UNIFORM LAW CONFERENCE OF CANADA

CONFERENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

PROCEEDINGS

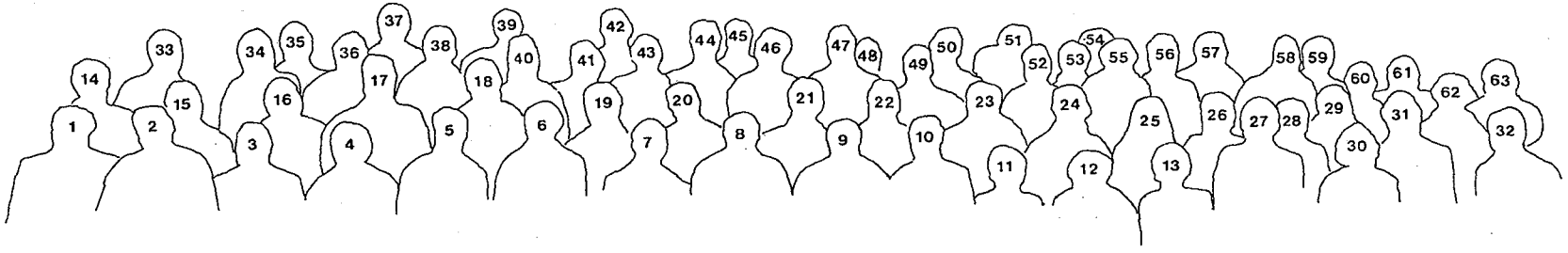
OF THE

SIXTY-FOURTH ANNUAL MEETING

HELD AT

MONTEBELLO QUEBEC

August, 1982



1. Murray, N.B.
2. Fordham, N.S.
3. Morton, Ont.
4. Préfontaine, Can.
5. MacIntosh, P.E.I.
6. Stone, Ont.
7. Macaulay, B.C.
8. O'Donoghue, Yuk.
9. Colas, Que.
10. Brown, Sask.
11. Charowsky, Sask.
12. Longtin, Que.
13. Viens, Que.
14. Kujawa, Sask.
15. Not identified
16. Gamache, Alta.
17. Tallin, Man.
18. Leal, Ont.
19. Walker, N.S.
20. Hoyt, Ex. Sec.
21. Edwards, Man.
22. Pigeon, Can.
23. Pardons, N.B.
24. Roger, B.C.
25. Ozirny, Sask.
26. Jackson, Sask.
27. Thomas, Ont.
28. Noonan, Nfld.
29. Hurley, Nfld.
30. Miller, Man.
31. Smethurst, Man.
32. Eagan, Nfld.
33. Piragoff, Can.
34. Mosley, Can.
35. Chester, Ont.
36. Hunter, B.C.
37. Gale, N.S.
38. Goodman, Man.
39. Weinstein, Man.
40. Pink, N.S.
41. Pilkey, Man.
42. Hodges, Sask.
43. Balkaran, Man.
44. Mendes da Costa, Ont.
45. Duncan, Alta.
46. Dawson, Can.
47. Mapp, Alta.
48. Coles, N.S.
49. Ménard, Que.
50. Scott, Alta.
50A Létourneau, Que.
51. Dionne, Que.
52. Fraser, Alta.
53. Bouchard, Que.
54. Greenspan, Can.
55. Roslak, Alta.
56. Takach, Ont.
57 McLeod, Ont.
58. Paul, Can.
59. Dick, Ont.
60. Pagano, Alta.
61. Larson, Alta.
62. Lake, Nfld.
63. Bertrand, Can.

Absent: *Alta.,* Clegg, Elliot, McAra, Paisley; *Canada,* Beaupré, Biron, duPlessis, Einbinder-Miller, Elton, Ewaschuk, LaBarre, Muldoon, Tassé; *N.B.,* Doleman, Gregory, Guerette, Lalonde, Teed; *Nfld.,* Noel, O'Reilly; *N.W.T.,* Lal, Pearce; *N.S.,* Hebb; *Ont.,* Ewart, Fader, McGuigan, Revell, Schuh, Smith; *P.E.I.,* Moore; *Que.,* Allaire; *Sask.,* Brown, Cuming, Gosse.

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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	1949-1950
Horace A. Porter, K.C., Saint John	1950-1951
C. R. Magone, Q.C., Toronto	1951-1952
G. S. Rutherford, Q.C., Winnipeg	1952-1953
Lachlan MacTavish, Q.C., Toronto (two terms)	1953-1955
H. J. Wilson, Q.C., Edmonton (two terms)	1955-1957
Horace E. Read, O.B.E., Q.C., 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
George B. Macaulay, Q.C., Victoria	1981-1982

OFFICERS: 1982-83

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Chairman	Gordon Gregory, Q.C., Fredericton
Secretary	Don Piragoff, Ottawa

LEGISLATIVE DRAFTING SECTION

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

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

(For addresses of the above, see List of Delegates, page 10)

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1982 Annual Meeting

The following persons (98) attended one or more Sections of the Sixty-Fourth Meeting of the Conference

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(*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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RÉMI BOUCHARD, Sous-ministre associé, Affaires criminelles, Ministère de la Justice, 1200 Route de l'Eglise, Sainte-Foy, G1V 4M1 (*C.L.S.*)

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DELEGATES EX OFFICIO

1982 Annual Meeting

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Minister of Justice and Attorney General of Canada:
HON. JEAN CHRÉTIEN, P.C.
Attorney General of Manitoba: HON. ROLAND PENNER, Q.C.
Minister of Justice of New Brunswick: HON. G. W. N. COCKBURN, Q.C.
Minister of Justice and Attorney General of Newfoundland:
HON. GERALD R. OTTENHEIMER.
Attorney General of Nova Scotia: HON. HARRY W. HOW, Q.C.
Attorney General of Ontario: HON. R. ROY MCMURTRY, Q.C.
Minister of Justice and Attorney General of Prince Edward Island:
HON. GEORGE R. MCMAHON, Q.C.
Minister of Justice of Quebec: HON. MARC-ANDRÉ BÉDARD, Q.C.
Attorney General of Saskatchewan: HON. J. GARY LANE, Q.C.
Minister of Justice of the Yukon: HON. CLARKE L. ASHLEY

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.
1982. Aug. 19-28, Montebello.

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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LEGISLATIVE DRAFTING SECTION

MINUTES

Attendances

Thirty-five delegates were in attendance.

Opening

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

Hours of Sitting

It was agreed to sit on Thursday, August 19th, and Friday, August 20th, from 9:30 a.m. to 12:30 p.m. and from 1:30 p.m. to 5:00 p.m., except when circumstances dictated otherwise.

Exchange of Statutes

A discussion was held on the subject of reciprocal exchange of statutes and legislative papers among jurisdictions with respect to the resolution adopted by the Section at its 1981 meeting (1981 Proceedings, page 25). Each jurisdiction briefly described its position on the issue and some of the problems being experienced in giving effect to reciprocal exchange. Most provincial jurisdictions expressed interest in receiving the federal materials on the same basis.

Drafting Manuals

It was reported that, in accordance with the resolution adopted by the Section at its 1981 meeting (1981 Proceedings, page 24), Alberta and Ontario had distributed their drafting manuals prior to the 1982 meeting. Saskatchewan's drafting manual was distributed at the meeting.

Purposes and Procedures

The section conducted a general discussion of its future organization, rules and procedures, time of meeting and relationship to the Uniform Law Section. As a result of the discussion, it was

> RESOLVED that a Committee on Purposes and Procedures be constituted consisting of the following persons:
>
> Ms. Merrilee Charowsky
> Ms. Mary Dawson
> M. Bruno Lalonde
> Mr. George Macaulay
> Mr. Arthur Stone
> Mr. Rae Tallin
> Mr. Graham D. Walker
>
> with Mr. Stone to be Chairman, to review the purposes and procedures of the Section and to make recommendations and, if possible, to provide a preliminary report to this meeting.

Education, Training and Retention of Draftsmen

It was agreed that this item be carried forward on the agenda next year but that, in future, jurisdictions should only report changes to the information previously submitted to the Section.

Regulations

The Section considered the draft Uniform Regulations Act prepared by the Alberta, British Columbia and Saskatchewan representatives. As a result of these deliberations, the Section

> RESOLVED that the draft Act prepared by the Section be referred to the Uniform Law Section for adoption.

Uniform Transboundary Pollution Reciprocal Access Act

The Section considered a draft Transboundary Pollution Reciprocal Access Act referred to it as a result of discussions between the Uniform Law Conference and the National Conference of Commissioners of Uniform State Laws. As a result of these deliberations, the Section

> RESOLVED that the draft Act prepared by the Section be referred to the Uniform Law Section for adoption subject to the question of whether economic loss is included in the phrase "injury to the person" as that phrase is used in the draft Act.

Uniform Reciprocal Enforcement of Maintenance Orders Act

The Section vetted the recommendation of the Saskatchewan Commissioners to amend the Uniform Act to conform to the Ontario legislation. As a result of these deliberations, the Section

> RESOLVED that the draft amendments to the Uniform Reciprocal Enforcement of Maintenance Orders Act prepared by the Section be referred to the Uniform Law Section for adoption should the Uniform Law Section adopt the recommendations of the Saskatchewan Commissioners to amend the Uniform Act.

Uniform Child Status Act

The Section discussed the matters raised with respect to the Uniform Child Status Act by Dr. Gilbert Kennedy. As a result of these deliberations, the Section

> RESOLVED that the Section advise the Uniform Law Section of certain clerical and editorial errors discovered in the Uniform Child Status Act and that these errors be corrected in the next printing of this Act.

Uniform Interpretation Act in the light of a Bilingual Uniform Act

Il est proposé qu'on renvoie à un comité spécial de la Section de la rédaction des lois l'avant-project de la version française de la *Uniform Interpretation Act* préparée par le comité Beaupré en vue d'établir, en français et en anglais, un projet bilingue de Loi uniforme d'interprétation qui tiendrait compte des difficultés dans le texte actuel que la

préparation de l'avant-projet a fait ressortir et que ce comité spécial soit composé de Arthur Stone, c.r. et de R. Michael Beaupré.

Bilingual Drafting

The Section received the French-language versions of the following Uniform Acts:

Uniform Service of Process by Mail Act
Uniform Foreign Judgments Act
Uniform Statutes Act

and was advised that the work of preparing the French-language version of existing Uniform Acts is continuing.

RESOLVED that the three Uniform Acts drafted in the French text be referred to the Uniform Law Section for adoption.

French Language Drafting Conventions

The Section discussed the possibility of preparing drafting conventions for drafting in French and determined that the adoption of such conventions was not possible until after further experience has been acquired.

Uniform Canada/U.K. Reciprocal Enforcement of Judgments Act

The Section considered a draft Uniform Canada/United Kingdom Reciprocal Enforcement of Judgment Act. As a result of these deliberations, the Section

RESOLVED that the draft Act in both its English and French versions prepared by the Section be referred to the Uniform Law Section for adoption.

Uniform Contributory Fault Act

The Section considered a draft Uniform Contributory Fault Act. As a result of these deliberations, the Section

RESOLVED that the draft Act prepared by the Section be referred to the Uniform Law Section for adoption.

New Business

The Section discussed the possibility of a drafting manual for use by members of the Uniform Drafting Section. As a result of these deliberations, the Section

RESOLVED that Saskatchewan prepare a preliminary drafting manual for the Section to be considered by the Section when it next meets in August, 1983.

Officers

Graham D. Walker was re-elected as chairman, Bruno Lalonde as vice-chairman and Merrilee Charowsky as secretary for 1982-83.

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.

Reconvened

On Thursday, August 26th, 1982, the Uniform Drafting Section reconvened to consider a Uniform Judgment Interest Act. As a result of these deliberations, the Section

> RESOLVED that the draft Uniform Judgment Interest Act, prepared by the Section, be referred to the Uniform Law Section for adoption.

Uniform Criminal Injuries Compensation Act

The preparation of the French-language version of the Uniform Criminal Injuries Compensation Act has shown, in certain respects, the need to review the present Act and to this end it is proposed that a special committee made up of Graham D. Walker, Q.C. and Gérard Bertrand, Q.C., be asked to prepare a revised Act in both English and French for submission to the 1983 annual meeting.

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 p.m. on Sunday, August 22, in the Canada Room of the Chateau Montebello in Montebello, Quebec with Mr. Macaulay, Q.C. in the chair and Mr. Hoyt, Q.C. as secretary.

Address of Welcome

The President extended a warm welcome to all those delegates in attendance.

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 on 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 63rd annual meeting as printed in the 1981 Proceedings be adopted.

Treasurer's Report

Gerard Bertrand presented his Statement of Receipts and Disbursements and Cash Position as of July 15, 1982, together with a report of the Conference's Auditors, Clarkson, Gordon, Chartered Accountants, Appendix A, page 59.

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 53.

Secretary's Report

Mr. Walker presented his report, Appendix B, page 62.

RESOLVED that the report be received.

Executive Secretary's Report

Mr. Hoyt presented his report, Appendix C, page 63.

RESOLVED that the report be received.

Appointment of Resolutions Committee

RESOLVED that a Resolutions Committee be constituted for a report from Mr. Ewart in the form of a motion to be presented at 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.

Adjournment

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

UNIFORM LAW SECTION

MINUTES

Attendance

Forty-three delegates were in attendance. For details see list of delegates, page 10.

Sessions

The Section held eight sessions, two each day from Monday to Thursday.

Distinguished Visitor

The Section was honored 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 Session opened with Mr. Stone as Chairman and Mr. Hoyt as Secretary.

Hours of Sitting

RESOLVED that the Section sit from 9 a.m. to 12 noon and from 1:30 p.m. to 5 p.m. daily, subject to change as circumstances require.

Agenda

The tentative agenda was considered and the order of business for the week agreed upon.

Canada-U.K. Convention on the Recognition and Enforcement of Judgments

The report is set out in Appendix D, page 64.

RESOLVED that the Uniform Act Respecting the Convention between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters be adopted as a Uniform Act as set out in Appendix E, page 85, and recommended for enactment in that form. It was referred to the Legislative Drafting Section for a French version to be brought back to the Uniform Law Section in 1983.

Central Aircraft Registry

There was no report on this matter and it was agreed that it should be struck from the agenda.

Child Status Act

RESOLVED that the Uniform Child Status Act as adopted by the Conference, 1980 Proceedings, page 29, be withdrawn by reason of a number of clerical errors, and a new Uniform Act be reprinted as set out in Appendix F, page 86.

Class Actions

The report of the Quebec and Ontario Commissioners was received as set out in Appendix G, page 94. Background notes on the Ontario Law Reform Commission's Report on Class Actions is also attached as useful information. The matter was referred to the Quebec, Ontario and British Columbia Commissioners for a further report in 1983.

Company Law

The matter of the capacity of corporations to sue and carry on business in another jurisdiction in Canada without extra-provincial licensing or registration is to be placed on the agenda and referred to the Quebec, Ontario and Canada Commissioners for a report in 1983. A copy of the report submitted in 1982 is set out in Appendix H, page 106.

Contributory Fault

The draft Act was referred to the Alberta Commissioners for further drafting. Their report was studied at length, but it was decided to defer "contractual limitations on liability" to 1983. The report is set out in Appendix I, page 118. The draft Contributory Fault Act presented for adoption in 1982 is set out in Appendix J, page 162.

Criminal Injuries Compensation Act

The Nova Scotia and Canada Commissioners volunteered to work on the French version of this Act. Because of translation problems, authority was given for them to change English phraseology without changing substance.

Defamation

An extensive report was presented on this matter by the Saskatchewan Commissioners as set out in Appendix K, page 166. It was referred back to them for a further report in 1983 with a draft Uniform Act reflecting any further recommendations.

Enactment of and Amendment to Uniform Acts

The report of the Manitoba Commissioners was received and distributed for information purposes. It is set out in Appendix L, page 232.

Evidence

The Institute of Law Research and Reform of Alberta distributed a press release entitled Adoption of Uniform Evidence Legislation Recommended. It is set out in Appendix M, page 236.

Extra-Provincial Child Welfare Orders

The Alberta report on this matter as set out in Appendix N, page 240, was referred to the Alberta and Newfoundland Commissioners for a draft Act in 1983.

Foreign Judgments

The Nova Scotia and Quebec representatives will have a report in 1983.

Franchises

A report was submitted by the Alberta, Quebec and Canada Commissioners as set out in Appendix O, page 248. The matter was referred back to the Alberta Commissioners for another report and draft Act in 1983.

French Version of Uniform Acts

RESOLVED that the French version of the Uniform Service of Process by Mail Act, the Uniform Foreign Judgments Act and the Uniform Statues Act be adopted as set out in Appendices P, Q and R, pages 272, 275 and 283, and recommended for enactment in that form. It was also resolved that necessary steps be taken to ensure that consideration be given early in the drafting process for the French version of new Uniform Acts.

IT WAS FURTHER RESOLVED that the draft French version of the Uniform Interpretation Act prepared by the Beaupre Committee be referred to a Special Committee of the Legislative Drafting Section for the purpose of preparing, in English and in French, a draft Uniform Interpretation Act that would take into account the difficulties with the present text that became apparent during the preparation of the draft French version.

Intestate Succession Act

The British Columbia report on amendments to this Act is set out in Appendix S, page 287. It was considered and referred to the Saskatchewan, Alberta and Quebec Commissioners for a report on policy issues in 1983.

Judgment Interest

The Section received the Manitoba report and acknowledged the strides that the Manitoba Law Reform Commission has made in this area. The Saskatchewan report was presented with commentary and alternative recommendations were made by the Manitoba Commissioners. These reports are set out in Appendix T, page 299.

RESOLVED that the draft Act as amended be adopted as a Uniform Act as set out in Appendix U, page 328 and recommended for enactment in that form.

Judicial Decisions Affecting Uniform Acts

The report of the Prince Edward Island Commissioners as set out in Appendix V, page 332, was received and it was the unanimous wish of those present that a similar report from those Commissioners would be forthcoming in 1983.

Legal Aid and Security for Costs

These matters were taken care of by the Special Committee on Private International Law, and were deleted from the agenda.

Limitations Act

RESOLVED that the draft Limitations Act as produced by the Legislative Drafting Section and set out in Appendix W, page 341, be adopted as a Uniform Act and recommended for enactment in that form. But the matter will remain on the agenda referred to Alberta and Saskatchewan for a report in 1983 on the result of their new approach.

Matrimonial Property

This matter is to be retained on the agenda for a monitoring report by the Manitoba Commissioners next year on the conflict of laws problems respecting matrimonial property.

Personal Property Security

Professor Ronald C. C. Cuming submitted a memorandum and a proposed Personal Property Security Act for joint adoption by the Uniform Law Conference and the Canadian Bar Association. Section 23 was amended and other minor drafting changes were made.

The Act as amended was referred to the Legislative Drafting Section for the French version to be brought back to the Uniform Law Section in 1983.

The Ontario delegation abstained throughout from voting on any motions relating to this matter.

It was resolved that:

(a) the proposed Uniform Personal Property Security Act, 1982 in the form set out in Appendix X, page 358 be adopted as a Uniform Act;

(b) the Conference recognizes that the Canadian Bar Association is likely to adopt an identical Act and will be asked to join with the Uniform Law Conference in recommending the adoption of the Act by provinces and territories;

(c) the Conference join with the Canadian Bar Association in recommending the adoption of the Act by provinces and territories;

(d) the Conference join with the Canadian Bar Association in

appointing a Joint Editorial Committee which will have a mandate to:

(i) correct any minor drafting errors or structural deficiencies in the Act;

(ii) keep the Act under study and from time to time recommend to the sponsoring parent bodies any substantial changes in the Act which may be required in order to take account of changed circumstances such as unexpected judicial interpretation of the legislation or changes in business practices;

(iii) monitor the adoption of the Act in provinces and territories and encourage adopting jurisdictions to maintain inter-jurisdictional uniformity by adopting the Act without substantial change.

The Joint Editorial Committee will be composed of six persons, three of whom are to be named by the Executive of the Conference and the Chairman to be jointly appointed by the Canadian Bar Association and the Executive of the Conference.

Private International Law

The report as set out in Appendix Y, page 421 was received.

Products Liability

The paper submitted by the Nova Scotia Commissioners is set out in Appendix Z, page 441. The matter was referred to the Ontario and Manitoba Commissioners and to any other jurisdiction that wishes to participate in a report for 1983.

Protection of Privacy: Tort

This had been referred to the Nova Scotia, Quebec and Ontario Commissioners for a report, but the matter was deferred to 1983.

Purposes and Procedures of Conference

The Committee is to be continued and is to deposit a full report with the Executive Secretary before June 1, 1983 so that it can be studied carefully by the meeting of the whole in Quebec City in August, 1983.

Reciprocal Enforcement of Maintenance Orders

The Saskatchewan Commissioners presented their report on Amendments to the Uniform Reciprocal Enforcement of Maintenance Orders Act. It is set out in Appendix AA, page 477.

RESOLVED that section 7 of the Uniform Act be amended by adopting section 7(7) and (8) of the Ontario Act and carrying forward the old Uniform subsection (8) as (9); and that other sections of the existing Uniform Act be amended to consistently use the phrase "necessary modification" rather than "necessary changes".

Regulations

The British Columbia Commissioners presented their report which is set out in Appendix BB, page 489. The draft Act submitted with that report was amended slightly, so instead of printing the draft Act in these proceedings, the revised draft is printed instead.

RESOLVED that the draft Act as amended be adopted as a Uniform Act as set out in Appendix CC, page 495, and recommended for enactment in that form.

Time Sharing: Real Property

This matter was referred to the Manitoba Commissioners for a report and recommendations in 1983.

Transboundary Pollution Reciprocal Access Act

The report on this matter was received and both the report and the draft Act with few amendments are set out in Appendix DD, page 498.

The Executive Secretary was asked to import into our Proceedings the table from the Annual Handbook of the National Conference of Commissioners on Uniform State Laws showing what jurisdictions have enacted this particular piece of legislation.

RESOLVED that the draft Act as amended be adopted as a Uniform Act and recommended for enactment in that form.

Vital Statistics

The British Columbia Commissioners presented a report on this matter as set out in Appendix EE, page 509. It was referred to the British Columbia and Canada Commissioners for proposed amendments to the Uniform Vital Statistics Act.

Wills

The Manitoba and British Columbia Commissioners made a joint report on the Formalities of Will-Making and Gifts to Witnesses. That report is set out in Appendix FF, page 518.

RESOLVED that the following subsection be added at the end of section 12 of the Uniform Wills Act:

(3) Notwithstanding subsection (1), where a (surrogate court) is satisfied that neither the person so attesting nor the spouse of the person exercised any improper or undue influence upon the testator, the devise, bequest or other disposition or appointment is not void.

Formal requirements of the Unform Wills Act were referred to the Nova Scotia Commissioners for study as to what formal requirements should be retained and, if not, whether substitution should be made.

Recommendations are also to be made about non-testamentary lists of personal tangible property as appears in the American Uniform Probate Code.

Workers' Compensation

The Prince Edward Island Commissioners presented a report on this matter as set out in Appendix GG, page 526. It raised a number of issues and options.

The Nova Scotia Commissioners did not participate in the discussion on this particular item.

RESOLVED that where two or more persons have caused an injury and one or more of those persons is exempt from contribution by reason of the Workers' Compensation Act, the liability of those who remain responsible to pay the common law damages for the injury shall not be the full common law damages but only that portion that remains after the ascribed fault of those who are exempt from contribution is first calculated and deducted.

Officers: 1982-1983

Mr. Bertrand was elected Chairman of the Section with Mr. Hoyt as Secretary.

Close of Meeting

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

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

Note: The Uniform Sale of Goods Act adopted by the Conference and reviewed by the Legislative Drafting Section pursuant to a resolution in the 1981 Proceedings at page 34 is set out in Appendix HH, page 531 of these Proceedings.

CRIMINAL LAW SECTION

MINUTES

Attendance

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

Opening

Mr. S. Kujawa, Q.C., presided and Mr. D. Préfontaine, with the assistance of Mr. D. Piragoff, 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-two delegates included representatives from the provinces, the Federal Department of Justice and the Ministry of the Solicitor General, the President and Vice-President of the Law Reform Commission of Canada and members of the private bar.

Fifty-one resolutions were considered calling for amendments to the *Criminal Code*, being both procedural and substantive in nature. During the course of debate on these proposals the Government of Canada advised the delegates of its intentions by way of the next Criminal Law Amendment Bill.

Mr. R. Tassé, Q.C., the Deputy Minister of the federal Department of Justice, advised on the following matters:

(a) *Law of Evidence*—The Federal Government intends to proceed with a Bill in the fall to implement the recommendations of the Uniform Law Conference.

(b) *Criminal Law Review*—A detailed progress report on Phase II activities consisting of 9 projects was made, i.e.: (i) Principles and Objectives of the Criminal Law, (ii) Theft and Fraud, (iii) Contempt of Court, (iv) Jury, (v) Sentencing, (vi) Post-sentencing Procedures, (vii) Pre-Trial Procedures, (viii) Mental Disorder, and (ix) Clemency.

(c) *The Criminal Law Amendment Bill*, to be introduced in the Autumn of 1982, should incorporate some 75% of the resolutions passed by the Uniform Law Conference, Criminal Law Section, during the past several years.

(d) *Bill C-127, "The Sexual Offences Bill"*, was passed by the House of Commons on August 4, 1982. the Bill is expected to pass the Senate in October 1982 before the present session of Parliament formally ends.

(e) The Federal Government released a document in August 1982 entitled "The Criminal Law in Canadian Society", being a statement of the policy of the Government of Canada with respect to the purpose and principles of the criminal law in Canada.

Criminal Law Review, Phase II: Theft and Fraud Project—The options for reform arising out of the Theft and Fraud report of the Law Reform Commission were discussed.

The operation of the Therapeutic Abortion provisions of the *Criminal Code* was raised by several provinces. The subject was to be discussed at the next meeting of Provincial Attorneys General.

The taking of blood samples in relation to impaired driving prosecutions was canvassed in the context of the New Brunswick resolution and a Bill tabled in late July 1982 in the British Columbia legislature. The Law Reform Commission advised that a working paper was to be published in early 1983.

A discussion with respect to the future role of the Criminal Law Section of the Uniform Law Conference resulted in a continuing commitment to the basic purpose of the Section to bring forward amendments required to the *Criminal Code.*

Finally, the work of the Section was greatly facilitated by the very competent assistance of the Canadian Inter-governmental Conference Secretariat and Messrs. D. Préfontaine and D. Piragoff.

Mr. G. F. Gregory, Q.C., was elected Chairman of the Section for next year. Mr. D. Piragoff agreed to act as secretary for next year.

Resolutions

The resolutions were presented by each jurisdiction as follows:

ALBERTA

Item 1

Sections 85, 331(1)(a) and 361 of the *Criminal Code* should be amended to provide that these offences may be proceeded with either by indictment or by summary conviction procedure, at the discretion of the Crown.

re: section 85
CARRIED (18-11)

re: section 331(1)(a)
CARRIED (22-7)

re: section 361
CARRIED (21-9)

A resolution from the floor proposed that the maximum penalty provided for section 361 be reduced from fourteen years to ten years.

CARRIED (15-10)

Item 2

Section 211 of the *Criminal Code* be repealed.

CARRIED (13-3)

The principle of "influence on the mind alone" be included as culpable homicide by an amendment to paragraph 205(5)(c) of the *Criminal Code.*

DEFEATED (8-8)

Item 3

The *Criminal Code* be amended to increase the maximum penalty for the offence of forcible confinement [s. 247(2)] to ten years from the present maximum of five years.

CARRIED (28-4)

Item 4

The alternative proposals, to either increase the value of the monetary jurisdictional limits in section 483, or to repeal section 483 and make the offences listed therein punishable either by indictable or by summary conviction procedure, at the option of the Crown, were withdrawn in favour of the proposals of Ontario, as amended, to increase the monetary jurisdictional limits:

Sections 294, 313, 320 and 338(1) of the *Criminal Code* be amended as follows:

(1) The offences should be punishable either by way of indictment or summary conviction procedure, at the option of the Crown, where the dollar value does not exeed $1,000.

CARRIED (26-1)

(2) The maximum punishment available where the Crown proceeds summarily should coincide with the general penalty framework for summary conviction offences, to be amended by the proposed Criminal Law Amendment Bill.

CARRIED (unanimous)

Item 5

The proposed resolution, that the provisions of section 497(a) of the *Criminal Code* be made applicable to elections made under either section 464 or 484, was withdrawn in favour of a new resolution:

The duplicate election procedures of sections 464 and 484 be consolidated in one section.

CARRIED (unanimous)

The proposed resolution, that clear statutory provisions could be indicated to assist the judge, who pursuant to section 497(b) declines to record the election, in order to determine what precisely "the court of competent criminal jurisdiction" should be, was withdrawn in favour of the proposed resolution by British Columbia concerning section 497:

Section 497 of the *Criminal Code* should provide that where two or more persons are charged with the same offence and:

(a) if one or more of them, but not all, elect to be tried by a court composed of a judge and jury, the magistrate may, in his discretion, decline to record the elections of those who have not elected trial by a court composed of a judge and jury. The magistrate shall then hold a preliminary inquiry, and the trial of anyone committed for trial at the conclusion of the preliminary inquiry shall be by a court composed of a judge sitting with a jury.

CARRIED (unanimous)

(b) if none of the accused elect to be tried by a court composed of a judge and jury, but one or more of the persons charged with the offence, but not all of them, elect to be tried by a judge alone, then the magistrate may, in his discretion, decline to record the election of any of the accused. The magistrate shall then hold a preliminary inquiry and the trial of any of the accused committed for trial shall be by a court composed of a judge sitting without a jury.

DEFEATED (8-19)

or

(c) Same as (b) above, except that the trial be by a court composed of a judge sitting with a jury.

CARRIED (21-4)

Item 6

Sections 618 and 620-622 of the *Criminal Code* be amended to provide that it only be necessary to file the notice of appeal within the required time limit and that it not be necessary that leave to appeal need also to be granted within that time limit.

CARRIED (unanimous)

Sections 618 and 620-622 of the *Criminal Code* be amended to increase the time limit to 45 days from the present limit of 21 days.

CARRIED (18-11)

Item 7

The proposed resolution, that the plea of *Nolo Contendere* be examined with a view to amending the provisions of the *Criminal Code* to permit the use of such plea, was withdrawn.

Item 8

The proposed resolution, that the phrase "and begs" be deleted from subsection 244(c) of the *Criminal Code*, leaving the section to read, "he accosts or impedes another person", was withdrawn.

It was proposed from the floor that paragraph 244(1)(c) of the *Criminal Code*, as proposed to be amended by clause 19 of Bill C-127, as passed by the House of Commons, August 4, 1982, be amended to delete the words "or begs" to be replaced by the words "and begs".

DEFEATED (8-15)

Vote by delegation was called:

DEFEATED (12-18)

It was proposed from the floor that paragraph 244(1)(c) of the *Criminal Code*, as proposed to be amended by clause 19 of Bill C-127, as passed by the House of Commons, August 4, 1982, be amended to delete the words "accosts or", thereby leaving the paragraph to read "he impedes or begs".

DEFEATED (7-14)

A re-vote was called on a point of clarification:

DEFEATED (9-18)

It was proposed from the floor that paragraph 244(1)(c) of the *Criminal Code*, as proposed to be amended by clause 19 of Bill

C-127, as passed by the House of Commons, August 4, 1982, be amended to delete the phrase, "he accosts or impedes another person or begs", to be replaced by the phrase "he begs or without lawful excuse impedes another person", on condition that a proper French expression could be drafted equivalent to the concept expressed in the words "without lawful excuse impedes".

CARRIED (24-6)

Item 9

Two new offences be created by the *Criminal Code* to incorporate the aspects of causing death and causing injury while "driving in a manner dangerous to the public . . .", with maximum penalties of 14 and 10 years, respectively.

DEFEATED (4-18)

BRITISH COLUMBIA

Item 1

The proposed resolution, to delete the word "wife", in subsection 745(1) of the *Criminal Code* to be substituted by the word "spouse", was withdrawn.

Item 2

Subsection 664(3)(c) of the *Criminal Code* be amended to permit the granting of an increase, not exceeding one year, of the period for which a probation order is to remain in force.

CARRIED (15-14)

A vote by jurisdiction was called:

CARRIED (17-11-2)

Item 3

Subsection 594(1) of the *Criminal Code* be amended to provide that subsection 594(1) apply to both indictable and summary conviction proceedings, and that subsection 594(2) be repealed.

CARRIED (unanimous)

The proposed resolution, to delete in paragraph 594(1)(a) the words, "upon proof that the accused is the person referred to in the certificate, . . .", to be substituted by the words, ". . . upon proof of the identity of the accused, . . .", was withdrawn.

Item 4

The proposed resolution, that paragraph 460(1)(b) of the *Criminal Code* be expanded to include *"to plead to* or to stand his trial upon a charge that may be tried by indictment or on summary conviction", was withdrawn.

It was proposed, in substitution, that: Section 460 be amended to provide that a prisoner may be brought before the court, judge, justice or magistrate in respect of any court appearance at which his attendance is required, and not just with respect to the purposes described in paragraphs 460(1)(a)-(c).

CARRIED (unanimous)

Section 460 be amended to provide that the affidavit of the applicant need not be required, but that the court's order in writing be maintained; and further, that subsection 460(1)(d) be amended to provide, "the applicant for the order satisfies the judge or justice that his attendance is required".

DEFEATED (6-22)

Item 5

Subsection 771(1) of the *Criminal Code* be amended to allow either the appeal court or a judge thereof to grant leave on any ground that involves a question of law alone.

CARRIED (19-6)

Item 6

The proposed resolution, that section 73 of the *Criminal Code* be amended to provide that it is not a requisite of the offence that the accused intend to dispossess the owner/occupier, was withdrawn.

The proposed resolution, that section 173 of the *Criminal Code* be amended to delete the words "loiters or prowls", and to include as an offence not only being "upon the property of another person near a dwelling house", but also being "in the dwelling house", was withdrawn.

Item 7

The *Criminal Code* be amended to provide that a justice acting on a preliminary inquiry would have the power to amend an information during the proceedings in order that it may conform to the evidence.

CARRIED (18-1)

Item 8

With the permission of British Columbia, this item, relating to sections 464 and 497, was incorporated and voted upon in relation to Item 5 of Alberta.

MANITOBA

The proposed resolution, that section 178.22 of the *Criminal Code* be amended along the lines proposed by Ms. Louise Savage in her report on "Electronic Surveillance: Annual Reports, 1975-1977", prepared for the Law Reform Commission of Canada in October 1979, was withdrawn as a resolution and was tabled for discussion and consideration.

NEW BRUNSWICK

The proposed resolution, that the offences described in section 234(1) (impaired driving), section 234.1(2) (refusal-roadside testing), section 235(2) (breathalyzer refusal) and section 236 (driving with over .08 blood alcohol) remain hybrid offences, but that the punishment for conviction by indictment on these offences be amended to provide for an increased minimum penalty of 6 months imprisonment and an increased maximum penalty of 5 years imprisonment, was withdrawn in favour of the formation of a committee to propose a new set of resolutions.

A committee was formed and proposed the following resolutions:

That the offences referred to in section 234(1) (impaired driving), section 234.1(2) (refusal-roadside testing), section 235(2) (breathalyzer refusal) and section 236 (driving with .08 blood alcohol) remain hybrid offences, but the maximum penalty available where the charge is proceeded with by indictment be 2 years.

CARRIED (unanimous)

That the maximum penalty for the above-stated offences where the charge is proceeded with by summary conviction procedure be 6 months imprisonment and/or a fine of $2,000.

CARRIED (22-3)

That with respect to second and subsequent offences, a limit be statutorily provided that a court could not consider convictions occurring more than 5 years prior to the date of the occurrence of the offence which comprises the subject matter presently before

the court; and that the present notification requirements with respect to subsequent offences be maintained.

CARRIED (24-7)

That with respect to the above-stated offences, the minimum penalty for a first offence, proceeded with either by indictment or by summary conviction procedure, be a fine of $200, rather than the present fine of $50.

CARRIED (unanimous)

That with respect to the above-stated offences, the minimum penalty for offences proceeded with either by indictment or by summary conviction procedure, on proof of one previous conviction, be 21 days imprisonment rather than the present penalty of 14 days imprisonment.

CARRIED (19-6)

That with respect to the above-stated offences, the minimum penalty for offences proceeded with either by indictment or by summary conviction procedure, on proof of two or more previous convictions, be 6 months imprisonment rather than the present 3 months imprisonment; and that there be no provision for intermittent sentencing.

DEFEATED (9-15)

A vote by jurisdiction was called:

DEFEATED (11-14)

A resolution from the floor was proposed that with respect to the above-stated offences, on proof of two or more previous convictions, the present penalty of 3 months minimum imprisonment be retained, *but* that no intermittent sentencing be available.

DEFEATED (3-20)

Item 2

The proposed resolution, that the *Criminal Code* be amended by inserting immediately after section 235 a provision permitting the taking of blood samples where a police officer believes on reasonable and probable grounds that an alleged offender has caused bodily harm to himself or another person resulting from the commission of an offence under section 234, and that he is incapable of providing a proper or suitable sample of his breath as required under section 235, was deferred for discussion until later on the agenda.

NEWFOUNDLAND

No submissions presented.

NORTHWEST TERRITORIES

No submissions presented.

NOVA SCOTIA

No submissions presented.

ONTARIO

Item 1

The proposed resolution, that subsection 159(1) of the *Criminal Code* be amended to include the selling and renting of any obscene matter, etc., was withdrawn.

The proposed resolution, that the word "rents" be added to subsection 159(2), was withdrawn in favour of a resolution that subsection 159(2) be amended to include rental of obscene material, but be amended in such a manner and form so as not to create adverse consequences or expand the definitional net too wide.

CARRIED (unanimous)

Subsection 159 be amended by adding a subsection to provide that where a finding of guilt or conviction has been made pursuant to section 159, the court shall make an order declaring the matter, etc., which is the subject of the finding of guilt or conviction to be forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

CARRIED (19-3)

Item 2

Subsections 646(10) and 722(9) either be repealed, or amended to provide the courts with a statutory remedy, exercisable at the discretion of the court, to bring the offender back before the court so that a determination can be made concerning the conduct and means to pay of the accused.

CARRIED (unanimous)

Item 3

Section 610 of the *Criminal Code* be amended to confer on the

Court of Appeal an express power to amend an Information or Indictment and dismiss an appeal should the Court be of the view that if the amendment were made no prejudice would be done to the defence of the accused as presented at trial.

CARRIED (26-1)

Item 4

Subsection 331(1) of the *Criminal Code* be amended to make all threats to cause death, injury, or to burn or destroy property belonging to any person, irrespective of the means employed, an offence.

CARRIED (17-9)

Subsection 331(1) of the *Criminal Code* be amended to provide that the offences described therein may be committed whether or not the intended victim is ascertainable or identifiable.

DEFEATED (10-16)

Item 5

The proposed resolution, that Part II.1 of the *Criminal Code* be amended to require the person, from whom weapons, etc., were seized under section 101, and on being given notice, to attend before the magistrate to show cause why the order sought, as set forth in the notice, should not be made against him; and that in default of appearance, on proof of notice being served upon the respondent, the order shall be made *ex parte*, was withdrawn.

It was proposed that the contemplated amendment to the *Criminal Code* in the proposed Criminal Law Amendment Bill be enacted; that is, a provincial court judge may proceed *ex parte* to hear and determine an application described in subsection 101(4) in the same circumstances in which a summary conviction court may, pursuant to Part XXIV, proceed with a trial in the absence of the defendant.

CARRIED (unanimous)

Item 6

Section 577 of the *Criminal Code* be amended by adding a provision enabling the trial judge to appoint counsel for an unrepresented accused who has been removed or has been permitted to be absent from the court.

DEFEATED (5-25)

Item 7

Section 627(2) be amended to empower a magistrate to issue a subpoena to compel the attendance of witnesses who are not within the Province in which the case is to be tried.

CARRIED (unanimous)

Item 8

The proposed resolution, that section 108 (bribery of judicial officers, etc.), section 109 (bribery of officers), section 110 (frauds upon the government), section 111 (breach of trust by public officer), section 112 (municipal corruption), section 113 (selling or purchasing office), section 114 (influencing or negotiating appointment or dealings in offices), section 296 (criminal breach of trust) and section 383 (secret commissions) be amended to make these offences prosecutable either by indictment or by summary conviction procedure at the option of the Crown, was withdrawn and presented for discussion only.

Item 9

The following resolutions, with the consent of Ontario, and as amended, were incorporated as resolutions of Alberta (See Item 4 of Alberta): Sections 294, 313, 320 and 338(1) of the *Criminal Code* be amended to provide that: (1) these offences be hybrid where the dollar value does not exceed $1,000; and (2) the maximum punishment available where the Crown proceeds summarily be 6 months or $2,000 or both.

The following resolutions were withdrawn: Sections 294, 313, 320 and 338(1) of the *Criminal Code* be amended to provide that: (3) the maximum term of imprisonment available where the Crown elects to proceed by indictment should be 5 years (rather than the present 2 years); and (4) the maximum term of imprisonment available where the dollar value exceeds $2,000 should be 14 years (rather than 10 years).

Item 10

The proposed resolution, containing a draft amendment to the *Criminal Code*, was withdrawn in favour of a resolution that the *Criminal Code* be amended to restrict public access to sworn informations to obtain search warrants; such amendment to reflect the principle that with respect to all persons the basic presumption

is confidentiality, subject to the right of only interested parties to apply to obtain access at the discretion of the court.

CARRIED (19-5)

Item 11

The proposed resolution, that the *Criminal Code* be amended to provide that for the purpose of section 507.1 an indictment shall be deemed to be presented to a court if it is presented to a court on the relevant occasion, irrespective of whether the court is a trial court or whether the court is ready to proceed with the trial of the accused, was withdrawn.

It was proposed that the *Criminal Code* be amended to provide that a court be able to issue process under section 507.1 to require the accused to attend to his trial, irrespective of whether the court is a trial court ready to proceed with the trial of the accused; but that such power not adversely effect an accused's right to challenge by way of prerogative relief the committal to stand trial.

CARRIED (unanimous)

Item 12

Part II.1 of the *Criminal Code* be amended by adding the following section:

S. 106.10(1) Everyone who is lawfully entitled to possess a restricted weapon under this Part shall, upon the demand of a peace officer, produce for his immediate inspection

(a) the certificate or permit under which he may lawfully possess the restricted weapon, and

(b) the restricted weapon which the certificate or permit entitles him to lawfully possess.

(2) Where a peace officer makes a demand under subsection (1) and the person to whom the demand was made cannot comply because the certificate or permit and/or the restricted weapon is not at his immediate disposal because it or they are at a different place, he shall forthwith accompany the peace officer to that place and immediately produce them for inspection by the peace officer.

(3) Where a peace officer makes a demand under this section and the person to whom the demand is made fails to comply, the peace officer may immediately search, without a warrant, the place or places at which the certificate or permit indicates that the restricted weapon may be lawfully possessed.

(4) Everyone who, without lawful excuse, fails to comply with

the demand of a peace officer made under this section is guilty of an offence punishable on summary conviction.

DEFEATED (12-12)

A vote by jurisdiction was called:

CARRIED (16-14)

Item 13

Section 423(1)(a) of the *Criminal Code* be amended to increase the maximum punishment to life imprisonment from the present maximum of 14 years.

CARRIED (unanimous)

Item 14

The *Criminal Code* be amended to extend the jurisdiction of Canadian courts to try persons in Canada for counselling in Canada crimes to be committed abroad, and for counselling abroad crimes to be committed in Canada.

CARRIED (19-2)

PRINCE EDWARD ISLAND

No submissions presented.

QUEBEC

Item 1

Section 666 of the *Criminal Code* be amended by replacing subsection (1) with the following:

(1) An accused who is bound by a probation order and who fails or refuses, without lawful excuse, the proof of which lies upon him, to comply with that order is guilty of an offence punishable on summary conviction.

CARRIED (17-2)

Item 2

Section 483 of the *Criminal Code* be amended to include all of the offences listed in section 133, thereby placing them within the absolute jurisdiction of a magistrate.

CARRIED (16-1)

Item 3

The proposed resolution, to amend paragraphs 618(1)(b),

620(3)(b) and 621(1)(b) by deleting the words, "twenty-one days", and replacing them with the words, "forty-five days", was incorporated, with the consent of Quebec, into a resolution of Alberta. (See Item 6 of the resolutions of Alberta).

Item 4

Section 623(2) of the *Criminal Code* be repealed so that Rule 59 of the Rules of Court of the Supreme Court of Canada would only apply.

CARRIED (unanimous)

SASKATCHEWAN

No submissions presented.

YUKON

No submissions presented.

CANADA

No submissions presented.

Other matters for discussion on the agenda

Criminal Law Review, Phase II: Theft and Fraud

Representatives from the Department of Justice consulted with the Commissioners on the above-captioned matter. Discussion occurred on a number of issues raised by the Law Reform Commission Report on Theft and Fraud, 1979.

It was proposed from the floor that the review with respect to theft and fraud proceed upon the following principles:

(1) that the process be a review, not a revision,

(2) that fundamental concepts and requisites of the present offences of theft and fraud not be abandoned, subject to the recognition that some new concepts may be included; although at this time it is premature to express an opinion upon such,

(3) that any simplified package may not cover all historical concepts, anomalies, etc., contained in the present law.

CARRIED (15-7)

Therapeutic Abortion Committees

This matter was added to the agenda by Saskatchewan. Discussion occurred on a number of issues in relation to the operation of Therapeutic Abortion Committees. No resolutions were presented.

Blood sample acquisition in relation to impaired driving offences

Discussion occurred on the proposed resolution of New Brunswick and on Bill 69 of the Fourth Session, Thirty-second Parliament, 30-31 Elizabeth, 1981-82, of the Legislative Assembly of British Columbia.

The proposed resolution of New Brunswick was withdrawn in favour of the following resolution:

That the *Criminal Code* be amended to provide for the taking of blood samples in relation to impaired driving offences on the basis that there must exist reasonable and probable grounds to believe that:

(1) an offence under section 234 or section 236 of the *Criminal Code* was committed causing bodily harm to the alleged offender;

(2) the alleged offender is incapable of providing a proper or suitable sample of breath as required under section 235; and

(3) the alleged offender is unable to give informed consent to the taking of a blood sample.

CARRIED (14-10)

Bill C-127 of the First Session, Thirty-second Parliament, 29-30-31 Elizabeth II, 1980-81-82, as passed by the House of Commons, August 4, 1982

The Department of Justice advised as to the passage of the above-numbered Bill. Several delegates expressed their opinions on various aspects of the Bill.

Future of the Criminal Law Section of the Uniform Law Conference

Discussion occurred as to the future role of the Criminal Law Section of the Uniform Law Conference, especially in light of the Criminal Law Review project recently undertaken by the federal and provincial governments, which encompasses a detailed examination of all substantive and procedural aspects of criminal law and procedure. The Department of Justice advised that they still considered the Uniform Law Conference to be a beneficial forum in which to become appraised of practical problems relating to the administration of justice which require legislative reform. The Chairman argued strongly for a continuation of the Section on the grounds that it is the one continuing forum for practical ongoing criminal law review and reform. It gives the every day practitioner a chance to discuss, learn and cause change in the criminal law.

CLOSING PLENARY SESSION

MINUTES

The Closing Plenary Session opened with the President, Mr. Macaulay, 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. Stone, reported on the work of the Section.

Criminal Law Section

The Chairman, Mr. Kujawa, reported on the work of the Section.

Treasurer's Report

Resolved that the Treasurer's Report presented by Mr. Bertrand, Appendix A, page ——, be adopted.

Report of the Executive

The President, Mr. Macaulay, reported on the work of the Executive mentioning in particular the printing of the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence.

Resolutions Committee's Report

Mr. Ewart 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 Canada and its delegates for their generous hospitality in hosting the Sixty-fourth Annual Meeting of the Uniform Law Conference of Canada, for the reception for the Legislative Drafting Section and for the reception and dinner for the delegates of the Conference;
2. M. Carol Bourgeois and members of the Canadian Intergovernmental Conference Secretariat for their valuable assistance in so many aspects of the Conference and the many services provided;
3. Messieurs Jean-Pierre Lessard and Jacques Gruber and members of their staff for providing excellent simultaneous translation services to the Conference;
4. our American counterpart, the National Conference of Commissioners on Uniform State Laws, for the invitation to

attend and the hospitality they extended to Mr. George Macaulay at the National Conference in Monterey;

5. Mr. King Hill, Jr. and Mr. George Keely for honouring this year's Conference with their presence and for contributing their wisdom to the deliberations of the Conference.

Nominating Committee's Report

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

Honorary President:	George B. Macaulay, Q.C., Victoria
President:	Arthur N. Stone, Q.C., Toronto
1st Vice President:	Serge Kujawa, Q.C., Regina
2nd Vice President:	Gérard Bertrand, Q.C., Ottawa
Treasurer:	Graham D. Walker, Q.C., Halifax
Secretary:	Rémi Bouchard, Sainte-Foy

New Business

Resolved that the Executive Committee study and report back on how reports presented to the Conference are to be treated with respect to confidentiality.

Close of Meeting

Mr. Macaulay after making his closing remarks turned the chair over to the incoming President, Mr. Stone.

Mr. Stone referred to the changing role of the Conference and pointed out how vital those changes have been to the continued existence of the Conference.

Special tributes were paid to Mr. Macaulay for his outstanding contribution to the work of the Conference and also to Mr. O'Donoghue for his advice and assistance to the Executive.

There being no further business, the President declared the meeting closed.

STATEMENT TO THE CANADIAN BAR ASSOCIATION

by

GEORGE B. MACAULAY, Q.C.

It is my pleasure as outgoing president of the Uniform Law Conference of Canada to make this statement of our activities at this year's 64th annual meeting. The meeting was held at Montebello, Quebec and hosted by the Federal Government.

As you know, the prime purpose of the Conference is to achieve uniformity in the laws of those jurisdictions throughout Canada which have legislative powers. At present there are 13 jurisdictions participating—the 10 Provinces, 2 Territories and of course the Federal Government. Each jurisdiction sends pre-appointed Commissioners to represent it at the meetings. These representatives are selected from the private bar, law reform commissions and legal departments of government.

