# UNIFORM LAW CONFERENCE OF CANADA

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# CONFERENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

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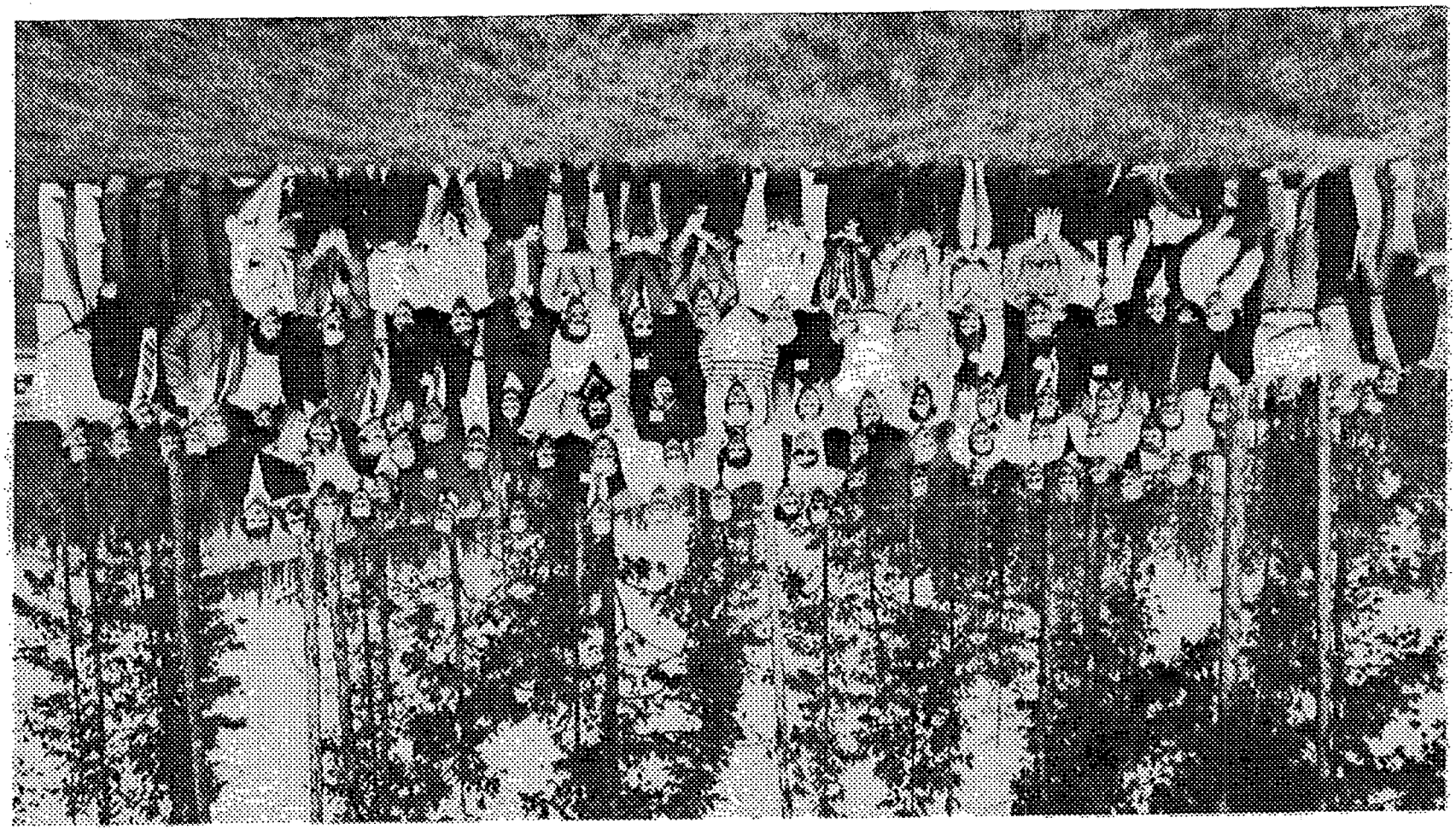
## PROCEEDINGS
OF THE

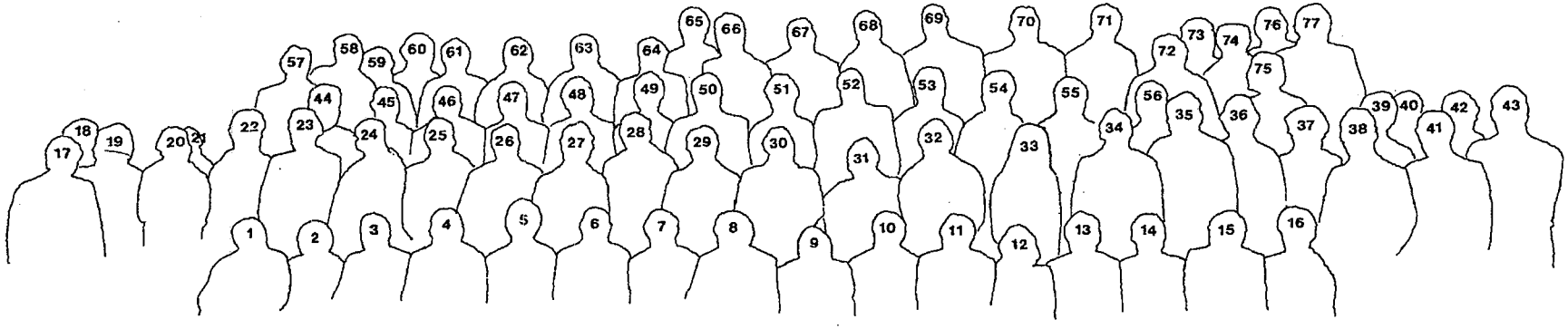
## SIXTY-THIRD ANNUAL MEETING

HELD AT

## WHITEHORSE
## YUKON

August, 1981





1. Bertrand, Can.
2. Morven, Yuk.
3. Shaffer, Can.
4. Paisley, Alta.
5. Dawson, Can.
6. MacTavish, Ex. Sec.
7. Stone, Ont.
8. O'Donaghue, Yuk.
9. Macaulay, B.C.
10. Horton, Yuk.
11. Gosse, Sask.
12. Viens, Que.
13. Ménard, Que.
14. Doleman, N.B.
15. Murray, N.B.
16. Noonan, Nfld.
17. Préfontaine, Can.
18. Tasse, Can.
19. Bouchard, Que.
20. Hurley, Nfld.
21. McLeod, Ont.
22. Moore, P.E.I.
23. Maurais, Can.
24. Fordham, N.S.
25. Edwards, Man.
26. Charles, N.S.
27. MacIntosh, P.E.I.
28. Goodman, Man.
29. Fraser, Alta.
30. Pink, N.S.
31. Bradley, Alta.
32. Roger, B.C.
33. Jackson, Sask.
34. Pigeon, Can.
35. Hurlburt, Alta.
36. Takach, Ont.
37. Shone, Alta.
38. Duncan, Yuk.
39. Sheppard, B.C.
40. Wood, B.C.
41. Burden, C.I.C.S.
42. Bonin, Que.
43. Pearce, B.C.
44. Chamut, B.C.
45. Aikins, B.C.
46. Kennedy, B.C.
47. Cassells, Ont.
48. Hoyt, Ex. Sec.
49. Henderson, B.C.
50. Walker, N.S.
51. Pagano, Alta.
52. Gamache, Alta.
53. Hewitt, Sask.
54. Low, Can.
55. Coles, N.S.
56. Ketcheson, Sask.
57. Langdon, Ont.
58. Kujawa, Sask.
59. Close, B.C.
60. Thomas, Ont.
61. Spence, B.C.
62. Hunter, B.C.
63. McDiarmid, B.C.
64. Steward, B.C.
65. Perkins, Ont.
66. Mendes da Costa, Ont.
67. Muldoon, Can.
68. Smethurst, Man.
69. Gale, N.S.
70. Weinstein, Man.
71. Hodges, Sask.
72. LeTourneau, Que.
73. Ewaschuk, Can.
74. Roslak, Alta.
75. Allain, Que.
76. Paul, Can.
77. Greenspan, Can.

Absent: *Alta.*, Mapp, Schmidt, Scott, Wilson; *B.C.*, Ford, Lovelace; *Canada*, Beaupré, duPlessis, England, Stoltz, Tollefson; *Man.*, Balkaran, Pilkey, Tallin; *N.B.*, Gregory, Guerette, Lalonde, Teed; *Nfld.*, Goodyear, Lake; *N.S.*, Johnson, Smith; *Ont.*, Doran, Fader, McLeod, Morton, Smith; *Que.*, Colas, Longtin; *Sask.*, Charowsky, Cuming, Ozirny.

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## PAST PRESIDENTS

| | |
|---|---|
| Sir James Aikins, K.C., Winnipeg (five terms) | 1918-1923 |
| Mariner G. Teed, K.C., Saint John | 1923-1924 |
| Isaac Pitblado, K.C., Winnipeg (five terms) | 1925-1930 |
| John D. Falconbridge, K.C., Toronto (four terms) | 1930-1934 |
| Douglas J. Thom, K.C., Regina (two terms) | 1935-1937 |
| I. A. Humphries, K.C., Toronto | 1937-1938 |
| R. Murray Fisher, K.C., Winnipeg (three terms) | 1938-1941 |
| F. H. Barlow, K.C., Toronto (two terms) | 1941-1943 |
| Peter J. Hughes, K.C., Fredericton | 1943-1944 |
| W. P. Fillmore, K.C., Winnipeg (two terms) | 1944-1946 |
| W. P. J. O'Meara, K.C., Ottawa (two terms) | 1946-1948 |
| J. Pitcairn Hogg, K.C., Victoria | 1948-1949 |
| Hon. Antoine Rivard, K.C., Quebec | 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., LL.D., 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, K.M., C.R., LL.D., 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 |
| Gordon F. Coles, Q.C., Halifax | 1979-1980 |
| Padraig O'Donoghue, Q.C., Whitehorse | 1980-1981 |

## OFFICERS: 1980-81

| | |
|---|---|
| *Honorary President* | Padraig O' Donoghue, Q.C., Yukon |
| *President* | George Macaulay, Q.C., British Columbia |
| *1st Vice-President* | Arthur N. Stone, Q.C., Ontario |
| *2nd Vice-President* | Serge Kujawa, Q.C., Saskatchewan |
| *Treasurer* | Gerard Bertrand, Q.C., Canada |
| *Secretary* | Graham D. Walker, Q.C., Nova Scotia |

### UNIFORM LAW SECTION

| | |
|---|---|
| *Chairman* | George Macaulay, Q.C., British Columbia |
| *Secretary* | Melbourne M. Hoyt, Q.C., Executive Secretary |

### CRIMINAL LAW SECTION

| | |
|---|---|
| *Chairman* | Rod M. McLeod, Q.C., Ontario |
| *Secretary* | Daniel Préfontaine, Canada |

### LEGISLATIVE DRAFTING SECTION

| | |
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| *Chairman* | Graham Walker, Q.C., Nova Scotia |
| *Vice-Chairman* | Bruno Lalonde, New Brunswick |
| *Secretary* | Merrilee Charowsky, Saskatchewan |

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| | |
|---|---|
| *Alberta* | Emile Gamache |
| *British Columbia* | Allan Roger |
| *Canada* | Donald Maurais |
| *Manitoba* | Rae Tallin |
| *New Brunswick* | Alan Reid |
| *Newfoundland* | John Noel |
| *Northwest Territories* | S. K. Lal |
| *Nova Scotia* | Graham Walker, Q.C. |
| *Ontario* | Arthur Stone, Q.C. |
| *Prince Edward Island* | Arthur Currie |
| *Quebec* | Marie-José Longtin |
| *Saskatchewan* | Georgina Jackson |
| *Yukon Territory* | Padraig O' Donoghue, Q.C. |

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(506) 453-2226

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1981 Annual Meeting

The following persons (105) attended one or more Sections of the Sixty-Third Meeting of the Conference

Legend

(*L.D.S.*) Attended the Legislative Drafting Section.
(*U.L.S.*) Attended the Uniform Law Section.
(*C.L.S.*) Attended the Criminal Law Section.

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PADRAIG O'DONOGHUE, Q.C., Deputy Minister of Justice, P.O. Box 2703, Whitehorse Y1A 2C6. (*L.D.S. & U.L.S.*)

## DELEGATES EX OFFICIO

1981 Annual Meeting

*Attorney General of Alberta:* HON. NEIL S. CRAWFORD.
*Attorney General of British Columbia:* HON. ALLAN WILLIAMS, Q.C.
*Minister of Justice and Attorney General of Canada:*
HON. JEAN CHRÉTIEN, P.C.
*Attorney General of Manitoba:* HON. GERALD W. J. MERCIER, Q.C.
*Minister of Justice of New Brunswick:* HON. RODMAN E. LOGAN, Q.C.
*Minister of Justice of Newfoundland:* HON. GERALD R. OTTENHEIMER
*Attorney General of Nova Scotia:* HON. HARRY HOW, Q.C.
*Attorney General of Ontario:* HON. R. ROY MCMURTRY, Q.C.
*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.
*Minister of Justice of the Yukon:* HON. HOWARD TRACEY.

## 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
1980 Aug. 14-23, Charlottetown
1981 Aug. 20-29, Whitehorse.

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 years, law reform commissions and similar bodies.

The appointment of delegates by a government does not of course have any binding effect upon the government which may or may not, as it wishes, act upon any of the recommendations of the Conference.

The primary object of the Conference is to promote uniformity of legislation throughout Canada or the provinces in which uniformity may be found to be possible and advantageous. At the annual meetings of the Conference consideration is given to those branches of the law in respect of which it is desirable and practicable to secure uniformity. Between meetings, the work of the Conference is carried on by correspondence among the members of the Executive, the Local Secretaries and the Executive Secretary, and, among the members of *ad hoc* committees. Matters for the consideration of the Conference may be brought forward by the delegates from any jurisdiction or by the Canadian Bar Association.

While the chief work of the Conference has been and is to try to achieve uniformity in respect of subject matters covered by existing legislation, the Conference has nevertheless gone beyond this field on occasion and has dealt with subjects not yet covered by legislation in Canada which after preparation are recommended for enactment. Examples of this practice are the *Uniform Survivorship Act*, section 39

of the *Uniform Evidence Act* dealing with photographic records, and section 5 of the same Act, the effect of which is to abrogate the rule in *Russell v. Russell*, the *Uniform Regulations Act*, the *Uniform Frustrated Contracts Act*, the *Uniform Proceeding's 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 subsequent years when the presidents of the two Conferences have 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, the 1976 and the 1980 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 two days 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 Secretariat 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.

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

## LEGISLATIVE DRAFTING SECTION

*(Document: 840-204/078)*

MINUTES

*Attendances*

Twenty-seven delegates were in attendance.

*Opening*

The Section opened with the chairman, Mr. Walker presiding. Mr. Lalonde acted as vice-chairman.

*Hours of Sitting*

It was agreed to sit on Thursday, August 20th, and Friday, August 21st, from 9:30 a.m. to 12:30 noon and 1:30 p.m. to 5:00 p.m., except when circumstances dictated otherwise.

*Uniform Act Respecting the Convention of the Hague Conference on Private International Law on the Civil Aspects of International Child Abduction*

The chairman reported that the Uniform Law Conference adopted an Act in both English and French texts at its meeting held in August, 1980. He further reported that there is a problem with respect to the "bringing into force" portion of the Act. This necessitates a change in the Act. The chairman presented to the Drafting Section a new Draft Act in both its English and French text.

RESOLVED that the draft Act proposed by the Section, in both its English and French text, be referred to the Uniform Law Section for adoption and that the Draft Act adopted by the Uniform Law Section, in both its English and French text, at its meeting held in August, 1980, be repealed.

*Contributory Fault Act*

At its meeting in August of 1980 the Uniform Law Section referred to the Legislative Drafting Section a Contributory Negligence and Contribution Act. This Act, along with a report from the British Columbia representatives, was considered by the Legislative Drafting Section. As a result of these deliberations, the Section

RESOLVED that the title of the Act be the Contributory Fault Act and that the draft prepared by the Legislative Drafting Section be referred to the Uniform Law Section for consideration and further instruction upon certain matters that the Drafting Section consider require clarification

*Limitation of Actions Act*

RESOLVED that the draft Act prepared by the Section be referred to the Uniform Law Section for its consideration

*Prejudgment Interest*

RESOLVED that the draft Act prepared by the Section be referred to the Uniform law Section for its consideration.

*The Canadian Bar Association Resolutions Committee*

The chairman reported that he had received a letter from Mr. Tom Walsh, Q.C., chairman of the Resolutions Committee of the Canadian Bar Association, inquiring as to whether or not the Legislative Drafting Section, on a formal basis, would be prepared to provide a draftsman to the Resolutions Committee of the Canadian Bar Association each year when the Canadian Bar Association meets. After much discussion, it was decided that there should be no formal arrangements between the Drafting Section and the Canadian Bar Association with respect to this matter but, that the Association should continue to make arrangements on an ad hoc basis with draftsmen in the jurisdictions.

*Education, Training and Retention of Draftsmen*

Mr. Allan Roger presented to the meeting the results of answers obtained to two questionnaires he had developed, namely, one concerning legislative process and the other dealing generally with the offices of the Legislative Counsel. After much discussion, it was resolved that Mr. Roger, next year, should attempt to provide some summary or analysis of the questionnaires and further, that the questionnaires be expanded to include the subject of computerization in the offices of the Legislative Counsel. In this respect, it was suggested that the report prepared in the past by Mr. Stephen Skelly be looked at as a precedent for adoption by Mr. Roger.

RESOLVED that Allan Roger report to the Section at its meeting to be held in August, 1982 upon the matter of education, training and retention of draftsmen and that he provide to the Section, in addition to the copy of the questionnaire concerning legislative process, the questionnaire concerning the offices of the Legislative Counsel generally and the question concerning computerization, a summary and analysis of the contents of the questionnaires

BE IT FURTHER RESOLVED that some attempt be made to determine what training programs are undertaken throughout the jurisdictions in regard to legislative drafting.

*Drafting Manuals*

The Section inquired as to whether any of the jurisdictions had developed Drafting Manuals. It was determined that the provinces of Ontario, Alberta and Saskatchewan had such manuals.

RESOLVED that those jurisdictions that have Drafting Manuals make them available to the Legislative Counsel of other jurisdictions, so that consideration might be given in the future to developing a uniform manual.

*Exchange of Statutes*

Mr. Arthur N. Stone, Q.C. raised the question of the free lists in respect of the exchange of statutes. This resulted in inquiries being made as to the provision of Bills and legislative papers generally. After reviewing the situation in each jurisdiction, it was

RESOLVED that each Legislative Counsel take the appropriate steps to provide for the free exchange of statutes and legislative papers among the other jurisdictions

*Uniform Interpretation Act in the Light of Bilingual Uniform Act*

RESOLVED that the report of the committee chaired by Michael Beaupré on the study of the Uniform Interpretation Act be received and that the Committee continue its work and report to the Section when it meets next in August, 1982.

BE IT FURTHER RESOLVED that Mr. Beaupré's paper be printed in the proceedings.

*Bilingual Drafting*

RESOLVED that the report of Bruno Lalonde's committee setting forth the names of the Uniform Acts to be drafted in French text be referred to the Uniform Law Section for adoption

BE IT FURTHER RESOLVED that the report of Mr. Lalonde's committee be printed in the proceedings

*Regulations Act*

The Section considered a report of the Alberta, British Columbia and Saskatchewan representatives which they proposed to present to the Uniform Law Section for discussion and consideration. As a result of the discussion that ensued, the representatives for those jurisdictions indicated that certain of their views concerning a new Regulations Act would be either changed or modified when discussed by the Uniform Law Section.

*Indexing of Statutes*

The representatives from the Province of British Columbia circulated to the members of the Drafting Section a copy of the index completed in respect of their Revised Statutes and related to the Section their experience and advice in respect of indexing.

*New Business*

RESOLVED that in the future, when the Legislative Drafting Section meets to consider a Draft Act or report referred from the Uniform Law Section, that a member familiar with the principles embodied in such Draft Act or report join the Drafting Section as an advisor so that problems of principle that arise while drafting might be resolved at the time the Drafting Section considers the Draft Act or report.

*Officers*

Graham D. Walker, Q.C. was re-elected as chairman and Bruno Lalonde as vice-chairman and Merrilee Charowsky as Secretary for 1981-82.

*Close*

There being no further business, upon motion duly made, the Section adjourned to meet again at the time of the next Conference, or earlier, at the call of the chair.

## OPENING PLENARY SESSION

### MINUTES

*Opening of Meeting*

The meeting opened at 8:30 p.m. on Sunday, 23 August, in the Selkirk Street School with Mr. O'Donoghue, Q.C. in the chair and Mr. MacTavish, Q.C. as secretary.

*Address of Welcome*

The President extended a warm welcome on behalf of the Government of the Yukon.

*Mr. King Hill*

The President introduced our guest of honour, Mr. King Hill of Baltimore, Maryland. Mr. Hill is President of the National Conference of Commissioners of Uniform State Laws.

*Introduction of Delegates*

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

*Minutes of the Last Annual Meeting*

RESOLVED that the minutes of the 62nd annual meeting as printed in the 1980 Proceedings be taken as read and adopted.

*Treasurer's Report*

In the absence of the Treasurer, Ms. Young's report (Appendix A page 61) was presented by her colleague, Mr. Pagano.

The Report was a Statement of Receipts and Disbursements for the period July 16 1980 to July 15 1981 together with the Report of the Conference Auditor's, Clarkson, Gordon, Chartered Accountants.

As neither of these reports had been distributed prior to the meeting, the motion to adopt was not put until the closing plenary session (see page 54).

*Secretary's Report*

Mr. Stone presented his report (Appendix B page 66).

RESOLVED that the report be received.

*Executive Secretary's Report*

Mr. MacTavish presented his report (Appendix C page 67).

RESOLVED that the report be received

*Appointment of Resolutions Committee*

RESOLVED that a Resolutions Committee be constituted, composed of Mr. Moore, Chairman, and Messrs. Roger and Bertrand, 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.

*New Business*

RESOLVED that a Committee to study the Financial Administration of the Conference be constituted, composed of Mr. Macaulay, Chairman, and Messrs Gosse, Gregory, Stone and Bertrand, to report to the Closing Plenary Session

*Adjournment*

There being no further business, the meeting adjourned at 9:00 p.m. to meet again in the Closing Plenary Session next Saturday morning.

## UNIFORM LAW SECTION

### MINUTES

*Attendance*

Fifty-eight delegates were in attendance. For details see List of Delegates page 16.

Sessions

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

*Distinguished Visitor*

The Section was honoured by the participation of Mr. King Hill, 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. Macaulay as chairman and Mr. Hoyt as secretary.

*Hours of Sitting*

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

*Agenda*

The revised agenda of 17 August, 1981 was considered and the order of business for the week agreed upon.

*Central Aircraft Registry*

The recommendation of the British Columbia Commissioners that the matter of a Central Aircraft Registry be considered by the Conference was deferred to the 1982 Annual Meeting. In the meantime if any jurisdiction sees fit to make a report on this matter, it will be considered then.

*Child Abduction*

The report on the Uniform International Child Abduction (The Hague Conference) Act was presented by Mr. Walker.

RESOLVED that the Act adopted last year (Appendix N, Schedule 3, 1980 Proc. 169) be replaced by the Uniform Act Respecting the Convention of The Hague Conference on Private International Law on the Civil Aspects of International Child Abduction (Appendix D, page 68) and that both the English and French versions of the Act be adopted by the Conference as a Uniform Act and recommended for enactment in that form.

*Editorial Note*

Although the Convention forms part of the Act, it is not set out here; it appears on pages 156 to 169 in the 1980 Proceedings.

*Child Status*

The Report of Ontario on Conflict of Laws Provisions for the Uniform Child Status Act was presented by Mr. Perkins. (Appendix E, page 70).

RESOLVED that the draft Conflict of Laws provisions under the Uniform Child Status Act considered at this meeting be incorporated in the Act and that if the redraft is not disapproved by two or more jurisdictions on or before November 30, 1981, by notice to the Executive Secretary, it be adopted by the Conference as a Uniform Act and recommended for enactment in that form.

*Note*: No disapprovals were received

*Class Actions*

Ms. Longtin presented the report on Class Actions. The following resolution was adopted:

RESOLVED that the report be received and printed in the Proceedings (Appendix F, page 75) and that the matter be referred to the Quebec, Ontario and British Columbia Commissioners for further study, and report to the 1982 Annual Meeting.

*Commercial Franchises*

RESOLVED that the Alberta Commissioners prepare, in cooperation with other jurisdictions that wish to participate, an in depth policy analysis on the topic of franchises, and report to the 1982 Annual Meeting

*Company Law*

Mr. Moore presented the report on Company Law. The following resolution was adopted:

RESOLVED that the report be received and printed in the Proceedings (Appendix G, page 81); and that the matter be not carried forward to the 1982 Annual Meeting.

*Contributory Fault*

RESOLVED that the draft Contributory Fault Act be referred to the Alberta Commissioners for final study, and report to the 1982 Annual Meeting.

*Defamation*

RESOLVED that the Saskatchewan Commissioners revise the Uniform Defamation Act, and report to the 1982 Annual Meeting

*Enactment of and Amendments to Uniform Acts*

Mr. Balkaran presented his report (Appendix H, page 86).

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

*Extra-Provincial Custody Orders Enforcement*

Mr. Perkins presented the Ontario Report on the Uniform Extra-Provincial Custody Orders Enforcement Act.

RESOLVED that the new Uniform Custody Jurisdiction and Enforcement Act presented by Ontario be approved in principle; that the draft be referred to the Legislative Drafting Section to review the drafting; that the product be circulated and that if the Act as so redrafted and circulated (Appendix I, page 91) is not disapproved by two or more jurisdictions on or before the 30 November 1981, by notice to the Executive Secretary it be adopted by the Conference as a Uniform Act and recommended for enactment in that form

*Note*: Only one disapproval was received

*Foreign Judgments*

RESOLVED that the report on the Uniform Foreign Judgments Act presented by the Nova Scotia and Quebec representatives be received and printed in the Proceedings (Appendix J, page 102) and that the matter stand referred to those representatives for further study, and report to the 1982 Annual Meeting.

*French Versions of Uniform Acts*

RESOLVED that the Report of a Committee responsible for producing French versions of Uniform Acts be received and printed in both languages in the Proceedings (Appendix K, page 105)

*International Conventions in Private International Law*

RESOLVED that the Report or the Special Committee on International Law be received and printed in the Proceedings (Appendix L, page 107).

*Intestate Succession*

RESOLVED that the British Columbia Commissioners revise the Uniform Intestate Succession Act, and report to the 1982 Annual Meeting

*Judicial Decisions Affecting Uniform Acts*

The Annual Report of Prince Edward Island (Appendix M, page 139) was presented by Mr. Moore and a supplement to it was presented by Mr. Walker. (Appendix N, page 148).

RESOLVED that the report and supplement be received and printed in the Proceedings.

*Legal Aid and Security for Costs*

Consideration of Legal Aid and Security for Costs was deferred to the 1982 Annual Meeting.

*Limitation of Actions*

Consideration of the Uniform Limitations Act which stands referred to the Legislative Drafting Section was deferred to the 1982 Annual Meeting.

*Matrimonial Property*

Consideration of Manitoba's 1977 Memorandum on the Conflict of Laws in Matrimonial Property matters (1977 Proc. 394: 1979 Proc. 35) was deferred to the 1982 Annual Meeting.

*National Conference of Commissioners on Uniform State Laws*

RESOLVED that the report of the Special Liaison Committee with the National Conference of Commissioners on Uniform State Laws presented by the Chairman, Mr Smethurst, be received and printed in the Proceedings (Appendix O, page 150); that special thanks be expressed to the Committee for its splendid report and that it continue its work, and report further to the 1982 Annual Meeting.

*Personal Property Security*

RESOLVED that the Personal Property Security Act Committee established in Charlottetown in 1980 be continued; that the Chairman of that Committee invite interested jurisdictions to a meeting of the Committee to examine the Model Uniform Personal Property Security Act and recommend such changes as are considered appropriate, keeping in mind the extensive work of the Canadian Bar Association Special Committee on the matter; that after the meeting the Model Act be referred to the Alberta Legislative Counsel for drafting according to the Uniform Law Conference drafting standards; that the redraft be circulated to the Local Secretaries before January 31, 1982, and that the Act as redrafted and circulated be brought back to the 1982 Annual Meeting.

*Prejudgment Interest*

RESOLVED that consideration of the draft Uniform Prejudgment Interest Act be deferred to the 1982 Annual Meeting at which time the Saskatchewan Commissioners will present their report taking into account a report prepared for this meeting on the matter by the Manitoba Commissioners.

*Product Liability*

The report of the Committee on Product Liability was presented by Mrs. Doleman.

RESOLVED that the report be received and that it be printed in the Proceedings (Appendix P, page 156); that the project be referred to the Nova Scotia Commissioners for further study with the New Brunswick Commissioners, and report to the 1982 Annual Meeting

*Protection of Privacy: Tort*

RESOLVED that this year's report on the Protection of Privacy: Tort, be received and printed in the Proceedings (Appendix Q, page 165) of the Sixty-Third Annual Meeting.

RESOLVED that the Committee 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 1982 Annual Meeting.

*Purposes and Procedures of the Uniform Law Section*

RESOLVED that a committee on scope and purposes be established composed of Mr Colas, Chairman and Messrs. Smethurst, Stone, Tallin and Walker to study ways and means to implement a report on purposes and procedures set out on pages 306 and 307 of the 1979 Proceedings so as to improve the efficiency and productivity of the Section.

*Real Property: Time Sharing*

RESOLVED that the matter of Time Sharing be adopted by the Conference as a project for uniformity and referred to the Manitoba Commissioners to identify issues and problems in relation thereto with recommendations for uniform legislation and, if practicable, a draft Uniform Act to be brought back to the 1982 Annual Meeting.

*Reciprocal Recognition and Enforcement of Judgments*

Consideration of the Recognition and Enforcement of Judgments and the Joint United Kingdom/Canada Convention in the Enforcement of Judgments was deferred to the 1982 Annual Meeting.

*Reciprocal Transboundary Pollution Remedies*

Mr. Smethurst gave a verbal report on a draft Reciprocal Transboundary Pollution Remedies Act and asked each jurisdiction to consider the draft, and report to the 1982 Annual Meeting. In the meantime he asked for representations to be made before September 30, 1981.

*Recognition of Extra-Provincial Wardship Orders*

The recommendation of the Alberta Commissioners that the matter of Recognition of Extra-Provincial Wardship Orders be considered by the Conference was referred to the Alberta and Newfoundland Commissioners for study and report to the 1982 Annual Meeting.

*Regulations*

RESOLVED that the report of the Committee on a Proposed New Uniform Regulations Act be received and printed in the Proceedings (Appendix R, page 167);

that the subject be referred to the Saskatchewan, Alberta and British Columbia Commissioners for further study, and report to the 1982 Annual Meeting with a draft Uniform Act.

*Sale of Goods*

The Chairman of the Committee, Dr. Mendes da Costa, presented the report.

RESOLVED that the report and the draft Uniform Sale of Goods Act (Appendix S, page 185) be received and printed in the Proceedings with comments on the sections; that the draft be referred to the Legislative Drafting Section to review the drafting; that the product be adopted by the Conference as a Uniform Act and recommended for enactment in that form; and that the adopted Uniform Act be printed in the 1982 Proceedings.

The Chairman of the Uniform Law Section was asked to send letters of appreciation to each member of the Committee.

*Substantial Compliance in Execution of Wills*

The matter of Substantial Compliance in Execution of Wills was referred to the British Columbia and Manitoba Commissioners for a joint report to the 1982 Annual Meeting.

*Taking of Evidence Abroad*

Mr. Low presented a report on the Taking of Evidence Abroad in Civil or Commercial Matters.

RESOLVED that Mr. Tallin's Memorandum (1980 Proceedings at pages 196-202) be referred back to the Special Committee on International Conventions in Private International Law for further study, and report to the 1982 Annual Meeting.

*Vienna Convention on International Sale of Goods*

A report on International Sale of Goods prepared by Professors Ziegel and Samson was tabled. It was decided that the adoption by jurisdictions of this convention was to be left to each jurisdiction to study and consider on its own.

*Vital Statistics*

RESOLVED that the Uniform Vital Statistics Act be referred to the British Columbia Commissioners for a report to the 1982 Annual Meeting

*Workers Compensation Acts and Contribution under the Contributory Negligence Act*

Mr. MacIntosh presented the Prince Edward Island Report (Appendix T, page 322). After discussion, the following resolution was adopted:

RESOLVED that the Prince Edward Island Report be received and referred to such committee as the Prince Edward Island Commissioners see fit to appoint; that the Committee so appointed consider the implications raised by the Report, and report to the 1982 Annual Meeting.

*Officers: 1981-82*

Mr. Stone was elected as Chairman of the Section and it was agreed that Mr. Hoyt would act as Secretary of the Section.

*Close of Meeting*

A unanimous vote of appreciation and thanks was tendered Mr. Macaulay for his handling of the arduous duties of Chairman throughout the week.

Mr. Macaulay then turned the chair over to the incoming Chairman, Mr. Stone, who closed the meeting.

## CRIMINAL LAW SECTION

### MINUTES

*Attendance*

Forty-one delegates were in attendance. For details see list of delegates.

*Opening*

Mr. R. McLeod, Q.C., presided and Mr. Dan Préfontaine acted as secretary. It was agreed that voting would be individual with the right to call for a delegation vote: with 3 votes per delegation.

*Chairman's Report*

The forty-one delegates included representatives from the provinces, the Federal Department of Justice and the Ministry of the Solicitor General, the President and a member of the Law Reform Commission of Canada and the private bar.

Seventy-five resolutions were considered calling for procedural and substantive amendments to the need to create new offences in the Criminal Code. During the course of debate on these proposals the Government of Canada advised the delegates of its intentions by way of the next Omnibus Criminal Law Amendment Bill.

The delegates also discussed the matter of organized crime and reviewed a background paper presented by British Columbia entitled "The Business of Crime". Proposals for legislation similar to the *American Racketeer Influenced and Corrupt Organizations Statute* (RICO) from a Canadian perspective were discussed. It was resolved that a study be undertaken by Governments at the earliest opportunity.

A clause by clause review was made of Bill C-53, the Sexual Offences and Protection of Children Act. A background paper prepared by Saskatchewan concerning mandatory bodily substance samples in impaired driving cases was put forward for the information and comments of the delegates and further consideration.

Finally, the work of the Section was greatly facilitated by the very competent assistance of the Canadian Intergovernmental Conference Secretariat and Mr. Dan Préfontaine.

Mr. Serge Kujawa, Q.C., was elected Chairman of the Section for next year. Mr. Dan Préfontaine agreed to act as secretary again next year.

*Resolutions*

The resolutions were presented by each jurisdiction as follows:

*ALBERTA*

*Item A*

The Criminal Code should provide for an appeal in accordance with s. 608.1 to the Court of Appeal, on leave of the Chief Justice and only when there has been a reversal of an order, by the crown or the accused from a Queen's Bench Judge's order.

DEFEATED 17 to 8

It was agreed to deal with Mr. Greenspan's motion put forward by Canada to amend Criminal Code s. 457.5 and 6 to permit a review of an order of a justice under s. 457 and in accordance with s. 457.8 where there has been an alteration of the original decision.

DEFEATED 17 to 8

Vote by delegation was called.

DEFEATED 13 to 13.

*Item B*

It should be stated in the Criminal Code that when an accused is not present a warrant is not necessary if it is for the sole purpose to maintain jurisdiction.

CARRIED UNANIMOUSLY

*Item C*

The Criminal Code be amended to extend the provisions of s. 730 C.C. to indictable offences, by including a duplicate of s. 730 in Part XVIII.

CARRIED 16 to 11

*Item D*

A section be added to the Criminal Code empowering the Magistrate to hold a fitness hearing prior to an accused's election where it appears the accused is incompetent to make an election.

CARRIED 26 to 2

*Item E*

The proposal to delete s. 518 was withdrawn.

*Item F*

S. 688 be amended so that the court has no option but to find the offender to be a dangerous offender once the conditions have been proven. The word "may" where it appears in the section should be substituted by the word "shall".

DEFEATED 11 to 19

*Item G*

The provision in the Criminal Code which allows a court to impose an intermittent sentence on an accused be eliminated.

DEFEATED 7 to 22

*Item H*

S. 85 of the Criminal Code be amended to make it a hybrid offence.

DEFEATED 14 to 15

Vote by delegation was called.

DEFEATED 11 to 15

S. 133(1) of the Criminal Code be amended to make it a hybrid offence.

CARRIED 20 to 1

S. 149 of the Criminal Code be amended to make it a hybrid offence.

DEFEATED 3 to 18

*Item I*

S. 99(1) of the Criminal Code be amended to provide a peace officer with the right to search a dwelling house without warrant, and to seize, where he has reasonable grounds to believe an offence has been or is being committed contrary to the provisions relating to prohibited weapons, restricted weapons, firearms or ammunition.

DEFEATED 3 to 19

*Item J*

S. 383 of the Criminal Code be amended to raise the penalty from two (2) to five (5) years for this offence.

CARRIED 32 to 1

*Item K*

Legislation be enacted to provide that when a person serving life sentence is convicted of an offence committed after he has been sentenced to life and before he is eligible for parole, upon conviction of such offence, even though the sentence is to run concurrent, the sentence should have the postponing effect on the eligibility for parole.

CARRIED 32 to 1

*BRITISH COLUMBIA*

*Item 1*

S. 628(1) of the Criminal Code be amended to add after the word "writings" the words "matter, object, thing".

CARRIED UNANIMOUSLY

*Item 2*

This item dealing with an amendment to s. 85 was dealt with earlier under Alberta item H and accordingly was withdrawn.

*Item 3*

S. 666 of the Criminal Code be amended by adding a new subsection similar to that under s. 133(9) to permit a probation order to be proved by certificate.

CARRIED UNANIMOUSLY

To provide that where a certificate is used then a copy of the probation order should be attached.

CARRIED UNANIMOUSLY

*Item 4*

S. 738(3) of the Criminal Code be amended to permit ex parte trials where an accused fails to appear pursuant to his undertaking or recognizance.

CARRIED 30 to 2

*Item 5*

S. 457.8 of the Criminal Code be amended by adding a subsection which would simplify the procedure for substituting an information so as to allow for the previous bail to apply to the substituted information.

CARRIED 19 to 0

*Item 6*

This item proposing an amendment to s. 455.3(1)(6) was withdrawn.

*Item 7*

This item proposing an amendment to s. 133 having been dealt with in 1979 (item 11) was withdrawn.

*Item 8*

The subject of "An Evaluation of the American *Racketeer Influenced And Corrupt Organizations* statute from a Canadian Perspective and Recommendations" was deferred for discussion at the end of the Agenda items.

*MANITOBA*

*Item 1*

S. 653 of the Criminal Code be amended as follows:

1. To apply to both summary conviction and indictable offences;
2. To repeal the requirement that a person aggrieved must make the application.

CARRIED UNANIMOUSLY

S. 653 of the Criminal Code be amended to provide for imprisonment in default of payment of a compensation order, however, imprisonment would be limited to a maximum of two months in summary conviction cases and to one year in indictable offences and the term of imprisonment would not wipe out the debt.

CARRIED 18 to 2

S. 653 of the Criminal Code be further amended to provide that the onus would be on the accused to show cause for non payment and why the court should not issue a warrant of committal.

CARRIED 15 to 3

*Item 2*

S. 662.1 of the Criminal Code be amended to permit the court to impose a fine in addition to an order of conditional discharge.

DEFEATED 14 to 16

Vote by delegation was called.

DEFEATED 9 to 21

*NEW BRUNSWICK*

*Item 1*

This item proposing an amendment to the Criminal Records Act having been dealt with in 1980 (item 46) was withdrawn.

*Item 2*

S. 178.23(1) of the Criminal Code be amended to provide for a regulation prescribing the form of written notice to be used when notifying the object of interception.

DEFEATED 2 to 18

*Item 3*

This item proposing an amendment to s. 85 and 149 having been dealt with in Alberta item 8 was withdrawn.

*Item 4*

To enact a section in the Criminal Code giving the crown the statutory authority to withdraw an indictment (which by definition would include an Information) at any time before evidence is called.

DEFEATED 12 to 14

Vote by delegation was called.

DEFEATED 14 to 14

*Item 5*

S. 387 of the Criminal Code be amended to abolish the distinction between "private" and "public" property and make the sentence uniform at 10 years.

CARRIED UNANIMOUSLY

S. 388 of the Criminal Code be amended to increase the amount provided for from $50 to $500.

CARRIED UNANIMOUSLY

*Item 6*

This item was withdrawn in view of the proposed amendment to the Criminal Code in the Omnibus Bill to raise the maximum fine in s. 722(1) for summary conviction offences from $500 to $2,000.

*Item 7*

This item having been dealt with in 1980 (item 45) was withdrawn.

*Item 8*

S. 457(1) of the Criminal Code be amended to clarify the interpretation of what is meant by the words "is taken before".

DEFEATED 18 to 5

*NEWFOUNDLAND*

No submissions made.

*NORTHWEST TERRITORIES*

No submissions made.

*NOVA SCOTIA*

No submissions made.

*ONTARIO*

*Item 1*

This item proposing that sections 645 and 669 be amended to provide for an additional period of incarceration or parole ineligibility for persons serving a term of life imprisonment and convicted of a subsequent offence was dealt with in Alberta item 8 and was therefore withdrawn.

*Item 2*

Amend section 594(1) of the Criminal Code to apply to previous convictions of all indictable offences within the definition of s. 27(1)(a) of the Interpretation Act which might have been prosecuted by indictment or by summary conviction. This amendment would render subsection (2) of section 594 applicable only to convictions for which the accused must be prosecuted by summary procedure.

CARRIED 16 to 4

*Item 3*

Section 735(2) of the Criminal Code and similar provisions in other Federal statutes be amended to provide that a defendant may appear and or act in person or by counsel or agent.

CARRIED UNANIMOUSLY

*Item 4*

Section 178.16(5) be amended so that all lawfully intercepted spousal communications if otherwise properly admissible may be introduced in evidence.

CARRIED 17 to 6

*Item 5*

The proposal to amend sections 484 and 485 (1) to include notice to and consent of the Crown to any proposed re-election by the accused during his trial or preliminary inquiry and before committal for trial was withdrawn in view of the proposals in the Omnibus Bill.

*Item 6*

Section 85 of the Criminal Code be amended to include use of a weapon in a manner dangerous to the public peace.

DEFEATED 4 to 19

*Item 7*

That wherever in the Code an accused is liable to an increasing schedule of minimum penalties for "second" or "subsequent" offences these be defined.

DEFEATED 6 to 20

*Item 8*

Section 238 of the Criminal Code be amended to include a) a power in the trial judge to prohibit from driving a person convicted of certain Criminal Code offences in the manner provided prior to Statutes of Canada 1972 chapter 13 and b) an offence of driving while so prohibited.

CARRIED 22 to 5

Section 238 be amended to create an offence of driving while a licence is suspended by operation of provincial law as a result of a conviction for certain Criminal Code driving offences.

CARRIED 16 to 11

Section 238 be amended to create an offence of driving while suspended as a result of certain provincial statutory provisions and provincially authorized judicial orders (after conviction for certain provincial offences) in relation to mattters concerning highway safety.

DEFEATED 4 to 21

*Item 9*

Amend s. 301.1 to allow for a reverse onus clause to the effect that possession of a credit card issued in the name of another is in the absence of evidence to the contrary that the card was in the accused's possession knowing that it was obtained by crime.

DEFEATED 4 to 19

Amend s. 434(1) to include s. 301.1(2) as an exception.

CARRIED 20 to 2

Amend s. 282 so that "document" would include a credit card.

CARRIED UNANIMOUSLY

Amend s.s. 315, 316 and 317 to include reference to s. 301.1

CARRIED UNANIMOUSLY

*Item 10*

S. 79(1) of the Criminal Code be amended to add a new subsection as follows: (c) with intent to injure, alarm, annoy or harass any person, sends or delivers to a person or place, causes a person to take or receive any thing or substance represented or held out to be an explosive or explosive device.

CARRIED UNANIMOUSLY

S. 80 of the Criminal Code be amended to add a new subsection as follows: (c) has in his possession or under his care or control any substance or thing represented or held out to be an explosive or explosive device.

CARRIED 22 to 1

*Item 11*

That a new offence be added to the Criminal Code which makes it an offence to publish works with intent to inform members of the public or a section of the public on methods of committing crimes or drug offences or which without lawful justification or excuse glorify or glamorize any one or more of the following subjects (a) horror, cruelty, violence, human suffering or death.

DEFEATED 5 to 22

*Item 12*

That the Canada Law Reform Commission study the appropriateness of minimum mandatory penalties as part of its fundamental review of the Code.

CARRIED 21 to 3

*Item 13*

Amend sections 465(1)(c), 465(2), 543(2) and 738(5) of the Criminal Code to provide the power to order successive remands for observation.

DEFEATED 9 to 19

*Item 14*

That subsection 457.5(c) of the Code be amended to delete the words "other" and "other than an order provided for in subsection (5) and (5.1) of that section".

CARRIED UNANIMOUSLY

*Item 15*

That section 233(4) be amended to delete the word "public" so that the section would cover driving on a "street, road, highway or other place . . .".

DEFEATED 8 to 13

*Item 16*

Section 698 be amended to include a new subsection 698(5) making it the responsibility of the surety to ensure that the accused complies with each and every condition of this recognizance and in the event of a breach of any of the conditions in the recognizance by the accused default proceedings may be taken against the surety.

DEFEATED 4 to 19

Amend Form 29.

DEFEATED 7 to 17

*Item 17*

That section 83(1) of the Criminal Code be amended to include being armed with a firearm.

DEFEATED 10 to 15

*Item 18*

That the Criminal Code be amended to provide that a peace officer have the statutory power to seize or at least "freeze" the assets of a person, alleged to be proceeds of crime, when said person places the subject proceeds on account in a financial institution. It was agreed to defer consideration of this resolution until the discussion of RICO.

*PRINCE EDWARD ISLAND*

No submissions.

*QUEBEC*

*Item 1*

Replace subsection 1 of section 178.12 by the following:

(1) An application for an authorization shall be made *ex parte* and in writing to a judge of a superior court of criminal jurisdiction, or a judge as defined in section 482 and shall be signed, as the case may be, by

(a) the Solicitor General of Canada or an agent specially designated in writing by the Solicitor General of Canada personally, if the offence under investigation is one in respect of which proceedings, if any, may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or

(b) the Attorney General of a province or an agent specially designated in writing for the purposes of this section by the Attorney General of a province personally, if the offence under investigation is one in respect of which proceedings, if any, may be instituted in that province at the instance of the government of that province and conducted by or on behalf of the Attorney General of that province.

CARRIED 26 to 1

*Item 2*

That when a justice issues a warrant under section 456.1(2) for the accused's failure to appear, he be able to authorize the release of the accused in the same way as he may now do under subsection 6 of section 455.3, when he issues a warrant pursuant to that section.

CARRIED UNANIMOUSLY

*Item 3*

S. 468 be amended by deleting from subsection 5 the following words: "signed by the justice and . . .".

CARRIED UNANIMOUSLY

*Item 4*

S. 455.3 be amended by substituting the wording "before a justice" for "before him" in paragraph b of subsection 1.

CARRIED UNANIMOUSLY

*Item 5*

To give the power to a court of appeal to either pass sentence or to remit the case by amending s.s. 613(3) and 614(4) of the Criminal Code.

CARRIED 22 to 2

To take a consequential amendment to s. 643 to delete words required to give effect to the above power.

CARRIED UNANIMOUSLY

*SASKATCHEWAN*

*Item 1*

To amend the Criminal Code to add a new section which would make it an offence to possess containers of petroleum products, flammable material, incendiary devices, delaying devices, frangible hand grenades, molotov cocktails or improvised incendiary devices in circumstances that give rise to a reasonable inference that they are intended to be used to unlawfully set fire to property.

CARRIED UNANIMOUSLY

*Item 2*

This item proposing amendments to s.s. 79 and 80 having been dealt with in Ontario item 10 was withdrawn.

*Item 3*

This item proposing an amendment to s. 83 having been dealt with in Ontario item 17 was withdrawn.

*Item 4*

It was agreed to defer discussion on the matter of mandatory bodily substances samples in impaired driving cases to be dealt with at the end of the Agenda.

*YUKON*

No submissions made.

*CANADA*

*Item 1*

The proposal to amend the Code to permit federal authorities powers regarding s. 133 and s. 666 offences only where they arise out of federal prosecutions was withdrawn. It was agreed that the matter could be referred to the Federal-Provincial Sub-Committee on Prosecutorial Responsibility chaired by Mr. R. Paisley, Q.C. if Canada thought it appropriate to do so.

*Item 2*

That Section 168 be repealed. It was agreed that this item be deferred for discussion at the time Bill C-53 is discussed.

*Item 3*

That s. 170(1) be amended so as not to apply to performances in theatres.

DEFEATED 6 to 18

*Item 4*

Repeal s. 193(2)(b).

DEFEATED 13 to 17

Delegation vote.

DEFEATED 14 to 16

The proposal to repeal s. 185(2)(a) was withdrawn.

*Item 5*

(a) That s.s. 457.5 and 457.8 be amended to permit a bail order to be varied without the need to enter into a new order where affidavit evidence of the sureties of consent is provided.

CARRIED UNANIMOUSLY

(b) The proposal to amend s. 457.5(1) and (8) having been dealt with by the Alberta item was withdrawn.

(c) That the Code be amended to give the Court the power to name in the bail order a special surety.

CARRIED UNANIMOUSLY

*Item 6*

(a) The Criminal Code be amended to permit an accused to request a trial in his own language at the time when the date for his trial is set.

DEFEATED 5 to 17

(b) The Criminal Code be amended to permit an accused to request in his Notice of Appeal specifying that the trial be in his official language if a new trial is granted by the Court of Appeal, subject to the discretion of the Court of Appeal to grant the request.

CARRIED 15 to 12

(c) The Criminal Code be amended to allow an accused to have his trial in his official language no matter when the request is made as long as the Crown consents.

CARRIED 17 to 3

*Item 7*

S. 467(4) of the Criminal Code be amended to expand the definition of "newspaper" to provide that any publication whether it comes out bimonthly, or quarterly or annually is included and is prevented from publishing the proceedings of a preliminary enquiry until the accused is discharged or the trial has ended.

CARRIED UNANIMOUSLY

*BRITISH COLUMBIA*

*RICO*

It was agreed to deal with the general question of whether there was a need for a RICO type of statute or provisions for Canada. Following a general discussion on the problems and merits of such a statute the following resolution was proposed:

That there be a study undertaken at the earliest opportunity to review the British Columbia recommendations brought to the attention of this meeting of Uniform Law

Commissioners and to recommend any legislative changes necessary to more effectively deal with organized crime.

CARRIED 22 to 3

In addition it was agreed that the Ontario resolution on the "freezing" of assets be referred for consideration in the aforementioned study.

*SASKATCHEWAN*

*Supplementary Agenda Item*

The Criminal Code be amended so as to create a section similar to the present s. 234.1 but relating to persons navigating or operating boats. It appears a new section creating the ALERT demand and the refusal of that demand for boaters is required.

CARRIED UNANIMOUSLY

The Item on Mandatory Bodily Substances Samples in Impaired Driving cases was discussed. Dr. R. Gosse, Q.C. stated that Saskatchewan was putting the matter forward for the information and comments of the delegates and further consideration.

*CANADA*

Bill C-53, "An Act to amend the Criminal Code in relation to sexual offences and the protection of young persons and to amend certain other Acts in relation thereto or in consequence thereof" was reviewed clause by clause.

Although formal votes were not taken concern was expressed on a number of the provisions. Those concerns included the following:

- —a definition of "sexual misconduct" in respect to sections 166, 167 and 168;
- —the 3 year difference should be substituted for a "proximity of ages and circumstances" test;
- —"gross indecency" in s. 169 should be restricted to two persons;
- —s. 228 wounding with intent should be retained as to the discharge of firearms part;
- —s. 245(a) should have 5 years as a penalty;
- —s. 245.1 should have 14 years as a penalty;

— s. 244(5) should read "Where there is evidence that" instead of "Where a question is raised as to whether";

— s. 246.1 change of terminology from "rape" to "sexual assault and aggravated sexual assault";

— problem of gang rapes needs to be covered. Two options were suggested: 1) either raise the penalty for sexual assault to 14 years or 2) specify in 246.2 by addition of a paragraph (c) to state where more than one person commits a sexual assault, it is aggravated sexual assault;

— s. 246.2(1)(a) need to add the concept of "threatens to use any kind of evidence".

It was agreed that any further comments by delegates would be forwarded to Mr. Dan Préfontaine, General Counsel, Policy Planning and Criminal Law Amendments, Department of Justice, Ottawa.

## SPECIAL PLENARY SESSION

### MINUTES

The meeting opened at 9:15 a.m., Thursday, August 27 with the President, Mr. P. O'Donoghue, Q.C., in the chair.

The President reviewed the work of the special plenary sessions held in April, May, June and July to deal with the recommendations of the Federal/Provincial Task Force on Uniform Rules of Evidence and the Draft Uniform Evidence Act. He noted that provision had been made for members to reopen decisions taken at these earlier plenary sessions, but that such requests for reconsideration would only be granted if supported by 60% of the delegates. If a request to reconsider was granted, the normal voting rules for the Uniform Law Section would apply to the disposition of the substantive question.

The President noted that there had been a great deal of time, effort and expense put into this task by all jurisdictions. He therefore suggested that the objective at this meeting should be passage of a resolution regarding the proposed Uniform Evidence Act.

The meeting agreed to reconsider the decisions set out in Appendix U page 326.

*FINAL DRAFTING OF THE ACT*

Resolved that the Draft Uniform Evidence Act adopted by the Special Plenary Sessions of this Conference convened in April, May, June and July of this year be approved with any amendments agreed upon at this meeting; that the Draft Uniform Evidence Act be referred to a special drafting group composed of Mr. H. B. Shaffer (Federal Department of Justice), Mr. Richard Tremblay (Quebec Department of Justice), and Mr. William MacDonald (Office of the Legislative Counsel, Nova Scotia) as draftsmen, and the Chairman of the Task Force as counsel; that this group be empowered to incorporate amendments agreed upon at this meeting and to effect such technical and other changes as are necessary to make the Uniform Act correspond to decisions taken by the Uniform Law Conference and the drafting style of the Conference; and that the product in both English and French be adopted by the Conference as a Uniform Act and recommended for enactment in that form.

*MOTION OF THANKS*

Mr. R. Tasse, Q.C., praised the Uniform Law Conference and the Task Force for their efforts in bringing the Evidence project to a

successful conclusion, and in particular noted the part played by the President of the Conference and the Chairman of the Task Force.

*ADJOURNMENT*

The meeting was adjourned at 12:15 p.m., August 28.

## CLOSING PLENARY SESSION

### MINUTES

The Closing Plenary Session opened with the President, Mr. O'Donoghue, in the chair and the Executive Secretary, Mr. Hoyt, acting as secretary.

*Legislative Drafting Section*

The Chairman, Mr. Walker, reported on the work of the section.

*Uniform Law Section*

The Chairman, Mr. Macaulay, reported on the work of the section.

*Criminal Law Section*

The Chairman, Mr. McLeod, reported on the work of the section.

*Report of the Executive*

The President, Mr. O'Donoghue, reported on the work of the Executive mentioning in particular the printing of the Draft Uniform Evidence Act. The whole matter of printing, publishing and selling the final product was submitted for information as to what negotiations are going on; he was not asking for adoption at this time.

*Treasurer's Report*

*Resolved* that the Treasurer's Report presented by Mr. Pagano (Appendix A page 61) be adopted.

*Financial Committee*

The Chairman, Mr. Macaulay, reported on the general financial position of the Conference.

*Resolved* that the Conference adopt a budgetary system under which the Executive will each year prepare a budget for the following year to coincide with fiscal year of each jurisdiction.

*RESOLUTIONS COMMITTEE'S REPORT*

Mr. Bertrand presented the report in the form of a motion which was carried unanimously.

*Resolved* that the Conference express its appreciation by way of letter from the Secretary to:

1. the Government of the Yukon Territory and its delegates for their generous hospitality in hosting the Sixty-third Annual Meeting of the Uniform Law Conference of Canada, for the reception and dinner

for the Drafting Section, for the convivial barbeque at Takhini Hot Springs, for giving the delegates an understanding of "sourdoughs" through the Frantic Follies and for awarding them the title of Cheechako First Class;

2. the Honourable Howard Tracey, Minister of Justice, for hosting the formal dinner at the scenic location of the Ski Chalet;

3. the Government of Canada for hosting receptions in honour of the delegates;

4. the National Conference of Commissioners on Uniform State Laws for the invitation to attend and the hospitality they extended to Mr. and Mrs. Padraig O'Donoghue at the National Conference in New Orleans and to Mr. King Hill Jr. and his wife Agnes for honouring this year's conference with their presence;

5. Padraig and Joan O'Donoghue for their hospitality and for treating the delegates as old friends rather than guests;

6. the members of the staff of the Minister of Justice and especially to Ruth Morven, Pat Pettit and Thomas Duncan for their untiring assistance in catering to the comfort and entertainment of the delegates and their attention to all the details that contributed to the success of the Conference;

7. Jan Phelps for the varied program for the entertainment of the spouses of delegates;

8. Chris Christiansen and his very willing assistants at the Correctional Institute for preparing our daily bread;

9. Atlas Travel for their patience and perseverance in times of adversity;

10. the custodial staff of Selkirk School for their assistance;

11. David Burden and the members of the staff of the Intergovernmental Conference Secretariat for their assistance in so many aspects of the Conference and the many services provided.

*Lachlan MacTavish*

Mr. Macaulay paid tribute to the fine work over the years of Mr. MacTavish and expressed his regret that Mr. MacTavish was retiring as Executive Secretary of the Conference.

*Dr. H. Allan Leal*

Dr. Gosse spoke with regard to Dr. H. Allan Leal and presented the following motion which was carried unanimously.

This 63rd Conference of the Uniform Law Conference of Canada

| | |
|---|---|
| *Hearing:* | of the change in official status of H. Allan Leal, Q.C.; and |
| *Remembering:* | the many years of service; and |
| *Recognizing:* | the great value of such service; and |
| *Missing:* | the humour and oratory of |
| *The Distinguished:* | former President of this great conference |
| *Fervently:* | hopes that he will return to it in another capacity at |
| *The Earliest:* | time. |

*Canadian Intergovernmental Conference Secretariat*

*Resolved* that this Conference again notes the successful assistance of the Canadian Intergovernmental Conference Secretariat in this the Sixty-third Annual Meeting and wishes to express its thanks to the Secretariat for its many services so very well performed under the able direction of Mr. David G. Burden. The Conference is most grateful.

*Nominating Committee's Report*

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

Seven past presidents formed the committee this year. They recommend unanimously the following as the Executive for 1981-82:

| | |
|---|---|
| Honorary President: | Padraig O'Donoghue, Q.C., Yukon |
| President: | George Macaulay, Q.C. British Columbia |
| 1st Vice President: | Arthur Stone, Q.C. Ontario |
| 2nd Vice President: | Serge Kujawa, Q.C. Saskatchewan |
| Treasurer: | Gerard Bertrand, Q.C. Canada |
| Secretary: | Graham Walker, Q.C. Nova Scotia |

*Resolved* that nominations be closed and that those nominated by the Nominating Committee be declared to be duly elected to their respective offices.

*Close of Meeting*

Mr. O'Donoghue after making his closing remarks turned the chair over to the incoming president, Mr. Macaulay.

Mr. Macaulay referred to the matter of future annual meetings. They will be as follows:

1982 — Canada will host this meeting. It is to be held at the Chateau Montebello on the Ottawa River about half-way between Ottawa and Montreal. The C.B.A. will meet in Toronto.

1983 — The Government of Quebec will be the host for this meeting to be held in or near Quebec City. The C.B.A. will meet in Quebec City.

1984 — The Government of Alberta will be the host for this meeting.

1985 — The site will be chosen at a later date, probably a year from now. Invitations are standing from British Columbia, Nova Scotia and New Brunswick. The C.B.A. will meet in Halifax.

He also mentioned that in accordance with custom, the president and the first vice-president will represent the Conference on the Council of the Canadian Bar Association; and that Mr. O'Donoghue will present the Conference's Statement to the Annual Meeting of the Canadian Bar Association next week in Vancouver.

Mr. Macaulay after paying tribute to Mr. O'Donoghue for his outstanding contribution to the work and the interests of the Conference, closed the meeting.

# STATEMENT TO THE CANADIAN BAR ASSOCIATION

**by**

PADRAIG O'DONOGHUE

It is my duty and pleasure as the outgoing president of the Uniform Law Conference of Canada to make this statement to you of our activities.

As many of you know, our Conference was established some sixty-three years ago by the provincial governments upon the recommendation of the Canadian Bar Association. It has been meeting annually ever since and has been joined by the federal government and the two territories.

The object of the Conference is, of course, to bring about as much uniformity in the laws of this country as is possible.

This year's conference was held at Whitehorse in the Yukon for some ten days ending last Saturday. Some 111 delegates attended representing every senior jurisdiction in Canada with the exception of the Northwest Territories and representing government, the bench, law reform agencies and private practitioners.

Unquestionably the most important matter dealt with at our recent meeting and perhaps in the entire life of the Conference was the adoption of a *Uniform Evidence Act* after some four years of intensive work by a task force of experts. No doubt you will be hearing a great deal more of this work which blends together in one Act all the provisions applicable in both civil and criminal matters that it is considered should be legislated upon.

The second most important subject dealt with was the adoption in principal of a *Uniform Sale of Goods Act* after several years of work by a team of specialists in the field. It is expected that this Model Act will be promulgated and recommended to the provinces for enactment at this time next year at which time its form and style will have been vetted by our Legislative Drafting Section.

Other items finalized were:

Uniform Contributory Negligence Act, and
Uniform Act Respecting Child Abduction.

Other matters in which progress was made included

Class Actions
Regulations
Custody Jurisdiction and Enforcement.

The Criminal Law Section met for five days with 41 commissioners in attendance.

Matters relating to criminal law and procedure were thoroughly discussed and recommendations made for the consideration of the federal department of justice.

These included:

The Legislative Drafting Section met for two days on August 20th and 21st with 27 delegates in attendance.

They recommended for adoption to the Conference a Uniform Act respecting the convention of the Hague Conference on Private International Law, on civil aspects of International Child Abduction, completed final work on a Contributory Fault Act, a Limitation of Actions Act and a Prejudgement Interest Act.

The Contributory Fault Act was subsequently adopted by the Conference as a Uniform Act. The Limitation of Actions Act and the Prejudgment Interest Act were reopened for discussion by the Conference and will be reported upon next year. They reviewed the Regulations Act and made certain recommendations to the Conference concerning its contents. Further progress was made in respect of the Uniform Interpretation Act in the light of Bilingual Uniform Act and six Uniform Acts were adopted for immediate drafting into the French language.

The Legislative Drafting Section discussed certain matters which are of particular interest to them, namely Drafting Manuals and Pre-Exchange of Statutes and the Education, Training and Retention of Draftsmen.

Mr. Graham D. Walker, Q.C., was elected Chairman, Mr. Bruno Lalonde, Vice-Chairman and Merrilee Charowsky, Secretary.

Once again the Canadian Intergovernmental Conference Secretariat provided its interpretation, translation and secretarial services in its usual most efficient manner. These useful services fill a great need and are duly appreciated.

It is our pleasure to have as our guest Mr. King Hill of Baltimore,

the current president of the National Conference of Commissioners on Uniform State Laws.

The following officers were elected to serve in the coming year:

| | |
|---|---|
| Honorary President: | Padraig O'Donoghue, Q.C., Whitehorse |
| President: | George B. Macaulay, Q.C., Victoria |
| 1st Vice-President: | Arthur Stone, Q.C., Toronto |
| 2nd Vice-President: | Serge Kujawa, Q.C., Regina |
| Treasurer: | Gérard Bertrand, Q.C., Ottawa |
| Secretary: | Graham D. Walker, Q.C., Halifax |

*Legislative Drafting Section*

| | |
|---|---|
| Chairman: | Graham D. Walker, Q.C., Halifax |
| Vice-Chairman: | Bruno Lalonde, Frederiction |
| Secretary: | Merrilee Charowsky, Regina |

*Uniform Law Section*

| | |
|---|---|
| Chairman: | George B. Macaulay, Q.C., Victoria |
| Secretary: | Melbourne M. Hoyt, Q.C., Fredericton |

*Criminal Law Section:*

| | |
|---|---|
| Chairman: | Serge Kujawa, Q.C., Regina |
| Secretary: | Dan Préfontaine, Ottawa |

Lachlan MacTavish, Q.C., of Toronto, who has been an Executive Secretary for eight years has retired and is succeeded by M. M. Hoyt, Q.C., of Fredericton, a one-time president of the Conference.

Copies of Uniform Acts, the annual proceedings, etc. are available free of charge to members of the Canadian Bar upon request to Mr. Hoyt.

Our next annual conference will meet next August at the Chatéau Montebello, Montebello, Québec.

## APPENDIX A

*(See page 27)*

*(Document: 840-204/057)*

## TREASURER'S REPORT

**Statement of Receipts and Disbursements for the period July 16, 1980 to July 15, 1981**

(with comparative figures for the period July 17, 1979 to July 15, 1980)

GENERAL FUND

| | 1981 | 1980 |
|---|---|---|
| Receipts: | | |
| Annual contributions (Schedule 1) | $29,250 | $33,000 |
| Interest — earned on general funds | 2,330 | 2,753 |
| — transferred from Research Fund (Note 3) | 3,163 | 3,942 |
| | 34,743 | 39,695 |
| Disbursements(Note 4): | | |
| Printing of 1979 proceedings | | 15,454 |
| Printing of 1978 proceedings | | 12,025 |
| Executive-secretary — honorarium | 14,000 | 12,500 |
| — other | 400 | 500 |
| Secretarial services — 1978/79 | | 3,500 |
| — 1979/80 | | 3,500 |
| National Conference of Commissioners on Uniform State Laws meeting — 1979/80 | | 2,657 |
| — 1980/81 | 451 | 2,900 |
| Annual meeting | 3,017 | 3,049 |
| Evidence Task Force meeting. . . . . | 2,025 | |
| Executive meeting | | 1,139 |
| Joint Liaison Committee meeting. . . . . | 1,482 | |
| Other meetings | | 537 |
| Professional fees | 708 | 534 |
| Telephone | 279 | 189 |
| Printing and stationery | 132 | 129 |
| | 22,494 | 58,613 |
| Excess (deficiency) of receipts over disbursements | 12,249 | (18,918) |
| Balance in bank, beginning of period | 23,298 | 42,216 |
| Balance in bank, end of period | $35,547 | $23,298 |

| | | |
|---|---|---|
| Balance in bank consists of: | | |
| Term deposits | $27,468 | $23,339 |
| Current account balance | 8,079 | (41) |
| | $35,547 | $23,298 |

(See accompanying notes)

RESEARCH FUND

| | 1981 | 1980 |
|---|---|---|
| Receipts: | | |
| Government of Canada contribution | $25,000 | $25,000 |
| Interest earned | 5,708 | 3,163 |
| University of Manitoba | | 259 |
| | 30,708 | 28,422 |
| Disbursements: | | |
| Evidence Task Force | 359 | 29,812 |
| Sale of Goods Project | 19,084 | 8,422 |
| Interest transferred to General Fund (Note 3) | 3,163 | 3,942 |
| Bank charges | 5 | 8 |
| | 22,611 | 42,184 |
| Excess (deficiency) of receipts over disbursements | 8,097 | (13,762) |
| Balance in bank, beginning of period | 28,895 | 42,657 |
| Balance in bank, end of period | $36,992 | $28,895 |
| Balance in bank consists of: | | |
| Term deposits | $34,831 | $28,299 |
| Current account balance | 2,161 | 596 |
| | $36,992 | $28,895 |

(See accompanying notes)

**Notes to Financial Statements**

**July 15, 1981**

1. *Accounting policies*

The accompanying statements of receipts and disbursements reflect only the cash transactions of the organization during the period. The statements are prepared on a fund basis. The Research

Fund includes the receipts and disbursements for specific projects. The General Fund includes the receipts and disbursements for all other activities of the organization.

2. *Contribution not yet received*

   An anticipated contribution of $25,000 by the Government of Canada to the Research Fund had not been received at July 15, 1981.

3. *Interest transfer*

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

4. *Disbursements*

   At July 15, 1981, the following approximate amounts were payable from the General Fund and are not reflected in the accompanying statement of receipts and disbursements:

| | |
|---|---|
| Printing of 1980 proceedings..... | $15,000 |
| Secretarial services..... | 3,500 |
| | $18,500 |

## SCHEDULE OF MEMBERS' ANNUAL CONTRIBUTIONS FOR THE PERIOD JULY 16, 1980 TO JULY 15, 1981

(with comparative figures for the period July 17, 1979 to July 15, 1980)

| | 1981 | 1980 |
|---|---|---|
| Re: Previous year— | | |
| Northwest Territories | | $ 1,250 |
| New Brunswick | | 1,000 |
| Canada | $ 2,500 | 2,500 |
| | 2,500 | 4,750 |
| Re: Current year— | | |
| Canada | 2,500 | |
| British Columbia | 2,500 | 2,500 |
| Ontario | 2,500 | 2,500 |
| Prince Edward Island | 1,250 | 1,250 |
| New Brunswick | 2,500 | 2,500 |
| Newfoundland | 2,500 | 2,500 |
| Quebec | 500 | 2,500 |
| Northwest Territories | 1,250 | 1,250 |
| Manitoba | 2,500 | 2,500 |
| Nova Scotia | 2,500 | 2,500 |
| Alberta | 2,500 | 2,500 |
| Saskatchewan | 2,500 | 2,500 |
| Yukon | 1,250 | 1,250 |
| | 26,750 | 26,250 |
| Re: Subsequent year— | | |
| Quebec | | 2,000 |
| | $29,250 | $33,000 |

## AUDITORS' REPORT

To the Members of the
Uniform Law Conference of Canada:

We have examined the statements of general fund receipts and disbursements and research fund receipts and disbursements of the Uniform Law Conference of Canada for the period July 16, 1980 to July 15, 1981. 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 these statements present fairly the cash operations of the organization for the period July 16, 1980 to July 15, 1981 in accordance with accounting principles as described in Note 1 to the financial statements on a basis consistent with that of the preceding period.

Clarkson Gordon
*Chartered Acountants*

Edmonton, Canada
July 30, 1981

## APPENDIX B

*(See page 27)*

## SECRETARY'S REPORT

The office of the Secretary is closely linked with that of the Executive Secretary who will be reporting on the particulars in more detail.

The Conference has been fortunate in having the services of L. R. MacTavish, Q.C. as its Executive Secretary for the last eight years. Before that Mr. MacTavish had been a member of the Conference for more than twenty years and had held the office of Secretary and later the office of President for two terms from 1953 to 1955. For the last two or three years, Mr. MacTavish has been indicating to the Executive his wish to retire but the Executive did not act because we could not conceive of getting along without him. He formally submitted his resignation this year and it has been reluctantly accepted by the Executive. Mr. MacTavish's experience and his understanding of the nature of the Conference have been greater than any person on the Executive and have been invaluable to us. This and his great good humour and quiet efficiency are easily taken for granted and the prospect of losing him has come as a shock. Douk, we thank you for your assistance over the past eight years and wish you well. I know that the time involved in this work has eaten into your other endeavours which you will now be free to pursue.

I am most pleased that the Executive has been successful in persuading Mr. M. M. Hoyt, Q.C., of Fredericton, New Brunswick to take on the position. He is well known to many of you. Mr. Hoyt was a member of the conference for about twenty-five years. He retired in 1976 after holding the office of local secretary for New Brunswick and Treasurer and he was President of the Conference for the year 1967-68. Mel was formerly Legislative Counsel and Clerk of the Executive Council in New Brunswick. I do not believe it would have been possible to replace Mr. MacTavish with anyone else so well qualified to continue the office in the same tradition. We welcome you, Mel, and look forward to working with you.

The office of Secretary has passed the year without noteworthy incident. Letters of appreciation were sent as directed by the Resolution Committee of the last annual meeting and the Special Plenary Session held in April.

Arthur N. Stone
Secretary

## APPENDIX C

*(See page 27)*

## EXECUTIVE SECRETARY'S REPORT

As your newly retired Executive Secretary, I take it to be my duty to report upon the highlights of the Conference's year now closing. This function I can perform quickly.

The year has been normal in most respects. One exception was the special general meeting of the Conference held to consider the Report of the Federal-Provincial Task Force on Uniform Rules of Evidence. This was, I believe, a unique experience in the life of the Conference and, if I may say so, it was remarkably successful. In fact, it made possible the consideration by you in a special plenary session on Thursday of this week the consideration of the Draft Uniform Rules of Evidence.

In closing this report I wish to say how fortunate the Conference is in acquiring the services of Mel Hoyt as my successor. I have known Mel for many years and, without reservation of any kind, I am sure he will serve you well in the years ahead.

Lachlan MacTavish

## APPENDIX D

*(See Page 30)*

*(Document: 840-204/045)*

### Uniform Act Respecting the Convention of The Hague Conference on Private International Law on the Civil Aspects of International Child Abduction

Interpretation

1. In this Act, "convention" means the Convention on the Civil Aspects of International Child Abduction set out in the Schedule hereto.

Convention in force in Province

2. On, from and after the date the convention enters into force in respect of the Province as determined by the convention, except (note any reservation which is allowed and made under the convention), the convention is in force in the Province and the provisions thereof are law in the Province.

Central Authority

3. The (Minister of or ) shall be the Central Authority for the Province for the purpose of the Convention.

Request to ratify Convention

4. The (Minister of or ) shall request the Government of Canada to submit a declaration to the Ministry for Foreign Affairs of the Kingdom of the Netherlands declaring that the convention extends to the Province except (note any reservation which is allowed and made under the convention).

Publication of date

5. The (Minister of or ) shall publish in the Gazette the date the convention comes into force in the Province.

Regulations

6. The Lieutenant Governor in Council may make such regulations as are necessary to carry out the intent and purpose of this Act.

This Act prevails

7. Where there is a conflict between this Act and any enactment, this Act prevails.

## APPENDICE D

*(Voir page 30)*

*(Document 840-204/045)*

### Loi uniforme sur les aspects civils de l'enlèvement international d'enfants

Convention a force de loi

1. La convention sur les aspects civils de l'enlèvement international d'enfants reproduite en annexe, a force de loi dans la province. (s'il y a des réserves, les indiquer ici)

Autorité centrale

2. Le (ministre de ou ) est l'Autorité centrale pour l'application de la convention dans la province.

Demande de ratification

3. Le (ministre du ou ) requiert le gouvernement du Canada de déclarer au ministère des Affaires étrangères du Royaume des Pays-Bas que la convention s'applique dans la province conformément à l'article 1.

Entrée en vigueur de la convention

4. A la date qu'elle prévoit, la convention entre en vigueur dans la province.

Avis public

5. Lorsque la date d'entrée en vigueur de la convention est déterminée, (le ministre de ou ) en donne avis dans la Gazette.

Règlements

6. Le lieutenant-gouverneur en conseil peut, par règlement, adopter les mesures nécessaires à l'application de la présente loi.

Primauté

7. La présente loi prévaut sur la Loi uniforme sur l'exécution extra-provinciale des ordonnances de garde.

## APPENDIX E

*(See Page 30)*

*(Document 840-204/041)*

# REPORT OF ONTARIO ON CONFLICT OF LAWS PROVISIONS FOR THE UNIFORM CHILD STATUS ACT

At the 1980 annual meeting, the Uniform Law Conference of Canada directed Ontario to prepare a separate set of provisions for the conflict of laws rules that should apply to the recognition of extra-provincial declarations of paternity: see 1980 Proceedings, p. 29. A draft set of conflict of laws provisions is attached as Appendix A to this report.

Although instructed to prepare provisions for recognition of formal declarations of paternity only, we have included for consideration by the Conference a set of rules for recognition of findings of paternity that do not amount to a formal declaration in rem. These provisions are severable and could quite easily be dropped from the draft by a jurisdiction which chooses not to grant recognition to extra-provincial findings of paternity. However, it seemed to be logical to include provisions for recognition of these findings because the *Uniform Child Status Act* as adopted creates a presumption of paternity where a domestic court has made a finding of paternity: see 1980 Proceedings, p. 106, cl. 9(f).

The draft operates on the principle that declarations (and findings) made by a court in Canada are entitled to recognition without question, whereas those of a court outside Canada should be subject to a slightly higher test before they are recognized. Once recognized, a declaration or finding is to have the same effect in the enacting jurisdiction as a declaration or finding of a domestic court.

The following are some detailed comments on individual provisions of the draft.

*Section 12.* The definition of extra-provincial declaratory order plugs into the provision for declaratory orders made within the enacting jurisdiction under s. 6 of the *Uniform Child Status Act.* Extra-provincial findings of paternity are defined so as to be any judicial finding not amounting to a declaratory order.

*Section 13.* Extra-provincial declarations made *within Canada* are to be recognized and given effect as if made in the enacting

jurisdiction without any question as to the jurisdiction of the court that made the declaration. No rules for the assumption of jurisdiction are stated in the Uniform Act, but rather, this is left to the jurisprudence.

*Section 14.* The test for recognition of truly foreign declarations, that is, those made *outside Canada,* is based on the rules for recognition of foreign divorces. Enacting jurisdictions should be sure that their rules for determining the domicile of a married woman permit her to establish a separate domicile from that of her husband, as cl. (a) assumes this. Cls. (a), (c) and (d) speak of the domicile or habitual residence of the child or parent either at the time the proceeding was commenced (the usual relevant time for determining domicile) or at the time the order was made (a new relevant time proposed for consideration by the Conference). Is there an advantage to having the option of determining domicile as of the date of the order (presumably the hearing date), so that the artificial exercise of determining domicile or habitual residence at the date of commencing the proceeding is avoided?

*Section 16* Canadian extra-provincial declarations may be filed with the director of vital statistics and, under our proposal, the director would then act on the declaration as he would act on a domestic declaration. This may be a controversial proposal, but it reflects the full faith and credit approach that we have generally taken to the recognition of extra-provincial declarations made within Canada. Foreign declarations must be accompanied by the opinion of a local lawyer stating that the declaration is entitled to recognition, a sworn statement by a lawyer in the foreign jurisdiction explaining the effect of the declaration (so that the director of vital statistics has two forms of backup) and a translation, where necessary. Where the director is faced with two or more contrary declarations, the section directs him to ignore all of them. The section also exonerates the director from civil liability for acting on material that is apparently regular on its face.

*Section 18* This section continues the full faith and credit principle for extra-provincial findings of paternity made in Canada.

*Section 19* A foreign finding of paternity is entitled to recognition only if it was made by a court whose jurisdiction would be recognized under the domestic conflict of laws rules. No attempt has been made to spell out those rules here, as was done for declarations under s. 14 of the draft, as a finding of paternity is merely a finding made in personam. The usual conflicts of laws rules for in personam orders would apply.

## Annex A

The Uniform Child Status Act is amended by adding thereto the following sections:

### Recognition of Extra-Provincial Determination of Paternity

Interpretation

**12.** In sections 13 to 22,

(*a*) "extra-provincial declaratory order" means an order in the nature of a declaratory order provided for in section 6 but made by a court outside of (*enacting jurisdiction*);

(*b*) "extra-provincial finding of paternity" means a judicial finding of paternity that is made incidentally in the determination of another issue by a court outside of (*enacting jurisdiction*) and that is not an extra-provincial declaratory order.

Recognition of orders elsewhere in Canada

**13.** An extra-provincial declaratory order that is made in Canada shall be recognized and have the same effect as if made in (*enacting jurisdiction*).

Recognition of orders made outside Canada

**14.** An extra-provincial declaratory order that was made outside Canada shall be recognized and have the same effect as if made in (*enacting jurisdiction*) if,

(*a*) at the time the proceeding was commenced or the order was made, either parent was domiciled,

(i) in the territorial jurisdiction of the court making the order, or

(ii) in a territorial jurisdiction in which the order is recognized;

(*b*) the court that made the order would have had jurisdiction to do so under the rules that are applicable in (*enacting jurisdiction*);

(*c*) the child was habitually resident in the territorial jurisdiction of the court making the order at the time the proceeding was commenced or the order was made; or

(*d*) the child or either parent had a real and substantial connection with the territorial jurisdiction in which the order was made at the time the proceeding was commenced or the order was made.

Exceptions

**15.** A court may decline to recognize an extra-provincial declaratory order and may make a declaratory order under this Act where,

(*a*) new evidence that was not available at the hearing becomes available; or

(*b*) the court is satisfied that the extra-provincial declaratory order was obtained by fraud or duress.

Filing with director

**16.**—(1) A copy of an extra-provincial declaratory order, certified under the seal of the court that made it, may be filed in the office of the director but where the extra-provincial declaratory order is made outside of Canada, the copy shall be accompanied by,

(*a*) the opinion of a lawyer that the declaratory order is entitled to recognition under the law of (*enacting jurisdiction*);

(*b*) a sworn statement by a lawyer or public official in the extra-provincial territorial jurisdiction as to the effect of the declaratory order; and

(*c*) such translation, verified by affidavit, as the director requires.

Amendment of record

(2) Upon the filing of an extra-provincial declaratory order under this section, the director shall amend the register of births accordingly, but where the extra-provincial declaratory order contradicts paternity found by an order already filed, the director shall restore the amended record as if unaffected by it or previous orders.

Liability of director

(3) The director is not liable for any consequences resulting from filing under this section material that is apparently regular on its face.

Evidence

**17.** A copy of an extra-provincial declaratory order, certified under the seal of the court that made it, is admissible in evidence without proof of the signatures or office of any person executing the certificate.

Findings of paternity elsewhere in Canada

**18.** An extra-provincial finding of paternity that is made in Canada shall be recognized and have the same effect as if made in (*enacting jurisdiction*) under the same circumstances.

Findings of paternity

**19.** An extra-provincial finding of paternity that is made

outside Canada

outside Canada by a court that has jurisdiction to determine the matter in which the finding was made as determined by the conflict of laws rules of (*enacting jurisdiction*) shall be recognized and have the same effect as if made in (*enacting jurisdiction*) under the same circumstances.

Evidence

**20.** A copy of an order or judgment in which an extra-provincial finding of paternity is made, certified under the seal of the court that made it, is admissible in evidence without proof of the signature or office of any person executing the certificate.

Presumption where conflicting findings

**21.** There shall be no presumption of paternity under section 9(*f*) where contradictory findings of paternity exist, whether extra-provincial or otherwise.

Application

**22.** Sections 12 to 21 apply to extra-provincial declaratory orders and extra-provincial findings of paternity whether made before of after sections 12 to 21 come into force.

## APPENDICE F

*(Voir page 30)*

*(Document 840-204/067)*

## RAPPORT DU COMITE SUR LE RECOURS COLLECTIF

Lors d'une réunion tenue le 25 août 1981, les membres du comité ont fait le point sur ce dossier.

Si le comité considère toujours opportun de recommander qu'une législation uniforme soit proposée en matière de recours collectif, en suivant globalement les orientations de fond et de méthodes suggérées dans le rapport présenté en 1980, force lui est de constater que les difficultés alors mentionnées demeurent.

Ainsi, on constate que, dans les provinces de common law aucune législation n'a été proposée ou adoptée. Cependant, la Commission de réforme du droit de l'Ontario a entrepris, en priorité, des études en matière de recours collectif et il est prévu que son rapport sera complété d'ici la prochaine conférence.

En ce qui concerne le Québec, la législation est en vigueur depuis janvier 1979 et plusieurs recours sont exercés ou en voie de l'être. La législation québécoise répond à l'ensemble des questions soulevées dans le rapport précédent et elle porte la marque de choix politiques et sociaux. Comme le soulignait la Cour d'appel du Québec, la législation québécoise est, principalement, "une législation sociale destinée à favoriser l'accès à la justice des citoyens qui ont des problèmes communs dont la valeur pécuniaire peut être modeste et qui, en raison de circonstances ou de leur état individuel n'oseraient ou ne pourraient mettre en marche le processus judiciaire."

De manière plus détaillée, la situation au Québec se présente comme suit. Depuis l'entrée en vigueur de la loi, 71 requêtes ont été présentées en Cour supérieure: 18 jugements ont autorisés l'exercice du recours, 28 jugements l'ont refusé et 25 requêtes sont pendantes.

Des 28 jugements de refus, 9 ont été portés en appel: des 18 jugements accueillant les requêtes, 7 ont été portés en appel et 3 ont été portés jusqu'en Cour suprême. Neuf actions ont été prises: dans 6 cas, la cause procède, dans 1 cas, l'affaire est en délibéré, et dans 2 cas, des jugements ont été rendus accueillant les actions.

Un des jugements a ordonné un recouvrement collectif; aucune exécution n'a encore eu lieu puisqu'une demande en rétractation de

jugement a été présentée et rejetée et qu'un appel est pendant sur ce dernier jugement.

Enfin, 80 demandes d'aide ont été présentées au Fonds d'aide au recours collectif dans 54 dossiers. 56 demandes ont été accueilles, 9 l'ont été partiellement et 10 ont été rejetées. Deux décisions de refus ont fait l'objet d'un appel et la Cour provinciale a, dans un cas, renversé la décision du Fonds d'aide. Notons que 5 demandes sont en délibéré.

En jurisprudence, les points saillants de l'année ont été les suivants:

la Cour suprême a, dans la cause Comité régional des usagers des transports en commun de Québec et Commission des transports de la Communauté urbaine de Québec, précisé l'interprétation à donner à l'article 1003 du Code de procédure civile en indiquant qu'au stade de la requête, le tribunal n'avait qu'à constater que les faits allégués par le requérant paraissaient justifier les conclusions recherchées sans avoir à décider qu'ils les justifiaient. Le tribunal n'a donc pas, à ce stade, à décider du bien fondé de la demande; il n'a qu'à constater que le requérant fait valoir une sérieuse apparence de droit.

dans une deuxième décision, Nault c Canadian Consumer Co. Ltd, la Cour suprême a décidé qu'on ne pouvait refuser l'exercice d'un recours collectif pour le motif que les conclusions recherchées par le requérant ne pouvaient satisfaire l'ensemble des membres du groupe et que ceux-ci auraient pu choisir de rechercher une autre sanction. Selon la cour, il suffit que la conclusion recherchée par le requérant soit une des conclusions possibles, les membres qui n'en sont pas satisfaits pouvant toujours s'exclure.

la Cour d'appel a, dans l'affaire Syndicat national des employés de l'Hôpital Saint-Charles Borromée c Lapointe, admis la possibilité, au stade de la requête, d'interroger l'affiant; elle a aussi jugé que pour déterminer si la composition d'un groupe rendait difficile ou peu pratique l'application des procédures sur mandat, le tribunal devait tenir compte de l'état physique et mental des membres.

