UNIFORM LAW CONFERENCE OF CANADA

CONFERENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

PROCEEDINGS

OF THE

SIXTY-FIRST ANNUAL MEETING

HELD AT

SASKATOON
SASKATCHEWAN

August, 1979

ANNUAL PROCEEDINGS

The Proceedings of this Conference from 1918 to date have been published by the Conference. Copies of the first sixty years are now hard to come by.

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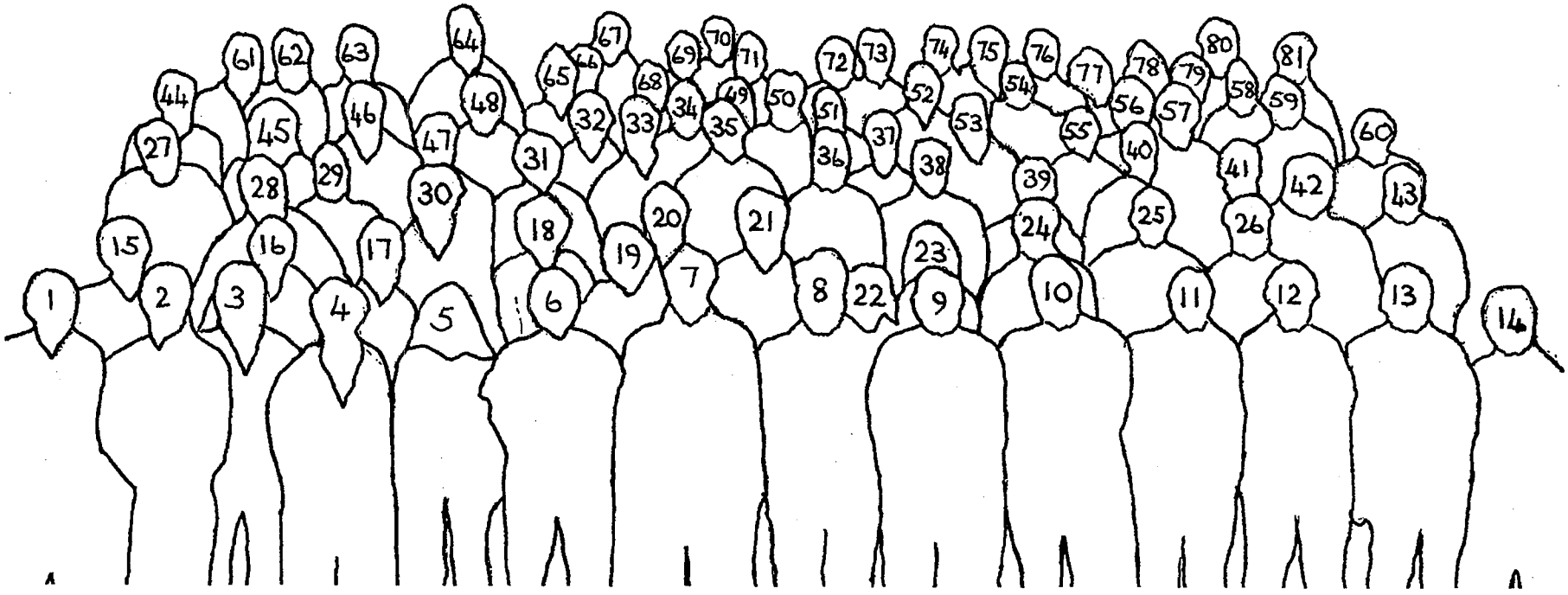

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67. Hymie Weinstein, Winnipeg
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69. Graham Stewart, Charlottetown
70. R. M. McLeod, Toronto
71. R. S. G. Chester, Toronto
72. Hazen Strange, Fredericton
73. M. E. Martin, London
74. Tom Braidwood, Vancouver
75. Neil McDiarmid, Victoria
76. Derek Mendes da Costa, Toronto
77. Bonnie Ozirny, Regina
78. Georgina Jackson, Regina
79. Elizabeth King, Victoria
80 Raymond Moore, Charlottetown
81. Derek Singer, Yellowknife

Absent: Alta., Baugh, Pannu, Young; Can., Beaupré, Bergeron, Ducros. Greenspan, Pepper, Stoltz, Tassé; Man., Balkaran; N.B., Lalonde, Teed; N.S., MacDonald; Ont., Fader, Maltais; Que., Carrier, Colas, Gaudry; Sask., Caldwell, Cuming, Ish, Kujawa, MacKinnon, Perras, Quinney, Romeo, Scratch.

CONTENTS

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(*For local addresses, etc., see list of delegates, page 10-17*)

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Sir James Aikins, K.C., Winnipeg (five terms)	1918-1923
Mariner G. Teed, K.C., Saint John	1923-1924
Isaac Pitblado, K.C., Winnipeg (five terms)	1925-1930
John D. Falconbridge, K.C., Toronto (four terms)	1930-1934
Douglas J. Thom, K.C., Regina (two terms)	1935-1937
I. A. Humphries, K.C., Toronto	1937-1938
R. Murray Fisher, K.C., Winnipeg (three terms)	1938-1941
F. H. Barlow, K.C., Toronto (two terms)	1941-1943
Peter J. Hughes, K.C., Fredericton	1943-1944
W. P. Fillmore, K.C., Winnipeg (two terms)	1944-1946
W. P. J. O'Meara, K.C., Ottawa (two terms)	1946-1948
J. Pitcairn Hogg, K.C., Victoria	1948-1949
Hon. Antoine Rivard, K.C., Quebec	1948-1950
Horace A. Porter, K.C., Saint John	1950-1951
C. R. Magone, Q.C., Toronto	1951-1952
G. S. Rutherford, Q.C., Winnipeg	1952-1953
Lachlan MacTavish, Q.C., Toronto (two terms)	1953-1955
H. J. Wilson, Q.C., Edmonton (two terms)	1955-1957
Horace E. Read, O.B.E., Q.C., Halifax	1957-1958
E. C. Leslie, Q.C., Regina	1958-1959
G. R. Fournier, Q.C., Quebec	1959-1960
J. A. Y. MacDonald, Q.C., Halifax	1960-1961
J. F. H. Teed, Q.C., Saint John	1961-1962
E. A. Driedger, Q.C., Ottawa	1962-1963
O. M. M. Kay, C.B.E., Q.C., Winnipeg	1963-1964
W. F. Bowker, Q.C., LL.D., Edmonton	1964-1965
H. P. Carter, Q.C., St. John's	1965-1966
Gilbert D. Kennedy, Q.C., S.J.D., Victoria	1966-1967
M. M. Hoyt, Q.C., B.C.L., Fredericton	1967-1968
R. S. Meldrum, Q.C., Regina	1968-1969
Emile Colas, C.R., Montreal	1969-1970
P. R. Brissenden, Q.C., Vancouver	1970-1971
A. R. Dick, Q.C., Toronto	1971-1972
R. H. Tallin, Winnipeg	1972-1973
D. S. Thorson, Q.C., Ottawa	1973-1974
Robert Normand, Q.C., Quebec	1974-1975
Glen Acorn, Q.C., Edmonton	1975-1976
Wendall MacKay, Charlottetown	1976-1977
H. Allan Leal, Q.C., LL.D., Toronto	1977-1978
Robert G. Smethurst, Q.C., Winnipeg	1978-1979

DELEGATES

1979 Annual Meeting

The following persons were designated by their respective governments to attend one or more Sections of the 1979 Annual Meeting of the Conference. Of the 113 so designated, 106 attended.

Legend

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

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1979 Annual Meeting

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Minister of Justice of New Brunswick: HON. RODMAN E. LOGAN, Q.C.
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Minister of Justice of Prince Edward Island: HON. HORACE B. CARVER.
Minister of Justice of Quebec: HON. MARC-ANDRÉ BÉDARD, Q.C.
Attorney General of Saskatchewan: HON. ROY J. ROMANOW, Q.C.
Member of Executive Council of the Yukon Responsible for Justice: HON. DOUGLAS R. GRAHAM.

IN MEMORIAM

EVERETT CLAYTON LESLIE

Died 7 December 1978

A Member of this Conference

Representing Saskatchewan

From 1947 to 1964

And Its President

in 1958-59

REQUIESCAT IN PACE

JOHN GEORGE DIEFENBAKER, P.C., Q.C., LL.D.

On the Wednesday afternoon of the annual-meeting week, our president, Robert G. Smethurst, Q.C., accompanied by Mrs. Smethurst, officially represented the Conference at the burial ceremonies of the former prime minister of Canada on the grounds of the University of Saskatchewan in Saskatoon.

Me Emile Colas a delegate from Quebec and a former president of the Conference also attended.

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, Montreal.
1965. Aug. 23-27, Niagara Falls
1966. Aug. 22-26, Minaki.
1967. Aug. 28-Sept. 1, St. John's.
1968. Aug. 26-30, Vancouver.
1969. Aug. 25-29, Ottawa.
1970. Aug. 24-28, Charlottetown
1971. Aug. 23-27, Jasper.
1972. Aug. 21-25, Lac Beauport.
1973. Aug. 20-24, Victoria.
1974. Aug. 19-23, Minaki.
1975. Aug. 18-22, Halifax.
1976. Aug. 19-27, Yellowknife.
1977. Aug. 18-27, St. Andrews.
1978. Aug. 17-26, St. John's.
1979. Aug. 16-25, Saskatoon.

Because of travel and hotel restrictions due to war conditions, the annual meeting of the Canadian Bar Association scheduled to be held in Ottawa in 1940 was cancelled and for the same reasons no meeting of the Conference was held in that year. In 1941 both the Canadian Bar Association and the Conference held meetings, but in 1942 the Canadian Bar Association cancelled its meeting which was scheduled to be held in Windsor. The Conference, however, proceeded with its meeting. This meeting was significant in that the National Conference of Commissioners on Uniform State Laws in the United States was holding its annual meeting at the same time in Detroit which enabled several joint sessions to be held of the members of both conferences.

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

Since 1935 the Government of Canada has sent representatives annually to the meetings of the Conference and although the Province of Quebec was represented at the organization meeting in 1918, representation from that province was spasmodic until 1942. Since then, however, representatives of the Bar of Quebec have attended each year, with the addition since 1946 of one or more delegates appointed by the Government of Quebec.

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

Since the 1963 meeting the representation has been further enlarged by the attendance of representatives of the Northwest Territories and the Yukon Territory.

In most provinces statutes have been 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 year, 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 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.

Another first in this area occurred in 1979 when through the good offices of the Canadian Intergovernmental Conference Secre-

tariat a complete edition in French of the 1978 Proceedings of this Conference was published and distributed throughout Canada and elsewhere to those who would be most interested in it.

L.R.M.

BIBLIOGRAPHY

(arranged chronologically)

L'Association Du Bureau Canadien et L'Uniformité des Lois. The Honourable Judge Surveyor. 1923 Can. Bar Rev, p. 52.

Uniformity of Legislation. R. W. Shannon. 1930 Can. Bar Rev., p. 28.

Conference on Uniformity of Legislation in Canada. Sidney Smith. 1930 Can. Bar Rev., p. 593.

Uniformity Coast to Coast—A Sketch of the Conference of Commissioners on Uniformity of Legislation in Canada. Published by the Conference in 1943.

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

Securing Uniformity of Law in a Federal System—Canada. John Willis, 1943-44 U of Toronto L.J., p 352.

Uniformity of Legislation in Canada—An Outline. L. R. MacTavish, K.C. 1947 Can Bar Rev., p. 36.

Uniformity of Legislation in Canada. (In English with French translation) Henry F. Muggah. 1956 Yearbook of the International Institute for the Unification of Private Law (UNIDROIT), p. 104.

Uniformity of Legislation in Canada (1957). (In English with French translation). Henry F. Muggah. 1957 Yearbook of the International Institute for the Unification of Private Law (UNIDROIT), p. 240.

Uniformity of Legislation in Canada—The Conditional Sales Experience. Jacob Ziegel 39 Can. Bar Rev., 1961, pp. 165, 231.

Conference of Commissioners on Uniformity of Legislation in Canada—Model Acts recommended from 1918 to 1961. Published by the Conference in 1962.

La Conférence des Commissionaires pour l'uniformité de la législation au Canada. (In French and English). J. W. Ryan and Gregoire Lehoux. 1970 Yearbook of the International Institute for the Unification of Private Law (UNIDROIT). p. 126. For a reprint of this article and for a list of the materials consulted in its preparation, *see* 1971 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, p. 414. For a review of this article, see Kurt H. Nadelmann. The American Journal of Comparative Law, Vol. 12, No. 2, Spring, 1973.

Consolidation of Uniform Acts of the Uniform Law Conference of Canada. Published by the Conference. 1978. A loose-leaf collection with annual supplements

Preserving the Uniformity of Law. Shiroky and Trebilcock Canadian Confederation at the Crossroads: The Search for a Federal-Provincial Balance. The Fraser Institute, Vancouver. 1978, pp. 189-218.

Uniform Law Conference of Canada. W. H. Hurlburt, Q.C. Commonwealth Law Bulletin, Vol. 5, No. 1, Jan. 1979, p. 246. A paper presented to the Meeting of Commonwealth Law Reform Agencies held at Marlborough House, London, England.

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

LEGISLATIVE DRAFTING SECTION

MINUTES

Attendances

Twenty-six delegates were in attendance. For details see List of Delegates, pages 10 to 17.

Opening

The Section opened with the chairman, Mr. Stone, presiding. Mrs. Black agreed to act as secretary in place of Mr. Penney, who was unable to attend.

Hours of Sitting

It was agreed to sit on Thursday, August 16th, and Friday, August 17th, from 9:30 a.m. to 12:00 noon and 1:30 p.m. to 4:30 p.m.

Translation of Uniform Acts into French

The resolution of the Executive to refer this topic to the Section was noted and there was discussion as to how the problem should be tackled.

> RESOLVED that a committee of the Section be formed for the purpose of considering item 6 of the agenda (Translation of Uniform Acts into French) and also item 7 (Uniform Drafting Techniques in French Language), and reporting to the Section, the committee to be composed of any members of the Section who wish to participate and meeting at times decided by the committee, including concurrently with meetings of the Section.

A committee was formed during the meeting and a preliminary report submitted (Appendix A, page 61).

Computerization of Statutes and Related Matters (1978 Proc., p. 25)

Each jurisdiction reported on the computerization and printing of statutes.

> RESOLVED that each jurisdiction prepare a report on its computerization and automated printing of statutes and distribute it before the next meeting for information and not for publication in the Proceedings.

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

Canadian Legislative Drafting Conventions: Section 9 (1978 Proc., pp. 66, 76)

There was discussion on this matter and as a result it was decided that this matter be further considered if commented upon in the paper

prepared by Elmer Driedger, Q.C., on the Drafting Conventions, when that paper is considered by the Section.

Education, Training and Retention of Legislative Draftsmen in Canada (1978 Proc., p. 25)

Each jurisdiction reported on their responsibilities and staffing. The issue of education in the area of legislative drafting and the retention of draftsmen in the jurisdictions was also discussed.

RESOLVED that each jurisdiction prepare a report on its functions and staff, including the education, training and retention of draftsmen for distribution before the next meeting for information and not for publication in the Proceedings. Allan Roger is to co-ordinate the reports.

Presentation on behalf of Canadian Law Information Council on Statutory Indexing Methodology

RESOLVED that the Section support the proposal of the Canadian Law Information Council for the adoption of a uniform system of subject matter indexing of statutes and recommend the standards contained in the proposal to all jurisdictions.

RESOLVED that the Section recommend that the Canadian Law Information Council pursue the possibility of developing a common facility that is available to all jurisdictions for the indexing of statutes.

New Business

RESOLVED that the Executive Secretary be directed to delete Appendix II of the Report on the Decimal system of numbering, and reference to it, as reprinted in the Consolidation of Uniform Acts.

RESOLVED to recommend the translation by the Drafting Section of existing Uniform Acts as selected and assigned by the Uniform Law Section.

RESOLVED to recommend that where possible, drafts recommended to the Uniform Law Section for adoption be in both the French and English languages.

RESOLVED that the part of the report of the Committee on French language drafting (Appendix A, page 61) be adopted with respect to future drafts and that the Committee be continued for study and report on procedures for the preparation of drafts in both the French and English languages.

RESOLVED that there be a chairman, vice-chairman and secretary of the Legislative Drafting Section and that where the chairman is English speaking the vice-chairman be French speaking and where the chairman is French speaking the vice-chairman be English speaking.

RESOLVED that the paper prepared by Dr. Driedger be referred to a representative of Nova Scotia for review and that a report be made to the Legislative Drafting Section next year.

RESOLVED that Michael Beaupré examine the *Uniform Interpretation Act* in light of the existence of bilingual uniform Acts.

Officers

Mr. Graham D. Walker, Q.C. was elected as Chairman, Me Bruno Lalonde was elected as Vice-Chairman and Mr. Ronald Penney was elected as Secretary for 1979-80.

Miscellaneous Matters

RESOLVED that the Section give a special vote of thanks to Mr. Stone who has served so well as chairman of the Section.

OPENING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting opened at 8:00 p.m. on Sunday, 19 August, in the Bessborough Hotel with Mr. Smethurst in the chair and Mr. MacTavish as secretary.

Address of Welcome

The President, Mr. Smethurst, introduced Dr. Gosse, the Deputy Attorney General of Saskatchewan, who extended a welcome to all to Saskatchewan on behalf of his Minister, the Honourable Roy J. Romanow, Q.C., who would be with us later in the week.

John C. Deacon

The President then introduced Mr. John C. Deacon of Jonesboro, Arkansas, the president of the National Conference of Commissioners on Uniform State Laws, who with his wife, Doreen, are our guests.

Then Mr. Deacon briefly addressed the delegates.

Introduction of Delegates

The President asked the senior delegates from each jurisdiction to introduce himself and the other members of his delegation.

Minutes of Last Annual Meeting

RESOLVED that the minutes of the 60th annual meeting as printed in the 1978 Proceedings be taken as read and adopted.

President's Address

Mr. Smethurst then addressed the meeting (Appendix B, page 62).

Treasurer's Report

The Treasurer, Claire Young, presented her report being a Statement of Receipts and Disbursements for the Period 11 August 1978

to 16 July 1979, together with the Auditor's Report (Appendix C), page 68).

RESOLVED that the Treasurer's Report be adopted.

Secretary's Report

Mr. Stone presented his report for 1978-79 (Appendix D, page 73).

RESOLVED that the report be received.

Executive Secretary's Report

Mr. MacTavish presented his report (Appendix E, page 74).

RESOLVED that the report be received.

Appointment of Resolutions Committee

RESOLVED that a Resolution Committee be constituted, composed of Arthur Close of British Columbia and Linda Black of Newfoundland, to report to the Closing Plenary Session.

Nominating Committee

RESOLVED that where there are five or more past presidents present at the meeting, the Nominating Committee shall be composed of all the past presidents present, but when fewer than five past presidents are present, those who are present shall appoint sufficient persons from among the delegates present to bring the Committee's membership up to five, and in either event the most recently retired president shall be chairman.

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 on Saturday morning.

UNIFORM LAW SECTION

MINUTES

Attendance

Fifty-four delegates were in attendance. For details see List of Delegates pages 10-17.

Sessions

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

Distinguished Visitor

The Section was honoured by the participation of Mr. Jack Deacon, President, National Conference of Commissioners on Uniform State Laws.

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. Smethurst as chairman and Mr. MacTavish as secretary.

Hours of Sitting

> RESOLVED that the Section sit from 9:00 a.m. to 12:30 p.m. and from 2:00 p.m. to 5:00 p.m. daily, subject to change from time to time as circumstances require.

Agenda

The revised agenda of 1 July 1979 was considered and the order of business for the week agreed upon.

Children Born Outside Marriage (1978 Proc., p. 30; CICS Doc. 840-173/043)

The report of the British Columbia Commissioners (Appendix F, page 76) was presented by Mr. Adamson and the clauses of the draft statute (Uniform Child Status Act) considered at length.

RESOLVED that the draft Uniform Act contained in the British Columbia report be referred to the Legislative Drafting Section for redrafting in accordance with the decisions taken at this meeting including those relating to declarations of parentage as proposed by Karen Weiler and that the redraft be circulated and considered for adoption at next year's annual meeting.

Class Actions (1978 Proc., p. 30; CICS Doc. 840-173/053)

The report of the Committee (Appendix G, page 83) was presented by its chairman, Marie-José Longtin.

RESOLVED that the report be adopted.

Commercial Franchises

The duly submitted request of the Canada delegates to have added to the agenda the subject of Commercial Franchises was presented by Mr. Fred Gibson and was considered having regard to the letter dated 18 July 1979 from Mr. A. M. Guerin, Assistant Deputy Minister, Department of Industry, Trade and Commerce, Ottawa, to Mr. Gibson (Appendix H, page 85).

The following resolution was adopted.

RESOLVED that the matter of Commercial Franchises be added to the agenda of the 1980 annual meeting and that Quebec and Ontario undertake a study of the subject and report to that meeting with or without a draft Uniform Act as their consideration of the matter indicates.

Company Law (1978 Proc., p. 30; CICS Doc. 840-173/040)

The report on the Promotion of Uniformity of Company Law in Canada (Appendix I, page 88) was presented by Mr. Hubert Gaudry (Part I) and by Mr. Graham Walker (Part II).

RESOLVED that the report be adopted and printed in the 1979 Proceedings.

Consolidation of Uniform Acts; Revision of Acts in 1978 Loose-leaf Edition. (1978 Proc., p. 31; CICS Doc. 840-173/015)

Mr. Tallin presented the report of the Manitoba Commissioners (Appendix J, page 93).

RESOLVED that the report be adopted.

RESOLVED that the Executive appoint the chairman of the Committee of three called for by the report.

Note: The Executive appointed Arthur Stone as chairman of the Committee with power to name the other two members (see page 52).

Contributory Negligence: Tortfeasors (1978 Proc., p. 31; 1977 Proc., p. 29; 1976 Proc., p. 28; 1975 Proc., p. 26; CICS Doc. 840-173/016)

Consideration of the Alberta Commissioners report (Appendix K, page 95) was put over until the 1980 annual meeting.

RESOLVED that the report be printed in the 1979 Proceedings

Defamation (CICS Doc. 840-173/018)

This subject which involves the amendment of the *Uniform Defamation Act* and the decision of the Supreme Court of Canada in *Cherneskey v. Armadale Publishers Ltd.* [1979] 1 S.C.R. 1067 was added to the agenda at the request, upon due notice, of Alberta and Ontario.

The joint report of the Alberta and Ontario Commissioners (Appendix L 1, page 116) was presented by Mr. Chester.

After considerable discussion and the consideration of several draft sections, the following resolutions were adopted.

RESOLVED that Mr. Mendes da Costa's draft be adopted in principle.

RESOLVED that the draft adopted in principle be referred to Mr. Stone with the request that he form an *ad hoc* committee to put the draft in proper legislative form and to report back on Friday morning.

RESOLVED that the Ad Hoc Committee's Section 8.1(1)(2) of the *Uniform Defamation Act* (Appendix L2, p. 122; *CICS Doc. 840-173/061*) be adopted, effective as of today (24 August 1979).

Enactments of and Amendments to Uniform Acts (1978 Proc., p. 31)

Mr. Balkaran presented Mr. Tallin's annual report (Appendix M, page 123) which was received with thanks.

RESOLVED that the report be printed in the 1979 Proceedings.

Extra-Provincial Custody Orders Enforcement (1978 Proc., p. 31)

See *infra* under International Conventions on Private International Law; Report of Committee (Appendix N, page 125; *CICS Doc. 840-173/024).*

International Administration of Estates of Deceased Persons (1978 Proc., p. 31; 1977 Proc., p. 33; CICS Doc. 840-173/046)

Mr. Tallin's memorandum with a draft Bill attached was referred to the Committee on International Conventions on Private International Law for consideration and report to the 1980 annual meeting.

It was decided not to print Mr. Tallin's memorandum and draft Bill in this year's Proceedings.

International Conventions on Private International Law (1978 Proc., p. 31; CICS Doc. 840-173/024)

The report of the Committee (Appendix N, page 125) was presented by its chairman, Mr. Leal.

RESOLVED that the report be adopted and printed in the Proceedings.

RESOLVED that the draft *Uniform Custody Jurisdiction and Enforcement of Custody Orders Act* attached to the report of the Special Committee on International Conventions on Private International Law be referred to the Legislative Drafting Section to redraft having regard to the decisions taken at this meeting; that the fresh draft be circulated and then considered with a view to its adoption at the 1980 annual meeting.

Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (CICS Doc. 840-173/049)

This report (Appendix T, page 232), which was presented by Mr. Tallin, was prepared at the request of the Special Committee on International Conventions on Private International Law.

It appeared that The Hague Convention can be brought into force in Canada with little or no amendment.

RESOLVED that the report be printed in the 1979 Proceedings and that it be referred to the Special Committee on International Conventions on Private International Law for study and report to the 1980 annual meeting.

Taking of Evidence Abroad in Civil or Commercial Matters (CICS Doc. 840-173/047)

A report on this subject (Appendix U, page 251), which was presented by Mr. Tallin, was prepared by him following the completion of a research paper.

The subject concerns legislation to enable provinces to bring into force The Hague Convention of the Taking of Evidence Abroad in Civil or Commercial Matters. A draft Uniform Act is attached to Mr. Tallin's report.

RESOLVED that the report be printed in the 1979 Proceedings, and that it be referred to the Special Committee on International Conventions on Private International Law for study and report to the 1980 annual meeting.

Judicial Decisions Affecting Uniform Acts (1978 Proc., p. 32; CICS Doc. 840-173/036)

The report of the Prince Edward Island Commissioners was presented by Mr. Moore (Appendix O, page 146).

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

RESOLVED that Prince Edward Island be requested to prepare a report on this subject for presentation at the 1980 annual meeting.

Limitations (1978 Proc., p. 32; CICS Doc. 840-173/017 part)

Mr. Hurlburt placed before the meeting a report respecting the proposed Uniform Limitation of Actions Act and a redraft of the proposed Uniform Act (Appendix P, page 155) which was discussed at length.

RESOLVED that the redraft of the *Uniform Limitation of Actions Act* dated 7 December 1978 considered at this meeting be referred to the Legislative Drafting Section to incorporate the decisions taken at this meeting and that the redraft so revised be circulated and considered at the 1980 annual meeting with a view to its adoption at that time.

Matrimonial Property (1978 Proc., p. 32)

It was decided to postpone consideration of Manitoba's memorandum (1977 Proceedings, page 394) until the 1980 annual meeting.

Prejudgment Interest (1978 Proc., p. 33; CICS Doc. 840-173/042)

In considering this matter it will be useful to peruse the British Columbia report dealt with at page 32 and set out in full at page 216 of the 1976 Proceedings, the Ontario memorandum dealt with at page 33 and set out at page 239 of the 1978 Proceedings, and the British Columbia Law Reform Commission's Report on Prejudgment Interest.

RESOLVED that the Conference should proceed with the study of the subject of Prejudgment Interest with a view of preparing a Uniform Act in due course.

RESOLVED that the subject be referred to Saskatchewan, with British Columbia assisting, to prepare a report upon the policy points involved and that the report be given priority at the 1980 annual meeting

Protection of Privacy: Tort (1978 Proc., p. 33; CICS Doc. 840-173/037)

The report of the Committee (Nova Scotia, Ontario and Quebec) was presented by its chairman, Mr. Walker (Appendix Q, page 214).

RESOLVED that the Report be adopted.

Reciprocal Enforcement of Maintenance Orders (1978 Proc., p. 34)

Mr. Adamson presented a fresh composite draft of the *Uniform Reciprocal Enforcement of Maintenance Orders Act* which was considered at length.

RESOLVED that the draft *Uniform Reciprocal Enforcement of Maintenance Orders Act* considered at this meeting be referred back to the British Columbia Commissioners to incorporate therein the amendments made at this meeting; that copies of the *Uniform Act* as so revised be sent by the Local Secretary for British Columbia to the other Local Secretaries for distribution by them to the delegates who are interested in the subject in their respective jurisdictions; and that if the *Uniform 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 1979, it be adopted, recommended for enactment and printed in the 1979 Proceedings in that form.

Note: Copies were distributed as required by the above resolution. One disapproval was received (Alberta could not agree to include sections 8(3) and 15(1)).

The *Uniform Reciprocal Enforcement of Maintenance Orders Act* as it appears in Appendix R, page 216 is adopted and recommended for enactment.

Sale of Goods (CICS Doc. 840-173/019)

The duly submitted request of the Ontario Commissioners to have added to the agenda the subject of a *Uniform Sale of Goods Act* was presented by Mr. Chester, having regard to the report of the Ontario Commissioners (Appendix S 1, page 228).

RESOLVED that the report of the Ontario Commissioners be adopted having regard to the letter dated 20 August 1979 of Dr. Mendes da Costa to the chairman of the Uniform Law Section (Appendix S2, page 230), and that the matter be referred to the Executive for development as speedily as possible (*See also page 53 of these Proceedings*).

Support Obligations (1978 Proc., p. 34)

Mr. Ferrier presented a report (CICS Doc. 840-173/044) on behalf of the Ontario Commissioners.

RESOLVED that the Ontario report not be printed in the 1979 Proceedings.

RESOLVED that the matter of a *Uniform Family Support Obligations Act* be referred to Ontario to prepare a fresh draft for consideration at the 1980 annual meeting.

Uniform Acts in French (CICS Doc. 840-173/061)

The report of the Legislative Drafting Section, as adopted by the Executive, was presented by Mr. Walker (Appendix V, page 305).

RESOLVED that the report be adopted.

Uniform Law Section: Purposes and Procedures (1978 Proc., p. 34; CICS Doc. 840-173/063)

The report of the committee was presented by its chairman, Emile Colas (Appendix W, page 307).

RESOLVED that the report be adopted in principle.

RESOLVED that the report be referred back to the Committee to integrate the new principles into the present rules.

RESOLVED that the report be referred to the Executive for consideration and action as soon as may be.

Officers: 1980 Meeting

Mr. O'Donoghue was re-elected as chairman and it was agreed that Mr. MacTavish would continue as secretary of the Section for the 1980 annual meeting.

Close of Meeting

A unanimous vote of thanks was tendered to Mr. O'Donoghue for his handling of the duties of chairman throughout the week.

The meeting concluded.

CRIMINAL LAW SECTION

MINUTES

Attendances

Forty-seven delegates were in attendance. For details see List of Delegates, pages 10-17.

Opening

Mr. René Dussault presided and Mr. Don Gibson, acted as secretary.

Chairman's Report

Tout au long de la semaine, quarante et un déléguées ont assisté et participé avec une assiduité et un enthousiasme remarquables aux délibérations de la Section. Parmi ces délégués se trouvaient trois représentants de la Commission de réforme du droit au Canada et huit avocats de la défense.

Quelques cinquante trois résolutions on retenues l'attention de la section dont certaines très importantes concernant, par exemple, la conduite automobile pendant interdiction, les entrées subreptices dans le domaine de l'écoute électronique, les privilèges de la Couronne en matière de documents gouvernementaux, la publicité permise concernant un accusé avant que son procès n'ait commencé, l'application des notions de fraude et de faux prétextes au secteur des services, le droit d'un prévenu d'être jugé par un juge on un jury qui s'exprime dans sa propre langue officielle, et la corruption en matière municipale, le choix des jurés.

Egalement, les membres de la section ont reçus et examiné les rapports de la Commission de reforme du droit du Canada sur les infractions sexuelles ainsi que sur le vol et la fraude. Ils ont aussi pris connaissance de l'expérience vécue par chacune de provinces en matière de communication de la preuve préalable au procès.

It has also been agreed that certain items which were on the agenda this year will be reviewed during the coming year and be brought back for discussion at the 1980 session. Thus British Columbia has agreed to prepare a discussion paper on pre-trial publicity for next year's Conference. The federal Department of Justice has agreed to review the following items:

1. *Statutory Forms:*
   A small committee will be formed comprising Canada, Ontario, British Columbia and Saskatchewan.
2. *Pre-trial Diversion:*
   The federal Department of Justice will attend to the distribution of the discussion paper prepared on this matter with request for comments.
3. *Contempt:*
   The federal Department of Justice has this matter under review and will present a progress report.
4. *Theft of Information and Access to Computers Fraud:*
   The federal Department of Justice will review and present a discussion paper.

It should be noted also that, due to the recent change of government in Ottawa, the representatives of the federal Department of Justice have not been in a position this year to present to the Section their report on the action which the federal government intends to take on the motions carried at the 1978 session of the Criminal Law Section.

En terminant, j'aimerais insister sur la nécessité pour toutes les jurisdictions participantes à la section de droit criminel de faire le maximum d'effort pour préciser de façon succint et claire toutes et chacune de leurs propositions. J'ai eu l'occasion de constater qu'il existe une certaine disparité dans le niveau de préparation des diverses propositions qui contribue dans certains cas à ralentir le déroulement de la discussion. Entre un exposé général au niveau des principes seulement et une rédaction législative détaillée, il y a généralement place pour la formulation d'une proposition en terme suffisamment précis pour permettre à l'auteur d'en voir immédiatement les implications essentielle et aussi de leur accorder la réflexion préalable appropriée.

On behalf of all the members of the Criminal Law Section, I would like to thank sincerely Mr. Don Gibson of the federal Department of Justice for the tremendous job he has done throughout the week as secretary for the section. I would like also on behalf of all of you to thank all the personnel of the Canadian Intergovernmental Conference Secretariat and particularly Miss Ann Vice. Je suis convaincu-que l'expérience de la traduction simultanée de nos débats que nous avons expérimenté pour la deuxième année consécutive constitute l'une des meilleures guaranties d'avenir pour la réussite des travaux de la Conférence sur l'uniformité des lois.

En terminant il me fait plaisir de vous informer que M. Gordon Pilkey a été désigné pour présider la section de droit criminel pour la prochaine année et que M. Gibson continuera d'assureur les fonctions de secrétaire.

Resolutions

The fifty-three resolutions referred to above are as follows:

1. *Driving While Disqualified — s. 238*
   That s. 238 be amended to provide that, in the absence of evidence to the contrary, the accused be presumed to know of the legal suspension or cancellation. *Carried* (16-12).

2. *Breaking and Entering With Intent — s. 306(1)(a)*
   That s. 306(1)(a) be an included offence in s. 306(1)(b). *Carried* (14-12).

3. *Definition of Place — s. 306(4)*
   That s. 306(4) be amended to include motor vehicle. *Defeated* (26-7).

4. *Possession of Property Obtained by Crime — s. 312*
   That s. 312 be an included offence in ss. 294, 302, and 306. *Defeated* (32-4).

5. *Implications of the Dass case*
   Whereas the Commissioners are of the view that s. 25 of the *Criminal Code* and s. 26 of the *Interpretation Act* constitute sufficient authority to make it clear for the purposes of Part IV.1 of the *Code* that lawful authority to intercept includes authority to enter premises and install, repair, maintain and remove listening devices; and
   Whereas the Commissioners also recognize that the *Dass* case has created sufficient doubt in this area to place the police in a position of uncertainty;
   Be it resolved that Part IV.1 of the *Criminal Code* be amended to provide that an authorization to intercept a private communication is deemed to include authorization to enter premises and install, repair, maintain and remove listening devices, subject to any restriction imposed by the court under s. 178.13(2)(d). *Carried* (20-6).

6. *Procuring Attendance of Prisoner — s. 460*
   That s. 460 be amended to add that upon motion of the Crown, with notice to the prisoner or with the written consent

of the prisoner, a judge may order the release of a prisoner from custody for the purposes specified in the order, for the period of time specified in the order, and under the responsibility of the person specified in the order. *Defeated* (17-9).

7. *Procuring Attendance of Prisoner — s. 460*

That s. 460 be amended to add that upon motion of the Crown, where a prisoner consents in writing, a judge may order the release of the prisoner from custody for the purposes specified in the order, for the period of time specified in the order, and under the responsibility of a person specified in the order. *Carried* (19-8).

8. *Procuring Attendance of Prisoner — s. 460*

That s. 460 be amended to expand judicial authority to allow for the return of prisoners to their original place of incarceration, if desirable, where a prisoner brought to another jurisdiction has not been ordered to be imprisoned, committed for trial or discharged. *Carried* (28-0).

9. *Statutory Forms*

That certificates and notices, for example, those under ss. 133, 237, 317, 318, 592, 594 and 740, be included as statutory forms to the *Criminal Code*. *Carried* (25-2).

10. *Soliciting — s. 195.1*

That s. 195.1 be amended to add:

(a) prostitution means conduct performed by either a male or a female person, (b) public place includes any means of transportation located in or on a public place, and (c) soliciting need not be pressing or persistent conduct in order to constitute an offence. *Carried* (18-7).

11. *Failure to Appear — s. 133*

That s. 133 be amended to add:

Everyone who attends court for the purposes of an appearance, adjournment or trial, and who fails without lawful excuse, the proof of which lies upon him, to attend thereafter as required by the court in order to be dealt with according to law, is guilty of (a) an indictable offence and liable to imprisonment for two years, or (b) an offence punishable on summary conviction. *Carried* (29-0).

12. *Printing Circulars in Likeness of Notes — s. 415*

That s. 415(3) be amended by adding the words "unless such reproduction is done by a law enforcement agency for the purposes of its investigation". *Defeated* (18-6).

13. *Disclosure of Private Communications to Foreign Peace Officers*

That Part IV.1 of the *Criminal Code* be amended to permit disclosure to foreign peace officers where a private communication discloses a past or prospective crime in the foreign jurisdiction. *Carried* (29-0).

14. *Pre-Trial Publicity*

That the *Criminal Code* be amended to provide that the name, address or other information that may disclose the identity of an accused shall not be published in any newspaper or broadcast, unless the accused or all of them consent, or until their trial has commenced. *Defeated* (18-15).

15. *Pre-Trial Publicity*

That the *Criminal Code* be amended to provide that the name, address or other information that may disclose the identity of an accused shall not be published in any newspaper or broadcast, unless the accused or all of them consent, they have been committed or indicted to stand trial, or until their trial has commenced. *Defeated* (20-15).

16. *Pre-Trial Publicity*

That s. 467 be amended to provide that the Crown has the same right as the accused to obtain a non publication order. *Carried* (29-2).

17. *Rulings Made Prior to Trial*

That s. 574 be amended to add: The judge, in any case to be tried with a jury, has jurisdiction, before the jury is empanelled, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been empanelled and sworn to try the issues of the indictment. *Defeated* (26-10).

18. *Rulings Made Prior to Trial by Other Than the Trial Judge*

That s. 574 be amended to add: The trial judge, or any other judge of that court where the rules of court so provide, in any case to be tried with a jury, has jurisdiction before the jury is empanelled, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been empanelled and sworn to try the issues of the indictment. *Defeated* (28-4).

19. *Rulings Made Prior to Trial*

That s. 574 be amended to add: With the consent of the parties, the trial judge, in any case to be tried with a jury, has

jurisdiction, before the jury is empanelled, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been empanelled and sworn to try the issues of the indictment. *Carried* (18-13).

20. *Seizure of Government Documents*

That the *Criminal Code* be amended to extend the "sealed packet system" to the seizure of provincial and federal government documents, notwithstanding the provisions of any other federal statutes. The seized documents would be returnable before a county, district or superior court judge, and the judge could allow inspection to the Crown where he is of the opinion that he requires the assistance of the Crown representations to determine the issue of whether or not Crown privilege exists in respect of the disputed document while applying the criteria of s. 41(1) of the *Federal Court Act*. *Defeated* (20-11).

21. *Seizure of Government Documents*

That the *Criminal Code* be amended to extend the "sealed packet system" to the seizure of provincial and federal government documents, notwithstanding the provisions of any other federal statutes. The seized documents would be returnable before a county, district or superior court judge who, in determining whether or not Crown privilege exists in respect of any disputed documents, shall permit inspection of the documents by and receive and consider submissions by, counsel designated by the Attorney General in advance for purposes of any hearings under this section. *Defeated* (16-14).

22. *Release of Mentally Ill Prisoners*

That ss. 545, 546 and 547 be amended to transfer the power from the Lieutenant Governor to the board of review. *Defeated* (25-4).

23. *Release of Mentally Ill Prisoners*

That ss. 545, 546 and 547 be amended to transfer the power from the Lieutenant Governor to the Lieutenant Governor in Council. *Carried* (25-6).

24. *Right of Attorney General to Appeal — s. 605*

That s. 605 be amended to provide that the Crown has a right of appeal on any ground that involves a question of fact or a question of mixed law and fact, with leave of the Court of Appeal, or a judge thereof, or upon a certificate of the trial

judge that the case is a proper one for appeal. *Defeated* (20-13).

25. *Evidence at the Bail Hearing — s. 457.3*

That s. 457.3(1)(b) be amended to provide that the accused shall not be examined by the justice or cross examined on the circumstances of the offence with which he is charged, unless he first personally volunteers or is examined upon those circumstances. *Defeated* (16-15).

26. *Re-election*

That the *Criminal Code* be amended to provide that an accused who has elected trial by magistrate may re-elect another mode of trial if he does so more than fourteen days before the date set for the trial, and thereafter only with the consent of the prosecutor. *Defeated* (19-13).

27. *Remission of Fines — s. 685*

That s. 685 be amended to add as clause (3): Except in the case of the granting of a pardon under section 683, no order under subsection (1) shall be made for remission of a penalty, fine or forfeiture imposed under this Act without the concurrence of the Lieutenant Governor in Council of the province affected. *Carried* (27-0).

28. *Seizure of Proceeds of a Crime from a Bank*

That the *Criminal Code* be amended to provide that where the Crown has reason to believe that funds have been obtained as the result of a criminal offence, it may apply to a superior court of criminal jurisdiction for an order freezing the funds in the account of any bank or other financial institution. *Carried* (15-14).

29. *Driving while Disqualified*

That s. 238 be amended to add: Where by or under the provisions of an act of a provincial legislation a permit or licence is suspended or cancelled, and the person to whom the supension or cancellation applies is not the holder of a permit or license, as the case may be, such person shall be deemed for the purposes of a prosecution under this section to be a person whose permit or license, as the case may be, has been suspended or cancelled. *Carried* (10-8).

30. *Review of a Judicial Interim Release Order — ss. 457.5(7) and 457.6(8)*

That ss. 457.5(7) and 457.6(8) be amended to add a provision that a transcript of proceedings held before any other

judge who previously had reviewed the issue of judicial interim release may be considered by the judge hearing a subsequent judicial review. *Carried* (19-3).

31. *Interim Release by Judge Only — s. 457.7*

That s. 457.7 be amended to include all charges which are laid against a person who is charged with any offence set out in s. 457.7. *Carried* (36-0).

32. *Release Pending Determination of Appeal — s. 608*

That s. 608(5) be amended to provide that a cash deposit be a discretionary requirement on an order for release pending appeal. *Carried* (34-0).

33. *Written Notice of Wiretap Authorization — s. 178.23*

That s. 178.23(4) be amended by requiring only that the judge to whom the application for an extension is made be of the opinion that the interests of justice warrant the granting of the application. *Carried* (27-0).

34. *Review of Release Order by Court of Appeal — s. 608.1*

That s. 608.1 be amended to provide that a variation of a term of bail pending appeal may be obtained from a single judge of the Court of Appeal on the consent of the Crown. *Carried* (30-0).

35. *Release Pending Determination of Appeal — s. 608*

That s. 608 be amended to provide that nowithstanding subs. 6, a single judge of the Court of Appeal may revoke or cancel a release order previously granted under that section, if he is satisfied that the administration of justice has been brought into disrepute by virtue of the appellant's delay in perfecting the appeal. *Carried* (16-9).

36. *Summary Convictions Trials Ex Parte — s. 738(3)*

That s. 738 be amended to provide that where the court has jurisdiction over the person in respect of that offence, a trial in absentia may be held. *Carried* (31-1).

37. *Right of the Accused to have His Trial Conducted before a Judge or a Judge and Jury who speak His own Official Language*

That the provisions of Part XIV.1 of the *Criminal Code* affording trial in the official language of the accused, and protecting those whose language is not an official language of Canada, be proclaimed in force in all provinces as quickly as

practicable. Because some jurisdictions will experience considerable difficulty in the implementation of this legislation, the Government of Canada should actively co-operate in such matters as linguistic training, translation facilities, financial assistance, and the interprovincial transfer of judges and Crown attorneys. In a few cases, the provisions of s. 462 should be modified, for example by partial proclamation, on a common sense basis. *Carried* (30-0).

38. *Committal for Trial — s. 475*

That s. 475(1)(*a*)(i) be amended to replace the words "commit the accused for trial" with the words "order the accused to stand trial." *Carried* (29-0).

39. *Penalties under the Narcotic Control Act*

That the degrees of guilt and the consequent penalties in the *Narcotic Control Act* be reviewed. *Carried* (18-5).

40. *Conspiracy to Commit Murder — s. 423(1)(a)*

That the penalty in s. 423(1)(*a*) be increased to life imprisonment. *Carried* (26-0).

41. *Release Pending Determination of Appeal — s. 608*

That s. 608(6) be amended to refer to s. 458(4) instead of s. 459(5). *Carried* (27-0).

42. *Possession of Instruments Suitable for Robbery*

That the *Criminal Code* be amended to add a provision similar to s. 309(1) in relation to the possession of instruments suitable for committing a robbery. *Carried* (23-5).

43. *Municipal Corruption*

That the definition of government in s. 107 be amended to include municipal governments and school boards. *Carried* (27-1).

44. *Obtaining Services by False Pretences or Fraud*

That the *Criminal Code* be amended to prohibit the obtaining of services by false pretences or fraud. *Carried* (21-7).

45. *Standardization of ss. 457.7 and 427*

That s. 457.7 be amended to include all the crimes reserved to the exclusive jurisdiction of the superior court as set out in s. 427. *Carried* (29-0).

46. *Unexpired Portion of Intermittent Sentence*

That s. 663 be amended to introduce a procedure similar to that found in s. 664(4). The provision would enable the

judge who imposed an intermittent sentence to bring the accused back before him in order that he could specify the times when the unexpired portion of the sentence would be served. *Carried* (28-2).

47. *Detention of Seized Items — s. 446*

That s. 446(1)(a) be amended to enable the judge to make successive orders of extension upon giving notice to the party whose item was seized. *Carried* (21-9).

48. *Judicial Interim Release — s. 457(1)*

That s. 457(1) be amended by deleting the words "who is not required to be detained in custody in respect of any other matter". *Carried* (22-0).

49. *Abolition of the Right to Stand By*

That the *Criminal Code* be amended to provide that the right to direct a juror to stand by be abolished, and that the Crown be entitled to the same number of peremptory challenges as the defence, rather than the right to direct a juror to stand by. *Carried* (17-9).

50. *Right to Address the Jury Last*

That the *Criminal Code* be amended to provide that the right to address the jury last be given to the accused. *Defeated* (17-14).

51. *Reverse Onus Provisions in Narcotics Legislation*

That s. 8 of the *Narcotic Control Act* and the corresponding sections in the *Food and Drugs Act* be amended so that the accused be required to raise only a reasonable doubt as to his intention of not trafficking in the narcotic or drug found in his possession. *Defeated* (13-11).

52. *Limitation Periods*

That the Commissioners approve in principle the concept of appropriate limitation periods for the prosecution of indictable offences, commensurate with the seriousness and the detection of the crimes. *Defeated* (17-6).

53. *General Review of the Criminal Code*

The Commissioners expressed concern with the ad hoc approach that has been followed in recent years with respect to amendments to the *Criminal Code.*

The Commissioners recommend that serious consideration be given to developing a comprehensive strategy of change that will lead to a modernization of the *Criminal Code. Carried* (26-0).

SPECIAL PLENARY SESSION

MINUTES

The day, Thursday, August 23rd, was given over entirely to hearing and discussing the report of the Task Force on Uniform Rules of Evidence.

The morning session was chaired by Task Force member, the Hon. Mr. Justice George L. Murray of the Supreme Court of British Columbia. In summarizing the activities of the Task Force in 1978-79, Mr. Justice Murray indicated that a serious question had arisen as to its mandate: was the Task Force expected to develop a comprehensive draft *Uniform Evidence Act,* or only to deal with problem areas that appear to require a legislative as distinct from judicial response? If it was the former, the fear was expressed that the Task Force could not finish its work by the target date of August 1980, or even within a reasonable time thereafter. The Task Force therefore sought further instructions on this point.

In the discussion that followed some members expressed the view that the Task Force should develop a comprehensive legislative statement of the Law of Evidence while others contended that this would lead to rigidity and the subject therefore should be left to evolve through court decisions. Finally, the question was referred for consideration to a committee composed of the deputy attorneys general of the jurisdictions participating in the Task Force. (The Committee's report, as approved by the Conference on August 24th, appears as Appendix X on page 308.)

The afternoon session, which was chaired by Mr. Kenneth Chasse, outgoing chairman of the Task Force, heard presentations on the issues involved in four of the areas considered to date by the Task Force: Competence and Compellability of Spouses in Criminal Cases; Professional Privilege; Cross-Examination on a Criminal Record; and Character Evidence. Each of these topics evoked a lively discussion.

REPORT OF COMMITTEE OF PARTICIPATING DEPUTIES ON THE MANDATE OF THE EVIDENCE TASK FORCE

On the afternoon of August 24, Mr. Leal submitted the report of the Committee. He said that he and his colleagues on the Com-

mittee had found the sessions of the previous day to be both interesting and informative, and that as a result they felt they had gained a better understanding of the problems confronting the Task Force.

The Committee members reaffirmed their commitment to the Evidence Project, and to that end made certain recommendations that they believed would enable the Task Force to complete its work and submit a final report and draft *Uniform Evidence Act* in time for submission to the 1980 meeting of the Conference. In particular, the Committee recommended the establishment of a full-time research team that would be a part of the Task Force. The Federal Government and the Provinces of Ontario and Quebec would provide one full-time researcher each to the team for up to one year, while British Columbia and Alberta agreed to provide a researcher each for up to a half year. The Federal researcher would be the chairman of both the research team and the full Task Force.

To clarify the mandate of the Task Force the Committee suggested a new statement of principles as a supplement to the resolution of the 1977 Conference whereby the Task Force originally had been created. This statement of principles, as approved by the Conference, reads as follows:

"A. *Principles*

The ultimate objective of the exercise is the development of as comprehensive a legislative statement of the rules of evidence as may be consistent with the following principles:

1. Legislative statement of the law is desirable wherever possible, but there may be areas of the law of evidence where it is better not to attempt to legislate but rather rely on common law evolution and precedent.
2. The rules of evidence should be as understandable as possible to the practicing bar and the judiciary, but it should be recognized that some of the rules of evidence may be complex and to a certain extent technical areas of the law not admitting of a simple statement.
3. Although legislative statement can assist in making the law of evidence more understandable and more certain, provisions which create wide discretions in the trial judge, especially with respect to admissibility, can reduce, rather than increase, the very certainty and uniformity that are rationales of legislating. For example, broad exclusionary rules requiring an individual trial judge to decide what an "abuse of process" is, or what "brings the administration of justice into disrepute", without further legislative guidelines, may create more uncertainty and lack of uniformity that is desirable. The Task Force should therefore strive to avoid submitting model sections creating wide unfettered judicial discretion.

B. *Procedure* (with respect to each area of the law of evidence)

1. State the law as it is;
2. Indicate whether it should be changed and if so why;
3. Indicate whether the law can, and should be, in statutory form;
4. Draft model section(s) for all areas where the Task Force feels that the law can and should be in statutory form (whether or not any change in the law itself is recommended);
5. The final report can include any minority or dissenting view."

CLOSING PLENARY SESSION

MINUTES

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

Legislative Drafting Section

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

Uniform Law Section

The chairman, Mr. O'Donoghue, reported upon the accomplishments of the Section during the week.

Criminal Law Section

The chairman, Mr. Dussault, reported upon the work of the Section during the meeting.

Report of the Executive

The President made a report on the work of the Executive at its meetings held during the week, mentioning particularly the following matters which he thought would be of special interest to the delegates.

1. A special meeting was held, attended by the members of the Committee on the Purposes and Procedures of the Uniform Law Section, to hear Mr. Deacon, the President of the National Conference of Commissioners on Uniform State Laws, explain how his Conference raises its funds and how its committee system works.

2. The firm of Clarkson, Gordon & Co., Chartered Accountants, has been engaged as auditors of the Conference.

3. Future annual meetings have been settled upon as follows:

1980. Hotel Charlottetown, Charlottetown, Prince Edward Island, from August 14-23 inclusive. The CBA will meet at Montreal.

1981. Whitehorse, Yukon Territory. The CBA will meet at Vancouver.

1982. The Government of Canada will host the meeting to be held at the former Seigniory Club, Montebello, Quebec, some forty miles down river from Ottawa. The CBA will be meeting in Toronto.

1983. The Conference has invitations from Alberta, Manitoba and Quebec. The CBA will be meeting in Quebec City.

4. In line with practice, the incoming president and first vice-president will represent the Conference on the Council of the Canadian Bar Association.

5. In line with practice, the outgoing president will make the Statement to the annual meeting of the Canadian Bar Association at Calgary.

6. The Executive has accepted a request of a joint working group of the American Bar Association and the Canadian Bar Association concerned with making arrangements for the settlement of international disputes to set up a special committee to co-operate and work jointly with a similar committee from the National Conference of Commissioners on Uniform State Laws to explore the feasibility of taking on this new proposal.

It is expected the joint committees will look first at the subject of the handling of trans-frontier pollution claims.

Initially the special committee will be composed of Messrs. Leal, Smethurst and Coles.

Ed. Note. The Committee will be known as the *Liaison Committee with the UCCUSL.*

7. Mr. Stone has been named as chairman of a committee of three on the revision of the Uniform Acts in our Consolidation. Mr. Stone will name the other two members of the committee.

8. A motion will be presented later under New Business that will seek to establish the policy of the Conference by way of a standing rule on our relationship with the media.

The principle that the Executive will put forward is that all sessions are *in camera* unless a section determines otherwise on a particular occasion.

9. It was announced that the delay in the payment of our federal research grant and the disposal of interest on the capital in the fund had been satisfactorily settled.

10. Dr. Mendes da Costa attended a meeting of the Executive to develop the new major project of the Uniform Law Section: Sale of Goods.

After a full discussion, the following decisions were taken:

1. to ascertain the Law Reform Agencies that wish to participate in the Sale of Goods Project;
2. to recommend to the Executive for appointment the names of not more than five persons representative of the participating provinces and of the various regions of Canada to constitute a committee to study the Draft Act attached to the Report of the Ontario Law Reform Commission on the Sale of Goods and to report thereon to the 1980 Annual Meeting of the Uniform Law Section with a recommendation for its adoption as a Uniform Act in its present form or with such changes as they consider necessary;
3. to submit a budget to the Executive for the operations of the Committee during the year 1979-1980.

11. It was announced that the budget for the Task Force on Evidence for the coming year had been approved.

12. It was also announced that the general financial position of the Conference had been reviewed by the Executive and that it had concluded that the 1979-80 annual contributions of the jurisdictions would remain the same as in 1978-79. However, owing to increasing costs the situation will be watched and reviewed a year hence.

Resolutions Committee Report

Mr. Close presented the report in the form 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 Saskatchewan and the delegates of Saskatchewan for hosting the Sixty-First Annual Conference of the Uniform Law Conference of Canada and in particular for the buffet dinner at the Faculty Club of the University of Saskatchewan, and the dinner for the Legislative Drafting Section at the Sheraton Hotel.
2. To the Honourable Roy J. Romanow, Q.C., Attorney General of Saskatchewan, for hosting the special banquet at the Ukrainian Hall.
3. To the Law Society of Saskatchewan for the reception at the Bessborough Hotel.
4. To the College of Law of the University of Saskatchewan for the reception at the Faculty Club.
5. To Dr. Richard Gosse, Deputy Attorney General for Saskatchewan, and Joanne Sutherland, his Special Assistant, for their

attention to all the details that go into planning the activities associated with the Conference and the spouses programme that included a river cruise, city tour, tour of the Western Development Museum, and a bus tour to Batoche and other historical sites related to the Riel rebellion.

6. To the Saskatoon Branch of the Ukrainian Women's Organization for giving the members of the Conference an opportunity to enjoy the banquet of Ukraine cuisine.
7. To the Yeshevan Dance Company for their impressive performance of dances following the banquet.
8. 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. Robert G. Smethurst at the National Conference in San Diego, California and to Jack Deacon and his wife, Doreen, for honouring this year's Conference with their presence.
9. To the Canadian Intergovernmental Conference Secretariat for its assistance in so many aspects of the operation of the Conference and many services well performed.

New Business

The following resolutions were adopted:

Honourable Douglas Graham

RESOLVED that an invitation be extended to the Honourable Douglas Graham of the Yukon, the member of the Executive Committee of the Yukon Territory responsible for the administration of justice, and his successors in office, to become a delegate *ex officio* to the Uniform Law Conference of Canada.

Media Relations

RESOLVED that all meetings of the Conference and its Sections be held *in camera* unless it is determined otherwise on a particular occasion.

RESOLVED that the Executive review the wording of the above resolution at its next meeting.

RESOLVED that in the Executive's review of the subject the matter of the establishment of guidelines for delegates vis-a-vis the media be considered.

International Abduction of Children

RESOLVED that in view of the fact that The Hague Conference on Private International Law, at the suggestion of the Canadian delegation, is currently preparing an International Convention on the International Abduction of Children and in view of the fact that the international abduction of children is a serious and urgent problem, the Uniform Law Section of this Conference endorses the general principle that provincial jurisdictions should be prepared to establish central authorities and should

be prepared to shoulder the expense, both financial and in terms of manpower and other resources, if the central authority is given the responsibility for,

(a) finding and locating the child, a potential burden on police and sheriffs;
(b) advising parents in other jurisdictions of the relevant laws and procedures;
(c) providing legal assistance to parents, advising on subjects such as initiation of proceedings, potential court orders and applicable law;
(d) assisting parents to select counsel, and in appropriate cases, financing the legal costs of the proceedings through the provision of legal aid;
(e) taking legal measures to obtain and enforce orders concerning the return of a child, and guaranteeing access rights;
(f) obtaining relevant social welfare reports on the condition of a child;
(g) transmitting all relevant documentation to the foreign jurisdiction; and
(h) serving documents.

Canadian Intergovernmental Conference Secretariat

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

Nominating Committee's Report

On behalf of the Nominating Committee, Mr. Leal submitted the following report:

The Nominating Committee submits the following names for nomination as the officers for the Uniform Law Conference of Canada for the year 1979-1980:

Honorary President	—	Robert G. Smethurst, Q.C., Winnipeg
President	—	Gordon F. Coles, Q.C., Halifax
1st Vice-President	—	Padraig O'Donoghue, Q.C., Whitehorse
2nd Vice-President	—	George B. Macaulay, Q.C., St. John's
Treasurer	—	Claire Young, Edmonton
Secretary	—	Arthur N. Stone, Q.C., Toronto

Close of Meeting

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

Mr. Coles after paying tribute to Mr. Smethurst for his outstanding contribution to the work and the interests of the Conference, adjourned the meeting.

STATEMENT TO THE CANADIAN BAR ASSOCIATION

by

ROBERT G. SMETHURST, Q.C.

Last week at Saskatoon, Saskatchewan, the Uniform Law Conference of Canada held its sixty-first annual meeting. Some 113 persons involved in the work of the Conference attended the meeting—an all time high attendance. These persons were from the Federal Government, the ten provincial governments, the two territorial districts, the law reform commissions and the practicing bar throughout Canada. In this regard I am pleased to report that this past year 18 practicing members of the Bar were appointed to the Conference and attended the meeting—a significant increase over past years.

We were happy to have as distinguished guests Mr. Jack Deacon of Arkansas, the President of our counterpart in the United States, the National Conference of Commissioners on Uniform State Laws, and his wife Doreen.

The Canadian Intergovernmental Conference Secretariat once again this year provided instantaneous interpretation of proceedings and English to French and French to English translation of documents as well as general secretarial services of a very high order for which the Conference is most grateful.

The Secretariat also made possible during the past year the preparation, publication and distribution, for the first time in the history of the Conference, of an edition in French of all reports considered at and the proceedings of our 1978 annual meeting. This, we consider to be an historical event in the life of the conference.

It was decided that we should proceed with a program of reviewing all our Uniform Acts to determine why some of them have only been enacted by a few provinces and also to determine if they need updating or re-studying in order that they become more acceptable for enactment. Arthur N. Stone, Q.C. of Toronto will chair a special committee of three to oversee this project. As the study of each Uniform Act is completed it will then be translated into French, as will all new Uniform Acts of the Conference, and thus a French version of the more than 60 Uniform Acts will be built up gradually.

One of our three sections, the Legislative Drafting Section, decided to support the proposal of the Canadian Law Information Council for the adoption throughout Canada of uniform system of subject matter indexing of statutes. In addition this section provided for the exchange of information respecting the computerization and automatic printing of statutes.

Graham D. Walker, Q.C., of Halifax was elected as chairman of the section for the coming year, Bruno Lalonde of Fredericton as vice-chairman and Ronald Penney of St. John's as secretary.

As in past years representatives of the several Canadian law reform agencies held an informal one day meeting immediately prior to our conference at which matters of import to the agencies and the conference were discussed.

Over sixty delegates sat in on the Uniform Law section this year, another record number. During the very busy and productive week one major project was finished: The Uniform Reciprocal Enforcement of Maintenance Orders Act. As well an amendment to the Uniform Defamation Act was adopted after considerable discussion and publicity. This amendment is designed to overcome the decision of the Supreme Court of Canada in the Cherneskey v. Armadale Publishers Ltd. case and thus to enlarge the scope of the defence of fair comment in cases of alleged defamation.

The Uniform Law Section also completed work on three major projects and hopefully they will be adopted and recommended for enactment next year. They are the Uniform Child Status Act, the Uniform Extra-Provincial Custody Orders Enforcement Act and the Uniform Limitations Act.

Reports were received and considered as well on another 12 topics which will receive further study this coming year.

Two new matters were added to the agenda of the section for report at next year's meeting: a proposal that we consider having a uniform act dealing with commercial franchises and a Uniform Sale of Goods Act. The Conference considers this last item, a Uniform Sale of Goods Act, to be a major project and intends to enlist the services of one or more consultants to work with a committee made up from members of the conference and law reform commission representatives.

Padraig O'Donoghue, Q.C. of Whitehorse, the 1st vice-president of the Conference. and Lachlan MacTavish, Q.C. of Toronto, the

Executive Secretary, served as chairman and secretary respectively of the Section and were re-elected for the coming year.

Forty-seven delegates were present and took part with a remarkable degree of enthusiasm and assiduity during the week's deliberations of the Criminal Law Section. Among the delegates were representatives of the Canada Law Reform Commission and lawyers representing the private bar. Some fifty-three resolutions were studied in depth by the Section, a number of them being particularly important. For instance, driving a vehicle while under suspension, surreptitious entries in relation to the interception of communications, Crown privilege with regard to governmental documents, the publicity in relation to an accused before his trial has commenced, the principle of fraud and false pretense with regards to services, the right of an accused to be tried by a judge or jury speaking his own official language, corruption by municipal officers, and the empanelling of the jury.

Two reports of the Law Reform Commission of Canada, one on sexual offences and one on theft and fraud, were tabled and examined by the members of the Section. There was also a report from each province about pre-trial disclosure.

Gordon E. Pilkey, Deputy Attorney General of Manitoba, was elected as chairman of the Criminal Law Section for next year.

One outstanding feature of this year's meeting of the Conference was the acceptance of a recommendation of the Joint Working Group of the American and Canadian Bar Associations on the Settlement of International Disputes. Accordingly we have established a special committee to co-operate with and work jointly with a similar committee of the National Conference of Commissioners on Uniform State Laws to explore the feasibility of being of some assistance in such matters as transfrontier pollution claims. At the outset the committee will be comprised of H. Allan Leal, Q.C., LL.D. of Toronto, Robert G. Smethurst, Q.C. of Winnipeg and Gordon F. Coles of Halifax.

Thursday August 23rd was Evidence Day of the Conference for on that day the Conference met in a special plenary session to be brought up to date on the work of the Conference's joint Federal-Provincial Task Force on Uniform Rules of Evidence. The Task Force consists of representatives of Canada, Quebec, Ontario, British Columbia, Nova Scotia and Alberta. In the morning Mr. Justice George Murray of the B.C. Supreme Court, a member of the Task

Force, outlined to the delegates the major items considered during the first two years of the Task Force and drew particular attention to a number of the more contentious issues covered to date.

Most of the afternoon of Evidence Day was devoted to the discussion of several issues on which the Task Force had prepared issue papers setting out the issues considered or to be considered by the Task Force during their deliberations and on which they wished to have input from the Conference members.

Part of both the morning and the afternoon sessions of Evidence Day was spent discussing the terms of reference of the Task Force as difficulties had become apparent to the Task Force during the year resulting in some delay in their schedule. Two meetings of representatives of the participation jurisdictions were held resulting in amendments to the terms of reference of the Task Force designed to overcome the difficulties, to assist the Task Force in completing its work at as early a date as possible, and to result in an improved, acceptable final product. Several of the participating jurisdictions have indicated that they will provide the services of research personnel on a full or part time basis at no expense to the Conference in order to make it possible for the Task Force to comply with the amended terms of reference.

The Task Force's first annual report appeared in full in the Proceedings of the 1978 Conference and approval was given to publishing the second annual report in this year's Proceedings along with the reports and full details of all other business transacted at the Conference. Copies of the Proceedings will be available from the Executive Secretary.

Before concluding this year's somewhat lengthy report I wish to draw to your attention that over the past two or three years a number of very significant changes have taken place which are now beginning to be reflected in the work of the Conference.

We have access to Secretariat services which has greatly improved the efficiency of our meetings; proceedings in the Criminal Law and Uniform Law Sections and in all plenary sessions are now simultaneously translated; all proceedings and reports of the Conference are printed in both English and French; there is greater participation by members of the practicing bar; there has been a significant growth in the size of the sections and the overall Conference; plans have been developed to review all uniform acts for the purpose of updating them; and finally new proceedings have been adopted

for the Uniform Law Section designed to speed up the work of the Section and to improve the likelihood that all uniform Acts recommended by the Conference will be enacted by most, if not all, of the provinces. For that, of course, is the principal aim of the Conference. The officers of our Conference for 1979-80 are:

Honorary President	—	Robert G. Smethurst, Q.C., Winnipeg
President	—	Gordon F. Coles, Q.C., Halifax
1st Vice-President	—	Padraig O'Donoghue, Q.C., Whitehorse
2nd Vice-President	—	George B. Macaulay, Q.C., St. John's
Treasurer	—	Claire Young, Edmonton
Secretary	—	Arthur N. Stone, Q.C., Toronto

The incoming President, Gordon F. Coles, and the incoming first Vice-President, Padraig O'Donoghue, will represent the Conference on the Council of your Association during the next year.

Lachlan MacTavish, Q.C. of Toronto will continue as Executive Secretary.

Next year our annual meeting will be held in August at Charlottetown, Prince Edward Island.

APPENDIX A

(See page 26)

REPORT OF COMMITTEE ON THE TRANSLATION OF UNIFORM ACTS INTO FRENCH AND UNIFORM DRAFTING TECHNIQUE IN FRENCH

With respect to the drafting of new uniform acts, we suggest that both the French and English versions be drafted at the same time, in close collaboration.

The French version of an act should state the same rule of law as the English version, but according to the "génie de langue française", should be of the highest quality and should keep the same general structure (divisions, sections, paragraphs, etc.) without being a word-for-word translation.

The French draftesman should be provided with the same information and documentation as the English draftsman.

With respect to the presentation, we suggest that both versions be printed side by side so that they may be used more easily.

With respect to uniform drafting techniques in French, we believe that once the inventory of acts already translated is complete and once some other acts are prepared in French, we will be in a position to prepare a list of conventions on the translation and drafting of acts in French. Those conventions will not necessarily be identical to what has been adopted in English by the Conference.

Phillippe Maltais,	Ontario
Bruno Lalonde,	New Brunswick
Denis Carrier,	Québec
Robert C. Bergeron,	Ottawa

Saskatoon
17 August 1979

APPENDIX B

(See page 29)

PRESIDENT'S ADDRESS: ROBERT G. SMETHURST, Q.C.

My fellow Commissioners, Guests of Honour, Ladies and Gentlemen: It is my very pleasant duty to formally welcome you to Saskatoon for this, the 61st Annual Meeting of the Uniform Law Conference of Canada. I am delighted to see so many familiar faces as well as many new ones.

And on your behalf, I would like to extend a very special welcome to John C. Deacon and his wife, Doreen, of Jonesboro, Arkansas. Jack is the newly elected president of our American counterpart, the National Conference of Commissioners on Uniform State Laws, having formerly served that Conference as chairman of its Executive Committee since 1977.

I do not know Jack's age, but I do know that he was deemed to be a young man in 1955 for in that year he won the Outstanding Young Man of the Year Award of his hometown Jonesboro.

Jack's biography reads like a page out of Who's Who. He has been very involved in many professional organizations including the Arkansas Bar Association which he served as president in 1970-71; the American Bar Association in which he has served in several capacities; the American Counsel Association of which he was president in 1974-75; the International Academy of Trial Lawyers of which he is a director; the National Institute of Trial Advocacy and the Southwestern Legal Foundation. As well, he has been honoured by being made a Fellow of the American Bar Foundation, the Arkansas Bar Foundation, and the International Academy of Trial Lawyers, and is a member of several other legal organizations. Jack's public and civic record of service is equally impressive, having served the United Way, the Red Cross, Rotary, and as president of seven or eight local organizations. Thus it is easy to see that not only has he lived up to the promise of being named Outstanding Young Man of Jonesboro, he also most deservedly received the Outstanding Lawyer-Citizen Award of the Arkansas Bar Foundation in 1973.