The Conference is divided into 3 sections—

(a) the Drafting Section which meets independently a few days before the official opening to prepare model or uniform Acts for discussion;

(b) the Uniform Law Section which debates the policy behind the Act and recommends adoption in the jurisdictions; and

(c) the Criminal Law Section which debates and resolves on problems concerning the administration of criminal justice and the criminal law itself.

The Drafting Section met for 2 days on August 19th and 20th, with selected delegates from each jurisdiction in attendance. A number of draft Acts were reviewed for submission to the Uniform Law Section. This latter section and the Criminal Law Section met during the week commencing Monday, August 23rd.

In the Uniform Law Section, the most significant achievement of the week from Canadian Bar's point of view was the recommendation for enactment of the Uniform Personal Property Security Act. As you know, this Act is the result of the joint effort of your Association and

the Conference working in harmony to achieve a model Act which will have the support of both bodies. This Act will require continued monitoring, and it is my hope that a joint editorial committee will be satisfactorily established for the purpose. The achievement is indicative of the linkage which has traditionally existed between the Canadian Bar and the Uniform Law Conference.

Another act of major significance recommended for adoption was the Uniform Transboundary Pollution Reciprocal Access Act. A joint committee of the Canadian Conference and the National Conference of Commissioners on Uniform State Laws (our U.S.A. counterpart) has worked for some years in the area of transboundary pollution and court jurisdiction when pollution originating in one state or province might cause damage to a person in another state or province. As a result of the efforts of this joint committee, both the Canadian and U.S.A. conferences have now adopted the draft Act. It makes me proud to introduce for the first time a new phrase into our thinking —"A uniform, uniform Act".

Other Acts recommended for adoption were the Judgment Interest Act, Regulation Act and a Reciprocal Enforcement Act respecting judgments between Canada and the United Kingdom. Some existing uniform acts were recommended for amendment in certain areas such as the Wills Act and Reciprocal Enforcement of Maintenance Orders Act. In addition there are many areas in which policy discussion is continuing. These include Defamation, Contributory Fault, Intestate Succession and Products Liability.

The Criminal Law Section discussed a whole variety of matters relating to criminal law and procedure, including Bill C-127 relating to sexual offences, the law touching on fraud and theft, and breath sampling and penalties for impaired driving. The question of time limits for appeals to the Supreme Court of Canada was debated.

Once again, the Canadian Intergovernmental Conference Secretariat provided excellent secretarial services including interpretation and translation. These services fill a great need and are much appreciated by the Conference.

It was our pleasure to have as an honoured guest, Mr. King Hill of Baltimore, U.S.A., the current president of the American Conference. As well, we were favoured with the presence of Mr. George Keely, a U.S.A. Commissioner who took part in the debate on transboundary pollution.

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

Honorary President:	George B. Macaulay, Q.C., Victoria
President:	Arthur Stone, Q.C., Toronto
1st Vice-President:	Serge Kujawa, Q.C., Regina
2nd Vice-President:	Gérard Bertrand, Q.C., Ottawa
Treasurer:	Graham D. Walker, Q.C., Halifax
Secretary:	Rémi Bouchard, Sainte-Foy

Legislative Drafting Section

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

Uniform Law Section

Chairman:	Gérard Bertrand, Q.C., Ottawa
Secretary:	Melbourne M. Hoyt, Q.C., Fredericton

Criminal Law Section

Chairman:	Gordon Gregory, Q.C., Fredericton
Secretary:	Don Piragoff, Ottawa

Melbourne M. Hoyt, Q.C., continues as Executive Secretary to the Conference and, on specific request, will make copies of Uniform Acts and the annual proceedings available free of charge to members of the Canadian Bar.

Our next annual conference will meet in Quebec City.

APPENDIX A

(See page 28)

AUDITORS' REPORT

To the Members of the
Uniform Law Conference of Canada:

We have examined the statement of receipts and disbursements and cash position of the Uniform Law Conference of Canada for the year ended July 15, 1982. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests and other procedures as we considered necessary in the circumstances.

In our opinion, this statement presents fairly the cash position of the organization as at July 15, 1982 and the cash transactions for the year then ended, in accordance with the accounting principles as described in Note 1 to the statement applied on a basis consistent with that of the preceding year.

Ottawa, Canada
July 30, 1982.

Clarkson Gordon
Chartered Accountants

UNIFORM LAW CONFERENCE OF CANADA

Statement of Receipts and Disbursements and Cash Position
Year Ended July 15, 1982

	General Fund	Research Fund	Total 1982	Total 1981
Receipts:				
Annual contributions (schedule, note 2)	$34,300		$34,300	$29,250
Government of Canada (note 2)		$25,000	25,000	25,000
Interest	1,951	4,317	6,268	8,038
	36,251	29,317	65,568	62,288
Disbursements:				
Printing of—1981 proceedings	18,227		18,277	
—1980 proceedings	13,071		13,071	
Executive secretary—honorarium	12,151		12,151	14,000
—other	300		300	400
Secretarial services	5,218		5,218	
National Conference of Commissions on Uniform State Laws	5,000		5,000	451
Executive travel	4,821		4,821	
Annual meeting	1,547		1,547	3,017
Executive meeting	878		878	
Professional fees	810		810	708
Joint Liaison Committee meeting	438		438	1,482
Postage	315		315	
Printing and stationery	217		217	132
Miscellaneous	211	24	235	5
Telephone	167		167	279
Sale of Goods Act Project		4,749	4,749	19,084
Evidence Task Force Meeting		646	646	2,384
Personal Property Security Act Committee		281	281	
	63,371	5,700	69,071	41,942
Excess (deficiency) of receipts over disbursements before inter-fund transfer	(27,120)	23,617	(3,503)	20,436
Interfund transfer (note 3)	5,708	(5,708)		
Balance in bank, beginning of year	35,547	36,992	72,539	52,193
Balance in bank, end of year	$14,135	$54,901	69,036	72,539
Balance in bank consists of:				
Term deposits	$20,389	$ 9,451	$29,840	$62,299
Current account (overdraft)	(6,254)	45,450	39,196	10,240
	$14,135	$54,901	$69,036	$72,539

(See accompanying notes to the statement)

UNIFORM LAW CONFERENCE OF CANADA

Notes to the Statement of Receipts and Disbursements and Cash Position
July 15, 1982

1. *Accounting Policies*

The accompanying statement of receipts and disbursements and cash position reflects only the cash transactions of the organization during the year.

This statement is 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. *Amounts Not Yet Received*

1982 annual contributions have yet to be received as of July 15, 1982 from the following members:

Canada	$ 1,500
British Columbia	4,000
Prince Edward Island	700
Newfoundland	4,000
Saskatchewan	1,500
	$11,700

The annual grant to the Research Fund from the Government of Canada to a maximum of $25,000 per year is anticipated once the Government has reviewed the annual audited statement of receipts and disbursements and cash position.

3. *Inter-Fund Transfer*

Interest revenue received by the Research Fund during the year is transferred to the General Fund in the following year.

4. *Commitment*

The Executive Committee has awarded a contract for the printing of the Report of the Federal/Provincial Task Force in the amount of $7,500.

5. *Tax Status*

The Conference qualifies as a non-profit organization, as defined in Section 149(1)(1) of the Income Tax Act, and is exempt from income taxes.

6. *Statement Presentation*

A balance sheet and a statement of changes in financial position have not been presented since they would not provide additional useful information over and above that presented in the statement of receipts and disbursements and cash position.

UNIFORM LAW CONFERENCE OF CANADA

Schedule of Members' Annual Contributions
Year Ended July 15, 1982

	1982	1981
Re: Previous year—		
Canada		$ 2,500
Re: Current year—		
Canada	$ 2,500	$ 2,500
British Columbia		2,500
Ontario	4,000	2,500
Prince Edward Island	1,300	1,250
New Brunswick	4,000	2,500
Newfoundland		2,500
Quebec	4,000	500
Northwest Territories	2,000	1,250
Manitoba	4,000	2,500
Nova Scotia	4,000	2,500
Alberta	4,000	2,500
Saskatchewan	2,500	2,500
Yukon	2,000	1,250
	34,300	26,750
	$34,300	$29,250

(See accompanying notes to the statement)

APPENDIX B

(See page 28)

SECRETARY'S REPORT

The office of the Secretary is closely linked with that of the Executive Secretary who will be reporting on particular matters associated with the office of Secretary.

The Conference has been fortunate during the past year in having Mr. Melbourne M. Hoyt, Q.C., as its Executive Secretary. 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. He was President of the Conference for the year 1967-68. He was formerly Legislative Counsel and Clerk of the Executive Council in New Brunswick.

The office of Secretary has passed the year without noteworthy incident. Letters of appreciation were sent as directed by the Resolutions Committee of the last annual meeting to those persons and organizations named in the resolution. A copy of the resolution is found at pages 54 and 55 of the Proceedings of the Sixty-Third Annual Meeting (1981).

Graham D. Walker, Q.C.
Secretary

APPENDIX C

(See page 28)

EXECUTIVE SECRETARY'S REPORT

The 1981 proceedings contain about 100 pages more than previous years. This is due in large part to the publication of the Evidence Act and the Sale of Goods Act, both together being 60% of the total.

The success of this Conference depends to a large extent on the local secretaries. We will be exchanging ideas this week for the purpose of improving our lines of communication.

During the last three days, I attended the Legislative Drafting Section. I attended to see what, if anything, that section might want me to do.

Since the Criminal Law Section and the Uniform Law Section meet at the same time, it is difficult to attend both, although some delegates have done so. Nevertheless, I am also anxious to know what, if anything, that section might want me to do.

According to my terms of reference, I am to receive and circulate all reports. Most of the reports, if not all of them, were sent to me. Some of them, however, were circulated by the person or committee making the report, or by the local secretaries. I appreciated that assistance, but at the same time, it did cause some confusion as to what was being done, by whom and when. This coming year, I hope to establish better communication with all concerned to avoid that confusion and duplication of effort.

M. M. Hoyt
Executive Secretary

APPENDIX D

(See page 30)

REPORT ON THE CANADA-UK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS

I *Introduction*

A third session of negotiations on this matter was held in Edinburg from April 26-29, 1982, and, subject to one outstanding issue of policy, a draft text (attached as Annex "A") was adopted for consideration. the United Kingdom was represented by Mr. Ian Mathers, of the Lord Chancellor's Office, and by Mr. Hugh Macdiarmid, of the Scottish Courts' Administration. Canada was represented by Mr. D. Martin Low, of the Department of Justice and by Mr. Graham D. Walker, Q.C., Chief Legislative Counsel, Nova Scotia.

Negotiations proceeded on a clause-by-clause examination of a previous draft, dated August 8, 1981, and the Canadian position on each article was developed from comments on this earlier draft which had been submitted by the following correspondents:

1. Daniel Jacoby, Quebec,
2. Marie Josée Longtin, Quebec,
3. H. Allen Leal, Q.C., Ontario,
4. Craig Perkins, Ontario,
5. M. Raymond Moore, P.E.I.,
6. A. Bissett-Johnson, Nova Scotia
7. R. H. Tallin, Manitoba,
8. H. M. Ketcheson, Q.C., Saskatchewan,
9. R. W. Paisley, Q.C., Alberta,
10. W. H. Hurlburt, Q.C., Alberta,
11. Gilbert D. Kennedy, Q.C., B.C.,
12. Arthur L. Close, Q.C., B.C.,
13. Padraig O'Donoghue, Q.C., Yukon

The comments of these correspondents were brought to the attention of the British representatives as each article was discussed. It should be noted that these comments not only helped to clarify the previous draft, but on difficult policy questions they served as independent reinforcement for the position taken by the Canadian representatives. Mr. Walker and I believe it would be desirable to elicit similar comments in negotiations on other private international law matters, whenever feasible in future.

It is not anticipated that further meetings will be required. On the outstanding policy question, which concerns the issue of jurisdic-

tional rules, both the Canadian and British representatives agreed to consult interested sources and to obtain instructions on a position. But despite disagreement on the policy question on whether there should be, in effect, a complete or partial codification of the rules of jurisdiction in the draft convention, tentative agreement was reached on the formulation of such a codification, and this should facilitate the final resolution of this matter without further meetings.

On the form of the agreement consultation is underway with the Department of External Affairs and in particular, its Treaty Section. It remains open to both sides to suggest modifications on this aspect of the Convention, and no matters of drafting and substance, it is anticipated that any minor changes that may be required can be adopted by correspondence.

II *Analysis*

Since earlier drafts of this Convention have been considered by the Advisory Group on Private International Law and by the Uniform Law Conference on previous occasions, this assessment of the terms of the Convention will focus on the modifications that were made to the August, 1981 draft and on the rationale for these changes.

Article 1 Definitions

Paragraph (a): No comments were received from any source and it is unchanged from the 1981 draft.

Paragraph (b): the reference to the pertinent Convention of the European Economic Communities has been changed from the previous draft, which referred to the "Brussels Convention". That Convention is described in the British *Civil Jurisdiction and Judgments Bill* as "the 1968 Convention" and a British proposal to use the same term was accepted.

Paragraph (c): Sub-paragraph (i) now provides the necessary cross-reference to Article 13, to confirm the inclusion of the courts of certain jurisdictions to which Britain may extend the Convention. This was thought to be uncertain in earlier drafts.

Sub-paragraph (ii) now uses the correct title of the Federal Court of Canada, a point which several commentators on the previous draft noted.

Paragraph (d): As a result of a decision to adopt a provision on the recognition of judgments in Article 8, a British proposal to exclude the previous limitation in this definition, to judgments "whereby a sum of money is made payable", was accepted. The new article on

recognition would cover judgments in favour of a defendant which may not be for a sum of money, where for example an action is dismissed without costs. It was therefore agreed that the *enforcement* provisions of the Convention would be limited to money judgments by Article 2(5) and that the restriction of the Convention to "civil and commercial matters", together with the clearer exclusions set out in Article 2(2), should alleviate any concern about the extent of the Convention's application to non-money judgments. The drafting of this definition has also been simplified considerably, by comparison with the previous text.

Paragraphs (e) and (f): There was no comment on paragraph (e), which remains unchanged, and the previous text of paragraph (f) was brought into closer alignment with (e).

Paragraphs (g), (h) and (i): No change.

Article 2 Scope of the Convention

Paragraph (1): It is important to note that the arrangements for recognition and enforcement of judgments set out in the draft Convention apply only to judgments given *after* the Convention enters into force. Unlike the *Uniform Reciprocal Enforcement of Judgments Act* which contains no such restriction, the relevant British legislation, the *Foreign Judgments (Reciprocal Enforcement) Act,* 1933, 3.6, excludes all proceedings on a judgment which could be enforced pursuant to a convention such as this but which was given prior to the entry into force. (s. 6)

The Canadian representatives received firm assurances from the British representatives that the current means of enforcing a judgment of a Canadian court will be unaffected, for judgments given prior to entry into force of the Convention. Thus, the provinces which already have reciprocal arrangements with the UK will continue to have recourse to their present legislation for such judgments; for those provinces and territories which do not, a judgment creditor will continue to have an action on the judgment in a British court. A province or territory which decides to have the draft convention extended to it should bear clearly in mind that the draft Convention will be the *exclusive* means of enforcing in Britain judgments to which it applies and which are given after its entry into force and extension to that province or territory.

Paragraph (2): This reverts to the form which the original Canadian working draft for this convention employed. Inclusion of the provision on recognition in Article 8 raised a number of concerns that the Convention would extend, in literal terms, to matters of status and

capacity, *inter alia.* It also seemed top cover matters like maintenance orders, for which generally satisfactory enforcement mechanisms are already in place. Under the circumstances, it was agreed to adopt specific exclusions and it will be for consideration whether the listed exclusions are satisfactory. It will be noted that provisions relating to judgments against a state, in Article 2 of the 1981 draft, have been deleted. A number of comments demonstrated the inadequacy of the previous draft on this point, and after some deliberation, it was agreed that all possible concerns about sovereign and diplomatic immunities were adequately covered by Article 4(1)(g), which provides for refusal or setting aside of registration of a judgment in circumstances of such immunity. This also facilitated the deletion of the previous Article 5(4)(c).

There are other specific issues of note in this paragraph. It may not be possible under the European Convention for Britian to provide for the enforcement of final, lump-sum awards in a matrimonial proceeding. An attempt was made not to preclude enforcement of such judgments, by differentiating sub-paragraph (a) (which excludes maintenace orders as such) from sub-paragraph (d) (iii), judgments which determine matrimonial matters. It may be argued, as a consequence, that a final financial award in a matrimonial proceeding would fall within Article 3(3) and be enforceable as such. The 1933 British Act excludes judgments in matrimonial matters. The scope of this is not entirely clear in British law, and it may not exclude the financial aspects of a judgment in a matrimonial proceeding. In view of the specific exclusion of such judgments in the British statute, it was not possible to enhance the prospect of securing the enforcement of lump sum awards by clearer provision.

The United Kingdom representatives were also concerned to extend the Convention to the judgments of all tribunals, including, possibly, some which do not bear the normal attributes of a court. A major concern to them was the enforcability of decisions of certain industrial tribunals. The Canadian position was that existing legislation in Canada might extend to courts other than the superior courts, unlike the 1933 British Act, but it was clearly restricted to judgments of "courts". In that regard, it might cover judgments of administrative agencies which were, under the enabling legislation, transformed into an order of a court, for example, by registration, as is often the case with the orders of certain boards. But going beyond a judgment of a "court" might raise questions of policy, having regard to the potentially different objectives of administrative tribunals in the different countries, and extension to the decisions of "non-courts" was considered to be of

questionable necessity in most cases that sprang to mind. Amendments to the British legislation will remove the restriction to superior courts, and the effect of this will apparently be to cover all manner of tribunals, whether or not endowed with the usual indicia of a "court" as such. The effect will be to require a precise enumeration of the courts in the various Canadian jurisdictions to which the Convention will eventually extend, as provided for in Article 12.

Paragraphs (3) and (4): No change in substance was made to these provisions. The effect of paragraph 3 is, of course, that the enforcement mechanism of the Convention is available only for money judgments, but the recognition provisions, in Part V of the convention, will apply even though the judgment may not provide for the payment of money. This may often be the case with judgments in favour of a defendant, which was a major British objective in these discussions.

Article 3

There is no change of substance from the previous draft, although a possible variant on paragraph 3, which was raised by one of our correspondents, was discussed. This would have enabled the registering court to enforce a non-money judgment to the same extent that it would do so, for a similar domestic judgment, under its local law. The British representatives considered this would create uncertainty and unpredictability and could not accept such an approach.

Article 4

Paragraph (1): The square brackets in paragraph (c) are related to the outstanding policy question that remains, and this will be discussed in connection with Article 5.

A new paragraph (g) has been added, as noted, to cover concerns about sovereign and diplomatic immunity in a clearer and more certain fashion than in the previous draft. It is now clear that the court in which registration is sought will determine issues of immunity.

The meaning of the word "enforceable" in paragraph (b) was discussed as a result of questions raised by certain of our correspondents. The agreed interpretation is that it refers to judgments which are capable of being executed under the law of the territory of origin. Practical factors which might inhibit execution, such as the existence of exchange controls or the lack if assets of the judgment debtor in the territory of origin do not go to the enforceability of the judgment under the local law, within the meaning of this provision, and it is this criterion of local legal enforceability that is the root of this paragraph.

Paragraph 2: The opening words "shall or may be set aside" were considered, in light of comments received. These words are intended to clarify that the local law of the registering court will determine whether setting aside of the registration is mandatory or permissive, in the circumstances that are enumerated.

Paragraph (a): A number of comments indicated that there were policy concerns about the non-enforcement of judgments against a defendant who did not receive notice "In sufficient time to defend", as a separate ground of objection to registration. It was argued that this was broader than many of our correspondents felt desirable. The essence of the Canadian position was that the judgment debtor will have been regularly served under the rules of procedure of the original court and that, as a matter of hypothesis (since this is a separate head of refusal to register) no other objection to the jurisdiction of that court could be raised. The British took the position that this was an essential safety valve, particularly important in litigation involving persons in different countries, to ensure that a person impleaded in a foreign court has an effective opportunity to defend, they also responded that this provision relates only to default judgments, so it will not cover the case of abortive attempts to defend, for which the judgment debtor may subsequently seek to resist registration on this basis.

Paragraph (b): The operation of the previous version of this provision, which relates to multiple proceedings in courts in different jurisdictions, has been extended. Under this revised formula, registration may be set aside if a court of a third state has given judgment before the judgment in the original court. Previously, the third state judgment had to be given before the initiation of proceeding in the original court, but it was suggested and we accepted that this was unduly restrictive.

Paragraph (c): This paragraph was extended to the circumstances in which a judgment debtor remains entitled to apply for leave to appeal, having regard to the increasing number of cases where an appeal lies only with leave.

Paragraph (3) and (4): The drafting of paragraph 3 has been simplified without substantive charge, paragraph 4 was modified to clarify that there is to be no enforcement until the parties affected are no longer able to apply to have registration set aside. Some comments questioned whether the previous draft gave some discretion to the judgment creditor to enforce the judgment even after an application to set aside is made. This interpretation was been avoided in the new text by casting non-enforcement in such a case in mandatory terms. A further comment suggested that the judgment creditor should be able to

execute on the judgment until an application is made to set aside the registration. That approach proved unacceptable and it also may be inconsistent with subsection 6(a) of the *Uniform Act.*

Article 5

There have been substantial changes in the previous version of this Article which continues to be enclosed by square brackets, indicating that the two sides could not accept the inclusion of this provision in the agreed text of the Convention without further instructions.

The British negotiating position is that a necessary feature of the Convention is a "statement" of the jurisdictional rules which will equivocably be accepted by a Canadian court. It was pointed out to the British that the common law in England appears to have evolved to a considerable degree since the 1933 legislative codification. This is particularly the case in connection with paragraph (1)(c), jurisdiction based on an agreement to submit to the jurisdiction of the original court. *The Eleftheris* (1969) 2 All E.R. 641 and *Carvlaho v. Hull Elyth* (1979) 3 All E.R. 280 were cited as examples of the relaxation of the courts' approach to such agreements. In addition to the developing rules for disregarding such agreements to submit where the justice of the case so requires, concern was expressed about so-called "contracts of adhesion", in consumer sales of electronic equipment for example, where the purchaser may submit to the jurisdiction of a foreign court in a contract which he has no effective opportunity to modify. The strict terms of sub-paragrpahs 5(1)(c) and 52(b) would dictate a reversion to the pre-*Eleftheria* state of law, in both Canada and the U.K. for the purposes of this Convention. A further example of developments since the 1933 Act have been the recent cases which have eased the *Moçambique* rule (*British South Africa Company v. Companhia de Moçambique* 1893 AC 602), as set out in sub-paragraph 2(a). Despite recent indications that the rule in paragraphs 2(a) would be less rigorous at common law (as for example, *Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd.,* 1978 a All E.R. 1168) the British position was that while they could make the provisions permissive and thus enable a Canadian court to apply these new developments, a British court would not, in relation to a Canadian judgment, under their statute.

It was also indicated that the history of the adoption of the *Uniform Reciprocal Enforcement of Judgments Act,* which followed very shortly after the 1933 British Act, demonstrates a conscious policy decision not to codify the grounds of jurisdiction. In view of this history, the Canadian representatives took the position that a restatement

of the jurisdictional grounds that would necessarily be recognized by a Canadian court would require legislation which would revert to the 1933 British codification. It was suggested that the rigour of Article 5 might be relaxed if there were an overriding reference to the law of the registering court in Article 4(1)(c), although as a matter of construction there was some unease about this possible device. The consequence of this suggestion was that the British then insisted on inserting that reference in Article 4(1)(c) in square brackets.

The effect of adopting the draft Convention in its present form is an acceptance of a codification of the law on jurisdiction as it may have been in England in 1933, disregarding developments in the common law in both the United Kingdom and Canada since that time. Although the British delegation confirmed that they were seeking only a "statement" of the law rather than a codification, it soon became clear that the statement could not depart in any material respect from the substance of the 1933 British Act. Specifically, the very rudimentary and flexible jurisdictional provisions of subsection 2(6) of the *Uniform Act* were rejected by the British to the extent that they entail variation from the 1933 British Act.

To conclude the discussions on Article 5, it was agreed that the jurisdictional issue should be looked at afresh as a matter of policy in both Canada and the U.K. Since the negotiations, the United Kingdom has made the following proposal.

> "(i) in Article 4(1)(c), maintain the words 'by the law of the registering court;
>
> (ii) maintain Article 5 but replace the chapeau to paragraph (1) by:
>
> 'It is understood that for the purposes of Article 4a(1)(c) the law of the Contracting States will regard the original court as having jurisdiction in any case where the following can be established'
>
> and delete paragraph (1)(f)."

It would appear that this proposal does not involve any change of substance in the British position. The new wording in Article 5(1) would mean that the particular jurisdictional rules set out in sub-paragraphs (1) to (c) would, when satisfied, preclude any review of jurisdictional basis of the proceedings in the original court.

At least on the jurisdictional point, the British proposal would enhance predictability and clarity as to the circumstances in which a judgment will be capable of recognition and enforcement, in each Canadian jurisdiction as in the United Kingdom. What it may imply,

however, are that these jurisdictional rules are exhaustive. It also would imply that in the very occasional case where substantial justice between the parties appears to require it, the registering court would have to find some ground other than one of jurisdiction to inject some flexibility.

A collective decision would therefore appear to be required on this point. In view of the value to Canada of this Convention and the certainty which it will provide to the practitioner, and bearing in mind the fact that these jurisdictional rules would cover the vast majority of cases, are Articles 4 and 5 of the Convention acceptable, notwithstanding that they may be narrower and more rigid than the common law?

Notwithstanding the stand-off on this Article, an attempt was made to simplify and clarify its provisions, and to resolve certain questions that had been raised.

In *paragraph (1),* the word "regarded" is equivalent to "deemed" and is intended to lead to an irrebuttable inference that the original court had jurisdiction in the circumstances defined.

In sub-paragraph (1)(a), specific reference in the previous draft to appearances for the purposes of protecting property or contesting the jurisdiction on the original court was deleted. It was agreed that these were circumstances that would go to the voluntariness of the appearance and were therefore strictly redundant.

Comments have already been made about sub-paragraph (1)(c) above. It suffices to conclude that, in conjunction with paragraph 2(b), an agreement to submit to the jurisdiction of a particular court, would, under this Convention, be given absolute effect, without regard to the circumstances.

Sub-paragraph (1)(d) was discussed in light of certain revisions suggested by one of our correspondents but these were not accepted by the British.

Article 6

Very limited drafting changes were adopted. In paragraph 2(a) a proposal was received to limit registration to matters within the *exclusive* competence of the Federal Court of Canada. This was rejected on the basis that it was unnecessarily restrictive and might have the effect, for example, of precluding the registration of a judgment in the Federal Court in certain classes of maritime cases where jurisdiction is concurrent. Since this would deprive such a

judgment of Canada-wide effect, by requiring registration in a provincial court, this proposal was considered by the British representatives to be a potentially serious and unnecessary limitation.

Apart from the adoption of minor drafting improvements the only other modification of the previous draft was to delete the previous paragraph 4(d) which, one commentator had pointed out, would have required proof of a negative proposition.

Article 7

There was no change from the previous draft, which will leave to the law of the registering court questions of currency conversion and interest on the judgment after its registration.

Article 8

The ambit of this Article has been substantially narrowed. Along with the exclusion of certain classes of judgments from the scope of the convention in Article 2 and the deletion of the reference to similar judgments which was contained in the previous version of Article 5(3), it is now clear from the new version of Article 8 that recognition of judgments under the Convention is restricted to money judgments, and to judgments of the same character, but which would not be registrable only because they do not require the payment of money. the most obvious category of such non-money judgments are those in favour of defendants. It was intended in the provision to ensure that operative aspects of a non-money judgment, such as injunctive relief, are not to be recognized and thereby indirectly enforced under the convention, if they could not be capable of registration and enforcement under Article 3.

The objective of the Article is to obviate the possibility of multiple proceedings and from the British perspective, to ensure that a defendant who succeeds in the original court will be able to rely on the judgment in his favour even if it does not provide for a payment of money. The approach taken in the discussion was that, absent some other objection to registration of the judgment which is prescribed in the Convention, the judgment should have conclusive effect between the parties in any proceedings based on the same cause of action.

It should be noted that the so-called "merits" rule, as set out in the *Black-Clawson* case, is not explicitly dealt with in this Article. That rule prescribes that a foreign judgment is not given conclusive effect unless there has been an adjudication on the merits of the substantive

dispute between the parties. It was decided to leave this matter to the determination of the law of the registering court.

Article 9

This article was modified only slightly from the previous draft, to clarify certain drafting points that had been raised by our correspondents. A particular point is that the previous text of paragraph (2)(b) was felt to be restricted to corpporations established under federal law. This has not been rectified, by referring to a corporation or association "incorporated or formed under *a law in force in Canada*".

Articles 10 and 11

No changes were proposed or adopted in these Articles.

Article 12

This Article has been substantially improved. It now calls for Canada to designate to the United Kingdom the provinces or territories to which the Convention will extend and the courts in which a British judgment creditor may seek to have the judgment registered in the relevant jurtisdiction. This, of course, has no impact on the normal procedure under the federal state clause, whereby Canada would make such a designation at the request of a particular province or territory following the enactment of the requisite implementing legislation by that jurisdicition.

The restricition contained in the previous draft, that ratification would occur only after six jurisdictions in Canada were in a position to have the Convention extend to them, has been deleted from the text. The British representatives continued to stress the importance to them of a relatively widespread application of the Convention throughout Canada. Before ratification of the Convention and its resulting entry into force, it has been accepted that Canada and the UK will have to reach agreement on the number of jurisidictions within Canada that will be designated under Article 12. The Canadian representatives indicated that to require six jurisdictions to participate from the outset, (as was required in the earlier draft) might be quite unrealistic as a practical matter. The British negotiators made it clear that one or two provinces or territories at the outset would be equally unrealistic, as a policy matter, from their perspective. It was therefore agreed to leave this for resolution after the level of acceptability of the Convention in Canada and in the United Kingdom can be assessed and implementing legislation is in place in more than one Canadian jurisdiction.

Article 13

The formulation of this Article was modified slightly to have it conform to the analoguous provision in Article 12.

Article 14

This Article was left unchanged.

Conclusion

Policy direction is required on Article 5 and on the acceptability of Article 8 of the latest revised text of this Convention. Subject to the determination of those matters, it seems possible to adopt the substance of the Convention for a recommendation to the provinces and territories that they adopt legislation to implement this Convention and thereby protect Canadian litigants with assets in the United Kingdom against the negative effects of the European Convention on Jurisdictions in Civil and Commercial Matters.

Graham D. Walker, Q.C.

D. Martin Low

April 1982

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

The United Kingdom of Great Britain and Northern Ireland

and

Canada;

Desiring to provide on the basis of reciprocity for the recognition and enforcement of judgments in civil and commercial matters;

Have agreed as follows:

PART I: DEFINITIONS

Article 1

In this Convention:

(a) "appeal" includes any proceeding by way of discharging or setting aside a judgment or an application for a new trial or a stay of execution;

(b) "the 1968 Convention" means the Convention of 27th September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as amended;

(c) "court of a Contracting State" means

(i) in relation to the United Kingdom, any court of the United Kingdom or of any territory to which the Convention extends pursuant to Article 13;

(ii) in relation to Canada, the Federal Court of Canada or any court of a province or territory to which this Convention extends pursuant to Article 12,

and the expressions "court of the United Kingdom" and "Court of Canada" shall be construed accordingly;

(d) "judgment" means any decision, however described (judgment, order and the like), given by a court in a civil or commercial matter, and includes an award in proceedings on an arbitration if the award has become enforceable in the territory of origin in the same manner as a judgment given by a court in that territory;

(e) "judgment creditor" means the person in whose favour the judgment was given, and includes his executors, administrators, successors and assigns;

(f) "judgment debtor" means the person against whom the judgment wad given and includes any person against whom the judgment is enforceable under the law of the territory of origin;

(g) "original court" in relation to any given judgment means the court by which the judgment was given;

(h) "registering court" means a court to which an application for the registration of a judgment is made;

(i) "territory of origin" means the territory for which the original court was exercising jurisdiction.

PART II: SCOPE OF THE CONVENTION

Article 2

(1) Subject to the following provisions of this Article, this Convention shall apply to any judgment given by a court of a Contracting State after the Convention enters into force and, for the purposes of Article 9, to any judgment given by a court of a third State which is party to the 1968 Convention.

(2) This Convention shall not apply to

(a) orders for the periodic payment of maintenance;

(b) the recovery of taxes, duties or charges of a like nature of the recovery of a fine or penalty;

(c) judgments given on appeal from decisions of tribunals other than courts;

(d) judgments which determine

(i) the status or legal capacity of natural persons;

(ii) custody or guardianship of infants;

(iii) matrimonial matters;

(iv) succession to or the administration of the estates of deceased persons;

(v) bankruptcy, insolvency or the winding up of companies or other legal persons;

(vi) the management of the affairs of a person not capable of managing his own affairs.

(3) Part III of this Convention shall apply only to a judgment whereby a sum of money is made payable.

(4) This Convention is without prejudice to any other remedy available to a judgment creditor for the recognition and enforcement in one Contracting State of a judgment given by a court of the other Contracting State.

PART III: ENFORCEMENT OF JUDGMENTS

Article 3

(1) Where a judgment has been given by a court of one Contracting State, the judgment creditor may apply in accordance with Article 6 to a court of the other Contracting State at any time within a period of six years after the date of the judgment (or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in proceedings) to have the judgment registered, and on any such application the registering court shall, subject to such simple and rapid procedures as each Contracting State may prescribe and to the other provisions of this Convention, order the judgment to be registered.

(2) In addition to the sum of money payable under the judgment of the original court including interest accrued to the date of registration, the judgment shall be registered for the reasonable costs of and incidental to registration, if any, including the costs of obtaining a certified copy of the judgment from the original court.

(3) If, on an application for the registration of a judgment, it appears to the registering court that the judgment is in respect of different matters and that some, but not all of the provisions of the judgment are such that if those provisions have been contained in separate judgments those judgments could properly have been registered, the judgment may be registered in respect of the provisions aforesaid but not in respect of any other provisions contained therein.

(4) Subject to the other provisions of this Convention:

(a) a registered judgment shall for the purposes of enforcement, be of the same force and effect;

(b) proceedings may be taken on it; and

(c) the registering court shall have the same control over its enforcement,

as if it had been a judgment originally given in the registering court with effect from the date of registration.

Article 4

(1) Registration of a judgment shall be refused or set aside if

(a) the judgment has been satisfied;

(b) the judgment is not enforceable in the territory of origin;

(c) the original court is not regarded as having jurisdicition [by the law of the registering court];

(d) the judgment was obtained by fraud;

(e) enforcement of the judgment would be contrary to public policy in the territory of the registering court;

(f) the judgment is a judgment of a country or territory other than the territory of origin which has been registered in the original court or has become enforceable in the territory of origin in the same manner as a judgment of that court;

(g) in the view of the registering court the judgment debtor either is entitled to immunity from the jurisdiction of that court or was entitled to immunity in the original proceedings.

(2) The law of the registering court may provide that registration of a judgment may or shall be set aside if

(a) the judgment debtor, being the defendant in the original proceedings, either was not served with the process of the original court or did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and, in either case, did not appear;

(b) another judgment has been given by a court having jurisdiction in the matter in dispute prior to the date of judgment in the original court;

(c) the judgment is not final, or an appeal is pending or the judgment debtor is entitled to appeal or to apply for leave to appeal against the judgment in the territory of origin.

(3) If at the date of the application for registration the judgment of the original court has been partly satisfied, the judgment shall be registered only in respect of the balance remaining payable at that date.

(4) A judgment shall not be enforced so long as, in accordance with the provisions of this Convention and the law of the registering court, it is competent for any party to make an application to have the registration of the judgment set aside, or, where such an application is made, until the application has been finally determined.

[**Article 5**

(1) For the purposes of Article 4(1)(c) the original court shall be regarded as having jurisdiction if

(a) the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings;

(b) the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court;

(c) the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the territory of origin;

(d) the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted habitually resident in, or being a body corporate had its principle place of business in, the teritory of origin;

(e) the judgment debtor, being a defendant in the original court, had an office of place of business in the territory of origin and the proceedings in that court were in respect of a transaction effected through or at that office or place; or

(f) the jurisdiction of the original court is otherwise recognized by the law of the registering court.

(2) Notwithstanding anything in paragraph (1) of this Article, the original court need not be registered as having jurisdiction if

(a) the subject matter of the proceedings was immoveable property outside the territory of origin;

(b) the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the territory of origin]

PART IV: PROCEDURES

Article 6

(1) Any application for the registration in the United Kingdom of a judgment of a court of Canada shall be made

(a) in England and Wales, to the High Court of Justice;

(b) in Scotland, to the Court of Session;

(c) in Northern Ireland, to the High Court of Justice.

(2) Any application for the registration in Canada of a judgment of a court of the United Kingdom shall be made

(a) in the case of a judgment relating to a matter within the competence of the Federal Court of Canada, to the Federal Court of Canada;

(b) in relation to any other judgment, to a court of a province or territory designated by Canaada pursuant to Article 12.

(3) The practice and procedure governing registration (including procedures governing notice to the judgment debtor and applications to set registration aside) shall, except as otherwise provided in this Convention, be governed by the law of the registering court.

(4) The registering court may require that an application for registration be accompanied by:

(a) the original judgment or a copy thereof ceritifed by the original court;

(b) a certified translation of the judgment, if given in a language other than the language of the registering court;

(c) proof of the notice given to the defendant in the original proceedings, unless this appears from the judgment;

(d) particulars of such other matters as may be required by the rules of the registering court.

Article 7

All matters concerning:

(a) the conversion of the sum payable under a registering judgment into the currency of the territory of the registering court; and

(b) the interest payable on the judgment with respect to the period following its registration,

shall be determined by the law of the registering court.

PART V: RECOGNITION OF JUDGMENTS

Article 8

Any judgment given by a court of one Contracting State for the payment of a sum of money which would be registered under this

Convention, whether or not the judgment has been registered, and any other judgment given by such a court, which if it were a judgment for the payment of a sum of money would be registered under this Convention, shall, unless registration has been or would be refused or set aside on any ground other than that the judgment has been satisfied or could not be enforced in the territory of origin, be recognized in a court of the other Contracting States as conclusive between the parties thereto in all proceedings founded on the same cause of action.

PART VI: RECOGNITION AND ENFORCEMENT OF THIRD STATE JUDGMENTS

Article 9

(1) The United Kingdom undertakes, in the circumstances permitted by Article 59 of the 1968 Convention, not to recognize or enforce under that Convention any judgment given in a third State which is a Party to that Convention against a person domiciled or habitually resident in Canada.

(2) For the purposes of paragraph (1) of this Article

(a) an individual shall be treated as domiciled in Canada if and only if he is resident in Canada and the nature and circumstances of his residence indicate that he has substantial ties with Canada; and

(b) a corporation or association shall be treated as domiciled in Canada if and only if it is incorporated or formed under a law in force in Canada and has a registered office there, or its central management and control is exercised in Canada.

PART VII: FINAL PROVISIONS

Article 10

This Convention shall not affect any conventions to which both Contracting States are or will be parties and which, in relation to particular matters, govern the recognition or enforcement of judgments.

Article 11

Either Contracting State may, on the exchange of instruments of ratification or at any time thereafter, declare that it will not apply the

Convention to a judgment that imposes a liability which that State is under a treaty obligation toward any other State not to recognize or enforce. Any such declaration shall specify the treaty containing the obligation.

Article 12

(1) On the exchange of instruments of ratification, Canada shall designate the provinces or territories to which this Convention shall extend and the courts of the provinces and territories concerned to which application for the registration of a judgment given by a court of the United Kingdom may be made.

(2) The designation by Canada may be modified by a further designation given at any time thereafter.

(3) Any designation shall take effect six months after the date on which it was given.

Article 13

(1) The United Kingdom may at any time while this Convention is in force declare that this Convention shall extend to the Isle of Man, any of the Channel Islands, Gibralter or the Sovereign Base Areas of Akrotiri and Dhekelia (being territories to which the 1968 Convention may be applied pursuant to Article 60 of that Convention).

(2) Any declaration pursuant to paragraph (1) shall specify the courts of the territories concerned to which application for the registration of a judgment given by a court of Canada shall be made.

(3) Any declaration made by the United Kindgdom pursuant to this Article may be modified by a further declaration given at any time thereafter.

(4) Any declaration pursuant to this Article shall take effect six months after the date on which it was given.

Article 14

(1) This Convention shall be ratified; instruments of ratification shall be exchanged at

(2) This Convention shall enter into force six months after the date on which instruments of ratification are exchanged.

(3) This Convention may be terminated by notice in writing by either Contracting State and it shall terminate six months after the date of such notice.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

Done in duplicate at the day of 19 .

For the United Kingdom of Great Britain and Northern Ireland:

For Canada:

APPENDIX E

(See page 30)

Uniform Act Respecting the Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland Providing For the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters

Interpretation

1. In this Act, "convention" means the Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 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, the convention is in force in the Province and the provisions thereof are law in the Province.

Request to Designate Province and Courts

3. The (Minister of or) shall

(a) request the Government of Canada to designate the Province as a province to which the convention extends; and

(b) determine the courts of the Province to which application for registration of a judgment given by a court of the United Kingdom may be made and request the Government of Canada to designate those courts for the purpose of the convention.

Publication of date and courts

4. The (Minister of or) shall cause to be published in the Gazette the date the convention comes into force in the Province and the courts to which application for registration of a judgment given by a court of the United Kingdom may be made.

Regulations

5. 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

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

APPENDIX F

(See page 31)

UNIFORM CHILD STATUS ACT

(As adopted by the Conference: See 1980 Proceedings, page 103)

Court

1. (1) In Section 5 to 8 "court" means (*insert name of court to have jurisdiction*).

Director

(2) In this Act "director" means the Director of Vital Statistics.

Void and voidable marriage

(3) For the purpose of sections 9 and 11,

(*a*) where a man and woman go through a form of marriage with each other with at least one of them doing so in good faith and they cohabit and the marriage is void, they shall be deemed to be married during the time they cohabit, and

(*b*) where a voidable marriage is decreed a nullity, the man and woman shall be deemed to be married until the date of the decree of nullity.

Person is child of natural parents

2. (1) Subject to subsection (2) and section 11, for all purposes of the law of (*enacting jurisdiction*) a person is the child of his natural parents, and his status as their child is independent of whether he is born inside or outside marriage.

Effect of adoption

(2) Where an adoption order has been made, sections of the Act apply and the child is in law the child of the adopting parents as if they were the natural parents.

NOTE: THE BLANKS IN THIS SUBSECTION ARE TO BE FILLED IN WITH REFERENCE TO THE ENACTING JURISDICTION'S ADOPTION LEGISLATION AND ITS PROVISIONS RESPECTING TERMINATION OF RELATIONSHIPS WITH NATURAL PARENTS AND RECOGNITION OF FOREIGN ADOPTIONS.

Kindred relationships

(3) Kindred relationships shall be determined according to the relationships described in subsection (1) or (2) and section 11.

Abolition of distinction

(4) Any distinction between the status of a child born inside marriage and a child born outside marriage is

abolished and the relationship of parent and child and kindred relationships flowing from that relationship shall be determined in accordance with this section and section 11.

Construction of instruments and enactments

3. For the purpose of construing an instrument or enactment, a reference to a person or group or class of persons described in terms of relationship to another person by blood or marriage shall be construed to refer to and include a person who comes within the description by reason of the relationship of parent and child as determined under sections 2 and 11.

Application

4. This Act applies to an enactment before, on or after the day this Act comes into force and to an instrument made on or after the day this Act comes into force, but it does not affect

(*a*) an instrument made before this Act comes into force; or

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

Declaration

5. (1) Any person having an interest may apply to the court for a declaratory order that a person is or is not in law the mother of a child.

Order

(2) Where the court finds on the balance of probabilities that a person is or is not the mother of a child, the court may make a declaratory order to that effect.

Declaration

6. (1) Any person having an interest may apply to the court for a declaratory order that a person is or is not in law the father of a child.

Order

(2) Where the court finds on the balance of probabilities that a person is or is not the father of a child, the court may make a declaratory order to that effect.

One presumption

(3) Where the court finds that a presumption of paternity under section 9 applies, the court shall make a declaratory order confirming that the paternity is recognized in law unless it is established on the balance or probabilities that the presumed father is not the father of the child.

Conflicting presumptions

(4) Where circumstances exist that give rise under section 9 to conflicting presumptions as to the paternity of a child and the court finds on the balance of probabilities

that a person is the father of a child, the court may make a declaratory order to that effect.

No order if father or child dead

(5) A declaratory order that a person is in law the father of a child shall not be made under this section unless the father and the child whose relationship is sought to be established are living.

Exception if presumption

(6) Notwithstanding subsection (5), where only the father or the child is living, a declaratory order that a male person is in law the father of a child may be made under this section if circumstances exist that give rise to a presumption of paternity under section 9.

Blood tests

7. (1) On the application of a party to a proceeding under section 5 or 6 the court may, subject to conditions it considers appropriate, give the party leave to obtain blood tests of persons named by the court and to submit the results in evidence.

Incapacity

(2) Where a person named by the court is not capable of consenting to having a blood test taken, the consent shall be deemed to be sufficient.

(*a*) where the person is a minor of the age of 16 years or more, if the minor consents,

(*b*) where the person is a minor under the age of 16 years, if the person having the charge of the minor consents, and

(*c*) where the person is not capable of consenting for any reason other than minority, if the person having his charge consents and a medical practitioner certifies that the giving of a blood sample would not be prejudicial to his proper care and treatment.

Inference from refusal

(3) Where a person named by the court refuses to submit to a blood test the court may draw any inference it considers appropriate.

Order to be recognized

8. (1) Subject to this section, a declaratory order made under section 5 or 6 shall be recognized for all purposes.

New evidence

(2) Where a declaratory order has been made under section 5 or 6 and evidence that was not available at the previous hearing becomes available, the court may, on application, discharge the order.

(3) Where an order is discharged under subsection (2), Effect of new order
(*a*) rights and duties which have been exercised and observed; and
(*b*) interests in property which have been distributed as a result of the order before its discharge,
are not affected.

9. Unless the contrary is proved on the balance of probabilities, a person shall be presumed to be the father of a child in one or more of the following circumstances: Presumption of paternity
(*a*) he was married to the mother at the time of the child's birth;
(*b*) he was married to the mother by a marriage that was terminated by
(i) death or judgment of nullity that occurred, or
(ii) divorce where the decree nisis was granted within 300 days, or a longer period the court may allow, before the birth of the child;
(*c*) he married the mother after the child's birth and acknowledges that he is the father;
(*d*) he and the mother have acknowledged in writing that he is the father of the child;
(*e*) he was cohabiting with the mother in a relationship of some permanence at the time of the child's birth or the child was born within 300 days, or longer period the court may allow, after the cohabitation ceased;
(*f*) he has been found or recognized by a court to be the father of the child.

10. (1) The registrar or clerk of every court in (enacting juridsiction) shall file in the office of the director a statment respecting each order or judgment of the court which makes a finding of parentage or that is based on a recognition of parentage. Orders to be filed with director

(2) A written acknowledgement of paternity referred to in section 9 may be filed in the office of the director. Acknowledgements to be filed with director

(3) On application and on satisfying the director that the information is not to be used for an unlawful or improper purpose, any person may inspect and obtain from the director a certified copy of Inspection of filings

(*a*) a statement or acknowledgment filed under this section,

(*b*) a statutory declaration filed under section 3(6) of the *Uniform Vital Statistics Act*, or

(*c*) a request filed under section 3(8) of the *Uniform Vital Statistics Act.*

Director need not amend

(4) Subject to subsection (5), the director is not required to amend the register of births in relation to a statment or acknowledgment filed under this section.

Director shall amend

(5) On receipt of a statement under subsection (1) in relation to a declaratory order made under section 5 or 6, the director shall, in accordance with section 39 of the *Uniform Vital Statistics Act*, amend the register of births accordingly.

Interpretation

11. (1) In this section, "artificial insemination" includes the fertilization by a man's semen of a woman's ovum outside of her uterus and subsequent implantation of the fertilized ovum in her.

Father by artificial insemination

(2) A man whose semen was used to artificially inseminate a woman is in law the father of the resulting child if he was married to or cohabiting with the woman at the time she is inseminated even if his semen were mixed with the semen of another man.

Husband deemed after

(3) A man who is married to a woman at the time she is artificially inseminated solely with the semen of another man shall be deemed in law to be the father of the resulting child if he consents in advance to the insemination.

Cohabiting man deemed father

(4) A man who is not married to a woman with whom he is cohabiting at the time she is artificially inseminated solely with the semen of another man shall be deemed in law to be the father of the resulting child if he consents in advance to the insemination, unless it is proved that he refused to consent to assume the responsibilities of parenthood.

Treated as child

(5) Notwithstanding a married or cohabiting man's failure to consent to the insemination or consent to assume the responsibilities of parenthood under subsection (3) or (4) he shall be deemed in law to be the father of the resulting child if he has demonstrated a settled intention to treat the child as his child unless it is proved that he did not know that the child resulted from artificial insemination.

(6) A man whose semen is used to artificially inseminate a woman to whom he is not married or with whom he is not cohabiting at the time of the insemination is not in law the father of the resulting child. Certain persons not fathers

Consequential Amendments

The *Uniform Legitimacy Act* should be repealed.

The *Uniform Vital Statistics Act* should be amended as follows:

(1) Section 3(3), by striking out "an illegitimate child" and substituting "a child born outside marriage".

(2) Section 5(1), by striking out "Where a child is legitimated by the intermarriage of his parents subsequent to his birth," and substituting "Where after the birth of a child his parents marry each other".

(3) Section 5(1)(*b*), by striking out "as to the legitimation".

(4) Section 32(2), repeal.

NOTE: ENACTING JURISDICTIONS SHOULD CHECK RELEVANT STATUTES AND AMEND THEM ACCORDINGLY TO ENSURE COMPATIBILITY WITH THIS ACT.