Parmi les difficultés identifiées, on note qu'une des principales difficultés rencontrées est dû à l'absence de règle pour déterminer le statut du représentant entre le jugement de première instance autorisant le recours et l'introduction de l'action. Ainsi, dans une cause qui avait reçu beaucoup de publicité au state de la requéte, un jugement a autorisé le recours; la compagnie poursuivie a porté l'affaire en appel, mais avant que l'appel ne soit entendu, le requérant a réglé sa réclamation individuelle, sans qu'aucun avis ne soit donné aux membres. Un autre cas semblable est survenu, mais

le requérant avait alors agi en consultant les membres du groupe qui avaient pu être rejoints et le règlement était global.

Il sera nécessaire aussi d'examiner certaines autres difficultés, telles la tendance des tribunaux à interpréter très strictement les conditions d'exercice du recours, les délais encourus en raison de l'existence du droit d'appel sur le jugement d'autorisation et le vide juridique qui peut survenir entre le moment du jugement sur la requête et l'introduction de l'action.

La législation québécoise, de même que la proposition de loi qui sera élaborée par la Commission de réforme du droit de l'Ontario pourront, entre autres projets, servir de modèle pour une loi uniforme et permettre de fonder un document d'orientation. Mais d'ici à ce que cette proposition soit connue, le comité, soit par ses membres ou par les experts qu'il pourrait engager, ne pourra pas entreprendre des travaux utiles en accord avec les objectifs poursuivis par la Conférence. Aussi, pour l'année qui vient, le comité considère qu'à moins que des développements majeurs ne surviennent dans une province, son rôle sera de suivre l'évolution du droit dans ce domaine et de prévoir l'organisation de ses futurs travaux.

MARIE-JOSÉ LONGTIN
Présidente
Comité sur le recours collectif

## APPENDIX F

*(See Page 30)*

*(Document 840-204/045)*

## REPORT OF THE CLASS ACTION COMMITTEE

At their meeting of August 25, 1981, the members of the Committee made a review of this matter.

While the Committee still holds to the expediency of recommending that uniform class action legislation be proposed, in general along the lines of the basic directions and methods suggested in the 1980 report, it has to acknowledge that the difficulties mentioned in that report remain.

For instance, it can be observed that, in the common law provinces, there has been no legislative action taken. However, the Ontario Law Reform Commission has given first priority to its report on class action and it is anticipated that the report will be completed before the next meeting of the Conference.

As far as Québec is concerned, the legislation has been in force since January 1979 and many class actions have been brought or are being considered. The Québec legislation answers to most of the questions raised in the preceding report and bears the stamp of political and social choice. As the Québec Court of Appeal puts it, the Québec legislation is, mostly, a "social legislation intended to promote the access of justice to citizens with common problems, the monetary value of which may be modest and who, due to circumstances or their individual situation, would not dare or would be unable to seek judicial redress."

To be specific, the experience in Québec has been this: since the Act came into force, 71 applications have been presented to the Superior Court; 18 judgments have authorized the bringing of the action, 28 judgments have refused that leave, and 25 judgments are pending. Of the 28 judgments refused, 9 have been appealed from; of the 18 judgments allowing the applications, 7 have been appealed from and 3 have been taken to the Supreme Court. Nine actions have been instituted: in 6 cases the trial is in process; in 1 case, the judgment is awaited; and in 2 cases judgments have been rendered granting the actions.

One of the judgments ordered "fluid" recovery; no enforcement has yet been made as a motion in revocation of the judgment was

presented and dismissed and an appeal on the latter judgment is pending.

Finally, 80 applications for assistance have been submitted to the Class Action Assistance Fund in 54 cases. 56 applications have been granted, 9 granted in part, and 10 have been refused. Two of the refused decisions were appealed; the Provincial Court, in one of these, reversed the decision of the Assistance Fund. It should be added that 5 applications are under consideration.

In jurisprudence, the salient points of the year were the following:

The Supreme Court, in Comité régional des usagers des transports en commun de Québec v. Commission des transports de la Communauté urbaine de Québec, gave the construction to be placed on article 1003 of the Code of Civil Procedure by stating that at the application stage, the court had to consider only whether the facts alleged by the applicant apparently justified the conclusions sought without deciding that they justified them. The court has not, at this stage, to decide if the action is well founded, but it had only to consider that the applicant is asserting the serious appearance of a right.

In a second decision, Nault v. Canadian Consumer Co. Ltd., the Supreme Court decided that the exercise of a class action cannot be refused on the ground that the conclusions sought by the applicant could not satisfy the totality of the class members and that they could have elected to seek another remedy. The Court held that it is sufficient that the conclusion sought by the applicant be one of the possible conclusions, the dissatisfied members always having the right to opt out.

The Court of Appeal, in Syndicat national des employés de l'Hôpital Saint-Charles Borromée v. Lapointe, acknowledges the fact that the deponent may be examined at the application stage; it also decided that in determining if the composition of a group rendered the application of proceedings by mandate difficult or impractical, the court had to take the physical and mental state of the members into account.

Among the main difficulties encountered, one is due to the lack of a rule determining the status of the representative between the first judgment granting leave to institute the action and the commencement of the action. For example, in a case that was well publicized at the application stage, judgment was given granting leave to bring the action. The defending company lodged an appeal from that decision and before the appeal was heard, the applicant settled his own individual claim without giving any notice whatsoever to the members. Another similar case arose but the applicant in that instance had acted after consulting the members of the group whom he had managed to get in touch with and the settlement was a global one.

Other difficulties to be weighed concern the tendency of courts to place a very rigid construction on the conditions for bringing the action, the delays encountered due to the right of appeal from the judgment granting leave to bring the action, and the juridical void which can come about between the time of judgment on the application and the commencement of the action.

This legislation and the draft that will be proposed by the Ontario Law Reform Commission could, among other drafts, serve as models for a Uniform Act and assist in the formulation of a policy direction document. However, until this proposed draft be known, the committee, either by its members or by experts, will be unable to undertake useful work in accordance with the aims of this Conference. So, for the coming year, the Committee is of the opinion that unless there are major developments in a province, its role should be to monitor evolutions in the sector and to look at the organization of its future work.

MARIE-JOSÉ LONGTIN,
Chairwoman,
Class Action Committee.

## APPENDIX G

*(See Page 30)*

*(Document 840-204/066)*

## PART I

### Legislative Changes in Quebec Company Law
### Uniform Law Conference of Canada
### Report of the committee on corporate law

Part 1A of the Companies Act regarding the incorporation of companies through the filing of articles has been replaced and substantially augmented, Part I continuing to apply as supplementary law.

New Part 1A takes up with a few modifications the provisions of the previous Act, and taking some of its inspiration from the Canada Business Corporations Act, completes the juridical framework by adding provisions concerning pre-incorporation contracts, organization meetings, share capital, more specifically as regards the maintaining of capital and the acquisition of its own shares by a company, and concerning directors and their responsibility. New Part 1A establishes the principle of unanimous agreement for shareholders whereby the latter may assume the obligations of the board of directors to the extent they decide to do so, and also affirms the possibility for a company to be exempt from the obligation of having an auditor examine the books in a given year if all the shareholders agree. It authorizes the company to provide financial assistance of its shareholders on certain conditions. It simplifies the compromise and arrangement procedure by eliminating the intervention of a judge, provided the shareholders are unanimous in their approval of the compromise. It also simplifies amalgamation provisions by eliminating the directors' discretion requirement and allowing for simplified vertical and horizontal amalgamations. And finally, new Part 1A provides a novel procedure involving the intervention of a court for the retroactive correction of an illegality or an irregularity where shareholders or creditors' rights have been affected.

The new legislation aims mainly at achieving greater flexibility than under the previous legislation and relieving administrators of some of the burden related to the discharge of their duties.

Other distinguishing characteristics between Québec legislation and the federal or federal-inspired legislations, are the following.

First of all, the Act retains the "share with nominal value" concept rejected by recent legislation. In many other jurisdictions, on the other hand, the Act subjects certain actions of a company, such as the acquisition of its own shares by a company, the declaration of dividends, the reduction of issued and paid-up capital, and loans to shareholders, to a solvency test inspired by the Canada Business Corporations Act; however, unlike the Canadian legislation, which imposes the realizable value as sole evaluation criterium for the assets of a company, the Québec legislation allows the directors to opt between this criterium and that of book value. The Act also allows shareholders to hold meetings by means of such communications facilities as permit all persons participating in the meeting to hear each other, provided the company's articles permit or provided all the shareholders who have the right to vote are in agreement over this procedure. The Act establishes the directors and officers as mandatories of the company. It obliges the company to assume the defence of its mandatory if he or she is prosecuted in the discharge of their functions, provided no serious offence was committed or if the offence had no connection with the discharging of these functions. The Act also states that a director absent from a meeting of the board or from the executive committee is presumed not to have approved a resolution passed or not to have participated in the making of a decision concerning a measure approved at that meeting.

These amendments do not constitute the final word on the reform of Québec corporate law. Work is still in progress towards the drafting of a new Companies Act.

## PART II

### Legislative Changes in Common Law Jurisdictions

The purpose of this Part of the Report is to review activities and legislative changes that have occurred in the common law jurisdictions in the past year.

*NEWFOUNDLAND*

There have been no amendments to the Companies Act in the last year. However, a Select Committee of the House of Assembly was struck in June to review the law relating to corporations, partnerships and the use of business names.

*NEW BRUNSWICK*

A new *Business Corporations Act* was given Royal Assent during the 1981 Session. It is anticipated that all parts of the bill be proclaimed by January, 1982. The Act is similar to the *Canada Business Corporations Act* in that it has simplified the procedure for incorporation; the comprehensive legislation is intended to clarify the law in New Brunswick regarding rights of shareholders and in particular minority shareholders, duties of directors, corporation administration, rights and duties of receivers, and the dissolution and winding up of corporations. The Act is intended to regulate corporations generally; however, it does not apply to not-for-profit corporations or companies with similar objectives.

The Act also provides for the registration of extra-provincial corporations. These corporations will be required to register with the Director appointed under the Act and to appoint an attorney for service who is a resident of New Brunswick.

The *Companies Act* has been amended to provide for the coming into force of the *Business Corporations Act.* The *Companies Act* will not be repealed because not-for-profit corporations will continue to be regulated by it, as will existing companies. These existing companies may continue under the new Act and after five years, shall be deemed to have continued under the Act. This approach is similar to the approach taken by the Federal government. As well, the *Companies Act* has been amended in order to vest the power in New Brunswick companies to continue out of the Province and into another jurisdiction.

*NOVA SCOTIA*

During 1981, the Nova Scotia Legislature enacted amendments to the *Companies Act* which permit a company to use the words "Incorporated" or "Incorporée" or the abbreviation "Inc." as the last word in its name instead of "Limited" or "Limitée", or the abbreviations "Ltd" or "Ltée". The amendments also permit a company to have its name in more than one language form and to use its name in any one of the language forms, and to be legally designated in more than one language form.

Several other amendments were also enacted in 1981, including:

(a) removal of the requirement of the approval of the Provincial Secretary of a change in the name of a company, and a requirement that a name change be published in the Royal Gazette;

(b) removal of the requirement of filing the statutory report with the Registrar of Joint Stock Companies;

(c) removal of the ceiling on fees charged for copies of documents;

(d) a requirement that changes in officers be reported to the Registrar;

(e) a provision that shareholders in an out of province company will not be adversely affected if the corporation is continued in Nova Scotia;

At the spring session of the Nova Scotia Legislature, several amendments to the Corporations Registration Act were enacted. These amendments are of a "housekeeping" nature and include:

(a) the removal of the requirement on an out of province corporation wishing to be registered in Nova Scotia to report to the Registrar of Joint Stock Companies the amount of its rest or reserve funds;

(b) the removal of the requirement that an annual statement be sworn under oath;

(c) a limitation of the maximum registration fee on a corporation limited by guarantee to twenty-five dollars.

*ONTARIO*

A revised *Business Corporations Act* is before the Legislature. The principal purposes of the revision are to create greater uniformity with corresponding Federal legislation and to increase the informality of the incorporation procedures.

*MANITOBA*

An Act to Amend the *Corporations Act* (Bill 46) came into force on August 1 of this year. The amendments will expedite the processing of documents filed with the Corporations Branch and are designed to achieve uniformity with the procedures for incorporation, nomenclature and substantive provisions of the *Canada Business Corporations Act* on such matters as share capital, certificates of incorporation, use of corporate name, change of registered address, amalgamation and dissolution.

*SASKATCHEWAN*

The *Business Corporations Act* was amended *inter alia* to relax the requirement for a special resolution of shareholders prior to application for a certificate of continuance and add a provision authorizing the directors to apply for a certificate. The amended provision accords with the legislation of Canada and Manitoba.

The *Business Names Registration Act* was amended to provide for the registration of business associations organized as joint ventures or syndicates. Miscellaneous amendments were made to the *Non-profit-Corporations Act* including a requirement that non-profit corporations file financial statements whether or not they are charitable corporations.

*ALBERTA*

Alberta enacted a *Business Corporations Act* based on the *Canada Business Corporations Act*. There are, however, significant differences in areas where uniformity with other jurisdictions adopting the CBCA is not considered vitally important. The Act is subject to proclamation and is expected to come into force this year.

In addition, a new *Securities Act* has been enacted using for guidance the recent Ontario legislation. Modifications have been made relating to the structure of the Commission, investigations, the appointment of receivers and exemptions for small businesses.

*BRITISH COLUMBIA*

Only minor amendments to the *Companies Act* which may be characterized as of a housekeeping nature were enacted in the recent session of the Legislature.

*CANADA*

There have been no amendments to the Canada *Business Corporations Act* except minor amendments consequential to other enactments. The Canada *Non-Profit Corporations Act* remained on the Order Paper at the conclusion of the recent session of Parliament.

There have been no relevant changes to company law in *Prince Edward Island* or the *Territories*.

## APPENDIX H

*(See Page 31)*

*(Document 840-204/049)*

## ENACTMENT OF AND AMENDMENTS TO UNIFORM ACTS 1980-81

## REPORT OF MANITOBA COMMISSIONERS

*Assignment of Book Debts Act*

New Brunswick amended its Act to allow late filing of documents without a judge's order, but subject to any rights that may have accrued to other persons by reason of the failure to file on time.

*Bills of Sale Act*

New Brunswick amended this Act in the same way as it amended its Assignment of Book Debts Act.

The Yukon Territory repealed its Ordinance and replaced it with a Personal Property Ordinance based on the Uniform Act with substantial modifications.

*Bulk Sales Act*

New Brunswick added new section 3.1 (similar to section 3 of the Uniform Act) to its Act, and amended subsections 5(2) and (3). These amendments authorize a vendor in a bulk sales transaction to apply to a Queen's Bench Judge for an order exempting the transaction from all provisions of the Act except the requirement to provide the purchaser with an acknowledgement by the provincial tax commissioner to the effect that all taxes under The Social Services and Education Tax Act have been paid or that an arrangement for the payment thereof has been made with the provincial tax commissioner.

*Conditional Sales Act*

New Brunswick amended its Act in the same way as it amended its Assignment of Book Debts Act.

The Yukon Territory repealed its Ordinance and replaced it with a Personal Property Security Ordinance based on the Uniform Act with substantial modifications.

*Condominium Insurance Act*

The Yukon Territory enacted the Uniform Act.

*Contributory Negligence Act*

The Yukon Territory repealed a provision of its Ordinance (relating to contribution where the plaintiff is a passenger) that does not appear in the Uniform Act.

*Criminal Injuries Compensation Act*

The Yukon Territory amended its Ordinance to give adjudicative power to its Workers Compensation Board instead of its Supreme Court.

*Defamation Act*

The Yukon Territory enacted an amendment to its Ordinance similar to the 1979 amendment made to the Uniform Act.

*Dependants' Relief Act*

The Yukon Territory enacted the Uniform Act.

*Evidence Act*

Alberta amended its Act to provide that (a) judicial notice shall be taken of every Act or regulation of Alberta or Canada and (b) where an Act or regulation states that a document is evidence of a fact but does not state that it is "conclusive" evidence, the document shall be admissible as conclusive in the absence of evidence to the contrary. These amendments were made to conform to Alberta's new Uniform Interpretation Act.

The Yukon Territory enacted amendments to its Ordinance which do not appear in the Uniform Act.

*Extra-Provincial Custody Orders Enforcement Act*

The Northwest Territories enacted The Extra-Territorial Custody Orders Enforcement Ordinance in May of 1981.

*Family Support Act*

The Yukon Territory enacted its Matrimonial Property and Family Support Ordinance which is similar to the Uniform Act with modifications.

*Fatal Accidents Act*

The Yukon Territory enacted the Uniform Act.

*Frustrated Contracts Act*

The Yukon Territory repealed its Ordinance and replaced it with the latest version of the Uniform Act.

*Human Tissue Gift Act*

Prince Edward Island amended its Act to authorize the removal, without consent, of pituitary glands in the course of post-mortems.

The Yukon Territory repealed its Cornea Transplant Ordinance and replaced it with the Uniform Act.

*International Child Abduction (Hague Convention) Act*

The Yukon Territory enacted the Uniform Act.

*Interpretation Act*

Alberta enacted the Uniform Act.

Prince Edward Island enacted a new Interpretation Act based on the Uniform Act but containing a number of additions borrowed from the British Columbia statute which are not found in the Uniform Act. Included in these additions are a provision relating to binding the Crown and a provision relating to construction of the power to make regulations.

*Interprovincial Subpoena Act*

Both Alberta and the Yukon Territory enacted the Uniform Act.

*Jurors Act (Qualifications and Exemptions)*

Prince Edward Island amended its Jury Act to incorporate the provisions of the Uniform Act, with the modification that a person of 70 years of age (rather than 75 as in the Uniform Act) is entitled to an exemption from jury service. Newfoundland enacted The Jury Act (uniform Jurors Act) which incorporates the provisions regarding qualifications and exemptions of jurors.

*Perpetuities Act*

The Yukon Territory enacted a Perpetuities Ordinance based on the Uniform Act, to replace its Pensions Trusts and Plans Ordinance.

*Personal Property Security Act*

The Yukon Territory enacted a Personal Property Security Ordinance, based on the Uniform Act but with substantial modifica-

tion, to replace its Bills of Sale Ordinance, Conditional Sales Ordinance and Corporations Securities Registration Ordinance.

*Presumption of Death Act*

The Yukon Territory repealed its Ordinance and replaced it with the latest version of the Uniform Act.

*Reciprocal Enforcement of Judgments Act*

The Yukon Territory amended its Ordinance to conform to the latest version of the Uniform Act.

*Reciprocal Enforcement of Maintenance Orders Act*

Alberta amended its Act to allow for a "certified transcript" of evidence as an alternative to a "sworn document" setting out the actual evidence or a summary thereof.

New Brunswick enacted amendments to its Act, consistent with the Uniform Act, empowering the Attorney-General to delegate his duties under the Act to any person he may designate in his department, and providing for a division of responsibility under the Act between the Attorney-General and the Minister of Justice.

The Yukon Territory repealed its Ordinance and replaced it with the latest version of the Uniform Act.

In Saskatchewan The Reciprocal Enforcement of Maintenance Orders Act was amended to ensure that orders made in the provincial courts in Saskatchewan may be enforced through the vehicle of the uniform Reciprocal Enforcement of Maintenance Orders Act in another jurisdiction, if registered in the District Courts of Saskatchewan. All uniform acts in Saskatchewan have been amended to give jurisdiction to the Court of Queen's Bench upon amalgamation of the District and Queen's Bench Court on July 1, 1981.

*Retirement Plan Beneficiaries Act*

Prince Edward Island amended its Act to include plans established by investment corporations as well as retirement savings plans, homeownership savings plans and retirement income funds as defined in the Income Tax Act.

The Yukon Territory enacted the Uniform Act.

*Survival of Actions Act*

The Yukon Territory enacted the Uniform Act.

*Survivorship Act*

The Yukon Territory repealed its Ordinance and replaced it with the latest version of the Uniform Act.

*Trustee Act (re Trustee Investments)*

The Yukon Territory amended its Ordinance by adopting the latest amendment made to the Uniform Act.

*Wills Act*

The Saskatchewan Wills Act was amended to provide two things:

(*a*) Where in a Will a gift is made to a spouse or a spouse is appointed Executor or Trustee and, after making of the Will and before the death of the Testator, the marriage is terminated by divorce or found to be void then unless a contrary intention appears in the Will the bequest is revoked and the Will is to be construed as if the spouse had predeceased the Testator.

(*b*) Adopted Part III of the Uniform Wills Act respecting International Wills.

Andrew C. Balkaran,
for the Manitoba Commissioners.

August, 1981.

## APPENDIX I

*(See Page 31)*

*(Document: 840-204/042)*

# REPORT OF ONTARIO ON THE UNIFORM EXTRA-PROVINCIAL CUSTODY ORDERS ENFORCEMENT ACT

At the 1980 annual meeting of the Uniform Law Conference of Canada, Ontario was directed to redraft the proposed revision of the *Uniform Extra-Provincial Custody Orders Enforcement Act*: see 1980 Proceedings, p. 174. The proposed revision appears as Appendix A to this report.

The proposed new provisions have been retitled the *Uniform Custody Jurisdiction and Enforcement Act*, as much of the Act deals with the circumstances under which a domestic court will assume jurisdiction to hear a custody case. The draft is based largely on the most recent version of Ontario's *Children's Law Reform Amendment Act, 1981*, now before the Ontario Legislature. The principles expressed in the draft are those embodied in the earlier draft but the language and organization reflect the changes made in Ontario's bill. Although there is no reference in the draft to the Hague Convention on the Civil Aspects of International Child Abduction, the draft is designed to fit with the Uniform Act for the adoption of the Convention.

All of the enforcement mechanisms available under the Ontario bill have been included in the draft Uniform Act for the sake of convenience, although it is recognized that not all of them may be desirable in a particular jurisdiction. It is also recognized that the definition of court in s. 1 of the draft may have to be considered further in light of the Supreme Court of Canada's pending ruling in the *Reference re Family Relations Act* of British Columbia.

### Uniform Custody Jurisdiction and Enforcement Act

**1.—(1) In this Act,** Interpretation

(*a*) "court" means a (*provincial family court of enacting jurisdiction*), a county or district court, or (*Superior Court of enacting jurisdiction*);

(*b*) "extra-provincial order" means an order, or that

part of an order of an extra-provincial tribunal that grants to a person custody of or access to a child;

(*c*) "extra-provincial tribunal" means a court or tribunal outside (*enacting jurisdiction*) that has jurisdiction to grant to a person custody of or access to a child.

Child

(2) A reference in this Act to a child is a reference to the child while a minor.

Purposes

**2.** The purposes of this Act are,

(*a*) to ensure that application to the courts in respect of custody of, incidents of custody of, access to and guardianship for children will be determined on the basis of the best interests of the children;

(*b*) to recognize that the concurrent exercise of jurisdiction by judicial tribunals of more than one province, territory or state in respect of the custody of the same child ought to be avoided, and to make provision so that the courts of (*enacting jurisdiction*) will, unless there are exceptional circumstances, refrain from exercising or decline jurisdiction in cases where it is more appropriate for the matter to be determined by a tribunal having jurisdiction in another place with which the child has a closer connection;

(*c*) to discourage the abduction of children as an alternative to the determination of custody rights by due process; and

(*d*) to provide for the more effective enforcement of custody and access orders and for the recognition and enforcement of custody and access orders made outside (*enacting jurisdiction*).

Jurisdiction

**3.**—(1) A court shall only exercise its jurisdiction to make an order for custody of or access to a child where,

(*a*) the child is habitually resident in (*enacting jurisdiction*) at the commencement of the application for the order;

(*b*) although the child is not habitually resident in (*enacting jurisdiction*), the court is satisfied,

(i) that the child is physically present in (*enacting jurisdiction*) at the commencement of the application for the order,

(ii) that substantial evidence concerning the best interests of the child is available in (*enacting jurisdiction*),

(iii) that no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,

(iv) that no extra-provincial order in respect of custody of or access to the child has been recognized by a court in (*enacting jurisdiction*),

(v) that the child has a real and substantial connection with (*enacting jurisdiction*), and

(vi) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in (*enacting jurisdiction*).

Habitual residence

(2) A child is habitually resident in the place where he resided,

(*a*) with both parents;

(*b*) where the parents are living separate and apart, with one parent under a separation agreement or with the implied consent of the other or under a court order; or

(*c*) with a person other than a parent on a permanent basis for a significant period of time,

whichever last occurred.

Abduction

(3) The removal or withholding of a child without the consent of the person having custody of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld.

Serious harm to child

**4.** Notwithstanding sections 3 and 7, a court may exercise its jurisdiction to make or to vary an order in respect of the custody of or access to a child where,

(*a*) the child is physically present in (*enacting jurisdiction*); and

(*b*) the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if,

(i) the child remains in the custody of the person legally entitled to custody of the child,

(ii) the child is returned to the custody of the person legally entitled to custody of the child, or

(iii) the child is removed from (*enacting jurisdiction*).

Declining jurisdiction

**5.** A court having jurisdiction in respect of custody or access may decline to exercise its jurisdiction where it is of the opinion that it is more appropriate for jurisdiction to be exercised outside (*enacting jurisdiction*).

Interim powers of court

**6.** Upon application, a court

(*a*) that is satisfied that a child has been wrongfully removed to or is being wrongfully retained in (*enacting jurisdiction*); or

(*b*) that may not exercise jurisdiction under section 3 or that has declined jurisdiction under section 5 or 8,

may do any one or more of the following:

1. Make such interim order in respect of the custody or access as the court considers is in the best interests of the child.
2. Stay the application subject to,
   i. the condition that a party to the application promptly commence a similar proceeding before an extra-provincial tribunal, or
   ii. such other conditions as the court considers appropriate.
3. Order a party to return the child to such place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application.

Enforcement of foreign orders

**7.**—(1) Upon application by any person in whose favour an order for the custody of or access to a child has been made by an extra-provincial tribunal, a court shall recognize the order unless the court is satisfied,

(*a*) that the respondent was not given reasonable notice of the commencement of the proceeding in which the order was made;

(*b*) that the respondent was not given an opportunity

to be heard by the extra-provincial tribunal before the order was made;

(*c*) that the law of the place in which the order was made did not require the extra-provincial tribunal to have regard for the best interests of the child;

(*d*) that the order of the extra-provincial tribunal is contrary to public policy in (*enacting jurisdiction*); or

(*e*) that, in accordance with section 3, the extra-provincial tribunal would not have jurisdiction if it were a court in (*enacting jurisdiction*).

Effect of recognition of order

(2) An order made by an extra-provincial tribunal that is recognized by a court shall be deemed to be an order of the court and enforceable as such.

Conflicting orders

(3) A court presented with conflicting orders made by extra-provincial tribunals for the custody of or access to a child that, but for the conflict, would be recognized and enforced by the court under subsection (1) shall recognize and enforce the order that appears to the court to be most in accord with the best interests of the child.

Further orders

(4) A court that has recognized an extra-provincial order may make such further orders under (*Act governing custody and access*) as the court considers necessary to give effect to the order.

Superseding order, material change in circumstances

**8.**—(1) Upon application, a court by order may supersede an extra-provincial order in respect of custody of or access to a child where the court is satisfied that there has been a material change in circumstances that affects or is likely to affect the best interests of the child and,

(*a*) the child is habitually resident in (*enacting jurisdiction*) at the commencement of the application for the order; or

(*b*) although the child is not habitually resident in (*enacting jurisdiction*), the court is satisfied,

(i) that the child is physically present in (*enacting jurisdiction*) at the commencement of the application for the order,

(ii) that the child no longer has a real and substantial connection with the place where the extra-provincial order was made,

(iii) that substantial evidence concerning the best interests of the child is available in (*enacting jurisdiction*),

(iv) that the child has a real and substantial connection with (*enacting jurisdiction*), and

(v) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in (*enacting jurisdiction*).

Declining jurisdiction

(2) A court may decline to exercise its jurisdiction under this section where it is of the opinion that it is more appropriate for jurisdiction to be exercised outside (*enacting jurisdiction*).

Superseding order, serious harm

**9.** Upon application, a court by order may supersede an extra-provincial order in respect of custody of or access to a child if the court is satisfied that the child would, on the balance of probability, suffer serious harm if,

(*a*) the child remains in the custody of the person legally entitled to custody of the child;

(*b*) the child is returned to the custody of the person entitled to custody of the child; or

(*c*) the child is removed from (*enacting jurisdiction*).

Order restraining harassment

**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 bond as the court considers appropriate.

Order where child unlawfully withheld

**11.**—(1) Where a court is satisfied upon application by a person in whose favour an order has been made for custody of or access to a child that there are reasonable and probable grounds for believing that any person is unlawfully withholding the child from the applicant, the court by order may authorize the applicant or someone on his behalf to apprehend the child for the purpose of giving effect to the rights of the applicant to custody or access, as the case may be.

Order to locate and take child

(2) Where a court is satisfied upon application that there are reasonable and probable grounds for believing,

(*a*) that any person is unlawfully withholding a child from a person entitled to custody of or access to the child;

(*b*) that a person who is prohibited by court order or separation agreement from removing a child from (*enacting jurisdiction*) proposes to remove the child or have the child removed from (*enacting jurisdiction*); or

(*c*) that a person who is entitled to access to a child proposes to remove the child or to have the child removed from (*enacting jurisdiction*) and that the child is not likely to return,

the court by order may direct the sheriff or a police force, or both, having jurisdiction in any area where it appears to the court that the child may be, to locate, apprehend and deliver the child to the person named in the order.

Application without notice

(3) An order may be made under subsection (2) upon an application without notice where the court is satisfied that it is necessary that action be taken without delay.

Duty to act

(4) The sheriff or police force directed to act by an order under subsection (2) shall do all things reasonably able to be done to locate, apprehend and deliver the child in accordance with the order.

Entry and search

(5) For the purpose of locating and apprehending a child in accordance with an order under subsection (2), a sheriff or a member of a police force may enter and search any place where he has reasonable and probable grounds for believing that the child may be with such assistance and such force as are reasonable in the circumstances.

Time

(6) An entry or a search referred to in subsection (5) shall be made only between sunrise and sunset unless the court, in the order, authorizes entry and search at another time.

Expiration of order

(7) An order made under subsection (2) expires six months after the day on which it was made, unless the order specifically provides otherwise.

When application may be made

(8) An application under subsection (1) or (2) may be made in an application for custody or access or at any other time.

Application to prevent unlawful removal of child

**12.**—(1) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person prohibited by court order or separation agreement from removing a child from (*enacting jurisdiction*) proposes to remove the child from (*enacting jurisdiction*), the court in order to prevent the removal of the child from (*enacting jurisdiction*) may make an order under subsection (3).

Application to ensure return of child

(2) Where a court, upon application, is satisfied upon reasonable and probable grounds that a person entitled to access to a child proposes to remove the child from (*enacting jurisdiction*) and is not likely to return the child to (*enacting jurisdiction*), the court in order to secure the prompt, safe return of the child to (*enacting jurisdiction*) may make an order under subsection (3).

Order by court

(3) An order mentioned in subsection (1) or (2) may require a person to do any one or more of the following:

1. Transfer specific property to a named trustee to be held subject to the terms and conditions specified in the order.
2. Where payments have been ordered for the support of the child, make the payments to a specified trustee subject to the terms and conditions specified in the order.
3. Post a bond, with or without sureties, payable to the applicant in such amount as the court considers appropriate.
4. Deliver the person's passport, the child's passport and any other travel documents of either of them that the court may specify to the court or to an individual or body specified by the court.

Idem, provincial court

(4) A (*provincial court*) shall not make an order under paragraph 1 of subsection (3).

Terms and conditions

(5) In an order under paragraph 1 of subsection (3), the court may specify terms and conditions for the return or the disposition of the property as the court considers appropriate.

Safekeeping

(6) A court or an individual or body specified by the court in an order under paragraph 4 of subsection (3) shall hold a passport or travel document delivered in accordance with the order in safekeeping in accordance with any directions set out in the order.

Directions

(7) In an order under subsection (3), a court may give such directions in respect of the safekeeping of the property, payments, passports or travel documents as the court considers appropriate.

Further evidence

**13.**—(1) Where a court is of the opinion that it is necessary to receive further evidence from a place outside (*enacting jurisdiction*) before making a decision, the court may send to the Attorney General, Minister of Justice or similar officer of the place outside (*enacting jurisdiction*) such supporting material as may be necessary together with a request,

(*a*) that the Attorney General, Minister of Justice or similar officer take such action as may be necessary in order to require a named person to attend before the proper tribunal in that place and produce or give evidence in respect of the subject-matter of the application; and

(*b*) that the Attorney General, Minister of Justice or similar officer or the tribunal send to the court a certified copy of the evidence produced or given before the tribunal.

Cost of obtaining evidence

(2) A court that acts under subsection (1) may assess the cost of so acting against one or more of the parties to the application or may deal with such cost as costs in the cause.

Referral to court

**14.**—(1) Where the Attorney General receives from an extra-provincial tribunal a request similar to that referred to in section 13 and such supporting material as may be necessary, it is the duty of the Attorney General to refer the request and the material to the proper court.

Obtaining evidence

(2) A court to which a request is referred by the Attorney General under subsection (1) shall require the person named in the request to attend before the court and produce or give evidence in accordance with the request.

Information as to address

**15.**—(1) Where, upon application to a court, it appears to the court that,

(*a*) for the purpose of bringing an application in respect of custody or access; or

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

the proposed applicant or person in whose favour the order is made has need to learn or confirm the whereabouts of the proposed respondent or person against whom the order referred to in clause (*b*) is made, the court may order any person or public body to provide the court with such particulars of the address of the proposed respondent or person against whom the order referred to in clause (*b*) is made as are contained in the records in the custody of the person or body, and the person or body shall give the court such particulars as are contained in the records and the court may then give the particulars to such person or persons as the court considers appropriate.

Exception

(2) A court shall not make an order on an application under subsection (1) where it appears to the court that the purpose of the application is to enable the applicant to identify or to obtain particulars as to the identity of a person who has custody of a child, rather than to learn or confirm the whereabouts of the proposed respondent or the enforcement of an order for custody or access.

Compliance with order

(3) The giving of information in accordance with an order under subsection (1) shall be deemed for all purposes not to be a contravention of any Act or regulation or any common law rule of confidentiality.

Section binds Crown

(4) This section binds the Crown in right of (*enacting jurisdiction*).

Contempt of orders of provincial court

**16.**—(1) In addition to its powers in respect of contempt, every (*provincial court*) may punish by fine or imprisonment, or both, any wilful contempt of or resistance to its process or orders in respect of custody of or access to a child, but the fine shall not in any case exceed $1,000 nor shall the imprisonment exceed ninety days.

Conditions of imprisonment

(2) An order for imprisonment under subsection (1) may be made conditional upon default in the performance

of a condition set out in the order and may provide for the imprisonment to be served intermittently.

True copy of extra-provincial order

**17.** A copy of an extra-provincial order certified as a true copy by a judge, other presiding officer or registrar of the tribunal that made the order or by a person charged with keeping the orders of the tribunal is *prima facie* evidence of the making of the order, the content of the order and the appointment and signature of the judge, presiding officer, registrar or other person.

Court may take notice of foreign law

**18.** For the purposes of an application under this Act, a court may take notice, without requiring formal proof, of the law of a jurisdiction outside (*enacting jurisdiction*) and of a decision of an extra-provincial tribunal.

## APPENDIX J

*(See Page 31)*

*(Document: 840-204/072)*

## UNIFORM FOREIGN JUDGMENTS ACT

## REPORT
## OF THE
## REPRESENTATIVES OF NOVA SCOTIA AND QUEBEC

The present Uniform Foreign Judgments Act was adopted by the Conference in 1964 and is found at pages 26 and 107 of the Proceedings for the year 1964. The amendments made to the Act at that time were the results of a report that was adopted by the Conference in 1963 and this report is found in Appendix J at page 95 of the Proceedings of the Conference for the year 1963. The Uniform Foreign Judgments Act was originally adopted by the Conference in August, 1933, and copy of that Act is to be found at pages 86 and 89 of the Proceedings for that year. The Act was adopted as the result of a report prepared by the Saskatchewan Commissioners in 1932. It was based upon The Administration of Justice Act, 1920, of the United Kingdom. The Statute now in force in the United Kingdom is The Foreign Judgments (Reciprocal Enforcement) Act, 1933. The 1964 Uniform Foreign Judgments Act is in effect a codification of the rules of Private International Law relating to that subject.

In 1980, at its Conference held in August of that year, in Charlottetown, the Conference resolved that certain Uniform Acts be assigned to certain jurisdictions for review. The Uniform Foreign Judgments Act was referred to the Nova Scotia and Quebec delegations for report and revision if appropriate.

The Uniform Foreign Judgments Act was adopted in 1934 by Saskatchewan without modification and was adopted in 1950 by New Brunswick with certain modifications. Saskatchewan and New Brunswick are the only jurisdictions represented at the Conference that have adopted the Uniform Foreign Judgments Act. Bearing this in mind, and taking into consideration the negotiations that have been going on between the governments of Canada and the governments of the United Kingdom of Great Britain and Northern Ireland, it is the view of the delegates from Nova Scotia and Quebec that the report upon this matter should wait until after the negotiations concerning the

convention for the reciprocal recognition and enforcement of judgments in civil and commercial matters has been considered by the Conference.

The proposed convention between the United Kingdom and Canada respecting the reciprocal enforcement of judgments was brought to the attention of all members at the Conference in July 1980 by a letter from Graham D. Walker, Q.C., one of the participants in the negotiations. The United Kingdom, as part of its entry into the European Economic Community has entered into a convention with other members of the European Economic Community, respecting the enforcement of judgments among member states. Under the terms of the convention, the United Kingdom will be required to enforce judgments against persons having assets in the United Kingdom where judgment has been entered by a court of a contracting state in accordance with the rules of the jurisdiction recognized by the convention. Some of the grounds of jurisdiction of the courts of the contracting states differ from the grounds of jurisdiction now recognized by the United Kingdom and Canada as proper grounds for asserting jurisdiction over a party. The result is that when the Convention on Foreign Judgments pertaining to the European Economic Community comes into force in respect to the United Kingdom, it is possible that a Canadian resident who owns property in the United Kingdom, and against whom judgment has been entered by a contracting state to the European Economic Convention, will be adversely affected because the United Kingdom courts will be required to enforce the judgment where previously it was not so required. Upon examination, the Convention entered into by the United Kingdom through Article 59 appears to offer relief. The effect of Article 59 is that the United Kingdom is not prevented "from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a third state not to recognize judgments given in other contracting states against defendants domiciled or habitually resident in the third state . . . ". As a result of Article 59 of the Convention, Canada, through the Federal Department of Justice and the Department of External Affairs, opened negotiations with the Foreign Office and the Lord Chancellor's Department in Great Britain. Since June 16, 1980 a number of meetings have taken place between representatives of Canada and the United Kingdom. As a result of the most recent meeting a Draft Convention between the United Kingdom of Great Britain and Northern Ireland and Canada providing for the reciprocal recognition and enforcement of judgments in civil and commercial matters has resulted. This Draft is dated August 8,1981. Contained within the Draft is a codification of the rules of Private Inter-

national Law relating to the recognition and enforcement of judgments in civil and commercial matters. This Convention will be placed before the members of the Conference for their views.

Your committee is of the opinion that at this time further progress on the Uniform Foreign Judgments Act should await developments concerning the Draft Convention. If the Draft Convention is acceptable to the jurisdictions at the Conference, then the Uniform Foreign Judgments Act might become the vehicle through which the Convention will be implemented in the provinces and territories. Your committee will thus keep this matter under review and report to the Conference when it meets next in August of 1982.

All of which is respectfully submitted,

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

E. Colas, Q.C., LL.D.
for the Quebec Representatives

## APPENDICE K

*(Voir page 31)*

### La Version Française des Lois Uniforms

Monsieur le Président,

Il me fait plaisir de vous faire rapport au nom du comité que je dirige concernant la version française des lois uniformes, comité formé de Jean Allaire, Michael Beaupré, Gérard Bertrand, J. Clarence-Smith, Ray duPlessis, Bruno Lalonde et Louis-Philippe Pigeon.

Nous avons discuté longuement de la façon de préparer la version française des lois uniformes.

Nous avons choisi plusieurs lois uniformes dont la majorité visent le droit administratif et la procédure, pour présentation et approbation à la conférence de Montebello l'an prochain. C'est à partir de ces travaux qu'il sera possible d'illustrer la démarche que nous souhaitons voir suivre dans la préparation des versions françaises.

Les lois uniformes que nous avons choisies sont les suivantes:

1 — Interpretation Act
2 — Interprovincial Subpoenas Act
3 — Criminal Injuries Compensation Act
4 — Conflict of Laws (Traffic Accidents) Act
5 — Child Status Act
6 — Extra-provincial Custody Orders Enforcement Act
7 — Regulations Act

Le comité est d'avis et recommande que dorénavant toute décision de la Section à l'effet qu'un projet de loi uniforme soit rédigé, prévoie que soit le Canada, le Nouveau-Brunswick, l'Ontario ou le Québec participe à l'élaboration de ce projet afin d'en établir concurremment la version française.

C'est avec beaucoup d'enthousiasme que le comité abordera son travail afin de mener à bonne fin le mandat qui lui fut confié à la Conférence de 1979 à Saskatoon.

Nous présentons respectueusement ce rapport.

Bruno Lalonde
Président du comité

## APPENDIX K

*(See Page 31)*

### The French Version of Uniform Statutes

Mr. Chairman:

I am pleased to report to you on behalf of the Committee which I chair concerning the French version of the uniform statutes, a committee composed of Jean Allaire, Michael Beaupré, Gérard Bertrand, J. Clarence Smith, Ray duPlessis, Bruno Lalonde, and Louis-Philippe Pigeon.

We have held lengthy discussions on the method of preparing the French version of the uniform statutes.

We have selected several uniform statutes, most of which relate to administrative law and procedure, for presentation and approval at the Montebello conference next year. On the basis of this work, it will be possible to illustrate the procedure we recommend in preparing the French versions.

The uniform statutes we have selected are as follows:

1. Interpretation Act
2. Interprovincial Subpoenas Act
3. Criminal Injuries Compensation Act
4. Conflict of Laws (Traffic Accidents) Act
5. Child Status Act
6. Extra-provincial Custody Orders Enforcement Act
7. Regulations Act

The Committee believes and recommends that henceforth, any decision by the Section to the effect that a uniform bill be drawn up recommend that either Canada, New Brunswick, Ontario or Québec participate in the formulation of this bill, in order to establish the French version concurrently.

The Committee will undertake its work with great enthusiasm in order to successfully carry out the mandate conferred upon it at the 1979 Conference in Saskatoon.

We respectfully submit this report.

Bruno Lalonde
Committee Chairman

## APPENDIX L

*(See Page 107)*

*(Document 840-204/029)*

# REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL CONVENTIONS IN PRIVATE INTERNATIONAL LAW

In recent years, the pace of international law-making has quickened. A variety of international bodies are busily occupied in many legal areas bringing reform and harmony to the structure of international legal rules. In the private international law area, the most productive and important work has been done by the Hague Conference on Private International Law, but the achievements of UNIDROIT (Institute for the Unification of Private International Law), and UNCITRAL (United Nations' Commission for International Trade Law) have also been significant.

Canada has played a leading part in this continuing development and has established a certain presence on this stage. In part this is because Canada due to its federal structure has developed a great deal of experience in the field of conflict of laws. However, the initiative and energy that Canada displays in international law-making is not carried forward into the implementation of these laws within Canada. The Canadian implementation record is very limited. The problem is not one of initiative or commitment. It is a structural problem that derives from Canada's constitutional system.

When Canada signs or enters into an international convention or treaty, it does not by that step alone, give the instrument the force of law within Canada. If the instrument is self-executing it may not require further legislative action. But in most cases domestic legislative action will be required either by Parliament or the provincial legislatures depending on whether the subject matter of the treaty falls under federal or provincial legislative jurisdiction within Canada. For those treaties which deal with subjects under provincial legislative jurisdiction, the federal authorities must work closely with their provincial colleagues. In order for Canada to have a realistic prospect of implementing in these areas, it is necessary for the treaty or convention to have a federal state clause, permitting ratification on a "phased-in basis". In the absence of such a clause, implementation requires the consent of all the provinces to assume whatever legislative

and other obligations the convention may impose; the practical difficulty of achieving this dictates the use of federal state clauses.

To promote greater federal-provincial co-operation in this area, and thus to enhance the prospects of Canada ratifying international conventions in the private international law area, a number of measures have been adopted. The provincial governments are now routinely consulted on forthcoming conventions of interest. The federal government has in recent years so constituted its official delegations to the appropriate international law-making bodies to recognize provincial interests. A special advisory committee drawn from both federal and provincial levels advises the federal Minister of Justice on private international law matters. And lastly, the Uniform Law Conference of Canada has a special committee active in this area.

The Special Committee was formed in 1971 after extensive discussion about the potential contribution that the Uniform Law Conference might make to the promotion of private international law. Dean Horace Read, the Conference's President from 1957 to 1958 and a Nova Scotia Commissioner from 1950 to 1967 summarized the issues in The Ansul for January 1969:

> There are two ways in which Canada and its provinces can gain the advantages of membership in the Hague Conference. One is by Canada ratifying its conventions and implementing them by statutes enacted by the constitutionally competent legislatures. The other is by refraining from ratification and instead passing uniform acts that incorporate the provisions of the conventions. It is said that law reform is generally more easily attainable in Western Europe and the United Kingdom by adopting international conventions than by uniform legislation. The draw-back to ratifying conventions is that the adhering government loses its freedom of action and the law is frozen until the other adhering countries agree to amendment of the conventions. Among the provinces and territories of Canada uniform legislation has been used with considerable success. The Conference of Commissioners on Uniformity of Legislation in Canada was organized in 1918 and since then has contributed to law reform by preparing sixty-four model statutes, most of which have been enacted by a large majority of the provincial legislatures. This seems to indicate that in this country the advantages of membership in the Hague Conference could be better gained, not by formal adherence to the conventions but by active participation in its work and use of its conventions as models for uniform acts. In this way, perhaps with an occasional slight departure from uniformity, greater flexibility and adaptability to conditions peculiar to this country could be ensured.

The Committee has been active since its formation in 1971. It now consists of H. Allan Leal [Ontario—chairman], Emile Colas [Quebec], D. Martin Low [Canada], Alan Reid [New Brunswick], and Rae Tallin [Manitoba]. R. S. G. Chester of Ontario serves as rapporteur to the Committee. Though the Committee has not met during the past year, it has maintained close links with the Minister of Justice's Advisory Group on Private International Law and Unification of Law. The Advisory Group met on April 27 and April 28, 1981, and currently consists of Denis Carrier, D. M. M. Goldie, Michel Hetu, M. L. Jewett, M. Langlois, H. Allan Leal, D. M. Low, and Graham D. Walker.

## HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Conference's Fourteenth Session was held at The Hague from October 6 to 25, 1980. Twenty-nine member states participated, with another seven states attending as observers, including Hungary and the Union of Soviet Socialist Republics. Canada's delegation was headed by H. Allan Leal, who was also elected vice-president of the session, and consisted of Denis Carrier, D. M. M. Goldie, Michel Hetu, M. Langlois and Francois Mathys.

The Conference divided into four commissions, working on the Civil Aspects of International Child Abduction, Judicial Co-operation, the Law Applicable to Consumer Sales and Miscellaneous Matters.

## CONVENTION ON THE CIVIL ASPECTS OF CHILD ABDUCTION

For the past four years, we have described the discussions leading up to the development of an effective international regime to deal with child abduction: 59th Annual Proceedings 1977, pp. 245, 282; 60th Annual Proceedings 1978, pp. 170-171; 61st Annual Proceedings 1979, pp. 126-131; 62nd Annual Proceedings 1980, pp. 153-169.

On October 25, 1980, Canada signed the Convention on the Civil Aspects of International Child Abduction, the first Hague Convention it has signed. The full text of the Convention as signed was printed in the Sixty-second Annual Proceedings of the Conference at page 156. In view of that fact, and the fact that Michel Hetu's *'Rapport Explicatif'* on the Convention and John Eekelaar's monograph 'The Hague Convention on the Civil Aspects of International Child Abduction—Explanatory Documentation prepared for Commonwealth Jurisdictions' (Commonwealth Secretariat 1981) have both been circulated to all Canadian jurisdictions, it is not intended to provide a full analysis of its provisions.

The purpose of the Convention is to require the return of children who have been wrongfully removed from a person entitled to custody

in their home country. The Convention operates reciprocally. By implementing the Convention, a Canadian jurisdiction assumes certain obligations towards residents of other jurisdictions that have implemented the Convention. At the same time, Canadian residents gain the advantage of being able to make use of the Convention in those jurisdictions.

Canadian courts have already shown an awareness of the problem of international child kidnapping and have recognized that there are circumstances in which they should not interfere with custody rights arising in other jurisdictions. In many other countries, however, the judicial authorities do not consider these issues. Implementation of the Convention would be of major importance to Canadian residents whose children are wrongfully removed from Canada, since it would require other countries who have ratified the Convention to respect custody rights arising under Canadian law.

*Highlights of the Convention*

1. Each state must designate a Central Authority to carry out the duties imposed by the Convention (Article 6).
2. Central Authorities must co-operate with each other and must take measures,
   (a) to locate a child who has been wrongfully removed;
   (b) to attempt to secure the voluntary return of the child;
   (c) to institute or facilitate the institution of judicial proceedings for an order returning the child;
   (d) to make provisional arrangements to prevent further harm to the child;
   (e) to provide or facilitate the provisions of legal aid;
   (f) to exchange information relating to the background of the child;
   (g) to provide general information regarding the applicable law;
   (h) to provide administrative arrangements for the safe return of the child;
   (i) to keep other Central Authorities informed and to eliminate obstacles to the operation of the Convention (Article 7).
3. A child is considered to have been wrongfully removed when he is taken from the state of his habitual residence in breach of a person's custody rights, unless the custody rights were not being exercised. Custody rights may arise by operation of law, by agreement or by judicial decision (Article 3). The Convention applies to children under 16 years of age (Article 4).

4. Where a child is wrongfully removed, an application may be made to secure his return (Article 8).

5. An applicant under the Convention is entitled to legal aid as if he were a resident of the state in which the application is made (Article 25).

6. Judicial authorities are required to act expeditiously in proceedings under the Convention. If no decision is made within six weeks from the commencement of the proceedings, reasons for the delay may be requested (Article 11).

7. If judicial proceedings are commenced within one year of the wrongful removal, the court must order the return of the child. After one year, the court must order the return of the child unless the child has become settled in his new environment (Article 12).

8. Once it is determined that the child has been wrongfully removed, there are only a few limited circumstances in which the court may refuse to order the return of the child. The order may be refused if,

   (a) the person whose custody rights were breached was not actually exercising those rights at the time of the removal;
   (b) the return of the child would expose him to grave risk of physical or psychological harm; or
   (c) the child objects to being returned and is of an age and degree of maturity where it is appropriate to consider his views (Article 13).

Return of the child may also be refused if the return would be contrary to fundamental principles relating to the protection of human rights and fundamental freedoms (Article 20).

At last year's Uniform Law Conference meeting in Charlottetown the Conference adopted a Uniform International Child Abduction (Hague Convention) Act which was a uniform act implementing the Convention. At the meeting of the Minister of Justice's Advisory Group on Private International Law and Unification of Law held in Ottawa on April 27 and 28, a subcommittee consisting of Mr. Graham Walker, Mr. Denis Carrier, and Mr. Michel Hetu revised the Uniform Act to deal with certain difficulties which had arisen in the interpretation of the "effective date" of the Convention. The problem was that proclamation would be unsatisfactory because it would not guarantee the coming into force at the same time as the Convention; the length of a calendar date, is defined by Canadian courts, did not seem to conform with the Hague interpretation; lastly, the "effective date"

might have two different meanings in Articles 40 and 43. The Ottawa revision of the Uniform Act deletes section 1(*b*), and accordingly, section 1(*a*) is renumbered section 1. A new section 2 was drafted reading:

> On, from and after the date the Convention enters into force in respect of the Province as determined by the Convention, except (note any reservation which is allowed and made under the Convention), the Convention is in force in the Province and the provisions thereof are law in the Province.

Sections 3 and 4 remain unchanged. Section 5 was redrafted to read:

> The (Minister of or ) shall publish in the Gazette the date the Convention comes into force in the Province.

Section 6 remains unchanged. Section 7 redrafted to read:

> Where there is a conflict between this Act and any enactment, this Act prevails.

The Conference may wish to compare these changes with the Uniform International Child Abduction (Hague Convention) Act set out on page 169 of the 1980 Proceedings, and consider incorporating these revisions.

Lastly, it may be of interest to note that on June 19, 1981, the Honourable R. Roy McMurtry Attorney General of Ontario introduced Bill 125 The Children's Law Reform Amendment Bill into the Ontario Legislature. Clause 54 of this Bill is intended to implement the Convention on the Civil Aspects of International Child Abduction so far as Ontario is concerned. The Convention in paragraph 3 of Article 26 permits a reservation to be made, enabling a jurisdiction to declare that it will "not be bound to assume any costs referred to . . . resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by a system of legal aid in advice". Ontario's bill contains clause 54(3) which reads:

> The Crown is not bound to assume any costs resulting under the Convention from the participation of legal counsel or advisers or from court proceedings except in accordance with The Legal Aid Act.

In addition, a new subclause 5 has been added to the implementing provision reading:

> An application may be made to a court in pursuance of a right or an obligation under the Convention.

This provision was inserted to ensure that courts would have jurisdiction to entertain applications under the Convention. It is one clause that should perhaps be considered for inclusion in the Uniform Act. The Bill will be proceeded with at the Autumn sitting of the Legislature. When it has been passed, Ontario will be requesting the Federal Government to ratify the Convention with respect to Ontario.

At last year's proceedings at page 221, we mentioned that the Hague Conference was working on a proposal to revise Chapters III and IV of the Hague Convention on Civil Procedure 1954, dealing with Security for Costs and Free Legal Aid. At the close of the 1980 Session, the Conference adopted a Convention on International Access to Justice. The Convention is of only limited interest to Canada, but a copy of it is annexed to this Report for reference purposes.

The legal aid provisions are the only elements of the Convention which require any analysis. They recognize the rights of both nationals and persons who have their habitual residence in a contracting state (landed immigrants) to legal aid in another contracting state. Thus, a French national in any country or a person who was habitually resident in France could apply for legal aid in Canada if he were pursuing a cause of action before the Canadian courts. This is a major departure from our current system which normally restricts legal aid to persons in Canada. Of course, the provision is reciprocal in that it would give Canadian citizens and landed immigrants access to French legal aid for actions before the French courts.

Turning to eligibility requirements, the test has been changed from the 1954 Hague Convention, which required indigence, toward a flexible financial means test which resembles those used in Canada under the provincial Legal Aid Plans. The requesting state must furnish all the necessary financial information concerning the applicant. On the basis of this, the receiving state is to test the application for eligibility on the same basis as it would were the application to have come from one of its own nationals. Assistance is granted in compliance with the laws of the requested state. Article 1 of the Convention requires that aid be granted for court proceedings in civil and commercial matters, and in administrative, social or fiscal matters, in states where legal aid is provided under the circumstances.

The Convention adopts the "Central Authorities" approach to handling requests for legal aid. Central Authorities would be responsible for both sending and receiving applications. In other words if a Canadian in Quebec wished to seek legal aid to pursue an action in Germany, the Quebec Central Authority would assist in preparing and

transmitting the application to the German Central Authority. If the situation were reversed, the Quebec Central Authority would be the receiving agency for a German application. The Central Authorities are to provide all services without cost to the applicant. Any translation costs are to be borne by the requesting state, except that any translations made in the requested state are not to give rise to any claim for reimbursement on the part of the requested state. Normally the application and documentation is to be in the official language of the requested state, but where this poses problems, documentation may be submitted in either English or French.

We suggest that the Convention should be analyzed carefully by the relevant provincial authorities. They will wish to consider questions such as:

- Are the benefits which the Convention confers on Canadian residents sufficient to warrant Canadian ratification?
- Are the provinces prepared to assume the financial burden imposed by the Convention in handling requests for legal aid from non-nationals?
- Are the provinces prepared to accept the role of the Central Authority?
- Are the provinces prepared to accept the principle of the availability of legal aid to non-residents of the requested state?

The rest of the substantive provisions of the Convention concern questions of security for costs, and enforceability of orders for costs, copies of entries and decisions, and physical detention and safe conduct. For all the common law countries participating in the Fourteenth Session of The Hague Conference, these provisions posed considerable difficulty. The normal requirement under Canadian law, for example is that security for costs is required from non-residents and those without assets in the jurisdiction. By contrast, Articles 14 to 17 of the Convention embody the principle that as between contracting states, a national or resident of the contracting state suing in another state shall not be discriminated against in respect of security for costs by reason only of his nationality or non-residence. In place of the protection which security for costs provide when a resident is involved in litigation with a non-resident a supposedly expeditious, but actually rather complicated, alternative method of collecting costs are provided under the Convention. These require the intervention of the state in the registration of an execution upon a foreign judgment to an extent which is quite alien to the common law tradition. In short, the provisions relating to security for costs are cumbersome, open to misunderstanding, and potentially very costly. Accordingly, it is

unlikely that they would receive much support from Canadian jurisdictions, or indeed from other common law states.

## SERVICE ABROAD OF JUDICIAL AND EXTRA-JUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

In last year's proceedings at page 195, the following resolution is recorded:

> That this conference recommend the Hague Conference that Canada should move to ratify the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, and the provincial governments in Canada should be requested by Ottawa to amend their rules of practice when necessary, so that Canada may ratify the Convention.

The agreement of the provinces has been obtained for Canadian ratification, but certain objections have been raised by the Bar, and these are now being studied.

It was noted in the report that specific legislation would not be required to implement the Hague Convention. At the Fourteenth Session of the Hague Conference, the second commission prepared a summary of the document to be served, together with an important warning notice. It was recommended that parties to the 1965 Convention should take appropriate steps to ensure that any judicial or extra-judicial document in relation to a civil or commercial matter sent or served abroad should be accompanied by the summary.

For the information of member jurisdictions, a copy of the summary and warning is attached to this report as an appendix.

## DRAFT CONVENTION ON THE LAW APPLICABLE TO CERTAIN CONSUMER SALES

The Hague Conference has placed on its future agenda, the question of revision of the 1955 Convention on the law applicable to International Sale of Goods. The Conference has yet to determine whether special rules applying to consumer sales should be included in a new general convention on sale of goods, of whether a separate convention should be drafted on the law applicable to consumer sales. In the interim, the Fourteenth Session drafted articles dealing with choice of law rules in consumer sales. The fundamental principle is that the buyer of consumer goods should be protected by the law of his habitual residence even where the conventional conflicts rules would dictate a different choice of law. This general principle is subject to some exceptions.

A copy of the draft articles are included as an appendix to this report. There has also been a suggestion that in view of the quantity of inter-provincial trade within Canada in consumer goods, the provinces might consider a model law patterned on the basic principles of the Convention.

## HAGUE CONFERENCE – FUTURE WORK PROGRAMME

The Fourth Commission of the Fourteenth Session discussed the question of opening up the work of the Conference to non-member states, and future co-operation with other international organizations, such as UNCITRAL, the Council of Europe, and the Commonwealth Secretariat.

In addition, the Fourth Commission proposed to include in the future agenda of the Conference, the following items:

(*a*) The revision of the 1955 Convention on the law applicable to International Sale of Goods
(*b*) The international validity and recognition of trusts
(*c*) The law applicable to negotiable instruments
(*d*) Licensing agreements and know-how
(*e*) The law applicable to arbitration clauses
(*f*) The law applicable to deceased persons estates, with the possibility of limiting the subject to moveable property.

The Permanent Bureau is also to undertake a feasibility study on the law applicable to contractual obligations, and another feasibility study on the law applicable to labour contracts.

## FEDERAL STATE CLAUSES

At the Fourteenth Session of the Hague Conference, there was a considerable discussion about the currently used Hague Federal State Clause formed by Canada. This matter was raised by Australia; which felt that the current clause was inadequate for them in view of its federal system. A subcommittee of the fourth Commission studied the issue, and submitted a draft proposal containing two articles in order to accommodate the Australians. The first of these simply restates the classic Hague Convention federal state formula favoured by Canada and the United States, enabling a state which has two or more territorial units to declare that the Convention would extend to all its territorial units or to only one or more of them. The second article is designed to prevent any argument being raised that the Convention has modified the internal distribution of powers. The new "Australian" clause reads:

> Where a contracting state has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that state, its signature or ratification, acceptance, or approval of, or accession to this Convention, or its making of any declaration under [the normal Hague Federal State Clause] shall carry no implication as to the internal distribution of powers within that state.

In the closing session Canada recorded its objection on the grounds that the "Australian Clause" was not appropriate in an international Convention.

UNIDROIT

The General Assembly of UNIDROIT at its Thirty-Second Session held in Rome during December 1980 approved the following work programme for the next three years:

I International Trade Law
- (i) Law of sale and kindred matters
  - (a) Protection of the acquisition in good faith of corporeal movables
  - (b) Agency of an international character in the sale and purchase of goods
- (ii) Progressive codification of international trade law
- (iii) The leasing contract
- (iv) The factoring contract

II Transport Law
- (i) Carriage of goods by inland waterway
- (ii) Civil liability for damage caused by hazardous cargoes
- (iii) Liability of international terminal operators (the warehousing contract)

III Miscellaneous
- (i) The hotel keeper's contract
- (ii) Power of attorney
- (iii) Revision of the 1970 International Convention on the Travel Contract (CCV)
- (iv) Civil liability connected with the carrying out of dangerous activities
- (v) Credit cards

IV Legal Assistance to Developing Countries

V Activities subsidiary to the Unification of Law
- (i) Publications
  - (a) Uniform Law Review
  - (b) Digest of Legal Activities of International Organizations and Other Institutions
  - (c) News Bulletin
- (ii) Studies of the Methods of Unification of Law and Periodical Meetings

## UNCITRAL

Immediately before the last meeting of the Uniform Law Conference, the Thirteenth Plenary Session of the United Nations Commission on International Trade Law was held at New York. The session adopted unanimously the UNCITRAL conciliation rules, similar to the UNCITRAL arbitration rules which were printed in the Fifty-Ninth Annual Proceedings of the Uniform Law Conference of Canada, 1977 at page 307. The conciliation rules are recommended for cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute. The rules are extremely flexible, and can be varied or excluded by the parties; if the rules conflict with any provisions of law from which the parties cannot derogate, the rules must yield. The full text of the rules is set out as an appendix to this report.

Among other matters on the UNCITRAL agenda were:

(1) The legal aid implications of the new International Economic Order
(2) UNCITRAL conciliation rules
(3) Uniform rules on security interests
(4) International payments
(5) International contract practices
(6) Co-ordination of work
(7) UNCITRAL law symposium
(8) Approval of future work programme

The Fourteenth Session which is scheduled to meet in Vienna at the end of July 1981 is to study:

(1) The report of the working groups on negotiable instruments;
(2) Contract practices;
(3) Re-evaluation of the "unit of account", per package limitation in international shipping;
(4) Arbitration rule Guidelines.

## CANADA/U.K. PROPOSED AGREEMENT ON THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS

Negotiations are taking place with the United Kingdom on an agreement for the recognition and enforcement of judgments which would ensure that Canadian litigants were not prejudiced by British accession to the European economic community conventions on jurisdiction and the recognition and enforcement of judgments in civil

and commercial matters. This matter was raised briefly in last year's proceedings at page 220.

The negotiating team for Canada in the discussions with the United Kingdom on this topic consists of D. Martin Low and Graham Walker. The team is scheduled to meet with its English counterparts early in August. Accordingly, a full report on those discussions will be postponed until after that meeting, and will be delivered orally by Messrs. Low and Walker at the Whitehorse Conference.

## CONCLUSION

We would like to acknowledge with thanks the assistance and the preparation of this report of the private international law officials of the federal Department of Justice, Messrs. Mark Jewett, D. M. Low, and Michel Hetu. We also acknowledge with thanks the assistance of Ms. Holly Harris and Ms. Micheline Langlois of the federal Department of Justice for their assistance on the subject of the Hague Convention. Finally, we would also like to express our thanks to Simon Chester, the rapporteur to the Special Committee, for his work on the drafting of this report.

H. Allan Leal
Chairman

Toronto 21 July, 1981

# CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

# HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

## QUATORZIÈME SESSION
## FOURTEENTH SESSION

## ACTE FINAL
## FINAL ACT

## LA HAYE, LE 25 OCTOBRE 1980
## THE HAGUE, 25th OCTOBER 1980

### Acte Final de la Quatorzième session

Les soussignés, Délégués des Gouvernements de la République Fédérale d'Allemagne, de l'Argentine, de l'Australie, de l'Autriche, de la Belgique, du Canada, du Danemark, de la République Arabe d'Egypte, de l'Espagne, des Etats-Unis d'Amérique, de la Finlande, de la France, de la Grèce, de l'Irlande, d'Israël, de Italie, du Japon, du Luxembourg, de la Norvège, des Pays-Bas, du Portugal, du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, de la Suède, de la Suisse, du Surinam, de la Tchécoslovaquie, de la Turquie, du Venezuela et de la Yougoslavie, ainsi que les Représentants des Gouvernements du Brésil, de la Hongrie, du Maroc, de Monaco, du Saint-Siège, de l'Union des Républiques Socialistes Soviétiques et de l'Uruguay participant à titre d'Invité ou d'Observateur, se sont réunis à La Haye le 6 octobre 1980, sur invitation du Gouvernements des Pays-Bas, en Quatorzième session de la Conférence de La Haye de droit international privé

Alasuitedesdélibérationsconsignéesdansles procès-verbaux, ils sont convents de soumettre à l'appréciation de leurs Gouvernements:

**A Les projets de conventions suivants:**

**I**

CONVENTION SUR LES ASPECTS CIVILS DE L ENLÈVEMENT INTERNATIONAL D'ENFANTS

Les Etats signataires de la présente Convention,

### Final Act of the Fourteenth Session

The undersigned, Delegates of the Governments of Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Jugoslavia, Luxembourg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela, and the Representatives of the Governments of Brazil, the Holy See, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as Observer, convened at The Hague on the 6th October 1980, at the invitation of the Government of the Netherlands, in the Fourteenth Session of the Hague Conference on Private International Law

Following the deliberations laid down in the records of the meetings, have decided to submit to their Governments—

**A The following draft Conventions—**

**I**

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention,

Profondément convaincus que l'intérêt de l'enfant est d'une importance primordiale pour toute question relative à sa garde,

Désirant protéger l'enfant, sur le plan international, contre les effets nuisibles d'un déplacement ou d'un non-retour illicites et établir des procédure en vue de garantir le retour immédiat de l'enfant dans l'Etat de sa résidence habituelle, ainsi que d'assurer la protection du droit de visite,

Ont résolu de conclure une Convention à cet effet, et sont convenus des dispositions suivantes:

CHAPITRE I—CHAMP D'APPLICATION DE LA CONVENTION

*Article premier*

La présente Convention a pour objet:

*a* d'assurer le retour immédiat des enfants déplacés ou retenus illicitement dans tout Etat contractant:

*b* de faire respecter effectivement dans les autres Etats contractants les droits de garde et de visite existant dans un Etat contractant

*Article 2*

Les Etats contractants prennent toutes mesures appropriées pour assurer, dans le limites de leur territoire, la réalisation des objectifs de la Convention A cet effet, ils doivent recourir à leurs procédures d'urgence

*Article 3*

Le déplacement ou le non-retour d'un enfant est considéré comme illicite:

*a* lorsqu'il a lieu en violation d'un droit de garde, attribué à une personne, une institution ou toute autre organisme, seul ou conjointement, par le droit de l'Etat dans lequel l'enfant avait sa résidence habituelle immédiatement avant son déplacement ou son non-retour; et

*b* que ce droit était exercé de façon effective seul ou conjointement, au moment du déplacement ou du non-retour, ou l'eût été si de tels événements n'étaient survenus.

Le droit de garde visé en *a* peut notamment résulter d'une attribution de plein droit, d'une décision judiciaire ou administrative, ou d'un accord en vigueur selon le droit de cet Etat

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—

CHAPTER 1—SCOPE OF THE CONVENTION

*Article 1*

The objects of the present Convention are—

*a* to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

*b* to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States

*Article 2*

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

*Article 3*

The removal of the retention of a child is to be considered wrongful where—

*a* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

*b* at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention

The rights of custody mentioned in subparagraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an aggreement having legal effect under the law of that State.

*Article 4*

La Convention s'applique à tout enfant qui avait sa résidence habituelle dans un Etat contractant immédiatement avant l'atteinte aux droits de garde ou de visite L'application de la Convention cesse lorsque l'enfant parvient à l'âge de 16 ans

*Article 5*

Au sens de la présente Convention:

*a* le "droit de garde" comprend le droit portant sur les soins de la personne de l'enfant, et en particulier celui de décider de son lieu de résidence:

*b* le "droit de visite" comprend le droit d'emmener l'enfant pour une période limitée dans un lieu autre que celui de sa résidence habituelle.

CHAPITRE II – AUTORITÉS CENTRALES

*Article 6*

Chaque Etat contractant désigne une Autorité centrale chargée de satisfaire aux obligations qui lui sont imposées par la Convention

Un Etat fédéral, un Etat dans lequel plusiers systèmes de droit sont en vigueur ou un Etat ayant des organisations territoriales autonomes, est libre de désigner plus d'une Autorité centrale et de spécifier l'étendue territoriales des pouvoirs de chacune de ces Autorités L'Etat qui fait usage de cette faculté désigne l'Autorité centrale à laquelle les demandes peuvent étre addressées en vue de leur transmission à l'Autorité centrale compétente au sein cet Etat

*Article 7*

Les Autorités centrales doivent coopérer entre elles et promouvoir une collaboration entre les autorités compétentes dans leurs Etats respectifs, pour assurer le retour immédiat des enfants et réaliser les autres objectifs de la presente Convention.

En particulier, soit directement, soit avec le concours de tout intermédiaire, elles doivent prendre toutes les mesures appropriées:

*a* pour localiser un enfant déplacé ou retenu illicitement;

*b* pour prévenir de nouveaux dangers pour l'enfant ou des préjudices pour les parties concernées, en prenant ou faisant prendre des mesures provisoires;

*Article 4*

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years

*Article 5*

For the purposes of this Convention –

*a* 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

*b* 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence

CHAPTER II – CENTRAL AUTHORITIES

*Article 6*

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State

*Article 7*

Central Authorities shall co-operate with each other and promote co-operation amongst the competent anthorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention

In particular, either directly or through any intermediary, they shall take all appropriate measures–

*a* to discover the whereabouts of a child who has been wrongfully removed or retained;

*b* to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

*c* pour assurer la remise volontaire de l'enfant ou faciliter une solution amiable;

*d* pour échanger, si cela s'avère utile, des informations relatives à la situation sociale de l'enfant;

*e* pour fournir des informations générales concernant le droit de leur Etat relatives à l'application de la Convention;

*f* pour introduire ou favoriser l'ouverture d'une procédure judiciaire ou administrative, afin d'obtenir le retour de l'enfant et, le cas échéant, de permettre l'organisation ou l'exercice effectif du droit de visite;

g pour accorder ou faciliter, le cas échéant, l'obtention de l'assistance judiciaire et juridique, y compris la participation d'un avocat;

*h* pour assurer, sur le plan administratif, si nécessaire et opportun, le retour sans danger de l'enfant;

*i* pour se tenir mutuellement informées sur le fonctionnement de la Convention et, autant que possible, lever les obstacles éventuellement rencontrés lors de son application

*c* to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

*d* to exchange, where desirable, information relating to the social background of the child;

*e* to provide information of a general character as to the law of their State in connection with the application of the Convention;

*f* to initiate or facilitate the institution of judicial of administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

*h* to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

*i* to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPITRE III – RETOUR DE L'ENFANT

*Article 8*

La personne, l'institution ou l'organisme qui prétend qu'un enfant a été déplacé ou retenu en violation d'un droit de garde peut saisir soit l'Autorité centrale de la résidence, habituelle de l'enfant, soit celle de tout autre Etat contractant, pour que celles-ci prêtent leur assistance en vue d'assurer le retour de l'enfant
La demande doit contenir;

*a* des informations portant sur l'identité du demandeur, de l'enfant et de la personne dont il est allégué qu'elle a emmené ou retenu l'enfant;

*b* la date de naissance de l'enfant, s'il est possible de se la procurer;

*c* les motifs sur lesquels se base de demandeur pour réclamer le retour de l'enfant;

*d* toutes informations disponsibles concernant la localisation de l'enfant et l'identité de la personne avec laquelle l'enfant est présumé se trouver.

CHAPTER III – RETURN OF CHILDREN

*Article 8*

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child
The application shall contain–

*a* information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

*b* where available, the date of birth of the child;

*c* the grounds on which the applicant's claim for return of the child is based;

*d* all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

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'Autorité centrale qui est saisie
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ɜ penser que l'enfant se trouve dans
Etat contractant, elle transmet la
directement et sans délai à l'Auto-
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'Autorité centrale requérante ou, le
ant, le demandeur.

*0*

:é centrale de l'Etat où se trouve
rendra ou fera prendre toute mesure
assurer sa remise volontaire

*1*

rités judiciaires ou administratives
Etat contractant doivent procéder
ɜ en vue du retour de l'enfant

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ɜ n'a pas statué dans un délai de six
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itiative ou sur requête de l'Autorité
de l'Etat requérant, peut demander
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nse est reçue par l'Autorité centrale
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tre à l'Autorité centrale de l'Etat
t ou, le cas échéant, au demandeur

*2*

n un enfant a été déplacé ou retenu
ɔnt au sens de l'article 3 et qu'une
de moins d'un an s'est écoulée à
déplacement ou du non-retour au
de l'introduction de la demande
autorité judiciaire au administrative
contractant où se trouve l'enfant,
saisie ordonne son retour immédiat

The application may be accompanied or supplemented by —

*e* an authenticated copy of any relevant decision or agreement;

*f* a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

*g* any other relevant document

*Article 9*

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be

*Article 10*

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child

*Article 11*

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requesting State, on its own initiative or if asked by the Central Authority of the requesting State shall have the right to request a statement of the reasons for the delay If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be

*Article 12*

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith

L'autorité judiciaire ou administrative, même saisie après l'expiration de la période d'un an prévue à l'alinéa précédent, doit aussi ordonner le retour de l'enfant, à moins qu'il ne soit établi que l'enfant s'est intégré dans son nouveau milieu

Lorsque l'autorité judiciaire ou administrative de l'Etat requis a des raisons de croire que l'enfant a été emmené dans un autre Etat, elle peut suspendre la procédure ou rejeter la demande de retour de l'enfant

*Article 13*

Nonobstant les dispositions de l'article précédent, l'autorité judiciaire ou administrative de l'Etat requis n'est pas tenue d'ordonner le retour de l'enfant, lorsque la personne, l'institution ou l'organisme qui s'oppose à son retour établit;

*a* que la personne, l'institution ou l'organisme qui avait le soin de la personne de l'enfant n'exerçait pas effectivement le droit de garde à l'époque du déplacement ou du non-retour, ou avait consenti ou a acquiescé postérieurement à ce déplacement ou à ce non-retour; ou

*b* qu'il existe un risque grave que le retour de l'enfant ne l'éxpose à un danger physique ou pyschique, ou de toute autre manière ne le place dans une situation intolérable

L'autorité judiciaire ou administrative peut aussi refuser d'ordonner le retour de l'enfant si elle constate que celui-ci s'oppose à son retour et qu'il a atteint un âge et une maturité où il se révèle approprié de tenir compte de cette opinion

Dans l'appréciation des circonstances visées dans cet article, les autorités judiciaires ou administratives doivent tenu compte des informations fournies par l'Autorité centrale ou toute autre autorité compétente de l'Etat de la résidence habituelle de l'enfant sur sa situation sociale

*Article 14*

Pour déterminer l'existence d'un déplacement ou d'un non-retour illicite au sens de l'article 3, l'autorité judiciaire ou administrative de l'Etat requis peut tenir compte directement du droit et des décisions judiciaires ou administratives reconnues formellement ou non dans l'Etat de la résidence habituelle de

The judicial administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child

*Article 13*

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that —

*a* the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

*b* there is a grave risk that his or her return would expose the child to physical of psychological harm or otherwise place the child in an intolerable situation

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence

*Article 14*

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual

l'enfant, sans avoir recours aux procédures spécifiques sur la preuve de ce droit ou pour la reconnaissance des décisions étrangères qui seraient autrement applicables

residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

*Article 15*

Les autorités judiciaires ou administratives d'un Etat contractant peuvent, avant d'ordonner le retour de l'enfant, demander la production par le demandeur d'une décision ou d'une attestation émanant des autorités de l'Etat de la résidence habituelle de l'enfant constatant que le déplacement ou le non-retour était illicite au sens de l'article 3 de la Convention, dans la mesure où cette décision ou cette attestation peut être obtenue dans cet Etat. Les Autorités centrales des Etats contractants assistent dans la mesure du possible le demandeur pour obtenir une telle décision ou attestation.

*Article 15*

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination

*Article 16*

Après avoir été informées du déplacement illicite d'un enfant ou de son non-retour dans le cadre de l'article 3, les autorités judiciaires ou administratives de l'Etat contractant où l'enfant a été déplacé ou retenu ne pourront statuer sur le fond du droit de garde jusqu'à ce qu'il soit établi que les conditions de la présente Convention pour un retour de l'enfant ne sont pas réunies, ou jusqu'à ce qu'une période raisonnable ne se soit écoulée sans qu'une demande en application de la Convention n'ait été faite

*Article 16*

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

*Article 17*

Le seul fait qu'une décision relative à la garde ait été rendue ou soit susceptible d'être reconnue dans l'Etat requis ne peut justifier le refus de renvoyer l'enfant dans le cadre de cette Convention, mais les autorités judiciaires ou administratives de l'Etat requis peuvent prendre en considération les motifs de cette décision qui rentreraient dans le cadre de l'application de la Convention

*Article 17*

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention

*Article 18*

Les dispositions de ce chapitre ne limitent pas le pouvoir de l'autorité judiciaire ou administrative d'ordonner le retour de l'enfant à tout moment

*Article 18*

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

*Article 19*

Une décision sur le retour de l'enfant rendue dans le cadre de la Convention n'affecte pas le fond du droit de garde

*Article 19*

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue

*Article 20*

Le retour de l'enfant conformément aux dispositions de l'article 12 peut être refusé quand il ne serait pas permis par les principes fondamentaux de l'Etat requis sur la sauvegarde des droits de l'homme et des libertés fondamentales

*Article 21*

Une demande visant l'organisation ou la protection de l'exercice effectif d'un droit de visite peut être adressé à l'Autorité centrale d'un Etat contractant selon les mêmes modalités qu'une demande visant au retour de l'enfant

Les Autorités centrales sont liées par les obligations de coopération visées à l'article 7 pour assurer l'exercice paisible du droit de visite et l'accomplissement de toute condition à laquelle l'exercice de ce droit serait soumis, et pour que soient levés dans toute la mesure du possible, les obstacles de nature à s'y opposer

Les Autorités centrales, soit directement, soit par des intermédiaires, peuvent entamer ou favoriser une procédure légale en vue d'organiser ou de protéger le droit de visite et les conditions auxquelles l'exercice de ce droit pourrait être soumis

CHAPITRE V – DISPOSITIONS GÉNÉRALES

*Article 22*

Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé pour garantir le paiement des frais et dépens dans le contexte des procédures judiciaires ou administratives visées par la Convention

*Article 23*

Aucune légalisation ni formalité similaire ne sera requise dans le contexte de la Convention

*Article 24*

Toute demande, communication ou autre document sont envoyés dans leur langue originale à l'Autorité centrale de l'Etatrequis et accompagnés d'une traduction dans la langue officielle ou l'une des langues officielles de cet Etat ou, lorsque cette traduction est difficilement réalisable, d'une traduction en français ou en anglais.

*Article 20*

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV – RIGHTS OF ACCESS

*Article 21*

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject

CHAPTER V – GENERAL PROVISIONS

*Article 22*

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention

*Article 23*

No legalization or similar formality may be required in the context of this Convention.

*Article 24*

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

Toutefois, un Etat contractant pourra, en faisant la réserve prévue à l'article 42, s'opposer à l'utilisation soit du français, soit de l'anglais, dans toute demande, communication ou autre document adressés à son Autorité centrale

*Article 25*

Les ressortissants d'un Etat contractant et les personnes qui résident habituellement dans cet Etat auront droit, pour tout ce qui concerne l'application de la Convention, à l'assistance judiciaire et juridique dans tout autre Etat contractant, dans les mêmes conditions que s'ils étaient eux-mêmes ressortissants de cet autre Etat et y résidaient habituellement.

*Article 26*

Chaque Autorité centrale supportera ses propres frais en appliquant Convention.

L'Autorité centrale et les autres services publies des Etats contractants n'imposeront aucun frais en relation avec les demandes introduites en application de la Convention. Notamment, ils ne peuvent réclamer du demandeur le paiement des frais et dépens du procès ou, éventuellement, des frais entraînés par la participation d'un avocat Cependant, ils peuvent demander le paiement des dépenses causées ou qui seraient causées par les opérations liées au retour de l'enfant.

Toutefois, un Etat contractant pourra, en faisant le réserve prévue à l'article 42, déclarer qu'il n'est tenu au paiement des frais visés à l'alinéa précédent, liés à la participation d'un avocat ou d'un conseiller juridique, ou aux frais de justice, que dans la mesure où ces coûts peuvent être couverts par son systeme d'assistance judiciaire et juridique.

En ordonnant le retour de l'enfant ou en statuant sur le droit de visite dans le cadre de la Convention, l'autorité judiciaire ou administrative peut, le cas échéant, mettre à la charge de la personne qui a déplacé ou qui a retenu l'enfant, ou qui a empêché l'exercice du droit de visite, le paiement de tous frais nécessaires engagés par le demandeur ou en son nom, notamment des frais de voyage, des frais de représentation judiciaire du demandeur et de retour de l'enfant, ainsi que de tous les coûts et dépenses faits pour localiser l'enfant

*Article 27*

Lorsqu'il est manifeste que les conditions requises par la Convention ne sont pas

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

*Article 25*

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

*Article 26*

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child

*Article 27*

When it is manifest that the requirements of this Convention are not fulfilled or that the

remplies ou que la demande n'est pas fondée, une Autorité centrale n'est pas tenue d'accepter une telle demande En ce cas, elle informe immédiatement de ses motifs le demandeur ou, le cas échéant, l'Autorité centrale qui lui a transmis la demande

*Article 28*

Une autorité centrale peut exiger que la demande soit accompagnée d'une autorisation par écrit lui donnant le pouvoir d'agir pour le compte du demandeur, ou de désigner un représentant habilité à agir en son nom.

*Article 29*

La Convention ne fait pas obstacle à la faculté pour la personne, l'institution ou l'organisme qui prétend qu'il y a eu une violation du droit de garde ou de visite au sens des articles 3 ou 21 de s'adresser directement aux autorités judiciaires ou administratives des Etats contractants, par application ou non des dispositions de la Convention

*Article 30*

Toute demande, soumise à l'Autorité centrale ou directement aux autorités judiciaires ou administratives d'un Etat contractant par application de la Convention, ainsi que tout document ou information qui y serait annexé ou fourni par une Autorité centrale, seront recevables devant les tribunaux ou les autorités administratives des Etats contractants.

*Article 31*

Au regard d'un Etat qui connaît en matière de garde des enfants deux ou plusieurs systèmes de droit applicables dans des unités territoriales différentes:

*a* toute référence à la résidence habituelle dans cet Etat vise la résidence habituelle dans une unité territoriale de cet Etat;

*b* toute référence à la loi de l'Etat de la résidence habituelle vise la loi de l'unité territoriale dans laquelle l'enfant a sa résidence habituelle

*Article 32*

Au regard d'un Etat connaissant en matière de garde des enfants deux ou plusieurs systèmes de droit applicables à des catégories différentes de personnes, toute référence

application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons

*Article 28*

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

*Article 29*

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

*Article 30*

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States

*Article 31*

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units—

*a* any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

*b* any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

*Article 32*

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that

à la loi de cet Etat vise le système de droit désigné par le droit de celui-ci

*Article 33*

Un Etat dans lequel différentes unités territoriales ont leurs propres règles de droit en matière de garde des enfants ne sera pas tenu d'appliquer la Convention lorsqu'un Etat dont le système de droit est unifié ne serait pas tenu de l'appliquer.

*Article 34*

Dans les matières auxquelles elle s'applique, la Convention prévaut sur la *Convention du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs,* entre les Etats Parties aux deux Conventions Par ailleurs, la présente Convention n'empêche pas qu'un autre instrument international liant l'Etat d'origine et l'Etat requis, ni que le droit non conventionnel de l'Etat requis, ne soient invoqués pour obtenir le retour d'un enfant qui a été déplacé ou retenu illicitement ou pour organiser le droit de visite

*Article 35*

La Convention ne s'applique entre les Etats contractants qu'aux enlèvements ou aux non-retours illicites qui se sont produits après son entrée en vigueur dans ces Etats.
Si une déclaration a été faite conformément aux articles 39 ou 40, la référence à un Etat contractant faite à l'alinéa précédent signifie l'unité ou les unités territoriales aux-quelles la Convention s'applique

*Article 36*

Rien dans la Convention n'empêche deux ou plusieurs Etats contractants, afin de limiter les restrictions auxquelles le retour de l'enfant peut être soumis, de convenir entre eux de déroger à celles de ses dispositions qui peuvent impliquer de telles restrictions

CHAPITRE VI – CLAUSES FINALES

*Article 37*

La Convention est ouverte à la signature des Etats qui étaient Membres de la Conférence de La Haye de droit international privé lors de sa Quatorzième session
Elle sera ratifiée, acceptée, ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès

State shall be construed as referring to the legal system specified by the law of that State

*Article 33*

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

*Article 34*

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors,* as between Parties to both Conventions Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

*Article 35*

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States
Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies

*Article 36*

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction

CHAPTER VI – FINAL CLAUSES

*Article 37*

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session
It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the

du Ministère des Affaires Etrangères du Royaume des Pays-Bas.