Welcome to Canada and to Saskatoon, Jack and Doreen. We do hope you enjoy your brief stay with us.

Two weeks ago Eleanor and I had the pleasure of attending the 81st annual meeting of the National Conference in San Diego, California. The warmth of their welcome and their friendliness was overwhelming, and we spent a marvellous week with our American friends. From a business standpoint, I was impressed by the many similarities between our two groups—similar projects, similar problems—such as completing our agendas in the allotted time and in having our work carried through into legislation. Like my predecessors in office, I found the opportunity to see the National Conference in action a rewarding one and a most instructive one. Hopefully, as in past years, some of the experiences gained in these exchanges of visits will lead to the betterment of our own work.

There is one person who, had he been with us tonight, would have been so pleased that we had returnd to his native province for our first visit since 1961. I am, of course, referring to the late E. C. Leslie, Q.C., (better known to all as "Lofty"), who served our Conference with such dedication from 1947 to 1964, a total of 17 years, and as its president in the years 1958-1959. Lofty was both loved and respected by all who knew him, and we were all saddened to learn of his death this past year.

Last week we were further saddened by the death of one who, although never a member of our Conference, was known to us all and whose life touched us all in one way or another—a very great Canadian and one who called Saskatchewan his home. I am of course referring to our former Prime Minister, the Right Honourable John G. Diefenbaker. As you know, Mr. and Mrs. Diefenbaker are both to be buried here in Saskatoon on Wednesday of this week. We have asked Mr. Dick Gosse to keep us informed regarding the details of the interment and announcements will be made to members of the Conference as to our participation.

I have news of another former member and past-president of our Conference, known to most of you, and I am referring to our friend, Glen Acorn—who is with us tonight. I understand that Glen has left the Government of Alberta to go into practice in Edmonton —specializing in his chosen field of drafting.

We have also received word that another longtime member of the Conference, Jim Ryan, is still in the Barbados; I understand he is now on the faculty of the University.

In his address last year, our then president, Allan Leal, referred to many of the changes that have been taking place in our Confer-

ence in recent years—the introduction of law reform agency representation on the Conference, the growth in our membership and in the scope of our work, the addition of the Legislative Drafting Section, and the institution of the simultaneous translation facilities and other most welcome services of the Canadian Intergovernmental Conference Secretariat which I will mention more particularly later. All of these changes have taken place within the framework of our respective provincial mandates and without detracting from our overall objective—namely the preparation of uniform statutes worthy of being legislated into law in our several provinces and territories.

Tonight, I would like to carry Allan's message along a little further and to report to you on some developments over this past year. For instance, last year we all received our new Consolidation of Uniform Acts which had been provided to us after a great deal of hard effort by our Executive Secretary, Lachlan MacTavish, and with the generous financial assistance of the Canadian Law Information Council. This year, Duke was able to complete and mail to our members, and to the many others on our mailing list, the first Supplement to the Consolidation. One of the items to be dealt with by the Uniform Law Section this week is a report on how best we can proceed with a review and up-dating of the Uniform Acts in our Consolidation—an urgent matter if the hard work of earlier years is to be fully utilized.

Those of you in attendance at last year's meeting in St. John's will recall the spendid contribution to the success of the Conference that was made by the members of the Canadian Intergovernmental Conference Secretariat headed by Ann Vice who provided us with simultaneous translation facilities at all our meetings and who also translated a great many documents for us during the week. This past winter the CICS continued to serve us by completing the translation of all reports, appendices and minutes of the 1978 meeting into both the English and the French language, and for the first time in our history we have had published a complete French edition of our proceedings. Copies have been distributed to between 50 and 60 addressees in Quebec, to law schools across the country, and to a few select addressees in France as well as many government people in Ottawa. On our behalf, I wish to publicly express our appreciation to Ann and all her staff for this wonderful service. Ann, we thank you and your team for your help and we welcome you back with us for a second year. As was the case last year, we consider you all an

integral part of the Conference and hope you will join us in the social activities planned by the local committee.

Earlier in this address, I referred to the increasing membership of our Conference. Last year's attendance was the largest ever, 101, with 57 sitting in the Uniform Law Section, 41 in the Criminal Law Section, and 29 in the Legislative Drafting Section. You may be interested to know that this list was broken down into approximately 22 legislative counsel, 9 law reform agency representatives, 56 other provincial or federal government personnel, and 14 private practitioners.

In breaking down the membership into groups, I would not in any way wish to convey the idea that we think of ourselves as separate groups, for of course we do not. We all contribute as individuals and it is good that we do, for the success or otherwise of our deliberations is a reflection of the individual input into the discussions. It is important that this input reflects the different points of view—a balance so to speak between the legal scholar, the researcher, those responsible for drafting legislation, those charged with the task of enforcing or putting it into effect, and those who must work with it on a daily basis, the private practitioners. Each has his own contribution to make.

I was advised this afternoon that our pre-registration indicates that this year's Conference will be attended by a new all-time high number of commissioners—approximately 110 at last count. This is undoubtedly a reflection of the increased awareness of our provincial and federal governments of the work of the Conference and the value they place on our deliberations and the uniform statutes produced.

A couple of years ago your Executive became aware of a trend to more government employee appointments to the Conference and fewer members of the practising profession. In recognition of the dangers of such a policy if it were to continue, my predecessors, Wendall MacKay, Allan Leal and I, in concert with your Executive, have made a concerted effort to bring to the attention of the provincial attorneys general and their deputies our concern. I am happy to report that they responded by naming fourteen private practitioners to the Conference last year and at least eighteen this year. As a private practitioner myself, I believe that in choosing me as your president this past year, you have in turn recognized and honoured the contribution made by all my colleagues who come

from private law practices. I would be remiss if I were not to mention the continuing work of our Task Force on Evidence. Earlier this year I had the opportunity to meet briefly with the members of the Task Force and was most impressed with the progress they are making on this monumental work. Later this week we will be hearling more about it and will have an opportunity to express our opinions on some of the matters. I am sure we all look forward eargerly to that particular session. During the year, it appeared that the work of the Task Force might be disrupted, albeit briefly, by the need to find a new chairman as a result of Ken Chasse's new position as Director of Research for the Ontario Legal Aid Plan.

As will be disclosed to you in the Treasurer's Report, a significant portion of the yearly expenditures out of our Research Fund has been earmarked these past two years to the Evidence Task Force project with smaller amounts to other worthwhile projects such as the Letters Rogatory study being carried on by the Legal Research Institute of the Province of Manitoba. This Research Fund, set up in 1974 with the help of the then federal Deputy Minister of Justice, Don Thorson, has been of invaluable support to the work of the Conference. During this past year, as a result of certain federal cutbacks on spending, or reviews, we received notice from the Federal Government that we would not receive our 1979 allotment until after 15 August 1979 and then only when the freeze on grants was lifted and after consideration. There was also an indication that the interest received on the investment of these monies might be deducted from this year's grant. Hopefully these funds and the interest from their investment will not be lost to the Conference in future years for we unanimously feel that this would be a most retrogressive step. You may rest assured that your Executive will pursue this matter with representatives of the Federal Government at the first opportunity.

One new item that I would like to mention briefly—and this involves our American friends as well—concerns the possible establishment of a joint liaison group, comprised of representatives of the American Uniform Law Conference and of our conference to continually review and possibly draft model uniform legislation of common interest to our two countries. As a start, it has been suggested that one area of immediate concern is that of transfrontier pollution claims. At their recent meeting in San Diego, the executive of the American conference approved the appointment of a committee to work with a committee of our conference to examine the proposal and to determine if such a project would be feasible. Your Executive

intends to discuss this matter with Mr. Deacon while he is with us this week with a view to working out some of the details. I hope that by the end of the week I may be able to report on some progress on this most interesting and challenging new idea. Before closing, I would like to recognize on unofficial group among us who met earlier today to discuss matters of common concern—and I refer here to the representatives of the law reform agencies across Canada. There have been several such meetings over the years which I had the privilege of attending and I found them all most worthwhile. I trust that your meeting today was no less productive, and we, in the Uniform Law Section, will look forward to receiving your reports during the week.

In concluding these remarks, I want to express my grateful appreciation to "Duke" MacTavish for all his assistance during the year, to all members of your Executive for their cooperation and hard work on your behalf, to Ann Vice and her staff for their services in preparing material for this meeting and in making available to us the simultaneous translation facilities—and last but not least, Dick Gosse for all his time and effort in arranging for our comfort and our pleasures during our time in Saskatoon.

It will be a busy week—I know we will enjoy the Saskatchewan hospitality. May the deliberations of each of the Sections be worthwhile.

APPENDIX C

(See page 30)

TREASURER'S REPORT

Statement of Receipts and Disbursements for the period August 11, 1978 to July 16, 1979

GENERAL FUND

Receipts:	
Annual contributions (Schedule 1)	$ 32,500
Interest - earned on general funds	1,744
- transferred from Research Fund (Note 3)	3,544
	$ 37,788
Disbursements:	
Executive-secretary - honorarium	$ 11,200
- other	700
Executive meeting	822
Annual meeting . . .	3,768
Other meetings	574
Telephone	229
Printing and stationery	128
	$ 17,421
Excess of receipts over disbursements	$ 20,367
Balance in bank, beginning of period	21,849
Balance in bank, end of period	$ 42,216
Balance in bank consists of:	
Term deposits	$ 30,849
Current account balance	11,367
	$ 42,216

RESEARCH FUND

Receipts:	
Interest earned on research funds	$ 3,942

Disbursements:	
Evidence Task Force	28,815
Interest transferred to General Fund (Note 3)	3,544
University of Manitoba, Legal Research Institute	2,400
	$ 34,759
Excess of disbursements over receipts	(30,817)
Balance in bank, beginning of period	73,474
Balance in bank, end of period	$ 42,657
Balance in bank consists of:	
Term deposits	$ 39,874
Current account balance	2,783
	$ 42,657

(See accompanying notes)

UNIFORM LAW CONFERENCE OF CANADA

NOTES TO FINANCIAL STATEMENT
July 16, 1979

1. *Basis of financial statement*
   The accompanying statement of receipts and disbursements reflects only the cash transactions of the organization during the period.

2. *Contributions*
   At July 16, 1979 the following annual contributions to the General Fund had not been received from members:

Canada	$2,500
Northwest Territories	2,500
New Brunswick	1,000
	$6,000

   In addition, an anticipated contribution of $25,000 by the Government of Canada to the Research Fund had not been received at July 16, 1979. Discussions are presently in progress with the Government of Canada regarding this contribution, however, the outcome is not known at this time.

3. *Interest transfer*
   Interest earned in the preceding year is transferred from the Research Fund to the General Fund.

Schedule 1

UNIFORM LAW CONFERENCE OF CANADA

Schedule Of Members' Annual Contributions for the Period August 11, 1978 to July 16, 1979

Re: 1977/78 —	
Newfoundland	$ 2,500
Quebec	2,500
Saskatchewan	2,500
Canada	1,000
	$ 8,500
Re: 1978/79 —	
Nova Scotia	$ 2,500
New Brunswick	1,500
Newfoundland	2,500
Prince Edward Island	1,250
Quebec	2,500
Ontario	2,500
Manitoba	2,500
Saskatchewan	2,500
Alberta	2,500
British Columbia	2,500
Yukon	1,250
	$24,000
	$32,500

AUDITORS' REPORT

To the Members of the
Uniform Law Conference of Canada:

We have examined the statement of receipts and disbursements of the Uniform Law Conference of Canada for the period August 11, 1978 to July 16, 1979. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests and other procedures as we considered necessary in the circumstances.

In our opinion, this statement presents fairly the cash operations of the organization for the period August 11, 1978 to July 16, 1979 in accordance with accounting principles generally accepted for non-profit organizations.

Edmonton, Canada
August 7, 1979

Clarkson, Gordon & Co.
Chartered Accountants

APPENDIX D

(See page 30)

SECRETARY'S REPORT

The Conference and particularly the Secretary is fortunate to have the services of our Executive Secretary, L. R. MacTavish, Q.C. Mr. MacTavish and the Secretary work closely together on a daily basis and much of what would otherwise be in the Secretary's Report is now more appropriately in the report of the Executive Secretary.

Following last year's meeting at St. John's, letters of appreciation were sent to those referred to in the resolution passed at the Closing Plenary Session.

In the past year one new project was authorized for payment out of the Research Fund. At the request of the Committee on Private International Law a maximum of $2,400 was authorized to be paid for research into provincial legislation for the purpose of implementing the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters and Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters.

In keeping with the policy of the Executive, the Secretary reported on the activities of the Conference in an article published in the May issue of the Canadian Bar Association publication "The National".

Arthur N. Stone
Secretary

14 August 1979

APPENDIX E

(See page 30)

EXECUTIVE SECRETARY'S REPORT

1978 Proceedings: French Edition

The outstanding feature of the past year's operations of the Conference was, as the President mentioned in his address, the publication for the first time of an edition in French of our annual proceedings.

As Mr. Smethurst said, this novel and important accomplishment was made possible by the co-operation, money and work of the Canadian Intergovernmental Conference Secretariat which translated our 1978 Proceedings *in toto*, reproduced copies and distributed them to persons, libraries, law schools and other organizations throughout Canada and elsewhere.

I wish to add my personal thanks to Ann Vice and her group for a job well done.

Consolidation of Uniform Acts: 1979 Supplement

Another new feature in the life of the Conference during the year now ending was the publication of a supplement to the loose-leaf edition of our Consolidation of Uniform Acts. This has brought the volume up to date. I expect another supplement will be published next Spring.

Purge of the Mailing List

The third and last feature of the year's operations that I wish to draw to your attention this evening is that our general mailing list has been thoroughly revised — a job that I had not undertaken for some five years. This purge was timely for it was possible in the result to cut out a great deal of deadwood, correct and up-date addresses and so on, so that we are sure that all those now on our list are alive and have shown a desire to receive some or all of our publications. The revised list contains upwards of 300 names which is some 100 less than before the revision.

APPENDIX E

Ontario's Extra Contribution

For the sixth consecutive year the Ministry of the Attorney General of Ontario has provided office and storage accommodation for me, postage and all kinds of office equipment and supplies at no cost to the Conference. I can assure you that without this assistance there is no way the Conference could carry on its work on its present income.

Allan Leal and Arthur Stone deserve your special thanks for making all this happen.

Table IV

In conclusion, let me remind all of you, particularly the Local Secretaries, of your continuing responsibility to inform me from time to time as to the changes that should be made in Table IV (1978 Proc. 364-370) in order to keep it up to date and correct.

This is now more important than heretofore as Table IV and the others are now being reprinted in the Desk Book of the Canadian Encyclopedic Digest. Please cooperate.

Queen's Park, Toronto
10 August 1979

Lachlan MacTavish
Executive Secretary
CICS Doc. 840-173/043

APPENDIX F

(See page 32)

CICS Doc. 840-173/043

CHILDREN BORN OUTSIDE MARRIAGE
REPORT TO THE BRITISH COLUMBIA COMMISSIONERS

INTRODUCTION

This topic has now acquired an extensive history.

1973

The Conference asked the Ontario Commissioners to prepare a report for the 1974 Conference. *(See 1973 Proc. 30.)*

1974

The Conference asked the British Columbia and Ontario Commissioners to prepare an analysis of the reports of various law reform bodies on children born outside marriage. *(See 1974 Proc. 31 and App. Q, 145.)*

1975

The Conference received the analysis, and asked the British Columbia Commissioners to prepare a series of policy points for discussion at the 1976 meeting. *(See 1975 Proc. 31 and App. Z, 180-208.)*

1976

The Conference made detailed decisions on policy and asked the British Columbia Commissioners to prepare a draft statute for consideration at the 1977 meeting. *(See 1976 Proc. 28 and App. J, 90-126.)*

1977

The British Columbia Commissioners presented the draft statute, but consideration of it was postponed for a year. *(See 1977 Proc. 29 and App. I, 152-208.)*

1978

The draft statute was considered, but in the course of the discussion it became apparent that the Conference wished to make substantial changes in the policy decisions taken in 1976. The British Columbia Commissioners have therefore been asked to submit another, different, draft statute, based on the discussions which took place in 1978. *(See 1978 Proc. 30.)* I prepared a record of the decisions taken in 1978, but considerations of economy prevented its being published in the *1978 Proceedings*. The record was distributed separately to Local Secretaries.

At the 1978 meeting the Conference asked me to assist in the preparation of the statute to be considered in 1979, and this I agreed to do. I should point out again, however, that I lack confidence in my ability to be of much assistance. Those who attended the 1978 meeting will recall that I found myself personally disagreeing with a number of the decisions taken, and the task which has confronted me has been to put these into statutory language. This is scarcely a novel situation for someone trained in legislative drafting, but it is new to me, and while I have made as conscientious an attempt as possible, the product should be treated with caution. It should also be noted, however, that the Conference did ultimately accept a large number of the concepts contained in *The Children's Law Reform Act, 1977* of Ontario, and much of my drafting has been copied from that Act.

DRAFT STATUTE

1. (1) Subject to subsection (2), for all purposes of the law of [here insert name of appropriate province] a person is the child of his natural parents and his status as their child is independent of whether the child is born inside or outside marriage.

(2) Where an adoption order has been made, [here insert reference to statutory provision which applies], the child is the child of the adopting parents as if they were the natural parents.

(3) Kindred relationships shall be determined according to the relationship described in subsection (1) or (2).

(4) Any distinction between the status of children born inside marriage and born outside marriage is abolished and the relationship of parents and child and kindred relationships flowing from that relationship shall be determined in accordance with this section.

Commentary

The above section, in its revised form, was approved at the 1978 Conference.

2. (1) For the purpose of construing an instrument, Act or regulation [unless the contrary intention appears,] a reference to a person or group or class of persons described in terms of relationship by blood or marriage to another person shall be construed to refer to or include a person who comes within the description by reason of the relationship of parent and child as determined under section 1.

(2) For the purpose of construing an instrument, Act or regulation, the use, with reference to a relationship described in terms of blood or marriage, of the words legitimate or lawful or other words of the same effect shall not of itself prevent the relationship being determined in accordance with section 1.

Commentary

The reason for placing the phrase "unless the contrary intention appears" in square brackets in subsection (1) lies in the fact that the

1978 Conference was divided on the issue whether Legislatures and like bodies or, more importantly, the framers of instruments such as trust deeds or wills, should be permitted to discriminate either directly or indirectly between children born inside marriage and those born outside marriage.

In relation to statutory instruments it appeared to be agreed that, ultimately, a legislative body could not be absolutely prohibited from making discriminations. The division of opinion here appeared to go to the extent to which legislative bodies should be invited or permitted to make discriminations by relatively loose forms of words.

In relation to non-statutory instruments such as trust deeds and wills, the division of opinion was much more fundamental.

Some members felt that if a settlor and testator were determined to exclude children born outside marriage, and persons claiming through them, from dispositions of property (by dint of a carefully framed instrument), the principle and practicality of freedom of disposition and testation could not, and should not, be infringed.

Other members felt that, as a matter of policy, a settlor or testator should not, under any circumstances, be permitted to discriminate against a child born outside marriage, or a person claiming through him. It was suggested by these members that whether or not a settlor or testator actually *had* discriminated against a claimant on the ground of birth outside marriage would be a matter of evidence. It is implicit in the views of these members that a finding of discrimination could be made either (i) by reason of the persons or class of persons chosen by the settlor or testator or (ii) by reason of the amounts given to beneficiaries. It is also implicit that a finding of discrimination would necessarily result in a *re-arrangement of beneficial interests by the courts*. The details of such a scheme of re-arrangement were not touched upon, and it is my view that if this position is to be adopted it will require a substantial amount of work.

As for subsection (2), those who would maintain freedom of disposition and testation under subsection (1) would nonetheless be able to approve it. Those who would take the extreme step under subsection (1) would probably feel that this subsection was unnecessary. They might also find it dangerous—as it indirectly assumes that a settlor or testator may, by carefully chosen words, discriminate against children born outside marriage and those claiming through them.

3. This Act applies to an Act, regulation, order or by-law enacted or made before, on or after the day this Act comes into force, and to an instrument made on or after the day this Act comes into force, but it does not affect

(*a*) an instrument made before this Act comes into force, or
(*b*) a disposition of property made before this Act comes into force.

Commentary

The principles of the above section were approved at the 1978 Conference, pursuant to a report from Nova Scotia.

4. The court(s) having jurisdiction for the purposes of sections 5, 6 and 7 are [here insert name(s) of appropriate court(s)].

5. (1) Any person having an interest may apply to the court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.

(2) Where the court finds that a presumption of paternity exists under section 8 and unless it is established, on the balance of probabilities, that the presumed father is not the father of the child, the court shall make a declaratory order confirming that the paternity is recognized in law.

(3) Where the court finds on the balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect.

(4) Subject to section 7, an order made under this section shall be recognized for all purposes.

6. (1) Where there is no person recognized in law under section 8 to be the father of a child, any person may apply to the court for a declaration that a male person is his or her father, or any male person may apply to the court for a declaration that a person is his child.

(2) An application shall not be made under subsection (1) unless both the persons whose relationship is sought to be established are living.

(3) No order shall be made under this section on the uncorroborated evidence of one person.

Commentary

Sections 5 and 6 reflect the decisions taken at the 1978 Conference (i) to adopt the principles of sections 4 and 5 of the Ontario Act and (ii) to reduce severely the circumstances in which corroborative evidence is required in paternity cases.

7. (1) Where a declaration has been made under section 5 or 6 and evidence becomes available that was not available at the previous hearing, the court may, upon application, discharge or vary the order and, subject to subsection (2), make any other order, or give directions, ancillary to it.

(2) Where an order is discharged or varied under subsection (1), rights and duties which have been exercised and observed, and interests in property which have been distributed as a result of the previous order, are not affected.

Commentary

Subsection (2) represents principles of limitation which were extensively debated at the 1978 Conference, but upon which there was ultimately a consensus.

8. (1) Unless the court, by the making of an order under section 5 or 6 declares otherwise, a man is presumed to be, and he shall be recognized in law to be, the father of a child in one or more of the following circumstances:

(*a*) The man was married to the mother of the child by a marriage that was terminated by death or a judgment of nullity within 300 days, or such longer period as the court may allow, before the birth of the child.

(*c*) The man marries the mother of the child after the birth of the child and acknowledges that he is the father.

(*d*) The man and the mother have acknowledged in writing that the man is the father of the child.

(*e*) The man has been found or recognized by a court of competent jurisdiction to be the father of the child.

(*f*) The man was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child or the child is born within 300 days, or such longer period as the court may allow, after they ceased to cohabit.

(2) Where a marriage is either void or voidable the man and the woman shall be deemed, for the purposes of subsection (1), to have been married during the period that one of them believed that they were married to each other.

(3) Where circumstances exist that give rise to a presumption or presumptions of paternity by more than one father under subsection (1), no presumption shall be made as to paternity and no person is recognized in law to be the father unless the court makes an order under section 6.

Commentary

This section embodies the substantial changes in policy which the Conference wrought in 1978. It now bears a close resemblance to section 8 of the Ontario Act. There remains, of course, the issue of what effect, if any, is to be given to extra-provincial or truly foreign acknowledgments or judicial findings of paternity. It was decided at the 1978 Conference that the Ontario Commissioners should write a seperate report on these matters.

9. (1) The registrar or clerk of every court in [here insert name of appropriate province] shall furnish the Director of Vital Statistics with a statement respecting each order or judgment of the court which makes a finding of parentage or that is based upon a recognition of parentage.

(2) When acknowledgments of paternity are made under section 8 they may be filed in the office of the Director of Vital Statistics.

(3) Where the Director of Vital Statistics receives a statement or acknowledgment under subsection (1) or (2), he shall amend that Register of Births accordingly.

Commentary

It was thought in 1978 that the principle of encouraging acknowledgments of paternity ought to be preferred over the possible disadvantage of a fraud being perpetrated on a child's estate. It was also thought that there ought not to be a separate registry, apart from the Register of Births, concerning the paternity of children born outside marriage.

10. (1) If a married woman is artificially inseminated with semen, all or part of which is donated by a man other than her husband,

(*a*) the donor is not in law the father of the child, and
(*b*) the husband is in law the father of the child if he consents to the artificial insemination but not otherwise.

(2) Subsection (1) applies with necessary changes to a woman and a man who cohabit throughout the year preceding the child's birth, but only if the man also consents to assume the responsibility of parenthood.

Commentary

In 1978 the Conference, pursuant to a report from the Ontario Commissioners, decided (*i*) to include the issue of artificial insemination in the draft statute and (*ii*) to accept the views of the Alberta Institute of Law Research and Reform on the matter. The above section appears as section 8 in the draft statute prepared by the Alberta Institute.

Other Issues

In 1978 it was agreed that the draft statute ought to contain some attempt to come to grips with the conflict of laws issues posed by the concepts of extra-provincial and truly foreign acknowledgments and judicial findings of paternity.

It was also agreed that an order relating to paternity, made by a court in Canada operating property under its own jurisdictional rules, ought to be recognized in all Canadian jurisdictions. It was not made clear whether this principle extends to orders *in personam* as well as to orders *in rem*.

All issues relating to the draft statute and the conflict of laws were referred to Ontario for a report at the 1979 Conference. This report should address, at the very least, the following questions:

(a) In relation to sections 7 and 8(*c*) of the draft statute, what constitutes a court of competent jurisdiction?

(b) What effect, if any, should the finding of a court in another Canadian, or a truly foreign, jurisdiction have on the duties of the Director of Vital Statistics under section 9 of the draft statute?

(c) If a local court makes a finding that A. is the father of the child, but a foreign court makes a finding that B. is the father, is this a circumstance which invokes section 8(3) of the draft statute, or should the order of the local court be regarded as binding?

R. D. Adamson
of the British Columbia Commissioners

August 1979

APPENDIX G

(See page 32)

CICS Doc. 840-173/053

CLASS ACTIONS

REPORT OF THE COMMITTEE

1. The Class Action Committee was created in 1977, following a report submitted by the British Columbia delegation dealing with questions of legislative policy and procedure which should be considered in the drafting of a uniform statute.

2. The mandate of the Committee, as formulated at that time, was to consider studies and legislation relating to the class action and review developments taking place in this area.

3. The Committee's mandate was renewed in 1978; it is composed of the following:

for Québec:	Marie-José Longtin, Chairman, another member to be designated
for Ontario:	Simon Chester Derek Mendes da Costa or his representative
for British Columbia:	Ken McKenzie

4. Once again this year, the Committee did not feel it was necessary to organize a formal meeting of members, but information was exchanged and preliminary discussions are under way to reformulate the questions to be considered in drafting a uniform statute and to draw up a working document. This will require the Committee to review in their entirety the questions submitted to the Conference by British Columbia, and to consider certain questions submitted by Québec relating to the application of the procedure and the exercise of the remedy, as well as certain questions submitted by Ontario concerning rules prior to institution of the class action and rules on recognition of judgments rendered in other jurisdictions.

5. The situation did not change during the year with regard to legislation. Ontario and British Columbia continued with studies of the question, and Québec proceeded with the implementation of class actions in that province. The administrative part of the

Act became effective on 5 July 1978 and the procedural part on 19 January 1979. The Superior Court also adopted its rules of practice, and the Class Action Assistance Fund the greater part of its regulations. Some applications for leave to bring class actions were made dealing with such matters as the effects of a transit strike on users, an interruption of cable television service, and the deterioration in patient care during rotating strikes. Some judgments have been rendered, and one was appealed.

6. The Committee met during this Conference to discuss the future direction of its work; members felt that because of the probable expansion in this area of the law in the years ahead, it is important for their work to continue and for a working document to be prepared, noting questions of legislative policy and procedure to be followed in the drafting of uniform legislation on class actions and making some proposals.

7. It is accordingly proposed that:

   (1) this report be approved and adopted;
   (2) the mandate of the Committee be renewed;
   (3) the Committee include representatives from Québec, Ontario and British Columbia, and be chaired by the Québec representative;
   (4) the Committee be given a mandate to review developments taking place in legislation affecting class actions and to prepare a working document, preparatory to the drafting of uniform legislation on class actions.

For the Committee:

Marie-José Longtin
Québec

Derek Mendes da Costa (or his representative) Ontario

Simon Chester
Ontario

Ken McKenzie
British Columbia

20 August 1979

APPENDIX H

(See page 32)

July 18, 1979

Mr. F. E. Gibson, Q.C.
Chief Legislative Counsel
Justice Department
Ottawa, Ontario
K1A 0H8

Dear Mr. Gibson:

COMMERCIAL FRANCHISES

I am writing to request that consideration be given to including the topic franchise legislation on the August 1979 agenda of the Uniform Law Conference of Canada. I believe that such consideration could be important to the economic health of franchise firms in Canada, by contributing to legislative uniformity amongst the provinces in the field of franchise regulation. Non-uniform provincial franchise legislation could result in both high legal costs for franchise firms and inordinate demands on the time of their key executives.

Non-uniform state franchise legislation in the United States created difficulties and added to the cost of doing business. In 1978, the Federal Trade Commission was asked to develop rules and regulations which would standardize registration across the U.S. These new trade regulation rules will be coming into affect in July or August 1979.

The rule requires franchisors and franchise brokers to furnish certain information to prospective franchisees within a specified time frame. The information consists of facts of the type found to be needed by prospective franchisees in order to make an informed decision about entering into a franchise relationship. The rule also sets forth the circumstances under which any franchisor or franchise broker, who chooses to do so, may make claims about the actual or projected sales, income, or profits of existing or potential outlets.

In Canada, Alberta is presently the only province with legislation specifically governing the sale of business franchises. The Franchises Act, being chapter 38 of the Statutes of Alberta, was introduced in 1971. The Act, administered by the Alberta Securities Commission, is presently under review.

There are indications that other provinces may enact such legislation in the next year or two. Ontario had a commission of

inquiry into franchising abuses in 1971 which strongly recommended the regulation of franchising. Such legislation seemed to be imminent in the past year, but as far as we know, it is now on the "back burner".

Quebec is currently developing franchise legislation and has announced that a white paper would be ready by July and that it would be tabled in the National Assembly this Fall. British Columbia and Saskatchewan are also actively studying this area of business practice.

A precipitating factor in the enactment of such legislation may be the potential influx into Canada of foreign firms selling business franchises of little or no real value. The subsequent financial losses of Canadian investors could well result in additional Canadian provinces enacting legislation controlling the sale of franchises. Such an influx may result from the entry into force throughout the U.S. in the Fall of this year, of U.S. Federal Trade Commission regulations concerning the sale of business franchises. Up until now only fourteen of the states have had such legislation.

Non-uniform legislation in Canada will tend to favour the larger, well financed franchisors in Canada, which are mainly owned and controlled by U.S. interests. The smaller Canadian franchisors, already having difficulty in competing with their larger U.S. rivals, will be placed at a considerable competitive disadvantage; they are less able to bear the legal costs and the burdens on the time of key executives required to comply with differing legislation in a number of provinces.

Given the existence of legislation in one province and the stated intentions of some of the other provinces, in addition to the U.S. experience, the Department of Industry, Trade and Commerce would favour the development of a "model" franchise regulatory act by the "Conference of Canadian Commissioners on the Uniformity of Law in Canada". This model act would then constitute a means of encouraging uniformity amongst the provinces which subsequently decide at some later date to enact legislation affecting franchising.

Officers of the Distribution Services Branch have formally discussed the above solution with officials of the Association of Canadian Franchisors, including their legal counsel. Their reaction has been most positive and they would like the Department of Industry, Trade and Commerce to pursue the matter. We also have had preliminary discussions with eight of the provinces and all have shown interest.

Your comments on this proposal would be most appreciated. The person directly responsible for this project will be Mr. Guy-André

Gélinas, Chief, Distribution Services Branch (88), C. D. Howe Building, 235 Queen St., 8th Floor East, Ottawa, Ontario K1A 0H5, telephone number: 593-7981.

Yours sincerely,

A. M. Guérin
Assistant Deputy Minister
Industry and Commerce Development

APPENDIX I

(See page 88)

CICS Doc. 840-173/040

PROMOTION OF UNIFORMITY OF COMPANY LAW IN CANADA

REPORT OF QUEBEC, NOVA SCOTIA AND PRINCE EDWARD ISLAND

In 1978 the annual report was presented by Messrs. Ryan, Rioux and Walker on behalf of Newfoundland, Quebec and Nova Scotia.

On this occasion your Committee's report will be presented in two parts. Part I will be presented by Mr. Hubert Gaudry and will deal with legislative changes that have been made in the corporate law of Quebec, while Part II will be presented by Mr. Walker and will deal with the changes in company law in the common law provinces and the changes made by the Government of Canada.

PART I—LEGISLATIVE CHANGES IN CORPORATE LAW IN QUEBEC

The Government of Quebec enacted on 22 June 1979 a Bill to amend the *Companies Act*. This Bill provides for a new legal regime inspired by the *Canada Business Corporations Act*. Among the Bill's many innovations, we find the possibility to incorporate a company through the filing of articles, the one-man company, the cancelling of the obligation for a director to also be a shareholder, the possibility of holding a board of director's meeting by telephone and that of making decision by signing resolutions, the abandonment of the authorized capital stock concept and of the obligatory definition of a corporation's purposes. Moreover, the onus to make sure that the documents which are submitted to the director for registration comply with the law is on the person concerned exclusively and not on the director.

These changes, which are closer to the institutional dimension of corporate law, are inspired by the federal legislation and thus show our desire to standardize our laws with those of other jurisdictions.

This Bill does not foreclose the whole range of subjects on which the Government of Quebec intends to keep its *Companies Act* in harmony with other similar Canadian laws. In this respect, the Government of Quebec is firmly decided to keep to a minimum the differences between its legislation and those of its North American neighbours in the field of corporate law.

As already announced, one can expect to see, from now on, original legislative developments marked by the existence of a fully revitalized civil law.

PART II—CHANGES IN COMPANY LAW MADE BY THE COMMON LAW PROVINCES AND THE GOVERNMENT OF CANADA

Newfoundland

As stated in last year's report, the Minister of Justice in June of 1978 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. Since that time the Department of Justice has been receiving briefs and comments on that report but no legislation has been introduced on the matter of company law.

Nova Scotia, New Brunswick and Prince Edward Island

The only legislation passed in these three provinces in relation to company law in the past year was in Nova Scotia. In Nova Scotia an amendment to the *Companies Act* was passed in the Spring of 1979 permitting certain extra-provincially incorporated companies such as corporations incorporated under the *Canada Business Corporations Act* to obtain a certificate of continuation in Nova Scotia. Such a certificate authorizes a company to operate as if it had been incorporated in Nova Scotia. In addition, in Nova Scotia legislation was passed in the Spring of 1979 changing the fees payable by corporations to the Registrar of Joint Stock Companies.

In last year's report it was indicated that the Council of Maritime Premiers had referred the matter of drafting of uniform company legislation to the Nova Scotia Law Reform Advisory Commission for recommendation. At this time the Commission still has the matter under active consideration and has not yet made its final recommendations.

Ontario

In the past year legislation was passed in Ontario which is to have the effect of shortening the length of time required for an incorporation to take place. The amendments place greater onus on the person applying for incorporation rather than the government department to whom the application is made to make sure that the documents which he submits are in compliance with the law. For example, it will be the responsibility of the applicant to make sure that the proposed corporation's name and articles of incorporation comply with the requirements of the law. These amendments are to come into force on 1 September 1979. In addition, amendments were also made to *The Business Corporations Act* which are consequential to *The Securities Act, 1978*. These amendments and *The Securities Act, 1978* are both to come into force on 15 September 1979.

Finally it is understood that work is continuing on a complete revision of *The Business Corporations Act*. It is also understood that the revised Act will contain more provisions uniform with the Federal Act than is the case at present.

Manitoba

Amendments to *The Corporations Act* have been made to maintain uniformity with the *Business Corporations Acts* of Saskatchewan and Canada. The changes that were made were of a housekeeping nature rather than major changes to the basic philosophy of the Act.

Saskatchewan

As in Manitoba amendments have been made to *The Business Corporations Act* to maintain uniformity with the Federal Act and the Manitoba Act. For example, a provision has been added permitting the making of a fundamental change (such as a change in classes of shares) by way of an arrangement. These amendments have been in force since the Spring of 1979.

Also, in the Spring of 1979 *The Non-profit Corporations Act* was passed. This Act is the successor to *The Societies Act* in the same manner as *The Business Corporations Act* is the successor to *The Companies Act*. *The Non-profit Corporations Act* is subject to proclamation and has not yet been proclaimed at the time this Report was written.

Alberta

No company law legislation has been enacted in Alberta in the past year. However, the special committee organized in Alberta to prepare extensive, in-depth studies for the purpose of proposing revision of that province's company law is actively continuing its work although it has not yet made its report.

British Columbia

In the past year a Policy, Legislation and Program Planning Branch in the Ministry of Consumer and Corporate Affairs has been created. This Branch has taken over the function of the Legislative Committee of the Ministry of Consumer and Corporate Affairs mentioned in last year's report. The purpose of the Branch is to examine all corporate legislation with a view to promoting uniformity, simplification and deregulation. Examples of some of the areas under study are personal property security legislation, trust company legislation and securities legislation.

No legislation on company law has been enacted in the past year.

Northwest Territories

No amendments have been made to the *Companies Ordinance* in the Northwest Territories in the past year. However, a committee established by the government is continuing its reviewing of corporation law in the Territory.

Yukon

There have been no amendments to the Yukon *Companies Ordinance* since 1976. While the Department of Consumer and Corporate Affairs for the Yukon may be proposing some non-controversial housekeeping amendments for introduction in the Fall of 1979, it is understood that there are no major policy changes planned for the Companies Ordinance in the foreseeable future.

Government of Canada

In late 1978 the *Canada Business Corporations Act* was amended by completely rewriting the French version of the Act. In addition, other amendments to the Act were made to fill gaps and to clarify

certain situations. None of these amendments change the basic philosophy of the *Canada Business Corporations Act.*

In addition, in the past year the *Canadian Non-profit Corporations Act* was passed in the Senate of Canada and introduced into the House of Commons. However, the Bill died on the Order Paper on the dissolution of the House following the calling of the Federal election.

ACKNOWLEDGEMENT

The Nova Scotia Commissioners wish to acknowledge the assistance of Mr. James A. Gumpert, Barrister of the Office of the Legislative Counsel, Nova Scotia, in completing the material pertaining to the common law provinces and the Government of Canada.

RESOLUTION

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

RESOLVED that this year's report be adopted and printed in the Proceedings.

Hubert Gaudry
for the Quebec Commissioners

Graham D. Walker, Q.C.
for the Nova Scotia Commissioners

Raymond Moore
for the P.E.I. Commissioners

August 1979

APPENDIX J

(See page 32)

CICS Doc. 840-173/015

CONSOLIDATION OF UNIFORM ACTS — REVISION

REPORT OF MANITOBA COMMISSIONERS

On page 31 of the 1978 Proceedings the following appears:

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.

The Manitoba Commissioners recommend that the Executive appoint a committee comprised of not more than three persons to do an in depth examination of the Acts contained in the 1978 Consolidation of Uniform Acts to determine

(*a*) which should be revised and the order in which they should be revised; and

(*b*) which of those Acts should perhaps be deleted from the consolidation because

(i) they do not appear to be working satisfactorily, or

(ii) adopting jurisdictions have modified them to such an extent that they are no longer uniform, or

(iii) after a reasonable time from recommendation by the Conference, no jurisdiction has adopted them, e.g. the *Accumulations Act,* the *Domicile Act,* the *Hotelkeepers Act* and the *Reciprocal Enforcement of Tax Judgments Act,* or

(iv) they have been superseded by other recommended Acts, e.g. the *Uniform Assignment of Book Debts Act* and the *Uniform Bills of Sale Act* superseded by the *Uniform Personal Property Security Act.*

In preparing this report the Manitoba Commissioners noted that six of the Uniform Acts were adopted by no more than one jurisdiction and that the *Uniform Foreign Judgments Act* was adopted by two jurisdictions. The committee might examine them to see whether

we should continue to keep some of them in the Consolidation. The Acts referred to are as follows:

Act	*Adopted by*
Conflict of Laws	Yukon
Effect of Adoption	P.E.I.
Medical Consent of Minors	New Brunswick
Occupiers Liability	British Columbia
Personal Property Security	Manitoba
Statutes	B.C. and P.E.I.
Foreign Judgments	New Brunswick and Saskatchewan

The Committee should be an on-going committee that would continue to scrutinize the Uniform Acts—even those that may have been revised—to see if any of them should be revised further in light of changing times and social conditions and report to the Uniform Law Section of the Conference from time to time with its recommendations.

After the Committee has decided which of the Uniform Acts should be revised and the priority in which they should be revised, the Uniform Law Section should then assign the responsibility of the actual revision to various jurisdictions to be completed as expeditiously as possible, hopefully within five years.

A suggested procedure for the jurisdiction charged with the responsibility of carrying out the revisions might be for them to contact every jurisdiction to find out

(a) those who have adopted Uniform Acts with or without modifications;
(b) where a Uniform Act was adopted with modifications, the reasons for the modifications; and
(c) where a Uniform Act was never adopted, the reasons for not adopting it.

The Acts as they are revised should then be brought before the Conference for consideration and adoption.

In a matter unrelated to the revision, the Manitoba Commissioners felt that this Committee might be charged with the responsibility of urging jurisdictions by whatever persuasive means it might have at its disposal to adopt Uniform Acts.

R. H. Tallin
R. G. Smethurst
A. C. Balkaran
of the Manitoba Commissioners

1 May 1979

APPENDIX K

(See page 33)

CICS Doc. 840-173/016

CONTRIBUTORY NEGLIGENCE AND CONTRIBUTION

ALBERTA REPORT

Contents

I
Introduction

The Alberta Commissioners made preliminary reports on these subjects in 1967 (1967 Proc. 74-86) and 1975 (1975 Proc. 66-75). At the 1975 meeting the subject was referred back to the Alberta Commissioners for the preparation of a fresh draft incorporating the decisions and thinking of the meeting (1975 Proc. 76). We attach an annotated draft of the legislation which we propose, and we think that the Conference might usefully consider it section by section (except for the definitions in draft sec. 1 which might better be considered with the substantive sections to which they relate).

In the meantime, the Alberta Institute of Law Research and Reform has published its Report 31, Contributory Negligence and Concurrent Wrongdoers, copies of which are being circulated for the information of Commissioners. Attached to that report is a draft Contributory Negligence and Contribution Act. Because that draft

was prepared by Mr. David Elliott, former Associate Legislative Counsel for the Province of Alberta and now a private practitioner engaged in legislative drafting, and because it embodies the decisions made or considered by the Conference in 1975 and effectively raises other matters which should be considered by the Conference, we have made it the basis of our report.

One of the decisions made by the Conference in 1975 was that legislation dealing with tortfeasors should be combined with the Uniform Act. This has been done in the draft, and the divergent ways in which the Uniform Act and tortfeasors legislation in those provinces which followed the *Law Reform (Married Women and Tortfeasors) Act, 1935* (U.K.) deal with contribution have been brought together. The rule that the release of one joint tortfeasor releases all is done away with, and efforts have been made to provide rational solutions to the problems of settlements and differing limitations periods (though the Conference may wish to deal with the latter in its Limitations project). Other points of important detail arise from the annotations to the sections of the draft Act.

We have made some proposals in the draft with regard to the scope of contributory fault and contribution principles which have not previously been before the Conference or on which it was divided. The proposed extension of contributory fault to breaches of duty of care arising from a contract and the confirmation of its application to all torts can be discussed in connection with draft sec. 7, and the proposed extension of contribution to cases of concurrent breaches of contract and to cases of concurrent breaches of contract and torts can be discussed in connection with draft sec. 12.

We will now deal with some points which are not raised by the draft Act itself.

II
Contribution among Co-Trustees

The 1975 report of the Alberta Commissioners raised the question of contribution among co-trustees, and the 1975 meeting thought it worthy of further consideration. Having considered it, we recommend that it not be dealt with in uniform contribution legislation of the kind under consideration. While the right of contribution now available among trustees leaves something to be desired, we think that it should be dealt with in a Trustee Act against the general background of trust law after further substantial consideration of the subject.

III

Guest Passenger Legislation

Section 3 of the *Uniform Contributory Negligence Act* reads as follows:

Contribution where plaintiff is a passenger

> **3.** Where no cause of action exists against the owner or driver of a motor vehicle by reason of section of the *Act,* no damages, contribution or indemnity is recoverable from any person for the portion of the damage or loss caused by the fault of such owner or driver and the portion of the damage or loss caused by the fault of such owner or driver shall be determined although such owner or driver is not a party to the action.

The Alberta Commissioners in their 1975 report (1975 Proc. at p. 74) thought the guest passenger provision should be repealed, and the Conference agreed. British Columbia had already done so; and since that time Ontario has repealed its version and the Alberta Institute of Law Research and Reform has recommended the repeal of Alberta's. (Copies of the Institute's Report No. 32, Guest Passenger Legislation are being circulated to the Commissioners for their information).

In view of the 1975 decision of the Conference we have dropped Uniform sec. 3.

Sec. 5 of the *Uniform Highway Traffic and Vehicles Act: Responsibility of Owner and Driver,* reads as follows:

> **5.**—(1) No action lies against the driver or owner of a motor vehicle for the death of or for injury, loss or damage sustained or incurred by a person while a passenger in the motor vehicle without payment for the transportation or by him when entering or alighting from the motor vehicle unless the death, injury, loss or damage was caused or contributed to by gross negligence or wilful and wanton misconduct on the part of the owner or driver.
>
> (2) This section does not relieve from liability a person transporting a passenger for hire or gain, or the owner or driver of a motor vehicle that is being demonstrated to a prospective purchaser.

It appears to us that this section should be deleted as being contrary to the 1975 decision of the Conference, AND WE RECOMMEND ACCORDINGLY. In view of the reflection of the guest passenger legislation in sec. 3 of the *Uniform Contributory Negligence Act* we think that the recommendation is within the scope of the existing project, but, if not, we recommend that its deletion be undertaken as a Conference project.

If contrary to this recommendation, guest passenger legislation is retained by a province, fairness requires that something like Uni-

form sec. 3 be provided, and we accordingly think that a note should be appended to the proposed Uniform Act to the following effect:

1. That if a province proposes to maintain its guest passenger legislation it should include a provision along the lines of Uniform sec. 3; and
2. That before repealing guest passenger legislation a province should ensure that insurance against claims by guest passengers will be carried by all owners and drivers of motor vehicles.

IV
Interspousal Tort Immunity

Sec. 4 of the *Uniform Contributory Negligence Act* reads as follows:

> **4.** In an action founded upon fault and brought for damage or loss resulting from bodily injury to or the death of a married person, where one of the persons found to be at fault is the spouse of the married person, no damages, contribution or indemnity is recoverable for the portion of damage or loss caused by the fault of such spouse, and the portion of the damage or loss caused by the fault of such spouse shall be determined although the spouse is not a party to the action.

This section is made necessary by, and can be justified only by, a co-existing interspousal tort immunity, such as that provided by several provincial Married Women's Property Acts and by sec. 6 of the *Uniform Married Women's Property Act*. The Alberta Commissioners in their 1975 report (1975 Proc. p. 74) referred to Manitoba's abolition of the immunity in 1973, and it has been abolished since by Ontario and Prince Edward Island and recommended for abolition by the Alberta Institute of Law Research and Reform, copies of whose Report No. 33, Interspousal Tort Immunity are being circulated to the Commissioners for their information. The Saskatchewan Law Reform Commission has also tentatively recommended abolition, and the Newfoundland Family Law Study recommended abolition some years ago.

In their 1975 report, the Alberta Commissioners thought that it might not be necessary for the Conference to decide on the total removal of the immunity but that it should be made clear in the Uniform Act that the other concurrent wrongdoer should be able to obtain contribution against the wrongdoing spouse, and that suggestion appears to have been approved. However, we are encouraged by the post-1975 developments we have mentioned to go farther and recommend the abolition of the immunity, even though we do not have an existing mandate to do so.

The arguments for and against the immunity appear in many places, including pages 7 to 27 of the Alberta Institute's Report No. 33. The basic argument in favour of it is that litigation between spouses is inconsistent with the marital relationship and is likely to provoke domestic disharmony; there are secondary arguments that its abolition would encourage collusion in actions against insurers, that it would allow a wrongdoing spouse to benefit indirectly from the proceeds of a judgment against his insurer, and that it would give rise to subrogated claims being brought by one spouse's insurer against a wrongdoing spouse for wrongs done to the insured spouse. The arguments in favour of abolition are that the law should not refuse relief to a spouse which it would grant to an outsider; that it is not right that a spouse's insurance is not available to compensate the one person whom the insured spouse is most obliged to protect; that it is anomalous that "her husband may break her leg with immunity but not her watch" (and *vice versa*); that a spouse may lay a criminal charge for a wrong done by the other spouse but may not sue; and that an uncompensated wrong and its financial consequences are as likely to be evidence of, and a cause of, domestic disharmony as is litigation arising from it. We find the arguments in favour of abolition persuasive.

We think that the Conference has three options:

1. Do nothing. That would involve a direction that the principle of sec. 4 of the *Uniform Contributory Negligence Act* be carried forward into the new Uniform Act, and that sec. 6 of the *Uniform Married Women's Property Act* be left untouched. If this option is adopted we would in fact prefer that Uniform sec. 4 be redrafted so that it protects the concurrent wrongdoer, and protects him only, in cases in which the injured spouse is precluded from suing the wrongdoing spouses. At present, the immunity covers all torts except those interfering with the protection and security of the injured spouse's property, while the protection against a claim for contribution covers only cases of damage or loss resulting from bodily injury or death; and (in Alberta at least) the immunity does not, and the protection against contribution does, apply while the couple are judicially separated. This, however, is a minor point. This would be the easiest course and the one least likely to interfere with the early adoption of a new Uniform Act, but for the reasons we have given above we do not recommend it.

2. Abolish the immunity. That would, we think, involve a decision to substitute something along the following lines for sec. 6 of the *Uniform Married Women's Property Act*: "Each of the parties to a marriage has the same right of action in tort against the other as if they were not married." It would also involve a decision not to carry forward sec. 4 of the *Uniform Contributory Negligence Act*. It is the course we would prefer to follow. (If it is followed, however, we think that consideration should be given to appending notes similar to the two we have recommended in connection with the abolition of the guest passenger legislation and which appear at p. 4, but this is also a small point.)
3. Compromise, along the lines suggested in the 1975 report of the Alberta Commissioners. That would involve leaving sec. 6 of the *Uniform Married Women's Property Act* untouched and including in the new *Uniform Contributory Negligence and Contribution Act* a provision which might be along the following lines, probably as sec. 12(3):

   Notwithstanding

   (a) sec. 12(2), and
   (b) [here refer to legislation or other law conferring inter-spousal tort immunity],

   a concurrent wrongdoer is entitled to contribution from a concurrent wrongdoer who is the husband or wife of the person suffering the damage.

Alternatively, the draftsman might consider it sufficient to say in sec. 12(3) that sec. 12(2) does not apply to a claim for contribution by one concurrent wrongdoer against another concurrent wrongdoer who is the husband or wife of the person suffering the damage, but we would prefer an explicit statement.

Upon reflection we are dubious about this alternative. It would, we agree, protect the outside concurrent wrongdoer from the decision in *Macklin* v. *Young* [1933] S.C.R. 603 under which the outside concurrent wrongdoer had to pay the injured spouse in full without right of contribution against the wrongdoing spouse and to that extent it would be useful. However, it would maintain the principle of the inter-spousal tort immunity if one spouse sues another, but abandon it if one spouse sues an outsider who claims from the other spouse contribution towards the injured spouse's damage, a state of the law which would be somewhat anomalous.

WE INVITE the Conference to make a decision among the alternatives set out above, or to devise its own course of action, so that delay in the resolution of this peripheral (though important) question will not impede the enactment of a new Uniform Act. Our recommendation, as we have said, is for abolition.

DRAFT

THE CONTRIBUTORY NEGLIGENCE AND CONTRIBUTION ACT

Notes:

1. *We have used the words "Contributory Negligence" in the title. This will help to build a bridge from existing law to the proposed new Act. However, it must be pointed out that if the Conference extends the principle of contributory fault to cover intentional wrongs, the title will not reflect the whole content of the proposed Act.*
2. *"Contribution" is included in order to give a better description of the content of the proposed Act.*
3. *Alternatives which have been proposed are: "The Contributory Fault and Contribution Act" and "The Apportionment and Contribution Act."*
4. *The Conference should give directions about the title, probably at the end of the discussion when the content of the proposed Act has been decided.*

1. In this Act

   (a) "concurrent wrongdoers" means

      (i) two or more persons whose wrongful acts contribute to the same damage suffered by another, and any other person liable for the wrongful act of any of those persons, or

      (ii) a person whose wrongful act causes damage suffered by another and a person liable for the wrongful act;

Note:

1. *This definition is fundamental to Part 4, Contribution, as it is "concurrent wrongdoers" who are entitled to contribution under that Part. It might best be discussed in connection with draft sec. 10. As drafted, it includes joint torfeasors, several concurrent wrongdoers, and persons who break contracts.*

   (b) "contribution" includes indemnity;

Note:

1. *Uniform sec. 2(2) provides that persons at fault are "liable to make contribution to and indemnify each other" according to their respective degrees of fault. The draft continues the policy of that section by use of this definition.*

(c) "damage" means damage, injury or loss to a person or to property;

(d) "fault" means

(i) a tort,

(ii) a breach of duty of care arising from a contract, or

(iii) a failure of a person to take reasonable care of his own person or property,

whether or not it is intentional or criminal;

Note:

1. *The definition of "fault" defines the scope of Part 2, Contributory Fault and should be discussed with draft sec. 7.*

(e) "wrongful act" means

(i) a tort, or

(ii) a breach of contract,

whether or not it is intentional or criminal.

Notes:

1. *The definition of "wrongful act" enters into the definition of "concurrent wrongdoers" and helps to define the scope of Part 4, Contribution.*

2. *It may seem awkward to define two terms so closely related in popular meaning as "fault" and "wrongful act." So long as the subject matter of Parts 3 and 4 is not entirely the same, the use of the two terms appears desirable.*

PART 1

GENERAL

2. This Act binds the Crown.

Note:

This section does not appear in the Uniform Act and has not been considered by the Conference. We suggest that it be accepted on the grounds that there is no reason in this area to distinguish between Crown and subject.

3. This Act applies if damage is caused or contributed to by the act or omission of a person notwithstanding that another person had the opportunity of avoiding the consequences of that act or omission and failed to do so.

Notes:

1. *This section is intended to continue the abolition of the "last clear chance" rule.*

2. *Sec. 8 of the Uniform Act read as follows:*

> **8.** This Act applies to all cases where damage is caused or contributed to by the act of any person notwithstanding that another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.

The addition of the word "omission," we think, clarifies a point which might otherwise be obscure. The words "negligently or carelessly" have been omitted; it seems to us that the Act should apply in all cases.

4. The liability of concurrent wrongdoers is joint and several.

Notes:

1. *This section agrees in principle with the Uniform Act, sec. 2(2). Under it, P would be entitled to a judgment for 100% of his damages against D1 and D2 if they are concurrent wrongdoers, even though they are respectively 1/3 and 2/3 at fault. If P is 1/3 at fault, he would have joint and several judgments against D1 and D2 for 2/3 of his damages. This approach favours the plaintiff.*

2. *An alternative would be to apportion the responsibility among the three, and to give separate judgments accordingly. If D1 and D2 are 1/3 and 2/3 at fault and damages are assessed at $9,000 P would get judgment against D1 for $3,000 and D2 for $6,000; and if P himself was 1/3 at fault and the proportionate responsibility of D1 and D2 remains the same, P would get judgment for $2,000 against D1 and $4,000 against D2. This approach is based on the proposition that it is unfair to a wrongdoer that he should be held liable for damage beyond the degree of his responsibility for it, and, when P is contributorily negligent, upon the further proposition that P himself is a wrongdoer who contributed to the damage and should not be treated better than the other wrongdoers. This*

approach would avoid the necessity for dealing with the contribution among wrongdoers, the effect of settlements, the effect of the expiration of limitation periods, and related problems and would therefore greatly simplify the law.

3. *Notwithstanding the arguments set forth above, we recommend the adoption of the section as drafted on grounds of fairness to the plaintiff. But for the negligence of each concurrent wrongdoer the damage would not have been suffered, and vis-à-vis the plaintiff the allocation of responsibility for an indivisible injury is artificial and arbitrary.*

4. *At its 1975 meeting, the Conference considered the question in principle, but there were divergent views and the Conference deferred making a decision. It appears that the question should be decided now: Should the liability of D1 and D2 be joint and several, or should there be separate judgments for their respective shares*

   (a) if P has not *been guilty of contributory fault?*
   (b) if P has *been guilty of contributory fault?*

5. In every action

   (a) the amount of damage,
   (b) the fault, if any, and
   (c) the degree to which the fault of a person contributes to damage,

are questions for the trier of fact.

Note:

Uniform sec. 5 reads as follows:

> **5.** In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

The changes are drafting changes only.

6. In every action, unless the court otherwise directs, the liabiilty of the parties for costs shall be in the same proportion as their liability to make good the damage.

Note:

This is the substance of the first part of sec. 12 of the Saskatchewan Contributory Negligence Act, which appears to have been approved by the Conference at its 1975 meeting.

PART 2

CONTRIBUTORY FAULT

7. (1) This section applies when the fault of two or more persons contribute to damage suffered by one or more of them.

(2) The liability of a person whose fault contributes to damage is reduced by the degree to which the fault of the person suffering the damage contributes to it.

(3) If a claim arises from the death of or personal injury to a third person, the liability of the person whose fault contributes to the damage is reduced by the degree to which the fault is attributable to the third person.

(4) If different degrees of contribution to the damage, caused by the fault, cannot be determined, each of the persons contributing to the damage shall be deemed to have contributed equally.

Notes:

1. *Uniform sec. 1 reads as follows:*

> **1.** (1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.
>
> (2) Nothing in this section operates so as to render any person liable for any damage or loss to which his fault has not contributed.

2. *The first question is whether contributory fault should be a defence available in all tort actions. We see no reason to exclude any torts. The courts assess fault and the degree to which the fault of each person contributes to the damage; and if the wrongdoer intentionally committed the wrong he will get short shrift on a plea that the injured party did not take active enough steps to avoid the wrongful act. On the other hand, there may be a case, e.g., a fight entered into deliberately by both persons, in which an apportionment would be the only fair adjudication. We therefore recommend that the inclusion of "a tort . . . whether or not it is intentional or criminal" in the definition of "fault" in draft sec. 1(d) be accepted. The Conference has not considered the question.*

3. *The second question is whether contributory fault should be available in actions for breach of contract. We do not think that it should apply to the usual breach of a contractual obligation,*

but we do think that it can appropriately apply to a claim resulting from a failure to carry out a duty of care under contract. A contributorily negligent bus passenger or patient should not, we think, be able to avoid the consequences of his failure to take care for himself by choosing to sue in contract rather than tort, and it is not necessary to look farther than Giffels Associates Ltd. *v.* Eastern Construction Co. *(1978) 84 D.L.R. (3d) 344 (S.C.C.) for the proposition that there is often concurrent liability in tort and contract. The defence has expressly or by implication been held available in cases of negligence under contract in a number of trial judgments in British Columbia (*Emil Anderson Construction Co. Ltd., *unreported, but referred to in Truman, infra;* West Coast Finance Ltd. *v.* Gunderson, Stokes, Walton & Co. [*1974*] *1 WWR 428;* Truman *v.* Sparling Real Estate Ltd. *(1977-78) 3 CCLT, 205;* Davey Bros. Paving & Development Ltd. *v.* Riteway Equipment Rentals (1973) Ltd., *unreported, July 28, 1978, No. C776176, Vancouver Registry; and* Carmichael *v.* Mayo Lumber Co. *(1978) 85 DLR (3d) 538), in Ontario (*Pajot *v.* Commonwealth Holiday Inns of Canada Ltd. *(1978) 86 DLR (3d) 729) and Saskatchewan (*Husky Oil Operation Ltd. *v.* Oster *(1978) 87 DLR (3d) 86), and by one appellate judge in a case in which the majority applied instead the rules relating to mitigration of damage (*Caines *v.* Bank of Nova Scotia *(1978) 22 NBR (2d) 631 (App. Div.)). On the other hand, Chief Justice Laskin in* Giffels Associates Ltd. *v.* Eastern Construction Co. *(1978) 84 DLR (3d) 344 was inclined to the opinion that the defence is not available in actions brought under contracts though he did not decide the question. The Conference has not considered this question.*

4. *The third question is whether the criterion of apportionment should be "the degree to which the fault of the person suffering the damage contributes to it." This is much like the criterion in Uniform sec. 1(1). An alternative would be the criterion of contribution in draft sec. 12(1), "the amount which the court finds just and equitable having regard to the responsibility of each . . . for the damage." The "fault-contribution" criterion may appear to suggest that a scientifically determined degree of fault mechanically determines the apportionment, but it really leaves the determination in the discretion of the court. While we recognize that greater symmetry would be achieved by the application of the same criterion in both parts 2 and 4 of the draft, we never-*

theless think this criterion to be appropriate here and we recommend acceptance of it.

5. *The final point we would mention is that of the "identification" of a plaintiff with the contributory fault of a person whose injury or death gives rise to the paintiff's cause of action. It has been suggested that the wrongdoer should have to pay the whole claim to a deceased's dependants under a Fatal Accidents Act or similar statute, and should then have a claim against the estate for contribution to the extent that the deceased's own contributory fault contributed to the loss. There has also been a debate as to whether a spouse claiming for loss of consortium, an employer claiming for loss of services or a parent paying hospital costs, should have his claim reduced in proportion to the contributory fault of the injured person. The Conference appears to have agreed in 1975 that the reduction should take place in all these cases. We agree, and draft sec. 7(3) is intended to carry out the decision.*

8. If a counterclaim is allowed in actions arising out of the operation of motor vehicles, unless the court otherwise orders, no judgment shall be given for any balance but separate judgments shall be given for each party against the other, to the extent that any party is successful, so that the plaintiff shall have judgment on the claim for a specified amount and the defendant, the plaintiff by counterclaim, shall have judgment on the counterclaim for a specified amount.

Notes:

1. *The question of set-off was raised in the Alberta Commissioner's 1975 report but does not seem to have been answered.*

2. *If the parties to the action are the only ones involved, set-off is usually sensible. However, if the parties are insured, set-off would usually be unfair. If A and B, two insured persons, are involved in an accident for which they are equally responsible and in which they each suffer damage of $5,000, set-off would mean that neither would get anything, while independent judgments would mean that A's insurer will pay B $5,000 and that B's insurer will pay A $5,000. The purpose of insurance is to compensate for loss, and there is no reason why the two parties should be wholly or partly uncompensated for the benefit of their insurers.*

Should the Uniform Act:

(1) *Remain silent and leave the courts to work out the proper result as is done, for example, in Alberta;*
(2) *require set-off, as, for example, the British Columbia Act appears to do; or*
(3) *make specific provision for motor vehicle cases (in which almost everyone is insured) as Prince Edward Island does?*

We are inclined to the view that the latter is the best course, so long as the courts retain a discretion to depart from it, and draft sec. 7 follows it. The Conference should decide the question.

PART 3

TORTFEASORS

9. An action against one or more joint tortfeasors is not barred by

(a) a settlement with or release of any other joint tortfeasor, or

(b) an unsatisfied judgment against any other tortfeasor,

and may be continued notwithstanding the settlement, release or unsatisfied judgment.

Notes:

1. *This provision is not dealt with by the Uniform Act, but those provinces who adopted some or all of the provisions of the* Law Reform (Married Women and Tortfeasors) Act, 1935 *(U.K.) have part of it. The question was raised in the Alberta Commissioners' 1967 report and we think that there is general agreement on the abolition of the common law rule that a judgment against, or a release of, one joint tortfeasor deprived the plaintiff of his right to sue another.*

2. *The Tort-Feasors Acts have abolished the rule applying to a* judgment *against one joint tortfeasor, but not the rule applying to a* release. *This section goes on to abolish this last vestige of the anomalous position of the joint tortfeasor at common law. Section 14(2) goes on to reduce the liability of the second joint tortfeasor by the amount for which the one who has been released is responsible.*

10. (1) If a judgment determines an amount of damages against one or more joint or concurrent tortfeasors the person suffering

the damage is not entitled to have the damages determined in a higher amount by

(a) a judgment in the same action against any other joint or concurrent tortfeasor, or
(b) a judgment in any other action against any other joint or concurrent tortfeasor.

(2) Except in respect of the action first taken against a joint or concurrent tortfeasor, the person suffering damage is not entitled to costs in respect of an action taken against any other joint or concurrent tortfeasor unless the court is of the opinion that there were reasonable grounds for bringing more than one action.

Note:

1. *This section carries forward the policy of the* Tortfeasors Act. *While a judgment against one joint tortfeasor should not release the second, the plaintiff should not be encouraged to bring successive actions for the same damage by the prospect of getting a better judgment in the second, and, indeed, should be discouraged from doing so by the prospect of being denied costs unless he can show good reason for bringing the two actions.*

PART 4

CONTRIBUTION

11. Subject to this Part, a concurrent wrongdoer is entitled to contribution from any other concurrent wrongdoer.

12. (1) Subject to this section, the amount of contribution to which a concurrent wrongdoer is entitled is the amount which the court finds just and equitable having regard to the responsibility of each concurrent wrongdoer for the damage.
(2) If the liability of a concurrent wrongdoer is limited or reduced by statute or agreemnt the amount of contribution payable by him shall not exceed his liability as so limited or reduced.
(3) If the responsibility of each concurrent wrongdoer cannot be determined the responsibility shall be apportioned equally.

Notes:

1. *In 1975 the Conference agreed that contribution should be available from a concurrent tortfeasor in all kinds of tort cases. It is*

not entirely clear whether Uniform sec. 2(2) applies to all torts or only to negligence, as it speaks of persons "found at fault." The Tortfeasors Acts do apply to all torts. The definition of "wrongful act" in draft sec. 2(e) includes a tort, whether or not it is intentional or criminal, and that definition determines who is a current wrongdoer under draft sec. 2(a) and therefore under this section.

2. *In 1975 the Conference was divided on the question whether or not D1 should be able to claim contribution from D2 where both are in breach of contract, or one is in breach of contract and the other is a tortfeasor, and their wrongful acts have contributed to P's damage. Draft sec. 1(e) includes breach of contract in the definition of "wrongful act" and therefore answers the question affirmatively, and a decision of the Conference is required. The following appear to be the relevant considerations and arguments.*

AGAINST INCLUSION

(a) *D2, by contracting with P, has undertaken certain obligations to P, not to D1, and there is no relationship between D1 and D2 which should require him to make contribution to D1.*

(b) *The contract between P and D2 may provide for a contractual limitation period or a limitation of liability to an agreed amount; there may be different rules applicable to the determination of damages; remedies other than damages may be available to a contracting party; P may waive his rights under contract; and the general dissimilarity between the liabilities of a tortfeasor and a party in breach of contract, or between the liabilities of parties in breach of different contracts, is so great as to make contribution difficult and inappropriate.*

FOR INCLUSION

(a) *If D1 and D2 have both committed wrongs which have contributed to P's loss, it is unfair that D1 should have to pay for the whole of the damage while D2 gets off scot-free; the requirements of fairness, which are the real basis of contribution between tortfeasors, apply equally to parties in breach of contract. If a builder uses inferior materials and the architect negligently fails to catch him at*

it, why should the architect bear the entire loss merely because P chooses to sue him alone and not the builder, or to issue execution against him alone? In Giffels Associates *v.* Eastern Construction Co. *(1978) 84 DLR (3d) 344 (SCC) the Ontario Court of Appeal would, except for a contractual limitation period, have held the builder liable to make contribution on the grounds that both were tortfeasors, and Chief Justice Laskin was prepared to assume without deciding that it is inequitable that one of two contractors should bear the entire brunt of the plaintiff's loss caused by concurrent breaches of their contracts. In* Smith *v.* McInnis *(1978) 4 CCLT 154, Pigeon J., dissenting along with Beetz J. in a way which required them to deal with contribution, was willing to construe "fault" in the contribution provisions in the Nova Scotia Contributory Negligence Act as providing for division of liability in proportion to the respective degrees of fault in all cases, or, in the alternative to apply the principle of causality.*

(b) *The problems arising from the origin of one wrongdoer's liability in a contract, or in a different contract, are not insurmountable; contribution can be restricted to the amount of the overlap of damages for which D1 and D2 come under liability to P. Contracts will thus be respected, and the difference in the considerations entering into determination of amount becomes immaterial.*

We recommend inclusion.

3. *Draft sec. 12(2) assumes that breach of contract is included in the definition of "wrongful act," and it gives D2 the benefit of any limitation of liability he may have bargained for (as well as any given to him by statute). The most difficult case is that in which D2 has stipulated for a contractual upper limit. Suppose that P is entitled to a joint and several judgment for damages of $2,500 against D1, a tortfeasor, and D2, who is in breach of contract between himself and P which provides that D2 is not liable for more than $1,000 for the breach; and suppose that D1's and D2's wrongful acts are equally responsible for the damage. At first blush, D1 and D2 should be liable as between themselves for $1,250 each, but sec. 12(2) would restrict D2's liability to the $1,000 provided in the contract, leaving D1*

responsible for the remaining $1,500. This gives effect to the Conference's decision in 1975.