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

(As adopted by the Conference: See 1981 Proceedings, page 72)

Recognition of Extra-Provincial Determination of Paternity

12. In sections 13 to 22, Interpretation

(*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, in accordance with section 39 of the *Uniform Vital Statistics Act*, 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 outside Canada

19. An extra-provincial finding of paternity that is made 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 or after sections 12 to 21 come into force.

APPENDIX G

(See page 31)

RAPPORT DU COMITÉ SUR LE RECOURS COLLECTIF

Cette année, le comité avait le mandat de suivre l'évolution de la situation au pays en matière de recours collectif.

Deux faits sont à souligner:

1° Le dépôt, le 24 juin dernier, devant l'Assemblée législative de l'Ontario, du rapport de la Comission de réforme du droit de cette province,

2° l'adoption, à la même époque, par l'Assemblée nationale, de modifications à la lègislation québécoise en la matière.

Le rapport de la Commission de réforme du droit est un document volumineux et d'importance pour la poursuite des travaux. Les objectifs poursuivis par la Commission, la méthodologie utilisée et les points saillants du rapport ont fait l'objet d'un document de présentation qui le résume bien. Ce document fait l'objet de l'annexe A du rapport.

Quant aux modifications apportées à la législation québécoise, elles visaient à corriger certaines difficultés dans l'application de la loi.

C'est ainsi que, pour réduire les délais préalables à l'action à la suite d'un jugement autorisant l'exercice du recours, on a limité le droit d'appel à ce stade des procédures aux seuls jugements refusant l'exercice du recours.

Egalement, afin d'éviter que les membres ne souffrent préjudice des transactions qui peuvent intervenir entre le représentant et le défendeur après le jugement d'autorisation, mais avant l'action, la législation rend applicable durant cette période les règles voulant que ces actes fassent l'objet d'un avis aux membres et d'une autorisation du tribunal.

Enfin, une modification d'importance a aussi été apportée pour réglementer les frais judiciares. La loi était silencieuse sur le sujet et ce silence a entraîné quelques difficultés; selon certains, cela aurait même découragé l'exercice de plusieurs recours. Dorénavant, outre le fait que ce type d'action sera réji par le même tarif, quels que soient les montants en jeu ou la nature des demandes, le tribunal aura le pouvoir de décider, sur demande et après audition des parties

intéressées, y compris le Fonds d'aide au recurs collectif, de l'octroi ou non de l'honoraire additionnel déjà prévu au tarif judiciaire.

Compte tenu de ces développements, il semble opportun que le comité poursuivre ses travaux. En effet, le comité dispose maintenant de deux documents d'importance: la législation québécoise et la proposition de la Commission de réforme du droit de l'Ontario. A partir de ces textes, il devrait être possible d'indiquer les points communs devant être retenus dans une loi uniforme, de faire état des divergences entre les deux textes, des motifs en faveur de l'une ou l'autre des solutions et de demander, à cette Conférence, les directives nécessaires à la rédaction d'un projet de loi uniforme. C'est le travail que le comité devrait entreprendre cette année.

représentante du Québec

représentant de l'Ontario

REPORT OF THE COMMITTEE ON CLASS ACTIONS

This year the committee was to examine developments in Canada in the area of class actions.

Two facts should be noted:

1. The report of the Ontario Law Reform Commission was tabled in the Ontario Legislature on June 24 of this year.
2. The National Assembly passed amendments to the Quebec legislation in this area at about the same time.

The Law Reform Commission's report is a lengthy document of considerable significance for the committee's work. the aims of the Commission, the methodology used and the highlights of the report were set out clearly in a summary appearing in Appendix A to the report.

The Quebec legislative amendments, for their part, were aimed at rectifying certain problems encountered in the application of the law.

Thus, in order to reduce the delays involved in bringing an action, the right to appeal a judgment on the motion for authorization to bring the action has been limited, at this stage in the proceedings, to judgments refusing authorization to bring the action.

Moreover, so that the members will not be prejudiced by any arrangement that might be made between the representative and the defendant after the judgment granting authorization but before the action, the legislation makes applicable during this period the rule that such arrangements must be approved by the court, and that such approval will not be granted unless notice has been given to the members.

Finally, a major amendment has also been made with respect to court costs. The legislation was silent on this subject, and this created problems; according to some, it even discouraged several actions from being brought. In future, in addition to the fact that this type of action will be governed by the same tariff, regardless of the amounts involved or the nature of the claims, the court will have the power to decide, upon application and after bearing the parties concerned, including the Fonds d'aide au recours collectif (class action assistant fund), whether or not to grant an additional fee already provided for in the court tariff.

In view of these developments, it would seem advisable for the committee to continue its work. It now has two important documents

at its disposal: the Quebec legislation and the proposal of the Ontario Law Reform Commission. On the basis of these it should be possible to find common points to be retained in a uniform Act, determine discrepancies between the two texts and reasons for favouring one solution over the other and ask this Conference for guidelines for drafting a uniform Act. This is the work the committee should undertake this year.

Representative of Quebec

Representative of Ontario

BACKGROUND NOTES ON THE ONTARIO LAW REFORM COMMISSION REPORT ON CLASS ACTIONS

On Thursday, June 24th, 1982, the Attorney General, R. Roy McMurtry, tabled the Ontario Law Reform Commission Report on Class Actions. The Report represents the culmination of an intensive research project which has lasted over five years. The Commission's 880 pages Report recommends that Ontario should adopt a class actions Act. The Act sets out a detailed procedural scheme, designed to encourage class actions which would achieve real economies in judicial time, and eliminate class actions which would not be in the public interest, because of the impact that they would have on the court system.

In its Report, the Commission concludes that the present rule governing class actions in Ontario is deficient in many respects. First, the Rule is unduly restrictive, since it has been interpreted as prohibiting class actions involving claims for damages that must be assessed individually. Nor does it afford adequate protection to absent class members—that is to say, members of the class other than the representative plaintiff. They must be unaware of litigation which may affect them. The rule is skeletal and unclear in many respects. To summarize, the present law is simply too unsatisfactory, from all perspectives, to serve as the basis for present-day class actions; the limitations imposed by the courts have severely restricted its effectiveness.

In an interesting analysis the Commission looks at four major recent incidents, and the litigation resulting from them, and asks whether our legal system currently provides effective ways of handling them. The incidents involve "mass wrongs" where injury or damage has been caused to many people by the same or very similar circumstances. The Commission looked at the 1979 Mississauga train derailment; the installation of urea formaldehyde foam as home insulation; the collapse of the Re-Mor investment group; and the troubles faced by owners of Firenza automobiles which were alleged to be defective. The Commission concluded that existing procedural alternatives to class actions were inadequate to deal with such mass wrongs, that are increasingly a feature of our technological society.

Relying on a number of existing empirical studies, as well as on the Commission's own study of class actions in the United States federal courts, the Commission concludes that the benefits of class actions —judicial economy, increased access to justice, and the deterrence of wrongful or illegal behaviour—outweigh their costs.

In an exhaustive analysis of the experience of the United States Courts in dealing with class actions, the Commission concludes that the impact of class actions on the courts has been modest. Claims that the courts have been flooded with unmanageable class litigation are shown to be unfounded or exaggerated. The Commission's study shows:

- class actions are only a small fraction of civil cases in American courts
- over the last six years the number of class action cases in the U.S. Courts has fallen by more than a third
- class actions are used most in the civil rights, antitrust, and securities areas
- a class action takes on average roughly 2½ times longer to be disposed of, than an individual suit
- most of the criticisms levelled at class actions as being unfair to defendants and unduly burdensome upon the courts are demonstrably false.

The smaller number of statutory causes of action which exists in Ontario in comparison to the United States, leads the Commission to believe that the impact of class actions on Ontario's courts will be even less than predicted.

The Commission recognizes that class actions may place greater burdens on the courts but it feels that the benefits of class actions outweigh any additional burdens on the judiciary, and therefore justify the expense of providing any additional resources necessary to process these actions. The procedure the Commission recommends is designed to facilitate the bringing of class actions, but would also permit courts to terminate at an early stage inappropriate cases which would have a harmful impact upon society. The Commission believes that the adoption of such a flexible and comprehensive class action procedure is essential if the critically important goals of judicial economy, increased access to justice, and behaviour modification are to be achieved in Ontario.

The Commission describes the substantive law areas in which such a procedure might be usefully employed: these include civil rights, securities law, consumer and trade practices, mass accidents, and environmental law.

The remainder of the Report is devoted to the design of a new and expanded class action procedure. The Commission next examines the arguments for and against private and public initiation of class actions.

The Commission ultimately opts for class actions procedure similar to Rule 23 of the United States Federal Rules of Civil Procedure which incorporates private initiation of class proceedings by a member of the class and judicial approval of every class suit. However, it does recognize that the Attorney General has an important role to play in such litigation. Accordingly, notice to the Attorney General of every class action commenced under the proposed *Class Actions Act* is recommended, with a right in the Attorney General to apply to the court to intervene in respect of any aspect of a class action that raises a matter of public interest, and a discretion in the court to permit the Attorney General in limited circumstances to act as the representative plaintiff.

The Commission's proposed class action mechanism is a three-stage procedure involving judicial "certification" of a class action, proceedings to resolve the issues common to the class, followed, where necessary, by proceedings to determine individual issues.

The certification review is the most important part of the procedure. It permits the judge to examine the propriety of the class action in the light of specified criteria. If the court certifies a class action, it permits it to be maintained in class form. If it does not certify the action, it will either be dismissed, or continue as an individual action.

The first certification test that the Commission recommends is a preliminary merits test. Only those class actions brought in good faith with a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class would be certified. The mere fact that the action as pleaded discloses a reasonable cause of action would not be sufficient to satisfy this test.

Three additional certification tests are recommended by the Commission. Two of those conditions—that the class is numerous, and that there are questions of law or fact common to the class—are relatively uncontroversial. The common questions test is, however, considerably less stringent than the "same interest" test applied under Ontario's current rule.

A further condition for certification proposed for inclusion in the *Class Actions Act* would fill a major gap that now exists in class action law. To safeguard the interests of absent class members, the Commission recommends that an action should be allowed to be maintained in class form only if the court is satisfied that the representative plaintiff will fairly and adequately protect the interests of the class. In making this determination, a court would consider whether provision has been

made for competent legal representation that is adequate for the protection of the interests of the class. The proposed *Class Actions Act* would also permit the court to make an order substituting another class member as representative plaintiff where the initial representative plaintiff is found to be "inadequate".

To limit the impact of class actions on the courts, the Commission recommends the adoption of two additional certification tests—a superiority and a cost-benefit test. The former would ensure that class actions are employed only where the court is satisfied that a class action is superior to other vailable methods for the fair and efficient resolution of the underlying controversy. In making this determination, courts would be required to examine factors, whether questions of fact or law common to the members of the class predominate over any question affecting only individual class members; whether a significant number of members of the class have a valid interest in individually controlling the prosecution of separate actions; whether the class action would involve claims that are or have been the subject of any other proceedings; whether other means of resolving the claims are less practicable or less efficient; and whether the administration of the class would create greater difficulties than those likely to be experienced if relief were sought by other practical means.

Finally, a court would be authorized to refuse to certify a class action, despite its meeting all the other tests for certification, where the court was satisfied that the adverse effects of proceedings upon the courts, the class and the public would outweigh its benefits. This unique provision would enable a court to conduct a wide-ranging inquiry into the purposes of the action, the costs of litigating it and the benefits that are likely to result if it is successful. It would permit a court, for example, to balance the impact of class litigation on the administration of justice in the Province against the amount of relief likely to be secured by the suit or the deterrent value of the particular class action. The Commission recommends that the onus of establishing that the costs associated with a class action outweigh its benefits rest upon the person who so contends. This decision is taken because a cost-benefit analysis will normally only be undertaken once the court has determined that a class action is the superior procedural device to resolve the controversy, and because serious consequences would flow from a refusal to certify in such circumstances.

Under the Commission's recommendations, a court could grant or deny certificatation, making amendments to the proceedings necessitated by its order. A court would also have the power to amend a certification order, and to set aside an order certifying an action as a

class action if satisfied that the action no longer meets the certification prerequisites.

The Commission also considered a series of more general procedural questions, such as which courts should have jurisdiction over class actions brought under the proposed *Class Actions Act*, and the general management powers that judges must have when adjudicating class actions. The Commission proposes that class actions should be heard only in the High Court of Justice and in the county and district courts. Once a class action was commenced, it would be assigned to a particular judge, who would preside over all proceedings until the trial of the action. Another judge would then preside over the trial of the common questions and would also be responsible for supervising any subsequent proceedings. Following on previous recommendations of the Commission, it is further recommended that class actions be tried by a judge without jury. Insofar as the powers of a judge presiding over a class action are concerned, the Commission proposes that he or she should be invested with broad powers designed to facilitate the management of complex class actions and protection of class members' interests.

Under the Commission's proposals, class members would not be automatically required to opt in to a class action after certification. Nor would a proof of claim procedure be allowed. The court would have to decide in each case whether class members should be allowed to exclude themselves from the action. In making this decision the court would consider whether as a practical matter members of the class who exclude themselves would be affected by the judgement; whether the claims of the class members are so substantial as to justify independent litigation; whether it is likely that many members would want to be excluded; the cost of any notice necessary to inform members of the class action and their right to exclude themselves; the desirability of achieving judicial economy, consistent decisions and a broad binding effect of the judgement on common questions.

The determination of individual issues such as damages and reliance would constitute the final stage of the Commission's envisaged three-stage class action procedure. To maximize the access to justice function of class actions, the Commission recommends that the judge who decides the common questions should have a broad discretion to fashion proceedings for the resolution of individual issues and a duty to order the simplest, least expensive and most expeditious method of determining these issues consistent with fairness to the class members, the defendant and the representative plaintiff.

Under the Commission's recommendations, the judge who has decided the common questions would be able to conduct the individual proceedings alone, or with the assistance of other judges of the same court; he would be empowered to appoint persons, other than judges, to conduct the individual proceedings by way of inquiry and report; and he or she would be authorized to provide for such individual proceedings as agreed upon the representative plaintiff and the defendant.

Among the other procedural matters addressed in the Report are the rights of discovery of the representative plaintiff, the defendant, and the absent class members at various stages of a class action; the binding effect of a class action judgement; the need for notice to absent class members at various times during the course of a class action; rights of appeal; limitation periods and class actions; and the need for court approval of class action settlements.

The Commission proposes major changes in the law of class actions in the areas of costs and monetary relief. On the subject of costs, the Commission recognizes that without change, class actions will simply not be brought. In place of the present "two-way" costs rule that costs follow the event, the Commission proposes a general "no-way" costs rule. In other words, a successful litigant in a class action would not normally be able to recover his party and party costs from his unsuccessful adversary. A court would be authorized to depart from this general no-way costs rule in three instances: at the certification hearing, where it would be unjust to deprive the successful party of costs; in the event of vexatious, frivolous, or abusive conduct on the part of either of the parties; and in the case of interlocutory proceedings. The proposed no-way costs rule would not apply to individual proceedings, where the ordinary rule that costs follow the event would continue to govern.

With respect to the fees of the lawyer retained by the representative plaintiff, the Commission recommends that a type of court approved agreed fee arrangement should be possible. Although the representative plaintiff and his lawyer would be entitled to enter into an agreement that provides that the lawyer will be entitled to a fee only in the event that the action is successful or confers benefits upon the members of the class by way of a settlement, the agreement may neither stipulate the amount of the lawyer's fee nor prescribe a method by which this fee is to be calculated. The determination of the fee to which the class lawyer is entitled would be left to the court. The court would have a duty to award a fee that is fair and reasonable compensation in light of the risk assumed by

the lawyer in undertaking the litigation on a contingent basis. A somewhat similar scheme is proposed in respect of disbursements incurred by the class lawyer on behalf of the class.

The fee to which the class lawyer is entitled, whether or not such a court approved fee agreement is entered into, would be paid out of any recovery realized by the class proceedings. This fee, it is recommended, should constitute a first charge on the class action recovery and be payable on a proportional basis against amounts ordered to be paid to class members. The Report, in addition, deals with the issues of security for costs and payment into court in respect of both the common questions stage and individual questions stage of class proceedings.

In the area of monetary relief, the major thrust of the Commission's proposals is to facilitate class actions where the claim is one for damages, an area in which the present law is less than satisfactory. First, the Commission proposes the use of "bifurcated" proceedings —common proceedings to dispose of common questions followed by individual proceedings to determine individual questions—where all the issues to which a class action gives rise cannot be disposed of without resort to individual proceedings. Secondly, the Commission makes clear in its proposed *Class Actions Act* that certification of a class action should not be refused solely on the ground that the relief claimed includes a claim for damages that would require individual assessment in subsequent proceedings involving the defendant or arises out of or relates to separate contracts between members of the class and the defendant. In this way, the Commission seeks to avoid the major restrictions imposed on the use of class actions by the present law.

Thirdly, the Commission recommends that the court should be able to make an aggregate award of monetary relief in appropriate circumstances. In this way, the total liability of the defendant to the class could be fixed on the basis of the harm done to the class as a whole, without resorting to individual proceedings. Where an aggregate award of monetary relief is ordered, the court is authorized to distribute the relief in a number of ways. For example, where feasible, the court could order direct distribution by the defendant to the individual class members. The court is also authorized to assume responsibility for a direct distribution. Where it is not practicable to determine those members entitled to share in an aggregate award or the exact share that should be allocated to particular class members, the court is authorized to make an average distribution if

the failure so to order would result in the denial of recovery to a substantial number of class members. Where neither a direct distribution nor an average distribution is possible, the court would be obliged to afford class members a reasonable opportunity to claim their shares of an aggregate award, in proceedings designed to minimize the burden upon members of the class. For example, the court is expressly authorized to employ proof of claim forms to enable class members to establish their claims.

Where there is a residue of an aggregate award after resort to the above-mentioned distribution techniques, the court may make a distribution in a way that will indirectly benefit uncompensated class members or else order that the residue be forfeited to the Crown or returned to the defendant unconditionally. An indirect distribution would be appropriate where it might reasonably be expected to benefit some or all of the class members and a reasonable number of class members, who could not otherwise receive monetary relief, would benefit therefrom.

The Commission's Report is a major work of scholarship and reform. It provides Canadians with a comprehensive and objective assessment of the risks and benefits that would result from an expanded class action procedure. It moves the debate on this complex and important topic to a new plane. The Attorney General has announced that his Ministry will be studying the Report, and evaluating the comments submitted on the Report by members of the public, concerned organizations and businesses.

APPENDIX H

(See page 31)

Provincial Companies Legislation – provisions regarding rights of action of extra-provincial corporations – A matter for the Uniform Law Conference?

British Columbia:

Company Act, R.S.B.C., 1979, c. 59. The Act has been updated up to July 1981 via the statutes of B.C. 1981 and since then via current bills into 1982.

Section 321 requires all extra-provincial companies to register under the *Act* within 30 days after commencing to carry on business in the province.

Section 337(1)(a) states that any extra provincial company required to be registered under the *Act* which is not so registered, is incapable of maintaining an "action, suit of other proceeding" in respect of contracts made in the province in the course of business.

The exemption contained in *section 327* regarding federal companies does not exempt such companies from the registration requirement or the s. 337(1)(a) disability.

Section 322 also exempts certain companies operating ships, where such companies do not have a warehouse or office etc. in the province.

Alberta

(1) *Companies Act,* R.S.A. 1980 c. C-20: Updated in latest statute volume to June 2, 1981, and from that time up to the latest Bills on hand (received December 30, 1981 – Bill 260).

Section 183(1) requires the registration of extra-provincial companies within 30 days of commencing to carry on business in Alberta.

Section 183(3) provides on exemption where an extra-provincial company does not carry on business for gain.

Section 196(1) provides that where an extra-provincial company is required to be registered under Part I, while unregistered it is not capable of commencing or maintaining any action in respect of contracts made in the Province in the course of business conducted while it was unregistered. Section 196(1) does not apply to federal companies.

Section 197(1) provides that registration allows an extra-provincial corporation to sue and be sued in its corporate name. This appears to extend the powers of action beyond mere contract actions.

(2) *Business Corporations Act,* Bill 43: As of January 15, 1982 Gazette — still not proclaimed.

Section 266(1) requires the registration of all extra-provincial corporations within 30 days of commencing to carry on business in Alberta.

Section 282(1) — An unregistered extra-provincial corporation is not capable of maintaining or commencing an action re. any contract made while it was carrying on business while unregistered. However, later registration may enable a previously unmaintainable action to be conducted: see section 282(2).

Section 265(2) provides that Part 21, "Extra-provincial corporations" does not apply to a Canada corporation so as to affect its right to carry on business in Alberta. How far this subsection extends is not clear since 265(1), in contrast, contains categorical exemptions from Part 21.

Section 264(2) allows the Registrar to exempt non-profit companies from the *payment of fees* under Part 21; however, this does not mean the other acts of registration need not be completed.

Interaction of the Two Acts

Subsection 284(5) of the *Business Corporations Act* adds s. 2.1, which provides that upon the coming into force of *The Business Corporations Act* no extra-provincial company shall be registered under *The Companies Act.*

Section 266(2) of the *BCA* deems the registration of all extra-provincial companies registered under Part 8 of *The Companies Act* immediately before the coming into force of the *BCA*, which has not yet occurred.

Saskatchewan:

Companies Act, R.S.S. 1978, c. C-23**

Section 193 requires the registration of all extra-provincial companies having gain for an object within 30 days of commencing business in the province.

Section 3(1)(1) includes Dominion companies, but not those incorporated under an ordinance of the Northwest Territories.

Section 19 requires the deliverance to the registrar of copies of the memorandum and articles of association for registration. Sections following provide the powers concomitant with such registration.

Section 214 provides for the licensing of every company (except non-profit companies) and every extra-provincial company. Subsection (7) provides an exception for Dominion companies.

Section 207 disables an unregistered and unlicensed (as required) extra-provincial company from maintaining an "action, suit or other proceeding" in respect of a contract made in connection with its business. Subsection (2) provides exceptions to this, and subsection (3) excepts Dominion companies from the application of the section.

Section 208 provides that where an action etc. has been dismissed because of lack of registration, a company may be registered and licensed and maintain a new action etc.

Section 209 requires the registration of every company or extra-provincial company acting for an extra-provincial company (other than a Dominion company).

Business Corporations Act, R.S.S. 1978, C. B-10**

**Section 4* provides that no provision of the *Companies Act* applies to a company incorporated under this Act.

**Section 260* After the *BCA* in force no companies to be incorporated under *The Companies Act.*

Part II of the Act deals with the registration of corporations.

Section 261(1) states that Part II applies to all corporations and *(2)* provides a list of exceptions. *Paragraph (d.1)* exempts an extra-provincial corporation from the application of the Part where it is registered under *The Non-Profit Corporations Act. Paragraph (a)* also exempts corporations without share capital incorporated under an Act of the Legislature.

Subsection 261(4) states that no provision of the *Companies Act* applies to an extra-provincial corporation and no extra-provincial corporation and no extra-provincial corporations may be registered under the *Companies Act.*

By virtue of section 262, every corporation carrying on business in Saskatchewan must be registered.

By *s. 275(1)* a corporation that is not registered under the Act

cannot maintain any action or proceeding in respect of a contract made in connection with its business.

An action may be maintained if a corporation becomes registered (s.276).

275(3)— This section does not apply to a Canada corporation.

277— Where an action was dismissed due to a lack of registration, with leave of the court, the company may maintain a new action. (See also *s. 266(2)* and 278 re. previous acts of unregistered corporations).

Non-Profit Corporations Act, R.S. 1979, c. N-4.1**

Section 247(1) allows an extra-provincial corporation to carry on its activities in Saskatchewan, provided that it is registered (and subject to its articles and certificate of registration).

Subsection 247(2) provides that registration or renewal of registration of an extra-provincial corporation is deemed to authorize all previous acts of the corporation.

The definition of extra-provincial corporation includes a Canada corporation (s.2(r)).

*These sections combined really wipe out the application of the *Companies Act, Supra.*

**These *Acts* have been updated to the latest statute volumes (September 11, 1981) and since then up to Bill 46 of 1981-82, received April 1, 1982. Only paragraphs 7(b) and (c) and subsection 87(6) of the *Non-Profit Corporations Act* have not been proclaimed.

Manitoba

Corporations Act, S.M. 1976, c. 40

—(repealing the *Companies Act,* R.S.M. 1970, c. C160).

—Updated to September 1980 via statute book; since then amended by Bill 46, 5th session, 31st Legislature, 1981; Royal Assent required.

Section 187(4) requires all corporations to be registered if they are going to carry on business in the province; this does not apply to bodies corporated licensed under the *Insurance Act* or to bodies corporate created solely for religious purposes *(187(1))*, nor does it apply to bodies corporate not "carrying on business" in Manitoba, as set out in *s.187(2).*

Under *Subsection 194(3)* the cancellation of registration of a body corporate does not affect the liability of the body corporate or its successors regarding debts or liabilities of the body corporate.

By virtue of *197(1),* an unregistered extra-provincial body corporate is not capable of commencing or maintaining an action in respect of a contract made during the course of its business.

Paragraph 1(1)(/q/) defines "extra-provincial" body corporate" and does not include federal companies.

Ontario

Corporations Act, R.SO. 1980, c. 95*

According to *s.4,* corporations can be established by the issuance of letters patent.

In *paragraph 1(c),* "company" is defined as "corporation with share capital".

In *paragraph 1(d),* "corporation" is defined as a "corporation with or without share capital", but in Part III, "corporation" means a "corporation without share capital".

Application

By *section 2,* the Act does not apply to a company to which the *Business Corporations Act* applied (or to which the *Co-operative Corporations Act* applies).

"Extra-provincial corporation" means a corporation incorporated otherwise than by or under the authority of an Act of the Legislature *(2.336(a))*

Section 337 enumerates eleven classes of extra-provincial corporations. Class 5 includes corporations not having gain for their objects; Class 6 includes corporations incorporated under an Act of the Parliament of Canada and authorized to carry on business in Ontario; Class 11 includes corporations not within classes 1-10—this appears to cover, for example, a B.C. corporation operating in Ontario.

Section 338 provides for an exemption from registration.

Section 339(1) requires any extra-provincial corporation in class 11 to obtain a licence under part VIII of the Act before it can carry on business in Ontario. *Subsection (2)* clarifies what is meant by "carrying on business".

Section 349 provides that an unlicensed Class 11 extra-provincial corporation is not capable of maintaining any action or proceeding in respect of any contract made in connection with business carried on contrary to Section 339.

Note that classes 5 and 6 *(non-profit* and *federal companies)* are not required to be licensed, and therefore are not subject to any disability regarding maintenance of actions.

Business Corporations Act, R.S.O. 1980, c. 54.

Application

This Act applies as set out in *Section 2* basically to corporations incorporated under the laws of Ontario or former province of Upper Canada. under 2(2)(a), the Act does not apply to a corporation that is a "company" within the meaning of the *Corporations Act, supra,* and has objects in whole or in part of a social nature.

Under *s.4(1)* bodies corporate may incorporate by signing and delivering to the Minister in duplicate articles of incorporation.

When all required documents and fees are received, the Minister shall endorse a certificate, which will constitute the certificate of incorporation. *(s.5(1) and (2)).*

There are no provisions dealing with extra-provincial corporations which are covered by the *Corporations Act.*

**The Ontario Corporations Act* and *Business Corporations Act* have been updated to the present via the statute citator.

Quebec

Extra-provincial Companies Act, R.S.Q. 1977, c. C-46*

Section 2 defines extra-provincial corporations as including all commercial corporations and joint stock companies not incorporated under a statute of Quebec or of the Parliament of Canada.

Section (4) exempts from the definition corporations incorporated under a Act of a Legislature of a province where Quebec companies are authorized to carry on business without a licence.

Section 3 requires the licensing of all extra-provincial corporations before they can carry on business in Quebec. This applies to agents of such a corporation as well.

Application

By virtue of *section 1,* the provisions of Division I of the Companies

and Partnerships Declaration Act apply to extra-provincial corporations.

Companies and Partnerships Declaration Act, R.S.Q. 1977, c. D-1*

Section 1: incorporated companies carrying on business in Quebec are required to file a declaration if they have a head office or branches of the company in Quebec. The prothonotary registers the declaration *(section 3).*

Companies Act, R.S.Q. 1977, c. C-38.

By *section 6,* companies in Quebec are created by the issuance of letters patent, such being registered under subsection 2(2).

By *section 218,* non share capital corporations are also created by letters patent.

*Updated as of April 1982 to most recent statute volume (1980) and current bills.

New Brunswick

Companies Act R.S.N.B. 1973, c. C-13
— Updated to and including 1981.

Section 4(1) provides that new companies are created by the issuance of letters patent.

Section 26(1) allows the application to the Minister for letters patent by certain companies which are incorporated otherwise than under the laws of New Brunswick.

Application

By c.12 of the *Statutes of New Brunswick, 1981*—sections 1.1 and 1.2(1)—(5) were added to the Companies Act, shedding light on its interaction with the *Business Corporations Act.* (See attached).

Business Corporations Act, 1981 c. B-9.1
— in force as of October 1, 1981.

Application

Section 192(6) states that upon the coming into force of the *B.C.A.,* no body corporate shall be continued under the *Companies Act* when provision has been made in the *B.C.A.* for those acts regarding that body corporate.

Section 194(1) outlines what situations constitute "carrying on business in New Brunswick"; included is where a corporation has a resident agent or warehouse etc. in New Brunswick.

Section 196(1) requires registration of extra-provincial corporations within 30 days of commencement of carrying on business.

Section 213(1) precludes a corporation from maintaining or commencing an action in respect of any contract made in New Brunswick while it was unregistered.

213(2) allows the maintenance of proceedings once registration occurs, as if the corporation had always been registered.

Section 213 does not apply to federally incorporated corporations. *(s.213(3)).*

Corporations Act, R.S.N.B. 1973, c. C-24.

This Act contains general powers of corporations in existence at the date of passage of the Act where no other provision is specially made. These powers involve the capacity to sue and be sued in the corporate name. It is assumed that the more specific provisions of either the *Companies Act* or the *Business Corporations Act* would oust those general provisions.

Prince Edward Island

An Act to provide for the Licensing or Registration of Certain Corporations and persons, R.S. P.E.I. 1974, c. L-15

– Updated through 1981 statute volume to January 1, 1982 and Bills up to the 4th Session, 55th general Assembly, 31 Eliz. 1982.

Section 3 imposes license fees on certain corporations and persons, including, under (i) non-resident construction companies and in (j) to all other persons not previously mentioned therein who are not ordinarily resident in the province, whose chief place of business is outside the province, and who carry on business within the province.

Section 8 precludes any right of action based on contracts made while a corporation was unregistered, "unless and until (it) holds a certificate of registration that is in force"; *section 8* does not apply to any corporation incorporated under an Act of the Parliament of Canada, or by an Act of the Legislature of P.E.I.

Nova Scotia

Corporations Registration Act, R.S.N.S. 1967, c. 59

– Updated to 1980 statute book and since then via 1981 bills of the 3rd Session, 52nd General Assembly, 30 Eliz. II, 1981.

The provisions of *Sections 30(1), (3)* and *32* along with *36(1)* and

37(1) create an obligation for Dominion and foreign corporations to register and pay certain fees.

Section 37(1) applies to any corporation and creates an offence for carrying on business in Nova Scotia while being unregistered; the Section does not apply to a Dominion corporation until the expiration of one month after its carrying on business in Nova Scotia (s. 37(2)), thereby implying that all other companies required to register must do so before commencing to carry on business.

Section 38(1) describes what "carrying on business" means.

Section 44: No action may be maintained etc. "unless and until" a corporation holds a certificate of registration that is in force, in respect of any contract made in Nova Scotia during the course of business carried on while the corporation was unregistered; the section does not apply to a federally incorporated company or a Nova Scotia-incorporated company.

It should be noted that the *Societies Act,* R.S.N.S. 1967, c. 286 does not contain provisions specifically regarding extra-provincial corporations.

Newfoundland

Companies Act, R.S.N. 1970, c. 54

—Updated to 1980 statute volume; up to Bill 118, 3rd Session, 38th General Assembly, 30 Eliz. II, 1981 (received December 1981).

Section 266(1) prohibits a domestic or foreign company having gain for its object from commencing business in Newfoundland until it is registered under Part VI—"Domestic and Foreign Companies".

Section 265(g): "foreign company"—company incorporated otherwise than by an Act of the Legislature and includes a dominion company;

Section 265(e): "domestic company"—any company, whether or not it is formed for gain, incorporated by any Act of the Legislature other than the *Companies Act* (and other than a Crown corporation).

265(f)—"dominion company"—one incorporated under an Act of Parliament.

By virtue of *section 274* nothing in the Act shall be deemed to affect the status of a dominion company or impair its right to carry on business in Newfoundland.

Section 282 renders unregistered companies incapable of maintaining actions in respect of contracts made during the course of its business.

Under *282(2),* where registration subsequently occurs, the situation is to be treated as if no disability ever occurred.

Subsection 282(3) renders assignees of unregistered foreign companies incapable of maintaining actions based on the assigned chosen action.

Subsection 282(4), (1) and *(2)* do not apply to dominion companies or foreign companies applying to have a judgment registered (as judgment creditors) in the Supreme Court, under the *Reciprocal Enforcement of Judgments Act;* (3) does not apply to a dominion company.

Northwest Territories

Companies Act, R.O.N.W.T. 1974, c. C-7
—Updated to 1978 statute book and since then via 1979, 1980, 1981 bills (2nd Sess.).

Section 156(1) requires the registration of extra-territorial companies commencing to carry on business in the N.W.T., within 30 days of such commencement.

Section 156(2)—Those extra-territorial companies not operating for gain may be exempted from the operation of "this Part" (Part VII—Extra-territorial Companies"), with the Registrar's approval.

"Extra-territorial company means a company incorporated otherwise than under an Ordinance, one incorporated under an Ordinance but not subject to the legislative authority of the Territories, and includes companies incorporated under an Act of the Parliament of Canada. *(s.1(14))*

Section 169(1) provides that any extra-territorial company required to be registered under Part VII, other than a "dominion" company, cannot maintain an action while it is unregistered in respect of contracts made during the course of business carried on without registration.

Section 170(1) allows a registered extra-territorial company registered under the Ordinance to sue in its corporate name.

Section 170(4) allows the maintenance of an action as if the

company had always been registered, if it becomes registered under Part VII.

Yukon Territory

Companies Act, R.O.Y.T. 1978, c. C-10
— Updated to Bills receiving 3rd reading as of December 17, 1981 during the 4th Session of the 24th Council.

Section 142(1) sets out the registration requirement for extra-territorial companies; it does not apply to "federal" companies; no agents can conduct business in the Yukon for unregistered companies; the subsection applies to companies operating for gain.

Subsection 142(3) requires dominion or federal companies to be registered but provisions restricting the carrying on of business before registration do not apply to such a company.

Section 155(1) requires the registration of all extra-territorial companies carrying on business in the Yukon, such registration being made within 30 days of the commencement of carrying on business.

155(3) allows companies not carrying on business for gain to be exempted from the application of the Part, with the approval of the Registrar.

Section 165.1 provides for the continuation of corporations incorporated under the laws of another jurisdiction. *Section 165.3* states that the liabilities of such a corporation will not be affected.

167(1) prevents the maintenance of actions by unregistered companies in respect of contracts made in the course of business conducted contrary to Part VI; if such a company becomes registered, such an action may be then instituted as if the company had been registered.

Extra-Provincial Corporations	B.C.	Alberta		Saskatchewan			Man.	Ontario		Quebec	New Bruns.		P.E.I.	N.S.	Nfld.	N.W.T.	Yukon
		Co's	CBCA	Co's	N-P	CBCA		Corps	CBCA	Extra-prov.	Co's	CBCA					
	X	X	X	X	X	X	X	X		X	X	X	X	X	if for gain	X	X
If unregistered has no right of action re. contract made while unreg'd.	X	X	X	X		X	X	X				X	X	X	also applies to assignees	X	X
Federal co's exempted from registration/licensing			ques-tion-able	X				X		X					ques-tion-able		no, but can carry on busi-ness anyway
Federal co's exempt-ed from loss of action (re. unreg'd co's) provisions		X		X		X	X	X				X	X	X	X	X	
Other exemptions	s. 322 327		264(2) 265(2)	207(2)		261(2) (d.1) 261(2) (a)	187	338		2(4)					282	156(2)	155(3)
Remedial—later registration allows action			X	X	ques-tion-able 247(2)	X	ques-tion-able 197(3)					X			X	X	X
Cancelled reg. doesn't affect liabilities							X										
Consequence of regis-tration—can sue and be sued in corporate name		X														can sue in cor-porate name	
Registration of agents				X						X		X					unreg. co. can't operate through agents

APPENDIX I

(See page 31)

CONTRIBUTORY FAULT AND CONTRIBUTION REPORT OF THE ALBERTA COMMISSIONERS

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CONTRIBUTORY FAULT AND CONTRIBUTION REPORT OF THE ALBERTA COMMISSIONERS

1. *Reasons for Report*

In 1979 the Alberta Commissioners delivered their final report on this subject. It appears at 1979 Proc. 95. At the 1980 meeting the Uniform Law Conference considered that report in detail and referred the draft Act attached to the report to British Columbia to redraft the draft Act in line with the decisions taken at the meeting. The mandate of the Alberta Commissioners having been terminated, we did not consider the effect of the changes made by the Conference until we saw the draft Uniform Act at the 1981 meeting. At that time we expressed some concern about the effect of the changes and the Conference referred the draft Contributory Fault Act back to us for final study and report to the 1982 annual meeting (1981 Proc. 30). This report is prepared pursuant to that reference.

2. *Points of concern*

(a) *Effect on contract law of application of contributory fault principle*

The recommendation of the Alberta Commissioners (1979 Proc. 105-106) was that the defence of contributory fault should apply to a claim resulting from a failure to carry out a duty of care under a contract, but that it should not apply to a claim for a breach of

another kind of contractual obligation. The Conference did not accept the recommendation. The motion which it adopted was as follows:

> Definition of fault should include breach of contract, and not merely breach of duty of care arising from contract, i.e., the principle of contributory negligence is to be applicable to all contracts.

The attached final draft Uniform Act, which was laid before the 1981 meeting, gives effect to that resolution by including in the definition of "fault" in s. 1(c)(ii) "a breach of contract . . . giving rise to a right of action for damages". S. 6(2) then allows the reduction of liability by a person whose "fault" contributes to damage.

We were troubled by the fact that the Conference had not received any advice about the effect upon other principles of contract of the extension of the contributory fault principle, our own consideration having been restricted to its effect in cases of breaches of duties of care. We therefore arranged through the Alberta Institute of Law Research and Reform for the preparation of two papers on the subject by Professor David Percy of the Faculty of Law, University of Alberta. The first is entitled "Contribution Claims and Contract Principles" and is attached to this report as Annex I. It identifies the contract principles which would be affected by the extension of the contributory fault principle. The second is entitled "The Impact of the Contribution Proposals of the Uniform Law Conference on the Common Law of Contract" and is attached as Annex II. Its subject matter is indicated by its title.

We recommend that members of the Conference read the second paper, Annex II, carefully. It would be useful for members of the Conference also to read the first paper, Annex I, and there are some references to it in the second paper, Annex II.

It will be noted that Professor Percy (Annex II, page 19) is of the opinion that "in contract cases which do not involve the breach of a duty of care, the determination of relative fault threatens to distort the fundamental nature of contractual liability" and (Annex II; page 22-3) that "the transfer of concepts from the essentially fault-based system of torts to the law of contracts, which in many cases relies on strict liability, may well lead to difficulty in applying any scheme of apportionment".

We would suggest that members of the Conference review, in the light of Professor Percy's paper, its previous decision to extend the principle of contributory fault to all cases of contract.

(b) *Definitions of "damage" and contributory "fault"*

S. 1(b) of the draft Uniform Act defines "damage" as "damage, injury or loss to a person or to property", and s. 1(c)(iii) includes in the definition of "fault" "a failure of a test to be applied in determining the reduction of the defendant's liability by reason of the plaintiff's contributory fault. Under s. 6(2) of the draft Uniform Act, the liability of a person whose fault contributes to damage is reduced by the amount that the court finds just and equitable, having regard to the degree of responsibility for the damage that is attributable to the person who suffers it. If ss. 5(c) and 6(2) of the draft are read together, it would appear that the jury, if there is a jury, is to decide about the degree to which the fault of a person contributes to damage, and that the judge is then to decide the final question, that is, what is a just and equitable reduction in the defendant's liability, having regard to responsibility, which is probably something different from degree of contribution. The Conference did not address its mind to the point, and we doubt that, if it had done so, it would have divided the functions of judge and jury in this way.

It is clearly for the jury, if there is one, to decide the facts, that is to say, what the parties did and did not do and what damage they did or did not suffer. The existing Uniform Act carries the jury's function a step further and calls upon it to decide not only the facts but how much contribution was made to damage by two courses of conduct.

Under the present draft Act, the final question, what is "just and equitable", having regard to such a value laden concept as "responsibility," is one that would usually be decided by a person to take reasonable care of his own person or property." This is in accordance with the Conference's previous instructions. We are not sure, however, that damage to person or property includes economic loss, or that a failure to take care of person or property includes a failure to take care of one's economic interests. We take it that, if the Conference intends to extend the defence of contributory fault to all claims based on contract, it must intend to include claims for economic loss. We would recommend that, whether or not the Conference makes the extension, the terminology be changed so that "damage" would clearly include economic loss, and so that contributory "fault" would clearly include a failure of a person to take reasonable care of his own interests of any kind.

(c) *Function of jury*

S. 5(c) of the draft Uniform Act provides that the degree to which the fault of a person contributes to damage is a question for the trier of fact. That provision articulates properly with the present Uniform Contributory Negligence Act, and also with the draft Uniform Act which we had proposed. The reason is that in the present Uniform Act and in our draft, the relative liabilities of the parties depend upon the degrees to which the fault of each contributes to the damage.

The provision does not articulate as well with the present draft Uniform Act. The reason is that the Conference changed the judge. This latter consideration would suggest that, once the basic facts are found, it should be for the judge to decide whether or not there should be a reduction of the defendant's liability because of the plaintiff's contributory fault, and, if so, how much that reduction should be. It appears to us however that the final question as posed by the present Uniform Act (degree of contribution), though expressed in something like arithmetical terms, is as metaphysical a question, and, indeed, is really much the same question, and allows the decision-maker much the same degree of discretion, as the question posed by s. 6(2) of the present draft.

We do not see how the decision-making function can be satisfactorily divided. The jury must decide what the parties did and did not do. If negligence is involved the jury must decide whether one party's conduct was negligent and whether the other party's conduct involved contributory fault. If the principle of contributory fault is applied to a claim for breach of contract, the jury will have to decide whether there has been a breach of the contract and whether there has been contributory fault. The jury will also have to decide upon the amount of damage. The bare facts found by the jury will hardly provide the judge with enough factual basis to make a determination of what is just and equitable having regard to responsibility, and if the judge decides the latter question upon the basis of the evidence rather than upon the facts as found by the jury, he would be usurping the function of the trier of fact. It seems to us that the question of responsibility is inextricably bound up with the facts, and that an attempt to separate them will merely lead to confusion.

Our recommendation therefore is that the Uniform Act allow the jury to determine the amount of reduction of liability for contributory fault.

(d) *Contractual limitations on liability*

S. 12(2) of the draft Act attached to our 1979 report (1979 Proc. 109) provided that if the liability of a concurrent wrongdoer is limited or reduced by statute or agreement, the amount of contribution payable by him was not to exceed his liability as so limited or reduced. That provision gave effect to an earlier decision of the Conference. However, the Conference at its 1980 meeting decided to delete that provision. Since the Conference did not put anything in the place of s. 12(2) the present draft of the Uniform Act is silent on the subject.

Assume that D1 (e.g., an architect) and D2 (e.g., a builder) are joint wrongdoers and are sued by the injured person P (e.g., the owner of the badly designed and constructed building). Assume that the contract between P and D2 limits D2's liability for failure to perform his contract properly (e.g., to defects appearing within a year) and that D2 raises the limitation as a defence to D1's claim for contribution. We think that the following conflicting arguments could be put forward:

(1) S. 9 of the present draft Uniform Act gives D1 a right of contribution from D2, and the draft Uniform Act does not say anything that would deprive D1 of that right merely because P and D2 have, by a contract to which D1 was not a party, limited D2's liability to P.

(2) S. 10 of the draft Uniform Act allows the Court to consider what is "just and equitable having regard to the degree of responsibility of each wrongdoer for the damage." D2 may well have relied upon the limitation of liability in agreeing to the other terms of the contract. If that has happened it would not be just and equitable to impose upon him a liability to a stranger (D1) and thus confer upon him a fortuitous benefit at D2's expense.

We think that the Uniform Act should settle the question one way or another. If it is the view of the Conference that a contractual limitation as between the plaintiff and the second wrongdoer should not give D2 a complete or partial defence in an action brought by D1, then the Uniform Act should say so. If it is not the purpose of the Conference to make that provision, then s. 12(2) of our earlier draft or something like it should be restored.

(e) *Consequential amendments to other uniform Acts*

This subject is somewhat outside the scope of the subject of the Uniform Contributory Fault Act, but we think it appropriate to raise it here.

At its 1980 meeting the Conference decided to delete s. 5 of the Uniform Highway Traffic and Vehicles Act and add notes as suggested at 1979 Proc. 97 and 98. It also agreed to amend the Uniform Married Women's Property Act so that each of the parties to a marriage will have the same right of action in tort against the other as if they were not married. This would also involve appending notes to the Uniform Married Women's Property Act. The effect of the Conference's decision was to accept our suggestion No. 2 which appears at the top of page 100 of the 1979 Proceedings. We think that the Conference should give the necessary directions to give effect to these decisions.

D. C. ELLIOTT
E. J. F. GAMACHE
W. H. HURLBURT
T. W. MAPP
P. J. PAGANO

July 5, 1982

ANNEX I

CONTRIBUTION CLAIMS AND CONTRACT PRINCIPLES

A Background Paper Prepared for the Institute of Law Research and Reform

by

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A. INTRODUCTION

The purpose of this paper is to identify those areas of the law of contract which might be affected by the proposal of the Uniform Law Conference of Canada that the principle of contributory fault be made applicable to all claims in contract. The paper results from a memorandum dated November 16, 1981, from Mr. Hurlburt to myself and from subseqent conversations between us.

It must be emphasized that the intention of this paper is solely to identify those principles of contract law which are likely to be affected by the U.L.C. proposal. In the terms of Mr. Hurlburt's memorandum to the writer of November 16, 1981, the paper deals with the issue of identifying the relevant portions of contract law. It does not constitute a comprehensive statement of the relevant law, although it does show how contract law deals with many cases of contributory fault, and it leaves for future studies a statement of the courses of action open to the Institute, and an assessment of the advantages and disadvantages of possible courses of action.

The method of approach adopted has been to examine the U.L.C. proposal and to attempt to assess what types of contract cases it might affect. The question is then asked how existing contract law already deals with those cases, in order to provide a foundation for predicting the probable impact of the U.L.C. proposal on existing contract doctrine. From the nature of this methodology, it is obvious that this paper cannot purport to be comprehensive. Cases of contributory fault and contributory negligence are rarely categorized under those headings in contract and the issues to which they give rise can be found in almost every area of the subject. As a result it is impossible to assess with complete confidence all those areas of contract which might be affected by the widespread application of contributory fault in contract or to envisage all the situations in which contribution might be claimed. The paper instead deals with those areas of contract law which, in the writer's opinion, are most likely to be significantly affected by the U.L.C. proposal.

Accordingly, the paper is divided into five main sections covering those areas of contract law in which contribution principles are most likely to be raised. These deal in turn with the concepts of causation, remoteness, mitigation, the interpretation of terms and some auxiliary contract mechanisms which might be more remotely affected by changes in the law of contribution.

B. CAUSATION

As was suggested in the Introduction to this paper, it seems that the law of contract dealt with problems analogous to those of contributory negligence in the law of torts by a large range of doctrines. However, the most important contractual principle covering cases of this type was that of causation, as indeed was the case with the law of torts prior to the adoption of the principle of contributory negligence in the nineteenth century.[1] As McInerney J. pointed out in the case of *A.S. James Pty. Ltd. v. Duncan* "in cases where courts have treated the plaintiff's contributory negligence . . . as barring the right to recover damages for the defendant's breach of contract, the basis has been that the plaintiff's contributory negligence was the 'sole', or the effective 'cause', of the damage complained of by the plaintiff. In other words, the defendant has been exonerated on the ground that his breach of contract was not the cause of the damage."[2] Indeed, McInerney J.'s historical view was subsequently adopted by the New South Wales Court of Appeal in the leading case of *Harper v. Ashtons Circus Pty. Ltd.*, where Hope J.A. added the additional comment that, because the doctrine of causation was available in the law of contract, "the importation into the law of contract of contributory negligence as a defence in this [tortious] sense seems both unjustified and unnecessary."[3]

The application of principles of causation in contracts to cases which, if they had occured in the law of torts, would be described as involving contributory negligence, tends to lead to "all or nothing" results. Accordingly, in this part of the paper an analysis will be made of cases which fall into two groups, involving firstly cases in which the plaintiff's own acts in causing the damage which occurred were held not to have affected the defendant's liability for breach of contract and secondly, cases in which the plaintiff's acts were held to constitute a total bar to a breach of contract action. In each of these sections, an effort has been made to draw on cases from several different kinds of contracts, in order to illustrate as widely as possible the application of the principles of causation in contract and to give an indication of the likely effect of the introduction of principles of contributory negligence. Following the discussion of the straightforward application of causation principles in these two categories, the third section deals with the question whether causation principles in contract can lead to a division of the loss between the plaintiff and defendant. Finally, the fourth section in this part of the paper is devoted to the application of the principles of causation in contracts by Canadian courts.

1. The Application of Causation Principles Resulting in Liability of the Defendant

There are a large number of cases in contracts in which it has been argued unsuccessfully that the plaintiff's own carelessness contributed to or caused the loss which he suffered. These cases have been decided by the courts largely on principles of causation, although the exact nature of the causation argument is not always elucidated in the reasons for judgment. Cases of this nature arise throughout the law of contract and in this section of the paper, it is proposed to give examples from three areas, in which the argument has frequently arisen that the plaintiff's damages ought to be reduced by reason of his own act or neglect. The cases deal with respectively breach of a contractual duty of care, breach of warranty generally and breach of warranty in a contract of sale.