*Article 38*

Tout autre Etat pourra adhérer à la Convention

L'instrument d'adhesion sera déposé auprés du Ministère des Affaires Etrangères du Royaume des Pays-Bas

La Convention entrera en vigueur, pour l'Etat adhérant, le premier jour du troisième mois du calendrier après le dépôt de son instrument d'adhésion.

L'adhésion n'aura d'effet que dans les rapports entre l'Etat adhérant et les Etats contractants qui auront déclaré accepter cette adhésion Une telle déclaration devra également être faite par tout Etat membre ratifiant, acceptant ou approuvant la Convention ultérieurement à l'adhésion Cette déclaration sera déposée auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas; celui-ci en enverra, par la voie diplomatique, une copie certifiée conforme, à chacun des Etats contractants

La Convention entrera en vigueur entre l'Etat adhérant et l'Etat ayant déclaré accepter cette adhesion le premier jour du troisième mois du calendrier après le dépôt de la déclaration d'acceptation

*Article 39*

Tout Etat, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, pourra déclarer que la Convention s'étendra à l'ensemble des territoires qu'il représente sur le plan international ou à l'un ou plusieurs d'entre eux Cette déclaration aura effet au moment où elle entre en vigueur pour cet Etat

Cette déclaration, ainsi que toute extension ultérieure, seront notifiées au Ministère des Affaires Etrangères du Royaume des Pays-Bas

*Article 40*

Un Etat contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par cette Convention pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la présente Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs

Ministry of Foreign Affairs of the Kingdom of the Netherlands.

*Article 38*

Any other State may accede to the Convention

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance

*Article 39*

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the internatinal relations of which it is responsible, or to one or more of them Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands

*Article 40*

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration

d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.

Ces déclarations seront notifiées au Ministère des Affaires Etrangères du Royaume des Pays-Bas et indiqueront expressément les unités territoriales auxquelles la Convention s'applique

*Article 41*

Lorsqu'un Etat contractant a un système de gouvernement en vertu duquel les pouvoirs exécutif, judiciaire et législatif sont partagés entre des Autorités centrales et d'autres autorités de cet Etat, la signature, la ratification, l'acceptation ou l'approbation de la Convention, ou l'adhésion à celle-ci, ou une déclaration faite en vertu de l'article 40, n'emportera aucune conséquence quant au partage interne des pouvoirs dans cet Etat.

*Article 42*

Tout Etat contractant pourra, au plus tard au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou au moment d'une déclaration faite en vertu des articles 39 ou 40, faire soit l'une, soit les deux réserves prévues aux articles 24 et 26, alinéa 3. Aucune autre réserve ne sera admise.

Tout Etat pourra, à tout moment, retirer une réserve qu'il aura faite Ce retrait sera notifié au Ministère des Affaires Etrangères du Royaume des Pays-Bas.

L'effet de la réserve cessera le premier jour du troisième mois du calendrier après la notification mentionnée à l'alinéa précédent

*Article 43*

La Convention entrera en vigueur le premier jour du troisième mois du calendrier après le dépôt du troisième instrument de ratification, d'acceptation, d'approbation ou d'adhésion prévu par les articles 37 et 38

Ensuite, la Convention entrera en vigueur:

1 pour chaque Etat ratifiant, acceptant, approuvant ou adhérant postérieurement le premier jour du troisième mois du calendrier après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion;

2 pour les territoires ou les unités territoriales auxquels la Convention a été étendu conformément à l'article 39 ou 40, le premier jour du troisième mois du calendrier après la notification visée dans ces articles

at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

*Article 41*

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State

*Article 42*

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph No other reservation shall be permitted

Any State may at any time withdraw a reservation it has made The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

*Article 43*

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38

Thereafter the Convention shall enter into force—

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

*Article 44*

La Convention aura une durée de cinq ans à partir de la date de son entrée en vigueur conformément à l'article 43, alinéa premier, même pour les Etats qui l'auront postérieurement ratifiée, acceptée ou approuvée ou qui y auront adhéré

La Convention sera renouvelée tacitement de cinq ans en cinq ans, sauf dénonciation
La dénonciation sera notifiée, au moins six mois avant l'expiration du délai de cinq ans, au Ministère des Affaires Etrangères du Royaume des Pays-Bas Elle pourra se limiter à certains territoires ou unités territoriales auxquels s'applique la Convention.
La dénonciation n'aura d'effet qu'à l'égard de l'Etat qui l'aura notifiée La Convention restera en vigueur pour les autres Etats contractants

*Article 45*

Le Ministère des Affaires Etrangères du Royaume des Pays-Bas notifiera aux Etats Membres de la Conférence, ainsi qu'aux Etats qui auront adhéré conformément aux dispositions de l'article 38:
1 les signatures, ratifications, acceptations et approbations visées à l'article 37;
2 les adhésions visées à l'article 38;
3 la date à laquelle la Convention entrera en vigueur conformément aux dispositions de l'article 43;
4 les extensions visées à l'article 39;
5 les déclarations mentionnées aux articles 38 et 40;
6 les réserves prévues aux articles 24 et 26, alinéa 3, et le retrait des réserves prévu à l'article 42;
7 les dénonciations visées à l'article 44

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention

Fait à La Haye, le . . . . . 19 . , en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Etats Membres de la Conférence de La Haye de droit international privé lors de sa Quatorzième session

*Acte final*

*Article 44*

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it If there has been no denunciation it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period It may be limited to certain of the territories or territorial units to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States

*Article 45*

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following—
1 the signatures and ratifications, acceptances and approvals referred to in Article 37;
2 the accessions referred to in Article 38;
3 the date on which the Convention enters into force in accordance with Article 43;
4 the extensions referred to in Article 39;
5 the declarations referred to in Articles 38 and 40;
6 the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
7 the denunciations referred to in Article 44

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention
Done at The Hague, on the .. day of. ..... 19 . , in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

*Final Act*

**Application of the Rules**

*Article 1*

(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

**Commencement of Conciliation Proceedings**

*Article 2*

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate If he so elects, he informs the other party accordingly

**Number of Conciliators**

*Article 3*

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly

**Appointment of Conciliators**

*Article 4*

(1) (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;

(c) In conciliation proceedings with three conciliators, each party appoints one conciliator The parties shall endeavour to reach agreement on the name of the third conciliator

(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators In particular,

(a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties

**Submission of Statements to Conciliator**

*Article 5*

(1) The conciliator*, upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate The party sends a copy of his statement to the other party

(3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate

**Representation and assistance**

*Article 6*

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

**Role of Conciliator**

*Article 7*

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor

**Administrative Assistance**

*Article 8*

In order to facilitate the conduct of the conciliation proceedings, the parties or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person

**Communication between Conciliator and Parties**

*Article 9*

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings

* In this and all following articles, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

**Disclosure of information**

*Article 10*

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

**Co-operation of Parties with Conciliator**

*Article 11*

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

**Suggestions by Parties for Settlement of Dispute**

*Article 12*

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

**Settlement Agreement**

*Article 13*

(1) When it appears to the conciliator that there exists elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement**. If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement

**Confidentiality**

*Article 14*

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement

**Termination of Conciliation Proceedings**

*Article 15*

The conciliation proceedings are terminated:

(a) By the signing of the settlement by the parties, on the date of the agreement; or

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

** The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written declaration of a party to the other party and the conciliator if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration

**Resort to Arbitral or Judicial Proceedings**

*Article 16*

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights

**Costs**

*Article 17*

(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties The term "costs" includes only:

(a) The fee of the conciliator which shall be reasonable in amount;

(b) The travel and other expenses of the conciliator;

(c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;

(d) The cost of any expert advice requested by the conciliator with the consent of the parties;

(e) The costs of any assistance provided pursuant to articles 4, paragraph (2) (b), and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

**Deposits**

*Article 18*

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

**Role of Conciliator in other Proceedings**

*Article 19*

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

**Admissibility of Evidence in other Proceedings**

*Article 20*

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

**Model Conciliation Clause**

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force

(The parties may agree on other conciliation clauses.)

# APPENDIX M

*(See Page 31)*

*(Document 840-204/044)*

## JUDICIAL DECISIONS AFFECTING UNIFORM ACTS

## PRINCE EDWARD ISLAND REPORT

### *CHILD STATUS*

*Re D and S* 118 D.L.R. (3d) 369 (Ont. Div Ct.)

Section 10(1) of the *Children's Law Reform Act,* 1977, Ont, c 41 [equivalent of s.7(1) Uniform Act] provides that the court may give a party leave to obtain blood tests of such persons as are named in the order granting leave and to submit the results in evidence.

Section 10 does not give an unfettered discretion and an application must be supported by admissible evidence at least in affidavit form

In Manitoba, where the *Child Status Act* has not yet been enacted, a bequest to "grandchildren" in the absence of further description was held not to extend to illegitimate children of a son of the testator. Berlanger v. Pester et al. (Man. Q.B.) 1980 2 W W.R. 155.

### *CONTRIBUTORY NEGLIGENCE*

*Carl B. Potter Limited* v *Mercantile Bank of Canada* 112 D.L.R. (3d) 88 S.C.C.

This case involved consideration of subsection 1(1) of the *Contributory Negligence Act* R S N S 1967, c.54 [same Uniform Act]. Ritchie J. in a judgment concurred in by the other members of the court commented as follows:

> It was argued on behalf of the Bank that the word "fault" as employed in this statute connotes more than "negligence" in the accepted tortious sense of that word and is to be read as embracing a breach of trust such as that disclosed in the evidence in the present case. To this argument I am bound to say that in my opinion whatever extended meaning may be given to the word "fault" it must involve a breach of duty of some kind In the present case the relationship of Potter to the Bank was that of *cestui que* trust and trustee and I know of no authority for the proposition that a *cestui que* trust owes a duty to its trustee to ensure that the terms of the trust are observed. Accordingly, I cannot find here any duty on the part of the Potter Company to inquire into the internal accounting of the Bank or its dealing with trust monies

*Canadian Western Natural Gas Company Ltd* v *Pathfinder Surveys Ltd.* 12 Alta. L.R. (2d) 135

The respondent hired the appellant to do a survey of a proposed natural gas pipeline The appellant failed to stake a curve with the result that the contractor was forced to modify the angle and dig a new trench which was outside the easement area The respondent was compelled to relay the erroneous section.

HELD the fact that the respondent framed its action in contract rather than tort did not mean that he could thereby avoid having its claim reduced because of contributory negligence in its employees not noticing earlier that the pipeline was incorrectly laid.

The court could not be deprived of jurisdiction to arrive at an equitable result by the form of pleading chosen by a plaintiff.

The negligence fell within s.2(1) of the *Contributory Negligence Act* R S A 1970 c.65 [same Uniform Act].

## *CRIMINAL INJURIES COMPENSATION*

*Berlingieri* v *De Santis et al* 118 D.L.R. (3d) 167 (Ont C A )

Berlingieri's husband was killed by De Santis and she received compensation in the sum of $3,350 from the Board pursuant to the provisions of the *Compensation for Victims of Crime Act* 1971 Ont c 51. She subsequently commenced an action for damages under the *Fatal Accidents Act* and obtained a judgment for $46,405 No notice of the action was given to the Board as required by subsection 25(4) of the Act.

Subsection 25(2) of the Act [same Uniform Act] provides that the Board "is subrogated to all the rights of the person to whom payment is made to recover damages by civil proceedings in respect of the injury or death and may maintain an action in the name of such person . . . and any sum recovered by the Board shall be applied . in reimbursement of the Board"

HELD that the right given to the Board arises only if it has "maintained" the action and "recovered" an amount in the action which was not the fact in this case However, applying the equitable principle that the respondent should not be entitled to benefit from her breach of the notice requirements of the statute, the burden is on her to prove, on the balance of probabilities that had the Board been notified it would not have maintained the action. In the absence of such proof, the court must assume that the Board would have maintained the action and, accordingly, the Board is entitled to rely on the provisions of subsection 25(2) giving it priority of payment.

For discussion of the meaning of "victim" and "dependant" [s 1 Uniform Act] see *Re Theriault* 32 N B R. (2d) 306.

## *DEFAMATION*

*Frisina* v. *Southam Press Ltd. et al* 30 O R. (2d) 65 (Ont. High Court)

Subsection 5(1) of the *Libel and Slander Act* R S.O. 1970 c.243 [s 14(1) Uniform Act] requires the plaintiff before commencing action against a newspaper to give notice of the alleged libel

The plaintiff gave the required notice but subsequently sought leave to amend his statement of claim by adding claims for libels allegedly published in five earlier editions of the newspaper The plaintiff relied on s.6 [s 15 Uniform Act] which provides that where action is brought within the limitation period the action may include a claim for any other libel against the plaintiff by the defendant in the same newspaper within a period of one year before the commencement of the action.

HELD section 5 sets out the notice requirements and unless notice is given in accordance with section 5 no claim is maintainable. The notice requirements are not altered or overridden by the provisions of section 6.

## *EFFECT OF ADOPTION*

*Re Podolsky and Podolsky et al* 111 D.L.R. (3d) 159 (Man. C.A.)

The testator died in 1979 and there was a contest between his two natural daughters who were adopted in 1970 and his mother as to who was entitled to his property In 1970, s.96 of the *Child Welfare Act* R.S.M 1970 c 80 specifically provided that "an adoptive child does not by reason of the adoption lose the right to inherit from his natural parents". In 1974 the Act was amended and a provision similar to s.1(1) of the *Uniform Effect of Adoption Act* was substituted for section 96.

HELD the Act does not have the effect of disentitling the adopted children from inheriting from their natural parents.

The Uniform Act does not directly address the point of "right of inheritance" from

the natural parent and there is some doubt if the result would be the same on construction of the language of the Uniform Act

## *EVIDENCE*

*McLeod* v *Macleod and Macleod* 22 B.C.L.R. 51 (B.C S.C.).

Section 11 of the *Evidence Act R.S.B C 1960 c 134* [same s 13 Uniform Act] provided that corroboration is an essential element in respect of any matter occurring before the death of a deceased person.

The section was repealed in 1976. The deceased made certain payments to the defendants and the only evidence as to his intent in making the payments was given by the defendants. The issue was whether the repeal of section 11 revived the common law doctrine requiring corroboration in such cases

HELD it did not Reliance was placed on s.30(a) *Interpretation Act* 1974 B.C. c.42 [s.31(a) Uniform Act] and *R v Camp* (1978 Proceedings p 179)

## *FAMILY SUPPORT*

*Re Glover* v. *Glover et al (No. 2)* 113 D.L.R. (3d) 174 (Ont. C.A.)

The wife on her petition for divorce was awarded custody of the children of the marriage The husband disappeared and took the children with him. At the divorce hearing the husband's brother-in-law testified that he had received long distance calls from the husband.

Pursuant to section 26 of the *Family Law Reform Act* [same s 14 *Uniform Family Support Act*] which enables the court to order any person or public agency to provide particulars of the address of a person from the purpose of enforcement of a court order, the wife applied for an order directing Bell Canada to disclose the name and address of the subscribers to and from whom calls to the brother-in-law were made

HELD the order would affect the confidentiality of persons who are strangers to the action, the section does not permit an order requiring the disclosure of any information that Bell Canada may have which may or may not, upon investigation, be found to include some information as to the address

Per Wilson J A , dissenting, the order may be made not under s 26 but under the inherent jurisdiction of the court to maintain the integrity of its own process and punish for contempt.

Quaere if an order in more restrictive terms could be made under section 26.

*Matson and Matson* 117 D.L.R. (3d) 665 (Ont. S.C.)

Although a solicitor swears that his knowledge of his client's whereabouts was received in professional confidence, an order pursuant to the *Family Law Reform Act*, 1978 (Ont.), c.2, s 26, may be made compelling the solicitor to disclose the client's whereabouts in aid of execution of a maintenance order where the applicant demonstrates evasion of the maintenance order on the part of the respondent upon whose behalf the privilege is claimed.

*Stere* v. *Stere et al., Herron, Third Party* 116 D.L R 703 (Ont H.C.)

In a divorce proceeding the respondent husband, against whom a claim for support of an infant was made, sought to issue a third party notice against the petitioner's first husband and father of the child. Both the respondent and the third party fell within the definition of parent in the *Family Law Reform Act* and had an obligation to support the child [s 3 Uniform Act].

HELD the respondent was not entitled to invoke the third party's obligation in third

party proceedings but the obligation of the third party was simply a factor to be considered in determining the sum the respondent might be called upon to pay.

For analysis of the concept "in loco parentis" and the meaning of "step-parent" see *Re Director of Child Welfare and L* (Alta C.A.) 118 D.L.R. (3d) 133

## *FOREIGN JUDGMENTS*

*Dovennuehle* v. *Rocca Group Ltd.* (1981), 34 N.B.R. (2d) 444 (N.B. C A.)

The appellant had appeared in the court of Illinois to protest the jurisdiction of that court to hear an action for a claim of unpaid services made by the respondent. Subsequently, default judgment was entered in favour of the respondent and the respondent started an action to enforce the judgment in New Brunswick under the *Foreign Judgments Act* R.S.N.B. 1973 c. F-19. The appellants put forth the defence that under section 5 of the Act [s.3 Uniform Act] the foreign court of Illinois did not have jurisdiction to hear the matter because the defendant had not voluntarily submitted to the jurisdiction. The appellants appealed the decision of The Court of Queen's Bench of New Brunswick which found that even though the appellants had appeared to protest, such appearance was still voluntary submission and there was no defence.

The New Brunswick Court of Appeal held that the Act must be interpreted with regard to the plain meaning Since the appellant had no other process available to protest the action except to make an appearance, the motion to quash jurisdiction could not be interpreted as being made without protest as contemplated by the Act and that the appellant's appearance to protest did not amount to voluntary submission.

## *INTERPRETATION*

*Regina* v. *Philips Electronics Ltd* 116 D.L R. (3d) 298 (Ont. C.A.)

The accused, a manufacturer of electronic equipment was tried on two counts of resale price maintenance contrary to s.38(1)(a) of the *Combines Investigation Act* R.S.C. 1970, c. C-23 The section provides that "no person who is engaged in the business of producing or supplying a product shall . . ., by agreement, threat, promise, or any like means, attempt to influence upward, or to discourage the "reduction of, the price at which any other person supplies or offers to supply a product " The issue was whether the publication of an advertisement listing stores where a particular product could be purchased and showing the price fell within the phrase "any like means".

HELD Jessup J.A. dissenting, it did not

The case is significant for the acceptance of the proposition (arguably obiter) that while section 11 of the *Interpretation Act* R.S C. 1970 c I-23 [s 9 Uniform Act "every enactment shall be construed as being remedial"] applies to penal statutes, the application of the common law principle requiring strict interpretation of the provisions of a penal statute is not inconsistent with s.11.

For an example of the adoption of a remedial construction in relation to planning legislation see *Re Cal Investments Ltd et al* and *Capital Regional District* 117 D.L.R (3d) 491.

*Regina* v. *L* 31 O.R (2d) 237 (Ont. C.A.)

The accused committed an offence on his 16th birthday and an issue arose as to whether the juvenile court had jurisdiction to try him. Subsection 25(9) of the *Interpretation Act* R.S.C. 1970, c. I-23 [s. 23(9) Uniform Act] provides that a person does not attain a given age until the anniversary of his natal day begins. Subsection 3(1) of the Criminal Code provides that a person shall be deemed to have been of a given age when the anniversary of his birthday, the number of which corresponds to that age, is fully completed, and until then to have been under that age

HELD the *Interpretation Act* provision applies "unless a contrary intention appears" and the provision of the Criminal Code as applied by the *Juvenile Delinquents Act* constitutes such contrary intention. The Juvenile court therefore has exclusive jurisdiction.

The opposite conclusion was contemporaneously reached at first instance in *Re Regina and Allan* 1981, 1 W.W.R. 344.

*Regina* v. *Budget Car Rentals (Toronto) Ltd* 31 O.R (2d) 161 (Ont C A.)

An information charged the defendant that it was "the owner of a vehicle which was parked unlawfully" contrary to a City of Toronto bylaw.

The *Municipal Act* provides that municipalities may pass bylaws respecting the use of parking meters and that "the owner of the vehicle is also liable" to any penalty provided under the bylaw

The statute did not contain any express statement that the owner could be charged and convicted of an offence.

HELD the principle of interpretation that penal statutes should be construed strictly means that where a person is charged with an offence created by a statute, his conduct must fall clearly and unmistakeably within the kind of conduct proscribed by the statute. Where a statute is open to two equally reasonable interpretations, the accused should have the benefit of the interpretation which will not subject him to a penalty. To interpret the words "liable to any penalty provided under a bylaw" as creating an offence by the owner is consistent with the object of the legislation, whereas to interpret those words as not creating an offence would make the bylaw unenforceable for all practical purposes. The latter interpretation is not an equally reasonable one. Accordingly, the owner can be convicted of an offence where the vehicle is illegally parked by another and can be made liable for the fine imposed.

*Potter Distilleries Ltd* v *The Queen in Right of British Columbia et al* 111 D.L R (3d) 167 (B C S C )

A provision in an amending statute repealing an unproclaimed section of the principal statute and substituting a new section therefor, does not automatically proclaim the unproclaimed section, even though the amending statute is itself proclaimed In order for the amendment to become effective, the repealed section must first be proclaimed.

*Provincial Bank* v. *Daigle* (1980) 31 N.B.R. (2d) 236 (N B Q.B T.D.)

In accordance with s.28 of the *Creditor's Relief Act*, after the sheriff, defendant, had given notice of the levy of money under an execution and the amount to be distributed rateably amongst all the execution creditors and other creditors whose writs were in the hands of the sheriff at the time of the levy, the sheriff circulated a notice to the creditors of the distribution. He subsequently gave notice of another list which gave priority to the accounts in relation to the Federal Income Tax and Provincial Sales Tax and Income Tax, which priorities had not been included in the first plan. Both these accounts exhausted all the money levied by the sheriff

The execution creditors took action to compel the sheriff to distribute the money in accordance with the first plan of distribution The creditors did not argue that the Crown did not have priority, rather, the creditors argued that the sheriff was bound to distribute the money levied in accordance with the first plan.

The court held that under s 32 of the *Interpretation Act* R.S.N.B. 1973, c. I-13 [s.14 Uniform Act] the *Creditor's Relief Act* cannot limit the Crown's prerogative unless there is express language limiting the right of the Crown. The court held that although the sheriff's actions gave rise to some form of estoppel, the Crown's prerogative could not be compromised by the error or ignorance of law of the sheriff.

For a discussion of "shall" see *Re Westcliffe Management Ltd* (1980), 30 N.B.R. (2d) 264, (N.B.Q.B.T.D.)

For a discussion of the effect of repeal on accrued rights [s.31(c) Uniform Act] see *Re Chafe and Power* 117 D.L.R. (3d) 117.

Also for an interesting example of the significance of a comma see *Cardinal et al* v. *The Queen* 109 D.L.R (3d) 366

## *LIMITATION OF ACTIONS*

*Lutz* v *Kawa* 112 D.R. (3d) 273 (Alta. C A.)

A fence was erected along what was assumed to be the dividing line between two lots The plaintiff claimed title by adverse possession. The defendant had first occupied the neighbouring lot as a beneficiary under a will but subsequently made payments under an agreement to purchase and acquired title less than 10 years prior to the commencement of the action.

HELD section 18 of the *Limitation of Actions Act* R.S.A 1970, c. 198 [same s.15 Uniform Act] requires that time run against the registered title holder for 10 years and as the defendant filed her defence and counterclaim within 10 years of her acquisition of title as a purchaser for value, the plaintiff's adverse possession was insufficient to deprive the defendant of her title.

## *PERSONAL PROPERTY SECURITY*

*Commercial Credit Corp Ltd* v. *Harry D. Shields Ltd et al.* 29 O.R (2d) 107

Section 68 of the *Personal Property Security Act* [s.69 Uniform Act] which provides that where there is a conflict between a provision of that Act and another Act, the *Personal Property Security Act* prevails, does not apply in a contest between a chattel mortgagee and the landlord as to priorities over moneys raised on the sale of the tenant's chattels.

Where the landlord in exercise of his rights of distress takes possession of the tenant's chattels, he enjoys a lien arising by operation of law and section 3(1)(a) of the Act [same Uniform Act] provides that the Act does not apply to a lien given by statute or rule of law

The landlord therefore has priority over the chattel mortgagee.

*Trans Canada Credit Corp Ltd.* v. *Bachand et al* 117 D L.R. (3d) 653 (Ont. C A.)

Subsection 7(1) of the *Personal Property Security Act* R S.O. 1970, c 344 [same Uniform Act] provides that a security interest perfected in another jurisdiction before the collateral is brought into Ontario "continues perfected in Ontario for 60 days and also thereafter if within the 60-day period it is perfected within Ontario".

The appellant claimed that the words "continues perfected in Ontario for 60 days" conferred an absolute protection even though his financing statement was not filed within the period.

The respondent purchased the vehicle within the 60-day period and without notice of the security interest of the appellant.

HELD that subsection 7(1) does not protect an extraprovincial security holder against a person purchasing the collateral in Ontario within the 60-day period where the security holder fails to perfect its interest within that period. To hold that the 60-day protection is absolute without the need for subsequent action by the security holder would cause injustice to an innocent purchaser.

## *PRESUMPTION OF DEATH*

*Re Larsen* 18 R F L. 14 (B.C S.C.)

The wife applied for and received an order in 1963 that her husband be presumed dead for the purpose of her remarriage. The wife remarried twice since the 1963 order.

The husband applied pursuant to subsection 3(3) of the *Survivorship and Presumption of Death Act* R.S.B.C 1979, c.398 [s.2(3) Uniform Act] for an order revoking the 1963 order

HELD that although revocation of the 1963 order would invalidate the wife's subsequent marriages, the husband's death could be presumed only until it was shown that he was not in fact dead The order was revoked.

*Freeman* v. *Crown Life Insurance Company et al.* 1981 C.I.L R. 5074 (Ont H.C.)

The applicant sought a declaration that the insured be presumed dead pursuant to section 180 of the *Insurance Act* R.S.O. 1970 c.224. After a marriage of twenty years the insured, who had enjoyed a chequered business career, disappeared in 1970 just prior to a scheduled application for discharge from his bankruptcy Inquiries by the applicant, relatives, government agencies and the respondent insurers failed to produce evidence of the insured being alive.

HELD in view of his family loyalty if he were alive his wife or children would have heard from him.

Applying the reasoning in *Re Harlow* 1977, 13 O.R. (2d) 760 [1977 Proceedings p 339] the court declared that the insured was presumed to have died before 31 December 1977.

## *PROCEEDINGS AGAINST THE CROWN*

*N B Tel* v. *Prov of N B.* (1981) 34 N.B.R. 63 (N.B. C.A.)

Plaintiff's action against the Ministers of Justice, Municipal Affairs and Finance was based on the invalidity of assessment legislation and certain assessments and taxes and was held to be an action against the Crown. The defendant argued that because the action was not one enumerated under s 3 of the Act [similar to s.2 of the Uniform Act] no proceedings could be taken against the Crown The court held that the words of s.10 [s 10 of the Uniform Act] "In proceedings against the Crown", implied that the Act was to apply to all actions against the Crown and should not be narrowly construed to those actions enumerated in section 3.

## *RECIPROCAL ENFORCEMENT OF JUDGMENTS*

*Hill* v. *Bank of Montreal* 14 Alta L.R. (2d) 78 (Alta. Q.B.)

The applicant brought an application to set aside the registration of a default judgment obtained against him in Ontario. He was resident in Ontario when the cause of action arose and he was served with a copy of the statement of claim. He claimed that he had been out of the province at the time of the default judgment and that he had a defence to the action.

HELD Application dismissed. The applicant was resident in Ontario when he was served with a statement of claim. The relevant time was when the cause of action arose. The applicant's absence from the country when the respondent obtained default judgment was irrelevant, as the words "original judgment" in s.3(6) of the *Reciprocal Enforcement of Judgments Act* R.S A 1970, c. 312 ["judgment" in s.2(6)(g) of Uniform Act] did not mean the cause of action.

## *RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS*

*Re Pointmeier and Pointmeier* 116 D L.R (3d) 559 (Alta. Q.B.)

The *Reciprocal Enforcement of Maintenance Orders Act* R S A 1970, c.313 [same as 1973 version of Uniform Act] is valid and operative provincial legislation. The doctrine of paramountcy does not apply, notwithstanding the *Divorce Act,* R.S.C 1970, c. D-8, s.19(1)(d) as the reciprocal enforcement legislation validly provides for the

enforcement of orders from reciprocating states outside of Canada. Provision for the enforcement of an extraprovincial decree *nisi* granting maintenance, although duplicative of the *Divorce Act,* is operative because of its inseverable combination with the enforcement of non-Canadian orders. The provincial legislative scheme for the reciprocal enforcement of maintenance orders will be workable only if it is framed in terms broad enough that it will in some cases apply to orders made under the *Divorce Act.* Accordingly, jurisdiction is concurrent Thus, a party seeking to enforce an extraprovincial decree *nisi* granting maintenance has the option of proceeding under either federal or provincial legislation.

*Gould* v. *Gould* 1970, 1 W.W.R. 479 which is discussed at page 228 of the 1980 Proceedings not followed Note that the point in *Gould* as to whether a province is a reciprocating state is clarified in the definition of "reciprocating state" [clause 1(1) of the 1979 Uniform Act] by the addition of the words "and includes a province".

To the same effect is *Brewer* v *Brewer* (N B. C.A.), not yet reported.

The New Brunswick Court of Appeal found that the phrase "made against any person by any court in any reciprocating state," appearing in s.2 [s 3 of the Uniform Act] was sufficient to embrace a maintenance order contained in a decree of divorce issued by a court of another province The word "state" was held to be sufficiently broad to include the concept of "law district" and because the provinces have long been recognized and accepted as separate and distinct law districts, provinces were "reciprocating states".

The court further held that even though orders made under the *Divorce Act* have immediate effect throughout Canada under s.14 of the *Divorce Act,* s 2 of the *REMO Act* does not have the effect of limiting that section Rather s 14 of the *Divorce Act* gives immediate effect to any order and s 2 of the Reciprocal Enforcement of Maintenance Orders provides a vehicle by which enforcement of legal effect may be carried out The enforcement mechanism under this section and the Divorce Court Rules are not substantive in purpose and therefore not in conflict with s.14 of the *Divorce Act*

The respondents also argued that the *Provincial Act* was in conflict with the *Divorce Act* and by the doctrine of paramountcy must be inoperative. The court held that because the language of s.15 of the *Divorce Act* pertaining to enforcement was permissive, the procedure under that Act could not be interpreted to be exclusive and therefore the alternative procedures under the *N B Reciprocal Enforcement Maintenance Orders Act* were valid

However, the court dismissed the appeal on the grounds that the order pertained to enforcement of payment of arrears under the maintenance order Because of the inconsistency between the Divorce Rules which limited payment of arrears to "any sums which became due during the preceding twelve months" and the *REMO Act* which had no restrictions, the court held that the inconsistencies affect the respondent's substantive rights and therefore the *REMO Act* is inoperative where a claim is made for a judgment under the *REMO Act* for arrears of payments in excess of twelve months.

## *WAREHOUSEMEN'S LIEN*

*Re Dutton Pacific Forest Products Ltd* 117 D L R. (3d) 507 (B.C. S.C.)

The petitioner applied to the court for a declaration that the lien granted by subsection 2(1) of the *Warehouse Lien Act* R S.B.C 1979 c.427 [same Uniform Act] is a general lien and is not restricted to debts arising out of the warehousing of goods currently in the possession of the warehouseman.

HELD the lien extends only to money owing in respect of the goods currently in the possession of the warehouseman, and not to unpaid charges in respect of goods previously stored.

Clear language is necessary to create a general lien.

## *WILLS*

*Chester* v. *Baston et al.* 118 D.L.R. (3d) 323 (Sask. C.A )

The validity of a will is to be determined by the provisions of s 7(1) of the *Wills Act* R.S.S. 1978, c. W-14 [substantially same ss. 3 & 4 Uniform Act] which merely requires that the testator's signature shall be attested by two witnesses in the presence of the testator, but does not require that both witnesses attest the will in the presence of each other. Subsection 38(1) of the *Surrogate Court Act* R.S.S. 1978, c. S-66, which provides for approval of due execution of a will by means of the affidavit of one of the witnesses which states that the witnesses attested the will in the presence of each other, only outlines one procedure to be followed in proving due execution of the will. It does not impose an additional requirement upon due execution. In any event, where the will is proved in solemn form and the evidence of one of the witnesses and of the beneficiary shows that the will was attested by both witnesses in the presence of the testator and in the presence of each other, even though the other witness does not recall the details of the execution of the will, there is a presumption of due execution.

*Re McNeill* 109 D.L.R. (3d) 109 (Nfld. S.C.)

A testatrix, in a home-drawn holograph will, divided the residue of her estate equally between brothers and sisters. Subsequently, a brother and sister predeceased her. Thereafter the testatrix made a codicil in which she gave her deceased brother's share to that brother's only son. She did not make any provision for her deceased sister's only daughter. Section 19 of the *Wills Act* R.S.N 1970, c.401 [same as s 32 Uniform Act] provides that, absent a contrary intention, where a beneficiary, being a brother or sister of a testator, predeceased him, leaving a child or children living at the testator's death, the gift to that beneficiary does not lapse, but passes directly to the child or children. On an application to determine whether the reference to the nephew, but not to the niece, showed a contrary intention within the meaning of the section. HELD, it did not.

The mere omission of a reference to the daughter of the testatrix's deceased sister did not constitute a contrary intention. Accordingly, she was entitled to share in the estate.

*Re Rynard* 31 O.R. (2d) 257 (Ont. C.A )

S 31 of the *Wills Act* R.S.O. 1927, c 149 [equivalent to s.26(a) Uniform Act] which provides that the word "heirs" in a devise meant, absent any contrary intention, the persons to whom the land would descend on an intestacy and not the testator's whole line of issue, does not have the effect of impliedly repealing the rule in *Shelley's* case, but merely negates the principle of primogeniture.

## APPENDIX N

*(See Page 31)*

## JUDICIAL DECISIONS AFFECTING UNIFORM ACTS

NOVA SCOTIA REPORT

### *BILLS OF SALE*

*Re Smith's Estate and Canadian Acceptance Company Limited* (1980), 40 N.S.R. (2d) 707 (N.S.S.C.T.D.).

A chattel mortgage had been filed in the Registry of Deeds after more than thirty days had passed from the date of its execution.

Subsection 5(1) of the *Bills of Sale Act* provides that a bill of sale, including a chattel mortgage, must be filed within thirty days after it has been executed, if no delivery of possession of the chattel is made to the grantee or mortgagee when the bill of sale is executed.

The trustee in bankruptcy of the mortgagor applied for a declaration that the chattel mortgage was void as against the trustee. The application was made after the mortgagor defaulted and the mortgagee, as a result, had seized the chattel.

HELD that the word "void" should not be interpreted as meaning "voidable" and the chattel mortgage is void as against the trustee notwithstanding that the chattel was seized before this application was made.

### *CONTRIBUTORY NEGLIGENCE*

*Carl B Potter Limited v Mercantile Bank of Canada* (1980), 41 N.S.R (2d) 573 (Can. Sup. Ct )

Here, the Court held that the word "fault" in Section 1 of the Act extends only to circumstances involving a breach of duty.

### *TESTATORS FAMILY MAINTENANCE*

*Adams and Graves v Perks Estate and Perks* (1980), 41 N.S.R. (2d) 14 (N.S.S.C.T.D.).

HELD: (1) In an application under the *Act* it is not the function of a court to rewrite a will to conform with what the court may feel is a just disposition of the assets of an estate;

(2) In providing that any services rendered by the defendant could be considered by a court when making an award, the Legislature intended to include services on which a specific money value could not be placed.

*Moxon v Moxon's Estate* (1981), 43 N S.R. (2d) 116 (N S.S C.T.D.).

Here, the Court adopted the following test, laid down in *Bosche v. Perpetual Trustee Company Limited* [1938] All. E.R. 14 (P.C.), in determining whether the testator has failed to provide "proper maintenance and support":

(a) The actual need of the dependant;
(b) the relation of the amount of maintenance to the size of the estate; and
(c) the moral claim of the dependant.

*Coolen v Coolen and Wilson* (1981), 43 N.S R (2d) 67 (N.S.S.C App. Div.).

Here, the trial judge struck out a provision in a will which devised a life interest in a residence property to the testator's widow and the remainder to one of his children. The

order, in effect, purported to amend the will to provide that the residence property go to the widow absolutely.

HELD, on appeal from this order, that the trial judge did not have power to make the order A judge has no jurisdiction to rewrite a will in an attempt to put a dependant in a position to meet a need which may or may not arise in the future, rather than to meet a present need.

The Court also held that since all the children of the testator were aware of the widow's application, the judge had jurisdiction to hear it, notwithstanding that all interested parties had not received the formal notice of the application required under Section 14 of the *Act* The Court said that the object of Section 14 is obviously to ensure that all dependants be made aware of their right to apply and be heard.

## APPENDIX O

*(See Page 32)*

*(Document: 840-204/028)*

# REPORT OF THE SPECIAL LIAISON COMMITTEE

**of the**

# NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

**and the**

# UNIFORM LAW CONFERENCE OF CANADA

PREFATORY NOTE

In 1979 a joint Committee of the Canadian Bar Association and the American Bar Association presented a report on "The Settlement of International Disputes Between Canada and the United States of America" to the Annual Meetings of both Bar Associations. This report was sponsored by the International Law Section of the ABA and the Constitutional and International Law Section of the CBA, and developed from joint discussions designed to promote world peace through law. The report has a broad compass, but concentrates on two major areas where the committee felt its work could have a real impact: the equalization of rights and remedies of citizens in Canada and the U.S.A. affected by pollution emanating from the other jurisdiction, and the arbitration of legal disputes between the Canadian and American governments. The Committee drafted bilaterial treaties on both these topics.

The ABA-CBA Committee's report suggested that a "liaison group" be established between the National Conference of Commissioners on Uniform State Laws and the Uniform Law Conference of Canada, the organizations dedicated to the promotion of uniformity of law in the two countries. This group's mandate would be to review and co-ordinate legislation on matters of common interest; it might also draft model or uniform legislation. The two Conferences had in the past maintained contact through representative delegates attending either conference as delegates. This informal contact was supplemented when in the summer of 1979 the two Conferences accepted the ABA-CBA Committee suggestion and established a liaison committee. Since then the Committee has met in Toronto, Chicago, Denver and Ottawa discussing the drafting of a Uniform Reciprocal Transboundary Pollution Remedies Act.

For many years the problem of pollution, primarily of our air and water, has received significant media attention. Most people are aware of the deterioration of our environment. Lakes, which were once beautiful and available for all sorts of uses, in many instances are now all but dead; and many rivers are now little more than open sewers. Persons upstream, of course, may discharge their sewage into a river without significant local harm, but as the water flows down toward the sea, persons downstream have most serious and increasing problems with respect to pollution.

The same general situation exists with respect to our air. The prevailing westerly winds will normally move air pollution to the east, and the people to the east of wherever the pollutants are put into the air, experience increasing difficulties with the quality of their air. The "acid rain" controversy today is a primary example of this kind of problem.

Acid rain is a very complex phenomenon but in essence it occurs when sulphur and nitrogen oxides, emitted by smelters or coalfired electricity plants, rise into the upper atmosphere, combine with water vapour, and fall to earth as rain or snow containing dilute sulphuric or nitric acid. When emissions in the form of smoke rise into the upper atmosphere, they may be transported over very considerable distances, often crossing state or provincial, and even international, boundaries. Pollution is no respecter of artificial lines on maps.

There are a number of ways of tackling the problem. Direct regulation at state, provincial or federal levels through legislated standards enforced by government prosecution, is one approach to the problem. We do have such legislation though it is in many areas deficient and incomplete, and often difficult to enforce. Because of the vested interests involved it is not easy to pass a strong bill with teeth in it. Another approach is to rely on common law tort actions. Here there are some practical and doctrinal barriers that make it difficult to bring private civil actions in the courts to enjoin alleged polluters or recover damages from them for pollution caused by them.

It is a generally recognized rule of law in the Anglo-American tradition that actions for damages for trespass, nuisance or negligent injury in respect to lands located in another state are local actions and may be brought only in the state where the land is situated. This rule has been criticized, but most courts still follow it. Its significance is that unless the alleged tortfeasor can be "found" in the state where the injury took place, an action for damages is for all intents and purposes precluded.

When only states of the United States are involved the increasing number of state long-arm statutes minimizes the significance of this rule, since their valid jurisdiction over the defendant is obtained under a long-arm statute and judgment rendered, and that judgment is entitled to full faith and credit within the Unites States. But if there is no long-arm statute, or if it is not as broad as it might be, and the prospective defendant is not "found" within the jurisdiction where the injury occurred, then the plaintiff, for all practical purposes, is without a forum. The problem can become acute in an international setting. Suppose that on the northern shore of Lake Ontario there is a manufacturing plant which regularly emits highly toxic materials into the air and these are carried by the prevailing winds across Lake Ontario and into the State of New York. There forests and lakes are severely damaged. What can a person in New York, who is damaged, do about it? The Canadian courts will probably not entertain the action because of the rule in *British South Africa Co. v. Companhia de Mozambique* [1893] AC 602 (H.L.). The New York State Courts could entertain the action, but would they be able to acquire personal jurisdiction over the Canadian defendant in order to permit the action to proceed? Under the New York State long-arm statute perhaps it could; and perhaps New York would reduce the claim to a money judgment. But no Canadian court would be bound by the doctrine of full faith and credit, and the chances are great that a judgment of a United States court reached upon a long-arm statute would not be honored by a Canadian court.

In *British South Africa Company v. Companhia de Mozambique*, the House of Lords decided that only the courts of a jurisdiction where an immovable is situated can adjudicate upon its title. An English court thus had no jurisdiction to try a damage action for trespass to land situated abroad. Courts in Canada have extended this rule to an extreme. Dealing with an action in New Brunswick for damages to Quebec land caused by the negligent blocking of an interprovincial river, Chief Justice Baxter of New Brunswick stated "whether title to land comes into question or not appears to be immaterial. The moment it appears that the controversy relates to land in a foreign country our jurisdiction is excluded". Applying this rule to transboundary pollution, it would prevent an American citizen from suing in Canadian courts for damage caused by a Canadian polluter, if the controversy relates in any way to land. The same obstacle for Canadians is created in the United States by the "local action rule", established in *Livingston v. Jefferson* 15 Fed Cas. 660 (No. 8411) (cc D. Va. 1811).

This bill is designed to eliminate this particular problem. Whether the pollution originated in Ontario or Ohio, a New Yorker injured in New York thereby, would be entitled to go into a Canadian court or an Ohio court and maintain an action for damages for injury to New York land. In other words this proposed statute abrogates the rules in *Livingston v. Jefferson*, and *British South Africa Co. v. Companhia de Mozambique* which many believe to be anachronisms in any event.

The basic thrust of reform is to jettison these rules and provide equal access for the victims of transfrontier pollution to the courts of the jurisdiction where the contaminant originated. As Steven McCaffrey puts it, "the mere existence of a political boundary line should prevent neither the "upstream" state from considering the transfrontier effects of an activity, nor the "downstream" state from having an input into the decision-making process concerning the permissibility of that activity. Nor should the boundary line constitute an impediment to victims of transfrontier pollution seeking redress in the same country".

The proposed statute also provides that in the event that suit is brought in the province or state where the alleged pollution actually originated, then the local law of that state as distinguished from its whole law, including conflict of laws rule, shall apply. This means that an alleged polluter sued in the state where the alleged pollution originated is governed by the substantive laws of that jurisdiction. Insofar as the courts of that state are concerned, he has one standard to meet.

Of course, if service of process is achieved in the state where the pollution actually caused harm, then that state would be free within constitutional restraints to apply either its own law or the law of the state where the alleged pollution occurred. So total uniformity and predictability are not established, but at least an alleged injured party will know when he chooses a particular court what law will be applied.

The following notes explain the draft provisions:

*Section 1(1)* The definition of jurisdiction performs a number of functions. It enables the act to apply to interstate and inter-provincial pollution actions, as well as actions involving pollution spanning the U.S./Canada international boundary. The Act does not apply to U.S./Mexico transboundary pollution or to any other nation. The reciprocal action of the Act is achieved by section 1(1) providing that both the "polluting" and "polluted" jurisdictions must have enacted "this or a substantially similar reciprocal law" in order for the Act to apply. This type of threshold test has posed no problems for the

American courts. However, in Canada it is usual under reciprocal legislation for provincial governments to designate lists of reciprocating states by regulation, where it is satisfied that reciprocity exists. Accordingly section 7(b) permits this procedure to be followed. It is possible that section 1(1) might be used in Canadian courts to determine whether a particular state is a reciprocating jurisdiction, if the regulation has not been amended in a timely fashion; it may also be quite a burden for some jurisdictions to conduct the necessary research to monitor the legislation of the various states and provinces.

*Section 1(2)* Self-explanatory standard wording of NCCUSL. In addition, if the Attorney General or other official of the state or province where the injury occurred can bring an action with respect to environmental injury, then the Attorney General of another state injured by pollution or threatened with injury, should also be able to bring a similar action in the state where the pollution originated.

*Section 2* This section and section 3 form the main operative provisions of the statute. It should be noted that the statute is not restricted in its scope to civil trials, but also extends to other proceedings concerning environmental injury or threatened injury. A more difficult issue arises in a situation where a harmless product "X" is produced in jurisdiction A, processed into toxic substance "Y" in jurisdiction B, where through negligence it escapes and is transported to jurisdiction C. Though the product is initially from A, the tort occurs at B, and it would seem more appropriate for an action to be brought in B's courts for the damage in C, assuming B is a reciprocating state. The problem becomes more difficult if the substance is not transformed from "X" into "Y", but is the same substance throughout: does the pollution then come from A or B within the meaning of section 2?

*Section 3* This section equates the rights of an extra-jurisdictional pollution victim to those of a victim who is a resident of the jurisdiction. It ensures that the actual or potential victim of transfrontier pollution will have a remedy in the courts of the jurisdiction where the pollution originated, if a victim residing in that jurisdiction would have had a remedy in the case of pollution caused locally.

*Section 4* This section determines that the lex forum will apply in actions brought under the Act.

*Section 5 and 6* These sections clarify that the Act is designed to provide equality of access to court for non-residents and that the Act in no way diminishes existing rights.

*Section 7* Two alternative drafts are provided to deal with the question of sovereign or crown immunity, and to ensure that the doctrines will treat extra-jurisdictional actions in the same way as actions brought by residents.

*Section 7(b)* establishes a procedure for Canadian jurisdictions to provide an authoritative list of reciprocating jurisdictions. It has also been discussed under section 1(1).

*Section 8, 9 and 10* Self-explanatory.

CONCLUSION

The National Conference of Commissioners on Uniform State Laws has circulated working copies of the drafts to interested organizations for comments. During the coming year, further meetings will take place, and the draft revised in the light of comments from the two Conferences and interested organizations.

At this time we would like to express our appreciation and thanks to our colleagues from the National Conference of Commissioners on Uniform State Laws. We look forward to continuing this most stimulating and productive form of co-operation during the coming years.

R. S. G. Chester
Co-Rapporteur
Joint Liaison Committee

July 23, 1981

## APPENDIX P

*(See Page 32)*

*(Document 840-204/062)*

### Report on Product Liability

At the 1980 meeting of the Uniform Law Conference the following resolution was adopted:

> New Brunswick assisted by Saskatchewan, Manitoba and Ontario undertook to review all Canadian legislation, case law and the reports of the Law Reform Agencies, to consider the feasibility of uniformity in this field, and to report thereon to the 1981 Annual Meeting.

After the meeting, British Columbia expressed the desire to be included as well in the Project.

While the scope of "product liability" as a legal concept has not precisely been defined, generally the term is used to express the liability that attaches in respect of the manufacture, sale or distribution of a defective product.

Until recently, this liability was governed in Canada by sale of goods legislation and by the principles of common law and civil law. In common law, liability either flowed from a contractual relationship or was imposed on the basis of the law of torts. In civil law, a roughly analogous situation obtained.

Within the last few years, however, legislation has been passed in New Brunswick, Saskatchewan and Quebec altering the former basis of the law respecting product liability. All three provinces have enacted consumer protection legislation based on contractual principles. This legislation has eliminated the restrictive aspects of contract law in order to provide wide protection both with regards to the class of persons protected and the recoverable losses. It has also limited the circumstances in which one can disclaim responsibilities for losses.

As well, New Brunswick has provided for strict liability in tort for consumer losses in cases in which there is no contract. This right has been limited to injuries caused by defective products that are "unreasonably dangerous". In adopting this approach, New Brunswick has provided remedies for any person who, on the basis of reasonable foreseeability, will come into contact with the product for losses caused by defects in the product. It has allowed for the streaming back of liability for consumer losses to the supplier who caused the problem

in the first place. As the Act only pertains to consumer protection, protection is only afforded with respect to the suppliers of consumer products.

The Ontario Law Reform Commission, on the other hand, has recommended that strict liability should be imposed on all suppliers of defective products for personal injury and property losses suffered in a non-business capacity, regardless of any contractual relationship or the existence of consumer aspects. Rather than relying on contractual principles for recovery, the Commission would provide compensation for losses by extending existing tort principles.

It is evident from the existing legislation and from recommendations of the Law Reform Commissions (summarized in greater detail in the background paper circulated with this report) that there is no consensus as to how best to impose liability with respect to defective products. While there is agreement that certain persons in certain situations should be liable strictly (without the existence of fault) in relation to certain products, differences arise in relation to all or any of the following issues:

1. What kinds of products should give rise to strict liability?
2. Upon which persons in the chain of production and distribution should strict liability be imposed?
3. Which classes of persons should be protected by strict liability?
4. What kinds of losses should a manufacturer, or other person, be held strictly liable for?
5. What limitation periods should apply?
6. Should the manufacturer, or other person, be held accountable according to the standards in place at the time of manufacture or at the time of injury?
7. Should strict liability be imposed for defects that are disclosed?
8. Should contributory negligence be taken into account in imposing strict liability?
9. Should contracting out of liability be permitted, under any conditions?

While for purposes of this preliminary report there is no need to examine the options available in respect of each issue, suffice it to say that several important policy questions must be addressed by the Conference in developing a uniform product liability statute.

It should also be noted that there is an important relationship between warranty law and product liability law. To the extent that the

victim of a defective product has a remedy under warranty law there is no need for him to rely on product liability law. However, in most provinces the victim does not have a remedy under warranty law unless there exists privity of contract with the person against whom he is seeking a remedy. The results can be ludicrous. For example, suppose that a man buys a box of chocolates from a retailer and that he and his wife eat them. Suppose further that the chocolates are poisonous, because of contamination in the manufacturing process, and that the man and his wife suffer severe personal injury as a result. The retailer is liable to the man on a strict liability basis regardless of negligence, but he is not liable to the wife unless he was negligent. The manufacturer is not liable to either the man or his wife unless he was negligent.

There have been important developments in New Brunswick, Quebec and Saskatchewan which make major inroads on the privity requirement. Furthermore, we understand that the Sale of Goods Committee of the Conference will recommend legislation to relax the privity requirement by extending warranty protection to all subsequent buyers. This would go part of the way towards extending product liability. However, the wife in our chocolate hypothetical would not be protected because she would not be a subsequent buyer. There are, as well, at least two other reasons why the Committee's recommendations would not remove the need for product liability law. First, the victim's rights would be tied to some contract, so that if the goods were not supplied by way of contract then the victim would have no contract rights — e.g. free chocolate samples from the manufacturer. Second, and more important in the normal case, removing the privity barrier would simply give the victim the rights of the original buyer, so that if the original buyer had no rights then neither would the victim. The door would be open for the supplier to contract out of liability, where not otherwise precluded by law.

Having raised these general considerations, the Committee wishes to fulfill its mandate to report on the feasibility of a study of product liability.

There appears to the Committee to be little doubt as to the need or desirability of uniform legislation. The courts have not demonstrated an ability or willingness to move outside the confines of traditional contract and tort law to find adequate solutions to the problems imposed by the distribution of defective products. Accordingly, there is every indication that legislatures will gradually attempt to deal with the issues through legislation. The development of a common basis

and common principles for recovery against losses is desirable in a country in which, regardless of provincial or international boundaries, goods flow freely from one jurisdiction to another. Unless there is uniformity, the residents of New Brunswick, Saskatchewan and Quebec will have rights to recover for losses that do not give rise to liability in other provinces, even though the losses flow from identical goods of the same manufacturer.

Product liability cases often involve more than one jurisdiction. Discrepancies in law lead to choice of law problems that may lead to inequitable and anachronistic results. It is also apparent that liability can be successfully avoided unless uniform rules are adopted with respect to bringing actions and enforcing judgments in product liability cases.

It is also the opinion of the Committee that the issues to be faced in the study of product liability are no more likely to be unmanageable than those arising in other areas in which studies have been undertaken by this Conference. The Sale of Goods Study, and recent studies on family law, raise equally difficult economic and social issues on which views may legitimately differ from jurisdiction to jurisdiction.

It is the opinion of the Committee that product liability is a suitable subject for study by this Conference, and it is recommended that a Committee be struck to prepare a detailed study of the issues and a draft uniform Act, including uniform rules for bringing actions and enforcing judgments in product liability cases.

The Committee should give particular consideration to the existing legislation in the three provinces above referred to, and should attempt to prepare an Act that, as far as possible, takes into account these recent developments. The Committee should also give particular consideration to the recommendations of the Ontario Law Reform Commission in its report on product liability.

Because of the specialized nature of the subject matter, it is recommended that a similar approach be adopted in structuring this Committee as was adopted in structuring the Sale of Goods Committee.

## APPENDICE P

*(Voir page 32)*

## RAPPORT

### En matière de responsabilité du fait des produits

A la réunion de 1980 sur l'uniformisation du Droit, la résolution suivante a été adoptée:

> Le Nouveau-Brunswick appuyé par la Saskatchewan, le Manitoba et l'Ontario ont étudié toute la législation canadienne, la jurisprudence et les rapports des organismes de la réforme du Droit pour envisager la possibilité d'uniformisation en ce domaine et pour en faire rapport à la réunion annuelle de 1981.

Après la réunion, la Colombie-Britannique a exprimé le désir de s'associer au projet.

Comme concept légal, la portée de la "responsabilité du fait des produits" n'a pas encore été définie avec précision. Toutefois, son acception de responsabilité attachée à la fabrication, la vente ou la distribution d'un produit défectueux a été retenue.

Il n'y a pas longtemps, une telle responsabilité était régie au Canada par la législation sur la vente des marchandises et par les principes de la Common law et du droit civil. En Common law elle découlait des relations contractuelles ou était imposée par le jeu des règles de droit touchant la responsabilité civile. Le droit civil crée dans les grandes lignes la même situation.

Depuis quelques années cependant, le Nouveau-Brunswick, la Saskatchewan et le Québec ont modifié par voie législative l'ancienne base du droit traitant de la responsabilité du fait des produits et adopté une législation visant la protection du consommateur et basée sur des principes contractuels. Cette dernière législation a assoupli le droit contractuel afin d'en élargir la marge de protection quant aux catégories de personnes et quant à la réparation des préjudices tout en limitant les cas où l'on pouvait se décharger de celle-ci.

Aussi, le Nouveau-Brunswick a-t-il légiféré sur la stricte responsabilité attachée aux préjudices subis par le consommateur en situation extra-contractuelle. Un tel droit a été circonscrit aux dommages causés par des produits défectueux "très dangereux". Dans le cadre de cette approche, le Nouveau-Brunswick a accordé des recours à toute

personne qui, sur le fondement d'une prévoyance raisonnable a utilisé le produit défecteux et a été victime de dommages. Cette loi permet de reporter la responsabilité des dommages subis par le consommateur sur le fournisseur, lequel a initialement causé le problème. Étant donné qu'elle ne vise que la protection du consommateur, c'est seulement contre les fournisseurs de produits de consommation que joue cette protection.

De son côté, la Commission de réforme du Droit de l'Ontario a recommandé que la stricte responsabilité de tous les fournisseurs soit mise en jeu en raison de dommages et de pertes subis par le consommateur du fait des produits défectueux qu'ils ont fournis, ce, sans acception d'activité commerciale de sa part, de tout lien contractuel ou de sa qualité de consommateur. Au lieu de faire reposer la réparation sur des principes contractuels, la Commission prévoit une compensation pour dommages par l'extension des principes appliqués en matière de préjudices.

A étudier la législation existante et les recommandations des commissions de réforme du Droit (résumées de façon moins condensée dans la documentaion accompagnant le présent rapport), on constate l'absence d'accord sur la meilleure façon d'imposer la responsabilité pour des produits défectueux. Alors qu'on s'entend sur le fait que certaines personnes dans certaines situations doivent être tenues responsables (sans qu'il y ait faute) en regard de certains produits, les divergences de vue surgissent à l'égard de l'ensemble ou de l'une des questions suivantes:

1. Quels genres de produits doivent mettre en jue la stricte responsabilité?
2. Au cours du processus de production et de distribution quelles sont les personnes dont la stricte responsabilité doit être mise en jeu?
3. Quelle catégorie de personnes doit être protégée par la stricte responsabilité?
4. A l'égard de quels préjudices le fabricant ou autre doit être tenu responsable?
5. Quels sont les délais à impartir?
6. Doit-on mettre en jeu la responsabilité du fabricant ou autre selon les normes en usage au moment de la fabrication ou au moment où le dommage est survenu?
7. La structe responsabilité doit-elle être mise en jeu pour les défectuosités qui sont dévoilées?

8. La négligence contributoire doit-elle être prise en considération dans l'imposition de la stricte responsabilité?

9. Doit-on permettre à une personne de se décharger de sa reponsabilité quelque soit la situation?

Il n'est pas de notre propos de considérer dans ce rappot préliminaire, les options possibles relativement à chaque question. Contentons-nous d'observer que plusiers points importants concernant des directives à suivre doivent être soumis à la Conférence pour l'élaboration d'une loi uniforme sur la responsabilité du fait des produits.

Il faut aussi noter la relation étroite entre le droit des garanties et celui de la responsabilité du fait des produits. Dans la mesure où la victime d'un produit défectueux dispose d'un recours en vertu du droit de garantie, elle n'a pas besoin de compter sur le droit de la responsabilité du fait des produits. Dans la plupart des provinces cependant, la victime ne dispose d'une recours en garantie que par le jeu des rapports contractuels directs avec la personne contre laquelle la demande en réparation est exercée. Il se peut à cet égard que les résultats relèvent de l'ironie. Supposons par exemple qu'un homme achète d'un détaillant une boîte de chocolat qu'il a mangé avec sa femme. Supposons aussi que le chocolat contenait du poison par contamination, durant la fabrication, et a causé de graves dommages corporels à l'acheteur et à sa femme. Le détaillant est responsable à l'égard de cet homme—responsabilité stricte s'entend—mais non à l'égard de sa femme en dehors du cas de négligence du détaillant. Le fabricant n'est responsable, à l'égard ni de l'un, ni de l'autre si ce n'est en raison de sa propre négligence.

Le Nouveau-Brunswick, le Québec et la Saskatchewan ont fait de grandes incursions dans le domaine des obligations des parties. Par ailleurs, nous nous rendons compte que le Comité de vente des marchandises de la Conférence recommandera une législation qui assouplit les obligations des parties en élargissant la protection de la garantie aux acheteurs subséquents. Ce serait un pas de plus dans le sens de l'élargissement de la responsabilité du fait des produits. Pour revenir au cas hypothétique de la boîte de chocolat, la femme ne serait pas protégée, n'étant pas acheteur subséquent. Aussi bien, il existe au moins deux autres raisons pour lesquelles les recommandations du Comité doivent maintenir la nécessité d'une loi sur la responsabilité du fait des produits. Premièrement les droits de la victime seraient contractuels. Si les marchandises étaient fournies sans contrat, la victime serait dépourvue de droits contractuels—c'est le cas par exemple d'échantillons de chocolat donnés gratuitement par le fabricant.

Deuxièmement, cas plus important dans une affaire normale, le renversement de la barrière contractuelle aurait tout simplement dévolu à la victime les droits de l'acheteur initial: si celui-ci n'a pas de droit, la victime n'en a pas non plus. Le fournisseur pourrait facilement se décharger de sa responsabilité, là où la loi ne s'y oppose.

Ces considérations générales une fois posées, le Comité désire remplir son mandat de produire un rapport sur la possibilité d'une étude de la responsabilité du fait des produits.

Il appert que le besoin ou le désir d'une législation uniforme ne fait presque pas de doute. Les tribunaux n'ont pas encore montré qu'ils peuvent ou désirent se libérer du corset traditionel du contrat et des préjudices en apportant des solutions pertinentes aux problèmes posés par la distribution des produits défectueux. En conséquence, tout indique que le Parlement essayera de les résoudre graduellement par voie législative. Certes, la concertation sur les bases et les principes regardant la réparation des préjudices est plus que désirable. En effet, la libre circulation des marchandises est une réalité malgré la diversité des compétences et des frontières provinciales ou internationales. Sans uniformité, les résidents du Nouveau-Brunswick, de la Saskatchewan et du Québec n'auraient pas droit aux réparations des préjudices qui dans d'autres provinces n'engagent pas la responsabilité, même si ces préjudices étaient causés par les marchandises identiques d'un même fabricant.

Les causes nées de la responsabilité du fait des produits relèvent de plus d'une compétence. Les divergences de vues sur le plan juridique portent à choisir des situations pouvant mener à des résultats injustes et anachroniques. Il ne nous a pas échappé que la responsibilité peut être évitée sans l'adoption de règles uniformes portant sur les actions à intenter et sur l'exécution des jugements en maitère de responsabilité du fait des produits.

Le Comité pense aussi que les questions à envisager dans cette étude ne paraissent pas plus inextricables que celles posées dans d'autres domaines considérés par la Conférence. La vente des marchandises et le droit de la famille soulèvent des questions économiques et sociales de difficulté comparable au sujet desquelles les divergences de vue d'une aire de compétence à une autre peuvent être légitimes.

Le Comité apprécie d'autre part le caractère pertinent d'une telle étude dans le cadre de la conférence. Il recommande la formation d'un comité devant se pencher sur les particularités et la rédaction d'une

législation uniforme embrassant, pour nous répéter, des règles uniformes pour les actions à intenter et pour l'exécution des jugements en matière de responsabilité du fait des produits.

Le Comité doit prêter une attention particulière à la législation des trois provinces que nous venons de mentionner. Il lui revient également de s'appliquer à rédiger une loi qui tienne compte autant que possible des plus récentes évolutions du droit. La même attention doit aussi être accordée aux recommandations du rapport de la Commission de Réforme du Droit de l'Ontario sur la responsabilité du fait des produits.

Enfin, la nature spéciale du sujet nous porte à recommander le choix d'une même approche pour structurer le présent Comité et celui traitant de la vente des marchandises.

## APPENDIX Q

*(See Page 33)*

*(Document: 840-204/070)*

## 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. 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 it 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 since the Royal Commission on the Freedom of Information and Individual Privacy established by the Province of Ontario estimated that it would not have available its final report until March of 1980, it was decided by the Conference that this matter could best be dealt with by being postponed for a further period.

The Ontario Royal Commission has now produced all its study papers and its final report 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, and the Province of Newfoundland has enacted legislation respecting Privacy substantially in the form of that presented to the Conference in 1972 by the Commissioners for the Provinces of Nova Scotia, Newfoundland, Prince Edward Island and New Brunswick.

In September 1980, the government of Quebec appointed special commissioners to study access to government information and individual privacy.

A report, entitled *Information et Liberté* was submitted in May 1981 and tabled before the National Assembly. It is to be discussed by a parliamentary committee in September. This committee will receive comments from the public and associations.

A draft bill is attached to the report, dealing with access not only to provincial government information, but also to municipal government and public corporation information. This draft bill also deals with individual privacy and it proposes to add some special rules in relation to civil responsibility.

The availability of the additional material particularly that from the Province of Quebec requires further study of this matter to bring about a Uniform Privacy Act based upon acceptable principles and policy.

The Representatives for Nova Scotia, Ontario and Quebec propose for adoption the following Resolutions:

RESOLVED that this year's report be received and printed in the Proceedings of the Sixty-Third Annual Meeting.

RESOLVED that the Committee 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 1982 Annual Meeting.

All of which is respectfully submitted,

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

Arthur N. Stone, Q.C.
for the Ontario Representatives

Marie-Josée Longtin
for the Quebec Representatives

## APPENDIX R

*(See Page 33)*

*(Document: 840-204/021)*

# REPORT OF THE COMMITTEE ON A PROPOSED NEW UNIFORM REGULATIONS ACT

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# REPORT OF THE COMMITTEE ON A PROPOSED NEW UNIFORM REGULATIONS ACT

## PART 1

*Introduction*

The 1980 Uniform Law Conference in Charlottetown, P.E.I., established a committee to investigate and report back to the Uniform Law Section on problems that appear to have arisen from the administration of the various Regulations Acts in the various jurisdictions in Canada and to make recommendations on changes, if any, that should be made to the Uniform Regulations Act to resolve those problems. The Committee consists of representatives of Saskatchewan, Alberta and British Columbia.

*History of the Uniform Regulations Act*

The 1st Uniform Regulation Act was passed by the Uniform Law Conference at its annual meeting in 1943. It is reproduced in Appendix 1.

The Act resulted from a 1942 resolution of the Conference which was the Conference's response to proposals for the adoption of an orderly system for keeping and publishing subordinate legislation in Canada. The proposals were contained in a letter dated July 24, 1942 from the Office of the Legislative Counsel of Ontario. The letter reviewed problems involved in respect of subordinate legislation in Canada, England and the United States and also contained a description of legislation adopted as a solution to the problems encountered in the various jurisdictions. It is reproduced in Appendix 2.

The Act was a variation of a draft based on the recommendations contained in the July 24, 1942 letter and the contents of a "Report of the Dominion Representations and Ontario Commissioners on Control Filing and Publication", to which the draft was appended. The Report with appended draft is reproduced in Appendix 3.

It should be noted at this point that the draft in Appendix 3 contained the definition

"regulation" means,

(i) any regulation; and
(ii) any rule or order of a legislative nature or imposing a penalty,

made under the authority of any statute of ".

That definition appears to have been drafted on that limited basis in order to express the original intention for proposing a Regulations Act

that the public should have the opportunity easily to ascertain subordinate laws that apply to it generally in a legislative sense, rather than on a purely administrative level.

However, the Uniform Regulations Act adopted by the Conference contained the definition

> " 'regulation' means any regulation, proclamation, rule or order made under the authority of any statute of but does not include any bylaw or resolution made by a local authority or by a company incorporated under the laws of the province."

The effect, of course, of omitting the requirement that a rule or order, to be a regulation, had to be "of a legislative nature", was to broaden the scope of the filing requirement imposed by the Act so that it applied to any rule or order, whether it was of a legislative nature or an administrative nature.

*Adoption of Uniform Regulations Act by Canadian jurisdictions*

Although all jurisdictions have enacted legislation based on the system prescribed in the Uniform Regulations Act the legislation now varies from the Uniform Regulations Act in some respect, primarily in the definition of "regulation".

It appears, because the filing and publication of rules and orders that were strictly of an administrative nature was not warranted (probably from the practical standpoint), that the various Canadian jurisdictions chose to adopt the more limited approach of the draft over the sweeping approach of the Uniform Regulations Act.

The Regulations Acts of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Prince Edward Island and Newfoundland include expressly the requirement that a regulation must be "of a legislative nature" if filing in the system and the consequent usual publication in the Gazette are to follow the making of the regulation.

The Regulations Act of Nova Scotia defines a regulation as one that has been made "in the exercise of a legislative power conferred" by or under a statute, while the Regulations Ordinance of the Northwest Territories and The Statutory Instruments Act of Canada additionally include those "for the contravention of which a penalty, fine of imprisonment is prescribed by or under an Act (or Ordinance)."

The Regulations Act of New Brunswick and The Regulations Ordinance of the Yukon Territory are the only legislation in which the exact definition, apart from the exemptions, of the Uniform Regula-

tions Act has been included. Both jurisdictions, however, only file rules and orders that are of a "legislative nature".

Quebec has not adopted the Uniform Regulations Act or enacted any statute having a similar effect. However under its Legislature Act the publication, in the Quebec Official Gazette, of any "documents and announcements as the Lieutenant Governor in Council may require to be printed or published" is mandatory.

## PART 2

### Division 1
### Existing Problem Area

*"Legislative nature"*

Notwithstanding the adoption of the limited approach, considerable uncertainty appears to exist in virtually all jurisdictions as to what rules or orders are "of a legislative nature", and therefore are regulations and are to be submitted for filing (and publication) under the applicable Regulations Act.

The uncertainty generally exists in the minds of the "rulemaker" and his administrative staff. Frequently the rulemaker and his staff are not aware that the exercise of a statutory power may result in the making of a rule or order that is of a legislative nature and that the rule or order should be submitted for filing as a regulation. In many instances they do not appear to seek legal advice to ascertain whether or not a rule or order should be filed.

The uncertainty does not exist to the same degree in the minds of the Registrars of Regulations who are usually lawyers or who, if they are not lawyers, obtain legal advice before making their decision on the "legislative nature" issue.

Two problems have thus arisen that defeat the original intention of the applicable Regulations Act. Firstly, and most importantly, rules and orders that should be filed (and published) as regulations are not filed because the rulemakers fail to submit them for filing. Secondly, rules and orders that need not be filed are being submitted by the rulemakers for filing and, in some cases, are being filed as regulations out of an over-abundance of caution on the part of the Registrar of Regulations.

As its solution to the problem of what rule or order can be filed the Northwest Territories Government established a register system

consisting of 3 parts which separately accommodates both the limited and the broad approach.

The first part is the register for regulations, as defined, i.e. those made in the exercise of a legislative power (and being of legislative nature) or for the contravention of which a penalty, fine or imprisonment is provided by or under an Ordinance.

Regulations are by definition "statutory instruments" and the second part is a register for all other statutory instruments, as defined, which are made in the execution of a power (almost necessarily not of a legislative nature) under an Ordinance or by or under the authority of the Commissioner of the Northwest Territories. The definition contains specific exclusions; appointments made by the Commissioner, for instance, are not statutory instruments.

The third part is entirely unofficial and has no statutory basis. It is a register for other instruments — mainly appointments — that do not fall within the definition of "statutory instruments", whether as regulations or otherwise. Only practice, and not the law, requires their filing, and the Registrar of Regulations' responsibility for these is almost accidental.

The Northwest Territories' system or a system based on it may represent to other "low volume" jurisdictions a solution to any uncertainty existing in them but does not seem to the Committee to be an entirely practical solution for "high volume" jurisdictions.

Since it has been and still appears to be the desire of most Canadian jurisdictions not to require the filing of all rules and orders but to apply the requirement to only those "of a legislative nature" or, in some cases, to those for a contravention of which a penalty, fine or imprisonment is provided in an Act, a more practical approach than any of those currently in effect in any of the jurisdictions seem desirable. Any change in approach should be confirmed by appropriate changes to the Uniform Regulations Act.

*Possible changes respecting "legislative nature"*

It seemed to the Committee that, under the existing Regulations Acts, the decision whether or not a rule or order is "of a legislative nature" when made by the rulemaker or the Registrar, should be made on a sound legal basis, the making of the decision, even with legal advice, is a problem particularly to the rulemaker and, to a lesser extent, the Registrar, and does not always, on a public policy basis, represent the intention of the legislator.

The Committee therefore felt that the basis for the making of the decision should either be simplified or changed entirely.

A possible simplification of the decision making process might, at first glance, result from providing to rulemakers (and registrars of Regulations) appropriate guidelines on what type of rule or order is "of a legislative nature". However, no judicial decisions on point appear to be available as a basis for establishing the guidelines.

On closer examination it appears that the effect of applying any guidelines established for that purpose would, as likely as not, become the subject of interpretation in court actions in which the issue, whether or not a rule or order should or should not have been filed, is raised or in which the validity or invalidity of a regulation is questioned. It therefore seems likely that whatever guidelines could be provided may tend to confuse the situation to an even greater extent than it now appears to be instead of simplifying the matter.

Another simplification, at least in "low volume" jurisdictions, may consist of the adoption of the Northwest Territories triple registry system or a system based on it. As earlier mentioned, for "high volume" jurisdictions that system may not be entirely practical and it may, even in low volume jurisdictions, outlive its usefulness as volume increases and the bureaucracy necessary to support the increase also grows. It therefore did not appear to the committee that the triple registry system, in the usual circumstances, would result in any simplification.

The Committee felt therefore that a complete change in approach at this time would be beneficial.

The decision of whether or not a rule or order should be filed has frequently been recognized as involving as much questions of policy as a determination of whether or not a rule or order is "of a legislative nature". On many occasions, due to consideration of policy, statutes authorizing the making of rules and orders that are clearly "of a legislative nature" have expressly excluded the application of the Regulations Act.

The most complete change in approach would, of course, consist of a repeal, without replacement by another system and statute, of the Uniform Regulations Act.

As mentioned earlier, the original intention of the Uniform Regulations Act was to provide to the public a central source for ascertaining subordinate laws that are of general application. Countless studies in virtually all common law jurisdictions have indicated that in order to satisfy a strong public interest in such a central source, a Regulations registry is a necessity for any jurisdiction.

To repeal, without replacement by another system and statute, the Uniform Regulations Act would be contrary to that public interest and would therefore be an unsatisfactory change.

A less drastic and imminently more practical change therefore seems appropriate.

*Recommended change respecting " legislative nature"*

On the basis of the matters set out in the preceding portion of this report the Committee recommends as follows:

Firstly: the decision of whether or not a rule or order should or should not be filed as a regulation should not, apart from the concerns respecting ultra vires, be the decision of the rulemaker and the Registrar of Regulations, but should be the decision of the lesgislator. The decision should, as a matter of practice, be made with the advice of Legislative Counsel at the time of drafting the legislation that authorizes the making of the rule or order.

Secondly: the decision of whether or not a rule or order should or should not be filed as a regulation should not solely be based on whether or not it is "of a legislative nature", or whether or not a penalty, fine or imprisonment is provided for its contravention. The decision should also take into consideration whether or not, as a matter of public policy, the rule or order should be filed as a regulation.

Thirdly: if the first and second recommendations are accepted, the Uniform Regulations Act should be amended so that, whether or not a rule or order is required to be filed under it, can be ascertained by a uniquely identifying "keyword" rather than after the making of a decision as to whether or not the rule or order is "of a legislative nature" or provides for the imposition of a penalty, fine or imprisonment.

*Comments on recommended change respecting "legislative nature"*

If a "keyword" regulation identifier is included in the Uniform Regulations Act, it will be necessary to include that identifier in the statutes containing the rule and ordermaking authority.

To achieve that purpose all statutes will have to be reviewed so that they can be appropriately amended to reflect the policy decision on what rule or order making power, when exercised, results in the making of a rule or order that should be filed under the Regulations Act or one that need not so be filed.

A provision that authorizes the making of rules and orders which, as a matter of predetermined policy, must be filed would contain the "keyword". If a rule or order is made under that provision, the consequence of filing and, usually, publication would automatically follow.

A provision that authorizes the making of rules and orders that, as a matter of predetermined policy, need not be filed would not contain the "keyword". If a rule or order is made under that provision it would not have to be submitted for filing and, if it were so submitted, filing would automatically be refused.

A difficulty might be the improper identification of the authorizing provision at the time of the making of a rule or order, or the possible inclusion, in a rule or order that must be filed, of matters that need not be filed. In those instances the "fileable" matters should be separated, by redrafting of the rule or order, from the "nonfileable"matters, whenever practical and, if separation is impractical, the entire rule or order could be filed as a matter of policy.

Because the change to a keyword regulation identifier is primarily directed at alleviating any difficulty existing in the minds of the rule maker and his staff, the keyword chosen should be a word that is familiar to them and that, preferably, triggers the "filing" requirement relating to the rule or order being made.

Experience in Saskatchewan, Alberta and British Columbia has indicated that, with respect to current legislation, a rule or order made under a statutory authority which requires the making "of a regulation" or "by regulation" is usually submitted for filing, while a rule or order made as a "rule", "order", "directive" or under some other expression that does not include the word "regulation" is usually not submitted for filing.

The Committee therefore recommends that the "keyword" to be adopted should simply be "regulation". (Appropriate amendments to the definition "regulation" in the Uniform Interpretation Act will have to be made.)

The choice of "regulation" as the "keyword" will also somewhat ease the task of amending current legislation to separate provisions that authorize the making of "regulations" which must be filed from provisions that authorize the making of rules and orders which need not be filed. It will furthermore carry forward automatically most rules and orders that are currently regarded as "true" regulations and thereby, in the transition from the existing system to the new system,

be useful for preserving those rules and orders that were filed as "regulations".

The matter of transition will be dealt with more fully later in this report.

## Division 2
## Other considerations and recommendations

The Committee, in addition to considering the aspect of the "legislative nature" of a regulation, reviewed the Uniform Regulations Act to ascertain what other changes might be desirable and has the following comments and recommendations.

*Central depository*

As earlier expressed, the Committee agrees with the present general policy embodied in the Act that it has been and continues to be desirable in the public interest that there should be available to the public a central source of ascertaining subordinate laws that are of general application.

The central source should consist of a depository of regulations operated with an appropriate indexing system that identifies the subordinate law in an adequate manner.

The Uniform Regulations Act of course embodies the foregoing by requiring the "filing" of regulations and prescribing the manner of numbering regulations that are filed.

*Registrar of Regulations*

The Committee acknowledges the need, for administrative purposes, for an official charged with the duty of filing regulations that must be filed. It therefore recommends the continuation of those provisions of the Uniform Regulations Act that

(a) authorize the appointment of a Registrar, and
(b) relate to the performance of his duties and the exercise of his powers.

The Committee suggests that, as a matter of policy, the person appointed as Registrar should be a lawyer and, from a practical standpoint, should be a legislative draftsman.

Any duty or power that is of an administrative nature can, of course, be continued by way of authority to make appropriate regulations that will prescribe the appropriate duty or power. A duty

or power that may affect the validity of regulations required to be filed, however, should be expressed in the Act itself. This aspect will be dealt with more fully later in this report.

*"Filing" vs. "registration"*

The Committee felt that the public generally thinks of "filing" to be the starting point of some administrative action, as in the case of the filing of an application. On the other hand it seemed to the Committee that the act of "registration" is generally considered to be the conclusion of an administrative process, as in the case of registering a bill of sale. While "filing" usually is not thought of as resulting in immediately enforceable legal rights, "registration" normally is considered to give those rights.

It is therefore recommended that the Uniform Regulations Act be amended to require the "registration" rather than the "filing" of regulations.

*Effect of "filing" or "registration"*

Currently the Uniform Regulations Act imposes the obligation that every regulation "shall be filed with the Registrar" and furthermore provides that "in no case does such a regulation come into force before the day of filing". The effect of the foregoing is to render unenforceable a regulation that is not filed.

The Committee discussed whether or not the principle of unenforceability for failure to file (register) a regulation should be continued but did not arrive at a consensus.

A departure from the status quo may be warranted to distinguish between unenforceability in the sense of prosecution as compared to unenforceability in the sense of granting or withholding a benefit under the regulation. Furthermore, questions concerning the rights inter se of persons affected by the regulation may be in issue and should be resolved.

The Committee therefore recommends a reexamination by the Conference of that principle, with the view to possibly modifying the provision to express that an unfiled (unregistered) regulation could not be enforced by the prosecution of any person otherwise liable to prosecution for failure to comply with the regulation but that, in the case where a regulation confers a benefit, there could be no withholding or loss of that benefit because the regulation was not filed (registered). The latter case would, of course, presume notice of the making or knowledge of the content of the unfiled (unregistered) regulation on the part of the person otherwise entitled to the benefit.

*Registration and exemption from registration*

If the concept of the "keyword" regulations identifier is adopted, the policy of whether or not a regulation must be registered or not, for policy reasons, will be addressed at the time of drafting the regulation-making authority in the Act. Therefore virtually every instance where registration is not to occur will have been decided at the drafting stage and a rule or order that need not be registered will not be made under a provision authorizing the making of "regulations". However, exceptions may still occur.

If the "keyword" concept is not adopted, a policy decision not to require registration may or may not be reflected in the authorizing Act by the inclusion of a provision that "the Regulations Act does not apply" to a rule or order made under the Act in question. It will then become necessary to make the policy decision not to register when the regulation is being made.

It therefore appears prudent in that event to continue in the Act the power of the Lieutenant Governor in Council to exempt "from any of the provisions of the Act" (including, of course, registration) "any regulation the publication of which in his opinion is not in the public interest". The Committee, however, also recommends a discussion by the Conference of that power having regard to possible abuses of the power. It may be preferable only to permit the exercise of the exempting power in specific cases such as those involving the adoption of codes, without more, or the designation of areas etc. on complicated or unwieldy maps that constitute or form part of a regulation.

The decision not to require registration of a regulation should not, however, be a decision to be made in any case by the Registrar.

*Effective date of registration*

The effective time of registration appears to present, occasionally, a problem since the Act expresses that time to be "on the day it is filed with the Registrar". It is recommended that, whether or not the concept of "registration" (rather than filing) is adopted, the effective time should be "on the registration (filing) of the regulation".

The change would indicate that an administrative action must be performed by the Registrar before a regulation comes into force; a rule maker cannot simply leave a regulation with or mail it to the Registrar and expect the regulation to come into force without more.

The making of retroactive regulations is currently prohibited by the inclusion, in the section that prescribes the time of coming into

force, of the provision earlier referred to: "in no case does a filed (registered) regulation come into force before the day of filing (registration)". Experience has indicated that the limitation so imposed generally should only apply if another Act does not provide otherwise.

There are many situations where it is desirable, or at least expedient, for a regulation to be effective during a period before its registration, particularly in cases where some rate of rental, royalty or other payment to someone cannot be calculated until after the registration of the regulation. The committee therefore recommends the express recognition in the Act of provisions in other Acts that permit retroactivity in specific cases. The limitation earlier quoted could be changed as follows or to a like effect: "but in no case, unless expressly authorized in the other Act, does a registered regulation come into force before the day of registration".

*Evidence of registration*

The Committee considers the current provisions of the Act respecting proof of registration of a regulation to be adequate and recommends their continuation.

*Publication and exemption from publication*

Since the Committee considers that the publication of registered regulations is essential to the legislative intention of the Act it recommends that the requirement for the publication of regulations should continue to be expressed in the Act itself.

However, having regard to the increasing complexity of the administrative process and the time frames relevant to that process, it seems inappropriate to the Committee that a fixed time period within which publication must occur following registration, should be expressed in the Act. It therefore recommends that no prescribed period of time should determine when publication must occur rather than the current normally fixed, but extendable period of "one month".

The proposed change could then alleviate the need for extensions of publication orders by the responsible Minister as currently contemplated in the Act.

In order to express in the Act the essential nature of the publication process the Committee also recommends the addition to the Act of a provision that has the effect of stating that publication is constructive notice and that a person is not adversely affected by an unpublished regulation unless he has actual notice of it. Section 4(5) of the Alberta Regulations Act or preferably section 3(2) of the British Columbia

Regulations Act should be considered in that respect. Those provisions currently read as follows:

(a) Alberta:

(5) Unless expressly provided to the contrary in another Act, and subject to subsection (3), a regulation that is not published is not valid as against a person who has not had actual notice thereof.

(b) British Columbia:

(2) No person shall be convicted of an offence against an unpublished regulation unless it is shown that, at the time of the offence, reasonable steps had been taken to bring the substance of the regulation to the notice of the public or the persons likely to be affected by it.

The Committee furthermore recommends the addition to the Act of a power in the Lieutenant Governor in Council (or perhaps the responsible Minister) to exempt from publication any regulation that has been available in printed form to all persons who are likely to be interested in it. Publication of a notice of the registration of that regulation, adequately identifying its nature, should expressly be required similarly to the requirement of section 4(3) and (4) of the Alberta Regulations Act, which read as follows:

(3) Where a regulation, in the opinion of the Lieutenant Governor in Council,

(a) has been available in printed form to all persons who are likely to be interested therein, and

(b) is of such length as to render publication thereof in The Alberta Gazette unnecessary or undesirable, the Lieutenant Governor in Council, by order, may dispense with the publication thereof, and the regulation upon registration is as valid against all persons as if it had been published.

(4) Where, by order of the (.....) Lieutenant Governor in Council, the (.....) publication (of a regulation) is dispensed with, the registrar shall publish the order or a notice of the order in The Alberta Gazette within one month after the making thereof.

There are also those cases where Appendices to regulations consist of maps, forms and illustrations, the publication of which is impractical. To accommodate those cases, the power to exempt from publication should be sufficiently broad to relate to any part of a regulation, such as the Appendices referred to. The exempting power should be flexible enough to apply even if the exempted part of the regulation is

not necessarily available in printed form to persons interested in it, except, perhaps, by an opportunity to view and examine it in the Registrar's office or elsewhere. An adequate notice identifying the exempted part should also have to be published with those other parts of the regulation which must and can be published. The notice should state where and under what conditions the exempted part Appendix is available for viewing or examination.

## Powers of Registrar and Lieutenant Governor in Council

*Preregistration Review*

The adoption of a "keyword" regulation identifier, if combined with a "preregistration review" mechanism as hereafter described, will alleviate the need for the Registrar to examine all documents submitted for registration to determine whether or not they are "intra vires" in the manner he must presently so determine.

Under the existing statutes the Registrar must in each case not only ascertain whether or not a document submitted for registration is made under a provision of an Act that authorizes the making of a "regulation", but he must also ascertain whether or not the document submitted, if it is a "regulation", was made within the four corners of the authorizing provision and whether or not it is exempt from registration and should not be registered. For example, section 6(1) of The Alberta Regulations Act and section 10 of The Saskatchewan Regulations Act provide that ". . . the registrar may decide whether any regulation, rule, order, or bylaw, that has been presented to him for filing is a regulation within the meaning of this Act".

The Committee considers that because many Registrars of Regulations, particularly those who are not lawyers, have practical problems and real difficulties in determining the "vires" of a document submitted for registration as a regulation, the Registrar should not normally have to make decisions in the foregoing context.