4. *We turn now to the test by which the liability of each concurrent wrongdoer for contribution is to be determined. It appears in sec. 12(1). This test deals with what is "just and equitable" and with "responsibility for . . . damage," terms which emphasize the qualitative aspect and downplay the quantitative aspect of the determination to a greater extent than the test applied by draft sec. 6(2) to apportionment in case of contributory fault, i.e., "the degree to which . . . fault . . . contributes to" damage. We think that the difference is justified by the wider range of acts and omissions covered by draft sec. 12; the court should be encouraged to weigh the different quality of culpability involved in, for example, the conduct of a builder who deliberately uses inferior material and that of the architect who is merely negligent when he does not detect the builder's departure from the specifications.*

13. No person is entitled to recover contribution under this Act from any person entitled to be indemnified by him in respect of the liability for which contribution is sought.

Note:

1. *The Tortfeasors Acts make this express provision. The Uniform Act provides for indemnity as well as contribution (as this draft does by including indemnity in the definition of contribution), and it seems to follow logically that if D1 is obliged to indemnify D2 he cannot obtain contribution from him. While the section may be thought otiose, we think that the express statement might as well be made.*

14. If the court is satisfied that the share of a concurrent wrongdoer cannot be collected, the court may, upon or after giving judgment for contribution, make such order as it considers necessary to apportion among the other concurrent wrongdoers, in the ratio of their respective responsibilities, liability for payment of the share that cannot be collected.

Note:

This draft section provides a means of dividing the share of D3, an insolvent concurrent wrongdoer, between D1 and D2. Glanville Williams suggests a scheme of contingent judgments, but we think that this provision is adequate and flexible.

15. (1) This section applies if a person suffering damage enters into a settlement with a concurrent wrongdoer or a person whom he considers to be a concurrent wrongdoer.

(2) If the person suffering the damage does not release all concurrent wrongdoers, the amount for which the other concurrent wrongdoers may be held liable to him is reduced by the amount for which the concurrent wrongdoers who are released would be responsible under this Part and there shall be no contribution between those who are released and those who are not released.

(3) If all concurrent wrongdoers are released, a person who gives consideration for the release, whether he is a concurrent wrongdoer or not, is entitled to contribution in accordance with section 11 from any other wrongdoer based upon the lesser of

(a) the consideration actually given for the release, and

(b) the consideration which in all the circumstances of the settlement it would have been reasonable to give.

Notes:

1. *This draft section is self-explanatory. Draft sec. 15(3) allows D1 to claim contribution from D2 upon settling the whole of P's claim, but incorporates a safeguard from the present Ontario legislation so that P and D1 cannot foist an unreasonable settlement upon D2. The 1975 meeting of the Conference decided that settlements should be dealt with, though it did not say precisely how they should be dealt with, and that the safeguard should be included.*

2. *Draft sec. 15(2) would have the result that if P settles only with D1 who is ⅓ responsible for P's damage, P would be able to proceed against D2 for the remaining ⅔. If P were to get more than ⅓ from D1 under the settlement he might ultimately recover more than his actual damages; if he were to get less than ⅓ he might ultimately recover less than his actual damages. As an alternative, P could be deprived of the benefit of a favourable settlement with D1, or he could be allowed to try to make up the detriment from D2, or one or the other of D1 and D2 could be allowed to claim contribution from the other, but any of these expedients would derogate from or do away with any incentive to settle.*

16. In proceedings for contribution under this Part, the fact that a person has been held not liable in respect of any damage in an

action brought by or on behalf of the person who suffered it, is conclusive evidence in favour of the person from whom contribution is sought as to any issue determined on its merit by that judgment.

Note:

In 1975 the Conference considered whether to use the Tortfeasors Act *phraseology allowing recovery of contribution from a tortfeasor "who is, or would if sued, have been liable in respect of" P's damage, and preferred the structure of Uniform sec. 3 (now sec. 2). We think that this draft section, though its provisions are not found in the Uniform section, gives effect to the principle approved by the Conference, and should be accepted. A dismissal of an action by P against D2 on technical grounds or for want of prosecution would not bar D1's claim for contribution, but a dismissal on the merits would. So far as this section goes, dismissal of P's claim against D2 on the grounds that it is statute-barred would not bar D1's claim either, but either the next section or the* Limitations Act *will deal with limitation periods.*

17. (1) A concurrent wrongdoer shall not commence proceedings for contribution from any other concurrent wrongdoer except as provided in this section.

(2) A concurrent wrongdoer may commence proceedings for contribution at any time at which the person who suffered the damage is entitled to commence proceedings to recover damages from the concurrent wongdoer from whom contribution is claimed.

(3) Notwithstanding the expiration of any statutory limitation or notice period, a concurrent wrongdoer from whom damages or contribution is claimed in an action may in the same action claim contribution from any other concurrent wrongdoer in accordance with subsection (4).

(4) Unless subsection (2) applies, a concurrent wrongdoer may commence proceedings under subsection (3) and serve the initiating process within 6 months of the service upon him of the process by which relief is claimed against him.

(5) If for any sufficient reason service of the initiating process cannot be effected within the time specified in subsection (4), the court may extend the time for service.

(6) Subsections (4) and (5) apply notwithstanding any rule of court to the contrary.

Note:

The subject of limitations may be dealt with in the discussion of the proposed Limitations Act. We include it here so that the subject will not be overlooked. This section has not been before the Conference.

18. If concurrent wrongdoers are responsible for damage and judgment for contribution is given in respect of that damage, unless either the person suffering the damage has been fully compensated or the court otherwise orders, execution shall not issue on the judgment until

(a) after satisfaction by the person obtaining the judgment of such proportion of the total damages as the court may order, and

(b) the court makes provision for the payment into court of the proceeds of the execution on the judgment to the credit of such persons as the court may order.

Note: An enacting jurisdiction should consider the relationship of sec. 17(*b*) to its law relating to the disposition of money realized under execution.

Note:

1. *When P obtains judgment against D1, D1 is entitled to a judgment for contribution from D2. It would be unfair if he should get D2's money before he pays out his own, and, indeed, if he becomes insolvent and does not pay, D2 might have to pay again. This draft section is intended to prevent such a result. It has not been considered by the Conference.*

E. Gamache
W. H. Hurlburt
Graham Reid
W. E. Wilson
of the Alberta Commissioners

May 28, 1979

APPENDIX L1

(See page 33)

CICS Doc. 840-173/018

UNIFORM DEFAMATION ACT—FAIR COMMENT

REPORT OF THE ALBERTA AND ONTARIO COMMISSIONERS

INTRODUCTION

A person commits the tort of defamation when he communicates to a third person a defamatory statement concerning another. Courts throughout the common law world use the following test in deciding whether a statement is defamatory: "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"

The definition of "defamatory" quoted above is a very broad one. If all such statements gave rise to liability it would become virtually impossible for citizens in a free society to discuss issues of public concern. To prevent this consequence, the law has developed a number of important defences.

From the point of view of free speech, the most important defence is the right of fair comment. This defence permits citizens in our democratic society to express freely their opinions on matters of public interest, as long as they are not actuated by malice. To establish the defence, according to a leading English textbook on defamation, the defendant must prove:

(a) that the statement is a comment as opposed to a statement of fact;
(b) that the comment is on a matter of public interest;
(c) that the comment is based on fact; and
(d) that a person could honestly hold the opinion expressed in the comment.

Even if these four requirements are satisfied, the defence of fair comment will be defeated if the plaintiff proves that the comment was actuated by malice.

The defence of fair comment is an extremely important legal doctrine which has a direct effect on our society and institutions of government.

Without the defence, many accepted forms of public expression would be stifled. Fair comment permits scholars to criticize the theories of other scholars. It permits ordinary citizens to criticize politicians. It permits politicians to criticize other politicians. It permits newspapers to publish critical reviews of books, music, drama and other artistic endeavours. It permits columnists to express critical opinions about the activities of large unions and corporations. Any weakening of the defence of fair comment amounts to a weakening of freedom of speech.

The Supreme Court of Canada recently considered the defence of fair comment in the case of *Cherneskey v. Armadale Publishers.* The case arose when a Saskatoon newspaper published a letter to the editor criticizing a position taken by a local alderman. The alderman then sued the newspaper for libel. No action was taken against the writers of the letter. The case was decided in the alderman's favour.

While the decision of the Supreme Court of Canada is not as clear as might be hoped, the overall view which emerges from the majority judgments is that, in order to rely on the defence of fair comment, it was necessary for the newspaper to show that it agreed with the opinions expressed in the letter. Although this is the most prominent feature of the majority opinions, it might be possible to argue, based on some ambiguous wording elsewhere in the judgments, that the newspaper could have avoided liability by showing that the writers of the letter honestly held the opinions they expressed. This would have been impossible in the *Cherneskey* case, however, since the letter writers had left the province and were not available as witnesses at the trial.

The three dissenting members of the court took a contrary view. They were of the opinion that an objective test should be used. In other words, the question is not whether the newspaper or any other particular person held the opinion. Instead, the question to be asked is: "Could any person honestly hold the opinion expressed in the comment?" It should be noted that this test appears to be favoured in other jurisdictions of the Commonwealth.

PROBLEM

The decision in *Cherneskey* has met with widespread criticism from editors and publishers across Canada. If a newspaper wishes to be certain of avoiding liability, it will be forced to publish only those letters with which it agrees. This defeats the purpose of letters to

the editor columns, which are intended to provide a forum for opinions of all kinds.

The problem is not restricted to newspapers. The principles enunciated in the *Cherneskey* case would apply to any medium containing expressions of opinion, including television, radio, scholarly journals, books and magazines.

OPTIONS

1. Do nothing.
2. Overrule *Cherneskey* and codify the defence of fair comment in the *Uniform Defamation Act*.
3. Amend the *Uniform Defamation Act* to overrule *Cherneskey* by allowing the publisher of an opinion on a matter of public interest to rely on the defence of fair comment if he honestly believes that the author of the opinion honestly held the opinion (a subjective test).
4. Amend the *Uniform Defamation Act* to overrule *Cherneskey* by allowing the publisher of an opinion on a matter of public interest to rely on the defence of fair comment if a person could honestly hold the opinion (an objective test).

DISCUSSION

Option 1—Do nothing.

Doing nothing would leave the law as stated by the majority in *Cherneskey*. The effect of the majority decision was considered by Mr. Justice Dickson, who wrote the opinion of the dissenting judges:

> Newspapers will not be able to provide a forum for dissemination of ideas if they are limited to publishing opinions with which they agree. If editors are faced with the choice of publishing only those letters which espouse their own particular ideology, or being without defence if sued for defamation, democratic dialogue will be stifled. Healthy debate will likely be replaced by monotonous repetition of majoritarian ideas and conformity to accepted taste. In one-newspaper towns, of which there are many, competing ideas will no longer gain access. Readers will be exposed to a single political, economic and social point of view. In a public controversy, the tendency will be to suppress those letters with which the editor is not in agreement . . . I do not wish to overstate the case. It is my view, however, that anything which serves to repress competing ideas is inimical to the public interest.

The majority decision in *Cherneskey* could produce inconsistent results for which there is no rational explanation. For example, a Conservative paper would be free to publish a letter calling a Liberal politician unfit to govern. The defence of fair comment would protect the newspaper since it agreed with the letter. The same letter, however, could not be published in a Liberal paper without leaving the paper open to a libel suit.

Mr. Justice Dickson, in the passage quoted above, expresses concern about the possibility of overstating his case. In fact, however, the implications of the majority decision may be even more serious. Logically, there is no reason to suppose that the test of honest belief adopted by the majority would be restricted to newspapers. It would presumably also apply, for example, to an open line radio program. These programs are the electronic equivalent of letters to the editor columns. They are intended to provide a forum for opinions of all kinds. Yet, following the reasoning in *Cherneskey*, the radio station would be liable for defamatory statements made by people who called in but would be entitled to rely on the defence of fair comment only if it agreed with those statements. Since most of these programs are broadcast live, the radio station would not even have any opportunity to determine in advance what opinions a caller was going to express. Even if the program were taped for later broadcast, it would seem absurd to expect the radio station to broadcast only those comments with which it agreed.

There is another potential consequence of the *Cherneskey* rule that is inimical to the concept of free speech. Assume that a respected Canadiao historian writes a book in which, based on certain political and economic events, he expressed a critical opinion of a political leader. The defence of fair comment would protect the historian (assuming he honestly believed what he said). But the defence would not be available to the publishing house which printed the book unless it agreed with the historian's thesis. The publisher would have to be careful not to print books that expressed a contrary view, even if written by equally respected scholars.

It is difficult to imagine that these consequences were viewed as desirable by the majority of the Supreme Court. Nevertheless, they appear to be logical results of the *Cherneskey* case. Clearly, therefore, the *Cherneskey* case has the potential to interfere seriously with the right of free speech and the uninhibited discussion of matters of public concern. Legislation should be enacted to eliminate these

undesirable consequences. It therefore becomes necessary to consider what form the legislation should take.

Option 2—Overrule Cherneskey and codify the defence of fair comment in the Uniform Defamation Act.

One way to overrule the *Cherneskey* case would be as part of a general codification of the defence of fair comment. This would provide lawyers with a convenient summary of the defence. However, there are major drawbacks to this proposal.

Any errors in codification could create loopholes which were previously covered by the common law. Extreme care would have to be taken to avoid this possibility.

This difficulty is not insurmountable. However, codification of the defence of fair comment would be a time consuming process, requiring considerable study. This would result in delay on an issue that many consider to be of urgent importance. Immediate legislative attention should be directed to the narrower issue of honest belief raised in the *Cherneskey* case. Codification might be viewed as a long term objective, perhaps in connection with a complete review of the law of defamation.

Option 3—Amend the Uniform Defamation Act to overrule Cherneskey by allowing the publisher of an opinion on a matter of public interest to rely on the defence of fair comment if he honestly believes that the author of the opinion honestly held the opinion (a subjective test).

This option isolates the issue of honest belief. It follows the approach suggested by one of the judges in the Saskatchewan Court of Appeal decision in the *Cherneskey* case.

One difficulty with this approach is that it could cause publishers to think that, before publishing an opinion, they should verify the identity and opinions of the author. This could cause serious practical difficulties for newspapers and open line radio programs. In addition, the need for verification is clearly contrary to the law in England and other Commonwealth jurisdictions.

Option 4—Amend the Uniform Defamation Act to overrule Cherneskey by allowing the publisher of an opinion on a matter of public interest to rely on the defence of fair comment if a person could honestly hold the opinion (an objective test).

This option adopts the approach taken by the dissenting judges of the Supreme Court in the *Cherneskey* case. Like Option 3, it isolates the issue of honest belief, leaving the other elements of fair comment to the common law. Thus, it would still be necessary for the defendant to prove that the allegedly defamatory statement was a comment, based on fact, on a matter of public interest. If the defendant was not the original author of the comment, it would not be necessary to show that he agreed with the comment.

This option appears to be more in accord with the law of other Commonwealth jurisdictions. It would not be necessary for the publisher to locate the author and verify that the author actually held the opinion.

RECOMMENDATION

The Alberta Commissioners and the Ontario Commissioners jointly recommend that:

> THE UNIFORM DEFAMATION ACT BE AMENDED TO OVERRULE CHERNESKEY BY ALLOWING THE PUBLISHER OF AN OPINION ON A MATTER OF PUBLIC INTEREST TO RELY ON THE DEFENCE OF FAIR COMMENT IF A PERSON COULD HONESTLY HOLD THE OPINION (AN OBJECTIVE TEST).

The following amendment to the *Uniform Defamation Act* has been drafted to implement this recommendation:

The *Uniform Defamation Act* is amended by adding thereto the following section:

Defence of fair comment

8.1 Where the defendant published defamatory matter that is an opinion expressed by another person, a defence of fair comment shall not fail for the reason only that the defendant or the person who expressed the opinion, or both, did not hold the opinion, if a person could honestly hold the opinion.

W. H. Hurlburt
R. S. G. Chester
of the Alberta and
Ontario Commissioners

10 August 1979

APPENDIX L2

(See page 33)

CICS Doc. 840-173/061

REPORT OF AD HOC COMMITTEE OF LEGISLATIVE DRAFTING SECTION

UNIFORM DEFAMATION ACT

8.1(1) Where the defendant published alleged defamatory matter that is an opinion expressed by another person, a defence of fair comment shall not fail for the reason only that the defendant did not hold the opinion if,

(a) the defendant did not know that the person expressing the opinion did not hold the opinion; and
(b) a person could honestly hold the opinion.

(2) For the purpose of this section, the defendant is not under a duty to inquire into whether the person expressing the opinion does or does not hold the opinion.

Arthur N. Stone
Alan Reid

24 August 1979

APPENDIX M

(See page 33)

ENACTMENTS OF AND AMENDMENTS TO UNIFORM ACTS 1978-79

REPORT OF MR. TALLIN

Uniform Dependants' Relief Act:

Manitoba amended its *Testators Family Maintenance Act,* (essentially the model *Dependants' Relief Act*) to provide a new definition of "child" which includes an illegitimate child of a testator.

Uniform Human Tissue Gift Act:

Manitoba amended its *Human Tissue Act* (superseded by the model *Human Tissue Gift Act*) to permit the removal of the pituitary gland for use in the treatment of a person having a growth hormone deficiency, except in cases where the deceased person if living or his surviving spouse, etc. would not have consented to such use.

Uniform Interpretation Act:

New Brunswick amended its *Interpretation Act* to provide for the use of "certified mail" in the service of documents. The Act was also amended to provide that "a word importing a masculine gender includes the feminine gender and a corporation to which the context may extend, and a word importing a feminine gender includes the masculine gender and a corporation to which the context may extend".

Uniform Interprovincial Subpoenas Act:

New Brunswick adopted the *Interprovincial Subpoenas Act* with certain modifications, one of which is to authorize the Lieutenant Governor in Council to designate any board, commission, tribunal or other body that has the power to issue subpoenas as courts for the purpose of their Act and the other is to empower the Lieutenant Governor in Council to issue the interprovincial subpoena certificate and to fix witness fees, rather than setting them out in the Act as is the case in the *Uniform Act.*

Uniform Partnerships Registration Act:

New Brunswick amended its *Partnerships Registration Act* to provide that upon the dissolution of a partnership one or more mem-

bers of the firm "shall" sign a certificate of dissolution. Prior to the amendment their Act stated that a member of the firm "may" sign the certificate. Subsection 13(3) of their Act, as does the Uniform Act, prohibits the use of words such as "Imperial", "Crown", "King", and "Queen", etc. as part of the name of the firm or business. This subsection was amended to provide that any of those words may form part of a firm or business name with the consent of the Lieutenant Governor in Council. A further amendment provides that a similar or identical business or firm name may be used where consent to such use has been obtained. This is necessary in the case of franchises.

Uniform Powers of Attorney Act:

British Columbia enacted section 2 of the *Uniform Act* respecting the enduring power of attorney but did not enact section 1 respecting the termination of an authority granted under the power of attorney.

Uniform Vital Statistics Act:

New Brunswick enacted the *Uniform Vital Statistics Act* with certain modifications.

Uniform Wills Act—Section 17:

British Columbia enacted this provision with the following two substantive modifications:

(a) a reference to judicial separation was included because it is still possible to obtain one in Britih Columbia, and
(b) the words "in a proceeding to which he is a party" in the Uniform provision were deleted from the British Columbia provision.

20 August 1979 Rae Tallin

APPENDIX N

(See page 33)

CICS Doc. 840-173/024

INTERNATIONAL CONVENTIONS ON PRIVATE INTERNATIONAL LAW

REPORT OF SPECIAL COMMITTEE

The implementation of international treaties poses special problems for federal states such as Canada. Since so many of the international conventions produced by bodies such as the Hague Conference deal with matters that domestically fall within provincial legislative competence, close co-operation between federal and provincial governments is of critical importance. Six years ago, the Conference set up a Special Committee on International Conventions in Private International Law to promote the consideration of international conventions by the Conference's member jurisdictions. Its task is to maintain a continuous watching brief over developments in the private international law area, and to analyze any convention or treaty open to ratification or accession by Canada on behalf of the several provinces. If a particular treaty or convention poses obstacles to ratification or accession, for example by a defective federal state clause, the Committee may recommend that the subject of the convention be considered as a subject for uniform legislation for enactment by the member jurisdictions.

The Committee is chaired by H. Allan Leal. Its members are F. J. E. Jordan (Canada), Rae Tallin (Manitoba), Emile Colas (Quebec), and Alan Reid (New Brunswick) as the one member from the four Atlantic provinces.

The Committee has met twice during the past year to consider the subject of legal kidnapping and the extra-provincial enforcement of custody orders. The Committee also maintains close contact with the Minister of Justice's Advisory Committee on Private International Law, whose chief purpose is to ensure that provincial interests are taken into account in the consideration of possible private international law initiatives. The Advisory Committee has met twice in Ottawa on November 6 and 7, 1978 and April 23 and 24, 1979. Its membership is as follows: H. Allan Leal, Graham Walker, Denis Carrier, D. M. M. Goldie, F. J. E. Jordan, D. M. Low, and M. Hétu.

Legal Kidnapping

During the last year, the subject of legal kidnapping, the abduction of children by a parent, has come to the forefront of attention. A Special Commission of Experts was convened by the Hague Conference on Private International Law to discuss this subject.

The Special Commission on International Child Abduction by One Parent met at the Peace Palace in The Hague from March 12-21, 1979, under the chairmanship of Mr. A. E. Anton (United Kingdom). Canada was represented by H. Allan Leal, who was elected Vice Chairman of the Commission and by Michel Hétu, Director of Legal Services for the Secretary of State. Another meeting is to be held at The Hague from November 5 to 16, 1979. The following conclusions have been drawn up by the Permanent Bureau of the Hague Conference on Private International Law in order to provide a synthesis of the result of the discussions held by the Special Commission in March 1979. The headings have been supplied for purposes of orderly presentation of the conclusions.

The proposal was made very early in the discussions that the Draft European Convention on Recognition and Enforcement of Decisions relating to Custody and on Restoration of Children (the so-called Strasbourg Draft) be taken as a basis for preparation of the Convention by the Hague Conference. Given the different basis for the Conference's work, which took as its starting point independent legal and sociological research done by its staff and by co-operating organizations on the specific phenomenon of child abduction by parents, the meeting did not find it desirable to take the Strasbourg Draft as its starting point, even though certain solutions incorporated in the Strasbourg Draft might be useful as models. Likewise, the Commission did not think that the *Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants* should be taken as as a starting point, with a view to preparation of a protocol on enforcement of custody decisions, because that Convention did not take into account the particular features of the "legal kidnapping" phenomenon. However, the effort should be made if possible to avoid incompatibility with that Convention, and in some circumstances the provisions for administrative co-operation which it contains might provide useful lessons for the Commission's work.

Conclusions

I. Reality of the problem and methods for dealing with it

1. The problem of child abduction is becoming more and more acute, and a solution should be sought through international co-operation.
2. The frame work for such international co-operation should be set up by an independent convention, not by preparation of a protocol to the 1961 Convention on Protection of Infants.
3. The Convention to be drawn up should not contain rules directly governing jurisdiction to adjudicate in questions of child custody; it might, on the other hand, contain rules forbidding or limiting the exercise of jurisdiction, in the State to which the child has been taken following an abduction, to decide on questions of custody.
4. A preliminary document prepared by Mr. C. A. Dyer of the Permanent Bureau of the Conference described five types of abduction. The five types of situations which are considered to constitute "child abduction" are described below.

   (a) The child was removed by a parent from the country of the child's habitual residence to another country without the consent of the other parent, at a time when no custody decision had yet been handed down but serious problems between the parents already existed.
   (b) The child was abducted by a separated parent from the judicially determined custodian in one country and removed to another, where no conflicting custody decision had been handed down.
   (c) The child was retained by the non-custodial parent or other relatives beyond a legal visitation period, in a country other than that in which the child habitually resided.
   (d) The child was abducted by a parent from the legal custodian in one country and removed to another, where the abductor had been granted custody under a conflicting order in that other country or in a third country.
   (e) The child was removed by a parent from one country to another in violation of a court order which expressly prohibited such removal.

   With regard to the five types of abduction described above, the Convention should cover *all* types. Type *a*, where no court order has been entered, is an important category which is not covered by the Strasbourg Draft.

5. In the context of recognition of custody orders, "decision" mentioned in Types *a* and *b* should mean every decision or element of a decision relating to the actual control of a child, or to the right of access.

II. Channels for administrative co-operation

6. Every State which ratifies the Convention should be obliged to create within its administration a "central authority".
7. The central authorities should have all powers to find and locate the child and, more generally, to establish the concrete factual situation.
8. The central authorities must be able to give or receive any *general* information on the legal situation in the countries involved in the abduction.
9. In order to be as effective as possible, the central authorities should have very broad administrative powers (e.g. the right to serve documents, to initiate a letter of request, to send copies of any decisions, etc.).
10. With regard to specific information, the central authorities should have the power to provide information to parents on the following matters:

    (a) the initiation of legal proceedings;
    (b) the making of court orders, both interlocutory and final;
    (c) the general content of the law applicable to the case;
    (d) the choice of counsel.

11. The central authorities might give information on the chances of success in particular proceedings, but the Convention should not oblige them to do so.
12. The central authorities should help the parties to obtain legal aid; moreover, the expenses of the central authorities themselves should be free of charge.
13. The central authorities should have the power to secure the rights of access of a parent who does not have custody of the child.
14. The central authorities should have the power to ensure the recognition and enforcement of a judicial decision and to make sure that the child will in fact be returned.

III. Rules limiting the exercise of jurisdiction by courts and other authorities when the child is retained abroad

15. Where a child whose habitual residence has been in a Contracting State ("the State of origin") is being retained by one

or more persons in another Contracting State ("The State addressed") without the consent of the lawful custodian, a relative who exercised custody over the child (whether alone or jointly) in the State of origin shall be entitled to have the child returned immediately to his or her custody by applying to the central authority of the State addressed within six months after learning that the child has been so retained.

16. The foregoing rule applies equally where the child has been abducted by stealth or force and where the child has left his or her State of origin for a temporary visit or sojourn elsewhere, pursuant to a court order for access or by agreement between the custodian and one or more other relatives.

17. The court of the State addressed may decline to order the immediate return of the child if it finds that the result will be gravely prejudicial to the interests of the child.

18. Where the application has been made more than six months after the removal of the child from his or her State of origin, the court will assume jurisdiction to determine custody of the child or a change of custody on the merits only if it considers the child to be habitually resident within the territory of the State where the court sits and the child has actually been so resident for not less than [one year], unless its assumption of jurisdiction is necessary to protect the child from serious physical danger. No such decision will be taken until the court of the requested State has communicated with the central authority of the State of origin.

19. The rules set out above shall apply whether or not the applicant has obtained a decision in the State of origin. A decision could take the form of a permanent or temporary order for custody of the child or a declaratory judgment determining that the removal or retention of the child was wrongful. The existence, date or contents of any such decision might affect the burden of proof to be carried by the applicant.

20. A reservation should be permitted by the Convention under which the courts of the requested State might undertake full consideration of the child's interests on the merits in order to determine a change in custody if, under the law of the State of origin, it was not possible for the court to take account of the interests of the child in determining custody.

IV. Improvements in judicial procedures

21. Cases involving an application for return of a child who is being retained away from the State of origin should be resolved under the most expeditious procedures possible. These should be set out specifically in the Convention.
22. Preparation of model forms for requesting the return of a child, along the lines of those included in the 1965 Convention on Service of Process Abroad and that recommended for use under the 1970 Convention on Taking of Evidence Abroad, should be seriously considered.
23. The creation of a system for registration of foreign decisions in custody matters should also be considered.
24. If the court of the State addressed enquires into the question of whether a child has established effective social ties with its State, it should be obliged to communicate with the authorities of the State of origin before making a decision on this question.
25. In exceptional circumstances, the court of the State addressed should be able to ask the authorities of the State of origin to take such steps as may be practicable to obtain a judicial decision concerning the abduction.

V. General principles

26. In questions of custody and access, the welfare of the child is of primary importance.
27. The right of access is a necessary corollary to that of custody.
28. Abduction of children is contrary to their interests and welfare.
29. The Convention should only apply to children who are not more than 16 years of age. This age limit might be set lower.

VI. Accession

30. The Convention should neither be completely open nor completely closed but should employ a system similar to that of article 31 of the *Convention of 2 October 1973 on the Recognition and Enforcement of Decision Relating to Maintenance Obligations.*

One item is of particular interest to those who would be responsible for the administration of such a convention: the role and responsibilities of central authorities. The Commission arrived at certain tentative conclusions set out under heading II: Channels for administrative co-operation *supra.* The Commission made no

decision concerning the cost of the Central Authority's services, though many thought these should be free to parents. This is likely, however, to be a controversial question in some jurisdictions. National delegates were asked to consult their governments to sound out official views. Even if administrative and legal services are not provided free of charge, it is possible that certain free services could be provided for in the convention. It is perhaps significant that the Council of Europe's draft Convention provides for free services to be provided by the Central Authorities, including any legal costs incurred.

LEGAL AID AND SECURITY FOR COSTS

A Special Commission meeting was held at The Hague from May 28 to June 1, 1979, to consider a proposal to revise Chapters III and IV of The Hague Convention on Civil Procedure 1954 (to which Canada is not a party). The Federal Department of Justice was represented at this meeting and it is expected that a fuller report will be available for the 1980 Annual Meeting.

HAGUE CONVENTION ON THE SERVICE OF DOCUMENTS ABROAD

In last year's Report *(1978 Proceedings, p. 165)* we described this Convention and how it might operate within the various provincial jurisdictions. We understand that it is thought possible to implement the Convention in Canada with only minimal amendments to rules of court in the respective provinces. From Canada's position it would be highly desirable if Canada was in a position to adhere to the Convention before the 1980 Hague Conference Plenary Session. Commissioners are urged to encourage their respective jurisdictions to act by preparing and passing any relevant amendments to their rules of court.

ACTIVITIES OF UNIDROIT

The International Institute for Unification of Private Law (UNIDROIT) which is based in Rome continued its work on a broad number of topics, many of which will be of interest in Canada.

A Diplomatic Conference was held in Bucharest in May/June 1979 to adopt the Unidroit draft Convention providing a uniform law or agency of an international character in the sale and purchase of goods. Canada was represented by D. M. Low, R. H. Tallin,

and Professor Claude Samson. Work has also continued in the following topics:

1. Progressive codification of international trade law—formation and interpretation of contracts;
2. Uniform rules on the contract of leasing;
3. Uniform rules on the contract of factoring;
4. Civil liability for carriage of hazardous substances;
5. The hotelkeeper's contract;
6. Warehousing contract—Liability of international terminal operators;
7. Civil liability for damage caused by small pleasure craft.

UNIFORM LAW ON THE FORM OF INTERNATIONAL WILLS

During the past year, Canada has extended the application of the 1973 Washington Convention providing a uniform law in the form of an international will to the provinces of Ontario and Alberta. Within Canada, the Convention now extends to the provinces of Alberta, Manitoba, Newfoundland and Ontario.

UNCITRAL

The United Nations' Commission on International Trade Law met in Vienna for its 12th session at the end of June, 1979.

The Commission dealt with a broad range of items, including international trade contracts, with special attention being given to international barter or exchange, and to the study of international contract practices. Work has continued on the broad question of international payment, including additional work on the draft convention on international bills of exchange and international promissory notes, a report on stand-by letters of credit, and a preliminary report on the feasibility of uniform rules in respect of security interests to be used in the financing of trade.

UNCITRAL has continued to work in the international commercial arbitration area, formulating a preliminary draft set of UNCITRAL conciliation rules. Preliminary work has been done on the legal implications of the new international economic order, and on international transport law.

In 1978 the Commission decided to integrate a draft convention on the international sale of goods and the uniform law on the forma-

tion of contracts for the international sale of goods into a single convention, known as the convention on contracts for the international sale of goods. A diplomatic conference will be convened in Vienna in March and April in 1980 to adopt the draft convention. We understand that a comprehensive report on this convention has been prepared for the Department of Justice by a leading Canadian writer on the international sales law.

EXTRA-PROVINCIAL CUSTODY ORDERS ENFORCEMENT

Introduction

Following last year's resolution, the report of the Ontario Commissioners was referred to the Committee on International Conventions on Private International Law for consideration with the Department of Justice, Ottawa, with the recommendation to 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.

The Special Committee met to discuss the general question of Child Abduction and the *Extra-Provincial Custody Orders Enforcement Act*. As a result new draft provisions were drafted which are attached to this Report. The approach taken in this draft was discussed briefly by the Conference of Federal-Provincial Deputy Attorneys General Meeting which met in Ottawa on November 27, 1978.

Background

There is a growing public concern over the fact that possibly thousands of children are shifted from one place to another and from one parent to another every year while these same parents or other persons battle over custody in the courts of various provinces, states or countries. Children of separated parents may live with their mother, for example, but one day the father snatches them and takes them to another province where he makes application to a court to award him custody while the mother starts custody proceedings in her province; or in the case of illness of the mother the children may be cared for by grandparents in a third province, and all three parties fight over the right to keep the children in several provinces.

These and many similar situations constantly arise in our mobile society where family members often are scattered throughout Canada and at times over other countries. A young child may have been

moved to another province repeatedly before the case goes to court. When an order has been made awarding custody to one of the parties, this is by no means the end of the child's migration. It is well known that those who lose a court battle over custody are often unwilling to accept the judgment of the court. They will remove the child in an unguarded moment or fail to return him after a visit and will seek their luck in a court of a distant place where they hope to find—and often do find—a more sympathetic ear for their plea of custody. The party deprived of the child may then resort to similar tactics to recover the child and this "game" may continue for years.

The harm done to children by these experiences can hardly be overestimated. It does not require an expert in the behavioural sciences to know that a child, especially during his early years and the years of growth needs security and stability of environment and continuity of affection.

Until recently, the courts of the various provinces, states or countries have acted in isolation and at times in competition with each other; often with disastrous consequences. One court may have awarded custody to the mother while another decreed simultaneously that the child must go to the father. Also, a custody order made in one year is often overturned in another forum the next year or some years later. Hence the term, forum shopping.

In this confused legal situation the person who has possession of the child has an enormous tactical advantage. Physical presence of the child opens the doors to many courts to the applicant and often assures that person of the decision in his favour. It is not surprising then that custody claimants tend to take the law into their own hands, that they resort to self-help in the form of child stealing, kidnapping or various other schemes to gain possession of the child. The irony is that persons who are good, law-abiding citizens are often driven into these tactics against their inclination; and that lawyers who are reluctant to advise these persons of a manoeuver of doubtful legality may place their client at a decided disadvantage.

To remedy this intolerable state of affairs where self-help and the rule of seize-and-run prevail rather than the orderly processes of the law, a number of provinces, states and countries have begun to enact or adopt uniform legislation or conventions.

Ontario has had a number of reservations about the *Uniform Extra-Provincial Custody Orders Enforcement Act* that was adopted by the Uniform Law Conference of Canada in 1974. Certain modifi-

cations to the Uniform Act, by way of refinements to its basic principles, are being put forward by Ontario after consideration by the Special Committee on Private International Law of the Uniform Law Conference.

In drafting this proposed legislation, Ontario has drawn heavily on the existing *Uniform Extra-Provincial Custody Orders Enforcement Act*, and on the uniform *Child Custody Jurisdiction Act of* the United States. To a large measure this legislation also codifies existing case law which has developed in England and in Canada. We have also looked at Australia's recently enacted family law legislation and draft European conventions.

The proposed draft is designed to afford maximum recognition to custody orders of other provinces, states or countries while at the same time restricting the assumption of jurisdiction by our courts essentially on the basis of habitual residence of the child or where there are strong connecting factors between the child and the chosen forum. Jurisdiction to supercede orders of other provinces, states or countries is also restricted. The Act stresses enforcement and provides authority for many of the types of orders presently being made by courts in an attempt to ensure that their orders are upheld.

A number of these issues are embodied in the modification to be proposed to the Uniform Act by Ontario. The first is a modification of the jurisdictional test of the Uniform Act, from a "real and substantial connection" to the "habitual residence" of the child. The court of the child's habitual residence would be given primary jurisdiction to determine a custody issue, except in certain restrictive, well-defined, and exceptional circumstances including a threat of serious harm to the child. This is set out in section 3 of the attached discussion draft, and is based on the premise that in general, courts should be given a statutory directive to avoid embarking on the merits of a custody dispute unless they have the closest connection with the child and the evidence pertaining to it, which will ordinarily be the place of the child's habitual residence.

This proposal is amplified by certain others that flow from it, including a provision relating to the recognition and enforcement of extra-provincial orders given in accordance with the principles of natural justice, in section 4 of the attachment. There is also specific provision authorizing, and, one hopes, encouraging, the courts to decline jurisdiction, where another court might be more appropriate to deal with the substantive custody issues. Finally, there is provision

for ancillary orders (section 6) and certain enforcement mechanisms in the attachment (section 7-10).

There is a further policy issue, one which arises out of one of the concerns expressed by the Hague Conference in its approach to member states. That is the possibility of some form of administrative cooperation among states in dealing with the problem of child abduction. This runs the gamut from a simple undertaking to make available information that is otherwise public all the way to the creation of central data banks and the establishment of offices in each province that would act, perhaps on the model of the *Uniform Reciprocal Enforcement of Maintenance Orders Act*, at the request of another state to secure the enforcement of an extra-provincial custody order by the courts of that province.

CUSTODY JURISDICTION AND ENFORCEMENT OF CUSTODY ORDERS ACT

1. The purposes of this Part include,

   (a) the avoidance of jurisdictional competition and conflict with tribunals outside in matters of child custody which have in the past resulted in the removal of children from one province, state or country to another with harmful effects on their well-being;
   (b) the promotion of cooperation with tribunals outside to the end that a custody order is rendered by the court which can best decide the case in the interests of the child;
   (c) the assurance that litigation concerning the custody of a child will usually take place in the province, state, or country where the child is habitually resident in as much as this is likely to be the place where the preponderance of evidence concerning his care, personal relationships, education, religious or moral training is more readily available;
   (d) in the absence of exceptional cricumstances, the assurance that courts decline the exercise of jurisdiction when the child is habitually resident outside a province, state, or country;
   (e) the deterrence of abductions and other unilateral Acts removing a child from a province, state or country to find a more favourable forum for obtaining a custody order;
   (f) discouraging relitigation in this province of custody decisions of tribunals outside insofar as feasible;

(g) facilitating the enforcement of custody orders of tribunals outside and the promotion and exchange of information and other forms of assistance between the courts of this province and other tribunals concerned with the same child.

Section 1

Because this proposed legislation introduces relatively new concepts never specifically formulated before its purposes are stated in some detail. Each section must be read and applied with these purposes in mind.

2. (1) Subject to subsection (2) a child is habitually resident in the province, state or country where both parents had their last common habitual residence or, where there is no place where the parents had a common habitual residence or both parents have ceased to have a real and substantial connection with the province, state or country in which they had their last common habitual residence, the child is habitually resident in the province, state or country where the preponderance of evidence concerning his care and upbringing is situate.

(2) A child is habitually resident in the province, state or country where he resides with the parent or person having custody of him pursuant to a written agreement or court order recognized under this Act.

(3) The act of a parent or other person in unilaterally removing a child from the province, state or country in which he is habitually resident or in improperly withholding a child from a person entitled to custody does not alter the habitual residence of a child unless there has been acquiescence or undue delay in the part of the person entitled to custody.

Section 2

This section represents an attempt to codify Canadian and English case law as to habitual residence of a child.

3. (1) A court of this province may assume jurisdiction to decide a custody application and to make an original custody or access order or to make an order superceding the order of a tribunal outside where there has been a material change in circumstances if,

Section 3(1)

Note that this section applies to the making of an initial custody order. The Extra-Provincial Custody Orders Act required that a custody order be in existence before it could be invoked against a parental kidnapper.

The concepts embodied in this section provide for a restraint of jurisdiction by courts unless certain tests are met thus discouraging a parental kidnapper from acting prior to, as well as after, the making of a court order. Once a court order has been made it will not be varied unless there has been a material change of circumstances. This discourages relitigation of the issue of custody based on essentially the same facts.

Note that the court makes its own order which replaces the original order and does not attempt a fictional "variation" of an order which it did not make. The use of the term "supercedes" also avoids the question of whether a provincially appointed judge would have power to "vary" the order of a federally appointed judge.

(a) the child is habitually resident in at the time of the commencement of the application;

Section 3(1)(a)

Physical presence of the child, while desirable, is not a prerequisite for the assumption of jurisdiction to determine custody where the child is habitually resident in the province, state or country.

(b) the child is physically present in and the court is satisfied that it is necessary to make an order because the child has suffered or is in imminent danger of serious harm if he remains in or is restored to the person legally entitled to custody;

Section 3(1)(b)

This subsection is similar to section 4 of the *Uniform Extra-Provincial Custody Orders Enforcement Act*. It reaffirms the parens patriae jurisdiction which is reserved for extraordinary circumstances.

(c) the child is physically present in and it appears that the child would not have a more real and substantial connection with another province or jurisdiction; or

Section 3(1)(c)

This subsection is similar to the basis for assuming jurisdiction contained in section 3 of the *Uniform Extra-Provincial Custody Orders Enforcement Act*. It is conducive to the assumption of jurisdiction by the court not just by virtue of the fact that the child has a real and substantial connection with the province, state or country but on the added factor that he does not have a closer connection with another forum. Perhaps more than any other provision this subsection requires that it be interpreted in the spirit of the legislation.

(d) all persons having rights of custody or access in relation to the child, and the representative of the child, if any, consent to the exercise of jurisdiction by the court and the court is satisfied that it is in the best interest of the child to exercise jurisdiction.

Section 3(1)(d)

Subsection (d) provides a final basis for jurisdiction which is to be resorted to only where the parent who has had a child kidnapped consents to the court assuming jurisdiction and the court feels that it is in the best interest of the child to do so. Considerations of time and delay in resolving a custody dispute are the major factors here. If one of the parties has had a great deal of difficulty in tracing the person with the child and substantial expense has been incurred as well as time evolved there may be a desire to litigate the matter and resolve it rather adjourn and commence proceedings elsewhere. See also s. 5(2) in this regard.

4. (1) A court on application shall recognize and enforce and make such further orders under this Act as it considers necessary to give effect to the order of a tribunal outside as if the order had been made by a court in where the court is satisfied.

Section 4(1)

The term "application" is to be understood in a broad sense so as to cover writs of habeas corpus and other proceedings available under provincial law to determine custody.

The Act does not require reciprocity. It follows the philosophy that the best interests of the child are overriding and that prop-

erly made custody orders ought to be enforced. This was the position adopted in the *Uniform Extra-Provincial Custody Orders Enforcement Act*. However, minimal natural justice and jurisdictional requirements have been added primarily to ensure that, with respect to custody orders made outside the country the grounds for the exercise of jurisdiction and the basis for assuming jurisdiction are somewhat similar.

(a) that the order was made on reasonable notice and opportunity to be heard was given to all affected parties by a tribunal using as a jurisdictional standard the best interests of the child;
(b) that the child affected by the order

(i) was habitually resident in the province, state or country in which the order was made; or
(ii) had a real and substantial connection with the province, state or country making the order and no application for custody has been made in the province, state or country where the child is habitually resident or the habitual residence of the child cannot be determined.

(2) Where two or more conflicting orders have been made pursuant to section 4(1)(b) the court must decide which to recognize having regard to the best interests of the child in accordance with the principles of this Act.

5. (1) Where the court is of the opinion that the exercise of jurisdiction by a tribunal outside would be more convenient the court may decline to exercise jurisdiction and may,

Section 5(1)

Subsection (1) enables the court to decline to exercise jurisdiction while protecting the child by way of an interim order and ensuring that a full determination of the issue takes place in the proper forum.

(a) make such interim order as the courts see fit;
(b) stay the application upon condition that an application be promptly commenced in another forum or upon any other conditions which may be just and proper, including the condition that the parties consent to the assumption of jurisdiction by the forum.

(2) Where the court is of the opinion that it is necessary to receive further evidence before deciding whether to enforce or to supersede an order as to custody or access in accordance with the provision of the Act it may forward to the Attorney General or the Minister of Justice of another province, state or country such documentation as is appropriate, and may request him to contact the appropriate court to subpoena a named person and to hold a hearing to produce or give evidence under the procedures of that province, state or country and to forward to the court in certified copies of the transcript of the record of the hearing and any evidence produced and the cost of such services may be assessed against the parties or considered as costs in the cause.

Section 5(2)

By adopting a leaf from the REMO Act, subsection (2) provides for an inexpensive and hopefully speedy method of getting further evidence. For example, a parent may allege that he or she removed a child in violation of a court order because the child was being abused. The evidence on this point might be in another jurisdiction. The court could use this section to obtain evidence from witnesses on the point. Another possible use for the section arises where the court has assumed jurisdiction on consent and wishes to have the evidence of persons in the province, state or country where the child formerly resided.

(3) Where a request for further evidence is received by the Attorney General of or Minister of Justice for for transmission to the proper court, the document shall be transmitted and the court shall conduct a hearing in accordance with the request received insofar as practicable.

6. In making or declining to make or to supercede a custody order the court may, in addition to any other order it sees fit, make an order directing the return of the child to the appropriate jurisdiction together with payment of necessary travel and other expenses, including legal costs, for the child, other parties and their witnesses.

Section 6

These are optional sections specifying what steps would be taken to enforce a custody order which is recognized. They could also

apply to domestic custody orders. They attempt to deter parental kidnapping of children or to restore the parties and the child to their previous situation.

This section also provides for broader costs to be awarded by compensating a party for expenses incurred in connection with obtaining an order for the return of a child.

7. (1) In enforcing the order of the tribunal of another province, state or country the court may punish by fine or imprisonment or both any wilful contempt of or resistance to the order but the fine shall not in any case exceed $ nor shall the imprisonment exceed .

(2) An order for imprisonment under subsection 1 may be conditional upon default in the performance of a condition set out in the order and may provide for the imprisonment to be served intermittently.

Section 7

Section 7 provides for violation of a custody order to be punished in the same manner as contempt of an order of a court of the enforcing state by fine or imprisonment and provides for the imposition of conditions.

8. (1) Where an order made by a court with respect to custody of or access to a child is in force, a court having jurisdiction may, upon application of a person entitled to custody or access, issue a warrant authorizing or directing the sheriff, police, or a named person or persons to whom it is addressed to assist in locating and to take possession of the child and to deliver the child to the person entitled to custody or access in accordance with the terms of the order or to some other person or authority named in the warrant on behalf of the person entitled to custody or access.

(2) For the purpose of executing a warrant under subsection 1, any person named in the warrant may enter and search any building, structure, aircraft, ship, vehicle, machine, land, premises or place, whether public or private, with such assistance as he may require and with such force as is reasonable in the circumstances, but such entry and search shall be made only between sunrise and sunset unless the court, in the warrant, authorizes the person to so act at another time.

Section 8

Section 8 provides authority for assistance to be given by police, sheriffs or other named persons such as a children's aid society officer to locate a child and return him or to enforce the provisions with respect to access contained in an order.

9. (1) Where a court is of the opinion that a child in respect of whom an order for custody or access has been made may be removed from Canada without the consent of all persons having a right to custody or access, the court by order may direct that the passport or other documents of the child and any other person concerned be delivered to the court or any other person for safekeeping and in accordance with such terms and conditions as the court considers appropriate.

Section 9(1)

Section 9(1) provides for the court to retain possession of travel documents as security against the kidnapping of a child, for example, during the exercise of access.

(2) Subsection 1 shall be construed and applied only for the purpose of ensuring compliance with an order of the court for custody or access.

(3) Where a person in respect of whom an order for custody or access is made wishes to remove the child from the jurisdiction temporarily and another person having rights of custody or access pursuant to the order has reasonable and probable grounds to believe that the child may not be returned to the jurisdiction, the court may give directions for the transfer of property in escrow or for the payment of support payments to a named person as trustee or for the deposit of such other security as it sees fit pending the safe return of the child to the jurisdiction.

Section 9(3)

Section 9(3) provides for the transfer of property in escrow as security for the return of a child or the holding of support payments by a trustee pending the child's return.

10. Upon application, a court may make an order restraining any person from molesting, annoying or harassing the applicant or a child in the lawful custody of the applicant and may require the

respondent to enter into such recognizance, with or without sureties, or to post a monetary bond as the court thinks appropriate.

Section 10

Section 10 provides for the posting of a recognizance.

11. (1) Where it appears to a court that,

(a) for the purpose of bringing an application under this Part; or

(b) for the purpose of the enforcement of an order for custody or access,

the proposed applicant or the person in whose favour the order is made has need to learn or to confirm the address of the proposed respondent or the person against whom the order is made, the court may order any person or public agency to provide the court with such particulars of the address as are contained in the records in its custody, and the person or agency shall provide to the court such particulars as the person or agency is able to provide.

(2) This section binds the Crown in right of .

Section 11

Since one of the primary problems confronting a parent who has had a child wrongfully removed by the other is locating that person, section 11 provides assistance in tracing if the court issues an order providing for the disclosure of the address only of an individual. It is proposed that this section be binding on the Crown. The section is presently in Ontario's Family Law Reform Act and applies to maintenance as well as custody orders.

12. (1) An application under this Act shall be accompanied by a copy of the custody order to which the application relates, certified as a true copy by a judge, other presiding officer or registrar of the tribunal which made the order or by a person charged with keeping the custody orders of the tribunal.

(2) No proof is required of the signature or appointment of a judge, presiding officer, registrar or other person in respect of any certificate produced as evidence under subsection 1.

Section 12

This section is identical to section 5 of the *Uniform Extra-Provincial Custody Orders Enforcement Act* and deals with proof of an order made outside the enforcing jurisdiction.

CONCLUSION

We would like to acknowledge with thanks the assistance in the preparation of this Report of the Private International Law officials of the Federal Department of Justice, F. J. E. Jordan, D. M. Low, and M. Hétu. The Special Committee is also greatly indebted to Mrs. Karen Weiler and Mr. Craig Perkins of the Policy Development Division of the Ministry of the Attorney General of Ontario for their assistance on the subject of Extra-Provincial Custody Orders Enforcement. Finally, we would also like to express our thanks 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
July 6, 1979

H. Allan Leal
Chairman

APPENDIX O

(See page 35)

CICS Doc. 840-173/036

JUDICIAL DECISIONS AFFECTING UNIFORM ACTS

PRINCE EDWARD ISLAND REPORT

BILLS OF SALE

Inland Kenworth Sales (Skeena) Ltd. v. Eidsveick, 91 D.L.R. (3rd) 156 (B.C.S.C.)

The mistaken addition of a superfluous letter to an otherwise accurate reproduction of the serial number of a motor vehicle in a chattel mortgage is not fatal to the validity of the mortgage. Further, the curative provisions of section 24 of the *Bills of Sale Act, 1961,* B.C. c. 6, [s. 21 *Uniform Act*] may be applied where the irregularity relates to an imperative provision of the Act provided that no person has actually been misled.

For a contrary view in relation to the curative provisions in the *Conditional Sale Act* [s. 18 *Uniform Act*] see *Clarkson Co. Ltd. v. G.T.E. Sylvania Canada Corporation,* 88 D.L.R. (3rd) 160 (Sask. C.A.).

For an instructive example of the application of the curative provisions of the Nova Scotia Act see *H. F. Russell Seafoods Ltd. v. Mason and Mason,* (N.S.S.C. not yet reported). In that case the description was defective and the affidavit attached to the renewal statement misstated the amount owing under the mortgage. *Jollimore v. Bauld,* 1950 4 D.L.R. 242 considered.

CONDITIONAL SALES

Re Nishi Industries Ltd., 91 D.L.R. (3rd) 321 (B.C.C.A.).

A lease of chattels whereby the lessee has an option, if not in default, to purchase the chattels at the end of the lease for "fair market value" is a conditional sale within section 2(*b*) of the *Conditional Sales Act, 1961,* B.C. c. 9 [section 1(f) *Uniform Act*] which defines a conditional sale to include a contract for the hiring of goods by which the hirer shall become or have the option of becoming the owner of the goods. Even though the price is not specified, the fair market value would be readily ascertainable.

CONTRIBUTORY NEGLIGENCE

Graham v. The Queen, 90 D.L.R. (3rd) 223 (Sask. Q.B.).

Plaintiff brought action for damages for personal injury sustained in one-car accident based on breach of statutory duty of defendant to maintain highway. Both plaintiff and defendant were held to be at fault and the judge applied *The Contributory Negligence Act* to the apportionment of liability. "Liability for negligent conduct as created by statute is nowhere expressly excluded from the ambit of *The Contributory Negligence Act*".

The doctrine of "last clear chance" lingers on in Manitoba. *Keogh v. Royal Canadian Legion,* 91 D.L.R. 507.

The doctrine of "last clear chance" lingers in Manitoba. *Keogh v. Royal Canadian Legion,* 91 D.L.R. 507.

DEFAMATION

Cherneskey v. Armadale Publishers et al., 90 D.L.R. (3rd) 321 (S.C.C.).

The plaintiff was a practising lawyer and city alderman. The defendants were the editor and publisher of a newspaper. The defendants published a letter to the editor in which the writers suggested the plaintiff adopted a "racist" position on a matter of public controversy. The trial judge refused to put the defence of fair comment to the jury.

Per Martland J., Laskin C.J.C. and Beetz J. concurring: Freedom to express opinion is protected only where the opinion represents the honest expression of the view of the person who expresses it. The evidence was that the letter did not represent the honest expression of the views of the publisher and editor and there was no evidence to show that the letter was the honest expression of the views of the writers. Thus there was insufficient evidence to enable the respondents to rely on the defence of fair comment.

Per Ritchie J., Laskin C.J.C., Pigeon and Pratte JJ. concurring: Honesty of belief is the cardinal test of the defence of fair comment and the state of mind of the publisher was directly in issue. Where the publisher has disavowed any honest belief in the opinions expressed in the letter, the defence of fair comment is not open to him.

Per Dickson J., Spence and Estey JJ. concurring, dissenting: The effect of the majority view is that an editor will have a defence if he shares the views expressed by the letter writer but not if he does not. Thus he is limited to the publication of those letters with which he agrees.

The test of whether a comment is "fair comment" in law is an objective test, i.e., is the comment one that an honest, albeit prejudiced, person might make in the circumstances?

Even if the comment passes this test, the defence will fail if it does not pass the subjective test of whether the publisher himself was actuated by malice. There would be no point in having the second test if the first one included the ingredient of the subjective test. The question of the honest belief of the defendant is of relevance only if and when the question of malice, proof of which rests upon the plaintiff, arises.

EFFECT OF ADOPTION

Re Fulton, 85 D.L.R. (3rd) 291 (Ont. C.A.).

Section 32(3) of *The Child Welfare Act, 1965* Ont. c. 14, repealed and reenacted in revised form 1970, c. 96, s. 23 [s. 2 *Uniform Act*] provided that any reference to "child" or "issue" in a will shall be deemed to include an adopted child.

The testatrix by her will made before this provision was enacted devised property to her son, but if he died without issue, then to all her children equally.

After the death of the testatrix the son adopted two children.

HELD that the Legislature clearly intended that adopted children would fall within the meaning of the word "issue" as found in any will, whenever made, if the necessity to determine who were "issue" did not arise until after the change in the law came into force.

Re Gage, 1962 (S.C.R.) 241 considered.

INTERPRETATION

Her Majesty the Queen v. Mohamed Mustapha Ali (not yet reported) (S.C.C.).

The issue in this case was whether the provisions of the *Criminal Law Amendment Act*, Stats. Can. 74-75-76, c. 93 requiring more than one breath sample can be applied retrospectively to an offence occurring on April 22, 1976, a date prior to the proclamation of the Act but after its enactment. The charge was in fact laid after the Act was proclaimed.

Pratte J., Pigeon, Dickson, Beetz and McIntyre JJ. concurring: HELD that only one sample was required at the date of the offence and the amendment related to substantive law and could not therefore

operate retrospectively. The majority also relied on section 36(d) of the *Interpretation Act* (R.S.C. 1970, c. I-23) [32(1)(c) *Uniform Act*] and held that the new procedure could not be adopted in relation to matters that have happened before the repeal. The repeal of section 237 of the *Code* could not affect the previous operation of that enactment (section 35(b) [31(b) *Uniform Act*] applied).

Ritchie J., Estey J., concurring, dissenting, found that the relevant date was the date of laying the charge and since the amendment was proclaimed prior to that date two samples were required.

LIMITATION OF ACTIONS

Chang et al. v. Price Properties Ltd. et al., 91 D.L.R. (3rd) 91 (B.C.S.C.).

There were two points of interest in this case. The first was that the judge ruled that the Report of the Law Reform Commission of British Columbia on Limitations was not admissible to establish the intention of the Legislature (cf. *Crown Zellerbach* below).

The second and substantial issue was whether a claim for damages for fraud, based on contract and involving property and economic loss, fell within section 3(1)(a) of the *Limitations Act, 1975*, B.C. c. 37 or within the residual provision of section 3(4) relating to actions not specifically provided for. Section 3(1) provides for a two-year period in respect of "(a) actions for damages in respect of injury to person or property, including economic loss arising therefrom, whether based on contract, tort or statutory duty."

The defendant contended that section 3(1)(*a*) covered two separate classes of action:

(i) damages in respect of injury to person,
(ii) damages in respect of property,

and that the words "injury to" modify only "person" and not "property" for if the Legislature had intended otherwise it would have inserted the word "to" before "property".

McFarlane J.

> "I think that the Legislature intended, in enacting section 3(1), to include therein certain actions involving wrongs to person or property. Many of the wrongs which are specified in the subsection are torts, while others, of a generally tortious nature, may be based on a breach of contractual or statutory duty, and may, but need not, involve economic loss. Subsection (1)(*a*) concerns

wrongful damage or injury to person or property. Although we do not usually speak of injury to property, the word "injury", according to the Shorter Oxford English Dictionary, may mean "hurt or loss caused to or sustained by a person or thing; harm, detriment, damage".

"A claim for damages for fraud, although it may be based on contract, involve property, and economic loss, is not, in my opinion, of the same genus as direct damage to person or property, trespass to property, or the other personal wrongs referred to in section 3(1). I do not think it falls within section 3(1)(*a*), but rather, not being otherwise covered, falls within section 3(4)."

For discussion of retroactivity of provisions of this Act concerning the addition of defendants following the expiry of the limitation period see *Edwards v. H. Williamson Blacktopping and Landscaping,* (1978) 8 (B.C.L.R.) 82.

PERSONAL PROPERTY SECURITY

Re Pelee Motor Inn Limited, 26 (C.B.R.) 229 (Ont. S.C.).

A conditional sales agreement was dated 21st December, 1976, and a financing statement was registered on 25th January, 1977. Shipment of the goods sold commenced on 26th January. Bankruptcy of the purchaser took place on 15th September.

Section 47(3) of *The Personal Property Security Act* R.S.O. 1970, c. 344 [idem *Uniform Act*] provides that the financing statement should not be registered after 30 days from the date of the execution of the security agreement. On the other hand, section 22(3) provides that a purchase money security interest would give priority if it is registered before or within 10 days after the debtor's possession of the collateral commences. In this case the agreement was registered more than 30 days after execution but before the debtor's possession of the collateral commenced.

The trustee argued that the security interest claimed by the conditional vendor was subordinate to the interest of the trustee in the goods sold. The conditional vendor conceded that registration was effected outside the statutory period specified in section 47 but submitted that there was a registration sufficient to give priority over the trustee in bankruptcy under section 22(3).

HELD the conditional vendor had a valid security as against the trustee in bankruptcy.

PREJUDGMENT INTEREST

Crown Zellerbach Canada Limited and *British Columbia Forest Products Limited* vs *Her Majesty The Queen in Right of the Province of British Columbia* (unreported to date) B.C.C.A.

The Court of Appeal reversed the British Columbia Supreme Court [92 DLR (3rd) 459] and held that a declaratory judgment (sought in order to have the Crown pay prejudgment interest on a refund of an overpayment of taxes) was not a pecuniary judgment within the meaning of the Act. By virtue of this interpretation of the Act, the Crown was not obliged to compensate the plaintiffs even though the Crown had the use of the taxpayers' money for a number of months.

PRESUMPTION OF DEATH

Re Walker, (S.C.P.E.I.) (not yet reported)

Lillian Walker died intestate in 1972. Her nearest next of kin was a niece Beatrice who could not be located and was last heard of in 1966 at which time she was discharged from a mental hospital in Ontario. Administration of the estate was granted to the Public Trustee.

On application by other next of kin for payment to them of the balance of the estate M. J. McQuaid J. held that since seven years had not elapsed between the disappearance of Beatrice in 1966 and the death of the intestate in 1972 there could be presumption that Beatrice was dead in 1972. "In the absence of evidence to the contrary, the presumption must in fact be that she was then living and, that being the case, the Lillian Walker estate passed to her."

Quaere whether the failure of the common law presumption of death to establish that a person was dead at a particular date raises a converse presumption of life.

It would appear the applicants would have succeeded if the *Uniform Act* had been enacted in the province.

PROCEEDINGS AGAINST THE CROWN

Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan, 80 D.L.R. (3rd) 449 (S.C.C.).

Monies were paid by the respondent by way of income tax and royalty surcharge under Saskatchewan legislation which was declared by the Supreme Court of Canada to be *ultra vires*. The order

of the Supreme Court directed repayment of the monies with interest up to the date of repayment and the provincial government applied to delete the provision for payment of interest on the ground that *The Queen's Bench Act,* R.S.S. 1967, c. 75, s. 46, (which provides for payment of interest on judgments) did not bind the Crown.

The issue involved construction of s. 17(1) of *The Proceedings Against the Crown Act,* R.S.S. 1967, c. 87, which is identical to s. 15(1) of the *Uniform Act.* Ritchie J., delivering the unanimous judgment of the court, found that the words of s. 17(1) declaring the rights of the Crown to be "as nearly as possible the same as in a suite between person and person" rendered it incumbent on the court to require the Crown to pay interest. The applicant contended that the section related only to procedural matters but the court indicated that the authority to "give such appropriate relief as the case may require" is clearly not limited to procedural matters and any force that could be attached to the applicant's argument based upon s. 17(1)(a) is neutralized by the subsection immediately following it.

RECIPROCAL ENFORCEMENT OF JUDGMENTS

Alberta Livestock Transplants Ltd. v. Pine Tree Rancho Ltd., 92 D.L.R. (3rd) 478 (Sask. Q.B.).

The words in *The Reciprocal Enforcement of Judgments Act,* R.S.S. 1965, c. 92; s. 3(4) [2(2) *Uniform Act*] "personally served" mean service within the jurisdiction of the original court but where a defendant in Saskatchewan neither appeared to nor defended an action in Alberta but did appear for examination for discovery and was personally served in Saskatchewan, the plaintiff is entitled to registration of the judgment in Saskatchewan on an *ex parte* basis. However, since the defendant is entitled to raise a defence of set-off which he would have had to an action on the original judgment, registration obtained on an *ex parte* basis should be set aside.

Moore Mahon Group v. Mercator Enterprises et al., (1978) 31 N.S.R. (2nd) 327, (N.S.S.C.).

Thomas Cook Overseas Limited was appointed exclusive sales agent of Mercator for all of Canada and the United States and the plaintiffs were engaged by Cook and conducted an extensive promotional campaign. The plaintiffs obtained judgment in Ontario and the defendants sought to have registration in Nova Scotia set aside on the ground that they were not carrying on business in

Ontario. HELD that the defendants were carrying on business in Ontario through their agent who had an office in Toronto. [2(6)(*b*) *Uniform Act*]

See also *Weigand v. Calgary Joint Ventures Ltd.*, 1979 2 W.W.R. 671 (Alta. S.C.) for construction of the words "ordinarily resident within the province[state]of the original court" in section 2(6)(*b*) of the *Uniform Act*.

Re Overseas Food Importers and Distributors Ltd. and Brandt, 93 D.L.R. (3rd) 317 (B.C.S.C.).

An agreement between the parties out of which litigation arises selecting a foreign court as the jurisdiction for settlement of disputes does not constitute submission "during the proceedings" in section 2(6)(*b*) of the *Uniform Act* so as to make the judgment of the foreign court enforceable under the Act. A letter written by the defendant to the foreign court declining to appear but stating the defendant chose "the Consulate General of the Federal Republic of Germany as our representative" does not constitute a voluntary appearance nor a submission to the jurisdiction of the foreign court.

WAREHOUSE RECEIPTS

Evans Products Company Limited v. Crest Warehousing Ltd., S.C.C. (not yet reported)

The respondent, a warehouseman, received a number of crates of plywood for storage on behalf of the plaintiff. Because the crates were stored too close to electric heaters a fire resulted and the plywood was damaged. By clause 11(f) of the warehouse receipt the respondent purported to limit his liability "to the actual value of the loss or damage of the stored goods and in no case shall the liability exceed $50.00 on any one package or stored unit . . ."

The appellant contended that the clause was void because of section 3(4)(*b*) of the *Warehouse Receipts Act,* R.S.B.C. 1960, c. 404[2(4) *Uniform Act.*]

> "(4) A warehouseman may insert in a receipt issued by him any other term or condition that
>
> (a) is not contrary to any provision of this Act; and
> (b) does not impair his obligation to exercise such care and diligence in regard to the goods as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances."

The appellant argued by analogy from American cases that the limitation of liability for loss would engender carelessness on the part of the warehouseman.

McIntyre J., Martland, Pigeon and Dickson JJ., concurring, HELD that the contractual limitation of liability did not impair the obligation to take care declared in section 14 but merely went to performance of the obligation. The combined effect of sections 3(4) and 14 is that the parties may not stipulate for a lower standard of care and relieve the warehouseman of his statutory duty.

Estey J. dissenting, traced the development of the *Uniform Statute* in the United States which now includes a specific provision authorizing the parties by contract to limit the liability of the warehouseman for loss resulting from his negligence.

It is for consideration whether a similar provision should be added to section 13 of our *Uniform Act.*

Raymond Moore
of the Prince Edward
Island Commissioners

August 1979

APPENDIX P

(See page 35)

LIMITATION OF ACTIONS

ALBERTA REPORT

Table of Contents

CONTENTS (cont'd)

INTRODUCTION

At its 1977 meeting the Conference considered the report of the Alberta Commissioners which appears at 1976 Proc. 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 *Proc.*, 30). We have prepared an annotated draft of a proposed Uniform Act which is attached to this report. Some revisions have been made to the draft Act and report filed before the 1978 meeting.

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. In 1975 the British Columbia Legislation enacted a new *Limitations Act* based on the recommendations of the British Columbia Law Reform Commission (1975, c. 37). 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 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 purports to require all limitations to be brought in, though 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 *Proc.*, 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 *Proc.*, 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 sec. 3(3) and sec. 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 sec. 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 firstly describe the areas and give them abstract designations of the areas 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 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 sec. 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* (sec. 14).
The ultimate limitation affecting F (including A, B, C and C1) is 30 years from accrual (sec. 17).

II. *Relationship of various proposed provisions*

1. Two year limitation period (draft sec. 3(1)(a) and (b)).

Legal area covered—A.

2. Time runs from damage (draft sec. 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 sec. 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 sec. 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 sec. 12(1)).
   Legal area covered—D.

5. Pre-existing or supervening disability may extend time or stop it from running (draft sec. 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 sec. 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 sec. 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 sec. 14).

Notices before action

It is not uncommon for a provincial statute to preclude action by a prospective plaintiff unless, within a period of time much shorter than the limitation period, he gives notice to the prospective defendant of the facts or of his intention to sue. Examples are actions against municipal bodies for failure to maintain roads and sidewalks in proper condition, and actions against newspapers and broadcasters for defamation. A requirement that the injured person give notice has the same effect upon him as does a limitation period. A requirement that he do so within 21 days (which is a not unusual requirement relating to claims against municipalities) or 3 months (which is the requirement of the Uniform Defamation Act) makes that effect much harsher than a limitations statute which prescribe a period of two years.

There are of course reasons for the notice provisions. Municipalities say that without such protection they would be unable to investigate effectively complaints made about the condition of a road and would be helpless against such claims. The provision in the Uniform Defamation Act is part of a larger legislative scheme under which the newspaper or broadcasting station is given an opportunity to apologize and reduce its damages.

These provisions are diverse and arise from diverse circumstances and pressures, and we accordingly do not think it practical to recommend that the proposed Uniform Limitations Act deal with them. We do, however, have two suggestions for the Conference.

Our first suggestion is that the Conference add to its agenda as a separate item consideration of an amendment to the Uniform Defamation Act which would give relief to the plaintiff against the consequences of failing to give his notice within 3 months, while continuing to give an opportunity to the newspaper or broadcasting station to apologize.

Our second suggestion is that the Conference take one step designed to mitigate the effect of notice periods generally by appending a note to the Uniform Limitations Act suggesting a form of escape clause which would make many of them less draconian by making them inapplicable unless the defendant is prejudiced by the failure to give notice. That would avoid a result such as that in *Pepper* v. *Hoover* (1977) 71 DLR (3d) 129 (Alta. S.C.) where a plaintiff failed on the grounds that he had not given timely notice to the municipal secretary or solicitor as required although the notice had

been received and acknowledged in proper time by the city's claims department. The form which we would suggest is as follows:

> Where a statute of the province precludes the bringing of an action unless notice of the facts or of the plaintiff's intention to sue is given to the defendant within a period which is shorter than the prescribed limitation period, it is suggested that the statute include the following provision or one to like effect:
>
> > Failure to give or the insufficiency of a notice of claim is not a bar to the action if the judge before whom the action is tried, or, if on a preliminary application, a judge of the court in which the action is pending, is of the opinion that the defendant was not prejudiced by the want or insufficiency of the notice.

MATTERS NOT DEALT WITH

1. *Death of a party*

We are inclined to the view that the death of either party should not affect the running of a limiation period. It is true that the death of a plaintiff is likely to result in delays in the administration of his affairs, but if he has for some reason delayed commencing action until the latter part of a limitation period, the court will make a partial appointment of some kind in order to permit the action to be brought; and if the prospective defendant dies the plaintiff can take steps to see that his estate is represented to the extent necessary to permit the commencement of action.