(a) *Breach of a Contractual Duty of Care*

Those cases in which it is alleged that the defendant broke a contractual term that he would use reasonable care are of course closely analogous to cases of contributory negligence in the law of torts. In a number of recent contract cases the courts have noticed this fundamental similarity and have shown an increasing tendency to apply directly the principles of contributory negligence, despite the fact that the relationship between the parties is governed by contract.[4] However, before this recent tendency developed, courts dealt with exactly the same arguments concerning the alleged contributory negligence of the plaintiff in contract cases solely on principles of causation.

Two vivid examples of the application of causation principles to what might be loosely described as contributory negligence problems in contract are provided by the cases of *Vaile Brothers v. Hobson Ltd.* and *Harper v. Ashtons Circus*.[5] In the former case, the defendant carried out a contract to repair the carburetor in the plaintiff's truck in a negligent fashion with the result that when the truck was driven, the throttle opened fully and caused the engine to race. This in turn shattered the flywheel and seriously damaged the truck's engine. It appeared, however, that prior to the accident the plaintiff had disconnected the engine switch. If this had not been done, the driver could have stopped the engine promptly when it began to race and prevented damage to the engine. At trial, the plaintiff's action was held to constitute contributory negligence, which resulted in a dismissal of his action.

However, on appeal, a different view was taken of the effect of disconnecting the engine switch. Talbot J. held that the defendant's breach of contract had in fact caused the damaged engine, although the damage could have been prevented if the plaintiff had not disconnected the switch. However, the plaintiff's alleged contributory negligence was no defence, as the plaintiff was found to owe no duty whatsoever to the defendant in respect of the condition or equipment of the truck. The plaintiffs succeeded in their action based on a breach of contract, followed by the direct physical result of damage to the engine.

This case has been heavily criticized and indeed it has been suggested that it was wrongly decided.[6] However, there can be no doubt that the courts saw the issue of the plaintiff's alleged contributory negligence solely as a matter of causation and the criticism focuses simply on the application of the principles of causation to the facts before the court.

A more modern and explicit recognition of the role played by the plaintiff's negligence in an action against the defendant for failing to use reasonable care under the terms of the contract is provided by the *Ashtons Circus* case. In that case, the plaintiff bought a ticket for a travelling circus and, as the tent was full, he and his family took seats in the back row, some nine to twelve feet above the ground. During the performance, the plaintiff and his wife changed seats, as his wife was feeling cold, and during this manoeuvre the plaintiff fell to the ground over the back of the seats and injured himself. The New South Wales Court of Appeal confirmed a trial decision that the failure of the defendant to provide a guard rail on the top row of seats constituted a breach of warranty, the content of which was presumably that the circus would take reasonable care of its patrons. At trial, a jury had found the plaintiff contributorily negligent and reduced his damages by 25%. This finding was reversed on the ground that there was no evidence whether the plaintiff had been negligent when he slipped during the changing of seats. However, it was clear that, if the plaintiff had been contributorily negligent, the court would have decided the case on the ground of causation, based upon an inquiry whether the prime cause of the accident was the defendant's breach or the plaintiff's own act in negligently changing seats.

(b) *Breach of Warranty Cases*

Although arguments of contributory negligence are found with some frequency when the plaintiff argues that the defendant has failed

to take reasonable care under the terms of a contract, they are also found in cases of strict liability when the breach consists of a failure to meet the standards required by an express or implied warranty. For example, in the well-known case of *Mowbray v. Merryweather*,[7] the plaintiff's stevedores unloaded a ship using, as was the custom of the port, equipment and chains supplied by the defendant, who owned the ship in question. The chain supplied by the defendant was cracked and in the course of unloading the ship it broke, injuring the plaintiff's employee. The employee sued the plaintiff, who settled the action and then sought to recover the amount of the settlement from the defendant. On these facts, the Court of Appeal held that the defendant had broken an implied warranty that the chain was reasonably fit for its intended purpose, but the defendant argued that the plaintiff's own negligence had contributed to the accident because it had failed to examine the chain prior to use. However, the Court of Appeal held that there was no negligence as between the plaintiff and the defendant, as the plaintiff was entitled to rely on the implied warranty. The plaintiff was able to recover the amount of the settlement paid to the employee because, as a matter of causation, the injury to the workman and his consequent recovery against the plaintiff were a natural result of the defendant's breach of contract.

(c) *Breach of Warranty in Contracts for the Sale of Goods*

Traditional attitudes towards the plaintiff's contributory negligence in claims for breach of warranty under the Sale of Goods Act closely parallel those in *Mowbray v. Merryweather.* A standard example is provided by *British Oil and Cake Company Limited v. Burstall and Company*,[8] in which the plaintiffs purchased copra cattle cake from the defendants. The cake had been adulterated by the addition of a percentage of poisonous castor bean and, when it was resold to some purchasers by the plaintiffs, it caused serious illness in the cattle to which it was fed. The plaintiffs settled a large number of claims which were made against them by farmers whose cattle were injured as a result of eating the cake and sought to recover from the defendant the amounts which they had paid out. The supply of the adulterated cattle feed was held to constitute a clear breach of contract, but the defendant argued that the plaintiff should have realized that the cake was contaminated before entering into the various subsales. Rowlatt J. found that the dark colour of the cake would have been "ominous" to a person of great experience, yet it was not patently dangerous. Accordingly, there was no interruption in the chain of causation from the defendant's breach to the plaintiff's loss,

although the court did contemplate that the result might have been different and that the buyer could not have distributed the cake at the risk of the seller if it had been patently unfit for consumption. There was little doubt, therefore, that the plaintiff's alleged contributory negligence was treated entirely as a matter of causation, with the result that the court faced an "all or nothing" dilemma of finding either that there had been a break in the chain of causation, thus depriving the plaintiff of any remedy, or that the breach caused the entire loss, resulting in complete liability on the part of the defendant.

2. The Application of Causation Principles Resulting in no Liability on the Part of the Defendant.

The application of the principles of causation outlined in the previous section of this paper emphasizes that the courts could well have reached an opposite conclusion on the appropriate facts and decided that the plaintiff's own act or neglect was the cause of the damage suffered. Indeed, there are obviously cases in each of the three categories described in the previous section where this result was reached, with the consequence that the defendant was entirely absolved of any liability. An example of this effect of causation is provided by the old case of *Harper* v. *Jones,*[9] in which the plaintiffs sought compensation for damage caused by a flood to their bags of rice, which were stored in the defendant's warehouse under a contract of bailment. It seemed, however, that the plaintiffs had, contrary to the advice of the warehouse owner, directed that the rice be stored on the floor of the warehouse, rather than on a raised platform where the defendant wished to place it. In the view of the court, the intervening act of the plaintiffs meant that they were the authors of their own injury and that they could not recover for what was essentially the consequence of their own act.

Little purpose would be served by multiplying the examples of the application of principles of causation in contracts to situations which are the converse of those discussed in the previous section and which are loosely comparable to those in which contributory negligence is argued in torts. However, as some commentators have recently urged the adoption of apportionment in cases where a purchaser suffers injury partly as a result of the breach of warranty of a seller and partly as a result of his own neglect, an interesting line of authority which illustrates the approach of Courts to this problem under the common law of contract will be briefly outlined.

There have been a fairly large number of cases arising under the

Sale of Goods Act in which the seller of a defective product has sought to negate his liability on the grounds that either the plaintiff should have noticed the defect prior to the use of the product or that the damage was caused by the plaintiff's own neglect. The *British Oil and Cake Company* case, discussed in the previous section of this paper, is a simple instance where such an argument was unsuccessful. However, in other cases the application of the principles of causation have yielded a different result. For example, in *Yachetti* v. *John Duff and Sons Ltd.*,[11] a butcher sold fresh pork sausages to the plaintiffs, who became afflicted with trichinosis as a result of eating the sausages. The plaintiff sued, *inter alios*, the butcher for breach of the implied terms under the Sale of Goods Act. Because the sale of pork infested with trichinae was both commonplace and unavoidable, the Ontario High Court held that the sausage was not unfit for its intended purposes, nor did it fail to meet the standard of merchantable quality. However, it also appeared that even if there had been a breach of one of the implied terms by the butcher, the plaintiff's failure to cook the meat properly prior to eating it would have deprived her of a cause of action.

A more direct example of the use of causation to deprive a negligent plaintiff of an action for breach of warranty was found in the decision at the trial level in the recent English case of *Lambert* v. *Lewis*.[12] In that case, the owner and driver of a vehicle were sued as a result of an accident, which occurred when the towing hitch attaching a trailer to the vehicle failed. The owner and driver then joined the retailer, who had sold the defective towing hitch, by means of a third party notice. In the third party proceedings, Stocker J. held that the sale of the defective towing hitch by the retailer constituted a breach of the implied term that the hitch would be fit for its intended purpose. However, the retailer's breach was found not to be an operative cause of the accident or of the loss which the owner had suffered, because of the owner's negligence in maintaining and operating the trailer hitch. Although there were other grounds for the decision of Stocker J. in the third party action,[13] it illustrates the straightforward application of causation principles so as to avoid what would otherwise be liability for breach of warranty on the part of a retailer.

Although courts appear to use causation principles in the majority of breach of warranty cases where the plaintiff's own act has intervened, other functionally similar cases have been decided by the manipulation of the implied terms themselves. This group of cases, typefied by *Ingham* v. *Emes*,[14] are further described in Section E of this paper.

3. Causation and the Division of Loss

The instance of the application of causation principles considered so far in this paper have resulted in an all or nothing approach to liability, depending upon whether the plaintiff's own act is considered to have interrupted the chain of causation. The final inquiry under this section of the paper explores the question whether the application of tests of causation in contract can result in a division of loss between the parties.

In principle, there is no reason why courts cannot use the principles of causation to make a *de facto* apportionment of loss in cases in which the damage is shown to have been caused by the combined operation of the plaintiff's contributory negligence and the defendant's breach of contract, although there is scant authority to justify this proposition. Any such apportionment in the law of contract could not, of course, be dependent on the notion of relative fault, which is apparently the basis for apportionment under the Contributory Negligence Act, because fault is largely irrelevant in the law of contract. However, a division of the loss, at least where damage is theoretically divisible, can surely be derived from the ordinary principle that the defendant will be held liable for such part of the total damage as the plaintiff proves was the result of the defendant's breach.[15] Such a possibility was undoubtedly envisaged by McInerney J. in *A.S. James Pty. Ltd.* v. *Duncan*,[16] in which he concluded that the effect of the English authorities was "to place liability on the defendant if, but only if, his breach of contract was the cause of the damage complained of and to leave the plaintiff to bear his own loss if his own want of care has been the "real", the effective, cause of damage, or if he is unable to prove what damage flowed from the defendant's breach of contract as distinct from his own want of care." The corollary of the last clause of this quotation is that the plaintiff would recover if he could prove some damage flowed from the defendant's breach, even though perhaps the damage was aggravated by the plaintiff's own want of care.

Some slight support for the view that the principles of causation can lead to *de facto* apportionment of loss can be derived from the comments of Mocatta J. in *Government of Ceylon* v. *Chandris.*[17] In that case, the charterer of a ship sought damages from the owner for loss of and damage to bags of rice during a voyage from Burma to Ceylon. The question arose whether the damage was caused by the owner's breach in failing to equip the ship adequately to carry rice or by the charterer's breach in delaying the ship for 120 days prior to discharge upon its arrival in Ceylon. This dispute arose upon a special

case stated by an arbitrator and Mocatta J. stated the law which ought to be applied by the arbitrator in assessing damages. In so doing, he agreed with the position of the owner that the burden lay on the charterer (as claimant) to show how much of the damage was caused otherwise than by its own fault or breach of contract, failing which it could recover nominal damages only.[18] The result was, in the words of McInerney J. in the *Duncan* case,[19] that "the burden lay on the claimant to prove the damages to which it was entitled over and above nominal damages." Accordingly, those damages which resulted from the plaintiff's own act could not be proved as resulting from the defendant's breach of contract and would not be recoverable.

4. The Application of Causation Principles in Canada.

Although the bulk of the authority relied on in this part of the paper to show how the common law of contract deals with problems akin to those of contributory negligence in torts has been drawn from non-Canadian jurisdictions, there is no reason to suppose that the attitude of Canadian courts to similar problems is any different. Indeed, reference to both traditional and recent authority suggests that the approach of Canadian courts is very close to those of other Commonwealth countries.

As an example of the traditional approach of Canadian courts is provided by the case of *Burrard Dry Dock Company Limited* v. *Canadian Union Line Limited,*[20] which arose as a result of an action in which a cargo owner recovered damages from the respondents, who were owners and charterers of a ship, in which the cargo was damaged by water seepage during a voyage from Powell River to Tasmania. The damage had occurred because the covering of a storm valve had been imperfectly tightened, thus permitting water to seep through to the cargo. Immediately prior to the loading of the cargo, the appellant had overhauled and repaired the ship, including the storm valve. The appellant's work had been inspected by an officer of the ship, who had been apprehensive that the valve might not have been screwed tightly enough, but who had made no final inspection of it. The officers of the ship then signed a certificate stating that the repairs had been done to their satisfaction. The owner and charterer of the ship sought an indemnity from the appellant in third party proceedings for the damages paid to the cargo owners and were successful both at trial and before the British Columbia Court of Appeal.

A dissenting judgment in the Court of Appeal would have reduced the recovery of the shipowners and charterers from the appellant by

half, on the grounds that they had been contributorily negligent. Before the Supreme Cout of Canada, the appellant framed its argument that the damage to the cargo resulted from the acts of the shipowners and charterers in terms of both causation and contributory negligence. Kerwin J. held, as a matter of causation, that there was no action on the part of the ship owners and charterers amounting to a *novus actus interveniens* and that the appellant's breach of contract had been the effective cause of the damage suffered by the cargo owners. His Lordship further adopted the view of *Mowbray* v. *Merryweather*[21] that there was no duty on the part of the shipowner or charterer to inspect the work performed by the appellant under its contract to repair. Rand J. also found that there was no break in the chain of causation as a result of any action by the shipowners or charterers, but that the damage resulted from an absolute obligation of the appellant to finish the work with care and skill. As a matter of causation the act or neglect of the shipowners and charterers was not to be treated as a *novus actus*, because they were entitled to rely upon the contract with the appellant "for the completeness of the work to be done, and it is that persisting contractual right which differentiates the case from one of negligence."[22] Accordingly, the *Burrard Dry Dock* case can be taken as an example of the cases outlined in the first section of this part of the paper, where the application of causation rules makes no difference to the liability of the defendant. Indeed, by concentrating upon the absolute nature of the liability of the appellant, the courts saw little room for the application of an argument that an act of neglect on behalf of the ship owner or charterer should reduce or eliminate its right of action in damages as a matter of policy.

The ordinary treatment of cases of contributory negligence in contracts by resort to causation was more recently emphasized by the Supreme Court of Canada in *Smith* v. *McInnis*.[23] In that case, a lawyer was successfully sued for negligence as a result of his failure to enforce by action claims under fire insurance policies within the limitation period set out in the policies. The lawyer had retained an experienced insurance counsel to assist him in the preparation of the claims and brought a third-party action against counsel. The majority of the Supreme Court of Canada dismissed the third-party action, on the ground that it was not part of counsel's duty to advise the lawyer over the limitation period. However, Pigeon and Beetz JJ., in dissent, felt that the duty of counsel did extend to advising the lawyer of the limitation period and thus the question arose whether there should be an apportionment of liability between the lawyer and counsel. Although Pigeon and Beetz JJ. were of the opinion that the Nova

Scotia Contributory Negligence Act could extend to allow apportionment even in cases of breach of contract, they considered in some detail the effect of the plaintiff's contributory negligence in a breach of contract action at common law. The analysis of Pigeon J. supports the view that it was dealt with by "the principle of causality"[24], the application of which might even result in an apportionment of the loss, presumably along the lines considered in section 3 of this section of this paper.

5. Conclusion.

Accordingly, it seems that the common law of contract dealt with those cases analogous to contributory negligence in torts mainly by the application of principles of causation and that this approach was adopted by the courts of Canada and other Commonwealth jurisdictions. The application of principles of causation generally lead to a "all or nothing" result, so that the plaintiff's act or neglect was either regarded as irrelevant, leaving the defendant entirely liable for the breach of contract, or as creating a break in the chain of causation, in which case the defendant avoided liability completely. One commentator has recently noted with respect to some of the cases in which the plaintiff's contributory negligence was argued in breach of warranty actions that this approach creates a very fine line between the plaintiff recovering nothing and recovering in full, with the consequence that a case can be made for apportionment in such circumstances.[25] It seems that the principles of causation at common law could allow for such an apportionment, though it is widely conceded that it is very difficult to find many instances in which such an apportionment actually occurred.

C. REMOTENESS OF DAMAGE

In theory, the concepts of remoteness and causation in contracts are clearly distinct, although their roles are similar, in that both are used to limit the amount of damages recoverable by a plaintiff. The theoretical distinction between the two concepts is plain since the defendant's breach might well be held to have "caused" a particular loss, even though the plaintiff cannot recover for that loss under the rules of remoteness because it was neither a natural consequence of the breach nor within the reasonable contemplation of the parties. However, despite this distinction, rules of remoteness can clearly be used to achieve the same results as causation. Where the plaintiff's own act or neglect aggravates or becomes a partial cause of the loss which he has suffered, courts can deny recovery on grounds of

causation, as set out in part B of this paper, or by categorizing the resulting damage as too remote because it is neither a natural nor a foreseeable consequence of the defendant's breach of contract.

There are a large number of cases in which the rules of remoteness are used in this manner to limit the amount of the plaintiff's recovery when his actions might be held to amount to contributory negligence in a tortious sense. This proposition can be illustrated by reference to two cases which were discussed in detail in part B of this paper. Firstly, in *Lambert* v. *Lewis*,[26] the seller of the defective trailer hitch claimed that his liability for the resulting accident should be reduced or eliminated because of the owner's act in continuing to use a manifestly broken hitch. At trial, Stocker J. used both causation and remoteness principles to hold that the retailer was not liable. In remoteness terms, he held that the action of the owner in using the hitch when he realized, or ought to have realized, that it was broken "would not have been in the contemplation of the parties at the time the contract was made." Similarly, in the Court of Appeal, Stephenson L.J. viewed the question of the owner's intervening "contributory negligence" in terms of both causation and remoteness when he phrased the real question as being "whether, in all the circumstances, the owner's carelessness was so unreasonable as to be beyond the contemplation of the retailers, or such as to break the chain of causation between their breach of warranty and the accident which resulted in the owner's liability to pay the plaintiff damages."[27] Secondly, in *Mowbray* v. *Merryweather*,[28] the defence that the plaintiffs might with reasonable care have discovered the defect in the chain and avoided the accident was disposed of by Lord Esher on the ground that the damages suffered by the plaintiff were not too remote, because they were both natural consequences of the defendant's breach and within the reasonable contemplation of the parties.[29]

The facts of a number of recent cases in which the courts have been inclined to apply the apportionment rules of the Contributory Negligence Act to breach of contract actions emphasize that the common law would ordinarily have dealt with these questions by means of the concepts of remoteness and causation. For example, in *Davey Bros. Paving and Development Ltd.* v. *Riteway Equipment Rentals (1973) Ltd.*,[30] the plaintiff leased from the defendant a propane heater, which he used to heat a small house. However, the heater was unsuitable for this purpose, as it was designed to dry concrete in buildings under construction, and it caused a serious fire. Munroe J. found that the defendant lessor was liable to the plaintiff for breach of warranty, but that the plaintiff was contributorily negligent to the

extent of 25%. The apportionment of loss under the Contributory Negligence Act in this decision was clearly innovative, as it would probably have been decided at common law on grounds of causation or remoteness. Under these two doctrines, the relevant questions would have been respectively whether the plaintiff's damages should have been in the reasonable contemplation of the lessor at the time the contract was made or whether the plaintiff's unusual use of the propane heater broke the causal chain stemming from the defendant's breach.

Finally, the flexibility of the tests of remoteness must be considered. As with principles of causation, the rules of remoteness can easily be used to either deny the defendant's liability to justify total recovery by the plaintiff. However, it appears that courts may also be able to effect a *de facto* apportionment of the loss more readily under the remoteness test. Such an apportionment is both justified in principle and supported by decided cases.

This flexible application of the rules of remoteness may be illustrated by reference to those sale of goods cases in which the defendant seeks to limit his liability for breach of an implied term by pointing to the plaintiff's unusual or careless use of the goods which he purchased. In principle, the application of the rules of remoteness ought to restrict the liability of a defendant to ordinary damages if the defendant can show that the breach of an implied term would ordinarily have lead to a small amount of damages and that the plaintiff used the product in an unforseeable manner or continued to use the product when it was manifestly defective, as in *Lambert* v. *Lewis*. A division of the loss in this fashion was accomplished in the well-known case of *Cory* v. *Thames Ironworks Company,*[31] in which the defendants broke a contract to supply to the plaintiffs the hull of a floating boom derrick when they were six months late in delivery. The defendants believed on reasonable grounds that the plaintiffs intended to use the hull as a coal store and, if this belief had been justified, the plaintiffs' loss would have been 420 pounds. However, unknown to the defendants, the plaintiffs intended to put the hull to the revolutionary new use of transferring coal from colliers to barges, an activity which would have produced profits of 4,000 pounds. Under these circumstances, the plaintiffs recovered damages of 420 pounds for loss of profits, which represented the loss which they would have suffered had they put the hull to its ordinary, foreseeable use. Although this case did not deal with a problem directly analogous to contributory negligence, its principle would surely be applicable to such cases. For example, if a person

purchased defective goods from a seller, who was thereby in breach of the implied terms of the Sale of Goods Act, and put the goods to an entirely unforeseeable and careless use, there would surely be a good argument on the part of the seller that he might be liable for the damages which would have been suffered by the plaintiff in the ordinary course of events, but not for the exceptional damages caused by the plaintiff's unusual use. Indeed, the *Cory v. Thames Ironworks* principle was argued in a recent contractual case where there was evidence that the plaintiff was contributorily negligent, but the case was decided on grounds which rendered a decision on this point unnecessary.[32]

Accordingly, many contract cases akin to those of contributory negligence in the law of torts are disposed of by rule of remoteness. Those rules have considerable flexibility and can permit a *de facto* apportionment of the loss, though such apportionment does not, of course, depend on the assignment of relative degrees of fault to a plaintiff and defendant but rather on a causal connection between the breach and the types of loss suffered by the plaintiff.

D. MITIGATION

The relationship between contributory negligence and mitigation has been considered in a number of recent cases and it has been frequently pointed out that the two concepts are juridically distinct. Under the principle of mitigation, a plaintiff's damages are reduced because, once the damage has occurred, he has failed to avoid part of his loss. Contributory negligence, in contrast, deals with conduct on the part of the plaintiff which actually brought about the damage or the event causing it.[33] In addition, the recent Alberta Court of Appeal decision of *Canadian Western Natural Gas Company Limited* v. *Pathfinder Surveys Ltd.*[34] emphasized that this theoretical difference can have significant practical consequences. In that case, surveyors were hired to stake the route of a proposed natural gas pipeline. They left the survey incomplete on one part of the route, where it was intended that the pipeline would follow a gentle curve. At this point, the surveyors simply staked two tangents and failed to measure back from the tangents to locate the proposed curve. The owner's contractor simply followed the staked tangent in laying the pipeline until it realized that the angle created where the two tangents joined exceeded that permitted for pipelines. Accordingly, the contractor departed from the staked tangents and laid the pipeline on a curve of its own choosing, which happened to be outside the right-of-way of the owner. As a result, the owner was compelled

to relay the misplaced section of pipeline and sought to recover the resulting costs from the surveyors. The surveyors relied on the failure of the owner to notice the error in the survey in an effort to reduce the amount of damages for which they would be liable. Prowse J.A. found that this failure on the part of the owner constituted contributory negligence, which reduced the damages for which the surveyors were liable. However, it could not be said that there had been a failure to mitigate loss on the part of the owner because such a finding would require proof that the person suffering damage was aware that such damage was being sustained. In the *Pathfinder Surveys Ltd.* case there was no evidence that the owner's employees knew that the pipeline was being placed in the wrong location. The owner, therefore, could be held to be contributorily negligent, and its total damages could be reduced, but the same result could not be achieved by the doctrine of mitigation.

Despite these distinctions, however, it is clear that courts in contract cases have limited the plaintiff's recovery on the basis of a failure to mitigate when the plaintiff has been guilty of what would be described in the law of torts as contributory negligence. The reason that this is possible is that the obligation to mitigate damage arises as soon as a breach of contract occurs, even if at that moment no monetary loss has been suffered by the plaintiff, whereas in most torts there is no complete cause of action until actual damage occurs. Thus, conduct can be analyzed as contributory negligence in tort and, if it occurs in a contractual setting, as a failure to mitigate loss.[35] For example, in *Sayers* v. *Harlow Urban District Council,*[36] the plaintiff paid one penny to enter a public lavatory and found herself trapped inside, owing to a breach of contract and possible negligence of the local authority. She was injured while trying to climb out of the cubicle and sued the local authority for the damages which she had suffered. On the analysis set out above, the plaintiff's conduct would still involve contributory negligence in the law of torts, as no complete tort had been committed when she began to try to escape, but mitigation if the action were grounded purely in contract, for the contract had already been breached as soon as she was trapped.

For the purposes of illustrating how the courts have used the doctrine of mitigation to deal with what otherwise might be categorized as contributory negligence, two examples will be given. Firstly, an old common law rule, enshrined in the Sale of Goods Act, provides that when a seller fails to deliver goods, the buyer is entitled to recover only the difference between the contract price and the market price prevailing at the date of delivery, rather than his actual market

loss.[37] This section, which is a statutory confirmation of the principle of mitigation, enables a court to deal with what might be otherwise considered as contributory negligence by resort to principle of mitigation. Secondly, the doctrine of mitigation was applied with harsh results in the recent New Brunswick Court of Appeal decision of *Caines* v. *Bank of Nova Scotia,*[38] in which the bank, under a loan agreement with the plaintiff, had undertaken to pay the fire insurance premium on the plaintiff's house. Owing to an error, the bank failed to make the necessary payment, but the plaintiff was told by his insurance agent that the premium had not been paid and later received notice of cancellation of his fire insurance policy. The plaintiff took some minimal steps to discover why the premium had not been paid but, even after receipt of the notice of cancellation, he continued to rely on the bank's assurance that the premium had been paid. Shortly afterwards, the plaintiff's house was destroyed by fire, causing a loss in the amount of $24,000, for which the plaintiff sued the bank. The majority of the Court of Appeal were found that the bank's failure to pay the insurance premium constituted a breach of its loan agreement, but that the plaintiff had failed to mitigate his loss by not arranging adequate coverage when he learned that the fire insurance policy had been cancelled. As a result, he was entitled to only nominal damages for the breach of contract on the part of the bank.

The doctrine of mitigation has accordingly provided a considerable weapon with which courts have dealt with contributory negligence arguments in the law of contract. It can in many instances permit the courts in effect to apportion the loss by finding that the plaintiff is entitled to recover his ordinary damages, but not those damages which were the result of his own failure to take reasonable steps to minimize the loss. However, in cases like *Caines* v. *Bank of Nova Scotia* the facts sometimes leave the courts with the possibility of either awarding all of the plaintiff's damages or virtually nothing and the rules of mitigation lead to apparently harsh results. It seems that this sentiment in *Caines* v. *Bank of Nova Scotia* led Bugold J.A. in dissent to prefer an apportionment of liability under the Contributory Negligence Act.

E. INTERPRETATION OF TERMS

The contractual doctrines so far considered have regulated contributory negligence on the part of the plaintiff by excluding recovery for all or part of the damages suffered as a result of the breach of contract. However, courts have also achieved similar results

by defining the primary duties of the parties under the contract in a particular fashion, so that the plaintiff is not permitted full recovery when he is to some extent the author of his own misfortune. The interpretation of the terms of the contract to achieve this objective has generally been carried out in one of three different ways. Firstly, the contractual duty of the defendant has been made conditional upon the adoption of certain conduct by the plaintiff: secondly, terms have been implied so as to impose various contractual duties upon the plaintiff; thirdly, the warranties given by the defendant have been limited or modified in some way. It will be readily apparent that these techniques are not always entirely distinct, but they do represent differing approaches to the same problem and each of them will be considered in turn.

1. Warranty conditional upon the Adoption of Certain Conduct by the Plaintiff.

Although the interpretation and manipulation of the terms of a contract to eliminate or reduce recovery by a plaintiff who has been contributorily negligent suggests that courts might simply wish to avoid compensating an undeserving plaintiff, many cases emphasize that this approach is grounded on the presumed intention of the parties. Indeed, this would ordinarily be the case, for it would be most unlikely that a contracting party would be willing to give an absolute warranty, which remained applicable no matter how reckless the conduct or actions of the plaintiff. For example, in *Harper* v. *Ashtons Circus Pty. Ltd.*,[39] which was considered in detail in part B of this paper and in which the plaintiff sued a circus for injury suffered when he fell from his seat, Hope J.A. commented: "Taking reason into account as well as the presumed intention and the interest of the parties, one would think that the warranty which the law implies in cases such as the present would protect the person giving the warranty in relation to the way in which the person to whom it is given is using the premises to which the warranty relates."[40] It is surely in accordance with the implied intention of the parties that the implication of a duty to take reasonable care of circus patrons does not extend to protect plaintiffs who take no care for their own safety.

A simple example of the application of this approach is provided by the decision of the English Court of Appeal in *Ingham* v. *Emes*,[41] in which the plaintiff sued a hairdresser when she contracted dermatitis as the result of the application of a proprietary hair dye. Prior to the application of the hair dye the plaintiff underwent a skin test

in order to determine whether she might be allergic to the dye. The test proved negative, but the plaintiff failed to inform the hairdresser that seven years earlier she had suffered an adverse reaction to the very same dye. Under these circumstances, Denning L.J. concluded that the implied term that the hair dye was fit for its intended purpose was "dependent upon proper disclosure by the customer of any relevant peculiarities known to her, and in particular of the fact that she knew by experience that [the dye] might have a bad effect on her."[42] This conclusion, which had the effect of negating any liability on the part of the hairdresser, was clearly based on the presumed intention of the parties, because the court emphasized that the hairdresser would never have considered giving a warranty if she knew of the plaintiff's earlier adverse reaction to the dye.

2. The Imposition of Implied Contractual Duties on the Plaintiff.

It was a short step from making the defendant's warranty conditional upon some act or conduct on the part of the plaintiff to implying a term requiring some specific action on the part of the plaintiff as a pre-requisite to recovery. In these circumstances, the failure by the plaintiff to perform such an implied duty might well entitle the defendant to be absolved from his own obligations. The technique of implying a duty on the part of the plaintiff to use care in co-operating with the defendant was recognized by Professor Glanville Williams as one of the traditional methods used by the law of contract for dealing with problems similar to those of contributory negligence.[43] A simple example of its application is provided by the old contractual bailment case of *Talley* v. *Great Western Railway Company*.[44]

In that case, a passenger sued a railway company for breach of its contract to carry his luggage safely when the luggage was stolen during the course of a journey. The passenger had requested that his luggage be placed in the carriage in which he was travelling, rather than in the luggage van where it normally would have been carried. He left the train at an intermediate stop and failed to return to his original carriage, with the result that his luggage was left unattended for the balance of the journey. Under these circumstances, the court implied a condition that the passenger must take ordinary care of the luggage in his possession, so that the breach of that term negated the duty of the railway company under its contract. In the course of his judgment in this case, Willes, J. pointed out that the apparently absolute duty of the carrier to take care of passenger's luggage must be limited in this fashion in order to avoid ludicrous results which cannot

have been intended by the parties to the contract. Otherwise, it would be possible for passengers to recover for lost or stolen luggage when they took no care of it whatsoever, for example, by looking on without objection while the thief removed it from the carriage.

In most cases, the breach of the implied obligation by the plaintiff has absolved the defendant entirely on his contractual duty, as in the *Talley* case itself. Presumably this effect flows from the term broken being characterized as a condition or fundamental term of the contract; if it were classified merely as a warranty, its breach would not entitle the defendant to avoid his obligations under the contract entirely, but might create an offsetting right to damages in the defendant. This possibility could result effectively in an apportionment of the loss between the plaintiff and defendant, though it has not been possible to discover any cases in which this solution was adopted by the courts.

3. Modification of the Defendant's Warranties

Courts have also taken into account contributory negligence on the part of the plaintiff by modifying the terms of the defendant's warranty so that he is not held liable for the consequences of the plaintiff's own neglect. For example, in the House of Lords' decision in *Lambert* v. *Lewis,*[45] Lord Diplock was concerned to limit the liability of the retailer of the trailer hitch in the face of the owner's continued use of it when it was manifestly broken. In order to accomplish this object, his Lordship found that the implied term that the hitch was fit for its intended purpose continued to operate only until it had become apparent to the owner that the hitch had become defective. If there was to be any liability on the part of the retailer after that time, "the only implied warranty which could justify [the owner's] failure to take the precaution either to get it mended or at least to find out whether it was safe to continue to use it in that condition would be a warranty that the coupling could continue to be safely used to tow a trailer on a public highway notwithstanding that it was obviously in a damaged state."[46] Lord Diplock's finding that there is no such warranty effectively negated the liability of the retailer in the face of apparent contributory negligence on the part of the owner.

F. AUXILIARY CONTRACT MECHANISMS

The most important methods by which courts in contract cases have resolved problems akin to those of contributory negligence in tort have been set out above. However, the description cannot be exhaustive because in many instances courts may have effectively dealt with what amounts to contributory negligence on the part of

the plaintiff under other contract doctrines *sub rosa*, without any acknowledgement or perhaps realization of the character of the problem with which they were concerned. In addition to the major doctrines set out above, there have been suggestions that courts may also have resolved problems of contributory negligence in a few cases by resort to other principles of contract law. In particular, it is possible that account could be taken of contributory negligence in discretionary areas in quantifying contract damages,[47] and in the area of self-induced frustration and discharge by breach.

The ordinary rules concerning the discharge of contracts on grounds of frustration clearly provide that the defence frustration cannot be relied upon if it is self-induced.[48] Although the usual cases of self-induced frustration deal with an intentional act on the part of one party which leads to impossibility of performance, there have been strong suggestions that mere negligence by that party will be sufficient to prevent reliance upon frustration.[49] In most cases, this will not give rise to questions of contributory negligence, for it is the defendant who is seeking to excuse what would otherwise be a breach of contract. However, it is conceivable that the issue might arise if a plaintiff argues that a contract is discharged in the course of an action for damages. For example, it has often been argued in building contract cases when a contractor has encountered unexpected difficulties that the contract has been discharged on the grounds of frustration and that the contractor is thereby entitled to recover more than the contract price on a *quantum meruit* basis.[50] If, however, it can be shown that the supervening difficulties faced by the contractor resulted from his own neglect, he might well be deprived of his cause of action by resort to the doctrine of self-induced frustration, which would in effect be taking into account the contractor's contributory negligence.

The English Law Commission raised a similar technical possibility in which the rules of discharge by breach might in effect cover a case of contributory negligence.[51] The Commission cited the case in which a building contractor chose to abandon work on a site because the owner who engaged him had delayed the payment of an instalment of the price. The Commission suggested that if the owner sued the contractor for abandonment of the work and the court found that the contractor had not been entitled to stop work under these circumstances, the contractor might be able to claim that the owner was partly the author of his own loss as a result of his failure to pay at the proper time. Although this example is entirely hypothetical, it would appear to raise issues analogous to contributory negligence.

It is clear that arguments along the lines suggested in this section hardly arise in the mainstream of contract litigation. However, they do emphasize that the law of contracts might deal with contributory negligence in problems in a multitude of ways, dependent upon the accidents of litigation and the way in which claims for damages are phrased.

G. CONCLUSION

Claims that the plaintiff has caused or aggravated the damages which he has suffered have obviously been raised with considerable frequency in contract actions and dealt with by standard contract doctrines. Until recent times, there has virtually been no suggestion that it is necessary to adopt the apportionment provisions of the Contributory Negligence Act in order to bring about acceptable solutions to these cases in contracts. Indeed it may be that in those cases in which the Contributory Negligence Act has been applied to contracts, traditional contract doctrines have not been fully argued.[52]

It is undeniable that the contract rules applicable to these cases often produce an "all or nothing" solution, in that the plaintiff either succeeds fully or fails entirely in his claim, though some rules do permit an effective apportionment of the loss in appropriate circumstances. However, the hallmark of the contractual approach is its focus on the importance of the terms of the parties' agreement, so that, in the words of two recent commentators, "the court is enabled to allocate liability for loss not upon some external principle of division but by examining the inferable content of the agreement and by looking to what, in particular, the party allegedly in breach can be deemed to have undertaken."[53] As is to be expected with an area of law based on a theory of strict liability, this approach leaves very little room for an examination of the relative degrees of "fault" of each party in bringing about the loss which has been suffered. The overall consequence of this approach has probably been to produce more rigid results than would obtain in similar cases under the law of negligence, though it is to be noted that in many cases where this aspect is considered, particularly in Australian decisions, it is not regarded as an undesirable phenomenon.

FOOTNOTES

1. Taggart, *Contributory Negligence: Is the Law of Contracts Relevant?* (1976-79) 3 Auckland U.L. Rev. 140,143.
2. [1970] V.R. 705, 723 (Vic. S.C.).
3. [1972] 2 N.S.W.L.R. 395, 404.

4. See especially *Canadian Western Natural Gas Company Limited v. Pathfinder Surveys Ltd.* (1980), 12 Alta. L.R. (2d) 135.
5. (1933), 149 L.T. 283; [1972] 2 N.S.W.L.R. 395 (C.A.).
6. Palmer and Davies, *Contributory Negligence in Breach of Contract—English and Australasian Attitudes Compared* (1980) 29 Int. and Comp. L.Q. 415, 419, quoting from Glanville Williams, *Joint Torts and Contributory Negligence*, pp. 214-222. An original copy of Professor Williams' book was not available at the time of writing.
7. [1895] 2 Q.B. 640 (C.A.).
8. (1923), 39 T.L.R. 406.
9. (1879), 4 V.L.R.(L) 536.
10. See, e.g., Bridge, *Defective Products, Contributory Negligence, Apportionment of Loss and the Distrubution Chain* (unpublished paper, 1982) 32.
11. [1943] 1 D.L.R. 194 (Ont. H.C.); see also the similar case of *Heil v. Hedges*, [1951] 1 T.L.R. 515.
12. [1979] R.T.R. 61; rev'd in part [1980] 2 W.L.R. 299 (C.A.); rev'd. [1981] 1 All E.R. 1185 (H.L.). Bridge, *supra*, footnote 10, page 7.
13. Described in Bridge, *op. cit. supra*, footnote 10, at page 8.
14. [1955] 2 Q.B. 366 (C.A.).
15. Palmer and Davies, *op. cit. supra*, footnote 6, at page 450.
16. *Supra*, footnote 2, at page 725.
17. [1965] 3 All E.R. 48.
18. *Id.*, at 56-57.
19. *Supra*, footnote 2, at page 724.
20. [1954] S.C.R. 307.
21. *Supra*, footnote 7.
22. *Supra*, footnote 20, 319.
23. 91 D.L.R. (3d) 190.
24. *Id.*, at page 207.
25. Bridge, *op. cit. supra*, footnote 10, at page 17.
26. *Supra*, footnote 12; the discussion of causation principles is found in [1978] 1 Ll. Rep. 610, 616-627.
27. [1980] 2 W.L.R. 299, 317. See Bridge, *op. cit. supra*, footnote 10, at page 9.
28. *Supra*, footnote 7.
29. [1895] 2 Q.B. 640, 643; See Bridge, *op. cit. supra*, footnote 10, at page 11. *Vaile Bros. v. Hobson, supra*, footnote 5, is another example of the application of remoteness rules.
30. Unreported decision, July 28, 1978, No. C776176, Vancouver Registry (B.C.S.C.), discussed in *Contributory Negligence and Concurrent Wrongdoers*, Alberta Institute of Law Research and Reform, Report No. 31 (April 1979), 19.
31. (1868), L.R. 3 Q.B. 181.
32. *H. Parsons (Livestock) Ltd. v. Uttley, Ingham & Co. Ltd.*, [1978] 1 Q.B. 791, 797.
33. Treitel, *The Law of Contract* (5th ed.), 728.
34. (1980), 12 Alta. L.R. (2d) 135.
35. Swanton, *Contributory Negligence as a Defence to Actions for Breach of Contract* (1981), 55 Australian L.J. 278, 286-7; Palmer and Davies, *op. cit. supra*, footnote 6, at page 451.
36. [1958] 1 W.L.R. 623.
37. Bridge, *op. cit. supra*, footnote 10, at page 36.
38. (1979), 90 D.L.R. (3d) 271.
39. *Supra*, footnote 3.
40. [1972] 2 N.S.W.L.R. 395, 405.
41. [1955] 2 Q.B. 366 (C.A.).
42. *Id.*, at 374.
43. *Joint Torts and Contributory Negligence*, 214.
44. (1870), 6 L.R.C.P. 44.
45. *Supra*, footnote 12; Bridge, op. cit. supra, footnote 10, page 10.
46. [1981] 1 All E.R. 1185, 1191.

47. A suggestion made by the U.K. Law Commission, Report on Contribution, Report No. 79 (1977), para. 30.
48. *Maritime National Ltd. v. Ocean Trawlers Ltd.*, [1935] A.C. 524 (P.C.); see generally Percy, *The Application of The Doctrine of Frustration in Canada* in Fridman (ed), *Studies in Canadian Business Law (1971), 77-79.*
49. *Lebeaupin v. Richard Crispin & Co.*, [1920] 2 K.B. 714; *Re Arthur's Estate* (1880), 14 Ch.D. 603.
50. *Davis Contractors Ltd. v. Fareham U.D.C.*, [1956] A.C. 696; *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] S.C.R. 361.
51. *Op. cit. supra*, footnote 47, para. 30.
52. E.g., there was no discussion in the judgments in the *Pathfinder* case, *supra*, footnote 34, of causation principles which might have achieved similar results to apportionment under the Contributory Negligence Act.
53. Palmer and Davies, *op. cit. supra*, footnote 6, at page 449.

ANNEX II

THE IMPACT OF THE CONTRIBUTION PROPOSALS OF THE UNIFORM LAW CONFERENCE ON THE COMMON LAW OF CONTRACT

A Background Paper Prepared for the Institute of Law Research and Reform

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A. *INTRODUCTION*

In an earlier background paper,[1] a survey was undertaken of the methods by which the common law of contract dealt with cases analogous to those of contributory negligence in the law of torts. The purpose of that paper was to identify those areas of the law of contract which might be affected by the proposal of the Uniform Law Conference of Canada that the principle of contributory fault be made applicable to all claims in contract. The purpose of this background paper, in contrast, is to assess how the contribution proposals of the U.L.C. might affect the contractual doctrines which were identified in the first paper.

This inquiry is essentially speculative in nature, because it requires a prediction of judicial attitudes towards traditional contract doctrine in the event that the conference proposal is accepted. As no other Commonwealth jurisdiction has apparently adopted this reform, there is no sound empirical basis upon which this paper can be founded. However, some conclusions can be drawn from an examination of the proposed Act and specific contract principles and from the experience provided by those cases in which Canadian courts have already begun to apply the defence of contributory negligence in the law of contract.

In order to assess the possible impact of the Conference proposal, the nature of that proposal will be discussed in Section B of this paper and in Section C its possible effects on the existing law of contract will be considered in detail.

B. THE CONTRIBUTION PROPOSALS OF THE UNIFORM LAW CONFERENCE

As is pointed out in Mr. Hurlburt's memorandum of September 16, 1981 to the Board of the Institute,[2] there is considerable doubt over the

extent to which the Uniform Law Conference intended to introduce apportionment principles into the law of contract. The draft Contributory Fault Act, as Mr. Hurlburt's memorandum emphasizes, fails to define with any clarity the type of conduct on the part of the plaintiff which will result in a reduction of the normal award of damages. As section 6 presently reads, an apportionment can occur only where the plaintiff has committed a tort, a breach of contract or statutory duty, or has failed to take reasonable care of his own person or property.[3] A change of this nature would have a minimal effect on the law of contract, as courts can already reduce the total recovery in damages in the event that the plaintiff has committed a tort, a breach of contract or a breach of statutory duty. The only new power to apportion loss would arise in the event that the plaintiff had failed to take reasonable care of his own person or property. Such circumstances arise occasionally in those areas of contract law which are akin to contributory negligence in torts, but Section 6 as it is presently drafted fails to take into account many cases in which the plaintiff has been to some extent the author of his own loss.

For the purposes of this background paper, it will be assumed that these restricted views of the Uninform Fault Act are not what was intended by the Conference and that its intention is better reflected by the motion set out on page two of Mr. Hurlburt's memorandum that "the principle of contributory negligence is to be applicable to all contracts."[4] It is therefore assumed that the Conference was of the opinion that apportionment should be available in all cases where the loss was caused by the defendant's breach of contract and by some act or omission on the part of the plaintiff, regardless of whether the plaintiff's act or omission constitutes a tort, a breach of contract or failure to take reasonable care of his own person or property. The discussion in the remainder of this paper will be based on this broad interpretation of the contributory fault proposal.

C. THE POSSIBLE IMPACT OF A BROAD CONCEPT OF CONTRIBUTORY FAULT

In theory, the adoption of the principle of contributory fault ought to have little effect on standard doctrines, with the notable exception of causation. This view is justified by the fact that those contract doctrines which were discussed in the first background paper as applicable to cases analogous to those of contributory negligence in the law of torts are entirely independent and deal only incidentally with problems of contributory fault. Those doctrines illustrate how the law of contract can cope with problems of contributory fault, but that

is not their primary object and they were developed to meet other, more general, problems is contracts. Thus, for example, although the doctrine of mitigation in contracts can be used to deal with some problems of contributory fault, it is unlikely to be severely affected by the introduction of apportionment provisions, for they have little to do with its primary purpose of requiring the plaintiff to act reasonably to keep losses to a minimum following a breach of contract. In contrast, the contractual rules of causation are more likely to be directly affected, as they deal with the problem of jointly caused loss, which would be at the heart of any widely-drawn Contributory Fault Act. Accordingly, it might be expected that most contract doctrines could continue to fulfill their normal roles in the law of contract, despite the adoption of a general principle of contributory fault.

However, the availability of an apportionment mechanism, which invites a division of the loss between the parties to a dispute, may deflect judicial attention from existing contractual doctrines, which tend to produce absolute results that are sometimes perceived to be harsh. Evidence of this potential trend is provided by the tendency of courts in the law of torts to resort more frequently in recent times to the apportionment provisions of the Contributory Negligence Act and to ignore other devices by which the plaintiff's recovery might be limited. The speculative issue of the likelihood of this trend developing in the law of contract and the more concrete question of the direct effect of the contributory fault proposals will be discussed firstly with reference to specific contract principles and secondly from the perspective of contract theory.

1. The Effect on Specific Contract Principles

(a) *Causation*

The adoption of the principle of contributory fault into the law of contract ought not to affect directly the contractual rules of causation in the ordinary case, where the prime question will remain whether the plaintiff or the defendant actually caused the loss. In the ordinary case, there ought to be no room for the application of apportionment, for it is a pre-requisite to the operation of the existing Contributory Negligence Act that, even if both parties were negligent, the negligence of each must be a contributory cause of the loss which occurred.[5] In principle, it is only in cases where the loss was genuinely caused by both the plaintiff and the defendant that apportionment should apply.

This fundamental point is important when the possible application of apportionment to contract is considered. In the first background

paper, it was pointed out that the law of contracts dealt with a number of cases loosely analogous to those of contributory negligence in the law of torts by means of the principles of causation. However, a close analysis of those cases suggests that many of them would not have been proper cases for apportionment under the law of contributory negligence, because the plaintiff's loss was not jointly caused by the fault of both the plaintiff and the defendant. For example, in *Yachetti* v. *John Duff & Sons Ltd.*,[6] in which the plaintiff complained that she had become afflicted with trichinosis as a result of eating pork sausages sold by the defendant, the plaintiff's failure to cook the pork sausages properly would have defeated her claim for damages, even if she had been able to prove a breach of contract. It is suggested that the same result ought to follow in this and many other contract cases, even if the suggested apportionment provisions are made available to the courts. It is only in cases where the loss is caused jointly by the breach of contract of the defendant and some fault on the part of the plaintiff that apportionment should make a difference.

The reason for the rarity of true cases of jointly caused loss in contract must arise from the nature of contractual warranties, which tend to produce absolute results and to restrict the scope of inquiry to the question whether the loss was actually caused by the breach, so as to enable the plaintiff to recover damages, or by the plaintiff's own act, so as to prevent any recovery whatsoever. The relative dearth until recent times of true cases of contributory negligence in the law of contracts therefore may well simply be explained by the absolute nature of much contractual liability. This suggests that there may be much merit in the original Institute proposal that contributory fault should apply only to claims resulting from a failure to carry out a duty of care under a contract. In this area of contract law, liability is far from absolute and it depends upon the judicial assessment that the defendant failed to use reasonable care. Because the standard of reasonable care is rarely defined in the contract, a court must essentially make its own judgment on the merits of the defendant's conduct in exactly the same way as in the tort of negligence. As the nature of the inquiry is similar and as the same fundamental issue is at stake in cases of this nature; it might be expected that contributory negligence issues will arise with the same frequency whether the action is framed in contract or tort. This hypothesis may be supported by the fact that much of the pressure to introduce apportionment in recent contract cases has arisen in cases involving a contractual duty of care. Because of the similarity of these cases to those arising in the tort of negligence, it can be predicted that the introduction of contributory

fault in contracts could affect a substantial number of cases involving a contractual duty of care and that courts would be likely to exercise powers of apportionment on criteria similar to those now employed in negligence.