The Committee therefore recommends the addition to the Act, preferably by way of authority to make appropriate regulations, of a "preregistration review" consisting of a variation of the "premaking review" currently required under the Statutory Instruments Act (Canada). Sections 3 and 4 of that Act read as follows

> 3(1) Where a regulationmaking authority proposes to make a regulation it shall cause to be forwarded to the Clerk of the Privy

Council three copies of the proposed regulation in both official languages.

(2) Upon receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that

(a) it is authorized by the statute pursuant to which it is to be made;

(b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

(c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the Canadian Bill of Rights; and

(d) the form and draftsmanship of the proposed regulation are in accordance with established standards.

(3) When a proposed regulation has been examined as required by subsection (2), the Clerk of the Privy Council shall advise the regulationmaking authority that the proposed regulation has been so examined and shall indicate any matter referred to in paragraph (a), (b), (c) or (d) of that subsection to which, in the opinion of the Deputy Minister of Justice, based on such examination, the attention of the regulationmaking authority should be drawn.

(4) Subsection (1) does not apply to any proposed regulation or class of regulation that, pursuant to paragraph (a) of section 27, is exempted from the application of that subsection, and paragraph (d) of subsection (2) does not apply to any proposed rule, order or regulation governing the practice or procedure in any proceedings before the Supreme Court of Canada or the Federal Court of Canada.

Where any regulationmaking authority or other authority responsible for the issue, making or establishment of a statutory instrument, or any person acting on behalf of such an authority, is uncertain as to whether or not a proposed statutory instrument would be a regulation if it were issued, made or established by such authority, it or he shall cause a copy of the proposed statutory instrument to be forwarded to the Deputy Minister of Justice who shall determine whether or not the instrument would be a regulation if it were so issued, made or established.

The prereview mechanism recommended for the Uniform Regulations Act could be based on an obligation on the rule maker to refer a

regulation, before submitting it to the Registrar for registration, for review to and by the Attorney General or a designated legal officer or branch of the Attorney General's Department.

For example, the reviewer could be required to ascertain whether or not the regulation was, in his opinion, intra vires the authorizing legislation and, if he so found, he could provide to the rule maker an expresssion of his opinion in the form of a certificate or similar document. The rule maker, when submitting the regulation for registration, would, simultaneously with the proposed regulation, submit to the Registrar the reviewer's certificate.

The Registrar could then be given the authority, when the reviewer's certificate does not accompany the proposed regulation, to refuse registration of the regulation until the certificate has been submitted to the Registrar with the proposed regulation.

However, in the case where the registrar is a lawyer, the Registrar could possibly be empowered to assume the reviewer's function. The usual certificate could then either be dispensed with since the act of registering a regulation would be a confirmation of his "intra vires" opinion or it could be given by the Registrar. This situation would, of course, represent a continuation of the status quo.

The Committee also considered the current powers given to the Lieutenant Governor in Council in the Uniform Regulation Act, apart from the issue of the preregistration review.

It considers the powers so given, including those relating to the consolidation of regulations, to be generally adequate and recommends their continuation.

The committee, however, also recommends that some consideration should be given to adding to the Act some express provisions dealing with the Registrar's power to revise, as to form and style only, any proposed regulations submitted for registration and to make nonsubstantive corrections in proposed regulation, in filed regulations and in the preparation of office consolidations of regulations.

The provisions should be sufficiently broad to enable the Registrar to correct nonsubstantive errors, such as outdated references to "old" statutory or regulatory sources from time to time. Corrections made by the Registrar could be expressly authorized subject to appropriately prescribed methods of making the corrections and, if made after publication of a regulation containing the error, to publication of the correction.

## PART 3

*Transitional Matters*

As mentioned earlier in this Report the adoption of a "keyword" regulation identifier will necessarily require a review of all Acts authorizing the making of rules, orders, directives and other legal imperatives, including proper "regulations" to ascertain where and how that authority is set out in those Acts.

Any amendments to Acts containing that authority should, under normal circumstances, be made as consequential amendments to the new Regulations Act and would, of course, only apply with respect to new, or "postkeyword" regulations.

In cases where, as a matter of policy, it is undesirable to require the registration of what would otherwise be a "postkeyword" regulation, an exempting power in the Lieutenant Governor in Council under the Regulations Act could be applied or, if more desirable, the authorizing provision could be recast in a direct amendment to the authorizing Act as a "nonregulation" provision.

If the "keyword" regulation identifier is adopted, it will be necessary to review all regulations filed before the commencement of the adoption to ascertain whether or not they are "proper" regulations under the "new" system or are merely rules, orders or directives that do not require registration under the new system. Ideally the adoption of the "keyword" regulation identifier would therefore occur at a time of revision of regulations.

Whether or not that revision is cause for the adoption or the result of the adoption of the "keyword" regulation identifier is immaterial, but the Regulations Act should provide for the transition from "prekeyword" regulations to "postkeyword" regulations.

The Transitional provisions should set a time limit on the continuation of "prekeyword" regulations, coupled with powers in the Registrar to review and revise those regulations to conform with the "postkeyword" system.

A reasonable time limit, having regard to the usual complications that accompany a revision, would seem to be a 5 year (or possibly an extendable) period during which the prekeyword regulations would coexist with the postkeyword regulations but at the end of which all "prekeyword" regulations would have to have been rewritten and registered and if not rewritten and registered would become ineffective.

Details of transitional provisions will, of course, have to vary from jurisdiction to jurisdiction and the committee consequently recommends that, for the purposes of the Uniform Regulations Act, transitional provisions should be included as an addendum or appendix that sets out and discusses those provisions as guidelines for the various jurisdictions.

All of which is respectfully submitted.

Peter J. Pagano
Allan Roger
Marilee Charowski
Peter G. Schmidt
George MacCauley
Herb Thornton

## APPENDIX S

*(See Page 34)*

## DRAFT UNIFORM SALE OF GOODS ACT

### CONTENTS

1. Letter of Transmittal.
2. Introduction to the Report.
3. The Draft Act with Comments on the Section.
4. Appendix: Comparative Analysis.

The Chairman of the Uniform Law Section
George B. Macaulay, Q.C.

Dear Mr. Macaulay:

The Committee on Sale of Goods has completed its terms of reference, and submits herewith its Report on Sale of Goods.

| | |
|---|---|
| Dr. Derek Mendes da Costa<br>Chairman | Ronald C. C. Cuming |
| E. Arthur Braid | Karl J. Dore |
| Michael G. Bridge | Michel Paquette |
| Diane Campbell | David Vaver |

### INTRODUCTION

At the sixty-first Annual Meeting of the Uniform Law Conference of Canada, held in Saskatoon in 1979, the Uniform Law Section considered a report of the Ontario Commissioners on the subject of the 1979 *Report on Sale of Goods* (hereafter OLRC Report) of the Ontario Law Reform Commission (hereafter OLRC). The Ontario Commissioners proposed that a committee be appointed to consider the need for new, revised, uniform sale of goods legislation, and, if such a need existed, to assess the utility of the OLRC Report as the

basis for such uniform law. The Uniform Law Section also considered a letter from Dr. Derek Mendes da Costa, Q.C., dated August 20, 1979, written on behalf of the law reform agencies. The letter supported the proposal of the Ontario Commissioners and stressed the willingness of the law reform agencies to participate in the work of the proposed committee. The Uniform Law Section referred the matter to the Executive "for development as speedily as is practicable".

The Executive considered the matter at its meeting on August 24, 1979, and requested Dr. Mendes da Costa:

1. to ascertain the Law Reform Agencies that wished 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 considered necessary;
3. to submit a budget to the Executive for the operations of the Committee during the year 1979-1980.

A Sale of Goods Committee was subsequently struck but with an increased membership. The members of the Committee are:

Dr. Derek Mendes da Costa, Q.C. (chairman) (Ontario); Professor Arthur Braid (Manitoba); Mr. Michael Bridge (who replaced Mr. George Field) (Alberta); Professor R. C. C. Cuming (Saskatchewan); Mr. Karl J. Dore (New Brunswick); M. Michel Paquette (who replaced Professor Claude Samson) (Quebec); Miss Diane Campbell (P.E.I.), and Professor David Vaver (British Columbia). Professor Jacob S. Ziegel of Toronto served as consultant to the Committee but had no voting rights. Apart from this fact, it should of course be clearly understood that the Committee alone is responsible for the decisions taken by it.

The Committee held an organizational meeting in Toronto in November, 1979, and has met since then on twelve occasions including most recently on July 28 and 29, 1981. During this period the Committee has considered every recommendation in the OLRC Report and its proposed legislative implementation at least once, and difficult or contentious issues more often. The Committee has also had the benefit of numerous memoranda on particular topics prepared by the members of the Committee and Professor Ziegel.

## A. *THE NEED FOR A REVISED ACT*

All the common law provinces have adopted, more or less verbatim, the Sale of Goods Act 1893 (U.K.), and the Act is still in force in those Provinces.[1] The United Kingdom Act has been amended in important respects[2] but only one of those amendments has been adopted anywhere in Canada. Nor, for the most part, have the Provinces adopted many changes of their own. Most of the Provinces have adopted consumer protection Acts which qualify or supplement the Sale of Goods Act in important respects; but, as their names imply, their effect is restricted to consumer transactions. For the most part, non-consumer transactions have been left untouched.[3] By way of contrast, in the United States, the earlier Uniform Sales Act, which was substantially modelled on the United Kingdom Act, has been superseded by an entirely new legislative effort, Article 2 of the Uniform Commercial Code (hereafter UCC).[4]

Having regard to the many changes that have occurred in Canada since the adoption of the United Kingdom Act, we agree with the OLRC that there is a need for a revised Sale of Goods Act tailored to meet Canadian conditions and perceptions, and that every reasonable effort should be made to maintain uniformity among the Provinces by the adoption of a Uniform Sale of Goods Act.[5] We also agree that an amended version of the Ontario draft bill commends itself for this purpose. We have prepared such an amended draft Act and submit it herewith for adoption by the Uniform Law Conference as the Uniform Sale of Goods Act 1981. Part II of this Report contains an annotated version of our draft Act. The annotations explain what changes, if any, were made to the corresponding provisions of the Ontario draft bill, and why. The Table of Concordance, following the Table of Contents at the beginning of our draft Act, also shows what changes were adopted in the organization of the sections and their numbering.

We devote the balance of this Introduction to a brief review of the most important changes made by us to the Ontario draft bill.

## B. *SALIENT FEATURES OF CHANGES TO ONTARIO DRAFT BILL*

### I. *Basic Behavioural Norms: Good Faith and Unconscionability*

Ontario bill, s. 3.1, like the existing provincial Acts, permits the parties to vary or exclude altogether their rights and duties arising by implication of law. In the Ontario bill, however, the power to vary or exclude does not extend to the obligations of good faith, diligence,

reasonableness and care prescribed by the Act. The Committee agrees that, in a modern milieu, minimum benchmarks of decent contractual behaviour must be maintained, but the Committee was concerned about the broad reach of the good faith requirement in Ontario bill, s. 3.2.[6] Some members felt that it could affect the exercise of every right and obligation of the parties and expose it to *ex post facto* review and potential attack. Whether this would have happened in practice is debatable (and even more debatable is whether such attacks would have succeeded). The Committee agreed, however, that the scope of s. 3.2 should be confined to the "performance" of a duty created by the contract or the Act, good faith itself being defined in s. 1.1(1)15 (as before) as "honesty in fact and the observance of reasonable standards of fair dealing".

The Committee made only minor changes to the powers conferred on the courts in Ontario bill, s. 5.2, to police unconscionable bargains or manifestly unfair terms contained in a contract. We agree with the OLRC[7] that such an explicit power is preferable to the covert tools frequently used by Canadian courts and that, outside the area of disclaimer clauses, the common law jurisprudence is still too meagre and haphazard to be an adequate substitute for a statutory enunciation of the applicable rules. We recognize that several of the Provinces have now adopted business practices and trade practices legislation to deal with contractual abuses in the consumer area, and that at least two provinces (Ontario and Manitoba) are considering more comprehensive unfair contract terms legislation. In our view, there is no justification for restricting the courts' reviewing power to consumer contracts and, in the interests of uniformity, the unconscionability provisions should be retained in the Act until such time as a majority of the Provinces have adopted general unconscionability legislation.

## II. *Formation of Issues*

Unlike the present provincial Acts, the Ontario bill contains a substantial number of provisions dealing with the formation, assignment and modification of contracts of sale. We support this attempt to modernize some basic contractual rules but feel that some amendments are desirable to the following provisions appearing in the Ontario bill.

1. *Conflicting Writings and "Battle of the Forms".* UCC 2-207 deals with this difficult topic which has been much litigated in the United States. The OLRC felt that the section raises too many problems of construction to make it entirely suitable for adoption, and that only

subs. (3) should be adopted in Ontario. Ontario bill, s. 4.2(3), accordingly provides:

> (3) Conduct by both parties which assumes the existence of a contract is sufficient to establish a contract of sale although the writings or other communications of the parties do not otherwise establish a contract, and in such a case the terms of the contract consist of those terms on which the parties have agreed together with any supplementary terms incorporated under any provision of this Act.

It was the Committee's view that this solution was too rigid and might lead to undesirable results. We have therefore replaced s. 4.2(3) with two new provisions. First, s. 4.2(3) of the draft Act provides that a reply purporting to be an acceptance of an offer shall be treated as an acceptance, even though the reply contains additional or different terms, if the changes "do not materially alter the terms of the offer". Secondly, and more importantly, new s. 4.3 deals with the situation, corresponding to UCC 2-207(3), where one or other party has proceeded with performance of the contract even though the parties' communications do not show mutual assent to a single set of contractual terms. In such circumstances, the court is invested with broad powers to deal with the conflicting terms if it concludes that "having regard to all of the circumstances, the one party, by his conduct in receiving or shipping the goods or otherwise, has not in fact assented to conflicting terms of the other party and that it would be unreasonable to hold such parties to such terms" (s. 4.3(2)).

2. *Parol Evidence Rule.* We agree with the conclusion in the OLRC Report, pp. 110-17, that the parol evidence rule, as traditionally interpreted, should cease to apply in contracts of sale and that a court should be free to hear all relevant evidence to determine the terms of the bargain struck between the parties. A similar conclusion, in a wider setting, was reached in a subsequent report by the British Columbia Law Reform Commission.[8]

We feel, however, that Ontario bill, s. 4.6, which gives effect to the OLRC recommendation, is too compressed and that the effect of abolishing the parol evidence rule should be spelt out more fully. Accordingly, s. 4.8 of the draft Act provides:

> 4.8 No rule of law or equity respecting parol or extrinsic evidence and no provision in a writing shall prevent or limit the admissibility of evidence to prove the true terms of the agreement, including evidence of any collateral agreement or representation, or evidence as to the true identity of the parties.

Section 4.8 does not mean of course that a court must always—or even

most of the time—accept the parol evidence when it varies or conflicts with the written terms. It means simply that the court may admit it and may take it into consideration in determining whether the writing was intended by *both* parties to be the exclusive expression of their agreement.

(3) *Binding Character of Modifications without Consideration.* An important aspect of the Ontario bill's attempt to liberalize some of the existing rules of consideration is the provision, in its s. 4.8(1), that an "agreement in good faith modifying a contract of sale needs no consideration to be binding". Some members of the Committee felt keenly that a promise "not paid for" should be enforceable only to the extent that it has actually been relied upon; until such time a party should be free to withdraw from the executory portion of such an agreement and revert to the terms of the original contract after giving reasonable notice to the other party. We accepted this argument and a provision to this effect now appears in s. 4.10 of the draft Act.

III. *Warranty Provisions*

1. *Definition of "Express Warranty".* The existing distinction in sales law between contractual and non-contractual representations, the one amounting to a warranty and the other not, has been a source of recurring difficulty because of the problem of devising a satisfactory test to distinguish between them and because of the inadequate remedies available under existing law for a non-contractual representation. The OLRC Report favoured adopting the reliance test in s. 12 of the American Uniform Sales Act as the definition of an express warranty, and this was done in Ontario bill, s. 5.10. The OLRC Report recognized, however,[9] that this expanded definition could give rise to undesirable results in the case of representations by private sellers (or buyers), but eventually decided to defer the whole question of damages claims in private sales for consideration by the OLRC in its Law of Contract Amendment Project. The Committee agrees with the soundness of the reliance test (though not where the representation clearly amounts to a term of the agreement), but we also felt that the question of remedies had to be addressed. Our solution will be found in s. 9.19(1)(b) of the draft Act, which confers a broad remedial discretion on the court with respect to a breach of warranty "not amounting to a term of a contract". In such a case, the court may grant one or more of the following remedies: rescission, reduction in the price, and damages. In considering which of these remedies to exercise the court may take into account such factors as:

(a) the fact that both persons are merchants or that one or neither is a merchant;

(b) whether the person giving the warranty or contractual undertaking purported to have knowledge or expertise, or, as the other party knew, was merely transmitting information derived from another source;
(c) whether the person giving the warranty or contractual undertaking was negligent; and
(d) any other relevant circumstance.

The net result, it will be seen, is to retain a substantial measure of difference between contractual and non-contractual warranties, but one which gives the court much greater remedial flexibility than is possible under existing law.

2. *Manufacturers' Liability for Breach of Express and Implied Warranties.* The Committee also experienced some difficulty with Ontario bill, s. 5.18. It is a commonplace that under the existing law a buyer, not in privity with the manufacturer, experiences great difficulty in holding the manufacturer liable for defective goods even though it is the manufacturer who normally advertises and creates the market for them. Of course, the buyer has his recourse against the person (usually a retailer) from whom he bought the goods, but this may avail him little if the immediate seller is judgment proof or has gone out of business. Moreover, the retailer may have similar difficulties in obtaining satisfaction from the manufacturer if he bought the goods, not from the manufacturer, but from an intermediate distributor.[10]

Where the manufacturer advertises directly to the public, a member of the public may have redress under the doctrine of collateral warranty. Section 5.10 of both the Ontario bill and the draft Act gives statutory legitimacy to the doctrine. However, this still leaves a large gap. Ontario bill, s. 5.18, provides that the express and implied warranties of "a prior seller", and any remedies for breach thereof, enure in favour of a subsequent buyer who suffers injury because of a breach of the warranty. Section 5.18(4) goes on to provide that the measure of damages recoverable by a subsequent buyer shall be no greater than the damages that the immediate buyer could have recovered from such a prior seller, if a successful claim had been brought against the immediate buyer for breach of the same warranty and the immediate buyer had made a claim over against the prior seller. Section 5.18 was only put forward by the OLRC for purposes of discussion.[11] The OLRC made no recommendations concerning its enactment.

The Committee also debated the wisdom of including such a provision in the draft Act. Some members of the Committee felt the

whole problem was best left to be dealt with in the context of consumer product warranties legislation. Other members were concerned that only a minority of the Provinces have so far adopted consumer product warranties legislation and that there was little evidence that the remaining Provinces were in a hurry to follow the lead of Saskatchewan, New Brunswick, and Quebec. It was also pointed out that *Lambert* v. *Lewis*[12] showed that privity problems were not confined to consumer sales, and that it would be anomalous if a modern sales Act failed to acknowledge, however modestly, one of the most pressing problems in this branch of the law. It was these latter arguments that ultimately prevailed and, as a result, the Committee decided to retain s. 5.18 in an amended form as a fully fledged section in the draft Act. However, in the draft Act the section is restricted by subs. (1)(d) to cases where the prior seller is a merchant who sells goods that are subsequently resold. Ontario bill, s. 5.18(5), which in effect made the section non-excludable, has been omitted, thus subjecting such a disclaimer to the usual test of unconscionability.

IV. *Special Property and Insurable Interest*

Following the UCC precedent, the Ontario bill has eliminated title issues as a factor in determining the rights and duties of buyer and seller vis-à-vis one another.[13] In partial substitution, Ontario bill, s. 7.1, adopts the UCC concept of the buyer's special property and insurable interest, both of which arise by identification of existing goods to the contract. The insurable interest speaks for itself. "Special property" is a relevant connecting factor in Article 2 for the purpose of allowing the buyer to claim goods in the hands of an insolvent seller that have been paid for (UCC 2-502) and to bring an action in tort against third parties for injury to the goods (UCC 2-722). The OLRC decided that neither section was suitable for adoption in the Ontario bill.[14] In view of this conclusion, the question to which the Committee addressed itself was whether or not special property still serves a useful purpose. The Committee was especially troubled by the case of the buyer of identified goods who has paid all or part of the price, but has not received delivery of the goods because of the seller's insolvency. It felt that endowing the buyer with a special property may still assist him in obtaining the goods and in bringing tortious claims against third parties even before he has received the full title to the goods. The Committee therefore decided that both aspects of s. 7.1 should be retained. It also felt that the buyer's special property was a relevant factor for the court to consider in an action for special performance, and the draft Act so provides in s. 9.20(2).

V. *Excuse for Failure of Presupposed Conditions*

An important group of provisions in Part VIII of the Ontario bill (ss. 8.13 to 8.17) deals with the effects of unforeseen circumstances on the parties' obligations. The Committee's changes here were of a twofold character. First, the sequence of the sections was arranged in a more logical pattern.[15] Secondly, the scope of s. 8.12 of the draft Act, which corresponds to Ontario bill, s. 8.13, was narrowed somewhat. Both sections deal with the effect on the contract of an attempt to sell non-existing goods and with cases where casualty is suffered by the goods subsequent to the conclusion of the contract. The point was made that, since s. 7.7 operates to preserve bargains where the goods are non-conforming, it would be consistent with this approach for the dispensing power in s. 8.12 to be as narrow as reasonably possible for goods damaged or destroyed before delivery. Accordingly, s. 8.12(3) of the draft Act provides that Rules 1 and 2 of subs. (1) do not apply where "the seller is able to tender performance that differs in no material respect from that agreed on".

VI. *Remedies for Breach*

1. *Doctrine of Substantial Breach.* No single issue provoked livelier discussion within the Committee than the question of what type of breach should be sufficient to entitle a buyer to reject non-conforming goods and either party to cancel the contract for breach by the other. The OLRC Report, deviating from the perfect tender rule in UCC Article 2, adopted the position that only a "substantial breach", defined in Ontario bill, s. 1.1(1)24, should justify such strong remedies.[16] Ontario bill, s. 7.7, further qualified the right to cancel by conferring on the seller a broad right to cure even a substantial breach where this could be done without unreasonable prejudice to the buyer. The Committee felt that these provisions were too complex and perhaps too generous to the seller. It favoured a "perfect tender" rule with respect to the seller's obligations and the buyer's right to reject, coupled with substantially the same right to cure as under the Ontario bill. A similar regime has also been adopted with respect to breaches by the buyer although, in the nature of things, the buyer's right to cure in such cases is much more simply described.[17] In the Committee's view, the effect of these changes is to reach a result not dissimilar from that of the Ontario bill but by a more direct route. There are two important exceptions to the strict performance rule. In the case of instalment contracts (s. 8.10) and in cases of anticipatory repudiation (s. 8.8), only a substantial or total breach will confer a right to cancel the contract. The Committee is of the view that these revised provisions will have two salutary effects. First, they will

encourage a performing party to take his duties seriously since he will not be able to shelter behind the confident belief that a minor breach can lead only to a damages claim. A reduction in the price may indeed be an appropriate remedy under the new provisions (e.g., for the delivery of non-conforming goods) but the burden will be on the seller to show this, and he will have a strong inducement to make his offer promptly. The second salutary effect will be that, where a breach has occurred, the parties will be obliged to negotiate a settlement in good faith since neither party will enjoy absolute rights.

2. *Rejection and Revocation of Acceptance.* "Revocation of acceptance" is the term used in the UCC and in Ontario bill, s. 8.8, to describe the right of a buyer to reject non-conforming goods even after he is deemed to have accepted them. The OLRC Report[18] considered the possibility of collapsing the distinction betwen rejection and revocation of acceptance, but concluded it was not feasible in view of the important role reserved for acceptance (narrowly defined) in the Ontario bill in determining when the seller is entitled to sue for the price. For reasons that are explained below, the Committee reached the conclusion that the link between acceptance and entitlement to price should be severed so that this obstacle to eliminating the distinction has been removed. However, the Committee still thought acceptance a useful and familiar concept for other purposes and decided to retain it (see s. 8.2 of the draft Act). What the Committee has done instead is to expand the concept of acceptance so as to merge rejection and revocation of acceptance. This was possible because, under s. 8.2(2) of the draft Act, mere lapse of time no longer amounts to acceptance (as it is under the existing law and under the Ontario bill), except where (i) the buyer knew or ought to have known of the non-conformity, (ii) the goods are no longer in substantially the condition in which the buyer received them, or (iii) the non-conformity is of a minor character. Apart from this change, the sequence of the sections in Ontario bill, ss. 8.2 to 8.8, has been rearranged and their number reduced by two by consolidating several of the provisions.

3. *Seller's Right to Price.* As already mentioned, under Ontario bill, s. 9.11, following UCC 2-709, the seller is entitled to recover the price only where the goods have been accepted by the buyer or where one of the other enumerated exceptions applies. The Committee was of the view that the acceptance test was a little too severe and might result in a seller having to take back goods that had already been shipped to the buyer. It preferred instead a "delivery" test as the touchstone of the seller's entitlement to the price. This is the test adopted in s. 9.11(1)(a) of the draft Act. "Delivery" for this purpose is

defined in subs. (4). The seller also retains the right to sue for the price in the same circumstances as under the Ontario bill, viz., where at the material time the goods were at the buyer's risk or where the seller can show that there is no alternative market for the goods.

4. *Remedies Common to the Parties.* The Ontario bill, following the existing provincial Acts and the structure of part VII of UCC Article 2, treats separately the seller's and buyer's claim for damages. In a search for greater economy of language and a desire to avoid the unnecessary repetition of provisions, the Committee decided to combine several of the damages provisions in what is now s. 9.18 of the draft Act. The Committee also thought it desirable to include in s. 9.18(3) a specific reference to the aggrieved party's duty to mitigate his damages.

5. *Damages in Private Sales.* As previously mentioned, the OLRC Report considered this a generally neglected branch of sales law but ultimately decided that the question should be referred, in a broader setting, to its Law of Contracts Amendment Project. The Committee was of the view that something should be done now, and that the right solution was to give the court the same discretion to vary the remedy or substitute other remedies as it has in the case of a breach of warranty not amounting to a term of the contract of sale (see s. 9.19(1)(a)). Reference was made earlier to s. 9.19(2), which lists some of the factors to be taken into consideration by the court in determining whether or not to exercise its discretion.

6. *Specific Performance.* In addition to the change involving the relevance of the buyer's special property in the goods, only one significant alteration has been made to the provisions in Ontario bill, s. 9.18. Section 9.20 of the draft Act covers suits by a seller as well as a buyer. The change was made because the Committee felt there may be circumstances—as, for example, in requirement and output contracts and in situations involving third party contracts[19]—where damages may not be an adequate remedy to an aggrieved seller. Of course, the remedy itself remains discretionary, as is true under the existing law and under the Ontario bill.

## C. *DOCUMENTS OF TITLE*

"Documents of title" is a term that appears frequently in the draft Act,[20] and necessarily so, to describe the rights and obligations of the parties under a contract of sale and in the context of the exceptions to the *nemo dat* rule. The draft Act also distinguishes between negotiable and non-negotiable documents of title.[21]

The OLRC was of the view that the Ontario law of documents of title was badly fragmented, not always consistent, and incomplete in important respects, and it recommended that the Ontario law be comprehensively examined with a view to its systematic codification.[22] The Commission also recommended that Article 7 of the Uniform Commercial Code should be considered with a view to determining its suitablity for adoption in Ontario.

The Committee fully endorses the sentiments of the OLRC and believes them to be as relevant to the position in the other common law Provinces as they are in Ontario. The Committee is particularly concerned that there is no proper common law or comprehensive statutory basis for distinguishing between negotiable and non-negotiable documents of title, although the distinction is a vital one for the purposes of the draft Act. We therefore recommend, as a matter of some urgency, that the Uniform Law Conference establish a committee to review the existing federal and provincial law and to make recommendations with respect to the adoption of a Uniform Documents of Title Act.

## D. *CONCLUSION*

It is always hazardous to generalize about a draft Act as complex as the present one. It would be fair to conclude, however, that certain themes are pervasive throughout much of the draft Act, which generally favours flexibility, reasonable conduct, and an enlarged scope for the exercise of judicial discretion in difficult situations. In adopting this approach or, more accurately, in pursuing and adapting an approach already very evident in the Ontario bill, the Committee has not lost sight of the importance of certainty and predictability in commercial transactions. It believes, however, that the certainty is often illusory and that in daily practice sellers and buyers themselves adopt the same attitude of flexibility and reasonableness that the draft Act seeks to promote.

**FOOTNOTES**

1 The citations and a comparative table of the sections will be found in GHL Fridman, *The Sale of Goods in Canada* 2nd ed , pp. 4-5. One of the earliest initiatives of the Conference of Commissioners on Uniformity of Legislation in Canada was to encourage the Provinces that had not yet done so to adopt the UK Act of 1893, but the Act was never formally adopted as a Uniform Act. See *Proc 1st Ann. Meeting*, 1918, p. 9, and *Proc 2nd Ann Meeting*, pp, 7, 11 and 60.

2. See OLRC Report, pp. 8-9. The 1893 Act and the subsequent amendments have now been consolidated in The Sale of Goods Act, 1979, c 54 (U.K.).

3 OLRC Report, pp. 9-11.
4. *Ibid.*, pp. 12 et seq.
5. *Ibid.*, p. 30.
6. Section 3.2 of the Ontario bill reads: "Every right and duty that is created by a contract of sale or by this Act imposes an obligation of good faith in its enforcement or performance whether or not it is expressly so stated." The "good faith" requirement is discussed in the OLRC Report, pp. 163-69.
7 OLRC Report, ch. 7, pp 153 et seq.
8. Law Reform Commission of British Columbia, *Report on Parol Evidence Rule* (1979) LCR 44.
9. OLRC Report, pp. 140-41, and 489-91.
10 This point is illustrated by the recent decision of the English Court of Appeal in *Lambert v Lewis*, [1980] 1 All. E.R. 978, rev'd on other grounds [1981] 1 All. E.R. 1185 (H L.).
11. OLRC Report, p. 247.
12. *Supra*, n. 10.
13. See s. 6.2 and OLRC Report, ch 5.
14 OLRC Report, pp. 265, and 276-78.
15 See now ss. 8.11 to 8.15.
16 See OLRC Report, ch. 6(B) and ch. 17, pp. 459-61; and Ontario bill, ss. 8.1, 8.10, 8.2, 9.3(2) and 9 12(2).
17. See draft Act, ss 9.4(f) and 9.5 (seller's rights), and ss. 8.1, 9.12 and 7.7 (buyer's rights).
18 *Op. cit.*, pp. 474-75.
19 Cf *Beswick v Beswick*, [1968] A.C. 58 (H.L.)
20. See e g , ss. 6·1(3)2, 6 2, 7.2(4), 7.4, 7.5, 7 8, and 7.9. "Document of title" is defined in s. 1.1(1)11.
21 See sections cited in previous note.
22 OLRC Report, p. 329, recom. 1-2.

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| 7.2(3) | 7.2(3) |
| 7.2(4) | 7.2(4) as am. |
| 7.2(5) | 7.2(5) |
| 7.3 | 7 3 |
| 7.4(1) | 7.4(1) |
| 7 4(2) | 7.4(2) |

| Draft Uniform Bill | Draft O.L.R.C. Bill |
|---|---|
| 7.5(1) | 7.5(1) |
| 7.5(2) | 7.5(2) |
| 7.6(1) | 7.6(1) |
| 7.6(2) | 7.6(2) |
| 7 7(1) | 7.7(1) as am |
| 7.7(2) | 7.7(2) as am. |
| 7 7(8) | 7.7(3) as am. |
| — | 7 7(3) |
| — | 7.7(4) |
| — | 7.7(5) |
| 7 7(4) | 7.7(6) as am. |
| — | 7.7(7) |
| 7.8(1) | 7.8(1) as am. |
| 7.8(2) | 7.8(2) |
| 7 9(1) | 7.9(1) as am |
| 7.9(2) | 7.9(3) as am. |
| — | 7.9(2) |
| 7.10(1) | 7.10(1) |
| 7.10(2) | 7.10(2) |
| 7.10(3) | 7.10(3) |
| 7.11(1) | 7 11(1) |
| 7.11(2) | 7.11(2) |
| 7.12(1) | 7.12(1) |
| 7.12(2) | 7.12(2) |
| 7.12(3) | 7 12(3) |
| 7.12(4) | 7.12(4) |
| 7.12(5) | 7.12(5) as am. |
| 7.12(6) | 7.12(6) |
| 7.13 | 7.13 |
| 7 14(1) | 7 14(1) |
| 7 14(2) | 7.14(2) |
| 7.14(3) | 7.14(3) |
| PART VIII | |
| 8.1(1) | 8.1 as am. |
| 8 1(2) | 8.7(1) as am. |
| 8.2(1) | 8.2(1) as am. |
| 8.2(2) | 8.6(1) as am. |
| 8.2(3) | 8.8(1) as am |
| 8 2(4) | 8.6(2) as am. |
| 8 2(5) | 8 7(2) as am. |
| — | 8.2(3) |
| 8.3 | 8 2(2) as am. |
| 8.4(1) | 8.3(1) as am |
| 8.4(2) | 8.3(2) |
| 8.4(3) | 8.3(3) |
| 8 4(4) | 8.3(4) |
| 8 4(5) | 8.3(5) |
| 8.4(6) | 8.3(6) |
| 8.5(1) | 8.4(1) |
| 8.5(2) | 8.4(2) |
| 8.6(1) | 8.5(1) as am. |
| 8.6(2) | 8.5(2) as am. |
| 8.6(3) | — |
| 8.7(1) | 8.9(1) |
| 8 7(2) | 8 9(2) |
| 8.7(3) | 8.9(3) as am. |
| 8.7(4) | 8.9(4) |
| 8 7(5) | — |
| 8.8(1) | 8.10(1) as am. |
| 8 8(2) | 8.10(2) |
| 8.8(3) | 8 10(3) |
| 8.8(4) | 8.10(4) |
| — | 8 8(2) |
| — | 8.8(3) |
| — | 8.8(4) |
| 8.9(1) | 8.11(1) |
| 8.9(2) | 8.11(2) |
| 8.9(3) | 8.11(3) |
| 8.10(1) | 8.12(1) |
| 8.10(2) | 8.12(2) |
| 8.10(3) | 8.12(3) as am. |
| — | 8.12(4) |
| 8.11(1) | 8 15(1) (part) as am. |
| 8.11(2) | 8.15(1) (part) as am. |
| 8.11(3) | 8.15(2) (part) |
| 8.12(1) | 8.13(1) as am. |
| 8.12(2) | 8.13(2) |
| 8.12(3) | — |
| 8.13(1) | 8.15(1) (part) |
| 8.13(2) | 8.15(1) (part) |
| 8.13(3) | 8.16(1) as am. |
| 8.13(4) | 8.16(2) |
| 8 13(5) | 8.16(3) |
| 8.13(6) | 8.15(2) (part) |
| 8.14(1) | 8.14(1), 8.14(2) as am |
| 8.14(2) | 8.14(3) |
| 8.15(1) | 8.17(1) as am. |
| 8.15(2) | 8.17(2) |
| PART IX | |
| 9.1 | — |
| 9 2 | 9.1 |
| 9.3 | 9.2 |
| 9.4 | 9 3(1), (2) (part) as am. |
| 9.5(1) | 9.3(2) part, 9.4(1) as am. |
| 9.5(2) | 9.4(2) |
| 9.6(1) | 9.5(1) as am. |
| 9.6(2) | 9.5(2) as am. |
| 9.7 | 9.6 |
| 9.8(1) | 9.7(1) |
| 9.8(2) | 9.7(2) |
| 9.8(3) | 9.7(3) |

| Draft Uniform Bill | Draft O.L.R.C. Bill |
|---|---|
| 9.8(4) | 9.7(4) as am. |
| 9.8(5) | 9.7(5) |
| 9.9(1) | 9.8(1) |
| 9.9(2) | 9.8(2) |
| 9.9(3) | 9.8(3) |
| 9.9(4) | 9.8(4) |
| 9.9(5) | 9.8(5) |
| 9.9(6) | 9.8(6) |
| 9.9(7) | 9.8(7) |
| 9.9(8) | 9.8(8) |
| 9.9(9) | 9.8(9) |
| 9.9(10) | 9.8(10) |
| 9.10(1) | 9.9(1) as am. |
| 9.10(2) | 9.9(2) |
| 9 10(3) | 9.9(3) |
| 9.10(4) | 9.9(4) |
| 9.10(5) | 9 9(5) |
| 9.10(6) | 9.9(6) |
| 9.10(7) | 9.9(7) |
| 9.11(1) | 9.11(1) as am. |
| 9.11(2) | — |
| 9.11(3) | 9.11(2) |
| 9.11(4) | — |
| — | 9.11(3) |
| 9.12 | 9.12(1), (2) (part) as am. |
| 9.13 | 9.12(1) (part) as am. |
| 9.14 | 9.13 as am. |
| 9.15 | 9.14 |
| 9.16(1) | 9.15(1) as am. |
| 9.16(2) | 9.15(2) as am. |
| 9.16(3) | 9.15(3) |
| 9.17(1) | 9.17(1) |
| 9.17(2) | 9.17(2) |
| 9.17(3) | 9.17(3) |
| 9.18(1) | 9.10(1), 9.16(1) as am. |
| 9.18(2) | 9.10(2), 9.16(2) as am. |
| 9.18(3) | — |
| 9.18(4) | 9.10(3), 9.16(3) as am. |
| 9.18(5) | 9.10(4), 9.16(4) as am. |
| 9.18(6) | 9.19(1) |
| 9.18(7) | 9.19(2) as am. |
| 9.19(1) | — |
| 9.19(2) | — |
| 9.20(1) | 9.18 as am. |
| 9.20(2) | — |
| 9.21(1) | 9.20(1) as am. |
| 9.21(2) | — |
| 9.21(3) | 9.20(2), (3) as am. |
| | PART X |
| 10.1 | 10.1 |
| 10.2 | 10.2 as am. |
| 10.3 | 10.3 as am. |
| 10.4 | 10.4 |

# THE SALE OF GOODS ACT

## PART I

## INTERPRETATION

Interpretation

**1.1**—(1) In this Act,

1. "action" means a civil proceeding commenced by writ of summons or otherwise, and includes a counterclaim;

Sources: The Judicature Act, R.S.O. 1970, c. 228, s. 1(a); SGA s. 1(1)(a); UCC 1-201(1).

2. "agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing, usage of trade or course of performance;

Sources: UCC 1-201(3).

3. "bill of lading" means a document evidencing the receipt of goods for shipment by any mode of carriage issued by a person engaged in the business of transporting or forwarding goods;

Sources: UCC 1-201(6).

4. "buyer" means a person who buys or contracts to buy goods;

Sources: UCC 2-103(1)(a).

5. "buyer in the ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind for cash or by exchange of other property or on secured or unsecured credit, and includes a person who receives goods or documents of title under a pre-existing contract of sale, but does not include a person who receives a transfer in bulk within the meaning of [insert reference to bulk sales legislation] or as security for or in total or partial satisfaction of a money debt;

Sources: UCC 1-201(9).

6. "commercial unit" means a unit of goods that by commercial usage is a single whole for the purpose of sale and the division of which would materially impair its character or value on the market or its use; for example, a commercial unit may be a single article (as a machine), a set of articles (as a suite of furniture or an assortment of sizes), a quantity (as a bale, gross, or car-load), or any other unit treated in use or in its market as a single whole;

Sources: UCC 2-105(6).

7. "contract" means the legal obligations that result from the parties' agreement as affected by this Act and any other applicable rules of law;

Sources: UCC 1-201(11).

8. "contract of sale" means a contract whereby the seller transfers or agrees to transfer the title in goods to the buyer for a price, and includes,

(a) a contract for the supply of goods to be made, created or produced by the seller whether or not to the buyer's order, and without regard to the relative value of the labour and materials involved;

(b) a contract in which the seller is to retain a security interest in the goods; or

(c) a contract to which section 5.12(2) applies;

Sources: SGA s. 2(1); ULIS Art. 6; new.

9. "course of dealing" means previous conduct between the parties to a transaction that may fairly be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct;

Sources: UCC 1-205(1).

10. "delivery" means the voluntary transfer of possession.

Sources: SGA s. 1(d).

11. "document of title" means a writing that,

(i) purports to be issued by or addressed to a bailee,

(ii) purports to cover goods in the bailee's posses-

sion that are identified or fungible portions of an identified mass, and

(iii) in the ordinary course of business is treated as establishing that the person in possession of the document of title is, with any necessary endorsement, entitled to receive, hold and dispose of it and the goods it covers;

Sources: PPSA s. 1(i).

12. "fault" means a wrongful act, omission or breach;

Sources: UCC 1-201(16).

13. "financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract of sale, as by purchasing or paying the seller's bill of exchange or making advances against it or by merely taking it for collection whether or not documents of title accompany the bill;

Sources: UCC 2-104(2).

14. "fungible goods" means goods of which any one unit is the equivalent of any other unit by nature or by usage of trade or is so treated by agreement or in a document;

Sources: UCC 1-201(17).

15. "good faith" means honesty in fact and observance of reasonable standards of fair dealing;

Sources: UCC 1-201(19), 2-103(1)(b).

16. "goods" means movable things, and includes the unborn young of animals and such things attached to or forming part of land as provided in section 2.5, but does not include the money in which the price is to be paid or things in action;

Sources: UCC 2-105(1).

17. "insolvent" means a person who has ceased to pay his debts in the ordinary course of business, who cannot pay his debts as they become due, or who

is insolvent within the meaning of the *Bankruptcy Act* (Canada);

Sources: UCC 1-201(23).

18. "lease" includes hire and "lessor" and "lessee" shall be construed accordingly;

Sources: New.

19. "merchant" means a person,

(a) who deals in goods of the kind involved in the transaction;

(b) who by his occupation holds himself out as having knowledge or skill appropriate to the practices or goods involved in the transaction; or

(c) to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill;

Sources: UCC 2-104(1).

20. "notify" means to take such steps as are reasonably required to give information to the person to be notified so that the information,

(a) comes to his attention; or

(b) is directed to him at the place of business or residence through which the contract or offer was made or at such other place as is held out by him as the place for receipt of such information,

and "notification" has a corresponding meaning.

Sources: PPSA s. 1(p); UCC 1-201(26).

21. "receipt" of goods means taking physical possession of them, and "to receive" has a corresponding meaning;

Sources: UCC 2-103(1)(c).

22. "security interest" means an interest in personal property, including goods, that secures payment or performance of an obligation;

Sources: PPSA s. 1(y); UCC 1-201(37) (1st sent.).

23. "seller" means a person who sells or contracts to sell goods;

Sources: UCC 2-103(1)(d).

24. "signed" includes the execution or adoption of any symbol by a party to a contract of sale with the present intention of authenticating a writing;

Sources: UCC 1-201(39).

25. "usage of trade" means any reasonable practice or method of dealing that is observed in a place, vocation or trade with such regularity as to justify an expectation that it will be observed with respect to a transaction in question;

Sources: UCC 1-205(2).

26. "value" means a consideration sufficient to support a simple contract;

Sources: PPSA s. 1(z).

27. "writing" includes any mechanical, electronic or other form of recording of information, and "written" has a corresponding meaning;

Sources: New.

(2) In this Act, in relation to a contract of sale,

Meaning of "conforming"

(a) "conforming" means that goods or conduct, including any part of a performance, are in accordance with the obligations under the contract;

"termination"

(b) "termination" occurs when a party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach and thereupon all executory obligations are discharged but any right based on prior breach or performance survives, and "terminate" has a corresponding meaning;

"cancellation"

(c) "cancellation" occurs when a party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed part thereof, and "cancel" has a corresponding meaning;

"reasonable time" agreed

(d) whenever any action is required to be taken within a reasonable time, any time that is not manifestly unreasonable may be fixed by agreement;

test for "reasonable time"

(e) what is a reasonable time for taking any action depends on the nature or purpose of the action and all the other surrounding circumstances;

"seasonably"

(f) an action is taken "seasonably" when it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

Sources: UCC 1-204, 2-106(2), (3), (4).

*Comment*

The definitions contained in this section are virtually unchanged from those in Ontario bill, s. 1, apart from minor changes designed to clarify meaning or to reflect changes made in the substantive provisions of the draft Act.

## PART II

## SCOPE AND APPLICATION OF ACT

Purposes of Act

**2.1.** the purposes of this Act are to revise, reform, and modernize the law governing the sale of goods, to promote fair dealing, to assist the continued expansion of commercial practices through custom, usage and agreement of the parties, and to seek greater uniformity with the laws of other jurisdictions.

Sources: Canada Business Corporations Act, S.C. 1974-75, c. 53, s. 4; UCC 1-102(1).

*Comment*

1. This provision makes explicit the purposes of the draft Act. Apart from modernizing the law relating to sales, the Act is drafted in such a way as to ensure that new commercial practices are recognized and accommodated as they arise. The final stated purpose, "to seek greater uniformity with the laws of other jurisdictions", is intended to signal Canadian courts that they may be assisted in interpreting the Act not only by common law precedents but also by decisions from American jurisdictions, especially where the provision in question is based on a similar UCC section.

2. No changes have been made to Ontario bill, s. 2.

Application of Act

**2.2**—(1) This Act applies to every contract of sale of goods.

Act does not apply to secured transactions

(2) This Act does not apply to any transaction that is intended to operate only as a secured transaction,

whether or not it is in the form of an unconditional contract of sale.

What constitutes a contract of sale

(3) Whether or not a contract in the form of a lease of goods, bailment, hire-purchase, consignment or otherwise is a contract of sale depends on the intention of the parties, the substantial effect of the contract and all the other surrounding circumstances.

Act applies to "near sales"

*(4) Any of the provisions of this Act, if relevant in principle and appropriate in the circumstances, may be applied by analogy to a transaction respecting goods other than a contract of sale such as a lease of goods or a contract for the supply of labour and materials.

Sources: SGA s. 57(3); UCC 2-102; new.

*Comment*

1. Subsection (1) defines the scope of the Act as applying to every contract for the sale of goods.

2. Under existing law, the extent to which a secured transaction is subject to the Sale of Goods Act is uncertain. Subsection (2) requires the substance of the matter to be looked at. No matter what the form of the agreement, if it is intended to operate *only* as a secured transaction, the Act does not apply. However, if an agreement (e.g., a condition sales contract) contains sales features as well, these will be governed by this Act, while the security features will be governed by other law.

3. Many transactions are intended to effect a sale on credit, but because of the way in which the transaction is cast, there may be no legal obligation to purchase. According to *Helby v. Matthews*, [1895[ A.C. 471 (H.L.), a transaction whereby the seller is not obliged to sell and the purchaser to purchase does not constitute a sale. Subsection (3) rejects this test. The intention of the parties and the substantial effect of the contract, rather than the precise legal obligation undertaken by the parties, will determine the matter. The provision is also designed to dovetail with a similar test contained in the Personal Property Security Acts in those Provinces which have adopted such an Act.

4. Subsection (4) is optional. A majority of the OLRC recommended the inclusion of this provision so that courts would be encouraged to apply the Sale of Goods Acts analogically to "near-sales" transactions. The Committee was divided on the merits of such a

provision. Ultimately, it was felt that such a provision was marginal to a uniform law on sales and probably redundant: as courts gain experience with the Act, they are likely to develop the common law of "near-sales" to reflect the principles of the Act. The Committee thus thought that adoption of the provision could best be left to the individual Provinces.

5. No changes have been made to Ontario bill, s. 2.2, apart from making subs. (4) optional.

Crown bound

**2.3.** The Crown is bound by this Act.

Sources: New.

*Comment*

1. In the interests of fairness and certainty, the Crown should be bound by the Act.

2. No changes have been made to Ontario bill, s. 2.3.

Condition of goods before interest can pass

**2.4.**—(1) Goods that are the subject of a contract of sale must be both existing and identified before any interest in them can pass.

"Future" goods

(2) Goods that are not both existing and identified are "future" goods.

Purported sale of future goods

(3) A purported present sale of future goods or of any interest in future goods operates as a contract to sell.

Part interests

(4) There may be a sale of a part interest in existing identified goods.

Fungible goods

(5) An undivided share in an identified bulk or fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined, and any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may, to the extent of the seller's interest in the bulk, be sold to the buyer who then becomes an owner in common.

Sources: SGA ss. 2(1), 6; UCC 2-105(2), (3), (4).

*Comment*

1. Subsections (1) to (3) largely reflect the current law.

2. Subsection (4) clarifies the existing law to ensure that the

sale of a part interest in existing identified goods is governed by the Act.

3. Subsection (5) changes the present law which prevents the passing of property in an undivided interest in an identified bulk of goods, unless the share has been separated from the bulk. The subsection provides that an unidentified share in an identified bulk of fungible goods may be validly sold, and that a buyer then becomes an owner in common. The term "fungible goods" is defined in s. 1.1(1)14.

4. No changes have been made to Ontario bill, s. 2.4.

Sale of minerals, etc

**2.5.**—(1) A contract of sale of minerals, hydrocarbons or other substances to be extracted from land is a contract of sale of goods if they are to be severed by the seller, but until severance a purported present sale thereof that is not effective as a transfer of an interest in land is effective only as a contract to sell.

Sale of fixtures etc

(2) A contract of sale, apart from the land, of growing crops, timber, fixtures or other things attached to the land that are intended to be servered under the contract of sale is a contract for the sale of goods,

(a) whether the subject matter is to be severed by the buyer or by the seller; and
(b) even though the subject matter forms part of the land at the time of contracting and severance is to be at a later time;

and the parties can by identification effect a present sale before severance.

Rights of third parties

(3) The rights of a buyer under subsection 2 are subject to the interest of any person, other than the seller, who had a registered interest in the real property at the time of the contract of sale, and are subject to the interest of,

(a) a subsequent purchaser or mortgagee for value of an interest in the real property;
(b) a creditor with a lien on the real property subsequently obtained as a result of judicial process; or
(c) a creditor with a prior encumbrance of record on the real property in respect of subsequent advances,

if the subsequent purchase or mortgage was made or the

lien was obtained or the subsequent advance under the prior encumbrance was made or contracted for, as the case may be, without actual notice of the contract of sale.

Registration

(4) A notice in the form prescribed by the regulations may be registered in the proper land registry office and thereupon it shall, for the purposes of subsection 3, constitute actual notice of the buyer's rights under the contract of sale.

Sources: PPSA ss. 36, 54; UCC 2-107.

*Comment*

1. Whether a contract for the sale of minerals, crops or fixtures to be severed from the land is a contract for the sale of goods or of land has always been a difficult question. Subsections (1) and (2) state the occasions when such transactions shall be considered sales of goods.

2. Subsections (3) and (4) provide for a system of priority as between persons dealing with the land and purchasers of crops, timber and fixtures, Each adopting Province should review its legislation to ensure consistency with this section.

3. No changes have been made to Ontario bill, s. 2.5.

Price, how payable

**2.6.**—(1) The price may be made payable in money or otherwise.

Price includes goods

(2) Where the price is payable in whole or in part in goods, each party is a seller of the goods that he is to transfer.

Price includes land

(3) Where the price is payable in whole or in part in an interest in land, this Act applies to the transfer of the goods and to the seller's obligations in connection therewith, but this Act does not apply to the transfer of the interest in land or to the buyer's obligations in connection therewith.

Sources: UCC 2-304.

*Comment*

1. Under existing law, a barter of goods is not caught by the Sale of Goods Act. Subsections (1) and (2) change the law to provide that the consideration for a sale need not be monetary and that where goods are traded, each party is considered a seller.

2. Subsection (3) allows the price to be satisfied by the transfer of an interest in land, but makes it clear that the land transfer is not subject to the draft Act.

3. No changes have been made to Ontario bill, s. 2.6.

## PART III

## GENERAL

Exclusion, variation of provisions of Act

**3.1.**—(1) Except as otherwise provided in this Act, any provision of this Act may be varied or negatived by agreement of the parties.

Standards of performance of obligations

(2) The obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by the parties, but they may agree upon the standards by which the performance of such obligations are to be measured so long as the standards agreed upon are not manifestly unreasonable.

Sources: SGA s. 53; UCC 1-102(3).

*Comment*

1. This section recognizes the freedom of the parties to make their own contract, subject to two exceptions. First, a specific provision of the draft Act may indicate that it is not excludable (e.g., s. 5.2(4) dealing with unconscionability). Secondly, subs. (2) provides that the obligations of good faith, diligence, reasonableness and care prescribed by the draft Act may not be excluded, although the parties are free to regulate the content of such obligations in a reasonable manner.

2. No changes have been made to Ontario bill, s. 3.1.

Obligation of good faith

**3.2.** Every duty that is created by a contract of sale or by this Act requires good faith in its performance whether or not it is expressly so stated.

Sources: UCC 1-203; new.

*Comment*

1. This section imposes an obligation of good faith in the performance of duties under a contract of sale or under this Act. "Good faith" is defined in s. 1.1(1)15 as including both honesty in fact and the "observance of reasonable standards of fair dealing".

2. The OLRC recommended that the obligation extend to the

"enforcement" of rights, as well as to the performance of duties. The Committee decided it was inappropriate to apply an obligation of good faith to the enforcement of rights under a contract of sale. See also the Introduction to this Report.

## DISSENT

Professor David Vaver wishes to record the following dissent:

I agree with the Committee's decision not to include in the draft Act the Ontario bill's provision that good faith be required in the enforcement of duties. In my opinion, however, the Committee should have gone further and eliminated s. 3.2 completely.

My reasons for holding this view are:

(a) The OLRC correctly said that no obligation of good faith in the performance of contracts currently existed as a general concept in Anglo-Canadian sales or contract law (see OLRC Report, p. 163; see also Burrows, (1968) 31 Modern L. Rev. 390, at p. 405). Nonetheless, the OLRC considered it should follow current American doctrines which appear to recognize such a concept. The OLRC has not, in my opinion, presented any persuasive case for changing Canadian law in such a radical manner. No pre-existing defect of Canadian law which this concept is supposed to cure has been demonstrated to my satisfaction.

(b) As defined, the concept is inherently meaningless. It will be impossible to advise with any certainty in litigation or indeed to draft sales contracts in such a way as to take account of such an amorphous notion. The other party's alleged lack of "good faith" is now likely to become the new "last-ditch" argument of every advocate faced with a case devoid of merits or law.

(c) In the past, Anglo-Canadian courts have dealt adequately with the sort of problem which an obligation of good faith presumably is designed to cover by implying terms to give the contract business efficacy or by construing contracts in a broad commercial manner. The draft Act encourages this tendency, *inter alia,* by insisting that trade usages and the parties' course of dealing must be regarded in construing contracts, by eliminating the parol evidence rule, and by providing comprehensive and flexible remedies on breach. Given such a broad approach, any further requirement of good faith is redundant at best and mischievous at worst.

(d) Such a principle may cause considerable uncertainty in the

future application of other well-established principles. Take, for example, the case where a party has a choice under his contract to perform in either of two ways. The current law is that he may choose whichever performance suits him best, without regard for the convenience or benefit of the other party: *Reardon Smith Line Ltd.* v. *Minister of Agriculture,* [1963] 1 All E.R. 545 (H.L.). Henceforth, will such a party be acting "in good faith" if he takes this course? Will this be the "observance of reasonable standards of fair dealing?" Nothing in the OLRC Report indicates how many principles of as apparently innocuous a nature as that in the *Reardon Smith* case may now have to be reconsidered.

(e) There may be a number of objections taken to my approach. First, it may be said that no harm can possibly result from the introduction of such a concept. I have detailed above some of the harms I consider might occur; but, in any event, a change of this nature should not be made because it is thought harmless, but because it is intended to cure some demonstrated defect. No such defect has, in my opinion, been revealed.

Secondly, my being against the imposition of a generalized concept of "good faith" in contractual performance does not mean that I favour "bad faith" performance, any more than a person who does not favour winter can therefore be said to favour summer.

Thirdly, it may be argued that, since both American and civil law recognize an obligation of good faith, why should not Canadian law? If the draft Act were truly uniform with United States and Quebec law and good faith the only matter standing in the way of uniformity, I confess that I would probably have withdrawn my objection. But the draft Act does not achieve such uniformity. Nor is it proper, in my view, to lift concepts from other systems of law and import them into Canadian law, as if Canadian common law does not already adequately deal with the concerns which such concepts are designed to cover.

(f) Ultimately, I do not consider that the draft Act would suffer in any way if s. 3.2 were omitted. Where it is considered desirable that an obligation of good faith should modify a particular provision of the Act, it should be expressly written into that provision. Where an issue of improper exercise of contractual power arises in a particular case, it should be dealt with under existing contract principles, as modified by the broader approaches which the draft Act mandates for ascertaining and construing agreements.

Rights, etc., enforceable by action

**3.3.** Where any right is conferred or any duty or liability is imposed by this Act, it may, unless otherwise provided by this Act, be enforced by action.

Sources: SGA s. 55.

*Comment*

This provision represents existing law. No changes have been made to Ontario bill, s. 3.3.

General principles of law applicable

**3.4.**—(1) Unless inconsistent with this Act, the principles of law and equity, including the law merchant and the law of principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, supplement the provisions of this Act.

R S C 1970, c B-5, etc

(2) Nothing in this Act affects the rights of a holder in due course of a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Can.), or the rights of a holder of a document of title under federal legislation, or [insert name of enacting Province] legislation other than this Act.

Sources: SGA s. 57; UCC 1-103; new.

*Comment*

1. Subsection (1) preserves the general principles of law and equity in relation to contracts of sale, unless inconsistent with the Act. Under existing law, there is some doubt whether or not principles of equity apply to sale contracts; the provision now clearly makes them applicable.

2. Subsection (2) provides that the Bills of Exchange Act (Can.) and the rights of a holder of a document of title under any relevant federal or provincial statutes are unaffected by the Act.

3. No change of substance has been made to Ontario bill, s. 3.4.

## PART IV

## FORMATION, ADJUSTMENT AND ASSIGNMENT OF CONTRACTS

Meaning of necessaries

**4.1.**—(1) In this section "necessaries" means goods suitable to the condition in life of the minor or other person and to his actual requirements at the time of delivery of the goods.

Capacity to buy and sell

(2) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property, but where necessaries are sold and delivered to a minor or to a person who by reason of mental incapacity, drunkenness or otherwise is incompetent to contract, he must pay a reasonable price therefor.

Sources: SGA s. 3.

*Comment*

This provision represents existing law. No changes have been made to Ontario bill, s. 4.1.

How contract of sale may be made

**4.2.**—(1) A contract of sale may be made in any manner sufficient to show agreement, including conduct by the parties which recognizes the existence of such a contract.

Moment of making may be undetermined

(2) An agreement sufficient to constitute a contract of sale may be found even though the moment of its making is undetermined.

Effect of additional or different terms

(3) A reply to an offer purporting to be an acceptance but containing additional or different terms which do not materially alter the terms of the offer constitutes an acceptance and in such a case the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

Notice of objection

(4) Subsection 3 does not apply if the offeror seasonably notifies the offeree of his objection to the additional or different terms.

Material alteration of terms of offer

(5) For the purpose of subsection 3, additional or different terms relating to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are terms which materially alter the terms of the offer.

Sources: UCC 2-204, 2-207; new.

*Comment*

1. Subsections (1) and (2) provide that no special formalities (e.g., writing) are required for a contract of sale. The provisions also indicate that a contract may be found by regarding the conduct of

the parties, and that a court need not engage in the exercise of finding the precise moment when a contract is made.

2. Subsections (3) to (5) were added by the Committee. They deal with cases where an acceptance does not precisely mirror the terms of the offer. At common law this would prevent there being any contract. These subsections, which are based on similar provisions in the United Nations Convention on Contracts for the International Sale of Goods adopted at Vienna on April 11, 1980, state that a contract may be formed even though the acceptance contains additional or different terms, provided that: (a) those terms do not materially alter the terms of the offer; and (b) the offeror does not seasonably object to the new terms. See also the Introduction to this Report. "Seasonably" is defined in s. 1.1(2)(f). A definition of what terms are deemed material is contained in subs. (5).

3. Two changes were made to Ontario bill, s. 4.2. Subsection (3) was deleted and replaced by a new s. 4.3, and new subs. (3) to (5) were added.

Conflicting terms

**4.3.**—(1) Subject to section 4.2(3), this section applies where under the rules of offer and acceptance the parties are deemed to have concluded a contract of sale and one of them has proceeded with performance even though their communications do not show mutual assent to a single set of contractual terms.

Powers of the court

(2) When a court concludes that, having regard to all of the circumstances, the one party, by his conduct in receiving or shipping the goods or otherwise has not in fact assented to conflicting terms of the other party and that it would be unreasonable to hold such party to such terms, the court may:

(a) ignore the conflicting terms and apply this Act as if the contract contained no such terms,

(b) substitute such terms as, in the court's view, the parties would have adopted had their attention been drawn to the conflicting terms, or, as in the court's view, represent a reasonable compromise of the conflicting terms; or

(c) find that no contract has been concluded between the parties and make such consequential order as may be appropriate.

Relevant factors

(3) In exercising its discretion under subsection 2 and

in determining whether or not it would be unreasonable to hold a party to the other party's terms, the court shall have regard, among other things, to the usage of trade in the vocation or trade in which the parties are engaged, their course of dealings and course of performance, and where relevant, the extent to which one party seeks not to be bound by a term without which, as he knew or ought to have known, the other party would not have been willing to enter into the contract.

Sources: UCC 2-204, 2-207(3); new.

*Comment*

1. The OLRC recommended that a provision, partly based on UCC 2-207, should deal with the common commercial case where a buyer and seller attempt to conclude an agreement by exchanging divergent standard order and acknowledgment of order forms. The Committee agreed that the matter should be dealt with, but concluded that Ontario bill, s. 4.2(3), was too rigid and might lead to undesirable results. Accordingly, a more flexible provision in place of the Ontario section was adopted.

2. The scheme of s. 4.3 is: (a) s. 4.2 of the draft Act applies where the acceptance contains additional or different terms which do not materially alter the offer; (b) where under ordinary rules of offer and acceptance, a contract of sale is considered concluded and one of the parties has proceeded with performance, the court is given a discretion in dealing with the transaction where it is plain that the parties have not mutually assented to a single set of contractual terms. In such a case, where there has not been assent in fact and it would be unreasonable to hold one party to the other party's terms, the court may ignore the conflicting terms, substitute reasonable terms, or hold that no contract exists. In exercising its discretion, the court is directed by subs. (3) to look at the relevant trade usages and course of dealings between the parties. See also the Introduction to this Report. For a detailed discussion of the problems addressed by this provision, see OLRC Report, pp. 81-86.

3. Ontario bill, s. 4.2(3), was deleted by the Committee and replaced by this new section.

Firm offers

**4.4**—(1) An offer by a merchant to buy or sell goods which expressly provides that it will be held open is not revocable for lack of consideration during the time stated or, if no time is stated, for a reasonable time not to exceed three months.

Form supplied by offeree

(2) Any such assurance of irrevocability in a form supplied by the offeree is not binding unless the assurance is separately signed by the offeror.

Sources: UCC 2-205; new.

*Comment*

1. Subsection (1) reverses the common law rule that an offer made without consideration but stated to be irrevocable may nonetheless be withdrawn at any time. The subsection provides that an irrevocable offer made by a merchant will be binding for the time stated, despite the absence of consideration; if no time is stated, the offer will be irrevocable for a reasonable time not exceeding three months. A similar offer made by a non-merchant party will remain subject to ordinary common law principles.

2. The OLRC did not adopt the provision in UCC 2-205 that some formality should be required where the assurance of irrevocability is contained in a form supplied by the offeree. The Committee preferred the UCC solution to ensure that an offeror was not surprised by the presence of such a provision secreted in the midst of a boilerplate form. Subsection (2) accordingly requires a signed writing in such a case.

3. No other change was made in Ontario bill, s. 4.3.

Revoked offers

**4.5**—(1) An offer to buy or sell goods which the offeror ought reasonably to expect to induce substantial action or forbearance by the offeree before acceptance and which does induce such action or forbearance will, if revoked, bind the offeror to compensate the offeree in accordance with subsection 2.

Powers of the Court

(2) In such a case the court may,

(a) award damages on the same basis as if a contract had been completed between the parties, or

(b) grant compensation limited to the restoration of any benefit conferred upon the offeror or to the recovery of any losses incurred as a result of reliance on the offer or generally to the extent necessary to avoid injustice.

Sources: Restatement (Tent. Draft) s. 89B; new.

*Comment*

1. The OLRC Report (pp. 95-96) considered whether it should include in the Ontario bill a provision to grant relief where an offer had

been revoked and where the offeree had, before revocation, relied upon the offer to his detriment. The OLRC felt the proposal had obvious merit but thought it would be more appropriate to deal with it in the context of the OLRC's Law of Contracts Amendment Project. The Committee considered it appropriate to include such a provision in the draft Act.

2. Subsection (1) is modelled on s. 89B of the Tentative Draft of the American Restatement on Contracts (Second). Where an offeror revokes an offer, but the offeree has acted, or forborne from acting, in response to the offer, as the offeror ought reasonably to have expected, the offeror may be ordered by the court to compensate the offeree. This preserves the offeror's right to withdraw his offer, but recognizes that there may be circumstances where it is fair that he do so only on terms. Subsection (2) gives the court a discretion to grant compensation on a number of alternative bases "to the extent necessary to avoid injustice".

Forms of acceptance

**4.6.**—(1) Unless otherwise indicated by the language or the circumstances,

(a) an offer to make a contract of sale shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances including performance of a requested act; and

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

Acceptance by tender or beginning of performance

(2) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, or requires acceptance by performance,

(a) the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance; and

(b) such an acceptance binds the offeree to render complete performance.

Duty to notify of acceptance by performance

(3) If an offeree who accepts by performance has reason to know that the offeror has no adequate means of learning of the acceptance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless,

(a) the offeree notifies the offeror seasonably of his acceptance;

(b) the offeror learns of the performance within a reasonable time; or

(c) the circumstances of the offer indicate that notification of acceptance is not required.

Sources: Restatement (Tent. Draft) ss. 29, 56(2), 63; UCC 2-206.

*Comment*

1. An offer does not always indicate in what manner it may be accepted. Subsection (1) provides that acceptance may be made in any reasonable manner including performance of the requested act. In the case of an offer to buy goods for prompt or current shipment, the offeree may accept either by promptly shipping or by promptly promising to ship.

2. Where an offeree is entitled to accept by performance, subs. (2) provides that the commencement of performance is deemed to be acceptance and that the offeree thereafter is bound to complete. Subsection (3) deals with situations where the offeror may not promptly learn of the acceptance and imposes a duty of notification on the offeree.

3. Apart from minor drafting amendments, no changes have been made to Ontario bill, s. 4.4.

Sales by auctions; lots

**4.7**—(1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate sale.

When auction sale complete

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in any other customary manner.

Reserve bids

(3) A sale by auction is with reserve unless the goods are put up without reserve.

Auctions with reserve

(4) In an auction with reserve, the auctioneer may withdraw the goods at any time until he announces completion of the sale.

(5) In an auction without reserve, after the auctioneer calls for bids on an article or lot, that aritcle or lot cannot be withdrawn unless no bid is made within a reasonable time. Auctions without reserve

(6) In an auction with or without reserve the bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid. Bidder's right to retract bid

(7) A right to bid may be reserved expressly by or on behalf of the seller. Seller's right to bid

(8) Where the seller has not reserved the right to bid, it is not lawful for a seller to bid himself or to employ a person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Wrongful bid by seller

(9) Where subsection 8 is contravened, the buyer may treat the sale as fraudulent and may avoid the sale and recover damages, or may affirm the sale and recover damages or claim an abatement in the price. Consequences

Sources: SGA s. 56; UCC 2-328.

*Comment*

1. This section deals with certain aspects of sales by auction and largely reproduces the existing law.

2. Apart from a minor drafting amendment to subs. (8), no changes were made to Ontario bill, s. 4.5.

**4.8.** No rule of law or equity respecting parol or extrinsic evidence and no provision in a writing shall prevent or limit the admissibility of evidence to prove the true terms of the agreement, including evidence of any collateral agreement or representation, or evidence as to the true identity of the parties. Parol evidence rule not applicable

Sources: new.

*Comment*

1. Ontario bill, s. 4.6, is intended to abolish the parol evidence rule in sales contracts, reflecting the considerable criticism which has been levelled against the rule in recent years. The committee agreed with the OLRC proposal but felt that the language of the section was too compressed. See also the Introduction to this Report.

2. Section 4.8 provides that the parol evidence rule should not limit the admissibility of evidence to prove the true terms of the parties' agreement including any collateral agreement or representation, or any evidence as to the true identity of the parties. A provision in a contract designed to limit such evidence equally has no effect. This does not mean that a court must always, or even most of the time, accept the parol evidence when it varies or conflicts with the written terms. It means simply that the court may admit it and may take it into consideration in determining whether the writing was intended by both parties to be the exclusive expression of their agreement. See OLRC Report, pp. 110-17.

3. Drafting changes, but not changes of policy, were made by the Committee to Ontario bill, s. 4.6.

Course of dealing and usage of trade

**4.9.**—(1) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify the terms of an agreement.

Place of performance

(2) An applicable usage of trade in the place where any part of performance is to occur may be used in interpreting the agreement as to that part of the performance.

Course of performance

(3) Where an agreement of sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant in determining the meaning of the agreement.

Relationship of express terms, course of performance, course of dealing and usage of trade

(4) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, the express terms of the agreement control the course of performance, the course of performance controls both the course of dealing and the usage of trade, and the course of dealing controls the usage of trade.

Course of performance as waiver or variation

(5) Subject to section 4.10, such course of performance is relevant to show a waiver or variation of any term inconsistent with such course of performance.

Sources: UCC 1-205(3), (4), 2-208.

*Comment*

1. This section provides that relevant trade usages and the parties' course of dealing and performance should be considered in construing sales contracts. Its purpose is to ensure that the terms of the agreement are considered in the light of the relevant commercial background and the parties' understanding of it as exhibited by their performance.

2. Apart from minor drafting amendments, no changes have been made to Ontario bill, s. 4.7.

**4.10.** An agreement varying or rescinding a contract of sale needs no consideration to be binding, but a party may withdraw from an executory portion of such an agreement made without consideration and revert to the original contract by giving reasonable notice to the other party, unless the withdrawal would be unjust in view of a material change of position in reliance on the agreement. Variation or rescission of contract of sale

Sources: UCC 2-290; new.

*Comment*

1. Ontario bill, s. 4.8, changes the existing law by providing that good faith modifications to a contract are binding without consideration. The Committee agreed with the OLRC (see OLRC Report, pp, 96-102) but thought that the drafting of the provision could be simplified.

2. Section 4.10 provides that a variation or rescission of a contract needs no consideration to be binding. The Committee, however, added a qualification that where such an "unpaid-for" modification occurs, the original agreement may be reverted to upon notice, so long as no material change of position in reliance on the modification has occurred rendering withdrawal unjust.

3. This section deals only with variations or rescissions. The Committee did not think it necessary to add any provision indicating that the doctrines of waiver and promissory estoppel remain unaffected. Section 4.10 should eliminate the need to rely on these other doctrines in most sales cases.

4. Subsections (2) to (4) of Ontario bill, s. 4.8, deal with the effect of a clause which purports to prevent the modification of a contract except by means of writing. The Committee felt that such issues would be more appropriately resolved under s. 5.2 (unconscionability) and deleted these provisions from the draft Act.

**4.11**—(1) A party to a contract of sale may perform his duty under it through a delegate unless the other party has a Delegation of performance

substantial interest in having his original promisor perform or control the acts required by the contract, but a delegation of performance does not relieve the party delegating of any duty to perform or of any liability for breach.

Assignment of rights

(2) The rights of a seller or buyer may be assigned except where the assignment would,

(a) change materially the duty of the other party;

(b) increase materially the burden or risk imposed on the other party by the contract; or

(c) impair materially the other party's chance of obtaining return performance.

Assignment of right to damages etc

(3) A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation may be assigned despited contrary agreement, but then only in its entirety, whether or not such assignment occurs before or after performance of the assignor's obligation.

Construction of term prohibiting assignment

(4) Unless the circumstances indicate the contrary, a term prohibiting assignment of a contract shall be construed as barring only the delegation to the assignee of the assignor's duty of performance.

Assignments in general terms

(5) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is,

(a) an assignment of rights; and

(b) unless the language or the circumstances indicate the contrary, a delegation of performance of the duties of the assignor, other than a duty to pay damages for a breach arising before the assignment.

Acceptance of assignment by assignee

(6) The acceptance by the assignee of an assignment under subsection 5 constitutes a promise by him to perform the duties of the assignor and this promise is enforceable by either the assignor or the other party to the original contract.

Grounds for insecurity

(7) The other party may treat an assignment that delegates performance as creating reasonable grounds for insecurity for the purposes of section 8.7.

Sources: UCC 2-210.

*Comment*

1. These provisions clarify the existing law relating to assignment and delegation of performance in respect of sales contracts. Under subs. (1) and (2), delegation and assignment are permitted, unless they would impose significant additional burdens or risks on the other party. Subsection (3) permits the assignment of damages claims, despite contrary agreement. Subsections (4) and (5) provide a number of aids to the construction of clauses permitting or prohibiting assignment. Subsection (6) imposes a duty of performance on the assignee who accepts an assignment. Subsection (7) allows the party to an assigned contract to seek adequate assurances of performance pursuant to s. 8.7 of the draft Act, where further performance is still owing under the contract.

2. Two changes to Ontario bill, s. 4.9, were made by the Committee. The first was a minor amendment to subs. (7) to make a specific reference to s. 8.7 (assurance of performance). The second was to amend subs. (3) to provide that parties may limit partial, but not total, assignments of damages claims. Otherwise an assignee might not be prevented from making multiple partial assignments, thereby imposing unwarranted additional burdens on the other party.

## PART V

## GENERAL OBLIGATIONS AND CONSTRUCTION OF CONTRACT

General obligations of the parties

**5.1.**—(1) It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

Meaning of buyer's obligation to pay extended

(2) The buyer's obligation to pay includes taking such steps and complying with such formalities as are required under the contract and any relevant law to enable payment to be made or to ensure that it will be made.

Sources: SGA s. 26: UNCITRAL Arts. 14, 35, 36.

*Comment:*

1. This section summarizes the basic obligations of seller and buyer and corresponds to the existing law (see, e.g., Ont. SGA, s. 26).

2. Subsection (2) contains a slight elaboration of the buyer's payment obligations and is based on art. 54 of the United Nations Convention on Contracts for the International Sale of Goods adopted at Vienna on April 11, 1980. It reflects the realities of modern international trade and the fact that a buyer frequently has to comply with the

exchange and similar public law requirements of national law before he can effect payment.

3. No changes have been made to Ontario bill, s. 5.1.

Unconscionable contracts or parts of contracts

**5.2.**—(1) If, with respect to a contract of sale, the court finds the contract or a part thereof, to have been unconscionable at the time it was made, the court may,

(a) refuse to enforce the contract or rescind it on such terms as may be just;

(b) enforce the remainder of the contract without the unconscionable part; or

(c) so limit the application of any unconscionable part or revise or alter the contract as to avoid any unconscionable result.

Factors to be considered in determining unconscionability

(2) In determining whether a contract of sale, or a part thereof, is unconscionable, or whether the operation of an agreement is unconscionable under section 5.7(3), the court may consider, among other factors;

(a) the commercial setting, purpose and effect of the contract, and the manner in which it is formed;

(b) the bargaining strength of the seller and the buyer relative to each other, taking into account the availability of reasonable alternative sources of supply or demand;

(c) the degree to which the natural effect of the transaction, or any party's conduct prior to, or at the time of, the transaction is to cause or aid in causing another party to misunderstand the true nature of the transaction and of his rights and duties thereunder;

(d) whether the party seeking relief knew or ought reasonably to have known of the existence and extent of the term or terms alleged to be unconscionable;

(e) the degree to which the contract requires a party to waive rights to which he would otherwise be entitled;

(f) in the case of a provision that purports to exclude or limit a liability that would otherwise attach to the party seeking to rely on it, which party is better able to safeguard himself against loss or damages;

(g) the degree to which one party has taken advantage of the inability of the other party reasonably to protect his interests because of his physical or mental infirmity, illiteracy, inability to understand the language of an agreement, lack of education, lack of business knowledge or experience, financial distress, or similar factors;

(h) gross disparity between the price of the goods and the price at which similar goods could be readily sold or purchased by parties in similar circumstances; and

(i) knowledge by one party, when entering into the contract, that the other party will be substantially deprived of the benefit or benefits reasonably anticipated by that other party under the transaction.

Power of court

(3) The court may raise the issue of unconscionability of its own motion.

No waiver

(4) The powers conferred by this section apply notwithstanding any agreement or waiver to the contrary.

Application of section

(5) For the purposes of this section, a contract of sale includes any variation or rescission of the contract and any assurance of irrevocability under section 4.4.

Sources: The Business Practices Act, S.O. 1974, c. 131, ss. 2(b), 4(8), UCC 2-302; UK SGA s. 55(5).

*Comment*

1. This section is a key normative provision and confers an explicit power on the courts to refuse enforcement of the contract, or any part thereof, if it was unconscionable at the time it was made. The section therefore constitutes an important exception to the general policy of the draft Act (s. 3.1(1)), also found in the existing Acts, that, unless otherwise provided, its provisions may be varied or negatived by agreement of the parties. See further OLRC Report, ch. 7(a), and cf. *supra,* s. 3.1.

2. The structure of s. 5.2 is as follows. Subsection (1) describes the powers of the court; subs. (2) lists, non-exhaustively, the factors the court may take into consideration in determining the issue of unconscionability; subs. (3) allows the court to raise the issue of unconscionability of its own motion; subs. (4) makes the section non-excludable; and subs. (5) extends the scope of the section to

include variation or rescission of a contract and firm offers governed by s. 4.4.

3. A number of minor changes have been made to Ontario bill, s. 5.2. First, the criteria of unconscionability in subs. (2) were rearranged in what, the Committee felt, was a more logical sequence. Secondly, subs. (2)(i) of the Ontario bill (now subs. (2)(a)) was amended by deleting "general" before "commercial setting" and by adding at the end thereof, "and the manner in which it is formed". Thirdly, subs. (2)(d) and (3) of the Ontario bill, dealing with a waiver of rights to which a party would otherwise be entitled, were deleted because it was felt that the provisions neutralized each other and added nothing to the section. Finally, new subs. (5) was added extending the meaning of contract of sale as indicated above. This change was adopted to avoid the necessity of having to make cross-references in s. 5.2 to ss. 4.4 and 4.10 and, no less importantly, to make it clear that the court's policing powers extend to all phases of the contractual process.

Open price

**5.3.**—(1) If the parties so intend, they may conclude a contract of sale even though the price is not settled.

Where reasonable price applies

(2) In such a case the price is a reasonable price at the time for delivery if,

(a) nothing is said as to price;

(b) the price is left to be agreed by the parties or a third person and they fail to agree or the third person fails to fix the price; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Where party to fix price

(3) Where the price is to be fixed by a party, he must do so in good faith.

Where there is failure to fix a price

(4) Where the price left to be fixed otherwise than by agreement of the parties fails to be fixed through the fault of one party, the other party may treat the contract as cancelled or may himself fix a reasonable price.

Where no price fixed

(5) Where the parties intend not to be bound unless the price is fixed or agreed and it is not fixed or agreed, there is no contract, and in such a case the buyer must

return any goods already received or, if he is unable so to do, he must pay their reasonable value at the time of delivery and the seller must return any part of the price paid on account.

Sources: UCC 2-305.

*Comment*

1. This section is based on UCC 2-305 and deals with the effect of "open price" terms in an agreement. The most important difference between s. 5.3 and the provisions in the existing Acts (see, e.g., Ont. SGA ss. 9-10) is with respect to terms providing for the price to be agreed upon by the parties at a later time. The existing law is that such agreements are unenforceable unless a price is subsequently fixed by the parties and apparently regardless of the intentions of the parties. See *May and Butcher* v. *R.*, [1934] 2 K.B. 17n (H.L.), and cf. *Foley* v. *Classique Coaches Ltd.*, [1934] 2 K.B. 1 (C.A.). Section 5.3(1) is intended to remedy this defect in the existing law. It provides that "if the parties so intend they may conclude a binding contract even though the price is not settled", and, in such a case, s. 5.3(2)(b) comes into play. It states that where the price is left to be agreed by the parties and they fail to agree, the price is a reasonable price at the time of delivery. The overriding effect therefore of these provisions is to give the courts greater flexibility in dealing with open price terms. See further OLRC Report, pp. 178-81.

2. No changes have been made to Ontario bill, s. 5.3.

Output and requirements agreements

**5.4.**—(1) An agreement that measures the quantity of goods to be bought or sold by the output of the seller or the requirements of the buyer means such reasonable quantity as may be required or supplied by the buyer or seller acting in good faith, having regard to any stated estimates, any previous output or requirements, and all the circumstances of the case.

Exclusive dealing agreements

(2) Where the buyer lawfully agrees to buy goods exclusively from the seller or the seller lawfully agrees to sell goods exclusively to the buyer, there is, unless the circumstances show a contrary intention, an obligation by the seller to use reasonable efforts to supply the goods and by the buyer to use reasonable efforts to promote their sale.

Sources: UCC 2-306.

*Comment*

1. This section has no counterpart in the existing Acts and is based on UCC 2-306. The purpose of the section is to spell out the implications of three well known types of contract—output and requirement contracts (subs. (1)) and exclusive dealings contracts (subs. (2))—which contain an unavoidable subjective element and where the contract itself may not prescribe the applicable standards of performance. See further OLRC Report, pp. 181-85.

2. Only one small change was made to Ontario bill, s. 5.4. In subs. (2), second and fourth last lines from the end, "reasonable efforts" replaces "best efforts". The Committee felt that "reasonable efforts" was more appropriate in the context.

Delivery in single lot or in lots

**5.5.** All goods called for by a contract of sale must be tendered in a single delivery and payment is due only on such tender, but where the circumstances give either party the right to make or demand delivery in lots, payment, if the price can be apportioned, may be demanded for each lot.

Sources: SGA s. 30(1); UCC 2-307.

*Comment*

1. This section is based on UCC 2-307 and corresponds, with some differences, to s. 30(1) of the existing Ontario Act and its counterpart in other Provinces. Section 5.5 reaffirms two well known propositions, viz., that, unless otherwise agreed, all goods must be tendered in a single delivery and that, where the goods can or must be delivered in lots and the price can be apportioned, payment may be demanded for each lot.

2. "Lot" is not defined in the draft Act nor in the Ontario bill (it is defined in UCC 2-105), but a delivery in lots must not be confused with a contract of sale by instalments, which is dealt with in s. 8.10 of the draft Act. The two are conceptually different and lead to different results.

3. No change was made to Ontario bill, s. 5.5.

Place for delivery of goods

**5.6.**—(1) The place for delivery of goods under a contract of sale is governed by the following rules:

1. If the seller has only one place of business, it is the place for delivery.

2. If the seller has two or more places of business only one of which is known to the buyer, that one is the place for delivery.

3. If the seller has two or more places of business and the buyer knows two or more of them, the one at or from which the seller conducted the negotiations for the sale is the place for delivery.

4. If the seller has no place of business, his residence is the place for delivery.

5. If the seller has no place of business and two or more residences only one of which is known to the buyer, that one is the place for delivery.

6. If the seller has no place of business and two or more residences and the buyer knows two or more of them, the one at or from which the seller conducted the negotiations for the sale is the place for delivery.

7. Where in a contract of sale of identified or unascertained goods the parties knew at the time of contracting that the goods were or were to be drawn from bulk or made, created or produced at a particular place, that place is the place for delivery.

Delivery of documents of title

(2) Documents of title may be delivered through customary banking channels.

Sources: SGA s. 28(1); UCC 2-308;
UNCITRAL Art. 15(b); new.

*Comment*

1. This section provides presumptive rules for the place of delivery of goods and documents of title where the contract contains no contrary provisions.

2. No changes were made to Ontario bill, s. 5.6.

Action to be taken within reasonable time

**5.7.**—(1) Except where otherwise provided in this Act, any action that is required to be taken by either party under a contract of sale must be taken within a reasonable time.

Successive performances

(2) Subject to subsection 3, a contract of sale that provides for successive performances over an indefinite period of time may be terminated by either party at any time.

Where notice of termination required

(3) Except where such a contract of sale terminates upon the happening of an agreed event, it may be terminated only if the terminating party gives the other party reasonable notification thereof and an agreement dispensing with such notification is invalid if its operation would be unconscionable.

Sources: SGA s. 28(2); UCC 2-309.

*Comment*

1. Subsection (1), which is an enlarged version of that appearing in existing Acts (e.g., Ont. SGA, s. 28(2)), provides for the time of performance of any action required under the contract of sale where no time is provided in the contract itself.

2. Subsections (2) and (3) have no counterpart in the existing Acts and, following UCC 2-309(2) and (3), deal with the determination of contracts of sale of indeterminate duration. See further OLRC Report, pp. 185-88.

3. No changes were made to Ontario bill, s. 5.7.

When and where payment due

**5.8.**—(1) Payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery.

Inspection before payment

(2) Where the seller is authorized to send the goods, he may ship them under reservation and may tender the documents of title, but the buyer may inspect the goods after the arrival before payment is due.

Payment against documents

(3) Where delivery is authorized and made by way of documents of title otherwise than under subsection 2, payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received.

When goods shipped on credit

(4) Where the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch correspondingly delays the starting of the credit period.

Sources UCC 2-310.

*Comment*

1. This section deals with the time and place of payment and is based on UCC 2-310. It is designed to supply the detail that is

missing from the too succinct, and to some extent misleading, statement in the existing Acts (see, e.g., Ont. SGA, s. 27). See further OLRC Report, pp. 335-41, 350-52, and 355.

2. No changes were made to Ontario bill, s. 5.8.

Where particulars of performance left open

**5.9.**—(1) An agreement of sale that is otherwise sufficiently definite to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties, but any such specification must be made in good faith and within limits set by commercial reasonableness.

Specifications relating to assortment of goods and shipment

(2) Specifications relating to assortment of the goods are at the buyer's option and, except as otherwise provided in this Act, specifications or arrangements relating to shipment are at the seller's option.

Effect of failure to cooperate

(3) Where a specification mentioned in subsection 2 would materially affect the other party's performance but is not seasonably made, or, where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party, in addition to all other remedies.

(a) is excused for any resulting delay in his own performance; and

(b) may, subject to sections 8.8, 8.9 and 9.6, proceed to perform in any reasonable manner.

Sources: UCC 2-311.