Sec. 9 of the Uniform Survival of Actions Act provides that, in general, a cause of action which survives under the Act (a category which appears to include all that survive) may be brought within the original limitation period or within one year from the date of the death, whichever is longer. (There is a special provision in sec. 4 dealing with a cause when a person dies before or at the same time that damage is suffered by reason of his wrongful act.)

The Conference should make a decision. We think that it should be one of the following:

1. To delete sec. 9 of the Uniform Survival of Actions Act so that the death of a party would not affect the moving of a limitation period.

2. To leave sec. 9 alone, so that the plaintiff or his legal representatives will have at least a year to commence action on a cause of action subsisting at the time of death.
3. To maintain the principle of sec. 9 but move it into the Limitations Act.

2. *Enforcement procedures under a statute-barred money judgment*

Under the Ontario draft Act, an execution creditor could take proceedings under an unexpired writ of execution (though he could not renew it), or to obtain a charging order, even though his judgment is statute barred. We are very doubtful about giving continued life to a means of recovering money when the substantive right upon which it is based cannot be enforced, particularly if (as sec. 4(1)(g) of the attached draft would provide) the judgment creditor is given an appropriate way of obtaining a new judgment. We think, however, that the enforcement of judgments is something which each province deals with differently, and that the issue should be left to be resolved by the enacting province.

3. *Application of postponement provisions to limitations outside the Statute*

Sec. 15 of the Ontario draft Act 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.

While we sympathize with the intention of the section we do not think that we know enough about the laws of all provinces or the nature of their limitation periods to be able to recommend such a provision for the Uniform Act.

4. *Contracting out*

The attached draft Act does not contain any provision dealing with contracting out of the limitation periods which it imposes (unless "confirmation" is considered in that light.) In the absence of any such provision it appears that there is nothing to prevent the lengthening or shortening of limitation periods by contract.

5. *Transitional provisions*

We have not included any transitional provisions.

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;

(e) "possession" includes the receipt of rents and profits without physical possession.

Notes:

1. *Sec. 1(a) is sec. 1(a) of the Ontario draft Act.*

2. *Sec. 1(b) is sec. 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. *Sec.* 1(*d*) *is substantially sec.* 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 sec* 2(*a*) *and* (*b*) *of the Ontario draft. The words "in aid of a legal right" appear after the words "equitable relief" in sec.* 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.*
2. *The Ontario draft includes among the things with which the Act does not interfere proceedings by way of judicial review of the exercise of statutory powers. We do not think that there is anything in the draft Act which could interfere with such proceedings and we have accordingly omitted the reference. If anyone is of the view that it is necessary it can be included as sec.* 2(*c*).

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., sec. 3); no proceedings shall be taken to recover . . . but within . . . years next after a present right to recover the same accrued (e.g., sec. 12); no . . . shall be recovered but within . . . (e.g.,, sec. 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, if 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.

(3) *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 damages for injury to person or property, including economic loss arising therefrom, and whether based on contract, tort or statutory duty, time runs from the occurrence of damage.

Notes:

1. *Secs. 3(1)(a) and (b) together equal sec. 3(1)(a) of the Ontario draft Act. We have broken them up so that the same wording as sec. 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 sec. 3(2) of this draft, and for the hidden cause of action provision of sec. 12(3) of the draft. The 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 sec. 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 secs. 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 sec. 3(1)(a) also includes a reference to the nature of the cause of action.*

4. *The limitation period for a defamation action is 2 years under sec. 2(1)(c) of the Uniform Limitation of Actions Act, the B.C. Act, and the Ontario draft Act, and sec. 3(1)(d) is to the same effect. It should be noted, however, that there appears to be a present conflict between the two-year period prescribed by sec. 2(1)(c) of the Uniform Limitation of Actions Act for all defamation actions and the 6-month period prescribed by sec. 14 of the Uniform Defamation Act for actions against newspapers and broadcasting stations. Sec. 14 reads as follows:*

> **14.** An action against
>
> (a) the proprietor or publisher of a newspaper;
> (b) the owner or operator of a broadcasting station; or
> (c) any officer, servant or employee of the newspaper or broadcasting station,

for defamation contained in the newspaper or broadcast from the station shall be commenced within six months after the publication of the defamatory matter came to the notice or knowledge of the person defamed; but an action brought and maintainable for defamation published within that period may include a claim for any other defamation published against the plaintiff by the defendant in the same newspaper or from the same station within a period of one year before the commencement of the action.

We recommend that as part of this project sec. 14 be deleted from the Uniform Defamation Act. (We point out in passing that Alberta deleted its counterpart in 1966 as part of its rationalization of tort limitaltions.)

5. *Questions also arise about the starting point for the limitation period in defamation. At common law, it appears that libel was actionable per se so that time ran from publication, while most slander was not, so that time ran from damage. Sec. 2 of The Uniform Defamation Act provides that where defamation (i.e., libel or slander) is proved, damage shall be presumed, so that it appears that the time of publication and the time of presumed damage are one and the same. Under sec. 2(1)(c) of the Uniform Limitation of Actions Act, the time starts on publication, or, where special damage is the gist of the action, within 2 years after the occurrence of the damage. It is not entirely clear how this fits in with the presumption of damage in the Defamation Act.*

   It seems that the combined effect of the proposed sec. 2(1)(c) and of sec. 2 of the Uniform Defamation Act would be that the time would always run from publication. That might on occasion (for example, where an employee dismissed because of a defamatory credit report does not find out about it until long after) be harsh on the plaintiff, but, if so, it appears to us that the place to deal with it is in the hidden cause of action provision, and we raise the question there.

6. *It should be noted that some actions in tort for damages are not included in subsection (1), e.g., injurious falsehood and will fall into the six-year residuary period in sec. 7. The Conference may wish to consider whether the distinction is anomalous.*

7. *If the draft is referred to the Drafting Section, the Section 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.

8. *Subsection (2) is introduced to ensure that the two-year period does not apply to trusts arising from contracts.*

9. *The British Columbia Act does not have a section such as sec. 3(3). The first alternative in this dralft gives substantial effect to sec. 3(8) of the Ontario draft Act with some changes in wording, and the second is one that the Alberta Institute of Law Research and Reform proposes. The third alternative comes from the report of the Alberta Commissioners (1976 Proc. 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.*

10. *Sec. 3(3) relates to the problem described at pages 5-10 of the Introduction. The evil that sec. 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.*

11. 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.

12. 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.

13. 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.

14. We should note that the section overrides general provisions for the running of time. We leave it to the Drafting Section to decide whether anything needs to be done to ensure that that is the case.

15. Sec. 3(8) of the Ontario draft Act, upon which Alternative 1 of sec. 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.

16. It was suggested at the 1977 meeting of the Conference that defamation might be included in sec. 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:

(ii) some other future estate or interest, including therein an executory devise;

and

(b) no person has obtained the possession of the land or is in receipt of the profits thereof in respect of such estate or interest,

the right to take proceedings to recover the land 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 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.

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 title by some form of possession, and those jurisdictions which do not. The note to sec. 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,* or other incorporeal hereditament;
(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 have a system of registration of title to land may add the following:

(g) an action for registration as owner of an interest in land under [the statute providing for registration of title].

Note:

Jurisdicitions which do not allow the acquisition of title to land by possession may add the following:

(h) an action for possession of land; and
(i) an action on a judgment for the possession of land.

Notes:

1. *Clauses (a) to (f) are adapted from the Ontario draft. Clauses (g) and (h) are adapted from the British Columbia sec. 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 sec. 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 sec. 5, and that sec. 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 clauses (a) to (f), subject to Note 4.*

3. *We are not satisfied that clause (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.*

4. *The proposed clause (g) has not been considered by the Conference and may be controversial. It would allow the bringing at any time of an action to rectify the register of land titles. At least the Alberta authorities say that there is no limitation period now (an action to rectify the register having been held not to be an action to recover land). Apart from the question of policy there may be a question whether the provision should be in the Limitations Act or in the statute dealing with registration of title to land.*

5. *The addition of clauses (h) and (i) would follow from a decision by a particular jurisdiction that title to land should not be acquired by any form of possession.*

6. *Clauses (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 wrongdoer for contribution from another wrongdoer shall not be brought after the expiration of the time for the bringing of an action by the injured person against the wrongdoers.

Notes:

1. *The Conference has not considered the subject.*

2. *The first alternative is section 4(2) of the Ontario Draft Act. If it is adopted, we think that "wrongdoer" should be substituted for "tortfeasor" so that it would apply to claims for contribution other than in tort if allowed by the local law.*

3. *The second alternative is the proposal of the Alberta Institute of Law Research and Reform. It should be read in conjunction with sec. 18 of this draft under which the first wrongdoer would be able to claim contribution from the second* in the original

action *whether or not the limitation period has expired. The result of the two would be that the first wrongdoer could claim contribution either during the original limitation period or in the original action.*

4. *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 protected 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 secs. 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. *Sec. 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 sec. 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 sec. 3(5), but we have gone further in this draft by including secs. 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 sec. 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 section 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 section 7(2) be left to the Drafting Section. If the decision is to include section 7(2), the Drafting Section*

might further want to consider whether the order of the two subsections should be reversed.

6. *In sec. 7(2)(c) and (d) we have made changes to avoid the use of the word "collateral."*

Section 8

In sections 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 sec. 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 section 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 clause (a).]

Notes:

1. *Section 9 gives effect to decisions of the 1977 meeting of the Conference.*

2. *Sec. 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 section 9 extend to all personal property, or apply only to chattels, as does the Uniform Act?*

4. *Section 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. Section 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 sec. 44 of the Uniform Act is contained in sec. 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 sec. 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. Sec. 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 sec. 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 "pre-*

scription" 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. *Secs. 11(1) and (2) are secs. 3(9) and (10) of the Ontario draft Act. We are doubtful that subsection (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, and only complete, when the death takes place. However, we have included it. The Conference has not previously considered it. Similarly remarks apply to subsection (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 his right to enjoyment arises.

Note:

This is sec. 3(11) of the Ontario draft, somewhat re-worded. Does the Conference want it 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. *Sec. 12(1) and (2) are sec. 6(1) and (2) of the Ontario draft Act with one change. (See Note 3.)*

2. *Note that the definition of trust in sec. 1 includes express, implied, constructive, and resulting trusts, and the duties of personal representatives.*

3. *It will be noted that the provision in sec. 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 subsection (1) coupled with the onus imposed on the trustee by subsection (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 poinion that sec. 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 sec. 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 sec. 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 sec. 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.

Alternative No. 2

(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) Subsection (1) or subsection (4) does not postpone or interrupt the running of time under this Act in favour of a person who suffers damage or injury if

(a) his agent;
(b) his guardian or committee;
(c) his personal representatives; or
(d) his predecessor in right, title or interest,

knew or ought to have known the facts mentioned in the subsection.

Notes:

1. *It will be seen that sec. 12(3)(a) and sec. 12(3)(b) could be combined. The wording of clause (a) is the same as sec. 3(1)(a) of the draft and we think it useful to be able to follow it through sec. 3(1)(a), sec. 3(2), and sec. 12(3), but the Drafting Section may prefer to combine the two clauses.*

2. *Section 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 Proc. 199, in the hidden cause of action provision in the British Columbia Act (sec. 6(3)(c)) and in the Ontario draft Act (sec. 6(3)(c)). We are in some doubt as to how the word could be interpreted. Some people appear to equate a profession with an occupation the members of which by law have the power of self-regulation. On the other hand, 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 sec. 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. *Sec. 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 sec. 6 of the British Columbia Act and in sec. 6 of the Ontario draft Act. The Conference should decide whether or not to include them.*

4. *We raise for discussion the question whether actions for defamation should be added to the list. Note 5 to sec. 2 of this draft points out that the limitation period for defamation commences on publication. The person defamed might not become aware of it then as in the case of an employee dismissed because of an actionable credit report the existence of which is not dis-*

closed to him or in the case of a defamation published once to a small group and later to the public. On the other hand, limitations problems do not seem to be common in connection with libel or those cases of slander in which proof of damage is not necessary, and it may be that the proposed Act should extend the new hidden cause of action provision only to areas in which practical problems are likely.

5. *Alternative No. 1 of subsection (4) is section 6(4) of the Ontario draft Act. It would let in some plaintiffs who would be excluded by Alternative 2, 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 1. 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. *Subsection (5) was not dealt with at the 1977 meeting though the point which it deals with was mentioned in our report at 1976 Proc. 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 at pages 5-10 of 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.

9. *Subsection (8) has not been considered and does not appear in the B.C. Act or the Ontario draft. Without some provision, questions of interpretation will arise: e.g., if the victim of a wrongful acts dies, and the running of time is postponed if the "plaintiff" or "the person asserting the claim" does not know certain things, does that mean the deceased (who may have been killed instantly by the wrongful act or who may have been alive and able to look after his affairs until the day before the limitation period expired), or does it mean his executor? The subsection would take a broad view of those whose knowledge would mean that the cause of action is not hidden and would therefore tend to reduce the number of cases in which the hidden cause of action provision would postpone the running of time and would mean that the running of time would not be interrupted by the death of a prospective plaintiff with knowledge and the filling of his shoes by an executor or administrator without it.*

   What is the view of the Conference?

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 section 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 Proc. 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 subsections (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 sec. 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 Proc. 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 (sec. 7(6) and (7)) applies only where the disabled person has a guardian or committee. The Ontario Draft Act provision (sec. 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 government 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 sec. 8(2) of the Ontario draft Act.*

2. *If a plaintiff who has no actual or imputed knowledge under sec. 12 or a plaintiff who has acquired the knowledge but is still within his limitation period, comes under a disability, the combined effects of sections 12, 13 and 14 would be that time will not run against him until he emerges from the disability.*

Section 15

(1) Except as provided in subsection (1.1), where a person against whom an action lies confirms the cause of action, the time which elapses 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.

(1.1) In the case of an action to enforce or declare a right referred to in sec. 9, subsection (1) applies only if the confirmation takes place before the expiration of the limitation period.

(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 acknowledgement 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 purposes 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 such property 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. *Sec. 15 comes in general from the B.C. Act and Ontario draft. Sec. 15(1) and (1.1) are somewhat changed so as to allow a post-limitation period confirmation in those cases in which the Conference decided against extinction of the cause of action.*

2. *The Alberta Commissioners at 1976 Proc. 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 come 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 or his agent.

3. *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 uniliquidated 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 Proc. 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.*

4. *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.*

5. *The last few lines of subsection 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.*

6. *It should be noted that subsection (7) is against the views of the Alberta Commissioners as expressed by our previous report, that part payments and acknowledgments 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.

Note:

This is section 10 of the Ontario draft Act. It has not been considered by the Conference. It appears to be applicable only if the second conversion occurs before the owner's title is extinguished by sec. 9.

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 section 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 PROCEEDING

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,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original claim.

(2) A notice of third party proceedings permitted under subsection (1) shall not be served after the expiration of one year following the date of service of the statement of claim or other process which makes the claim in connection with which relief is claimed from the third party.

(3) 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, Amndments, excluding change of parties; and Amendments changing parties" at 1976 Proc. sec. 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 sec. 19 of this draft. Since that time the Ontario draft Act has proposed a slightly different sec. 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, counter-claim 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), while

   (2) The British Columbia provision would not make any restriction based on the time of accrual of the cause of action upon which the third party notice or counterclaim is based, but would impose a restriction 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. *We are not sure whether there is a function for British Columbia's section 4(2), which is subsection (2) of this draft. If a party who is joined by third party notice or counterclaim can under local procedures counterclaim against the party who joined him, he would be able to proceed under subsection (1). We would hope that subsection (1) could be drafted so as to make it clear that*

a person against whom a claim is made would always be able to raise a related claim.

6. *Subsection (2) has not been considered by the Conference and may be controversial. It arises out of the deliberations of the Alberta Institute of Law Research and Reform and is intended to avoid a situation such as that which occurred in* Edmonton Flying Club *v.* Northward Aviation [*1977*] *3 WWR 7(Alta. App. Div.) in which new parties were joined more than 4 years, 5 years and 6 years after the accident and in which a counterclaim filed more than 9 years after the accident was not held statute-barred (though it was struck out for other reasons). The Conference should consider whether it wants such a provision.*

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 claims asserted in an action, notwithstanding that since the commencement of the action a relevant limitation period has expired, whenever the claim sought to be added by amendment arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading or writ.

(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, if

(a) 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; and

(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 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 Proc. p. 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. *The Alberta Institute is of the view that sec. 19(1), second alternative, should be qualified so that the amendment could not be*

made if it would cause undue prejudice to the defendant. What is the view of the Conference?

3. *There may be a question 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

1. *The law of limitations of the province shall be applied to all actions in the province to the exclusion of the law of limitations of all other jurisdictions.*

Alternative No. 2

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 right.*

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 resolu-*

tion 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. *Sec. 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 renders 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 those grounds 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. Firstly, it would avoid forum-shopping. Secondly, it would give some consideration to the law of the original jurisdiction. Our view, however, is that it would be too harsh on plaintiffs.*

PART 10

The Crown

Section 21

(1) Except as provided in clause (2), this Act applies to actions by or against the Crown.

(2) 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.

Margaret Donnelly
W. H. Hurlburt
H. G. Reid
W. E. Wilson
of the Alberta Commissioners

7 December 1978

APPENDIX Q

(See page 36)

CICS Doc. 840-173/037

PROTECTION OF PRIVACY: TORT

REPORT OF THE REPRESENTATIVES OF NOVA SCOTIA, ONTARIO AND QUEBEC

In 1978 the Commissioners of Nova Scotia, Newfoundland, Prince Edward Island and New Brunswick presented to the Conference a proposed *Uniform Privacy Act (1978 Proc. pp. 33, 262).* This Act was based upon certain material referred to in the report accompanying the proposed *Uniform Privacy Act.*

Due to the fact that a number of years have passed since this matter was originally undertaken by the Conference (1972) with the result that the principles underlying such uniform legislation and the policy considerations were not readily available for those considering the proposed *Uniform Privacy Act,* it was felt by a number of the members at the Conference that further consideration should be given to the principles and the policy considerations prior to dealing with the draft *Uniform Privacy Act* itself. Added emphasis was given this viewpoint when it was pointed out that the Province of Ontario, in March of 1977, had appointed a Royal Commission on Freedom of Information and Individual Privacy and that since that Royal Commission had not completed its study, that is might be beneficial to the Conference to await the recommendations of that Commission. In addition, the representatives from the Province of Quebec indicated that they would like to make a further contribution to the resolution of the principles and the policy considerations. The result was that the Conference referred this matter to the representatives for Nova Scotia, Ontario and Quebec to consider the policy matters discussed at the meeting and to prepare a fresh draft and to report thereon at the 1979 annual meeting.

Since there is a direct interrelation between access to government information, individual privacy, the law of defamation, and the freedom of the press, and since the Royal Commission on Freedom of Information and Individual Privacy established by the Province of Ontario would not have available its final report until March of 1980, it was felt by the Commissioners of Nova Scotia, Ontario and

Quebec that this matter could best be dealt with by being postponed for a further year. This does not mean that during the period from August 1978 to August 1979 that study and consideration has not been given to this matter. Indeed, the exact opposite is true. To date, the Ontario Royal Commission has produced six separate study papers on Freedom of Information and Individual Privacy and the Law Reform Commission of Australia has made available two discussion papers, one dealing with Privacy and Publication—Proposals for Protection and the other entitled Defamation and Publication Privacy—A Draft Uniform Bill. The approach of the Law Reform Commission of Australia is to consider defamation one side of the coin and privacy as a tort, the other side of the same coin.

Since this matter requires further study, particularly respecting the principles and the policy considerations that should be incorporated into a *Uniform Privacy Act*, the Representatives for Nova Scotia, Ontario and Quebec propose for adoption the following resolutions:

RESOLVED that this report be adopted and printed in the 1979 Proceedings.

RESOLVED that the committee established at the 1978 Conference respecting a *Uniform Privacy Act* composed of representatives from Nova Scotia, Quebec and Ontario (with the Nova Scotia representative as chairman) be continued and that this committee consider the principles and policy matters to be incorporated into a *Uniform Privacy Act* respecting tort and report thereon at the 1980 annual meeting.

Graham D. Walker, Q.C.
for the Nova Scotia Representatives
Arthur Stone, Q.C.
for the Ontario Representatives
Marie-José Longtin
for the Quebec Representatives

August 1979

APPENDIX R

(See page 36)

UNIFORM RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS ACT

(As adopted by the Conference in 1979)

Interpretation **1.** In this Act

(*a*) "Attorney General" includes a person authorized in writing by the Attorney General to act for him in the performance of a power or duty under this Act;

(*b*) "certified copy" means, in relation to a document of a court, the original or a copy of the document certified by the original or facsimile signature of a proper officer of the court to be a true copy;

(*c*) "claimant" means a person who has or is alleged to have a right to maintenance;

(*d*) "confirmation order" means a confirmation order made under this Act or under the corresponding enactment of a reciprocating state;

(*e*) "court" means an authority having jurisdiction to make an order;

(*f*) "final order" means an order made in a proceeding of which the claimant and respondent had proper notice and in which they had an opportunity to be present or represented and includes

(i) the maintenance provisions in a written agreement between a claimant and a respondent where those provisions are enforceable in the state in which the agreement was made as if contained in an order of a court of that state, and

(ii) a confirmation order made in a reciprocating state;

(*g*) "maintenance" includes support or alimony;

(*h*) "order" means an order or determination of a court providing for the payment of money as maintenance by the respondent named in the order for the benefit of the claimant named in

the order, and includes the maintenance provisions of an affiliation order;

(*i*) "provisional order" means an order of a court in (*the Province*) that has no force or effect in (*the Province*) until confirmed by a court in a reciprocating state or a corresponing order made in a reciprocating state for confirmation in (*the Province*);

(*j*) "reciprocating state" means a state declared under section 18(2) or under an enactment repealed by this Act to be a reciprocating state and includes a province;

(*k*) "registered order" means

(i) a final order made in a reciprocating state and filed under this Act or under an enactment repealed by this Act with a court in (*the Province*),

(ii) a final order deemed under section 2(3) to be a registered order, or

(iii) a confirmation order that is filed under section 5(8);

(*l*) "registration court" means the court in (*the Province*)

(i) in which the registered order is filed under this Act, or

(ii) that deemed a final order to be a registered order under this Act or under an enactment repealed by this Act;

(*m*) "respondent" means a person in (*the Province*) or in a reciprocating state who has or is alleged to have an obligation to pay maintenance for the benefit of a claimant, or against whom a proceeding under this Act, or a corresponding enactment of a reciprocating state, is commenced;

(*n*) "state" includes a political subdivision of a state and an official agency of a state.

Final orders of reciprocating state

2. (1) Where the Attorney General receives a certified copy of a final order made in a reciprocating state before, on or after the day on which this Act comes into force with information that the respondent is in (*the Province*), the Attorney General shall designate a court in (*the Province*) for the purposes of the registration and

enforcement and forward the order and supporting material to that court.

Filing for registration

(2) On receipt of a final order transmitted to a court under subsection (1) or under a provision in a reciprocating state corresponding to section 5(8)(a), the proper officer of the court shall file the order with the court and give notice of the registration of the order to the respondent.

Claimant leaving province after final order made in province

(3) Where a final order is made in (*the Province*) before, on or after the day on which this Act comes into force and the claimant subsequently leaves (*the Province*) and is apparently resident in a reciprocating state, the court that made the order shall, on the written request of the claimant, the respondent or the Attorney General, deem the order to be a registered order.

Variation of registered order

(4) A registered order varied in a manner consistent with this Act, continues to be a registered order.

Setting aside a registered order

(5) A respondent may, within one month after receiving notice of the registration of a registered order, apply to the registration court to set the registration aside.

Grounds

(6) On application under subsection (5) the registration court shall set aside the registration if it determines that the order was obtained by fraud or error or was not a final order.

Disposition

(7) An order determined not to be a final order and set aside under subsection (6) may be dealt with by the registration court under section 5 as a provisional order.

Making of provisional orders

3. (1) On application by a claimant before, on or after the day on which this Act comes into force, a court may, without notice to and in the absence of a respondent, make a provisional order against the respondent.

Maintenance provisions in provisional orders

(2) An order under subsection (1) may only include the maintenance provisions the court could have included in a final order in a proceeding of which the respondent had notice in (*the Province*) but in which he failed to appear.

Transmission of provisional orders

(3) Where a provisional order is made, a proper officer of the court shall send to the Attorney General for transmission to a reciprocating state

(*a*) three certified copies of the provisional order;

(*b*) a sworn document setting out or summarizing the evidence given in the proceeding;

(*c*) a copy of the enactments under which the respondent is alleged to have an obligation to maintain the claimant; and

(*d*) a statement giving available information respecting identification, location, income and assets of the respondent.

Further evidence

(4) Where, during a proceeding for a confirmation order, a court in a reciprocating state remits the matter back for further evidence to the court in (*the Province*) that made the provisional order, the court in (*the Province*) shall, after giving notice to the claimant, receive further evidence.

Evidence and recommendations

(5) Where evidence is received under subsection (4), a proper officer of the court shall forward to the court in the reciprocating state a sworn document setting out or summarizing the evidence with such recommendations as the court in (*the Province*) considers appropriate.

New provisional orders

(6) Where a provisional order made under this section comes before a court in a reciprocating state and confirmation is denied in respect of one or more claimants, the court in (*the Province*) that made the provisional order may, on application within six months from the denial of confirmation, reopen the matter and receive further evidence and make a new provisional order for a claimant in respect of whom confirmation was denied.

Affiliation

4. (1) Where the affiliation of a child is in issue and has not previously been determined by a court of competent jurisdiction, the affiliation may be determined as part of a maintenance proceeding under this Act.

Relation in proceeding respecting provisional order

(2) If the respondent disputes affiliation in the course of a proceeding to confirm a provisional order for maintenance, the matter of affiliation may be determined

even though the provisional order makes no reference to affiliation.

Limited effect of determination

(3) A determination of affiliation under this section has effect only for the purpose of maintenance proceedings under this Act.

Making of confirmation orders

5. (1) Where the Attorney General receives from a reciprocating state documents corresponding to those described in section 3(3) with information that the respondent is in (*the Province*), the Attorney General shall designate a court in (*the Province*) for the purpose of proceedings under this section and forward the documents to that court.

Procedure

(2) On receipt of the documents referred to in subsection (1), the court shall, whether the provisional order was made before, on or after the day on which this Act came into force, (*issue process against*) the respondent in the same manner as it would in a proceeding under (*Provincial enactment*) for the same relief and shall proceed, taking into consideration the sworn document setting out or summarizing the evidence given in the proceeding in the reciprocating state.

Report to Attorney General

(3) Where the respondent apparently is outside the territorial jurisdiction of the court and will not return, a proper officer of the court, on receipt of documents under subsection (1), shall return the documents to the Attorney General with available information respecting the whereabouts and circumstances of the respondent.

Orders of confirmation or refusal

(4) At the conclusion of a proceeding under this section, the court may make a confirmation order in the amount it considers appropriate or make an order refusing maintenance to any claimant.

Commencement of payments

(5) Where the court makes a confirmation order for periodic maintenance payments, the court may direct that the payments begin from a date not earlier than the date of the provisional order.

Further evidence

(6) The court, before making a confirmation order in a reduced amount or before denying maintenance, shall decide whether to remit the matter back for further evidence to the court that made the provisional order.

Interim order

(7) Where a court remits a matter under subsection (6), it may make an interim order for maintenance against the respondent.

Report and filing

(8) At the conclusion of a proceeding under this section, the court, or a proper officer of the court, shall

(*a*) forward a certified copy of the order to the court that made the provisional order and to the Attorney General;

(*b*) file the confirmation order, where one is made; and

(*c*) where an order is made refusing or reducing maintenance give written reasons to the court that made the provisional order and to the Attorney General.

Choice of law

6. (1) Where the law of the reciprocating state is pleaded to establish the obligation of the respondent to maintain a claimant resident in that state, the court in (*the Province*) shall take judicial notice of that law and apply it.

Proof of foreign enactment

(2) An enactment of a reciprocating state may be pleaded and proved for the purposes of this section by producing a copy of the enactment received from the reciprocating state.

Adjournment

(3) Where the law of the reciprocating state is not pleaded under subsection (1), the court (*in the Province*) shall

(*a*) make an interim order for maintenance against the respondent where appropriate;

(*b*) adjourn the proceeding for a period not exceeding 90 days; and

(*c*) request the Attorney General to notify the appropriate officer of the reciprocating state of the requirement to plead and prove the applicable law of that state if that law is to be applied.

Application of local law

(4) Where the law of the reciprocating state is not pleaded after an adjournment under subsection (3), the court shall apply the law of (*the Province*).

Statement of local law

(5) Where the law of a reciprocating state requires the court in (*the Province*) to provide the court in the

reciprocating state with a statement of the grounds on which the making of the confirmation order might have been opposed if the respondent were served with (*process*) and had appeared at the hearing of the court in (*the Province*), the Attorney General shall be deemed to be the proper officer of the court for the purpose of making and providing the statement of the grounds.

Variation or rescission of registered orders

7. (1) The provisions of this Act respecting the procedure for making provisional orders and confirmation orders apply with the necessary changes to proceedings, except under subsection (5), for the variation or rescission of registered orders.

Restricted jurisdiction

(2) This section does not

(*a*) authorize a provincially appointed judge to vary or rescind a registered order made in Canada by a Federally appointed judge; or

(*b*) allow a registered order originally made under a Federal enactment to be varied or rescinded except as authorized by Federal enactment.

Powers of provincially appointed judge

(3) Notwithstanding subsection (2), a provincially appointed judge may make a provisional order to vary or rescind a registered order made in Canada under a provincial enactment by a Federally appointed judge.

Acceptance of jurisdiction

(4) Subject to subsections (2) and (3) a registration court has jurisdiction to vary or rescind a registered order where both claimant and respondent accept its jurisdiction.

Variation and rescission where respondent resides in the Province

(5) Where the respondent is ordinarily resident in (*the Province*) a registration court may, on application by the claimant, vary or rescind a registered order.

Confirmation of provisional orders of variation and rescission

(6) A registration court may make a confirmation order for the variation or rescission of a registered order where

(*a*) the respondent is ordinarily resident in (*the Province*);

(*b*) the claimant is ordinarily resident in a reciprocating state;

(*c*) a certified copy of a provisional order of variation or rescission made by a court in a recipro-

cating state is received by the registration court through the Attorney General; and

(*d*) the respondent is given notice of the proceeding and an opportunity to appear.

Application by respondents residing in the Province

(7) A registration court may, on application by the respondent, vary or rescind a registered order where

(*a*) the respondent is ordinarily resident in (*the Province*);

(*b*) the claimant is ordinarily resident in a reciprocating state; and

(*c*) the registration court, in the course of the proceeding, remits the matter to the court nearest to the place where the claimant lives or works for the purpose of obtaining evidence on behalf of the claimant,

or where

(*d*) the respondent is ordinarily resident in (*the Province*);

(*e*) the claimant is not ordinarily resident in a reciprocating state; and

(*f*) the claimant is given notice of the proceeding.

Application by claimant resident in the Province

(8) Where a claimant ordinarily resident in (*the Province*), applies for a variation or rescission of a final order and the respondent is apparently ordinarily resident in a reciprocating state, the court may make a provincial order of variation or rescission and and section 3 applies with the necessary changes to the proceeding.

Effect of variation or rescission of orders of (*the Province*) by courts in reciprocating states

8.—Where an order originally made in (*the Province*) is varied or rescinded in a reciprocating state under the law in that state corresponding to section 7, the order shall be deemed to be so varied or rescinded in (*the Province*).

Enforcement

9. (1) The registration court has jurisdiction to enforce a registered order notwithstanding that the order

(*a*) was made in a proceeding in respect of which the registration court would have had no jurisdiction; or

(*b*) is of a kind that the registration court has no jurisdiction to make.

(2) The provisions of (*the deserted spouses' and children's maintenance enactment of the Province*) for the enforcement of maintenance orders apply with the necessary changes to registered orders and interm orders made under this Act.

Effect of registered order

(3) A registered order, has, from the date it is filed or deemed to be registered, the same effect as if it had been a final order originally made by the registration court and may, both with respect to arrears accrued before registration, and with respect to obligations accruing after registration, be enforced, varied or rescinded as provided in this Act whether the order is made before, on or after the day on which this Act comes into force.

Status of order

(4) Where a registered order is registered with (*Supreme Court of Province*), it may be enforced as if it were an order of that court.

Service not necessary

(5) Where a proceeding is brought to enforce a registered order, it is not necessary to prove that the respondent was served with the order.

Recording variations

(6) Where a registered order is being enforced and the registration court finds that the order has been varied by a court subsequent to the date of registration, the registration court shall record the fact of the variation and enforce the order as varied.

Remedies of a state

10. Where (*the Province*), a province, a state or a political subdivision or official agency of (*the Province*), a province or a state is providing or has provided support to a claimant, it has, for the purpose of obtaining reimbursement or to obtain continuing maintenance for the claimant, the same right to bring proceedings under this Act as the claimant.

Duties of the Attorney General

11. (1) The Attorney General shall, on request in writing by a claimant or an officer or court of a reciprocating state, take all reasonable measures to enforce an order made or registered under this Act.

Transmission of documents

(2) On receipt of a document for transmission under this Act to a reciprocating state, the Attorney General shall transmit the document to the proper officer of the reciprocating state.

Delegation

(3) The Attorney General may, in writing, authorize a person to perform or exercise a power or duty given to the Attorney General under this Act.

Documents from reciprocating states

12. (1) Where a document signed by a presiding officer of the court in a reciprocating state or a certified copy of the document is received by a court in (*the Province*) through the Attorney General, the court in (*the Province*) may deem the document to be a provisional order or a final order, according to the tenor of the document, and proceed accordingly.

Terminology

(2) Where in a proceeding under this Act a document from a court in the reciprocating state contains terminology different from the terminology of this Act or customarily in use in the court in (*the Province*), the court in (*the Province*) shall give a broad and liberal iinterpretation to the terminology so as to give effect to the document.

Conversion to Canadian currency

13. (1) Where confirmation of a provisional order or registration of a final order is sought and the documents received by a court refer to amounts of maintenance or arrears not expressed in Canadian currency, a proper officer of the court shall first obtain from a bank a quotation for the equivalent amounts in Canadian currency at a rate of exchange applicable on the day the order was made or last varied.

Certification

(2) The amounts in Canadian currency certified on the order by the proper officer of the court under subsection (1) shall be deemd to be the amounts of the order.

Translation

(3) Where an order or other document received by a court is not in (*English or French*), the order or other document shall have attached to it from the other jurisdiction a translation in (*English or French*) approved by the court and the order or other document shall be deemed to be in (*English or French*) for the purposes of this Act.

Appeals

14. (1) Subject to subsections (2) and (3), a claimant, respondent or the Attorney General may appeal any ruling, decision or order of a court in the (*the Province*) under this Act and (*the deserted spouses' and children's*

maintainance enactment of the Province) applies with the necessary changes to the appeal.

Time for appeal by appellant

(2) A person resident in the reciprocating state and entitled to appear in the court in the reciprocating state in the proceeding being appealed from, or the Attorney General on that person's behalf, may appeal within seventy-five days after the making of the ruling, decision or order of the court in (*the Province*) appealed from.

Time for appeal by person responding to appeal

(3) A person responding to an appeal under subsection (2) may appeal a ruling, decision or order in the same proceeding within fifteen days after receipt of notice of the appeal.

Order in force pending appeal

(4) An order under appeal remains in force pending the determination of the appeal, unless the court appealed to otherwise orders.

Evidentiary matters

15. (1) In a proceeding under this Act, spouses are competent and compellable witnesses against each other.

Proof of documents

(2) In a proceeding under this Act, a document purporting to be signed by a judge, officer of a court or public officer in a reciprocating state shall, unless the contrary is proved, be proof of the appointment, signature and authority of the person who signed it.

Sworn documents and transcripts

(3) Statements in writing sworn by the maker, depositions or transcripts of evidence taken in a reciprocating state may be received in evidence by a court in (*the Province*) under this Act.

Proof of default

(4) For the purposes of proving default or arrears under this Act, a court may receive in evidence a sworn document made by any person, deposing to have knowledge of, or information and belief concerning, the fact.

Statement of payments

16. A registration court or a proper officer of it shall, on reasonable request of a claimant, respondent, the Attorney General, a proper officer of a reciprocating state or a court of the state, furnish a sworn itemized statement showing with respect to maintenance under an order

(*a*) all amounts that became due and owing by the respondent during the twenty-four months preceding the date of the statement; and

(*b*) all payments made through the court by or on behalf of the respondent during that period.

Transmission of documents by court where respondent leaves (*the Province*)

17. Where a proper officer of a court in (*the Province*) believes that a respondent under a registered order has ceased to reside in (*the Province*) and is resident in or proceeding to another province or state, the officer shall inform the Attorney General and the court that made the order of any information he has respecting the whereabouts and circumstances of the respondent and, on request by the Attorney General, a proper officer of the court that made the order or the claimant, shall send to the court or person indicated in the request

(*a*) three certified copies of the order as filed with the court in (*the Province*); and

(*b*) a sworn certificate of arrears.

Regulations

18. (1) The Lieutenant Governor in Council may make such regulations as are ancillary to this Act and not inconsistent with it.

(2) The Lieutenant Governor in Council may, where satisfied that laws are or will be in effect in a state for the reciprocal enforcement of orders made in (*the Province*) on a basis substantially similar to this Act, by order, declare that state to be a reciprocating state.

Saving

19. This act does not impair any other remedy available to a claimant or another person, (*the Province*), a province, a state or a political subdivision of official agency of (*the Province*), a province or a state.

Transitional

20. Any order made under an enactment repealed by this Act continues, insofar as it is not inconsistent with this Act, valid and enforceable, and may be rescinded, varied, enforced or otherwise dealt with under this Act.

Repeal

21. The *reciprocal enforcement of maintenance orders enactment presently in force in the Province*) is repealed.

APPENDIX S1

(See page 36)

CICS Doc. 840-173/019

SALE OF GOODS

REPORT OF THE ONTARIO COMMISSIONERS

Early in June 1979, the Attorney General of Ontario tabled the report of the Ontario Law Reform Commission on Sale of Goods in the Ontario Legislature. This three-volume report marked the culmination of the most ambitious and extensive work of law reform on this topic ever mounted in the Commonwealth. The report was an attempt to update the outmoded principles of *The Sale of Goods Act,* to make that Act more relevant to contemporary commercial behaviour and practices, and to adapt many of the provisions of Article 2 of the American *Uniform Commercial Code* to the Canadian context.

The common law jurisdictions in Canada have all enacted the *Sale of Goods Act,* with some minor modifications. Though the Uniform Law Conference of Canada has never been seized with the subject, there is, in fact, currently a great measure of uniformity. [Compare: R.S.A. 1979, c. 327; R.S.B.C. 1960, c. 344 as am.; R.S.M. 1970, c. S-10 as am.; R.S.N.B. 1973, c. S-1 as am.; R.S.N. 1970, c. 341; R.S.N.S. 1967, c. 274; R.S.O. 1970, c. 421; R.S.P.E.I. 1974, c. S-1; R.S.S. 1965, c. 388; R.O.Y.T. 1976, c. S-1; R.O.N.W.T. 1974, c. S-2.]

Over the years, many legal scholars have recognized that the *Sale of Goods Act* contains many important defects and have urged amendments or the adoption of a revised Act.

The subcommittee of the Commercial Law Subsection of the Ontario Branch of the Canadian Bar Association, whose report led to the establishment of the O.L.R.C. Project, shared these sentiments and urged the adoption of Article 2 of the U.C.C. "firstly in order to remove the present inadequacy in the law and secondly in order to establish uniformity of sale of goods legislation with the United States in view of the magnitude of commercial transactions involving parties in Ontario and parties in states of the United States".

The *Uniform Commercial Code* is well known as the most successful work of uniform legislation ever undertaken in the United

States. The *Code* was the result of a joint project undertaken by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. The project's task was to simplify, clarify and modernize the law governing commercial transactions. The *Code* was finally completed in 1952 and has since been adopted in all the common-law United States.

The Commission's report states that a revised Act is necessary, for several reasons, including the lack of consensus between buyers and suppliers as to the right solutions to be applied in key areas and the fact that there is a wide gulf between the existing law and what many businessmen believe it to be.

The revised Act cannot simply be a revision of the current statute because so many changes are needed that little would remain of the original Act. Nor would it be wise to adopt Article 2 *in toto* for the Commission feels that the Article may be improved in many ways. Therefore, the Commission decided to draft an entirely new Act which borrows heavily from Article 2 but is not simply a copy of it.

The tabling statement concluded with a strongly expressed hope that the Uniform Law Conference of Canada would use the publication of the Ontario Law Reform Commission's Report as an opportunity to consider the desirability of having new uniform sale of goods legislation across Canada. The draft Bill contained in volume III of the Report could form a first working draft for such uniform legislation.

We propose that a committee be appointed by the Executive consisting of six members, one from the Atlantic Provinces, one from Quebec, one from the Federal Government, one from Ontario, one from the three Prairie Provinces, and one from British Columbia. The mandate of the Committee should be to consider the need for new revised uniform sale of goods legislation, and, if such a need exists, to assess the utility of the Ontario Law Reform Commission's Report as a basis for such a uniform law and to report back to the Uniform Law Section. We propose that Professor Jacob S. Ziegel of the Faculty of Law, University of Toronto, should be approached to act as a technical advisor to the Committee.

R. S. G. Chester
of the Ontario Commissioners

6 June 1979

APPENDIX S2

(See page 36)

SALE OF GOODS

August 20, 1979

Mr. Padraig O'Donoghue,
Chairman, Uniform Law Section,
Uniform Law Conference of Canada,
c/o Bessborough Hotel,
Saskatoon, Saskatchewan.

Dear Mr. O'Donoghue:

A meeting of the law reform agencies was held yesterday, August 19, 1979.

At this meeting, one topic discussed was the relationship between the work of these agencies and the differences that seem to be steadily increasing, at least in some areas, between the laws of the various provinces and territories. For example, leaving aside homestead legislation, entitlement to matrimonial property was controlled by the common law and relative uniformity was achieved by decisions of the Supreme Court of Canada. As a result of the divergence of legislative solutions to common problems, this situation no longer exists.

While there has undoubtedly been very considerable improvement in the law of matrimonial property, variations in local laws have resulted in the creation of complex conflictual problems. In an ever increasingly mobile society, this side effect must be regarded as undesirable.

The Ontario Law Reform Commission has recently published a report on the *Sale of Goods*. It is to be expected that, unless action is taken without delay, this report may generate patchwork reform of sales law across Canada, activity that would only serve to impede the development of inter-provincial trade. For this reason, the law reform agencies were pleased to learn that the Ontario Commissioners propose that a committee be formed with the mandate to consider the need for new revised uniform sale of goods legislation, and, if such a need exists, to assess the utility of the Ontario Law Reform Commission's report as a basis for such a uniform law and to report back to the Uniform Law Section.

On behalf of the law reform agencies, I am writing to tell you of our support for this proposal of the Ontario Commissioners. I have also been asked to stress that the law reform agencies would be more than willing to participate in the work of this proposed committee. In this way, our agencies may more easily be able to move collectively in the direction of reform, rather than engage in individual projects dealing with the Law of Sales. Finally, may I say that it is the hope of the law reform agencies that should the proposed committee conclude that there is a need for reform, its terms of reference will enable it to move directly to the formulation of a proposed Uniform Act without any obligation to report back to the Uniform Law Section.

Sincerely,

Derek Mendes da Costa
Chairman
Ontario Law Reform Commission.

APPENDIX T

(See page 34)

CICS Doc. 840-173/049

SERVICE ABROAD OF JUDICIAL AND EXTRA-JUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS: THE HAGUE CONVENTION

SPECIAL REPORT OF MR. TALLIN

This report has been prepared at the request of the Special Committee on International Conventions on Private International Law. The report deals with the effects that the adoption of The Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters would have on the existing practices in the area of service in each Canadian province and territory. There is no general review of the Convention as this information is already available in the commentary of the *raparteur* of The Hague Conference.

The report is divided into three parts. The first part deals with the service of documents out of jurisdiction. Part I begins with general comments in which some Manitoba provisions are used by way of example. These comments, however, are intended to apply *mutatis mutandis* to all the provinces and territories. Part I is then divided into divisions which consider the application of the Convention to particular provinces.

Part II deals with the service of documents originating in foreign jurisdictions in the provinces and territories of Canada. This part is also divided into divisions which are devoted to the application of the Convention to particular provinces. It should be noted that, where a province or territory is not mentioned specifically it is because that province or territory has no provisions that overlap with those of the Convention. It is assumed, therefor, that the Convention could apply to that province or territory with no changes to its present procedure.

The third part deals with the provisions of the Convention concerning default proceedings.

Throughout the report references to "rules" refer to the Rules of Court of the particular province or territory, or to provisions of the Quebec *Code of Civil Procedure,* and references to articles refer to

provisions of the Convention. At the end of the report is a list of footnotes containing the relevant statutory and case citations.

The Northwest Territories have very recently enacted new Rules of Court. These new rules were not available for the preparation of this report. The consequent omission of references to the Northwest Territories is regrettable but has been unavoidable.

Rae Tallin
for the Special Committee
on International
Conventions on Private
International Law

August 1979

PART I

SERVICE ABROAD OF JUDICIAL AND EXTRA-JUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

Article 5 of the Convention provides that service is to be effected by a method prescribed by the law of the "requested jurisdiction". Under Article 5(*b*) it is possible to request service by a particular procedure. The "requested jurisdiction" is obligated to follow the requested procedure as long as this procedure is not incompatible with its internal law.

There will be a conflict in every instance in which the "requesting jurisdiction" has a specified means of service that a requested jurisdiction refuses to follow. To make use of the Convention the requesting jurisdiction will have to organize its internal law in such a way as to recognize the validity of service pursuant to the procedure of the "requested jurisdiction".

Manitoba.

In Manitoba, for example, *Queen's Bench Rule 18* specifies that, except if provided otherwise, every statement of claim shall be served personally.(1) If personal service happens to be incompatible with the law of the "requested jurisdiction" the following question arises: Is non-personal service valid for Manitoba purposes?

There are two possibilities for recognizing the validity of non-personal service. The Queen's Bench Rules could be amended to except the requirement of personal service when the Convention is

being used. The second possibility is to apply for an order permitting substitutional service pursuant to *Queen's Bench Rule 20.*

This rule allows for substitutional service where personal service cannot be effected on any document requiring personal service.(2)

If personal service cannot be effected pursuant to a request under *Article 5(b)* of the Convention it would be possible to apply for an order for substitutional service proposing a form of service that is acceptable to both the "requesting" and "requested" jurisdictions.

Queen's Bench Rules 28 to 30 set out certain provisions for the service of a statement of claim outside Manitoba. The Convention does not conflict with these provisions. These provisions specify the types of actions for which there may be service outside the province. The Convention says nothing about the types of actions but only purports to establish a procedure once there is an action.

Ontario.

The Ontario Rules of Court establish a procedure to be followed in serving documents *ex jure.* Rule 30 provides the procedure to be followed where service is to be effected upon a person, other than a British subject in a foreign country. Notice according to Form 3 and any document required to be served therewith are to be transmitted to the Under Secretary of State for External Affairs for Canada.(3) This procedure can remain intact under the Convention as the Convention does not purport to regulate the channels through which documents and requests are sent. It only purports to refer to the channels through which they are received.

Article 8 provides that each contracting state is free to effect service through its diplomatic or consular agents. Here the Convention provides for an additional method of service not presently sanctioned by the Ontario Rules.

Ontario *Rule 30* requests that service be personal or in such manner as is consistent with the practice of that country when personal service cannot be made. This provision is in complete congruence with *Article 5* of the Convention.

Rule 30 provides that the document to be served is to be sent with a copy thereof translated into the language of the country where service is to be effected. This provision corresponds to the paragraph of *Article 5* that allows the central authority to require the translation of the document into the official language of the state addressed.

Rule 30 also requires that a return be made showing how service has been effected. This requirement is comparable to *Article 6* of the Convention which requires the completion of a certificate of service that includes the method, place, date of service and person to whom the document was delivered.

It can be seen that the Ontario rules correspond to the provisions of the Convention respecting the service of documents out of Ontario. It is possible that Article 8 would add another method of service (through diplomatic channels) to the practice of Ontario.

Nova Scotia and Prince Edward Island.

Both Nova Scotia and Prince Edward Island have provisions in their *Rules of Court* concerning the procedure to be followed when an originating notice is to be served out of the jurisdiction. *Rule 10.08(1)* requires that service be effected personally by a person within that jurisdiction who has authority to serve documents.(4) This requirement corresponds to *Article 5* of the Convention which requires the central authority of the state addressed or an appropriate agency to serve the document. Both the rules and the Convention contemplate service by a competent person within the requested jurisdiction. *Article 5(b)* allows for service by a particular method requested by the applicant unless such a method is incompatible with the law of the state addressed. Therefor, the requirement for personal service can be met in all instances where personal service is not incompatible with the law of the state addressed.

The *Rules of Court* recognize that personal service may be impossible in some instances and have provisions to deal with that eventuality. *Rule 10.08(2)* can be made to apply to service in any foreign jurisdiction by a direction of the judge of the court. This rule allows the document to be sent via the Under Secretary of State for External Affairs to the government of the country where service is to be effected. The Convention might change this procedure in that the destination of the document might no longer be the government of the foreign jurisdiction but a non-government designated authority.

The *Rules of Court* do not set out the channels through which the Under Secretary of State is to transmit the originating notice to the government of the requested state. Although the main thrust of the Convention is to facilitate direct transmission of the documents to be served to the central authority, *Article 9* recognizes that the consular channels may also be used to transmit documents for the

purpose of service. Since the Convention recognizes both direct transmission, and transmission through consular and diplomatic channels, it is unlikely that the method of transmission currently in use would have to be changed to comply with the Convention.

Rule 10.08(2) provides that a copy of the notice be translated into the language of the country in which service is to be effected. This requirement corresponds to the second paragraph of *Article 5(b)* which allows that a "central authority may require the document to be written in, or translated into the official language or one of the official languages of the state addressed".

It is requested, by the Rule, that service be effected in such a manner as is consistent with the practice of that jurisdiction. Here again, the Rules correspond to *Article 5* which provides for a requested central authority to serve the document in accordance with its own procedure.

The rule also requests that a return be made showing how service has been effected. This request can be fulfilled through compliance with *Article 6* of the Convention which requires the completion of a certificate of service showing the method, place, date of service and the person to whom the document was delivered.

Rule 10.08(b) fixes responsibility for costs on the plantiff's solicitor. This corresponds to *Article 12* which specifies the costs for which an applicant will be responsible.

It can be seen that Nova Scotia and Prince Edward Island already have in place the procedure for serving documents out of jurisdiction that is set out in the Convention. One small difference between the Convention and the *Rules of Court* is that the Convention purports to encompass all judicial and extra-judicial documents. *Rule 10.08,* however, apparently only governs "originating notices". The Convention would therefor broaden the scope of *Rule 10.08.*

PART II

THE SERVICE OF DOCUMENTS ORIGINATING IN FOREIGN JURISDICTIONS

Alberta.

Rule 584 of *The Supreme Court Rules* of Alberta sets out the procedure for serving processes or citations originating in a foreign country on any person in Alberta. The Rules contemplate that a request for service will be transmitted to the court. This request is

to be translated into English.[5] *Article 3* provides for a request to conform to the model annexed to the Convention. The annexed model is in English and French. There is, therefor, correspondence in the language requirements.

Rule 584(a) requires that the process or citation to be served shall be furnished in duplicate with two copies translated into English. *Article 3* also provides for the document to be served to be furnished in duplicate. Paragraph 2 of *Article 5(b)* permits the central authority to require the document to be written in the official language of the state addressed. There is, therefor, correspondence between the Rules and the Convention on the translation and copy requirements.

The actual provisions for service correspond closely to those of the Convention. *Rule 584(b)* requires service to be effected by the sheriff of the judicial district within which the party to be served is found. This is the method provided for by *Article 5(a). Rule 584(c)* allows service to be effected in such manner as is directed by the request for service. This allowance corresponds directly to *Article 5(b).*

Rule 584(d) requires the process to be returned with an affidavit of service. *Article 6,* however, requires not an affidavit but a certificate in the form of the model annexed to the Convention.

Rule 584(e) provides for the clerk to certify under the seal of the court.

(1) "the amount properly payable for service,
(2) that the affidavit of service is sufficient proof of service as required by the practice of the court, and
(3) if it is the case, that the service is good and sufficient service as required by the practice of the court".

There is no similar provision for such certification under the seal of the court in the Convention although *Article 12* does recognize the applicant is responsible for the costs in certain instances.

It would require few changes to implement the Convention in Alberta. The affidavit of service would be replaced by a certificate of service. The provisions of *Rule 584(e)* would not be required under the Convention. It is possible that *Article 12* of the Convention might limit costs that Alberta now charges to an applicant.

Newfoundland.

Order 11, *Rule 7* of the Rules of the Supreme Court of Newfoundland sets out the procedure for entertaining letters of request

for service from foreign courts. *Rule 7* provides that the letter of request and the process or citation is to be transmitted to the Supreme Court by Her Majesty's Secretary of State for the Colonies with an intimation that it is desirable that effect be given to it.(6) Presumably Her Majesty's Secretary of State for the Colonies is now replaced by the Secretary of State for External Affairs for Canada.

Under the Convention by virtue of *Article 19* this channel of receipt of letters of request for service could remain intact. It would, however, be necessary to designate a central authority that would undertake to receive the letters of request directly. It would be possible to designate the Supreme Court of Newfoundland as such an authority in accordance with *Article 3*. It would also be possible to designate the Secretary of State for External Affairs or some other minister as the central authority. *Article 5* of the Convention requires the central authority to serve the document itself or arrange to have it served by an appropriate agency. With the Secretary of State for External Affairs as the central authority the Supreme Court of Newfoundland could be the appropriate agency referred to in *Article 5*. It would therefor be possible to maintain the present channels for the receipt of requests for service under the Convention.

Order 11, Rule 7(1) requires the request for service to be accompanied by a translation of the letter into English. Article 3 provides that the request for service must conform to the model annexed to the Convention. The model request is in both English and French, satisfying the translation requirements of *Order 11, Rule 7(1)*. The Convention also requires the request to be furnished in duplicate whereas the Newfoundland Rules require only one request and a translation if necessary.

Order 11, Rule (7)(1) requires the furnishing of two copies of the process to be served. *Article 3* requires the process to be furnished in duplicate. If the phrase "two copies" is synonymous with "in duplicate" the Convention and the Rules are identical in respect to the number of documents required. If, on the other hand, the Rules require two copies in addition to the original, the Convention will reduce the number of documents required from three to two.

Order 11, Rule 7(3) requires service to be effected in accordance with the rules and practice of the Supreme Court regulating service of process. This requirement is in accordance with *Article 5(a). Article 5(b)* would introduce the practice of serving documents by a particular method requested by the applicant.

Order 11, Rule 7(4) provides that evidence of service is to be in the form of an affidavit of the person effecting service verified by notorial certificate. *Article 6,* however, requires only that the central authority complete a certificate of service.

The Convention could be applied to Newfoundland with the following effects:

(1) It is possible that the number of documents accompanying the letter of request would be reduced from three to two.
(2) The Convention requires the letter of request itself to be in duplicate whereas the Newfoundland rules do not so require.
(3) The Convention would introduce the practice of serving documents by a particular method requested by the applicant.
(4) The Convention requires evidence of service to be in the form of a certificate completed by the central authority whereas presently it is furnished by the affidavit of the server which is verified by notarial certificate.

Ontario.

The procedure for entertaining requests for the service of foreign process is contained in *Rule 31.*[7] This Rule contemplates the receipt of a request for service by the Supreme Court of Ontario. It would be possible for Ontario to designate the Supreme Court as its central authority in compliance with *Article 2.*

Ontario currently requires that the request for service be translated into English. *Article 3* of the Convention provides that a letter of request shall conform to the model letter annexed to the Convention which is in both English and French. Since the model letter is in English, the Convention satisfies the language requirement of Rule 31.

The Ontario practice also calls for two copies of the document to be served and two copies of the document in English. It is possible that this practice actually requires the document to be in triplicate i.e. the original and two copies. *Article 3* of the Convention provides for both the request and the document to be furnished in duplicate. It is not clear therefor if the Convention and the Ontario Rules require the same number of documents.

The provisions for actually effecting service are in complete correspondence. *Rules 31(2)* and *(3)* provide for service by the sheriff or his agent delivering to and leaving with the person to be served a

copy of the process to be served. This procedure could be maintained under *Article 5* which recognizes that the "requested jurisdiction" may serve the process by a method prescribed by its internal law. The Ontario provision also recognizes that service may be effected in such manner as is directed by the letter of request. This is in complete accordance with the Convention.

Rule 31(4) contemplates that proof of service is to be given by affidavit of the person who effected service. *Article 6* conflicts with the Ontario requirement in that it establishes that proof of service is to be effected by a certificate of service, not by affidavit.

In giving effect to requests for service from other jurisdictions the Convention might have the effect of changing the number of copies of the document to be served. The Convention would either add to or replace the affidavit of service with a certificate of service.

Quebec.

Rule 136 of the *Code of Civil Procedure* of the Province of Quebec sets out the method by which proceedings issued by foreign tribunals are served. It is provided that "the Attorney General may, on request made to the government through diplomatic channels, . . " direct the service of a foreign proceeding.(8) The main thrust of the Convention is to facilitate the direct transmission of requests for service. *Articles 2* to *6* contemplate the designation of central authorities in each contracting state. The central authorities are to receive requests directly without the use of diplomatic channels.

The use of diplomatic channels for the receipt of a request for service is preserved by *Article 9* and *Article 19*. The Convention would not, therefor, abolish the procedure set out in *Rule 136*. It would, however, create a new channel for the receipt of requests for service.

Rule 136 provides that the actual service ". . . is made by leaving the party in the ordinary way a true copy of such proceeding, certified by an officer of the court by which such proceeding was issued". This provision corresponds to *Article 5(a)* which directs the central authority to serve the document by a method prescribed by its internal law. *Article 3* provides for the document to be served or a copy thereof to be annexed to the request. There is, however, no requirement for certification of the copy of the proceeding.

Article 5(b) allows for service by a particular method requested by the applicant. The Quebec Rules have no similar provision. It is

possible, therefor, that the Convention would introduce another method of service as well as another channel of request into the procedure of Quebec.

Rule 136 provides that the Attorney General may direct the bailiff to serve the proceeding. The use of the word "may" suggests that the Attorney General has a discretion in whether or not to direct the bailiff to serve. *Article 13* might have the effect of narrowing this discretion. It allows for a refusal only in instances in which compliance would infringe the sovereignty or security of the addressed state.

There is a provision of *Rule 136* that requires the proceeding to be translated into English or French. *Article 5* permits the contracting state to require the document to be written or translated into the official language or one of the official languages of the state addressed.

Rule 136 provides that the return of service is made in the ordinary way. This return presumably includes the certificate of service that is required by *Rule 144*. This Rule requires the person who makes the service to complete a certificate of service. This requirement corresponds to *Article 6* of the Convention. *Rule 144* further provides that if the person who effects the service is not a sheriff or a bailiff his certificate must be sworn. There is a similar provision in the Convention whereby the applicant may require the central authority or a judicial authority to countersign the certificate if the certificate was not completed by one of those authorities. The Convention would replace the swearing requirement of *Rule 144* with the countersigning requirement where requested by the applicant.

Rule 136 requires the Prothonotary of the Superior Court to attest to the signature and capacity of the serving officer. *Article 5* requires that the document to be served by the central authority or an appropriate agency. There is, however, no requirement for attesting to the signature and capacity of the serving officer.

The final paragraph of *Rule 136* provides that "the Lieutenant Governor may attest the signature and the declaration by the Prothonotary, and have the original proceeding with the return of service and taxed bill of costs transmitted to the Secretary of State of Canada".

The Convention has no similar provision for attestation. Although the Articles of the Convention provide only for return of the certificate of service, the form of the certificate of service annexed to the

Convention allows for the designation of the documents returned. The Convention presumably encompasses both the return of the certificate of service and the original document. *Article 6* requires that the certificate of service be returned to the applicant. This direct return would circumvent transmission of the return to the Secretary of State of Canada provided for in *Rule 136*.

The Convention would have the following effects on the procedure for serving foreign process in Quebec:

(1) A new channel for the receipt of requests for service would be created.
(2) The Convention would dispense with the requirement of having the copy of the document certified by an officer of the court which issued the proceeding.
(3) The Convention would allow for service according to a requested procedure whereas the Code now only provides for service according to the practice of Quebec.
(4) The discretion as to whether to give effect to a request for service may be narrowed by virtue of *Article 13*.
(5) The requirement that the certificate of service be sworn if service is effected by someone other than a sheriff or bailiff would be replaced by the requirement that the certificate of service be countersigned by the central or judicial authority if the applicant so requests.
(6) The Convention would dispense with the attestation of the capacity of the server.
(7) The Convention would provide for the direct return of the certificate of service to the applicant dispensing with transmission via the Secretary of State of Canada.

Saskatchewan.

Saskatchewan's Queen's Bench Rule 539 provides that where a request for service is transmitted to the court by the Attorney General of the province, effect shall be given thereto by the adoption of a certain procedure.

Article 2 of the Convention provides that each contracting state shall designate a central authority to receive requests for service. This central authority is to be organized in accordance with the internal law of each jurisdiction. Therefor, in adopting the Convention, Saskatchewan can maintain the same structures for receiving requests for service that now exist.

Queen's Bench Rule 539(a) requires that the request for service be accompanied by a translation into English and by two copies of the process to be served with two copies of the process in English.(9) *Article 3* of the Convention provides for a request for service to conform to the model letter which is in both English and French. The provisions concerning the translation of the documents can be accommodated by *Article 5(b). Article 3* also provides that the request and process to be served are to be furnished in duplicate. It is unclear if the Convention and the rules are ad idem on this point. If "two copies" means the same as "in duplicate" there will be no problem. "Two copies" might, however, mean two copies in addition to the original. If this is the case the Convention will reduce the number of documents required.

Queen's Bench Rule 539(b) provides for service to be effected by the sheriff, his bailiff or authorized agent of the judicial centre nearest to the person to be served. *Rule 539(c)* provides for service to be effected by delivering to the person the process in accordance with the practice of the court of origin.

Article 5 of the Convention requires service to be in accordance with the procedure of the requested jurisdiction or by a method requested by the applicant unless the requested method is incompatible with the law of the "requested jurisdiction". It can be seen that *Article 5* recognizes the method prescribed by *Queen's Bench Rule 539(b)* and that *Queen's Bench Rule 539(c)* recognizes the method prescribed by *Article 5(b).*

Queen's Bench Rule 539(c) provides that after service has been effected the sheriff must return a copy of the process together with an affidavit of service verified by notarial certificate. *Article 6* of the Convention provides for a designated authority to complete a certificate of service. If the Convention is adopted the Saskatchewan practice of furnishing an affidavit of service will be replaced by the certificate of service contemplated by the Convention.

It is clear therefor, that Saskatchewan could adopt the provisions of the Convention with very few changes to the procedure that exists by virtue of *Queen's Bench Rules 539* to *541*. The only areas of difference are:

(1) The Convention might change the required number of copies of the document to be served.
(2) The Convention would ask to or replace the affidavit of service with a certificate of service.

PART III

PROVISIONS CONCERNING DEFAULT JUDGMENT

Article 15 of the Convention provides that no default judgment shall be given until it is established that:

(*a*) a document was served by a method prescribed by the internal law of the "requested state"; or

(*b*) the document was actually delivered to the defendant by another method provided for by the Convention and that service was effected in sufficient time to enable the defendant to defend.

In the rules governing proceedings on default in the provinces there is a requirement for filing an affidavit of service.(10) It is clear, therefor, that by complying with the requirements for an affidavit of service the provinces would automatically comply with *Article 15*. The affidavit would be the means of establishing the requirements set out in paragraphs (*a*) or (*b*) of *Article 15*.

The issue is to what extent can the provinces insist upon the production of an affidavit of service under the Convention.

Article 6 provides that the means for establishing proof of service is by the completion of a certificate of service. It may be possible that the province as "requesting jurisdictions" can request that an affidavit be sworn as part of a particular method requested by an applicant pursuant to *Article 5(b)*. It can be seen, however, that pursuant to the Convention a "requested jurisdiction" has only to furnish a certificate of service. Any further request could conceivably be refused on the grounds that it is incompatible with the procedure of providing a certificate of service. Pursuant to *Article 5(b)* a requested jurisdiction is not bound to give effect to a request for a particular method if this method is incompatible with its own law.

To make use of service pursuant to the Convention in a default judgment proceeding, it is conceivable that the requirements of an affidavit of service would have to be changed to recognize the sufficiency of a certificate of service.

The insufficiency of a certificate of service as a replacement for an affidavit of service was recognized in the case of *Ford v. Mieske*.(11) Under the English rules of court it was required that an affidavit of service be filed before proceeding on default of appearance. The English Court of Queen's Bench would not accept a certificate of

service in lieu of an affidavit even though under the law of the country in which the service was made the process server could not make an affidavit.

Although *Article 15* does not conflict directly with any of the provincial rules the question is open as to whether under the terms of the Convention it is possible for a plaintiff to obtain an affidavit of service, the present condition precedent for proceeding on default of appearance.

Article 15 also provides that judgment shall not be given unless it is established that service was effected in sufficient time to enable the defendant to defend. This provision does not conflict with any provincial provisions as it leaves each jurisdiction free to determine the sufficiency of time.(12)

Article 16 provides that where judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effect of the expiration of the time for appeal. It must be shown that the defendant, without fault on his part, did not have knowledge of the document in sufficient time to defend or knowledge of the judgment in sufficient time to appeal. The defendant must also disclose a prima facie defence to the action on the merits.

The main problem with *Article 16* is that it is difficult to determine the procedure that it purports to regulate. There exists in the provinces the procedure of moving to set aside a default judgment as well as the regular appeal procedure.(13) If *Article 16* purports to deal with the motion to set aside a default judgment, there remains a question as to what part of the procedure this Article refers. Does it only apply to the expiration of the time within which the motion can be brought? The Rules of Court do not specify a time for bringing the motion. The Article would, therefor, have little effect, for there is no time stated that would expire thereby allowing the judge to exercise his power.

The only time requirement for bringing a motion to set aside a default judgment is that "the application should be made as soon as possible after the judgment comes to the knowledge of the defendant . . .". Mere delay will not bar the application unless an irreparable injury will be done to the plaintiff or the delay has been wilful.(14) Since there is no time stated for the bringing of the application the power to set aside the expiration of the time period is meaningless.

The second possibility is that the Article deals with the substantive prerequisities for the setting aside of a default judgment and not only the time for bringing the motion. If the Article is attempting to set out the pre-conditions that must be satisfied before a judge will set aside a default judgment it narrows the present law. An application to set aside a default judgment should be supported by an affidavit setting out the circumstances under which the default arose and disclosing a defence on the merits.(15) That the defendant did not have knowledge of the document in sufficient time to defend or knowledge of the judgment in sufficient time to appeal are but examples of circumstances under which default can arise. The Convention would narrow the allowable circumstances to those stated in *Article 16*.

It is, therefor, unclear as to what procedure *Article 16* purports to encompass. It can be seen that it narrows the prerequisities for bringing an application to set aside a default judgment regularly given. On the simple wording, however, it appears to deal only with the time for bringing an appeal.

All the jurisdictions have a provision whereby the time for appeal can be extended.(16) There is some debate, however, as to the propriety of using the appeal procedure at all when dealing with a default judgment. It is said that the Court of Appeal has jurisdictiin to entertain an appeal from a judgment by default. Notwithstanding this jurisdiction, the proper course is to apply to the judge for the setting aside of the judgment.(17) It is possible that *Article 16* contemplates a procedure (appealing from a default judgment) that is viewed with disfavour in most jurisdictions.

The rules of court of the various jurisdictions do not lay down conditions that must be satisfied before the time for appeal will be extended. The granting of the extension is a matter of discretion. Attempts to narrow this discretionary power have been met with great judicial disapproval.(18) The paramount consideration is whether or not justice requires that the time for appeal be extended.(19)

In considering what justice requires in such a case, regard is usually had as to

(1) the *bona fides* of the applicant;
(2) the delay whether great or trifling as affecting the question of prejudice to the opposite party; and
(3) whether there is reason to say that the appeal is apparently groundless or frivolous.

The third requirement is given special attention when the application is made after default.[20]

It can be seen that before relieving the defendant from the effects of the expiration of the time for appeal both the Convention and the case law dictate that the judge entertaining the application give consideration to similar, if not the same considerations. The requirement under *Article 16(a)* parallels the requirement for a *bona fide* application. The requirement under *Article 16(b)* parallels the requirement that the appeal not be groundless or frivolous. Presumably the appeal will not be groundless or frivolous only in those cases where the defendant has a *prima facie* defence. The Convention requires preconditions for extending the time for appeal that are presently encompassed in the common law. The common law, however, is somewhat wider than the Convention in that there is a measure of flexibility in the phrase "in the interest of justice". The Convention would harden this flexibility into the precisely articulated pre-conditions of *Article 16*.

The provisions of the *Code of Civil Procedure* of the Province of Quebec respecting proceedings on default require special consideration. *Rule 198* provides that judgment cannot be rendered against a defendant who has not appeared unless the plaintiff files proof of service of the original writ. This corresponds with *Article 15* which provides there shall be no default judgment until it is established that the defendant has been served. Presumably the certificate of service required by *Article 6* will satisfy Quebec requirement of proof.