In contrast, in those contract cases where the defendant has guaranteed a particular result, cases of loss caused jointly by the plaintiff and defendant seem to arise much less often. If contributory fault is introduced into the law of contract, there should probably be relatively few cases of this type in which apportionment can properly apply. However, arguments for apportionment would undoubtedly arise where it might appear that the defendant's breach of contract did not cause the plaintiff's entire loss, because of the plaintiff's negligent use of the product, or failure to inspect the product or failure to maintain it properly. Examples of claims of contributory fault that might arise in the latter two situations are found in the cases of *British Oil & Cake Company Limited* v. *Burstall & Company* and *Lambert* v. *Lewis*, both of which were discussed in the first background paper.[7]

As was pointed out in the earlier paper, claims of this nature are generally dealt with in the law of contract by inquiring whether the defendant's breach caused the loss and by examining the extent of the defendant's warranty. If the notion of contributory fault is introduced into contracts, there is little doubt that apportionment of the loss will offer a tempting avenue by which judges can dispose of these difficult cases. Although it is not the purpose of the background paper to evaluate whether such a development might be desirable, it must be commented that it does seem likely that the availability of apportionment might lead courts to decide cases according to some external criterion of fairness, rather than by concentrating on the terms of the agreement and the intention of the parties who made it. This possibility will be further elaborated in the second part of this section of this paper.

(b) *Remoteness*

Clearly, the introduction of the notion of contributory fault into the law of contracts should have no effect on the ordinary principles of remoteness. The issues of remoteness and contributory fault are as distinct in contracts as they are in the law of torts and there appears to be no reason why a change in one area should have an effect in another.

However, as was pointed out in the first background paper, the rules of remoteness in contract can be used to take into account action

on the part of the plaintiff which would constitute contributory negligence in tort. In this small group of cases, the change in the law of the type advocated by the Conference could have some effect on remoteness, in the event that a court chooses to limit the plaintiff's recovery under the Contributory Fault Act rather than by an application of the rules of remoteness. If the two techniques produce the same result in measuring the plaintiff's damages, this possibility can give rise only to theoretical objections. However, on occasion it seems possible that the attractions of dividing the loss between the parties under the Contributory Fault Act might persuade a court to avoid the application of the contractual rules of remoteness, which normally produce an all or nothing result. Indeed, this development has already occurred in the case *Davey Bros. Paving and Development Ltd.* v. *Riteway Equipment Rentals (1973) Ltd.*[8] which was discussed in the earlier paper. In that case the plaintiff leased from the defendant a propane heater, which was designed to dry concrete in buildings under construction, and used it to heat a small house. The heater caused a serious fire and Munroe J. found that the lessor was liable to the plaintiff for breach of warranty, but that the plaintiff was contributorily negligent to the extent of 25%. This type of case would ordinarily have been decided in the law of contracts according to the principles of causation and remoteness. The decision to apportion the loss might have appeared fair as between the parties, but it seems to avoid an analysis of the difficult question whether the defendant should have been liable at all or, if the lessor was aware of the purpose for which the plaintiff intended to use the heater, it should have been liable for the entire loss. The experience provided by the *Davey Bros.* case suggests that the possibility of applying rules of apportionment can make a real difference to the practical results of litigation to the parties.

(c) *Mitigation*

As a matter of theory, it might be expected that the adoption into the law of contract of the concept of contributory fault, which deals with causation, ought not to affect the principle of mitigation, which is concerned with minimizing loss once some damage has occurred. However, it was pointed out in the first background paper that some cases which could be analyzed as involving contributory negligence in tort are dealt with in contract under mitigation, because mitigation in contracts involves an element of causation. The proposed Contributory Fault Act could therefore have some impact on mitigation and this seems to be a real possibility for two reasons. Firstly, the overlap between contributory negligence and mitigation in contracts is easily

overlooked, especially because courts may well be more accustomed to classifying acts of the plaintiff which contribute to his own loss as questions of contributory negligence rather than of mitigation. Secondly, the specific wording of section 6(1) of the proposed Act might well encourage some courts to classify as contributory fault acts which would otherwise be dealt with by the principle of mitigation. For example, the clause in section 6(1) of the Act which states that apportionment can apply "where the fault of two or more persons contributes to damage suffered by one or more of them" can easily be applied to a case such as *Sayers* v. *Harlow U.D.C.*[9] In the first background paper it was argued that this case, where a lady was injured in attempting to escape from a public lavatory in which she had been trapped, should be properly categorized as one involving mitigation in contract. Under the section set out above, the case could equally be argued in terms of contributory fault, leading to an apportionment of loss, which would not necessarily be available under the doctrine of mitigation.[10]

The possible impact of the proposed Act on the doctrine of mitigation could have two important results. Firstly, although the earlier paper pointed out that the doctrine of mitigation can lead to some division of loss in breach of contract actions, it is not specifically designed to accomplish that purpose and the principle of contributory fault would probably encourage the apportionment of loss more frequently than the doctrine of mitigation. Secondly, in some cases it is felt that the doctrine of mitigation cannot permit any division of the loss, as, for example, in the case of *Caines* v. *Bank of Nova Scotia*,[11] which was considered in the first background paper. In that case, the defendant bank had undertaken to pay a fire insurance premium on the plaintiff's house. It failed to do so and the plaintiff received notice that his fire insurance policy had been cancelled. Following a serious fire, it was held in an action in breach of contract that the plaintiff had failed to mitigate his loss by not arranging adequate coverage when he learned of the cancellation of the fire insurance policy and that he was entitled only to nominal damages. The proposed Contributory Fault Act could well lead to an apportionment of loss, which would be difficult or impossible under the doctrine of mitigation, in this type of case and, indeed, the dissenting judge in the New Brunswick Court of Appeal would have been willing to use the existing Contributory Negligence Act to accomplish that result.

(d) *Interpretation of Terms*

It was pointed out in the first background paper that the law of contract deals with many cases comparable to those of contributory

negligence in torts by a detailed interpretation of the terms of the contract, based on the presumed intention of the parties. It was pointed out that this technique can involve making the defendant's obligations conditional upon the adoption of certain conduct by the plaintiff, imposing various positive duties on the part of the plaintiff or limiting the warranties given by the defendant in some way. The interpretation of contractual terms obviously provides a flexible weapon for courts in contracts disputes and can lead to a division of the loss in appropriate cases. However, perhaps because this technique was developed to meet general problems in the law of contract and not the specific question of contributory negligence, it can lead to "all or nothing" results in some cases where the Contributory Fault Act might allow the loss to be apportioned. For example, in *Ingham* v. *Emes*[12] where the plaintiff contracted dermatitis as a result of the application of hair dye, the plaintiff had undergone a skin test to determine whether she might be allergic to the dye. The test proved negative, but the plaintiff had failed to inform the hairdresser that she had suffered an adverse reaction to the same dye some years earlier. The English Court of Appeal held that the implied warranty on the part of the hairdresser was conditional upon disclosure of this fact by the plaintiff and dismissed the plaintiff's claim. However, it is conceivable that if the action had been governed by the proposed Act, the court might have been tempted to apportion the loss, particularly if the hairdresser had failed to ask the right questions of the customer or was aware that the skin test was not entirely reliable.

The proposed implementation of the Conference proposal relating to contributory fault would obviously not impair the ability of courts to resolve contractual disputes by interpretation of the terms of the contract. However, just as with the other contractual principles discussed in this part of this paper, it is possible that the introduction of contributory fault might induce courts to apportion the loss between the parties rather than to reach a different result by interpreting the terms of the contract. This possibility raises more than just a question of judicial technique, because the resolution of contractual disputes by the interpretation of the terms of the bargain is based on the intention of the parties, whereas the apportionment of loss is justified by a principle of fairness external to the parties' agreements. This raises again the larger issue of the effect of apportionment on general contract theory, which will be considered in the next section of this paper.

2. Contribution and Contract Theory

(a) *Contribution and the Terms of the Contract*

When the specific principles of contract were considered in the previous section of this paper, the conclusion was reached in a number of instances that contributory fault might have a limited direct impact in those principles. However, the point was frequently made that the proposed Act might have a more important indirect effect, in that courts might choose to apportion the loss between the parties under the Act instead of imposing the solutions which contract doctrine might demand. Initially, it might be argued that if judges do adopt this approach, it is surely evidence that apportionment is superior to the traditional principles of contract because of its inherent fairness. It is not the purpose of this paper to examine in detail the merits of the Conference proposal, but the possibility of this reaction inevitably raises the question of what might be the effect if courts did use contributory fault instead of existing contract principles.

If courts are attracted by the ability to divide the loss in contract cases, as they increasingly appear to have been in the law of torts in recent times, it is likely that the terms of the contract and the express and implied intention of the parties will become correspondingly less important in resolving contractual disputes. There is some evidence of this possibility in the *Davey Bros. Paving & Development Ltd.* case, discussed earlier in this paper,[13] and in other cases in which courts have already used the defence of contributory negligence in a contractual setting. For example, in *Truman* v. *Sparling Real Estate Ltd.*[14] the plaintiff visited an insurance agent to discuss insurance for his boat. The defendant obtained some information about the boat and quoted an approximate premium. The defendant did nothing more to obtain insurance, but apparently assured the plaintiff that he was looking into it. The plaintiff later attempted unsuccessfully to contact the insurance agent to inquire about the insurance and then launched his boat, which was subsequently badly damaged. Hutcheon J. found that the defendant insurance agent had contracted to use its best endeavours to obtain insurance and had broken that contract by its inaction. However, the defendant was liable only for 25% of the plaintiff's loss, because of the contributory negligence of the latter in launching the boat when he ought to have known that it was not insured.

It seems that the possibility of apportionment in the *Truman* case deflected the court from the basic contractual issue. The crucial question surely concerned the exact nature of the obligation which the defendant had undertaken and whether the breach of that obligation

had caused any of the resulting loss. The ability to divide the damage and to ensure that an unfortunate plaintiff secured some compensation seemed to offer an attractive way of avoiding an all or nothing result, but one which did not necessarily accord with contract theory. Where the parties have contracted on specific terms, the "all or nothing" result may be exactly what was contemplated and its application should not be avoided by judicial conceptions of fairness.

The objection can, however, be made that the various contractual doctrines considered in the previous section of this paper ensure that the courts apply their own conceptions of fairness to contracts in any event, under the guise of giving effect to the intention of the parties or applying doctrines such as mitigation. However, though there is little doubt that courts are often strongly result-oriented in contractual cases which raise issues analogous to contributory negligence, it is suggested that the existing contract doctrines do at least seek to achieve a result based on the intention of the parties. Although in many cases, the implication of terms into the contract or the interpretation of the terms will be used so as to deprive a careless plaintiff of a cause of action or to limit the recoverable damages, these results can often be properly justified by reference to the implied intention of the parties. For example, surely it cannot have been within the reasonable expectations of the parties to a contract for the sale of a lawn mower that the buyer would be protected by the seller's warranty even if the machine were used in an extremely careless fashion. Although the contract doctrines do give courts considerable latitude in cases of this nature, their starting point is the terms of the contract and at least some bounds are placed on them by the need to justify the result according to the implied intention of the parties. In the words of two recent commentators, they do not rely on "externally imposed solutions devised for cases of liability arising from non-consensual relationships." The extension of the notion of contributory fault may well lead to such externally imposed solutions.

(b) *Comparative Fault and Breaches of Contract*

In the period of nearly sixty years since Ontario first passed legislation allowing a reduction in the damages of a plaintiff who had been contributorily negligent there has been much debate over the question whether apportionment in torts should be based on causation or on the relative culpability of the parties. Although some support for the former view exists, it seems that in Canada apportionment is based on the relative culpability of the parties.[15] The task of the courts in cases of contributory negligence has been described as requiring the

application of "normal tests of reasonable versus unreasonable risks used in the determination of all negligence cases to come to a decision as to the degree of the culpability of the parties."[16] It is assumed that if the proposed Contributory Fault Act were adopted, courts would continue to apportion damages on the same basis, with the additional responsibility of extending apportionment to breaches of contract.

The adoption of the broad notion of contributory fault proposed by the Conference will require a comparison between the carelessness or fault of the plaintiff and the breach of contract of the defendant, when the acts of both parties have led to the loss in question. This creates a number of difficulties which vary according to the type of breach of contract involved.

In cases where the breach consists of a failure to meet a contractual duty of care, it was argued earlier in this paper that the function of the courts is similar to that in the analogous cases of negligence.[17] Accordingly, there should be little difficulty in apportioning loss on the ground of culpability, because the comparison between the lack of reasonable care exercised by the defendant and the plaintiff's carelessness could presumably be made on the basis of the developed, if arbitrary, criteria of the tort of negligence. However, in contract cases which do not involve the breach of a duty of care, the determination of relative fault threatens to distort the fundamental nature of contractual liability. This assertion can be supported by reference to two categories of contract actions in which apportionment might be argued if the Conference proposal were adopted.

Firstly, the possibility of apportionment may well arise where the defendant has broken a strict contractual obligation carelessly or even deliberately and the plaintiff's own conduct has also contributed to the resulting loss. This problem could occur, for example, under a building contract, in which the contractor has made no effort to finish the work by the stipulated completion date and some action on the part of the owner has also delayed the project. It might be tempting in such a case for the court to apportion the loss on criteria borrowed from tort law by comparing the blame-worthiness of each party and by taking into account the careless or deliberate nature of the contractor's breach. Such a result would run counter to the ordinary law of contract, where it is well established that the nature of the breach is irrelevant to the assessment of loss. The source of this inconsistency is obvious, for under the Conference proposal courts will inevitably be invited to compare fault or carelessness on the part of the plaintiff with a contractual breach, which depends on neither fault nor carelessness.

In such circumstances, the criterion of the relative culpability of the plaintiff and defendant may well require a court to focus on the nature of the breach because, if the experience provided by contributory negligence in the law of torts is any guide, there may be no other basis on which apportionment can be made.

The second category of contract cases is the converse of the first and emphasizes the problem of applying apportionment in contract more vividly. Many breaches of contract occur without any fault on the part of the defendant, as a result of the strict nature of contractual liability. It is possible to envisage a case under the proposed Act where the loss is found by a court to be jointly caused by a careless plaintiff and a totally innocent defendant, who could not reasonably have been expected to prevent the breach in question. Under these circumstances, it is difficult to discover any basis for the apportionment of loss. The test of comparative culpability might result in an equal division of the loss or the plaintiff being held responsible for a large proportion of the loss, because the defendant was not blameworthy in any way. However, such a result would seem to neglect the fact that the defendant, even though innocent, has failed to produce the result which he guaranteed under the terms of the contract.

The well-known and much criticized case of *Steel Company of Canada Ltd.* v. *Willand Management Ltd.*[18] illustrates this problem, although its facts do not parallel exactly the example outlined above. In that case, a contractor's tender to build a roof according to a set of plans and specifications was accepted by the owner, who had specified that the adhesive "Curadex" be used in construction. The roof was damaged because of the failure of "Curadex" to perform the function for which it was intended and the contractor was held liable for the resulting repair costs on the basis of its absolute contractual guarantee that "for a period of five years . . . all work . . . will remain weather tight." If this were to recur under the proposed Act, a court might have concluded the failure of the roof was caused both by the contractor's breach and the owner's decision to specify "Curadex". However, any apportionment would be very difficult, because it is almost impossible to compare the culpability of the parties. If the negligence of the owner is contrasted with the relative innocence of the contractor, it is possible that the owner might recover only a small percentage of the repair costs. Nevertheless, this result would severely undermine the nature of the warranty given by the contractor and presumably paid for by the owner.

These two categories of cases emphasize the difficulty of discovering a rational basis for apportionment when the objection to a plaintiff's

conduct is based on fault and the defendant has broken a strict obligation. Although recent American experience suggests that apportionment, at least in products liability cases involving implied warranties, is practicable,[19] there seems to be merit in the suggestion of Mosk J., in dissent, in *Daly* v. *General Motors Corp.*[20] that a comparison between the strict liability of the defendant and the contributory negligence of the plaintiff is as futile as a comparison between apples and oranges.

D. CONCLUSION

An attempt to predict the probable impact of the contributory fault proposals of the Uniform Law Conference is necessarily speculative and the opinions expressed in this paper are subject to all the frailties of speculation. However, it can be concluded that there will undoubtedly be some direct effect on specific doctrines of the law of contract if the Conference proposal is implemented. There is also the more intangible possibility that the extension of notions of contributory fault to contract will have an indirect effect on the resolution of contractual disputes, if courts are attracted by the possibility of dividing the loss between the parties. If this development occurs, it could have wide-ranging implications for the law of contract, which are more important than the direct effect of the Conference proposals. Finally, the transfer of concepts from the essentially fault-based system of torts to the law of contracts, which in many cases relies on strict liability, may well lead to difficulty in applying any scheme of apportionment. This problem is one aspect of the larger relationship between contracts and torts and its resolution involves fundamental questions about the differing nature of contractual and tortious liability.

FOOTNOTES

1. Percy, *Contribution Claims and Contract Principles,* Institute of Law Research and Reform, February, 1982.
2. Hurlburt, *Draft Uniform Fault Act: Problems Arising from Uniform Law Conference Decisions,* 1980, September 16, 1981, 3.
3. Uniform Law Conference of Canada, *The Contributory Fault Act, Draft for Adoption,* Document 840-204/074 (1981), s. 6.
4. Hurlburt, *op. cit. supra,* footnote 2, 2.
5. Heuston, Salmond on the Law of Torts (16th ed., 1973) 532.
6. [1943] 1 D.L.R. 194; see Percy, *op. cit. supra,* footnote 1, 12.
7. (1923), 39 T.L.R. 406; [1981] 1 All E.R. 1185 (H.L.); discussed respectively in Percy, *op. cit. supra,* footnote 1 at 9, 33.
8. Unreported decision, July 28, 1978, No. C776176, Vancouver Registry (B.C.S.C.). See Percy, *op. cit. supra,* footnote 1, 22.
9. [1958] 1 W.L.R. 623; see Percy, *op. cit. supra,* footnote 1, 26.

10. Loss was apportioned in the *Sayers* case under the Contributory Negligence Act, without any apparent realization of the problems of applying that Act to breaches of contract.
11. (1979), 90 D.L.R. (3d) 271 (N.B.C.A.); see Percy, *op. cit. supra,* footnote 1 at 27.
12. [1955] 2 Q.B. 366 (C.A.); see Percy, *op. cit. supra,* footnote 1 at 30.
13. *Supra,* page 9.
14. (1977-78) 3 C.C.L.T. 205 (B.C.S.C.).
15. Klar, *Contributory Negligence and Contribution Between Tort Feasors* in Klar (ed.), Studies in Canadian Tort Law (1977) 145, 156.
16. *Ibid.*
17. *Supra,* page 7.
18. (1966), 58 D.L.R. (2d) 595 (S.C.C.).
19. See Bridge, *Defective Products, Contributory Negligence, Apportionment of Loss and the Distribution Chain: Lambert v. Lewis* (1981-82). 6 Can. Bus. L.J. 184, 204.
20. 144 Cal. Rptr. 380, 402, quoted in Bridge, *op. cit. supra,* footnote 19, 204.

APPENDIX J

(See page 31)

THE CONTRIBUTORY FAULT ACT

Interpretation

1. In this Act,

(a) "concurrent wrongdoers" means,

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

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

(b) "damage" means damage, injury or loss to a person or to property:

(c) "fault" means

(i) a tort,

(ii) a breach of contract or statutory duty, giving rise to a right of action for damages, or

(iii) a failure of a person to take reasonable care of his own person or property, whether or not it is intentional.

Part 1

GENERAL

Act binds Crown

2. Her Majesty is bound by this Act.

Last clear chance

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

Liability joint and several

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

Questions of fact

5. In every action,

(a) the amount of damage,

(b) the fault, if any, and

(c) the degree to which the fault of a person contributes to damage,

are questions for the trier of fact.

Part 2

CONTRIBUTORY FAULT

Application of section

6. (1) This section applies where the fault of two or more persons contributes to damage suffered by one or more of them.

Contribution by plaintiff

(2) The liability of a person whose fault contributes to damage is reduced by the amount that the court finds just and equitable, having regard to the degree of responsibility for the damage that is attributable to the person who suffered it.

Contribution by third person

(3) Where a claim arises from the death of or personal injury to a third person, the liability of the person whose fault contributes to the damage is reduced by the amount that the court finds just and equitable having regard to the degree of responsibility for the damage that is attributable to the third person.

Part 3

CONTRIBUTION

Contribution between concurrent wrongdoers

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

Amount

8. (1) The amount of contribution to which a concurrent wrongdoer is entitled is the amount that the court finds just and equitable having regard to the degree of responsibility of each concurrent wrongdoer for the damage.

Equal contribution

(2) Where different degrees of responsibility of concurrent wrongdoers cannot be determined, their responsibility shall be deemed to be equal.

Indemnity

9. No person is entitled to contribution under this Act from a person who is entitled to be indemnified by him in respect of the liability for which the contribution is sought.

Apportionment of uncollectable contribution

10. Where the court is satisfied that the share of a concurrent wrongdoer cannot be collected, the court may, upon or after giving judgment for contribution, make such order as it considers necessary to apportion among the other concurrent wrongdoers, in the ratio of their respec-

tive responsibilities, liability for payment of the share that cannot be collected.

Application of section

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

Contribution when partial release

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

Contribution when full release

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

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

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

Claim for contribution where found not liable

12. In proceedings against a person for contribution under this Part, the fact that the person has been held not liable in respect of damage in an action brought by or on behalf of the person who suffered it is conclusive proof in favour of the person from whom contribution is sought as to any issue that is determined on its merit in the action.

Execution between concurrent wrongdoers

13. A concurrent wrongdoer who is responsible for damage shall not issue execution on a judgment for contribution by another concurrent wrongdoer until

(a) he has satisfied such proportion of the total damages as the court may order; and

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

unless the person suffering the damage has been fully compensated or the court otherwise orders.

Part 4

SETTLEMENTS, RELEASES AND JUDGMENTS

Settlements and releases

14. An action against one or more concurrent wrongdoers is not barred by,

(a) a settlement with or release of any other concurrent wrongdoer; or

(b) an unsatisfied judgment against any other concurrent wrongdoer,

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

Previous judgment binding in second action

15. (1) Where a judgment determines an amount of damages against one or more concurrent wrongdoers, the person suffering the damage is not entitled to have the damages determined in a higher amount by a judgment in the same or any other action against any other concurrent wrongdoer.

Costs

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

APPENDIX K

(See page 31)

DEFAMATION REPORT

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I. BACKGROUND TO UNIFORM DEFAMATION ACT

The tort of defamation "has shown remarkable stamina in the teeth of centuries of acid criticism"[1] and those called upon to deal with it require a similar staying power. The Uniform Law Conference has demonstrated considerable perseverance in its attempts to keep pace with this large and complex area of the law. However, now that Canadians have a constitutionally entrenched Charter of Rights and Freedoms which guarantees freedom of expression "including freedom of the press and other media of communication"[2] a new phase of defamation law may be about to begin.

The 1935 Conference resolved that the Saskatchewan Commissioners should submit a draft *Uniform Libel and Slander Act* based upon the civil law of defamation of the various provinces. The Saskatchewan report was received at the 1936 meeting and was accompanied by a draft Act which was, basically, an unrevised Ontario statute supplemented with provisions from other provinces covering subjects which did not appear in the Ontario legislation. The Saskatchewan Commissioners were then requested to prepare a revision of the draft Act for the 1937 meeting. However, although the revision was received in 1937, consideration of the Act was postponed.

Between 1937 and 1944 (the year in which a *Uniform Defamation Act* was adopted) several topics of importance for the law of defamation occupied successive Uniform Law Conferences. At the 1938 meeting the Alberta Commissioners raised the matter of "Privilege Existing in Connection with Reports of Reporting Agencies to Insurance Companies, Merchants & C." and this was referred to the Saskatchewan Commissioners. The question of privilege in relation to "mercantile reports" had been considered by the Privy Council in *Macintosh* v. *Dun* [1908] A.C. 390 where it was held that an association engaged in the communication of information about traders for reward could not rely upon the defence of privilege in a defamation action. At the 1939 Conference a verbal report on "mercantile reports" was delivered by Mr. Thom on behalf of the Saskatchewan Commissioners. The report concluded that, although it was inconvenient for mercantile agencies to be subjected to the ordinary law of libel, it was, nevertheless, desirable "for the common convenience and welfare of society" that credit reports should not enjoy absolute privilege. It was suggested that, like newspapers, they might be placed in a "middle category" to give mercantile agencies "some leeway" but not a "completely free hand.[3]

The Conference also explored the relationship between the law of defamation and the "right of privacy" and, at the 1939 meeting, the Saskatchewan Commissioners were asked to consider this issue. The focus of concern was whether the draft *Uniform Libel and Slander Act* should contain a provision prohibiting "the use of a portrait or picture of a living person in any advertisement unless the consent of such person" had been obtained. In their 1941 report to the Conference, the Saskatchewan Commissioners expressed the opinion that this issue did not come directly within the law of defamation although it was possible, as the House of Lords decision in *Tolley* v. *Fry* [1931] A.C. 333 had shown, that an advertisement could become defamatory "by

reason of the circumstances surrounding its publication." Consequently, the Saskatchewan Commissioners recommended that no amendment should be made to the law of libel and slander to deal with this problem.[4]

Not unexpectedly during these early years, the Conference was very much occupied with the law of defamation in relation to "broadcasting" and the "meteoric advance of radio." In particular, in 1941, the Saskatchewan Commissioners were asked to consider whether defamatory statements made in radio broadcasts should be treated as libel or slander and whether radio broadcasting systems should enjoy privileges with regard to defamatory statements comparable to those enjoyed by newspapers. The Saskatchewan Commissioners made some comments upon these issues but recommended "further study on this subject."[5]

By the time of the 1942 Conference, several important objectives had crystallized. At the meeting of that year the Conference resolved that the *Uniform Libel and Slander Act* be referred back to the Saskatchewan Commissioners so that it could be redrafted in accordance with the following principles:

(a) the abolition of the distinction between libel and slander and the consequences of that distinction arising under past authorities;

(b) a restatement of the law in terms of defamation so that proof of damages and the consequences would be identical in all cases, and that in every case where defamation was established damage should be presumed but that the court should retain a discretion to refuse costs in a proper case;

(c) in the case of defamation by radio, liability for defamation should be imposed on the radio station in every case where the station either employed the speaker to say what he said or was negligent in permitting the words to be spoken.

In 1943 a revised draft of the Act was submitted and the 1944 Conference adopted a *Uniform Defamation Act* whose principal innovative features were the abolition of the distinction between libel and slander, the simplification of procedures, and provisions to deal with the "development of a new means of publication, namely, radio."[6]

Since 1944 various modifications have been made to the *Uniform Defamation Act* but its basic shape has remained intact. Both the Act and the law of defamation in general have been reconsidered on several occasions by the Conference. An attempt to introduce the Uniform Act before the Provincial Legislature in British Columbia provoked a response from the B.C. Newspaper Association which

requested certain amendments. The suggestions of the Newspaper Association were brought before the Uniform Law Conference in 1947 and were referred to the Alberta Commissioners for consideration. At the 1948 meeting the Alberta Commissioners reported upon their deliberations and several of the changes requested by the Newspaper Association were debated by the Conference. In particular, the Conference seemed to be drawn to one of the proposals aimed at giving a defence to the innocent publisher who had no intention of referring to the plaintiff and who had displayed no want of reasonable care at the time of publication.[7]

In 1963 an attempt was made to broaden the range of privileged reports. The Attorney General of Manitoba wrote to the Conference in 1962 and asked that consideration be given to the desirability of replacing subsections (1) and (2) of section 10 of the Uniform Act with subsections (1) and (4) of section 3 of the Ontario *Libel and Slander Act.* This request was referred to the Manitoba Commissioners who, at the 1963 meeting, concluded in their report that "the area of privilege in the Ontario Act [was] considerably broader than in the Model Defamation Act" and recommended as follows:

> It is our view that the area of privilege be broadened to include a fair and accurate report of any legislative body or any part or committee thereof that may exercise any sovereign power acquired by delegation or otherwise in any part of the world. It might also be extended to the proceedings of any administrative body or any commission of inquiry properly constituted anywhere in the world.[8]

A significant amendment was made to the Uniform Act in 1979 in relation to the defence of fair comment. The widespread disapproval of the majority judgments in the Supreme Court of Canada decision in *Cherneskey* v. *Armdale Publishers* [1978] 6 W.W.R. 618 provided the momentum for reform. The Alberta and Ontario Commissioners, reporting together to the Conference in 1979, saw the decision in *Cherneskey* as a "weakening of freedom of speech" and recommended that the *Uniform Defamation Act* be amended "to overrule *Cherneskey* by allowing the publisher of an opinion on a matter of public interest to rely on a defence of fair comment if a person could honestly hold the opinion (an objective test)."[9] A new section—now section 9—was drafted and approved by the Conference to deal with the problems caused by the *Cherneskey* decision.

Generally speaking, the history of the *Uniform Defamation Act* reveals no comprehensive reform or codification of the law of defamation. The Act is something of a hybrid, but it does represent a

significant improvement upon the common law by its abolition of the anachronistic distinction between libel and slander and by its simplification of procedures. It removes some of the more blatant anomalies of the common law and makes some provision for newspapers and broadcasting without achieving a complete rationalization of the law of defamation. Thus, the law of defamation in Canada remains a "mosaic of statute and common law" and a "patchwork of rules."[10]

II. DEFAMATION LEGISLATION IN CANADA

Unlike the criminal law of libel, civil defamation varies to a greater or lesser extent from province to province in Canada. Adherence to the principles and format of the *Uniform Defamation Act* is not ubiquitous. Even in Alberta, British Columbia, Manitoba, New Brunswick, the Northwest Territories, Nova Scotia, Prince Edward Island and the Yukon where the Uniform Act has been enacted, there are modifications and deviations which are, sometimes, quite pronounced. The Quebec legislation differs considerably from the general pattern and Newfoundland has a statute which contains only five short sections relating to slander. The following comparisons are meant to be illustrative rather than exhaustive.

A. *The Libel and Slander Distinction*

Generally speaking, the *Uniform Defamation Act* makes all defamation actionable without proof of damage. This approach, which "introduces a great deal of simplicity into what was hitherto a subject beset with archaic rules and distinctions,"[11] has been followed in the statutes of Alberta, Manitoba, New Brunswick, the Northwest Territories, Prince Edward Island and the Yukon. Some provinces retain the distinction between libel and slander but make special provision for "broadcast" defamation. Section 2 of the British Columbia *Libel and Slander Act*, R.S.B.C. 1979, c. 234 and section 2 of the Ontario *Libel and Slander Act*, R.S.O. c. 237, both say that defamatory words in a "broadcast" shall be deemed to be published and constitute libel. Section 2 of the Ontario Act speaks of defamatory words "in a newspaper or in a broadcast" while the B.C. Act speaks only of "words in a broadcast." The Ontario Act further provides, in section 1(2), that "words" are to "be construed as including a reference to pictures, visual images, gestures and other methods of signifying meaning." The B.C. statute does not directly define "words." However, in Nova Scotia, section 2 of *The Defamation Act*, R.S.N.S. 1967, c. 72 provides that the "broadcasting of words shall be treated as publication in permanent form" and defines "words", in section 1(e) to include "pictures, visual images, gestures or other methods of signifying meaning."

In Saskatchewan and Newfoundland, where the distinction between libel and slander still exists and where no specific provision is made for "broadcasting," resort must still be made to the common law rules.

B. *The Meaning of "Broadcasting"*

The various statutory definitions of "newspaper" and "broadcasting" are important because the defences made available by the Acts will only apply where the statutory definition is satisfied. Section 1(a) of the *Uniform Defamation Act* stipulates the following definition:

> "broadcasting" means the dissemination of any form of radioelectric communication, including radiotelegraph, radiotelephone and the wireless transmission of writing, signs, signals, pictures and sounds of all kinds by means of Hertzian waves.

Manitoba, New Brunswick, the Northwest Territories, Prince Edward Island and the Yukon have similar definitions. Section 1(a) of the Alberta *Defamation Act*, R.S.A. 1980, c. D-6 employs a slight variation:

> "broadcasting" means a transmission, omission or reception to the general public of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3000 gigahertz.

The British Columbia Act uses a definition similar to Alberta's but, in section 1, limits "broadcasting" to "radio communication in which the transmissions are intended for direct reception by the general public." However this is to include a "broadcast by means of amplifiers or loudspeakers of tape recordings or other recordings."

The Nova Scotia Act uses the uniform definition but, in section 1(a), says that the Hertzian waves must be "intended to be received by the public either directly or through the medium of relay stations." The Ontario Act carries a similar definition to the one used in the *Uniform Act*, but, section 11(a)(ii) makes a significant extention by providing that the dissemination can be by means of "cables, wires, fibre-optic linkages or laser beams."

Saskatchewan and Newfoundland have no definition of "broadcasting."

C. *The Meaning of "Newspaper"*

Section 1(c) of the *Uniform Defamation Act* defines "newspaper" as follows:

"newspaper" means a paper,

(i) containing news, intelligence, occurrences, pictures or illustrations, or remarks or observations thereon,
(ii) printed for sale, and
(iii) published periodically, or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two of such papers, parts or numbers.

The Acts of Alberta, Manitoba, New Brunswick, the Northwest Territories, Nova Scotia, Prince Edward Island and the Yukon use the same definition. The British Columbia and Saskatchewan legislation contains a similar definition although section 1 of the British Columbia *Libel and Slander Act* refers to a "public newspaper or other periodical publication." Section 1(6) of the Ontario *Libel and Slander Act* is substantially the same but speaks of publication "at least twelve times a year." The Newfoundland Act has no definition of "newspaper." The definition contained in the Quebec *Press Act* differs considerably from the uniform formulation. Section 1 provides:

> For the purposes of this act, the word "newspaper" means every newspaper or periodical writing the publication whereof for sale and distribution is made at successive and determined periods, appearing on a fixed day or by regular issues, but more than once a month and whose object is to give news, opinions, comments or advertisements.

It should also be remembered that under the *Uniform Defamation Act* section 19 provides that the benefits of sections 14, 15 and 18 will not be available "unless the name of the proprietor and publisher and address of publication are stated in a conspicuous place in the newspaper." Alberta, New Brunswick, the Northwest Territories, Nova Scotia and the Yukon have enacted the same provision. British Columbia, Ontario, Prince Edward Island and Saskatchewan insist that the name of the proprietor and publisher and the address of the publication must be stated "either at the head of the editorials or on the front page of the newspaper." Section 18(1) of the Manitoba *Defamation Act*, R.S.M. 1970, c. D-20 denies the defences "unless the name of the printer and publisher and address of publication are printed as required by The Newspaper Act," and section 12 of the Quebec *Press Act* is a similar provision which says that "no newspaper may avail itself of the provisions of this act is the formalities required by the Newspaper Declaration Act . . . have not been complied with."

D. *Absolute Privilege*

Section 11 of the *Uniform Defamation Act* speaks of fair and accurate reports "published in a newspaper or by broadcasting, of proceedings publicly heard before any court" as being "absolutely

privileged." But this is a strange form of absolute privilege because the section then goes on to list a number of factors which will defeat the privilege:

(a) the report must contain no comments;
(b) the report must be published contemporaneously with the proceedings or within thirty days thereafter;
(c) the report must contain nothing which is seditious, blasphemous or indecent;
(d) there will be no privilege if the plaintiff can show that he requested the defendant to publish a statement of explanation or contradiction and the defendant has failed to do so.

The Acts of Alberta, Manitoba, New Brunswick, the Northwest Territories, Prince Edward Island and the Yukon have the same provision dealing with this conditional "absolute privilege." Section 4 of the Ontario *Libel and Slander Act* is a variant on the uniform provision. However it contains no "thirty days" leeway for the reporting. Section 11 of the Saskatchewan *Libel and Slander Act* is identical to Ontario's section 4. Section 3 of the British Columbia Act merely says that such a report is "privileged" and omits the qualification dealing with refusal to publish an explanation or contradiction. Section 13 of the Nova Scotia *Defamation Act* follows the uniform provision, but, like British Columbia's section 3, it also speaks of reports of court proceedings as being "privileged"; there is no mention of "absolute privilege". Newfoundland's Act has no provisions dealing with absolute privilege.

E. *Qualified Privilege*

Section 10(1) of the *Uniform Defamation Act* is an extremely important provision which affords privilege to certain "fair and accurate 'reports' published in a newspaper or by broadcasting" unless "it is proved that the publication was made maliciously." This provision is reproduced, sometimes with minor variations, in the Acts of Alberta, Manitoba, New Brunswick, the Northwest Territories, Prince Edward Island and the Yukon. Section 10(1) of the Saskatchewan *Libel and Slander Act*, R.S.S. 1978, c. L-14 is a similarly worded provision but only refers to a "report published in a newspaper." British Columbia has a somewhat similar provision which covers some of the bodies mentioned in sections 10(1) and 10(2) of the *Uniform Act.* Nova Scotia and Ontario have provisions in their statutes which not only cover the areas mentioned in the *Uniform Act* but which also extend qualified privilege to newspaper and broadcast reports of the "findings or decision" of a wide range of "associations, or any part or committee thereof" related to art, science, religion, learning, trade,

business, industry, games, sports and pastimes. Newfoundland's Act has no provisions of this nature. Section 10 of the Quebec *Press Act* covers a slightly different range of proceedings to the ones found in the Uniform Act:

> Provided that the facts be accurately reported and in good faith, the publication in a newspaper of the following is privileged:
>
> (a) Reports of the proceedings of the Senate, the House of Commons, the Assemblee nationale du Quebec and of their committees from which the Public Protector laid before the Assemblee nationale;
>
> (b) Any notice, bulletin or recommendation emanating from a government or municipal health service;
>
> (c) Public notices given by the Government or by a person authorized by it respecting the solvency of certain companies or regarding the value of certain issues of bonds, shares or stock;
>
> (d) Reports of the sittings of the courts provided they not be held *in camera*, and that the reports be accurate.
>
> This provision shall not, however, affect or diminish the rights of the press under common law.

Section 10(2) of the *Uniform Act* extends qualified privilege to the publication in a newspaper or by broadcasting "at the request of any government department, bureau or office or public officer, of any report, bulletin, notice or other document issued for the information of the public." Only Newfoundland does not deal with such publications, although the provisions in the statutes of Ontario, Nova Scotia and Saskatchewan dealing with public reports do show some variations from the uniform section and from the legislation of the other provinces and territories which have adopted it.

Section 12 of the Uniform Act extends the privileged report provisions to "every headline or caption in a newspaper that relates to any report therein." The British Columbia, Saskatchewan, Quebec and Ontario Acts make no special mention of headlines and captions, while section 11(3) of the Alberta Act, which deals with headlines and captions, is only applicable to reports of court proceedings.

F. *Apology*

Here there is considerable uniformity throughout Canada. Section 4 of the *Uniform Defamation Act* follows the common law rule that although apology is no defence to a defamation action, it can be used to mitigate damages. But section 4 only applies to a "written or printed apology" and the apology has to be made "before the commencement

of the action" or "as soon afterwards" as the defendant "had an opportunity." All of the common law provinces and territories, except Newfoundland, have a similar provision.

However, the Uniform Act also creates the statutory defence of retraction and apology in mitigation of damages by "newspaper" or "broadcast." Section 14 provides that the publication must have been "without actual malice and without gross negligence." Such a provision has a history which goes back to the English *Libel Act* of 1843. This uniform provision is faithfully followed in Alberta, British Columbia, Manitoba, New Brunswick, the Northwest Territories, Nova Scotia, Ontario, Prince Edward Island and the Yukon. But in Saskatchewan section 7 of *The Libel and Slander Act* only refers to newspapers, and in Newfoundland, there is no statutory provision for apology.

G. *Retraction*

Here again there is considerable uniformity. The legal effects of retraction are the products of statute so that there must be precise compliance with the conditions stipulated in the legislation. The defence is somewhat circumscribed and merely serves to limit the plaintiff to "special" or "actual" damages. Section 18(1) of the *Uniform Defamation Act* provides:

> The plaintiff shall recover only special damages if it appears on the trial
> (a) that the alleged defamatory matter was published in good faith;
> (b) that there was reasonable ground to believe that the publication thereof was for the public benefit;
> (c) that it did not impute to the plaintiff the commission of criminal offence;
> (d) that the publication took place in mistake or misapprehension of the facts; and
> (e) either
> (i) where the alleged defamatory matter was published in a newspaper, that a full and fair retraction of and a full apology for any statement therein alleged to be erroneous were published in the newspaper before the commencement of the action, and were so published in as conspicuous a place and type as was the alleged defamatory matter; or
> (ii) where the alleged defamatory matter was broadcast, that the retraction and apology were broadcast from broadcasting stations from which the alleged defamatory matter was broadcast, on at least two occasions on different days and at the same time of day as the alleged defamatory matter was broadcast or as near as possible to that time.

This provision also appears in the Acts of Alberta, Manitoba, New Brunswick, the Northwest Territories, Nova Scotia, Prince Edward Island and the Yukon. Section 4 of the Quebec *Press Act* is a much briefer provision:

> If the newspaper fully retracts and establishes good faith, in its issue published on the day following the receipt of such notice [as stipulated by section 3] or on the day next after such day, only actual and real damages may be claimed.

Section 8 of the Saskatchewan *Libel and Slander Act* is similar to the uniform provision but refers only to "libel contained in a newspaper" and speaks out of "actual" rather than "special" damages. Section 7 of the British Columbia Act also refers to "actual" damage but stipulates further that the "full and fair retraction" must be "published either in the next regular issue of the newspaper or other periodical publication" or "in any regular issue of it published within three days after the service of the writ." In the case of defamatory broadcasts, the British Columbia provision specifies that the retraction must be published "within a reasonable time and at the latest, three days after service of the writ" and also that "a transcript of the retraction broadcast was delivered or mailed by registered letter addressed to the plaintiff within that period." The equivalent Ontario provision contains similar time periods and also speaks of "actual" rather than "special" damage. But Ontario's section 5(2) does not require that "there was reasonable ground to believe that the publication thereof was for the public benefit." Newfoundland has no similar provision.

It is also a notable feature of all the provincial statutes, except the Newfoundland *Slander Act*, that they deal more strictly with the defaming of a candidate for "public office" than they do with the defaming of other plaintiffs. Section 18(2) of the *Uniform Defamation Act* stipulates that the "special damage" provisions of subsection (1) will not apply "against any candidate for public office" unless the retraction and apology are made editorially in the newspaper in a conspicuous manner" or are "broadcast" at least "five days before the election." The British Columbia Act is a little more onerous. Section 8 demands that a "transcript of the retraction " be "delivered or mailed by registered letter addressed to the candidate." The Saskatchewan *Libel and Slander Act* deals only with newspaper libels in this respect and section 8(2), demands that the retraction must be made editorially and in a conspicuous manner "at least fifteen days before the election."

H. *Notice*

The Uniform Act lays down that notice must be given by the

plaintiff to the defendant as a condition precedent to the bringing of his claim. Section 14 provides:

> (1) No action lies unless the plaintiff, within three months after the publication of the defamatory matter came to his notice or knowledge, has given to the defendant, in the case of a daily newspaper, seven, and in the case of any other newspaper or where the defamatory matter was broadcast, fourteen days' notice in writing of his intention to bring an action, specifying the defamatory matter complained of.
>
> (2) The notice shall be served in the same matter as a statement of claim.

This kind of notice provision really amounts to a limitation period within a limitation period. There are variations in the legislation of the provinces concerning the kind of notice required from a defamed plaintiff. The Acts of Alberta, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, faithfully reproduce the uniform provision. Subtle, though important, differences occur elsewhere.

The law of British Columbia does not require notice and no provision dealing with notice appears in the *Libel and Slander Act* of that province. Newfoundland, also, has no notice provision. The Northwest Territories and the Yukon follow the uniform provision but say that the notice must specify the "language complained of". Section 5(1) of the Ontario *Libel and Slander Act* has variations of time and mode of delivery:

> No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to his knowledge, given to the defendant notice in writing, specifying the matter complained of, which should be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant.

The Saskatchewan provision is different from the other common law provinces in that it avoids creating a limitation period within a limitation period, but it only refers to newspaper libel. Section 15 of the Saskatchewan *Libel and Slander Act* provides:

> No action shall lie for a libel contained in a newspaper unless the plaintiff has given to the defendant, in the case of a daily newspaper, five, and in the case of a weekly newspaper, fourteen, clear days' notice in writing of his attention to bring the action, such notice to distinctly specify the language complained of.

Also, here the degree of specificity is different. A similar kind of notice provision is found in section 3 of the Quebec *Press Act.* In Quebec, the injured party or his attorney must give a notice "of three days, not being holidays, at the office of the newspaper or at the domicile of the

proprietor, so as to allow such newspaper to rectify or retract the article complained of." The Quebec provision gives no guidance as to what will amount to sufficient notice.

I. *Limitation of Actions*

The law of limitations in relation to defamation actions is complex. The uniform provision only refers to "newspaper" and "broadcast" defamation. Section 15 of the *Uniform Defamation Act* provides:

> An action against
> (a) the proprietor or publisher of a newspaper;
> (b) the owner or operator of a broadcasting station; or
> (c) any officer, servant or employee of the newspaper or broadcasting station,
>
> for defamation contained in the newspaper or broadcast from the station shall be commenced within six months after the publication of the defamatory matter came to the notice or knowledge of the person defamed; but an action brought and maintainable for the defamation published within that period may include a claim for any other defamation published against the plaintiff by the defendant in the same newspaper or from the same station within a period of one year before the commencement of the action.

New Brunswick, the Northwest Territories, Nova Scotia, Prince Edward Island and the Yukon follow this provision in their defamation legislation. Section 14 of the Saskatchewan *Libel and Slander Act* is similar but it only applies to a "libel contained in a newspaper" and allows the plaintiff to revive a defamation published in the same newspaper "within a period of two years before the commencement of the action." Section 2 of the Quebec *Press Act* is also confined to newspaper defamation, but it lays down a different kind of limitation rule:

> Every person who deems himself injured by an article published in a newspaper and who wishes to claim damages must institute his action within the three months following the publication of such article, or within three months after his having had knowledge of such publication, provided, in the latter case, that the action be instituted within one year from the publication of the article complained of.

Section 5 of the Newfoundland *Slander Act*, R.S. Nfld. 1970, c. 352 provides that "all actions or suits taken under the provisions of this Act shall be begun within two calendar months next after the speaking of the words, and not afterwards." Because of the narrow scope of the Newfoundland Act, the effect of this provision is extremely limited. In Ontario, section 6 of the *Libel and Slander Act* refers to newspaper

and broadcast libel but the limitation period is "three months after the libel has come to the knowledge of the person defamed."

The Alberta, British Columbia and Manitoba legislation on defamation does not specify a limitation period. This means that in these provinces resort must be had to the several limitation Acts and to the common law for the appropriate rules governing the length of the limitation period, the *terminus a quo* and suspension and extension of time in a defamation action. This will be the case in all provinces when the defamation is not contained in a newspaper or a broadcast. The overall effect is an extremely complex body of law relating to a very basic issue.

J. *Procedure*

The *Uniform Defamation Act* contains several procedural provisions intended to clarify the respective functions of judge and jury in a defamation action and to simplify certain complications which are likely to arise. Section 6 deals with general and special verdicts and with the role of the court in directing the jury. Section 7 deals with the consolidation of actions for the same defamation and section 8 provides for the apportionment of damages and costs in consolidated actions. Section 5 is another clarifying provision which deals with the defendant's payment into court of a sum of money by way of amends.

The importance of these provisions is acknowledged by most of the common law provinces and territories which either reproduce them exactly or have substantially similar sections in their defamation legislation. This is the case in Alberta, British Columbia, Manitoba, New Brunswick, the Northwest Territories, Nova Scotia, Ontario, Prince Edward Island and the Yukon. In Ontario and Saskatchewan such procedural provisions only relate to "libel." The Newfoundland Act does not refer to these matters.

One important procedural matter not found in the *Uniform Defamation Act* concerns "security for costs." Only the British Columbia, Ontario, Quebec and Saskatchewan statutes deal with this issue. Section 13 of the Ontario *Libel and Slander Act* provides:

> (1) In an action for a libel in a newspaper or in a broadcast, the defendant may, at any time after the delivery of the statement of claim or the expiry of the time within which it should have been delivered, apply to the court for security for costs, upon notice and an affidavit by the defendant or his agent showing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in case judgment is given in favour of the defendant, that

the defendant has a good defence on the merits and that the statements complained of were made in good faith, or that the grounds of action are trivial or frivolous, and the court may make an order for the plaintiff to give security for costs, which shall be given in accordance with the practice in cases where a plaintiff resides out of Ontario, and the order is a stay of proceedings until the security is given.

(2) Where the alleged libel involves a criminal charge, the defendant is not entitled to security for costs under this section unless he satisfies the court that the action is trivial or frivolous, or that the circumstances which under section 5 entitle the defendant at the trial to have the damages restricted to actual damages appear to exist, except the circumstances that the matter complained of involves a criminal charge.

Section 19 of the British Columbia *Libel and Slander Act* is briefer than the Ontario provision. It lays down similar conditions for the granting of an order for security, but it does not refer to a "criminal charge." Also, it is only applicable in the case of "an action brought for libel in a public newspaper or periodical publication." Section 12 of the Saskatchewan Act follows the form of Ontario's section 13 with the significant difference that it is only applicable to "an action for libel contained in a newspaper." The Ontario statute is unique in that it has "security for cost" provisions which apply to "an action for slander." Section 20 follows the pattern of the libel section although, of course, there is no exception for a "criminal charge." Section 11 of the Quebec *Press Act* gives the judge a wide discretion to deal with this matter:

> The judge may, during a suit for defamation against a newspaper, order the plaintiff to furnish security for costs, provided that the defendant himself furnishes security to satisfy the judgement. The amount of security in each instance shall be left to the sole discretion of the judge.

K. *Fair Comment*

The constitutional significance of this defence has long been recognized and yet provision was not made for it in the Uniform Act until 1979. Even though fair comment is now mentioned, section 9 is an *ad hoc* provision designed to deal with the unsatisfactory decision of the Supreme Court of Canada in *Cherneskey*. Section 9 is reproduced in a 1980 amendment to the New Brunswick *Defamation Act* with one significant difference. The New Brunswick provision stipulates that the "person expressing the opinion" must be "identified in the publication." Alberta's section 9 is another variant:

(1) If a defendant published an opinion expressed by another person, other than an employee or agent of the defendant, that

is alleged to be defamatory, a defence of fair comment shall not fail by reason only that the defendant did not hold that opinion.

(2) Notwithstanding subsection (1), the defence of fair comment is not available to a defendant if it is proved that he acted maliciously in making the publication.