*Comment*

1. This section is based on UCC 2-311 and has no counterpart in the existing Acts. Subsection (1) deals with a contract, otherwise definite, in which particulars of performance are to be specified at a future time by one of the parties. The subsection requires good faith and commercial reasonableness in the exercise of the powers. Subsection (2) indicates which party has the specifying powers, in the absence of contrary agreement, where there is a contract for the sale of assorted goods or where the seller is responsible for the shipment of goods. Subsection (3) deals with cases where a party fails to make the necessary specifications or arrangements under subs. (2), or where he otherwise withholds his cooperation to enable the other party to perform. On all these aspects, see further OLRC Report, pp. 177-78 and 188-90.

2. No changes were made to Ontario bill, s. 5.9.

Meaning of statement

**5.10.**—(1) In this section, "statement" means a statement in any form or language made before or at the time of the contract and includes a promise or a representation of fact or opinion, whether or not made fraudulently, negligently or with contractual intention.

Qualified statements

(2) A conditional or qualified statement may be treated as unconditional or unqualified if it would be unconscionable for the maker of the statement to rely on the condition or qualification.

Meaning of express warranty

(3) "Express warranty" means,

(a) a term of the contract;

(b) a statement made by a seller which relates to the subject matter of the contract, except where the buyer did not rely or it was unreasonable for him to rely on the statement; and

(c) a statement referred to in subsections 8 and 9.

Liability of seller for statements of manufacturer etc

(4) A seller is deemed to make those statements of a manufacturer, distributor or other person relating to the goods which by word or conduct he has adopted.

Liability of merchants sellers

(5) Where the seller is a merchant, a statement relating to the subject matter of the contract and made by the manufacturer, distributor or other person on the container or label of goods or in a brochure, pamphlet or other writing associated with the goods shall be deemed also to have been made by the seller, except where in all the circumstances it is apparent that the seller did not adopt the statement.

Seller's right to indemnity

(6) A seller liable under subsection 4 or 5 is entitled to be indemnified by the maker of the statement in respect of such liability.

Buyer's statements

(7) A statement relating to the subject matter of the contract and made by a buyer to a seller is an express warranty, except where the seller did not rely or it was unreasonable for him to rely on the statement.

Liability of manufacturers etc

(8) A statement relating to the subject matter of the contract and made to a buyer by a manufacturer, distributor or other person with a direct business interest in any sale

of the goods is an express warranty, except where the buyer did not rely or it was unreasonable for him to rely on the statement.

Statements made to public

(9) Where a seller or a person referred to in subsection 8 makes a statement addressed to the public or a section of the public, the buyer may treat it as an express warranty made to him if such statement has a natural tendency to induce reliance, whether or not the buyer actually relied on the statement.

Irrelevant factors

(10) The liability of the maker of a statement referred to in subsection 8 shall not be affected by the fact that,

(a) there was no privity of contract between him and the buyer; or

(b) the buyer gave no consideration in respect of the statement.

Sources: NSW draft Bill ss. 5(5) (part), 15; USA 12; new.

*Comment*

1. This bill deals with the important questions of the definition of "express warranty" for the purposes of the draft Act and the relationship between contractual and non-contractual representations inducing the contract of sale. The notes that follow should be read in conjunction with the introduction to this Report and with ss. 9.1 and 9.19 concerning the remedies for breach of a warranty.

2. Section 5.10 has been substantially recast by the Committee, both with a view to clarifying and amplifying the earlier version in the Ontario bill and also with a view to incorporating several new features that the Committee deemed desirable.

3. Subsection (1) combines subs. (2) and part of subs. (10) of Ontario bill, s. 5.10; and "statement" replaces "representation or promise" in the original version.

4. Subsection (2) is new and addresses itself to a recurring problem, especially in the context of consumer sales, where the dominant impression created by a warranty (usually through some type of advertisement) differs significantly from the literal and restrictive wording of the warranty document itself, or where the bold heading of a warranty document leaves a misleading impression. Subsection (2) entitles the court to disregard the limiting provisions in the text of a warranty if it is unconscionable for the warrantor to rely

on them. See also *infra,* s. 5.16(4), with respect to the effectiveness of disclaimer clauses in manufacturers' warranties made to the public. The underlying principle of the subsection goes somewhat further than the reasoning adopted by the majority of the Ontario Court of Appeal in *Tilden Rent-A-Car* v. *Clendenning* (1978), 83 D.L.R. (3d) 400, since it is based on the general unconscionability of the warrantor's conduct and not simply on whether or not the buyer knew of the existence of the restrictive provisions.

5. Subsection (3) is also new. The Committee thought it desirable to distinguish between a representation or promise that constitutes a term of the contract (as traditionally defined) and those statements that are non-contractual in character. The difference resides in the fact that a "contractual" warranty is binding *per se,* (as it is under existing law) whether or not the other party relied on it, whereas a non-contractual statement requires actual reliance. The distinction is also profoundly important for remedial purposes. See *infra,* s. 9.19(1)(b).

6. Subsection 4 is an enlarged version of Ontario bill, s. 5.11(3), as to which see OLRC Report, pp. 204.06.

7. Subsection (5) is a transposition of the provision in Ontario bill, s. 5.13(1)(b)(v). The Committee felt it belonged more logically here than in the section on the implied warranty of merchantability. Note, however, that subs. (5) merely creates a presumption of adoption, a presumption that may be rebutted if the circumstances indicate that the merchant seller did not intend to adopt the statement.

8. Subsection (6) is new and was added to ensure that a seller who is held responsible under subs. (4) and (5) for another's statement has an explicit right of indemnity, without having to rely on uncertain common law or equitable rights of indemnity or contribution or, in at least some Provinces, on the unsettled scope of contributory negligence legislation. Cf. *Lambert* v. *Lewis,* [1980] 1 All E.R. 978, rev'd on other grounds [1981] 1 All E.R. 1185 (H.L.).

9. Subsection 7 essentially reproduces Ontario bill, s. 5.10(3).

10. Subsection 8 is new in form, though not in substance, and represents a more explicit and fuller statement than appears in Ontario bill, s. 5.10(1), of the binding character of representations made by manufacturers, distributors or others with a direct business interest in a sale. Note the following features. First, the subsection only applies to statements made to a "buyer", i.e., a person who has bought the goods and who may be expected to have done so in reliance on the statement.

A donee or transferee of the goods will not qualify unless, in the case of a subsequent buyer, he can bring himself within s. 5.8. Secondly, the subsection applies to representors "with a direct business interest" in a sale of the goods, as well as those directly involved in the manufacture or distribution of the goods. the Committee was anxious to ensure that those actively promoting the purchase of goods (e.g., franchisors) should be held responsible for statements directed to the ultimate buyer, even though technically they might not themselves be involved in the distribution of the goods.

11. Subsection (9) reproduces Ontario bill, s. 5.10(1)(a), but makes it clear that it is sufficient that the statement is addressed to a section of the public (such as farmers or the members of a trade or profession); it need not encompass all the public. The important consideration is whether or not the statement has a natural tendency to induce reliance; if it has, and given the effectiveness of modern advertising techniques, then it is assumed that the public statement will do what the representor means it to do. See also OLRC Report, p. 139, on the unreasonableness of applying a strict reliance test where a warranty acompanying the goods may not come to the buyer's attention until after he receives the goods.

12. Subsection (10) reproduces Ontario bill, s. 5.10(2)(b) and (d).

Sale by sample

**5.11.**—(1) Without restricting the generality of section 5.10, in a contract of sale by sample or model there is an express warranty that the goods to be supplied will conform to the sample or model in all respects including quality.

Sources: NSW Draft Bill s. 16; SGA s. 16; UCC 2-313(c).

*Comment*

1. Ontario bill, s. 5.11, was contracted by deleting subs. (1)(a) dealing with sales by description and subs. (2) dealing with sales in self-service stores. As noted in the Comment to s. 5.10, subs. (3) of the Ontario bill has been absorbed in s. 5.10(4) of the draft Act. As a result of these changes, s. 5.11 of the draft Act is restricted to a contract of sale by sample or model.

2. The reasons for the changes are as follows. The OLRC Report, pp. 202-04, points out that subs. (1)(a) was arguably redundant, or at least tautologous, and that there was no justification for singling out for special treatment particular types of statement relating to goods. The committee shares these reservations and also believed that any lingering doubts about a sale in a self-service store being a sale by

description can now safely be put to rest. If this were not so, the effectiveness of s. 5.10 in attaching warranty consequences to statements in the form of labels to, and other markings on, goods would be in serious jeopardy.

Implied warranty of title

**5.12.**—(1) In a contract of sale, other than a contract to which subsection 2 applies, there is an implied warranty by the seller,

(a) that in the case of a present sale he has a right to sell the goods and that in the case of a contract to sell he will have a right to sell the goods at the time when the title is to pass;

(b) that the goods will be delivered free from any security interest, lien or encumbrance or rightful claim in respect of any industrial or intellectual property right not disclosed or actually known to the buyer before the contract was made, and

(c) that the buyer will be entitled to quiet possession of the goods except so far as it may be disturbed by a person entitled to the benefit of any security interest, lien, encumbrance, or industrial or intellectual property right so disclosed or known.

Qualified title

(2) Where there appears from the contract or is to be inferred from the circumstances of the contract an intention that the seller will transfer only such title as he or a third person may have, there is an implied warranty by the seller,

(a) that all defects in title and all security interest, liens and encumbrances, or industrial or intellectual property rights known to the seller and not known to the buyer were disclosed to the buyer before the contract was made; and

(b) that

(i) the seller, or

(ii) in a case where the parties to the contract intend that the seller will transfer only such title as a third person may have, the third person, or

(iii) any person claiming through or under the seller or the third person otherwise than under a security interest, lien or encumbrance, or

industrial or intellectual property right disclosed or known to the buyer before the contract was made,

will not disturb the buyer's quiet possession of the goods.

Where seller retains a security interest

(3) where the seller retains a security interest in the goods, his implied warranty of title takes effect when the goods are delivered to the buyer.

Sources: UK SGA s. 12; UCC 2-312; new.

*Comment*

1. Three modest changes have been made to Ontario bill, s. 5.12(1). First, the implied warranty of freedom from encumbrances (para. (b)) has been enlarged by adding to the list of encumbrances a rightful claim in respect of any industrial or intellectual property right. The Committee felt that the addition was desirable in view of the great commercial importance of industrial and intellectual property rights, and to dispel any residual doubt that might be entertained about their proper characterization as encumbrances on the seller's title. Secondly, the specificity of the buyer's knowledge sufficient to relieve the seller from liability under para. (b) is emphasized by requiring the buyer to have "actually" known of the encumbrance before the contract was made. Thirdly, the implied warranty of quiet possession in para. (c) has been enlarged commensurately with the addition made to para. (b).

2. The other aspects of s. 5.12 are discussed in the OLRC Report, pp. 193-98.

Meaning of merchantable quality

**5.13.**—(1) In this section "merchantable quality" means,

(a) that the goods, whether new or used, are as fit for the one or more purposes for which goods of that kind are commonly bought or used and are of such quality and in such condition as it is reasonable to expect having regard to any description applied to them, the price, and all other relevant circumstances'

and, without limiting the generality of clause *a,*

(b) that the goods,

(i) are such as pass without objection in the trade under the contract description,

(ii) in the case of fungible goods, are of fair average quality within the description,

(iii) within the variations permitted by the agreement, are of even kind, quality and quantity within each unit and among all units involved,

(iv) are adequately contained, packaged and labelled as the nature of the goods or the agreement require, and

(v) will remain fit, perform satisfactorily, and continue to be of such quality and in such condition, as the case may be, for such length of time as is reasonable having regard to all the circumstances, and

(c) in the case of new goods, unless the circumstances indicate otherwise, that spare parts and repair facilities, if relevant, will be available for a reasonable period of time.

Implied warranty of merchantability

(2) Where the seller is a person who deals in goods of the kind supplied under the contract, there is an implied warranty that the goods are of merchantable quality.

Exceptions

(3) The implied warranty of merchantable quality does not apply,

(a) as regards defects specifically drawn to the buyer's attention before the contract was made;

(b) if the buyer examined the goods before the contract was made, with respect to any defect that such an examination ought to have revealed; or,

(c) in the case of a sale by sample or model, with respect to any defect that would have been apparent on reasonable examination of the sample or model.

Sources: NSW Draft Bill ss. 19, 20A; Ontario Bill, 110, 3rd Sess., 30th Leg., ss. 4(a), 5; SGA ss. 15(2), 16(2)(c); UCC 2-314(1), (2); UK SGA ss. 14(2), 62(1A); new.

*Comment*

1. Only a few minor changes were made to this important section. First, in subs. (1)(a), the words "or used" have been added after "are commonly bought" to adapt the clause to the requirements of a

lease of goods dealt with in s. 5.15(2). Secondly, clause (iv) in subs. (1)(b) of the Ontario bill has been deleted in view of its transposition to s. 5.10(5) of the draft Act. Thirdly, in subs. (1)(b)(v) of the draft Act the words "and continue to be of such quality and in such condition" have been added with a view to tracking the definition of "merchantable quality" in subs. (1)(a).

2. The other features of s. 5.13 are discussed in the OLRC Report, pp. 208-19.

Implied warranty of fitness

**5.14.**—(1) Where the buyer, expressly or impliedly, makes known to the seller any particular purpose for which he is buying the goods and the seller deals in goods of that kind, there is an implied warranty that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which goods of that kind are commonly supplied, and that the goods will so remain for such length of time as is reasonable having regard to all the circumstances.

Exception

(2) The implied warranty mentioned in subsection 1 does not apply where the circumstances show that the buyer does not rely or that it is unreasonable for him to rely on the seller to supply goods reasonably fit for the buyer's particular purpose.

Sources: UK SGA s. 14(3).

*Comment*

1. Two modest changes have been made to Ontario bill, s. 5.14, which deals with the implied warranty of fitness. First, at the end of subs. (1), the words "and that the goods will so remain for such length of time as is reasonable having regard to all the circumstances" have been added. Their purpose is to indicate (perhaps out of an abundance of caution) that durability of the goods is as relevant a feature of the implied warranty of fitness as it is of the implied warranty of merchantable quality. This proposition derives support from Lord Diplock's recent judgment for a unanimous House of Lords in *Lambert* v. *Lewis,* [1981] 1 All E.R. 1185, at p. 1191.

2. The second change appears at the end of subs. (1) where "to supply goods reasonably fit for the buyer's particular purpose" has been substituted for the original "seller's skill or judgment". The change was made partly because the new language is more consistent with the language of subs. (1), and partly because it is no longer realistic in the typical retail context to speak of a buyer relying on the seller's

skill or judgment. There is often very little skill or judgment for him to exercise. Nevertheless, the buyer may still expect the seller to supply goods for his indicated purpose and it is the reasonableness of that expectation that forms the focus of the inquiry under subs. (2).

(3) The other aspects of s. 5.14 are dealt with in the OLRC Report, pp.220-22.

Warranties applicable to goods in contract of work and materials

**5.15**—(1) Sections 5.10 to 5.14 apply *mutatis mutandis* to goods supplied under a contract of work and materials.

Lease of goods

(2) Sections 5.10, 5.11, 5.12(1)(a) and (c), 5.13 and 5.14 apply *mutatis mutandis* to a contract for the lease of goods.

Sources: Law Commission, Working Paper No. 71; Law of Contract, Implied Terms in Contracts for the Supply of Goods (1977), para. 79 at pp. 49-50.

*Comment*

1. This section deals with the implied warranties in a contract of work and materials and in a contract for the lease of goods. The reasons for their inclusion in a Sale of Goods Act is explained in the OLRC Report, pp. 45-48, and 223-26.

2. The changes made to s. 5.15 are purely of a drafting character, and are twofold. First, subs (1) of the Ontario bill has been transferred to the definition section (s. 1.1(1)18) of the draft Act. Secondly, clauses (a) and (b) in subs. (3) have been deleted and replaced in line one of the subsection by a *mutatis mutandis* cross-reference to s. 5.12(1)(a) and (c) of the draft Act.

Exclusion and modification of warranties

**5.16**—(1) Subject to subsection 2 and section 5.2,

(a) a warranty implied under this Act;

(b) the effect of a statement which would otherwise amount to an express warranty; and

(c) the remedies for each breach of a warranty,

may be modified, limited or excluded by the parties.

Exclusions and limitations of damages

(2) A modification, limitation or exclusion of a warranty, or a remedy for breach of such warranty is *prima facie* unconscionable to the extent that it impairs a right or remedy in respect of injury to the person.

Construction of warranties

(3) Words or conduct relevant to the creaton of an express warranty and words or conduct tending to negate

or limit a warranty shall, where reasonable, be construed as consistent with one another, but, to the extent that such a constructon is unreasonable, the negation or limitation has no effect.

Application of subs 1, 2, 3

(4) Subsections 1, 2 and 3 apply to a statement referred to in subsections 8 and 9 of section 5.10,

(a) where the modification, limitation or exclusion comes to the buyer's attention before he acts in reliance upon the statement; or

(b) where the statement is made to the public or a section of the public, and

(i) the buyer may reasonably be expected to learn of the modification, limitation or exclusion before relying upon the statement; or

(ii) the statement and the modification, limitation or exclusion are contained in the same document or may otherwise reasonably be expected to come to the buyer's attention at the same time.

Source: UCC 2-316(1): new.

*Comment*

1. A number of drafting and modest substantive changes have been made to Ontario bill, s. 5.16. The following comments are confined to the substantive changes. First, subs. (2) has been recast and extended to cover the modification, limitation or exclusion of a warranty as well as the remedy for breach of such warranty, so as to raise a presumption of unconscionability in both cases where the defective goods cause injury to the person. At the same time, the statement in the Ontario bill, that an exclusion or limitation of damages for economic losses is not prima facie unconscionable, has been deleted. The Committee was of the view that the exclusion of economic losses was adequately covered in subs. (1) and that since, in any event, the burden of proof of showing unconscionability under s. 5.2 is on the party averring it, there was no need for the separate statement.

2. The Committee realizes that a strong case can be made for outlawing altogether disclaimer clauses in respect of defective goods causing injury to the person. Indeed, the recommendation has already been made in the OLRC's *Report on Products Liability* (1980), p. 129, recom. 4, published subsequently to the OLRC's *Report on Sale of Goods*. The Committee believes, however, that this step should be

taken in legislation dealing with dangerous products or, at any rate, that it should be taken in tandem with such legislation so as to avoid piecemeal treatment of an important social and economic issue.

3. The second substantive change involves the addition of a new clause (ii) to subs. (4)(b). Subsection (4) is intended to extend to a manufacturer, or other distributor of goods who is not in privity with the buyer, the same opportunity to limit his liability for an express statement as is afforded to the seller under subs. (1). However, it seems to the Committee that subs. (4) of the Ontario bill did not accomplish this objective in a case where both the manufacturer's warranty and any restrictions thereon may only be expected to reach the buyer after he has received delivery of the goods. Clause (ii) is designed to bridge this gap.

Cumulation and conflict of warranties

**5.17.**—(1) Express or implied warranties whall be construed as consistent with one another and as cumulative, but if such a construction is unreasonable, the intention of the parties determines which warranty is dominant.

Rules

(2) For the purpose of subsection 1 the following presumptions apply:

1. Exact or technical specifications displace an inconsistent sample or model or general language of description.
2. A sample from an existing bulk displaces inconsistent general language of description.
3. Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

Sources: UCC 2-317.

*Comment*

1. Only one minor change has been made to Ontario bill, s. 5.17. In line 2 of subs. (2), "presumptions" replaces "rules". The Committee felt that since the rules are only presumptive, "presumptions" captures their flavour more accurately than "rules".

2. With respect to the section itself, see OLRC Report, pp. 226-27.

Interpretation

**5.18.**—(1) In this section,

(a) "goods" includes goods that have been converted into, incorporated in, or attached to, other goods or that have been incorporated in or attached to land;

(b) "immediate buyer" means a buyer who buys goods from a prior seller;

(c) "injury" means injury to the person, damage to property, or any economic loss;

(d) "prior seller" means a merchant who sells goods that are subsequently resold;

(e) "subsequent buyer" means a buyer who buys goods that have previously been sold by a prior seller to an immediate buyer.

Prior seller's warranty

(2) Without prejudice to a subsequent buyer's rights under section 5.10, a prior seller's warranty, express or implied, and any remedies for breach thereof, enure in favour of any subsequent buyer of the goods who suffers injury because of a breach of the warranty.

Subsequent buyer's rights

(3) A subsequent buyer's rights under subsection 2 are subject to any defence that would have been available to such prior seller in an action against him for breach of the same warranty by his immediate buyer.

Subsequent buyer's damages

(4) The amount of damages recoverable by a subsequent buyer for breach of warranty by a prior seller shall be no greater than the damages that the immediate buyer could have recovered from such prior seller if the immediate buyer had suffered the injury sustained by the subsequent buyer.

Sources: NSW Draft Bill ss. 20H, 20I, 20K, 20L; UCC 2-318; new.

*Comment*

1. This section deals with the difficult and controversial question of whether, and to what extent, a manufacturer or other person in the distributive chain should be accountable to a subsequent buyer, with whom he is not in privity, for breach of any express or implied warranty. The question is discussed at length in the OLRC Report, ch. 10, and more briefly in the Introduction to this Report.

2. In view of the controversial character of s. 5.18, the OLRC inserted it for discussion purposes only. After extensive deliberation, the Committee decided that s. 5.18 should be included in an amended form in the draft Act.

3. The changes cover the following points. First, the definition of "prior seller" in subs. (1)(d) is now restricted to a merchant who

sells goods that are subsequently resold. Secondly, subs. (4) of the Ontario bill has been simplified but without changing its intended meaning. Thirdly, subs. (5) of the Ontario bill, making s. 5.18 non-excludable by agreement, has been omitted. This means that an exclusion will be valid unless the provision is unconscionable.

Interpretation

**5.19.**—(1) In this section and in section 5.23, F.O.B. means "free on board" and F.A.S. means "free alongside".

Seller's obligations under F O B term

(2) The term F.O.B. at a named place, even though used only in connection with the stated price, is a delivery term under which,

(a) if the term is F.O.B. the place of shipment, the seller shall at that place ship the goods in the manner provided in section 7.3 and bear the expense and risk of putting them into the possession of the carrier; or

(b) if the term is F.O.B. the place of destination, the seller shall at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in section 7.2.

Additional obligations

(3) If under subsection 2,

(a) the term is also F.O.B. vessel, car or other mode of carriage, the seller shall in addition, at his own expense and risk, load the goods on board; and

(b) the term is F.O.B. vessel, the buyer shall name the vessel and, in an appropriate case, the seller shall comply with section 5.23 on the form of bill of lading.

F A S vessel

(4) The term F.A.S. vessel at a named port, even though used only in connection with the stated price, is a delivery term under which the seller shall,

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

Buyer's duty to give instructions

(5) In any case falling under subsection 2(a) or subsection 3 or subsection 4, the buyer shall seasonably give

any necessary instructions for making delivery, including the loading berth of the vessel, and its name and sailing date.

Effect of failure to do so

(6) The seller may,

(a) treat the failure to give any necessary instructions as a failure to cooperate under section 5.9; and

(b) at his option, move the goods in any reasonable manner preparatory to delivery or shipment.

Payment against tender documents

(7) Under the term F.O.B. vessel or F.A.S., the buyer shall make payment against tender of the required documents and the seller shall not tender and the buyer shall not demand delivery of the goods in substitution for the documents.

Sources: UCC 2-319.

*Comment*

1. Sections 5.19 to 5.24 deal with the meaning of common delivery terms that are used extensively in international sales contracts and, to a lesser extent, within North America. See further OLRC Report, pp. 346-48, and Appendix 9. The existing Acts contain no comparable dictionary of terms, but the OLRC thought their incorporation in the revised Act would serve a useful purpose. The Committee agrees.

2. Section 5.19 itself deals with the meaning of "f.o.b." and "f.a.s." terms. No changes have been made to Ontario bill, s. 5.19.

Interpretation

**5.20.**—(1) In this section and in sections 5.21 and 5.23,

(a) the term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination;

(b) the term C. & F. or C.F. means that the price for the goods includes cost and freight to the named destination.

Seller's obligation under C I F term

(2) Even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to,

(a) put the goods into the possession of a carrier at the port for shipment and obtain one or more negotiable bills of lading covering the entire transportation to the named destination;

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for;

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern, but the seller may add to the price the amount of the premium for any such war risk insurance;

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any endorsement necessary to perfect the buyer's rights.

C & F term

(3) The term C. & F. or the like has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

Payment against tender of documents

(4) Under the term C.I.F. or C. & F. the buyer shall make payment against tender of the required documents and the seller shall not tender and the buyer shall not demand delivery of the goods in substitution for the documents.

Sources: UCC 2-320.

*Comment*

This section deals with the meaning of "c.i.f.", "c. & f.", and "c.f." terms and the duties consequent upon the adoption of such shipping terms. No changes have been made to Ontario bill, s. 5.20.

Seller's duty under "net landed weights" and similar terms

**5.21.**—(1) Where under a contract containing the term C.I.F. or C. & F. the price is based on or is to be adjusted according to "net landed weights", "delivered weights", "out turn" quantity or quality or the like, the seller shall reasonably estimate the price and the payment due on tender of the documents required by the contract

is the amount so estimated, but after final adjustment of the price a settlement shall be made with commercial promptness.

Risk of ordinary deterioration and the like

(2) A contract under subsection 1 or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract of sale or delivery or on the passage of the risk of loss.

Inspection before payment

(3) Where the contract provides for payment on or after arrival of the goods the seller shall before payment allow such preliminary inspection as is feasible, but if the goods are lost, delivery of the documents and payment are due when the goods should have arrived.

Sources: UCC 2-321.

*Comment*

This section deals with the meaning of "net landed weights" and the seller's obligations when such an expression is employed. No changes have been made to Ontario bill, s. 5.21.

Delivery "ex-ship"

**5.22.**—(1) A term in a contract for delivery of goods "ex-ship" or the like is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

Seller's duties under

(2) Under the term "ex-ship" or the like,

(a) the seller shall discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

(b) the risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

Sources: UCC 2-322.

*Comment*

This section defines the seller's obligation under a delivery term "ex-ship" or the like. No changes have been made to Ontario bill, s. 5.22.

Overseas shipment; form of bill of lading

**5.23.**—(1) Where a contract of sale contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller shall obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of the term C.I.F. or C. & F., received for shipment.

Tender of bill of lading in parts

(2) Where in a case within subsection 1 a bill of lading has been issued in a set of parts, the buyer may demand tender of the full set of documents unless they are to be sent from abroad, in which case only part of the bill of lading is required to be tendered and even if the agreement stipulates a full set of documents, the person tendering an incomplete set may require payment upon furnishing an adequate indemnity.

Shipments by air or water

(3) For the purposes of this section, a shipment by water or by air or a contract contemplating such a shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristics of international deep-water commerce.

Sources: UCC 2-323.

*Comment*

This section deals with the forms of bills of lading in overseas shipments. No changes have been made to Ontario bill, s. 5.23.

"No arrival, no sale" terms

**5.24.** Under the term "no arrival, no sale" or the like,

(a) the seller shall properly ship conforming goods and, if they arrive by any means, he shall tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and

(b) where, without fault of the seller, the goods suffer partial loss or arrive after the contract time, the the buyer may proceed under section 8.12 as if there had been casualty to identified goods.

Sources: UCC 2-324; new.

*Comment*

This section deals with the parties' obligations under a "no arrival, no sale" term. Minor drafting changes have been made to Ontario bill, s. 5.24(b), to bring its language into conformity with s. 8.12 of the draft Act, which deals with the consequences of casualty to goods.

Meaning of letter of credit, banker's credit, confirmed credit

**5.25.**—(1) In a contract of sale,

(a) "letter of credit" or "banker's credit" means an irrevocable credit issued by a financing agency of

good repute and, where the shipment is overseas, of good international repute;

(b) "confirmed credit" means that the credit mentioned in clause (*a*) also carries the direct obligation of an agency of the kind mentioned in clause *a* that does business in the seller's financial market.

Letter of credit

(2) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract.

Delivery thereof suspends payment obligation

(3) The delivery to the seller of a proper letter of credit suspends the buyer's obligation to pay, but if it is dishonoured, the seller may on seasonable notification to the buyer require payment directly from him.

Sources: UCC 2-325.

*Comment*

This section deals with the presumptive meaning of three terms—"letter of credit", "banker's credit", and "confirmed credit"—that are widely used in international sales transactions. No changes have been made to Ontario bill, s. 5.25.

Interpertation

**5.26.**—(1) In this section,

(a) "sale on approval" means a contract in which the goods are delivered primarily for use and in which the buyer has the right to return delivered goods even though they conform to the contract;

(b) "sale or return" means a contract in which the goods are delivered for resale and in which the buyer has the right to return delivered goods even though they conform to the contract.

Special incidents of sale on approval

(2) In a sale on approval,

(a) although the goods are identified to the contract, the risk of loss and the title do not pass to the buyer until acceptance;

(b) use of the goods consistent with the purpose of trial is not acceptance, but failure seasonably to notify the seller of the buyer's election to return the goods or any other act adopting the transaction is acceptance, and, if the goods conform to the contract, acceptance of any part is acceptance of the whole; and

(c) after due notification of the buyer's election to return, the return is at the seller's risk and expense, but a merchant buyer must follow any reasonable instructions.

Sale or return

(3) In a sale or return,

(a) the option to return extends to the whole or any commercial unit of the goods so long as their concondition remains substantially unchanged, but the option must be exercised seasonably; and

(b) goods are at the buyer's risk until they are returned to the seller and the buyer is responsible for their return.

Sources: SGA s. 19, r. 4(i); UCC 2-326(1), 2-327.

*Comment*

1. This section deals with two special types of sale and their incidents. A "sale on approval" describes a contract of sale in which the buyer is entitled to return the goods after a short trial period if he does not wish to keep them. A "sale or return" contract describes a common type of distribution agreement in which a merchant buyer agrees to buy goods for resale, but with the privilege of being able to return the goods if he does not resell them. See further OLRC Report, pp. 48-49, and 276. Section 5.26 defines some of the incidents of the above types of contract. The only reference in the existing Acts to such agreements (e.g., Ont. SGA, s. 19, rule 4) deals with the time when the property in the goods is deemed to pass to the buyer in a "sale on approval" or contract of "sale or return".

(2) Apart from a minor amendment to s. 5.26(3)(b), no changes have been made to Ontario bill, s. 5.26.

## PART VI

## TRANSFER OF TITLE AND GOOD FAITH BUYERS

General irrelevance of title

**6.1.**—(1) Except as otherwise provided in this Act, the provisions of this Act with respect to the rights, obligations and remedies of the seller, buyer and any third party apply without regard to the person who has title to the goods.

General rules for the transfer of title

(2) Where questions concerning title become material, title passes from the seller to the buyer at the time and in the manner agreed upon by the parties, except that,

(a) title cannot pass before goods have been identified to the contract as provided in section 7.1; and

(b) any reservation by the seller of the title in goods shipped or delivered to the buyer is limited to the reservation of a security interest.

Where no time specified for title to pass

(3) Where there is no agreement between the parties with respect to the time at which the title to the goods is to pass to the buyer, the following rules apply:

1. Title passes at the time and place at which the seller completes his performance with reference to the physical delivery of the goods despite the reservation of a security interest and even though a document of title is to be delivered at a different time or place.

2. Where delivery is to be made without moving the goods, title passes,

   (a) if the seller is to deliver a document of title, at the time when, and the place where, he delivers the document;

   (b) where the goods are held by bailee other than the seller and the seller is not required to deliver a document of title, when the bailee acknowledges to the buyer his right to possession of the goods, and

   (c) in any other case, on the buyer's receipt of the goods.

Where title is revested in seller

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, revests title to the goods in the seller.

Sources: UCC 2-401; new.

*Comment*

1. Ontario bill, s. 6.1, was amended only slightly by the Committee. One word was deleted in subs. (3); rule 2 of subs. (3) was recast for clarity and to provide for another specific situation; and subs. (4) was amended consequent upon the Committee's decision to abandon the concept of revocation of acceptance.

2. The OLRC rejected the concept of title for the resolution of such issues as allocation of risk, the right of a seller to sue for the price, or the right of a buyer to reject specific goods. It was recognized,

however, that title may have some non-sales relevance and therefore a provision similar to UCC 2-401 was recommended to cover these residual cases in the absence of agreement between the parties. See further OLRC Report, pp. 278-80.

3. Subsection (3) was amended by removing the requirement that an agreement between the parties sufficient to oust the title rules in the subsection be "express".

4. Rule 2 of subs. (3) was divided into three discrete paragraphs for purposes of greater clarity and to provide specifically for the situation where goods are held by a bailee who is not required to deliver a document of title. In this case, title will pass on the bailee's attornment to the buyer, and not on receipt of the goods as provided in Ontario bill, s. 6.1(3).

Interpretation

**6.2.** In this Part, other than in sections 6.1 and 6.5 and subject to section 3.4(2), "goods" includes a document of title.

Sources: SGA s. 25(1), (2).

*Comment*

1. Goods are often represented by documents of title, and the purpose of this section is to ensure that the protection conferred on good faith buyers under the provisions of ss. 6.3 to 6.7 applies whether they obtain possession of the goods directly, or constructively through the delivery of documents of title. The purpose of the reference to s. 3.4(2) is to make it clear that the rights conferred on a buyer are without prejudice to any rights that he or any other person may have, under other applicable law, as holder of a document of title.

2. Section 6.2 must be read in conjunction with the discussion in the Introduction to this Report concerning the unsatisfactory state of the law of documents of title in Canada and the need for a coherent and modern restatement of the law comparable to UCC Article 7.

Nemo dat rule

**6.3.** Except as otherwise provided in this Part, where goods are sold by a person who does not own them and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title than the seller had.

Sources: SGA s. 22 (part).

*Comment*

1. No changes have been made to Ontario bill, s. 6.3.

2. This section reproduces the rule of *nemo dat quod non habet* appearing in the existing Acts. The OLRC decided to retain the familiar *nemo dat* rule together with a cluster of exceptions, rather than switch to the civilian *possession vaut titre* rule and its exceptions, when dealing with questions of title involving third parties. See OLRC Report, pp. 283-85, and 306-08. The Committee agrees with the OLRC's approach, and also agrees that this unavoidably controversial area of the law is not susceptible to clean and logical solutions but only to the striking of a pragmatic balance between the competing interests of owners of goods and third parties who buy them from non-owners.

Exceptions

**6.4.**—(1) Section 6.3 does not apply,

(a) where the owner of the goods is by his conduct precluded from denying the seller's authority to sell;

and it does not affect

(b) *The Factors Act* or any other enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof; or

(c) the validity of any contract of sale under any common law or statutory power of sale or under the order of a court of competent jurisdiction.

Owner's failure to exercise reasonable care

(2) Without limiting the generality of subsection 1(a), an owner is precluded from denying the authority to sell of the person in possession of the goods, where

(a) he has failed to exercise reasonable care with respect to the entrustment of the goods; and

(b) the buyer has exercised reasonable care in buying the goods and has received the goods in good faith, for value and without notice of the defect in the title of the transferor or his lack of authority to sell the goods.

Failure of owner and buyer to exercise reasonable care

(3) If in action between the owner and the buyer pursuant to subsection 2 the court finds that both have failed to exercise reasonable care, the court may allocate the loss between them and make such other order with respect to the goods as is fair in the circumstances.

Registered entrustments

(4) Subsection 2 does not apply to an entrustment of goods under a transaction governed by The Personal Property Security Act or any other Act requiring the

registration or filing in a public place of a document relating to the transaction.

Sources: SGA 2. 22; new.

*Comment*

1. This section contains the first group of exceptions to the *nemo dat* rule. Subsection (1) contains the familiar and unchanged exceptions found in Ont. SGA, s. 22 (i.e., estoppel, Factors Act, common law or statutory powers of sale, and court ordered sale). The OLRC added a new exception to subs. (2) which deals with negligent entrustment by an owner. The traditional estoppel rule found in the existing Acts was thought to be too narrow and a policy choice was made to impose a duty of care on an owner in cases of entrustment. See OLRC Report, pp. 310-11.

2. The Committee amended subs. 2(b) of the Ontario Bill so as to cover the case of a buyer who may have known that he was dealing with an agent for sale but did not appreciate that the agent was exceeding his authority. Since the Ontario version might not have protected the buyer if he knew the agent had no title, the Committee added suitable words to provide for this contingency.

3. Subsection (2), standing alone, would deprive a buyer of its protection if he himself had been negligent in the purchase of the goods. Some members of the OLRC thought that apportionment of the loss was appropriate where both buyer and owner had been careless and, as a result, subs. (3) of the Ontario bill was offered tentatively for discussion purposes. See Report, pp. 310-11. The Committee decided that subs. (3) was sound in principle and should be retained as part of the draft Act.

4. Subsection (4) was added by the Committee and reflects its view that an owner who has complied with an applicable registration requirement should not be chargeable with negligent conduct under subs. (2). In reaching this conclusion, the Committee was influenced by several factors. First, it would have an unsettling effect for owners to be told that they must exercise reasonable care over and beyond compliance with registration requirements. Secondly, registration is intended to alert third parties that the person in possession of the goods is not the unencumbered owner, so that it would be difficult for the third party to argue he has been prejudiced by the negligent entrustment of the goods. Thirdly, if registration is not sufficient for the purposes of subs. (2), then arguably it should also be insufficient for the purposes of s. 6.6, and s. 6.6(3) would need to be revised. This would

change a long settled Canadian tradition with respect to the sufficiency of registration requirements in maintaining the perfected status of a security interest. The Committee saw no sufficient reason to change so basic a policy.

5. Apart from the substantive changes noted above, a number of minor drafting changes were also made to Ontario bill, s. 6.4.

**6.5.**—(1) A person with a voidable title has power to transfer a good title to a buyer who receives the goods in faith, for value, and without notice of the defect in the title of the transferor. Effect of voidable title

(2) A person is deemed to have a voidable title even if, Extended meaning of voidable title
(a) the transferor was deceived as to the identity of the buyer;
(b) the goods were delivered in exchange for a cheque that is later dishonoured;
(c) it was agreed that the transaction was to be a cash sale;
(d) the transfer of title was procured by fraud; or
(e) the transaction was entered into under a mistake of such a character as to render the agreement void at common law.

(3) Subsection 1 applies even though the owner has purported to avoid the sale to the transferor. Application of subs 1

Sources: UCC 2-403(1); The Factors Act, R.S.O. 1970, c. 156, s. 2(1); new.

*Comment*

1. Subsection (1) re-enacts the rule of the common law (also found in the existing Acts) that a person with a voidable title can pass a good title to a bona fide buyer lacking notice of the defect in title. Subsections (2) and (3) change the common law in two respects; first, by substantially expanding the categories of voidable title (subs. (2)); and, secondly, by protecting the third party buyer where the owner has purported to avoid the sale to the transferor but without repossessing the goods themselves (subs. (3) and s. 6.8). See further OLRC Report, pp. 285-88 and 309.

2. The Committee made only a minor positional change to Ontario bill, s. 6.6, by transposing Ontario bill, s. 6.8(a), to s. 6.6(3) of the draft Act.

Effect of possession of goods by seller, etc

**6.**—(1) In the cases mentioned in subsection 2, where a seller, buyer or prospective buyer is in possession of goods such person has power to transfer all rights of the person consenting to his possession to a person who buys or leases and receives the goods from him in good faith, for value, and without notice of the defect in the title of the transferor.

Where subs 1 applies

(2) Subsection 1 applies,

(a) where a seller, having sold goods, continues in possession of the goods with the buyer's consent, whether in his capacity as seller or otherwise; or

(b) where a buyer or prospective buyer is in possession of the goods with the seller's or prospective seller's consent before title in the goods has been transferred to him.

Where subs 1 does not apply

(3) Subsection 1 does not apply where,

(a) prior to the disposition of the goods by the person in possession a security interest to which [insert reference to the Personal Property Security Act or other provincial legislation] applies has been perfected by registration in favour of the buyer or seller; or

(b) in any other case, a notice in the prescribed form has been filed under [insert reference to the Personal Property Security Act or other provincial legislation] prior to the disposition of the goods by the person in possession.

Meaning of prospective buyer etc

(4) For the purpose of this section, "prospective buyer" means a person who receives the goods,

(a) under a sale on approval or under a contract of sale or return;

(b) under an agreement containing an option to purchase; or

(c) under a contract of sale that is subject to approval by a third person or the fulfillment of any other condition,

and "prospective seller" means a person from whom a prospective buyer receives the goods.

Sources: SGA s. 25; new.

*Comment*

1. This section embodies two further familiar exceptions to the *nemo dat* rule in s. 6.3, and is based on the corresponding provisions in Ont. SGA, s. 25(1) and (2) and its counterparts in the other Provinces. Section 6.6(1) states the general principle of the exception. Subsection (2)(a) confers power on a seller in possession to pass better title than he himself has. Subsection (2)(b) applies the same rule to a buyer or prospective buyer who is in possession of the goods with the consent of the seller or prospective seller. Subsection (3) makes it clear that the exceptions do not apply where the owner out of possession has complied with applicable registration requirements or has otherwise filed a prescribed notice. Subsection (4) defines the meaning of "prospective buyer" and "prospective seller".

2. The Committee debated extensively the merits of the policy underlying s. 6.6 and its particularization in the section. The Committee ultimately decided in favour of the retention of the section for the same reasons as are given in the OLRC Report, pp. 309-10.

3. The following modest changes were made to Ontario bill, s. 6.6. First, in subs. (1) an ambiguity in s. 6.6 of the Ontario bill was removed by making it clear that the person in possession can only confer such rights to the goods as are enjoyed by the person consenting to his possession. Secondly, subs. (2)(a) of the Ontario bill was changed by restricting the scope of the paragraph to a seller who, having sold goods, "continues" in possession of them with the buyer's consent. The Ontario version also applies to a seller who "is" in possession. This expression was designed to embrace situations where the goods did not exist at the time of the contract or were only acquired by the seller at a subsequent time. The Committee was concerned that "is in possession of the goods" could also be construed to apply to any subsequent possession by the seller, whether in his capacity as seller or otherwise, for example, for purposes of repair. In the Committee's view, this would have extended the section too far. The Committee considered alternative formulations so as to confine the subsection to the seller's possession *qua* seller, without restricting it in time, but found none that it considered satisfactory. In the result, the Committee favoured a narrow statement of the scope of para. (a). A similar change was made in para. (b) to make it consistent with the language of para. (a). A further change was made in para. (b) by deleting the reference in the Ontario bill to the buyer having possession of the goods with the "owner's consent", substituting instead "prospective seller's consent".

4. Subsection (3)(a) in the Ontario bill was changed by confining its scope to cases where the security interest has been perfected by registration. The practical effect of the change is to eliminate temporary periods of perfection permitted under some of the provincial registration Acts so far as the rights of third party buyers are concerned. Cf. s. 22(3) of the Ontario Personal Property Security Act and its counterpart in the Manitoba and Saskatchewan Acts. The Committee felt that the recognition of "grace periods" and periods of temporary perfection would undermine the purpose of s. 6.6. Adopting Provinces will need to check their registration statutes to ensure consistency with s. 6.6(3)(a) of the draft Act.

5. Attention is also drawn to a minor consequential change in subs. (4) in which a definition of "prospective seller" was added to parallel the change in subs. (2)(b).

6. The Draft Act adopts no position with respect to the desirability of retaining bills of sale legislation in those Provinces that still have such legislation. Attention is drawn, however, to the discussion in the OLRC Report, pp. 302-05, the conclusions of which seem also apt for the other Provinces. In this context, adopting Provinces may wish to consider the amendment to Sask. SGA, R.S.S. 1978, c. S-11, s. 26(1.1), adopted in 1980.

Entrustment of goods to merchant

**6.7.**—(1) Any entrusting of possession of goods to a merchant who deals in goods of that kind for any purpose connected with sale or promoting sales of goods of that kind gives him power to transfer all rights of the entruster to a buyer or lessee in the ordinary course of business.

Meaning of entrusting

(2) For the purpose of subsection 1, "entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been fraudulent.

Sources: UCC 2-402(2), (3).

*Comment*

1. This section constitutes another familiar exception to the *nemo dat* rule and, following UCC 2-403(2), deals with the effect of an entrustment of goods to a merchant who disposes of them to a buyer or lessee "in the ordinary course of business". The term "buyer in the ordinary course of business" is defined in s. 1.1(1)5 of the draft Act.

2. The Committee fully supports the policy of the section but, like the dissenting Commissioner in the OLRC Report, was concerned about the scope of the original version of the section. See OLRC Report, pp. 298-301, 307-08, and 311-13. In the Committee's view, the mere entrustment of goods should not be sufficient; rather, the entrustment should be intended to serve a sale function. Subsection (1) of Ontario bill, s. 6.7, was accordingly amended to restrict the exception to cases where the entrustment was "for any purpose connected with sale or for promoting sales of goods of that kind". This language is broad enough to capture goods left in the merchant's possession for display purposes or to serve as a model, but it will not prejudice the position of an entruster who leaves his goods for repair or storage. The Committee also made a minor amendment to Ontario bill, s. 6.7, by deleting the opening words of subs. (1), "Notwithstanding section 6.6".

3. In view of the substantial overlap between s. 6.7 and provincial factors legislation, the OLRC Report, p. 317, recommended a review of the Ontario Factors Act with a view to determining the desirability of its retention. The Committee has not reviewed factors legislation. It offers no recommendation one way or the other but fully endorses the desirability of a review.

Effect of avoidance of sale and revocation of consent

**6.8.** Unless the goods are recovered by the owner before they have been delivered by the person in possession of them to the third party, sections 6.6 and 6.7 apply even though the owner has revoked his consent to possession of the goods by the seller, buyer, prospective buyer or merchant, as the case may be.

Sources: The Factors Act, R.S.O. 1970, c. 156, s. 2(1); new.

*Comment*

1. The purpose of this section is to make it clear that a consenting party under s. 6.6, or an entruster to a merchant under s. 6.7, must actually take or retake possession of the goods in order to prevent the application of exceptions to the *nemo dat* rule. See OLRC Report, p. 315.

2. The only change made to Ontario bill, s. 6.8, was to transfer para. (a) to s. 6.5(3). See Comment to s. 6.5.

Right of owner to recover goods

**6.9.** Where sections 6.4(2), 6.5, 6.6 and 6.7 apply and a court considers it fair to make such an order, the owner may recover the goods from the buyer or any person claiming from or under him on repaying the buyer or such other person,

as the case may be, the price or, if the price was not in the form of money, its equivalent value in money, paid by the buyer or such other person for the goods, together with such other reliance losses as he would otherwise suffer and as the court may order to be paid.

Sources: New.

*Comment*

1. This section introduces a new feature into the existing law. It enables a court to allow an owner to recover the goods from a buyer, or a person claiming from or under him, even though the buyer obtained a good title to the goods under the preceding exceptions to the *nemo dat* rule. See OLRC Report, pp. 313-14.

2. The court's power under Ontario bill, s. 6.9, does not include a case where the goods have been entrusted to a merchant under s. 6.7. The Committee thought it should, and amended s. 6.9 accordingly.

## Part VII

## PERFORMANCE

Buyer's special property and insurable interest

**7.1.**—(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them.

Identification matter of agreement

2. Such identification can be made at any time and in any manner expressly agreed upon by the parties.

Presumptive rules

(3) In the absence of express agreement identification occurs,

(a) when the contract is made if it is for the sale of goods already existing and agreed upon by the parties as the goods to be delivered under the contract;

(b) if the contract is for the sale of future goods other than those described in clause *c*, when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers; or

(c) when the crops are planted or otherwise become growing crops or the young are conceived if,

(i) the contract is for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting, whichever is longer, or

(ii) the contract is for the sale of unborn young to be born within twelve months after contracting.

Seller's insurable interest

(4) The seller retains an insurable interest in goods so long as title to or any security interest in the goods, or the risk of loss, remains in him.

Seller's right to substitute goods

(5) Where the identification is by the seller alone he may,

(a) until the buyer's default or insolvency; or

(b) until he has notified the buyer that the identification is final,

substitute other goods for those identified.

Other insurable interest not affected

(6) Nothing in this section impairs any insurable interest recognized under any other law of this Province.

Sources: UCC 2-501.

*Comment*

1. This section confers on the buyer a special property and an insurable interest in the goods once they have been identified to the contract. Identification is dealt with in subs. (2) and (3). It is similar to the concept of ascertainment in existing law and is an important feature in a number of sections in the draft Act: s. 2.4(5) (ownership of undivided shares in identified fungibles); s. 2.5(2) (sale of identified fixtures etc. before severance); s. 5.6(1)7 (place of delivery); s. 7.4 (shipment of goods under reservation); s. 7.9(2) (breach of contract by the buyer and risk); s. 7.12 (buyer's right of inspection); s. 8.12 (non-existence of or casualty to goods); ss. 9.4(g) and 9.6(1) (seller's right to identify goods to the contract); s. 9.10 (seller's action for damages and resale); and s. 9.11 (seller's action for the price).

2. Subsection (4) deals with a seller's insurable interest in goods once the buyer obtains a special property and an insurable interest in them by identification. Subsection (6) is a saving provision for insurable interests recognized under other provincial statutes.

3. Subsection (5) makes it clear that the buyer's special property is only a qualified interest. The seller in many cases will have a right to substitute identified goods. See OLRC Report, pp. 262-65, and 276-78.

4. The only change of substance made by the Committee to Ontario bill, s. 7.1, was in subs (4), which was amended so that a seller bearing the risk of loss would retain an insurable interest in the goods. This is in accordance with existing law.

Manner of seller's tender of delivery

**7.2.**—(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery.

Application of subs 1

(2) The manner, time and place for tender are determined by the agreement and this Act, and in particular,

(a) tender must be at a reasonable hour and, if it is of goods, they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) the buyer must furnish facilities reasonably suited to the receipt of the goods.

Compliance with section 7.3

(3) Where section 7.3 applies, tender requires that the seller comply with its provisions.

Goods in possession of bailee

(4) Where goods are in the possession of a bailee and are to be delivered without being moved,

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgement by the bailee to the buyer of his right to possession of the goods; but

(b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons, but risk of loss of the goods and of any failure by the bailee to honour the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honour the document or to obey the direction defeats the tender.

Tender of documents

(5) Where the contract requires the seller to deliver documents,

(a) he must tender all such documents in correct form, except as provided in section 5.23 with respect to bills of lading in a set; and

(b) tender through customary banking channels is sufficient and dishonour of a bill of exchange accompanying the documents constitutes non-acceptance or rejection.

Sources: UCC 2-503(1), (2), (4), (5).

*Comment*

1. Subsection (1) clarifies existing law, which is not always precise as to the differences in meaning of "delivery", "tender of delivery" and "shipment". Tender of delivery is a condition of the buyer's duties of payment and acceptance in s. 7.6.

2. Subsection (2) sets out the general requirements of tender, and subs. (3) deals by reference with tender where the goods are shipped by means of an independent carrier. Subsection (4) applies to cases where goods are being held by a bailee, such as a warehouseman, and deals with tender by means of the transfer of negotiable or non-negotiable documents of title and by informal and written directions to the bailee. Subsection (5) deals with the requirements of tender in documentary sales and accords with existing law. See OLRC Report, pp. 331-33, and 336-38.

3. Subsection (4)(a) of the Ontario bill was amended by the Committee so that tender occurs when a seller procures acknowledgement by the bailee to the buyer of the latter's right to possession of the goods. This accords with the principle of attornment in the law of bailment. The change also aligns subs. (4)(a) with subs. (4)(b), where a refusal by the bailee to honour the seller's written directions to hold for the buyer destroys the efficacy of the seller's tender.

Shipment by seller

**7.3.** Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then he must,

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Sources: UCC 2-504.

*Comment*

1. This section deals with a seller's duties when he is authorized or required to send the goods to the buyer, and is an expanded version of similar provisions found in the existing Acts.

2. No changes have been made to Ontario bill, s. 7.3. See OLRC Report, pp. 338-41.

Seller's shipment under reservation

**7.4.**—(1) Where the seller has identified goods to the contract by or before shipment,

(a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods;

(b) the seller's procurement of such a bill of lading to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named; and

(c) the procurement of a non-negotiable bill of lading to himself or his nominee also reserves a security interest in the goods but, except in the case of a conditional delivery governed by section 7.6, a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

Wrongful reservation of security interest

(2) Where shipment by the seller with reservation of a security interest violates the contract of sale it constitutes an improper contract for transportation within section 7.3 but does not impair the rights given to the buyer by shipment and identification of the goods to the contract or the seller's powers as holder of a negotiable document of title.

Sources: UCC 2-505.

*Comment*

1. This section is linked to s. 6.1(2)(b), which provides that a reservation of title to goods shipped by the seller to the buyer amounts to the reservation of a security interest. Each adopting Province will have to consider the treatment to be accorded to this security interest under its personal property security legislation.

2. Subsection (2) is designed to prevent title and special property rights of the buyer, and the seller's power as a holder of a negotiable document of title, from being prejudiced by an improper contract of carriage.

3. No changes have been made to Ontario bill, s. 7.4. See OLRC Report, pp. 341-46.

Rights of financing agency

**7.5.**—(1) A financing agency by paying or purchasing for value a bill of exchange that relates to a shipment of goods acquires to the extent of the payment or purchase, and in addition to its own rights under the bill of exchange and any document of title securing it, any rights of the seller in the goods, including the right to stop delivery and the seller's right to have the bill of exchange honoured by the buyer.

Defective document regular on its face

(2) The right to reimbursement of a financing agency which has in good faith honoured or purchased a bill of exchange under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

Sources: UCC 2-506.

*Comment*

1. Subsection (1) gives a party financing the sale the rights of the seller over the goods and in any bill drawn on the buyer. It is consistent with existing law. See also s. 9.7 which deals with the rights of stoppage of a person in the position of a seller.

2. Subsection (2) deals with the relationship of a buyer and his financing agency. It reflects existing law.

3. No changes have been made to Ontario bill, s. 7.5. See OLRC Report, pp. 358-60.

Tender of delivery by seller

**7.6.**—(1) Tender of delivery is a condition of the buyer's duty to accept and pay for the goods.

Rights of buyer conditional

(2) Where goods or documents of title are delivered to the buyer and payment is due and demanded, his rights as against the seller to retain or dispose of them is conditional upon his making the payment due.

Sources: SGA ss. 20(3), 27; UCC 2-507.

*Comment*

1. This section, which should be read together with ss. 5.1 and 7.10(1), reaffirms the principle set out in the existing Acts that the seller's duty to deliver and the buyer's duty of payment and acceptance are mutual and concurrent conditions.

2. No changes have been made to Ontario bill, s. 7.6.

Meaning of cure

**7.7.**—(1) In this section and in sections 7.9 and 8.6, "cure" means,

(a) tender or delivery of any missing part or quantity of the goods;

(b) tender or delivery of other conforming goods or documents or, in the case of a sale of identified goods, goods which differ in no material respect from those goods;

(c) the remedying of any other non-conformity in performance, including a defect in title; or

(d) a money allowance or other form of adjustment of the terms of the contract,

or any combination thereof as is consistent with subsection 2.

Seller's right to cure

(2) Where a buyer rejects a non-conforming tender or delivery, whether before or after the time for performance has expired, the seller has a reasonable time to cure the non-conformity if,

(a) the non-conformity can be cured without unreasonable prejudice, risk or inconvenience to the buyer;

(b) after being notified of the buyer's rejection, the seller seasonably notifies the buyer of his intention to cure and of the type of cure to be provided; and

(c) the type of cure offered by the seller is reasonable in the circumstances.

Where no right to cure

(3) Notwithstanding subsection 2, the buyer may cancel the contract where the seller fails seasonably to tender, deliver or otherwise perform any other term of the contract if,

(a) in the circumstances it is unreasonable to expect the buyer to give the seller more time to perform; or

(b) the seller fails to perform within a further reasonable period of time set by the buyer.

Right to damages preserved

(4) Nothing in this section affects the buyer's right to recover damages arising out of a breach by the seller.

Sources: New.

*Comment*

1. Ontario bill, s. 7.7, was substantially amended by the Com-

mittee. The changes were made in consequence of the Committee's decision to delete for the most part the concept of substantial breach contained in the Ontario bill.

2. This section deals with a seller's right to cure a non-conforming tender or delivery of goods or documents of title. Existing law recognizes such a right only where the tender or delivery is premature. The OLRC was of the view that the right to cure should be extended beyond such cases, so as to include cases where the seller has committed a substantial breach of the contract. The OLRC also thought that the buyer should have the right, in appropriate circumstances, to demand cure where the breach is non-substantial and to reject the goods if no cure was forthcoming. The Committee fully endorses the OLRC's recognition of the importance of conferring an expanded right to cure. Indeed, the right assumes an enhanced importance in the draft Act in view of the Committee's decision that the buyer's primary right to reject should not be confined to cases of substantial breach. See the Introduction to this Report and OLRC Report, pp. 453-56, and 461-67.

3. Subsection (1) sets out the means by which a cure can be effected. Flexibility is the keynote of the provision. In some cases, a seller would make a fresh tender of goods; in other cases he would correct minor faults; and some tenders might be cured by the offer of a money allowance, for example, where the goods suffer from a trivial defect which is either irremediable or excessively costly to put right.

4. Subsection (2) sets out the scope of the seller's right to cure. Subsection (3) deals with cases where, in view of the passage of time, the seller either never had or has lost any right to cure. Its application will vary according to whether time was initially of the essence or subsequently made so by the buyer.

5. Subsection (4) recognizes that the buyer may still have an action for damages against a seller who has cured, e.g., for damage caused by the seller's delay in making a good tender.

6. In view of the fact that the buyer has a right to reject for any non-conformity, whether substantial or otherwise (but subject to the seller's right to cure), subs. (4) and (5) of Ontario bill, s. 7.7, have become redundant and are accordingly omitted from the draft Act.

**7.8.**—(1) subject to sections 5.26 and 7.9, the following rules govern the transfer of risk of loss of the goods: Risk of loss in absence of breach

1. Where the contract requires or authorizes the seller to ship the goods by carrier,

   (a) unless it requires him to deliver at a particular destination, the risk passes to the buyer when they are delivered to the carrier even though the shipment is under reservation; but

   (b) if it does require him to deliver them at a particular destination and they are there tendered while in the possession of the carrier, the risk passes to the buyer when they are there so tendered as to enable the buyer to take delivery; and

   (c) if the seller is a merchant and the buyer is not a merchant, risk passes when the goods are tendered to the buyer at the destination.

2. Where the goods are held by a bailee other than the seller and are to be delivered without being moved, the risk passes to the buyer,

   (a) on his receipt of a negotiable document of title covering them;

   (b) on acknowledgment by the bailee to the buyer of the buyer's right to possession of them; or

   (c) after his receipt of a non-negotiable document of title or other written direction to deliver as provided in section 7.2(4)(b).

3. Where rules 1 and 2 do not apply, the risk passes to the buyer on his receipt of the goods.

Saving

(2) Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

Sources: UCC 2-509; new.

*Comment*

1. This section gives effect to the OLRC 's view that risk of loss should not be linked to title, but should be linked to easily identifiable events such as actual or constructive delivery of the goods.

2. Rules 1 and 2 of subs. (1) deal with delivery in the case of goods in the hands of independent carriers and warehousemen, and Rule 3 deals with residual cases. Rule 1(c) is noteworthy in that a test of actual tender at destination is substituted for one of delivery to the carrier. The clause contemplates primarily a dispatch

of goods by mail to a consumer buyer. It is in harmony with the balance of the section which is inspired by the general principle that risk rules should reflect insurance realities. It is easier for a party to know when to insure if risk is based on a concrete transfer of the goods rather than a metaphysical transfer of title. See OLRC Report, pp. 265-73.

3. Following the general principles of the section, the Committee amended subs. (1) Rule 2(b) so as to require bailees such as warehousemen, if no negotiable document title is involved, to attorn to the buyer. In the Committee's view, attornment best serves the purpose of notifying the buyer when the goods are at his risk.

4. Ontario bill, s. 7.8, was amended in only a minor respect by the Committee.

Effect of breach on risk of loss

**7.9.**—(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection, the risk of loss arising before acceptance or cure remains with the seller to the extent of any deficiency in the buyer's insurance coverage.

Where buyer in breach

(2) Subject to section 8.8(4), where the buyer as to conforming goods already identified to the contract repudiates or is responsible for any delay in delivery of the goods before risk of loss has passed to him, the seller may to the extent of any deficiency in his insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time sufficient to enable him to insure the goods.

Sources: UCC 2-510; new.

*Comment*

1. Ontario bill, s. 7.9, was modified considerably by the Committee as the result of its decision to dispense with the distinction between rejection and revocation of acceptance of goods. See s. 8.3 and the Introduction to this Report.

2. The existing law is unclear as to the incidence of risk where the buyer has taken delivery of goods but later rightfully rejects them.

3. Ontario bill, s. 7.9, imposes the risk of loss on a seller in breach until acceptance or cure. The OLRC contemplated that acceptance would have the strict meaning it has acquired under the UCC. Where a buyer was successfully able to revoke his acceptance of the goods, he would nevertheless carry the risk of loss provided

he was covered by insurance. Subsection (3) of the Ontario bill imposes the risk of loss on a buyer in breach, in circumstances where otherwise the risk would be on the seller, for a period sufficient to enable the seller to take out insurance coverage. See OLRC Report, pp. 273-75.

4. The decision of the Committee to collapse rejection and revocation of acceptance into the single concept of acceptance necessitated changes in subs. 1 and 2 of the Ontario bill, which have been amended and consolidated into the new subs. (1) in the draft Act. The Committee agrees with the OLRC that risk should be linked to insurance and, in view of the extended nature of acceptance under the draft Act, concluded that a single insurance coverage rule was the best solution.

5. Subsection (3) was amended so as to relate it to s. 8.8(4), which deals with an injured party's duty to mitigate his loss in the event of the other's anticipatory repudiation. It was also changed to reflect the Committee's decision to delete from the draft Act the concept of wrongful but effective rejection.

Tender of payment by buyer

**7.10.**—(1) Tender of payment is a condition of the seller's duty to tender and complete any delivery.

Manner of tender

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

Payment by cheque

(3) Payment by cheque or other instrument is conditional and is defeated as between the parties if the cheque or other instrument is dishonoured.

Sources: UCC 2-511.

*Comment*

1. This section is correlative to s. 7.6 and the Comment there made applies also here. The section should be read together with s. 5.8 which deals with the time and place, rather than the form, of the buyer's payment obligation. See OLRC Report, pp. 354-55.

2. Subsection (2) reflects the common commercial custom of permitting payment other than by legal tender. Subs. (3) states the existing common law rule.

3. Ontario bill, s. 7.10, was amended only on a minor point of style to bring it in line with its companion provision, s. 7.6.

**7.11.**—(1) Where the contract requires payment before inspection, non-conformity of the goods does not excuse the buyer from so making payment unless, Payment before inspection

(a) the non-conformity appears without inspection; or
(b) the seller has acted fraudulently.

(2) Payment pursuant to subsection 1 does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies. Buyer's rights unimpaired

Sources: UCC 2-512.

*Comment*

1. This section recognizes the principle that the parties, by requiring payment before inspection, have in some measure shifted to the buyer the risk of the goods being defective. In such a case, the buyer has to pay first and litigate later. This principle is subject to two exceptions. The first is based on common sense and normal commercial practice, and deals with the situation where the defect is manifest without inspection. The second exception is important in documentary sales financed by bankers' letters of credit. It has long been recognized that the financing arrangements between buyer, seller, issuing bank (the buyer's bank) and advising bank (the seller's bank) are essentially autonomous. The delicate system of credit and bankers' undertakings, so important in the financing of trade where the parties are separated by great distances, would be undermined if the buyer were freely able to request his bank to close the line of credit opened in his name. The second exception recognizes the autonomy of the letter of credit by permitting the buyer to stop payment only if the seller has been guilty of fraud. This is in line with common law authorities.

2. Subsection (2) exists for the avoidance of doubt. Though the buyer has assumed the risk of having to litigate to recover his money, he has not forfeited his right to reject the goods nor any entitlement to recover damages or money paid.

3. No changes have been made to Ontario bill, s. 7.11. See OLRC Report, pp. 353-54.

**7.12**—(1) Subject to subsection 4, where goods are tendered or delivered or identified to the contract, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. Buyer's right to inspect goods

Inspection after arrival

(2) Where the seller is required or authorized to send the goods to the buyer, the inspection may be made after their arrival.

Expenses of inspection

(3) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

Inspection before payment

(4) Subject to section 5.21, the buyer is not entitled to inspect the goods before payment of the price when the contract provides,

(a) for delivery "C.O.D." or on similar terms; or

(b) for payment against documents of title except where such payment is due only after the goods are to become available for inspection.

Place and method of inspection

(5) A place or method of inspection fixed by the parties is presumed to be exclusive but, unless otherwise expressly agreed, it does not affect the time of identification, the place of delivery, or the transfer of the risk of loss.

Where agreed place or method of inspection impossible

(6) If inspection at the place or by the method fixed by the parties becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which would avoid the contract.

Sources: UCC 2-513.

*Comment*

1. The existing Acts do not say where the buyer must exercise his right of inspection, but the common law rule is that the place of delivery is *prima facie* the place where inspection must be made. This is changed by subs. (1), which reflects the OLRC's preference for the rule that inspection can be carried out at any reasonable place. A place of delivery rule is frequently inconvenient or impracticable, e.g., in the case of an f.o.b. contract. Since the presumption is quite easily displaced in practice, there may be very little difference between the common law rule and the proposed rule. Subsection (2) lends further detail to subs. (1). Subsection (3) reproduces the common law. See OLRC Report, pp. 352-53, and 467-69.

2. The rule in subs. (1) is expressed to be subject to subs. (4). Subsection (4)(b) reinforces s. 7.11 in preserving the integrity of the documentary sales process. Subsection (4)(a) would apply, for example, to a case where the carrier is acting as the seller's collection

agent; it would not be a practical matter to expect him to attend the buyer's inspection.

3. Subsection (5) deals with two matters. First, for sound practical reasons, parties should not lightly be taken to have intended inspection to be carried out in more than one location. Secondly, the right of inspection should operate independently of rules dealing with frustration, risk, special property and insurable interests.

4. Subsection (6) is designed to prevent the contract from being frustrated by relatively unimportant changes of circumstances.

5. Ontario bill, s. 7.12, was amended only slightly, and for stylistic reasons.

When documents deliverable

**7.13.** Documents against which a bill of exchange is drawn are to be delivered to the drawee upon acceptance of the bill of exchange if it is payable more than three days after presentment, and in other cases, only upon payment.

Sources: UCC 2-514.

*Comment*

1. This section is an application to documentary sales of the rules in ss. 7.6 and 7.10, where payment is to be made against documents. A distinction is drawn between cases where the sale is, and cases where it is not, on credit terms. In the former case, the buyer is entitled to the documents when he accepts a bill drawn on him; in the latter case, only when he actually pays the agreed sum. If the bill is payable within three days of presentment, the sale is not in fact on credit terms because by law a three-day grace period is given after presentment, even in the case of "sight bills": Bills of Exchange Act, R.S.C. 1970, c. B-5, s. 42.

2. No changes have been made to Ontario bill, s. 7.13.

Preserving evidence of goods in dispute

**7.14.**—(1) In order to facilitate the adjustment or resolution of a claim or dispute between a buyer and a seller, either party, for the purpose of ascertaining the facts and preserving evidence, has the right to inspect, test and sample the goods, but where the goods are in the possession or control of the other, such right may only be exercised on reasonable notification to the other party.

Where access refused

(2) Where a party is refused the right to inspect, test and sample the goods, he may apply to a court of competent jurisdiction and a judge of the court may, upon such

terms as to notice and otherwise as he considers proper, make whatever order seems to him to be just in all the circumstances of the case.

Rights under rules of court preserved

(3) The rights conferred by subsections 1 and 2 are in addition to any rights conferred under the rules of court of the court in which proceedings relating to the contract of sale have been commenced.

Sources: UCC 2-515(a); new.

*Comment*

1. The purpose of this section is to facilitate the adjustment and resolution of a claim or dispute between the parties. If the seller were minded to resell the goods under section 9.10, the buyer would have to exercise his rights promptly.

2. No changes have been made to Ontario bill, s. 7.14.

## PART VIII

## BREACH, REPUDIATION AND EXCUSE

Buyer s rights on improper delivery

**8.1.**—(1) Subject to section 8.10, if the goods or the tender of delivery are non-conforming, the buyer may,

(a) reject the whole

(b) accept the whole; or

(c) accept those commercial units that are conforming and reject the rest.

Payment for accepted goods

(2) The buyer shall pay at the contract rate for any goods accepted by him.

Sources: UCC 2-601, 2-606(2); new.

*Comment*

1. This section states the options available to a buyer where there is a non-conforming tender by the seller.

2. The Committee made two minor changes to Ontario bill, s. 8.1. First, s. 8.7(1) became s. 8.1(2) as part of a substantial revision of the first eight sections of Part VIII of the bill. Secondly, subs. (1)(c) was amended so as to permit the buyer the option of part acceptance only if he accepted the whole of the goods that were actually in conformity with the contract. The Committee saw no reason why the buyer should be allowed to alter the basic contract between the parties by picking and choosing among conforming goods.

3. More significantly, the Committee decided to eliminate the concept of substantial breach. It was felt that, since under the Ontario bill a buyer can, in most cases, convert a non-conformity into a potential substantial breach by demanding cure, the concept should be eliminated for the sake of simplicity. Moreover, it was felt that cure, which is a flexible principle, could most efficiently operate in the context of a strict tender rule rather than a flexible substantial breach rule. In the Committee's view, the seller's general ability to cure by making a reasonable tender under s. 7.7(1) was well balanced by a strict tender principle encouraging him to avail himself of this right for the parties' mutual benefit. It is believed also that the cause of economic efficiency is best served by giving the buyer leverage against the seller to persuade him to save the contract and avoid economic waste.

Loss of right to reject on acceptance

**8.2.**—(1) The buyer loses the right to reject goods when he has accepted them.

What constitutes acceptance of goods

(2) The buyer accepts the goods where,

(a) he signifies to the seller that the goods are conforming or that he will take or retain them despite their non-conformity;

(b) he knew or ought reasonably to have known of their non-conformity and he fails seasonably to notify the seller of his rejection of the goods;

(c) the goods are no longer in substantially the condition in which the buyer received them and this change is due neither to any defect in the goods themselves nor to casualty suffered by them while at the seller's risk; or

(d) the non-conformity is of a minor character and a substantial period has elapsed after delivery.

Preservation of right of rejection

(3) The buyer does not accept goods by reason only that he has kept them in the reasonable belief, induced by the seller, that they are conforming or that their non-conformity will be cured.

Commercial unit

(4) A buyer who accepts part of a commercial unit is deemed to accept the whole of that unit.

Other remedies

(5) Acceptance does not of itself impair any other remedy provided by this Act.

Sources: UCC 2-602(1), 2-606, 2-607(2), 2--608(1); UNCITRAL Art. 63; new.

*Comment*

1. This section states the rule that a buyer loses the right of rejection when he has accepted the goods. Subsection (2) defines the circumstances when such acceptance is deemed to have taken place. These circumstances are substantially different from the rules under the existing Acts. Under existing law, the buyer is deemed to have accepted the goods, *inter alia*, after he has had a reasonable opportunity to examine the goods, even though the defect was of a latent character and would ordinarily not have manifested itself until much later.

2. Ontario bill, s. 8.6, which essentially retains the existing rules of deemed acceptance, deals with the problem of latent defects by adopting the UCC concept of revocation of acceptance. See also Ontario bill, s. 8.8. The OLRC considered the possibility of merging rejection and revocation of acceptance into an enlarged concept of acceptance. However, it felt unable to take this step because of the linkage between acceptance and the seller's right to recover the price. The Committee, having adopted a different rule with respect to the seller's entitlement to the price, was accordingly able to do what the OLRC was not. As a result, s. 8.2 of the draft Act plays a significantly greater role than does the Ontario bill, ss. 8.2 and 8.6. The important difference lies in the fact that, unlike the Ontario bill, s. 8.2 of the draft Act does not provide that the buyer loses the right to reject when he fails to reject after having had a reasonable opportunity to inspect the goods.

3. Although the Committee abolished the distinction between rejection and revocation of acceptance, one important feature of the distinction has been retained. Under s. 8.2(2)(d) of the draft Act, the buyer loses the right to reject where the non-conformity is of a minor character and a substantial period has elapsed after delivery. This provision was adopted as a safeguard against an abusive exercise of the right of rejection, It was felt that, in the case of minor latent defects emerging long after the sale, a *bona fide* seller should not be penalized for failure to tender a reasonable cure under s. 7.7.

4. The Committee also decided to eliminate the notion of wrongful but effective rejection as being a complication which was no longer needed in view of the change made to the price recovery rules in s. 9.11.

Buyer's duties after rejection

**8.3.** Subject to sections 8.4 and 8.5,

(a) after rejection, use of the goods or other acts of ownership by the buyer does not nullify the rejection

unless the seller has been materially prejudiced thereby; and

(b) if, before rejection, the buyer has taken physical possession of goods on which he does not have a lien, he must after rejection hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them but the buyer has no other obligations whth regard to goods rightfully rejected.

Sources: UCC 2-602; new.

*Comment*

1. Section 8.3(a) ensures that a buyer's use of the goods after rejection does not in itself invalidate the rejection. Section 8.3(b) states the extent of the buyer's obligation with respect to rejection.

2. Ontario bill, s. 8.2(2), was changed by the Committee in two minor respects. First, in subs. (2)(a) the words making the buyer's use of the goods "*prima facie* wrongful against the seller" were deleted. The Committee thought that the issue of the buyer's liability in the property torts should not be affected by any presumptions, but should be governed by the normal rules of proof in civil cases. Secondly, the reference in subs. (2)(b) to the buyer's "security interest" in the goods was changed to the buyer's "lien" in the goods in order to reflect a corresponding change in s. 9.14 of the draft Act.

Merchant buyer's duties with respect to rejected goods

**8.4.**—(1) Subject to any lien of the buyer arising under section 9.14, when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control.

(a) to follow any reasonable instructions received from the seller with respect to the goods; and

(b) in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline rapidly in value.

Reasonable instructions and indemnification

(2) For the purpose of subsection 1, instructions are not reasonable if on demand the buyer is not indemnified for expenses.

Buyer's right to expenses

(3) Where the buyer sells goods under subsection 1, he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling

them, and if the expenses do not include a selling commission then to such commission as is usual in the trade or, if there is none, to a reasonable sum not exceeding ten per cent of the gross proceeds.

Subs 1 does not affect other rights

(4) Where the parties do not agree as to the buyer's right to reject the goods, any instructions given to or action taken by the buyer pursuant to subsection 1 do not affect any other rights of the parties, including the right of the seller to recover any payments made to the buyer under subsection 3 where the buyer has wrongfully rejected the goods.

Buyer must act in good faith

(5) In complying with this section the buyer must act in good faith and with reasonable care.

Good faith conduct not acceptance, etc

(6) Good faith conduct by the buyer under this section shall be deemed not to be acceptance or conversion or to give rise to a claim in damages.

Sources: UCC 2-603, new.

*Comment*

1. This section, like the previous section, articulates the buyer's duty with respect to rejected goods. Its purpose is to minimize the seller's losses and avoid unnecessary waste. Existing common law principles would leave the buyer free to do nothing and let the goods stand. The duties imposed by s. 8.4 are applicable only to merchant buyers, who may be entitled to be indemnified for their expenses and may also be entitled to a selling commission.

2. Ontario bill, s. 8.3, was changed by the Committee in two minor respects. The word "lien" was substituted for the word "security interest", and the reference to "effective" rejection was deleted. See OLRC Report, pp. 475-77.

Buyer's options as to salvage of rejected goods

**8.5.**—(1) Subject to section 8.4 with respect to perishable goods or goods that threaten to decline rapidly in value, if the seller gives no instructions within a reasonable time after notification of rejection the buyer may,

(a) store the rejected goods for the seller's account;
(b) reship them to him; or
(c) resell them for the seller's account and claim reimbursement under subsections 3 to 6 of section 8.4.

(2) Any such action shall be deemed not to be acceptance or conversion of the goods or to give rise to a claim in damages. Salvage not acceptance, etc

Sources: UCC 2-604.

*Comment*

1. This is a companion section to ss. 8.3 and 8.4 and enunciates clear, practical rules in place of existing common law uncertainty. See OLRC Report, p. 477.

2. No changes have been made to Ontario bill, s. 8.4.

**8.6.**—(1) If the buyer fails to state in connection with rejection a non-conformity that is ascertainable by reasonable inspection, he is precluded from relying on the unstated non-conformity to justify rejection where the seller could have cured the non-conformity if it had been stated seasonably. Waiver of buyer's objections

(2) If the buyer makes payment against documents without reserving his rights, he is precluded from recovering his payment where the non-conformity was apparent on the face of the documents. Payment against documents

(3) Subsections 1 and 2 do not apply where the seller has not been unduly prejudiced by the buyer's failure to state a non-conformity or to reserve his rights. Seller not prejudiced

Sources: UCC 2-605; new.

*Comment*

1. This section modifies the general common law rule that a party may lawfully terminate a contract though he gives no reasons or bad reasons for so doing, provided there existed good grounds (of which he might not have been aware) for his action at the date he exercised his right to terminate the contract. If cure is to be an effective device, the seller should know what is to be cured. Subsection (2) is an application of the same principle to documentary sales.

2. Ontario bill, s. 8.5(1), precludes a buyer from relying on the unstated defect to establish breach as well as to justify rejection. The Committee was concerned that the words "to establish breach" might be given a broad meaning so as to encompass all claims for damages. The Committee felt that damages claims should be governed by general principles. The words "to establish breach" were accordingly deleted. See OLRC Report, pp. 477-79.

3. Subsection (3) was introduced to mitigate the application of the principle in s. 8.6, where a seller has not been unduly prejudiced by the buyer's failure to state a ground of rejection.

Right to adequate assurance of performance

**8.7.**—(1) Where reasonable grounds for insecurity arise with respect to the performance of either party, the other party may in writing demand adequate assurance of due performance and until he receives such assurance may if reasonable suspend any performance for which he has not already received the agreed return.

Acceptance of improper tender

(2) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of further performance.

Failure to provide adequate assurance

(3) After receipt of a demand, failure to provide within a reasonable time not exceeding thirty days adequate assurance of due performance is a repudiation of the contract.

Where adequate assurance is provided

(4) Upon adequate assurance being provided, the aggrieved party's obligation to perform is restored but he is not liable for any delay occasioned by his suspension of performance.

Meaning of adequate assurance

(5) For the purpose of this section, "adequate assurance of due performance" means such assurance as is commercially reasonable in the circumstances and may include the provision, whether by a party to the contract or a third party, of

(a) a report, opinion or explanation;
(b) an affirmation of due performance;
(c) security or surety for due performance; or
(d) an undertaking respecting extension of a warranty period or respecting cure by replacement, repair, money allowance or contract adjustment.

Sources: UCC 2-609(1), (3), (4); new.

*Comment*

1. This section introduces a right by which an insecure party can call on the other to furnish assurance of due performance, the content of which will vary according to the circumstances. It is based on the principle that a party is entitled to anticipate the due performance of a contract conferring on him expectations for which he has bargained. The section gives a party, who has reasonable grounds

to doubt the ability of the other party to perform his obligations, a practical remedy even in the absence of an actual repudiation.

2. Subsections (1) and (4) permit an insecure party to suspend his obligations under the contract without incurring liability. Subsection (3) treats a failure to supply adequate assurance as a repudiation of the contract.

3. Ontario bill, s. 8.9, does not give any guidance as to what form adequate assurance should take. The Committee felt that some indication should be given; subs. (5) serves this purpose.

Anticipatory repudiation

**8.8.**—(1) Where either party's refusal or inability to perform a future obligation amounts to a repudiation of the contract, the other party may,

(a) resort to any remedy for breach;
(b) suspend his own performance; or
(c) where the contract is repudiated by the buyer, proceed in accordance with section 9.6.

Application of subs 1(a)

(2) Subsection 1(a) applies whether or not the aggrieved party has awaited performance after learning of the repudiation and even though he has notified the repudiating party that he would await the latter's performance or has urged him to perform in spite of his repudiation.

Where repudiating party suffers loss

(3) Where the repudiating party has suffered foreseeable detriment or loss as a result of his reliance upon a notification or urging under subsection 2, the aggrieved party,

(a) shall not exercise his remedies under this section unless he first gives the repudiating party reasonable notice of his intention to do so; and
(b) is liable to compensate the repudiating party for such foreseeable detriment or loss as he has suffered before the notice mentioned in clause *a*.

Duty to mitigate loss

(4) The repudiating party is not liable in any event for loss or damage that the aggrieved party should have foreseen and could have mitigated or avoided without undue risk, expense or prejudice.

Sources: Restatement s. 280;
Restatement (Tent. Draft) s. 336; UCC 2-610; new.

*Comment*

1. This section will frequently work in practice in conjunction with s. 8.7. Like that provision, it eschews existing common law with its rigid adherence to principles of election and waiver. Once there has been a repudiation, the aggrieved party no longer has the stark choice of accepting the repudiation, thus bringing the contract to an end, or waiving the repudiation. He has the additional options of suspending his obligations under subs. (1) and retracting any assurance given to the repudiating party that he will hold the contract open for further performance under subs. (2). In the latter case, he will be liable to the repudiating party for that party's reliance losses induced by the assurance that he, the aggrieved party, would await the other's contractual performance.

2. Subsection (4) repeals the much-debated common law rule that there is no duty to mitigate any loss in actions involving an anticipatory breach, nor any duty in such cases to avoid incurring further expenses. Subsection (4) exists to avoid unnecessary loss and should be considered in conjunction with s. 9.5.

3. The Committee amended Ontario bill, s. 8.10, by substituting the familiar test of repudiation for the discarded principle of substantial breach. The words "inability to perform a future obligation" were added to subs. (1) to reflect the full reach of the common law meaning of anticipatory repudiation.

See generally OLRC Report, pp. 532-41.

Retraction of repudiation

**8.9.**—(1) The repudiating party may retract his repudiation at any time before his next performance is due unless the aggrieved party has since the repudiation,

(a) cancelled the contract;

(b) otherwise indicated that he considers the repudiation final; or

(c) materially changed his position.

Methods of retraction

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under section 8.7.

Consequences of retraction

(3) Retraction reinstates the repudiating party's rights under the contract but the aggrieved party is not liable, and is entitled to be compensated, for any delay occasioned by the repudiation.

Sources: UCC 2-611.

*Comment*

1. This section states the repudiating party's right to retract his repudiation in cases where the other party has not accepted it or otherwise acted on it to his prejudice.

2. No change has been made to Ontario bill, s. 8.11.

Meaning of instalment contract

**8.10.**—(1) In this Act "instalment contract" means a contract that requires or authorizes the delivery of goods in separate lots to be separately accepted, notwithstanding a provision in the contract to the effect that each delivery is a separate contract.

Remedies for breach of instalment

(2) Subject to subsection 3, the buyer's rights and remedies with respect to a non-conforming instalment and the seller's rights and remedies with respect to breach by the buyer of his obligations in relation to an instalment are the same with respect to that instalment as if it were a separate contract.

Breach of the whole contract

(3) Subject to section 7.7, if the non-conformity or breach with respect to one or more instalments substantially impairs the value of the whole contract the aggrieved party may cancel the contract.

Sources: UCC 2-612(1), (3) (part); new.

*Comment*

1. This section deals with instalment contracts and is a revised and clarified version of the rules found in the existing Acts.

2. The Committee agreed with the OLRC that the principle of substantial impairment in the value of the contract should be used as the test for a party's right to terminate the balance of an instalment contract.

3. The Committee made the following changes to Ontario bill, s. 8.12. First, the Committee deleted from subs. (3) the requirement that the value of the whole of the contract to the other party be "foreseeably" impaired by the breach. It saw no reason why the aggrieved party should have to estimate whether or not the guilty party foresaw that he, the aggrieved party, would suffer a substantial impairment in value. Secondly, the Committee added a reference to the seller's right to cure under s. 7.7. Thirdly, the Committee omitted subs. (4) of the Ontario bill because it did not think it consistent with the concept of instalment contracts to permit the buyer to reject previously accepted instalments.

Excuse by failure of pre-supposed conditions

**8.11.**—(1) Subject to sections 8.12, 8.13 and 8.14, a seller who wholly or partly fails to perform or delays performance is excused from liability under the contract if the agreed performance has been made impracticable,

(a) by the occurrence of a contingency that was not due to his fault and the non-occurrence of which was a basic assumption underlying the contract; or

(b) by a compliance in good faith with any applicable foreign or domestic law even if such law later proves to be invalid.

Notification of excuse

(2) A seller excused from performance under subsection 1 shall seasonably notify the buyer of his inability to perform and shall be liable for any damage suffered by the buyer arising from a failure so to notify.

Buyer's performance

(3) This section applies *mutatis mutandis* where the buyer's agreed performance has been made impracticable.

Sources: UCC 2-615; new.

*Comment*

1. Sections 8.11 to 8.15 deal with the circumstances in which a buyer is excused from performance and the consequences of non-performance, because of the failure of presupposed conditions.

2. The most important change made by the Committee was to rearrange the sequence of the sections and to bring forward s. 8.15 of the Ontario bill to provide an opening statement of the circumstances in which performance is excused. With respect to the scope of s. 8.11 as compared with existing common law, see OLRC Report, pp. 365, 369-70, and 374-79.

Non-existence of or casualty to identified goods

**8.12.**—(1) Where the seller's performance is or becomes impracticable under section 8.11(1) because of the parties' mistaken assumption that the goods are in existence or because the goods suffer loss through casualty, including theft, the following rules apply unless either party has expressly or impliedly assumed a greater obligation:

1. If the loss or non-existence is total the seller's obligation to deliver the goods is discharged but the buyer is discharged from the obligation to pay the price only if the risk thereof has not passed to the buyer.

2. If the loss or non-existence is partial and the risk thereof has not passed to the buyer, the buyer may
   (a) inspect the goods; and
   (b) either treat the contract as terminated or accept the goods with due allowance from the contract price but without any other rights against the seller.

3. Where the events referred to in rule 2 occur after the risk has passed to the buyer, the seller is discharged to the extent of the loss or non-existence from the obligation to deliver conforming goods but the buyer remains liable for the price.

Application of subs 1

(2) Subsection 1 applies,

(a) to a contract that requires for its performance goods identified when the contract is made or goods that have been subsequently identified to the contract with the consent of both parties; or

(b) to a contract that contains a "no arrival, no sale" term.