Rule 482 provides that a party condemned by default to appear may, if he was prevented from filing his defence by any reason considered sufficient, request that the judgment be revoked. The motion for revocation must contain both the grounds for revocation and also the grounds of defence to the action. If *Article 16* applies to this procedure it narrows the grounds of revocation as set out in the *Code*. The *Code* allows for revocation for any reason considered sufficient. The Convention specifies that relief can be granted only if the defendant, without fault on his part, did not have knowledge of the document in sufficient time to defend. Both the Convention and the *Code* require the defendant to disclose his grounds of defence.

Rule 484 specifies that the motion for revocation must be filed within 15 days from the day when the party acquired knowledge of the judgment. There is also an allowance that if the defendant shows

that it was impossible for him to act sooner the court may relieve him from the consequences of his default. This allowance is limited to 6 months from the judgment. The Convention would broaden these provisions by replacing the specific time requirements with the requirement of bringing applications within a reasonable time.

The *Code of Civil Procedure* also allows for the use of the appeal procedure in seeking relief from default judgments. The time for appeal against a default judgment may be extended by virtue of *Rule 523*. There can be an extension if the party can show it was impossible for him to act sooner. Again, *Article 16(a)* provides narrower conditions for extending the time for appeal. The defendant not having knowledge of the document in sufficient time to defend would be but one example of where it is impossible for him to act sooner.

The provision for extending the time for appeal is limited by *Rule 523* to 6 months from the date of judgment. There is, therefor, no means for extending the time for appeal if more than 6 months have elapsed from the date of judgment. The Convention does not place any similar time limits on the application for relief. It provides that an application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment. *Rule 494* of the *Code* provides for the defendant's knowledge of the judgment in that the delay for filing the appeal does not begin to run until the expiry of the delay within which he could demand revocation of the judgment. As noted previously, by virtue of *Rule 484*, the motion for revocation must be filed within 15 days from the day when the party acquired knowledge of the judgment.

Although the delay within which the appeal is to be filed does not begin to run until there is knowledge of the judgment, this delay cannot be extended if more than 6 months have elapsed from the judgment. The last paragraph of *Article 16* allows each contracting state to declare that the application will not be entertained if it is filed after the expiration of a time stated in the declaration. *Rule 523* corresponds to such a declaration, however, the Convention also states that this time cannot be less than one year. If the Convention is applied to Quebec the 6 month time limit stipulated by *Rule 523* should be extended to one year.

The Convention will have the following effects on the default judgment procedures of Quebec:

(1) If *Article 16* applies to the revocation of default judgment procedure the grounds for revocation would be narrowed.
(2) The time for bringing a motion would be altered from 15 days from knowledge of the judgment to a reasonable time.
(3) In relation to extending the time for appeal *Article 16* provides narrower grounds than does the Code.
(4) The six month limitation of *Rule 523* should be extended to at least one year.

FOOTNOTES

1. *The Queen's Bench Rules,* r. 18.
2 Provisions for substitutional service in other jurisdictions are as follows:
Alberta, *The Supreme Court Rules,* r. 23.
British Columbia, *Rules of Court,* r. 12. (This rule is also applicable to the Yukon Territory by virtue of the *Judicature Ordinance,* R.O.Y.T. 1971, c. J-1, s. 14.
Newfoundland, *The Rules of the Supreme Court* O. 9, r. 2.
New Brunswick *The Rules of the Supreme Court,* O. 9, r. 2(4).
Nova Scotia and Prince Edward Island, *Civil Procedure Rules,* r. 10.10.
Ontario, *Rules of Practice and Procedure of the Supreme Court of Ontario,* r. 16(2).
Saskatchewan, *The Queen's Bench Rules,* r. 22.
Quebec, *Code of Civil Procedure, S.Q.* 1965, c. 80, a. 138.
3. *Rules of Practice and Procedure of the Supreme Court of Ontario,* r. 30.
4 *Civil Procedure Rules,* r. 10.08(1).
5. *The Supreme Court Rules,* r. 584.
6. *The Rules of the Supreme Court,* O. 11, r. 7.
7. *Rules of Practice and Procedure of the Supreme Court of Ontario,* r. 31.
8. *Code of Civil Procedure,* S.Q. 1965, c. 80, a. 136.
9. *The Queen's Bench Rules,* r. 539.
10. For the provisions concerning the affidavit requirements see:
Alberta, r. 142 and 145.
British Columbia and Yukon Territory, r. 17.
British Columbia requires only proof of service. There is no requirement that this proof be by affidavit. The Convention and the Rules of Court of British Columbia are complementary on this point.
Manitoba, r. 31.
New Brunswick, O. 13, r. 2.
Newfoundland, O. 27, r. 3.
Nova Scotia and Prince Edward Island, r. 12.05.
Ontario, r. 49.
Quebec, *Code of Civil Procedure,* a. 198. Quebec (as does British Columbia) requires proof but not necessarily by affidavit. The Convention and the Code of Civil Procedure are complimentary on this point.
Saskatchewan, r. 114.
11. *Ford v. Mieske* (1885), 16 Q.B.D. 57.
12 For provisions concerning the time to appear see:
Alberta, r. 31.
British Columbia and the Yukon Territory, r 13(6).
New Brunswick, O. 11, r. 5.
Newfoundland, O. 11, r. 4.
Nova Scotia and Prince Edward Island, r. 10.07(3).
Ontario, r. 28.

Manitoba, r. 40.
Quebec, *Code of Civil Procedure,* a. 149.
Saskatchewan, r. 28.

13. For provisions concerning moving to set aside the default judgment see:
Alberta, r. 158.
British Columbia and the Yukon Territory, r. 17(11).
Manitoba, r. 458.
New Brunswick, O. 13, r. 10, O. 27, r. 15.
Newfoundland, O. 27, r. 18.
Nova Scotia and Prince Edward Island, r. 12.06.
Ontario, r. 526.
Quebec, *Code of Civil Procedure,* a. 482.
Saskatchewan, r. 346.

14. *Klein v. Schile,* [1921] 2 W.W.R. 78 (Sask. C.A.) at 79.
Nelligan v. *Lindsay,* [1945] O.W.N. 295 (Ont. H.C.)

15. *Klein v. Schile,* Supra n. 14.
McCaul v. Christie (1905), 15 Man. R. 398 (K.B.).
Nelligan v. Lindsay, Supra n. 14.
Watt v. Barnett (1878), 3 Q.B.D. 363.
Sales v. Sereda (1952), 5 W.W.R. 470 (Sask. Q.B.).
Fedors v. Boyda and Bazowski, [1941] 2 W.W.R. 457 (Sask. C.A.).
Scovil v. Lewis [1926], 2 W.W.R. 468 (B.C.C.A.).
DeRzonka v. Kummerfield et ux. (1956), 64 Man. R. 215 (Man. C.A.).
Traders Finance Corporation Ltd. v. MacKinley (No. 2) (1951), 28 M.P.R. 15 (N.S.S.C.).
Danylock v. Drouillard, [1953] O.W.N. 629 (Ont. H.C.).
Macleod v. Green (1934), 8 M.P.R. 254 (P.E.I. S.C.).
Hamel v. Chelle (1964), 48 W.W.R. 115 (Sask. C.A.).

16. For the provisions concerning extending the time for appeal see:
Alberta, r. 548.
British Columbia, *Court of Appeal Act,* R.S.B.C. 1960, c. 82, s. 26.
Manitoba, r. 50.
New Brunswick, O. 58, r. 3(4).
Newfoundland, O. 64, r. 5.
Nova Scotia and Prince Edward Island, r. 3.03(1).
Ontario r. 504.
Quebec, *Code of Civil Procedure,* a, 494, 523.
Saskatchewan, r. 534, see also *Shaw v. Masson* [1921] 1 W.W.R. 357 (Sask. C.A.), *Ray* and *Ray v. Rural Municipality of Meota No. 468* (1956), 20 W.W.R. N.S. 32 (Sask. C.A.).
Yukon Territory, *Court of Appeal Ordinance,* R.O.Y.T. 1971, C. c. 20, s. 12.

17. *Varley v. Porter* and *Smyth,* [1926] 3 W.W.R. 699 (Sask C.A.)
Vint v. Hudspith (1885), 29 Ch. D. 322 (C.A.).
Miles v. Wilkinson (1945), 61 B.C.R. 474 (B.C. C.A.).

18 *In Re Manchester Building Society* (1883), 24 Ch. D. 488 (C.A.).

19. *Ibid.*
For other cases discussing the grounds for extending the time for appeal see:
Ninos v. Margolian (1937), 12 M.P.R. 336 (N.S. S.C.).
Eidsvik v. Shepherd, [1975] 4 W.W.R. 105 (B.C. C.A.).
Best v. Dussessaye, [1921] 1 W.W.R. 363 (Man. K.B.).
Fraser v. Neas and *Neas* (1924), 35 B.C R. 70 (B.C. C.A.).
Workmen's Compensation Board v. Adams (1952), 5 W.W.R. 414 (B.C. C.A.).
Robinson v. Rouse (1957), 22 W.W.R. 89 (B.C. C A.).
Miles v. Wilkinson, Supra n. 17.

20. *Ross v. Robertson* (1904), 7 O.L.R. 464 (Ont. C.A.).

APPENDIX U

(See page 34)

CICS Doc. 840-173/048

TAKING OF EVIDENCE ABROAD IN CIVIL AND COMMERCIAL MATTERS: THE HAGUE CONVENTION

SPECIAL REPORT OF MR. TALLIN

This report has been prepared at the request of the Special Committee on International Conventions on Private International Law. The report deals with the effects that the adoption of The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (attached as the Schedule hereto; see page 292) would have on existing practices of letters of request and commissions in each Canadian province and territory. There is no general review of the Convention as this information is already available in the commentary of the *raparteur* of The Hague Conference. The report is divided into parts, each of which is concerned with the application of the Convention to a particular province or territory. Each part is divided into divisions: the first deals with letters of request, while the second is concerned with commissions. There is an occasional deviation from this format to accommodate particular jurisdictional variations. For example, the Province of Quebec has no statutory provisions concerning letters of request. Consequently that part deals with commissions first.

Throughout the report references to "Rules" refer to the *Rules of Court* of a particular province or territory, or to provisions of the Quebec *Code of Civil Procedure;* references to "sections" refer to provincial or federal statutes, and references to "Articles" refer to provisions of the Convention. At the end of each section is a list of footnotes containing the relevant statutory and case citations. In the footnotes pertaining to Ontario there is a general discussion of the principles and guidelines which presently apply to implementing letters of request from foreign jurisdictions. This discussion is so placed because Ontario is where most of the litigation in this area has arisen.

The Northwest Territories have very recently enacted new Rules of Court. Before this enactment, procedure in the Northwest Territories was regulated by the Supreme Court Rules of Alberta. At the

time of writing this report these new Rules were not yet available. The consequent omission of the Northwest Territories from this report is regrettable but has been unavoidable.

R. H. Tallin

August 1979

TAKING EVIDENCE ABROAD IN CIVIL AND COMMERCIAL MATTERS

MANITOBA

By virtue of *Queen's Bench Rule 245(2)* the court may order the issue of a letter of request to examine witnesses. The form of the order is set out in *Form 72* of the *Appendix of Forms* contained in the *Queen's Bench Rules*.[1]

The contents of the letter of request are set out in *Form 46* of the *Appendix of Forms*. The letter is:

(a) Addressed to the head of a tribunal whose assistance is asked.
(b) It contains a statement of the action pending.
(c) There is a brief description of the cause of action.
(d) The plaintiff and the defendant are identified.
(e) There is a request that the witness be summoned before a person competent by the procedure of the "requested" jurisdiction to take the examination of witnesses.
(f) There is a request that the witness be examined by the interrogatories that accompany the letter of request (or *viva voce*).
(g) There is a request that the witness be examined in the presence of the agents of the plaintiff and defendant.
(h) There is a request that the answers be reduced to writing.
(i) There is a request that the examination be authenticated by the seal of the tribunal or however allowed by the procedure of that jurisdiction.

The Convention proposes the following procedure:

Article 1 provides that the determination of whether or not to issue a letter of request is within the competence of the requesting jurisdiction. Therefore the present procedure for applying for a letter of request and the factors governing whether or not an order authorizing a letter of request will be granted remain unaltered.

Article 2 provides that each contracting state will designate a central authority to receive letters of request. A letter of request originating in Manitoba would, therefore, be addressed to the designated central authority instead of the head of the tribunal whose assistance is asked.

Article 3 sets forth the contents of a letter of request and is in general conformity with the contents of *Form 46*.

(a) The designation of the requesting authority corresponds to the present provision indicating that the letter comes from "The Chief Justice of the Court of Queen's Bench for Manitoba."

(b) The names and addresses of the parties and their representatives corresponds to the identification of the plaintiff and defendant in Manitoba practice. *Form 46* does not, however, include the addresses of the parties nor does it identify their representatives.

(c) The statement of the nature of the proceedings corresponds to the description of the cause of action in *Form 46*.

(d) The statement of the evidence to be obtained or other judicial act to be performed corresponds to the request to summon and examine witnesses contained in *Form 46*.

(e) The inclusion of the questions to be put to the person to be examined corresponds to the request to examine the witnesses upon the interrogatories accompanying the letter of request.

(f) The specification of the documents or other property to be inspected is a provision that is not included in the Manitoba letter. *Form 46* does contain a request to mark all books, letters, papers and documents produced on examination for identification. The Convention would be a vehicle for the production of documentary evidence as well as the testimony of witnesses. This would increase the scope of available evidence as *Form 46* provides only for taking the oral testimony of witnesses.

(g) According to the Convention a letter of request may specify any special method of procedure to be followed. *Form 46* contains a similar provision in so far as there is a request that the examination be carried out in the presence of the agents of the plaintiff and defendant.

Article 4 provides for the letter of request to be in the language of the authority requested to execute it or to be accompanied by a

translation into that language. *Article 4(2)* recognizes the validity of a request in English or French unless the "requested" jurisdiction has filed a declaration pursuant to *Article 33* specifying that requests will only be entertained in a designated language. This provision would have the effect of requiring letters to be issued in a language other than English in certain instances. In Manitoba it is currently the practice to send letters of request in English. It is conceivable that this practice would have to be altered when dealing with a jurisdiction that has filed a declaration pursuant to *Article 33*.

It is possible for the court to indicate in a letter of request a desire that certain procedures be followed in its execution. There is, however, no method whereby these special procedures can be insisted upon. There is no mechanism whereby Manitoba can insist upon the request being executed at all.

Article 9 of the Convention makes it mandatory that a "requested" jurisdiction execute a letter of request. It provides that the authority executing a letter of request shall apply its own law as to the methods and procedures to be followed. The second paragraph of *Article 9* provides that a requested jurisdiction shall follow the request to use a special method for procedure. This request must be followed unless it is incompatible with the law of the jurisdiction of execution, or is impossible of performance by reason of its internal practice and procedure, or by reason of practical difficulties.

By adopting the Convention, Manitoba would gain the right to insist on the execution of a request and the right to specify the desired procedure within the limits of *Article 9*.[2]

The provisions that pertain to dealing with letters of request from foreign jurisdictions in Manitoba are found in *section 84(1)* of *The Manitoba Evidence Act*.[3] By virtue of this section, it is the Court of Queen's Bench that is in charge of administering commissions from other jurisdictions. *Section 84* refers only to commissions but it is assumed that the section also encompasses letters of request. It would be possible to designate the Court of Queen's Bench as a central authority in accordance with *Article 2* without changing any of the internal structures or proceedings in Manitoba.

When entertaining a commission or order from abroad *section 84(1)* allows that the Court of Queen's Bench may direct the examination of the persons. There is, however, no obligation on the court to order such an examination. *Article 9* would change the discretion now enjoyed under *84(1)* to a mandatory obligation.

Article 10 imposes on the "requested" jurisdiction the obligation to apply the appropriate means of compulsion in accordance with its own internal procedure. Here again, the discretion presently enjoyed would be changed to an obligation.

In Manitoba when a person is examined under such a commission, order or other process, by virtue of *section 84(3)* of *The Manitoba Evidence Act* he has those privileges that he would have in an action pending in a court by which the order for examination was made. Since the order for examination comes from the Court of Queen's Bench a person being examined has whatever privileges existing in a Queen's Bench action.

Article 11 would seem to expand the scope of privilege available as it provides that a person being examined may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence under the law of the state of execution or of the state of origin.[4]

Technically, by adopting the Convention, the scope of privilege offered to witnesses being examined in Manitoba would be widened. Although presently Manitoba only affords recognition of Manitoba privileges it is likely that as a matter of practice the privileges of the state of origin are recognized in any event.

To enact *Chapter 1* of the Convention would require very few changes in the procedure of Manitoba as it now exists.

(1) The Convention would allow for the production of documentary evidence through letters of request. Currently *Form 46* does not provide for this.
(2) It is possible that under the Convention a letter of request would have to be issued in a language other than English.
(3) The Convention would have the effect of changing what is now a privilege to a right of request. It would also change what is now a discretion in regard to the execution of letters of request from another jurisdiction into an obligation to execute.
(4) The Convention would widen the scope of privilege currently available to a witness being examined in Manitoba by commission or letter of request to include those privileges available in the jurisdiction of origin.

By virtue of *Queen's Bench Rule 245(1)* "Where the testimony of a person who is residing out of Manitoba is required the court

may order the issue of a commission for the examination of such person".

Although *Rule 245(1)* authorizes the use of the procedure it cannot give the commissioner a right to exercise the commission in another jurisdiction. Such authorization must come from the jurisdiction in which the evidence is to be taken.[5]

Articles 15, 16 and 17 of the Convention draw a distinction between diplomatic officers, consular agents and other persons duly appointed as commissioners.

Article 15 gives diplomatic and consular officials the right to take evidence, without compulsion, of nationals of the state that the official represents. This can be viewed as a prima facie right as it is possible for a state to declare that such an official can only take evidence if permission is applied for.

Article 16 expands the class of persons from whom a diplomatic official can take evidence to include the nationals of the state where the official exercises his functions and nationals of a third state. This *Article* does not, however, confer an automatic right to take evidence. The official must have obtained permission from a competent authority.

Article 17 deals with a commissioner, duly appointed as such. A person duly appointed as commissioner may take evidence if he has the permission of the competent authority of the state in which the evidence is to be taken. *Article 17* does not give a commissioner an absolute right to exercise his commission. The commissioner must first have authorization of the state in which he is to take the evidence.

It can be seen therefore that the Convention would have virtually no effect on the procedure of Manitoba for appointing a commissioner. Both with and without the Convention a person appointed as commissioner has no right to take evidence until permission is granted. The only area of change would be with regard to diplomatic or consular officials who would have a prima facie right to take evidence. The Convention, by drawing a distinction between duly appointed commissioners and diplomatic consular officials, appears to give the latter a right to take evidence whether or not they have been appointed by a procedure analogous to that of *Rule 245*. This distinction would expand the class of people capable of taking evidence in another jurisdiction.

In Manitoba, the actual procedure for taking and returning commission evidence is contained in *Queen's Bench Rules 246 to 255. Rule 251* provides that "the witness shall be examined on oath, affirmation or otherwise in accordance with the law of the country in which the commission is executed".

Rule 251 corresponds to *Article 21(a)* which allows the commissioner to take all kinds of evidence which are not incompatible with the law of the state where the evidence is taken. Both provisions contemplate that the witness shall be examined in accordance with the law of the country of execution.

Article 21(d) provides that "the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the state where the evidence is taken". Therefore, the Manitoba procedure contained in the *Rules 246* to *255* could be followed completely to the extent that it is not actually against the law of the state where the evidence is to be taken.

The *Queen's Bench Rules* do not contain specific provisions concerning requesting witnesses to appear at the examination. It is possible that regular provisions for summoning witnesses by subpoena (Queen's Bench *Rule 230*) would be expanded by the provisions of *Article 21. Article 21(b)* provides that a request to a person to appear shall be in the language of the place where the evidence is taken. There is an exception if the recipient is a national of the state where the action is pending. *Article 21(c)* provides that the person shall be informed that he may be legally represented. In some instances he shall also be informed that he is not compelled to appear.

In Manitoba, the fact that the *Rules* permit the issue of letters of request does not in any way affect the courts inherent power to issue letters of request in aid of a commission. Such a letter of request asks a foreign tribunal to order the witness to attend before the commissioner named in the commission.[6] This is the only way a commissioner can compel a witness to attend.

Article 18 of the Convention contemplates a different procedure for a commissioner exercising compulsion. Instead of letters of request in aid of a commission the Convention provides that a contracting state may declare that a commissioner may apply to the competent authority to obtain evidence by compulsion. Therefore the

present procedure would be supplemented by a direct application for aid by the commissioner himself.

Section 84(1) of *The Manitoba Evidence Act* provides that the Court of Queen's Bench, if it is satisfied that the commission is authentic, may by order direct the examination of the desired persons. This section provides for compulsion but the exercise of this compulsion is at the discretion of the Court of Queen's Bench.

Article 18 and *section 84* contemplate the same procedure for obtaining evidence by compulsion. *Article 18* also allows for discretion in that it recognizes that an application may not be granted. This recognition is implicit in the words "if the authority grants the application".

Manitoba could adopt the provisions of the Convention in relation to commission evidence with virtually no change in its internal procedure.

The following is a list of changes:

(1) The Convention would create a distinction between consular or diplomatic officers and duly appointed commissioners.

(2) In addition to letters of request in aid of a commission a Manitoba appointed commissioner would be able to apply directly to a designated authority for assistance.

(3) It is possible that *Article 21* would add new requirements to the procedure for requesting witnesses to appear.

FOOTNOTES: MANITOBA

1. *The Queen's Bench Rules*, r. 245(2).
2. This comment of course applies equally to all the provinces and territories.
3. *The Manitoba Evidence Act*, R.S.M. 1970, cap. E150, ss. 84(1). For a discussion of the principles governing giving effect to letters of request from other jurisdictions see Ontario footnotes 6 and 8.
4. See: *Evidence (Proceedings in Other Jurisdictions) Act 1975*, 1975 c. 34 (U.K.) s. 3. By virtue of this statute the United Kingdom has given effect to the Convention. Section 3 recognizes the privileges that exist in the requesting state as well as those that exist in the United Kingdom. See also *Re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235*, [1977] 3 W.L.R. 430 (C.A.).
5. This comment also applies equally to all the provinces and territories.
6. *R. v. Keystone Fisheries Ltd.* (1955), 63 Man. R. 196 (Q.B.).

ONTARIO

The *Rules of Practice of the Supreme Court of Ontario* have no provisions concerning letters of request. When the testimony of a

person resident out of Ontario is required the court may order the issue of a commission to take such testimony.[1] If it appears that the assistance of a foreign court is necessary in order to compel the attendance of a witness before the commissioner the court may order the issue of letters rogatory. "The letters are directed to a foreign court within whose jurisdiction a witness whose evidence is desired is resident, requesting the aid of that court in procuring such evidence."[2]

There are, however, situations in which a foreign jurisdiction will not allow an Ontario appointed commissioner to take evidence. In the case of *Nacevich v. Nacevich* it was found that the only manner in which evidence could be obtained in Yugloslavia was by letter of request. The Senior Master of the High Court of Justice held that since the rules did not provide any procedure for obtaining an order for a letter of request, by virtue of *Rule 1,* the practice was to be regulated by analogy to the *Rules of Practice.* It was held that by analogy to *Rule 276,* which governs the order for a commission, the court had the power to make an order for a letter of request. The letter was addressed to the competent judicial authority of Yugoslavia requesting its assistance in obtaining the testimony of the witness.[3]

Although there is no formal procedure for issuing letters of request the practice does exist. The Convention would give independent procedural structure to this practice.

The procedure for entertaining letters of request from foreign jurisdictions is set out in *section 60(1)* of *The Evidence Act* of Ontario.[4] *Section 60* of *The Evidence Act* provides that the court may order the examination of the witness before the person appointed by the commission, order or other process. It must be shown to the court that a court or tribunal of competent jurisdiction in the foreign country has duly authorized the taking of evidence by commission, order, or other process. Presumably "other process" would include letters of request.

It is clear that the Ontario provisions contemplate that the examination will take place before a person appointed by the requesting jurisdiction. The Convention, however, appears to place the execution of a letter of request in the hands of the requested jurisdiction. *Article 2* provides that the central authority of each contracting state shall transmit the received letter of request to the authority competent to execute it. Presumably this execution of the

letter of request includes the appointment of the official before whom the examination is to take place.

It is unclear if the court under *The Evidence Act* of Ontario has the authority to actually appoint the official who is to conduct the examination. If *The Evidence Act* of Ontario does not empower the court to appoint an examiner such power does exist under the *Canada Evidence Act*.[5]

The relationship of these two statutes was the subject of discussion in the case of *Re Paramount Film Distributing Corporation* v. *Ram*.[6] It was held that *The Evidence Act* of Ontario contemplates the appointment by the foreign court of the person who is to act as commissioner in Ontario. Section 57, which is now section 60, empowers a judge to lend assistance to the commissioner by authorizing him to command the attendance of witnesses and the production of documents. It was further held that the *Canada Evidence Act* had concurrent effect in Ontario.

Under what is now *section 43* of the *Canada Evidence Act* it was found that "—the judge names the commissioner in his order and gives him whatever authorizations are required. The person named may, of course, be the same person named in the letters rogatory but there is no such limitation in the section." If *Article 2* requires the requested jurisdiction to appoint the examiner this power exists presently in Ontario by virtue of the *Canada Evidence Act*.

Section 60(3) of *The Evidence Act* of Ontario and *section 47* of the *Canada Evidence Act* provide that the person being examined under an order from another jurisdiction has the same right to refuse to answer questions tending to incriminate himself or other questions as a party or witness would have in an action pending in an Ontario court.[7] *Article 11* would increase these privileges to include not only those available in the jurisdiction of execution, but also that exist in the jurisdiction of origin.

When an Ontario court entertains a letter of request pursuant to the provincial or federal Evidence Act it is clear that the judge has discretion in whether or not to grant an order.[8] The Convention would change this discretion into a mandatory obligation that can be avoided only within the limits of *Article 12*.

The provisions of the Convention concerning letters of request could be applied to Ontario with the following effects:

(1) The Convention would give independent procedural form to the practice of issuing letters of request. This practice exists in Ontario presently only by analogy to the practice of issuing commissions.
(2) It is possible that the Convention would widen the scope of privileges available to a witness or party being examined in Ontario.
(3) The Convention would change the discretion of the Ontario court in regards the execution of letters of request to an obligation to execute.

As indicated previously the usual method for taking evidence out of Ontario is by way of commission. *Rule 276* provides that where the testimony of a person resident out of Ontario is required the court may order the issue of a commission to take such testimony.

The actual conduct of the commission is governed by *Rules 279* to *289*. *Rule 279* provides that unless otherwise directed the examination shall be on oral questions reduced to writing. *Rule 280* also recognizes that interrogatory evidence may be taken. The Rules therefor contemplate the taking of two kinds of evidence, viva voce and interrogatory. The Convention, by virtue of *Article 21(a),* allows a commissioner to take all kinds of evidence which are not incompatible with the law of the state where the evidence is taken. Both types of evidence mentioned in *Rule 279* and *280* will continue to be available under the Convention unless there is incompatibility with the law of the state where the evidence is to be taken.

Article 21(d) allows that the evidence may be taken in the manner provided by the law applicable to the court where the action is pending. This allowance exists as long as that manner is not forbidden by the law of the state where the evidence is taken. Under the Convention, therefor, the Ontario rules could still be followed unless a contracting state had actual prohibitions respecting some matter.

The Ontario Rules do not have specific provisions concerning the summoning of witnesses to appear at the examination. It is possible that the Convention would introduce some new requirements in this area. *Articles 21(b)* and *(c)* contain language and translation requirements concerning requests to appear. It is also required that the request inform the person that he may be legally represented. In some instances it is required that the person be informed that he is not compelled to appear or give evidence.

Articles 15, 16, 17 of the Convention draw a distinction between diplomatic or consular officials and duly appointed commissioners. Diplomatic and consular officials have a prima facie right to take evidence in the territory of another contracting state. This right may be limited if that state requires the official to have its permission to proceed. Duly appointed commissioners, on the other hand, have no right to proceed unless they have been given permission either generally or in the particular case.

By providing that diplomatic or consular officials may take evidence the Convention appears to create a class of official who has the authority to take evidence by virtue of his position. This distinction does not appear in the Ontario Rules.

As previously indicated *section 60* of *The Evidence Act* of Ontario deals with Ontario courts granting assistance to commissioners appointed by a foreign court. This section corresponds exactly to *Article 18* of the Convention. Ontario is presently in the position, contemplated by *Article 18,* of a state that has declared that a commissioner may apply to a designated authority for appropriate assistance to obtain evidence by compulsion. Both the Convention and *The Evidence Act* contemplate that a commissioner will apply for assistance and that the granting of this assistance will be at the discretion of the authority to which the application is directed.

The provisions of the Convention respecting the taking of evidence by commissioners could be applied to Ontario with the following effects:

(1) The Convention would create a distinction between duly appointed commissioners and diplomatic or consular officials.

(2) The Convention might have the effect of changing or adding to the procedure for summoning witnesses to appear at the examination.

FOOTNOTES: ONTARIO

1. *Rules of Practice and Procedure of the Supreme Court of Ontario,* r. 276.
2. Holmstead and Gale (ed.), *The Judicature Act of Ontario and Rules of Practice* (1969) 1445.
3. *Nacevich* v. *Nacevich,* [1962] O.W.N. 105 (Ont. H.C.)
4. *The Evidence Act,* R.S.O. 1970, c 151, s. 60.1.
5. *Canada Evidence Act,* R.S.C. 1970, c. E-10, s. 43.
6. *Re Paramount Film Distributing Corporation* v. *Ram,* [1954] O.W.N. 753 (Ont. H.C.).
   For other authorities stating that an application may be made under either statute see: *Re McCarthy and Menin and United States Securities and Ex-*

change Commission, [1963] 2 O.R. 154 (Ont. C.A.) — *Re Raychem Corporation v. Canusa Coating Systems Inc.,* [1971] 1 O.R. 192 (Ont. C.A.) — *Re Westinghouse Electric Corporation and Duquesne Light Co.* (1977), 16 O.R. (2d) 273 (Ont. H.C.).

7. See Manitoba footnote 4.

8. There are basically five principles which govern the exercise of the Courts' discretion in implementing letters of request.

   (a) It must be shown that the evidence is to be used in a foreign court or tribunal of competent jurisdiction. Consequently it must also be shown that the court or tribunal had the authority to direct the taking of evidence in a foreign jurisdiction. In the case of *Re McCarthy and Menin and United States Securities and Exchange Commission, Supra* n. 6 an application by the Securities and Exchange Commission was refused because the commission was not a court of law or equity. It was held at page 160 that under the Canada Evidence Act ". . . the only foreign tribunal within the contemplation of the legislation is a court of law or equity by whatever name it may be known . . .". Article 1 would continue to give effect to this principle. It provides that a letter of request is not to be used for other than judicial proceedings. Under the Convention a letter of request from an administrative tribunal could be refused as it was in the *McCarty* case.

   (b) It must be shown that the evidence is for use at trial. Requests for evidence that is in fact discovery evidence will be refused. *Re Radio Corporation of America* v. *The Rauland Corporation,* [1956] O.R 630 (Ont. H.C.).
   Re Geneva v. *Comtesse,* [1959] O.R. 668 (Ont H.C.) sub nom *Re Comtesse and Zelig.*
   Re Raychem Corporation v. *Canusa Coating Systems Inc., Supra* n. 6.
   Re. Galamar Industries and Micro Systems International Ltd. (1975), 66 D.L.R. (3d) 221 (Ont. Cty. Ct.).
   Re United States of America and Executive Securities Corporation (1977), 15 O.R. (2d) 790 (Ont. H.C.).
   Re Westinghouse Electric Corporation and Duquesne Light Co, Supra n. 6.
   This principle can be maintained under the Convention but only if a declaration is filed pursuant to Article 23. It is of interest that the *Evidence (Proceedings in Other Jurisdictions) Act 1975,* 1975, c. 34 (U.K.) was passed in England to give effect to the Hague Convention. At the time of accession a declaration under *Article 23* was not filed. In the case of *Re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235,* [1977] 3 W.L.R. 430 (C.A.) the English Court of Appeal held that since no declaration had been filed it was not a valid objection to the execution of a letter of request that the evidence might be for pre-trial discovery. Prior to the enactment of this statute the English courts also refused to implement letters of request that were concerned with pre-trial discovery. *Radio Corporation of America* v. *Rauland Corporation,* [1961] 1 Q.B.D. 618.

   (c) It must be shown that the evidence cannot be secured without the intervention of an Ontario court. *Re McCarthy and Menin and Uninted States Securities and Exchange Commission, Supra* n. 6 at 159. The Convention does not contain a similar requirement. Under the Convention therefor this condition precedent would disappear.

   (d) It must be that the evidence is absolutely necessary for the purposes of justice. *Re McCarthy and Menin and United States Securities and Exchange Commission, Supra* n. 6. *Echlin Manufacturing Co.* v. *Sloan*

Valve Co. et al. (1977), 5 C.P.C. 275 (Ont. H.C.). *Re Westinghouse Electric Corporation and Duquesne Light Co., Supra* n. 6. In the *Westinghouse* case it was held that "the court is entitled to go behind letters rogatory, to examine precisely what it is the foreign court is seeking to do, and to give effect to them only if they satisfy the requirements of the law of this jurisdiction." (p. 286-287). Under the Convention it is possible to go behind the letter of request to determine if the evidence is for trial. It is not clear, however, if it would be possible to refuse to execute letters of request that were for trial but that were not "absolutely necessary for the purposes of justice". The Ontario high court, for example, adopted the case of *Ehrmann* v. *Ehrmann,* [1896] 2 Ch. D. 611 which held that ". . . corroboration of evidence already available to a foreign court does not provide a basis for implementation of letters rogatory." (P. 289). It should be noted, however, that the *Ehrmann* case concerned an application to issue letters of request not an application to implement letters already issued. The English Court set out that the corroboration of evidence already available was not sufficient cause to order the issue of letters of request. The Ontario Court appears to have applied this reasoning to an application to implement letters of request issued by a United States Court. In effect, the Ontario Court looked at the original application in Richmond, Virginia and decided that on the basis of the *Ehrmann* case the letters should not have been ordered to issue at all. The Court used this conclusion as one of the bases for denying the application to implement the letters in Ontario. The Convention does not appear to allow the jurisdiction of implementation to make such a determination. Once it is shown that the evidence is for use at trial it appears that the letter of request must be executed.

(e) In the *Westinghouse* case it was also held that the Court ". . . should take judicial cognizance of the stated public policy in exercising its discretionary power". (P. 291). The Court will not execute a letter of request if to do so would violate the public policy of the state to which the application is made. In this case, a Minister of the Crown had made it clear that the matter was to be regarded as an issue of sovereignty. *Article 12(b)* recognizes that the prejudice of sovereignty or security is a legitimate ground on which to refuse a request. Areas of public policy that are not coincident with issues of sovereignty, however, would not provide the basis for refusing a request under the Convention.

The Convention would have the following efftcts on the principles governing the exercise of the Courts' discretion in executing letters of request:

(a) The requirement that the evidence is to be for a judicial, as opposed to an administrative, tribunal would remain intact.

(b) The requirement that the evidence is to be for trial, as opposed to discovery, could remain intact if a declaration were filed pursuant to Article 23.

(c) It will no longer be necessary to show that the evidence cannot be secured without the intervention of an Ontario Court.

(d) It may no longer be a requirement to show that the evidence is absolutely necessary for the purposes of justice.
(e) The only area of public policy that will furnish grounds for refusal to execute is the sovereignty of the addressed state.

SASKATCHEWAN

At present the *Queen's Bench Rules of Saskatchewan* have no provision for the taking of evidence *ex jure* by "letters of request". *Chapter 1* of the Convention can be enacted in its entirety without changing any established procedures of Saskatchewan for the taking of evidence by letters of request. In effect, the adoption of the Convention would introduce a new procedure for the taking of evidence *ex jure*.

Queen's Bench Rule 310 provides that where a foreign court wishes to obtain evidence of a witness within the jurisdiction of Saskatchewan either by commission rogatoire or by letter of request, the court may on the ex parte application of someone duly authorized to make such an application make such orders as may be necessary.[1]

It is not clear if the Saskatchewan rules and the Convention are complimentary on the procedure for entertaining letters of request. *Rule 310* requires an application by a person duly authorized by the foreign court. The Convention does not appear to require an application. *Article 2* requires the designation of a central authority to receive letters of request. The central authority either executes the letter or transmits the letter to an authority that is competent to execute it. The Convention appears to by-pass the requirement of an *ex parte* application. It would be possible to maintain the Saskatchewan procedure under the Convention in the following way: It would be possible to designate a government agency such as the Attorney General as the central authority. The Court of Queen's Bench could be designated as the authority competent to execute letters of request. It would then be incumbent on the Attorney General to transmit the letters to the Court of Queen's Bench. This process of transmission could fulfil the requirement of an *ex parte* application pursuant to *Queen's Bench Rule 310*. In effect, the Attorney General, as the central authority, would become the person duly authorized to make the application on behalf of the foreign court. The *ex parte* application could be the method of transmission.

The procedure to be followed in obtaining evidence for foreign tribunals is set out in *Queen's Bench Rules 310 to 314. Article 9* provides that the authority executing a letter of request shall apply its own law as to the methods and procedures to follow. Saskatchewan could, therefor, adopt the Convention and maintain the procedures found in the rules. *Article 9* also provides that a "requested jurisdiction" shall follow a certain method or procedure that is indicated by a requesting jurisdiction as long as it is not incompatible with the procedure of the "requested jurisdiction". This provision corresponds to *Queen's Bench Rule* which provides that the court may direct the examination to be taken in the manner requested by the commission rogatoire or letter of request from the foreign court.

Queen's Bench Rules 310 and *311* allow the Court of Queen's Bench discretion in whether or not to give effect to the letter of request. It is provided that the court *may* make such orders. There is a similar discretionary provision in section 53 of *The Saskatchewan Evidence Act*, which allows the Court of Queen's Bench to direct by order the examination of persons on a foreign commission. This discretion would, by virtue of *Article 12* of the Convention, be changed to an obligation, as long as the request is in accordance with the Convention.[2]

The Saskatchewan Evidence Act is silent on what privileges a witness being examined under a commission, process or order from another jurisdiction would have. Therefore, it is difficult to assess the impact of *Article 11* on applications brought under this Act. Because *the Canada Evidence Act* has *concurrent* effect with the provincial Evidence Act a witness being examined pursuant to an application under this Act would have those privileges set out in *section 47*. The Convention might have the effect of expanding those privileges to include, not only those available in the state of execution, but also those available in the state of origin.[3]

Although there is no provision for the taking of evidence by the issuing of letters of request in Saskatchewan, *Queen's Bench Rule 289* does provide that the court may, where it appears necessary for the purposes of justice, make any order for the examination of any person at any place. The order for the examination is found in *Form 24*. The order provides for the appointing of a special examiner for the purpose of taking the examination, cross-examination and re-examination viva voce of the witnesses.

It should be noted that the Convention does not purport to deal with the principles or prerequisites that govern the application for, and subsequent issuance of, the order for examination. The Convention comes into effect at the point at which there is a valid order under *Queen's Bench Rule 289*.

Articles 15, 16 and *17* deal with the rights of a person appointed to take evidence in another jurisdiction. The same observations pertain to these provisions as were made in respect to Manitoba and Ontario.

The actual procedure governing examiners appointed pursuant to *Queen's Bench Rule 289* is found in *Queen's Bench Rules 291* to *303*. *Article 21(d)* provides that evidence may be taken in the manner provided by the law applicable to the court in which the action is pending. This is subject to the proviso that the manner is not forbidden by the law of the state where the evidence is taken. The Convention would give effect to the Saskatchewan provisions as long as they are not actually forbidden by the jurisdiction in which the evidence is to be taken.

Queen's Bench Rule 294(4) provides that if a witness objects to any question the question and the objection shall be taken down and transmitted to the court to determine their validity. Under *Article 21(e)* a person requested to give evidence may invoke the privileges that are provided for by *Article 11*. *Article 11* grants the person being examined the privileges of the state of execution, the state of origin, or of a third state if a declaration has been filed.

These provisions do not conflict. The Saskatchewan provision provides a procedure for determining the validity of an objection. The Convention defines the limits within which objections can be made. The provisions for recognizing foreign commissions are those mentioned earlier in dealing with foreign letters of request i.e. *Queen's Bench Rule 310* and *section 53* of *The Saskatchewan Evidence Act*. These sections contemplate that a person duly authorized on behalf of a foreign tribunal may apply to the Court of Queen's Bench. Upon considering the application the court may make an order to give effect to the commission. These provisions are identical to the procedure outlined in *Article 18* which allows that a person authorized to take evidence may apply to the competent authority for appropriate assistance to obtain evidence by compulsion.

The provisions of the Convention pertaining to letters of request can be enacted in Saskatchewan with the following changes:

(1) As a jurisdiction of origin Saskatchewan would acquire a new procedure for the taking of evidence *ex jure*.
(2) As a jurisdiction of execution the Saskatchewan court's discretion in granting orders to give effect to letters of request would be subject to *Article 12*.

The provisions of the Convention pertaining to commissioners could be enacted with virtually no effect on the present procedure in Saskatchewan. The Convention would create a distinction between duly appointed commissioners and diplomatic or consular officials. This distinction does not appear in the *Queen's Bench Rules. Article 21(b)* and *(c)* of the Convention might add to the procedure for requesting witnesses to appear at an examination.

FOOTNOTES: SASKATCHEWAN

1. *The Queen's Bench Rules,* r. 310.
2. *The Saskatchewan Evidence Act,* R.S.S. 1978, c. S-16, s. 53. See Ontario Footnotes 6 and 8 for a discussion of the principles governing the execution of letters of request from foreign jurisdictions.
3. See Ontario Footnote 6.
   See also Manitoba Footnote 4.

ALBERTA

In Alberta, where the testimony of a person who is resident outside of Alberta is required, the most common procedure is for the court to order the issue of a commission. *Rule 290* of the *Alberta Rules of Court* provides however, that if the court so orders "there shall be issued a request to examine witnesses in lieu of a commission".[1] Although the procedure of issuing a letter of request is recognized by the *Alberta Rules of Court* there is no form setting out the contents of such a letter. It would, therefore, be possible for Alberta to adopt the provisions concerning letters of request without changing existing forms and procedures.

Rule 270(2) says that "where the testimony of a person who is resident otuside Alberta is required, the court may order the issue of a commission for the examination of the person".

Rule 270(3) provides that the examination be conducted in accordance with the practice of examination of witnesses at trial. Following this rule there are a number of specific provisions pertaining to the conduct of the examination (Rules 271 to 289). The Convention, by virtue of *Article 21(d)* would ensure that these rules would be followed.

The order for the commission to examine a witness is in *Form E*. Paragraph 3 of *Form E* instructs the commissioner to cause the witnesses to come forward to answer such questions as shall be put to them. There is, however, no instruction as to how the commissioner is to cause the attendance of the witnesses. *Article 21(b)* would add the stipulation that the request to a person to appear shall be in the language of the jurisdiction in which the examination is to take place. This requirement does not, however, pertain to witnesses who are nationals of the jurisdiction in which the action is pending. *Article 21(c)* would further add that the request shall inform the person that he may be legally represented and that, in certain instances, he is not compelled to appear or to give evidence. These provisions of the Convention would add to the list of instructions issued to the commissioner in *Form E*.

The *Alberta Rules of Court* contemplate that wherever the evidence is to be taken by commission the commissioner is to be appointed by an order pursuant to *Rule 270(2)* and *Form E*. The Convention, however, appears to grant to diplomatic officers or consular agents the right to take evidence. The Convention, in *Articles 15* and *16* makes no reference to these officials being duly appointed i.e. by the procedure that is set out in *Form E*. *Article 17* does refer to commissioners who are duly appointed. This distinction would appear to introduce another official with the right to take evidence into the practice of Alberta.

Rule 272 deals with a party who refuses to attend before a commissioner. On proof of the refusal to attend by certificate of the examiner, the party requiring the attendance may apply to the court for an order directing the person to attend. The Convention provides another method of compelling the appearance of a witness. *Article 18* allows that a contracting state may declare that a commissioner may apply to an authority designated by the declaring state, for appropriate assistance to obtain the evidence by compulsion. In those situations where the state in question has filed such a declaration an alternative would exist. *Article 18* would not however eliminate or replace *Rule 272*. There would still be the need for a procedure to compel the attendance of witnesses in jurisdictions that have not filed a declaration. There is nothing in the Convention to guarantee that such an order would be enforced in another jurisdiction but there is nothing in the Convention to prohibit the use of such a procedure.

Section 57(1) of The Alberta Evidence Act deals with receipt of letters of request and commissions that originate in another jurisdiction.

Although letters of request are not specifically mentioned it is assumed that they would be embraced by the phrase "other process". The section provides that the court may order the examination of the witness in the manner and form directed by the commission order or other process. *Section 57(3)* provides that the order may be enforced in the same way as are orders issued by the court in actions pending before it. These provisions are in complete accordance with *Articles 9* and *10* of the Convention.[2]

Section 57(5) pertains to the right of a person being examined to refuse to answer questions. It allows that a person may refuse to answer all questions that he would have a right to refuse in an action pending before a court by which the order for examination was made. *Section 57(5)* corresponds to *Article 11* of the Convention. *Article 11* would, however, extend the rights to refuse to answer questions to include those that the person would have in the jurisdiction in which the action is pending. It is unlikely that *Article 11* would make any practical difference to *section 57(5)*. There is, however, the potential that the scope of privilege offered thereunder would be widened.[3]

On the wording of *section 57* it is clear that the court has a discretion in dealing with requests from other jurisdictions. The Convention would narrow this discretion to the extent that the only grounds for refusing to execute a letter of request would be those found in *Article 12*.

By virtue of *section 57* Alberta is in the position of a jurisdiction that has declared that a commissioner may apply to a competent authority for appropriate assistance to obtain evidence by compulsion. The procedure and discretion contemplated by *Article 18* are already in existence in Alberta.

In so far as letters of request are concerned the Convention, if applied to Alberta, would give procedural form to the method that is recognized by *Rule 290*. In regard to the receipt of letters of request from another jurisdiction the Convention would create an obligation where presently there is a discretion in the court. The only grounds for avoiding this obligation are set out in *Article 12*.

The Convention, in so far as it relates to commissions, could be applied to Alberta with the following changes:

(1) *Article 21(b)* and *(c)* would add to the instructions that are given to a commissioner by virtue of *The Alberta Rules of Court* and *Form E.*

(2) The Convention would introduce a distinction between commissioners duly appointed pursuant to *Rule 270,* on the one hand, and diplomatic or consular officials on the other. Such a distinction does not appear in the *Rules of Court* at present.

FOOTNOTES: ALBERTA

1. *The Supreme Court Rules,* r. 290.
2. *The Alberta Evidence Act,* R.S.A. 1970, c. 127, s. 57(1), as am. by *The Court of Queen's Bench Act,* S.A. 1978, c. 51, ss. 28, 38(2)(b).
   For a discussion of the principles governing the execution of letters of request from foreign jurisdictions see Ontario Footnotes 6 and 8.
3. See Manitoba Footnote 4.

BRITISH COLUMBIA AND THE YUKON TERRITORY

The *Judicature Ordinance* of the Yukon Territory adopts the Rules of the Supreme Court of British Columbia.[1] Consequently any reference to the British Columbia rules will also apply to the Yukon Territory.

In British Columbia the court may order the examination of a person residing outside British Columbia under the provisions of *Rule 38(5).*[2] If the person to be examined is unwilling to testify or, if for any other reason the assistance of a foreign court is necessary, the court may order that a letter of request be issued.

Rule 38(6)(a) requires that the letter of request be sent to the Under Secretary of State for External Affairs of Canada for transmission to the appropriate authority. The Convention would leave this procedure intact as it does not purport to regulate the procedure or channels through which a letter of request is issued.

Rule 38(6)(a)(i) requires that the letter shall have attached to it any interrogatories to be put to the witnesses. This requirement is provided for by *Article 3(f)* of the Convention.

It is also required that the letter contain a list of names, addresses, and telephone numbers of the solicitors or agents of the parties both in British Columbia and in the other jurisdiction. *Article 3(b)* also requires the names and addresses of the representatives of the parties although there is no requirement for the telephone numbers.

Rule 38(6)(a)(iii) provides that the letter have attached to it a copy of the letter of request translated into the appropriate official language of the jurisdiction where the examination is to take place. This requirement corresponds to *Article 4* which states that a letter of request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

The provision that the party requesting the order be responsible to the Under Secretary of State for costs does not conflict with *Article 14* which stipulates that the execution of the letter shall not give rise to reimbursements of costs. *Article 14* does specify certain instances in which the state of execution has the right to require the state of origin to reimburse expenses. It is these expenses to which the undertaking of responsibility mentioned in *Rule 38(6)(b)* relates.

The contents of the letter are set out in *Form 32:*

(a) The letter is addressed to the judicial authority of the requested jurisdiction and identifies the authority requesting the execution in correspondence to *Article 3(a).*

(b) The letter contains a brief description of the cause of action or the nature of the plaintiff's claim. This corresponds to *Article 3(c).*

(c) *Form 32* does not make a provision for the identification of the parties as is required by *Article 3(b).*

(d) The letter sets out the names and addresses of the persons to be examined as required by *Article 3(e). Form 32* also contains a request to examine those persons that the solicitors or agents of the parties mutually request in writing to be so examined. There is no similar provision in the Convention which appears to require the identification of all persons to be examined in the letter of request itself. It is possible, however, that such a request would be recognized through *Article 9* which allows a special method or procedure to be requested and followed.

(e) There is a request to summon the solicitors or agents of the parties and the witnesses to be examined to attend before a person competent to take deposition examination of witnesses. This request would be encompassed by *Article 3(d)* which requires the specification of the judicial act to be performed.

(f) There is a request that the witness be examined orally or by interrogatories in the presence of the solicitors or agents

of the parties. This request can also be effected through the provisions of *Article 9*.

(g) *Form 32* contains a request to permit the solicitor or agent of any parties to examine any witness called by him. There is a further request to permit the solicitor or agent of any opposing party to cross-examine the witness and the solicitor or agent of the party calling the witness to re-examine him. There is no similar provision in the Convention. It can be seen that through *Article 7* and *9* the Convention does encompass such a request. *Article 7* gives the parties and their representatives the right to attend the examination and *Article 9* gives the right to have a special method or procedure followed unless it is incompatible with the internal law of the state of execution.

(h) The requests to record the evidence of each witness verbatim, to mark documents produced for identification, to authenticate the depositions by a seal of the tribunal, can again, all be realized through *Article 9*.

The procedure for the receipt and execution of letters of request is found in *section 51(1)* of *The Evidence Act* of British Columbia.[3] The section refers to commissions, orders, or other process which presumably includes letters of request. It is provided that the court may order the attendance of the persons mentioned for the purpose of being examined. It is also provided the court may order the production of any writings or other documents mentioned in the order from the foreign tribunal. It would be possible to designate the Supreme Court as the central authority to receive letters of request as provided by *Article 2*.

The procedure used to be that one would make an application by motion for the purpose of showing that a court in a foreign jurisdiction had authorized obtaining the testimony. If the motion was successful an order compelling the attendance of the desired witness would issue. This section has been amended to delete the words "upon application by motion for this purpose[4]." Now it is only incumbent on the foreign jurisdiction to show that a court in that jurisdiction has duly authorized obtaining the evidence. This authorization can, of course, be shown in the letter of request itself.

The section also allows the examination to take place in the manner and form directed by the commission, order or other process. This is in complete accordance with *Article 9*. It is also provided that the order may be enforced and any disobedience thereof

punished in the same manner as are orders of the court in causes before it. This corresponds to *Article 10* which provides that in executing a letter of request the requested authority shall apply the appropriate measures of compulsion as are used in internal proceedings.

Section 51(3) grants a person being examined under such a commission, order or other process those rights to refuse to answer questions and privileges that he would have in an action pending in British Columbia.[5] *Article 11* has the potential of expanding the scope of privilege available as it provides that a person being examined may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence under the state of execution or the state of origin.

The adoption of the Convention in British Columbia would result in minimal changes to the procedure concerning letters of request. They are as follows:

(1) The Convention does not require the letter of request to contain the telephone numbers of the representatives of the parties whereas the British Columbia rules do.
(2) The Convention requires that the letter of request identify the parties to the action whereas the British Columbia rules do not.
(3) The Convention would allow for the production of documentary evidence. This is not provided for in *Form 32*.
(4) The Convention would narrow the discretion exercised when giving effect to letters of request under *section 51(3)* of *The Evidence Act* of British Columbia to an obligation which can only be avoided within the terms of *Article 12*.
(5) It is possible that *Article 11* would extend the scope of privilege available to a witness being examined in British Columbia.

Where the person to be examined is willing to testify there can be an order appointing an examiner to take the evidence. *Rule 38(1)* provides that a person may be examined before an official reporter or such other person as the court may direct. The rules appear to provide that in all cases where evidence is to be taken out of British Columbia the court shall appoint the examiner. *Articles 15, 16* and *17* draw a distinction between examiners duly appointed (under a court order) and diplomatic or consular officials. *Articles 15* and *16* appear to give these diplomatic or consular officials the right to take evidence whether or not they have been authorized by the court. The

Convention would, therefore, in effect introduce a new group of officials with the power of taking evidence into the practice of British Columbia.

The instructions to the examiner appointed by the order are contained in *Form 30*. The instructions contemplate that a person being examined be summoned by a subpoena served by the party wishing the examination. The Convention provides that a request to a person to give evidence shall:

(a) be in the language of the place where the evidence is to be taken unless the recipient is a national of the state where the action is pending;
(b) inform the person he may be legally represented; and
(c) in certain instances inform him that he is not compelled to attend.

These provisions of *Article 21(b)* and *(c)* would alter the procedure for summoning witnesses to give evidence.

The provisions governing the conduct of such an examination are found in *Rule 38*. *Rule 38(5)(a)* provides that in so far as is practical this rule, i.e. *Rule 38*, which governs examinations and depositions generally, applies to the examination of a person residing outside British Columbia. In the words "so far as is practical" it is realized that in all cases the provisions of *Rule 38* will not be able to be followed in another jurisdiction. An example of this would be where the procedure stipulated by *Rule 38* is forbidden by the law of the jurisdiction in which the examination is to be conducted.

It can be seen that the Convention and the British Columbia rules are in accordance on this point. *Article 21(d)* allows that the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending. The only reservation on this direction is where the manner of taking evidence is actually forbidden by the law of the state where the evidence is to be taken. In most cases, therefor, it would be possible for the provisions of *Rule 38* to be followed.

By virtue of *section 51(1) of The Evidence Act* of British Columbia there exists the same procedure that is set out in *Article 18* of the Convention. Both section 51(1) and *Article 18* provide that a commissioner may apply to a designated authority for an order to compel the attendance of witnesses.

The Convention, in so far as it relates to commissions, could be adopted in British Columbia without greatly affecting the procedures as set out in *British Columbia Rules of Court*. The major change would be in the distinction drawn between diplomatic or consular officials and duly appointed commissioners. This distinction does not exist at present. The procedure for summoning witnesses to the examination as set out in *Form 30* would be altered by *Article 21(b)* and *(c)*.

The Evidence Ordinance of the Yukon Territory has provisions respecting providing evidence for foreign tribunals.[6] These provisions are analogous to those of *The Evidence Act* of British Columbia and the same comments consequently apply. One difference, however, is that *The Evidence Ordinance* specifies that the application must be by motion. It is possible that the requirement of the motion is in conflict with the provisions of the Convention concerning entertaining letters of request. *Articles 2* to *6* contemplate a direct application to a designated central authority. There is no requirement for an application by motion. The letter of request itself is the application. It might be possible to continue the procedure required by the *Evidence Ordinance* in the following way. It would be possible to designate a government agency as the central authority for the receipt of letters of request pursuant to *Article 2*. It would also be possible to designate the Territorial Court of the Yukon Territory as the authority competent to execute letters of request. It would then be incumbent on the central authority to transmit the letters of request to the territorial court. It might be possible to transmit, or bring letters of request before the court, in an application by motion. In effect the central authority would transmit the letters of request to the court in the application.

The Convention could therefore be applied to the Yukon Territory with the same effects as were noted in relation to British Columbia. In giving effect to letters of request from foreign jurisdictions pursuant to section 64 of *Evidence Ordinance* an obligation to execute would be created where presently there is a discretion. By virtue of *section 64(3)* a person being examined in the Yukon Territory has the same right to refuse to answer questions that he would have in an action pending before the court that ordered his examination. This right would be extended by virtue of Article 11 to include those privileges available in the jurisdiction of origin.[7]

In respect to a commissioner's application for assistance, section 64(3) of the *Evidence Ordinance* corresponds exactly to *Article 18* of the Convention.

FOOTNOTES: BRITISH COLUMBIA; YUKON TERRITORY

1. *Judicature Ordinance*, R.O.Y.T. 1971, C. J-1, s. 14.
2. *Rules of Court*, r. 38(5).
3. *The Evidence Act*, R.S.B.C. 1960, c. 134, s. 51(1), as am. by *Miscellaneous Statutes (Court Rules) Amendment Act 1976*, S.B.C. 1976, c. 33, s. 86. For a discussion of the principles governing the execution of letters of request from foreign jurisdictions see Ontario Footnotes 6 and 8.
4. *Miscellaneous Statutes (Court Rules) Amendment Act 1976*, as in Footnote 3.
5. See Manitoba Footnote 4.
6. *Evidence Ordinance*, R.O.Y.T. 1971, c. E-6, s. 64.
7. See Manitoba Footnote 4.

NOVA SCOTIA AND PRINCE EDWARD ISLAND

The Civil Procedure Rules of Nova Scotia and *Prince Edward Island* contain identical provisions in regard to the taking of evidence out of province. They will, consequently be referred to as one. *Rule 32.01(1)(b)* allows the court to order the examination of a person in another jurisdiction before a person appointed by the court.[1] *Rule 32.01(1)(c)* recognizes that other jurisdictions may not allow the Nova Scotia appointed examiner to conduct the examination. In such a situation the rule allows the court to issue a letter of request to the judicial authorities of the other jurisdiction to take or cause to be taken the evidence of the person in that jurisdiction.

Rule 32.02(1) contemplates that the letter of request will be sent to the Under Secretary of State for External Affairs of Canada.

The adoption of the Convention would not necessarily change the procedure of using the Under Secretary of State for External Affairs for transmitting requests. *Article 2* governs the receipt of the letters but does not purport to regulate the channels through which a letter of request is issued.

Rule 32.02(1)(a) requires that the letter shall have attached to it pleadings and other documents that will inform the examiner of the facts in issue. This requirement corresponds to *Article 3(c)* which requires a letter of request to specify the nature of the proceeding and all the necessary information in regard thereto.

Rule 32.02(1)(b) requires that any interrogatories and cross-interrogatories to be put to the person being examined be attached to the letter. This requirement corresponds to *Article 3(f)* which requires that the questions to be put to the person being examined accompany the letter.

Both the rules *(32.02(1)(c))* and the Convention *(Article 3(b))* provide for the inclusion of the names and addresses of the representatives of the parties. The Convention further requires the names and addresses of the parties themselves to be included, whereas the rules have no such requirement.

Rule 32.01(1)(d) requires the documents attached to the letter to be translated into the official language of the country where the examination is to take place. The rule does not apparently require that the letter itself be so translated. *Article 4* provides that requests in English or French shall be accepted. It is possible, however, for a contracting state to declare that it will only receive letters that have been translated into its official language. There is, therefore, the potential that a letter of request may have to be issued or translated into a language other than English.

Rule 32.02(2) contemplates that the party obtaining the order will be responsible for all the charges and expenses incurred by the Under Secretary in respect of the letter of request. *Article 14* provides that the execution of the letter of request shall not give rise to any reimbursement of costs. The second paragraph outlines situations in which the state of origin may be responsible for some costs. *Article 14* does not, however, conflict with *Rule 32.02(2)*. The rule only provides that the party be responsible for costs if there are any. It does not purport to fix responsibility for all costs in every situation on the requesting party. The Convention and the rules are in fact mutually complimentary on the point of costs.

The actual form of the letter is found in *Form 32.02D*. The letter of request is:

(a) Addressed to the judicial authority of the requested jurisdiction. This corresponds to *Article 2* which provides that requests be entertained by a central authority.

(b) The authority requesting the execution is identified. This identification corresponds to the requirement of *Article 3(a)*.

(c) The plaintiff and the defendant are identified. *Article 3(b)* of the Convention also provides for the naming of the parties although the Convention also requires that their addresses be included. This is not a requirement of *Form 32.01D*.

(d) There is a provision by which the nature of the action is described. This corresponds to *Article 3(c)* which also re-

quires a description of the nature of the proceedings for which the evidence is required.

(e) The parties to be examined are identified in the Form. This identification corresponds to *Article 3(e)* of the Convention. *Form 32.01D* is somewhat broader on this point than the Convention. The Form also contains a request for the examination of such other persons as the solicitors or agents of the parties mutually request in writing. There is no similar provision in the Convention which appears to require the identification of all the parties to be examined in the letter of request itself.

(f) There is a request that the representatives of the parties and the person to be examined be summoned before a person competent by the procedure of the requested jurisdiction to take the examination of witnesses. This request would be encompassed by *Article 3(d)* which requires the specification of judicial act to be performed.

(g) There is a request to examine the person, orally or by interrogatories, in the presence of the solicitors or agents of the parties. This request would be encompassed by *Article 3(i)* which provides for the specification of a special method or procedure to be followed in taking the evidence.

(h) The *Form* contains a request that the solicitors or agents of any part be permitted to examine any person that may be produced on his behalf. There is, furtherance of this provision, a request that the opposing party be permitted to cross-examine and finally that the party producing the person for examination be permitted to re-examine. The Convention contains no similar provisions. It is possible, however, that this special request can be realized through the general provisions of *Article 3(i)* and *Article 9*. *Article 9* provides that a requested authority shall give effect to a special method or procedure unless it is incompatible with the law of that requested jurisdiction. *Article 7* ensures that the parties and their representatives may be present at the examination. It is possible that this *Article* implicitly allows for the examination, cross-examination and re-examination provided for in *Form 32.01D*. If it does not so allow, the mere provision for the attendance of the parties and their representatives would be of little importance. It is possible, therefore, that the request for examination, cross-examina-

tion and re-examination can be effected through the combination of *Articles 9* and *7*.

(i) There is a request that evidence be reduced to writing and that documents produced on the examination be marked for identification. This request can, again, be realized through *Article 9*.

(j) The final request is for the examination to be conducted in accordance with the enclosed instructions with such modifications as may be necessary. This request recognizes that all the instructions may not be followed completely. This provision for modification corresponds to *Article 9* which ensures that a request for a special procedure will be followed, but only to the extent that it is not incompatible with the internal law of the state of execution.

The two jurisdictions differ somewhat in their provisions for dealing with letters of request from other jurisdictions. In Nova Scotia *section 64* of the *Evidence Act* provides that it is lawful for the Supreme Court or a judge thereof to direct the examination of the persons whose examination is desired.[2] Nova Scotia can comply with the Convention in this respect by simply designating the Supreme Court of Nova Scotia as the central authority in accordance with *Article 2*. *Section 64* corresponds to *Article 9* to the extent that it provides for the conduct of the examination to be in accordance with the manner described in the commission. There is also the provision that the examination be taken before such person as the court directs. This would allow the court to appoint the person to conduct the examination as well as to confirm the authority of a commissioner appointed by another jurisdiction.

Section 65 adopts the *Foreign Tribunals Evidence Act* and provides that the Supreme Court, on receipt of a letter of request or other evidence showing that a foreign tribunal is desirous of obtaining the evidence of a witness within Nova Scotia, may on the application of a person duly authorized, make such orders that are necessary to give effect to the letter of request. Again, this section can be continued by designating the Supreme Court of Nova Scotia to be the authority for receiving letters of request.

Section 66 also corresponds to *Article 9* in that it provides that a judge may direct the examination to be taken in such manner as may be requested by the commission rogatoire or letter of request. If there is no special request then the examination is taken in the manner prescribed by the rules.

The *Evidence Act* of Nova Scotia is silent on the question of privileges available to a person being examined under such a procedure. It is therefore difficult to assess the impact of *Article 11* on applications under this Act. If, however, an application is made under the *Canada Evidence Act, section 47* provides that a person being examined . . . "has the right to refuse to answer questions tending to criminate himself, or other questions as a party or witness, as the case may be, would have any cause pending in the court by which, or by a judge whereof, the order is made".[3] *Article 11* has the potential of extending these privileges to include those recognized in the state of origin.

In Prince Edward Island since there is no provision for the recognition of letters of request from other jurisdictions under the provincial *Evidence Act,* such recognition can be found under the *Canada Evidence Act.* The procedure contemplated by the Convention is provided for by *section 43.* The only change would be that under *section 43* giving effect to an application is discretionary whereas under the Convention it is mandatory subject to *Article 12.* The comments concerning the scope of privileges available to a person examined pursuant to a letter of request made in relation to Nova Scotia pertain equally to Prince Edward Island.

It can be seen that the adoption of the provisions of the Convention pertaining to letters of request would not require great changes in the present practice of Nova Scotia and Prince Edward Island. Following are a list of those changes:

(1) The Convention requires the addresses of the parties to be included in the letter of request whereas *The Civil Procedure Rules* have no such requirement.
(2) It is conceivable that a letter of request may have to be issued in a language other than English.
(3) The Convention does not provide for the examination of witnesses that are not identified in the letter of request itself. It is possible that this request of the solicitors or agents of the parties can be accommodated by *Article 9.*
(4) *Article 3(g)* allows for the specification of the documents or other property real or personal to be inspected. This would expand the scope of the letter of request which in Nova Scotia and Prince Edward Island contains no similar provision.
(5) *Article 11* may have the effect of expanding the scope of privileges available to a person being examined in Nova

Scotia and Prince Edward Island pursuant to a letter of request from another jurisdiction.

(6) The discretion in whether or not to give effect to a letter of request under *sections 65* to *67* of the *Evidence Act* of Nova Scotia or section 43 of the *Canada Evidence Act* would be narrowed so that the only grounds for refusal would be those found in *Article 12*.

Civil Procedure Rule 32.01(b) of Nova Scotia and Prince Edward Island provides that where a person to be examined resides outside the jurisdiction and in a country that allows a person in that country to be examined before a person appointed by a court an order in *Form 32.01B* must issue. In the case of *Clow* v. *Clow and Healy* there was included a Practice Note which said "Provision for the taking of evidence by commission seems to have been purposely omitted from the 1941 Rules of the Supreme Court. The same end is now achieved by the appointment of a special examiner . . ".[4] These comments are equally applicable to the present rule that provides for the appointment of a special examiner.

Article 17 of the Convention deals with persons duly appointed as a commissioner. It is probable that this Article also extends to persons duly appointed as special examiners and therefore recognizes and encompasses the Nova Scotia and Prince Edward Island procedure.

When evidence is to be taken out of the jurisdiction by a special examiner the practice of Nova Scotia and Prince Edward Island requires the examiner to be appointed by an order in *Form 32.01B*. It is important to note that these *Articles* do not make reference to these officials being duly appointed whereas *Article 17* does. The Convention appears to give diplomatic and consular officials the right to take evidence whether or not they have been duly appointed. The Convention would have the effect of by-passing the procedure laid down for the appointing of examiners when those examiners are the officials mentioned in *Articles 15 and 16*. The Convention would change the procedure of Nova Scotia and Prince Edward Island to the extent that it adds a class of persons by whom evidence may be taken. There would be duly appointed examiners deriving their authority from an order in *Form 32.01B* and there would be diplomatic and consular officials deriving their authority from their office.

The order for the examination of persons out of jurisdiction is found in *Form 32.01B*. *Article 21(b) and (c)* requires that the

request to a person to give evidence shall be in the language of the place where the evidence is taken. There is an exception where the person being examined is a national of the state where the action is pending. Furthermore the request shall inform the person that he may be legally represented and, in some instances, that he is not compelled to appear or give evidence. Since *Form 32.01B* is silent on the form and content of a request to appear it is not clear if the Convention would precipitate any changes. It is likely, however, that *Article 21(b) and (c)* would introduce new requirements to the procedure for summoning witnesses to appear.

The provisions for the actual conduct of the examination are found in *Rules 32.05 to 32.11*. The order itself contains the provision that the examination shall be conducted in accordance with the enclosed instructions with such modifications as may be necessary. These provisions correspond to *Article 21(d)* which allows that the evidence may be taken in the manner provided by the law of the jurisdiction where the action is pending provided that such manner is not forbidden by the law of the state where the evidence is taken. If the manner applicable, by virtue of *Rules 32.05* to *32.11* is forbidden in the jurisdiction of execution, the order allows for a modification of the manner, presumably to accommodate a manner of taking evidence which is not forbidden in that jurisdiction.

In dealing with applications for assistance from commissioners duly appointed by authority of another jurisdiction both Prince Edward Island and Nova Scotia have in place the procedure contemplated by *Article 18* of the Convention. By virtue of *section 43* of the *Canada Evidence Act* and in addition in Nova Scotia *sections 65, 66 and 67* of the *Evidence Act* of Nova Scotia both jurisdictions provide for the receipt of an application for assistance from a person duly appointed as a commissioner. In adopting the provisions of the Convention that relate to commissions the only change would be in the distinction made between diplomatic officers or consular agents and persons duly appointed as examiners (commissioners), a distinction that does not exist at present. It is also possible that *Articles 21(b) and (c)* would change the procedure for summoning witnesses to appear.