Ontario's section 25 is different again:

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

The British Columbia, Manitoba, Newfoundland, the Northwest Territories, Prince Edward Island, Saskatchewan and the Yukon Acts have no provisions on fair comment.

The Nova Scotia and Ontario Acts make other reference to fair comment. In fact, they carry almost identical provisions derived from the English *Defamation Act* of 1952. Section 9 of the Nova Scotia *Defamation Act* provides:

> In an action for defamation in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as one proved.

L. *Miscellaneous*

In some provincial statutes notable provisions appear which have no equivalent in the *Uniform Defamation Act*. Several of these idiosyncracies are worth mentioning because of the ways in which they change the character of the law of defamation in the jurisdictions where they appear.

For instance, Manitoba is unique in being the only Canadian province which makes provision for a civil defamation action against persons accused of libelling a race or the adherents to a religious creed. However, section 19(1) only permits a "person belonging to the race, or professing the religious creed" to "sue for an injunction to prevent the continuation and circulation of the libel." The Manitoba Act also contains a definition of "publication" in relation to this limited form of group libel. Section 19(3) provides:

> The word "publication" used in this section means any words legibly marked upon any substance or any object signifying the matter otherwise than by words, exhibited in public or caused to be

> seen or shown or circulated or delivered with a view to its being seen by any person.

Elsewhere in Canada, group libels are governed by common law rules.

The defence of justification receives no mention in the Uniform Act. However, Nova Scotia and Ontario have limited justification provisions taken from the 1952 English Act. Section 8 of the Nova Scotia Act and section 23 of the Ontario Act read:

> In an action for defamation ["libel or slander" in Ontario] containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

The Nova Scotia statute is also somewhat exceptional in its provisions for dealing with the difficult issue of innocent defamation. Section 15 follows the convoluted provisions of the 1952 English Act which made use of the "offer of amends" defence.

The Ontario, Newfoundland and Saskatchewan statutes are exceptional in that they deal with certain forms of slander. Section 25 of the Saskatchewan *Libel and Slander Act* merely enacts the common law rule that the imputation of "unchastity or adultery to a female" is slander which is "actionable per se." Such imputations are the basic concern of Newfoundland's *Slander Act* but, under this statute, there is no necessity for the plaintiff to be female. Section 2 reads:

> Words spoken and published, which impute adultery, unchastity or other like immorality to any person, shall be actionable; and a plaintiff in any action for such words shall be entitled to damages without proof of special damage.

Ontario's section 17 is a similar provision but only covers "slander of women." However, the Ontario Act also deals with slander affecting business and professional reputation, as well as slander of title, slander of goods and "other malicious falsehood."

M. *Conclusions*

Generally speaking, and within certain notable exceptions, Canadian legislation on defamation reveals a pattern founded upon a core of basic concerns. The Newfoundland Act is quite distinct. The Saskatchewan statute is somewhat truncated because it confines itself to newspaper defamation as does the Quebec *Press Act*. On the other hand, the Nova Scotia and Ontario Acts are more comprehensive than the others and contain additional matter derived mainly from English

legislation. The legislation of the remaining provinces and territories displays the general shape and the preoccupations of *The Uniform Defamation Act*. However, subtle, and sometimes blatant, variations create an unsatisfactory complexity.

III. THE NEED FOR A UNIFORM DEFAMATION ACT IN CANADA

The inter-provincial publication of newspapers, books and magazines and the nationwide dissemination of information by the media make it extremely desirable that defamation law should be as uniform as possible throughout Canada. The constituents of a tort which, for the most, is committed through the medium of a common language should not be affected by provincial boundaries which are, in any case, belied by modern, instantaneous communications. Nor are those interests and values which the law of defamation serves and reflects matters of a local nature. They will be even less so in future if, as some suspect, the balance between freedom of speech and protection of reputation becomes more of a constitutional issue than it has formerly been in Canada.

The jurisprudential base for a uniform law of defamation is not wanting. The reports of successive Uniform Law Conferences reveal a general agreement among the provinces that the law of defamation has been, and continues to be, a "story of competing interests." The basic conflict is well understood. Fleming's characterization is typical:

> The law of defamation seeks to protect individual reputation. Its central problem is how to reconcile this purpose with the competing demands of free speech. Both interests are highly valued in our society, the one as perhaps the most dearly prized attribute of civilized man, the other the very foundation of a democratic community. This antithesis is particularly acute when the matter at issue is one of public or general interest.[12]

The pattern of provincial defamation legislation reveals a general consensus on many of the issues which make up this broad conflict. However, in Canada, legislation relating to the law of defamation is not particularly comprehensive and the case law reveals that our courts, using an as yet unrationalized amalgam of common law rules and patchy statutory modifications, do not always find it easy to strike the right balance. There are those who feel that, while the law of defamation in Canada remains a "patchwork of rules", repaired from time to time to meet the exigencies thrown up by a case such as *Cherneskey*, the desired coherence will not be possible.

In the light of the generally recognized need for a uniform law of

defamation, the *Uniform Defamation Act* should be re-examined in order to determine whether it provides an acceptable balance between freedom of speech and protection of reputation, and whether it functions as a persuasive paradigm for those who desire a coherent and uniform defamation law throughout Canada.

The present is a particularly appropriate time to take stock of our law of defamation and to decide whether the existing common law and statutory rules of which it is composed give sufficient protection to the "freedom of expression, including freedom of the press and other media communications" guaranteed by the Charter of Rights and Freedoms. The courts and their observers are as yet uncertain how the "new mandate" created by a constitutionally entrenched Charter will be used against our existing laws. However, experience in the United States should alert us to the possibility that our private law of defamation may now be more susceptible than in the past to attack from a body of superior constitutional rules.

IV. POINTS FOR CONSIDERATION

When the Law Reform Commission of British Columbia published its report last year on *Cable Television and Defamation*, it added a postscript which contained the following words:

> This Report has been deliberately confined to a very narrow aspect of the law of defamation. This does not mean that we regard all other aspects of this body of law as satisfactory. Nothing could be further from the truth. The *Libel and Slander Act* and the body of law to which it relates both call for substantial modification. Our work on this project has heightened our appreciation of the defects and needless complexity that have emerged in the law of defamation.[13]

Having reviewed the *Uniform Defamation Act* and the body of law at which its provisions are aimed, the Saskatchewan Commissioners to the Uniform Law Conference have also reached the conclusion that this area of the law is in need of "substantial modification." However, an exhaustive review of the law of defamation and a complete re-drafting of the *Uniform Defamation Act* to meet present needs have not been possible in the time available since the last Uniform Law Conference. Consequently, this report confines itself to a relatively narrow range of specific proposals for reform but also tries to indicate some of the areas of the law of defamation which might be given priority in future study.

A model defamation statute might be expected to provide the following:

(a) a repository of the basic constituents and perimeters of the

tort to which recourse could be had in all cases. A simple definition would provide the court with a constant point of departure and all desired refinements not obvious in the basic definition would be accounted for;

(b) a range of remedies flexible enough to meet the needs of the more common categories of defamed plaintiff;

(c) a range of defences which would permit a fair balance to be struck between freedom of speech and protection of reputation;

(d) procedures to enable defamation actions to be disposed of with a minimum of expense and delay.

In the following discussion of the *Uniform Defamation Act*, it is assumed that these characteristics are desirable. There is no assumption, of course, that they are easy to attain.

A. *The Meaning of "Defamatory Matter" and the Scope of Defamation*

Section 2 of the Uniform Act provides that an "action lies for defamation" and section 1(b) tells us that "'defamation' means libel or slander." No attempt is made to provide a definition of defamatory matter. No definition occurs in any of the provincial legislation which relates to defamation. The basic constituents and perimeters of the tort remain the preserve of the common law. It is a commonplace that the common law provides no entirely satisfactory definition.[14] Thus there is a risk of disparity of treatment of defamed persons. Several jurists have felt this situation to be insupportable and attempts have been made in a number of common law jurisdictions to provide a more comprehensive codification of the law of defamation including a statutory definition of the tort. Many issues remain contentious.

(a) In the interests of simplicity and uniformity, should there be a statutory definition of defamation on "defamatory matter"?

Experience elsewhere prompts caution in any attempt at a complete statutory definition of defamation. The introduction of a comprehensive code in New South Wales in 1958 is generally regarded as a failure. The 1971 report of the New South Wales Law Reform Commission concluded that the kind of codification attempted by the 1958 Act had resulted in "formidable difficulties."[15] The commission recommended the repeal of the Act and a return to common law principles with any common law inadequacies remedied by statute. The commission favoured this approach because it felt that the variety of circumstances in which defamation could arise was so great that, in any basic definition, the draftsman was bound to overlook possible future cases. It was felt that the risks of inadvertent injustice, inherent

in any codification, were particularly serious in the case of defamation, so that the common law provided the most serviceable base. In the end, the Commission recommended a modification of the common law "in those respects only in which we find the common law itself defective."[16] The report resulted in repeal of the 1958 New South Wales Act and the passage of a new *Defamation Act* in 1974 which, like most defamation legislation, does little more than simplify procedures and enact defences to a defamation action.

In 1977, the New Zealand Committee on Defamation took a similar stand. In its *Recommendations on the Law of Defamation*, the Committee advocated, in particular, that the definition of defamation should remain in the realm of common law.[17]

However, opinion on this issue is not unanimous. In 1975, the Faulk's Committee in england recommended the following definition of civil defamation "in the hope of introducing some measure of simplification":

> Defamation for the purpose of civil proceedings shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally; and "action for defamation" shall be construed accordingly.[18]

In 1976 the Australian Law Reform Committee agreed with the need for a statutory definition and recommended codification of the whole body of defamation law including "the critical definition of defamatory matter." The Law Reform Commission of Western Australia, in its 1979 *Report on Defamation*, was even more emphatic. On the question of whether a statutory definition was desirable, the Commission insisted that there was "little choice in the matter" and expressed approval for the formulation put forward by the Australian Law Reform Commission in 1976: "Defamation" is "published matter concerning a person which tends":

(a) to affect adversely the reputation of that person in the estimation of ordinary persons;
(b) to deter ordinary persons from associating or dealing with that person; or
(c) to injure that person in his occupation, trade, office or financial credit.[19]

The English definition is inadequate. It does little to clear up the uncertainties of the common law or to provide guidance for the layman who must examine his publications for defamatory content. Leaving the courts to apply something as broad as "likely to affect a

person adversely" invites the disparity of approach which a statutory definition should remedy. The courts would, in any case, fall back upon common law decisions for guidance concerning the statutory definition. Thus no advance would be made. The Australian proposal is much more acceptable although it requires further elaboration on the meaning of "person" and "ordinary persons."

Duncan & Neill consider it "doubtful whether a single definition is adequate to cover every kind of case which may be encountered in practice" and submit that "the most satisfactory solution would be to leave it to the judge to select from the existing judicial definitions the form of words which seems most appropriate to the particular case."[20] conceptual difficulties await any attempt to provide a basic statutory definition of "defamatory matter." However, leaving it to the judge "to select from the existing judicial definitions" does not answer the present need for a simple working definition to which all those individuals and organizations for whom the civil law of definition is an everyday consideration can look for guidance. Those who risk having to pay high damages in a strict liability tort action in order to bring information to the public deserve more assistance than the ambiguities of the common law. "Inadvertent injustice" is no less likely under judge-made definitions and the case law suggests that common law flexibility in this area should not be overestimated.

RECOMMENDATIONS

1. The *Uniform Defamation Act* should continue to disregard the common law distinction between libel and slander and to frame its provisions in terms of a tort of "defamation."
2. In the interests of simplicity, uniformity and general guidance, the *Uniform Defamation Act* should contain a definition of "defamatory matter."
3. The following definition should be considered for inclusion within the Uniform Act as best representing the various views on the meaning of "defamatory matter" found in the case law:

   "Defamatory matter" is published matter concerning a person which tends:

   (a) to affect adversely the reputation of that person in the estimation of ordinary persons; or

   (b) to deter ordinary persons from associating or dealing with that person; or

   (c) to injure that person in his occupation, trade, office or financial credit.

(b) Should provision be made in the *Uniform Defamation Act* to deal with the relationship between death and defamation?

Much discussion has taken place of late concerning the relationship between death and the tort of defamation. There are various ways in which the death of a person might become an issue in a defamation action. It might be that the offending matter has been published against someone who is already dead. Or it might be that someone is defamed while he is alive but dies before he obtains a remedy. On the other hand, it may be the defamer who dies before judgment is entered against him.

In common law Canada it is generally assumed that a dead person cannot be defamed. However, the conclusions of the English Faulk's Committee concerning this issue have engendered debate in common law jurisdictions all over the world. The Faulk's Committee felt that a claim in relation to a deceased person should be "sustainable for a declaration that the statement was false, and an injunction to prevent repetition within five years from the death in question, and costs."[21] The Committee felt that such a claim should be open to "surviving spouses and descendants and ascendants in any degree of the deceased, and brothers and sisters and their descendants in any degree of the deceased."[22] However, the Committee was adamant that the proposed new cause of action should not "carry any right to damages."

The Faulk's Committee and those who would like to see the introduction of such a claim into the law of defamation are motivated by a natural repulsion for those who seek to undermine the reputation of the dead. In England, prior to the report of the Faulk's Committee, a climate of national distaste had developed concerning a series of plays which were thought to bring into disrepute deceased national heroes. In particular, several lawyers had written articles condemning the well known Hochhuth play *Soldiers* and suggesting that a deficient common law of defamation should be modified to deal with such situations. The basic reasoning behind the Faulk's Committee proposals was that defamatory publications against dead men "constitute a highly objectionable method of profiteering."[23] However, this reasoning does not adequately answer the arguments contained in the earlier English *Porter Committee Report* of 1948. The Porter Committee had submitted that actions to vindicate the reputations of dead persons should not be allowed because of the highly personal nature of a defamation claim and because the public interest demands that such an inhibition should not be placed upon the writing of history. These considerations lie behind the recommendations of a minority of the Faulk's Committee

who were opposed to the introduction of the new claim into the law of defamation:

> [W]e believe that it is an essential element in a free society that the behaviour of public persons, alive or dead, should be open to scrutiny, and that, accordingly, a defamation action would be *impracticable* unless the allegedly defamed person is alive and prepared to go into the witness box. The presumption in law of the falsity of a defamatory statement, which places on the defendant the burden of proving the truth, gives the plaintiff in defamation an advantage without parallel in any other type of civil action.[24]

In relation to the family of the deceased, the minority argued that "public men and women excite hostility as well as admiration, and after their death their detractors and enemies may make false allegations" but that this "is a part of the price of fame, and their surviving family should, we believe, be prepared to take the rough with the smooth."

As pointed out recently by C.R. Symons in *U.W.O.L. Rev.*, the position of the minority of the Faulk's Committee gains strong support from the law of the United States:

> The fact that in such circumstances a plaintiff is unable to meet the fundamental requirement that he should show that the defamatory statements were made "of and concerning him" has proved to be one of the major obstacles to the establishment of an extension in tort for the protection of the reputation of the dead in the U.S.A. There, it has been affirmatively stated that "[t]heoretically, at least, no man's success can be aided . . . by the character of his relative." This *post mortem* difficulty concerning defamation of the dead leads to other practical reasons which, cumulatively at any rate, support the common law rule as it stands. For example, what measure of damages should apply to the relatives of what is, in effect, moral injury only; what degree of consaguinity or other relationship with the deceased should be required for an action; the impossibility of cross-examining the deceased to assist in establishing a defence; and, most particularly, the difficulty of proving truth in such circumstances.[25]

It might be argued that most of these suggested difficulties are a product of inappropriate remedies and that they are removed if damages are eliminated from such a claim, leaving only declaration and injunction. This was the view of the majority of the Faulk's Committee. However, it has even been suggested that damages are not necessarily inappropriate. In 1979 the Law Reform Commission of Western Australia recommended that a "deceased person's family or personal representative should have a right of action for a specified period after death in respect of defamation of the deceased." To meet

the objection that the writing of history should not be stultified by the law of defamation, the Commission suggested a five-year time period on any such action. When it came to appropriate remedies, the Commission thought that "correction and injunction" were the most suitable but that damages should be permitted in some cases. The personal representative should be allowed to show that defamatory matter had been published within the five-year period "by a person who knew that the matter was false" and, if actual loss had occurred to the estate, "such loss should be recoverable as damages":

> [A] person's character can survive his death. Preservation of this character might be important, for example, to keep up a family business for a short time following death until it was established. There could be circumstances where loss to an estate could arise as a direct result of an untrue attack on the deceased's character. The wrong may be greater by reason of the fact that the publisher chose to wait until the subject's death before going to print.[26]

While there is general agreement that in common law in Canada it is legally impossible to libel the dead, there does seem to be some doubt concerning the position in Quebec. Kesterton states categorically that the common law principle "also applies under Quebec civil law."[27] Professor Symmons, however, has recently unearthed the Quebec case of *Chinquy* v. *Begin* (1912), 7 D.L.R. 65 (Sup. Ct.), in which Greenshields, J. summed up Quebec law as follows:

> [T]hat the law of this province gives to the living descendants a right of action in damages for *defamatory libel, without justification*, on the memory of a dead ascendant, there can be no doubt. To make my statement, entirely in accord with the law and jurisprudence of this province, and entirely in accord with the law and jurisprudence of France, well established and unvaried, I should only add, that words spoken, in the case of slander, or written and published, in the case of libel, calculated, by reference to the dead, to injure, defame, humiliate and damage the living descendant, such living descendant, suing alone, is given relief.[28]

However, this judgment seems ambiguous. It begins by making the attack upon "the memory of the deceased" the basis for the descendant's action, but qualifies this by suggesting that the "reference to the dead" should be calculated to damage the living descendant before relief can be given. And, as Professor Symmons points out, the facts of the case reveal a strong inferential defamatory imputation on the living plaintiff daughter. If this inferential imputation is the basis of the decision, then no conflict exists between Quebec law and the position in the common law provinces. Whatever the position in Quebec, there seems little doubt that to allow a right of action to the relatives of a defamed

deceased would be to create "an unchartered sea of complications" into an area of the law "that is greatly in need of simplification."[29]

Debate has also waged as to whether the general rule that a defamation action dies with the plaintiff should be changed.[30] Apologists for the rule argue that the law of defamation protects an individual's reputation; the action is purely personal and should not be maintained by his estate. Also, without the actual presence of the plaintiff at the trial, it will be difficult to do justice between the parties. Perhaps a more convincing argument is that the plaintiff's death complicates the issue of damages.

Those who would like to see the law on this issue changed argue that it seems illogical to deprive the plaintiff's estate of the fruits of a defamation action when it would be quite possible for the personal representatives to initiate or continue the claim.[31]

The doctrine of *actio personalis moritur cum persona* has also been used to justify the basic rule that the plaintiff should not be able to recover damages against the estate of a solvent defamer who dies before judgment.[32] It has also been pointed out that to permit the plaintiff to proceed in this situation would cause great difficulties in the trial of some kinds of defamation action, particularly where malice becomes an issue. However, the majority of the Faulk's Committee found this objection insupportable:

> [I]n many cases there will be no issue of malice and . . . when the issue of malice does arise, it will arise either because the occasion is privileged or because the defence is that the words published were fair comment on a matter of public interest. In most cases it should not be difficult without the defamer's evidence to prove that the words were published on a privileged occasion or were *prima facie* fair comment on a matter of public interest. In any event such proof does not depend upon the defamer's attitude of mind. Where the occasion is shown to be privileged or the *prima facie* defence of fair comment is established the onus will be upon the plaintiff to prove malice on the part of the dead man, not the defamer's personal representatives to disprove it.[33]

All but two of the Committee recommended that actions arising out of defamation should survive against the estate of a deceased person.

When the Law Reform Commission of Western Australia considered these matters in 1979, it pointed out that "all recent reports on the subject of defamation law reform agree that an exemption for defamation actions from the survivorship rule is undesirable." However, the Commission also acknowledged that there were "significant differences in the detailed reform proposals" which were contained in

those reports.[34] In the end the Commission recommended that a "defamation action should survive in favour of the representative of a deceased plaintiff" but that "damages recoverable should be limited to pecuniary loss, including injury and financial loss accruing to the estate of the deceased."[35]

In the case of the deceased defamer, the Commission felt that it was "unsatisfactory" that a defamation action should die with the defendant and recommended that "defamation actions should survive against the estate of a deceased defendant.[36] The English legislation of 1934 which, generally speaking, abolished the doctrine of *actio personalis moritur cum persona* made an exception in the case of libel and slander. However, as the Faulk's Committee pointed out, the exception seems to have been based upon grounds of expediency rather than logic.[37] It would seem strange if Canadian law declined to reconsider the validity of a legal distinction between defamation and other torts that has now become discredited in its country of origin.

RECOMMENDATIONS

1. Provisions should be included in the *Uniform Defamation Act* which rationalizes the law pertaining to the relationship between the tort of defamation and either the death of the plaintiff or the death of the defendant.
2. Such provisions should be drafted in accordance with the following principles:
   (a) no right of action should be afforded to the relatives of a dead person who is defamed;
   (b) the doctrine of "*actio personalis moritur cum persona*" should not apply to actions in defamation;
   (c) where a person defamed has started an action but has died at any time prior to judgment, his personal representative should be entitled to continue the action for either general or special damages;
   (d) where the person defamed has died before starting an action, his personal representatives should be entitled to bring an action but only to the extent of claiming an injunction or for actual pecuniary damage suffered by the deceased or his estate as a result of the defamation;
   (e) causes of action arising out of defamation should survive against the estate of a deceased person.

(c) Should provision be made in the *Uniform Defamation Act* to restrict the right of an artificial legal person to sue in defamation?

Since the English case of *Bognor Regis U.D.C.* v. *Campion,* [1972]2 W.L.R. 982 in which a municipal corporation successfully sued an

individual for defamation, considerable discussion has taken place over the scope which ought to be given to an artificial legal person, or even an unincorporated association, when it seeks to vindicate its reputation in a tort claim. Williams concludes that the position in Canada is that "any legally recognized entity may maintain an action for defamation if that has affected its reputation in a material respect and that diminution of reputation has impaired its ability to carry out its aims and purposes."[38] It is assumed that an artificial legal person is no different from a natural person when it comes to considering the effects of a defamatory statement, although, of course, the statement must undermine the particular kind of reputation which the entity enjoys. However, several jurists have argued that the situation calls for different treatment and that special considerations should apply when the court is not dealing with a natural person.

First of all, it has been pointed out that the law of defamation compensates the natural plaintiff for injury to feelings, embarrassment and injury to his social relationships with other natural persons. The artificial legal person does not suffer in this way so that such considerations must not obtrude in a defamation claim made by, for instance, a corporate body or a trade union, In the case of trading corporation, it has been suggested that it should be required to allege and prove special damage, in the sense of actual identifiable financial loss, as a condition of its right action. The Faulk's Committee thought that a little more latitude than this should be allowed to a trading corporation and that it should have to establish either special damage or "that the defamation was likely to cause it financial damage."[39] The Committee also felt that "actions in defamation by non-trading corporations (including government bodies and local authorities) and trade unions should be subject to similar limitations."[40]

In the case of government authorities, some lawyers have argued that such authorities should be denied the right to bring any kind of defamation action and that it should be left to individual members to vindicate their own reputations. The case has been strongly made by Toni Weir:

> Nor need governments have all the rights of individuals; there are two reasons for this: the first is that governments are not individuals and the second is that there are some things they, as governments, should have to put up with. One of the things a government should have to put up with is criticism. The only criticism which government may properly repress is criticism which is harmful to the state or public order, and the only proper method for such repression is the criminal law. The exclusive use of

> the criminal law in such cases is safer for the citizen and the citizenry because its use attracts attention by showing that the relations of state and citizen are in issue, and its processes contain, for that very reason, many safeguards not found in private law.[41]

Weir's arguments have been taken up forcefully in Canada by John McLaren who, in discussing the British Columbia Supreme Court decision of *Prince George* v. *British Columbia Television System Ltd.* [1978] 85 D.L.R. (3d) 755, has warned that the "blithe acceptance of the right of municipal corporation to sue in defamation without an examination of the policy factors which initiate against it can only result in an unfortunate confining of the right of speech."[42]

The range of entities with special kinds of reputation is considerable. Not only are there trading and non-trading corporations and companies, but partnerships, trade unions, professional associations and even unincorporated associations. Any examination of the factors which ought to govern the law of defamation in relation to each entity would require considerable time, and there is a danger of complicating an already difficult area of the law. Duncan & Neill object to the Faulk's Committee proposals concerning "trading corporations" on the grounds that they would "introduce a further complication into the law."[43] They also disapprove of the Committee's proposals in relation to "non-trading corporations and organs of central or local government" because a change in the law would cause complications in actions which "are likely to be rare."[44]

The Saskatchewan Commissioners feel that more detailed study of this issue is required before specific recommendations can be made and seek the opinion of the Conference on the form which such study ought to take.

RECOMMENDATIONS

1. Further research should be undertaken to determine whether the *Uniform Defamation Act* should make special provision to restrict the rights of non-natural persons and bodies to sue in defamation.
2. Answers should be sought, in particular, to the following questions:
   (a) Should a trading body be required to establish actual pecuniary loss resulting from the defamation as a condition to a right of action?
   (b) Should a non-trading body, and in particular an organ of government, be prohibited from bringing a defamation claim other than through its officers and members seeking to vindicate their individual reputations?

(d) Should provision be made in the *Uniform Defamation Act* to permit some measure of relief to defamed "groups?"

The controversy over "group defamation" has been going on now for a considerable period of time and an extensive literature exists on the subject.[45] The common law has always steadfastly resisted the imposition of civil sanctions when groups of persons, rather than individual members of such groups, are vilified. However, this position has been modified by statute in several jurisdictions. In common law in Canada the Manitoba *Defamation Act* is unique in permitting an action for an injunction to a person belonging to a race or religious creed to restrain or prevent the circulation of the publication of a libel against the race or creed. This is, however, an extremely limited concession and, besides requiring that the libel must be "likely to expose persons belonging to the race, or professing the religious creed, to hatred, contempt or ridicule," section 19(1) also requires the libel to have a tendency "to raise disorder or unrest among the people." Thus, this provision functions more as an adjunct to the provisions of the Criminal Code intended to penalize "hate propaganda" than as an authentic civil action. However, some jurists have argued that the civil law of defamation should be extended to permit more scope for group actions. A minority of the Australian Law Reform Commission, in a 1977 discussion paper—*Defamation—Options for Reform*—argued strongly that a defamatory slur on a group of persons should be actionable by a member of the group and that the remedies should be correction, declaration of falsity and injunction.[46]

However, the weight or argument is against allowing any such extension. Considerable theoretical difficulties and practical obstacles stand in the way. How could "group" and "group membership" be adequately defined? What real protection can any civil remedy afford to a vilified group? The consensus of opinion is that attacks upon groups should remain in the domain of the criminal law. Sections 281.1 and 281.2 of the *Criminal Code* which deal with "hate propaganda" are aimed at publications which are "likely to lead to a breach of the peace" rather than at protecting loss of reputation which is the true function of the civil law of defamation.[47] In any case, any noteworthy attack upon a group is likely to be given exposure in the media where the group's reply will also be represented. A civil defamation claim would only inflame problems which are better resolved through public discussion and conciliation.

RECOMMENDATION

1. The scope of defamation should not be extended to include defamation of a group and the common law requirement that

the plaintiff must show publication "of and concerning him" should be preserved as a necessary constituent of the tort.

B. The Range of Remedies

> The preoccupation of our law of defamation with damages has been a crippling experience over the centuries. The damages remedy is not only singularly inept for dealing with, but actually exacerbates the tension between protection of reputation and freedom of expression, both equally important values in a civilized and democratic community.[48]

Professor Fleming's words form part of a growing body of criticism which sees one of the major faults of our law of defamation as being its failure to provide an appropriate system of remedies. In a 1978 article in U.B.C.L. Rev., Professor Fleming outlined some of the reasons why damages are not an adequate remedy:

(1) a defamed plaintiff requires vindication in order to restore his damaged reputation. A settlement or even a court award of damages is not the most appropriate way of achieving this end because the repudiation of the defamation is not attended by much publicity and can occur a long time after the publication has spread its poison;

(2) because damages is all that the law makes available to the plaintiff, whether he wants it or not, honourable men will demand large sums unless they wish to be taken as admitting that their reputations are not worth more. This has produced an inflationary effect in which damage awards for defamation often exceed awards in serious personal injury claims;

(3) the use of the jury leads to erratic awards of damages and, in times of acute social stress, juries are likely to use damage awards to wreak vengeance on political enemies;

(4) the preoccupation with damages has meant the extension of privilege to provide immunities, thus depriving the plaintiff of any right of vindication. Privilege is meant to preserve the free flow of information but where it applies there is no means of correcting falsehoods;

(5) a counteracting effect has also occurred in that, because falsehoods cannot be corrected if privilege applies, the law has been reluctant to extend the immunities created by privilege. This has led to a strictness in defamation law which is incompatible with the free flow of information on matters of public concern in a modern democratic society.

Fleming's conclusion is that the "traditional deadlock . . . between the individual's interest in his reputation and the general concern in the free flow of accurate information" is "largely a product of the damages remedy for injury to reputation." This is because its "all-or-nothing aspect necessarily entails subordinating completely the one interest to the other, to the ultimate detriment of both . . ."[49]

Declarations and injunctions are also used in defamation actions, though they are much less frequent than a damages award. Critics of the system usually suggest that our law of defamation would be significantly improved if, in addition to present remedies, our courts could make more use of apologies, retractions and even the *droit de reponse* familiar in civil law system. The Saskatchewan Commissioners find Professor Fleming's criticism of defamation remedies extremely persuasive. They also note that for a number of years now the American Law Institute has been urging courts and legislatures to develop new remedies to enable the plaintiff to better vindicate his good name and to aid in restoring his reputation. The Institute suggests that much greater use could be made of declaratory relief, limited injunctive relief, self-help and "further reform."[50] However, to change the range of remedies available in defamation actions would have a profound effect upon the rules of substantive law at present applicable. Consequently, any search for more appropriate remedies would be a considerable undertaking. The present report merely makes one or two modest suggestions concerning the direction that reform might take.

(a) What use is made of apology and retraction under our present law?

The *Uniform Defamation Act* contains several provisions, widely reproduced in provincial legislation, which refer to apology and retraction. Section 4 permits the defendant in a defamation action to introduce evidence in mitigation of damages that he made or offered "a written or printed apology to the plaintiff" either "before the commencement of the action" or "as soon afterwards as he had an opportunity." Section 17, which is confined to newspaper or broadcast defamation, also permits the defendant to introduce evidence in mitigation of damages that in the case of a newspaper he published "a retraction and a fair and full apology for the defamation" before the commencement of the action "or at the earliest opportunity afterwards" and, in the case of a broadcast, that a retraction and apology were broadcast "from the broadcasting station from which the alleged defamatory matter was broadcast, on at least two occasions on different days." In addition, the broadcast retraction and apology must be made "at the same time of day as the alleged defamatory matter was broadcast or as near as possible to that time." In the case of both newspapers and broadcasts, the retraction and apology will be of no avail unless the original defamatory matter "was inserted in the newspaper or was broadcast without actual malice and without gross negligence." Retraction and apology are also significant under section 18 which confines the plaintiff to recovery for "special damage" if certain conditions are satisfied.

Under our present law apology and retraction are not remedies and the retraction provisions apply only to newspapers and broadcasts. They are, in effect, extremely limited and circumscribed defences.

(b) Could more use be made of apology and retraction?

A form of retraction was used in the English Statute of 1952 to deal with innocent publications as defined by section 4 of that Act. Section 4 allowed certain defendants to avoid liability to pay damages if they were willing to make an "offer of amends" and publish a reasonable correction and apology and to pay the plaintiff's costs and expenses reasonably incurred as a consequence of the publication in question. However, under section 4, words were only published innocently if the "publisher did not intend to publish them of and concerning" the plaintiff and "did not know of circumstances by virtue of which they might be understood to refer to him," or, if the words "were not defamatory on the face of them," that, "the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that person." In either case the publisher had to show that he had "exercised all reasonable care" in relation to the publication.

These cumbersome provisions received recognition in Canada when they were reproduced as section 15 of the Nova Scotia *Defamation Act.* They were criticized by the Faulk's Committee as involving "too much expensive rigmarole" and as being "laborious, time-consuming and expensive."[51] The Committee recommended rectification of the defects "without impairing the overall intentions" of the provisions. The significant factor concerning the Nova Scotia "offer of amends" provisions, and the new English legislation which has replaced section 4 of the 1952 *Act*, is that the plaintiff does not have to accept the defendant's overtures. However, if he does not and brings a defamation action, the innocent defamer will be permitted to prove the offer as a defence to the action and, under the new English provisions, the court has power to order the plaintiff to give security for costs if his complaint "is not of an insubstantial nature."

Some jurists feel that such legislation does not go far enough. In a 1977 discussion paper, the Australian Law Reform Commission strongly favoured compulsory retraction as a complete substitute for damages in the case of group defamations and defamation of dead persons. In the case of defamatory statements which the defendant reasonably believed were true, the Commission recommended that a "correction order" be used as a substitute for general damages, leaving the plaintiff to claim special damages if he wished. The Commission also went on to recommend that a "correction order" should be awarded "in addition

to" general damages in certain situations, namely, where a defamatory statement was not reasonably believed to be true and for statements which did not attract qualified privilege because of malice.[52]

The effectiveness and the principle limitations of retraction as a remedy have been considered at some length by Professor Fleming:

> Its undoubted advantage to the plaintiff consists in the greater persuasive effect of having his reputation vindicated out of the defendant's mouth.... But against this must be set certain inherent limitations. First, retraction (especially compulsory retraction) is not really appropriate for expressions of opinion if we believe that there is no objective standard for determining the validity of opinions and that the public interest is better served by continuing debate through rebuttal rather than by compulsorily bringing it to an end. Moreover, it may also be felt invidious to be forced to recant opinions still honestly held compared with having to correct allegations of fact proven to be false. . . .
>
> The second limitation is that retraction can really be countenanced only with respect to statements of fact which have been shown to be false. This invites litigation; moreover, it is largely ineffective unless the defendant is faced with the alternative of having to pay damages in case he loses his plea of justification, since otherwise he would have little incentive to recant prior to a long-delayed judicial determination of truth. Hence the standard retraction statute which relieves the defendant of liability if he has made a suitable and prompt correction. In other words, retraction cannot very well stand on its own feet . . . and needs the crutch of a continuing threat of damages to be effective.[53]

It was with difficulties such as these in mind that the Western Australia Law Reform Commission, in its 1979 report, made its recommendations concerning retraction. The Commission felt that it was obvious that "damages cannot be replaced as a remedy in defamation actions" but was troubled by the fact that "in many cases such an award operates as a windfall and has its limitations as an effective remedy." The Commission concluded that "a correction order, as a supplementary remedy . . . could more effectively reduce the damaging impact of a defamatory publication."[54]

The Commission then went on to consider whether compliance with a correction order should be voluntary or compulsory. In most cases there would be no problem because the unsuccessful defendant would willingly comply "in order to reduce the amount of damages which might otherwise be awarded against him." However, there might be cases where the defendant would wish to insist on the truth of his statement notwithstanding a court finding to the contrary. Compulsion here would prevent the defendant from making his stand and

accepting the consequences. However, such a difficulty might be overcome if the court was given a discretion to award the appropriate remedy in each case. A correction order should not be granted in every case where the plaintiff succeeds. But, "if the plaintiff seeks retraction and the court considers this the appropriate remedy then "compliance by the defendant should be compulsory." But, in cases of doubt" the court might not grant it, or, in the case of a newspaper report, "a court might consider it to be more appropriate to order the defendant to publish a fair and accurate report of the result of the defamation action instead."[55]

The whole purpose of the retraction remedy is to ensure the "speedy correction of matter which is incorrect and defamatory." So, not to make a correction order compulsory would be to permit the defendant "through payment of damages, a licence to destroy another person's reputation":

> Publication of the findings of a court is desirable and . . . this would satisfy most people as to the truth. In cases where doubt exists about the effectiveness of a correction because of the defendant's attitude, damages would be assessed taking this into account. . . . [A] court should have power not only to give directions as to the content of a correction but also as to its publication.[56]

Retraction provisions are reasonable, well-intentioned devices designed to encourage the correction of wrongs done to the plaintiff's good name. However, they tend to be problematic because they place publishers in unrealistic position. This is why the use of retraction in Canada, Britain and the United States remains somewhat limited. The elevation of retraction to a full-blown remedy would involve serious practical difficulties. However, the Quebec *Press Act* makes use of retraction by combining it with a right of reply. Section 8 provides:

> Whenever the party who deems himself injured has both obtained a retraction and exercised the right to reply, no prosecution may issue if the newspaper publishes such retraction and reply without further comment.

The one area of defamation law where retraction seems feasible is the case of the innocent defamer who publishes in good faith. Here a retraction is easily secured and the plaintiff's reputation is usually adequately vindicated without allowing him the windfall of general damages. Special damages are difficult to prove and this provides the innocent defendant with some measure of protection. Also, where circumstances permit, there can be no harm in giving a court power to order the publication of a retraction instead of, or in addition to, general damages.

RECOMMENDATIONS

1. Consideration should be given to making more use of retraction in the *Uniform Defamation Act* along the following lines:
   (1) the innocent defamer who publishes in good faith should be permitted to offer reasonable retraction as a complete defence to a claim for general damages, leaving the plaintiff to prove special damage if he insists on compensation;
   (2) the court should have the power to order retraction instead of, or in addition to, general damages in appropriate cases.

(c) Is a right of reply desirable and/or feasible?

The right of reply is a firmly established remedy in Continental law and, over the years, has been advocated by a number of common law jurists as the only real solution to the deadlock between freedom of speech and protection of reputation.[57] In an extreme form the right of reply would mean creating a statutory right of access to the media so that the defamed person could bring his case to the notice of those who are likely to have read, heard or seen the offending material. This might give rise to constitutional problems as it did when, in the United States, several states adopted reply statutes.[58] A statutory right or reply might be regarded as an unconstitutional interference with editorial autonomy and with freedom of the press and other communication media. On the other hand, the time may now have come when we must recognize the right of reply as the inevitable corollary to the freedom of expression guaranteed to the media in the Charter of Rights and Freedoms. As long ago as 1948, article 4 of the Draft Convention on Freedom of Information passed at the United Nations Conference in Geneva provided that the "Contracting States recognize that the right of reply is a corollary of freedom of information."

As Professor Fleming has pointed out, the way in which the United States Supreme Court tested the right of reply for constitutional conformity "precluded any consideration of the merits of that remedy compared with damages and other alternatives." There was no opportunity for "the striking of any balance between its advantages and disadvantages independently of the constitutional problem."[59] With this in mind, the champions of the right of reply have stressed its superiority as a remedy for defamation over a monetary award as a means of vindication. They have also emphasized the use that could be made of it to resolve the seemingly intractable problems of privilege. Professor Fleming, in particular, approves of the remedy because it could be used to remove the "administrative burden of litigating truth" and is, therefore, "peculiarly apt to rebut offensive statements of *opinion*, which by their very nature are really unamenable to a judicial determination of validity."[60]

The right of reply has been said to be an appropriate remedy for several situations:

(1) to assist those plaintiffs who are now barred from all relief under the defence of fair comment. The remedy could be given *in lieu* of damages to honest comment on matters of public interest;
(2) it could be used in the case of honest defamatory statements of fact regardless of the truth of the statement;
(3) it could be used in privileged situations where, under present law, the plaintiff has no means of vindication.

To permit its use in such situations would resolve the dilemma which the courts are constantly forced to face when they only have damages at their disposal. It would allow the "public rather than the court to be the final arbiter of the controversy."[61]

The Faulk's Committee firmly resisted the arguments in favour of the right of reply finding "objectionable a principle which entitles a person, who may be without merits, to compel a newspaper to publish a statement extolling his non-existent virtue."[62] However, the Faulk's committee report does not touch upon the inadequacies of damages as a remedy and does not answer the many criticisms that have been made of the excessive use of monetary relief in defamation law. Indeed the report seems to assume that the reason why some legal systems have developed the right of reply is because they do not enjoy the advantages of the damages remedy:

> This [the right of reply] may be a valuable remedy in countries where the law of defamation as a civil wrong has not developed in the same way as in this country and substantial sums by way of damages for defamation are rare. In such circumstances, a quick, certain and well-published counter-statement by way of explanation or contradiction in respect of a defamation appearing in a newspaper or a periodical is or may be essential.[63]

Other reform commissions have felt that the remedy can play a useful role in a common law system. The Law Reform Commission of Australia, for instance, in a 1977 discussion paper, favoured the right of reply remedy in two situations:

(1) it should be available in the case of all fair reports of a statement made by another named person and published for the information of the public or the advancement of education;
(2) it should be substituted for general damages for loss of reputation where the defendant, on reasonable grounds and after making all inquiries reasonably open to him in the circumstances, in fact believed the truth of all statements of fact contained in, or assumed by, the matter published.[64]

Nor is a right of reply unknown to Canadian law. Section 7 of the Quebec *Press Act* provides that, in the case of every person who deems himself injured by an article published in a newspaper:

> The newspaper shall also publish at its expense any reply which the party who deems himself injured may communicate to it, provided that same be *ad rem*, be not unreasonably long and be couched in fitting terms.

RECOMMENDATIONS:

1. Further research should be undertaken to explore the use which could be made of the right of reply in defamation actions. Such research should determine whether provision should be made in the *Uniform Defamation Act* permitting a right of reply in appropriate circumstances.
2. The following circumstances should be considered:
   (a) Should a right of reply be available *in lieu* of or in addition to general damages for lost reputation where the defendant, on reasonable grounds, believed the truth of all statements of fact contained in the offending publication?
   (b) Should the court be given the power to grant, if circumstances permit, an order permitting reply where the plaintiff is barred from all vindication because of the defence of fair comment?
   (c) Should the court be given the power to grant, if circumstances permit, an order permitting reply where the plaintiff is barred from all vindication because of the defence of privilege?
   (d) Should the reasonable offer of an opportunity to reply be available as a defence in those situations where, at present, the law confines the plaintiff to special damages if the defendant can show retraction and apology?

C. *Defences*

The provisions of the *Uniform Defamation Act* are concerned mainly with procedure and defences, although the defence sections are limited in scope in that, for the most, they only create special statutory defences applicable to newspapers and broadcasts. As was pointed out above, the way that defences have developed in the law of defamation has a great deal to do with the remedies that have been available to the courts. In fact, a general discussion of defences to defamation should not be conducted in isolation from defamation remedies. However, this paper confines itself to a discussion of the

several statutory defences found in our defamation legislation and assumes that the present regime of remedies will remain unchanged.

It is through the utilization of defences rather than remedies that our law of defamation seeks to preserve a precarious balance between freedom of information and protection of reputation. Hence it is in this area that the debate concerning the constitutional significance of the rules of defamation law is mainly grounded. There is a constant need to scrutinize the scope of defamation defences to determine whether an acceptable balance exists.

(a) Should the statutory defences contained in the *Uniform Defamation Act* be more widely available?

The important statutory defences found in sections 10, 11 and 18 of the *Uniform Defamation Act* and the notice and limitation protection afforded by sections 14 and 15 are confined to newspapers and broadcasts. Hence the definitions of "newspaper" and "broadcasting" contained in section 1 of the Act are all-important. All of the provinces except Saskatchewan, Quebec and Newfoundland deal with broadcasting in their defamation legislation. However, as long ago as 1970, Patricia Johns et al., in an article in *Canadian Communications Law Review*, pointed out that the definition of "broadcasting" contained in the Uniform Act, and in the provincial statutes which follow it, is somewhat dated and inadequate:

> Assuming that the goal of affording access to community groups is a worthwhile one, it has nevertheless become increasingly apparent that the statutory protection for cable television operators in Canada is seriously deficient. Although radio and television stations are given substantial protection from defamation actions by virtue of the provincial libel and slander acts, it happens to be a little-known fact that cable-casting is not included within the ambit of these defences. Instead, cable television operators are forced to rely on the defences provided by common law, which are considerably more onerous.[65]

It is generally assumed that the uniform definition of broadcasting, which refers to the "dissemination of any radioelectric communication," only covers communications which are sent through the air. This means that communication by way of coaxial cable is not included.

Several provinces have already reacted to this issue. In 1980 the Ontario *Libel and Slander Act* was amended in order to assimilate the position of cable television to that of conventional broadcasts for the purpose of defamation law. Section 1(a) of the Ontario Act now provides:

"broadcasting" means the dissemination of writing, signs, signals,

pictures and sounds of all kinds, intended to be received by the public either directly or through the medium of relay stations, by means of,

(i) any form of wireless radioelectric communication utilizing Hertzian waves, including radiotelegraph and radiotelephone, or

(ii) cables, wires, fibre-optic linkages or laser beams,

and "broadcast" has a corresponding meaning.

The matter was also taken up by the British Columbia Law Reform Commission which reported in March 1981 and which concluded that there was "no justification in logic or policy in placing cable television in any different legal position, for the purposes of the law of defamation, from that of conventional broadcasters."[66]

The British Columbia Commission considered two possible ways of amending the provincial *Libel and Slander Act* to accommodate coaxial cable within the definition of "broadcasting":

> The first is to follow the example of Ontario and widen the existing definition to encompass dissemination by means of "cables, wires, fibre-optic linkages or laser beams." An alternative technique is to expand the definition with reference to federal licencing.[67]

The Commission objected to the Ontario definition on the grounds that it was "both too wide and too narrow at the same time":

> It is too narrow in the sense that it specifies only certain types of artificial guidance technology. New technologies may emerge in the future that may be suitable to carry the kinds of information now disseminated by cable but which fall outside the Ontario difinition.
>
> It is too wide in that it may presently encompass kinds of communications facilities not presently thought of as serving a "broadcasting" function. For example, the Ontario definition of "broadcasting" potentially extends to information disseminated by telephone through a dial-a-message type of communications device.[68]

In the end, the Commission recommended the following definition:

> "broadcasting" means the dissemination of writing, signs, signals, pictures, sounds or intelligence of any nature intended for direct reception by, or which is available on subscription to, the general public
>
> (i) by means of a device using Hertzian waves of frequencies lower than 3,000 G.H.Z. propogated in space without artificial guide.
>
> (ii) through a community antenna television system operated by a person licensed under the *Broadcasting Act* (Can.) to carry on a broadcasting receiving undertaking, or

(iii) by means of an amplifier or loudspeaker of a tape recording or other recording

and "broadcast" has a corresponding meaning.[69]

While they do not receive statutory protection cablecasters remain under a substantial burden and are undeservedly exposed to serious financial risk. Quite apart from the merits of their case, there is no disputing the argument that neither "logic or policy" justify a distinction between cable television and conventional broadcasting as far as the law of defamation is concerned. The only contentious issue here is the framing of an appropriate definition of "broadcasting" that will include coaxial cable and, perhaps, accommodate future technologies.

RECOMMENDATIONS

1. The definition of "broadcasting" contained in the *Uniform Defamation Act* should be amended to ensure that cablecasters can take advantage of the defences contained in the Act.
2. The present definition of "broadcasting" contained in the *Uniform Defamation Act* should be replaced by the following:

"broadcasting" means the dissemination of writing, signs, signals, pictures, sounds and intelligence of all kinds, intended to be received by the public either directly or through the medium of relay stations,

(i) by means of any device which utilizes Hertzian waves propogated in space; or

(ii) by means of cables, wires, fibre-optic linkages or laser beams; or

(iii) through a community antenna television system operated by a person licensed under the *Broadcasting Act* (Can.) to carry on a broadcasting receiving undertaking; or

(iv) by means of an amplifier or loudspeaker of a tape recording or other recording

and "broadcast" has a corresponding meaning.

(a) Should the *Uniform Defamation Act* deal more comprehensively with fair comment?

Section 9 of the Uniform Act is a narrow provision. Although, in its terms, it is not expressly confined to newspapers and broadcasts, it represents a response to the facts of a particular case in which the law of fair comment in Canada, as interpreted by the majority of the

Supreme Court, was shown to be "dangerously out of kilter."[70] However, as Professor Klar has pointed out, "the result which the majority of the Supreme Court arrived at in resolving the particular *Cherneskey* issue, was dependent upon, and was a logical extension of, its general views as to the substance and procedure of the defence of 'fair comment'."[71] In 1979, when the Uniform Law Conference responded to the *Cherneskey* decision and adopted section 9, it trimmed the weeds without digging out the roots. This was recognized by the Alberta and Ontario Commissioners who, in their report to the Conference, did consider codifying the defence of fair comment within the *Uniform Defamation Act* as one means of dealing with the *Cherneskey* problem. However, this approach was rejected because the exigencies thrown up by the case required a speedy solution:

> [C]odification of the defence of fair comment would be a time consuming process, requiring considerable study. This would result in delay on an issue that many consider to be of urgent importance.Immediate legislative attention should be directed to the narrower issue of honest belief raised in the *Cherneskey* case. Codification might be viewed as a long term objective, perhaps in connection with a complete review of the law of defamation.[72]

Now that the Conference has decided to take a broader look at defamation, a more comprehensive approach to fair comment may now be in order. This is particularly the case since a cadre of jurists has been insisting for some time now that the defence of fair comment is one area of the law of defamation which is ripe for rationalization and codification.

Several jurisdictions have already undertaken the task. Dissatisfaction with the defence has focussed upon the meaning of "fairness," the effect of "malice" and the special rules applied to opinions which attack character through the "imputation of dishonourable or corrupt motives." These problems were tackled in 1971 by the New South Wales Law Reform Commission whose recommendations in this respect had a powerful effect upon the English Faulk's Committee.