Substituted performance

(3) Except for a contract that contains a "no arrival, no sale" term, rules 1 and 2 of subsection 1 do not apply where the seller is able to tender performance that differs in no material respect from that agreed on, in which case the seller is bound to make and the buyer to accept the tender provided that each party's obligation is excused if it would cause him undue hardship.

Sources: Restatement (Tent. Draft) s. 281; UCC 2-613; new.

*Comment*

1. This section deals with the effect of the parties' mistake with respect to the existence of goods that are the subject matter of the contract, and with casualty to goods after the conclusion of the contract.

2. Apart from some minor stylistic changes, the only change to Ontario bill, s. 8.13, appears in subs. (3) which provides that casualty to the goods, if they are fungible, does not discharge the contract where the seller is able to tender performance which differs in no material respect from that agreed upon. For further discussion of this change, see the Introduction to this Report.

Prorated performance

**8.13.**—(1) Where the causes mentioned in section 8.11(1) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers or, where there is only one customer, to that customer, but may at his option include customers not then under contract as well as his own requirements for future manufacture, and he may so allocate in any manner which is fair and reasonable.

Notification to buyer

(2) A seller allocating under subsection 1 must notify the buyer seasonably of the estimated quota thus made available to him.

Procedure on notice claiming excuse

(3) Where the buyer is notified pursuant to subsection 2 of an allocation of goods, or under section 8.11(2) of a material or indefinite delay, he may, by written notification to the seller,

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to the delay, or agreeing to take his available quota in substitution with due allowance from the contract price.

Termination of contract

(4) If after receipt of such notification the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract is terminated with respect to any deliveries affected.

Application of subs 3 and 4

(5) Subsections 3 and 4 apply,

(a) to a single delivery; and

(b) to all deliveries under an instalment contract where the prospective deficiency substantially impairs the value of the whole contract.

(6) This section applies *mutatis mutandis* where the buyer's agreed performance has been made impracticable.

Sources: UCC 2-615; 2-616(1), (2); new.

*Comment*

1. This section is drawn from Ontario bill, ss. 8.15 and 8.16. It incorporates the pro-rated performance provisions of the former section and the whole of the latter section. Pro-rated performance, while compulsory for the seller, is optional for the buyer. The underlying rationale is that the seller whose ability to perform is impaired, must act equitably to all his customers, though the buyer,

on the other hand, should not be compelled to accept performance once the nature of the bargain has been changed.

2. Subsections (2) and (4) are designed to keep the parties informed as to the state of affairs, and subs. (5) clarifies the application of the section to instalment contracts. Subsection (6) applies to cases where the buyer's capacity to perform is impaired, e.g., the buyer whose factory is so affected by a catastrophe as to limit his capacity to handle incoming shipments.

3. The corresponding provisions of the Ontario bill were changed only in a few minor respects. Changes were essentially organizational.

Substituted performance: shipment, delivery or payment

**8.14.**—(1) Where without fault of either party,

(a) the agreed berthing, loading or unloading facilities fail;

(b) an agreed type of carrier is unavailable;

(c) the agreed manner of delivery otherwise becomes commercially impracticable; or

(d) the agreed means or manner of payment fails because of domestic or foreign law,

but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

Substituted performance: payment after delivery

(2) Where delivery has been made, payment by the means or in the manner provided by a law mentioned in subsection 1(d) discharges the buyer's obligation unless such law is discriminatory, oppressive or confiscatory.

Sources: UCC 2-614; new.

*Comment*

1. This section deals with certain supervening events affecting the manner in which the parties' obligations are to be performed. Under existing law, physical impossibility in the manner of a contract's performance is likely to lead to its frustration. This section provides for substituted performance binding on both parties.

2. Subsection (2) deals with the special case where delivery has been made and, exceptionally, obliges the seller to accept a substitute form of payment even though it does not satisfy the test of a commercially reasonable substitute under the concluding language of subs. (1).

3. The Committee deleted subs. (2) of Ontario bill, s. 8.14, because it saw no justification for different treatment of buyers' and

sellers' obligations. The Committee added a new subs. (1)(d), which obliges a buyer to make and the seller to accept a commercially reasonable substitute means or manner of payment.

See generally OLRC Report, pp. 373-74.

Application of frustrated contracts legislation

**8.15.**(1) *The Frustrated Contracts Act* applies,

(a) to a contract of sale that has been terminated pursuant to sections 8.11 to 8.14; and

(b) to a partial or delayed performance pursuant to section 8.11, 8.12 or 8.13.

(2) If there is a conflict between the provisions of this Act and the provisions of *The Frustrated Contracts Act*, this Act prevails.

Sources: New.

*Comment*

1. This section extends the scope of frustrated contracts legislation to all contracts of sale and thereby removes the existing anomaly contained in such legislation. The section also extends the legislation to cover cases of partial, as well as total, frustration of a contract of sale.

2. The Committee made minor stylistic changes to subs. (1)(b) of Ontario bill, s. 8.17. See OLRC Report, pp. 381-82.

## PART IX

## REMEDIES

Remedies for breach of non-contractual warranties

**9.1.** Except as otherwise provided in this Part, the remedies for breach of a warranty not constituting a term of the contract shall be the same as the remedies for breach of a contract of sale.

Sources: New.

*Comment*

1. Under s. 5.10, an express warranty need not be the term of the contract of sale, but may be a statement giving rise to legal liability. Since this type of warranty is non-contractual, the remedies available for breach of a contract of sale would ordinarily be inapplicable unless the draft Act specifically provides otherwise. Section 9.1 serves this function.

2. The qualifying phrase in the section is designed primarily to ensure accommodation with s. 9.19, which has an important bearing on the nature and scope of the remedies available for breach of a non-contractual warranty.

3. While the Ontario bill makes provision for non-contractual warranties, it contains no provision equivalent to this section specifying the remedies available for breach of such warranties.

**9.2.** Nothing in this Act impairs any remedy of a buyer or seller for breach of any obligation or promise collateral or ancillary to the contract of sale. Remedies for breach of collateral contracts

Sources: UCC 2-701.

*Comment*

1. This section is designed to ensure that the draft Act is not interpreted in such a way as to result in a merger of remedies for breach of a collateral or ancillary promise or obligation otherwise available at common law or under other legislation.

2. No changes were made to Ontario bill, s. 9.1.

**9.3.** Where the buyer is insolvent, the seller may refuse delivery as provided in section 9.8 and stop delivery under section 9.9. Seller's remedies on buyer's insolvency

Sources: SGA s. 39(1)(c).

*Comment*

1. This section recognizes a seller's right to protect himself by withholding or by stopping delivery in cases when the buyer's insolvency, which may not amount to a breach, indicates that performance by him is unlikely. The section is not, however, the source of this special remedy, but is designed to be a part of the index of seller's remedies contained in ss. 9.2 to 9.4.

2. No changes were made to Ontario bill, s. 9.2.

**9.4.** Where the buyer breaches the contract, the seller may Index of seller's remedies

(a) maintain an action for damages;
(b) withhold delivery of any goods in his possession;
(c) stop delivery by any bailee;
(d) recover the price;
(e) obtain specific performance;
(f) cancel the contract;

(g) proceed under section 9.6 respecting goods still unidentified to the contract;
(h) resell and recover damages;

as provided in this Act.

Sources: UCC 2-703; new.

*Comment*

1. This section provides an index of the seller's remedies when the buyer is in breach of contract. While the index is exhaustive in its enumeration of remedies, it is not the primary source for any of them. In each case, a specific section or group of sections provides the source and scope of the particular remedy:

(a) to sue for damages—ss. 9.2, 9.18, 9.19;
(b) to withhold delivery of goods—ss. 9.3, 9.8;
(c) to stop delivery by a bailee—ss. 9.3. 9.9;
(d) to recover the price—s. 9.11;
(e) to obtain specific performance—s. 9.20;
(f) to cancel the contract—s. 9.5;
(g) to proceed under s. 9.6; and
(h) to resell and recover damages—s. 9.10.

2. A corresponding provision is contained in Ontario bill, s. 9.3. The Committee made only minor changes to Ontario bill, s. 9.3, to reflect its decision to reject the concept of substantial breach and to state the right of cancellation in a separate section.

Seller's right to cancel

**9.5.**—(1) The seller may cancel the contract where,

(a) the buyer fails to make payment or take delivery of the goods or perform any other obligation on the date or within the time provided in the contract and if in the circumstances it is unreasonable to expect the seller to give the buyer more time to perform or to remedy a defective performance;
(b) in any other case the buyer fails to perform within a further reasonable period set by the seller;
(c) the buyer repudiates the contract under section 8.8(1); or
(d) the buyer wrongfully rejects the seller's tender or delivery,

provided that goods in the buyer's possession may not be recovered by the seller unless he is otherwise entitled to reclaim them.

(2) For the purpose of subsection (1), Meaning of failure to pay and failure to take delivery

(a) a failure to pay includes a failure to make such arrangements for payment as are required under section 5.1(1); and

(b) a failure to take delivery includes a failure to perform such acts as are required of the buyer under the terms of the contract to enable the seller to make delivery.

Sources: UNCITRAL Arts. 45, 46(1)(b); new.

*Comment*

1. This section states when the seller may cancel a contract because of the buyer's breach.

2. The section draws a distinction between a situation in which the buyer's actions amount to repudiation of the contract or wrongful rejection of tender or delivery, and a situation in which the buyer has merely failed to make payment or take delivery or otherwise perform in accordance with the contract. In the latter situation, the default gives a right to reject only in cases where it would be unreasonable to expect the seller to give to the buyer time to cure his default. Otherwise, the seller must give the buyer a further reasonable period of time to perform. In this respect, the section embodies the policy adopted by the OLRC under which defaulting parties are given an opportunity to cure their default whenever it is reasonable. The corresponding sections of the draft Act applicable to a seller's default are ss. 8.1, 9.13, and 7.7.

3. Corresponding provisions are contained in Ontario bill, ss. 9.3(2) and 9.4. There is, however, a major difference between s. 9.5 of the draft Act and the Ontario provisions. Under the Ontario bill, a seller is entitled to cancel the contract only when the buyer's conduct amounts to a substantial breach. A qualification to this rule appears in Ontario bill, s. 9.4, in cases of failure to pay or failure to take delivery, where the seller is allowed to cancel the contract if the failure is not cured within a further reasonable period of time set by the seller. See generally OLRC Report, pp. 391-94.

**9.6.**—(1) Where the seller is entitled to cancel, he may Seller's right to identify goods

(a) identify to the contract conforming goods not already identified if, at the time he learned of the breach, the goods are in his possession or control; or

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

Unfinished goods

(2) Where the seller is entitled to cancel and the goods are unfinished at the time of the breach, he must exercise reasonable commercial judgment for the purposes of effective realization and avoidance of loss, and to these ends may,

(a) complete the manufacture and wholly identify the goods to the contract; or
(b) cease manufacture and resell for scrap or salvage value; or
(c) proceed in any other reasonable manner.

Sources: UCC 2-704.

*Comment*

1. This section entitles the seller to identify to the contract conforming goods in his possession so as to preserve a right to recover the purchase price under s. 9.11(1)(c) and to facilitate the calculation of damages. Where the seller has goods which were clearly being prepared for delivery under the cancelled contract, he may resell the goods under s. 9.10 and recover damages even though the goods are unfinished at the date of cancellation. However, when dealing with unfinished goods, he must act in a commercially reasonable manner.

2. Ontario bill, s. 9.5, was changed in one respect. The Ontario bill gives the seller the right to identify goods to the contract or to treat goods as the subject of resale, only where there has been a substantial breach by the buyer. A seller has these rights under s. 9.6 of the draft Act where he is entitled to cancel the contract. See s. 9.5.

Person in position of seller

**9.7.** In sections 9.8, 9.9 and 9.10 "seller" includes a person who is in the position of a seller such as an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid or is directly responsible for the price, or anyone who otherwise holds a security interest in the goods.

Source: SGA s. 37(2).

*Comment*

1. No changes were made to Ontario bill, s. 9.6.

2. See also s. 7.5 which gives a party financing the sale the rights of a seller over the goods and in any bill drawn on the buyer.

Seller's right to withhold delivery

**9.8**—(1) The seller may withhold delivery of goods in his possession.

(a) until the buyer pays any sum due on or before delivery;

(b) until payment of the price where the buyer is insolvent;

(c) where the buyer repudiates the contract, until retraction of the repudiation as provided in section 8.9; or

(d) where the seller has requested assurance of performance under section 8.7(1), until adequate assurance of performance has been provided.

Seller's expenses

(2) The seller's right to withhold delivery under subsection 1 extends to any reasonable expenses in relation to the care and custody, transportation, and stoppage of the goods, and other incidental expenses incurred by him subsequent to the buyer's breach or insolvency.

Where seller agent or bailee

(3) The seller may exercise his right to withhold delivery notwithstanding that he is in possession of the goods as agent or bailiee for the buyer.

Part delivery

(4) Where a seller has made part delivery of the goods, whether under an indivisible contract or under an instalment contract, he may withhold delivery of the remainder until payment of all amounts that are due unless the part delivery has been made under such circumstances as show an agreement to waive the right to withhold delivery.

Judgment no bar

(5) A seller who may withhold delivery or stop delivery under section 9.9 does not lose his right to do so by reason only that he has obtained judgment for the price of the goods.

Sources: SGA ss. 39(2), 40, 41(2); ULIS Art. 91; UNCITRAL Art. 60; new.

*Comment*

1. This section gives a right to withhold delivery in circumstances in which the seller's right to be paid is not otherwise assured, and largely corresponds to existing law.

2. No changes were made to Ontario bill, s. 9.7.

Seller's stoppage of delivery

**9.9.**—(1) The seller may stop delivery of goods in the possession of a carrier or other bailiee,

(a) if he discovers the buyer to be insolvent;

(b) if the buyer repudiates;

(c) if the buyer fails to make a payment due before delivery; or

(d) if for any other reason the seller has a right to withhold or reclaim the goods.

When right ceases

(2) The seller may stop delivery as against a buyer within the meaning of subsection 1 until,

(a) the buyer receives the goods;

(b) any bailee of the goods, except a carrier, acknowledges to the buyer that he holds the goods for the buyer;

(c) the course of transit of goods in the possession of a carrier has ended; or

(d) a negotiable document of title relating to the goods has been negotiated to the buyer.

End of course of transit

(3) Where after the arrival of the goods at the appointed destination the carrier acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

Effect of buyer's rejection

(4) Where the goods are rejected by the buyer and the carrier continues in possession of them, the transit shall be deemed not to be at an end even if the seller has refused to receive them back.

Carrier's refusal to deliver

(5) Where the carrier wrongfully refuses to deliver the goods to the buyer or his agent, the transit shall be deemed to be at an end.

Part delivery

(6) Where delivery of part of the goods has been made to the buyer or his agent, delivery of the remainder may be stopped unless delivery of the part has been made under such circumstances as show an agreement to give up possesion of the whole of the goods.

Notification to bailee

(7) To stop delivery the seller must notify the bailee in sufficient time to enable the bailee by reasonable diligence to prevent delivery of the goods.

(8) After such notification the bailee shall hold and deliver the goods according to the directions of the seller, but the seller is liable to the bailee for any ensuing charges or damages. Bailee's duty to hold the goods

(9) Where a negotiable document of title has been issued for the goods, the bailee is not obliged to obey a notification to stop until surrender of the document. Negotiable document of title

(10) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification, received from a person other than the consignor, to stop delivery of the goods. Non-negotiable bill of lading

Sources: SGA s. 43(3), (4), (6), (7); UCC 2-705.

*Comment*

1. This section states when a seller may stop delivery of the goods. It entitles the seller to stop delivery of goods in the hands of a third party when the buyer is insolvent, when he fails to pay for the goods before delivery is required by the contract, or when he repudiates the contract. The section corresponds to existing law.

2. No changes were made to Ontario bill, s. 9.8.

**9.10.**—(1) Where the seller is entitled to cancel, he may resell the goods concerned or the undelivered balance thereof and, if the resale is made in a commercially reasonable time and manner, may recover the difference between the resale price and the contract price, less expenses saved in consequence of the buyer's breach. Seller's right to resell

(2) The resale may be by public or private sale and may include sale by way of one or more contracts to sell or by way of identification to an existing contract of the seller. Method of resale

(3) The sale may be as a unit or in parcels or at any time and place and on any terms, but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. Sale must be commercially reasonable

(4) The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach. Identification of resale to contract

(5) A purchaser who buys in good faith at a resale Purchaser in good faith

takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

Seller not reselling properly

(6) If the seller does not resell in a commercially reasonable manner, he may not sue for damages under this section.

Seller not accountable for profit

(7) The seller is not accountable to the buyer for any profit made on a resale.

Sources: UCC 2-706(1), (2), (5), (6); new.

*Comment*

1. This section is an enabling provision creating an alternative mechanism to the available market rule in the existing Acts for quantifying the seller's damages upon a buyer's breach. In order to take advantage of the section, a resale of the goods must be carried out in a commercially reasonable manner.

2. The right of resale arises when the seller is entitled to cancel the contract as provided in s. 9.5, but is not confined to situations in which the goods being sold have been identified to the contract. This feature of the section points to its role as a formula for quantifying the seller's recoverable damages rather than being simply a method of enforcing his unpaid seller's lien.

3. A seller who resells in accordance with the section is bound, by virtue of s. 9.18(5)(b), by the results of the sale and may not elect to seek damages on the basis of the test set out in s. 9.18(1).

4. Apart from the deletion of "substantial breach" in Ontario bill, s. 9.9(1), the Committee made only minor drafting changes to Ontario bill, s. 9.9. See OLRC Report, pp. 408-11.

Seller's action for the price

**9.11.**—(1) Where the buyer fails to pay the price as it becomes due, the seller may recover the price due,

(a) of goods that he has delivered unless the buyer has rightfully rejected the goods;

(b) of conforming goods lost or damaged while the risk of their loss is upon the buyer;

(c) of goods identified to the contract if the seller, being entitled to do so, is unable after reasonable effort to resell them at a reasonable price or the circumstances indicate that such effort will be unavailing.

Anticipatory repudiation

(2) Where the buyer repudiates the contract before

the seller has made delivery, section 8.8 and not subsection 1(a) shall govern the seller's rights.

(3) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control, except that if resale becomes possible he may resell them at any time prior to the collection of the judgment, in which case the net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold. Seller's obligation to hold goods

(4) For the purposes of this section delivery takes place: Meaning of delivery

1. Where the contract requires or authorizes the seller to ship the goods by carrier,
   (a) unless it requires him to deliver at a particular destination, when the goods are delivered to the carrier even though the shipment is under reservation; but
   (b) if it does require him to deliver them at a particular destination, when the goods are tendered at the destination so as to enable the buyer to take delivery; and
   (c) if the seller is a merchant and the buyer is not a merchant, when the goods are tendered to the buyer at the destination.
2. Where the goods are held by a bailee other than the seller, and are to be delivered without being moved,
   (a) on the buyer's receipt of a negotiable document of title covering the goods;
   (b) on acknowledgment by the bailee to the buyer of the buyer's right to possession of them; or
   (c) on the buyer's receipt of a non-negotiable document of title or other written direction to deliver as provided in section 7.2(4)(b).
3. Where rules 1 and 2 do not apply, when the buyer receives the goods.

Sources: UCC 2-709(1)(part), (2); new.

*Comment*

1. This section states when the seller is entitled to recover the price of goods rather than having to resell them and claim damages.

The price is recoverable where the goods have been delivered to the buyer and the buyer cannot rightfully reject them. Subsection (4) describes the term "delivery" for the purposes of the section.

2. This section recognizes two exceptions to the basic rule: first, where the goods suffer casualty after risk of loss has passed to the buyer; secondly, in the case of goods identified to the contract, where there is no reasonable alternative market for the goods.

3. The Committee did not adopt the criterion of acceptance of the goods appearing in Ontario bill, s. 9.11(1)(a), because it felt that it would be unfair to give the buyer so much power to control the seller's right to recover the price. See OLRC Report, pp. 415-18 and the Introduction to this Report.

Index of buyer's remedies

**9.12.** Where the seller breaches the contract, the buyer may,

(a) exercise his rights under section 8.1(1);
(b) maintain an action for damages;
(c) obtain specific performance;
(d) exercise his rights under section 9.16;
(e) cancel the contract;
(f) recover so much of the price as has been paid;

as provided in this Act.

Sources: UCC 2-711(1), (2); new.

*Comment*

1. This section provides an index of remedies available to a buyer when the seller is in breach of contract. While the index, when read in conjunction with s. 8.1, is exhaustive in its enumeration of remedies, it is not the primary source of any of the remedies noted. In each case, a specific section or group of sections provides the source and scope of the particular remedy:

(a) to reject the goods — s. 8.1;
(b) to sue for damages — ss.9.16, 9.18, 9.19;
(c) to obtain specific performance — s. 9.20;
(d) to cover — s. 9.16;
(e) to cancel the contract — s. 9.13; and
(f) to recover money paid — s. 9.13.

2. A corresponding provision is contained in Ontario bill, s. 9.12. The differences between this section and Ontario bill, s. 9.12, are primarily the product of a Committee decision to reject the concept of substantial breach and to state the right of cancellation in a separate section.

**9.13** The buyer may cancel the contract and recover any portion of the purchase price paid where, Buyer's right to cancel

(a) he has a right to cancel under sections 7.7(3) or 8.10;
(b) the seller repudiates the contract under section 8.8(1); or
(c) subject to section 7.7(2), the buyer has rejected a non-conforming tender or delivery.

Sources: New.

*Comment*

1. This section states when a buyer may cancel a contract because of the seller's breach. The right of cancellation is restricted to cases where the seller (a) has actually repudiated the contract, or (b) has breached the contract but has failed to cure in accordance with s. 7.7 of the draft Act.

2. Corresponding provisions are contained in Ontario bill, ss. 9.12(2) and 7.7. There is, however, a major difference between this section and those sections of the Ontario bill, although the practical result is likely to be the same. Under the Ontario proposal, a distinction is drawn between substantial breaches and other breaches. See Ontario bill, s. 1.1(1)24. If the seller's breach is substantial, the buyer must generally give to the seller a reasonable time after rejection to cure the non-conformity, unless it amounts to late tender or delivery or unless cure is unreasonable or prejudicial to the buyer. See Ontario bill, s. 7.7(2). If, thereafter, the default is not cured, the buyer may cancel the contract. See Ontario bill, s. 9.12(2). If the breach is not substantial, the buyer has no immediate right of rejection, but may demand that the non-conformity be cured within a reasonable time. If the demand is not met, the buyer may cancel the contract unless the type of cure demanded is unreasonable or the non-conformity cannot be cured without unreasonable prejudice, risk or expense to the seller. See Ontario bill, ss. 7.7(4), 7.7(5). Where failure to tender or deliver in accordance with the contract does not amount to a substantial breach, the buyer may set a further reasonable period of time within which to perform. The seller's failure to cure within the further time specified may be treated as a substantial breach and the contract may be cancelled. See Ontario bill, ss.7.7(8), 9.12(2).

3. The Committee decided to eliminate the distinction drawn in the Ontario bill between substantial and non-substantial breaches. In all cases of breach, the buyer is entitled to reject any tendered

performance but may cancel the contract only in accordance with s. 9.13.

Buyer s lien on rejected goods

**9.14.** On rightful rejection the buyer has a lien on goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody, and may hold and resell them, and section 9.10 applies *mutatis mutandis*.

Sources: UCC 2-711(3).

*Comment*

1. This section gives a buyer, who has rightfully rejected a seller's non-conforming delivery, a possessory lien on the rejected goods, supplemented by a right of sale, for the recovery of money paid to the seller and for expenses incurred in dealing with the rejected goods.

2. No change has been made to Ontario bill, s. 9.13.

Buyer s claim for return of price

**9.15.** Any claim by the buyer for the return of the purchase price is subject to such reduction on account of any benefits derived by him from the use or possession of the goods as is just in the circumstances.

Sources: UNCITRAL Art. 55(2); new.

*Comment*

1. This section establishes the buyer's liability to account for benefits derived from the goods even though the goods have been rightfully rejected. It changes existing law. See OLRC Report, pp. 504-09.

2. No change has been made to Ontario bill, s. 9.14.

Buyer s procurement of substitute goods

**9.16.**—(1) Where the buyer is entitled to cancel the contract, he may cover by making in a commercially reasonable time and manner any purchase of, or contract to purchase, goods in substitution for those due from the seller.

Measure of damages

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price, less expenses saved in consequence of the seller's breach.

Failure to cover

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

Sources: UCC 2-712.

*Comment*

1. This section is an enabling provision creating an alternative mechanism to the available market for quantifying the buyer's damages. Under the section, a buyer who is entitled to cancel a contract may cover the seller's default by a purchase of substitute goods. If he acts in a commercially reasonable time and manner, he may recover as damages the difference between the cost of acquiring substitute goods and the contract price, less any savings realized as a result of the changed circumstances. However, if he chooses this method of proceeding he is bound by the result and may not, thereafter, elect to seek damages based on the market-contract price test set out in s. 9.18. See section 9.18(5)(c).

2. Corresponding provisions are contained in Ontario bill, s. 9.15. The Ontario bill limits the right to cover to situations described in s. 9.12(2). The Committee's decision not to adopt the concept of substantial breach resulted in the difference in formulation as to the circumstances in which the right to cover may be exercised. See Comment to section 9.12 of the draft Act. In addition, minor stylistic changes were made to Ontario bill, s. 9.15, by the Committee. See OLRC Report, pp. 498-502.

**9.17.**—(1) Where there is a breach of contract by the seller and the buyer has accepted the goods, the buyer may, Buyer's damages for breach respecting accepted goods

(a) set up against the seller the breach of contract in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for breach of contract.

(2) In the case of a breach of warranty such loss is *prima facie* the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. Measure of damages

(3) The fact that the buyer has set up the breach of contract in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of contract if he has suffered further damage. Right to maintain action

Sources: SGA s. 51; UCC 2-714.

*Comment*

This section reproduces existing law. Ontario bill, s. 9.17(2), has been relocated to draft Act, s. 9.18.

Right to damages

**9.18.**—(1) Where the seller or buyer breaches the contract, the other party may maintain an action against him for damages.

Computation of damages

(2) The measure of damages is the estimated loss which the party in breach ought to have foreseen at the time of the contract as not unlikely to result from his breach of contract.

Mitigation of damages

(3) An aggrieved party must take reasonable steps to mitigate his damages.

Measure of damages

(4) Where at the agreed time for performance,

(a) the buyer wrongfully fails to accept and pay for the goods;
(b) the seller wrongfully fails to deliver the goods or the goods are rightfully rejected; or
(c) the buyer wrongfully rejects the goods,

the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the price that could have been obtained by a commercially reasonable disposition or purchase of the goods within or at a reasonable time and place after the aggrieved party learned of the breach, less any expenses saved in consequence of the breach.

Other cases

(5) Subsection 4 does not apply where,

(a) the measure of damages would be inadequate to put the seller in as good a position as performance by the buyer would have done;
(b) the seller has resold the goods as provided in section 9.10; or
(c) the buyer has bought substitutional goods as provided in section 9.16.

Incidental and consequential damages

(6) A seller's or buyer's claim for damages may include a claim for incidental or consequential damages.

Injury to person or damage to property

(7) The rules as to remoteness of damage in tort shall apply to consequential claims for injury to person or property.

Sources: SGA ss. 48, 49, 52; UCC 2-708, 2-710, 2-713, 2-715; new

*Comment*

1. This section provides for the right to recover damages where a party is in breach of the contract of sale.

2. Subsection (2) adopts the formula for measuring damages approved in *The Heron II,* [1969] 1 A.C. 350 (H.L.), refining the rules set out in *Hadley v. Baxendale* (1854), 9 Exch. 341.

3. Subsection (4) reproduces, with minor modifications, the contract-market test of recovery of damages in cases where the aggrieved party is entitled to cancel the contract.

4. Subsection 5(a) entitles the courts to use other formulae in cases where the market-contract price test of subs. (4) would provide inadequate recovery for the aggrieved party. An example of such a case occurs where a buyer has wrongfully repudiated a contract and the seller has resold the goods at the contract price, but can show that he could have made a profit on both sales if the first buyer had not repudiated the contract.

5. Subsection (5) also deals, albeit indirectly, with the much-debated problem of assessing damages for the buyer's breach when the seller succeeds in recovering his "loss", either by taking advantage of a rising market or by making a judicious resale. The Committee felt that, if the seller resold the goods outside the conditions prescribed in s 9.10 his damages should be assessed according to the market-contract price test in s. 9.18(4) regardless of whether the resale price was less or greater than the market price at the date of breach. In other cases, s. 9.10 would govern and the seller would be bound by the resale price, whether it was to his benefit or detriment. Subsection 5 deals in the same way with a buyer who repurchases after the seller defaults.

6. Subsection (6) provides for the recovery of incidental or consequential damages and subs. (7), by extending tortious rules of remoteness of damage to personal injury and property damage claims, subjects contract and tort actions to the same recovery rules.

7. Equivalent provisions are contained in Ontario bill, ss. 9.10, 9.16 and 9.19. Besides consolidating them, s. 9.18 of the draft Act removes some of the ambiguities in the Ontario bill.

Discretionary awards for some breaches of warranty and of contract

**9.19.**—(1) Where there is,

(a) a breach of contract by a non-merchant seller and it would be inequitable to award damages under section 9.18; or

(b) a breach of warranty not constituting a term of the contract of sale, whether the warranty was given by the seller or by a person referred to in subsection 8 of section 5.10,

the Court may in lieu of or in addition to any other remedy,

(i) grant rescission of the contract;
(ii) order a reduction in or return of the price of the goods;
(iii) award damages including an amount to compensate for loss or liability incurred in reliance on the warranty or contractual undertaking; or
(iv) make an order involving any combination of the above remedies,

on such terms and conditions as it considers just.

Application of subs 1

(2) In the exercise of its powers under subsection 1, the court may take into consideration,

(a) the fact that both persons are merchants or that one or neither is a merchant;
(b) whether the person giving the warranty or contractual undertaking purported to have knowledge or expertise, or, as the other party knew, was merely transmitting information derived from another source;
(c) whether the person giving the warranty or contractual undertaking was negligent; and
(d) any other relevant circumstances.

Sources: New.

*Comment*

1. This section is new and gives the courts a measure of flexibility to tailor remedies in situations where the ordinary remedies are inappropriate. The section is very important because of the expanded meaning of warranty in s. 5.10. Not only are representations more likely to be treated as contractual warranties under the draft Act, but in addition the selective removal of privity requirements of contract law results in a much broader scope for breach of warranty actions against persons who would escape liability under existing law. See also the Introduction to this Report.

2. Where a defaulting seller is non-merchant, it may be unduly

harsh to allow the buyer to recover loss-of-bargain damages or, in some cases, any damages at all. In such a situation, the court has power to order a more appropriate remedy such as rescission of the contract or a reduction in or return of the price, or power to limit recovery to reliance damages, alone or in combination with another remedy.

3. Under s. 5.10, a seller, manufacturer, distributor or other person with a business interest in selling the goods, may incur liability to a buyer for breach of a warranty not constituting a term of a contract with the buyer. While s. 9.1 provides that the ordinary rules for the recovery of damages apply in such a situation, the section is to be read subject to s. 9.19 which allows the court to order a more limited or alternative remedy.

4. Subsection (2) enumerates some of the factors which a court may take into consideration when determining whether or not to exercise powers granted under subs. (1).

**9.20.**—(1) In any action for breach of a contract of sale, the court may direct that the contract be performed specifically, and may in connection therewith impose such terms and conditions as to damages, payment of the price, and otherwise, as seem just to the court. Specific performance

(2) In determining whether to make an order under subsection 1 at the suit of the buyer, the court shall take into account whether the buyer has, Relevant factors

(a) a special property in the goods under section 7.1; and
(b) paid the purchase price or a part thereof.

Sources: SGA s. 50; new.

*Comment*

1. This section gives to a court power to order a seller or a buyer specifically to perform the contract. The court is given additional powers to attach conditions to its order. While in most situations an order for specific performance against a buyer is inappropriate, this will not always be the case. If a contract provides for payment by the buyer to a third person who is not party to the contract, an order for specific performance against a defaulting buyer may be the only remedy by which the seller's contractual rights can be adequately enforced.

2. Subsection (2) identified one particular type of situation in which specific performance would appear to be the most appropriate

remedy. If the buyer has paid all or part of the purchase price of goods, and goods have been identified to the contract, the requirements of justice may dictate an order for specific performance if the buyer's alternative remedies would be inadequate, e.g., where the seller's failure to deliver the goods is a result of his insolvency.

3. An equivalent provision is contained in Ontario bill, s. 9.18. Section 9.20 of the draft Act differs from the Ontario bill in two respects. The Ontario bill applies to orders for specific performance against sellers whereas s. 9.20 of the draft Act applies to both buyer and seller. Further, the Ontario bill makes no specific reference to the buyer's special property in goods as a factor in the exercise of the court's discretion. See the Introduction to this Report and OLRC Report, pp. 436-44.

Other causes of action

**9.21.**—(1) Subject to subsection 2, the rights and remedies of an aggrieved party arising otherwise than in contract are not affected by the existence of a contract of sale unless the contract itself so provides.

Innocent misrepresentation

(2) Where an innocent but non-negligent misrepresentation is a warranty within the meaning of section 5.10, the aggrieved party is limited to the rights and remedies provided in this Act for breach of warranty.

Fraudulent misrepresentation

(3) The remedies available for fraudulent misrepresentation inducing the formation of a contract include a right to recover damages as provided in this Act for breach of warranty and, without prejudice to the generality of the foregoing, the aggrieved party does not have to elect between rescission of the contract and damages for breach of warranty.

Sources: UCC 2-720, 2-721; new.

*Comment*

1. This section is designed to provide rules for determining the extent to which rights and remedies ordinarily available from sources outside the Act are affected by the Act. For example, a statement made to a buyer may amount to: (a) an innocent, non-negligent misrepresentation, so that the buyer's only remedy is equitable rescission and indemnification; (b) a negligent or fraudulent misrepresentation, so that the buyer may recover damages in tort; (c) a non-contractual statement under s. 5.10, so that the buyer has the remedies specified in ss. 9.1 and 9.19; or (d) a term of the contract of sale entitling the buyer to the remedies specified in ss. 9.16 to 9.20.

2. Generally, s. 9.21 allows the aggrieved party to elect between remedies available inside or outside the Act. Subsection (2) states an exception. Where an innocent, non-negligent misrepresentation is a warranty within the meaning of s. 5.10, the aggrieved party cannot seek equitable rescission and indemnity, but must pursue his statutory remedies as provided in the Act. The exception is designed to prevent circumvention of the remedial scheme provided in the Act for breach of warranty, since the expanded definition or warranty was intended to encompass such representations.

3. Subsection (3) eliminates any suggestion that an aggrieved party, seeking redress for a fraudulent misrepresentation inducing formation of a contract of sale, is limited to the tortious measure of damages and must elect between tortious and contractual remedies.

4. Equivalent provisions are contained in Ontario bill, s. 9.20. The Ontario bill contains no restriction similar to subs. (2) above, leaving the aggrieved party free to seek rescission for an innocent, non-negligent misrepresentation.

## PART X

## MISCELLANEOUS

Transitional provision

**10.1.** This Act applies to contracts of sale and other transactions governed by this Act that are entered into on or after the day on which this Act comes into force.

Repeal

**10.2.** *The Sale of Goods Act* is repealed except for contracts of sale entered into before the day on which this Act comes into force.

Commencement

**10.3.** This Act comes into force on a day to be fixed by proclamation.

Short title

**10.4.** The short title of this Act is *The Sale of Goods Act, 19 .*

## *APPENDIX: COMPARATIVE ANALYSIS WITH THE CIVIL LAW OF QUEBEC*

By way of introduction to this brief comparative analysis, we would like to make some remarks about uniformity of law in Canada, especially from the civilian point of view. Because of the co-existence of both civil and common law systems in our country, the concept of uniformity cannot have the same meaning as it would if there were

only one system in force. One tends to find in Quebec three legal attitudes among jurists: those who favour law reform by increasingly importing common law style solutions; those who react emotionally against any common law type of legal influence; and those (including the representative of Quebec on the Sale of Goods Committee) who are prepared to introduce carefully selected and comparatively evaluated common law type solutions but not to sacrifice the essential structure or style of the civilian tradition in the interests of unification.

It can hardly be argued that either system is unwilling to adopt good features from the other. However, each system is a particular mode of conception, expression and application of the law; neither system wishes to impose itself upon the other, nor would such an imposition be tolerated. On this view, the abandonment of a civil law rule in favour of a common law rule should occur only if the latter is seen as more useful and proper in the circumstances and if there is no provision in the Civil Code or in any other Quebec statute capable of achieving the same result. Where a common law rule or a new legal concept is adopted in both systems, for all practical purposes it may be said that uniformity of law exists, even though it may be necessary for the particular rule to be stated in a different style or manner in Quebec.

*The major divergences*

The following "common law" provisions in the draft Act may be mentioned as involving considerable difficulty of application to Quebec:

(1) *Meaning of "value"* (s. 1.1(1) 26)

The Civil law of Quebec does not recognize any distinction between contracts under seal and simple contracts. Moreover, the common law doctrine of consideration, which is connected with that distinction, and its civilian counterpart, the doctrine of *causa*, are dissimilar. In any event, the Civil Code Revision Office has recommended abolishing *cause* as a necessary condition to the formation of a contract. The civilian viewpoint is therefore that the abolition of consideration as a requirement of sale contracts would be a substantial step towards the greater harmonization of the sales law of Quebec with that contained in the draft Act.

(2) *Contractual modifications* (s. 4.10)

The common law approach relating to contractual modifications differs from the civilian approach although in some cases the practical results are the same. In the Ontario bill, aspects of modification remain submerged in concepts unknown to civil law such as waiver and

equitable estoppel. The corresponding provision of the draft Act, although it simplifies the Ontario bill somewhat, is no more acceptable in Quebec since it provides that a party may withdraw from an executory portion of an agreement varying or rescinding a contract of sale if such an agreement is made without consideration. The Civil Code states that an agreement modifying a contract is itself considered as a contract (art. 1022 CC) and is thus fully binding without consideration.

(3) *Implied warranties* (ss. 5.13 and 5.14)

Under the Civil Code (art. 1522 CC), a seller's liability does not depend upon whether or not he sold in the course of business, although this fact is relevant to the extent of that liability. This is fundamentally different from the position under the draft Act where the obligations of fitness and merchantability are imposed only on business sellers. Further, the implied warranty in article 1522 CC is limited to latent defects; in view of the exceptions in s. 5.13(3) of the draft Act, the implied warranty of merchantable quality is perhaps not much wider in scope. Finally, it is unanimously recognized by civilian authors and by the Quebec courts that the buyer is obliged to examine the goods; this obligation is not present to the same extend under the draft Act. However, in the case of a consumer sale, no major differences appear between the two systems (See *Loi sur la protection du consommateur*, 1978, S.Q., c. 9, ss. 34-40).

(4) *Nemo dat rule* (ss. 6.3 to 6.9)

There are two diametrically opposed policies upon which one may base rules to govern the competing interests that arise when a seller purports to transfer title in goods that he does not own. One policy favours security of ownership by protecting the title of the true owner of the goods. The other favours the security of commercial transactions by protecting persons who acquire goods from another who is in possession of them. Both the draft Act and the Quebec Civil Code are similar in that neither system has opted exclusively for either policy. The two systems do however adopt quite different approaches in attempting to reconcile the competing interests. To complicate matters further, the Civil Code Revision Office has opted for a position which differs radically from both the draft Act and the present Code.

The draft Act reaffirms the general common law principle, which vindicates security of ownership by providing that a buyer acquires no better title to the goods than the seller had. This principle is however subject to a number of exceptions. For example, the owner who entrusts goods to a factor, agent or merchant dealing in similar articles

can be precluded from claiming they were sold without his authority. Also, the third party buyer can acquire title where the contract transferring property between the owner and the seller is voidable and the owner does not sue to recover the goods before the seller purports to transfer property to the buyer.

The Civil Code provisions are also a compromise between the alternatives of protecting the rights of ownership or the security of commercial transactions. Transactions between sellers and buyers are divided into two broad categories, private and commercial. In commercial sales the basic principle, found in many civil law jurisdictions, is that a person in possession of goods can confer a better title than he himself has and can preclude revendication by the owner. This principle applies in Quebec to goods bought in good faith at a fair or market, at a public sale, or from a trader dealing in similar articles, and in commercial matters generally (art. 2268 par. 3 CC). Following French law, the Civil Code does not apply this principle to lost or stolen goods and permits the owner to recover these (art. 2268 par. 4 CC). In private sales, on the other hand, the true owner may revendicate the goods sold; this resembles the common law principle of *nemo dat quod non habet.*

Two features distinguish the Civil Code provisions from the common law principle. First, the person in possession of the goods has a presumption of title in his favour which the owner must rebut in order to revendicate his goods. Secondly, the person in possession acquires title to goods if the owner has been out of possession for three years.

The position adopted by the Civil Code Revision Office differs from both the draft Act and the Civil Code. The Office has proposed a rule favouring the protection of the rights of the original owner, except where goods are sold under judicial authority or where the owner has been out of possession for three years. Both private and commercial transactions are treated similarly. The underlying philosophy seems to be that "La protection du commerce pourrait en realite exiger que l'on assure d'abord la protection du droit de propriete" (Yves Caron, *"La vente et le nantissement de la chose mobiliere d'autrui",* (1977) 23 McGill L.J., at p. 436).

(5) *Anticipatory repudiation* (s. 8.8)

Quebec law does not distinguish between repudiation and other breaches of the contract, nor between anticipatory and actual breaches. The Codifiers decided to adopt the rules on breach

established by Roman law and followed in France. The underlying principle is that a person must be "put into breach" (or, more precisely, "put in default") by the creditor notifying the debtor of his desire that the latter fulfil his obligations. The debtor may be called on to perform either as soon as, or before, performance is due. Since the purpose of putting someone into breach is to notify the debtor that the creditor desires the fulfilment of his obligation without further delay, it is useless when the debtor himself states he will not perform. Under the Draft Civil Code, this is an immediate breach (Book Five, art. 262, par. 4).

Putting the defendant into breach is a prerequisite to claiming damages, either moratory or compensatory, or to cancelling the contract. The requirement of "putting into breach" should be maintained in the Province of Quebec as conforming with the Civil Code's general tendency to protect debtors. The Code does however contain rules to the effect that a conditional obligation becomes absolute when a party prevents its fulfilment (art. 1084 CC) and that a debtor cannot claim the benefit of a term when he has become bankrupt or insolvent, or has by his own act diminished the security given to his creditor by the contract (art. 1092 CC). Consequently, the draft Act's concept of anticipatory repudiation is out of step with Quebec law, where such a breach is treated as an actual breach.

(6) *Substituted performance* (s. 8.12(3))

The concept of substituted performance, even if not a common law rule as such, differs so radically from existing civil law concepts that it would be unacceptable in Quebec. In civil law, if the risks are upon the seller when the thing sold perishes before delivery, he loses the right to claim its price and the contract is cancelled. In other cases, when the parties have mistakenly assumed that the goods are in existence, there is no contract in existence because of lack of subject-matter (art. 984 CC). In either situation, the seller suffers loss since he has neither the thing nor the price, while the buyer has not lost anything. If the seller wants to be paid in these cases, he can, of course, try tendering a substitute. A substitute, however similar, is in fact different from the subject-matter of the original agreement. Therefore, under civil law, the parties should not be obliged to offer or accept it; they should not be bound to enter into a new contract.

(7) *Seller's stoppage of delivery* (s. 9.9)

In Quebec, an unpaid vendor has certain preferences and privileges corresponding to the common law concept of a lien, but differing from the right of stoppage *in transitu.* He may in certain circumstances

revendicate the thing sold after delivery. The right to revendicate must be exercised within eight days of delivery, or, in the case of insolvent traders, within thirty days of delivery (art. 1998 and 1999 CC). Apart from the above divergences, there are no fundamental differences between the basic theories underlying the draft Act and the sales law of Quebec. In fact, most of the rights, obligations and remedies set out in the draft Act have their civilian counterparts, although the latter are expressed in much less detail.

*Interesting innovations*

The Statute of Frauds requirement and the parol evidence rule are English rules of evidence that have been incorporated in the Civil Code (arts. 1234 and 1235 CC). Most of the criticisms made in the Ontario Report about these two topics seem equally valid in Quebec. Accordingly, the amendments suggested in the Report as well as in the draft Act abolishing these rules in respect of contracts for the sale of goods would constitute an improvement in the Civil Code and should be incorporated therein. These changes would be consistent with the civilian theory of the consensual nature of contracts (which declares that agreements need not be in writing to be binding, but may arise from the mere exchange of the parties' consent) and with the subjective will theory (which declares that parties are bound by their will and that the declaration of the real will, i.e., the objective manifestation, is of secondary importance). Furthermore, the parol evidence rule has already been excluded in two statutes since 1978 (*Loi sur la protection du consummateur,* 1978, S.Q., c. 9, s. 263; *Loi sur la Regie du logement,* 1979, S.Q., c. 48, s. 77).

In civil law and under the present *Sale of Goods Acts,* the situation as regards risk is the same: it is primarily an offshoot of property, not possession. The draft Act, however, adopts a different approach: it makes the passing of risk depend upon delivery of the goods (s. 7.8). By linking the passing of risk to delivery rather than to the transfer of property, the risk is placed upon the person perhaps in the best position to protect the goods. This modification has already been suggested for quebec (Daniel JACOBY, *Les risques dans la vente: de la Loi Romaine a la Loi de la Protection du consummateur,* (1972) 18 McGill L.J. 343, at p. 383) and I believe that it should be incorporated in the Civil Code.

Although many of the provisions of the draft Act arise from common law sources, some of these solutions, such as the provisions relating to express warranties (s. 5.10) and third party beneficiaries of warranties (s. 5.18 goes further than ss. 53 and 54 of the *Loi sur la*

*protection du consommateur,* cited above); the seller's right to cure a defective tender or delivery (s. 7.7); the buyer's right to reject non-conforming goods (s. 8.1(a)); the right of either party to demand adequate assurance of due performance (s. 8.7); and the principle of apportionment (s. 8.13), are fresh legal concepts and not common law concepts. Consequently, they could be adopted in Quebec without derogating from the basic principles of the civil law system which is capable of assimilating this new material without losing its individual character. However, the provisions concerned would have to be re-written in a language more familiar to civilian lawyers; indeed, loyalty to the civilian tradition implies that if these legislative policies of the draft Act really correspond to the needs of Quebec (and the view of the representative of Quebec is that they do so correspond), they have to be formulated in terms of general principles in the Civil Code and cannot be incorporated therein in the actual drafting style of the draft Act.

Finally, it would be very useful to adopt in Quebec s. 5.2, which is much more detailed than s. 8 of the *Loi sur la protection du consommateur* (cited above), and the codification of the rules for the construction of shipping terms, such as F.O.B., F.A.S., C.I.F., etc., along with the obligations of the parties thereunder (ss. 5.19 to 5.24).

## APPENDIX T

*(See Page 34)*
(Document: 840-204/016)

**Recommendation of Prince Edward Island**
**For an Addition to the Agenda (Rule 4)**
**Re: Workers Compensation Act and Contribution under the Contributory Negligence Act**

The Uniform Law Conference of Canada has been considering proposals in respect to the *Uniform Contributory Negligence Act.* Most matters were covered at the Charlottetown meeting in August, 1980. My notes indicated that the issue of identification of one person's negligence with another in the context of a claim was referred to Alberta for report.

Following the Charlottetown meeting, I corresponded with W. H. Hurlburt, Esq., Q.C. (one of the Alberta Commissioners) on the effect of the statutory bar in the *Workers' Compensation Acts* (P.E.I. section 13) on the inability of a defendant sued by a worker to claim contribution from a person who was also negligent but who was protected by the statutory bar.

Mr. Hurlburt thinks that the issue is appropriate to the subject but that it does not fall within the scope of the mandate given to the Alberta Commissioners and should form the basis of a separate inquiry. I am proposing to the P.E.I. Commissioners that they proceed under sections 4 to 6 of the Uniform section's rules of procedure to recommend that this matter be considered. The balance of this memo is intended to serve as the "reasons" and "report" for the purpose of section 4(2) of the rule.

*Background*

All jurisdictions who are members of the Uniform Law Conference have workers' compensation legislation that include provisions in respect to the potential overlap of the legislation compensation scheme and compensation (damages) as the result of litigation in the courts:

*Workmen's Compensation Act,* R.S.O. 1970, Chap. 505, s. 8, 15
*Workmen's Compensation Act,* R.S.N.S. 1967, Chap. 343, sections 47-49, 182-184
*Workers' Compensation Act,* Stats. Alta 1973, Cap. 87, s. 13-15
*Workers Compensation Act,* R.S. Man. 1976, Chap. W200, s. 7
*Workers Compensation Act,* R.S.B.C. 1979, Chap. 437, s. 10-11

*Workers' Compensation Act,* Stats. Sask. 1973-74, Chap. 127, s. 35, 36

*Worker's Compensation Act,* R.S. Nfld. 1970, Chap. 403, s. 11-13

*Workmen's Compensation Act,* R.S.N.B. 1973, Chap. W-13, s. 10-12

*Workmen's Compensation Ordinance,* R.O.Y. 1971, Chap. W-5, s. 16

*Workers' Compensation Act,* R.S.P.E.I. 1974, Cap. W-10, s. 11-13

*Workmen's Compensation Act,* R.S.Que. 1964, Cap. 159, s. 7

In all jurisdictions except Quebec, a defendant to a court action is liable for the whole amount of the damages awarded the plaintiff notwithstanding that as between the defendant and another person the defendant is entitled to contribution. (For the Quebec situation see *Plaisance v. Brink's Express Co. of Can. et al.* (1975) 9. N.R. 11 (S.C.C.)). With the possible exception of Nova Scotia (*Vance v. MacKenzie* (1977) 19 N.S.R. (2d) 381 (C.A.)), the defendant's right to contribution depends on whether the plaintiff ever had a cause of action for his injuries against the person from whom the defendant claims contribution. If there is no cause of action there is no potential liability *in solidum* (to use Glanville Williams' phrase) and hence no basis for a contribution claim.

The statutory bar of the workers' compensation legislation upsets the normal operation of the claim and contribution scheme of the legal system. The extent of the bar varies from jurisdiction to jurisdiction but does not affect the principle. Sections 11 to 13 of the *Workers' Compensation Act,* R.S.P.E.I. 1974, Cap. W-10 represents one of the earliest and crudest models. In essence, the worker and those claiming in respect to him have no cause of action against an employer or worker covered by the Act. This causes no problems for court litigation as long as all parties are covered by the Act. However, where a defendant is not covered by the Act and would normally have a right to contribution from a person who also caused the injury but who is covered by the Act, the Act's deletion of the worker's cause of action against that person also prevents the defendant's claim for contribution from that person. The result is that the defendant bears the whole of the plaintiff's claim.

Some jurisdictions (eg. section 15 of the Alberta Act as enacted by Stats. Alta. 1976, Cap. 55) alleviate the hardship on a defendant by restricting the plaintiff's claim against a defendant to the portion established as the portion in respect to which the defendant would not be able to claim contribution from the person protected by the Act if

the Act did not provide the protection. In Ontario, a similar provision is reduced in effectiveness by the ability of the Board to determine whether the statutory defence applies even when the Board itself is suing in the name of the worker; *Mack Trucks v. Forget* (1973) 41 D.L.R. (3d) 421 (S.C.C.).

In any event, it is submitted that such statutory protection to a defendant aggravates two other features of the legislation:

1. The legislation forces the worker to elect between claiming compensation and suing a person who is not protected by the Act but who is in reality only responsible for part of the damages.

2. When a worker elects compensation, the Board assumes complete control of the worker's common law rights (*MacIntosh v. Gzowski et al.* (1979) 15 C.P.C. 14 (Ont. C.A.)) and in the name of the worker sues the unprotected person for damages without regard to the fact that a person protected by the Act but "insured" by the Board is also casually responsible.

Those jurisdictions that continue to compel the election and also limit liability to proportionate fault decrease the incentive of a worker to assume the risks of litigation rather than accept the compensation.

Those jurisdictions that allow the Board to sue in the name of the worker even when a person protected by the Act has in part caused the loss enable the insurance pool created by the Act to be refunded at the expense of, and in priority to, the worker and create the anomalous situation in *Mack Trucks v. Forget* where the Board although effectively plaintiff decides the defendant's right to a statutory defence.

## POLICY ISSUES

1. When the workers' compensation legislation alone exempts a wrongdoer from legal responsibility, should a defendant be liable only to the extent that he would be liable if the exemption did not affect his right to contribution?

2. If so, should the worker be allowed to *both* claim the workers' compensation without deduction and sue for the sum representing the apportioned liability?

3. If so, in those cases where a person protected by the Act is in part causally at fault should the Board be prevented from setting off recovery at law from compensation otherwise payable under the Act within certain limits?

RECOMMENDATION

It is submitted that all three questions should be answered in the affirmative.

Their resolution in that manner would remove the present distortion in the system of court recovery of loss and bring about the same result under the workers' compensation legislation as would occur if there were no question of joint and several liability. The *Plaisance* case would indicate that the result approximates the solution in Quebec.

Arthur J. Currie
W. Raymond Woore
Diane O. Campbell
of the Prince Edward Island
Commissioners

## APPENDIX U

*(See page 52)*

## SPECIAL PLENARY SESSION

### Decisions on Uniform Rules of Evidence

Motions for Reconsideration:

The meeting agreed to reconsider the following decisions. [The decisions are identified by reference to the meeting at which they were made and the section of the Task Force Report to which they refer. The motions are listed in the sequence in which they were raised.]

*April, 13.14 (q) "Confessions"*

Mr. Ewaschuk, Q.C. moved that this decision be reversed and that the Uniform Evidence Act prohibit questioning of the accused as to the truth of his statement to a person in authority during a *voir dire* on the admissibility of that statement. *Carried.*

*April, 13.14 (ad) "Confessions"*

Mr. Ewaschuk, Q.C. moved that this decision be amended so that confirmation by a subsequent finding of confirmatory objective fact evidence would not render an otherwise inadmissible confession admissible, but reference could be made to the fact that the accused knew the whereabouts or condition of such objective fact evidence. *Carried.*

*April, 26.14 (a) "Cross-Examination on Previous Convictions"*

Mr. Ewaschuk, Q.C. moved that this decision, which adopts the rule as stated in section 12 of the *Canada Evidence Act,* be repealed insofar as it relates to the accused as a witness, and that a provision similar to section 1(f) of the *English Criminal Evidence Act, 1898,* be adopted. After considerable discussion the question was referred to a committee which recommended that cross-examination of the accused as to his previous criminal record be permitted only where

(a) such evidence is otherwise admissible to show that the accused is guilty of the offence charged;
(b) the accused has put his character in issue;
(c) the accused has given evidence against a co-accused;
(d) the conviction is one for perjury or giving contradictory evidence in a court proceeding;
(e) the conviction occurred within the past seven years and is one for an offence involving an element of fraud.

The committee also recommended that as a concomitant of the above recommendation it should be provided that the court and counsel might comment on the failure of the accused to testify on his own behalf.

Mr. Ewaschuk put forward the committee's recommendations as his motion. *Carried.*

*April, 3.6 (a) "Formal Admissions"*

The Chairman of the Task Force noted that the July plenary session on drafting had flagged subsection 18(2) for reconsideration, because it was felt that it was redundant. The subsection permits a party to veto a formal admission by his opponent in a criminal proceeding, even though the party has the right under subsection (3) to call evidence of any fact admitted by another party. *It was agreed to leave the section as it is.*

*April, 9.8 (c) "Proof of Handwriting"*

The Chairman of the Task Force noted that the debate on this provision had been on the basis of a Canadian practice that was clearly inconsistent with the existing law, and to that extent the decision may have been *per incuriam.* The law (section 8, *Canada Evidence Act*) clearly states that as a condition precedent of making a handwriting comparison in court the genuineness of the writing to be used as a standard first be established to the satisfaction of the court. In practice this condition is not required. *It was agreed that the decision in accordance with the practice should be approved.*

*April, 11.5 (g) "Exceptions to the Hearsay Rule"*

The Chairman of the Task force noted that a question had been raised in the July plenary session regarding the appropriateness of exempting statements made by police officers in the course of duty from the requirement that "the statement was not made in anticipation of imminent litigation". *The meeting decided that the exemption was appropriate.*

*April, 20.9 (b) "Spousal Competency"*

The Chairman of the Task force noted that the July plenary session had expressed the view that the relevant date of the spousal relationship should be the time of the trial rather than the time of the offence as decided in the April meeting. *It was agreed that the relevant time should be the time of the trial.*

*May, 28.11 (i) "Interpreters and Translators"*

The Chairman of the Task force noted that the July plenary session

had expressed doubt as to the feasibility of excluding evidence of a translation on the sole ground that the translator had not been produced in court for cross-examination. In some instances this would be impracticable, and accordingly it was recommended that the absence of the translator as a general rule should affect the weight rather than the admissibility of the translation. *It was agreed that the absence of the translator normally should go to weight.*

*May, 34.7 (c) "Crown Privilege"*

The Chairman of the Task force noted that the Federal Department of Justice had formally indicated that it could not accept the decision of the Uniform Law Conference whereby the Uniform Evidence Act would give the Cabinet absolute authority to declare as privileged communications falling within the "high policy" category. As the Uniform Act therefore would apply only in provincial proceedings it was questioned whether "a confidential communication, made by or to a law enforcement officer or authority, relating to the investigation or prosecution of an offence" needed to be a matter of high policy. *It was agreed that it should remain in the high policy category.*

*June, Addendum "Alibi Evidence"*

Mr. J. Cassels, Q.C., moved that the provisions regarding alibi be re-drafted, and he submitted draft provisions for the consideration of the meeting. *The motion was lost on a jurisdictional vote — 14/17/5. It was agreed, however, that some drafting changes were necessary to clarify the section and to avoid the creation of an offence.*

*April, 11.5 (c) "Exceptions to the Hearsay Rule"*

Mr. E. Greenspan moved that the definition of "unavailable" as it applies to criminal proceedings be removed from the Uniform Evidence Act. *Rejected.*

*April, 11.5(e) "Exceptions to the Hearsay Rule"*

Mr. E. Greenspan moved to eliminate the special restriction placed upon the admissibility of a statement against the penal interest of a declarant, on the basis that there is no reason to distinguish between pecuniary, proprietary and penal interest. *Rejected on a jurisdictional vote — 11/22/2.*

*April, 13.14 (k) "Confessions"*

Mr. Greenspan moved that this decision be modified so that the Uniform Evidence Act would provide that the accused had an "evidential" rather then a "legal" burden of showing that his physical

or mental condition when he made a statement to a person in authority was such that the statement should not be considered to be his statement. *Carried on a jurisdictional vote—20/11/5.*

*April, 21.12(b) "Manner of Questioning Witnesses"*

Mr. Greenspan moved that the provision prohibiting a party for alleging or assuming facts on cross-examination unless he is in a position to substantiate them be deleted because it interferes with the right of cross-examination in criminal cases. *Rejected on a jurisdictional vote—15/18/2.*

In relation to the same topic, Mr. Greenspan moved that the penalty for failing to direct the attention of a witness on cross-examination to a fact upon which it is intended to contradict the witness be limited to judicial comment or an order in accordance with the law. *Carried.*

*May, 27.4 (a) and (b) "Corroboration"*

Mr. Greenspan moved that because of the peculiar frailties of such evidence, corroboration be kept as a requirement for the unsworn evidence of a child. *Rejected on a vote by jurisdiction—15/16/5.*

*June, 33.9 (m) "Privilege Against Self-Incrimination"*

Mr. Greenspan moved that this decision be repealed and replaced by a rule that where a witness in another proceeding has made a statement under the protection of the Evidence Act such statement not be receivable against him as a previous inconsistent statement. *Rejected.*

A motion was then presented by Mr. Takach, Q.C., to restrict the operation of the rule to instances where the inconsistency was on a material fact and only for the purpose of assessing the credibility of the witness. *Carried.*

*April, 7.9 (d) "Character Evidence"*

Mr. W.D. Stewart moved that the right of the prosecution to adduce evidence of the accused's character where it is in issue not include the right to adduce evidence of specific instances of the conduct of the accused. *Carried.*

*April, 10.25 (m) "The Hearsay Rule"*

Mr. W.D. Stewart moved that the decision permitting courts to develop new principled exceptions to the hearsay rule be deleted. *Rejected on a vote by jurisdiction—8/26/2; however, the draftsman was asked to look at the provision with a view to imposing greater control on the creation of new exceptions.*

*May, 32.4 "Professional Privilege"*

Mr. W.D. Stewart moved that the new privilege regarding statements made by an accused person to a qualified medical practitioner during a court-ordered psychiatric examination be deleted and the matter be left to practice. *Rejected on a vote by jurisdiction – 16/20.*

*April, 23.5 (c) "Past Recollection Recorded"*

Mr. W.D. Stewart moved that the decision to allow as an exception to the hearsay rule evidence from a transcript of testimony given by the witness under oath and subject to cross-examination be deleted as an improper expansion of the "past recollection recorded" rule. *Rejected.*

*April, 8.8 (d) "Expert Witnesses"*

Mr. W.A. Pearce moved that with regard to the exchange of expert reports, the provision requiring service, a minimum of 10 days before commencement of the trial be amended to permit the court to set a longer period. *Rejected.*

*June, 1.15 (e) "Applicability of the Act"*

Mr. E. Ewaschuk, Q.C., moved that the onus be on the Crown to prove to the satisfaction of the trier of fact that the accused was fit to stand trial, regardless of who raises the issue. *Carried.*

## DEBATE ON THE MOTION TO ADOPT THE DRAFT AS A NEW UNIFORM EVIDENCE ACT

Only one delegate spoke against adopting the Draft Act as a new Uniform Evidence Act. His opposition was based on the argument that an entire new Act is not necessary and that Uniformity should therefore recommend only remedial changes.

A delegate from Québec indicated that there might be some problems insofar as the introduction of a Uniform Evidence Act in Québec was concerned, due to the existence of the Code Civil and the Code of Civil Procedure.

Mr. Tassé, Q.C., had indicated by letter to the President, prior to the meeting, that the Federal Department of Justice could not accept the provisions of the Draft Uniform Evidence Act relating to Crown Privilege and the reception of evidence gained by illegal or improper means. These provisions are inconsistent with federal policy as expressed in the Access to Information Bill and the Charter of Rights respectively.

*When the vote was taken on the main motion, it was carried with only one delegate being opposed.*

Uniform Law Conference of Canada

Uniform Evidence Act

Conférence sur l'uniformisation des lois au Canada

Loi uniforme sur la preuve

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# PART I

## INTERPRETATION AND APPLICATION

### *Interpretation*

Interpretation

**1.** In this Act,

"adduce" "adduce", in relation to evidence, means to offer or elicit evidence by way of one's own or other witnesses;

"adverse witness" "adverse witness" has the meaning set out in section 105;

"complainant" "complainant" means the person against whom it is alleged that an offence was committed;

"court" "court", except where otherwise provided, means

(*a*) the Supreme Court of Canada,

(*b*) the Federal Court of Canada,

(*c*) the court of appeal of a province,

(*d*) a superior court, district court or county court of a province or a court of general or quarter sessions of the peace,

(*e*) the provincial court of a province, family court, juvenile court or court presiding over surrogate, probate or chancery matters,

(*f*) a judge of any court referred to in paragraphs (*a*) to (*e*),

(*g*) a provincial magistrate, police magistrate, stipendiary magistrate or justice of the peace, and

(*h*) any other tribunal, body or person that the Governor in Council or Lieutenant Governor in Council may by order designate as a court for the purposes of this Act or any of its provisions;

(Note - For the purposes of a uniform provincial Act, this definition, except for the purposes of sections 77 to 82, would be restricted to courts in a province and the Supreme Court of Canada.)

"criminal proceeding" "criminal proceeding" means a prosecution for an offence and includes a proceeding to impose punishment for contempt of court;

# LIVRE I

## DÉFINITIONS ET APPLICATION

**1.** Dans la présente loi, on entend par: Définitions

«infraction» toute infraction prévue par une disposition législative ou réglementaire fédérale ou provinciale; «infraction»

«ouï-dire» une déclaration, présentée en preuve dans le but d'établir sa véracité, qui n'a pas été faite dans le cadre d'un témoignage à la procédure où elle est présentée; «ouï-dire»

«plaignant» la personne que la poursuite allègue être la victime de l'infraction reprochée; «plaignant»

«procédure criminelle» toute poursuite relative à une infraction ou visant à une condamnation pour outrage au tribunal; «procédure criminelle»

«tribunal» «tribunal»

1° la Cour suprême du Canada,

2° la Cour fédérale du Canada,

3° la Cour d'appel d'une province,

4° une cour supérieure, une cour de district ou de comté d'une province ainsi qu'une cour des sessions de la paix,

5° la Cour provinciale, un tribunal de la famille, un tribunal de la jeunesse, un tribunal chargé des affaires successorales, de vérification de testament ou de chancellerie,

6° un juge d'un tribunal visé aux paragraphes 1° à 5°,

7° un magistrat provincial, un magistrat de police, un magistrat stipendiaire ou un juge de paix, ou

8° tout tribunal, organisme ou personne désignés par proclamation du gouverneur général en conseil ou du lieutenant-gouverneur en conseil de façon à lui rendre applicable la présente loi ou une de ses dispositions.

"hearsay" "hearsay" means a statement offered in evidence to prove the truth of the matter asserted but made otherwise than in testimony at the proceeding in which it is offered;

"offence" "offence" means an offence under an enactment of Canada or a province;

"record" "record" means the whole or any part of any book, writing, other document, card, tape, photograph within the meaning of section 130 or other thing on, in or by means of which data or information is written, recorded, stored or reproduced;

"statement" "statement" means an oral or a recorded assertion and includes conduct that could reasonably be taken to be intended as an assertion

*Application*

General rule **2.** Subject to section 3, this Act applies to every proceeding and stage of a proceeding within the jurisdiction of the (Parliament of Canada) (Legislature or National Assembly) that is before a court or that is held for the purpose of taking evidence pursuant to a court order.

Application to civil proceedings **3.** (1) Parts I to IV and VI to VIII do not apply to the following civil proceedings:

(*a*) an examination for discovery;

(*b*) an examination on an affidavit; or

(*c*) an examination on the pleadings.

Application to criminal proceedings (2) Parts I to IV and VI to VIII apply only to the following criminal proceedings and appeals in connection with those proceedings:

(*a*) a preliminary inquiry;

(*b*) a trial prior to the rendering of a verdict as to guilt;

(*c*) a proceeding under the *Criminal Code* in respect of a dangerous offender; and

(*d*) the taking of evidence on commission for the purposes of any proceeding referred to in paragraphs (*a*) to (*c*).

(Note - Paragraphs (2)(*a*) and (*c*) and the reference to them in paragraph (2)(*d*) are for inclusion in the federal Act only.)

(Remarque: En ce qui concerne les lois provinciales, la définition du mot «tribunal», sauf à l'égard des articles 77 à 82, ne comprendra pas la Cour fédérale ni les autres tribunaux, organismes ou personnes désignés par le gouverneur général en conseil.)

«déclaration»

Dans la présente loi, «déclaration» comprend une conduite apparament destinée à constituer une affirmation ou une négation.

Règle générale

**2.** Sous réserve de l'article 3, la présente loi s'applique à toutes les étapes d'une procédure relevant de la compétence (du Parlement du Canada, de la législature ou de l'Assemblée nationale), pendante devant un tribunal ou visant à recueillir des témoignages conformément à une ordonnance du tribunal.

Application des procédures civiles

**3.** Les Livres I à IV et VI à VIII ne s'appliquent pas aux procédures suivantes en matière civile:

1° l'interrogatoire préalable;

2° l'interrogatoire sur affidavit;

3° l'interrogatoire sur plaidoyers.

Application aux procédures criminelles

Les Livres I à IV et VI à VIII ne s'appliquent en matière criminelle, qu'aux procédures suivantes et appels qui s'y rapportent:

1° l'enquête préliminaire;

2° le procès jusqu'au verdict relatif à la culpabilité;

3° la procédure relative aux délinquants dangereux suivant le *Code criminel*;

4° toute commission rogatoire en vue de recueillir des témoignages dans le cadre des procédures visées aux paragraphes 1° à 3°.

(Les paragraphes 1° et 3° et le renvoi à ceux-ci dans le paragraphe 4° relèvent de l'autorité législative fédérale.)

Exception for protective jurisdiction

**4.** A court is not required to apply this Act in a proceeding to determine or protect the best interests of a person who needs the protection of the court by reason of his age or physical or mental condition.

Application of provincial law

**5.** Except to the extent that they are inconsistent with this Act or any other Act of the Parliament of Canada, the laws of evidence in force in the province where a proceeding is taken apply to the proceeding.

(Note - This provision is for inclusion in the federal Act only )

Application to Crown

**6.** This Act is binding on Her Majesty in right of (Canada) (Province).

## PART II

## RULES OF PROOF

### *Legal and Evidential Burden*

Interpretation

**7.** In sections 8 to 13,

"evidential burden"

"evidential burden" means the onus to adduce sufficient evidence of a fact in issue to warrant the trier of fact to consider the evidence;

"legal burden"

"legal burden" means the onus to persuade the trier of fact of the existence of a fact in issue

Evidential burden in civil proceeding

**8.** The evidential burden in a civil proceeding is discharged if the court, without assessing the credibility of the witnesses, concludes that the trier of fact, properly instructed, reasonably could be satisfied on a balance of probabilities that the fact in issue has been established

Legal burden in civil proceeding

**9.** The legal burden in a civil proceeding is on the claimant with respect to every fact essential to the claim and that burden is discharged by proof on a balance of probabilities.

Application facultative dans certaines procédures

**4.** Le tribunal n'est pas tenu d'appliquer la présente loi dans une procédure visant à déterminer si les intérêts d'une personne requièrent la protection du tribunal en raison de l'âge ou de l'état physique ou mental de cette personne.

Application des règles provinciales

**5.** Les règles de preuve de la province où se déroule une procédure s'appliquent dans la mesure où elles sont compatibles avec la présente loi et avec les autres lois du Parlement du Canada.

(Remarque: L'article 5 apparaîtra uniquement dans la loi fédérale.)

Couronne liée

**6.** La présente loi lie la Couronne.

# LIVRE II

# RÈGLES GÉNÉRALES DE PREUVE

## TITRE I

## FARDEAU DE LA PREUVE

Fardeau de présentation

**7.** Le fardeau de présentation de la preuve est l'obligation d'offrir, relativement à un fait en litige, une preuve suffisante pour permettre au juge des faits de prendre celle-ci en considération.

Fardeau de persuasion

Le fardeau de persuasion est l'obligation de persuader le juge des faits de l'existence d'un fait en litige.

Fardeau de présentation en matière civile

**8.** En matière civile, une partie s'acquitte du fardeau de présentation de la preuve lorsque, sans juger de la crédibilité des témoins, le tribunal estime qu'un jury qui a reçu les instructions requises pourrait être convaincu que l'existence du fait en litige est plus probable que son inexistence.

Fardeau de persuasion en matière civile

**9.** En matière civile, le fardeau de persuasion repose sur le demandeur à l'égard de chacun des faits dont la démonstration est essentielle au soutien de ses prétentions.

Preuve requise

Le demandeur s'acquitte de ce fardeau au moyen d'une preuve rendant l'existence du fait en litige plus probable que son inexistence.

Evidential burden on prosecution in criminal proceeding

**10.** (1) Where the evidential burden in a criminal proceeding is on the prosecution, it is discharged if the court, without assessing the credibility of the witnesses, concludes that the trier of fact, properly instructed, reasonably could find that the fact in issue has been established beyond a reasonable doubt.

Evidential burden on accused in criminal proceeding

(2) Where the evidential burden in a criminal proceeding is on an accused, it is discharged

(*a*) where the accused does not have the legal burden, if the court, without assessing the credibility of the witnesses, concludes that the trier of fact, properly instructed, reasonably could find that sufficient evidence has been adduced to raise a reasonable doubt as to the existence of the fact in issue; or

(*b*) where the accused also has the legal burden, if the court, without assessing the credibility of the witnesses, concludes that the trier of fact, properly instructed, reasonably could be satisfied on a balance of probabilities that the fact in issue has been established.

Legal burden in criminal proceeding

**11.** (1) The legal burden in a criminal proceeding is on the prosecution with respect to every essential element of the offence charged and that burden is not discharged except by proof beyond a reasonable doubt.

Legal burden respecting insanity

(2) Where the issue of insanity at the time of the act is raised in a criminal proceeding, the legal burden with respect to that issue is on the proponent and that burden is discharged by proof on a balance of probabilities.

Where onus reversed

(3) Where an enactment expressly imposes a legal burden on an accused to prove or establish any fact in issue in a criminal proceeding, that burden is discharged by proof on a balance of probabilities.

Legal burden respecting excuse, exception, etc

**12.** (1) The legal burden in a criminal proceeding with respect to any excuse, exception, exemption, proviso or qualification

Fardeau de présentation sur la poursuite en matière criminelle

**10.** En matière criminelle, la poursuite s'acquitte du fardeau de présentation de la preuve lorsque, sans juger de la crédibilité des témoins, le tribunal estime qu'un jury qui a reçu les instructions requises pourrait être convaincu au-delà du doute raisonnable que les faits en litige ont été établis.

Fardeau de présentation sur l'accusé

Dans le cas où l'accusé a le fardeau de présentation de la preuve relativement à un fait, celui-ci s'acquitte de ce fardeau lorsque, sans juger de la crédibilité des témoins, le tribunal estime qu'un jury qui a reçu les instructions requises pourrait être convaincu que cette preuve est suffisante pour soulever un doute raisonnable quant à l'existence de ce fait.

Fardeaux de présentation et de persuasion sur l'accusé

Toutefois, dans le cas où l'accusé a le fardeau de persuasion en plus du fardeau de présentation de la preuve, il s'acquitte de ce dernier fardeau lorsque, sans juger de la crédibilité des témoins, le tribunal estime qu'un jury qui a reçu les instructions requises pourrait être convaincu que l'existence du fait est plus probable que son inexistence.

Fardeau de persuasion sur la poursuite

**11.** En matière criminelle, le fardeau de persuasion à l'égard de chacun des éléments de l'infraction reprochée repose sur la poursuite.

Preuve requise

La poursuite s'acquitte de ce fardeau lorsqu'elle convainc le juge des faits au-delà de tout doute raisonnable de l'existence de chacun de ces éléments.

Aliénation mentale

En matière criminelle, celui qui soulève la question d'aliénation mentale au moment du fait reproché a le fardeau de persuasion concernant cette question et s'acquitte de ce fardeau au moyen d'une preuve prépondérante.

Fardeau de persuasion inversé

En matière criminelle, un accusé s'acquitte au moyen d'une preuve prépondérante de tout fardeau de persuasion que lui impose une disposition législative en rapport avec un fait en litige.

Fardeau de la preuve reposant sur l'accusé

**12.** En matière criminelle, l'accusé a le fardeau de persuasion quant à l'admissibilité en sa faveur d'une défense particulière —

operating in favour of an accused, other than a defence of general application, is on the accused and that burden is discharged by proof on a balance of probabilities.

No burden on prosecution

(2) The prosecution is not required, except by way of rebuttal, to negate the application of anything operating in favour of an accused that is referred to in subsection (1).

Burden as to fitness

**13.** Where there is a real issue, on the ground of insanity, as to the fitness of an accused to stand his trial, the prosecution has the legal burden of satisfying the court on a balance of probabilities that the accused is fit to stand his trial.

Circumstantial evidence

**14.** In a criminal proceeding, the court is not required to give the trier of fact any special direction or instruction on the burden of proof in relation to circumstantial evidence.

*Presumptions*

Interpretation

**15.** A presumption is an inference of fact that the law requires to be made from facts found or otherwise established.

Effect in criminal proceeding

**16.** In a criminal proceeding, a presumption that operates against the accused may, subject to subsection 11(2), be rebutted by evidence sufficient to raise a reasonable doubt as to the existence of the presumed fact.

*Formal Admissions*

Formal admissions

**17.** (1) A party to a proceeding may admit a fact or matter for the purpose of dispensing with proof thereof, including a fact or matter that involves a question of law or mixed law and fact.

Exception

(2) In a criminal proceeding, no admission shall be received under subsection (1) unless it is accepted by the opposing party.

exception, exemption, réserve, excuse ou limitation — prévue par une règle de droit.

Preuve requise

L'accusé s'acquitte de ce fardeau au moyen d'une preuve prépondérante.

Absence de fardeau sur la poursuite

La poursuite n'est pas tenue, sauf à l'occasion de la réfutation de la preuve de l'accusé, de prouver que l'accusé n'a pas droit à cette défense.

Fardeau de la preuve sur l'état mental de l'accusé

**13.** Quand est soulevée la question de savoir si l'accusé, pour cause d'aliénation mentale, est capable de subir son procès, la poursuite a le fardeau d'établir, au moyen d'une preuve prépondérante, que celui-ci en est capable.

Preuve circonstancielle

**14.** En matière criminelle, le tribunal n'est pas tenu d'adresser des directives au jury relativement au fardeau de la preuve circonstancielle.

## TITRE II

## PRÉSOMPTIONS

**15.** Il y a présomption lorsqu'une règle de droit impose de déduire l'existence d'un fait à partir d'un autre fait constaté ou établi.

Effet en matière criminelle

**16.** En matière criminelle, toute présomption jouant contre l'accusé peut, sous réserve du fardeau de persuasion concernant la question d'aliénation mentale visé à l'article 11, être repoussée par une preuve qui soulève un doute raisonnable quant à l'existence du fait présumé.

## TITRE III

## AVEUX JUDICIAIRES

Aveux judiciaires

**17.** Une partie peut, dans le but de dispenser d'en faire la preuve, admettre tout fait ou toute question de droit ou question mixte de droit et de fait.

Consentement de la partie adverse

En matière criminelle, un aveu n'est recevable qu'avec le consentement de la partie adverse.

Adducing evidence respecting admitted fact or matter

(3) Nothing in this section prevents a party to a proceeding from adducing evidence to prove a fact or matter admitted by another party, but in a civil proceeding if the court is of the opinion that such evidence does not materially add to or clarify the fact or matter admitted, it may order the party who adduced the evidence to pay, as costs, an amount the court considers appropriate

*Judicial Notice*

Judicial notice of enactments

**18.** Judicial notice shall be taken of the following without production or proof:

(*a*) Acts of the Parliament of Canada;

(*b*) Acts or ordinances of the legislature of any province or colony that forms or formed part of Canada,

(*c*) Acts of the Parliament of the United Kingdom or any former kingdom of which England formed part that apply in the territorial jurisdiction of the court;

(*d*) regulations, orders in council, proclamations, municipal by-laws and rules of pleading, practice or procedure published in the *Canada Gazette* or the official gazette of a province; and

(*e*) unpublished municipal by-laws relevant to a criminal proceeding, unless the court is satisfied that proof of any of them should be made in the ordinary manner

(Note - Each jurisdiction may consider whether to include paragraph (*e*) )

Judicial notice of other matters

**19.** Judicial notice may be taken of the following without production or proof:

(*a*) decisional law of federal courts, and of the courts of a province, that would otherwise be required to be proved as a fact;

(*b*) facts so generally known and accepted that they cannot reasonably be questioned, and

Une partie peut faire la preuve de toute chose qui a été admise par une autre partie.

Preuve malgré l'admission

Toutefois, en matière civile, le tribunal peut condamner la partie qui a fait cette preuve aux frais qu'il estime raisonnables si cette preuve ne clarifie pas le fait admis ou n'y ajoute rien de substantiel.

Frais

## TITRE IV

## CONNAISSANCE D'OFFICE

**18.** Le tribunal prend d'office connaissance:

Connaissance d'office des dispositions législatives et réglementaires

1° des lois du Parlement du Canada;

2° des lois et des ordonnances de la législature d'une province ou d'une ancienne colonie qui aujourd'hui fait partie du Canada;

3° des lois du Parlement du Royaume-Uni ou de tout royaume dont l'Angleterre a déjà fait partie si ces lois s'appliquent sur le territoire où le tribunal a compétence;

4° des règlements, des arrêtés, des décrets, des proclamations et des règlements de procédure publiés à la *Gazette du Canada* ou à la gazette officielle d'une province

En matière criminelle, le tribunal prend d'office connaissance d'un règlement municipal, même si ce règlement n'est pas publié à la gazette officielle de la province concernée, sauf si le tribunal estime que la preuve de ce règlement devrait être faite en la manière ordinaire

Règlement municipal

(Remarque· L'inclusion du dernier alinéa relève de chacune des autorités législatives concernées.)

**19.** Le tribunal peut prendre d'office connaissance:

Connaissance d'office d'autres matières

1° des règles de droit résultant d'une décision d'un tribunal fédéral ou d'une décision d'un tribunal provincial qui devraient autrement être prouvées comme un fait;

(*c*) facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Hearing

**20.** Before taking judicial notice of any matter, the court shall afford the parties an opportunity to be heard on the question whether judicial notice should be taken.

Effect of judicial notice

**21.** (1) A matter judicially noticed shall be deemed to be conclusively proved, except that the court may change its decision where it is satisfied that the taking of judicial notice was based on an error of fact.

Appeal

(2) The decision to take judicial notice is a question of law that is subject to appeal.

## PART III

## RULES OF ADMISSIBILITY

### *General Rule*

General rule

**22.** (1) Relevant evidence is admissible unless it is excluded pursuant to this Act or any other Act or law, and evidence that is not relevant is not admissible.

Exception

(2) The court may exclude evidence the admissibility of which is tenuous, the probative force of which is trifling in relation to the main issue and the admission of which would be gravely prejudicial to a party.

2° des faits dont la notoriété est telle qu'ils ne sauraient raisonnablement être contestés;

3° des faits dont il est possible d'établir facilement l'exactitude en recourant à des sources dont la fiabilité ne saurait raisonnablement être remise en question.

Droit d'être entendu

**20.** Le tribunal doit, avant de prendre d'office connaissance d'un élément, permettre aux parties de se faire entendre sur la question de savoir s'il devrait en prendre d'office connaissance.

Effet de la connaissance d'office

**21.** Un élément dont le tribunal a pris d'office connaissance est réputé prouvé de façon irréfutable.

Réserve

Toutefois, le tribunal peut revenir sur sa décision s'il estime que la prise de connaissance d'office est fondée sur une erreur de fait.

Droit d'appel préservé

La décision de prendre d'office connaissance d'un élément est une question de droit susceptible d'appel.

# LIVRE III

# ADMISSIBILITÉ DE LA PREUVE

## TITRE I

## DISPOSITIONS GÉNÉRALES

Règle générale

**22.** (1) La preuve n'est admissible que si elle est pertinente.

Pouvoir de refuser une preuve

(2) Le tribunal peut refuser toute preuve dont l'admissibilité tient à une subtilité, si cette preuve est susceptible de causer un préjudice grave à la partie adverse et si sa force probante à l'égard de la question principale en litige paraît minime.

*Character Evidence in Criminal Proceedings*

General character

**23.** Evidence as to the general character of an accused is not admissible in a criminal proceeding.

Evidence of accused as to his character traits

**24.** (1) An accused may adduce evidence of a trait of his character by way of expert opinion as to his disposition or by way of evidence as to his general reputation in the community.

Prior notice required

(2) Evidence of witnesses as to the general reputation of the accused in the community shall not be received under subsection (1) unless the accused, at least seven days prior to the commencement of the trial, has given notice in writing to the court, the prosecutor and any co-accused of his intention to call witnesses for the purpose of adducing that evidence.

Evidence of prosecution as to character traits of accused

**25.** (1) Subject to subsection (2), the prosecution shall not adduce evidence of a trait of an accused's character for the sole purpose of proving that the accused acted in conformity with that trait.

Scope of evidence

(2) Where an accused has adduced evidence under section 24, the prosecution may, on examination-in-chief, cross-examination of defence witnesses or rebuttal, adduce evidence of any trait of the accused's character, whether or not the accused has adduced evidence of that trait.

Manner of adducing evidence

(3) The prosecution may adduce evidence under subsection (2) by way of

(*a*) expert opinion as to the disposition of the accused;

(*b*) the general reputation of the accused in the community; or

(*c*) any previous finding of guilt or conviction of the accused of an offence.

# TITRE II

# DISPOSITIONS PARTICULIÈRES

## CHAPITRE I

## PREUVE DE CARACTÈRE EN MATIÈRE CRIMINELLE

Preuve de caractère

**23.** En matière criminelle, une preuve visant à établir de façon générale le caractère de l'accusé est inadmissible.

Preuve de l'accusé concernant ses traits de caractère

**24.** L'accusé peut présenter une preuve sur un trait de son caractère si elle vise à établir la réputation qu'il a dans son milieu ou sa prédisposition à un type de comportement. Dans ce dernier cas, seul un expert peut rendre témoignage.

Avis

Un témoignage rendu par un témoin de l'accusé à l'égard de la réputation qu'a ce dernier dans son milieu n'est admissible que si l'accusé a donné au tribunal, à la poursuite et à tout coaccusé au moins sept jours avant le procès, un avis écrit de son intention d'appeler des témoins à cette fin.

Preuve de la poursuite concernant les traits de caractère de l'accusé

**25.** La poursuite ne peut présenter une preuve concernant un trait de caractère de l'accusé dans le seul but de démontrer qu'il a agi conformément à ce trait.

Moment de la preuve

Toutefois, la poursuite peut, lorsque l'accusé a présenté une preuve concernant un trait de son caractère, présenter une preuve concernant tout trait de caractère de ce dernier lors de l'interrogatoire principal, lors du contre-interrogatoire des témoins de la défense ou à l'occasion de la réfutation de la preuve de l'accusé.

Modes de preuve

La poursuite peut faire sa preuve au moyen soit:

1° d'un témoignage d'expert concernant la prédisposition de l'accusé à un type de comportement;

2° d'un témoignage concernant la réputation de l'accusé dans son milieu;

3° d'une preuve de reconnaissance de culpabilité ou de condamnation de l'accusé pour une infraction.

Saving

**26.** Nothing in section 25 prevents the prosecution from adducing evidence of any trait of an accused's character

(*a*) for any purpose other than proving that the accused acted in conformity with that trait; or

(*b*) that is admissible under the rule known as the "similar acts" or "similar facts" rule.