FOOTNOTES: NOVA SCOTIA; PRINCE EDWARD ISLAND

1. *Civil Procedure Rules*, s. 32.01(1)(b).
2. *Evidence Act*, R.S.N.S. 1967, c. 94, s. 64.
   For a discussion of the principles governing the execution of requests from foreign jurisdictions see Ontario Footnotes 6 and 8.

3. *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 47.
For authority for the proposition that there can be an application under either the federal or provincial statute see Ontario Footnote 6.
4. *Clow* v. *Healey*, [1947] 2 D.L.R. 75 (P.E.I. C.D.).
This case would presumably be applicable to all instances in which the order appointing a special examiner has replaced the order for a commission.

NEW BRUNSWICK

The *Rules of the Supreme Court* of New Brunswick contain no reference to letters of request. The Convention would, therefore, create a new procedure for the taking of evidence out of jurisdiction in the practice of New Brunswick.[1]

In New Brunswick by virtue of *Order 37 Rule 5* the court or judge may make any order for the examination of any person at any place.[2] Within this broad power is the specific provision for issuing an order for a commission.

The writ of commission is set out in *Form 9 Appendix J* of the *Rules*. The writ appoints the commissioner and contains instructions concerning giving notice of and conducting the examination. The commissioner is authorized to take *viva voce* and interrogatory evidence.

Article 21(a) authorizes a commissioner to take all kinds of evidence which are not incompatible with the law of the state where the evidence is taken. *Article 21(d)* allows that the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the state where the evidence is taken.

Order 37 Rule 6 allows that the form may be subject to such variations as the circumstances require. Presumably the circumstances requiring variation would arise both when the kind of evidence to be taken is incompatible with the law of the state where the evidence is taken and when the manner of taking the evidence is actually forbidden in that state. It can be seen that this provision in the rules encompasses the reservations expressed in *Article 21(a)* and *(e)*. Subject to these reservations the commissioner's instructions contained in the *Rules of the Supreme Court* can be maintained under the Convention.

It is possible that the Convention would add to the instructions to the commissioner contained in *Form 9*. *Article 21(b)* requires that a request to a person to appear be in the language of the place where the evidence is to be taken unless the person is a national of the

state where the action is pending. *Article 21(c)* provides that the request shall inform the person that he may be legally represented, and in some instances that he is not compelled to appear or give evidence. There are no similar instructions to the commissioner in *Form 9*. The Convention would, therefore, have the effect of adding to those instructions.

The order for a commission to examine witnesses is found in *Forms 36* and *37*. There is no conflict between these orders and the Convention.

It appears that in every case in which a commissioner is appointed, the *Rules of the Supreme Court* contemplate that he will derive his authority from an order in *Form 9*. The Convention, however, by virtue of *Articles 15, 16* and *17* creates a distinction between diplomatic or consular officials and duly appointed commissioners. The Convention appears to grant diplomatic or consular officials the right to take evidence whether or not they have been duly appointed by a procedure analogous to or identical with an order in *Form 9*.

Provisions respecting commissioners from other jurisdictions exercising their commission in New Brunswick are found in *sections 30 and 32 of the New Brunswick Evidence Act*.[3] *Section 30* allows a commissioner to summon a witness. If the person refuses to attend the commissioner may apply to the Supreme Court for assistance. This corresponds to *Article 18* of the Convention which says that a contracting state may declare that a commissioner may apply to an appropriate designated authority for assistance to obtain evidence by compulsion. This declaration may contain such conditions as the declaring state may see fit to impose. *Section 31* requires that the application be accompanied by an affidavit of service of a subpoena on the witness. This requirement corresponds to the conditions mentioned in *Article 18*. New Brunswick is in the position of a state that has filed a declaration with certain conditions pursuant to *Article 18* of the Convention. The procedure outlined in *sections 30 and 31* of *the New Brunswick Evidence Act* can remain intact under the Convention.

The adoption of the Convention would have the following changes on the present practices of New Brunswick:

(1) Chapter 1 of the Convention would introduce a new procedure as the *Rules of the Supreme Court* have no provisions concerning letters of request.

(2) The Convention would alter or at least add to the procedure for summoning a witness to appear before a commissioner.
(3) The Convention would create a distinction between duly appointed commissioners and diplomatic or consular officials which does not exist at present.

FOOTNOTES: NEW BRUNSWICK

1. *The Evidence Act* R.S.N.B. 1973, c. E-11, s. 30 refers only to giving effect to commissions; there is no mention of giving effect to letters of request. It would, however, be possible to give effect to letters of request in New Brunswick under the *Canada Evidence Act,* R.S.C. 1970, c. E-10, s. 47. The relationship of the Canada Evidence Act and the Convention is considered under the heading of Nova Scotia and Prince Edward Island. For authority supporting the proposition that an application can be made under either the federal or the provincial Act see Ontario Footnote 6.
2. *The Rules of the Supreme Court,* O. 37, r. 5.
3. *Evidence Act,* R.S.N.B. 1973, c. E-11, s. 30.
For a discussion of the principles guiding the exercise of discretion in respect to executing letters of request from foreign jurisdictions, see Ontario Footnotes 6 and 8.

QUEBEC

By virtue of *Rule 426* of the *Code of Civil Procedure* of the Province of Quebec the court may appoint a commissioner to receive the testimony of any person who resides outside the province.[1] *Rule 429* provides that the judgment appointing the commissioner must set out the instructions to the commissioner. The Rule itself, however, does not contain specific provisions concerning the execution of the commission. Since there are no mandatory requirements in the rules the adoption of the Convention would not greatly alter the practice of Quebec in respect to commissions.

It is possible, however, that the Convention will have an impact on the contents of a judgment appointing a commissioner pursuant to *Rule 429*. Under the Convention such a judgment will have to conform to *Article 21*.

It is also possible that the present procedure of summoning witnesses to appear by subpoena, which is governed by *Rule 280*, will have to change to meet the requirements of *Article 21(b)* and *(c)*. These provisions stipulate that the request to appear must be in the language of the place where the evidence is taken. There is an exception when the witness is a national of the state where the action is pending. The request must also inform the person that he may be legally represented.

The Code does not differentiate between duly appointed commissioners and diplomatic or consular agents. The Convention creates this distinction in *Articles 15, 16, and 17*. It appears to give diplomatic or consular agents the right to take evidence whether or not they have been duly appointed. If this is so the Convention would create a new class of people capable of taking evidence outside Quebec. In addition to the commissioners appointed by virtue of the procedure identical to that contemplated by *Rule 426*, there would be diplomatic or consular agents who would have authority to take evidence by virtue of their position.

The *Code* contains no provisions respecting letters of request. The Convention would, therefore, introduce a new procedure in this area.

Sections 16 to *26* of the *Special Procedure Act* concern evidence taken in the Province of Quebec at the request of a foreign country. *Section 16* is similar in substance to *Article 18* of the Convention. Both the *Special Procedure Act* and the Convention contemplate an application to a designated authority.[2] After considering the application this designated authority (which in Quebec is the Superior Court) may order the witness to be examined and documents to be produced. *Section 23* of the *Special Procedure Act* provides that the provisions of the *Code of Civil Procedure* respecting the competence and examination of witnesses are to be followed when an examination is being conducted pursuant to *section 16*. *Article 21(d)* would also allow the evidence to be taken in the manner provided by the law applicable to the court in which the action is pending. This allowance is only restricted where the manner is forbidden by the law of the state where the evidence is taken. The Convention would, therefore, broaden the scope of the provisions respecting the examination of witnesses.

It is not clear if the *Special Procedure Act* encompasses the procedure contemplated by the Convention in respect to letters of request. If the letter of request itself satisfies the requirement of a petition outlined in section 16 then the procedures are complimentary. The Convention and the *Special Procedure Act* can also be complimentary if the central authority, when transmitting the letter of request to the Superior Court, satisfies the requirement of an application by way of petition.

The Convention when applied to Quebec will have the following effects:

(1) The contents of a judgment appointing a commissioner and the procedure for requesting witnesses to appear will have to conform to *Article 21*.
(2) The Convention will distinguish between duly appointed commissioners and diplomatic or consular agents; this distinction does not appear to exist presently.
(3) The Convention will introduce a new procedure of issuing letters of request.
(4) The discretion enjoyed by virtue of *section 16* of the *Special Procedure Act* in giving effect to letters of request will be narrowed to a mandatory obligation subject to the exceptions granted by *Article 12*.
(5) *Articles 9* and *21(d)* would introduce the practice of taking evidence by letter of request or commission pursuant to a procedure requested by the applicant.

FOOTNOTES: QUEBEC

1 *Code of Civil Procedure*, S.Q. 1965, C.80, a. 429.
2. *Special Procedure Act*, R.S.Q. 1964, c. 22, s. 16.
For a discussion of the principles governing the exercise of discretion in giving effect to a letter of request see Ontario Footnotes 6 and 8.

NEWFOUNDLAND

In Newfoundland, by virtue of *Order 33, Rule 6*, the court may order the issue of a letter of request. The contents of the letter are set out in *Form 22* of *Appendix K* of the *Rules of the Supreme Court*.(1) The letter is:

(1) Addressed to the President and Judges of the state of execution.
(2) The plaintiff and defendant are identified. There is, however, no provision for the inclusion of their addresses, nor is there a provision that identifies their representatives as required by *Article 3(d)*.
(3) The statement of claim is attached to the letter. This practice satisfies *Article 3(c)* which requires the specification of the nature of the proceedings and the furnishing of all necessary information in regard to the proceedings.
(4) The letter identifies the persons to be examined in correspondence to *Article 3(e)*.
(5) There is a request to summon the named witnesses and such other witnesses as the agents of the plaintiff and the defendant request in writing to be so summoned. The Con-

vention appears to require the specification of all the witnesses in the letter of request itself. Under *Article 9* it is possible to request the use of a special method or procedure in the execution of a letter of request. It may be possible to continue the practice of allowing the agents or representatives of the parties to request the summoning of certain witnesses under *Article 9*.

(6) There is a request to cause the examination of the witnesses on the interrogatories that accompany the letter, or *viva voce*, touching the matters in question. This request can be accommodated by *Article 3(f)* which requires the specification of the questions to be put to the witnesses or a statement of the subject matter about which the witnesses are to be examined.

(7) There is a request to conduct the examination in the presence of the agents of the parties. This request is recognized under *Article 7* which provides that the parties and their representatives may be present at the examination.

(8) There is a request to reduce the answers to writing and to mark books, letters, papers and documents produced on examination for identification. Effect can be given to this request under *Article 9* of the Convention.

(9) The request to authenticate the examination can also be accommodated by *Article 9*.

The letter of request as set out in *Form 22* contains no provision for the production of documents or real or personal property. *Article 3(g)* does contain such a provision. Consequently, the Convention would have the effect of expanding the type of evidence available pursuant to a letter of request.

Order 33, Rule 38 deals with the procedure for entertaining letters of request from foreign tribunals. The Rule requires a person duly authorized by the foreign tribunal to make an application to the court in Newfoundland. It is not clear if the requirement for an application by a person duly authorized by the foreign tribunal can be maintained under the Convention. The Convention appears to replace this procedure with the receipt of a letter of request by a designated central authority. The central authority then transmits the letter of request to the authority competent to execute it, i.e. the Supreme Court. It is possible that the letter might be transmitted to the Supreme Court by way of application by the designated central authority. The central authority would in effect replace the person duly authorized by the foreign tribunal.

Order 33, Rule 44 sets out a procedure that is more in keeping with the spirit of the Convention. *Rule 44* allows that a letter of request may be executed without the application of a person duly appointed by the foreign court. The rule provides that when a letter of request is transmitted to the Supreme Court by His Majesty's Secretary of State for the Colonies, with an intimation that effect should be given to it, without requiring an application by the agents or representatives of the parties, the Registrar of the Supreme Court will transmit the letter to the Attorney General, who will make the application. Presumably the Secretary of State for the Colonies is now the Secretary of State for External Affairs for Canada. It would be possible to maintain this procedure under the Convention by designating the Secretary of State for External Affairs as the central authority. The Attorney General could be designated as the authority competent to execute the letters. Part of the execution of the letters would be bringing them before the court as presently required by *Order 38, Rule 44*. Under this *Order* giving effect to a letter of request is a matter of discretion. Under the Convention this discretion would be removed; the grounds for refusing to give effect to a letter of request would be those set out in *Article 12*.[2]

Under *Order 33, Rule 42* it is possible for the court to direct the examination to be taken in the manner indicated in the letter of request. If no particular manner is requested the examination is to be governed by the Newfoundland rules that pertain to the examination of witnesses generally, i.e. *Order 33, Part II*. These provisions correspond exactly to *Article 9* of the Convention.

The Newfoundland Rules are silent as to the privileges available to a person being examined pursuant to a letter of request. It is, therefore, difficult to assess the impact of the Convention in this area. Under the Convention a witness being examined pursuant to a letter of request in Newfoundland would have those privileges and rights to refuse questions that are set out in *Article 11*.[3]

The provisions of the Convention relating to letters of request could be applied to Newfoundland with the following effects:

(1) It would be incumbent on Newfoundland to include the addresses of the parties and the names and addresses of their representatives in the letter of request.

(2) The Convention would extend the type of evidence available pursuant to a letter of request to include documents and real and personal property.

(3) The discretion the judge now has in whether or not to execute a letter of request would be replaced by a mandatory obligation to execute.

Order 33, Rule 4 and *5* also allows the court to order a commission to take the evidence of a witness who is out of Newfoundland. The commissioner, by virtue of the writ of commission in *Form 4* of *Appendix J*, is instructed to take *viva voce* and interrogatory evidence. Under *Article 21(a)* interrogatory and viva voce evidence will continue to be available as long as the taking thereof is not incompatible with the law of the state where the evidence is taken.

The writ also instructs the commissioner to allow the parties to examine, cross-examine, and re-examine all witnesses. This manner of taking evidence will be continued under *Article 21(a)* as long as it is not actually forbidden by the law of the state where the evidence is taken.

Order 33, Rule 4 allows that the writ may be subject to such variations as circumstances require. This provision would appear to accommodate those instances in which the manner of taking evidence outlined in the writ is forbidden by the state in which the evidence is taken. It would also appear to accommodate those instances in which the kind of evidence to be taken is incompatible with the law of the state in which the evidence is taken. Under *Order 33, Rule 4* it would be possible to vary the writ to eliminate the incompatibility. There is, therefore, correspondence between the Convention and the Newfoundland rules in respect to the manner of taking evidence and the kind of evidence that can be taken by a commission.

There are general provisions of the rules dealing with the examination of witnesses that also extend to commissions. (*Order 33, Rules 4* to *25*). The Convention corresponds to these provisions in the same way as it corresponds to the writ for a commission. The practice of the state of origin is accommodated within the limits of *Article 21(a)* and *(d)*.

It is possible that the procedure for requesting witnesses to appear which is presently by subpoena under *Order 33, Rule 4*, will be expanded to meet the language requirements of *Article 21(b)*. Under the Convention a request to appear must be in the language of the place where the evidence is to be taken, unless the witness is a national of the state of origin. The request must also inform the

witness that he may be legally represented. The Newfoundland rules have no provision for so informing the witness.

Articles 15, 16 and *17* of the Convention create a distinction between diplomatic or consular officials and duly appointed commissioners. This distinction does not appear in the Newfoundland rules.

Newfoundland is presently in the position of a state that has declared that a commissioner may apply to a designated authority for appropriate assistance to obtain evidence by compulsion. *Order 33, Rule 38* allows that a person duly authorized to make the application on behalf of a foreign court map apply to the Newfoundland courts for assistance in obtaining evidence. The requirements of *Rule 38* correspond to the conditions mentioned under *Article 18*. Both the Convention and the rules contemplate that the granting of the application will be discretionary. The provisions of the Convention respecting commissions can be applied to Newfoundland with the following effects:

(1) The Convention will create a distinction between duly authorized commissioners and diplomatic or consular officials.
(2) The Convention, by virtue of *Article 21(b)* and *(c)*, will introduce new requirements into the procedure for requesting witnesses to attend at the examination.

FOOTNOTES: NEWFOUNDLAND

1. *The Rules of the Supreme Court*, O. 33, r. 6.
2. For a discussion of the principles governing the exercise of discretion in giving effect to a letter of request see Ontario Footnotes 6 and 8.
3 See Manitoba Footnote 4.

SCHEDULE

XIV. CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

(Concluded November 15, 1965)

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I — JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organize the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalization or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either—

(*a*) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(*b*) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (*b*) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with—

(*a*) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(*b*) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(*c*) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by—

(*a*) the employment of a judicial officer or of a person competent under the law of the State of destination,
(*b*) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions

of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that—

(*a*) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(*b*) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled—

(*a*) the document was transmitted by one of the methods provided for in this Convention,

(*b*) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(*c*) no certificate of any kind has been received, even though every reasonable effort has been made to obatin it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled—

(*a*) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(*b*) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II — EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of the present Convention.

CHAPTER III — GENERAL CLAUSES

Article 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with—

(*a*) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3,

(*b*) the language requirements of the third paragraph of article 5 and article 7,
(*c*) the provisions of the fourth paragraph of article 5,
(*d*) the provisions of the second paragraph of article 12.

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following—

(*a*) the designation of authorities, pursuant to articles 2 and 18,
(*b*) the designation of the authority competent to complete the certificate pursuant to article 6,
(*c*) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of—

(*a*) opposition to the use of methods of transmission pursuant to articles 8 and 10,
(*b*) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,
(*c*) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the parties have otherwise agreed.

Article 25

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of The Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affiairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following—

(*a*) the signatures and ratifications referred to in article 26;
(*b*) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;
(*c*) the accessions referred to in article 28 and the dates on which they take effect;
(*d*) the extensions referred to in article 29 and the dates on which they take effect;
(*e*) the designations, oppositions and declarations referred to in article 21;
(*f*) the denunciations referred to in the third paragraph of article 30.

In witness whereof the undersigned, being duly authorized thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

ANNEX TO THE CONVENTION

Forms

REQUEST

FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague 196 .

Identity and address of the applicant

Address of receiving authority

The undersigned applicant has the honour to transmit—in duplicate—the documents listed below and, in conformity with article 5 of the above-mentioned Convention, requests prompt service of one copy therefore on the addressee, i.e.,

(identity and address :

a) in accordance with the provisions of sub-paragraph *(a)* of the first paragraph of article 5 of the Convention*.
b) in accordance with the following particular method (sub-paragraph *(b)* of the first paragraph of article 5)*:

c) by delivery to the addressee, if he accepts it voluntary (second paragraph of article 5)*.

The authority is requested to return or to have returned to the applicant a copy of the documents—and of the annexes*— with a certificate as provided on the reverse side.

List of documents

Done at , the

Signature and/or stamp.

* Delete if inappropriate

Reverse of the request

CERTIFICATE

The undersigned authority has the honour to certify, in conformity with article 6 of the Convention,

1) that the document has been served*
— the (date)
— at (place, street, number)

— in one of the following methods authorized by article 5—
a) in accordance with the provisions of sub-paragraph (*a*) of the first paragraph of article 5 of the Convention*.
b) in accordance with the following particular method*:

c) by delivery to the addressee, who accepted it voluntarily*.
The documents referred to in the request have been delivered to:
— (identity and description of person)

— relationship to the addressee (family, business or other):

2) that the document has not been served, by reason of the following facts *:

In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expense detailed in the attached statement*.

Annexes
Documents returned:

In appropriate cases, documents establishing the service:

Done at , the

Signature and/or stamp.

* Delete if inappropriate.

SUMMARY OF THE DOCUMENT TO BE SERVED

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, the 196 .
(article 5, fourth paragraph)

Name and address of the requesting authority:

Particulars of the parties*:

JUDICIAL DOCUMENT**

Nature and purpose of the document:

Nature and purpose of the proceedings and, where appropriate, the amount in dispute:

Date and place for entering appearance**:

Court which has given judgment**:

Date of judgment**:

Time limits stated in the document**:

EXTRAJUDICIAL DOCUMENT**

Nature and purpose of the document:

Time limits stated in the document**:

* If appropriate, identity and address of the person interested in the transmission of the document.

** Delete if inappropriate.

APPENDIX V

(See page 37)

CICS Doc. 840-173/061

UNIFORM ACTS IN THE FRENCH LANGUAGE

REPORT OF THE UNIFORM LAW SECTION

In considering the question of publishing the Proceedings and the Consolidation of Uniform Acts in both the English and French languages, the Executive referred the matter of drafting Uniform Acts in the French language to the Legislative Drafting Section.

The reference was dealt with by the Legislative Drafting Section at its meeting this year and the following resolutions were passed:

> RESOLVED to recommend that existing Uniform Acts, as selected and assigned for publications in both the English and French languages by the Uniform Law Section, be translated by the Legislative Drafting Section into French.
>
> RESOLVED that where possible draft Uniform Acts recommended to the Uniform Law Section be recommended for adoption in both the English and French languages.

The Legislative Drafting Section also established a committee to study and report on procedures for the implementation of the two resolutions and for otherwise performing the function of the Section in respect of French drafting.

The Executive has adopted the report of the Legislative Drafting Section and submits the recommendations to the Uniform Law Section for its consideration.

Graham D. Walker
Chairman
Legislative Drafting Section

24 August 1979

APPENDIX W

(See page 37)

CICS Doc. 840-173/063

UNIFORM LAW SECTION: PURPOSES AND PROCEDURES

REPORT OF THE COMMITTEE

The Committee has held three meetings and one telephone conference in order to assess the problems that could be brought forward to the delegates for further discussion.

It also had the benefit of a meeting with the president of the American uniform law conference, Mr. Deacon, which proved to be helpful.

At the first meeting, the present rules and regulations were reviewed in order to determine the problems which could be raised. It was then suggested that one member of the Committee should review the rules and regulations of the American Conference.

At the last meeting, it was decided unanimously to recommend the following:

1. Each jurisdiction should avoid appointing all new delegates on its delegations from year to year. It is important that a certain continuity be established in order that a better participation of all the jurisdictions be achieved.
2. Each jurisdiction should distribute to every member of its delegation, ahead of time, a copy of the rules and regulations of the Conference, so that all participants be familiar with its terms and may better understand the working of the Sections.
3. A committee on scope and purpose should be established for the purpose of determining the topics that should be put on the agenda at each annual meeting. This standing committee should review all requests for the addition of items to the agenda and submit suggestions to the Executive.
4. Whenever a topic is placed on the agenda, the work should be referred to pre-determined individuals by the chairman of the Section and not to a delegation. Thus it would be possible to choose the member of each committee according to interest in the topic, regional affiliation, and other factors

which could best serve the objectives of the Conference, which is uniformity.

5. Each committee so designated to report on a particular topic should meet as often as needed, should prepare a detailed explanation for the solutions prepared, and should offer alternative solutions.
6. The reports of the committees should be forwarded to all the participating delegates at least three months prior to the annual meeting, and comments and representations of each delegation should be submitted in writing ahead of time, so that they will be available to all delegates at time of discussion.
7. In certain instances, to be determined either by the Executive or the Scope and Purpose Committee, a particular topic should be discussed at a special meeting of the Conference called during the year, where each delegation will be entitled to send delegates. Thus it would give a better approach to the study and conclusions and avoid the heavy agenda of the annual meeting, which is becoming more and more the practice.
8. In the study of a particular topic, efforts should be made to refer to the work of the law reform agencies, to legal studies and to existing legislation. But the verbatim reproduction of an already existing law should be avoided so that the delegates will not be faced with the difficult task of accepting a solution which some delegates responsible for such legislation may feel obliged to support or impose.

The Committee wishes to express its appreciation for the great contribution given by the translators and interpretation services received by the Conference during the last two annual meetings. It has allowed delegates to take a more active part in the discussions and thus has enabled the other delegates to benefit by such participation. It is to be hoped that these services will continue in the future and that we give all possible help to the Executive Secretary and staff in Toronto.

Emile Colas
Lee Ferrier
Frank Muldoon
Ray Tallin
Graham Walker

24 August 1979

APPENDIX X

(See page 48)

SECOND REPORT OF THE FEDERAL/PROVINCIAL TASK FORCE ON UNIFORM RULES OF EVIDENCE

TABLE OF CONTENTS

(The numeration of the headings continues from the First Report, which ends at 9.4. See 1978 Proceedings, pages 283 to 347)

10. THE TASK FORCE

10.1 *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:

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 timetable 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 proceed with the drafting of uniform legislation, the participating jurisdictions approve or, if desirable, alter the terms of reference, the priorities and time-table recommended by the Task Force.
3. The Task Force 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.

10.2 *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.

10.3 *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:

Edwin A. Tollefson, Director, Programmes and Law Information, Development Section, Department of Justice, Room 762, Justice Building, Kent & Wellington Streets, Ottawa, Ontario K1A 0H8.

Eugene G. Ewaschuk, Q.C., Director of Criminal Law Amendments, Department of Justice, Room 403, Justice Building, Kent & Wellington Streets, Ottawa, Ontario K1A 0H8.

Alternates (Canada):

David Solberg, Counsel, Policy Planning, (Criminal Law Policy), Department of Justice, Justice Building, Ottawa, Ontario K1A 0H8.
Donald Gibson, Counsel, Criminal Law Amendments, Department of Justice, Justice Building, Ottawa, Ontario K1A 0H8.

British Columbia:

The Hon. George L. Murray, Justice of the Supreme Court of British Columbia, Courthouse, 800 West Georgia Street, Vancouver, B.C. V6Z 2C5.
Kenneth L. Chasse (Chairman), Barrister & Solicitor, Ontario Legal Aid Plan, Suite 1000, 145 King Street West, Toronto, Ontario M5H 3C7 (from July 3, 1979).

Alberta:

Margaret A. Shone, Counsel, Institute of Law Research & Reform, 402 Law Centre, University of Alberta, Edmonton, Alberta T6G 2H5.
Barinder Pannu, Crown Counsel, 5th Floor, 9919—105 Street, Edmonton, Alberta.

Ontario:

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10.4 *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 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.

10.5 *Meetings of the Task Force*

During the period covered by this report, the members of the Task Force held ten meetings of two or three days. The meetings were held in offices supplied by a participating jurisdiction, often those of the Federal Department of Justice. The Task Force held meetings and discussed the topics set out below.

Date	*Location*	*Topics Considered*
September 14, 15, 1978	Toronto	Cross-examination as to Previous Convictions, Character of Accused (or Party), Reputation of Witnesses, Expert Witnesses and Non-Expert Opinion Evidence, Use of Previous Statements, Res Gestae
October 17, 18, 1978	Vancouver	Cross-examination as to Previous Convictions, Reputation of Witnesses
November 9, 10, 1978	Edmonton	Expert Witnesses, Cross-examination as to Previous Convictions
December 7, 8, 1978	Toronto	Cross-examination as to Previous Convictions, Character of a Party (or Accused), Character of a Complainant (Section 142 of the *Criminal Code*)
January 15, 16, 1979	Montreal	Cross-examination as to Previous Convictions, Character of Complainant (Section 142 of the *Criminal Code*), Business and Government Documents, Expert Witnesses (Exchange of Reports)
February 12, 13, 1979	Vancouver	Expert Witnesses (Exchange of Reports), Character of Accused (or Party), Character of Complainant (Section 142), Use of Previous Statements

Date	*Location*	*Topics Considered*
March 14, 15, 16, 1979	Toronto	Character of Complainant, (Section 142), Use of Previous Statements (Recent Complaint, Recent Fabrication)
April 18, 19, 20, 1979	Ottawa	Use of Previous Statements (Recent Fabrication, Prior Inconsistent Statements)
May 23, 24, 25, 1979	Halifax	Refreshing a Witness's Memory, (Past Recollection Recorded), Character of Accused (or Party) Expert Witnesses
June 20, 21, 22, 1979	Toronto	Expert Witnesses, Non-Expert Opinion Evidence, Character of Accused (or Party)

10.6 *Timetable and Method*

The Task Force is carrying out its review of the Law of Evidence, according to the method briefly described here and set out fully in para. 1.6 of the First Report. The Law of Evidence was reduced to specific topics. Most of the topics have been assigned to members of the Task Force. Prior to a monthly meeting at which a particular topic is to be introduced, a member is responsible for preparing and circulating to the other members a 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. This year, to focus the discussion at the meetings of the Task Force the member also prepares and circulates a written outline of the issues arising out of the position paper. The Task Force usually considers a topic at more than one monthly meeting. Between meetings, the author may be asked to rework the discussion paper; other members may also prepare and circulate papers and each of the members consults with knowledgeable individuals in the member's jurisdiction about the topic under consideration. In three of the participating jurisdictions, the members of the Task Force consult regularly with committees comprising barristers, including Crown and defence counsel, judges and others with an interest and expertise in the Law of Evidence. A fourth participating jurisdiction proposes to constitute such a committee. Within three or four meetings, the Task Force has usually reviewed the alternative courses of action and arrived at its

decision. Only the most controversial areas require more than four meetings.

At the December meeting of the Task Force, Professor Peter Carter, of Wadham College, Oxford, who was a visiting professor at the University of Toronto, attended to discuss the British rules and practice as to the cross-examination of witnesses on previous convictions.

In para. 1.6 of the First Report, the Task Force estimated completion of its work by August, 1980. During the year, the Task Force has been unable to proceed as quickly as it had originally hoped. The Task Force is now approximately seven months behind its original timetable and consequently has revised its estimated date of termination. It expects to finish its work and submit its final report to the Uniform Law Conference in 1981.

The following table lists the topics that have been dealt with during this year or that have yet to be considered in order of consideration by the Task Force and also sets out the assignment of discussion papers.

Topic	*Discussion Paper*
Cross-examination as to Previous Convictions	Alberta, Barinder Pannu
Reputation of Witnesses	Alberta, Margaret Shone
Character of an Accused (or Party)	Anthony Sheppard
Expert Witnesses	Ontario, Peter Lockett
Non-Expert Opinion Evidence	Anthony Sheppard
Use of Previous Statements	British Columbia, Kenneth Chasse
Refreshing a Witness's Memory	British Columbia, Kenneth Chasse and Anthony Sheppard
Business and Government Records Documents	British Columbia, Kenneth Chasse
Best Evidence Rule	British Columbia, Kenneth Chasse
Interpreters and Translators	Canada, Edwin Tollefson
Manner of Questioning Witnesses	Quebec, Gilles Letourneau and Lucien Leblanc
Res Gestae	Anthony Sheppard
Hearsay	Alberta, Margaret Shone Ontario, David Watt Canada, Eugene Ewaschuk

Topic	*Discussion Paper*
Corroboration	British Columbia, Hon. Mr. Justice George Murray
State Privilege	Ontario, Peter Lockett
Relevance	Anthony Sheppard
The Rule in *Hollington* v. *Hewthorn*	Ontario, Peter Lockett
Admissions and Confessions	Ontario, David Watt
The Privilege Against Self-Incrimination	Canada, Edwin Tollefson
Real Evidence	Alberta, Margaret Shone
Illegally Obtained Evidence	Quebec, Gilles Letourneau
Evidence Obtained in a Manner Likely to Bring the Administration of Justice into Disrepute	Quebec, Gilles Letourneau
Judicial Notice	Alberta, Margaret Shone
Trial Problems	Anthony Sheppard
Excluding Witnesses	Anthony Sheppard
Burden of Proof	Quebec, Gilles Letourneau
Presumptions, Inferences and Reverse Onus Clauses	Alberta, Barinder Pannu
Evidence on Appeal	Ontario, David Watt
Applicability of Rules of Evidence	Alberta, Margaret Shone
Other Privileges	Nova Scotia, William MacDonald

10.7 *Preparation of Agenda and Reports*

The monthly meetings of the Task Force are tape-recorded. From the tapes, Anthony Sheppard prepares discussion notes. Kenneth Chasse prepares the agenda for the monthly meetings. Both the discussion notes and agendas are circulated to members of the Task Force prior to the following meetings. Anthony Sheppard is responsible for preparing drafts of the annual report.

10.8 *Summary of Accomplishments to Date*

In the First Report, the Task Force completed its review and made recommendations on the following topics: Spousal Competency in Criminal Cases, Civil Proceedings and Provincial Prosecutions; Marital Communications Privilege; Marital Privileges Relating to Illegitimacy and Adultery; The Oath; Competency of Children and the Mentally Disabled; and Professional Privilege. The Report was circulated to delegates to the Uniform Law Conference, August, 1978.

The First Report was published in full in the 1978 Proceedings.[1] The delegates to the Conference approved the suggestion that the First Report be published and distributed to interested groups.[2] To publicize the Report, it was published in full in the Criminal Reports.[3] Excerpts from the Report were also published in Carswell's Practice Cases,[4] to acquaint the civil judiciary and bar with the work of the Task Force. Comment on the Report has been favourable.

For this Second Report, the Task Force has completed its review of the following topics: Cross-examination as to Previous Convictions; Reputation of Witnesses; Character of Accused (or Party); Expert Witnesses; Non-Expert Opinion Evidence; and Use of Previous Statements.

On other topics, the work of the Task Force is underway: discussion papers have been prepared, circulated and some have been reviewed at one or more monthly meetings. These topics are: Business and Government Documents, Manner of Questioning Witnesses, the Definition of Hearsay. Hearsay—General Principles and Approach, Interpreters and Translators, *Res Gestae*, and Corroboration in Criminal Matters. 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 1980. 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 that the Task Force recommendations will take.

10.9 *The Drafting of Uniform Legislation*

In August, 1978, the Uniform Law Conference asked the Task Force as soon as possible to draft legislation towards the ultimate objective of a *Uniform Evidence Act*.[5] The Government of Canada, later in 1978, supplied the Task Force with the services of Bernie Shaffer, Barrister and Legislative Counsel of the Department of Justice. As suggested by the Conference, Bernie Shaffer has attended meetings of the Task Force and provided very helpful advice.

10.10 *The Second 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 Conference of the way in which it is proceeding and to receive comment and criticism. The recommendations which follow set out the majority views of the Task Force and do not necessarily reflect those of the participating jurisdictions.

10.11 *Outline of the Recommendations*

To enable the reader to appreciate the main recommendations in this Report, the present rule of evidence and the Task Force's proposal are concisely summarized. This outline does not purport to be a full summary.

(1) *Cross-Examination as to Previous Convictions* (see Section 11 of the Report)

(a) *Cross-examination*

Present Rule: By statute, any witness (including an accused) may be cross-examined as to previous convictions, The prevailing view is that a trial judge has no discretion to limit this cross-examination.

Proposal: A majority of the Task Force recommends that evidence of a finding of guilt or conviction of any offence is inadmissible in respect of any witness unless (i) the finding of guilt or conviction was in respect of a crime of dishonesty as determined by the court, or (ii) the court is of the opinion that such evidence in respect of any witness is of substantial relevance to the credibility of the witness.

(b) *Jury Direction*

Present Rule: Subsection 4(5) of the *Canada Evidence Act* prohibits comment by the judge or by counsel for the prosecution on the failure of the accused or his or her spouse to testify.

Proposal: A majority of the Task Force recommends that subsection 4(5) be retained and that a subsection be enacted to provide that notwithstanding subsection (5), where an accused does not testify the judge shall direct the jury as follows: "I have pointed out to you that the burden of proof is on the Crown throughout the case, and that there is no burden on the accused to prove his innocence. It follows that while the accused has a right to testify on his own behalf, the law imposes no obligation upon him to do so. In this case, he has chosen not to testify."

In reverse onus cases, a statutory jury direction as to an accused's right not to testify should also be provided. The jury direction, in reverse onus cases

where an accused does not testify, would be along the lines suggested by Lord Parker, C.J., in *R. v. Bathurst*:[6] "The accused is not bound to go into the witness box, no one can force him to go into the witness box, but the burden is upon him and if he does not, he runs the risk of not being able to prove his case." The direction would be given only where an accused does not take the stand.

(2) *Reputation of Witnesses* (see Section 12 of the Report)

Present rule: At common law, an opposing party can impeach the credibility of a witness by introducing testimony as to the witness's bad reputation for veracity. To rehabilitate a witness whose credibility has been impeached, the party who called the witness can offer testimony as to the witness's good reputation for veracity.

Proposal: The Task Force unanimously recommends that evidence of general reputation should be inadmissible to attack or support credibility.

(3) *Character of Accused (or Party)* (see Section 13 of the Report)

(a) *Character of a Complainant*

Present Rule: At common law, a complainant who testified in a sexual case could be cross-examined as to sexual conduct to impeach his or her credibility. Although an accused has the right to ask such questions, the complainant could answer them or refuse to do so and the accused could not introduce other evidence of the conduct. But, if the complainant's conduct was regarded as relevant to an issue like consent, the complainant must answer such questions on cross-examination and other evidence was admissible to contradict the complainant's testimony. In 1976, section 142 of the *Criminal Code* was amended to protect complainants in court and to abolish the requirement of a jury direction as to the desirability of corroboration in certain sexual cases. Section 142 states as follows:

142. (1) Where an accused is charged with an offence under section 144 or 145 or subsection 146(1) or 149(1), no question shall be asked by or on behalf of the accused as to the sexual conduct of the complainant with a person other than the accused unless

(a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to ask such question together with particulars of the evidence sought to be adduced by such question and a copy of such notice has been filed with the clerk of the court; and

(b) the judge, magistrate or justice, after holding a hearing in camera *in the absence of the jury, if any, is satisfied that the weight of the evidence is such that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings, including the credibility of the complainant.*

(2) The notice given under paragraph (1)(a) and the evidence taken, the information given or the representations made at a hearing referred to in paragraph (1)(b) shall not be published in any newspaper or broadcast.

(3) Everyone who, without lawful excuse the proof of which lies upon him, contravenes subsection (2) is guilty of an offence punishable on summary conviction.

(4) In this section, "newspaper" has the same meaning as it has in section 261.

(5) In this section and in section 442, "complainant" means the person against whom it is alleged that the offence was committed.

Proposal: A majority of the Task Force recommends that section 142 of the *Code* be amended. For further discussion at the Uniform Law Conference, the Task Force would propose two alternatives:

(i) within the Task Force, the preponderant view of the majority is that subsection 142(1) be repealed and replaced by the following provision:

"Where an accused is charged with a sexual offence, evidence relating to the complainant's sexual conduct other than with the accused may not be offered or elicited on cross-examination by or on behalf of the accused except:

(A) evidence either of the complainant's reputation as a prostitute or of a specific instance of prostitution by the complainant, providing that neither the reputation nor the instance was more than five years prior to the conduct that is the subject of the charge against the accused; or

(B) evidence that tends to show that the accused could have believed the complainant consented to the conduct which is the subject of the charge against the accused and that is offered otherwise than by the testimony of the complainant; or

(C) evidence to rebut evidence of the complainant's sexual conduct or lack thereof, that was previously introduced by the prosecution."

(ii) the alternative view within the majority of the Task Force is that only paragraph 142(1)(b) should amended, to provide that:

"(A) The judge, magistrate or justice, after holding a hearing *in camera* in the absence of the jury, if any, is satisfied that the evidence is of substantial relevance to an issue of fact in the proceedings.

(B) The complainant is not a compellable witness for the purposes of the hearing referred to in paragraph (A)."

(b) *Putting the Accused's Character in Issue*

Present rule: An accused, either personally or through the testimony of other witnesses, may offer evidence of his good reputation to show that he is not the type of person to engage in the conduct charged. Until the accused raises the issue of character by offering evidence, the prosecution may not offer evidence of the accused's bad reputation or previous convictions under section 593 of the *Criminal Code*. Section 593 of the *Code* provides:

593. Where, at a trial, the accused adduces evidence of his good character the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of the previous conviction by reason of which a greater punishment may be imposed.

Proposal: A majority of the Task Force recommends that evidence of general reputation be inadmissible to prove the disposition or conduct of an accused. No witness, including the accused, should be permitted to testify as to the accused's general reputation. Section 593 of the *Criminal Code* should also be amended to provide first that where an accused, either personally or through the testimony of a witness, introduces evidence of his character or disposition, the prosecution may

adduce evidence in rebuttal. Such evidence could include previous convictions, specific instances of misconduct and opinion so long as the evidence is relevant to rebut the accused's evidence. Section 593 should further be amended to provide that where an accused testifies for the defence and, either personally or through other witnesses, puts his character in issue, previous convictions that are admissible under section 593 of the *Code* would be admissible not only as to the accused's disposition but also as to his credibility as a witness. The trial judge would direct the jury that they could consider such convictions in assessing the accused's credibility.

(c) *Sections 317 and 318 of the Criminal Code*

Present Rule: Sections 317 and 318 permit the Crown to introduce evidence of the accused's misconduct on other occasions, where the accused is charged with possession of stolen property or possession of stolen mail. The evidence of misconduct can be that the accused either was found in possession of other stolen property within twelve months, or had been convicted of theft within five years, in either case prior to the commencement of the proceedings. The Crown must give three days notice to the accused in writing, before introducing the evidence.

Proposal: The Task Force (a majority having decided to recommend that sections 317 and 318 be retained) unanimously recommends (i) that sections 317 and and 318 should be confined to a possession charge standing alone except where the possession charge is joined with a count that alleges theft or breaking and entering and theft (paragraph 306(1)(b) of the *Code*); and (ii) that the notice time should be increased to seven days prior to trial, subject to the trial judge's discretion.

(4) *Expert Witnesses* (see Section 14 of the Report)

(a) *Exchange of Expert Reports in Civil Cases*

Present Rule: Although the provision varies among the Canadian jurisdictions, a statute or rule of civil procedure may require a party to supply the opposing party with a report summarizing the findings of an

expert, before the expert may be called as a witness. In some jurisdictions, the report is admissible as an exception to the hearsay rule. Unless a party requires the attendance of the expert as a witness, the report by itself may be sufficient evidence at the trial.

Proposal: The Task Force recommends:

(i) Unanimously, that in regard to civil proceedings, there should be a provision that requires a compulsory exchange of expert reports as a condition precedent to calling the expert evidence without leave of the court;
(ii) Unanimously, that the exchange of expert reports must take place at least ten days before trial; and
(iii) By a majority, that either party can introduce the expert's report, which has been exchanged, without necessarily having to call the expert as a witness.

The provision, which would be enacted either in an evidence act or in rules of civil procedure would state:

"(A) A statement in writing setting out the opinion of an expert is admissible in evidence without proof of the expert's signature if a copy of the written statement is furnished to every party to the proceeding who is adverse in interest to the party tendering the statement at least 10 days before the commencement of the trial.

(B) The written statement shall set out the expert's name, address and qualification, including experience, and a full statement of the proposed testimony.

(C) Where the written statement of an expert is given in evidence in a proceeding, any party to the proceeding may require the expert to be called as a witness.

(D) Where the expert has been required to give evidence under subsection (C), and the trial judge is of the opinion that the evidence so obtained does not materially add to the information in the statement furnished under subsection (A), he may order the party that required the attendance of the expert to pay, as costs, such sum as the trial judge considers appropriate.

(E) Unless subsection (A) has been complied with, no expert witness may testify without leave of the trial judge."

(b) *Ultimate Issue*

Present Rule: The ultimate issue doctrine prevents a lay or expert witness from expressing an opinion on the very fact in issue which the court has to decide or in terms of a legal standard.

Proposal: A majority of the Task Force recommends that a provision should be enacted to allow a witness to testify as to his opinion on an ultimate issue in the case if the trial judge concludes that it would be helpful to the trier of fact to receive such evidence.

(c) *Court Appointed Experts in Civil Cases*

Present Rule: A trial judge does not have an inherent power to appoint an expert witness. In Canadian jurisdictions, rules of civil procedure usually authorize the appointment of assessors and referees.

Proposal: The Task Force recommends:

(i) Unanimously, that in civil proceedings, there should be a mechanism for court-appointed experts;

(ii) Unanimously, that the enactment (which could be included in an evidence act or on rules of civil procedure) should contain the following provisions:

"(A) On the application of any party, or on his own motion, a judge may, at any time, order the appointment of one or more independent experts to inquire and report on any question of fact or opinion relevant to any issue in the action.

(B) The court expert shall be named by the judge and, where possible, shall be an expert agreed upon by the parties.

(C) The order shall contain the instructions to be given to the court expert and the judge may, from time to time, make such further orders as he deems necessary to enable the court expert to carry out the instructions, including the examination of any party or property and the making of experiments and test.

(D) The court expert shall file copies of the report with the court in such number as the judge may direct, and the appropriate official of the court shall send copies of the report to the parties or their solicitors.

(E) The judge may direct the court expert to make a further and supplementary report.

(F) The report of a court expert may be received in evidence.

(G) Any party may, at the trial, cross-examine the court expert on a report.

(H) Where a court expert is appointed, any party may call one expert to give reply evidence on any question of fact or opinion reported on by the court expert, but no party may call more than one such witness without leave of the court.

(I) The remuneration of a court expert shall be fixed by the judge and shall include a fee for the report and a proper sum for each day that the court expert is required to be present.

(J) Where a court expert is appointed on the application of a party, the liability of the parties for the payment of the court expert's remuneration shall be determined by the Judge.

(K) When an application by any party for the appointment of a court expert is opposed, the judge may, as a condition of making the appointment, require the party applying for the appointment to give such security for the remuneration of the court expert as may seem just.

(L) Where a court expert is appointed by a judge on his own motion, the remuneration of the court expert shall be paid out of funds provided by law."

(d) *Court-Appointed Experts in Criminal Cases*

Present Rule: A court has an inherent power to appoint expert witnesses in criminal cases.

Proposal: The Task Force recommends:

(i) By a majority, that the power of a court to appoint an expert witness in a criminal case should be formalized and put into legislation;

(ii) By a majority, that while the court's power to appoint an expert would exist before trial, the power would be for the purpose of trial only and not for the purpose of a preliminary hearing; and

(iii) By a majority, that the provision should state:

"(A) On the application of any party or upon his own motion, a judge may at any time, if he considers it necessary for a proper determination of the issues, appoint an expert who shall, if possible, be a person agreed upon by the parties.

(B) The judge shall give the court expert instructions regarding his duties and these instructions shall, if possible, be agreed upon by the parties.

(C) The court expert shall inform the judge and the parties in writing of his opinion, and may thereafter be called to testify by the judge or any party and be subject to cross-examination by each party.

(D) Where a court expert is appointed, any party may call one expert to give reply evidence on any question of fact or opinion reported on by the court expert, but no party may call more than one such witness without leave of the court.

(E) The court expert is entitled to reasonable compensation in an amount to be determined by the judge, such compensation to be paid from funds provided by law."

(e) *Limitations on the Number of Expert Witnesses in Civil and Criminal Proceedings*

Present Rule: To enable judges to curtail the flow of expert evidence, some Canadian jurisdictions have enacted numerical limits on the expert witnesses that a party may call without leave of the court. It is unclear whether such limitations apply to each issue or to a party's case.

Proposal: The Task Force recommends:

(i) By a majority, that section 7 of the *Canadian Evidence Act* be retained in a uniform evidence act, applicable to both civil and criminal proceedings;

(ii) By a majority, that the provision should apply to a party's whole case rather than to each issue; and

(iii) By a majority that the number of experts who can be called by a party without leave should be increased from 5 to 7.

(5) *Non-expert Opinion Evidence* (see Section 15 of the Report)

(a) *Non-Expert Opinion Based on Personal Observation*

Present Rule: A lay witness testifies as to facts of which he has personal knowledge and, in general, may not testify in the form of an opinion. In practice, a distinction between "fact" and "opinion" can be difficult to draw and lay opinion evidence is admitted on various issues. Its admissibility is largely in the trial judge's discretion.

Proposal: A majority of the Task Force recommends that a provision should be enacted whereby a non-expert witness would be permitted to give an opinion or draw an inference only if it is based on facts perceived by him and is helpful to the witness in giving a clear statement or to the trier of fact in determining an issue.

(b) *Comparison of Handwriting*

Present Rule: In common law jurisdictions, a statutory provision like section 8 of the *Canada Evidence Act* permits proof of the genuineness of a disputed writing by comparison with a writing shown to be genuine. Section 8 provides as follows:

8. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting such writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writing in dispute.

Proposal: The Task Force unanimously recommends that section 8 of the *Canada Evidence Act* be retained.

(6) *Use of Previous Statements* (See Section 16 of the Report)

(a) *Evidence of Out-of-Court Identification*

Present Rule: Where a witness identifies an accused in the courtroom, evidence that the witness previously identified the accused is admissible to confirm the in-court identification. However, where the witness does not identify the accused in court, evidence of a previous identification is inadmissible as hearsay.

Proposal: The Task Force unanimously recommends that where the declarant testifies at a proceeding concerning a statement and the statement is one identifying

a person after perceiving him, that statement should be admissible for all purposes.

(b) *The Doctrine of Recent Complaint*

Present Rule: Evidence that a victim of a sexual offence made a complaint at the first reasonable opportunity and the details of the recent complaint are admissible to bolster the victim's credibility as a witness. If the victim did not make a complaint or if evidence of complaint is inadmissible, the trial judge must direct the jury that they may draw an adverse inference as to the victim's credibility.

Proposal: The Task Force recommends:

(i) Unanimously, that the doctrine of recent complaint as a rule of evidence be abolished: that a judge should not be required to give a direction to the jury as to the inference of lack of credibility that they may draw from the absence of a complaint; and that there should be no presumption as to consent in the absence of evidence of recent complaint.

(ii) Unanimously, that the rule of evidence applicable only to sexual offences whereby evidence of recent complaint is admissible to bolster the victim's credibility be abolished.

(iii) Unanimously, that evidence of the contents of a complaint be admissible only if it qualifies for admission under a rule of evidence such as a part of the *res gestae* (excited utterance) or to rebut impeachment by either an allegation of contrivance or a previous inconsistent statement; and that evidence of the absence of a complaint be admissible only if it qualifies for admission under a rule of evidence such as to impeach the complainant by an allegation of contrivance.

(c) *Allegation of Contrivance*

Present Rule: Where an opposing party suggests or implies that the testimony of a witness has been recently fabricated, a prior statement by the witness that is consistent with the testimony is admissible to rebut the allegation of contrivance. Even before a witness testifies, Canadian courts admit a prospective witness's prior statement where it can be anticipated that when

the witness does testify, the opposing party will allege that the witness's testimony is contrived. As to what constitutes an allegation of recent fabrication, the common law is unclear. An allegation of recent fabrication includes a suggestion that the witness is influenced by bias or improper motive, or that the witness did not make a prior statement on an occasion when it would have been reasonable to do so. Impeachment by means of a prior inconsistent statement is not *per se* an allegation of recent fabrication.

Proposal: The Task Force recommends:

(i) By a majority that the right to rehabilitate a witness by a previous consistent statement following an allegation of recent contrivance, only be available once the witness is on the stand;

(ii) By a majority, that the phrase "recent fabrication" be clarified to permit rehabilitation of a witness by a consistent statement if the witness has been impeached by an express or implied allegation of contrivance or by means of an inconsistent statement; and

(iii) By a majority, that prior consistent statements, which are admissible to rebut an allegation of contrivance or to rebut an inconsistent statement, given under oath and subject to cross-examination at the time they were made, would be admissible for all purposes in civil and criminal proceedings.

(d) *Prior Inconsistent Statements*

(i) *Impeachment of an Opposing Witness*

Present Rule: In most Canadian jurisdictions the cross-examination of a witness as to a prior inconsistent statement is regulated by two statutory provisions. Where the prior statement is written, the cross-examiner must comply with the requirements of a provision like section 10 of the *Canada Evidence Act*. Section 10 states:

10. (1) Upon any trial a witness may be cross-examined as to previous statements made by him in writing or reduced to writing, relative to the subject matter of the case, without such writing being shown to him; but, if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for

the purpose of so contradicting him; the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit.

(2) A deposition of the witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed prima facie *to have been signed by the witness.*

Where the prior statement is not written, the cross-examiner must comply with section 11 of the *Canada Evidence Act* or its counterpart. Section 11 states:

11. Where a witness upon cross-examination as to a former statement made by him relative to the subject matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

Evidence of a prior inconsistent statement is admissible only to impeach the witness's credibility. Unless the statement falls within an exception to the hearsay rule, it is inadmissible as substantive evidence.

Proposal: The Task Force recommends

(A) By a majority, that prior inconsistent statements, given under oath and subject to cross-examination at the time they were made, be admissible for all purposes in civil and criminal proceedings;

(B) By a majority, that the statutory provisions governing the admissibility of previous inconsistent statements should be revised and brought into one section;

(C) By a majority, that the revised section should commence with the following words: "Upon cross-examination as to credibility, a witness may be asked as to his prior statement . . .";

(D) By a majority, that the word "statement" comprises oral and written statements;

(E) By a majority, that the cross-examiner must furnish the witness with enough information so that he reasonably knows what the circumstances were or

the occasion was, when he made the previous statement;

(F) By a majority, that where it is intended to contradict a witness by a previous statement, the witness's attention must be drawn first to the occasion on which he is alleged to have made the statement and must be asked whether he made the statement and in the case of a written statement, the witness's attention must further be drawn to those parts of the statement that will be used for the purpose of contradicting him;

(G) By a majority, that the requirement be retained that before extrinsic evidence of the contradictory statement is admissible, the contradiction must be on a material matter;

(H) By a majority, that the phrase "in writing or reduced to writing" in subsection 10(1) be revised to include other forms of recording and transcripts prepared therefrom; and

(I) By a majority, that a judge's power to order production of a statement, presently in subsection 10(1), be retained.

(ii) *Impeachment of a Party's Own Witness*

Present Rule: At common law, a party may introduce other evidence to contradict the testimony of his own witness. But a party cannot impeach his own witness by attacking the witness's character or by proving bias, interest or corruption. The common law permits a party to cross-examine his own witness if he is adverse. But, the common law is unclear as to when a party can impeach his own witness either by cross-examination as to, or proof of, a prior inconsistent statement. To clarify the use of prior inconsistent statements to impeach the credibility of a party's own witness, most Canadian jurisdictions have enacted a provision like subsection 9(1) of the *Canada Evidence Act*. Subsection 9(1) states:

9. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or by leave of the court, may prove that the witness made at other times a statement inconsistent with his present

testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

Subsection 9(1) is unclear as to whether a party, who is seeking a ruling that a witness is adverse, can introduce the witness's inconsistent statement as evidence of adversity. To ensure that a judge can consider the witness's prior statement as a factor indicating adversity, Parliament, in 1968, enacted subsection 9(2). The other Canadian jurisdictions have not enacted equivalent provisions. Subsection 9(2) states:

9. (2) Where the party producing a witness alleges that the witness made at other times a statement in writing or reduced to writing, inconsistent with his present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to statement and the court may consider such cross-examination in determining whether in the opinion of the court the witness is adverse.

However, courts have interpreted subsection 9(2) as permitting a party to impeach his own witness by means of a prior inconsistent statement, independently of subsection 9(1) and without obtaining the judge's ruling that the witness is adverse.

Proposal: The Task Force recommends:

(A) By a majority, that section 9 of the *Canada Evidence Act* be revised;

(B) By a majority, that the prohibition in subsection 9(1) be retained upon a party's impeachment of his witness's credibility by general evidence of bad character and that the "great blunder" in subsection 9(1) be corrected to clarify that a party can call other evidence to contradict a witness's testimony without proving that the witness is adverse and without leave of the court;

(C) By a majority, that a party be able to cross-examine his own witness on a prior statement that is inconsistent on a material matter and, if necessary, to prove the statement by other evidence, without

being required either to establish that the witness is adverse or to obtain leave of the court;

(D) By a majority, that a party should continue to be entitled to impeach the credibility of an adverse witness but that the word "adverse" should mean "hostile or contrary in interest" and that in addition to proof of adversity, leave of the court should not be required;

(E) By a majority, that the requirement in subsections 9(1) and (2) of leave of the court be replaced with a discretion in the judge to require the party to try to refresh the witness's memory before impeaching the witness's credibility; and

(F) By a majority, that where a party cross-examines his own witness, or introduces other proof, as to a prior statement, that was made under oath and subject to cross-examination, the statement should be admissible for all purposes.

FOOTNOTES

1. Uniform Law Conference of Canada, *Report of the Proceedings of the Sixtieth Annual Meeting,* Appendix T, pp. 283-347.
2. *Id.,* p. 56.
3 (1978) 4 C.R. (3d) 1-75.
4. (1978) 7 C.P.C. 155-167.
5. The Conference resolution of August, 1977, clause 1(*c*) requires the Task Force "to proceed with the drafting of the uniform legislation": see section 10 1 of this Report.
6. [1968] 2 Q.B. 99; [1968] 1 A11 E.R. 1175 (C.A.-Cr. Div.).

11. CROSS-EXAMINATION AS TO PREVIOUS CONVICTIONS

11.1 *In General*

Cross-examination is the principal method of testing a witness's credibility. If a cross-examiner can show that a witness is an untruthful person, his credibility will have been impeached. With the exception of Quebec (civil matters), all of the other jurisdictions of Canada have legislated, in very similar terms, impeachment by a prior conviction.

At common law, conviction of an infamous crime[1] rendered the convicted person incompetent as a witness in civil or criminal proceedings. When conviction of the infamous crime carried the death penalty, the problem of incompetency was usually a secondary

obstacle to calling the convicted person. Two exceptions to this incompetency developed: (1) at common law, a pardon restored competency unless the statute creating the offence otherwise provided, and (2) by statute,[2] for certain types of convictions, a convicted person regained his competency by serving his sentence to completion. In such cases, at common law, the conviction could be used for impeachment purposes,[3] but a witness might have invoked a privilege to refuse to answer.[4]

Beginning in 1843 legislation in England and Canada made convicted persons competent to testify in all cases,[5] and, beginning in 1854, authorized impeachment by a prior conviction.[6] If the witness denies the conviction or refuses to answer, the conviction may be proved by extrinsic evidence. This form of impeachment is a statutory exception to the common law rule that evidence may not be offered to contradict a witness on a collateral matter.[7]

11.2 *Impeachment by Evidence of a Prior Conviction*

Section 12 of the *Canada Evidence Act* is set out in full, because impeachment by prior conviction is much more frequent in criminal cases and section 12 is typical of the Canadian provisions. Section 12 states as follows:

> *s. 12(1) A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.*
>
> *(2) The conviction may be proved by producing (a) a certificate containing the substance and effect only, omitting the formal part of the indictment, and conviction, if it is for an indictable offence, or a copy of the summary conviction, if for an offence punishable upon summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned; and*
>
> *(b) proof of identity.*

The usual form of question is to ask the witness whether he was convicted of an offence: the question specifies the name of the offence, the date and place of conviction and sentence.[8] It is improper to cross-examine a witness, particularly an accused, about the details

of the offence.[9] However, the circumstances of an accused's prior conviction might be admissible as evidence of similar facts. The witness is always entitled to explain the circumstances of the conviction if he wishes to do so.[10]

If the witness acknowledges the prior conviction, it is proved and extrinsic evidence is inadmissible to prove it.[11] Even though the witness is open and candid about the prior conviction, the trier of fact must decide whether the conviction has impeached his credibility.[12] In *Morris's* case,[13] Pratte J. explained the process of impeachment as follows:

> There is indeed a distinction which must not be overlooked between cross-examination as to prior convictions which is governed by s. 12(1) and cross-examination which is aimed at weakening the evidence given in chief by exposing the errors, omissions or contradictions of the testimony of the witness or by eliciting from him statements contrary to his own evidence.
>
> Cross-examination as to prior convictions is not directly aimed at establishing the falsity of the witness's evidence; it is rather designed to lay down a factual basis—prior convictions—from which the inference may subsequently be drawn that the witness's credibility is suspect and that his evidence ought not to be believed because of his misconduct in circumstances totally unrelated to those of the case in which he is giving evidence. The evidentiary value of such cross-examination is therefore purely inferential.
>
> By comparison, where the cross-examination is directed at eliciting from the witness answers that are contrary to his evidence in chief, the attack on credibility is no longer based on an inference of unreliability of the witness, but on the actual proof of the witness's unreliability in the case itself, as established by the contradiction between various portions of his evidence. This type of cross-examination is essential if the search for truth is ever to be successful. Cross-examination would become pointless if it were not available to attempt to prove the falsity of the evidence given in chief. In *Jones* v. *D.P.P., supra,* Lord Devlin said, at p. 708: "If a witness cannot be cross-examined to test the veracity and accuracy of his evidence in chief, he cannot be cross-examined at all."

If the witness denies the conviction or refuses to answer, to impeach the witness's credibility the cross-examiner must prove the conviction by extrinsic evidence. The witness's mere denial or refusal to answer without such proof does not constitute impeachment.[14]

To initiate impeachment by a prior conviction, a cross-examiner may ask a general question, without specifying a particular conviction, such as, "Have you ever been convicted?" Although the question is proper, the witness's answer or refusal to answer may not be

contradicted by extrinsic evidence.[15] The particular conviction must be put to the witness before extrinsic evidence is admissible.

It is improper, particularly for a Crown Counsel, to cross-examine a witness on a prior record without proving the record, if the witness does not admit it.[16] Since it is usually impractical to prove such convictions on the spot, one solution is to advise opposing counsel in advance (1) of the convictions to be put to the prospective witness, and (2) that, if the witness does not admit them, an adjournment will be required to obtain extrinsic proof.

Extrinsic evidence of a conviction may consist of (1) the original court document;[17] (2) under paragraph 12(2)(a) of the *Canada Evidence Act* a certificate of the indictment and conviction or a copy of a summary conviction; or (3) a certified copy of the proceeding pursuant to section 23 of the *Canada Evidence Act*.[18] Under paragraph 12(2)(b) of the *Canada Evidence Act*, identity of of the person named in the document must also be established. The three methods of proof of identity are: (1) the testimony of an eyewitness who was present in court when the prior conviction was registered;[19] (2) comparison of fingerprints under section 594 of the *Criminal Code*; or (3) similarity of the name and address of the witness and in the document as *prima facie* evidence.[20]

11.3 *The Lack of Judicial Discretion*

The word "may" in subsection 12(1) is ambiguous. It can incorrectly be read as conferring a discretion on the trial judge to prohibit cross-examination on a prior conviction.[21] However, the Supreme Court of Canada has unanimously held that subsection 12(1) confers an absolute right on the parties to impeach by prior convictions.[22] Under section 12, if the accused chooses to testify, the Crown has the unfettered right to cross-examine him as to prior convictions.[23] The word "may" authorizes a party to impeach by a prior conviction, but leaves the decision to do so up to him and his counsel. Similarly, under the equivalent provisions of the provincial evidence acts, the trial judge does not have a discretion to prohibit impeachment by a prior conviction.[24]

11.4 *The Meaning of a Conviction for "Any Offence"*

Section 12 is limited to impeachment by prior conviction. A conviction is an adjudication of guilt plus judgment or sentence.[25] A suspected offence,[26] charge,[27] acquittal,[28] or discharge,[29] is not a

conviction. A juvenile record or a conviction under appeal is a conviction.[30]

Section 12 allows impeachment by a conviction for "any offence". A conviction is admissible for impeachment even though the offence does not bear on veracity.[31] An offence includes foreign[32] and provincial offences.[33] On cross-examination a witness may be asked about discreditable conduct and associations for impeachment. But the accused is protected: neither section 12[34] nor the common law[35] permits the Crown to ask the accused about misconduct or bad associations for impeachment. If evidence of anti-social conduct is admissible on the merits, as similar fact evidence, such questioning of the accused would be proper.

11.5 *Prior Convictions on Examination in Chief*

To reduce the adverse effect of a witness's prior record on his credibility and to minimize the prejudicial effect upon the accused who takes the stand, counsel may, during examination in chief, ask the witness about prior convictions.[36] Such questions of an accused do not put his character in issue; the convictions are relevant only to his credibility.[37] The trial judge has a discretion to prohibit this procedure, but it will usually be exercised in favour of the accused. Paradoxically, while section 12 authorizes examination in chief and cross-examination as to prior convictions, courts do recognize a discretion to prevent questioning in chief, but not on cross-examination.

11.6 *Direction to the Jury*

Impeachment of an accused's credibility by prior convictions poses a risk of prejudice to him. From the accused's record, the jury may unfairly and improperly draw an inference either that the accused is likely to have committed the crime charge, or that even if he is not guilty, he is such a danger to society that he should be imprisoned. To minimize the danger of prejudice, where an accused has been impeached by prior convictions, the judge must instruct the jury that the evidence is admissible only to impeach his credibility and not to show his guilt or his propensity to engage in criminal activity.[38] Failure of the trial judge to warn the jury may require a new trial.[39]

Because section 12 indiscriminately admits prior convictions which have little or no probative value on the issue of credibility, a judge may advise the jury that such a conviction can be disregarded

in assessing the credibility of a witness.[40] Recently the Ontario Court of Appeal held that if the convicted person is a principal defence witness, such a warning may be required.[41] The accused called as a witness a drinking companion who had been convicted nine years earlier of breaking and entering and theft. As to the effect of the prior conviction on the witness's credibility, the judge directed the jury that:

> . . . a man who has a record should have his evidence carefully scrutinized. This does not mean that you cannot believe his evidence—you are perfectly free to do so—but what it does mean is that you should consider his evidence carefully before deciding to accept it.

The court held that this misdirection warranted a new trial and that it is necessary, in such cases, to guide the jury as to the tenuous probative value of convictions.[42] For the court, Martin, J.A. said:[43]

> The fact that a witness has been convicted of a crime is relevant to his trustworthiness as a witness. Obviously, convictions for offences involving dishonesty or false statements have a greater bearing on the question whether a witness is or is not likely to be truthful, than convictions for offences such as dangerous driving or assault. The probative value of prior convictions with respect to the personal trustworthiness of the witness also varies according to the number of prior convictions and their proximity or remoteness to the time when the witness gives evidence. A jury might well be justified in concluding that a conviction, even for a serious offence committed many years before, was of little if any value in relation to the credibility of a witness if he had since that time lived an honest life. Indeed, the trial judge in the exercise of his discretion might so instruct the jury, and similarly would be warranted in the exercise of his discretion in directing the jury that a prior conviction for such offences as assault or dangerous driving was of little probative value in relation to the credibility of the witness.
>
> It is a well-recognized rule that the trial judge should, as a matter of prudence, direct the jury that the evidence of witnesses in certain categories should be carefully scrutinized, for example, children of tender years, or witnesses of unsavoury character. There is no rule of law or practice, however, that a witness who has a single prior conviction, such as [the defence witness] automatically comes within a special category of witnesses whose evidence must be carefully examined.
>
> The conviction of [the defence witness] albeit for a serious offence, was some nine years before, and the jury ought in assessing his evidence to apply the usual tests of credibility, giving such weight to the prior conviction as, in the circumstances, they considered it had, in relation to his credibility.

In the first sentence, Martin J.A. asserts that all convictions have some relevancy to a witness's credibility. But later in the passage, he qualifies that generalization by identifying two crimes that have little probative value on credibility: driving offences and crimes of violence. The unrestricted admissibility of such convictions to impeach a witness's credibility violates the first principle of the law of evidence, that only logically probative evidence should be admitted.

The cross-examination of the defence witness as to his prior conviction may have had a prejudicial effect on the accused. According to the old saying, birds of a feather flock together. Since the defence witness was a companion of the accused, and the accused did not testify, the jury might conclude that if the witness had a record, the accused probably had prior convictions as well.

Since a trial judge's instruction to the jury as to the probative value of prior convictions on the issue of credibility is a ground for a mistrial, it does not seem that the present indiscriminate admissibility of prior convictions under section 12 can withstand some restriction. While a more thorough direction to the jury is helpful, the real answer is to exclude convictions that have little probative value on the issue of credibility.

11.7 *The Accused's Right to Testify*

An accused who wants to testify but has a record is confronted with a dilemma.[44] Should he testify or not? If he takes the stand, under section 12 the prosecution may impeach his credibility by cross-examination as to his prior convictions. The judge's direction, according to empirical evidence, does not overcome the jury's natural inclination to conclude, despite the accused's testimony, that he is guilty.[45] Empirical studies suggest that a jury will more readily convict if it is aware of an accused's record.

If an accused does not testify, so that the jury will remain ignorant of prior convictions, the jury may draw the inference that he did not testify because he had something to hide. Empirical studies also show that the jury's rate of conviction rises where the accused does not testify.[46]

In civil and criminal cases, a party, having the onus of proof and failing to call a witness who would have knowledge of the facts and who might reasonably be expected to give valuable testimony, runs the risk that the trier of fact may draw an adverse inference in the absence of an explanation.[47] The onus is on the party to explain

the absence of the witness. Ordinarily a judge or counsel may explain this to the jury.

However, to protect an accused who exercises his right not to testify, subsection 4(5) of the *Canada Evidence Act* provides:

> *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.*

While this subsection prohibits comment, it does not preclude the jury from drawing an adverse inference from the accused's failure to testify, but they cannot be told that they may do so.[48] On appeal from a conviction, an appellate court may also draw an adverse inference from the accused's failure to testify in deciding whether the conviction was a substantial wrong or a miscarriage of justice, an unreasonable verdict or unsupported by the evidence.[49] Subsection 4(5) prohibits comment only where there is a jury[50] and does not apply on a *voir dire*.[51] The prohibition against comment on the failure to call a spouse does not apply after divorce.[52]

Where an accused does not testify, the judge's direction to the jury must be fair and impartial. A direction that the jury may not draw an inference of guilt from the silence of the accused is bad law and unfair to the Crown.[53] A direction which is ". . . prejudicial to the accused or such as to suggest to the jurors that his silence was used to cloak his guilt"[54] is a comment prohibited by subsection 4(5), which may require a new trial. Alternatively, if the appellate court considers that the evidence of guilt is overwhelming, it can dismiss the accused's appeal, on the ground that despite the improper comment, "no substantial wrong or miscarriage of justice has occurred".[55] Between these two extremes, a judge may make "a statement" or a neutral explanation of the accused's right to refrain from testifying.[56]

> I think it is to be assumed that subsection 4(5) was enacted for the protection of accused persons against the danger of having their right not to testify presented to the jury in such fashion as to suggest their silence is being used as a cloak for their guilt.
> . . . it would be 'most naive' to ignore the fact that when an accused fails to testify after some evidence of guilt has been tendered against him by the Crown, there must be at least some jurors who say to themselves "If he didn't do it, why didn't he say so?" It is for this reason that it seems to me to be of the greatest importance that a trial judge should remain unhampered in his right to point out to the jury, when the occasion arises to do so in order to protect the rights of the accused, that there is no onus on the accused to prove his in-

> nocence by going into the witness box. To construe subsection 4(5) of the *Canada Evidence Act* as interfering with that right would, in my opinion, run contrary to the purpose of the section itself.[57]

In other words, the jury can see that the accused has not testified and they are likely to wonder why. Unless they are properly informed, there is a real danger that the jury may misconstrue the accused's silence and reach an irrational result. In some cases, the jury's misapprehension that the accused's silence automatically means guilt, or that the Crown can call the accused, has formed the basis of their verdict.[58] It ". . . introduces an element of chance into the administration of justice."[59] Critics have argued that even a neutral comment, by drawing the jury's attention to the accused's silence, impliedly invites the jury to draw an unfavourable inference.[60] However, this criticism appears to under-estimate the intelligence and powers of observation of the jury. Where a jury has observed that the accused has not testified, should they be allowed to remain "puzzled and unhappy"[61] or should the judge be able to explain the accused's right of silence?