Lawyers have long complained that "it is perhaps unfortunate that the term 'fair', with its possible connotation of reasonableness and moderation, ever gained currency to express the limit upon permissible criticism, since the law freely permits expression of opinion couched in ironical, bitter or even extravagant language."[73] Both the New South Wales Law Reform Commission and the Faulk's Committee thought it would be much more satisfactory if the defence were renamed simply "Comment." The Faulk's Committee was seriously worried that the jury could easily be misled by the use of the adjective "fair" and that it

introduced unnecessary complications into a defamation trial when a judge had to expound at length upon the legal meaning of "fair":

> The adjective "Fair" in the phrase "Fair Comment" is seriously misleading having regard to the actual nature of the defence, which in reality protects *unfair* comments, since manifestly the opinion of a man with prejudiced or exaggerated views may be extremely unfair if viewed objectively by a balanced person. Consequently a jury considering this defence in answer to the traditional question — "Are the words fair comment on a matter of public interest" — may be confused, though the judge will have directed them that the word "fair" must not be taken as generally understood.[74]

Much dissatisfaction has also been expressed concerning the legal meaning of, and the role played by, "malice" in the defence of fair comment. The difficulties of applying the concept prompted both the New South Wales Commission and the Faulk's Committee to recommend that "malice" be dropped so that for the defence to apply all that was necessary was honesty. The Faulk's Committee accepted the New South Wales arguments to the effect that the function played by 'malice' — covering "any indirect or improper motive which may have actuated the defendant in making the comment complained" — was to show that the comment was not a genuine expression of . . . opinion" but was a counterfeit: "This, and this alone, is the material significance of malice in fair comment."[75] This led the Faulk's Committee to the following conclusion:

> We have concluded that it would be best to get rid of the word malice altogether and to substitute in fair comment cases a test adapted from the New South Wales recommendation, which in our view reflects the essence of the matter, namely that the defence of fair comment will be defeated if the plaintiff proves that the comment expressed did not represent the defendant's genuine opinion. We think the insertion of the adjective "genuine" into the New South Wales wording serves to underline the essential issue at stake. This change (which we *recommend* be incorporated into a statute) will we believe substantially simplify the problem; it will eliminate the need for any direction to juries as to the difference between the legal and colloquial concept of malice; it will concentrate the mind of the tribunal of fact upon the essential issue; and it will make less likely an unjust result in the cases where there is animosity between the parties but the critic has expressed his genuine opinion. Book publishers, newspaper proprietors and others who publish the opinions of authors with which they may disagree should be safeguarded.[76]

The third problem associated with the defence has been the different treatment given to imputations of dishonourable or corrupt motives.

The exception can be traced back to the judgment of Cockburn, C.J. in *Campbell* v. *Spottiswoode* (1863) 3 B. & S. 769 where it was laid down that a person's moral character is never a permissible subject of adverse comment:

> It is said that it is for the interest of society that the public conduct of men should be criticized without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character and made without any foundation.[77]

Fleming, among others, has said that it "is open to serious doubt whether this Victorian period piece should survive into the more robust atmosphere of our present public life."[78] The Faulk's Committee discussed at some length in their proposals the "latent ambiguities" contained in this old case which have "led to conflicting decisions in ensuing cases" and were of the opinion that such complexities were unnecessary because "the normal principles of fair comment give adequate protection in this class of case no less than in the general run of cases":

> Quite apart from these considerations, there are serious practical objections to the continuance of this particular exceptional class within the law of fair comment. First the definition, be it the imputation of "corrupt" or dishonourable motives" or of "base or sordid motives", is extremely vague, and, in the case of the latter the two adjectives could cover a very wide class of comment. Secondly, if invoked, it adds a serious dimension of complexity and difficulty.[79]

The general consensus of opinion seems to be that the law of fair comment should be simplified by abolishing this exceptional class of case and that the defence should apply generally and uniformly in respect of all cases involving expression of opinion on matters of public interest. The best way to deal with all of these problems would be to rationalize and codify the defence of fair comment within a model act.

There are several approaches which appropriate legislation could take. Several commentators favour a single rule applicable to both the originator of the opinion and to any report of the opinion which appears in the media. This would require removing any subjective element from the defence and demanding merely objective fairness in all cases. So that, provided the words are an expression of opinion

concerning a matter of public interest and are based upon a sufficient basis of fact, all that the jury would have to decide is whether it is, objectively speaking, possible for a normal, albeit biased, person to hold such an opinion. This approach may be considered radical, but, quite apart from the much needed simplicity that it would introduce into the law, it really captures the essence of the defence. As Lord Denning pointed out as long ago as 1951 in *Adams* v. *Sunday Pictorial Newspapers (1920) Ltd.* [1951] 1 K.B. 354, if the defendant "proves that the facts were true and that the comments, objectively considered, were fair, that is, if they were fair when considered without regard to the state of mind of the writer, I should not have thought that the plaintiff had much to complain about."

For those who find this approach unpalatable because it might protect dishonest opinions—even though such opinions considered objectively are quite within the bounds of what the public regards as tolerable—a more complicated rule will be necessary which preserves the present section 9 protection for the reporter of an opinion but which updates the law in the case of the originator of the opinion. This would require abandoning "malice" and permitting the defence to the originator—provided always that the publication is an opinion on a matter of public interest based upon substantial fact—if he honestly held the opinion, and if it was possible for a normal, albeit biased, person to hold such an opinion.

These proposals are not exactly radical if we look at suggestions that are being made elsewhere. For instance, in a 1977 report, the Australian Law Reform Commission recommended that the defence should be re-named "comment"; that it should be sufficient if the facts upon which the comment is based are substantially true; and that the presence or absence of malice by the person making the comment should be irrelevant. However, the Commission further recommended that comment should be permitted on any topic regardless of whether the comment was made in the public interest.[80]

It would also be helpful if the *Uniform Defamation Act* adopted a provision equivalent to section 9 of the Nova Scotia *Defamation Act* and section 24 of the Ontario *Libel and Slander Act* which deal with the defence of fair comment in relation to defamations "consisting partly of allegations of fact and partly of expression of opinion." These sections are useful provisions which preserve the fair comment defence in situations where the defendant can prove a substantial factual base for his comments but is unable to prove unimportant statements of fact, in statements where fact and opinion are mixed.

However, the Ontario and Nova Scotia provisions are modelled upon section 6 of the English *Defamation Act* 1952. This provision has now been modified in England. The Faulk's Committee thought that the words "alleged or referred to in the words complained of" — which also appear in the Canadian progeny of section 6 — were not adequate because they seemed "on their strict construction to limit the scope of this section in one important respect, namely that to come within the section the defendant must be able to support his comment by reference to proved statements of fact *within the cords complained of*":

> Thus, where a plaintiff complains of only part of a longer publication consisting partly of statements of fact and partly of expressions of opinion, it would seem that under the section the defendant might be precluded from relying upon statements of fact in the remainder of the publication to support the expression of opinion complained of, even though such statements of fact might well have formed the main or possibly the only foundation of the opinion expressed. We are by no means certain that this result was intended. Since in the ordinary fair comment case a defendant relying on this defence is not limited to the statements of fact contained in the publication complained of. He may rely on other relevant facts, provided they were in his mind when he made the comment. Indeed sometimes the publication may contain no explicit statements of fact at all.[81]

The Committee recommended a modification to the section to enable the defendant to rely upon assertions of fact contained elsewhere in the same publication or upon "any other facts which may be relevant in support of the comment complained of."[82]

RECOMMENDATIONS

1. The whole defence of "fair comment" should be codified within the *Uniform Defamation Act.*
2. The defence of "fair comment" should apply where there is
   (a) a statement of opinion,
   (b) upon a matter of public interest,
   (c) grounded upon a substantial base of fact,
   (d) provided the statement was, objectively speaking, one which it was possible for a normal, albiet biased, person to make concerning those facts.
3. As an alternative to 2, the defence of "fair comment" should apply where there is
   (a) a statement of opinion,
   (b) upon a matter of public interest,
   (c) grounded upon a substantial base of fact,
   (d) provided the statement was, objectively speaking, one

which it was possible for a normal, albeit biased, person to make concerning those facts and provided the person making the statement honestly or genuinely held the opinion.

4. Under both 2 and 3 "malice" should no longer be relevant as a means of defeating the defence of fair comment and any special limitation on the defence in cases where dishonourable or corrupt motives are imputed should be abolished.
5. The *Uniform Defamation Act* should contain a provision stating that the defence of fair comment should not fail by reason only that the defendant has failed to prove the truth of every relevant assertion of fact relied upon by him as a foundation for his comments, provided the assertions he does prove are true and relevant and afford a sufficient foundation for his comments.
6. If 2 above is adopted, section 9 of the *Uniform Defamation Act* should be abolished. If 3 is adopted, section 9 should be retained.

(b) Does the *Uniform Defamation Act* deal adequately with reporting?

The defence of "qualified privilege" may assume a broad constitutional significance within the next few years. Once again we should be mindful of the United States constitutional debate and the decision in *New York Times* v. *Sullivan* 376 U.S. 254 (1964). It may be that our new constitution will require greater recognition from the law of defamation of the need for unfettered disclosure on matters of public importance. However, this is outside of the present discussion of defamation defences. The *Uniform Defamation Act* does not codify the law of qualified privilege.

Section 10 of the *Uniform Defamation Act* extends the defence of qualified privilege to certain "fair and accurate" reports which are "published in a newspaper or by broadcasting." With minor variations most provincial statutes contain similar statutory defence sections. The basis for such a defence is the public interest in full information concerning the administration of public affairs. This being the case, there is obviously great scope for disagreement over which bodies are of sufficient interest to the public to require that reports of their proceedings should attract qualified privilege. It is significant that the Nova Scotia and Ontario statutes have a wider range of relevant bodies than do the Uniform Act or the Acts of the other provinces. It might also be expected that such lists will have to be updated from time to time. The law on privileged reporting gives rise to a number of issues which might cause us to question the adequacy of the provisions of the *Uniform Defamation Act*.

The first issue is whether such a defence should be restricted to reports in newspapers and broadcasts. Unlike section 11 of the Uniform Act which says that fair and accurate reports in newspapers and broadcasts of court proceedings are "absolutely privileged," there is no requirement under section 10 that the report be contemporaneous or published within a specified period of time of the proceedings. Thus a situation might arise in which a fair and accurate report of the proceedings described in section 10 contained in a book or some other publication would not attack the statutory qualified privilege. One might argue that the public interest is just as strong as such a situation as it is in the case of a newspaper or a broadcast.

The narrowness of section 10 is probably dictated by the request provisions of subsection (4) which deny the defence where the defendant fails to publish or broadcast a reasonable letter or statement of explanation or contradiction requested by or on behalf of the plaintiff. It would be more difficult for the author of a book to comply with such a request. But this is no reason to deny the defence to him if he is willing to publish at his expense some suitable statement of explanation or contradiction which is likely to reach the same audience as his original report.

A more important issue is the question of which reports should attract qualified privilege. The list contained in section 10 is almost certainly too confined for modern needs. To provide an exhaustive list of all reports which should attract qualified privilege is a daunting task. However, this issue has been given extensive treatment by numerous law reform bodies in recent years. The best way forward would be to consider the various categories which they have thought should qualify and to assess their suitability in a Canadian context. Consequently two such lists are reproduced below. Some of the contents of these lists are not directly relevant to Canada but they are reproduced completely in order to illustrate the breadth of the public interest in other jurisdictions that has been thought to justify qualified privilege for reporting. In 1979 the Western Australian Law Reform Commission recommended the following for inclusion:

(a) the proceedings in public of any board, or body of trustees or other person constituted under the provisions of any statute for the discharge of public functions so far as the report relates to matters of public concern;

(b) the proceedings of a person or authority held whether in Australia or elsewhere under the authority of a law in force or of a Parliament in any country other than Australia;

(c) a publication issued or authorized by the Government of any country other than Australia;

(d) notices or advertisements published in order to comply with the requirement of any law in force in Australia, provided that if the notice is issued in relation to any application to a tribunal the privilege should apply only after the relevant application has been filed;

(e) a document circulated by a company or its auditor to its members in accordance with or pursuant to the provisions of any law in force in Australia.[83]

In 1975, the Faulk's Committee compiled the following list. Some of the contents are already covered by existing Canadian legislation:

REPORTS AND STATEMENT PRIVILEGED SUBJECT TO EXPLANATION OR CONTRADICTION

11. A fair and accurate report of the findings, or decision of any of the following associations, or of any committee or governing body thereof, that is to say—

(*a*) an association formed in the United Kingdom for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion or learning, and empowered by its constitution to exercise control over or adjudicate upon matters of interest or concern to the association, or the actions or conduct of any persons subject to such control or adjudication;

(*b*) an association formed in the United Kingdom for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, and empowered by its constitution to exercise control over or adjudicate upon matters connected with the trade, business, industry or profession, or the actions or conduct of those persons;

(*c*) an association formed in the United Kingdom for the purpose of promoting or safeguarding the interests of any game, sport or pastime to the playing or exercise of which members of the public are invited or admitted, and empowered by its constitution to exercise control over or adjudicate upon persons connected with or taking part in the game, sport or pastime;

(*d*) an association formed in the United Kingdom for the purpose of promoting a charitable object or other objects beneficial to the community and empowered by its constitution to exercise control over or to adjudicate on matters of interest or concern to the association or the actions or conduct of any persons subject to such control or adjudication.

12.—(*a*) A fair and accurate report of the proceedings at any public meeting held in the United Kingdom, that is to say, a meeting *bona fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission to the meeting is general or restricted.

(*b*) A fair and accurate report of any press conference held in the United

Kingdom convened to inform the press or other media of a matter of public concern.

(*c*) A fair and accurate report of any such public meeting or press conference may include a fair and accurate report of any document circulated at the public meeting or press conference to the persons lawfully admitted thereto.

13. A fair and accurate report of the proceedings at any meeting or sitting in any part of the United Kingdom of—

(*a*) any local authority or committee of a local authority or local authorities;

(*b*) any justice or justices of the peace sitting otherwise than as a court exercising judicial authority;

(*c*) any commission, tribunal, committee or person appointed for the purpose of any inquiry by Act of Parliament, by Her Majesty, or by a Minister of the Crown;

(*d*) any person appointed by a local authority to hold a local inquiry in pursuance of any Act of Parliament;

(*e*) any other tribunal, board, committee or body constituted by or under, and exercising functions under an Act of Parliament

not being a meeting or sitting admission to which is denied to representatives of *publishers of newspapers, or broadcast programmes* and to other members of the public.

14.—(*a*) A fair and accurate report of the proceedings at a general meeting of any corporation or association constituted, registered or certified by or under any Act of Parliament or incorporated by Royal Charter, not being a private company within the meaning of the Companies Act 1948.[5]

(*b*) A fair and accurate report of any report or other document circulated to stockholders, shareholders or members by or with the authority of the board of any corporation or association constituted, registered or certified as aforesaid not being a private company.

(*c*) A fair and accurate report of any document relating to the appointment, resignation, retirement or dismissal of directors, circulated to stockholders, shareholders or members of any corporation or association constituted, registered or certified as aforesaid not being a private company.

(*d*) A fair and accurate report of any document circulated by the auditors to stockholders, shareholders and members of any corporation or association, constituted registered or certified as aforesaid, not being a private company.

15. A fair and accurate report of any adjudication, official report, statement, or notice issued by:—

(*a*) The Panel on Take-overs and Mergers

(*b*) The Council of the Stock Exchange

(*c*) The Press Council

(*d*) The B.B.C. Complaints Committee

(*e*) The I.B.A. Broadcasting Panel

(*f*) A District Auditor

(*g*) The Parliamentary Commissioner for Administration and any other Commissioner for Administration appointed by any enactment.

16. Any information made available officially from court documents in criminal cases.

17. A fair and accurate report of any official notice or other matter (including photographs, sketches or other pictorial representations) issued for the information of the public by or on behalf of any government department, officer of state, public or local authority, nationalised industry, serving officer of Her Majesty's Armed Forces, or a chief Officer of Police of the United Kingdom.

18.—(*a*) A fair and accurate report of any proceedings in public before a foreign court duly constituted by the de facto or effective Government of the State in which such court exercises jurisdiction, such State not being a member State of the European Comunities.

(*b*) A fair and accurate report of any proceedings in public of the legislature of a foreign State which is not a member State of the European Communities.

(*c*) A fair and accurate report of any publication issued under the authority of a Government or legislature of a foreign State which is not a member of the European Communities.

The third important issue in relation to privileged reporting is whether such activity should be raised to the level of absolute privilege so that the troublesome "malice" problem can be avoided. Parallels can be made with fair comment. The aim of the defence is to enable the public to be informed on matters of public interest. So why should it be limited to reports published for the right reasons? Some commentators have taken the attitude that, provided the report is "fair and accurate," the publisher's motives are irrelevant, and to retain the "absence of malice" requirement is an unnecessary complexity.[85] The plaintiff's interests are sufficiently protected by the explanation or contradiction provisions. On the other hand, there are those who argue that even "fair and accurate" reporting should not be done maliciously. The Faulk's Committee found that the meaning of "malice" in this context causes the courts problems. However, they did not go so far as to recommend the abolition of malice and the relevance of the defendant's motives. They felt that the plea of "malice" should be replaced by the plea "that the defendant in making the publication complained of took improper advantage of the occasion giving rise to the privilege."[86] But this seems merely to substitute one set of difficulties for another.

"Improper advantage" is an even more nebulous concept than "malice".

RECOMMENDATIONS

1. The privileges which attach to reporting in the *Uniform Defamation Act* should not be confined to newspapers and broadcasts but should include books and other publications.
2. The range of privileged reports in the *Uniform Defamation Act* should be expanded to meet the modern interest in public affairs.
3. The "absence of malice" required in privileged reports should be abolished.

(c) Does provision need to be made in the *Uniform Defamation Act* for live broadcasts of parliamentary proceedings?

It is trite law that words spoken by a member of Parliament within Parliament are absolutely privileged and that once it has been determined that the words are spoken in Parliament, the court loses its jurisdiction over the matter. Section 10 of the Uniform Act bestows a qualified privilege upon fair and accurate reports of proceedings in the Senate or House of Commons of Canada. Section 10 is not really intended to deal with live broadcasts of Parliamentary proceedings. The concept of Parliamentary privilege is complicated by the fact that it is now possible for a member's words to be broadcast simultaneously throughout the whole nation. Presumably, as the words are still spoken within the confines of Parliament, public policy will still require total freedom of expression even when express malice is present. However, the position of the broadcaster is not quite so straightforward as this. Should he be protected by qualified or absolute privilege? A few years ago, in the Dalhousie Law Journal, Keith Evans complained that we "have reached the stage in Canada where we have live coverage of Parliament and yet no thought has been given to this matter in the field of defamation."[87] We have also now, admittedly under rather extraordinary circumstances, had live coverage of a Supreme Court decision.

The incidence of live broadcasting of proceedings taking place in absolutely privileged situations may not yet be frequent enough to warrant special consideration of how the law of defamation should apply to such broadcasts. However, other jurisdictions have thought the issue sufficiently important to require study and legislation. The Faulk's Committee saw the issues as follows:

> In the case of live broadcasts . . . much more difficult problems arise. Insofar as the broadcasting authority is transmitting live the

> spoken words of the Member concerned, it has no prior knowledge of or control over what will be said and instantaneously broadcast. On the other hand, insofar as transmissions of pictures are concerned, in live transmissions the programme controller has continuous power of selection as to the picture that will appear on the screen. This may either be a general scene or a close-up, may portray the speaker or perhaps one or a group of the Members present, or may even portray the gallery of individual persons therein.[88]

In the light of such different degrees of control, the Committee felt that live television coverage should not attract absolute privilege because of the power of selection which exists in that medium. In the end the Committee was drawn to the following solution:

> *We recommend* that in the case of live television broadcasts absolute privilege should attach to the transmission of the words spoken by a member or members, but only qualified privilege to the pictures transmitted. It would follow as a natural corollary that in the case of live sound broadcasts, absolute privilege should apply.[89]

The defamation problems associated with live broadcasts extend much further than those which occur when absolutely privileged occasions are transmitted. The *Uniform Defamation Act* tends to deal with newspapers and broadcasting in the same way. But there are many ways in which they are very different mediums, the most obvious one being that, in the case of a newspaper, the editor has the opportunity to screen all submitted material very closely. The public interest in live broadcasts of one kind or another may require a new set of defamation rules which take account of the special conditions which prevail in such situations. Hence to follow the Faulk's Committee and deal only with live broadcasts of Parliamentary proceedings would result in piecemean legislation. It would be much more useful with a model statute to provide a full set of rules for the law of defamation in relation to all aspects of live broadcasting.

RECOMMENDATION

1. Further research should be undertaken into the relationship between live broadcasting and the law of defamation in order to determine in what ways the *Uniform Defamation Act* should include special provisions for such broadcasting.

   (d) Does section 18 of the *Uniform Defamation Act* go far enough in protecting "freedom of speech including freedom of the press and other media"?

It was in 1965 that the Shawcross Committee recommended that

there should be a statutory defence of qualified privilege for newspapers "in respect of the publication of matters of public interest where the publication is made in good faith without malice and is based upon evidence which might reasonably be believed to be true." The defence was only to apply if the defendant had "published upon request a reasonable letter or statement by way of explanation or contradiction and withdrawn any inaccurate statements with an apology if appropriate to the circumstances."[90] The need for untrammeled debate of matters of public importance which prompted the Shawcross proposals also lies behind the provisions which are at present section 18 of the *Uniform Defamation Act.* However, the Uniform Act does not allow a complete defence. It merely restricts the plaintiff to special damages. Section 8 has been widely accepted throughout Canada. Supporters of section 18 feel that it strikes an acceptable balance between freedom of expression and protection of reputation because it restricts the plaintiff to special damages which are difficult to prove so that the *bona fide* defendant will be protected in the majority of cases. Its detractors usually favour the U.S. position which is aimed at securing the widest possible exposure to public information and discussion of affairs. Thus they believe that, in the absence of deliberate falsification as reckless disregard for the truth, the news media should not have to suffer liability for defamatory statements about public figures. The words of Mr. Justice Black in the *Sullivan* case are frequently conjured up in support of this position:

> This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financialy for criticizing their government, its actions, or its officials . . . An unconditional right to say what one pleases about public affairs is what I consider to be a minimum guarantee of the First Amendment.[91]

We should also be mindful of the words of Mr. Justice Dickson in *Cherneskey* when, à propos fair comment, he asserted that it "is not only the right but the duty of the press, in pursuit of its legitimate objectives, to act as a sounding board for the free flow of new and different ideas. It is one of the few means of getting the heterodox and controversial before the public."[92]

There are those who feel that, in the light of the "new mandate" given by the Charter of Rights that our courts will be loathe to tolerate a law of defamation which insists that critics of public officials must guarantee the truth of their assertions, or which forces them into silence when they honestly believe their criticism but doubt whether

its truthfulness can be proved in court and they cannot risk the expense of possible legal action.

This is a situation where the limited range of remedies available to our courts in a defamation action is most evident. The public debate could only profit from the judicious use of the right of reply when a public official is criticized in good faith.

The Shawcross proposals for a special defence for the news media found favour in New Zealand but have been rejected almost everywhere else that they have been considered. The Faulk's Committee were strongly opposed to the creation of such a defence for a number of reasons:

(1) it would place newspapers and broadcasting and television authorities in a special position and such bodies should not be given authority to publish false defamatory "facts" obtained from a source which turns out to be unreliable;
(2) there was no concrete evidence to show that newspapers or broadcasting authorities were handicapped in their proper function by the absence of such a defence;
(3) on many occasions such a defence would not work so long as newspapers and television and broadcasting authorities hold to their principle of non-disclosure of confidential information.[93]

The creation of such a defence has also been opposed by the New South Wales Law Reform Commission, the Australian Law Reform Commission and by the Law Reform Commission of Western Australia. The Australian Commission considered very carefully who should bear the loss in such a situation:

> [A] person whose reputation has been injured should not be denied compensation merely because the person causing the injury genuinely believed that he did not deserve the reputation. . . . The plaintiff is passive, the defendant active. The defendant is wrong in fact even if, in a particular case, he is morally blameless. As between those two parties loss should be suffered by the active, wrong party—the defendant—rather than by the plaintiff.[94]

What these arguments do not consider is the stultifying effect which such an allocation of risk might have upon the free flow of information and public debate. However, as the Faulk's Committee pointed out, there is as yet no concrete evidence that such suppression results from the present law. The weight of opinion seems to be that, for the time being at least, we can continue to take comfort from Lord Goodman's words:

> A great newspaper—if it believes that some villainy ought to be exposed—should expose it without hesitation and without regard to the law of libel. If the editor, his reporters and his advisers are

> men of judgment and sense, they are unlikely to go wrong; but if they do go wrong the principle of publish and be damned is a valiant and sensible one for the newspaper and it should bear the responsibility.[95]

Such admirable robustness assumes a world of "great newspapers" with the resources to "publish and be damned." These are also words to which any self-respecting editor in the United States would subscribe and yet in that country the Press enjoys a considerably greater freedom to comment upon public matters than exists in either Canada or the U.K. It should not be forgotten, however, that section 18 functions in conjunction with the defences of qualified privilege and fair comment to protect newspaper and broadcast publications. The real problem in this area is one of remedies and, while damages continue to dictate the applicable rules of substantive law, the weight of argument suggests leaving section 18 alone.

RECOMMENDATION

1. No special defence for newsmedia should be incorporated within the *Uniform Defamation Act* and the protection offered by section 18 should remain unchanged.

(e) Should the *Uniform Defamation Act* make provision to alleviate the position of the innocent defamer?

The *Uniform Defamation Act* offers little assistance to the innocent defamer unless he is a newspaper or a broadcaster who publishes defamatory matter for the public benefit and he can bring himself within one of the statutory defences. And at common law the rule is that liability for defamation rests upon the mere fact of defamation, the intention of the defamer being irrelevant. This means that the innocent defamer will be liable at common law unless he can invoke a specific defence. However, the harshness of this position has been alleviated by several narrow common law and, in some jurisdictions, statutory exceptions. Hence the vague common law dispensations in favour of mere distributors and the English, New South Wales, New Zealand and Nova Scotia statutory provisions permitting the "offer of amends" mechanism to function in certain circumstances. Some commentators have disapproved of the common law position and have argued that it is unfair to make the defendant strictly liable and to expose him to the risk that all the statements he makes, however innocent they appear when they are made, might turn out to be defamatory. They point out further that it seems somewhat anomalous that tort law should impose strict liability for damage to reputation while insisiting upon fault in most cases of physical damage.[96] Profes-

sor Fleming has also alluded to the incongruity of a law which says that there is "no liability for intentionally defamatory matter published accidentally, but there is for accidentally defamatory matter published intentionally."[97] In both situations, the defamed victim requires vindication. On the other hand, it is argued that there is often no reason why a passive plaintiff, rather than an active defendant, should be the loss bearer.

Several lawyers have discussed the difficulties that can be caused by strict liability in particular situations. Keith Evans, for instance, has defined the issues in the context of broadcasting:

> The application of the strict rule can have particularly hard consequences in the field of broadcasting . . . [T]he T.V. editor will often have no opportunity to prevent the publication of defamatory material. The first area of broadcasting to encounter the problem was the ever popular open line radio programmes (*sic*). The problem was met somewhat through the technology that was used. Conversations were taped and replayed seconds later as a control device. Yet, this, by itself, only allows for the very quickest of editing and does not subject (*sic*) itself to the meticulous editing available in relation to the printed word, nor are such methods adaptable to all fields of broadcasting. Surely the public interest in such shows is not disputed, and yet the strict rules will apply. This may be acceptable if you see the station as being better able to bear the risk, and perhaps to insure against it, but shouldn't (*sic*) some aspect of fairness and justice apply? One would expect that the station could recover on open line programmes from the caller making the defamatory remarks. But perhaps it would be better to set some guidelines in legislation.[98]

The Faulk's Committee did not recommend any changes in this area of the law and cited four basic reasons why liability should remain strict:

(1) the lack of fault in the publisher of the defamatory matter could be taken into account for the purpose of mitigation of damages;
(2) if liability were not strict it would be too difficult for the plaintiff to recover;
(3) the fact that media publications reached a wide audience was an argument in favour of strict liability:
(4) there was no real evidence of a large number of claims against innocent defamers.[99]

However, the Faulk's Committee was strongly in favour of retaining legislation similar to section 4 of the English *Defamation Act* 1952 which did something to mitigate the hardships on defendants who published defamatory statements innocently.[100] Section 4 of the English

Act is reproduced in section 15 of the Nova Scotia *Defamation Act*, but no similar provision exists in the *Uniform Defamation Act*. Professor Fridman, among others, has favoured a broader acceptance of this kind of legislation on the grounds that "given the perils that may attend authorship, whether in journals or elsewhere, it is surprising that nothing has been done to bring the law into a more modern shape."[101]

The "offer of amends" provisions in the Nova Scotia Act offer the opportunity for resolution by the parties themselves and a defence to the innocent defamer if his offer is refused. They are, however, rather cumbersome and when the Faulk's Committee considered the equivalent English legislation it recommended several procedural improvements. But the usefulness of this kind of legislation has been doubted and few cases exist with which we can estimate its effectiveness. It is always open to the parties themselves to settle the dispute and make amends, and any apology or offer of amends can be accounted for in mitigation of damages.

RECOMMENDATION

1. The *Uniform Defamation Act* should contain provisions to alleviate the hardships caused to the innocent defamer.
2. Consideration should be given to the "offer of amends" machinery contained in section 15 of the Nova Scotia *Defamation Act* and to the procedural improvements suggested by the Faulk's Committee.

D. *Procedure*

The expeditious disposal of defamation actions is highly desirable. Delays, whether arising in the normal course of events or from interlocutory jockeying, will obscure the issues and make it difficult to completely vindicate the plaintiff's reputation in the court action. It is also necessary that, in certain cases, the potential defendant should be informed quickly and clearly of the plaintiff's grievances so that he can, if possible, avail himself of the several statutory defences which are dependent upon apology and retraction. Notice and limitation rules play an important function in this respect.

(a) Could the notice requirements of section 14 of the *Uniform Defamation Act* be improved?

As Mr. Justice Hall pointed out in *Barber* v. *Lupton* (1970), 9 D.L.R. (3d) 635 at 636 (Man. Q.B.), the notice provisions in a defamation statute are "intended to enable a defendant to correct or withdraw statements; to apologize for having published them; to mitigate damages if an action is commenced and if the statements are found to

be defamatory." The notice provision in the *Uniform Defamation Act* is, in fact, a defence in that the defendant can rely upon the absence of requisite notice to defeat the plaintiff's claim. The Uniform Act makes notice a condition precedent to the bringing of a defamation action against a newspaper or a broadcaster. The important points about section 14 are:

(1) it only applies to newspapers and broadcasts;
(2) it lays down different time periods to apply between the giving of the notice and the bringing of the action;
(3) it says something about the form which the notice must take;
(4) it says something about how notice should be served;
(5) it functions like a limitation period because it provides that the notice must be given "within three months after the publication of the defamatory matter" came to the plaintiff's notice or knowledge."

If the apology and special damage defences of sections 17 and 18 should be extended to other forms of publication, then the notice provisions will need to be similarly extended. Notice, however, is not necessary to assist the defendant in availing himself of the common law defences.

Section 14(2) tells us that the "notice shall be served in the same matter (*sic*) as a statement of claim." The word "matter" is probably meant to be "manner." Section 17(2) of the Nova Scotia *Defamation Act* and section 13(2) of the Prince Edward Island *Defamation Act* say that the notice "shall be served in the same manner as a writ of summons." There is no provision in the Quebec or the Saskatchewan Acts concerning the manner of service. As the results of a defective notice can be so serious for the plaintiff, the manner of service should be made quite clear. To insist upon service in the same manner "as a statement of claim" is probably the best way of achieving this result.

The form of the notice is more problematic. There is some evidence in the case law that the degree of specificity being demanded by the courts varies somewhat from province to province.[102] The situation is not helped by the slight variations in the terminology of provincial legislation. Section 3 of the Quebec *Press Act* merely says that the plaintiff or his attorney must give "a previous notice." Saskatchewan's section 15 says that the notice must "distinctly specify the language complained of." The Uniform Act says that the notice must specify the defamatory "matter" complained of while the Yukon and the Northwest Territories' provisions speak of "language complained of." Failure to comply with the requisite degree of specificity will vitiate the notice and thus may defeat the plaintiff's claim.

However, it would be difficult to improve upon the uniform provision as regards giving guidance as to specificity. "Matter" seems better than—because it is wider than—"language."

The great drawback with the Uniform Act provision, and with its provincial counterparts, is that it functions as a limitation period within a limitation period. The defendant requires notice in order to act, but the objectives of the notice requirement are not served by removing the plaintiff's rights if he fails to give notice within a prescribed time period from knowledge of publication. This forces the plaintiff to act quickly which should be the job of a limitation period proper. It is noteworthy that the Saskatchewan and Quebec notice provisions avoid the risk of hardship to the plaintiff in this respect. Under section 15 of the Saskatchewan *Act*, notice is necessary but it does not have to be given within a prescribed period after knowledge of publication. Thus a secondary limitation period is avoided.

RECOMMENDATION

1. Section 14 of the *Uniform Defamation Act* should be modified so that it does not function as a limitation period within a limitation period. The following provision should be substituted for section 14:

   (1) No action lies unless the plaintiff has given to the defendant, in the case of a daily newspaper, seven, and in the case of any other newspaper or where the defamatory matter was broadcast, fourteen days' notice in writing of his intention to bring an action, specifying clearly the defamatory matter complained of.

   (2) The notice shall be served in the same manner as a statement of claim.

(b) Could more be done in the *Uniform Defamation Act* to clarify the law of limitations in a defamation action?

Unlike the provisions for notice, a limitation rule is required in *all* defamation actions in order to secure speedy process and the elimination of stale claims. However, the limitation rule embodied in section 15 of the *Uniform Defamation Act* is only applicable to newspaper and broadcast defamation. In Canada the law of limitations applicable to defamation actions is far too complicated. Williams' summary gives some idea of the complexity and lack of uniformity which exists in relation to this very basic issue:

> These actions [libel and slander], in some jurisdictions termed simply defamation, often have a particular limitation period

> allotted. The period is usually two years. In Ontario, Newfoundland, and British Columbia the time begins to run when the words were published or spoken. Other jurisdictions retain the date of publication of the libel or the date on which slanderous words were uttered as the basic starting point of the limitation period, but permit that where special damage is the gist of the action the period shall run from the occurrence of the damage. Jurisdictions with such a dual starting point for the running of the limitation period are Saskatchewan, Alberta, Manitoba, Prince Edward Island, Yukon and the Northwest Territories. The adoption of this dual starting point for the running of the limitation period conforms with the accrual of the cause of action at common law for libel (in which damage was presumed and a cause of action would arise on publication) and slander (in which special damage would have to be proved and in which a cause of action would not accrue until damage had occurred). In those jurisdictions in which damage is to be presumed, then accrual of the cause of action takes place on publication unless the gist of the action is damage and the jurisdiction has a statute allowing time to run from the occurrence of the damage.[103]

This means, for instance, that in a province such as Saskatchewan, the relevant limitation rule for a defamation action will vary depending upon whether the plaintiff is claiming general or special damages or whether the action involves a newspaper defamation.

The cause of the complexity is adherence to the old common law rules of accrual to determine the *terminus a quo*. Common law accrual has nothing to do with the plaintiff's knowledge of either a claim or of damage. If one of the purposes of limitation rules is to ensure the expeditious disposal of claims, one would have thought that the best way to do this would be to force the plaintiff to act within a short period from the time that he knows, or ought to know, that he has a claim. This is the approach which the Uniform Act takes towards newspaper and broadcast defamation actions. Ostensibly, there seems to be no reason why such an approach could not be taken towards all defamation actions. Rather than attaching a fixed period of years to an abstract cause of action, the law could acquire a much needed simplicity by using the plaintiff's knowledge as the *terminus a quo* in all cases. This will also mean that a shorter period of time can be used so that, in the majority of cases, defamation claims can be disposed of much more quickly than at present.

The argument against this approach is that, if the plaintiff's knowledge of publication becomes the *terminus a quo* in all cases, knowledge of publication need not necessarily coincide with the knowledge of special damage. This might mean that a defamed person

could acquire knowledge of publication but decide not to act until much later when he acquires knowledge of special damage, by which time the limitation period may have expired. However, this could happen under the present rule in the *Uniform Defamation Act* in the case of a newspaper or broadcast libel. One way around this problem would be to distinguish between the two kinds of claim and to provide that, if the plaintiff's claim is for special damage, then the *terminus a quo* is his knowledge of that damage.

RECOMMENDATION

1. The *Uniform Defamation Act* should contain the following limitation rule applicable to all actions for defamation:

   An action for defamation shall be commenced within six months after the publication of the defamatory matter came to the notice or knowledge of the person defamed or, where special damage is the gist of the action, within six months after the occurrence of the damage came to the notice or knowledge of the person defamed. But an action brought and maintainable for defamation against

   (a) the proprietor or publisher of a newspaper;

   (b) the owner or operator of a broadcasting station; or

   (c) any officer, servant or employee of the newspaper or broadcasting station,

   published within the limitation period may include a claim for any other defamation published against the plaintiff by the defendant in the same newspaper or from the same station within a period of one year before the commencement of the action.

FOOTNOTES

1. *See, Report of the Committee on Privacy*, H.M.S.O. Cmnd. 5012, p. 21, footnote 23.
2. *The Canadian Charter of Rights and Freedoms*, s. 2(b).
3. *Proceedings of the Uniform Law Conference of Canada*, 1939, p. 338.
4. *See, Proceedings of the Uniform Law Conference of Canada*, 1941, p. 348.
5. *Ibid.*, p. 350.
6. *See, Proceedings of the Uniform Law Conference*, 1944, p. 74.
7. *See, Proceedings of the Uniform Law Conference*, 1948, pp. 79-91.
8. *Proceedings of the Uniform Law Conference*, 1963, p. 73.
9. *See, Proceedings of the Uniform Law Conference*, 1979, pp. 116-121.
10. *See*, J.G. Fleming, *The Law of Torts*, 5th ed. (Sydney: The Law Book Company, 1977), p. 516.
11. J.S. Williams, *The Law of Defamation in Canada*, (Toronto: Butterworths, 1976), p. 57.

12. *The Law of Torts*, p. 516.
13. Law Reform Commission of British Columbia, *Report on Cable Television and Defamation* (1981), p. 16.
14. *See*, for example, the discussion of several well-known common law formulations in Duncan & Neill, *Defamation* (London: Butterworths, 1978), chapt. 7.
15. *See*, New South Wales Law Reform Commission, *Report of the Law Reform Commission on Defamation* (1971), *L.R.C.* 11, para. 14.
16. *Ibid.*, paras. 17-18.
17. *See*, The Committee on Defamation, *Recommendations on the Law of Defamation*, (1977).
18. *Report of the Committee on Defamation* (1975), H.M.S.O. Cmnd. 5909, para. 65.
19. The Law Reform Commission of Western Australia, *Report on Defamation*, (1979), para. 5.1.
20. *Defamation*, pp. 34-35.
21. *See, Report of the Committee on Defamation*, para. 421.
22. *Ibid.*, para. 422.
23. *Ibid.*, para. 420.
24. *Ibid.*, 205.
25. C.R. Symmons, "New Remedies Against Libellers of the Dead?" 18 *U.W.O.L. Rev.* (1980), p. 527.
26. *See, Report on Defamation*, paras. 9.2-9.8.
27. *See*, Wilfred H. Kesterton, *The Law and the Press in Canada*, (Toronto: McClelland and Stewart, 1976), p. 45 and p. 165, fn. 17.
28. *See* Symmons, "New Remedies Against Libellers of the Dead?", p. 525.
29. These are the words used by the minority of the Faulk's Committee. *See, Report of the Committee on Defamation, p. 206.*
30. *See*, for instance, *The Trustee Act*, R.S.S. 1978, c. T-23, s. 58.
31. *See*, for instance, The Law Reform Commission of Western Australia, *Report on Defamation*, paras. 9.9-9.13.
32. *See*, for instance, *The Trustee Act*, R.S.S. 1978, c. T-23, s. 59.
33. *Report of the Committee on Defamation*, para. 402.
34. *Report on Defamation*, para. 9.10.
35. *Ibid.*, para. 9.13.
36. *Ibid.*, para. 9.14.
37. *See, Report of the Committee on Defamation*, paras. 392-416.
38. *The Law of Defamation in Canada*, p. 23.
39. *Report of the Committee on Defamation*, para. 342.
40. *Ibid.*, para. 342.
41. Toni Weir, *"Case Comment—Local Authority v. Critical Ratepayer—A Suit in Defamation,"* (1979) *Camb. L.J.*, p. 241.
42. John P.S. McLaren, "The Defamation Action and Municipal Politics," (1980) 29 *U.N.B. Law Journal*, p. 127.
43. *Defamation*, p. 46, fn. 4.
44. *Ibid.*, 47, fn. 4.
45. *See, inter alia*, Riesman, "Democracy and Defamation: Control of Group Libel" (1942), 42 Colum. L. Rev. 727; Fenson, "Group Defamation: Is the Cure too Costly?" (1964), 1 Man. L.S.J. 255; Arthurs, "Hate Propaganda—An Argument Against Attempts to Stop it by Legislation: (1970), 18 Chitty's L.J. 1; Cohen, "The Hate Propaganda Amendments: Reflections on a Controversy" (1971), 9 Alta. L. Rev. 103; Burns, "Defamatory Libel in Canada, A Recent Illustration of a Rare Crime" (1969), 17 Chitty's L.J. 213.
46. *See*, Australian Law Reform Commission, *Defamation—Options for Reform* (1977), p. 7.
47. *See* sections 281.1 and 281.2 of the *Criminal Code* dealing with "Hate Propaganda."
48. John G. Fleming, "Retraction and Reply: Alternative Remedies for Defamation," (1978) 12 *U.B.C.L. Rev.*, p. 15.
49. *Ibid.*, 30-31.

50. *See*, 3 Restatement 2d, Torts 326, "Special Note on Remedies for Defamation other then Damages."
51. *Report of the Committee on Defamation*, para. 281.
52. *See, Defamation—Options for Reform* (1977), paras. 251-253.
53. "Retraction and Reply: Alternative Remedies for Defamation," pp. 25-26.
54. *Report on Defamation*, para. 19.2.
55. *Ibid.*, para. 19.4.
56. *Ibid.*, para. 19.5.
57. *See*, for instance, the discussion in Lawrence H. Eldridge, *The Law of Defamation* (New York: Bobbs-Merrill, 1978), pp. 297-299.
58. *See, Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1973).
59. "Retraction and Reply: Alternative Remedies for Defamation," p. 21.
60. *Ibid.*, 22.
61. *Ibid.*, 25.
62. *Report of the Committee on Defamation*, para. 623.
63. *Ibid.*, para. 619.
64. *Defamation—Proposals for Reform*, paras. 8-11.
65. Patricia Johns, et al. "Defamation on Cable Television Systems: The Legal and Practical Problems," (1970) 2 *Can. Com. L.R.*, p. 15.
66. Law Reform Commission of British Columbia, Report on *Cable Television and Defamation*, (1981), p. 14.
67. *Ibid.*, 14.
68. *Ibid.*, 14.
69. *Ibid.*, 15-16.
70. John P.S. McLaren, "The Defamation Action and Municipal Politics," p. 145.
71. Lewis N. Klar, "Memorandum Re: *Cherneskey v. Armdale Publishers Limited*," prepared for the Alberta Institute of Law Research and Reform, April, 1979, p. 5.
72. *Proceedings of the Uniform Law Conference*, (1979), p. 120.
73. John G. Fleming, *The Law of Torts*, p. 580.
74. *Report of the Committee on Defamation*, para. 152.
75. *Ibid.*, para. 157.
76. *Ibid.*, para. 159.
77. *Cambell v. Spottiswoode* (1863) 3 B. & S., pp. 776-777.
78. *The Law of Torts*, p. 579.
79. *Report of the Committee on Defamation*, para. 168.
80. *See, Defamation—Options for Reform* (1977), para. 130.
81. *Report of the Committee on Defamation*, para. 172.
82. *Ibid.*, para. 174.
83. *See, Report on Defamation*, para. 15.13.
84. *Report of the Committee on Defamation*, Appendix XI.
85. *See*, for instance, Law Reform Commission of Western Australia, *Report on Defamation*, para. 15.9.
86. *Report of the Committee on Defamation*, para. 240.
87. Keith R. Evans, "Defamation in Broadcasting," (1979) 5 Dalhousie L.J., p. 659.
88. *Report of the Committee on Defamation*, para. 226.
89. *Ibid.*, para. 222.
90. Joint Working Party of the British Section of the International Commission of Jurists and the International Press Institute, *The Law and the Press* (1965), paras. 43-44.
91. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
92. *Cherneskey v. Armadale Publishers Ltd.*, 90 D.L.R. (3d), 321.
93. *See, Report of the Committee on Defamation*, paras. 211-215.
94. Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (1979), para. 126.

95. *See*, Michael Rubinstein, Review of "Wicked, Wicked Libels," *New Statesman* (March, 1972), p. 426. Also quoted in *Report of the Committee on Defamation*, para. 215.
96. *See*, for instance, the discussion in Paul C. Weiler, "Defamation, Entreprise Liability, and Freedom of Speech," (1967) 17 *U.T.L.J.* 278.
97. *The Law of Torts*, p. 543.
98. "Defamation in Broadcasting," p. 668.
99. *Report of the Committee on Defamation.* See, however, the reservations of Michael Rubinstein and Elizabeth Clarke in Minority Report C., p. 200.
100. *Ibid.*, paras. 281-287.
101. G.H.L. Fridman, *Introduction to the Law of Torts* (Toronto: Butterworths, 1978), p. 161.
102. *See* Williams, *The Law of Defamation in Canada*, p. 124.
103. J.S. Williams, *Limitation of Actions in Canada*, 2nd ed. (Toronto: Butterworths, 1980), pp. 65-66.

APPENDIX L

(See page 31)

ENACTMENT OF AND AMENDMENTS TO UNIFORM ACTS 1981-82

REPORT OF MANITOBA COMMISSIONERS

Bills of Sale Act

New Brunswick amended their Act to vest in a judge of the Court of Queen's Bench authority to order the rectification of omissions and mis-statements in documents registered under the Act, and to permit late registration of documents.

Prince Edward Island made changes to the filing fees under this Act.

Bulk Sales Act

New Brunswick amended their Act to give a judge of the Court of Queen's Bench authority to exempt bulk sales from the application of certain provisions of the Act. The Act was also amended to provide that in lieu of a certificate from the Tax Commissioner certifying that all sales tax owing from the vendor has been paid, a certificate stating that a satisfactory arrangement has been made with the Tax Commissioner for the payment of the tax will suffice.

Child Abduction Act

Nova Scotia enacted An Act to Implement the Hague Convention on Civil Aspects of International Child Abduction, cited in Nova Scotia as The Child Abduction Act.

British Columbia also (through a new section 42.1 of their Family Relations Act) adopted the Hague Convention on the Civil Aspects of International Child Abduction. However their legislation contains a departure from the Uniform Act in that they have set out the circumstances in which the domestic law applies rather than the Convention.

New Brunswick enacted the Uniform Act (An Act to Implement the Hague Convention on Civil Aspects of International Child Abduction) under the title: The International Child Abduction Act.

New Brunswick also amended their Child and Family Services and Family Relations Act to complement the provisions of their International Child Abduction Act by prescribing the circumstances in which

a court must recognize a custody or access order from another jurisdiction.

Manitoba enacted the Uniform Act as part of the Uniform Extra-Provincial Custody Orders Enforcement Act.

Conditional Sales Act

Prince Edward Island made changes to the filing fees under this Act.

Criminal Injuries Compensation Act

Alberta amended their Criminal Injuries Compensation Act to provide

(a) compensation for a victim where injury or loss of property was as a result of a peace officer endeavouring to apprehend a criminal; and

(b) that common law relationships shall be deemed to be spouses for the purposes of the Act.

Extra-Provincial Custody Orders Enforcement Act

Ontario has included the provisions of this Act together with provisions for local custody orders in a Bill which should be enacted into law before this report is received by the Conference.

Manitoba repealed The Extra-Provincial Custody Orders Enforcement Act (i.e. the Uniform Act) and replaced it with The Child Custody Enforcement Act which in essence contains most of the Uniform Act provisions but avoided the "habitually resident" test.

Through this latter Act, Manitoba adopted the Hague Convention on the Civil Aspects of International Child Abduction. Substantial portions of the Uniform Custody Jurisdiction and Enforcement Act were adopted in this Act.

Human Tissue Act

Newfoundland amended their Human Tissue Act to permit, in certain cases, the removal of the pituitary gland during a post-mortem examination for use in treatment of persons having a growth hormone deficiency.

Interpretation Act

Alberta amended their Interpretation Act to add a reference to "acting deputy" in the provision dealing with the appointment of public officers. They also deleted the provision dealing with the presumption of service by mail and adopted a new provision, which provides that where an Act authorizes service by mail, service is

presumed to be effected 7 days from the date of mailing if it is mailed in Alberta to an address in Alberta, or 14 days from the date of mailing if the document is mailed in Canada to an address in Canada.

The presumption does not apply where the document is returned to the sender other than by the addressee or the document was not received by the addressee, the proof of which lies on the addressee.

New Brunswick amended their Act as follows:

(a) to make it clear that certain provisions of the Act containing rules of interpretation apply to regulations as well as to Acts;

(b) to extend the application of subsection 39(2) to regulations and to Acts and regulations of Canada and other provinces; and

(c) to make it clear that a reference in a New Brunswick Act or regulation to an Act or regulation of another province or Canada that is repealed is deemed to be a reference to an Act or regulation that is substituted therefor.

Personal Property Security Act

Ontario amended their Personal Property Security Act to require security interests in rent or mortgage payments to be registered in the land registry and to provide for registration during mail strikes.

Reciprocal Enforcement of Maintenance Orders Act

British Columbia (through a new Part 4.1 to their Family Relations Act) basically re-enacted the 1972 Uniform Reciprocal Enforcement of Maintenance Orders Act. They did this in response to a court decision which held that an attempt to enact the provisions as regulations under their Family Relations Act fell outside the regulation making powers under this Act. The new legislation also validates actions taken under the invalid regulations.

Ontario adopted the Uniform Act with minor changes.

Manitoba adopted the Uniform Act almost entirely except in 2 areas. Subsection 5(8) was changed so that the Attorney-General rather than the court provides the reasons to extra-provincial tribunal for refusing to confirm an order. Subsection 7(7) was added to simplify procedures where the respondent wishes a change and the claimant is still resident in the state that made the initial order.

Retirement Plan Beneficiaries Act

New Brunswick had previously enacted the provisions of this Act as section 65 of their Property Act. This year they decided to remove it from The Property Act and to re-enact it as a separate Act. Their new

definition of "plan" was taken from Ontario's Succession Law Reform Act.