Use of evidence

**27.** Evidence adduced under section 24, 25, 28 or 29 may be considered not only in relation to the character traits but also in relation to the credibility of an accused or a complainant, as the case may be.

Evidence as to character traits of complainant

**28.** An accused may adduce evidence of a character trait of the complainant where

(*a*) the trait was known to the accused at the time the offence is alleged to have been committed; or

(*b*) the evidence would be admissible, if the complainant were a party, under the rule known as the "similar acts" or "similar facts" rule.

Rebuttal evidence

**29.** (1) Where an accused adduces evidence under section 28, the prosecution may adduce evidence of the character traits of the complainant by way of rebuttal, including evidence as to the general reputation of the complainant in the community if the complainant is deceased or unfit to testify by reason of his physical or mental condition.

Self-defence

(2) For the purposes of subsection (1), evidence adduced by an accused tending to establish self-defence shall be deemed to be evidence of a character trait of the complainant adduced by the accused under section 28.

Application of section 25

**30.** Where an accused has adduced evidence of a character trait of the complainant, or evidence tending to establish self-defence, the prosecution may, if the court concludes that the accused has thereby put his own character in issue, adduce evidence of any trait of the accused's character in accordance with section 25.

No evidence of sexual conduct of complainant

**31.** In a criminal proceeding, evidence relating to the sexual conduct of the complainant with a person other than the accused

Réserve

**26.** La poursuite peut toujours présenter une preuve d'un trait de caractère de l'accusé si cette preuve n'a pas pour but de démontrer que l'accusé a agi conformément à ce trait ou si cette preuve est admissible en vertu de la règle relative aux faits ou aux actes similaires.

Utilisation de la preuve

**27.** Une preuve présentée suivant les articles 24, 25, 28 ou 29 peut être prise en considération non seulement en rapport avec le caractère de l'accusé mais aussi en rapport avec sa crédibilité ou celle du plaignant.

Preuve des traits de caractère du plaignant

**28.** L'accusé peut présenter une preuve concernant un trait de caractère du plaignant s'il connaissait ce trait au moment de l'infraction reprochée ou si la preuve de ce trait eût été admissible en vertu de la règle relative aux faits ou aux actes similaires.

Preuve d'un trait de caractère du plaignant

**29.** La poursuite peut, dans le but de réfuter une preuve présentée par l'accusé suivant l'article 28, présenter une preuve concernant un trait de caractère du plaignant, y compris une preuve relative à la réputation de ce dernier dans son milieu s'il est décédé ou incapable de rendre témoignage en raison de son état physique ou mental.

Légitime défense

Une preuve présentée par l'accusé visant à établir un état de légitime défense est réputée concerner un trait de caractère du plaignant présentée suivant l'article 28.

Application de l'article 25

**30.** La poursuite peut, en la manière prévue à l'article 25, présenter une preuve sur tout trait de caractère de l'accusé si ce dernier a présenté une preuve d'un trait de caractère du plaignant ou une preuve tendant à établir un état de légitime défense et si le tribunal estime que l'accusé a ainsi mis en question son caractère.

Preuve concernant le comportement sexuel

**31.** En matière criminelle, l'accusé ne peut présenter une preuve relative au comportement sexuel du plaignant avec une personne

shall not be adduced by or on behalf of the accused.

Exceptions

**32.** Notwithstanding section 31, the accused may adduce

(*a*) evidence of specific instances of the complainant's sexual conduct tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge, where the court is satisfied that the probative value of the evidence outweighs its prejudicial nature; or

(*b*) evidence tending to rebut evidence of the complainant's sexual conduct or absence of sexual conduct that was previously adduced by the prosecution.

Notice and hearing

**33.** Evidence referred to in paragraph 32(*a*) shall not be received unless

(*a*) reasonable notice has been given to the prosecutor by or on behalf of the accused of his intention to adduce that evidence, together with particulars of the evidence, and a copy of the notice has been filed with the court; and

(*b*) the court, after holding a hearing *in camera* in the absence of the jury, if any, is satisfied under that paragraph that the evidence may be adduced.

Complainant not compellable

**34.** (1) The complainant is not a compellable witness for the purposes of a hearing referred to in section 33.

Prohibition

(2) A notice referred to in section 33 and the evidence taken, the information given and the representations made at a hearing referred to in that section shall not be broadcast or published.

Evidence of possession

**35.** (1) Where an accused is charged with an offence under section 312 or paragraph 314(1)(*b*) of the *Criminal Code*, evidence is admissible to show that property other than the property that is the subject-matter of the proceedings was found in the possession of the accused and was stolen within twelve months before the proceedings were commenced.

autre que l'accusé. Cette preuve ne peut non plus être présentée au nom de l'accusé.

Exception

**32.** Malgré l'article 31, l'accusé peut faire la preuve d'un rapport sexuel du plaignant avec une personne autre que lui dans le but d'établir l'identité de la personne qui est susceptible d'avoir eu avec le plaignant les rapports sexuels qui lui sont reprochés si la force probante de cette preuve est supérieure au préjudice qu'elle peut entraîner.

Autre exception

L'accusé peut en outre présenter une preuve à l'égard d'un rapport sexuel du plaignant si elle tend à réfuter une preuve présentée par la poursuite à cet effet.

Avis

**33.** La preuve d'un rapport sexuel du plaignant avec une personne autre que l'accusé n'est admissible que si ce dernier donne à la poursuite un avis suffisant de son intention indiquant la preuve qu'il entend présenter. Une copie de cet avis doit être déposée auprès du greffier du tribunal.

Auditions à huis clos

Le tribunal doit, aux fins de déterminer l'admissibilité de cette preuve, tenir une audience à huis clos, en l'absence du jury.

Non-contraignabilité du plaignant

**34.** Le plaignant ne peut être contraint de rendre témoignage à l'audience tenue suivant l'article 33

Publication interdite

Nul ne peut diffuser le contenu de l'avis donné suivant cet article ni la preuve présentée, les renseignements donnés ou les observations faites lors de cette audience

Possession d'objets volés

**35.** Dans une poursuite pour une infraction visée à l'article 312 ou à l'alinéa 314(1)*b*) du *Code criminel*, est admissible une preuve tendant à démontrer que l'accusé a été trouvé en possession d'un bien, autre que le bien faisant l'objet des procédures, qui a été volé dans les douze mois précédant le début de celles-ci.

Evidence of previous finding of guilt or conviction

(2) Where an accused is charged with an offence under section 312 or paragraph 314(1)(*b*) of the *Criminal Code* and evidence is adduced that property that is the subject-matter of the proceedings was found in his possession, evidence is admissible to show that the accused, within five years before the proceedings were commenced, was found guilty or convicted of one or more such offences.

Application

(3) Neither subsection (1) nor (2) applies where an accused is charged with an additional count other than a count in respect of theft or in respect of an offence under paragraph 306(1)(*b*), section 312 or paragraph 314(1)(*b*) of the *Criminal Code*.

Notice to accused

**36.** (1) Evidence shall not be received under section 35 unless the proponent gives notice in writing of the proposed evidence to the accused at least seven days before the commencement of the trial, identifying the property and the person from whom it is alleged to have been stolen or the offence of which the accused was found guilty or convicted, as the case may be.

Use of evidence

(2) Evidence received under section 35 may be considered for the purpose of proving that the accused knew that the property that is the subject-matter of the proceedings was unlawfully obtained.

(Note - Sections 31 to 36 are for inclusion in the federal Act only.)

*Opinion Evidence and Experts*

General rule

**37.** Subject to this Act, no witness other than an expert may give opinion evidence.

Non-expert opinion evidence

**38.** A witness who is not testifying as an expert may give opinion evidence where it is based on facts perceived by him, and the evidence would be helpful either to the witness in giving a clear statement or to the trier of fact in determining an issue.

Décision antérieure

Dans une telle poursuite, est admissible une preuve tendant à démontrer que l'accusé a, dans les cinq ans précédant le début des procédures, été reconnu coupable ou condamné pour l'une de ces infractions si la poursuite établit que l'accusé était en possession du bien qui fait l'objet des procédures.

Exception

Dans l'un et l'autre cas, cette preuve est inadmissible si l'accusé fait également l'objet d'une accusation autre que pour vol ou pour une infraction visée à l'alinéa 306(1)*b*), à l'article 312 ou à l'alinéa 314(1)*b*) du *Code criminel*.

Avis à l'accusé

**36.** La partie qui entend faire une preuve suivant l'article 35 doit donner à l'accusé, au moins sept jours avant le début du procès, un avis à cet effet identifiant le bien volé et la personne à laquelle il a été volé ou, selon le cas, l'infraction dont l'accusé a été déclaré coupable ou condamné.

Utilisation de la preuve

La preuve admise suivant cet article peut être prise en considération pour établir que l'accusé savait que le bien qui fait l'objet des procédures avait été illégalement obtenu.

(Remarque: Les articles 31 à 36 apparaîtront uniquement dans la loi fédérale.)

## CHAPITRE II

## PREUVE D'OPINION ET D'EXPERTISE

Règle générale

**37.** Sauf disposition contraire, la personne qui témoigne autrement qu'à titre d'expert ne peut donner son opinion sur un fait en litige.

Exception

**38.** La personne visée à l'article 37 peut donner son opinion sur des faits dont elle a eu directement connaissance si celle-ci est susceptible soit de l'aider à témoigner correctement, soit d'aider le juge des faits à décider du litige.

Handwriting comparison

**39.** Comparison of a disputed handwriting with another handwriting may be made by witnesses, and such handwritings and the evidence of witnesses with respect to them may be submitted to the trier of fact as proof of the genuineness or otherwise of the handwriting in dispute.

Opinion evidence on an ultimate issue

**40.** A witness may give opinion evidence that embraces an ultimate issue to be decided by the trier of fact where

(*a*) the factual basis for the evidence has been established;

(*b*) more detailed evidence cannot be given by the witness; and

(*c*) the evidence would be helpful to the trier of fact.

Statement of expert opinion

**41.** (1) In a civil proceeding, a statement in writing setting out the opinion of an expert is admissible without calling the expert as a witness or proving his signature if it is a full statement of the opinion and the grounds of the opinion and if it includes the expert's name, address, qualifications and experience.

Copy of statement to be furnished

(2) Except with leave of the court, neither a written statement of expert opinion nor the expert's testimony as to his opinion shall be received by way of a party's evidence in chief in a civil proceeding unless, at least ten days before the commencement of the trial, a copy of the statement has been furnished to every party adverse in interest to the proponent.

Proof by affidavit

(3) The furnishing of a copy of an expert's statement may be proved by affidavit.

Attendance of expert

**42.** (1) Where a written statement of an expert is adduced under section 41, any party may require the expert to be called as a witness.

Costs

(2) Where an expert has been required to give evidence under subsection (1), and the court is of the opinion that it was not reasonable to require the expert to testify, the court may order the party that required the testimony of the expert to pay, as costs, an amount the court considers appropriate.

Maximum number of expert witnesses

**43.** Except with leave of the court, no more than seven witnesses may be called by a

Comparaison d'écritures

**39.** Une écriture contestée peut être comparée par un témoin avec toute autre écriture.

Admissibilité de l'écriture et du témoignage

Ces écritures et le témoignage rendu sont admissibles comme preuve de l'authenticité de l'écriture contestée.

Opinion sur une question relevant du juge des faits

**40.** Un témoin peut donner son opinion sur un point relevant de l'appréciation finale du juge des faits si cette opinion repose sur un fait préalablement établi, que le témoin ne peut rendre un témoignage plus détaillé et que cette opinion est susceptible d'aider le juge des faits à décider du litige.

Production d'un rapport d'expert

**41.** En matière civile, une partie peut produire un rapport d'expert sans appeler l'expert à rendre témoignage et sans faire la preuve de sa signature si le rapport expose au complet l'opinion de l'expert, les faits sur lesquels elle se base et indique le nom, l'adresse, les qualifications et l'expérience de l'expert.

Copie du rapport

En matière civile, une partie ne peut, sans l'autorisation du tribunal, produire un rapport d'expert ou appeler un expert à rendre témoignage sur son rapport que si elle en fournit une copie à la partie adverse au moins dix jours avant le procès.

Preuve de l'envoi du rapport

La preuve qu'une copie du rapport d'expert a été fournie à une partie peut se faire au moyen d'un affidavit.

Présence de l'expert

**42.** Toute partie peut requérir que l'expert dont le rapport a été produit devant le tribunal soit appelé à rendre témoignage.

Frais

Le tribunal peut, s'il estime que cette demande n'était pas raisonnable, condamner la partie qui l'a faite à payer les frais entraînés par cette demande.

Nombre maximal de témoins experts

**43.** Une partie ne peut, dans une instance, faire témoigner plus de sept experts sans la permission du tribunal.

party to give expert opinion evidence in a proceeding.

Court appointed expert

**44.** (1) On the application of a party or on its own motion, the court at any stage of a civil proceeding may, if it considers it necessary for a proper determination of the issues, by order appoint an expert to inquire into, and submit a report on, any question of fact or opinion relevant to a matter in issue.

Parties to agree

(2) The expert shall, wherever possible, be appointed and instructed in accordance with the agreement of the parties.

Further orders

(3) The court may make any further orders it considers necessary to enable the expert to carry out his instructions, including orders for the examination of any party or property, for the making of experiments and tests and for the making of further or supplementary reports.

Report admissible in evidence

**45.** The report of an expert appointed under section 44 is admissible in evidence.

Production of report

**46.** The expert shall file any report he is ordered to make with the court in the manner the court may direct and the appropriate official of the court shall furnish copies of the report to the parties.

Examination of expert

**47.** Any party may cross-examine an expert appointed under section 44 on any report made by him and may call another expert to give evidence as to any question of fact or opinion reported on, but a party shall not call more than one other expert except with leave of the court.

Saving

**48.** Nothing in section 44 prevents a court from appointing an expert in a criminal proceeding.

Ordonnance nommant un expert

**44.** À tout stade d'une procédure civile, le tribunal peut, même d'office, nommer par ordonnance un expert chargé d'enquêter, de faire rapport et de donner son opinion sur tout fait en litige s'il considère cette nomination nécessaire à une juste décision.

Consentement des parties

L'expert et son mandat doivent être, si possible, agréés par les parties.

Ordonnance complémentaire

Le tribunal peut rendre des ordonnances complémentaires visant à permettre à l'expert qu'il a nommé de remplir adéquatement son mandat, notamment une ordonnance autorisant l'interrogatoire d'une partie, l'examen d'un objet ou permettant une expérience ou prescrivant la production d'un rapport supplémentaire.

Rapport admissible en preuve

**45.** Le rapport de l'expert nommé par le tribunal est admissible en preuve.

Production du rapport

**46.** L'expert nommé par le tribunal doit produire son rapport au tribunal en la manière prévue par ce dernier; le tribunal doit fournir à chaque partie une copie du rapport.

Interrogatoire de l'expert

**47.** Une partie peut contre-interroger l'expert nommé par le tribunal; elle peut appeler un autre témoin expert afin de l'interroger sur tout fait ou opinion mentionnés dans le rapport, mais elle ne peut en appeler plus d'un sans la permission du tribunal.

Réserve

**48.** L'article 44 n'empêche pas le tribunal de nommer un expert en matière criminelle.

## *Hearsay*

### *General Rule*

Hearsay rule

**49.** (1) Subject to this or any other Act, hearsay is not admissible.

Exception for consent

(2) Hearsay is admissible if the parties agree and the court consents to its admission.

Power of court to create exceptions

(3) A court may create an exception to the rule in subsection (1) or paragraph 59(*a*) that is not specifically provided for by this Act if the criteria for the exception sufficiently guarantee the trustworthiness of the statement.

Question of law

(4) The question whether the criteria for an exception referred to in subsection (3) sufficiently guarantee the trustworthiness of a statement shall be deemed to be a question of law that is subject to appeal.

### *Exceptions Where Declarant Available*

Previous identification

**50.** Where a declarant has made a statement containing an eye-witness identification of a person, that statement of identification is admissible for all purposes in any proceeding in which the declarant is called as a witness.

Past recollection recorded

**51.** (1) A record admissible under section 112 as past recollection recorded is admissible for all purposes.

Previous statements

(2) A previous statement of a witness that is admissible under section 117 or 118 is admissible for all purposes if it was made under oath or solemn affirmation and the witness was subject to cross-examination when making it.

# CHAPITRE III

# LE OUÏ-DIRE

## SECTION I

## DISPOSITIONS GÉNÉRALES

Règle du ouï-dire

**49.** La preuve par ouï-dire est inadmissible, sauf disposition contraire.

Exception en cas de consentement

La preuve par ouï-dire est admissible si les parties sont d'accord pour l'admettre et si le tribunal y consent.

Pouvoir du tribunal

Le tribunal peut créer une dérogation, non prévue par la présente loi, à la règle énoncée au premier alinéa ou au paragraphe 1° de l'article 59 si cette dérogation est fondée sur des critères permettant d'établir qu'une déclaration est digne de foi.

Question de droit

Aux fins d'application du troisième alinéa, l'appréciation du critère qui permet de conclure qu'une déclaration est digne de foi est une question de droit susceptible d'appel.

## SECTION II

## DISPOSITIONS PARTICULIÈRES

### SOUS-SECTION I

### DISPONIBILITÉ DE L'AUTEUR DE LA DÉCLARATION

Déclaration relative à une identification

**50.** La déclaration d'un témoin oculaire dans laquelle celui-ci a identifié une personne est admissible en preuve à toutes fins dans une procédure au cours de laquelle il est appelé à rendre témoignage.

Document relatant des faits connus

**51.** Un document admissible en preuve en vertu de l'article 112 à titre de document relatant des faits dont un témoin a eu préalablement connaissance est admissible à toutes fins.

Déclaration antérieure

La déclaration antérieure d'un témoin qui est admissible en preuve en vertu des articles 117 ou 118 est admissible à toutes fins si elle a été faite sous serment ou sous affirmation solennelle et si le témoin pouvait être contre-interrogé au moment de la faire.

*Exceptions Where Declarant or Testimony Unavailable*

Interpretation

**52.** (1) In a civil proceeding, a declarant or his testimony shall be considered to be unavailable only if the declarant

(*a*) is deceased or unfit to testify by reason of his physical or mental condition;

(*b*) cannot with reasonable diligence be identified, found, brought before the court or examined out of the court's jurisdiction;

(*c*) despite a court order, persists in refusing to take an oath or to make a solemn affirmation as a witness or to testify concerning the subject-matter of his statement; or

(*d*) is absent from the hearing and the importance of the issue or the added reliability of his testimony does not justify the expense or inconvenience of procuring his attendance or deposition.

Cross-examination of absent declarant

(2) Where paragraph (1)(*d*) applies, the court, on application, may order the attendance of an absent declarant for cross-examination at the expense of the applicant.

Interpretation

(3) In a criminal proceeding, a declarant or his testimony shall be considered to be unavailable only if the declarant is deceased or unfit to testify by reason of his physical or mental condition.

Civil proceeding

**53.** In a civil proceeding in which the declarant or his testimony is unavailable, a statement is admissible to prove the truth of the matter asserted if it would have been admissible had the declarant made it while testifying.

Criminal proceeding—statement in expectation of death

**54.** (1) In a criminal proceeding in which a declarant or his testimony is unavailable, a statement made by him as to the cause and circumstances of his death or injuries is admissible to prove the truth of the matter asserted on a charge for his murder or manslaughter, for criminal negligence resulting in his death or injuries, for an attempt to commit murder or for any other charge arising out of the transaction leading to his

## SOUS-SECTION II

## NON-DISPONIBILITÉ DE L'AUTEUR DE LA DÉCLARATION

Interprétation

**52.** En matière civile, une personne n'est pas disponible à rendre témoignage:

1° si elle est décédée ou incapable de ce faire en raison de son état physique ou mental;

2° s'il s'avère impossible, après avoir pris les moyens raisonnables, de s'assurer sa présence ou sa déposition;

3° si elle persiste, malgré une ordonnance du tribunal, à refuser de prêter serment, de faire l'affirmation solennelle ou de rendre témoignage;

4° si elle est absente de l'audition et que l'importance de la question en litige ou le supplément de preuve qu'apporterait son témoignage ne justifie pas les frais ou les inconvénients que susciteraient les démarches visant à s'assurer sa présence ou sa déposition.

Contre-interrogatoire

(2) Le tribunal peut, sur demande et aux frais du requérant, ordonner l'assignation de l'auteur d'une déclaration admissible en preuve en vertu du paragraphe 4° afin de permettre de le contre-interroger.

Interprétation

(3) En matière criminelle, une personne n'est pas disponible à rendre témoignage si elle est décédée ou incapable de rendre témoignage en raison de son état physique ou mental.

Témoignage non disponible en matière civile

**53.** En matière civile, est admissible comme preuve de sa véracité la déclaration d'une personne qui n'est pas disponible à rendre témoignage si cette déclaration eût été admissible eût-elle été faite à l'occasion d'un témoignage

Déclaration en matière criminelle concernant un décès ou des blessures

**54.** Dans une poursuite pour meurtre, pour homicide involontaire coupable, pour négligence criminelle ayant entraîné la mort, pour tentative de meurtre ou pour une accusation s'y rattachant, la déclaration d'une personne qui n'est pas disponible à rendre témoignage et qui concerne les circonstances et la cause de son décès ou des blessures qu'elle a subies est admissible comme preuve de sa véracité.

death or injuries that is joined with the main charge.

Admissibility

(2) A statement is not admissible under subsection (1) unless the declarant would have been a competent witness if called to testify at the time he made the statement and unless at the time the statement was made the declarant had a settled hopeless expectation of almost immediate death arising from the transaction leading to his death or injuries.

Criminal proceeding—statement in course of duty

**55.** (1) In a criminal proceeding in which a declarant or his testimony is unavailable, a statement made by him in the course of duty is admissible to prove the truth of the matter asserted or any collateral matter where the declarant had a duty to record or report his acts, the statement was made at or about the time the duty was performed, the declarant made the statement without motive to misrepresent and the statement was not made in anticipation of imminent litigation.

Saving

(2) Notes or other records made by a police officer performing a public duty shall not be excluded under subsection (1) by reason only that they were made in anticipation of imminent litigation.

Criminal proceeding—statement as to family history

**56.** In a criminal proceeding in which a declarant or his testimony is unavailable, a statement made by him that concerns a question of his family history, including relationship by blood, marriage or adoption, is admissible to prove the truth of the matter asserted where the statement was made before the commencement of any actual or legal controversy involving the matter and, according to evidence from a source other than the declarant himself, the declarant is a member of the family in question.

Criminal proceeding—statement as to testamentary document

**57.** In a criminal proceeding in which a declarant or his testimony is unavailable, a statement made by him that concerns the contents or proposed contents of a testamentary document made by him is admissible to prove the truth of the matter asserted where

Admissibilité

La déclaration n'est admissible en preuve que si la victime était apte à rendre témoignage au moment de faire cette déclaration et qu'à ce moment elle était convaincue qu'elle allait mourir presque immédiatement des suites de l'événement.

Déclaration en matière criminelle dans l'exercice d'une fonction

**55.** En matière criminelle, la déclaration d'une personne qui n'est pas disponible à rendre témoignage est admissible comme preuve de sa véracité si elle a été faite autrement qu'en prévision d'un litige, dans l'exercice d'une fonction par une personne ayant l'obligation de faire un rapport concernant ses actes ou de les enregistrer et si cette personne n'avait aucun motif de faire une fausse déclaration.

Matière connexe

Cette déclaration est également admissible en preuve afin d'établir tout fait connexe à la déclaration.

Notes d'un officier de police

Les notes ou tout autre document d'un agent de police rédigés dans l'exercice de fonctions officielles ne sont pas inadmissibles en preuve pour le seul motif qu'ils ont été rédigés en prévision d'un litige.

Déclaration en matière criminelle concernant la généalogie

**56.** En matière criminelle, la déclaration d'une personne qui n'est pas disponible à rendre témoignage et qui concerne sa généalogie par les liens du sang, du mariage ou de l'adoption est admissible comme preuve de sa véracité si elle a été faite avant que les faits qui y sont contenus ne suscitent quelque controverse.

Membre de la famille

La preuve que l'auteur de la déclaration est membre de la famille concernée ne peut se faire au moyen de cette déclaration.

Déclaration en matière criminelle concernant un testament

**57.** En matière criminelle, la déclaration concernant le contenu du testament d'une personne qui n'est pas disponible à rendre témoignage ou concernant une disposition qu'elle entendait y inclure est admissible comme preuve de la véracité de la déclaration si le testament a été perdu ou détruit.

the testamentary document has been lost or destroyed.

Criminal proceeding—statement against interest

**58.** (1) In a criminal proceeding in which a declarant or his testimony is unavailable, a statement made by him that asserts a matter against his pecuniary, proprietary or penal interest is admissible to prove the truth of the matter asserted and any collateral matter where the statement viewed in its entirety was to the declarant's immediate prejudice at the time it was made and the declarant, when making the statement, had personal knowledge of the matter asserted and knew it to be against his interest.

Exclusion

(2) The court may exclude a statement offered in evidence under subsection (1) as a statement against the penal interest of the declarant where there is no other evidence tending to implicate the declarant in the matter asserted or there is evidence tending to establish collusion between an accused and the declarant in the making of the statement.

Condition of admissibility

**59.** A statement is not admissible under sections 53 to 58 where

(*a*) it is tendered by a witness other than one who has firsthand knowledge that the declarant made the statement; or

(*b*) the unavailability of the declarant or his testimony was brought about by the proponent of the statement for the purpose of preventing the declarant from attending or testifying.

*Exceptions Where Availability of Declarant or Testimony is Immaterial*

Statements made, adopted or authorized

**60.** A statement is admissible against a party to prove the truth of the matter asserted if he made it in his personal capacity, if he expressly adopted it or it is reasonable to infer that he adopted it, or if it was made by a person he authorized to make a statement concerning the matter.

Statement by co-conspirator

**61.** (1) A statement made by a co-conspirator of a party in furtherance of a conspir-

Déclaration en matière criminelle à l'encontre des intérêts de son auteur

**58.** En matière criminelle, la déclaration d'une personne qui n'est pas disponible à rendre témoignage est admissible comme preuve de sa véracité ou de la véracité d'un fait connexe si dans son ensemble elle était, au moment où elle a été faite, immédiatement préjudiciable à son auteur à l'égard de ses intérêts pécuniaires ou patrimoniaux ou était de nature à rendre ce dernier passible d'une peine et qu'au moment de faire cette déclaration, l'auteur de celle-ci savait qu'elle allait à l'encontre de ses intérêts et connaissait les faits qui y sont relatés pour en avoir constaté l'existence.

Exception

Le tribunal peut refuser d'admettre en preuve une déclaration susceptible de rendre son auteur passible d'une peine si aucune autre preuve ne tend à incriminer ce dernier ou s'il existe une preuve tendant à établir qu'il y a eu collusion entre l'accusé et l'auteur de la déclaration à l'égard de celle-ci.

Condition d'admissibilité

**59.** Une déclaration est inadmissible en preuve suivant la présente sous-section:

1° si elle est rapportée par un témoin qui ne l'a pas lui-même recueilli de la personne qui en est l'auteur;

2° si la partie qui entend s'en prévaloir a provoqué la non-disponibilité de l'auteur de la déclaration dans le but de l'empêcher de comparaître ou de témoigner.

## SOUS-SECTION III

## NON-PERTINENCE DE LA DISPONIBILITÉ DE L'AUTEUR DE LA DÉCLARATION

Déclaration faite, adoptée ou autorisée

**60.** La déclaration d'une partie ou la déclaration que cette dernière a expressément ou tacitement adoptée ou autorisée est admissible contre elle comme preuve de sa véracité.

Déclaration d'un conspirateur

**61.** La déclaration faite dans le cadre d'une conspiration, par une personne ayant

acy is admissible against the party to prove the truth of the matter asserted if it is established by evidence from a source other than the declarant that the party was a party to the conspiracy.

Statement by person engaged in common unlawful purpose

(2) A statement by a person engaged with a party in a common unlawful purpose, made in furtherance of that purpose, is admissible against the party to prove the truth of the matter asserted if it is established by evidence from a source other than the declarant that the party was engaged in that common unlawful purpose.

Statement made in representative capacity

**62.** In a civil proceeding, a statement made by a trustee, executor or administrator of an estate or any other person in a representative capacity is admissible against the declarant and the party represented to prove the truth of the matter asserted without having to establish that the declarant made the statement as part of the exercise of his representative capacity.

(Note - Each jurisdiction may consider whether to include a next friend, guardian *ad litem*, tutor or curator in this provision.)

Rule respecting privity abrogated

**63.** The rule whereby a statement is admissible against a party if made by a person in privity with the party in estate or interest or by blood relationship is abrogated.

Statement of agent or employee

**64.** (1) Subject to subsection (2), in a civil or criminal proceeding, a statement by an agent or employee of a party, made during the existence and concerning a matter within the scope of the agency or employment is admissible against the party to prove the truth of the matter asserted.

Proceedings by way of indictment

(2) In a criminal proceeding by way of indictment, a statement by an agent or employee of an accused concerning a matter within the scope of the agency or employment is admissible against the accused to prove the truth of the matter asserted if the agent or employee exercised managerial authority at the time the statement was made

conspiré avec une partie est admissible contre cette dernière comme preuve de sa véracité s'il est démontré, par une preuve provenant d'une source autre que le témoignage de l'auteur de la déclaration, que cette partie était partie à la conspiration.

Déclaration d'une personne poursuivant une fin illégale commune

La déclaration faite dans la poursuite d'une fin illégale commune par une personne ayant poursuivi cette fin avec une partie est admissible contre cette dernière comme preuve de la véracité de cette déclaration s'il est démontré, par une preuve provenant d'une source autre que le témoignage de cette personne, que cette partie poursuivait une telle fin.

Déclaration d'un mandataire

**62.** En matière civile, la déclaration faite par le fiduciaire, l'exécuteur testamentaire, l'administrateur des biens d'une personne ou toute autre personne ayant le pouvoir de gérer les biens d'autrui est admissible contre l'auteur de la déclaration et contre la partie représentée comme preuve de sa véracité, sans qu'il soit nécessaire de démontrer que l'auteur de cette déclaration l'a faite dans l'exercice de ses fonctions.

(Remarque: Chaque autorité législative concernée décidera de l'opportunité de rendre l'article 62 applicable au tuteur ou au curateur )

Abolition de la règle relative aux déclarations de personnes liées

**63.** Est abolie la règle qui permet d'admettre contre une partie la déclaration d'une personne qui a avec cette dernière une propriété ou des intérêts communs ou un lien par le sang.

Déclaration du mandataire ou de l'employé

**64.** Sous réserve du deuxième alinéa, la déclaration faite par le mandataire ou l'employé d'une partie pendant qu'il exerce ses fonctions et portant sur des faits qui relèvent de celles-ci est recevable contre ladite partie pour établir la véracité de ces faits.

Procédure par voie de mise en accusation

Dans le cadre de l'instance criminelle par voie de mise en accusation, la déclaration du mandataire ou de l'employé d'un accusé sur des faits qui relèvent de ses fonctions est recevable contre l'accusé pour établir la véracité de ces faits si le mandataire ou l'employé exerçait à ce moment des fonctions de gestionnaire et a fait la déclaration sur des faits en rapport avec ses attributions.

and it related to a matter within the scope of that authority.

Directing mind of corporation

(3) In a criminal proceeding, where a party is a corporation, a statement by a person who was a directing mind of the corporation at the time the statement was made is admissible against the corporation.

(Note - Subsections (2) and (3) are for inclusion in the federal Act only.)

Other exceptions

**65.** (1) The following statements are admissible to prove the truth of the matter asserted:

(*a*) a statement contained in a marriage, baptismal or similar certificate purporting to be made at or about the time of the act certified, by a person authorized by law or custom to perform the act;

(*b*) a statement contained in a family Bible or similar family record concerning a member of the family;

(*c*) a statement of reputation as to family history, including reputation as to the age, date of birth, place of birth, legitimacy or relationship of a member of the family;

(*d*) a statement contained in a formally executed document purporting to be produced from proper custody and executed twenty years or more before the time it is tendered in evidence;

(*e*) a statement concerning the reputed existence of a public or general right, made before the commencement of any actual or legal controversy over the matter asserted and, in the case of a general right, made by a declarant having competent knowledge of the matter asserted;

(*f*) a statement as to the physical condition of the declarant at the time the statement was made, including a statement as to the duration but not as to the cause of that condition;

(*g*) a statement, made prior to the occurrence of a fact in issue, as to the state of mind or emotion of the declarant at the time the statement was made;

(*h*) a spontaneous statement made in direct reaction to a startling event perceived or apprehended by the declarant;

Pouvoirs de décision au sein d'une société

En matière criminelle, la déclaration faite par une personne exerçant des pouvoirs de décision au sein d'une société au moment de la déclaration, est recevable contre la société.

(Remarque: Les deuxième et troisième alinéas apparaîtront uniquement dans la loi fédérale. C'est la raison pour laquelle le mot «société» est employé plutôt que «corporation».)

Autres exceptions

**65.** Sont admissibles comme preuve de leurs véracité:

1° la déclaration contenue dans un certificat de mariage, de baptême ou dans tout autre certificat émanant d'une personne autorisée par la loi ou la coutume à dresser ce certificat, lorsque ce dernier a été dressé à la même époque que l'acte concerné;

2° la déclaration contenue dans un registre ou papier domestique concernant un membre de la famille;

3° la déclaration faisant état de la commune renommée concernant la famille, notamment quant à l'âge, à la date ou au lieu d'une naissance, à la légitimité ou à un lien de parenté;

4° la déclaration contenue dans un document en bonne et due forme et qui, selon toute apparence, est sous bonne garde et date d'au moins vingt ans;

5° la déclaration concernant l'existence réputée d'un droit public ou général, faite avant que les faits qui y sont relatés ne suscitent quelque controverse et, dans le cas d'un droit général, faite par une personne ayant une connaissance véritable de ces faits;

6° la déclaration concernant l'état physique de son auteur à l'époque où elle a été faite, y compris la déclaration quant à la durée mais non quant à la cause de cet état;

7° la déclaration faite avant la survenance des faits en litige, quant à l'état d'esprit ou l'état émotionnel de son auteur au moment de cette déclaration;

(*i*) a statement describing or explaining an event observed or an act performed by the declarant, made spontaneously at the time the event or act occurred;

(*j*) a statement of reputation that may be adduced under this Act; and

(*k*) a statement contained in a business record within the meaning of section 152.

Self-serving statements

(2) Where a statement referred to in paragraph (1)(*i*) is a self-serving statement made by an accused, it shall be received in evidence on behalf of the accused only if he testifies, and he shall not adduce it by way of cross-examination.

*Statements of Accused*

Interpretation

**66.** In this section and sections 67 to 73,

"person in authority"

"person in authority" means a person having authority over the accused in relation to a criminal proceeding or a person whom the accused could reasonably have believed had that authority;

"voluntary"

"voluntary", in relation to a statement, means that the statement was not obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority.

Statements of accused

**67.** A statement, other than one to which paragraph 65(1)(*f*), (*g*), (*h*) or (*i*) applies, that is made by an accused to a person in authority is not admissible at the instance of the prosecution at a trial or preliminary inquiry unless the prosecution, in a *voir dire*, satisfies the court on a balance of probabilities that the statement was voluntary.

No question as to truth

**68.** In a *voir dire* held under section 67, the accused shall not be questioned as to the truth of his statement by the court or any adverse party.

8° la déclaration spontanée faite en réaction immédiate à un événement saisissant réel ou appréhendé;

9° la déclaration décrivant ou expliquant un événement observé ou un acte accompli par son auteur si cette déclaration a été faite de façon spontanée à l'époque de l'événement ou de l'acte;

10° la déclaration admissible suivant la présente loi quant à la réputation d'une personne;

11° la déclaration contenue dans un document d'affaires au sens de l'article 152.

Déclaration à l'avantage de l'accusé

(2) L'accusé ne peut produire en preuve une déclaration visée au paragraphe 9° qu'il a faite à son avantage s'il ne rend pas témoignage; il ne peut en outre produire cette déclaration en contre-interrogatoire.

## SOUS-SECTION IV

## DÉCLARATIONS DE L'ACCUSÉ

Interprétation

**66.** Dans la présente sous-section, on entend par:

«déclaration volontaire» une déclaration qui n'a pas été faite dans la crainte d'un préjudice ni dans l'espoir d'obtenir un avantage de la part d'une personne en autorité; «déclaration volontaire»

«personne en autorité» une personne qui détient une autorité sur l'accusé en matière criminelle ou une personne que l'accusé pouvait avoir des motifs raisonnables de croire investie d'une telle autorité. «personne en autorité»

Déclaration de l'accusé

**67.** La poursuite ne peut produire en preuve au procès ou à l'enquête préliminaire une déclaration, autre qu'une déclaration visée aux paragraphes 6 à 9 de l'article 65, faite par l'accusé à une personne en autorité que si, lors d'un voir dire tenu à cette fin, elle établit, au moyen d'une preuve prépondérante, que cette déclaration était volontaire.

Interdiction de poser des questions sur la véracité d'une déclaration

**68.** Dans tout voir dire tenu en vertu de l'article 67, le tribunal et la partie adverse ne peuvent interroger l'accusé sur la véracité de sa déclaration.

Statutory compulsion irrelevant

**69.** Statutory compulsion of a statement shall not be considered in the determination of whether the statement was voluntary.

Contents may be considered

**70.** In determining whether a statement was voluntary, the court may consider the contents of the statement.

Admission that statement was voluntary

**71.** The accused may make an admission that his statement was voluntary for the purpose of dispensing with a *voir dire.*

Where statement not receivable

**72.** (1) A statement otherwise admissible under section 67 shall not be received in evidence where the physical or mental condition of the accused when he made the statement was such that it should not be considered to be his statement.

Burden of proof

(2) The prosecution is not required to establish that a statement referred to in subsection (1) should be considered to be that of the accused unless the accused has discharged an evidential burden within the meaning of section 7 with respect to his physical or mental condition when he made the statement.

Where accused unaware

**73.** Where an accused in making a statement was unaware that he was dealing with a person in authority, the statement shall be treated as having been made to a person other than a person in authority.

Preliminary inquiry

**74.** Where a statement is admitted in evidence at a preliminary inquiry, the evidence adduced by the prosecution at the *voir dire* shall, without further proof, form part of the evidence in the preliminary inquiry.

Confirmation by real evidence

**75.** A statement ruled inadmissible under section 67 is not rendered admissible in whole or in part by the subsequent finding of confirmatory real evidence within the meaning of section 160, but evidence is admissible to show that the real evidence was found as a result of the statement or that the accused knew of the nature, location or condition of the real evidence.

Obligation légale non pertinente

**69.** Le tribunal ne peut tenir compte de l'existence d'une obligation légale de faire une déclaration aux fins de déterminer si celle-ci était volontaire.

Contenu de la déclaration

**70.** Le tribunal peut prendre en considération le contenu de la déclaration aux fins de déterminer si celle-ci était volontaire.

Aveu

**71.** L'accusé peut, dans le but de dispenser de tenir un voir dire, admettre que sa déclaration était volontaire.

Irrecevabilité de la déclaration

**72.** La déclaration admissible dans le cadre de l'article 67 est irrecevable en preuve lorsque cette déclaration ne peut être imputée à l'accusé en raison de son état physique ou mental au moment où il l'a faite.

Fardeau de la preuve

La poursuite n'est pas tenue d'établir que la déclaration visée au premier alinéa est imputable à l'accusé à moins que celui-ci ne se soit déchargé du fardeau de persuasion au sens de l'article 7 quant à son état physique ou mental au moment où il l'a faite.

Qualité de personne en autorité inconnue de l'accusé

**73.** Une déclaration est réputée avoir été faite à une personne autre qu'une personne en autorité si l'accusé ignorait que la personne à qui il faisait cette déclaration était une personne en autorité.

Enquête préliminaire

**74.** La preuve présentée par la poursuite lors d'un voir dire tenu à l'enquête préliminaire fait partie de la preuve à cette enquête si le tribunal a établi que la déclaration était volontaire.

Confirmation par une preuve matérielle

**75.** La déclaration jugée inadmissible conformément à l'article 67 ne devient admissible ni en partie ni en totalité, du fait de la découverte postérieure d'une preuve matérielle au sens de l'article 160 la confirmant. Toutefois, il peut être prouvé que la découverte de la preuve matérielle résulte de la déclaration ou que l'accusé en connaissait la nature, son état ou le lieu où elle se trouvait.

*Credibility of Declarant*

Challenging credibility

**76.** (1) The party against whom hearsay is admitted in evidence may call the declarant as a witness and with leave of the court may examine him as if he were an adverse witness.

Where declarant unavailable

(2) Where the declarant is unavailable, his credibility may be challenged in the same manner as if he were a witness, and it may be supported by any evidence that would have been admissible for that purpose if the declarant had testified as a witness.

*Previous Court Proceedings*

General rule

**77.** Subject to this Act and the rules respecting the enforcement of judgments, the finding of another court is not admissible for the purpose of proving a fact in issue.

Interpretation

**78.** In sections 79 to 82,

"conviction"

"conviction" includes a conviction in respect of which a pardon other than a free pardon was granted by law;

"finding of guilt"

"finding of guilt" includes a finding of guilt of an offence, and a plea of guilty to an offence, made by or before a court that makes an order directing that the accused be discharged for the offence absolutely or on the conditions prescribed in a probation order;

"offence"

"offence" includes a contravention in respect of which a court martial is held pursuant to the *National Defence Act*.

Application

**79.** Sections 80 to 82 do not apply to a finding of guilt or conviction or to a finding of adultery while there is a right of appeal from it.

Admissibility in civil proceeding

**80.** (1) Where a court has found a person guilty or convicted him of an offence, or in a matrimonial proceeding has found him to

## SOUS-SECTION V

## CRÉDIBILITÉ DE L'AUTEUR DE LA DÉCLARATION

Interrogatoire de l'auteur de la déclaration

**76.** La partie contre laquelle une déclaration constituant du ouï-dire est admise en preuve peut appeler l'auteur de la déclaration à témoigner et, avec la permission du tribunal, l'interroger comme s'il était un témoin hostile.

Non-disponibilité de l'auteur de la déclaration

La crédibilité de l'auteur d'une déclaration qui n'est pas disponible à rendre témoignage peut être attaquée ou défendue par toute preuve qui aurait été admissible à cette fin s'il avait rendu témoignage.

# TITRE III

## DÉCISIONS JUDICIAIRES ANTÉRIEURES

Règle générale

**77.** Sauf disposition contraire, la décision d'un autre tribunal est inadmissible pour prouver un fait en litige.

Interprétation

**78.** Dans le présent titre:

1° est réputé avoir été condamné pour une infraction l'accusé qui s'est vu accorder un pardon autre qu'un pardon absolu;

2° est réputé avoir été reconnu coupable d'une infraction l'accusé qui a plaidé coupable à cette infraction ou qui a été libéré de façon conditionnelle ou inconditionnelle;

3° est réputée infraction toute contravention en raison de laquelle est tenue une audience par une cour martiale en vertu de la *Loi sur la défense nationale*.

Application

**79.** Les articles 80 à 82 ne s'appliquent pas à une décision reconnaissant la culpabilité d'une personne, condamnant une personne pour une infraction ou reconnaissant un adultère, s'il y a droit d'appel de cette décision.

En matière civile

**80.** Une décision reconnaissant la culpabilité d'une personne, condamnant une personne pour une infraction ou reconnaissant

have committed adultery, and the commission of the offence or adultery is relevant to a matter in issue in a civil proceeding, evidence of the finding or conviction is admissible in the civil proceeding for the purpose of proving that the offence or adultery was committed by that person, whether or not he is a party to the civil proceeding.

Defamation proceeding

(2) In a civil proceeding for libel or slander in which the commission of an offence or adultery is relevant to a fact in issue, proof that a person was found guilty or convicted of the offence or found to have committed adultery is conclusive proof that he committed the offence or adultery.

Theft and possession

**81.** (1) Where an accused is charged with possession of any property obtained by the commission of an offence, evidence of the finding of guilt or conviction of another person of theft of the property is admissible against the accused and in the absence of evidence to the contrary is proof that the property was stolen.

Accessory after the fact

(2) Where an accused is charged with being an accessory after the fact to the commission of an offence, evidence of the finding of guilt or conviction of another person of the offence is admissible against the accused and in the absence of evidence to the contrary is proof that the offence was committed.

Recorded proof and notice

**82.** (1) On proof of the identity of a person as the offender and subject to any notice required under section 139, a conviction or a finding of guilt or adultery may be proved by

(*a*) a memorandum, minute or other record of the conviction or the finding of guilt or adultery; or

(*b*) a certificate containing the substance and effect only, omitting the formal part, of the charge and the conviction or finding of guilt.

Proof of signature or official character

(2) Where a certificate or record referred to in subsection (1) purports to be signed by the judge or an appropriate clerk or officer of the court, it is proof, in the absence of evidence to the contrary, of the facts it asserts

un adultère dans une procédure matrimoniale est admissible en matière civile afin de prouver que l'infraction ou l'adultère a été commis par cette personne, que cette dernière soit ou non partie à l'instance, si la perpétration de l'infraction ou la commission de l'adultère est reliée à un fait en litige.

Poursuite pour diffamation

Dans une procédure civile pour diffamation dans laquelle la perpétration d'une infraction ou la commission d'un adultère est reliée à un fait en litige, la preuve qu'une personne a été reconnue coupable ou condamnée relativement à cette infraction ou qu'elle a été reconnue avoir commis un adultère fait preuve de la perpétration de l'infraction ou de la commission de l'adultère.

Possession d'objet volé

**81.** La reconnaissance de culpabilité ou la condamnation d'une personne pour vol est admissible en preuve contre toute autre personne accusée de possession de l'objet volé; en l'absence de preuve contraire, cette preuve établit que l'objet a été volé.

Complicité après le fait

La reconnaissance de culpabilité ou la condamnation d'une personne pour une infraction est admissible en preuve contre toute autre personne qui est accusée de complicité après le fait relativement à cette infraction; en l'absence de preuve contraire, cette preuve établit l'existence de l'infraction.

Preuve de la décision

**82.** Sur preuve de l'identité de la personne qui a été reconnue coupable ou condamnée relativement à une infraction ou qui a commis un adultère et sous réserve de l'avis prévu par l'article 139, la preuve de l'existence de cette infraction ou de cet adultère peut se faire:

1° par la production d'un mémoire, d'un procès-verbal ou de tout autre document faisant état de l'adultère ou de la reconnaissance de culpabilité ou de la condamnation;

2° par la production d'un certificat énonçant en substance seulement l'accusation ainsi que la reconnaissance de culpabilité ou la condamnation pour cette infraction.

without proof of the signature or official character of the person appearing to have signed it.

*Alibi Evidence*

Interpretation

**83.** In sections 84 to 88, "alibi evidence" means evidence tending to establish that an accused is not guilty of an offence with which he is charged on the ground that he was not present at the place where the offence is alleged to have been committed at the time it is alleged to have been committed.

Notice of alibi evidence

**84.** (1) An accused shall, at the first reasonable opportunity, give notice of alibi evidence in writing to the prosecutor or a law enforcement officer or authority acting in relation to the accused, indicating the whereabouts of the accused at the time the offence is alleged to have been committed and the names and addresses of the witnesses in support of the alibi.

Further notice

(2) Where changes occur in the names or addresses of the witnesses mentioned in a notice under subsection (1) or new witnesses are found, the accused shall, at the first reasonable opportunity, give further notice to any person to whom notice was originally given.

Notice by prosecutor

**85.** Where the prosecutor receives notice under section 84, he shall provide a copy of the notice to any co-accused and, after the alibi has been investigated, he shall, at the first reasonable opportunity, give notice in writing of the results of the investigation to the accused and any co-accused.

Adverse comment

**86.** Where a party fails to comply with section 84 or 85, the court and any party adverse in interest may comment on the weight to be given to the evidence of that party in relation to the alibi.

Determining the first reasonable opportunity

**87.** In determining when the first reasonable opportunity occurred for the purposes of

Preuve de signature ou de qualité

Un document visé au présent article portant une signature qui, selon toute apparence, est celle du juge, du greffier ou d'une personne autorisée par le tribunal fait preuve de son contenu, sauf preuve contraire, sans qu'il soit nécessaire de prouver la signature ou la qualité du signataire de ce document.

## TITRE IV

## PREUVE D'ALIBI

Interprétation

**83.** Dans le présent titre, est une preuve d'alibi une preuve tendant à démontrer l'innocence de l'accusé pour le motif qu'il n'était pas présent sur les lieux de l'infraction reprochée au moment où il est allégué que cette infraction a été commise.

Avis d'alibi

**84.** L'accusé qui entend présenter une preuve d'alibi est tenu, à la première occasion convenable, d'en aviser par écrit le poursuivant, un agent chargé de l'exécution de la loi ou l'autorité qui s'occupe de son cas; l'avis indique l'endroit où se trouvait l'accusé au moment de l'infraction, les nom et adresse des témoins d'alibi.

Avis complémentaire

En cas de changement de nom ou d'adresse des témoins visés à l'avis prévu au premier alinéa ou en cas de découverte de nouveaux témoins, l'accusé est tenu, à la première occasion convenable, d'en aviser toute personne à laquelle il avait déjà donné avis.

Avis donner par le poursuivant

**85.** Le poursuivant, sur réception de l'avis prévu à l'article 84, est tenu d'en fournir une copie à tout coaccusé; après la conclusion de l'enquête sur l'alibi, il avise à la première occasion convenable l'accusé et tout coaccusé des résultats de celle-ci.

Observations défavorables

**86.** Le tribunal et toute partie adverse qui y a intérêt peuvent faire des observations défavorables sur la force probante de la preuve d'alibi d'une partie qui ne se conforme pas aux articles 84 ou 85.

Détermination de la première occasion convenable

**87.** Pour déterminer à quel moment est survenu la première occasion convenable

section 84 or 85, the court shall consider all the circumstances and, in particular, with respect to an accused, shall consider when the accused became aware of the time and place of the alleged offence and when he retained or was provided with counsel.

Proceedings by way of indictment

**88.** (1) In a criminal proceeding by way of indictment in which a preliminary inquiry is held, where the accused has not complied with section 84 and has failed to give notice of alibi evidence within seven days after being committed for trial, alibi evidence is not admissible on his behalf at the trial without the consent of the prosecution unless the court for cause shown orders otherwise and, on committing the accused for trial, the court shall warn him accordingly.

Adverse comment where applicable

(2) Where alibi evidence is received under subsection (1), a comment in respect of that evidence may be made under the conditions and in the manner provided by section 86.

(Note - This section is for inclusion in the federal Act only.)

## PART IV

## KINDS OF EVIDENCE

### *Testimony*

#### *Competence and Compellability*

General rule

**89.** Subject to this Act and any other law, every person is competent and compellable to testify in a proceeding.

Presiding officer

**90.** (1) The person presiding at a proceeding is not a competent witness in that proceeding.

Members of jury

(2) A juror sworn and empanelled for a proceeding who is called as a witness in that proceeding, other than on a *voir dire* to determine whether the jury is properly discharging its duties or whether there has been interference with the jury, cannot continue as a juror in that proceeding.

visée à l'article 84, le tribunal tient compte de toutes les circonstances de l'espèce, notamment le moment où l'accusé a eu connaissance de la date et du lieu de l'infraction et s'il a retenu ou s'est vu fournir les services d'un avocat.

Procédure par voie de mise en accusation

**88.** Dans le cadre d'une instance criminelle par voie de mise en accusation durant laquelle est tenue une enquête préliminaire, faute par l'accusé de se conformer à l'article 84 et d'avoir donné l'avis qui y est prévu au plus tard le septième jour après qu'il a été cité à son procès, la preuve d'alibi en sa faveur est irrecevable au procès sans le consentement de la poursuite sauf ordre contraire du tribunal donné pour des motifs établis; le tribunal avertit l'accusé en conséquence quand celui-ci est cité à son procès.

Observations défavorables

Des observations sur la preuve d'alibi reçue en vertu du présent article peuvent être faites de la manière prévue à l'article 86 et aux conditions qui y sont précisées.

(Remarque: Cet article apparaîtra uniquement dans la loi fédérale.)

# LIVRE IV

# MODES DE PREUVE

## TITRE I

## PREUVE TESTIMONIALE

### CHAPITRE I

### COMPÉTENCE ET CONTRAIGNABILITÉ D'UN TÉMOIN

Règle générale

**89.** Sauf règle de droit contraire, toute personne peut rendre témoignage en justice et peut être contrainte à le faire.

Président du tribunal

**90.** Une personne ne peut rendre témoignage dans le cours de l'audition à laquelle elle préside.

Juré

Un juré appelé à rendre témoignage dans le cours du procès aux fins duquel il a été assermenté ne peut demeurer juré sauf si son témoignage est requis afin de tenir un voir dire visant à déterminer si le jury s'acquitte correctement de sa tâche ou si quelqu'un

Accused

**91.** (1) An accused is not a competent witness for the prosecution in a proceeding against him.

Persons jointly tried

(2) A person who is jointly tried for an offence with any other person is a competent but not a compellable witness for that other person.

Spouse

**92.** (1) The spouse of an accused is a competent but not a compellable witness for the prosecution.

Spouses of persons jointly tried

(2) Where two or more persons are jointly tried for an offence, the spouse of any one of them is a competent but not a compellable witness for any of the others.

Spouse as witness for prosecution

**93.** The spouse of an accused is a competent and compellable witness against the accused or any co-accused where the offence charged

(*a*) is high treason or treason punishable by imprisonment for life;

(*b*) is against the person or property of the spouse;

(*c*) is against a person under the age of fourteen years; or

(*d*) is under section 33 or 34 of the *Juvenile Delinquents Act* or sections 143 to 146, 148 to 157, 166 to 168, 195, 197, 200, 216, 218 to 222, 226, 227, 248 to 250, 255 to 257 or 289 of the *Criminal Code* or paragraph 423(1)(*c*), 688(*a*) or 688(*b*) of the *Criminal Code* or is an attempt to commit an offence under section 146 or 155 of the *Criminal Code.*

(Note - Paragraphs (*a*) and (*d*) are for inclusion in the federal Act only.)

Comment on failure to testify

**94.** The court and the prosecution may comment on the failure of an accused to testify on his own behalf but may not comment on the failure of the spouse of the accused to testify.

tente d'influencer le jury dans l'accomplissement de cette tâche.

Accusé

**91.** L'accusé ne peut rendre témoignage pour la poursuite.

Personne conjointement jugée

La personne conjointement jugée pour une infraction avec une autre personne ne peut être contrainte par cette dernière à rendre témoignage.

Époux

**92.** L'époux d'un accusé ne peut être contraint par la poursuite à rendre témoignage.

Époux d'un coaccusé

L'époux d'une personne conjointement jugée pour une infraction avec une autre personne ne peut être contraint par cette dernière à rendre témoignage.

Époux contraignable

**93.** L'époux d'un accusé peut être contraint à rendre témoignage contre l'accusé ou son coaccusé s'il s'agit:

1° d'une infraction de haute trahison ou de trahison passible d'emprisonnement à perpétuité;

2° d'une infraction commise contre lui-même ou contre ses biens;

3° d'une infraction commise contre une personne âgée de moins de quatorze ans;

4° d'une infraction visée aux articles 33 ou 34 de la *Loi sur les jeunes délinquants* ou aux articles 143 à 146, 148 à 157, 166 à 168, 195, 197, 200, 216, 218 à 222, 226, 227, 248 à 250, 255 à 257, 289, à l'alinéa 423(1)*c*) ou aux alinéas 688*a*) ou 688*b*) du *Code criminel*;

5° d'une tentative de commettre une infraction visée aux articles 146 ou 155 du *Code criminel*.

(Remarque: Les paragraphes 1° et 4° apparaîtront uniquement dans la loi fédérale.)

Observations sur le défaut de témoignage

**94.** Le tribunal et la poursuite peuvent faire des observations sur le défaut de l'accusé de témoigner en sa faveur, mais non sur le défaut du conjoint de l'accusé de témoigner.

*Oath or Solemn Affirmation*

Oath or solemn affirmation

**95.** Every witness shall be required, before giving evidence, to identify himself and to take an oath or make a solemn affirmation in the form and manner provided by the law that governs the proceeding.

Witness whose capacity is in question

**96.** (1) Where a proposed witness is a person of seven or more but under fourteen years of age or is a person whose mental capacity is challenged, the court, before permitting that person to give evidence, shall conduct an inquiry to determine whether, in its opinion, that person understands the nature of an oath or a solemn affirmation and is sufficiently intelligent to justify the reception of his evidence.

Burden as to capacity of witness

(2) A party who challenges the mental capacity of a proposed witness of fourteen or more years of age has the burden of satisfying the court that there is a real issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

Where witness does not qualify

**97.** A person under seven years of age or a person who cannot give evidence under section 96 shall be permitted to give evidence on promising to tell the truth if, in the opinion of the court after it has conducted an inquiry, that person understands that he should tell the truth and is sufficiently intelligent to justify the reception of his evidence.

Evidence to be under oath or solemn affirmation

**98.** An accused shall not testify or make a statement at a trial or preliminary inquiry without taking an oath, making a solemn affirmation or promising to tell the truth under section 97, as the case may be.

(Note - The reference to a preliminary inquiry is for inclusion in the federal Act only.)

## CHAPITRE II

## SERMENT OU AFFIRMATION SOLENNELLE

Serment ou affirmation solennelle

**95.** Le tribunal doit requérir de tout témoin qu'il s'identifie avant de rendre témoignage et prête serment ou fasse l'affirmation solennelle de dire la vérité.

Témoin dont la capacité mentale est mise en doute

**96.** Une personne âgée de sept à treize ans ou une personne dont la capacité mentale est mise en doute peut rendre témoignage en justice si le tribunal est d'avis, après enquête, que cette personne est suffisamment intelligente pour ce faire et qu'elle comprend la nature du serment ou de l'affirmation solennelle.

Fardeau de preuve

Une partie qui met en doute la capacité mentale d'un témoin de quatorze ans ou plus doit démontrer au tribunal qu'il existe des motifs sérieux de douter de la capacité du témoin de comprendre la nature du serment ou de l'affirmation solennelle.

Personne non admise à témoigner

**97.** Une personne âgée de moins de sept ans ou une personne qui n'est pas admise à témoigner suivant l'article 96 peut rendre témoignage sur promesse de dire la vérité si le tribunal est d'avis, après enquête, que cette personne est suffisamment intelligente pour ce faire et qu'elle comprend le devoir de dire la vérité.

Témoignage ou déclaration d'un accusé

**98.** Un accusé ne peut rendre témoignage ou faire une déclaration au procès ou à l'enquête préliminaire que s'il prête serment, fait l'affirmation solennelle ou, selon le cas, promet de dire la vérité.

(Remarque: La mention de l'enquête préliminaire apparaîtra uniquement dans la loi fédérale.)

*Calling and Questioning Witnesses*

Presenting evidence

**99.** Subject to the power of the court to exercise reasonable control over a proceeding, to protect witnesses from harassment and to avoid prolixity, the parties to a proceeding shall determine the manner in which they present the evidence and examine witnesses.

Questions by court

**100.** The court may ask a witness any question it considers useful and for that purpose may recall a witness, and a witness so questioned may be cross-examined by an adverse party and re-examined by the party who called him.

Court's power to call witnesses

**101.** Subject to section 44 and any other enactment, the court shall not call a witness in a civil proceeding but may do so in a criminal proceeding where it appears to the court to be in the interests of justice, and any witness called by the court may be cross-examined by the parties.

Leading questions on examination-in-chief or re-examination

**102.** (1) On examination-in-chief or re-examination, a party shall not ask a witness a leading question unless

(*a*) the question relates to an introductory or undisputed matter; or

(*b*) the court gives leave to ask the question in order to elicit the testimony of the witness.

Interpretation

(2) A leading question is one that assumes the existence of a fact in issue or that suggests an answer, but a question is not leading by reason only that it directs the attention of the witness to a subject-matter or is in hypothetical form.

Leading questions on cross-examination

**103.** (1) A party may cross-examine any witness not called by him on all facts in issue and on all matters substantially relevant to the credibility of the witness, and on cross-examination may ask the witness leading questions.

# CHAPITRE III

## APPEL ET INTERROGATOIRE DES TÉMOINS

Présentation de la preuve

**99.** Il appartient aux parties au litige de déterminer la manière de présenter la preuve et d'interroger les témoins.

Contrôle par le tribunal

Toutefois, le tribunal peut assurer un contrôle raisonnable de la présentation de la preuve et de l'interrogatoire des témoins et empêcher des pertes de temps et le harcellement des témoins.

Interrogatoire par le tribunal

**100.** Le tribunal peut poser à un témoin toute question qu'il juge utile et peut à cette fin le rappeler.

Nouvel interrogatoire

Un témoin rappelé par le tribunal peut être interrogé à nouveau par la partie qui l'avait appelé et être contre-interrogé par toute autre partie.

Pouvoir du tribunal d'appeler un témoin

**101.** Le tribunal ne peut appeler un témoin qu'en matière criminelle et seulement s'il considère que l'intérêt de la justice le requiert.

Contre-interrogatoire

Les parties peuvent contre-interroger tout témoin ainsi appelé.

Questions suggestives à l'interrogatoire principal ou lors d'un nouvel interrogatoire

**102.** Lors de l'interrogatoire principal ou lors d'un nouvel interrogatoire d'un même témoin, une partie ne peut poser au témoin une question suggestive que si cette question porte sur une matière non litigieuse ou si le tribunal permet de poser cette question dans le but de préciser une question que le témoin ne comprend pas.

Définition

Une question suggestive est une question qui tient certains faits en litige pour acquis ou qui suggère la réponse; une question n'est pas suggestive pour le seul motif qu'elle attire l'attention du témoin sur un point donné ou qu'elle revêt une forme hypothétique.

Contre-interrogatoire

**103.** Une partie peut contre-interroger un témoin qu'elle n'a pas appelé elle-même sur tout fait en litige ou sur tout fait pertinent se rapportant en substance à la crédibilité du témoin; elle peut, lors du contre-interrogatoire, lui poser des questions suggestives.

Alleged facts

(2) A party shall not allege or assume facts on cross-examination unless he is in a position to substantiate them.

Directing attention of witness

(3) Where a party cross-examining a witness intends to contradict the witness on a fact in issue, the party shall direct the attention of the witness to that fact.

Power to comment or take other measures

(4) Where a party has adduced evidence in contravention of subsection (2) or (3), the court may comment on the weight to be given to that evidence and may take any other appropriate measure provided by law.

Adverse witness

**104.** A party calling a witness may contradict him by other evidence but shall not cross-examine him unless the court finds him to be an adverse witness, in which case he may be cross-examined as if he were a witness not called by the party.

Interpretation

**105.** An adverse witness is a witness hostile or contrary in interest to the party calling him, but a witness is not adverse by reason only that his testimony is unfavourable to the party calling him.

Re-examination

**106.** A party may re-examine a witness called by him on any new matter elicited on cross-examination of the witness or to explain or clarify any answer given by the witness on cross-examination or any inconsistency between an answer given by the witness on cross-examination and an answer given by him on examination-in-chief.

Exclusion of witness other than a party

**107.** (1) The court on its own motion may, or at the request of a party shall, by order exclude from the courtroom any witness who has not yet testified, other than a party to the proceeding, in order to prevent the witness from hearing the evidence of other witnesses.

Exception

(2) Where the court is satisfied that the presence of a witness would materially assist in the presentation of the evidence, it may, notwithstanding subsection (1), permit the witness to remain in the courtroom, subject to any conditions it considers appropriate.

Where witness not excluded

(3) In a proceeding before a jury, where a witness has not complied with an exclusion

Faits allégués

Elle ne peut, lors du contre-interrogatoire, alléguer un fait ou tenir un fait pour acquis que si elle est en mesure d'étayer ce fait.

Attention du témoin attirée sur un fait

Elle doit attirer l'attention du témoin sur tout fait en litige à l'égard duquel elle entend le contredire.

Pouvoir de faire des observations et de prendre d'autres mesures

Dans les cas où une partie a produit des preuves en violation du présent article, le tribunal peut faire des observations sur la force probante de ces preuves et prendre toute autre mesure appropriée prévue par le droit.

Témoin hostile

**104.** Une partie peut contredire le témoin qu'elle a appelé par une preuve autre que son témoignage mais ne peut le contre-interroger que si le tribunal l'a déclaré témoin hostile.

Contre-interrogatoire

Une partie peut contre-interroger tout témoin déclaré hostile comme si celui-ci n'avait pas été appelé par elle.

Interprétation

**105.** Un témoin hostile est celui qui a des intérêts opposés à ceux de la partie qui l'a appelé ou qui lui manifeste de l'hostilité mais non celui qui ne fait que rendre un témoignage défavorable à cette partie.

Nouvel interrogatoire

**106.** Une partie peut interroger à nouveau un témoin qu'elle a appelé concernant tout fait nouveau soulevé en contre-interrogatoire.

Nouvel interrogatoire

Elle peut également interroger à nouveau ce témoin dans le but d'expliquer ou de clarifier une réponse qu'il a donnée en contre-interrogatoire ou une contradiction entre une réponse qu'il a donné en contre-interrogatoire et une réponse qu'il a donnée lors de l'interrogatoire principal.

Exclusion d'un témoin

**107.** Le tribunal doit, à la demande d'une partie, exclure de la salle d'audience tout témoin qui n'a pas encore déposé, autre qu'une partie, afin de l'empêcher d'entendre les autres témoignages; le tribunal peut en outre exclure d'office un tel témoin.

Exception

Le tribunal peut toutefois, aux conditions qu'il juge appropriées, permettre au témoin d'assister à l'audience lorsque sa présence est susceptible de procurer une aide véritable aux parties dans la présentation de leur preuve.

Témoin ayant assisté à l'audience

Le tribunal peut adresser des commentaires au jury quant au poids à accorder au

order under subsection (1) or testifies after being permitted to attend under subsection (2), the court may comment as to the weight to be given to his testimony.

Where accused confirms earlier evidence

**108.** An accused may call witnesses in any order he wishes, but where he testifies after calling a witness and by his testimony confirms the evidence of the witness, the court may comment as to the weight to be given to his confirmatory testimony.

Order not to discuss evidence

**109.** The court may order any person not to discuss evidence given in a proceeding with any witness who is to testify in the proceeding

Refreshing memory

**110.** (1) Where a witness is unable to recall fully a matter on which he is being examined, a party may ask him any question or require him to examine or consider any writing or object for the purpose of refreshing his memory, but the court may require the party, before doing so, to establish that the question, writing or object will tend to refresh the memory of the witness rather than lead him into mistake or falsehood.

Rights of adverse party

(2) Where any writing or object is used for the purpose of refreshing the memory of a witness

(*a*) in court, an adverse party is entitled to have it produced, to inspect it and to cross-examine the witness on it; or

(*b*) out of court, the court may order it to be produced for inspection and use in cross-examination by an adverse party.

Admissibility

**111.** Any writing used solely for the purpose of refreshing the memory of a witness is admissible only to challenge or support his credibility.

Past recollection recorded

**112.** Where a witness is unable to recall a recorded matter of which he once had knowledge, the record is admissible for all purposes, in the same manner as his testimony would be, if

(*a*) he made or verified the record while the matter was fresh in his mind; or

(*b*) it is a transcript of testimony given by him on a prior occasion under oath or

témoignage rendu par un témoin qui a fait défaut de se conformer à une ordonnance d'exclusion ou rendu par un témoin à qui le tribunal a permis d'assister à l'audience.

Ordre des témoignages

**108.** L'accusé peut appeler ses témoins dans n'importe quel ordre.

Preuve confirmée par l'accusé

Toutefois, le tribunal peut adresser des commentaires au jury quant au poids à accorder à la partie du témoignage de l'accusé qui confirme un témoignage préalablement rendu par un autre témoin.

Interdiction de discuter de la preuve

**109.** Le tribunal peut interdire à quiconque de discuter de la preuve produite avec un témoin qui n'a pas encore été entendu.

Rappel d'un fait

**110.** La partie qui interroge un témoin incapable de se remémorer complètement un fait peut notamment lui poser une question ou lui demander d'examiner un document ou un objet aux fins de l'aider à se le remémorer.

Moyen propre à remémorer un fait

Toutefois, le tribunal peut requérir de cette partie qu'elle établisse que l'aide-mémoire est de nature à lui en favoriser le rappel et non à l'induire en erreur.

Droits de la partie adverse

La partie adverse peut exiger la production de tout aide-mémoire utilisé par un témoin au cours de sa déposition, procéder à l'examen de cet aide-mémoire ou contre-interroger le témoin à son sujet.

Ordonnance du tribunal

Le tribunal peut, à des fins d'examen ou de contre-interrogatoire, ordonner la production d'un aide-mémoire qui a été utilisé hors la présence du tribunal.

Admissibilité d'un aide-mémoire

**111.** Un aide-mémoire utilisé par un témoin dans le seul but de lui remémorer un fait n'est admissible en preuve que dans le but d'attaquer ou de défendre sa crédibilité.

Document relatant des faits

**112.** Un document relatant des faits dont un témoin a eu préalablement connaissance mais qu'il ne peut se rappeler est admissible en preuve au même titre que son témoignage verbal si ce témoin a constitué ou vérifié ce document au moment où les faits qui y sont relatés étaient encore frais à sa mémoire.

Document relatant un témoignage

Un tel document est également admissible en preuve à toutes fins s'il relate un témoi-

solemn affirmation when he was subject to cross-examination.

Examination by court and production

**113.** (1) After examining any record used for the purpose of refreshing the memory of a witness or admissible under section 112, the court shall excise any portion that is unrelated to the matters in issue or privileged or otherwise not subject to production, order production of the remainder and order the preservation of the unproduced portions for the purposes of any appeal.

Introduction of record

(2) A record admitted in evidence under subsection (1) shall be introduced as an exhibit and is evidence of the facts stated in it.

*Previous Statements*

Cross-examination on a previous inconsistent statement

**114.** Where the party calling a witness alleges that the witness previously made a statement that is inconsistent with his present testimony and where, in the opinion of the court, the inconsistency is relevant to a matter in issue, the party may cross-examine the witness on the previous statement without proof that the witness is adverse.

Requirements before cross-examination

**115.** (1) A party intending to cross-examine a witness on a previous inconsistent statement shall, prior to the cross-examination,

(*a*) furnish the witness with sufficient information to enable him reasonably to recall the form of the statement and the occasion on which it was made and ask him whether he made the statement; and

(*b*) where the witness was called by that party and is not an adverse witness, attempt to refresh his memory if the court so requires.

Attention to relevant parts of statement

(2) If it is intended to contradict a witness by reason of a previous inconsistent statement, his attention shall be drawn to those

gnage antérieurement rendu par ce témoin alors qu'il était sous serment ou sous affirmation solennelle et qu'il pouvait être contre-interrogé.

Examen par le tribunal

**113.** Le tribunal, à la suite de l'examen d'un aide-mémoire ou d'un document admissible suivant l'article 112, doit en ordonner la production après en avoir soustrait toute partie qui est couverte par un droit au secret, qui n'a aucun rapport avec les faits en litige ou qui, pour un autre motif, ne devrait pas être produite.

Conservation

Le tribunal doit ordonner que toute partie d'un aide-mémoire ou d'un document soustraite suivant le présent article soit conservée aux fins d'un appel éventuel.

Force probante

L'aide-mémoire ou le document produit fait preuve des faits qui y sont relatés; cet aide-mémoire ou ce document doit être à la disposition du jury.

## CHAPITRE IV

## DÉCLARATIONS ANTÉRIEURES D'UN TÉMOIN

Contre-interrogatoire sur une déclaration antérieure

**114.** La partie qui a appelé un témoin peut, sans qu'il soit nécessaire de faire la preuve que ce dernier lui est hostile, le contre-interroger sur une déclaration qu'il a faite antérieurement et qui est incompatible avec le témoignage qu'il rend si le tribunal estime que l'incompatibilité est reliée à une question en litige.

Rafraîchissement de la mémoire

**115.** La partie qui entend contre-interroger un témoin sur une déclaration antérieure incompatible doit fournir au témoin des informations suffisantes pour lui permettre de se rappeler la déclaration et les circonstances dans lesquelles il a fait cette déclaration et lui demander s'il l'a effectivement faite.

Rappel de la déclaration

Cette partie doit également, si le tribunal le requiert, tenter d'amener le témoin à se remémorer un fait s'il a été appelé par elle et n'a pas été déclaré hostile.

Contradiction avec une déclaration antérieure

La partie qui entend contredire un témoin en raison d'une déclaration antérieure incompatible doit attirer son attention sur les par-

parts of the statement that are to be used for that purpose

Statement to person in authority

**116.** (1) The prosecution may cross-examine an accused on a previous inconsistent statement made to a person in authority within the meaning of section 66 if it first establishes that the statement was voluntary within the meaning of that section.

Determining voluntariness

(2) The question whether a statement referred to in subsection (1) was voluntary may be determined in a *voir dire* held during cross-examination of the accused.

Proof of statement

**117.** If, after being questioned, the witness denies or does not distinctly admit that he made a previous inconsistent statement and it is relevant to a matter in issue, the proponent may prove the statement.

Previous consistent statement

**118.** Subject to section 120, a statement made previously by a witness that is consistent with his present testimony is not admissible unless his credibility has been challenged by means of an express or implied allegation of recent fabrication or by means of a previous inconsistent statement.

Production of statement

**119.** The court may require the production of the whole or any part of a written or recorded statement used in cross-examining a witness or admitted under section 118.

Rule respecting recent complaint abrogated

**120.** (1) Subject to subsection (2), the rule that permits a previous consistent statement of a complainant to be admitted in evidence as a recent complaint is abrogated.

Evidence of a complaint

(2) In a proceeding for an offence in which lack of consent is an essential element, the complainant may give evidence of the making of a complaint concerning the conduct of the accused, but no evidence may be given of the particulars of the complaint unless the accused has challenged the credibility of the complainant on the basis of recent fabrication or previous inconsistent statement relating to the conduct of the accused.

ties de la déclaration qui doivent servir à cette fin.

Déclaration à une personne en autorité

**116.** La poursuite peut contre-interroger l'accusé concernant une déclaration antérieure incompatible qu'il a faite à une personne en autorité au sens de l'article 66 si elle établit d'abord que cette déclaration était volontaire au sens de cet article.

Déclaration volontaire

Un voir dire visant à déterminer si la déclaration était volontaire peut être tenu lors du contre-interrogatoire de l'accusé.

Preuve de déclaration antérieure

**117.** La partie qui allègue qu'un témoin a déjà fait une déclaration antérieure incompatible peut faire la preuve de cette déclaration si cette preuve est reliée à un fait en litige et si le témoin, après avoir été interrogé, nie avoir fait cette déclaration ou n'admet pas clairement l'avoir faite.

Déclaration antérieure compatible

**118.** La déclaration antérieure qui a été faite par un témoin et qui est compatible avec le témoignage qu'il rend n'est admissible en preuve que si la crédibilité de ce témoin a été attaquée au moyen d'une allégation expresse ou implicite de fabrication de preuve ou au moyen d'une déclaration antérieure incompatible.

Production de la déclaration

**119.** Le tribunal peut requérir la production de toute partie d'une déclaration écrite ou enregistrée qui a été utilisée en contre-interrogatoire ou qui a été admise suivant l'article 118.

Abolition de la règle relative à la plainte spontanée

**120.** Est abolie la règle qui permet d'admettre, à titre de plainte spontanée, une déclaration qui a antérieurement été faite par le plaignant et qui est compatible avec le témoignage qu'il rend.

Preuve de la plainte

Dans une poursuite criminelle dans laquelle l'absence de consentement du plaignant à la conduite de l'accusé est un élément essentiel, le plaignant peut prouver qu'il s'est plaint de cette conduite, mais il ne peut faire état du contenu même de la plainte que si l'accusé a attaqué sa crédibilité pour le motif qu'il a fourni une preuve de fabrication récente ou qu'il a antérieurement fait une déclaration concernant la conduite

Direction not required

(3) The court in a proceeding referred to in subsection (2) is not required to give the trier of fact any direction respecting the absence of a complaint concerning the conduct of the accused.

(Note - Section 120 and the reference to it in section 118 are for inclusion in the federal Act only.)

Use of statement

**121.** Where a previous statement of a witness is received in evidence, it may be used only for the purpose of challenging or supporting the credibility of the witness, except in the following cases where it may be used for all purposes:

(*a*) where it is adopted by the witness;

(*b*) where it was made under oath or solemn affirmation and the witness was subject to cross-examination; or

(*c*) where it is a previous inconsistent statement of a party, other than one adduced by the prosecution under subsection 116(1).

*Credibility of Witnesses*

Reputation evidence

**122.** Subject to section 27, evidence of reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of a witness.

Examination as to character and mode of life

**123.** Subject to section 124, an accused shall not be cross-examined, solely for the purpose of challenging his credibility, as to his character, antecedents, associations, mode of life or participation in crimes, except where it is directly relevant to proving the falsity of the accused's evidence.

No cross-examination on previous record

**124.** (1) An accused shall not be questioned by the court or any adverse party as to whether he has been found guilty or convicted of an offence other than an offence with which he is charged unless

(*a*) the evidence to be adduced by means of the question is otherwise admissible to

de l'accusé et qui est incompatible avec le témoignage qu'il rend.

Directives au jury non nécessaires

Le tribunal n'est pas tenu, dans cette poursuite, de donner des directives au jury en raison de l'absence de plainte concernant la conduite de l'accusé.

(Remarque: L'article 120 et le renvoi à celui-ci à l'article 118 apparaîtront uniquement dans la loi fédérale.)

Utilisation restreinte d'une déclaration

**121.** Une déclaration antérieure d'un témoin n'est admissible en preuve qu'aux fins d'attaquer ou de défendre la crédibilité de ce témoin.

Utilisation non restreinte d'une déclaration

Toutefois, cette déclaration est admissible à toutes fins si le témoin l'a faite sienne, si cette déclaration a été faite sous serment ou sous affirmation solennelle par un témoin susceptible d'être contre-interrogé ou s'il s'agit d'une déclaration antérieure incompatible faite par une partie et que celle-ci n'est pas une déclaration produite par la poursuite en vertu du paragraphe 116(1).

## CHAPITRE V

## CRÉDIBILITÉ DES TÉMOINS

Preuve de réputation

**122.** Sous réserve de l'article 27, une preuve de réputation visant à attaquer ou à défendre la crédibilité d'un témoin est inadmissible.

Preuve concernant le caractère ou le mode de vie

**123.** La poursuite ne peut, dans le seul but d'attaquer la crédibilité de l'accusé, le contre-interroger à l'égard de son caractère, de ses antécédents, de ses relations, de son mode de vie ou de sa participation à un crime que si cette preuve est de nature à établir la fausseté d'une preuve qu'il a préalablement introduite.

Interdiction de contre-interroger sur le casier judiciaire

**124.** Il est interdit au tribunal et à toute partie adverse d'interroger l'accusé sur les déclarations de culpabilité ou les condamnations dont il aurait fait l'objet pour une infraction autre que celle qui lui est imputée, sauf dans les cas suivants:

1° le témoignage découlant de la question serait par ailleurs recevable pour éta-

show that the accused is guilty of the offence with which he is charged; or

(*b*) the accused has given evidence against a co-accused.

Exception

(2) Notwithstanding subsection (1), the accused may be cross-examined as to whether he has been found guilty or convicted of perjury or giving contradictory evidence in a judicial proceeding or as to whether, at any time within seven years prior to the date of the present charge against him, he has been found guilty or convicted of an offence involving an element of fraud.

No corroboration or warning

**125.** (1) Subject to subsection (2), no corroboration of evidence is required and no warning concerning the danger of acting on uncorroborated evidence shall be given in any proceeding.

Caution required

(2) The court shall instruct the trier of fact on the special need for caution in any case in which it considers that an instruction is necessary, and shall in every case give the instruction with respect to

(*a*) the evidence of a witness who has testified without taking an oath or making a solemn affirmation;

(*b*) the evidence of a witness who, in the opinion of the court, would be an accomplice of the accused if the accused were guilty of the offence charged;

(*c*) the evidence of a witness who has been convicted of perjury; or

(*d*) a charge of treason, high treason or perjury where the incriminating evidence is that of only one witness.

(Note - Paragraph (*d*) is for inclusion in the federal Act only.)

*Interpreters and Translators*

Evidence of mute

**126.** A witness who is unable to speak may give his evidence in any manner in which he can make it intelligible.

blir que l'accusé est coupable de l'infraction qui lui est imputée;

2° l'accusé a témoigné contre un coaccusé.

Exception

Par dérogation au premier alinéa, l'accusé peut être contre-interrogé sur le fait de savoir s'il a déjà fait l'objet d'une déclaration de culpabilité ou d'une condamnation pour parjure ou pour avoir donné des témoignages contradictoires en justice, ou sur le fait de savoir si dans les sept ans précédant la date de sa mise en accusation pour l'infraction qui lui est imputée il a fait l'objet d'une déclaration de culpabilité ou d'une condamnation pour une infraction comportant un élément de fraude.

Corroboration non requise

**125.** La corroboration d'un témoignage n'est pas requise.

Directive au jury

Aucune directive ne doit être donnée au jury quant au danger de condamner un accusé sur la seule foi d'un témoignage non corroboré.

Exception

Toutefois, le tribunal doit donner des directives au jury sur la prudence requise dans les cas suivants:

1° si un des témoins n'a pas prêté serment ni fait d'affirmation solennelle;

2° si le tribunal estime qu'un des témoins est susceptible d'être considéré complice de l'accusé;

3° si un des témoins a déjà été reconnu coupable de parjure;

4° dans une procédure pour parjure ou pour trahison ou haute trahison si la seule preuve incriminante provient d'un seul témoin;

5° dans tout autre cas où il estime ses directives nécessaires.

(Remarque: le paragraphe 4° apparaîtra uniquement dans la loi fédérale.)

## CHAPITRE VI

## INTERPRÈTES ET TRADUCTEURS

Témoignage d'un muet

**126.** Le témoin qui est incapable de parler peut rendre témoignage en la manière qui lui permet de se faire comprendre.

Provision of interpreter or translator

**127.** (1) Where it appears to the court that a witness does not understand or speak the language in which a proceeding is conducted or does not understand the language of any document to be used in the proceeding, an interpreter or a translator shall be provided.

Oath or solemn affirmation

(2) Where the court is satisfied as to the qualifications of a person who is to serve as an interpreter or a translator in a proceeding, that person shall take an oath or make a solemn affirmation to give a true interpretation or translation of the evidence.

Verifying translation prepared out of court

**128.** (1) Except where the parties agree otherwise, a translation prepared out of court shall not be received in evidence without calling the translator as a witness unless it is accompanied by the document translated and an affidavit or a statutory declaration of the translator setting out his qualifications as a translator and verifying that the translation is a true translation.

Copy to be provided

(2) Except with leave of the court, no translation shall be received in evidence under subsection (1) unless the proponent has provided each party adverse in interest with a copy of the translation, in a civil proceeding at least ten days, or in a criminal proceeding at least seven days, before the commencement of the hearing in which the translation is to be used.

Attendance of translator

**129.** (1) Where a party tenders in evidence a translation verified by affidavit or statutory declaration of the translator, any other party may require the attendance of the translator for the purposes of cross-examination.

Where translator not made available

(2) Where the translator is not made available for cross-examination, the court may refuse to admit the translation if it is satisfied that in the circumstances it would be practicable for the translator to attend.

Costs

(3) In a civil proceeding, where a translator has been required to give evidence under subsection (1) and the court is of the opinion that the evidence does not materially add to the information in the affidavit or statutory declaration of the translator or materially clarify the translation, the court may order

Interprète ou traducteur

**127.** Un interprète ou un traducteur doit être fourni au témoin qui ne parle pas ou ne comprend pas la langue dans laquelle se déroule la procédure ou la langue dans laquelle est rédigé un document qui doit être utilisé dans le cours de cette procédure.

Qualifications de l'interprète ou du traducteur

Un interprète ou un traducteur ne peut exercer ses fonctions dans le cours d'une procédure que si le tribunal considère qu'il a les qualifications requises.

Assermentation

Il doit en outre prêter serment ou faire l'affirmation solennelle de donner une interprétation ou une traduction fidèle.

Admissibilité de la traduction d'un document

**128.** Sauf si les parties y consentent, la traduction d'un document qui a été effectuée hors la présence du tribunal n'est admissible en preuve que si le traducteur est appelé à témoigner ou si cette traduction est accompagnée du document traduit et est certifiée conforme au moyen d'un affidavit ou d'une déclaration du traducteur mentionnant ses qualifications.

Copie à fournir

Sauf si le tribunal y consent, cette traduction n'est admissible en preuve que si celui qui la produit en a fourni une copie à la partie adverse au moins dix jours avant l'audition en matière civile ou au moins sept jours avant le début de l'audition en matière criminelle.

Présence du traducteur

**129.** Une partie autre que celle qui a produit la traduction d'un document effectuée hors la présence du tribunal peut requérir la présence du traducteur afin de le contre-interroger.

Absence de traducteur pour contre-interrogatoire

Au cas où le traducteur n'a pu, en raison de son absence, être contre-interrogé, le tribunal peut refuser de recevoir la traduction s'il constate que, eu égard aux circonstances, la présence du traducteur était possible.

Frais

En matière civile, le tribunal peut condamner la partie qui a requis la présence du traducteur à payer les frais raisonnables s'il estime que le contre-interrogatoire n'ajoute pas substantiellement aux renseignements contenus dans l'affidavit ou dans la déclaration du traducteur ou ne clarifie pas substantiellement sa traduction.

the party who required the attendance of the translator to pay, as costs, an amount the court considers appropriate.

### *Recorded Evidence*

#### *Interpretation*

Interpretation

**130.** In this section and sections 131 to 159,

"duplicate"

"duplicate" means a reproduction of the original from the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction or by other equivalent technique that accurately reproduces the original;

"original"

"original" means

(*a*) in relation to a record, the record itself or any facsimile intended by the author of the record to have the same effect,

(*b*) in relation to a photograph, the negative and any print made from it, and

(*c*) in relation to stored or processed data or information, any printout or intelligible output shown to reflect accurately the data or information;

"photograph"

"photograph" includes a still photograph, photographic film or plate, microphotographic film, photostatic negative, x-ray film and a motion picture.

#### *Best Evidence Rule*

Best evidence rule

**131.** Subject to this Act, the original is required in order to prove the contents of a record.

Admissibility of duplicates

**132.** A duplicate is admissible to the same extent as an original unless the court is satis-

# TITRE II

# PREUVE DOCUMENTAIRE

## CHAPITRE I

## INTERPRÉTATION

Interprétation

**130.** Dans le présent titre, on entend par «double» le double provenant de la même matrice ou d'une même impression que l'original, le double produit par photographie, y compris un agrandissement ou une miniaturisation, ou le double produit par enregistrement mécanique ou électronique, par reproduction chimique ou par un autre procédé équivalent propre à assurer une reproduction fidèle de l'original.