11.8 *Criticisms of Section 12*

There are four criticisms of section 12.[62] First, by allowing cross-examination of an accused on prior convictions, section 12 forces him either to testify and run the risk of prejudice or to stay off the stand and run the risk that his silence will lead to an inference of guilt. Second, by admitting all convictions, even if they do not bear on credibility, the section admits irrelevant evidence, which can be highly prejudicial to an accused. Third, although a witness, other than a party, does not run the risk of prejudice, one who has paid his debt to society and has rehabilitated himself should not be open to indiscriminate cross-examination on prior convictions. Such cross-examination may blacken his charcter and cause embarrassment. Fear of this type of cross-examination may deter people who have lived down their prior convictions from coming forward to testify. Fourth, a prior conviction has no empirical predictive value in determining whether a witness is less likely to be truthful.

11.9 *Proposals for Reform*

The Task Force considered that impeachment by prior convictions, even of an accused person as a witness, should be retained and that the prohibition on adverse comment in subsection 4(5) of the *Canada Evidence Act* should also be dealt with, since it was

another consideration for an accused with a record who must decide whether to testify. The Task Force then considered whether these provisions could be improved upon. The five possible reforms and the recommendations of the Task Force, are set out in the pages that follow.

11.10 *Retain Section 12 in its Present Form or with Minor Changes*

Should section 12 be retained in its present form? Because section 12 indiscriminately admits all prior convictions for impeachment, it simplifies, by elimination, the question of admissibility. Difficult decisions as to which convictions are relevant to truthfulness are not posed directly for the judge but are passed on to the jury, as the trier of fact. However, if the judge is required to instruct the jury as to weight, he will have to face this problem as well. The application of the same rule to accused persons and to other witnesses also simplifies the conduct of trials. By allowing the parties complete discretion as to impeachment by prior convictions, section 12 conforms to the principles of the adversary system. The direction to the jury as to the use of an accused's prior convictions to impeach his credibility is standard. Even if, as the empirical evidence suggests,[63] jurors do not allow the instruction, the alternatives may complicate trial procedure. To deter a prosecutor from cross-examining an accused about convictions that have no bearing on credibility, in the hope that the jury will misuse them, the trial judge can comment on the weakness of the cross-examination. Would such a comment protect the accused from prejudice? If section 12 were retained, some amendments might be made for cross-examination as to discharges, juvenile records, pardons and convictions under appeal. The members of the Task Force were unanimous that, for impeachment purposes, discharges ought to be treated like convictions. Because a pardon does not necessarily mean that the convicted person is innocent, a pardon should not preclude impeachment for the conviction.

One member of the Task Force favours the retention of section 12 for both accused and non-accused witnesses. Another member would retain it for witnesses other than the accused.

11.11 *Restrict Cross-Examination to Prior Convictions for Crimes that are Relevant to the Issue of Credibility*

A theme of proposals for reform is to permit impeachment on convictions for offences that, by definition, have some probative

value concerning a witness's disposition to falsify.[64] The American proposals define these convictions as crimes involving "dishonesty or false statement".[65] Most of these proposals allow impeachment by evidence of such convictions as of right and without leave of the court. However, because of developments in the American case law, later proposals added an overriding, but limited, judicial discretion to prohibit such cross-examination unless probative value outweighs prejudicial effect.[66] The Ontario proposal would confine cross-examination as of right on prior conviction to offences bearing directly on credibility, i.e., convictions for perjury or contradictory testimony.[67]

A majority of the Task Force recommends that cross-examination as of right should be permitted on convictions for offences of dishonesty. Because these offences have greater probative value on the issue of credibility, the parties should be entitled to prove them in order to show what kind of a person the witness is. If cross-examination as of right were limited to crimes of dishonesty, an accused who wishes to testify would be substantially protected from the prejudice which section 12 presently causes him. Such a limitation should encourage both accused persons and others with records, to testify more frequently.

Limiting cross-examination as of right to convictions for offences of dishonesty would require a trial judge, as a matter of law, to permit cross-examination on convictions. If this recommendation were implemented, in practice a counsel who wished to impeach a witness by prior convictions would, before asking the witness any questions about his record, show the record to the opposing counsel. If the opposing counsel felt that one or more convictions ought not to be put to the witness on the ground that they were not offences of dishonesty, the jury would be excused while the judge conducted a *voir dire* into whether the disputed conviction involved an offence containing the mental element of dishonesty. An inquiry into the circumstances of the offence and *viva voce* evidence would not be required, except expert evidence on a foreign conviction might be called. If dishonesty were an element of an offence, it would be readily apparent by analyzing the statutory provision creating it. Offences of dishonesty would include some Provincial summary conviction offences. If objection were taken to cross-examination on a conviction, it would be up to the cross-examiner to convince the judge that the offence involved dishonesty.[68]

The Task Force rejected various other proposals for categorizing types of convictions as bearing on credibility. First, American proposals would permit impeachment by proof of convictions for crimes of "dishonesty or false statement". The Task Force rejected the phrase "false statement" as redundant and possibly confusing; for it might suggest that such crimes required an element of deliberate or reckless misrepresentation or mendacity. Although "dishonesty" is an ambiguous word, the Task Force intended convictions for crimes of dishonesty to include convictions for crimes involving theft or robbery as well as such offences of express or implied misrepresentation as forgery, false pretences, perjury and giving contradictory testimony. Second, the Task Force rejected as arbitrary and illogical proposals that enact limitation periods restricting impeachment to recent convictions. For example, the proposed Canada Evidence Code prohibits impeachment by a witness's prior conviction if ". . . five years have elapsed from the day of his conviction or release from confinement for his most recent conviction of a crime, whichever is the later."[69] Such a provision protects the rehabilitated witness. But a witness could be presently on parole if it exceeded five years, and the trier of fact could not be informed of that fact. Although the recency of a conviction for many types of offences bears on its probative value on the issue of credibility, other offences are relevant to a witness's credibility regardless of when the conviction occurred, such as perjury. Finally, the Task Force rejected as impractical attempts either to categorize convictions by maximum penalties or to list offences.

11.12 *Judicial Discretion*

While conviction for an offence of dishonesty has probative value on the question of a witness's credibility, other convictions may also show that the witness is more likely to give deliberately false testimony. In *Stratton's* case, Martin J.A. said:[70]

> It is, of course, true that convictions for certain kinds of criminal misconduct are of greater relevance in assessing testimonial reliability than convictions for other kinds of criminal misconduct. It is, none the less, a matter of extreme difficulty to develop an appropriate catalogue of such offences. It is commonly thought that *prima facie* only convictions for crimes involving dishonesty or false statements are inherently relevant in relation to credibility. On the other hand, it might well be thought that convictions for living on the avails of prostitution or trafficking in heroin may show an attitude of mind that may be of greater relevance in assessing testimonial reliability than a conviction for false pretences resulting from issuing a cheque on a bank account in which there were insufficient funds.

Another theme of recent proposals is to provide a trial judge with a discretion to admit evidence of convictions (other than convictions that are automatically admissible) for impeachment purposes.[71] Although the creation of such a discretion would not provide a final answer to which convictions may be used for impeachment, it would provide a judge with an effective means of (1) excluding cross-examination on convictions that are irrelevant to credibility, and (2) allowing cross-examination on convictions where the party who wishes to cross-examine can convince the judge that, in the circumstances, the conviction is relevant to credibility, e.g. if the witness has opened the door to such cross-examination by testifying to a blameless life, which is belied by the conviction.

Subsection 18(3) of the *B.C. Evidence Act*[72] provides such a judicial discretion. Subsection 18(1) allows cross-examination on a conviction for any offence. But subsection (3) provides:

> *Subsection (1) does not apply to the questioning of a witness in a civil proceeding conducted before a jury, where a judge is of opinion that the questioning of the witness would unduly influence the jury.*

A majority of the Task Force recommends that impeachment, by proof of prior conviction other than for crimes of dishonesty, be permitted in the trial judge's discretion.

Such a wide discretion in the judge to allow impeachment by prior convictions raises two issues. First, in *Stratton*'s case, Martin, J.A. said:[73]

> . . . in the absence of acceptable guidelines, the recognition of such a discretion would result in a lack of uniformity in its application which would not be consistent with the proper administration of justice.

In various Commonwealth countries[74] and in the United States,[75] the courts have successfully formulated guidelines for the exercise of such discretion. In exercising such a discretion the judge would balance such factors as: (1) how serious was the offence, (2) do the circumstances of the offence show that the witness was dishonest, (3) how recently was it committed, (4) how important is the credibility of the witness to the outcome of the case, (5) may the conviction prejudice the party with the jury, (6) has the witness rehabilitated himself, and (7) has the witness opened the door to such impeachment by testifying that he has been law-abiding. Impeachment of an accused by prior convictions raises the dangers of prejudice that accompany the admission of similar fact evidence and

common guidelines for balancing probative value and prejudicial effect could apply. As with similar facts, a judge should allow such impeachment only in exceptional cases if prohibiting it would be an affront to common sense.[76] A non-accused witness who has rehabilitated himself should be protected from impeachment by prior convictions that have little bearing on credibility but may be personally embarrassing to him. Judicial discretion should extend to permit impeachment of witnesses other than the accused and in civil cases. These matters would be reviewed on a *voir dire*. To establish the probative value of the conviction on the issue of credibility, witnesses could be called on the *voir dire* to testify as to the circumstances of the offence. If the judge ruled that the conviction could be used to impeach the witness, the present rule, that on cross-examination the witness could not be asked about the circumstances, would apply.

The second disadvantage of a judicial discretion to control impeachment by prior convictions is uncertainty. In preparing a case, a party and his advisers will not know before a witness with a record testifies, how the judge will exercise his discretion. To minimize this problem for the accused who must decide whether to testify, defence counsel might apply to the judge after the Crown's case and before calling the accused, for a provisional ruling on the question of impeachment by prior convictions. If the accused testified in such a manner as to open the door to impeachment by prior convictions, the trial judge would have the right to overturn his provisional ruling and to permit cross-examination on prior convictions. For other witnesses, provisional rulings would be exceptional.

11.13 *Special Rules for the Accused*

Another theme of proposals for reform is that since the accused is unlike any other witness, special rules should govern impeachment of his credibility by prior convictions.[77] First, more than any other witness the accused ought to be encouraged to testify, to enable the trier of fact to hear his side of the matter and to allow the accused to have a full hearing and fair chance to present his side. If the accused could be assured that evidence of his past record was inadmissible to attack his credibility, he might feel that by taking the stand he had nothing to lose. Second, since the danger of prejudice to the accused is real, and the direction to the jury is ineffective, he is entitled to further protection. According to the latest cases[78] an accused is unlike other witnesses because he is protected from im-

peachment by cross-examination as to instances of misbehaviour, misconduct and unsavoury assocations other than convictions unless he forfeits this protection by his own testimony. Martin, J.A., has written that:[79]

> . . . save for cross-examination as to previous convictions permitted by s. 12 of the *Canada Evidence Act,* an accused may not be cross-examined with respect to misconduct or discreditable associations unrelated to the charge on which he is being tried for the purpose of leading to the conclusion that by reason of his bad character he is a person whose evidence ought not to be believed. Cross-examination, however, which is directly relevant to prove the falsity of the accused's evidence does not fall within the ban, notwithstanding that it may incidentally reflect upon the accused's character by disclosing discreditable conduct on his part.

If an accused cannot be cross-examined concerning these instances of misconduct,, presumably because of the special danger of prejudice to him, the fact of conviction does not remove this risk. Since a conviction does not eliminate the risk of prejudice, the accused should not be subject to the same rules of impeachment by prior convictions as other witnesses.

One alternative is to prohibit cross-examination of the accused on prior convictions unless he "opens the door" or "loses his shield." Such provisions allow the accused to testify without running the risk that a prior conviction will be used to impeach him, except that, if he or his counsel conducts his defence in certain prescribed ways, his record will become admissible. The admissibility of the accused's record depends upon his own trial tactics and the nature of his defence. For example, under the *Criminal Evidence Act* 1898 (U.K.), section 1(f), the accused forfeits protection from impeachment if he: (1) offers evidence of his own good character or (2) attacks the character of the prosecution's witness or (3) gives evidence against a co-accused. Under some American proposals[80] and the proposed *Canada Evidence Code,*[81] the accused would be protected unless he adduces evidence of his own good character solely for the purpose of supporting his credibility.

Two members of the Task Force favour this general approach. For the following reasons, the majority opposes it.

The Canadian practice is that the accused should be subject to impeachment by prior convictions according to the rules applying to other witnesses. The English Criminal Law Revision Committee said that this view is correct in principle:[82]

> Now that the accused is competent to give evidence, his evidence ought ideally to be regarded like that of any other witness in the case . . .; that is to say, it ought to be believed or not according to its apparent probability and according to how far the witness seems likely, from his history, to be telling the truth. This suggests that the accused, if he gives evidence, ought to be open to cross-examination about his past conduct in order to test his credibility in the same way as other witnesses.

To apply the same rule to all witnesses simplifies trial practice.

There are other disadvantages to a special rule for the accused. First, under some proposals as a trade-off for the accused's special protection from impeachment, the failure of the accused to testify may be the subject of adverse comment. For example, the proposed *Canada Evidence Code* would permit comment, even by the prosecution, on the accused's silence.[83] Second, neither the conduct of an accused's defence nor the cross-examination of Crown's witnesses should be inhibited by the collateral risk to the accused of impeachment and prejudice by prior convictions. Third, by skilfully avoiding the prescribed methods of forfeiting protection, an accused may succeed in depriving the trier of fact of evidence that would have substantial probative value on his credibility. Finally, a critic has complained about the complexity of the case law under section 1(f).[84] However, he criticized the deficiencies of the provision and the inaction of the English Parliament without rejecting the principle underlying the provision.

Another suggestion for reform is to prohibit impeachment of the accused by evidence of prior convictions.[85] While this proposal offers the advantages of simplicity and elimination of prejudice, it would deny the trier of fact important evidence on the questions of an accused's credibility. For example, an accused with a record for perjury could testify, without fear of contradiction, that he was a truthful person. The proposal of complete immunity for an accused has never received wide support.

11.14 *Recommendations with respect to Cross-Examination as to Previous Convictions*

The Task Force recommends:

(a) By a majority, that evidence of a finding of guilt or conviction of any offence is inadmissible in respect of any witness unless:
  (i) the finding of guilt or conviction was in respect of a crime of dishonesty as determined by the court, or

(ii) the court is of the opinion that such evidence in respect of any witness is of substantial relevance to the credibility of the witness; and

(b) Unanimously, that the provision apply to criminal and provincial prosecutions and to civil proceedings.

11.15 *Comments and Dissents with respect to Cross-Examination as to previous Convictions*

MR. JUSTICE MURRAY

I and my committee unanimously, expressly dissent from the position of the majority of the Task Force, limiting cross-examination under section 12 to crimes of mendacity, on the ground that the proposed amendment would lead to the result that convicted hired assassins, convicted drug dealers and convicted pimps would be treated as more credible witnesses than a person who has concealed a small amount of assets on an application for welfare or a person who has failed to file a small amount of income on his tax return. In R. *v.* Stratton *(1978) 3 C.R. (3rd) 289 at p. 311, Martin J.A. said:*

> *It is commonly thought that* prima facie *only convictions involving dishonesty or false statements are inherently relevant to credibility. On the other hand, it might well be thought that convictions for living on the avails of prostitution or trafficking in heroin may show an attitude of mind that may be of greater relevance in assessing testimonial reliability than a conviction for false pretences resulting from issuing a cheque on a bank account in which there were insufficient funds.*

E. A. TOLLEFSON

I find it impossible to accept the position adopted by the majority of the Task Force with respect to cross-examination of an accused witness on his criminal record for purposes of testing his credibility. While the proposal, limiting cross-examination as of right to crimes of dishonesty as determined by the court, may be less oppressive than section 12 of the Canada Evidence Act *in my view the proposed new rule would still be illogical, unfair and difficult to administer.*

I think the provision is illogical because it is far from clear that a person who has committed a dishonest crime is more likely to lie under oath than one who has not. Dishonesty and mendacity

are separate character traits, and while they obviously may both exist in particular individuals, proof of the existence of one does not predicate the existence of the other. Such being the case, reception of evidence as to the dishonest record of the accused witness not only is unhelpful but may be positively harmful as a tool for assessing credibility. I would make the same comment with respect to the use of previous convictions for testing the credibility of non-accused witnesses, but with regard to them cross-examination on previous convictions may be permitted primarily as an act of charity towards the accused who should be given as much latitude as possible in his attempt to raise a reasonable doubt as to his guilt.

From the standpoint of fairness, it is quite clear that though theoretically previous convictions are admitted only for the purpose of testing credibility, the trier of fact, whether judge or jury, frequently subconsciously takes the accused's record into account in determining the merits. Research conducted in Canada and England between matching groups of jurrors, confirms that both those with experience being tried and those with experience trying cases regarded revelation of a serious record (particularly for offences of the same type as the one alleged in the case at Bar) as being very damaging to the accused in the eyes of his jury. Revelation of the accused's record was viewed as much more damaging than factors such as (a) the failure of the accused to enter the witness box, (b) evidence that the accused is a layabout who lives on welfare, or (c) evidence that the accused told an absurd tale to explain his presence near the scene of the crime a few minutes after its occurrence. What is particularly remarkable about the results is their consistency. On a scale of 0 to 100 being the maximum detrimental effect, a record of convictions for the same offence as the one charged received the following scores:*

	English	*Canadian*
Prisoners	*93.7*	*94.7*
Jurors	*95.1*	*93.1*

It is clear, therefore, that with such a rule the accused with a record has good reason to avoid the witness box, and in Canada he does. A study conducted in 1968-69 in Western Canada showed a rate of non entry of 73.5% in jury trial and 65.5% in non-jury trials. The English rate for the same period of time was 1.2%.

The modification to sec. 12 proposed by the majority of the Task Force is not enough in my mind to overcome the obvious injustice that now exists, and it will in fact operate in such a way as

to penalize accused persons with a record of offences involving dishonesty as compared with those having a record for violence and assault.

My final objection to the proposed rule is that it will create a great deal of difficulty in terms of administration. As drafted, the decision is left to the court whether the conviction is for "a crime of dishonesty," or is relevant to the issue of credibility regardless. Not only does such a rule make it difficult for the defence counsel to determine whether to put his client into the box in some cases, but it will almost certainly invite a flood of voir dires and appeals on the interpretation of these general words. The law should be simple and easy to apply, so that even a layman can understand it. Instead, the new rule will create major doubt and delay, without the redeeming virtue of having eliminated the mischief that presently exists in the law.

**In England, jurors means "shadow" jurors whose experience has been terms of observing a jury trial under controlled conditions from the public gallery.*

11.16 *The Accused's Right to Testify: Proposals for Reform*

Subsection 4(5) of the *Canada Evidence Act* prohibits comment by the judge or the prosecutor if the accused or his spouse do not testify.[86] Despite subsection 4(5), a trier of fact and an appellate court can draw an inference against the accused from his silence in court. If an accused does not testify, a judge may, in his discretion, explain to the jury in neutral terms that the accused has the right to testify and is under no obligation to do so. Because subsection 4(5) only partially protects an accused from adverse consequences if he does not testify, it deserves critical re-examination. What are the alternatives?

In the United States, proposals fully protect the accused's right of silence (and other privileges) by prohibiting (1) comment on, or (2) drawing an adverse inference from, the accused's silence.[87] These proposals also preclude the claiming of a privilege in the presence of the jury, and permit, at the request of the party against whom an adverse inference might be drawn, a judge to direct a jury not to draw such an inference.[88] Proponents of this approach argue that to protect a privilege, such as the accused's right to testify, no price or cost should be extracted for its exercise.[89] On the other hand, the Task Force feels that if the accused does not testify, in the face of the evidence against him, the jury is likely to draw an adverse inference despite an instruction not to do so. As Wig-

more says, ". . . to instruct the jury to disregard the inference . . . [is] to attempt to enlist the layman in the process of nullifying his own reasoning powers . . .".[90]

The Australian jurisdictions, by legislation, prohibit comment, but not the drawing of an adverse inference, from the accused's silence in court.[91] Australian judges define prohibited comment more broadly than their Canadian counterparts, although a complication is that many of the cases concern the propriety of a trial judge's direction on the weight to be given to an accused's unsworn statement from the dock. In Australia, ". . . a prohibited comment really contains two elements, viz. a reference to the fact that the accused could have given evidence on oath *and* a reference to the fact that he has not done so."[92] This standard would overturn some of Canada's leading cases on permissible comment.[93] An Australian accused is more favourably positioned than a Canadian one, not only because he can avoid cross-examination by making an unsworn statement from the dock, but also because he cannot be impeached by prior convictions unless he loses the protection of the Australian equivalents of section 1(f) of the *Criminal Evidence Act* 1898 (U.K.). On the other hand, Australian jurors are left without the guidance of a judicial explanation of the accused's right to testify.[94]

In England, as a trade-off for the protection of section 1(f) against impeachment by prior convictions and the accused's right to make an unsworn statement, the judge is permitted to comment on the accused's failure to testify.[95] The prosecutor is prohibited from doing so.[96] The Criminal Law Revision Committee said: "How far the judge can properly go in commenting on the failure of the accused to give evidence, and in particular in inviting the jury to draw adverse inferences against the accused from his failure to do so is not altogether clear. But the comment must not go so far as to suggest that failure to give evidence is enough to lead to an inference of guilt . . .".[97]

Reformers have recommended that the prosecutor should be allowed to comment on the accused's failure to testify, where a *prima facie* case has been made against him.[98] Since a majority of the Task Force recommends that an accused's credibility, like that of any other witness, can be impeached by proof of prior convictions,[99] to allow comment either by the judge or by the prosecutor would impose too heavy a burden upon an accused who chooses not to testify. To permit a comment to the effect that the jury could draw an adverse inference from the accused's failure to testify

"would be improper because that failure might have been due to fear of cross-examination on previous convictions."[100] A majority of the Task Force recommends that subsection 4(5) of the *Canada Evidence Act* be retained.

A majority recommends that where an accused does not testify, and the usual burden of proof is upon the Crown to prove the accused's guilt beyond a reasonable doubt, the trial judge be required to explain to the jury that the accused has a right to testify, to dispel any misapprehension. Subsection 4(5) permits this instruction now, in the trial judge's discretion. But the direction ought to be required where an accused does not testify, for the following reasons. Such an explanation will not prejudice an accused by calling the jury's attention to his silence in court. The jury will notice that he has not testified, and may draw unwarranted conclusions from his silence, unless instructed otherwise. The direction would have no effect upon the appellate court's inferring from, *inter alia,* the accused's failure to testify, that his conviction constituted no substantial wrong or miscarriage of justice. Although the direction is permissible now in the trial judge's discretion, and is desirable, the courts have not specified when a trial judge should exercise his discretion to give it.

Although the average juror probably would know without being told that the accused has the right to testify, it is also likely that many jurors do not. To prevent confusion and error in jury deliberations, an instruction by the judge should be required to inform all the jurors that the accused has the right to testify. The instruction should be neutral: it should not imply that the jury may draw an adverse inference from the accused's silence. Although the proposal does not specify the point in the judge's charge to the jury at which this instruction must be given ,and leaves that decision to the individual judge, it could conveniently be given after the general remarks on the burden of proof.

In *Proudlock's* case,[101] Pigeon J., for the majority of the Supreme Court of Canada, said that in Canadian criminal law there were only these three burdens of proof.[102]

1. Proof beyond a reasonable doubt which is the standard to be met by the Crown against the accused;
2. Proof on a preponderance of the evidence or a balance of probabilities which is the burden of proof on the accused when he has to meet a presumption requiring him to establish or to prove a fact or excuse;

3. Evidence causing a reasonable doubt which is what is required to overcome any other presumption of fact or of law.

In cases involving burdens of the first or third kinds, the instruction described above would be given where the accused did not testify.

In cases of the second type, where the burden of persuasion is on the accused and he does not testify, the judge should also instruct the jury as to the accused's right to testify. In these cases, to clarify the jury's understanding, the judge should instruct them that the burden of proof on the particular issue is upon the accused and that the jury, in evaluating the evidence for the defence, may take into account the accused's failure to testify. In *R.* v. *Bathurst,*[103] Lord Parker, C.J. suggested the appropriate type of comment: "The accused is not bound to go into the witness box, no one can force him to go into the witness box, but the burden is upon him and if he does not, he runs the risk of not being able to prove his case." In a Uniform Evidence Act both of these instructions would be authorized by a subsection following the present subsection 4(5) of the *Canada Evidence Act.*

11.17 *Recommendations with respect to the Accused's Right to Testify*

The Task Force recommends:

(a) Unanimously, that subsection 4(5) of the Canada Evidence Act *be retained, and*

(b) By a majority, that a subsection be enacted to provide that, notwithstanding subsection (5), where the accused does not testify the judge shall direct the jury as follows: "I have pointed out to you that the burden of proof is on the Crown throughout the case and that there is no burden on the accused to prove his innocence. If follows that while the accused has a right to testify on his own behalf, the law imposes no obligation on him to do so. In this case, he has chosen not to testify," and then when the burden of proof is on the accused, on a balance of probabilities, the jury direction would be along the lines suggested in Bathurst's *case: "The accused is not bound to go into the witness box, no one can force him to go into the witness box, but the burden is upon him and if he does not, he runs the risk of not being able to prove his case."*

11.18 *Comments and Dissents with respect to the Accused's Right to Testify*

MR. JUSTICE MURRAY

I and the British Columbia committee expressly dissent from the proposal that a mandatory direction be given by the trial judge to the jury as to the right of the accused to testify on the following grounds, inter alia (1) that the direction will draw attention to the fact that the accused did not testify; (2) that the cure proposed is worse than the disease which it is designed to cure; (3) that the direction will lead to difficulty in cases where there are reverse onus provisions and negative averments.

Julian Polika agrees with the first ground of the dissent.

KENNETH L. CHASE

The Task Force having decided in favour of recommending retention of cross-examination on prior criminal records (see Recommendation at 11.13), I am in favour of retaining the prohibition upon comment on failure to testify. But for that reason I feel that the following phrase should not *be part of the proposed judge's direction on the accused's right not to testify: "In this case, he has chosen not to testify." And for the same reason, there should be no direction at all as proposed for cases of reverse onus.*

Section 12 of the Canada Evidence Act is unfair to the innocent accused who has testimony to give which the trier of fact might well accept, but which he refrains from giving for fear of being cross-examined upon his prior criminal record. Cross-examination of the accused upon his previous convictions should be prohibited, subject to certain exceptions. I would go further than the majority, i.e. further than merely cutting s. 12 back to cross-examination upon crimes of dishonesty. I would much prefer a provision based upon s. 1(f) of the English Criminal Evidence Act, 1898.

Professor P. B. Carter of Wadham College, Oxford, England, visited with the Task Force during its deliberations in relation to s. 12. The following draft provision is based substantially upon a draft section prepared by him.

> *(1) An accused person who testifies may, subject to subsection 2 of this section, be asked any question notwithstanding that the answer may tend to criminate him as to the offence charged.*

(2) An accused person shall not be asked, and if asked shall not be required to answer, any questions eliciting or tending to reveal evidence that he is of bad character, disposition or reputation, or that he has committed, been charged with or convicted of any offence other than that with which he is then charged, except to the extent that evidence of such matters would have been admissible if the accused had not testified but all or part of the content of his testimony had been elicited from another or other witness, whether called by the Crown or the defence.

(3) If an accused person gives evidence against another accused person charged with the same or a related offence, subsection 2 of this section shall not apply to evidence tendered by the other person.

(4) Questions otherwise prohibited by subsection 2 may be asked and answers required, notwithstanding subsection 2, if an accused person in the course of his testimony casts an imputation upon the credibility of the prosecutor or a witness for the prosecution, provided that, (1) such imputation does not constitute a proper part of the defence, and (2) the evidence elicited by such questioning might bear significantly upon the credibility of the accused as a witness.

This provision would be subject to two limitations contained in my Comment and Dissent (paragraph 4(b)), which appears at the end of section 3.3 of the First Report of the Task Force dealing with Spousal Competency (see (1978) 4 C.R. (3rd) 1, at 39):

1. *Comment on failure of the accused to testify would be allowed.*
2. *The accused could be cross-examined on prior convictions for perjury and inconsistent testimony.*

As to cross-examination of non-accused witnesses on their previous convictions, I would retain s. 12.

MARGARET A. SHONE

I dissent from the recommendations of the majority of members of the Task Force for two reasons. My first and primary ground of objection is that, as framed, the jury direction prescribed for the usual case is prejudicial to the accused. My second basis for objec-

tion is less crucial and I simply register my view that the requirement of mandatory delivery needlessly interferes with the discretion of the trial judge to control the proceedings before him. Each of these features of the majority recommendation constitutes a departure, to my mind ill-advised, from the existng law. My concerns are shared by the members of the Alberta Advisory Committee on Evidence, and the suggestions contained in paragraphs (b) (ii) and (c) which follow were generated in discussion by that Committee.

The elements of prejudice embodied in the majority recommendation are threefold:

(a) the direction fails fully to inform the jury as to the law in that it does not caution against drawing an unwarranted inference of guilt from the silence of the accused;

(b) it omits to provide reasons other than guilt why an accused may choose not to testify; and

(c) it permits perverse timing of delivery to the detriment of the accused.

I elaborate below.

(a) Effect of silence. The prohibition against comment on the failure of an accused to testify now contained in section 4(5) of the Canada Evidence Act exists for the protection of the accused. It guards against the risk that the "right not to testify" might otherwise be presented to the jury in such fashion as to suggest that the silence of an accused is being used as a cloak for his guilt (McConnell and Beer v. The Queen, [1968] S.C.R. 802, at 809).

The proposal endorsed by the Task Force majority, quite to the contrary, invites the attachment of weight to the silence of the accused. With this I disagree. The principle that the Crown bears the burden of proving the guilt of the accused beyond a reasonable doubt is fundamental to our system of criminal justice. The accused has the right to testify in his defence, or to remain silent and rest his case on the inability of the Crown to meet its burden. The silence of the accused does not carry evidential weight, although where the Crown has made out an ostensible case the failure of an accused to cast doubt on the Crown's case by establishing or proving a fact or an excuse, or otherwise, may function to buttress the case already established by the Crown. Of course, the testimony of the accused is not the only means of dispelling a presumption or proving a fact or excuse—the accused may be able to marshal other evidence. Where the Crown has not met the burden of per-

suasion in the case, the jury should not be misguided into interpreting the accused's silence as evidence of guilt capable of converting an acquittal into a conviction.

The majority recommendation is motivated by a very different concern from that underlying the present prohibition against comment. They worry that a jury may not know that an accused has the right to testify on his own behalf. Thus, the argument continues, jurors mistakenly may give the accused the benefit of the doubt where the Crown has made out a case which cries of explanation from an accused who does not testify. Their solution significantly distorts if not altogether aborts the principle of silence. They purport to add mandatory comment on the right of the acccused to testify to the present prohibition against comment on the right of the accused not to testify, all in the interests of the accused. The recommendation, clearly, is incompatible with the policy and spirit of section 4(5) in that the invitation to the jury to infer guilt from the accused's choice not to exercise his right to testify is inescapable.

I do not dispute the desirability of an informed jury, nor does section 4(5) preclude it. That section has been interpreted, in my view rightly, so as to permit judges to explain "to juries the law with respect to the rights of accused persons in this regard" (McConnell and Beer v. The Queen, op. cit., at 809). The provision does not hamper the right of the trial judge "to point out to the jury, when the occasion arises to do so in order to protect the rights of the accused, that there is no onus on the accused to prove his innocence by going into the witness box" (ibid., emphasis added).

(b) Wording of direction. (i) I am not convinced for the need for the rigidity which accompanies a statutorily worded instruction, and would favour allowing the judge to choose the language best suited to the circumstances of the trial before him in order to clarify the accused's position to the jury without prejudicing him. This would accord with the approach taken by the majority of the Task Force where proof falls to the accused in respect of a particular issue rather than to the Crown in respect of the case.

(ii) If there is to be a statutory direction, the language adopted by the majority is unsatisfactory in that it leaves the inference of guilt dangling. This unfortunate consequence could be alleviated by expanding the wording to include an explanation of the reasons other than guilt why an accused, acting through his counsel, may choose not to

take the stand. The reasons include the risk of devastation of the accused on cross-examination in respect of irrelevant matters, for example because of his highly suggestible nature, low educational level, inarticulateness, or state of nervousness, fright or other intense emotion. A reference to factors such as these would help to deter the jury from the conclusion that the failure of an accused to testify of itself indicates guilt. The direction, thereby, would attain its objective of educating the jury without simultaneosly destroying the accused.

(c) Timing of delivery. Especially as presently worded, the recommendation adopted by the majority is likely to be more damaging to the accused the closer its delivery comes to the end of the charge and the commencement of jury deliberations. In light of the educational purpose of the statement, would it not be preferable to include this information in the general introductory remarks which the judge makes to the jury in advance of the trial? As a part of his explanation of the function of the jury, the judge might well incorporate an explanation of the roles of the prosecutor and defence counsel at trial, and draw attention to key points of procedure including the position of the accused in respect of testifying. An explanation delivered before the trial begins is likely to reduce the risk of abuse to the prejudice of the accused.

FOOTNOTES

1. Infamous crimes comprised treason or any felony or misdemeanor involving either dishonesty *(crimen falsi)* or the obstruction of justice: McCormick on *Evidence* (2nd ed., 1972), p. 84.
2. *Civil Right of Convicts Act 1823* (9 Geo. IV, c. 32) provided that an offender who had been convicted either of a felony (other than one punishable by death) or of a misdemeanor (other than perjury or subornation of perjury) regained competency on serving the sentence to completion
3. *Bugg* v. *Day* (1949) 79 C.L.R. 442 (Aust. H.C., per Dixon, J.); *R.* v. *Rookwood* (1696) Holt K.B. 683, 90 E.R. 1277 (State Trial); *R. v. Warden of the Fleet* (1700) Holt K.B. 133, 90 E.R. 972.
4. In *R.* v. *Stratton* (1978) 21 O.R. (2d) 258, at p. 270, 42 C.C.C. (2d) 449, at p. 460, Martin J. A. said the better view was that the witness had a privilege to refuse to answer.
5. England, *Evidence Act 1843* (6 & 7 Vict. c. 85) s. 1; Canada, *Canada Evidence Act,* R.S.C. 1970 c. E-10 s. 3; British Columbia, *Evidence Act,* R.S.B.C. 1960 c. 134 s. 4; Alberta, *The Alberta Evidence Act,* R.S.A. 1970 c. 127 s. 4; Saskatchewan, *The Saskatchewan Evidence Act,* R.S.S. 1965 c. 80 s. 32; Manitoba, *The Manitoba Evidence Act,* R.S.M. 1970 c. E-150 s. 4; Ontario, *The Evidence Act,* R.S.O. 1970 c. 151 s. 6; Quebec,

Code of Civil Procedure, R.S.Que. 1965 c. 80 s. 295; New Brunwick, *Evidence Act,* R.S.N.B. 1973 c. E-11 s. 2; Nova Scotia, *Evidence Act,* R.S.N.S. 1967 c. 94 s. 41; Prince Edward Island, *Evidence Act,* R.S.P.E.I. 1974 c. E-10 s. 2; Yukon, *Evidence Ordinance,* R.O. 1971 c. E-6 s. 3(1); Northwest Territories, *Evidence Ordinance,* R.O. 1974 c. E-4 s. 3.

6. England, *Common Law Procedure Act, 1854* (17 & 18 Vict. c. 125) s. 25; *Criminal Procedure Act 1865* (28 & 29 Vict. c. 18) s. 6; Canada, *Canada Evidence Act,* R.S.C. 1970 c. E-10 s. 12; British Columbia, *Evidence Act,* R.S.B.C. 1960 c. 134 s. 18; Alberta, *The Alberta Evidence Act,* R.S.A. 1970 c. 127 s. 26; Saskatchewan, *The Saskatchewan Evidence Act,* R.S.S. 1965 c. 80 s. 39; Manitoba, *The Manitoba Evidence Act,* R.S.M. 1970 c. E-150 s. 24; Ontario, *The Evidence Act,* R.S.O. 1970 c. 151 s. 23; New Brunwick, *Evidence Act,* R.S.N.B. 1973 c. E-11 s. 20; Nova Scotia, *Evidence Act,* R.S.N.S. 1967 c. 94 s. 55; Prince Edward Island, *Evidence Act,* R.S.P.E.I. 1974 c. E-10 s. 18; Yukon, *Evidence Ordinance,* R.O. 1971 c. E-6 s. 27; Northwest Territories, *Evidence Ordinance,* R.O. 1974 c. E-4 s. 27; *Uniform Evidence Act,* s. 26. In *R.* v *Stratton, op. cit.* footnote 4, pp. 270-71 (O.R.), pp. 459-60 (C.C.C.), Martin J.A. traces the evolution of the English common law and legislation; Friedland, Comment (1969) 47 Can.B.Rev. 656.

7. *A.-G.* v. *Hitchcock* (1847) 1 Ex. 91, 154 E.R. 38.

8. *R.* v. *Clark* (1977) 1 C.R. (3d) 368 (B.C.C.A.); *R.* v. *Boyce* (1974) 7 O.R. (2d) 561, 28 C.R.N.S. 336 (Ont.C.A.); *McLaughlan* v. *The Queen* (1974) 29 C.R.N.S. 265, *sub nom. R.* v. *McLaughlan,* 20 C.C.C (2d) 59 (Ont.C.A.); *R.* v. *Tanchuk* [1935] 1 W.W.R. 257, 63 C.C.C. 193 (Man.C.A.); *R.* v. *Roche* [1950] 1 D.L.R. 414, 95 C.C.C. 270 (N.S.S.C-A.D.).

9 *Ibid.*

10. *R.* v. *Stratton, op. cit.* footnote 4, p. 269 (O.R.), p. 458 (C.C.C.).

11. E.g. *Canada Evidence Act,* R.S.C. 1970 c. E-10 s. 12(1) states, " . . if he either denies the fact or refuses to answer, the opposite party may prove such conviction."

12. *R* v. *Leforte* [1962] S.C.R. viii, (1961) 36 C R. 181, 131 C.C C. 169, 31 D.L.R. (2d) 1 (S.C.C., affirming the dissenting judgment of Sheppard, J.A., 35 C.R. 227, 130 C.C.C. 318, 29 D L.R. (2d) 459 (B.C.C A.).

13 *Morris* v. *The Queen* [1979] 1 S.C.R. 405 at pp. 432-33, 6 C.R. (3d) 36, at pp. 53-54, 43 C.C.C. (2d) 129 at pp. 151-2.

14. *R.* v. *Clark, op. cit.,* footnote 8.

15. *Ibid.*

16 *R.* v. *Titchner* [1961] O.R. 606, 35 C.R. 111, 131 C.C.C. 64, 29 D.L.R. (2d) 1 (Ont.C.A.).

17 *R. ex rel. Murray* v. *Streatch* (1950) 99 C.C.C. (2d) 60 (N.S.S.C.-A.D); *R.* v. *Bat* (1926) 46 C.C.C. 151 (Sask.C A.).

18. *R.* v. *Blackstock* [1950] O.R. 561, 10 C.R. 175, 97 C.C.C. 201 (C.A.).

19. *Op. cit.,* footnote 17.

20. *R.* v. *The "Gulf Alladin"* [1978] 2 W.W.R. 472 (B.C.Co.C.); *R.* v. *Fedoruk* (1965) 55 W.W.R. 251, [1965] C.T.C. 566, 65 D.T.C. 5280, [1966] 3 C.C.C. 118 (Sask.C.A.); *R.* v. *Chandra* (1975) 29 C.C.C. (2d) 570 (B.C.C.A.); *The King* v. *Atkinson* (1910) 18 C.C.C. 279 (N S.S.C.-In Banc).

21 E g., *R.* v. *Skehan* (1978) 39 C.C.C. (2d) 196 (Ont.H.C.) and *R.* v. *Powell* (1977) 37 C.C.C. (2d) 117 (Ont.Co.C.) overruled by *R.* v. *Stratton, op. cit.* footnote 4; Cross, The Problem of an Accused with a Record (1968) 6 Sydney L. Rev. 173, at p. 177; *R.* v. *Titchner, op. cit.* footnote 16.

22. *R.* v. *Leforte, op. cit.,* footnote 12; *R.* v. *Stratton, op. cit.,* footnote 4.

23. *Ibid.* and see *The King* v. *Dalton* (1935) 9 M.P.R. 451, 64 C.C.C. 140, [1935] 3 D.L.R. 773 (N.S.S.C.-A.D.).
24. *Clarke* v. *Holdsworth, Laaja and Steelhead Ranch Resort Ltd.* (1967) 62 W.W.R. 1 (B.C.S.C.). However, section 26 of the *Alberta Evidence Act,* R.S.A. 1970 c. 127 refers to "a crime".
25. *R.* v. *Boyce* (1975) 7 O.R. (2d) 561, at p. 582, 28 C.R.N.S. 336, at p. 359 (Ont.C.A. *per* Martin, J.A.).
26. *Koufis* v. *The King* [1941] S.C.R. 481, 76 C.C.C. 161, [1941] 3 D.L.R. 657.
27. *Maxwell* v. *D.P.P.* [1935] A.C. 309, at pp. 319-20 (H.L., *per* Viscount Sankey, L.C.).
28. *Ibid., McLaughlan* v. *The Queen, op. cit.* footnote 8.
29. *R.* v. *Tan* (1974) 22 C.C.C. (2d) 184 (B.C.C.A.).
30. Juvenile records: *Morris* v. *The Queen, op. cit.* footnote 13; *R.* v. *Bradbury* (1973) 23 C.R.N.S. 293, 14 C.C.C. (2d) 139 (Ont.C.A.); *R.* v. *Boyko* (1975) 28 C.C.C. (2d) 193 (B.C.C.A.); convictions under appeal: *Hewson v. The Queen* (1978) 5 C.R. (3rd) 155 (S.C.C.).
31. *R.* v. *Brown* (1978) 38 C.C.C. (2d) 339, at pp. 342-3 (Ont.C.A., *per* Martin, J.A.).
32. *R.* v. *Stratton, op.cit.,* footnote 4.
33. Cf. *Clarke* v. *Holdsworth, Langa and Steelhead Ranch Reort Ltd., op.cit.,* footnote 24; *Levin* v. *Willis* (1969) 9 D.L.R. (3d) 536 (N.S.Co.C.) with *Street* v. *City of Guelph* [1964] 2 O.R. 421, [1965] 2 C.C.C. 215, 45 D.L.R. (2d) 652 (Ont.H.C.).
34. *Koufis* v. *The King, op.cit.,* footnote 26.
35. *R.* v. *Davison, DeRosie and MacArthur* (1974) 6 O.R. (2d) 103 at pp. 123-4, 20 C.C.C. (2d) 424 at p. 444 (Ont C.A.), quoted with approval by Pratte, J. for the majority of the S.C.C. in *Morris* v. *The Queen, op. cit.,* footnote 13.
36. *R.* v. *St. Pierre* (1974) 3 O.R. (2d) 642, 17 C.C.C. (2d) 489 (C.A.) (the accused); *R.* v. *Boyko* (1975) 28 C.C.C. (2d) 193 (B.C.C.A.) (Crown witness).
37. *R.* v. *MacDonald* (1974) 27 C.R.N.S. 212 (Ont.C.A.); *R. v. St. Pierre, id.* If, on examination-in-chief, counsel asks about the circumstances of the offences, on cross-examination, opposing counsel may also ask such questions subject to the trial judge's discretion to protect a party-witness from prejudice: *R.* v. *Hartridge* (1966) 56 W.W.R. 385, [1967] 1 C.C.C. 346, 57 D L.R. (2d) 332, 48 C.R. 389 (Sask. C.A.).
38. *R.* v. *Fushtor* (1946] 2 W.W.R. 204, 1 C.R. 351, 85 C.C C. 283 (Sask. C.A.); *R.* v. *Warren and Kozak* (1976) 11 C.R.N.S. 217 (Ont.C.A.); *R.* v. *Bodnarchuk* (1949) 57 Man. R. 291, 8 C.R. 293, [1949] 2 W.W.R. 161, 94 C.C.C. 279, [1949] 3 D L.R. 565 (C.A.).
39. *Ibid.*
40. *R.* v. *Tennant & Naccarato* (1975) 31 C.R.N.S. 1 (Ont. C.A.).
41 *R. v. Brown* (1978) 38 C.C.C. (2d) 339 (Ont. C.A.).
42 *R.* v. *Stratton, op. cit.* footnote 4, p. 279 (O.R.), p. 468 (C.C.C.).
43. *Op. cit. supra,* footnote 41, at pp. 342-3.
44. Friedland, *op. cit.,* footnote 6; Teed, The Effect of s. 12 of the *Canada* Evidence Act upon an Accused (1970) 13 Crim. L.Q. 70; Cadsby, Cross-Examination of Accused Persons as to Previous Convictions (1962) 4 Crim. L.Q. 265; Wright, Comment (1940) 18 Can. B. Rev. 808.
45. Hans and Doob, Section 12 of the *Canada Evidence Act* and the Deliberations of Simulated Juries (1975-76) 18 Crim. L.Q. 235; Doob and Kirshenbaum, Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act upon the Accused (1972-73) 15 Crim. L.Q. 88.
46. H. Kalven and H. Seisel, *The American Jury,* (1960) at p. 160.

47. *Kerekanich* v. *Stephenson et al.* (1976) 1 Alta. L.R. (2d) 354, 2 A.R. 198 (Alta. S.C.); *Jannock Industries Limited* v. *Acadia Forest Products Ltd.* (1977) 18 N.B.R. (2d) 361 (N.B.S.C.-T.D.); Molot, Non-Disclosure of Evidence, Adverse Inferences and the Court's Search for the Truth (1971) 10 Alta. L. Rev. 45.
48. *Corbett* v. *The Queen* (1973) 25 C.R.N.S. 296, 1 N.R. 258 (S.C.C.).
49. *Ibid.*
50. *R.* v. *Bouchard* (1970) 2 N.B.R. (2d) 138, [1970] 5 C.C.C. 95 (S.C.-A.D.); *R.* v. *Binder* [1948] O.R. 607, 6 C.R. 83, 92 C.C.C. 20 (C.A.).
51. *R.* v. *McDonald* [1948] 1 W.W.R. 657, 5 C.R. 395, 91 C.C.C. 30, [1948] 3 D.L.R. 129 (Alta. S.C.-A.D.).
52. *R.* v. *Cooper (No. 2)* (1974) 5 O.R. (2d) 118 (Ont. H.C.).
53. *Vezeau* v. *The Queen* [1977] 2 S.C.R. 277, 66 D.L.R. (3d) 418.
54. *Avon* v. *The Queen* [1971] S.C.R. 650 at p. 655, (*per* Fauteux, C.J.C.).
55. Criminal Code, R.S.C. 1970 c. C-34, paragraph 613(1)(b)(iii); *McConnell and Beer* v. *The Queen,* [1968] S.C.R. 802, 4 C.R.N.S. 269, [1968] 4 C.C.C. 257, 69 D.L.R. (2d) 149.
56. *Id.,* at p. 274 (C.R.N.S.).
57. *Id.,* at p. 275 (*per* Ritchie, J.).
58. Williams, *The Proof of Guilt* (2nd ed., 1958), at pp. 58-63.
59. *Id.,* at p. 62.
60. Ratushny, *Self-Incrimination in the Canadian Criminal Process* (1979) at p. 71.
61. *Op. cit.* footnote 58 at p. 62.
62. *Op. cit.* footnote 60, at pp. 335-43.
63. *Op. cit.* footnote 44.
64. E.g., American Law Institute, *Model Code of Evidence (1942),* Rule 106(1)(b) permits impeachment by evidence of a "conviction of crime . . . involving dishonesty or false statement"; National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Evidence* (1953), Rule 21, also permits impeachment by evidence of a "conviction of crime . . . involving dishonesty or false statement"; Federal Rules of Evidence for United States Courts and Magistrates (1975) Rule 609(a)(2), (hereinafter "Fed. R. Evid."); in Clarke v. Holdsworth, op. cit. footnote 24, Aikins J. referred to "the line of offences, such as perjury, fraud, theft, misrepresentation and so on which can give rise to a reasonable inference that a witness is not an honest person, not likely to be speaking the truth or that there is a likelihood that he would not be speaking the truth."
65 *Ibid.*
66. Fed. R. Evid. 609(a) provides that the judge must exclude convictions more than 10 years ago unless probative value on the issue of credibility outweighs prejudicial effect and notice is given.
67. Ontario Law Reform Commission, *Report on the Law of Evidence,* Draft Evidence Bill (1976) subsection 36(2) provides: 'Notwithstanding subsection 1, [which provides a judicial discretion], a witness in a proceeding may be asked any question tending to show that he has been convicted of an offence under section 121, 122 or 124 of the *Criminal Code* (Canada)."
68. The American Fed. R. Evid. 609 seems to be working well: recent analyses include: 3 J. Weinstein, *Evidence* (1975) para. 609; Annotation, (1978) 39 A.L.R. Fed. 570; Notes (1977-78) 27 Drake L. Rev. 326, (1978) 53 N.Y.U.L. Rev. 1290, (1978) 54 Wash. L. Rev. 117.
69. Canada Law Reform Commission, *Report on Evidence, Evidence Code (1977)* subsection 64(1) provides: "Evidence of the conviction of a witness for a crime is inadmissible for the purpose of attacking his credibil-

ity if the witness has been pardoned for the crime or five years have elapsed from the day of his conviction or release from confinement for his most recent conviction of a crime, whichever is the later." See also Fed. R. Evid. 609(b) which excludes convictions more than 10 years old, subject to judicial discretion.

70. *R.* v. *Stratton, op. cit.* footnote 4, p. 278 (O.R.), p. 467 (C.C.C.).
71. E.g., Canada Law Reform Commission, *Report on Evidence,* Evidence Code (1977), section 63, "Evidence of a trait of a witness' character for truthfulness or untruthfulness is inadmissible to attack or support the credibility of the witness unless it is of substantial probative value;" Ontario Law Reform Commission, *Report on the Law of Evidence,* Draft Evidence Bill (1976) subsection 36(1), "A witness in a proceeding shall not be asked any question tending to show that he has been convicted of any Federal or provincial offence solely for the purpose of attacking his credibility unless the court finds that the conviction is, because of the nature of the offence and the date of its commission, relevant to the witness' credibility."
72. R.S.B.C. 1960 c. 134.
73. Loc. cit., footnote 70.
74. E g., Autralia: *Victoria Evidence Act 1958-74,* sections 33, 37, and see *R.* v. *Taylor and Clarke* (1892) 18 V.L.R. 497 (S.C. Full Court); New South Wales, *The Evidence Act 1898-1954,* sections 56-58, and see *Bugg* v. *Day* (1949) 79 C.L.R. 442 (Aust. H.C.); New Zealand, *Evidence Act 1908,* section 5(2)(d); England, *Criminal Evidence Act 1898* (U.K.) section 1(f)(ii), see *Selvey* v. *D.P.P.* [1970] A.C. 304 [1968] 2 All E.R. 497 (H.L.).
75. *Luck* v. *United States* 121 U.S. App.D.C. 151, 348 F 2d 763 (1965), see McCormick, *op. cit.* footnote 1, at pp. 89-90.
76. *Boardman* v. *D.P.P.* [1975] A.C. 421, [1974] 3 W.L.R. 673, [1974] 3 All E.R. 887 (H.L.).
77. E.g. *Criminal Evidence Act 1898* (U.K.) section 1(f); Criminal Law Revision Committee, Eleventh Report Evidence (General) 1972 at p. 78, a majority recommended that the provision with modifications be retained; New South Wales, Law Reform Commission, *Working Paper on Evidence of Disposition* (1978) would also retain it, with modifications; American Law Institute, *Model Code of Evidence* (1942) Rule 106(3); National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Evidence,* Rule 21; Law Reform Commission of Canada, Report on Evidence (1975) subsection 65(2). Canadian authors who have recommended such a provision include: Teed, *op. cit.,* footnote 44; Cadsby, *id.*; Friedland, *op. cit.* footnote 6. The Yukon *Evidence Ordinance* R.O. 1971 C.E. 6 Section 4(c) adopts section 1(f) of the *Criminal Evidence Act 1898* (U.K.).
78. *R.* v. *Davison, DeRosie and MacArthur, op. cit.* footnote 35.
79. *Ibid.*
80. Rule 106(3) of the Model Code and Rule 21 of the Uniform Rules, *op. cit.* footnote 77.
81. Subsection 65(2), *op. cit.* footnote 77.
82. Criminal Law Revision Committee, *Eleventh Report Evidence (General)* (1972) at p. 30.
83. Law Reform Commission of Canada, *Report on Evidence,* (1975) Evidence Code, section 56.
84. Glanville Williams, *Proof of Guilt* (2nd ed., 1958), at p. 189.
85. E.g., Ratushny, *op. cit.,* footnote 60 at p. 343.
86. *See,* Section 11.7 of this Report, supra.

87. E.g., National Conference of Commissioners on Uniform State Laws, Uniform *Rules of Evidence (1953)* Rule 39, California *Evidence Code*, 1964-65, s. 913. Fed. R. Evid. 513 provides:

> 513 *Comment Upon or Inference from Claim of Privilege; Instruction*
> (a) *Comment or inference not permitted.* The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
> (b) *Claiming privilege without knowledge of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
> (c) *Jury instruction.* Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

88. The standard instruction contained in the District of Columbia Bar Association Criminal Jury Instructions for the District of Columbia, para. 2.26 (2d ed. 1972) states: "Every defendant in a criminal case has the absolute right not to testify. You must not draw any inference of guilt against the defendant because he did not testify." In practice, defence counsel prefer not to have the instruction unless it is obviously necessary because it points out that the accused did not testify and may unwittingly suggest inferences that the jury would not otherwise have thought of: *U.S.* v. *Williams,* 521 F. 2d 950 (D C.C.A., 1975).
89. McCormick, *op. cit.* footnote 1.
90. 8 Wigmore, *Evidence,* para. 2272 (McNaughton rev. 1961).
91. Snelling, Commentary Upon Comment (1962) 35 Aust. L.J. 395.
92. *R.* v *Barron* [1975] V. R. 496, at p. 502 (S.C.–Full Court).
93. E.g., *Avon* v. *the Queen* [1971] S.C.R. 650, 4 C.C.C. (2d) 357, 21 D.L.R. (3d) 442; *McConnell and Beer* v. *The Queen, loc. cit. supra,* footnote 55.
94. Cross, The Right to Silence and the Presumption of Innocence—Sacred Cows or Safeguards of Liberty? (1970) 11 Jo. of Soc. of Pub. Teachers 66, at pp. 68-69.
95. *Criminal Evidence Act 1898* (U.K.) section 1(b).
96. *Ibid.*
97. Criminal Law Revision Committee, Eleventh Report, *Evidence (General)* para. 109, at p. 68.
98. *Id.,* para. 10, at pp. 68-69, Williams, *op. cit.* footnote 82, at p. 63; Cross, *op. cit.* footnote 94, at 69; Ratushny, *op. cit.* footnote 60 at p. 332, American Law Institute, Model Code of Evidence, Rules 201(3) and 233.
99 See section 11.3 of this Report.
100. *Op. cit.* footnote 94, at p. 70.
101. *R.* v. *Proudlock* (1978) 5 C.R. (2d) 21 (S.C.C.).
102. *Id.,* at p. 29.
103. [1968] 2 Q B. 99, [1968] 2 W.L.R. 1092, [1968] 1 All E.R. 1175, 52 Cr. App. R. 251.

12. REPUTATION OF WITNESSES

12.1 *Impeachment and Rehabilitation by Evidence of General Reputation*

The common law permits a party to impeach the credibility of an opposing witness by showing that his character for truth and

veracity is bad.[1] For impeachment purposes, the means of proof is limited to evidence of reputation and an element of non-expert opinion: after the impeaching witness testifies that a witness's reputation for truth and veracity is bad, the witness may also be asked whether he personally would believe the witness. One view is that the witness's opinion should be a conclusion drawn only from his knowledge of the witness's reputation and not from his personal knowledge of the witness.[2] The English view is that the opinion may be based on the witness's personal knowledge.[3] The witness cannot testify in chief as to specific incidents of conduct which form the basis of the opinion. On cross-examination, these matters may be asked about. According to the view that the opinion must be based exclusively on knowledge of the witness's reputation, the proper form of questioning is as follows:

> Do you know the reputation of the witness for truth and veracity in the community in which he resides?
> (If the answer is no, the questioning ceases; if the answer is yes, it may continue).
> Is the reputation good or bad?
> From that reputation, would you believe the witness on oath?[4]

The character witness may be cross-examined concerning his knowledge both of the witness's reputation and of specific instances of the witness's conduct that bear on his credibility. Evidence of the character witness's own bad reputation for truth and veracity can be used to impeach his credibility.

Finally, the credibility of an impeached witness may be rehabilitated by good character evidence of his reputation for truth and veracity and personal opinion as to his credibility.[5] For rehabilitation, as well as impeachment, the personal opinion should be based on knowledge of the good reputation, so that for either purpose, character witnesses are asked the questions set out above.

An accused may call good character evidence either to rehabilitate his credibility or to put his character in issue, or for both purposes.[6] If an accused is impeached on cross-examination, he may call character evidence of his good reputation for truth and veracity to rehabilitate his credibility. Whether the accused testifies or not, he may call evidence of his good reputation for a character trait relevant to the merits, to show that he is unlikely to have done the act charged.[7] It is clear that the Crown can rebut character evidence on the merits by showing the accused's bad reputation[8]

and previous convictions.[9] Because of the absence of authority, it is unclear whether the Crown can impeach the accused as a witness by evidence of bad character. The likelihood of prejudice is so great that the Crown is probably prohibited from doing so and is limited to impeachment by proof of previous convictions.[10] If it is possible to impeach a witness not only by evidence of general reputation for moral turpitude,[11] the danger of prejudice to an accused is even greater.

Evidence of reputation for truth and veracity is an historical antiquity. It is a vestige of compurgation and such evidence is seldom called nowadays. The assumption underlying the admission, on the issue of credibility, of evidence of reputation in the community is that a person who is widely known to lie is likely to lie on the witness stand. This assumption is dubious for the following reasons. Evidence of reputation is founded on hearsay that can be misleading and unreliable as to a person's disposition to tell the truth.[12] A reputation for truth and veracity with respect to everyday affairs has little probative value as to a witness's credibility in a court. Because of modern society's anonymity and mobility, the concept of "community" is out-of-date, and a person who is called to testify may not have acquired a reputation for truth and veracity in the community where he resides at the time of testifying. The rule favours the highborn and well-connected person who can call upon notable members of society for support.

Bad reputation evidence of witnesses is seldom called. Such evidence could embarrass the non-party witness and could prejudice the party witness—especially an accused. Because such evidence is seldom called, the rules governing its admissibility are unclear.

The Task Force considered various law reform proposals. The Ontario Law Reform Commission recommended that the common law rules of admissibility be retained.[13] Because of the uncertainty of the common law, the Task Force would reject this suggestion. The Law Reform Commission of Canada proposed another alternative: to legislate the admissibility of evidence of reputation to show credibility.[14] While this proposal offers the advantages of clarifying and up-dating the common law, the Task Force rejected it because reputation evidence on the issue of credibility is seldom called, lacks probative value, and poses dangers of embarrassment, prejudice, confusion of issues and waste of court time. The Task Force unanimously recommends that impeachment (and rehabilitation) by evidence of general reputation be abolished.

12.2 *Recommendation with respect to the Reputation of Witnesses*

The Task Force unanimously recommends that evidence of general reputation should be inadmissible to attack or support credibility.

FOOTNOTES

1. *Toohey* v. *Metropolitan Police Commissioner* [1965] A.C. 595 at pp. 605-6, 49 Cr. App. R. 148 at pp. 159-60, *per* Lord Pearce.
2. *Steinberg* v. *The King* [1931] 4 D.L.R. 8 at pp. 36-37, 56 C.C.C. 9 at pp. 40-41 (Ont. C.A. *per* Grant, J.A. diss.).
3. *R.* v. *Richardson, R.* v. *Longman* [1969] 1 Q.B. 299 at p. 304; (1968) 52 Cr. App. R. 317 at p. 323 (C.A.-Cr. Div.).
4. Ontario Law Reform Commission, *Report on the Law of Evidence* (1976) at p. 200. For a recent illustration, *see· R. v French* (1977) 37 C.C.C. (2d) 201 (Ont. C.A.).
5. Cross on *Evidence* (4th ed., 1974) at p. 239.
6. E.g , *R.* v. *Dees* (1978) 40 C.C.C. (2d) 58 (Ont. C.A.).
7. *R.* v. *Rowton* (1865) Le. & Ca. 520, 169 E.R. 1497 (C.C.C.R.).
8. *Ibid.*
9. *Criminal Code*, R S.C 1970, c. C-34, s. 593.
10. See, *R.* v. *Davison, DeRosie and MacArthur* (1974) 6 O.R. (2d) 103 at pp. 123-4, 20 C.C.C. (2d) 422 at p. 444 (Ont. C.A., *per* Martin, J.A.).
11. Taylor on *Evidence,* (12th ed.) Vol. II, para. 1471, cited by Lord Peace, *loc. cit.*, footnote 1.
12. Wigmore described reputation evidence as ". . . the second hand, irresponsible product of multiplied gossip and guesses . . .", 7 Wigmore, *Evidence* §1986, at p. 244 (Chadbourn rev. 1978).
13. *Loc. cit.*, footnote 4. Similarly, the *Civil Evidence* 1968 (U.K.) ss. 9(3), (4)(a) and the Criminal Law Revision Committee, *Eleventh Report, Evidence (General),* Cmmd. 4991 (1972), Draft Bill, s. 40(2)(e) would retain the present common law rules of admissibility.
14. Law Reform Commission of Canada, *Report on Evidence* (1975), *Evidence Code,* ss. 5, 62 and 63 would expand admissibility beyond reputation to include both non-expert opinion testimony and evidence of specific instances of conduct that bear on credibility. The American proposals for reform are: American Law Institute, *Model Code of Evidence* (1942), Rule 106(1)(a); *Uniform Rules of Evidence* (1953), Rules 20 and 22(c); California *Evidence Code* (1964-65), section 780(e); and *Federal Rules of Evidence* (1975), Rule 608.

14. EXPERT WITNESSES

14.1 *Introduction*

The Task Force identifies five areas of the admissibility of expert testimony that can be improved by legislative reform. The proposals for change concern: (1) exchange of expert reports in civil cases; (2) ultimate issue; (3) court-appointed experts in civil cases; (4) court-appointed experts in criminal cases; and (5) limitations on the number of expert witnesses in civil and criminal proceedings.

14.2 *Exchange of Expert Reports in Civil Cases*

Expert evidence is frequently decisive in civil cases. In the adversary system of litigation, each party hires people with special knowledge, training or experience to assist in the preparing and presenting of the case. In the adversarial tradition, although one party may want to find out before trial the opinions of the other party's experts, solicitor-client privilege can preclude it. Because of this obstacle, parties cannot, before trial, determine the area of controversy, if any, among the experts on each side. At the trial, the hearsay rule requires experts, like other witnesses, to present their evidence through oral testimony. But, because the parties do not know beforehand what the opposing experts will say, cross-examination may be ineffective or perfunctory. Alternatively, the opposing party will seek an adjournment to prepare for cross-examination, which causes further delay and expense. Two long-standing weaknesses in the trial process have been the waste of time and money and the ineffective presentation of expert evidence that "trial by ambush" and the hearsay rule have caused.

To alleviate this deficiency, over the past 10 years or so many Canadian jurisdictions have enacted provisions for compulsory exchange of experts' reports before trial and admissibility of the reports in lieu of *viva voce* testimony at trial. By statute, the following Canadian jurisdictions compel the pre-trial exchange of expert reports and make them admissible in evidence: British Columbia, *Evidence Act,* R.S.B.C. 1960, c. 134, ss. 12, 13; Manitoba, *The Manitoba Evidence Act,* R.S.M. 1970, c. E-150, s. 50.2 (medical reports only); Ontario, *The Evidence Act,* R.S.O. 1970, c. 151, s. 52 (medical reports only); Yukon, *Evidence Ordinance,* R.O. 1971, c. E-6, ss. 11-13; Northwest Territories, *Evidence Ordinance,* R.O. 1974, c. E-4, ss. 11-13, and *Uniform Evidence Act,* ss. 9-11. Other jurisdictions provide for expert reports in rules of civil procedure: Canada, *Rules of the Federal Court of Canada* SOR/71-68, Rule 482; Alberta, *The Alberta Rules of Court,* Alta. Reg. 390/68, Rule 217 (discovery of medical reports); and Nova Scotia, *Civil Procedure Rules,* 1972, Rules 22.04, 22.05 (discovery of medical reports) and Rule 31.08 (exchange of expert reports).

Judges in the Canadian jurisdictions that have already adopted this development regard it as an improvement in civil trial procedure for the following reasons.

The pre-trial exchange and admissibility of expert reports dispense with in-court expert testimony, unless a party requires it. This procedure reduces the length and expense of trials, and benefits litigants, courts, counsel and experts. Kelly, J.A., of the Ontario Court of Appeal described the development as

> . . . a wholesome procedural change made in the public interests. It does not make any change in the law as to the respective obligations of parties arising out of the issues before the Court. It merely permits certain relevant evidence, with leave of the Court, to be given in written form. It recognizes the undesirability of the encroachment on the time of medical practitioners and of the Court that results, in many cases, from adducing expert medical testimony, in the traditional manner. The amendment is procedural: its effect is to provide an alternative method by means of which the Court may admit the evidence of a professional medical witness without the necessity of bringing that witness physically into Court and having his examination conducted in the face of the Court.[1]

A judge of the Federal Court of Canada, who was formerly an eminent civil counsel expressed regret that some Canadian jurisdictions had not yet introduced such provisions.[2]

The pre-trial exchange of an expert report as a condition precedent to its admissibility is not, strictly, a "discovery" device, since the party must exchange only those reports on which he intends to rely at trial.[3] Nevertheless, it curtails unnecessary surprise[4] and lawyers' " 'poker-playing' habits of keeping their best cards up their sleeves."[5] It allows an opposing counsel to prepare for cross-examination and an opposing expert to prepare to testify concerning the opinions expressed in the report. So, it produces better cross-examination and rebuttal testimony. It also serves to define the controversy among the experts[6] and "to aid in the pre-trial settlement process".[7]

Because an expert's report may be offered in evidence or used in cross-examination, the assistance of counsel is required to prepare it. A lawyer is necessary to ensure that the report contains only matter that: (1) is relevant to the issues before the court; (2) requires a qualified expert; and (3) is within the scope of the witness's expertise.[8] The report must comply with the rules of Evidence: it should not state information that would be inadmissible if offered in oral testimony.[9]

Complying with these requirements improves pre-trial preparation of expert witnesses and expert testimony at trial. These provi-

sions "assist counsel to obtain precisely from each of his . . . expert witnesses the opinion in respect to which each expert is qualified to express an admissible, credible and probative opinion and to enable each such expert witness to put his opinion in his most cogent language."[10]

Although judges have been very enthusiastic about these provisions, trial lawyers have expressed reservations.[11] First, it has been suggested that, because counsel must deal twice with the expert, in preparing the expert's report before trial and then in preparing the expert's testimony for trial, the cost to the litigants will increase. But since the main purpose of the exchange of expert reports is to minimize, or, if possible, eliminate the need for expert testimony at trial, the result should usually be a saving of costs. Another complaint is that the pre-trial exchange of reports requires the parties to commit themselves too far in advance of the trial. However, this argument seems unfounded. Although one trial judge has suggested that the exchange should take place a month before trial,[12] the provisions require the exchange of reports to take place within two weeks or less of trial. The date should be reasonably close to trial. An exchange of expert reports must take place far enough ahead of trial to allow the opposing party an adequate opportunity to prepare for cross-examination and rebuttal. Yet, it must be close enough to trial to be current and perhaps it is desirable to prevent the opposing party from obtaining the benefit of the other party's expert without paying for his own. A third criticism is that the non-compliance with the pre-trial requirements can cause delay and uncertainty at trial and may lead to appeals. Although this criticism has merit, it is a matter of drafting rather than of principle.

Successful implementation depends not so much upon the wording of a provision as upon the Bar's willingness to abandon "their old 'poker playing' habits".[13] If lawyers comply with the letter rather than the spirit of the rules, the rules will become self-defeating.[14]

The Task Force unanimously approves of compulsory exchange before trial of an expert report in a civil case and its admissibility at trial (dispensing with the expert's attendance, unless a party requires it). If the provision clearly defines the procedure and confers upon the parties the right to question the expert, it should alleviate failings of the adversary system while conforming to its precepts.

Such a provision could be introduced into an evidence act, another statute concerning civil procedure, or rules of court. However, the Ontario Court of Appeal held that a provision for the exchange of expert reports was *ultra vires* the rules of court.[15]

A proposal for the exchange and admissibility of expert reports raises the following issues.

Should the rules apply to all expert witnesses or only to medical experts?

The Province of Ontario is one of the few Canadian jurisdictions that confines its provisions to reports of medical experts.[16] The Ontario Law Reform Commission's proposal included all experts within its scope.[17] The experience of the other Canadian jurisdictions shows that the same rules should apply to all kinds of experts.[18]

What information should a report contain?

Kelly, J.A., accurately predicted that unless the parties fully disclose the expert's opinion and its basis, exchange of reports would become a perfunctory exercise.[19] The learned judge stated that provision for exchange and admissibility of expert reports

> . . . is not . . . designed to provide a means whereby expert medical testimony may be protected from the process of testing and refinement by cross-examination; nor is its purpose to deny the Court the benefit of an objective appraisal of the nature and extent of physical and mental disabilities reported upon and a reasonable statement of the observable data upon which the opinion is based. The great benefits which may flow from this amendment cannot be realized unless the members of both professions, the legal and the medical, show a discernment of the purpose of the written report and an awareness of their obligation to the Court to make its use as effective a means of adducing expert medical testimony as the traditional means of oral testimony.[20]

Because the expert's report is admissible in lieu of his testimony, it must be as comprehensive as the testimony would have been.[21] Jackett, C.J. of the Federal Court has suggested the following test: A report is sufficiently comprehensive and detailed if a court, assuming that the report is adopted, could apply its reasoning as the court's own and decide the issue to which it is relevant on the basis of it.[22] Thus the report should summarize: (a) the expert's qualifications including experience;[23] (b) the information submitted to the expert that forms the basis of the opinion; (c) the tests,

investigations or other procedures carried out by the expert, and results that also provide the basis of the opinion; and (d) the expert's opinion.

Should the date for exchange of expert reports be fixed or in the judge's discretion?

Although a fixed date is inflexible, it is certain. The parties would incur unnecessary expense and further delay if they had to apply to the court to set a "reasonable" date for the pre-trial exchange. To encourage settlement, narrow the controversy and prevent a party from taking advantage of another's preparation, the exchange should be simultaneous. The Task Force unanimously agreed that the exchange of expert reports must take place at least 10 days before trial. However, to accommodate those cases where the rule would be unfair or impractical, the judge may give a party leave to call the expert witness, upon terms and conditions, despite failure to disclose the report.

What use may an opposing party make of the report?

A party who intends to reply upon an expert's evidence at trial must disclose all of it in the report and cannot withhold an unfavourable part from disclosure to the opposite party.[24] If, at trial, the party offers only the favourable part of the report into evidence, the other party may call the expert for cross-examination on the remainder.[25] If the party who disclosed the report decides not to rely on the expert's evidence at trial, it is well-established that the other party may tender the report or call the expert, without further notice.[26] The expert is the witness of the party who offers his report in evidence.[27] By this turnabout, the expert is the witness of of the adversary to whom his report was disclosed and the party who originally employed him can cross-examine.

Provisions for the exchange of expert reports do not require a party to disclose an unfavourable report. If the party does not intend to rely upon the expert's evidence at trial, there is no duty to make the report or the expert available to the other side. However, in some jurisdictions, rules of discovery may require disclosure. But proposals for exchange of expert reports "do not abrogate the rule of privilege; they relate only to notice being given of evidence it is intended to lead and they give no indication of any power in the Court to order privileged reports to be disclosed."[28]

By exchanging a report, the party gives notice that he intends to use the expert's evidence and it is no longer confidential.[29].

Should the trial judge have an overriding discretion to exclude a report even though the provisions have been complied with?

In British Columbia, a report that has been duly exchanged and complies with the pertinent rules of evidence is admissible as of right.[30] In Ontario, the trial judge has a discretion to exclude it.[31] Brooke, J.A., of the Ontario Court of Appeal, described this discretion as "most important" because it enabled the trial judge to retain control over the admissibility of a report, particularly in civil jury trials.[32] However, the Task Force prefers the British Columbia proposal, because an overriding judicial discretion detracts from the provision's effectiveness for the following reasons. A party cannot be certain that an expert's testimony will be dispensed with until the judge so rules at trial. Such a discretion might require the party to have the expert "stand by" in case the judge excludes the report A judicial discretion is (a) undesirable because of the extra expense incurred by the parties and is (b) unnecessary because the ordinary rules of evidence adequately regulate admissibility.

Should the rules governing the exchange of expert reports expressly exclude evidence in rebuttal?

Even though a rule may not expressly say so, obviously pre-trial disclosure is not required of an expert's opinion on the contents of the opposing experts' reports.[33] The Task Force concluded that an explicit provision to this effect is unnecessary.

What penalties, if any, should be imposed for breach of the rules?

A trial judge may penalize a party for failing to comply with the rules by excluding not only the expert's report but also the expert's opinion testimony.[34] However, the usual and less drastic procedure is to grant an adjournment, require the offending party to exchange a further report and to bear the costs thrown away.[35] A party who unnecessarily requires an expert's attendance at trial should also be mulcted in costs. The wording of Clauses (D) and (E) of the Task Force's proposal may require revision to clarify this intention.[36]

The Task Force unanimously recommends the following proposal for enactment either in an Evidence Act or in rules of civil procedure:

(A) A statement in writing setting out the opinion of an expert is admissible in evidence without proof of the expert's signature if a copy of the written statement is furnished to every party to the proceeding who is adverse in interest to the party tendering the statement at least 10 days before the commencement of the trial.
(B) The written report shall set out the expert's name, address, and qualifications, including experience, and a full statement of the proposed testimony.
(C) Where the written statement of an expert is given in evidence in a proceeding, any party to the proceeding may require the expert to be called as a witness.
(D) Where the expert has been required to give evidence under subsection (C), and the trial judge is of the opinion that the evidence so obtained does not materially add to the information in the statement furnished under subsection (A), he may order the party that required the attendance of the expert to pay, as costs, such sum as the trial judge considers appropriate.
(E) Unless subsection (A) has been complied with, no expert witness may testify without leave of the trial judge.

14.3 *Exchange of Expert Reports in Criminal Cases*

The Task Force unanimously opposes the introduction into criminal procedure of compulsory pre-trial disclosure of expert reports.

In criminal cases it is impractical to impose such a condition upon the admissibility of expert evidence. In a criminal case, change of defence or prosecution counsel occurs frequently enough to cause problems for the pre-trial exchange of expert reports. If the new counsel wished to call an expert witness, perhaps arising out of a change of tactics or late preparation, an adjournment of the preliminary hearing or trial might be necessary to exchange an expert report. Criminal proceedings ought to take place as quickly as possible. Requiring a lead time for the exchange of expert reports would hinder that objective. Frequently in criminal cases a psychiatric expert is unable to provide an opinion until immediately before the trial or even later. Exchange of such reports before trial would be impossible. Finally, in the absence of sharply defined issues, pre-trial exchange of expert reports would not assist the opposing party in preparing the case for trial. In civil cases, the issues are defined before trial by the pleadings and discovery procedures. In criminal cases, pre-trial refinement of the issues is much more limited. Since the pre-trial exchange of expert reports is part of the larger question of discovery in criminal cases,[37] it is beyond the terms of the Task Force's mandate. To require exchange of defence expert reports

would violate the accused's privilege to refrain from disclosing his case until the prosecution presents its case.

14.4 *Ultimate Issue*

What is the present status in the Canadian Law of Evidence, of the rule that prevents a lay or expert witness from stating an opinion on an "ultimate fact" or "ultimate issue"? Eminent scholars have criticized the rule as unsound.[38] Canadian textbooks attack the rule but do not go so far as to state that it no longer has any application.[39] What do recent English and Canadian cases say about it?

One formulation of the ultimate issue doctrine is that testimony may not be received upon "the very question"[40] that the jury has to decide. In *R.* v. *Fisher*[41] and *R.* v. *Lupien,*[42] the Ontario Court of Appeal and the Supreme Court of Canada, respectively, appeared to sweep away this formulation of the rule. Yet, in *Phillion's*[43] case, speaking for the Ontario Court of Appeal, Jessup, J.A. said

> . . . the witness was being asked to express his opinion directly that the accused had not committed the act constituting the offence charged. We are all of the opinion that such evidence was properly rejected by the learned trial Judge as being inadmissible.

Another variation of the ultimate issue doctrine is that an opinion is inadmissible if it would "usurp the function of the jury". In *R.* v. *St. Pierre,*[44] Dubin, J.A., for the Ontario Court of Appeal, purported to excise this mode of expressing the rule when he wrote, "[s]uch objection is not by itself a reason for excluding [opinion evidence]."[45] Subsequently, a differently constituted bench of the same court invoked the very formulation of the rule that it had previously abandoned. MacKinnon J.A. said:

> To receive such evidence might, indeed, open a Pandora's box, from which there could be no resiling, of confusion and usurpation of function . . . The Courts must be chary of limiting or usurping the jury's duty and function in this area [of psychiatric evidence concerning a witness's credibility.] It is not 'empty rhetoric' to speak of the 'usurpation' of the function of the jury in these circumstances.[46]

The third formulation of the ultimate issue is that an opinion is inadmissible if it "invades the province of a jury". The Courts of Appeal of Ontario[47] and England[48] have recently rejected opinion testimony on this ground.

Despite academic criticism and judicial repudiation, Canadian courts continue to apply the classic statements of the ultimate issue rule.

Two further aspects of the rule should be mentioned.

First, many judges have said that a qualified expert may state an opinion on an ultimate issue if it is helpful to the judge or jury.[49] But when a lay person is able to make an intelligent judgment on the ultimate issue without expert testimony, it is indamissible.[50] What does this come down to? That expert opinion must be helpful to the jury is a general criterion of its admissibility. These courts are saying that expert opinion evidence, if it is admissible at all, is always admissible on an ultimate issue. By the same token, they should admit lay opinion evidence on the ultimate issue if it is helpful to the trier of fact.

Second, a witness should not testify on a question of law or on the application of a rule of law to the facts.[51] If the question is on the border-line between law and fact and the witness's opinion would be helpful to the jury, the judge has a discretion to permit it.[52] But the general exclusion of opinion evidence on questions of law has never been questioned.

Proposals for reform have unanimously recommended a relaxation of the ultimate issue rule.[53] The U.S. Federal *Rules of Evidence (1975)* completely abolish it, as follows:

> Rule 704. *Opinion on Ultimate Issue.* Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

By providing that the ultimate issue is no longer a ground of objection to the admissibility of opinion, Rule 704 eliminates the rule. The proposed *Canada Evidence Code* does not go so far:

> Section 69. Testimony in the form of an opinion or inference otherwise admissible may be received in evidence notwithstanding that it embraces an ultimate issue to be decided by the trier of fact.

Instead of abolishing objection based on the ultimate issue, section 69 permits such an objection and provides the judge with a discretion to overrule it.

A majority of the Task Force have concluded that the uncertain status of the ultimate issue doctrine should be clarified by legislation. If, during a proceeding, counsel asks a witness a question on an ultimate issue, a judge should have a discretion: (1) to prevent the witness from giving opinion on the ultimate issue if he can testify in greater detail and more precisely; (2) to require counsel to lay a

foundation, setting forth the factual basis of the opinion before asking for it; or, (3) to disallow the question where the answer is unnessary or unhelpful to the trier of fact.

Seven members of the Task Force were in favour of the following provision and two members opposed it:

> A witness may testify as to his opinion on an ultimate issue in the case if the trial judge concludes that it would be helpful to the trier of fact to receive such evidence.

14.5 *Court-Appointed Experts in Civil Cases*

Because of the increasing complexity of modern Canadian society, more and more frequently its civil disputes raise issues that require recourse to scientific or technical expertise. In the adversary system of trial, it is up to the parties to bring expert knowledge to the court through expert witnesses. The partisanship inherent in the adversarial system conflicts with the impartial methodology of scientific inquiry. This weakness of the adversarial system has been criticised on the following grounds:[54]

> 1. The court hears not the most expert opinions, but those favourable to the respective parties.
> 2. The corrupt expert may be a rare phenomenon, but will not necessarily be exposed by an inexpert cross-examination.
> 3. The expert is paid for his services, and is instructed by one party only; some bias is inevitable.
> 4. Questioning, whether educive or hostile, by a lay barrister may lead to the presentation of an inaccurate picture, which will mislead the court and frustrate the expert.
> 5. Where a substantial disagreement arises, it is irrational to ask a lay judge to solve it; he has no criteria by which to evaluate the opinion.
> 6. Success may depend on the plausibility or self-confidence of the expert, rather than his professional competence.
> 7. Those professions on which the judicial system is reliant are antagonized by adversary trial procedure.

To alleviate this long-standing weakness in the civil trial process, the Canada[55] and Ontario[56] Law Reform Commissions and the Williston Committee[57] have endorsed the use of impartial experts to assist the courts. After reviewing those proposals, the Task Force unanimously concluded that the Williston Committee's recommendation, with minor changes, would adequately provide for impartial expert evidence in appropriate cases without infringing upon the adversary system's objective of doing justice to the litigants. Seven

members of the Task Force were in favour of a mechanism for court experts; and one member abstained.

In the United States, suggestions for rules or legislation authorizing the use of impartial experts rely upon the common law power of a judge to call his own lay witnesses.[58] In Canada, this common law power of the judge to call a witness without the consent of the parties no longer exists.[59] It follows that a Canadian judge does not have an inherent power to call his own expert witness when it might seem necessary in the interest of justice to do so.[60]

Although rules of court throughout Canada empower a judge, upon motion of a party (or in some rules on his own motion), to appoint masters, referees, or assessors, their functions are different from those of court-appointed expert witnesses.[61] A court expert would conduct an examination or experiment out-of-court, report his findings to the parties and the judge, and be available for in-court examination concerning the report. A court expert is a witness. An assessor does not conduct experiments outside of the courtroom unless authorized by legislation to do so. The function of an assessor is to sit with the judge in court and to advise him in the privacy of chambers, in the absence of the parties and their counsel. An assessor is neither a witness nor a participant in the court proceedings. A master or referee has a wider role of conducting a hearing, taking evidence on oath, making a record of the evidence, and reporting to the judge in writing, but neither the judge nor the parties can call him to testify concerning his findings. Section 96 of the *B.N.A. Act* limits a judge's powers to delegate his duties to any of these experts.

An instructive example of the dangers of unfairness to the parties, delay, and undue intervention in the course of a trial caused by an improvident appointment of a court expert is *Phillips* v. *Ford Motor Co. of Canada Ltd.*[62] In this products liability case, the plaintiffs sued an automobile manufacturer and dealer, claiming that a motor vehicle accident was caused by defective brakes. Although the parties had before the trial hired numerous experts to investigate the causes of the brake failure, and proposed to call them to testify, the trial judge, who was sitting without a jury, during the testimony of one of the plaintiffs' experts, announced to the parties he intended to appoint his own expert pursuant to Rule 267(1) of the Ontario Supreme Court Rules of Practice, which provides as follows:

> *Rule 267(1). The court may obtain the assistance of merchants, engineers, accountants, actuaries, or scientific persons, in such a way as it thinks fit, the better to enable it to determine any matter of fact in question in any cause or proceeding, and may act on the certificate of such persons.*
>
> *(2) The court may fix the remuneration of any such person and may direct payment thereof by any of the parties.*

On appeal, the majority of the Court of Appeal ordered a new trial on the ground that the trial judge had misconstrued Rule 267(1); it did not authorize the expert's appointment. Also, the trial judge allowed the expert to so conduct himself as to require a new trial. The case raises most of the issues concerning court-appointed experts in civil cases.

Should a civil court have the power to appoint an expert witness?

In the *Phillips* case, Evans, J.A. expressed reservations about the role of a court expert in an adversarial proceeding.

> A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of a research director; it is a forum established for the purpose of providing justice for the litigants. Undoubtedly, a Court must be concerned with truth, in the sense that it accepts as true certain sworn evidence and rejects other testimony as unworthy of belief, but it cannot embark upon a quest for the "scientific" or "technological" truth when such an adventure does violence to the primary function of the Court, which has always been to do justice, according to law. While I recognize that the adversary system has been subjected to criticism on the ground that its procedures may on occasions inhibit the search for the ultimate truth, I believe it to be a workable system which has proved satisfactory over a long period and I am not prepared to abandon it in favour of the presumed, but undemonstrable, advantages of a clinical, scientific approach to the adjudication of legal disputes.[63]

Evans, J.A. acknowledged that critics of partisan expert witnesses have identified a failing of the adversary system but doubted if it were possible to alleviate this deficiency without abandoning the system. The Task Force feels that empowering a court to appoint an expert within a framework of procedural limitations and safeguards would improve civil trial procedure without damaging the fabric of the adversary system.

Assuming that a court is given the power to appoint an expert witness, under what circumstances should the power be exercised?

In the *Phillips* case, the trial judge announced his intention to appoint his own expert while one of the plaintiff's experts was testi-

fying. This led Evans, J.A. to infer "that the trial Judge concluded early in the case"[64] that although brake failure was the cause of the accident, as the plaintiffs alleged, their experts were advancing the wrong theory to explain it and that the judge wanted to develop other theories. By appointing an expert to advance new theories, before the plaintiff's experts had finished testifying and the defence experts had testified, the trial judge had decended into the arena of conflict. Although the judge said that he had become confused by the complexity of the issues, the Court of Appeal concluded that the judge was not having that difficulty.

The Task Force would suggest that a trial judge must exercise a power to appoint an expert with discrimination: an expert should only be appointed where the judge (or jury) has difficulty understanding the evidence or where the expert evidence offered by one or both parties is unsatisfactory because it is partisan or slanted. A court expert should not be appointed where the parties' experts have given satisfactory evidence, even though there is a genuine conflict or difference of opinion between them, providing it is understood by the judge (or jury). An expert should not be appointed to pursue the judge's theories about the case. The Task Force does not feel that it is necessary to impose these limitations explicitly in the terms of its proposal.

How should the court expert be selected?

In the *Phillips* case, the trial judge, with the agreement of the parties, left the selection of the expert to an independent third party.[65] If the parties can agree upon the identity of the expert or upon a method by which the expert will be chosen, the issue is satisfactorily resolved. However, if the parties cannot agree, there is an impasse and unless adequate safeguards are established, the judge's selection of an expert may create suspicion in the minds of the parties. One solution is the use of panels of expert witnesses, whose qualifications are screened by others in the field. In many Canadian jurisdictions, court interpreters are appointed by a similar procedure. Since 1952, New York has established panels of experts in those medical specialties most in demand as expert witnesses. A judge, in consultation with counsel for the parties, orders that an expert of a particular type be appointed and the registrar of the court selects the specialist, usually next in rotation on the list.[66] The Task Force's proposal requires the judge to consult with the parties concerning the selection of the expert.

What procedural safeguards are necessary to protect the parties?

The *Phillips* case illustrates dangers to be avoided. The court expert reviewed exhibits in the parties' files that had not been introduced in evidence, conducted experiments without keeping adequate records and examined the parties' witnesses in court.

At common law, the right of the parties to cross-examine a witness called by the court is unclear.

To protect the parties from prejudice, the following safeguards are necessary. The judge must consult the parties before setting the court expert's terms of reference; the judge must ensure that the court expert does not become one of the adversaries—the expert should neither examine witnesses in court nor violate a privilege in the course of his investigation; the court expert must keep adequate records of his work and prepare a report for disclosure to the judge and to the parties; the parties must have the right to a copy of the court expert's report; the court expert must be available for cross-examination by any party and at the request of a party or the judge may be called as a witness; and each party should be entitled to call one expert, in addition to any other expert witnesses, to rebut the evidence of the court expert. The Task Force's proposal establishes a framework of safeguards to protect the parties' rights to a fair trial.

Will the appointment of a court expert cause unnecessary delay and duplication of evidence?

In the *Phillips* case, the trial took 21 days, partly because of the appointment and conduct of the court expert. Referring to an English rule of court[67] that permits the appointment of a court expert, but only on a party's motion, Lord Denning, M.R. said:

> Neither side has applied for the court to appoint a court expert. It is said to be a rare thing for it to be done. I suppose that litigants realize that the court would attach great weight to the report of a court expert, and are reluctant thus to leave the decision of the case so much in his hands. If his report is against one side, that side will wish to call its own expert to contradict him, and then the other side will wish to call one too. So it would only mean that the parties would call their own experts as well. In the circumstances, the parties usually prefer to have the judge decide on the evidence of experts on either side, without resort to a court expert.[68]

The New York experience has been more positive: court experts have increased settlements, reduced court congestion, improved the

process of finding facts and raised the quality of expert testimony.[69] The Task Force's proposal will alleviate unnecessary expert testimony by admitting the court expert's report as evidence and dispensing with the calling of the court expert, unless either the judge or a party requires it. The Task Force felt that to penalize a party in costs for unnecessary or protracted cross-examination of a court expert was contrary to the principles of the adversary system.

Who should pay the costs of a court expert?

According to the Task Force's proposal, a party may ask the court to appoint an expert or the judge may do so of his own motion. If a party asks for the appointment, the costs should usually be in the cause and so ultimately borne by the losing party. The judge is authorized initially to order some or all of the parties to bear the expert's expenses, the ultimate liability to be reallocated as part of the costs. If the judge appoints the expert, he "forms an integral part of the court machinery and his costs should be paid from the public purse."[70] The expenditure is likely to be modest overall and may well effect a net saving in the expense of operating the courts. The Task Force's proposal provides that where one of the parties asks for a court expert, the costs will be borne by the parties but that where the court appoints the expert, the costs will be paid from public funds.[71]

Should provision for the appointment of court experts be made in an Evidence Act or in the rules of court?

Although the Task Force recommends the adoption of a uniform provision for the appointment of court experts in civil cases, it could be included in an evidence act, another statute concerning civil procedure (like a Judicature Act or Supreme Court Act) or in rules of court. In some jurisdictions, it may be desirable to provide for court-appointed experts in the rules of civil procedure. But because the appointment of a court expert is a matter of evidence rather than practice and procedure, such a provision in the rules of court may be invalid.[72] Some members of the Task Force feel that the provision for court-appointed experts should logically accompany the provision for exchange of expert reports in the evidence act.

Should a jury be told of the court expert's status?

Since the parties have the right to cross-examine the court expert and to introduce rebuttal evidence, the unusual role of a court expert

will become apparent to the jury. Therefore, the judge ought to explain it and to caution the jury against automatically increasing the weight according to the court expert's testimony because of his impartial status. But the Task Force feels that this matter should be left to the trial judge's discretion and should not be expressly provided for in its proposal.

The Task Force unanimously recommends the following proposal which draws upon the work of the Williston Committee[73] and the Nova Scotia Supreme Court Rules:[74]

> (A) On the application of any party, or on his own motion, a judge may, at any time, order the appointment of one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in the action.
> (B) The court expert shall be named by the judge and, where possible, shall be an expert agreed upon by the parties.
> (C) The order shall contain the instructions to be given to the court expert and the judge may, from time to time make such further orders as he deems necessary to enable the court expert to carry out the instructions, including the examination of any party or property and the making of experiments and tests.
> (D) The court expert shall file copies of the report with the court in such number as the judge may direct, and the appropriate official of the court shall send copies of the report to the parties or their solicitors.
> (E) The judge may direct the expert to make a further and supplementary report.
> (F) The report of a court expert may be received in evidence.
> (G) Any party may, at the trial, cross-examine the court expert on a report.
> (H) Where a court expert is appointed, any party may call one expert to give reply evidence on any question of fact or opinion reported on by the court expert, but no party may call more than one such witness without leave of the court.
> (I) The remuneration of a court expert shall be fixed by the judge and shall include a fee for the report and a proper sum for each day that the court expert is required to be present.
> (J) Where a court expert is appointed on the application of a party, the liability of the parties for the payment of the court expert's remuneration shall be determined by the judge.
> (K) When an application by any party for the appointment of a court expert is opposed, the judge may, as a condition of making the appointment, require the party applying for the appointment to give such security for the remuneration of the court expert as may seem just.
> (L) Where a court expert is appointed by a judge on his own motion, the remuneration of the court expert shall be paid out of funds provided by law.

14.6 *Court-Appointed Experts in Criminal Cases*

In criminal cases, although a judge may suggest that counsel should call further evidence, the judge has no power to require a party to call a witness if counsel declines.[75] A judge may call a witness of his own motion, without the consent of either party if he is satisfied that it is necessary in the interests of justice to do so.[76] To reduce injustice to the accused, a judge must not call a witness after the case for the defence is closed, except on a matter arising *ex improviso,* which human ingenuity could not have foreseen.[77] In Canada and England, the judge has power to call a witness in criminal cases but not in civil cases.[78] In criminal cases, the court's power to call witnesses embraces experts.[79]

A court is not bound to call a witness at a party's request. While a court has the power, of its own volition, it is under no duty to exercise it.

The parties have no right to cross-examine a judge's witness.[80] If a witness's answers are damaging to a party, the judge should give leave to cross-examine on those answers, but general cross-examination is prohibited.[81] (One court incorrectly held that it had no power to allow cross-examination and could only permit questions to be put through the court.) The rules regarding cross-examination of a judge's witness are unsatisfactory. Vague and uncertain, they may prevent the parties from thoroughly probing the accuracy and reliability of a witness's testimony.

A majority of the Task Force recommend that to aid a trial judge or jury in a criminal case where expert knowledge is necessary, a provision should be enacted authorizing the appointment of an expert witness by the court. At present the court's inherent power is unquestioned but unused. The enactment of such a provision would enhance the power so that judges would exercise it somewhat more frequently and more effectively. Although the judge would have a discretion to appoint an expert witness, it would not be used very often because the proposal retains the cautious standard of the common law, that the judge must be satisfied that the appointment may prevent injustice.[82] Eight members of the Task Force were in favour of such a provision; two members were opposed.

The Task Force's proposal would permit a party, prior to trial or at trial, to apply to the court for the appointment of a court expert. At trial, the judge would also be authorized to appoint an expert witness of his own motion. To allow the expert to make an effective

out-of-court investigation and to prevent unnecessary adjournments, the court should be able to appoint an expert before trial, on a party's motion. The pre-trial appointment of an expert would be for the purpose of trial only and not for a perliminary hearing. Nine members of the Task Force supported this procedure and one opposed it.

The costs of the court expert, whether appointed at the request of a party or on the judge's own motion, would be paid out of funds provided by law, in such reasonable amount as the judge may direct. The parties would not be deprived of their right to call their own experts, but at present an accused person can do so only at his own expense or on legal aid. An accused who expects the Crown to call expert witnesses and cannot afford to hire his own, may find that a neutral and objective court-appointed expert is an effective alternative. But from an accused's point of view, there is always a danger that the court will testify unfavourably to the defence. At the very least, such a provision should deter Crown experts from partisanship since they will be aware that, if their evidence is unsatisfactory, to refute it a court expert may be appointed.

The Task Force further recommends that, before selecting the expert, the court must consult the parties. The parties also must be consulted as to the expert's terms of reference. To avoid unfair surprise, the expert must prepare and send to the parties a report outlining his findings, prior to testifying in court. Because of the stronger preference for oral testimony in criminal, as opposed to civil, proceedings, the proposal is silent as to the admissibility of the expert's written report. Any party may call the court expert to testify and cross-examine him. The judge may also call the expert to testify. Unlike the common law the proposal permits the parties to cross-examine the court expert and to call rebuttal evidence as of right.

The court expert assumes the same limitations as the Crown; he cannot deprive the accused of any legal protection or privilege to which he is entitled by common law or statute. The Task Force feels that it it unnecessary to spell this out in its proposal.

Nine members of the Task Force recommend the following provision[83] and one member dissents:

> (A) On the application of any party or upon his own motion, a judge may at any time, if he conisders it necessary for a proper determination of the issues, appoint an expert who shall, if possible, be a person agreed upon by the parties.

(B) The judge shall give the court expert instructions regarding his duties and these instructions shall, if possible, be agreed upon by the parties.
(C) The court expert shall inform the judge and the parties in writing of his opinion, and may thereafter be called to testify by the judge or any party and be subject to cross-examination by each party.
(D) Where a court expert is appointed, any party may call one expert to give reply evidence on any question of fact or opinion reported on by the court expert, but no party may call more than one such witness without leave of the court.
(E) The court expert is entitled to reasonable compensation in an amount to be determined by the judge, such compensation to be paid from funds provided by law.

Procedural features of the Task Force's proposal might require further refinement. Clause (A) could expressly limit the scope of a court expert's activities to matters requiring expertise, beyond a lay person's understanding.[85] It might also include a procedure whereby the parties would receive notice of the proposed expert's name in advance of his appointment by the court and, at a formal hearing, could object.

Such notice is perhaps inconsistent with the court's power of selection. Clause (B) could require the judge to notify the court expert of his duties in the form of a court order on the record. It might also provide for a meeting at which the parties may consult with the court expert to clarify his duties, or to highlight potential difficulties that require further instructions by the judge. A clause might be added requiring the court expert to notify the parties in advance of his activities, allowing the parties, as of right, to be represented (but not to participate) and permitting any of the parties or the expert to apply to the court for further instruction if an objection should arise to the court expert's work. Another clause might specify the means of dismissing or replacing a court expert.

14.7 *Limitations on the Number of Expert Witnesses in Civil and Criminal Proceedings*

In many Canadian jurisdictions, statutory provisions limit the number of expert witnesses that a party may call without leave of the court.[86] A majority of the Task Force recommend that, to enable a trial judge to prevent undue repetition of expert testimony, a statutory limit on expert witnesses, and empowering the judge to give leave to exceed it, should be retained for both civil and criminal proceedings. In a criminal case, there is no other way by which a

trial judge can prevent unnecessary expert evidence. In a civil case, if both parties make excessive use of expert witnesses, costs are an impractical penalty. The only alternative is to impose a numerical limit.[87]

Section 7 of the *Canada Evidence Act* permits a party to call up to five expert witnesses without leave of the court. Section 12 of the *Ontario Evidence Act* imposes a limit of three witnesses.

Because of conflicting decisions,[88] it is unclear whether these limits apply to each issue of fact or to a party's whole case.[89] The Territories' *Evidence Ordinances* specify that the limits are on each issue.[90] The majority of the Task Force feel that if the numerical limit were tied to an issue, a trial judge could not enforce it. Six members of the Task Force were in favour of retaining a numerical limit on expert witnesses, allowing a party to apply to the judge at any time for leave to exceed it,[91] imposing the limit upon the party's whole case and increasing it to seven expert witnesses. The majority feel that because the proposed limit is tied to the party's whole case, the increase is justified. Since a judge will be able to give leave to exceed the limit in any appropriate case, the actual number is a matter upon which uniformity is unimportant. Two members object that in those jurisdictions that limit each party to three expert witnesses, an increase to seven is excessive.

14.8 *Recommendations with respect to Expert Witnesses*

The Task Force recommends:

(a) Unanimously, that in regard to civil proceedings, there should be a provision that requires a compulsory exchange of expert reports as a condition precedent to calling the expert evidence without leave of the court.

(b) Unanimously, that the exchange of expert reports must take place at least ten days before trial.

(c) By a majority, that any party can introduce the expert's report, which has been exchanged, without necessarily having to call the expert as a witness.

(d) By a majority, that the provision, which could be enacted either in an Evidence Act or in rules of civil procedure, would state:

(i) A statement in writing setting out the opinion of an expert is admissible in evidence without proof of the ex-

pert's signature if a copy of the written statement is furnished to every party to the proceeding who is adverse in interest to the party tendering the statement at least 10 days before the commencement of the trial.
(ii) The written statement shall set out the expert's name, address and qualifications, including experience, and a full statement of the proposed testimony.
(iii) Where the written statement of an expert is given in evidence in a proceeding, any party to the proceeding may require the expert to be called as a witness.
(iv) Where the expert has been required to give evidence under subsection (iii), and the trial judge is of the opinion that the evidence so obtained does not materially add to the information in the statement furnished under subsection (i), he may order the party that required the attendance of the expert to pay, as costs, such sum as the trial judge considers appropriate.
(v) Unless subsection (i) has been complied with, no expert witness may testify without leave of the trial judge.

(e) *By a majority, that the evidence acts be amended to provide that a witness may testify as to his opinion on an ultimate issue in the case if the trial judge concludes that it would be helpful to the trier of fact to receive such evidence.*

(f) *Unanimously, that in civil proceedings, there should be a mechanism for court-appointed experts.*

(g) *Unanimously, that the enactment, which could be included in an Evidence Act or in rules of civil procedure, should contain the following provisions:*

(i) On the application of any party, or on his own motion, a judge may, at any time, order the appointment of one or more independent experts to inquire into and report on any question of fact or opinion relevant to any issue in the action.
(ii) The court expert shall be named by the judge and, where possible, shall be an expert agreed upon by the parties.
(iii) The order shall contain the instructions to be given to the court expert and the judge may, from time to time, make such further orders as he deems necessary to enable the court expert to carry out the instructions,

including the examination of any party or property and the making of experiments and tests.

(iv) The court expert shall file copies of the report with the court in such number as the judge may direct, and the appropriate official of the court shall send copies of the report to the parties or their solicitors.

(v) The judge may direct the court expert to make a further and supplementary report.

(vi) The report of a court expert may be received in evidence.

(vii) Any party may, at the trial, cross-examine the court expert on a report.

(viii) Where a court expert is appointed, any party may call one expert to give reply evidence on any question of fact or opinion reported on by the court expert, but no party may call more than one such witness without leave of the court.

(ix) The remuneration of a court expert shall be fixed by the judge and shall include a fee for the report and a proper sum for each day that the court expert is required to be present.

(x) Where a court expert is appointed on the application of a party, the liability of the parties for the payment of the court expert's remuneration shall be determined by the judge.

(xi) When an application by any party for the appointment of a court expert is opposed, the judge may, as a condition of making the appointment, require the party applying for the appointment to give such security for remuneration of the court expert as may seem just.

(xii) Where a court expert is appointed by a judge on his own motion, the remuneration of the court expert shall be paid out of funds provided by law.

(h) By a majority, that the power of a court to appoint an expert witness in a criminal case should be formalized and put into legislation.

(i) By a majority, that while the court's power to appoint an expert would exist before trial, the power would be for the purpose of trial only and not for the purpose of a preliminary hearing.

(j) By a majority, that the provision for the appointment of a court expert in a criminal case should state:

(i) On the application of any party or upon his own motion, a judge may at any time, if he considers it necessary for a proper determination of the issues, appoint an expert who shall, if possible, be a person agreed upon by the parties.
(ii) The judge shall give the court expert instructions regarding his duties and these instructions shall, if possible, be agreed upon by the parties.
(iii) The court expert shall inform the judge and the parties in writing of his opinion, and may thereafter be called to testify by the judge or any party and be subject to cross-examination by each party.
(iv) Where a court expert is appointed, any party may call one expert to give reply evidence on any question of fact or opinion reported on by the court expert, but no party may call more than one such witness without leave of the court.
(v) The court expert is entitled to reasonable compensation in an amount to be determined by the judge, such compensation to be paid from funds provided by law.

(k) By a majority, that section 7 of the Canada Evidence Act be retained and made applicable to any proceeding.

(l) By a majority, that the provision should apply to a party's whole case rather than to each issue.

(m) By a majority, that the number of experts who can be called by a party without leave should be increased from 5 to 7.

14.9 *Comment and Dissent*

MR. JUSTICE MURRAY

I wish to register my dissent to any proposal for court-appointed experts or for the exchange of expert reports in criminal cases. The exchange of expert reports would take away any element of surprise. Secondly, in most cases it can be handled by an admission of fact. Thirdly, the defendant should not have to disclose his case. It is an encroachment on the presumption of innocence. Fourthly, changes of lawyers are far more frequent in criminal than in civil cases. As a purely practical problem, time limitations as to notice will cause adjournments and will upset court scheduling of trials.

FOOTNOTES

1. *Kapulica* v. *Dumancic* [1968] 2 O.R. 438, at pp. 441-2.
2. *Irish Shipping Ltd.* v. *The Queen et al.*, unreported, Federal Court, Trial Division, T-1107-73.
3. *Bates* v. *Stubbs,* unreported B.C.C.A., CA790011; *Yemen Salt Mining Corporation* v. *Rhodes-Vaughn Steel Ltd. (No. 3),* (1977) 5 B.C.L. Rep. 248, 7 C.P.C. 37 (S.C.); *Halteh* v. *McCoy* (1974) 6 O.R. (2d) 512, at p. 515 (H.C.).
4. *Ferraro* v. *Lee* (1974) 2 O.R. (2d) 417 (Ont.C.A.).
5. *Leithiser* v. *Pengo Hydra-Pull of Canada, Limited* [1974] 2 F.C. 954, at p. 963 (F.C.A. *per* Jackett, C.J.).
6. Law Reform Committee, Seventeenth Report, *Evidence of Opinion and Expert Evidence,* Cmnd. 4489 (1970), at p. 13-4.
7. *Loc. cit.,* footnote 5.
8. *Mackenzie* v. *The Queen* (1975) 9 L.C.R. 24, at p. 34 (F.C.T.D.).
9. *Loc. cit.,* footnote 1.
10. *Op. cit.,* footnote 8, at p. 35, *per* Gibson, J.
11. Henderson, The Expert Witness Particularly from the Standpoint of the Federal Court of Canada (1974) 22 C.P.R. (2d) 85; Kirkham, Expert Statements Pursuant to the B.C. *Evidence Act (1978)* 36 The Advocate 29.
12. See *Yemen Salt Mining Corporation* v. *Rhodes-Vaughan Steel Ltd., op. cit.* footnote 3.
13. *Loc cit.,* footnote 5.
14. *Ibid.*
15. *Circosta* v. *Lilly* [1967] 1 O.R. 398, 61 D.L.R. (2d) 12 (C.A.).
16. *The Evidence Act,* R.O. 1970 c. 151 s. 52(1).
17. *Report on the Law of Evidence* (1976), Draft *Evidence Act,* s. 16(1).
18. R.S.C., Order 38; see, Phipson on *Evidence* (12th ed., 1976), at pp. 1213-24. Examples of undue complexity are section 2 of the English *Civil Evidence Act 1972,* and Order 38. They authorize the compulsory exchange of medical reports in personal injury cases but leave the exchange of expert reports in other cases to the court's discretion.
19. *Loc. cit.,* footnote 1.
20. *Ibid.*
21. *Karam* v. *National Capital Commission* [1978] 1 F.C. 403, at pp. 406-7, (1977) 16 N.R. 327, at p. 330, (*per* Jackett, C.J.).
22. *Ibid.*
23. So that the trial judge can determine whether the expert is qualified to state the opinion and the trier of fact can assess its weight.
24. *Carew* v. *Loblaw's Limited* (1977) 18 O.R. (2d) 660 (H.C.).
25. *Steel Co. of Canada Ltd.* v. *Sivaco Wire and Nail Co.* (1973) 11 C.P.R. (2d) 153, at p. 166 (F.C.T.D.).
26. *Foster* v. *Hoerle* [1973] 2 O.R. 601 (H.C.); *Greenwood Shopping Plaza Ltd. et al.* v. *Neil J. Buchanan Ltd. et al.* (1979) 31 N.S.R. (2d) 135, at pp. 164-5 (N.S.S.C.-A.D.) (discussing the effect of Rule 31.08).
27. *Op. cit.* footnote 24.
28. *Bates v. Stubbs, op. cit.,* footnote 3 (*per* Aikins, J.A.).
29. *Op. cit.,* footnote 26.
30. *Evidence Act,* R.S.B.C. 1960 c. 134 s. 12(2); see *Eurocan Pulp & Paper Ltd.* v. *Rivtow Straits Ltd.,* unreported, B.C.S.C., Van. Reg. C762970, Nov. 1, 1977.
31. *The Evidence Act,* R.S.O. 1970 c. 151 s. 52(1).
32. *Op. cit.,* footnote 4, at p. 419.
33. *Quantrill et al.* v. *Alcan-Colony Contracting Co. Ltd. et al.* (1978) 18 O.R. (2d) 333 (C.A.).

34. An expert's testimony is not confined to the four corners of his report; he can explain and amplify but he cannot open up a new field; *Thorogood* v. *Bowden et al.* (1978) 89 D.L.R. (3d) 604 (Ont.C.A.).
35. *Karam* v. *National Capital Commission, op. cit.*, footnote 21; *Iler* v. *Beaudet* [1971] 3 O.R. 644 (Co.Ct.).
36. In *McLean* v. *Fairweather Inc. and Dylex Ltd.* (1978) 9 B.C.L. Rep. 57 (S.C.), it was held that in clause (D) the phrase "the expert has been required" applies only where an opposing party requires the expert's attendance for cross-examination. Where a party unnecessarily calls his own expert, the court cannot penalize him in costs: the only recourse is taxation.
37. See, Law Reform Commission of Canada, *Criminal Procedure, Discovery* (1974); Wilkins, Discovery (1975-6) 18 Crim. L.Q. 355.
38 7 Wigmore, *Evidence* §§1920-1 (Chadbourn Rev. 1978); *McCormick's Handbook of The Law of Evidence* (2nd ed. 1972) §12; Morgan, *Basic Problems of State and Federal Evidence* (5th ed., 1976), pp. 195-97.
39. McWilliams, *Canadian Criminal Evidence* (1974), at pp. 153-4; Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974) at pp. 328-31; MacRae on *Evidence* (3rd ed., 1976), §368-9; The Canadian Encyclopedic Digest (Western) 3rd ed., 1978, *Evidence*, vol. 12, §§368-9.
40. E.g., *R.* v. *Neil* [1957] S.C.R. 685, at pp. 88-89; 119 C.C.C. 1, at p. 4, 11 D.L.R. (2d) 545, at p. 548 (*per* Kerwin, C.J.C.).
41. [1961] O.W.N. 94, 130 C.C.C. 1, at p. 2; 34 C.R. 320 (Ont.C.A., *per* Aylesworth, J.A.), *affirmed* [1961] S.C.R. 535, 130 C.C.C. 1, 35 C.R. 107.
42. [1970] S.C.R. 263, [1970] 2 C.C.C. 193, 9 D.L.R. (3d) 1, (particularly the judgment of Hall, J.).
43. *R.* v. *Phillion* (1975) 5 O.R. (2d) 656, 37 C.R.N.S. 361 at p. 362, 20 C.C.C. (2d) 191, 53 D.L.R. (3d) 319 (C.A.), *affirmed*, (1977) 37 C.R.N.S. 361 at p. 363, 14 N.R. 371, 74 D.L.R. (3) 136, 33 C.C.C. (2d) 535 (S.C.C.).
44. *R.* v. *St. Pierre* (1974) 3 O.R. (2d) 642, 17 C.C.C. (2d) 489, 16 R.F.L. 26 (C.A.).
45. *Id.*, at p. 650 (O.R.), at p. 496 (C.C.C.), at p. 33 (R.F.L.).
46. *R.* v. *French* (1977) 37 C.C.C. (2d) 201 (Ont.C.A.).
47. *Id.*, at p. 211.
48. *R.* v. *Turner* [1975] 2 W.L.R. 56, [1975] 1 All E.R. 70, 60 Cr. App. R. 80 (C.A.).
49. *R.* v. *Clark* (1974) 22 C.C.C. (2d) 1, at p. 17 (Alta.C.A., *per* Clement, J.A.); *R.* v. *Fisher, op. cit.*, footnote 41; *R.* v. *Dubois* (1976) 30 C.C.C. (2d) 412 (Ont.C.A.); *R.* v. *Audy (No. 2)* (1977) 34 C.C.C. (2d) 231 (Ont.C.A.).
50. *Ibid.*
51. *R.* v. *Clark, op. cit.*, footnote 13, at p. 6 (*per* Smith, C.J.A. *diss.*).
52. *R.* v. *Rabey* (1978) 37 C.C.C. (2d) 461 (Ont.C.A.); see also, *D.P.P.* v. *A. & B.C. Chewing Gum Ltd.* [1968] 1 Q.B. 159, [1967] 3 W.L.R. 493, [1967] 2 All E.R. 504 (Q.B. Div.).
53. England: Law Reform Committee, Seventeenth Report, *Evidence of Opinion and Expert Evidence*, Cmnd. 4489 (1970), at p. 5 (lay opinion) and at pp. 26-7 (expert opinion); Civil Evidence Act, 1972, s. 3; Criminal Law Revision Committee, Eleventh Report, Evidence (General), Cmnd. 4991 (1972), Draft Bill, s. 43; South Australia, Criminal Law and Penal Methods Reform Committee, Third Report, *Court Procedure and Evidence*, para. 6.3; Federal Rules of Evidence for United States Courts and and Magistrates of Canada, *Report on Evidence* (1975) (hereafter 'FED. R. EVID.') Rule 704; Law Reform Commission of Canada, *Report on Evidence* (1975) proposed Evidence Code, s. 69; Ontario Law Reform

Commission, *Report on the Law of Evidence* (1976) Draft Evidence Act, ss. 14, 15.

54. Basten, The Court Expert in Civil Trials—A Comparative Appraisal (1977) 40 Mod. L. Rev. 174 (a very helpful analyis).
55. Law Reform Commission of Canada, *Report on Evidence* (1975), Evidence Code s. 73.
56. Ontario Law Reform Commission, *Report on the Law of Evidence* (1976), at pp. 158-65.
57. Province of Ontario, Ministry of the Attorney-General, Civil Procedure Revision Committee, Working Draft of Proposed Ontario Rules of Civil Procedure, (April, 1978, Walter B. Williston, Q.C., Chairman), draft subrule 54.04.
58. McCormick's *Handbook of the Law of Evidence* (2nd ed., 1972) §17.
59. *Re Enoch and Zaretsky Bock & Co.* [1910] 1 K.B. 327 (C.A.); *Jones* v. *National Coal Board* [1957] 2 Q.B. 55 at p. 64, [1957] 2 All E.R. 155 at p. 159 (C.A.); Zander, *Cases and Materials on the English Legal Sytem* (1973), at pp. 206-11; Edwards, The Power of the Judge to Call Witnesses (1959) 33 Aust.L.J. 269; but see *contra, Re Fraser* (1912) 8 D.L.R. 955, at p. 962 (Ont.C.A. *per* Moss, C.J.O.).
60. *Phillips* v. *Ford Motor Co. of Canada Ltd.* [1971] 2 O.R. 637, at p. 663, 18 D.L.R. (3d) 641, at p. 667 (C.A., *per* Evans, J.A.).
61. Basten, *op. cit.*, footnote 54, at pp. 189-90.
62. *Op. cit.*, footnote 60.
63. *Op. cit.*, footnote 60, p. 657 (O.R.); p. 661 (D.L.R.).
64. *Id.*, p. 658 (O.R.), p. 662 (D.L.R.)
65. [1970] 2 O.R. 714, at p. 720 (H.C.)
66. Morgan, *Basic Problems of State and Federal Evidence* (5th ed., 1976), at pp. 201-2; see also, Wright & Miller, *Federal Practice and Procedure: Civil* §2239.
67. *Rules of the Supreme Court,* Order 40.
68. *Re Saxton Dec'd* [1962] 1 W.L.R. 968, at p. 972.
69. Morgan, *loc. cit.*, footnote 66.
70. Basten, *op. cit.*, footnote 54, at p. 184.
71. A court can only make an order for costs on an adjudication of the facts and not upon the consent of the parties: *Northrop Corporation* v. *The Queen and Canadian Commercial Corporation* [1977] 1 F.C. 289 (T.D.).
72. Horn, Statutory Force of the Rules of Court (1978) 36 The Advocate 223; Institute of Law Research and Reform, The University of Alberta, Report No. 15, *Validity of the Alberta Rules of Court* (1974).
73. *Op. cit.*, footnote 4.
74. Nova Scotia, *Civil Procedure Rules and Related Rules (1971),* Rule 23, see alo Alberta *Rules of Court,* Alta. Reg. 390/68, Rule 218.
75. *R.* v. *Hagel & Westlake* (1914) 24 Man. R. 19, 6 W.W.R. 164, 23 C.C.C. 151 (K.B.).
76. Archbold, *Pleading, Evidence & Practice in Criminal Cases* (39th ed., 1976) §592; *R.* v. *Bouchard* (1973) 12 C.C.C. (2d) 554, at p. 569, 24 C R.N.S. 31, at p. 46 (N.S. Co. Ct.); Newark & Samuels, Let the Judge Call the Witness [1969] Crim. L. Rev. 399; Edwards, The Power of the Judge to call Witnesses (1959) 33 Aust. L.J. 271.
77. *Ibid.*
78. In Australia, the judge does not have the power to call a witness on his own motion, in either civil or criminal cases: *Skubevski* v. *R.* [1977] W.A.R. 129 (S.C.-C.C.A.).
79. *R. v. Bouchard, op. cit.* footnote 76; R. v. Holden (1838) 8 Car. & P. 606; 173 E.R. 638 (K.B.).
80. *Coulson* v. *Disborough* [1894] 2 Q.B. 316 (C.A.); *R.* v. *Cliburn* (1898) 62 J.P. 232.

81. *Ibid.*
82. Since 1946, Rule 28 of the Federal *Rules of Criminal Procedure* provided for court-appointed expert witnesses, until 1975 when Rule 706 of the FED. R. EVID. replaced it. During that period of forty years, the provisions have been infrequently used: Wright, *Federal Practice and Procedure*: *Criminal* §§451-6; 11 Moore's *Federal Practice* (2nd ed.) §706.
83. The provision is largely based on: Law Reform Commission of Canada, *Report on Evidence* (1975), *Evidence Code* s. 73.
84. See, Travis, Impartial Expert Testimony under the Federal *Rules of Evidence:* A French Perspective (1974) 8 International Lawyer 492, at pp. 521-2.
85 Section 70 of the proposed *Evidence Code,* footnote 8, imposes a condition precedent to the introduction of any expert testimony, including that of a court expert.
86. The following jurisdictions limit the parties to five experts without leave: Canada. *Canada, Evidence Act,* R.S.C. 1970, c. E-10, s. 7; Saskatchewan, *The Saskatchewan Evidence Act,* R.S.S. 1965, c. 80, s. 46. These jurisdictions impose a limit of three expert witnesses without leave: Alberta, *The Alberta Evidence Act,* R.S.A. 1970, c. 127, s. 11; Manitoba, *The Manitoba Evidence Act,* R.S.M. 1970, c. E-150, s. 27; Ontario, *The Evidence Act,* R.S.O. 1970, c. 151, s. 12; New Brunswick, *Evidence Act,* R.S.N.B. 1973, c. E-11, s. 22; Yukon, *Evidence Ordinance,* R.O. 1971, c. E-6, s. 10; Northwest Territories, *Evidence Ordinance,* R.O. 1974, c. E-4, s. 10; *Uniform Evidence Act,* s. 8.
87. *Graigola Merthyr Co.* v. *Swansea Corporation* [1928] 1 Ch. 31, at pp. 38-39 [1927] W.N. 30, at pp. 30-1 (Ch.D.) (In the W.N., the matter is explicitly referred to).
88. *Fagnan* v. *Ure* [1958] S.C.R. 377, 13 D.L.R. (2d) 273; *In re Scamen and C.N.R.* (1912) 5 Alta. L.R. 376, 2 W.W.R. 1006, 22 W.L.R. 105, 6 D.L.R. 142 (S.C., *en banc*).
89. *Buttrum* v. *Udell* (1925) 57 O.L.R. 97, [1925] 3 D.L.R. 45 (C.A.).
90. Yukon, *Evidence Ordinance,* s. 10; Norhwest Territories, *Evidence Ordinance,* s. 10; *Uniform Evidence Act,* s. 8, *loc. cit.,* footnote 1.
91. Only Alberta and Saskatchewan require a party to apply for leave before examining any of the witnesses who could be examined without such leave: *The Alberta Evidence Act,* s. 11; *The Saskatchewan Evidence Act,* s. 46, *loc. cit.,* footnote 1.

15. NON-EXPERT OPINION EVIDENCE

15.1 *In General*

Although the rule barring non-expert opinion testimony is one of the fundamental exclusionary rules, there is no consensus among the cases and standard textbooks as to the formulation of the rule. The Task Force suggests that current practice is to leave the admissibility of lay opinion to the trial judge's discretion and does not conform to the strictures of the orthodox statement of the rule.

Until the middle of the nineteenth century non-expert opinion testimony was excluded because it was not based on the witness's personal knowledge.[1] Now, the rule requires a lay witness to testify

only about the "facts" personally observed and not about deductions, inferences or conclusions drawn from the facts.

Academic writers[2] have pointed out that the distinction between "fact" and "opinion", upon which the modern rule depends, is one of degree rather than of kind. Even an eyewitness, testifying from personal observation, who identifies an accused in the courtroom as the culprit, is giving opinion evidence:

> A positive statement "that is the man", when rationalized, is found to be an opinion and not a statement of single fact. All a witness can say is that because of this or that he remembers about a person, he is of the opinion that person is "the man." A witness recognizes a person because of a certain personality that person has acquired in the eyes of the witness. That personality is reflected by the characteristics of the person, which, when associated with something in the mind of the witness, causes the latter to remember that person in a way the witness does not remember any other person.[3]

A statement of identification, because it is a conclusion based on the identifying witness's observation, experience and recollection, is a matter of opinion. Despite the opinion evidence rule, such testimony is admissible. No court would bar identification evidence on the ground that it was improper opinion.

When is a lay witness allowed to give opinion testimony? In the testbooks and cases there are three formulations of the rule.

15.2 *General Rule of Exclusion with Specific Exceptions*

The traditional and most restrictive statement of the rule consists of a general rule excluding all non-expert opinion testimony, followed by a random, incomplete and unexplained list of exceptions where the courts have admitted it.[4] The list of exceptions is a collection of issues, like identity of persons, things or handwriting; value of goods or services; distance; time; speed; size; weight; direction; intoxication; and sanity.[5] Unless lay opinion fits within one of these pigeonholes, it is inadmissible.

Labelling or pigeon-holing of the issues on which evidence of similar facts is admissible has been condemned as an unacceptable substitute for a general principle of admissibility:

> Just as a closed list need not to be contemplated so also, where what is important is the application of principle, the use of labels or definitive descriptions cannot be either comprehensive or restrictive.[6]

The same criticism may be levelled at the traditional approach to the admissibility of lay opinion. The alternatives to the traditional formulation do set forth principles of admissibility.

15.3 *The "Collective Facts" Rule*

According to this more progressive formulation, a lay witness will be allowed to express an opinion when it is "a compendious mode of ascertaining the result of the actual observation of the witness."[7] A witness who is otherwise unable to transmit his knowledge of what he has perceived to the trier of fact may testify in the form of opinion. Some statements of the collective facts rule forbid counsel from asking a lay witness to state an opinion.[8] But, in response to a question calling for testimony of a factual nature, if the witness has to resort to opinion to explain himself effectively, the evidence is admissible. The witness's conclusion is admissible for the factual basis that it implies rather than for the conclusion in itself.[9] The objective of this approach is to allow the lay witness to communicate what he has perceived. However, it retains the logical fallacy of the distinction between "fact" and "opinion".

In the United Kingdom, the *Civil Evidence Act, 1972,* sets forth the collective facts rule:

> *Subsection 3(2). It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on a relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.*[10]

The English Criminal Law Revision Committee recommended the enactment of an identifcal provision for criminal proceedings.[11] The Ontario Law Reform Commission proposed a similar provision:

> *Section 14. Where a witness in a proceeding is testifying in a capacity other than as a person qualified to give opinion evidence and a question is put to him to elicit a fact that he personally perceived, his answer is admissible as evidence of the fact even though given in the form of an expression of his opinion . . .*[12]

A majority of the Task Force agree with the English and Ontario Law Reform Commissions that because of the different formulations of the non-expert opinion rule, legislation is necessary to clarify the principle by which lay opinion may be received or rejected. Six members of the Task Force were in favour of legislation and four were opposed.

A majority of the Task Force were opposed to the English and Ontario proposals to enact the collective facts rule. First, both proposals purport to draw a distinction between "fact" and "opinion", which is illogical and in practice cannot be done. Second, they are intended to prohibit an examiner from asking a lay witness for an opinion. Although the drafting of subsection 3(2) of the *Civil Evidence Act* may not have succeeded in doing so, the drafters intended that result. The Ontario proposal explicitly prevents a lay witness from being asked for an opinion but allows the witness's answer to be received in evidence, even though it is in the form of an opinion.

Although these provisions were intended to permit the lay witness to tell his story in his own words, they appear to have the opposite effects of preventing an examiner from drawing a witness out and of putting a new objection into the mouth of an objecting lawyer. Contrary to these proposals, the Canadian practice is to permit, in the court's discretion, an examiner to ask a non-expert witness for an opinion, on various matters, as long as such rules as the prohibition on leading questions are not offended.[13]

Eight members of the Task Force were opposed to these proposals and two members were in favour.

15.4 *The "Helpfulness" Rule*

Lay opinion testimony would be admissible if it is based on the witness's personal observation and it will assist the trier to determine the facts or it will enable the witness to communicate effectively. The proposed Evidence Code of Canada provides as follows:

> *Section 67. A witness other than one testifying as an expert may not give an opinion or draw an inference unless it is based on facts perceived by him and is helpful to the witness in giving a clear statement or to the trier of fact in determining an issue.*[14]

The majority of the Task Force approve of this proposal because it corresponds to the present Canadian practice. Section 67 recognizes that the admissibility of lay opinion is largely a matter of the form of examining a witness and that to enable judges to prevent abuse and to encourage counsel to ask the witness about specific details, the admissibility of lay opinion testimony is presently in the trial judge's discretion. As Coady, J.A., for a majority of the British Columbia Court of Appeal suggests, leaving admissibility of lay

opinion to the trial judge's discretion eliminates a technical objection and a ground of appeal unless there has been an abuse of discretion:

> The matter of the admissibility of what may be termed opinion evidence from a lay witness, assuming it is relevant, is one that often presents difficulty to a trial judge . . . I refer to this ground of appeal solely for the purpose of indicating that opinion evidence if relevant is not to be excluded as the matter of law, but it is a matter in the discretion of the trial judge, a discretion which if properly exercised will not lightly be interfered with by an appellate tribunal.[15]

Section 67 would allow a lay witness to testify in the form of opinion if it is relevant, within the realm of common experience[16] and a shorthand expression of the witness's personal observation. Because the weight to be given to lay opinion testimony depends upon the specific details that a witness can give in support of it,[17] counsel will naturally explore the basis of the opinion on examination-in-chief or cross-examination.

Four members of the Task Force were in favour of section 67 of the proposed Canada Evidence Code; and three members were opposed.

15.5 *Abolition of the Non-Expert Opinion Rule*

Wigmore recommended elimination of a special rule of admissibility for non-expert opinion testimony, arguing that the general policy of excluding superfluous evidence would adequately regulate its admissibility.[18] Although Wigmore's suggestion may be correct in principle, a majority of the Task Force feel that for the guidance of the courts and of lawyers, a principle of admissibility should be enacted.

15.6 *Opinion on the Ultimate Issue*

As discussed in the previous section of this Report, the "ultimate issue" doctrine excludes lay and expert opinion on the very issue before the court, particularly if the issue includes a matter of law or involves the application of a rule of law to the facts. Another aspect of the doctrine is that a witness should not usurp the function of the jury. The proposals for law reform unanimously reject the ultimate issue doctrine as a ground of excluding lay opinion testimony.[19] For the Task Force's recommendation on the ultimate issue doctrine, see Section 14, *Expert Witnesses, ante.*

15.7 *Proof of Handwriting*

If the authenticity of a writing is not admitted, it must be proved, otherwise the writing will be excluded as irrelevant. One method of authentication is the introduction of circumstantial evidence from which genuineness of the writing may be inferred. By the beginning of the nineteenth century, English courts allowed lay or expert opinion testimony on the identity of a person's handwriting if the witness was sufficiently acquainted with it.[20] A witness who had either seen the person write, or had received writings, or had possession of ancient writings, purporting to have been written by him, was qualified to identify his handwriting.[21]

During the first half of the nineteenth century, the English courts prohibited lay or expert testimony based on comparison of hands, except where the specimen was already in evidence or an ancient document. [22] *The Common Law Procedure Act, 1854,* and section 8 of the *Criminal Procedure Act, 1865,* authorized comparison of hands.[23] Section 8 provides as follows:

> *Comparison of a disputed writing with a writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witneses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.*

All of the Canadian jurisdictions (except Quebec) have adopted this provision: Canada, *Canada Evidence Act,* R.S.C. 1970, c. E-10, s. 8; British Columbia, *Evidence Act,* R.S.B.C. 1960, c. 134, s. 46; Alberta, *The Alberta Evidence Act,* R.S.A. 1970, c. 127, s. 58; Manitoba, *The Manitoba Evidence Act,* R.S.M. 1970, c. E-150, s. 56; Ontario, *The Evidence Act,* R.S.O. 1970, c. 151, s. 57; New Brunswick, *Evidence Act,* R.S.N.B. 1973, c. E-11, s. 22; Nova Scotia, *Evidence Act,* R.S.N.S. 1967, c. 94, s. 20; Newfoundland, *The Evidence Act,* R.S.N. 1970, c. 115, s 22; Yukon, *Evidence Ordinance,* R.O. 1971, c. E-6, s. 51(1); Northwest Territories, *Evidence Ordinance,* R.O. 1974, c. E-4, s. 49; and *Uniform Evidence Act,* (as revised 1945 and as am.) s. 71. In Quebec, Article 1206 of the *Civil Code* provides:

> *When no provision is found in this code for proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England.*

The Ontario Law Reform Commission recommended that section 57 of *The Evidence Act* of Ontario be retained.[24] In the United States there has been some controversy about the admissibility of "stan-

dards" whose genuineness is disputed,[25] but section 8 appears to deal adequate with this problem by allowing an expert to use for comparison such standards as the trial judge finds on a balance of probabilities, to be genuine.[23] The Task Force unanimously recommends that section 8 of the *Canada Evidence Act* be retained.

15.8 *Recommendations with respect to Non-Expert Opinion Evidence and Proof of Handwriting*

The Task Force recommends:

(a) By a majority, that a provision regulating the admissibility of lay opinion evidence should be enacted.

(b) By a majority, that section 67 of the proposed Canada Evidence Code *should be adopted, to provide that a witness other than one testifying as an expert may not give an opinion or draw an inference unless it is based on facts perceived by him and is helpful to the witness in giving a clear statement or to the trier of fact in determining an issue.*

(c) Unanimously, that section 8 of the Canada Evidence Act *should be retained to permit comparison of hands.*

15.9 *Comment and Dissent*

MR. JUSTICE MURRAY

I expressly dissent from the proposal to adopt section 67 of the proposed Canada Evidence Code *on the ground that it is an alteration of the existing law of Canada governing the day-to-day examination and cross-examination of lay witnesses. It is again an undesirable attempt by this Task Force to codify the common law which at present is causing absolutely no difficulty.*

Concurring: David Watt and William MacDonald.

FOOTNOTES

1. 7 Wigmore, *Evidence* (Chadbourn rev. 1978) §1917.
2. *Id.* §1919; McCormick's *Handbook of the Law of Evidence* (2nd ed., 1972,) at p. 23; Morgan; *Basic Problems of State and Federal Evidence* (5th ed., 1976), at p. 193.
3. *R.* v. *Browne and Angus* (1951) 1 W.W.R. (N.S.) 449, at p. 455; 99 C.C.C. 141 at p. 147; 11 C.R. 297, at p. 302 (B.C.C.A. *per* O'Halloran, J.A.).
4. E.g., MacRae on *Evidence,* (3rd ed., 1976) §392-426; McWilliams, *Canadian Criminal Evidence,* (1974), at pp. 142-49.
5. *Ibid.*

6. *D.P.P.* v. *Boardman* [1975] A.C. 421, at p. 439; [1974] 3 W.L.R. 673, at p. 685; [1974] 3 All E.R. 887, at p. 893, (H.L. *per* Lord Morris).
7. Cross, *Evidence* (4th ed., 1974), at p. 387; Sopinka and Lederman, *The Law of Evidence in Civil Cases,* (1974), at p. 300.
8. English Law Reform Committee, Seventeenth Report, *Evidence of Opinion and Expert Evidence* (1970), at pp. 4, 5, 31; Ontario Law Reform Commission, *Report on the Law of Evidence* (1976), at pp. 150-53.
9. Cross, *loc. cit.,* footnote 7.
10. Implementing the recommendation of the English Law Reform Committee, *loc. cit*, footnote 8. There have been no reported cases interpreting that provision.
11. Criminal Law Revision Committee, *Eleventh Report: Evidence (General),* Cmnd. 4991 (1972) para. 270 and Draft Bill, s. 43(2).
12. Ontario Law Reform Commission, *op. cit.,* footnote 8, *Draft Evidence Act,* s. 14.
13. MacRae, *op. cit.,* footnote 4, p. 392 states: "There have been many cases where a witness has been asked whether a person was sober or not, and has been allowed to state what is, after all, a matter of opinion . . .".
14. Law Reform Commission of Canada, *Report on Evidence* (1975), Evidence Code, s. 67. The Federal Rules of Evidence for United States Courts and Magistrates (1975), Rule 701 provides: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."
15. *R.* v. *Miller* (1959) 29 W.W.R. 124, at p. 140; 125 C.C.C. 8, at p. 43; 31 C.R. 101, at p. 118 (B.C.C.A., *per* Coady J.A., Sheppard, J.A., concurring). FED. R. EVID. 701, on which s. 67 is based, has been held to be a matter of the trial judge's discretion: *Randolph* v. *Collectramatic* 590 F. 2d 844 (1979, U.S.C.A., 10th Cir.); *U.S.* v. *Thomas* 567 F. 2d 299, at p. 301 (1978), U.S.C.A., 5th Cir.).
16. *Randolph* v. *Collectramatic, id.;* Morgan, *op. cit.,* footnote 2, at p. 194.
17. In *R.* v. *Browne and Angus, loc. cit.,* footnote 3, O'Halloran, J.A. said: "Unless the witness is able to testify with confidence what characteristics and what "something" has stirred and clarified his memory or recognition, then an identification confined to "that is the man" standing by itself, cannot be more than a vague general description and is untrustworthy in any sphere of life where certitude is essential."
18. Wigmore, *op. cit.,* footnote 1, §1918.
19. E.g., *Civil Evidence Act,* 1972, s. 3(3) provides: "In this section 'relevant matter' includes an issue in the proceedings in question; Ontario Law Reform Commission, *op. cit.,* footnote 8, *Draft Evidence Act,* s. 14, provides that lay witness's answer "is admissible as evidence of the fact even though given in the form of an expression of his opinion upon a matter in issue in the proceeding."
20. Morgan, *op. cit.,* footnote 2, at pp. 329-30.
21. *Ibid.*; Sopinka and Lederman, *op. cit.,* footnote 7, at pp. 302-3.
22. Phipson on *Evidence,* (12th ed., 1976) para. 316; Osborn, *Questioned Documents* (2nd ed., 1929), pp. 650-1.
23. *R.* v. *Angeli* (1978) 68 Cr. App. R. 32 (Eng. C.A.). *The Criminal Procedure Act* applies to civil and criminal cases, s. 1.
24. Ontario Law Reform Commission, *op. cit.,* footnote 8, Draft *Evidence Act,* s. 63.
25. Morgan, *op. cit.,* footnote 2, p. 330 and FED. R. EVID. 901(a) and 901(b)(3).

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, '79.
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	

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; Rev. '79.
Reciprocal Enforcement of Tax Judgments Act	1965	
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 — Enacted by N.B. *sub. nom.* Property Act; Ont. ('66). Total: 2.

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.

Information Reporting Act —

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); N.B.° ('79); Nfld.° ('76); N.W.T.° ('76); Ont. ('79); Sask.° ('77). Total: 7.

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.

TABLE III

Perpetuities Act — Enacted by Alta. ('72); B.C. ('75); N.W.T.* ('68); Ont. ('66); Yukon ('68). Total: 5.

Personal Property Security Act — Man. ('77); Ont.° ('67). Total: 1.

Powers of Attorney Act — B.C.* ('79). Total: 1.

Presumption of Death Act — Enacted by B.C. ('58, '77) *sub nom.* Survivorship and Presumption of Death Act; Man. ('68); N.W.T. ('62, '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 — B.C.° ('74); P.E.I.[x]. Total: 2.

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 was 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.B.° ('79); N.W.T.° ('52); N.S. ('52); Ont. ('48); P.E.I.* ('50); Sask. ('50); Yukon° ('54). Total: 10.

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 — B.C.° ('79). Total: 1.

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); Powers of Attorney Act* ('79); 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; Statutes Act° ('74); 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), Section 17° ('79). 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); Interprovincial Subpoenas Act° ('79); 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); Vital Statistics Act° ('79); 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); Interprovincial Subpoenas Act ('79); 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[x]; 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 relevant minutes of that year.

Thus the reader can quickly trace the complete history in the Conference of his subject.

The cumulative index is arranged in parts:

Part I. Conference: General
Part II. Legislative Drafting Section
Part III. Uniform Law Section
Part IV. Criminal 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.

CUMULATIVE INDEX

PART I

CONFERENCE: GENERAL

PART II

LEGISLATIVE DRAFTING SECTION

PART III

UNIFORM LAW SECTION

PART IV

Criminal Law Section

Subjects considered each year are listed in the minutes of the year and published in the Proceedings of that year.

INDEX