«original»

Dans le présent titre, «original» comprend

1° lorsqu'il concerne un document, toute reproduction destinée par l'auteur du document à produire le même effet que celui-ci;

2° lorsqu'il concerne une photographie, le négatif ou un tirage de celui-ci; ou

3° lorsqu'il concerne des données informatisées, tout document intelligible provenant de l'appareil où elles sont emmagasinées et les reflétant fidèlement.

«photographie»

Dans le présent titre, «photographie» comprend un film, une plaque photographique, une pellicule microphotographique, un cliché au photostat ou une radiographie.

## CHAPITRE II

## RÈGLE DE LA MEILLEURE PREUVE

Règle de la meilleure preuve

**131.** Sauf disposition contraire, celui qui entend prouver le contenu d'un document doit en produire l'original.

Admissibilité d'un double

**132.** Le double d'un document est admissible en preuve au même titre que l'original,

fied that there is reason to doubt the authenticity of the original or the accuracy of the duplicate.

Admissibility of copies

**133.** Where an admissible duplicate cannot be produced by the exercise of reasonable diligence, a copy is admissible in order to prove the contents of a record in the following cases:

(*a*) the original has been lost or destroyed;

(*b*) it is impossible, illegal or impracticable to produce the original;

(*c*) the original is in the possession or control of an adverse party who has neglected or refused to produce it or is in the possession or control of a third person who cannot be compelled to produce it;

(*d*) the original is a public record or is recorded or filed as required by law;

(*e*) the original is not closely related to a controlling issue; or

(*f*) the copy qualifies as a business record within the meaning of section 152.

Other evidence

**134.** Where an admissible copy cannot be produced by the exercise of reasonable diligence, other evidence may be given of the contents of a record.

Voluminous records

**135.** (1) The contents of a voluminous record that cannot conveniently be examined in court may be presented in the form of a chart, summary or other form that, to the satisfaction of the court, is a fair and accurate presentation of the contents.

Examination and copies

(2) The court may order the original or a duplicate of any record referred to in subsection (1) to be produced in court or made available for examination and copying by other parties at a reasonable time and place.

Written explanation

**136.** (1) Where a record is in a form that requires explanation, a written explanation by a qualified person accompanied by an affidavit setting forth his qualifications and attesting to the accuracy of the explanation is admissible in the same manner as the original.

sauf s'il y a des motifs de douter de l'authenticité de l'original ou de la fidélité du double.

Admissibilité d'une copie

**133.** La preuve du contenu d'un document dont le double admissible en preuve s'avère impossible à produire, malgré diligence raisonnable, peut se faire au moyen d'une copie:

1° si l'original a été détruit ou perdu;

2° si la production de l'original est illégale, impossible ou entraînerait de sérieux inconvénients;

3° si l'original est en possession ou sous le contrôle de la partie adverse qui néglige ou refuse de le produire ou est en possession ou sous le contrôle d'une tierce personne qui ne peut être contrainte de le produire;

4° si l'original est un document public ou est enregistré ou déposé en vertu d'une loi;

5° si l'original n'est pas étroitement relié à un point important du litige;

6° si la copie est un document d'affaires au sens de l'article 152.

Autre preuve

**134.** La preuve du contenu d'un document dont la copie admissible en preuve s'avère impossible à produire, malgré diligence raisonnable, peut se faire par tout autre moyen.

Documents volumineux

**135.** Le contenu d'un document qui est trop volumineux pour être commodément examiné devant le tribunal peut être présenté sous forme de diagramme ou de résumé ou sous toute autre forme constituant une présentation juste et précise du document.

Examen et copie

Le tribunal peut ordonner que l'original ou le double de ce document lui soit produit ou soit mis à la disposition des autres parties pour leur permettre d'en faire l'examen et d'en tirer copie en un lieu convenable et à un moment propice.

Explication écrite

**136.** Une explication écrite fournie par une personne compétente concernant un document requérant une telle explication est admissible en preuve au même titre que l'original si elle est accompagnée d'un affidavit mentionnant les qualifications de cette personne et attestant l'exactitude de l'explication.

Examination of person making explanation

(2) A party, with leave of the court, may examine or cross-examine a person who has given a written explanation under subsection (1) for the purpose of determining the admissibility of the explanation or the weight to be given to it.

Testimony, deposition or written admission

**137.** The contents of a record may be proved by the testimony, deposition or written admission of the party against whom they are offered without accounting for the non-production of the original or a duplicate or copy.

Condition of admissibility

**138.** The court shall not receive evidence of the contents of a record other than by way of the original or a duplicate where the unavailability of the original or a duplicate is attributable to the bad faith of the proponent.

*Notice*

Notice and production

**139.** (1) No record other than a public record to which section 146 applies and no exemplification or extract of such a record or affidavit relating to such a record shall be received in a party's evidence in chief unless the party, at least seven days before producing it, has given notice of his intention to produce it to each other party and has, within five days after receiving a notice for inspection given by any of those parties, produced it for inspection by the party who gave the notice.

Notice and production in civil proceeding

(2) In a civil proceeding, the provisions of subsection (1) apply only to a business record within the meaning of section 152 or a record to which section 82, 147, 149, 150 or 151 applies.

(Note - Each jurisdiction may consider whether to include reference to sections 147, 149, 150 or 151.)

Une partie peut, avec la permission du tribunal, interroger ou contre-interroger la personne qui a fourni cette explication aux fins d'en déterminer l'admissibilité ou le poids à lui accorder.

Interrogatoire de la personne qui fournit les explications

**137.** La preuve du contenu d'un document peut se faire par le témoignage ou l'aveu écrit de la partie contre laquelle ce document est invoqué sans avoir à justifier l'absence de l'original, d'un double ou d'une copie.

Témoignage ou aveu écrit

**138.** La preuve du contenu d'un document par un moyen autre que la production de l'original ou du double est inadmissible si la non-disponibilité de l'original ou du double est attribuable à la mauvaise foi de celui qui entend produire cette preuve.

Condition d'admissibilité

## CHAPITRE III

## AVIS DE PRODUCTION

**139.** La partie qui entend se servir, en preuve principale, d'un document autre qu'un document public visé à l'article 146, d'une ampliation ou d'un extrait d'un tel document ou d'un affidavit s'y rapportant doit donner à la partie adverse un avis d'au moins sept jours à cet effet.

Avis

Ce document doit en outre être produit, pour fins d'examen par une partie, dans les cinq jours de la réception d'un avis donné par cette dernière.

Production

En matière civile, le présent article ne s'applique qu'aux documents d'affaires visés à l'article 152 et aux documents visés aux articles 82, 147, 149, 150 ou 151.

Application en matière civile

(Remarque: Les renvois aux articles 147, 149, 150 et 151 relèvent de chacune des autorités législatives concernées.)

*Authentication*

Authentication

**140.** The proponent of a record has the burden of establishing its authenticity and that burden is discharged by evidence capable of supporting a finding that the record is what its proponent claims it to be.

Self-authentication

**141.** There is a presumption of authenticity in respect of the following:

(*a*) a record bearing a signature purporting to be an attestation or execution and bearing a seal purporting to be a seal mentioned in the *Seals Act* (Canada) or a seal of a province or political subdivision, department, ministry, officer or agency of Canada or a province;

(*b*) a record purporting to bear the signature in his official capacity of a person who is an officer or employee of any entity described in paragraph (*a*) that has no seal, if a public officer having a seal and official duties in the same political subdivision certifies under seal that the person has the official capacity claimed and that the signature is genuine;

(*c*) a copy of an official record or report or entry in it, or of a record authorized by law to be recorded or filed in a public office, including a compilation of data, purporting to be certified as correct by the custodian or other person authorized to make a certification;

(*d*) a publication purporting to be issued by any person, body or authority empowered to issue the publication by or pursuant to an enactment;

(*e*) a formally executed document purporting to be produced from proper custody and executed twenty years or more before the time it is tendered in evidence;

(*f*) any printed material purporting to be a newspaper or periodical;

(*g*) any inscription, sign, tag, label or other index of origin, ownership or control purporting to have been affixed in the course of business;

(*h*) a document purporting to be attested or certified under oath, solemn affirma-

## CHAPITRE IV

## PREUVE D'AUTHENTICITÉ

Preuve d'authenticité

**140.** La partie qui introduit un document en preuve doit en établir l'authenticité par une preuve permettant de conclure que ce document est bien ce que la partie qui l'introduit allègue qu'il est.

Présomption d'authenticité

**141.** Est présumé authentique:

1° le document affichant ce qui, selon toute apparence, est le sceau d'une province ou l'un des sceaux mentionnés dans la *Loi sur les sceaux*, le sceau d'une division politique, d'un ministère, d'un fonctionnaire ou d'un organisme du gouvernement du Canada ou d'une province et portant une signature apposée à titre de certification ou d'attestation de validité;

2° le document n'affichant aucun sceau mais portant une signature qui, selon toute apparence, est celle d'un fonctionnaire ou d'un employé d'une autorité visée au paragrahe 1°, si la signature ou la qualité de ce fonctionnaire ou de cet employé sont certifiées conformes sous le sceau d'un fonctionnaire investi d'une fonction officielle dans la division politique où ce document a été constitué;

3° la copie d'un registre, d'un rapport, d'une inscription qui s'y trouve ou d'un document dont le dépôt ou l'enregistrement dans un bureau public est autorisé par la loi, y compris une compilation de données informatisées, si cette copie est certifiée conforme par celui qui en a la garde ou par toute autre personne autorisée à fournir une certification;

4° la publication qui, selon toute apparence, est faite par toute personne ou organisme ayant le pouvoir de la faire en vertu d'une disposition législative ou réglementaire;

5° le document en bonne et due forme et qui, selon toute apparence, est sous bonne garde et date d'au moins vingt ans;

tion, affidavit or declaration administered, taken or received in (Canada) (Province) by a person authorized to do so;

(*i*) a document purporting to be executed in a state other than Canada by a person authorized to do so and purporting to bear the seal of the appropriate minister of that state or his lawful deputy or agent;

(*j*) a document purporting to be executed or attested in his official capacity by a person authorized to do so by the laws of a state other than Canada, accompanied by a certification under section 143.

Persons authorized to administer oaths, etc

**142.** For the purposes of paragraph 141(*h*), the following persons are authorized to administer, take or receive oaths, solemn affirmations, affidavits or declarations in (Canada) (Province):

(*a*) a judge or the registrar of the Supreme Court of Canada, Federal Court of Canada or a superior court of the province;

(*b*) a provincial court judge, provincial magistrate, police magistrate, stipendiary magistrate or justice of the peace;

(*c*) a commissioner for taking affidavits or notary public in the province; or

(*d*) a commissioned officer of the Canadian Forces on full-time service.

Certification

**143.** An official within the meaning of subsection 200(2) may certify the signature and official character of the person who executed or attested any document referred to in

6° l'imprimé qui, selon toute apparence, est un journal ou un périodique;

7° l'inscription qui, selon toute apparence, a été apposée dans le cours ordinaire des affaires et qui indique l'appartenance, la garde ou la provenance d'une chose;

8° le document qui, selon toute apparence, est attesté ou certifié conforme au moyen d'un serment, d'une affirmation solennelle, d'un affidavit ou d'une déclaration reçus au (Canada) (province) par une personne autorisée;

9° le document qui, selon toute apparence, a reçu une attestation de validité dans un État autre que le Canada par une personne autorisée à ce faire et qui porte le sceau du ministre concerné ou celui de son sous-ministre ou de son représentant autorisé;

10° le document qui, selon toute apparence, est attesté ou validé par une personne autorisée à ce faire par une loi d'un État autre que le Canada et qui est accompagné d'un certificat visé à l'article 143.

Personnes autorisées à recevoir un serment, etc

**142.** Aux fins du paragraphe 8° de l'article 141, sont autorisés à recevoir un serment, une affirmation solennelle, un affidavit ou une déclaration:

1° un juge de la Cour suprême du Canada, de la Cour fédérale du Canada ou d'une cour supérieure d'une province ou le registraire d'une telle cour;

2° un juge d'une cour provinciale, un magistrat provincial, un magistrat de police, un magistrat stipendiaire ou un juge de paix;

3° un commissaire à l'assermentation ou un notaire public dans une province;

4° une personne en service actif dans les forces armées canadiennes et détenant un brevet d'officier.

Certification

**143.** Un représentant officiel visé à l'article 200 peut certifier l'authenticité de la signature ou la qualité de la personne qui a validé ou attesté un document visé au para-

paragraph 141(*j*) or who certified the signature or official character of that person.

Dispensing with certification

**144.** If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of a document described in paragraph 141(*j*), the court may order that the document be treated as presumptively authentic without certification, or may permit the document to be evidenced by an attested summary with or without certification.

*Public Records*

Interpretation

**145.** In sections 146 to 148, "public record" means any Act, ordinance, regulation, order in council, proclamation, official gazette, journal, treaty or other record issued by or under duly constituted legislative or executive authority.

Proof of public records of Canada or United Kingdom

**146.** The existence and the whole or any part of the contents of a public record of Canada or a province or a public record of the United Kingdom that is applicable in Canada may be proved by

(*a*) the production of a copy of the *Canada Gazette* or official gazette of a province or of any Act of the Parliament of Canada or legislature of a province purporting to contain a copy of the public record, an extract from it or a notice of it, or

(*b*) the production of a copy of the public record or an extract from it purporting to be

(i) printed by, for or by the authority of the Queen's Printer or other official printer for Canada or a province,

(ii) certified as a true copy or extract by the minister or head or deputy minister or deputy head of any department or ministry of the appropriate government,

(iii) certified as a true copy or extract by the custodian of the original record or the public records from which the copy or extract purports to be made, or

graphe 10° de l'article 141 ou de la personne qui a certifié l'authenticité de la signature ou la qualité de cette personne.

Certification non nécessaire

**144.** Le tribunal peut ordonner qu'un document visé au paragraphe 10° de l'article 141 soit tenu pour authentique sans certification ou permettre la preuve de ce document par la production d'un simple sommaire attesté, avec ou sans certification, si toutes les parties ont eu l'occasion d'examiner l'authenticité et l'exactitude de ce document.

## CHAPITRE V

## DOCUMENTS PUBLICS

Interprétation

**145.** Dans le présent chapitre, on entend par «document public» toute loi, règlement, ordonnance, décret, arrêté, proclamation, gazette officielle, journal, traité ou document officiel émanant de l'autorité législative ou exécutive compétente.

Preuve d'un document public

**146.** La preuve de l'existence ou du contenu d'un document public du Canada ou d'une province ou d'un document public du Royaume-Uni applicable au Canada peut se faire:

1° par la production d'une copie de la *Gazette officielle du Canada* ou de la gazette officielle d'une province ou par le dépôt d'une copie d'une loi du Parlement du Canada ou de la législature d'une province qui, selon toute apparence, contient une copie ou extrait du document public ou un avis le concernant;

2° par la production d'une copie ou d'un extrait du document public si celui-ci est, selon toute apparence,

(i) imprimé par l'imprimeur de la Reine ou par tout autre imprimeur officiel du Canada ou d'une province ou imprimé pour le compte ou sous l'autorité de l'un d'eux;

(ii) certifié conforme par le ministre, le sous-ministre, le chef ou le sous-chef d'un ministère du gouvernement concerné;

(iv) an exemplification of the public record under the Great Seal or other official seal of the appropriate government.

Proof of foreign public records

**147.** The existence and the whole or any part of the contents of a public record of any state or political division of a state not provided for under section 146 may be proved by the production of a copy of the public record or an extract from it purporting to be

(*a*) printed by, for or by the authority of the legislature, government, government printer or other official printer of that state or political division;

(*b*) certified as a true copy or extract by the minister or head or deputy minister or deputy head of any department or ministry of government of that state or political division;

(*c*) certified as a true copy or extract by the custodian of the original record or the public records from which the copy or extract purports to be made; or

(*d*) an exemplification of the public record under the Great Seal or other official seal of that state or political division.

Matters not subject to proof

**148.** Where any copy or extract of a public record is produced under section 146 or 147, it is not necessary to prove the signature or official character of the person by whom it purports to be certified or the authority or status of the legislature, government, printer or custodian by whom it purports to be authorized, made, printed or kept.

*Court Records*

Evidence of court proceeding or record

**149.** (1) Evidence of any proceeding or record of, in or before any court in or out of Canada or before any coroner in any prov-

(iii) certifié conforme par le dépositaire de l'original du document public dont cette copie ou cet extrait a été tiré;

(iv) une ampliation sous le grand sceau ou sous tout autre sceau officiel du gouvernement concerné.

Preuve de documents publics étrangers

**147.** La preuve de l'existence ou du contenu d'un document public d'un État autre qu'un État visé à l'article 146 ou d'un document public d'une division politique d'un tel État peut se faire par la production d'une copie ou d'un extrait de ce document si cette copie ou cet extrait est, selon toute apparence:

1° imprimé par la législature, le gouvernement, un imprimeur du gouvernement ou par tout autre imprimeur officiel de cet État ou de cette division politique ou imprimé pour le compte ou sous l'autorité de l'un d'eux;

2° certifié conforme par le ministre, le sous-ministre, le chef ou le sous-chef d'un ministère du gouvernement de cet État ou de cette division politique;

3° certifié conforme par le dépositaire de l'original du document public dont cette copie ou cet extrait a été tiré;

4° une ampliation sous le grand sceau ou sous tout autre sceau officiel de cet État ou de cette division politique.

Éléments ne nécessitant aucune preuve

**148.** Il n'est pas nécessaire de faire la preuve de la signature ou de la qualité de la personne qui, selon toute apparence, a certifié conforme la copie ou l'extrait d'une pièce publique présentée en preuve suivant le présent chapitre ou de l'autorité de la législature, du gouvernement, de l'imprimeur ou du dépositaire par qui ce document a, selon toute apparence, été autorisé, constitué, imprimé ou détenu.

## CHAPITRE VI

## PIÈCES DE PROCÉDURE

Preuve de pièces de procédure

**149.** La preuve d'une pièce de procédure qui est devant un tribunal canadien ou étranger ou devant un coroner d'une province peut

ince of Canada may be given by the production of an exemplification or a certified copy of the proceeding or record purporting to be under the seal of the court or under the hand and seal of the presiding officer of the court or coroner, as the case may be, without proof of the authenticity of the seal or of the signature or official character of the officer or coroner.

Where no seal

(2) A certified copy of a proceeding or record may be produced under subsection (1) without a seal where the court or person whose seal would otherwise be required certifies that there is no seal.

*Other Public Records*

By-laws, regulations, rules, etc

**150.** (1) Where the original of any by-law, regulation, rule, proceeding or other record referred to in subsection (2) is admissible, a copy or an extract or exemplification of the original, purporting to be certified under the hand of the appropriate presiding officer, clerk or secretary and under the appropriate seal, is admissible without any proof of the authenticity of the seal or of the signature or official character of the person purporting to have made the certification.

Application

(2) Subsection (1) applies in respect of any by-law, regulation, rule, proceeding or other record of

(*a*) a municipal or other corporation created by charter or by or under an enactment of Canada or a province; or

(*b*) a tribunal, body or person having power to compel the production of evidence.

Where no seal

(3) A copy or an extract of an original is admissible under subsection (1) without a seal where the tribunal, body or person whose seal would otherwise be required certifies that there is no seal.

Notarial acts in Quebec

**151.** A record, purporting to be a copy of any notarial act or instrument certified by a Quebec notary as a true copy of an original in his possession, is admissible and has the

se faire par le dépôt d'une ampliation ou d'une copie certifiée conforme si celle-ci, selon toute apparence, porte le sceau du tribunal ou la signature et le sceau du président de ce tribunal ou du coroner.

Preuve non requise

Il n'est pas nécessaire de faire la preuve de la qualité du signataire ou de l'authenticité du sceau ou de la signature.

Absence de sceau

L'apposition d'un sceau n'est pas requise à l'égard d'une copie certifiée conforme lorsque le tribunal ou la personne qui doit l'apposer certifie ne pas avoir de sceau.

## CHAPITRE VII

## DOCUMENTS DIVERS OU ACTES NOTARIÉS

Règlements, etc de corporations

**150.** Une copie, une ampliation ou un extrait d'un document, d'une procédure ou d'un règlement provenant d'une municipalité ou de toute autre corporation créée par une charte ou par une loi fédérale ou provinciale ou provenant d'un tribunal, organisme ou personne ayant le pouvoir d'ordonner la production d'une preuve est admissible en preuve au même titre que l'original si cette copie, cette ampliation ou cet extrait est, selon toute apparence, signé par le président, le greffier ou le secrétaire de l'entité dont il provient et, dans le cas d'une corporation, certifié sous le sceau de la corporation.

Preuve non requise

Il n'est pas nécessaire de faire la preuve de la qualité du signataire ou de l'authenticité du sceau ou de la signature.

Absence de sceau

L'apposition du sceau n'est pas requise à l'égard d'une copie ou d'un extrait lorsque celui qui doit l'apposer certifie ne pas avoir de sceau.

Actes notariés

**151.** Est admissible en preuve au même titre que l'original une copie qui, selon toute apparence, est certifiée par un notaire du Québec comme étant conforme d'un acte

same effect as the original would have if produced and proved, but that evidence may be rebutted by evidence impugning the accuracy of the copy or the authenticity of the original or its validity as a notarial act under Quebec law.

*Business and Government Records*

Interpretation

**152.** In this section and sections 153 to 158,

"business"

"business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government or any department, ministry, branch, board, commission or agency of any government or any court or other tribunal or any other body or authority performing a function of government;

"business record"

"business record" means a record made in the usual and ordinary course of business;

"financial institution"

"financial institution" means the Bank of Canada, the Federal Business Development Bank and any institution incorporated or established in Canada that accepts deposits of money from its members or the public and includes any branch, agency or office of any such Bank or institution.

Business records

**153.** (1) A business record is admissible whether or not any statement contained in it is hearsay or a statement of opinion, subject, in the case of opinion, to proof that the opinion was given in the usual and ordinary course of business.

Parts of record

(2) Where part of a business record is produced in a proceeding, the court, after examining the record, may direct that other parts of it be produced.

notarié ou instrumentaire qui est en sa possession.

Contestation de la copie ou de l'original

Toutefois, est admissible une preuve établissant que cette copie n'est pas une copie conforme sous un rapport essentiel ou que l'original ne peut être considéré comme un acte notarié authentique en vertu du droit du Québec.

## CHAPITRE VIII

## DOCUMENTS D'AFFAIRES OU DOCUMENTS GOUVERNEMENTAUX

Interprétation

**152.** Dans le présent chapitre, on entend par:

«affaires»

«affaires» tout métier, profession ou entreprise exercés ou exploités au Canada ou à l'étranger à des fins lucratives ou non, y compris une activité exercée par un tribunal, un gouvernement, un ministère, une direction, un conseil ou un organisme administratif ou par toute autre autorité exerçant une fonction gouvernementale;

«document d'affaires»

«document d'affaires» un document dressé dans le cours normal des affaires;

«institution financière»

«institution financière» la Banque du Canada, la Banque fédérale de développement ou toute institution ou corporation au Canada qui accepte des dépôts d'argent de ses membres ou du public, y compris une succursale, une agence ou un bureau d'une telle banque ou institution.

Admissibilité d'un document d'affaires

**153.** Un document d'affaires est admissible en preuve même s'il contient du ouï-dire ou exprime une opinion.

Document exprimant une opinion

Toutefois, dans le cas où il exprime une opinion, la preuve doit être faite que cette opinion a été donnée dans le cours normal des affaires.

Parties d'un document

Le tribunal peut, après avoir procédé à l'examen d'un document d'affaires dont une partie seulement a été produite en preuve, ordonner la production de toute autre partie de ce document.

Inference from absence of information

**154.** (1) Where a business record does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in the record if the matter occurred or existed, the court may admit the record in evidence for the purpose of establishing the absence of that information and the trier of fact may draw the inference that the matter did not occur or exist.

Financial institutions and government records

(2) In the case of a business record kept by a financial institution or by any government or any department, branch, board, commission or agency of any government under the authority of an enactment of the (Parliament of Canada) (Legislature or National Assembly), an affidavit of the custodian of the record or other qualified witness stating that after a careful search he is unable to locate the information is admissible and, in the absence of evidence to the contrary, is proof that the matter referred to in subsection (1) did not occur or exist.

Examination of record

**155.** (1) For the purpose of determining whether a business record may be admitted in evidence under this Act, or for the purpose of determining the probative value of a business record admitted in evidence under this Act, the court may examine the business record, receive evidence orally or by affidavit, including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

Evidence respecting record

(2) Where evidence respecting the authenticity or accuracy of a business record is to be given, the court shall require the evidence of the custodian of the record or other qualified witness to be given orally or by affidavit.

Affidavit evidence

(3) Where evidence under subsection (2) is offered by affidavit, it is not necessary to prove the signature or official character of the affiant if his official character purports to be set out in the body of the affidavit.

Examination on record

**156.** Any person who has or may reasonably be expected to have knowledge of the making or contents of any business record or duplicate or copy of it produced or received

Absence de renseignement

**154.** Le tribunal peut, aux fins d'établir l'absence du renseignement, admettre en preuve tout document d'affaires qui ne contient aucun renseignement sur une chose dont on peut raisonnablement s'attendre à trouver la survenance ou l'existence consignée dans ce document le juge des faits peut en conclure que cette chose ne s'est pas produite ou n'a pas existé.

Document gouvernemental ou d'une institution financière

Dans le cas d'un document d'affaires détenu par une institution financière, un gouvernement, un ministère ou un organisme d'un gouvernement en vertu d'une loi du (Parlement du Canada) (Législature ou Assemblée nationale) ou d'un règlement adopté sous son autorité, un affidavit du dépositaire de ce document ou de toute autre personne compétente déclarant qu'après une recherche sérieuse l'information s'avère introuvable est admissible en preuve; en l'absence de preuve contraire, cet affidavit fait preuve que la chose en question n'existe pas ou que l'événement en question n'est jamais survenu.

Examen d'un document d'affaires

**155.** Le tribunal peut, afin de décider de l'admissibilité ou de la force probante d'un document d'affaires, procéder à l'examen de ce document ou admettre une preuve verbale ou un affidavit, y compris une preuve relative aux circonstances dans lesquelles l'information contenue dans ce document a été emmagasinée ou aux circonstances de l'inscription, de l'enregistrement ou de la reproduction de cette information et tirer toute conclusion raisonnable de sa forme ou de son contenu.

Preuve d'un document d'affaires

Le tribunal doit, lorsqu'une partie fait la preuve de l'authenticité ou de l'exactitude d'un document d'affaires, requérir un affidavit ou le témoignage du dépositaire de ce document ou de toute autre personne compétente.

Preuve non requise

Il n'est pas nécessaire de faire la preuve de la signature ou de la qualité du signataire de l'affidavit si cette qualité y est énoncée.

Interrogatoire concernant un document d'affaires

**156.** Une partie peut, avec la permission du tribunal, interroger ou contre-interroger toute personne qui a eu connaissance ou qui est susceptible d'avoir eu connaissance de

in evidence may, with leave of the court, be examined or cross-examined by any party.

Business records of financial institutions

**157.** (1) A business record of a financial institution is, in the absence of evidence to the contrary, proof of any matter, transaction or account contained in the record.

Compellability

(2) Unless the court for special cause orders otherwise, a financial institution or its officer is not compellable, in any proceeding to which the institution is not a party, to produce any of its business records or to appear as a witness concerning any matter, transaction or account contained in its business records.

Inspection and copies

**158.** (1) On application by a party to a proceeding, the court may allow the party to examine and copy any business record of a financial institution for the purposes of the proceeding.

Notice

(2) Notice of an application under subsection (1) shall be given to any person to whom the business record to be examined or copied relates at least two days before the hearing of the application and, where the court is satisfied that personal notice is not possible, the notice may be given by addressing it to the appropriate financial institution.

*Probative Force of Records*

Where probative force not indicated

**159.** Where an enactment other than this Act provides that a record is evidence of a fact without anything in the context to indicate the probative force of that evidence, the record is proof of the fact in the absence of evidence to the contrary in any proceeding to which this Act applies.

(Note - Each jurisdiction may consider whether to include this provision.)

l'élaboration ou du contenu de l'original, d'un double ou d'une copie d'un document d'affaires produit en preuve.

Document d'affaires d'une institution financière

**157.** Un document d'affaires d'une institution financière fait preuve, en l'absence de preuve contraire, de tout élément, transaction ou compte qui y est inscrit.

Contraignabilité

Sauf si le tribunal l'ordonne autrement pour un motif sérieux, une institution financière — ou son représentant — ne peut être contrainte de produire, dans une instance à laquelle elle n'est pas partie, un de ses documents d'affaires ni être contrainte de rendre témoignage relativement à un élément contenu dans ce document.

Examen et copies

**158.** Le tribunal peut, sur demande, permettre à une partie de procéder à l'examen d'un document d'affaires d'une institution financière ou lui permettre d'en prendre copie, aux fins de la procédure.

Avis

La partie qui entend présenter une demande suivant le présent article doit donner un avis d'au moins deux jours à la personne que ce document concerne.

Impossibilité d'aviser personnellement

Le tribunal peut permettre que l'avis soit donné à l'institution financière concernée s'il estime qu'il est impossible d'aviser personnellement la personne que le document concerne.

## CHAPITRE IX

## FORCE PROBANTE DES DOCUMENTS

Absence d'indication quant à la force probante

**159.** Un document qui, en vertu d'une disposition législative ou réglementaire autre que la présente loi fait preuve de l'existence d'un fait, établit ce fait en l'absence de preuve contraire lorsque rien dans le contexte n'indique la force probante de cette preuve.

(Remarque: L'inclusion de l'article 159 relève de chacune des autorités législatives concernées.)

*Real Evidence*

General rule

**160.** (1) The trier of fact may draw all reasonable inferences from real evidence.

Interpretation

(2) In this section, "real evidence" means evidence that conveys a firsthand sense impression to the trier of fact, such as a physical object or a site, the demeanour or physical condition of a person or a visual or auditory presentation, but does not include testimony, admissible hearsay or a record offered in lieu of testimony.

## PART V

## STATUTORY PRIVILEGES

*Protection Against Use of Previous Testimony*

No right to withhold answer

**161.** (1) A witness shall not be excused from answering a question on the ground that the answer may tend to criminate him or establish his liability to a civil proceeding at the instance of the Crown or any person.

Protection against use of answer

(2) If at the time a witness is asked a question, he claims protection under this Act or an Act of the (Legislature or National Assembly) (Parliament of Canada) in any proceeding before a court, tribunal, body or person having power to compel his testimony, the answer shall not be receivable in evidence or used against him for any purpose in any subsequent proceeding, other than a subsequent proceeding in the same cause or a prosecution for perjury, or giving contradictory evidence, in that cause or in any other proceeding.

Corporations not protected

**162.** (1) The protection provided by subsection 161(2) applies only to natural persons and does not prevent the reception or use of evidence against a corporation.

Single claim sufficient

(2) Where a witness claims the protection provided by subsection 161(2) with respect to any answer, that protection applies with

## TITRE III

## PREUVE MATÉRIELLE

Règle générale

**160.** Le juge des faits peut tirer d'une preuve matérielle toute conclusion qu'il juge raisonnable.

Interprétation

Est une preuve matérielle celle qui permet au juge des faits de faire ses propres constatations, tels un objet, un site, la conduite d'une personne ou son état physique ou une manifestation visuelle ou auditive; ne constitue cependant pas une preuve matérielle du ouï-dire, un témoignage ou un document présenté pour tenir lieu de témoignage.

# LIVRE V

# PROTECTION DES TÉMOINS ET DROIT AU SECRET

## TITRE I

## PROTECTION EN MATIÈRE DE TÉMOIGNAGES ANTÉRIEURS

Aucune exemption de répondre à une question

**161.** Un témoin n'est pas exempté de répondre à une question pour le seul motif que sa réponse pourrait tendre à l'incriminer ou à établir sa responsabilité dans une procédure civile.

Protection

Toutefois, s'il demande la protection que lui offre la présente loi ou une autre loi (provinciale) (fédérale) au moment où il est contraint de répondre à cette question par un tribunal, une personne ou un organisme ayant le pouvoir de le faire, la réponse donnée par le témoin est inadmissible en preuve contre lui dans une procédure subséquente, sauf aux fins d'une poursuite ou d'un incident dans la même cause, ou pour parjure ou témoignages contradictoires dans la même cause ou dans toute autre cause.

Personnes physiques seulement

**162.** Seule une personne physique peut demander la protection qu'offre l'article 161.

Une seule demande

Une demande de protection à l'égard d'une question vaut pour toute autre question posée dans le cours de l'audition.

respect to all subsequent answers of that witness without the necessity of making a further claim for protection.

Exception for previous inconsistent statement

**163.** Notwithstanding section 161, a statement made previously by a witness that is relevant to a fact in issue and is inconsistent in a material particular with his present testimony may be received in evidence for the sole purpose of challenging his credibility.

Privilege respecting records abrogated

**164.** Subject to any other Act, any privilege whereby a witness may refuse to produce a record on grounds that its production would tend to criminate him or establish his liability to a civil proceeding at the instance of the Crown or any person is abrogated.

*Government Privilege*

Interpretation

**165.** In this section and sections 166 to 175,

"Attorney General"

"Attorney General", in relation to a claim of government privilege by the Government of Canada, means the Attorney General of Canada, and in relation to a claim of government privilege by the government of a province, means the Attorney General of the province and includes the lawful deputy of either Attorney General if that deputy is expressly authorized to act in respect of that claim of government privilege;

"Cabinet"

"Cabinet" means the members of the Queen's Privy Council for Canada or the Privy Council or Executive Council of a province, or the members of a committee of that Council, who are Ministers of the Crown at the material time;

"confidence of Cabinet"

"confidence of Cabinet" means a Cabinet decision, a discussion in Cabinet, a recommendation to Cabinet by a member of Cabinet and material prepared exclusively for the purpose of discussion in Cabinet;

"court"

"court" means any court, tribunal, body or person having power to compel the production of evidence;

"government privilege"

"government privilege" means the right under this Act of the Government of

Exception concernant une déclaration antérieure incompatible

**163.** Par dérogation à l'article 161, la déclaration antérieure d'un témoin sur un fait en litige, qui est incompatible sur un point important avec le témoignage qu'il rend, est admissible en preuve en vue uniquement d'attaquer la crédibilité du témoin.

Abolition du droit de refuser de produire un document

**164.** Sous réserve de toute autre loi, le droit d'un témoin de refuser de produire un document pour le motif que la production de ce document pourrait tendre à l'incriminer ou à établir sa responsabilité dans une procédure civile est aboli.

## TITRE II

## SECRET GOUVERNEMENTAL

Interprétation

**165.** Dans le présent titre, on entend par:

«cabinet»

«cabinet» l'ensemble des ministres membres du Conseil privé de la Reine pour le Canada ou l'ensemble des ministres membres du Conseil privé ou du Conseil exécutif d'une province ou d'un comité ou d'une commission de l'un de ces conseils;

«droit au secret gouvernemental»

«droit au secret gouvernemental» le droit du gouvernement de refuser, en vertu de la présente loi, qu'une information soit dévoilée, pour des motifs d'intérêts supérieurs ou pour tout autre motif d'intérêt public;

«motifs d'intérêts supérieurs»

«motifs d'intérêts supérieurs» tout motif de relations internationales, de sécurité ou de défense nationale ou tout motif relevant d'un secret du cabinet ou, sous réserve de l'article 119, une communication confidentielle faite par une personne chargée d'appliquer la loi ou faite à cette personne relativement à une investigation ou à une poursuite concernant une infraction;

«procureur général»

«procureur général» le procureur général du Canada ou d'une province, suivant que la demande de reconnaissance du droit au secret est de la part du gouvernement du Canada ou du gouvernement d'une province, ou le sous-procureur général s'il est expressément autorisé à faire valoir cette demande;

Canada or the government of a province to refuse production or disclosure of information on grounds of high policy or any other ground of public interest;

"high policy" "high policy", in relation to a claim of government privilege, means any of the following grounds:

(*a*) international relations,

(*b*) national defence or security,

(*c*) a confidence of Cabinet, or

(*d*) subject to section 119, a confidential communication, made by or to a law enforcement officer or authority, relating to the investigation or prosecution of an offence.

Notice to Attorney General

**166.** (1) Where a claim of government privilege arises in a proceeding in which the Attorney General is not a party, he shall be given notice as soon as possible by the party seeking to establish the claim or, in default of that notice, by the court.

Notice by court

(2) Where a claim of government privilege has not arisen in a proceeding but there is a real possibility that production or disclosure of information in that proceeding would be contrary to the public interest, the court, in the absence of notice by a party, shall give notice to the appropriate Attorney General in order that he may determine whether to claim government privilege.

Claiming privilege

**167.** (1) To claim government privilege, the Attorney General shall certify to the court, orally or in writing, that he has personally examined or heard the information in respect of which the privilege is claimed and has concluded that production or disclosure of the information would be contrary to the public interest on grounds of high policy or any other ground of public interest.

Matters to be specified in certification

(2) Where the Attorney General claims government privilege

(*a*) on grounds of high policy, he shall specify those grounds; or

(*b*) on grounds other than high policy, he shall specify the public interest that he considers would be harmed by production or disclosure of the information in question

«secret du cabinet» une décision ou une discussion du cabinet, une recommandation faite au cabinet par l'un de ses membres ou une documentation préparée exclusivement aux fins de discussions aux réunions du cabinet; «secret du cabinet»

«tribunal» tout tribunal, organisme ou personne qui peut ordonner la production d'une preuve. «tribunal»

**166.** La partie qui entend faire valoir le droit au secret gouvernemental doit en aviser le procureur général si ce dernier n'est pas partie à l'instance. Avis au procureur général

Le tribunal doit suppléer d'office au défaut de donner cet avis. Défaut de donner l'avis

À moins qu'une partie ne l'ait déjà fait, le tribunal doit, lorsqu'il a des motifs sérieux de croire que la production ou la divulgation d'une information serait contraire à l'intérêt public, en aviser le procureur général. Avis par le tribunal

**167.** Le procureur général qui entend invoquer le droit au secret gouvernemental doit présenter au tribunal une déclaration verbale ou écrite certifiant qu'il a personnellement procédé à l'examen de l'information visée par la demande et qu'à son avis la divulgation de cette information serait contraire à l'intérêt public pour des motifs d'intérêts supérieurs ou pour tout autre motif d'intérêt public. Demande de reconnaissance du droit au secret

La déclaration doit, si elle se fonde sur des motifs d'intérêts supérieurs, mentionner ces motifs ou, si elle se fonde sur des motifs autres que des motifs d'intérêts supérieurs, mentionner l'intérêt public qui souffrirait préjudice par la divulgation de l'information en question et comment cet intérêt serait affecté. Éléments à préciser dans la déclaration

and the manner in which that harm would occur.

Decision of court

**168.** (1) On a claim of government privilege the court, without examining, hearing or inquiring into the information in question, shall grant the claim

(*a*) where it is based on grounds of high policy, if the Attorney General has complied with section 167; or

(*b*) where it is based on grounds other than high policy, if the court is satisfied that production or disclosure of the information would be contrary to the public interest.

Opportunity to certify further particulars

(2) Where the court is not satisfied under paragraph (1)(*b*) that a claim of government privilege should be granted, it shall give the Attorney General a reasonable opportunity to certify further particulars in support of the claim.

Where further particulars not certified

**169.** (1) Where the Attorney General fails to certify further particulars pursuant to subsection 168(2), the court shall order that the information in question be produced or disclosed to it for its consideration in private.

Where further particulars certified

(2) Where the Attorney General certifies further particulars pursuant to subsection 168(2), the court, if satisfied that production or disclosure of the information in question would be contrary to the public interest, shall grant the claim of government privilege, and if not so satisfied shall order that the information be produced or disclosed to it for its consideration in private.

Consideration in private

(3) Where, after consideration in private under subsection (1) or (2), the court concludes that production or disclosure of the information in question would be contrary to the public interest, it shall grant the claim of government privilege and, if it concludes otherwise, it shall reject the claim.

Factors to be considered by court

**170.** In determining whether the production or disclosure of any information would be contrary to the public interest, the court shall consider the following factors:

Décision du tribunal

**168.** Le tribunal à qui une demande de reconnaissance du droit au secret a été adressée doit rendre sa décision sans procéder à l'examen de l'information en question.

Reconnaissance du droit au secret

Le tribunal doit, dans le cas d'une demande fondée sur des motifs d'intérêts publics, faire droit à la demande s'il considère qu'il serait contraire à l'intérêt public de dévoiler l'information concernée ou, dans le cas d'une demande fondée sur des motifs d'intérêts supérieurs, accueillir la demande si le procureur général a fait une déclaration en la manière prévue à l'article 167.

Présentation d'une nouvelle déclaration

Dans le cas d'une demande fondée sur des motifs autres que des motifs d'intérêts supérieurs, le tribunal doit, lorsqu'il estime que la déclaration du procureur général est insuffisante pour lui permettre de reconnaître le droit au secret, donner à ce dernier l'occasion de présenter une nouvelle déclaration.

Absence de nouvelle déclaration

**169.** Le tribunal doit ordonner la production de l'information pour qu'il l'examine en privé si le procureur général ne présente pas de nouvelle déclaration après que le tribunal lui en ait fourni l'occasion.

Décision ou examen en privé

Le tribunal doit accueillir la demande s'il estime que la nouvelle déclaration est suffisante pour lui permettre de décider que la divulgation de l'information concernée serait contraire à l'intérêt public ou, dans le cas contraire, ordonner la production de l'information pour qu'il l'examine en privé.

Décision

Le tribunal doit, après avoir examiné l'information en privé, accueillir ou rejeter la demande selon qu'il estime ou non que la divulgation de l'information serait contraire à l'intérêt public.

Éléments à considérer

**170.** Le tribunal doit, avant de décider si la divulgation d'une information serait contraire à l'intérêt public, tenir compte des éléments suivants:

(*a*) the reasons given for not disclosing the information in respect of which the privilege is claimed;

(*b*) the nature, age and currency of the information;

(*c*) the nature of the proceeding;

(*d*) the necessity for and relevance of the information;

(*e*) the extent to which and persons by whom the information has been circulated within and outside the government concerned; and

(*f*) the harm to the public interest and to the party seeking production or disclosure of the information.

Orders of court

**171.** Where the court grants or rejects a claim of government privilege, it shall make an order, subject to any conditions it considers appropriate, prohibiting or requiring production or disclosure of the information in question.

Further or other order

**172.** Where the court makes an order granting a claim of government privilege and it considers that a party other than the Attorney General who made the claim has been or may be deprived of material evidence by reason of the order, it may make any further or other order it considers to be required in the interests of justice.

No secondary or other evidence

**173.** Where the court makes an order prohibiting production or disclosure of information in any proceeding on grounds of government privilege, no secondary or other evidence of that information is admissible.

Claims before lower courts

**174.** Where government privilege is claimed before a court other than a superior court, the Attorney General or any party to the proceeding may, at any time before the claim is determined, require the court to refer the claim for determination in accordance with sections 168 to 173 to

(*a*) the trial division or trial court of the superior court of the province within which

1° les motifs justifiant la non-divulgation de l'information faisant l'objet de la demande;

2° la nature, l'âge et le caractère d'actualité de l'information;

3° la nature du litige au cours de laquelle la demande est présentée;

4° la nécessité et la pertinence de l'information à l'égard de cette procédure;

5° dans quelle mesure l'information a circulé et les personnes qui en ont pris connaissance à l'intérieur et à l'extérieur du gouvernement;

6° le préjudice que causerait à l'intérêt public et à la personne recherchant la production ou la divulgation de l'information, la réception ou le rejet de la demande.

Ordonnance

**171.** Le tribunal doit, selon qu'il accueille ou rejette la demande du procureur général, rendre une ordonnance interdisant la production ou la divulgation de l'information ou rendre une ordonnance de production de cette information aux conditions qu'il détermine.

Autre ordonnance

**172.** Le tribunal qui rend une ordonnnace interdisant la production ou la divulgation d'une information doit, s'il considère que cette ordonnance est susceptible d'empêcher une partie, autre que le procureur général ayant présenté la demande, de présenter une preuve importante, rendre toute autre ordonnance requise dans l'intérêt de la justice.

Aucune preuve secondaire

**173.** Une ordonnance interdisant la production ou la divulgation d'une information vaut pour toute preuve secondaire qui pourrait être présentée relativement à cette information.

Évocation

**174.** Le procureur général ou toute partie au litige peut, si la demande de reconnaissance du droit au secret a été présentée à un tribunal autre qu'une cour supérieure, demander d'évoquer cette demande à la Cour supérieure ou, si le tribunal auquel la demande a été adressée n'a pas été créé en vertu d'une loi provinciale, à la Cour fédérale.

the court before which the claim was first made exercises its jurisdiction; or

(*b*) the Federal Court - Trial Division, where the court before which the claim was first made is not a court established by or under an enactment of a province.

(Note - Each jurisdiction may specify the superior courts included for the purposes of this section.)

Appeals

**175.** (1) An appeal lies from an order under section 171 or 172 to

(*a*) the court of appeal of a province, from an order of a trial division or trial court of a superior court of a province; or

(*b*) the Federal Court of Appeal, from an order of the Federal Court - Trial Division.

Time limit for appeals

(2) An appeal under subsection (1) shall be taken within ten days after the date of the order appealed from or within such further time as the court before which the appeal is taken considers appropriate in the circumstances.

Appeals to Supreme Court of Canada

(3) Notwithstanding any other Act,

(*a*) an application for leave to appeal to the Supreme Court of Canada from a judgment pursuant to an appeal under subsection (1) shall be made within ten days after the date of the judgment or within such further time as the court to which the application is made considers appropriate in the circumstances; and

(*b*) where leave to appeal to the Supreme Court of Canada is granted, the appeal shall be taken in the manner set out in subsection 66(1) of the *Supreme Court Act* but within the time specified by the court that grants leave to appeal.

(Note - Paragraphs 174(*b*) and 175(1)(*b*) are for inclusion in the federal Act only.)

*Privilege for Psychiatric Assessment*

Psychiatric assessment

**176.** Any statement communicated by an accused to a qualified medical practitioner

Le tribunal devant lequel la demande a été évoquée rend sa décision conformément au présent titre.

Dispositions applicables

(Remarque: Aux fins de cet article, la désignation des cours supérieures relève de chaque autorité législative.)

**175.** Une décision rendue suivant les articles 171 ou 172 est susceptible d'appel à la Cour d'appel de la province ou, si elle a été rendue par la Cour fédérale, à la Cour fédérale d'appel.

Appel

Cet appel doit être interjeté dans les dix jours de la date de la décision ou dans tout autre délai fixé par le tribunal d'appel.

Délai d'appel

Toute demande de permission d'appel à la Cour suprême du Canada doit être présentée dans les dix jours de la date de la décision ou dans le délai fixé par la cour à laquelle la demande est adressée.

Modalités de l'appel à la Cour suprême du Canada

L'appel doit être interjeté en la manière prévue au paragraphe 66(1) de la *Loi sur la Cour suprême* et dans le délai fixé par la cour à laquelle la demande de permission d'appel est adressée.

Appel

(Remarque: La mention de la Cour fédérale dans les articles 174 et 175 apparaîtra uniquement dans la loi fédérale.)

## TITRE III

## SECRET RELATIF À UN EXAMEN PSYCHIATRIQUE

**176.** Une déclaration faite par un accusé à un médecin qualifié dans le cadre d'un

Examen psychiatrique

during the course of a court-ordered psychiatric observation, examination or assessment is privileged and, unless the accused has first put his mental condition in issue, no evidence of or relating to that statement is admissible against the accused in any proceeding before a court, tribunal, body or person having power to compel the production of evidence, other than a hearing to determine the fitness of the accused to stand trial or conduct his defence.

*Privileges Relating to Marriage*

Interpretation

**177.** In sections 178 to 184, "spouse" means spouse at the time a statement was made.

Privilege

**178.** In a proceeding before a court, tribunal, body or person having power to compel the production of evidence, a person is entitled to claim a privilege against production or disclosure by himself or his spouse of a statement made in confidence by him to his spouse.

Duration

**179.** The privilege under section 178 subsists for the lifetime of the declarant, notwithstanding any subsequent dissolution of the marriage.

Presumption

**180.** Unless the court is satisfied otherwise, a statement made by a declarant to his spouse shall be presumed to have been made in confidence.

Who may make claim

**181.** (1) A claim under section 178 may be made by the declarant or his spouse on his behalf, whether or not the declarant is a party to the proceeding in which the claim is made.

Presumed authority of spouse

(2) Unless the court is satisfied otherwise, the spouse of the declarant shall be presumed to be authorized to make a claim under section 178 on behalf of the declarant.

Exception in civil proceedings

**182.** (1) No claim under section 178 may be made in a civil proceeding between the declarant and his spouse.

Further exception

(2) A claim under section 178 may be denied in a civil proceeding in which the

examen psychiatrique ordonné par le tribunal est inadmissible en preuve dans toute procédure devant un tribunal, organisme ou personne qui peut ordonner la production d'une preuve, sauf si l'accusé a d'abord mis en cause son état mental.

Admissibilité en preuve

Toutefois, cette déclaration est admissible en preuve à une audition visant à déterminer si l'accusé est apte à subir son procès ou à assurer sa défense.

## TITRE IV

## SECRET CONJUGAL

Interprétation

**177.** Dans le présent titre, on entend par «époux» l'époux au moment où la déclaration a été faite.

Secret conjugal

**178.** Dans une procédure devant un tribunal, un organisme ou une personne qui a le pouvoir d'ordonner la production d'une preuve, toute personne peut objecter à la divulgation d'une déclaration confidentielle qu'elle a faite à son époux.

Durée de l'existence du droit au secret

**179.** Le droit au secret conjugal existe même après la dissolution du mariage et aussi longtemps que vit la personne qui a fait la déclaration.

Présomption de confidentialité

**180.** Sauf preuve contraire, une déclaration faite par une personne à son époux est présumée confidentielle.

Demande de reconnaissance du droit

**181.** La demande de reconnaissance du droit au secret conjugal peut être présentée par l'auteur de la déclaration ou, si ce dernier l'y autorise, par son époux, même si l'auteur n'est pas partie à la procédure.

Présomption d'autorisation

L'époux d'une personne qui a fait une déclaration confidentielle est présumé autorisé par cette dernière à présenter la demande.

Exception en matière civile

**182.** En matière civile, une personne ne peut présenter une demande de reconnaissance du droit au secret conjugal dans une instance entre elle-même et son époux.

court is satisfied that the denial is necessary in order to protect the interests of a child.

Exceptions in criminal proceedings

**183.** No claim under section 178 may be made in a criminal proceeding against the declarant in respect of

(*a*) an offence set out in section 93, whether the declarant's spouse is called as a witness for the prosecution or defence; or

(*b*) an offence against a third person that is alleged to have been committed by the declarant in the course of committing an offence against his own spouse.

Loss of privilege

**184.** The right to claim a privilege under section 178 is lost if the declarant or anyone with his authority voluntarily produces or discloses or consents to the production or disclosure of any significant part of the privileged statement, unless the production or disclosure is made in circumstances that give rise to a privilege.

Former privileges abolished

**185.** No privilege bars evidence

(*a*) tending to show that a person did or did not have sexual intercourse with his spouse at any time before or during their marriage; or

(*b*) tending to show that a person has or has not committed adultery.

## PART VI

## DECISION MAKING POWERS

Implied terms in contracts

**186.** The trier of fact shall determine whether a contract contains an implied term.

Actions for malicious prosecution

**187.** In an action for malicious prosecution, the trier of fact shall determine whether there was reasonable and probable cause for instituting the prosecution.

Foreign law

**188.** (1) Foreign law shall be determined by the court as a question of fact.

Expert evidence

(2) In making a determination under subsection (1), the court, except in a civil proceeding where the parties agree otherwise, shall consider only the evidence adduced by

En matière civile, le tribunal peut rejeter cette demande s'il l'estime nécessaire dans l'intérêt d'un enfant. Autre exception

**183.** En matière criminelle, nul ne peut se prévaloir du droit au secret conjugal si l'auteur de la déclaration est poursuivi pour une infraction visée à l'article 93 et que son époux est appelé à témoigner par la poursuite ou par la défense ou si l'auteur est poursuivi pour une infraction perpétrée contre une personne autre que son époux dans le cours de la perpétration d'une infraction contre ce dernier. Exceptions en matière criminelle

**184.** Une personne ne peut présenter une demande de reconnaissance du droit au secret conjugal relativement à une partie importante d'une déclaration qu'elle a divulguée ou permis de divulguer que si cette divulgation a été faite dans des circonstances donnant ouverture à la reconnaissance d'un droit au secret. Absence du droit au secret

**185.** Il n'existe aucun droit au secret permettant à une personne de s'objecter à la production d'une preuve tendant à démontrer qu'elle a eu ou n'a pas eu de relations sexuelles avec son époux avant ou pendant le mariage ou qu'elle a commis ou n'a pas commis l'adultère. Droit au secret aboli

## LIVRE VI

## POUVOIR DÉCISIONNEL

**186.** Il appartient au juge des faits de décider des conditions implicites que peut contenir un contrat. Condition implicite d'un contrat

**187.** Dans une action en dommages pour poursuite abusive, il appartient au juge des faits de décider s'il existait des motifs raisonnables et probables d'intenter la poursuite. Action pour poursuite abusive

**188.** La détermination du droit étranger est une question de fait qui doit être tranchée par le tribunal. Preuve du droit étranger

Aux fins de déterminer le droit étranger, le tribunal ne peut prendre en considération une preuve autre que la preuve soumise à son Dépositions de témoins experts

qualified expert witnesses, whether legal practitioners or not.

Where foreign law not proved

(3) Where a foreign law is not proved, it shall, in a civil proceeding, be presumed to be identical to the domestic law, but there is no such presumption in a criminal proceeding.

Notice of intention to produce foreign law

**189.** (1) Except where the court orders otherwise, a party intending to adduce evidence of foreign law shall, at least seven days before the commencement of the trial in a criminal proceeding or ten days before the commencement of the trial in a civil proceeding, give the opposing party a notice of his intention containing a statement of the substance of the evidence.

Where notice not required

(2) A notice is not required under subsection (1) where

(*a*) evidence of foreign law has been adduced at the preliminary inquiry; or

(*b*) the proceeding is taken under the *Extradition Act* or the *Fugitive Offenders Act* (Canada).

(Note - This subsection is for inclusion in the federal Act only.)

Meaning of words

**190.** The court shall determine the meaning of words used in their ordinary sense in an instrument or enactment.

Formal defects

**191.** In the interests of justice, the court may, subject to any conditions it considers appropriate, admit evidence despite a failure to comply with a required formality or order an adjournment where a required formality has not been complied with.

General power to comment

**192.** Where any provision of this Act permits, requires or forbids a court to comment or instruct the trier of fact on the weight to be given to any evidence, the general power of the court to comment on the evidence or on the credibility of witnesses is affected only to the extent necessary to give effect to that provision.

attention par les parties au moyen d'un témoignage d'expert.

Exception

Toutefois, en matière civile, le tribunal peut à cette fin prendre toute preuve en considération si les parties y consentent.

Absence de preuve du droit étranger

En matière civile, le droit étranger qui n'a pas été prouvé est présumé identique au droit domestique, mais il n'existe pas de telle présomption en matière criminelle.

Avis

**189.** Une partie qui entend prouver une règle de droit étranger doit donner à la partie adverse un avis de son intention, sauf si le tribunal en décide autrement.

Délai et contenu de l'avis

L'avis est d'au moins sept jours avant le procès en matière criminelle ou d'au moins dix jours avant le procès en matière civile; il énonce en substance la preuve qui sera introduite.

Avis non requis

Cet avis n'est pas requis si la preuve de la règle de droit étranger a été produite à l'enquête préliminaire ou si cette règle doit être prouvée dans le cadre d'une procédure se déroulant en vertu de la *Loi sur l'extradition* ou de la *Loi sur les criminels fugitifs*. (Canada)

(Remarque: Le dernier alinéa apparaîtra uniquement dans la loi fédérale.)

Signification de mots

**190.** Il appartient au tribunal de déterminer la signification des mots utilisés dans leur sens ordinaire et contenus dans un texte instrumentaire ou dans une disposition législative ou réglementaire.

Inaccomplissement d'une formalité

**191.** Le tribunal peut, dans l'intérêt de la justice, admettre une preuve malgré l'inaccomplissement d'une formalité ou ordonner un ajournement pour permettre d'accomplir cette formalité.

Conditions d'admission

Le tribunal peut assortir l'admission de cette preuve de toute condition qu'il juge appropriée.

Pouvoir de commenter la preuve

**192.** Le pouvoir général du tribunal d'adresser des commentaires au jury quant aux poids à accorder à la preuve offerte ou quant à la crédibilité des témoins n'est limité que dans la mesure prévue par la présente loi.

Appeal on admission or exclusion of evidence at trial

**193.** In determining whether an erroneous admission or exclusion of evidence resulted in a substantial error or miscarriage of justice or otherwise justifies an appeal, an appeal court shall consider all the circumstances of the trial, including whether a timely and specific objection to the admission of evidence was made or whether the substance and relevance of the excluded evidence were made known to the trier of fact or were apparent from the context of the questions asked.

## PART VII

## EXAMINING WITNESSES FOR OTHER JURISDICTIONS

Interpretation

**194.** In sections 195 to 199,

"court"

"court" means any court, tribunal, body or person having power to compel the production of evidence;

"senior court"

"senior court" means a superior court of a province, the Federal Court of Canada in relation to a matter within its exclusive jurisdiction or a judge of any such court.

(Note - Reference to the Federal Court of Canada is for inclusion in the federal Act only.)

Examination of witness out of the jurisdiction of the court

**195.** Where a court of competent jurisdiction in or out of Canada, for the purpose of a proceeding pending before it, authorizes the obtaining of the testimony of a witness out of its jurisdiction but within the jurisdiction of a senior court, an application may be made to the senior court for an order under section 196 for the examination of the witness.

Order for examination

**196.** (1) Where the senior court to which an application is made under section 195 is satisfied that an order should be made, it may order the examination of a witness referred to in that section before the person appointed in the order and in the manner specified in it and may, by the same or a subsequent order, command the attendance of the witness and the production of any

Décision sur l'opportunité d'une admission ou d'une exclusion de preuve

**193.** Une cour d'appel doit, aux fins de décider de l'opportunité d'une admission ou d'une exclusion de preuve, prendre en considération toutes les circonstances du procès, y compris le fait qu'une partie s'est objectée ou non à l'admission de cette preuve ou qu'elle s'y est objecté en temps opportun ainsi que le degré de précision de cette objection et le fait que l'arbitre des faits a eu connaissance ou non de la preuve exclue.

## LIVRE VII

## INTERROGATOIRE DE TÉMOINS POUR LE COMPTE D'UNE JURIDICTION EXTERNE

Interprétation

**194.** Dans le présent livre, on entend par:

«cour supérieure» «cour supérieure» une cour supérieure d'une province, la Cour fédérale lorsqu'elle a juridiction exclusive ou un juge de l'une de ces cours;

«tribunal» «tribunal» tout tribunal, personne ou organisme qui peut ordonner la production d'une preuve.

(Remarque: La mention de la Cour fédérale apparaîtra uniquement dans la loi fédérale.)

Interrogatoire aux fins d'une procédure en dehors du ressort du tribunal

**195.** Une partie qui entend obtenir un témoignage devant un tribunal étranger ou canadien n'ayant pas compétence sur le territoire où se trouve la personne appelée à témoigner peut, si elle est autorisée à ce faire par le tribunal devant lequel le témoignage est requis, s'adresser à une cour supérieure territorialement compétente pour obtenir une ordonnance permettant l'interrogatoire de cette personne.

Ordonnance

**196.** La cour supérieure peut, si elle ordonne l'interrogatoire d'un témoin par suite d'une demande d'ordonnance d'interrogatoire, désigner dans l'ordonnance la personne devant qui doit se dérouler cet interrogatoire et en prévoir les modalités.

Ordonnance de comparution ou de production de preuve

La cour supérieure peut, dans la même ordonnance ou dans une ordonnance subséquente, requérir la comparution du témoin

record or thing specified in the order that relates to the matter in question.

Appropriate directions and enforcement

(2) An order under subsection (1) may give all directions relating to the examination of the witness as the senior court making the order considers appropriate and the order may be enforced in the same manner as an order of the senior court made in any proceeding before it.

Conduct money and expenses

**197.** Any person ordered to attend for an examination under section 196 is entitled to conduct money and payment for expenses and loss of time as if he were a witness in a trial before the senior court that made the order.

Right to refuse answer or production

**198.** (1) Subject to subsection (2), a person examined pursuant to an order under section 196 has the right

(*a*) to refuse to answer any question on the ground that the answer may tend to criminate him or establish his liability to a civil proceeding at the instance of the Crown or any person; and

(*b*) to refuse to produce any record on the ground that he could not be compelled to produce it at a trial of the matter in question before the senior court that made the order.

Applicable provincial law

(2) Where an examination is ordered under section 196 for the purpose of a proceeding taking place in another province, the examination shall be conducted in accordance with the law of that other province.

Rules of court

**199.** An application for an order under section 196 shall be made in accordance with the rules relating to those applications that are made by the senior court applied to, and in the absence of rules to the contrary, a commission or order or letters rogatory for the examination of a witness, issuing from a court of competent jurisdiction in or out of Canada, shall be taken as sufficient evidence in support of the application.

devant la personne désignée ainsi que la production de toute pièce ou de tout objet décrit dans l'ordonnance et se rapportant à une question en litige.

Directives

L'ordonnance peut également contenir toute directive que la cour supérieure juge utile concernant l'interrogatoire du témoin.

Moyens de contrainte

Les moyens qui peuvent être utilisés pour contraindre une personne à respecter l'ordonnance sont les mêmes que si la procédure se déroulait devant la cour supérieure.

Frais de déplacement et autres dépenses

**197.** Toute personne qui doit comparaître aux fins d'un interrogatoire par suite d'une ordonnance d'interrogatoire a droit aux mêmes frais de déplacements ou de remboursement pour dépenses et perte de temps que si elle comparaissait en qualité de témoin devant la cour supérieure qui a rendu l'ordonnance.

Droit de refuser de répondre à une question

**198.** Une personne interrogée par suite d'une ordonnance d'interrogatoire peut refuser de répondre à une question pour le motif que la réponse à cette question pourrait tendre à l'incriminer ou à établir sa responsabilité dans une procédure civile subséquente.

Droit de refuser de produire un document

Cette personne peut en outre refuser de produire un document dont la production ne pourrait être exigée si l'interrogatoire se déroulait devant la cour qui a rendu l'ordonnance.

Droit provincial applicable

Toutefois, l'interrogatoire doit, s'il est destiné à servir à une instance devant un tribunal d'une province, être conduit selon les règles de droit de cette province.

Règles de la cour

**199.** La demande d'ordonnance d'interrogatoire doit être faite conformément aux règles de procédure de la cour à laquelle elle est adressée.

Preuve de la volonté du tribunal

En l'absence de règlement de procédure à l'effet contraire, une commission, une ordonnance ou des lettres rogatoires du tribunal devant lequel le témoignage est requis constitue une preuve suffisante de la volonté du tribunal d'obtenir ce témoignage.

## PART VIII

## TAKING EVIDENCE IN OTHER JURISDICTIONS

Oaths, etc, taken out of the jurisdiction

**200.** (1) Any oath, solemn affirmation, affidavit or declaration administered, taken or received out of (Canada) (Province) by an official mentioned in subsection (2) has the same effect as if it had been administered, taken or received in (Canada) (Province) by a person authorized to do so.

Interpretation

(2) For the purposes of subsection (1), "official" means any of the following persons exercising functions or having jurisdiction or authority in the place where the oath, solemn affirmation, affidavit or declaration is administered, taken or received:

(*a*) a judge, magistrate or officer of a court of justice;

(*b*) a commissioner for taking affidavits, notary public or other competent authority of a similar nature;

(*c*) the head of a city, town, village, township or other municipality; or

(*d*) any officer of Her Majesty's or Canada's diplomatic, consular or representative services, including any high commissioner, ambassador, envoy, minister, chargé d'affaires, counsellor, secretary, attaché, consul-general, consul, honorary consul, vice-consul, pro-consul, consular agent, permanent delegate, trade commissioner, assistant trade commissioner and a person acting for any of them.

Oaths, etc, taken out of the jurisdiction by persons authorized in the jurisdiction

**201.** Any oath, solemn affirmation, affidavit or declaration administered, taken or received out of (Canada) (Province) by a person authorized to do so in (Canada) (Province) and in the manner so authorized has the same effect as if it had been administered, taken or received by that person in (Canada) (Province).

Document admissible in evidence

**202.** Any document that purports to be signed by a person mentioned in subsection 200(2) or section 201 and sealed with his seal or the seal or stamp of his office, in testimony of any oath, solemn affirmation,

# LIVRE VIII

## TÉMOIGNAGES À L'ÉTRANGER

Serments, etc reçus à l'étranger

**200.** Un serment, un affidavit, une affirmation solennelle ou une déclaration reçus ailleurs qu'au (Canada) (province) par une personne autorisée à ce faire ont le même effet que s'ils avaient été reçus au (Canada) (province) par une personne compétente.

Personnes autorisées

Toutefois, sont seuls autorisés à recevoir un serment, un affidavit, une affirmation solennelle ou une déclaration ailleurs qu'au Canada:

1° un juge, un magistrat ou un greffier d'une cour de justice;

2° un commissaire à l'assermentation, un notaire public ou toute autre personne détenant des pouvoirs similaires à ceux de ces derniers;

3° la plus haute autorité d'une municipalité;

4° un fonctionnaire des services diplomatiques ou consulaires représentant Sa Majesté ou le Canada, y compris un haut-commissaire, un ambassadeur, un envoyé, un ministre, un chargé d'affaires, un conseiller, un secrétaire, un attaché, un consul général, un consul, un consul honoraire, un vice-consul, un proconsul, un agent consulaire, un délégué permanent, un commissaire au commerce, ou son suppléant ou toute personne agissant an nom de l'un d'eux.

Serments, etc reçus à l'étranger par une personne autorisée au Canada

**201.** Un serment, un affidavit, une affirmation solennelle ou une déclaration reçus ailleurs qu'au (Canada) (province) par une personne autorisée à ce faire au (Canada) (province) et en la manière autorisée ont le même effet que s'ils avaient été reçus au Canada.

Documents admissibles en preuve

**202.** Un document signé par une personne qui, selon toute apparence, est autorisé à recevoir un serment, un affidavit, une affirmation solennelle ou une déclaration ailleurs qu'au Canada est admissible en preuve si le

affidavit or declaration administered, taken or received by him, is admissible in evidence without proof of his signature or official character or the authenticity of the seal or stamp and without proof that he was exercising his functions or had jurisdiction or authority in the place where the oath, solemn affirmation, affidavit or declaration was administered, taken or received.

Lack of oath or solemn affirmation

**203.** Evidence taken in a jurisdiction outside Canada shall not be excluded by reason only of the lack of an oath or a solemn affirmation if the evidence was taken in conformity with the law of that jurisdiction.

## PART IX

## REPEAL, TRANSITIONAL AND COMMENCEMENT

(Note - The following provisional list of amendments affects federal legislation. Each jurisdiction will have its own consequential provisions.)

### *Canada Evidence Act*

R S, c E-10

**204.** The *Canada Evidence Act* is repealed.

### *Criminal Code*

R S, c 34

**205.** Sections 123, 142, 317, 318, 586 and 593 and subsections 139(1), 195(3) and 256(2) of the *Criminal Code* are repealed.

**206.** Section 469 of the said Act is repealed and the following substituted therefor:

Evidence of accused

"**469.** (1) When the evidence of the witnesses called on the part of the prosecution has been taken down and, where required by this Part, has been read, the justice or other appropriate court official shall ask the accused whether he wishes to give evidence and shall advise the accused that any evidence he gives shall be under oath or solemn affirmation and subject to cross-examination and that such evidence shall be recorded and may be used against him at his trial.

sceau ou le timbre de cette personne ou de son bureau y est apposé.

Preuve non requise

Il n'est pas nécessaire de faire la preuve de la signature, de la qualité du signataire, de l'authenticité du sceau ou du timbre ou du fait que la personne qui a reçu le serment, l'affidavit, l'affirmation solennelle ou la déclaration était dans l'exercice de ses fonctions ou avait compétence à l'endroit où elle l'a reçu.

Absence de serment ou d'affirmation solennelle

**203.** Un témoignage reçu ailleurs qu'au Canada, conformément au droit du pays où il est reçu, est admissible en preuve même si aucun serment ou affirmation solennelle ne l'accompagne.

## LIVRE IX

## ABROGATION, DISPOSITIONS FINALES ET ENTRÉE EN VIGUEUR

(Remarque: Les dispositions suivantes concernent uniquement la législation fédérale.)

### *Loi sur la preuve au Canada*

S R , c E-10

**204.** La *Loi sur la preuve au Canada* est abrogée.

### *Code criminel*

S R , c 34

**205.** Les articles 123, 142, 317, 318, 586 et 593 et les paragraphes 139(1), 195(3) et 256(2) du *Code criminel* sont abrogés.

**206.** L'article 469 du *Code criminel* est abrogé et remplacé par le suivant:

Témoignage du prévenu

«**469.** (1) Après la consignation des dépositions faites par la poursuite et après la lecture de ces dépositions, lorsque la présente partie l'exige, le juge de paix ou tout autre fonctionnaire compétent de la cour doit demander au prévenu s'il désire dire quelque chose et l'aviser que toute déclaration de sa part doit être faite sous serment ou sous affirmation solennelle, qu'il peut être contre-interrogé sur cette déclaration et que toute déclaration qu'il fera sera prise par écrit et pourra servir de preuve contre lui à son procès.

Witnesses for accused

(2) After subsection (1) is complied with and the evidence of the accused, if any, is recorded, the justice shall ask the accused if he wishes to call any witnesses.

Depositions of witnesses

(3) The justice shall hear each witness called by the accused who testifies to any matter relevant to the inquiry, and for that purpose section 468 applies with such modifications as the circumstances require."

**207.** Subsection 638(1) of the said Act is amended by striking out the word "or" at the end of paragraph (*a*) thereof, by adding the word "or" at the end of paragraph (*b*) thereof and by adding thereto the following paragraph:

"(*c*) to a provincial court judge where the proceedings are in the provincial court."

**208.** All that portion of section 639 of the said Act preceding paragraph (*b*) thereof is repealed and the following substituted therefor:

Reading evidence of witness

"**639.** Where the evidence of a witness mentioned in paragraph 637(*a*) is taken by a commissioner appointed under section 638, it may be read in evidence in the proceedings if

(*a*) it is proved by oral evidence or by affidavit that the witness is unable to attend by reason of death or physical disability arising out of illness or some other good and sufficient cause,"

**209.** Section 643 of the said Act is amended by striking out the word "or" at the end of paragraph (*c*) thereof and by adding thereto, immediately after paragraph (*d*) thereof, the following paragraphs:

"(*e*) cannot with reasonable diligence be identified or found, or

(*f*) testifies to a lack of memory of his evidence despite an attempt, where required by the court, to refresh his memory,"

(2) Après s'être conformé au paragraphe (1) et après que la déclaration du prévenu, le cas échéant, ait été prise par écrit, le juge de paix demande au prévenu s'il désire appeler des témoins.

Témoins du prévenu

(3) Le juge de paix doit entendre chaque témoin appelé par le prévenu à rendre témoignage sur une matière reliée à l'enquête et, à cette fin, l'article 468 s'applique compte tenu des adaptations de circonstance.»

Dépositions des témoins

**207.** Le paragraphe 638(1) dudit code est modifié:

1° par la suppression du mot «ou» à la fin de l'alinéa *a*);

2° par l'insertion du mot «ou» à la fin de l'alinéa *b*);

3° par l'insertion de l'alinéa suivant:

«*c*) à un juge d'une cour provinciale si les procédures se déroulent devant une cour provinciale.»

**208.** La partie de l'article 639 dudit code qui précède l'alinéa *b*) est abrogée et remplacée par ce qui suit:

«**639.** La déposition d'un témoin visé à l'alinéa 637*a*) qui est recueillie par un commissaire nommé suivant l'article 638 peut être lue en preuve,

Lecture du témoignage

*a*) s'il est établi par un témoignage oral ou par affidavit que le témoin est incapable d'être présent en raison d'un décès ou d'une incapacité physique résultant de la maladie ou pour toute autre raison suffisante,»

**209.** L'article 643 dudit code est modifié:

1° par la suppression du mot «ou» à la fin de l'alinéa *c*);

2° par l'addition, après l'alinéa *d*), des alinéas suivants:

«*e*) ne peut, malgré diligence raisonnable, être trouvé ou identifié, ou

*f*) ne peut se rappeler son témoignage antérieur même après avoir tenté de se rafraîchir la mémoire à la suite d'une demande en ce sens faite par le tribunal.»

*Federal Court Act*

R S , c 10 (2nd Supp )

**210.** Section 41 and subsection 53(2) of the *Federal Court Act* are repealed.

*Interpretation Act*

R S , c I-23

**211.** Subsection 24(1) of the *Interpretation Act* is repealed.

*Juvenile Delinquents Act*

R S , c J-3

**212.** Section 19 of the *Juvenile Delinquents Act* is repealed.

*Pending Proceedings*

Pending proceedings

**213.** Proceedings commenced before the coming into force of this Act shall be carried on until their final conclusion as if this Act had not come into force unless the parties agree that this Act or any of its provisions applies.

*Commencement*

Coming into force

**214.** This Act shall come into force on a day to be fixed by proclamation.

*Loi sur la Cour fédérale*

**210.** L'article 41 et le paragraphe 53(2) de la *Loi sur la Cour fédérale* sont abrogés.

S R , c 10 (2e suppl.)

*Loi d'interprétation*

**211.** Le paragraphe 24(1) de la *Loi d'interprétation* est abrogé.

S R , c I-23

*Loi sur les jeunes délinquants*

**212.** L'article 19 de la *Loi sur les jeunes délinquants* est abrogé.

S.R , c J-3

*Instances en cours*

**213.** Les instances commencées avant l'entrée en vigueur de la présente loi sont continuées comme si cette loi n'était pas entrée en vigueur, à moins que les parties ne consentent à ce qu'elle s'applique.

Instances en cours

*Entrée en vigueur*

**214.** La présente loi entre en vigueur à la date fixée par proclamation.

Entrée en vigueur

# 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 | |
| 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. |
| Child Abduction Act | 1981 | |
| Child Status Act | 1981 | |
| 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 | |
| Custody Jurisdiction and Enforcement Act | 1974 | Rev. '81 |
| 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. Hewthorne* | 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 | Rev. '81. |
| Fatal Accidents Act | 1964 | |
| Foreign Judgments Act | 1933 | Rev '64 |
| Frustrated Contracts Act | 1948 | Rev. '74. |
| Highway Traffic —Responsibility of Owner & Driver for Accidents | 1962 | |
| Hotelkeepers Act | 1962 | |
| Human Tissue Gift Act | 1970 | Rev. '71. |
| Information Reporting Act | 1977 | |

TABLE I

| Title | Year First Adopted and Recommended | Subsequent Amendments and Revisions |
|---|---|---|
| Interpretation Act | 1938 | Am. '39; Rev. '41; Am. '48; Rev. '53, '73. |
| Interprovincial Subpoenas Act | 1974 | |
| Intestate Succession Act | 1925 | Am. '26, '50, '55; Rev. '58; Am. '63. |
| Jurors' Qualifications Act | 1976 | |
| Legitimacy Act | 1920 | Rev. '59. |
| Limitation of Actions Act | 1931 | Am. '33, '43, '44. |
| —Convention on the Limitation Period in the International Sale of Goods | 1976 | |
| Married Women's Property Act | 1943 | |
| Medical Consent of Minors Act | 1975 | |
| Occupiers' Liability Act | 1973 | Am. '75. |
| Partnerships Registration Act | 1938 | Am. '46. |
| Perpetuities Act | 1972 | |
| Personal Property Security Act | 1971 | |
| Powers of Attorney Act | 1978 | |
| Presumption of Death Act | 1960 | Rev. '76. |
| Proceedings Against the Crown Act | 1950 | |
| Reciprocal Enforcement of Judgments Act | 1924 | Am. '25; Rev. '56; Am. '57; Rev. '58; Am. '62, '67. |
| Reciprocal Enforcement of Maintenance Orders Act | 1946 | Rev. '56, '58; Am. '63, '67, '71; Rev. '73, '79. |
| Regulations Act | 1943 | |
| Retirement Plan Beneficiaries Act | 1975 | |
| Sale of Goods Act | 1981 | |
| 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 |
|---|---|---|---|---|
| Assignment of Book Debts Act | 1928 | 10 | 1980 | Personal Property Security Act |
| Conditional Sales Act | 1922 | 7 | 1980 | Personal Property Security Act |
| Cornea Transplant Act | 1959 | 11 | 1965 | Human Tissue Act |
| Corporation Securities Registration Act | 1931 | 6 | 1980 | Personal Property Security 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 | | | | Retirement Plan |
| —Beneficiaries | 1957 | 8 | 1975 | Beneficiaries Act |
| —Perpetuities | 1954 | 8 | 1975 | In part by Retirement Plan Beneficiaries Act and in part by Perpetuities Act |
| | | | | Dependants' Relief Act |
| Reciprocal Enforcement of Tax Judgments Act | 1965 | None | 1980 | None |
| 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 NOW RECOMMENDED 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.

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). Total: 7.

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.

Child Abduction (Hague Convention) Act—Enacted by Yukon ('81).

Condominium Insurance Act—Enacted by B.C. ('74) *sub nom* Strata Titles Act; Man. ('76); P.E.I. ('74); Yukon ('81). Total: 4.

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.

Criminal Injuries Compensation Act—Enacted by Alta.† ('69); B.C. ('72); N.W.T. ('73); Ont. ('71); Yukon° ('72, '81). 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; Yukon ('81). Total: 4.

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.

Extra-Provincial Custody Orders Enforcement Act—Alta. ('77); B.C.

('76); Man. ('76): Nfld. ('76); N.W.T. ('81); N.S. ('76); P.E.I. ('76); Sask.° ('77). Total: 9.

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); Yukon ('81). Total: 5.

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 ('81). 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, '81); Sask.° ('68); Yukon ('81). Total: 9.

Information Reporting Act—

Interpretation Act—Enacted by Alta. ('81); B.C.° ('74); Man. ('39,'57); Nfld.° ('51); N.W.T.°† ('48); P.E.I.° ('81); Que.[x]; Sask. ('43); Yukon* ('54). Total: 9.

Interprovincial Subpoenas Act—Enacted by Alta. ('81); B.C. ('76); Man. ('75); N.B.° ('79); Nfld.° ('76); N.W.T.° ('76); Ont. ('79); Sask.° ('77); Yukon ('81). Total: 9.

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 Act (Qualifications and Exemptions)—Enacted by B.C. ('77) *sub nom.* Jury Act; Nfld. ('81); P.E.I.° ('81). Total: 3.

Legitimacy Act—Enacted by Alta. ('28, '60); B.C. ('22, '60); Man. ('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 Trusts and Plans—Perpetuities—Enacted by B.C. ('57); Man. ('59); N.B. ('55); Nfld. ('55); N.S. ('59); Ont. ('54); Sask. ('57); Yukon ('81). Total: 8.

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); Sask.° ('79); Yukon° ('81). Total: 4.

Powers of Attorney Act—B.C.* ('79); Man.° ('79); Ont.° ('79). Total: 3.

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 ('81). 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, '81). Total: 11.

Reciprocal Enforcement of Maintenance Orders Act—Enacted by Alta. ('47, '58, '79, '81); B.C.° ('72); Man.° ('46, '61); N.B. ('51, '81); Nfld.* ('51, '61); N.W.T.° ('51); N.S. ('49); Ont.° ('48, '59); P.E.I.* ('51); Que. ('52); Sask. ('68, '81); Yukon ('81). Total: 12.

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.[x]; Yukon ('81). Total: 4.

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]; Yukon ('81). Total: 4.

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 ('81). 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, '81). 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.

Warehousemen's Lien Act—Enacted by Alta. ('22); B.C. ('22); Man. ('23); N.B. ('23); N.W.T.° ('48); N.S. ('51); Ont. ('24); P.E.I.° ('38); Sask. ('21); Yukon ('54). Total: 10.

Warehouse Receipts Act—Enacted by Alta. ('49); B.C.° ('45); Man.° ('46); N.B. ('47); N.S. ('51); Ont.° ('46). Total: 6.

Wills Act—Enacted by Alta.° ('60); B.C. ('60); Man.° ('64); N.B. ('59); N.W.T.° ('52); Sask. ('31); Yukon° ('54). Total: 7.

—Conflict of Laws—Enacted by B.C. ('60); Man. ('55); Nfld. ('55); Ont. ('54). Total: 4.

—(Part 4) International—Enacted by Alta. ('76); Man. ('75); Nfld. ('76); Sask. ('81). Total: 4.

Section 17—B.C.° ('79). Total: 1.

## TABLE IV

LIST OF JURISDICTIONS SHOWING THE UNIFORM ACTS NOW RECOMMENDED ENACTED 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

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° ('81); Interprovincial Subpoena Act ('81); 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, '81); 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

Criminal Injuries Compensation Act ('72); Condominium Insurance Act ('74) *sub nom.* Condominium 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) *sub nom.* Family Relations Act*; Frustrated Contracts Act ('74) *sub nom.* Frustrated Contract Act; Human Tissue Gift Act ('72); Interpretation Act ('74); Interprovincial Subpoenas Act ('76) *sub nom.* Subpoena (Interprovincial Act*; Intestate Succession Act ('25) *sub nom.* Estate Administration Act*; Jurors' Qualification Act ('77) *sub nom.* Jury Act; Legitimacy

Act ('22, '60); Occupiers' Liability Act ('74) *sub nom.* Occupiers' Liability Act*; Perpetuities Act ('75) *sub nom.* Perpetuity Act*; Powers of Attorney Act ('79) *sub nom.*Power of Attorney Act*; Presumption of Death Act ('58, '77) *sub nom.* Survivorship and Presumption of Death Act; Reciprocal Enforcement of Judgments Act ('25, '59) *sub nom.* Court Order Enforcement Act*; Reciprocal Enforcement of Maintenance Orders Act° ('72) in Regulations under Sec. 70 08 Family Relations Act; Service of Process by Mail Act° ('45) *sub nom.* Small Claims Act*; Survival of Actions Act *sub nom.* Estate Administration Act*; Statutes Act° ('74) Part in Constitution Act; Part in Interpretation Act; Survivorship Act° ('39, '58) *sub nom.* Survivorship and Presumption of Death Act*; Testators Family Maintenance Act. Provisions now in Wills Variation Act*; Trustee (Investments) ('59) Provisions now in Trustee Act; Variation of Trusts Act ('68) *sub nom.* Trust Variation Act; Vital Statistics Act° ('62); Warehousemen's Lien Act ('52) *sub nom.* Warehouse Lien Act*; Warehouse Receipts Act* ('45); Wills Act° ('60); Wills—Conflict of Laws ('60), Sec. 17° ('79). Total: 36.

Canada

Evidence—Foreign Affidavits ('43), Photographic Records ('42); Regulations Act° ('50), superseded by the Statutory Instruments 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

Accumulations Act *sub nom.* Property Act; Bills of Sale Act[x]; Bulk 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); 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, '81); 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: 29.

Newfoundland

Bills of Sale Act° ('55); Bulk 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); Jurors Act (Qualifications and Exemptions) ('81); 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: 23.

Northwest Territories

Bills of Sale Act° ('48); Bulk Sales Act† ('48); Contributory Negligence Act° ('50); 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 ('81); Evidence Act° ('48); Fatal Accidents Act† ('48); Frustrated Contracts Act† ('56); Human Tissue Gift Act ('66); Interpretation Act°† ('48); Interprovincial Subpoenas Act° ('79); Intestate Succession Act° ('48); Legitimacy Act° ('49, '64); Limitation of Actions Act* ('48); Married Women's Property Act ('52, '77); 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: 32.

Nova Scotia

Bills of Sale Act ('30); Bulk Sales Act[x]; Contributory Negligence Act ('26, '54); 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: 21.

Ontario

Accumulations Act ('66); Criminal Injuries Compensation Act ('71) *sub nom.* Compensation for Victims of Crime Act° ('71); 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 Accidents' 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); Perpetuties Act ('66); Proceedings Against the Crown Act° ('63); Reciprocal Enforcement of Judgments Act ('29); Reciprocal Enforcement of Maintenance Orders Act° ('59); Regulations Act° ('44); Retire-

ment 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: 26.

Prince Edward Island

Bills of Sale Act* ('47); 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, '81); Interpretation Act° ('81); Jurors Act (Qualifications and Exemptions)° ('81); 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: 18.

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.

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; 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

Bills of Sale Act ('57); Contributory Negligence Act ('44); 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, '81); 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: 28.

Yukon Territory

Bulk Sales Act ('56); Child Abduction (Hague Convention) Act ('81); Condominium Insurance Act ('81); Conflict of Laws (Traffic Accidents) Act ('72); Contributory Negligence Act° ('55); Criminal Injuries Compensation Act° ('72, '81) *sub nom.* Compensation for Victims of Crime Act; Defamation Act ('54, '81); Dependants, Relief Act ('81); 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); Family Support Act[x] ('81); *sub nom.* Matrimonial Property and Family Support Act; Frustrated Contracts Act ('81); Human Tissue Gift Act ('81); Interpretation Act* ('54); Interprovincial Subpoena

Act ('81); Intestate Succession Act° ('54); Legitimacy Act* ('54); Limitation of Actions Act ('54); Married Women's Property Act° ('54); Perpetuities Act° ('81); Personal Property Security Act° ('81); Presumption of Death Act ('81); Reciprocal Enforcement of Judgments Act ('56, '81); Reciprocal Enforcement of Maintenance Orders Act ('81); Regulations Act° ('68); Retirement Plan Beneficiaries Act ('81); Survival of Actions Act ('81); Survivorship Act ('81); Testamentary Additions to Trusts ('69), see Wills Act, s. 29; Trustee (Investments) ('62, '81); Vital Statistics Act° ('54); Warehousemen's Lien Act ('54); Wills Act° ('54). Total: 33.

# 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.

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