Vital Statistics Act

Nova Scotia amended their Vital Statistics Act

(a) to require that the acknowledgement of the paternity of an illegitimate child by the purported father be done by way of statutory declaration; and

(b) to authorize the division registrar to take sworn statements.

Andrew C. Balkaran, Q.C.
for the Manitoba Commissioners.

August, 1982.

APPENDIX M

(See page 32)

The Institute of Law Research and Reform August 5, 1982

PRESS RELEASE

ADOPTION OF UNIFORM EVIDENCE LEGISLATION RECOMMENDED

The Institute of Law Research and Reform has issued Report No. 37A entitled *The Uniform Evidence Act 1981: A Basis for Uniform Legislation* and Report No. 37B entitled *Evidence and Related Subjects: Specific Proposals for Alberta Legislation.*

The two Reports contain recommendations for the enactment in Alberta of the rules for proving matters in evidence in proceedings taken before courts. The recommendations are based on the provisions of the Uniform Evidence Act adopted by the Uniform Law Conference of Canada* in 1981. That is a legislative model proposed for use by the Parliament of Canada and the provincial Legislatures with a view to making uniform the evidence laws across the country. It provides evidence rules which are suitable for both civil and criminal proceedings in all courts in Canada, although some of the rules proposed are particular to one or the other type of proceeding. The Uniform Evidence Act is the product of four years' work by a national Task Force specially constituted by the Uniform Law Conference and of an extensive review of the report submitted by the Task Force leading to some departures from its recommendations by the Conference.

Under existing law the rules of evidence have to be found in judicial decisions, textbooks and diverse statutes. The judge-made rules have evolved incrementally from case to case. Some of them are obscure and of doubtful authority. Others are unduly technical. Often they are unsystematic.

As its first recommendation in Report No. 37A, the Institute of Law Research and Reform endorses the importance of having evidence rules that are uniform across the country, particularly between federal and Alberta courts. The spectre of independent legislative action from jurisdiction to jurisdiction is one to be avoided. Requiring lawyers and judges to know different evidence systems is wasteful, inefficient and

* *The Uniform Law Conference of Canada*

costly. The Uniform Evidence Act brings the rules together in one place, making them simpler to locate and easier to understand. Moreover, it provides a clearer and more systematic statement of the law governing the fact-finding process.

The Institute regards the process which led to the preparation and completion of a Uniform Evidence Act of high quality within a period of four years to be a *tour de force* which could not have been accomplished without the cooperation of institutions from every part of the country. It is in general agreement with the content of the Uniform Act. The changes proposed for civil cases are moderate and present sensible improvements upon the existing law. For example, if a witness is not available to testify in a civil law suit, the Act would permit another witness to testify as to what the first had said, something which the existing rules against hearsay evidence usually would prevent. Some of the changes are based on laws already in place in other Canadian jurisdictions. For example, the Uniform Evidence Act enables a party wishing to call the evidence of an expert witness to give the expert's report to the other side before the trial. The party then would be able to put the written report in evidence unless the other side asked to have the expert testify, as is now possible in British Columbia. The Institute therefore urges as its second recommendation that in adapting the Uniform Evidence Act for use in a province any changes which would substantially derogate from uniformity of legislation should be made only sparingly and with strong reasons.

The Institute believes that it is desirable in the public interest that the rules of evidence applicable in criminal proceedings should strike a balance between the interests of the state and the interests of the individual. The striking of an appropriate balance is important both to provincial Legislatures and to the federal Parliament because the Uniform Evidence Act contemplates that the rules governing criminal cases will apply to cases where a provincial offence is charged as well. With benefit of hindsight, the Institute has discerned a deficiency in the process followed in the preparation of the Uniform Evidence Act. Time pressures did not allow individuals and groups outside government an adequate chance to participate. As a result the rules of evidence which apply to criminal proceedings may be or be seen to be more favourable to the prosecution than is so under the present law.

The third recommendation of the Institute therefore is that an independent review of these rules should be conducted to ensure the acceptance of the resulting legislation as fair to both prosecution and defence. In the opinion of the Institute, the reviewing body should be

part of the legislative process. It also should be in a position to take the time to conduct the review without unduly delaying the enactment of legislation. Additionally, it should be a body which is accustomed to investigating subjects of public importance. The Institute thinks that the Senate or a Senate Committee would be the appropriate body to decide whether the rules of criminal evidence set out in the Uniform Evidence Act strike the proper balance between the state and the individual. Review by the Senate or a Senate Committee should precede the enactment of the uniform legislation.

The fourth and final recommendation contained in Report No. 37A is for consultation between the federal government and provincial governments to facilitate the introduction of legislation based upon the Uniform Evidence Act throughout the country as soon as is practicable.

While the Institute of Law Research and Reform favours the adoption of uniform evidence rules, it does not think that the Alberta Legislature should, without more, enact the Uniform Evidence Act word for word. For one thing, that Act is a composite which contains some provisions which are appropriate only for federal legislation. Report No. 37B is devoted to the adaptation of the Uniform Evidence Act for enactment in Alberta. It includes some recommendations for change based on principle, some for change to fill lacunae which otherwise would exist in Alberta law, and some for minor changes which would adapt the Act to an Alberta context without changing its policies. The Report sets forth a draft Alberta Evidence Act which incorporates these changes while substantially accepting the Uniform Evidence Act. It also puts forward a draft Oaths, Affirmations and Witnesses Act which brings forward provisions from the current Alberta Evidence Act. Finally, it suggests some amendments to the Alberta Rules of Court which will avoid overlap and conflict.

The Uniform Law Conference of Canada was established in 1918 to promote the uniformity of laws among the provinces. Its members are appointed by the provincial and federal governments and include government lawyers, academic and practising lawyers and members of the law reform commissions and agencies. It meets annually.

The Uniform Law Conference is a recommending body. Uniform evidence legislation will become law only when enacted by the Parliament of Canada or by the Legislatures of the provinces. Work based on the Uniform Evidence Act is being done by the federal government but no Evidence Bill yet has been introduced federally or provincially.

Institute of Law Research and Reform

The Institute of Law Research and Reform began operations 1 January 1968, having been established by the agreement of the Government of Alberta, the University of Alberta and the Law Society of Alberta. Its objectives are to conduct legal research and to formulate recommendations for the improvement of the law of Alberta.

The Institute has nine full-time counsel on its legal staff. As well, it makes extensive use of research consultants. W.H. Hurlburt, Q.C., is Director and W.E. Wilson, Q.C., is the Chairman of the Board.

The recommendations of the Institute have led to the enactment, in recent times, by the Government of Alberta of a new Business Corporations Act (effective 1 February 1982) and of a Mobile Home Site Tenancies Act (assented to 4 May 1982, to come into force 1 January 1983). Currently, the Institute is engaged in several major law reform projects, including Land Titles, Limitation of Actions, Sale of Goods and the family law topics of Representation of Children in Legal Proceedings and Persons Living Together Outside Marriage.

The offices of the Institute are located at 402 Law Centre, University of Alberta, Edmonton, Alberta, T5G 2H5. The telephone number is (403) 432-5291.

Copies of the Institute's Reports Nos. 37A (109 pages) and 37B (177 pages) may be obtained by writing to the following address:

Institute of Law Research and Reform
402 Law Centre
University of Alberta
Edmonton, Alberta
T5G 2H5

Copies may be requested by telephone at (403) 532-5291.

APPENDIX N

(See page 32)

EXTRA-PROVINCIAL CHILD WELFARE ORDERS

REPORT OF THE ALBERTA COMMISSIONERS

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EXTRA-PROVINCIAL CHILD WELFARE ORDERS

REPORT OF THE ALBERTA COMMISSIONERS

1. *Reasons for report*

In 1981 the Alberta Department of Social Services and Community Health suggested to the Alberta Commissioners that it would be desirable for the provinces to enact legislation providing for the mutual recognition of all kinds of extra-provincial orders which place children in the care or under the supervision of welfare authorities. The Alberta Commissioners placed the subject on the agenda of the Uniform Law Conference for its 1981 meeting, when it was referred to the Alberta and Newfoundland Commissioners for study and report to

the 1982 annual meeting. This report is made pursuant to that reference. Due to pressure of time the Alberta Commissioners have not been able to consult the Newfoundland Commissioners on the subject but will give them advance notice of this report.

2. *The problem*

It is common for children under the care or supervision of child welfare authorities to move from one province to another. The child's parents or foster parents may temporarily or permanently change residence, or the second province may be able to provide a child with an educational facility which is not available in the first. The transfer may be highly desirable in the child's interest.

It is often doubtful, however, whether the child welfare order made by a court in the first province has effect in, or can be recognized by the courts of, the second. (See for example In the Matter of an Inquiry under Part 2 of the Child Welfare Act concerning the child, B.J., Fitch Prov. Ct. J, Alberta, September 15th, 1980.) If the second province does not recognize the order, and if the child is neglected or in need of protection, care or supervision (as is likely to be the case), the only sure way for the child welfare authority in the second province to obtain authority to provide it is to take steps under the law of the second province to have the child declared neglected or in need of protection and committed to the care of the authority, a procedure which is likely to be costly, time-consuming, upsetting, offensive and unnecessary.

Several of the provinces operate under an inter-provincial agreement under which the second or "receiving" province assumes responsibility for the maintenance costs of care and supervision of the child and under which, at least inferentially, the "receiving" province is authorized by the first or "guardian" province to carry out the care and supervision originally undertaken by the "guardian." The doubt about the legal validity in the second province of the order made in the first, however, calls in question the validity of the delegation of any power or authority granted by the order or by the statute upon which it is based, that doubt has been becoming acute.

Some provinces have legislation providing for recognition of extra-provincial orders conferring *full* parental rights and responsibilities upon anyone other than a parent of the child. For example, s. 22 of the Alberta Child Welfare Act reads as follows:

> 22(1) When, by an order of a court in any other province or in any state or country, full parental rights and responsibilities in respect of a child have been absolutely and for all purposes legally

vested in a person, organization, province, state, country or legal representative thereof, other than a parent of the child, the order has the same force and effect in Alberta as if it had been made under this Act and until further order under this Act.

(2) A statement, consent or declaration made by anyone in whom parental rights and responsibilities have been vested as mentioned in subsection (1) has the same force and effect as it would have had if made by the parent or parents of the child.

Only in two provinces, New Brunswick and Quebec, does there appear to be legislation which will provide for the recognition of orders which confer less than full parental rights.

Upon inquiry being made by Alberta Social Services and Community Health, the child welfare authorities of several of the provinces indicated that they had encountered serious problems arising from this uncertain legal situation. They, and also some authorities who had not encountered serious problems, thought that uniform legislation on the subject would be useful. The Alberta Director of Child Welfare said that the present legal uncertainty causes the following problems:

(a) There is a reluctance to allow some children to leave the province even though this would be in the best interest of the child.

(b) There is a reluctance to intervene on behalf of children from other provinces without establishing a legal sanction to do so under the Child Welfare Act in Alberta.

(c) There is difficulty in interpreting to clients and others the effects upon a child's legal status when moving from one province to another.

(d) The courts are concerned about making an order for a child if the plan is for the child to leave the province.

(e) There are increasing instances of doubts about the legality of the "gentleman's agreement" between provinces regarding the provision of services for this group of children.

None of the child welfare authorities who replied was able to give statistical information about the frequency of the cases in which problems arise, but the Alberta Director said that his branch's statistics indicated that as of September, 1981, there were 109 permanent wards of Alberta residing in other provinces and the territories and that there were 211 children in Alberta who were permanent wards of other provinces and the territories. He thought that the number of temporary wards would be less than the number of permanent wards for both

categories. The statistics suggest that the number of children involved is significant, and we think that there is a need for uniform legislation providing for the recognition by one province of child welfare orders made in another, and for enabling the child welfare authority in the recognizing province to exercise the powers and authorities granted by the first. (We understand that immigration laws and requirements obviate any similar problem with children moving into and out of Canada.)

3. *The proposed solution*

a. *Nature and location of proposed uniform legislation*

On the face of it, the problem of the itinerant child under the care of a child welfare authority appears to be similar to the problem of the itinerant child under the care of one parent or of another individual. The latter problem is dealt with by the Uniform Extra-provincial Custody Orders Enforcement Act and also by the Uniform Custody Jurisdiction and Enforcement Act which the Conference adopted in 1981. Some different considerations, however, apply to children under the care or supervision of child welfare authorities. Uniform custody legislation is designed to ensure that a custody dispute is resolved by the courts of the jurisdiction with which the child is most closely connected. The proposed uniform child welfare legislation would be designed to allow two co-operating child welfare authorities to ensure that the child is cared for in the place and by the authority in and by which the necessary care of supervision can best be given. On the other hand, similar considerations apply in child welfare cases. The uniform child welfare legislation, like the uniform custody legislation, should attempt to ensure recognition by one province of a child welfare order granted in another, and the criteria by which courts should decide whether to exercise jurisdiction or to refer the case to other courts are much the same. We think that, if the Conference decides to move towards the adoption of uniform legislation of the kind we suggest, it should settle the kinds of provision which the uniform child welfare legislation should contain and leave it to the drafter to decide whether it should be included in the Uniform Custody Orders Enforcement Act or in a separate Uniform Act.

b. *Application*

The uniform child welfare legislation would apply to all orders in favour of child welfare authorities. It would apply to an order clothing the child welfare authority with all the powers of a parent or guardian, and it would apply to an order merely giving the child welfare authority some power of supervision, and it would apply to the various kinds of orders which might be made between those extremes.

The legislation would provide only for recognition of an order made in another province (in which term we include the territories, as does the Uniform Interpretation Act); it would not apply to orders made outside Canada. It seems to us that each province should be willing to concede that the courts of the others are as likely to have acted properly as are its own courts and should be willing to grant automatic recognition of such orders in cases in which recognition is in the interests of children.

c. *Where the powers granted in Provinces A and B are substantially similar*

For convenience we will refer to the province in which a child welfare order is made as "Province A" and we will refer to the province to which a child is removed as "Province B."

(a) *Recognition of order and delegation*

In many cases, the powers and authorities which the Province A order grants to the Province A child welfare authority are substantially similar to the powers and authorities which a Province B court would be empowered to grant to a Province B child welfare authority. In these cases Province B should give full recognition to the orders.

The uniform legislation should therefore provide:

(1) that if the powers and authorities granted to a Province A child welfare authority by the Province A order are substantially similar to those which the Province B courts could grant to a Province B child welfare authority, Province B courts must recognize:
   (i) the Province A order.
   (ii) a delegation by the Province A child welfare authority to the Province B child welfare authority, if accepted by the latter, of some or all of the powers and authorities granted by the Province A order to the Province A child welfare authority.

(2) that the Province B court has jurisdiction to make orders under the Province B law enforcing the Province A order. The enforcement orders would be made in favour either of the Province A child welfare authority (if there has been no delegation) or in favour of the Province B child welfare authority (if there has been delegation, which is the usual case). (It will be noted that implicit in this province is the recognition

by the law of Province B of the extra-provincial personality of the Province A child welfare authority.)

(b) *Application of time requirements*

If the Province B law would impose a time limit upon a substantially similar child welfare order granted under it, the same time period would commence to run when the child comes under the authority of the Province B child welfare authority, that is to say, when there has been both delegation and physical entry. If the child remains under the authority of the Province A child welfare authority, the time would run from physical entry.

(c) *Extension, termination and variation*

If an application is made to either the Province A court or to the Province B court for an extension of the child welfare order, for a review or termination or the child welfare order, or for a variation by reason of changed circumstances, the court applied to should decide whether, having regard to the child's then habitual residence, the relative closeness of the child's connections with Provinces A and B, and the availability of evidence, it is appropriate for the Province B courts to exercise jurisdiction, or for the Province A courts to do so. If it is decided that the Province A court is the appropriate court, the Province B court should decline jurisdiction except for such interim orders as are necessary for the protection of the child, and vice versa. If it is decided that the Province A court is the appropriate tribunal, the application would have to be made to the Province A court, which would make such further order as is appropriate, and that order would also be recognized in Province B.

d. *Where the powers granted in Provinces A and B are not substantially similar*

If the Province A child welfare order is not substantially similar to an order which could be granted under the laws of Province B to the Province B child welfare authority, the Province B court should not recognize the order as such, but should give it such recognition as is not inconsistent with the laws of Province B. It would do so by making a new order in favour of the Province B child welfare authority which would be as similar as is practicable to the Province A child welfare order. The Province B child welfare order would have effect for Province B only and, except for the purposes of Province B, would not supersede the Province A child welfare order. If at a later date it is appropriate for the courts of Province B to assume jurisdiction having regard to habitual residence, closeness of connection and availability of evidence, the courts of Province B would have power to do so, and

when they have done so, they would be able to make an order which would supersede the Province A child welfare order.

e. *Acceptance of Province A order and evidence*

The legislation should provide that the courts of Province B should recognize the Province A order as establishing the facts and the best interests of the child to the same extent as a Province B order made at the same time would do. The legislation should also allow the Province B court to receive and accept transcripts of the evidence which was before the Province A court when the Province A child welfare order was made.

f. *Protection of child welfare authorities*

The foregoing is based upon court recognition of extra-provincial child welfare orders. The legislation should allow the Province B child welfare authority to accept a delegation and act upon it without the need of a court application, leaving the court application to be made if the Province B child welfare authority, the child, or someone else with a sufficient interest, wishes to bring the matter to court.

The legislation should therefore provide that the Province B child welfare authority, acting in good faith upon a purported delegation of powers and authorities from the Province A child welfare authority would be immune from claims based on the invalidity of the delegation.

g. *Conclusion*

The solution which we have proposed has the following disadvantages:

1. It is somewhat complex.
2. It would require a letter from the Province A child welfare authority to the Province B child welfare authority setting out the scope of the delegation, and an acceptance of the delegation by the Province B child welfare authority.
3. The Province B child welfare authority would have to decide whether or not the powers and authorities granted by the Province A order in conjunction with the Province A law are or are not "substantially similar" to powers and authorities which a Province B court could grant to a Province B court under the Province B law.

We think, however, that it is the most practical solution and that the difficulties can be worked out. We therefore recommend that the Conference approve it in principle with such improvements as may be

approved at the meeting. The next step would be the preparation of a draft Act.

D.C. ELLIOTT
E.J.F. GAMACHE
W.H. HURLBURT
T.W. MAPP
P.J. PAGANO

July 5, 1982

APPENDIX O

(See page 32)

REPORT ON A UNIFORM FRANCHISES ACT

BACKGROUND

At the 1981 Uniform Law Conference, this Committee undertook to analyze some of the possible legislative schemes relating to franchising. See Annex III to this report. The Committee proposed to review 4 alternatives:

1. Registration
2. Full disclosure
3. Regulation of Substantive Terms
4. A combination of the above.

Note that alternatives 1 and 2 are the main schemes and that alternative 3 could stand on its own or be included in either alternative 1 or 2.

Although last year's Committee report dealt with why franchising regulation was necessary, the Committee wishes to provide the following factors that have been identified as creating the atmosphere where abuses were able to flourish:

1. The assumption of significant financial and personal risks by prospective franchisees when entering into a franchise business;

2. The franchisee's relying on the franchisor's purported expertise and stability;

3. The informational imbalance between the parties pre-sale negotiations so that during the period prospective franchisees often never obtain complete or accurate information about the vital aspects about the proposed relationship of the risks being assumed;

4. The absence of a ready and reliable source of information for the prospective franchisee about vital aspects of the proposed franchise business.

Inasmuch as the franchise relationship

(a) is one in which the franchisee relies heavily on the franchisor's expertise,

(b) is subject to continuous franchisor control and supervision, and

(c) depends on the franchisor's performance for its own success,

the franchisee's need for complete and accurate pre-sale information is apparent.

Prior to franchise legislation, the existing laws as far as the U.S. experience is concerned were inadequate with respect to franchisees' claims that they had been misled. A franchisee was often unable to meet the burden of proof required. In some U.S. jurisdictions there was an attempt to argue that franchising should be governed by securities law, however, most courts were unwilling to find that the typical franchise was a security and therefore the franchisees were unsuccessful. It was these arguments, however, that led to some franchising legislative schemes being similar to legislative schemes relating to securities.

For your information Annex I contains a brief description of some of the provisions that have been enacted in the U.S. on franchising.

Business Opportunity Ventures

Although in last year's report it was suggested that business opportunity ventures not be an area for the Uniform Franchises Act, the Committee feels it necessary to briefly explain what business opportunity ventures are. Some jurisdictions in the U.S. have legislation dealing only with business opportunity ventures and they do not regulate franchises.

The F.T.C. guide describes the most common types of business opportunity ventures as follows:

> The most common types of business opportunity ventures or distributorships, rackjobbing and vending machine routes. In these ventures, the franchisor puts the franchisee into a business of distributing certain goods or services, usually those of well-known third party (such as film, juice, pantyhose, etc.), by providing or suggesting a supplier for the goods and representing that the franchisor will establish retail accounts or place vending machines or rack displays in suitable locations. In some cases, the franchisor obtains the services of another person to secure accounts or locations. For example, the franchisor may represent that he may secure 10 gasoline stations to be retail outlets for automotive after-market products (e.g., oil filters, gas additives, etc.) or place vending machines in 10 locations. The franchisee of a business opportunity venture is required to pay a fee or purchase goods or equipment (such as vending machines or display racks), in order to participate in the business opportunity offered by the franchisor.
>
> The Commission expects that most business opportunity ventures will be covered by the rule. (44 Fed. Reg. 49, 968 (1979)).
>
> In some jurisdictions a "business opportunity venture" is defined as

an opportunity to offer, sell or distribute goods or services supplied by the offerer when

1. there is an initial required consideration of more than $500;

2. the offeror has represented that the investor is likely to have profits in excess of his initial investment;

3. the offeror has represented that locations will be provided or assistance will be given in finding locations for the use or operation of the business opportunity.

WHAT CONSTITUTES A FRANCHISE

Generally there are 3 elements as to what constitutes a franchise:

1. Payment of a fee (usually referred to as a "franchise fee");

2. The use by one party of another's tradename or symbol;

3. Some continuing interest or control by the granting party.

In various jurisdictions those elements may vary in scope.

Payment of a Fee

The fee may be for any one or more of the following:

(a) payment or committment to pay a franchise fee is required as a condition of obtaining or commencing business
(b) $100 minimum franchise fee
(c) no minimum with respect to the franchise fee
(d) valuable consideration
(e) some jurisdictions have no requirement with respect to franchise fees.

The concept of "franchise fee" is used in Alberta and in many other jurisdictions.

What is a franchise fee? Generally a "franchise fee" is a fee or charge that a franchisee is required to pay or agrees to pay for the right to enter into a business under a franchise agreement. In Alberta the definition of "franchise fee" is as follows:

> "Franchise fee" means any consideration exchanged or agreed to be exchanged for the granting of the franchise agreement and, without limiting the generality of the foregoing, the consideration may include
>
> (i) any fee or charge of the franchisee or sub-franchisor is required to pay or agrees to pay,

(ii) any payment for goods or services,

(iii) any service which the franchisee or sub-franchisor is required to perform or agrees to perform, or

(iv) any loan, quarantee or other commercial consideration exigible from the franchisee or sub-franchisor at the discretion of the franchisor or sub-franchisor for the right to engage in business under a franchise agreement,

but the following are not franchise fees:

(v) the purchase of or agreement to purchase goods in a reasonable amount at the current wholesale market rate;

(vi) the purchase of the agreement to purchase services in a reasonable amount at the current market rate;

(vii) the payment of a reasonable service charge to the issuer of a credit card by an establishment accepted or honouring the credit card;

Under the "F.T.C. rule" the required payment element is qualified by the rule's provision that the total payment made before or within the first 6 months of the franchisee's operation must be $500 or more.

The rule's requirement that $500 be actually paid prior to the start of the 7th month of operation appears to be a deliberate device to exclude application of the rule to franchises that do not involve a significant front-end investment. The language of both the rule and the guide states that franchisors who can afford a 6-month delay in receiving required payments exceeding $499 will avoid the coverage of the rule.

The Use By One Party Of Another's Tradename Or Symbol

For example it may apply only to

(a) goods or services identified by trademark;

(b) operations under a name using trademark;

(c) operations substantially associated with a trademark;

(d) license the use of a trademark;

(e) goods or services substantially associated with trademarks;

(f) businesses using trademarks;

or there may be no requirements with respect to trademarks.

Some Continuing Interest Or Control By The Granting Party

For Example:

(a) a community of interest test is set out. Generally Community of Interest means a continuing financial interest between a franchisor and franchisee in the operation of the franchise business;

(b) marketing plan where there is

i. significant control over method of operation,

ii. marketing plan or a system prescribed in substantial part,

iii. a marketing plan prescribed or suggested in substantial part,

iv. marketing plan prescribed in substantial part,

v. significant assistance and method of operation,

vi. no requirement with respect to a marketing plan.

In Alberta the definition of a franchise also contains those elements, however, it seems as though the application is much broader. In the United States, the "F.T.C. Rule" provides that if a business is considered to be a franchise it must contain the 3 elements referred to above; however, in Alberta only 2 elements are necessary. First of all there must be a franchise fee (see franchise fee definition) and that fee must be in consideration for any one or more of the following:

A. The right to engage in the business of offering, selling or distributing the goods manufactured, processed or distributed or the service organized and directed by the franchisor,

B. The right to engage in the business of offering, selling or distributing any goods, services under a marketing plan or system prescribed or controlled by the franchisor,

C. The right to engage in a business which is associated with the franchisor's trademark, servicemark, tradename, logotype, advertising or any business symbol designating the franchisor or his associates,

D. The right to engage in a business in which the franchisee is reliant on the franchisor for the continued supply of goods or services, or

E. The right to recruit additional franchisees or sub-franchisors.

In some U.S. jurisdictions including the "F.T.C. Rule" more than one of the above is necessary while in Alberta only one in conjunction with a franchise fee is the rule. Some U.S. states have a similar definition as Alberta.

Exemptions and Exclusions

A franchisor can attempt to get around the "F.T.C. Rule" and other state laws by trying to set out his proposals so that they do not come within the definition of a franchise. In addition to attempting not to be caught by the definition of franchise there are a number of business exemptions or exclusions:

A. The rule exempts "fractional franchises" which are defined as "any continuing commercial relationship . . . in which the person

described therein as the franchisee or any of the current directors or executive officers thereof has been in the type of business represented by the franchise relationship for more than 2 years and the parties anticipated, at the time the agreement establishing a franchise relationship was reached, that the sale arising from the relationship would represent no more than 20% of the sales in dollar volume of the franchisee". (Alberta does not contain this exemption).

B. The rule also exempts arrangements where a retailor leases premises from another for the purpose of selling his own goods and services there on the same premises.

C. The rule exempts those arrangements in which the total of the payment described in the definition of franchise made during a period from anytime before to within 6 months after commencing operation of the franchisee's business, is less than $500.

D. Purely oral arrangements which lack any written evidence of a material term of a franchise arrangement are also exempted.

E. In addition, the rule excludes from the definition of franchise those relationships created solely by an employee-employer or partnership arrangement, membership in a cooperative association, certification of testing services, or an agreement between a licensor and licensee in which a single licensee is granted the right to use the trademark.

In addition, there are statutory exemptions:

(a) there is a statutory exemption if

(i) the franchisor has a net worth on a consolidated basis according to its most recent audited financial statement of not less than $5,000,000 or of not less than $1,000,000; if the franchisor is at least 80% owned by a corporation which meets the requirements of having a net worth of $5,000,000; and

(ii) the franchisor has had at least 25 franchisees conducting business at all times during the 5 year period immediately preceding the trade have conducted business which is the subject of the franchise continuously for not less than 5 years immediately preceding the trade or is at least 80% owned by a corporation which meets the above requirements; and

(b) the director may when in his opinion the action is not prejudicial to the public interest, order, subject to any terms and conditions he may impose, that any trade in a franchise is exempt from

the Act or contents of a statement of material facts or provisions of the regulations specifying the contents of the prospectus. Note: With respect to the statutory exemption he is exempted from providing a prospectus. A prospectus is used in the registration scheme but he must still provide a statement of material facts to the prospective franchisor.

Remedies

In addition to the quasi-criminal offences there are civil and consumer remedies that can be made available to a plaintiff. Some of these offences and remedies follow those under securities legislation. Some Acts also permit franchisees to bring private civil actions for damages against the franchisor's sales person or other participants who have violated the Act. A franchisee may be given the right to rescind an unlawful franchise sale to recover whatever he has paid plus interest. Further, the franchisor, franchise broker, sales person and any other person who participated or aided in making the sale could be jointly and severally liable. Like the securities laws, liability on controlling persons of the franchisor could be made liable. Thus, personal liability may be imposed on officers and directors of corporate franchisors.

EXISTING REMEDIES

Currently, the Combines Investigation Act provides some form of enforcement power. The Act deals with 2 types of practices. Firstly, the Restrictive Trade Practices Commission has power to review:

(a) refusals to supply,
(b) exclusive dealing,
(c) market restriction,
(d) tied selling;

also the following practices are subject to criminal prosecution:

(a) price discrimination,
(b) promotional allowances,
(c) price maintenance,
(d) pyramid selling,
(e) referral selling, and
(f) misleading advertising.

Civil recovery is also possible under the Combines Investigation Act in that the consumer (franchisee) may bring an action for the

recovery of damages due to the failure of the accused to abide by an order of the Commission or in respect of the conduct of a person who has committed an offence under the Act.

FULL DISCLOSURE

Many states have adopted the full disclosure scheme for regulating franchises. The Federal Trade Commission in the U.S. prepared the "F.T.C. Rule". In discussing full disclosure as a legislative scheme the F.T.C. Rule will be used as an example.

Summary Of The Rule

(A) Basic structure of the rule — the rule applies with equal effect to all franchisors and franchise brokers. It applies to sales of franchises and sales of interests in franchises. Generally the rule requires (this is true of any proposed disclosure scheme) franchisors and franchise brokers to furnish prospective franchisees with

(a) the basic disclosure document,

(b) a copy of the franchisors standard franchise agreement, and

(c) other related agreements.

The F.T.C. requirement headings for disclosure are set out in Annex II.

The "F.T.C. Rule" also deals with oral or written claims regarding actual or potential franchise sales, income or profit. A separate document is needed to establish these particular claims. Claims to prospective franchisees of potential earnings, past earnings performance, or earnings claims made in the media must meet certain conditions. There must be a reasonable basis for the claim and the franchisor must have the evidence to support this claim in his possession. In addition, the claim must be relevant to the prospective franchisee's geographical location. If these conditions are met, earnings claims may be made, provided that the franchisee receives a separate disclosure statement providing information about the earnings claimed. Alberta legislation does not specifically deal with this, to any special degree, however, it could be dealt with under the public interest provision.

Finally the franchisor must furnish the prospective franchisee with a completed copy of the final draft of the franchise agreement and other related agreements at least 5 business days before the date of their execution. (Some jurisdictions provide different time periods.)

REGISTRATION

Certain North American jurisdictions, including the Province of Alberta, have franchise legislation requiring registration of a franchisor with a regulatory body. These jurisdictions have a variety of requirements in addition to the full, true and plain disclosure necessary under such pieces of legislation as the "F.T.C. Rule".

Usually the franchisor is required to register as an entity and registration is also required of the disclosure document or prospectus to be given to prospective franchisees. Generally, annual renewal is required, with of course a less stringent review of the disclosure document where no material changes in the affairs of the franchisor have occurred subsequent to the prior registration.

Registration legislation usually delineates specific grounds for refusal of registration. In addition, often a general "public interest" ground for refusal of registration is present. An appeal of a decision to refuse registration would go to an appointed tribunal (for instance, in Alberta to the Alberta Securities Commission) or directly to the courts.

The basic disclosure document which would be given to prospective franchisees under a full disclosure regime is submitted to the regulatory body prior to its distribution to the potential market. The disclosure document is reviewed by the regulatory body and modifications requested in the event disclosure of information is not adequate. The regulatory body enforces its requests for alternatives via potential refusal of registration.

As noted, in most jurisdictions the disclosure document has a renewable one-year life span. In the event material changes occur in the affairs of the franchisor, amendments to the disclosure document are required to be filed.

In Alberta, registration of a franchise salesperson is also required. Under this aspect of the legislation, the Alberta Franchises Act also regulates desirable limits to advertising. A common element to all jurisdictions includes a ban on the franchisor making a representation that the regulatory body in any way "approves" the merits of the franchise investment.

Enforcement Powers

A prime advantage of registration legislation over full disclosure legislation is that enforcement action can and often is initiated by the regulatory body. The gamut of enforcement alternatives begins with a vestiture of investigative powers in the regulatory body.

In Alberta, the recurrence of detected violations can be prevented by an application by the Securities Commission to the Court of Queen's Bench of Alberta for an order restraining a franchisor from contravening the Act.

Criminal prosecution is also possible for violations of registration legislation; monetary penalties are a possible alternative. Performance bonds and indemnity bonds may be required of a franchisor with forfeiture to follow default.

Potential civil remedies include withdrawal from the trade agreement, rescission of the agreement or right to sue for damages sustained from a breach of the agreement.

Jurisdictions

In Canada, two provinces presently have franchise legislation on the books. Both of these provinces, Alberta and Quebec, chose the disclosure and registration route although in the case of Quebec, regulations are not yet in place to allow the legislation to function.

In the United States, 36 of 52 states now have some form of legislation bearing directly on the franchise industry. Although it is difficult to obtain authoritative up-to-date information overviewing franchise legislation status in all 52 jurisdictions, it does appear that approximately 13 of the above noted 36 states require a minimum of disclosure plus registration. Included in these 13 are virtually all states possessing major commercial status.

REGULATION OF SUBSTANTIVE TERMS

Distinct from legislation requiring disclosure or registration or both is legislation designed to control the ongoing relationship between the franchisor and franchisee. This type of regulation of franchising is a recent development in the U.S. The scope of such legislation can be wide indeed. It may include the regulation of termination, renewal and assignment of franchise rights and it may include such matters as regulating tie-in arrangements between the franchisor and franchisee, provisions prohibiting the franchisor from discriminating among franchisees in charge for royalties, goods, services, advertising and so forth. Prohibitions on franchisors from selling products or services for more than a fair or reasonable price or prohibitions on a franchisor from competing with or granting franchisees to compete with a franchisee in a particular market area.

There are a number of underlying policy arguments that can be

made both in favour of the franchisor and in favour of the franchisee in connection with attempts to regulate the franchise relationship.

From the franchisor's point of view, often he has invested considerable time effort and capital with the view to establishing a reliable reputation for his product among consumers. A below-standard franchisee could potentially destroy that reputation among members of the public. To protect his position and that of the franchisor's other franchisees a franchisor must have some power to terminate in certain situations, otherwise it becomes a formidable task for the franchisor to maintain reliability with respect to his products or services throughout the franchise system.

It further may be argued on behalf of the franchisor that regulation prohibits his ability to maximize his profit. A person considering promoting an idea through franchising may ultimately decide against such a move on this basis. The consuming public therefore may be denied easier access to certain products or services which in the absence of regulation might otherwise be available to them through a franchise system.

Moreover, the public is well served by the control of substandard franchisees by the franchisor from the point of view that they would not be misled as to the value and reliability of products or services. It is fairly easy to conceive that a substandard franchisee may in the eyes of the public reflect upon the franchise system as a whole, perhaps unjustifiably.

From the franchisee's point of view a favourable argument can be made for statutory regulation of the power of the franchisor to control a franchisee. He as well, invests considerable capital, time and effort in establishing and building a business. In the absence of substandard performance, to allow a franchisor to, for example, terminate an agreement seriously disrupts the legitimate expectations of the franchisee. In addition, the franchisee is generally less financially powerful than the franchisor and often therefore lacks the bargaining power to protect his interest.

With respect to the notice requirement, legislation may also treat termination and non-renewal differently. Notice may be required before termination only and not before non-renewal. The rational for such different treatment may be that non-renewal is a decision of the franchisor not to extend its contractual relationship with the franchisee beyond the expiration of the existing contract whereas termination involves the immediate end to a relationship even though the

contract has not expired. The latter circumstance therefore may require some form of advance notice. It may be argued however that a franchisee may well contemplate that he could continue his relationship with the franchisor as long as his performance was satisfactory. Therefore under these circumstances, notice would be required in both the non-renewal of, and termination of, a franchise agreement.

In connection with a consideration of regulation of non-renewal and termination clauses there may be a requirement for "good cause" to justify a decision not to renew or to terminate. The legislation may dictate what performance is satisfactory performance.

1. Such a definition may be framed in somewhat ambiguous language leaving it to the courts to decide each case on its own merits.

2. The legislation may attempt to provide for a comprehensive definition of good cause in an attempt to avoid litigation. However invariably some of the terms that one finds in such a definition would still contain ambiguities which will necessitate some form of interpretation and hence still litigation.

3. The legislation could provide for an open ended definition that essentially is a general description of what constitutes "good cause" but also included certain prescribed behaviour.

In addition, there may be a provision that would allow a franchisee the opportunity to cure any alleged defects that might otherwise be "good cause" for non-renewal or termination. Such a provision would allow a time period in which such curing of defects could occur. However, in addition, there may be a provision that immediate termination or non-renewal without an opportunity to cure could occur in such circumstances as bankruptcy, abandonment of the franchise, seizure of assets and the like.

Where a franchisor is permitted to end its relationship with a franchisee there may be statutory requirements for repurchase of the franchisee's inventory. Such a provision would have regard to what circumstances would trigger such a requirement, the extent of inventory covered, valuation and whether the provision applies to termination or non-renewal or both.

Beyond the statutory requirement for termination or non-renewal other provisions governing the relationship between the franchisor and franchisee may be considered.

1. There may be a provision regulating tie-in arrangements between the franchisor and the franchisee. This may take the form of prohibit-

ing franchisors from requiring a franchisee to purchase goods or services only from the franchisor or his suppliers unless such is reasonably necessary to maintain control over the nature and quality of goods or services.

2. In addition there may be provisions prohibiting franchisors from discriminating from franchisees in the charges respecting royalties, goods, services, advertising and so forth unless reasonably justifiable.

3. There may be prohibition on a franchisor from selling products or services for more than a fair or reasonable price or from competing with or granting franchises to compete with a franchisee in a particular market area.

Currently the Combines Investigation Act (Canada) could apply to the situations set out in 1-3 above.

Recommendation

The information in this report is an attempt to provide some information as to what is involved in franchise legislation. The goal of franchise legislation is to assure that the franchisee, *before he is contractually obligated*, receives relevant information on the franchisor, the franchise business and the cost in terms of the franchise. Both the registration and disclosure alternatives attempt to achieve this goal. In preparing the report it became evident that uniformity in the type of scheme (registration or disclosure) was not as relevant as uniformity in the information to be disclosed. Either system can be costly to the franchisor and ultimately the prospective franchisee and consumers of his product or service, if the jurisdictions do not adopt uniform disclosure documents. To the extent that each jurisdiction adopts varied rules or regulations, the costs of compliance will correspondingly increase.

It is recommended that the committee prepare a draft Act and comments that would include all relevant matters relating to the uniformity of information to be disclosed except the mechanism for its review. In addition, for the purposes of discussion at next year's meeting, the proposed draft would include provisions relating to the regulation of substantive terms.

Respectfully submitted

Peter J. Pagano
Marie-Jose Longtin
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Annex I

1. State registration requirements.
2. Oral franchise contracts covered by state laws.
3. Sales by a franchisor of an area franchise are specifically covered by state statutes.
4. State escrow or surety bonding requirements.
5. Sellers of franchises must maintain complete books, records, and accounts of all sales.
6. Prohibitions against inhibiting a franchisee's right to join a trade association.
7. Prohibitions against discrimination between franchisees with (exceptions).
8. Prohibitions against terminating or refusing to renew a franchise except for good cause (with exceptions).
9. Requirements that franchisor, at time of termination or non-renewal, compensate franchisee for fair market value of various items.
10. Prohibitions of statements that the state has approved, recommended, or in any way has passed on the merits of the franchise.
11. Advertisements must be filed with the state a certain time period before publication.
12. Prohibitions on use of an advertisement which has been disapproved by the state.
13. Prohibitions of fraud, misrepresentations, or omissions in registration application.
14. Prohibitions of fraud, misrepresentation, or omission in offers and sales of franchises.
15. Provisions for individual liability of violators.
16. Provisions for a private cause of action.
17. State administrative enforcement powers; e.g., administrative orders and investigations.
18. Provisions which define "sale" or "offer" to include contracts to sell and disposition of an interest in a franchise.
19. Time period for making of disclosures.

20. Large franchisor exemptions.
21. Exemption where franchisee invests over $100,000.
22. Exemptions for petroleum companies, with conditions.
23. Exemption for certain motor vehicle franchises.
24. Exemption for lessors of motor vehicles, with conditions.
25. Exemption or exclusion for the purchase or lease of supplies, fixtures, or real estate at fair market value if necessary to the franchise business.
26. Exemption for disclosure with regard to a franchisee who resides in a foreign country.

Annex II

DISCLOSURE REQUIREMENTS

1. Identifying information about the franchisor.
2. Business experience of the franchisor's directors and key executives.
3. The franchisor's business experience.
4. Litigation history.
5. Bankruptcy history.
6. Description of the franchise.
7. Initial funds required to be paid by the franchisee.
8. Recurring funds required to be paid by the franchisee.
9. Persons affiliated with the franchisor.
10. Franchisee obligation to purchase or lease.
11. Revenues received by the franchisor in consideration of purchases by a franchisee.
12. Financing arrangements.
13. Restrictions placed on a franchisee's conduct of its business.
14. Personal participation required of the franchisee.
15. Termination, cancellation and renewal of the franchise.
16. Statistical information about the number of franchises and their rate of termination.

17. Site selection.

18. Training program.

19. Celebrity involvement with the franchise.

20. Financial information about the franchisor. In most cases, this financial information must be audited.

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Annex III

Franchising Legislation

Object

1. The object of this report is to present in broad terms the case for uniform legislation relating to franchises, to make a preliminary recommendation as to the scope of that legislation, and to recommend that Alberta be asked to prepare, in cooperation with other jurisdictions that may wish to participate, an in-depth policy analysis together with a draft Uniform Act.

Background

2. The topic of franchises was raised originally by Canada at the 61st annual meeting of the Uniform Law Conference held at Saskatoon in August 1979. The relevant abstract from the proceedings reads as follows:

"The duly submitted request of the Canada delegates to have added to the agenda the subject of Commercial Franchises was presented by Mr. Fred Gibson and was considered having regard to the letter dated 18 July 1979 from Mr. A. M. Guérin, Assistant Deputy Minister, Department of Industry, Trade and Commerce, Ottawa, to Mr. Gibson (Appendix H, page 106).

The following resolution was adopted:

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

3. A report was prepared by Quebec and presented at the 62nd annual meeting held at Charlottetown, by Mr. Alain Fredette, legal counsel with the "Commission des valeurs mobilières du Québec." The Uniform Law Section received the report and referred it to Alberta, Canada, and Quebec "for further study of the subject and report to the next annual meeting with a draft Uniform Act if such should be thought appropriate". Moreover, it was thought that some basic decisions had first to be made by the Uniform Law Section before preparing a draft Uniform Act.

4. In its report dated June 1st, 1971, to the Ontario Minister of Financial and Consumer Affairs, the Minister's Committee on Franchises dealing with referral sales, multi-level or pyramid sales, and franchises, (the Grange Committee) posed the question of the need for legislation in the following terms:

> "Before even considering the type of legislation, we must determine whether any legislation is necessary. More than one witness beseeched us not to burden their lives further with regulations. They were conducting themselves and their businesses honourably, and for them and their companies, no legislation was necessary. Counsel for another franchisor emphasized that legislation is like cement, and that what may be desirable for some, and at least innocuous for the rest now, may be undesirable and burdensome in the future. We sympathize with and respect both views, but we believe that the evils cry out for some control. It shall be our purpose to recommend controls that are the least burdensome and the most flexible, while at the same time being consistent with the suppression of the evils of the system."

5. Since the report was made in 1971, current information must first be assessed before determining whether the evils referred to in the above report still exist and would warrant a Uniform Act. One type of evil to be considered is the unethical or fraudulent behaviour of certain franchisors. In this regard, at the request of the Federal Department of Industry, Trade and Commerce, the Commercial Crime Branch of the Royal Canadian Mounted Police have canvassed their field units as to the number of complaints received in the past two years respecting franchising. The report of the Commercial Crime Branch, in the form of a letter dated July 31, 1981, discloses that roughly 280 com-

plaints were received throughout Canada during that period and that the Northwest Territories were the only jurisdiction which had not received such complaints. Of the 280 complaints, only 34 were related to franchises originating out of the United States. The survey included municipal police departments but as a result of file classifications within a number of those departments, in many instances cases involving fraudulent franchises could not be identified. The Commercial Crime Branch was also unable to obtain statistics from the Ontario Provincial Police and from the Quebec Provincial Police due to time constraints. It also mentioned the possibility that in certain areas victims might have been advised to initiate civil proceedings. The figure of 280 complaints quoted above is far therefore from being comprehensive. The report discloses that in Alberta the general public has become familiar with the province's franchise legislation with the result that complaints have been minimal.

6. The Federal Department of Industry, Trade and Commerce receives also occasional complaints from franchisees. Officials involved have informally expressed the view in light of the circumstances surrounding those complaints that many questionable franchise dealings by unethical or incompetent franchisors go unknown to authorities due to lack of knowledge on the part of the victims on where they might turn for help.

7. What precedes however is not the determining factor in support of uniform legislation relating to franchises. One could indeed argue that there is already in place legislation which deals with such occurrences although such consideration would be of little consolation to small investors who have lost their life savings. It would seem, in light of the RCMP report, that the Alberta legislation, even though it is not primarily designed for that purpose, has nonetheless proven to be an effective deterrent against unethical or fraudulent behaviour. Prospective franchisees have a place to turn for advice and authoritative information material is available. The main policy objective however of the Alberta Franchises Act was to provide prospective franchisees with the same benefits and disclosure of information as prospective investors were given under legislation relating to securities. Another objective was to extend self-help to prospective franchisees by providing a cooling off period before the coming into effect of the agreement and by providing certain rights in addition to existing civil and contractual rights.

8. Franchising has become big business in Canada. Information gathered by Statistics Canada shows that there were in 1980, a total of

21,075 franchise establishments in Canada with sales estimated at 15.1 billion dollars. Not included in those figures are gasoline service stations, soft drink bottlers, car dealers and real estate offices. In that same year there were in excess of 500 firms offering franchises for sale. The growth of the industry and the need to promote the participation of Canadian franchisors therein explain the federal interest in this topic. That concern was thus expressed in Mr. Guérin's letter (Appendix A) of July 18, 1979:

> "Non-uniform legislation in Canada will tend to favour the larger, well financed franchisors in Canada, which are mainly owned and controlled by U.S. interests. The smaller Canadian franchisors, already having difficulty in competing with their larger U.S. rivals, will be placed at a considerable competitive disadvantage; they are less able to bear the legal costs and the burdens on the time of key executives required to comply with differing legislation in a number of provinces.
>
> "Given the existence of legislation in one province and the stated intentions of some of the other provinces, in addition to the U.S. experience, the Department of Industry, Trade and Commerce would favour the development of a 'model' franchise regulatory act by the 'Conference of Canadian Commissioners on the Uniformity of Law in Canada'. This model act would then constitute a means of encouraging uniformity amongst the provinces which subsequently decide at some later date to enact legislation affecting franchising."

9. The abstract from the Grange Committee quoted above referred to possible objections to legislative action on the part of certain franchisors. That attitude of Canadian franchisors appears however to have changed since 1971 with regard to legislation dealing with franchises. There is now in existence the Association of Canadian Franchisors (Association canadienne de franchiseurs), a trade association with over one hundred members representing a wide variety of industries who use the franchising method of distribution. Among the members are Shopper's Drug Mart, Macdonald's, St. Hubert Bar-B-Q, Century 21, Burger King, Country Style Donuts, St. Clair Paint and Wallpaper, IGA, Midas Mufflers, and Grandma Lee's. The Association, which has a Code of Ethics for its members, recognizes that self-policing by the industry cannot prevent abuses resulting from the sale of franchises to inexperienced investors by unethical or incompetent persons or organizations. There are indications that the Association would not oppose legislation of a "full disclosure" nature regulating the sale of fran-

chises. The Association has published a booklet "Investigate Before Investing" which contains the following statement:

> "The ACF has supported strongly the principle of full advance disclosure of relevant information to prospective franchisees. The ACF has for several years urged the enactment of a model federal franchise disclosure law which could be implemented by all provinces in the interests of legislative uniformity".

It is doubtful however whether it would wish governments to go further. The ACF has its headquarters at suite 1005-88 University Avenue, Toronto, Ontario M5J 1T9, tel. (416) 595-0022.

Legislative approaches

10. Should the Uniform Law Section agree that a Uniform Act relating to franchises be prepared, then it will need to decide on the legislative approach to be adopted. There are, basically, four distinct options open:

1. Full disclosure by franchisors to prospective clients of information about the franchisor, his business, his experience, the terms of the agreement and other relevant information;
2. registration with a government office or agency together with disclosure requirements;
3. regulation of all or certain substantive aspects of the agreement, especially its termination or renewal.
4. A combination of Options 2 and 3.

11. The first option — full disclosure — is that which has been adopted by the United States Federal Trade Commission through its trade regulation rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" which was promulgated on December 21, 1978 and which became effective on October 21, 1979 (16 C.F.R. No. 436). In the introduction to interpretive guides of that rule, the FTC explains it in the following terms:

> "In general, the rule addresses the problems of nondisclosure and misrepresentation which arise when prospective franchisees purchase franchises without essential and reliable information about them. To alleviate these problems, the rule requires franchisors and franchise brokers to furnish prospective franchisees with information about the franchisor, the franchisor's business and the terms of the franchise agreement in a single document ('the Basic Disclosure Document'). Additional information must be furnished if any claims are made about actual or potential earnings ('the

Earnings Claim Document'). Copies of the proposed franchise agreements also must be furnished. All disclosures must be made at prescribed times before any sale is consummated.

"The rule requires disclosure of important facts. It does not regulate the substantive terms of the franchisor-franchisee relationship. It does not require registration, approval or the filing of any documents with the Federal Trade Commission in connection with the sale of franchises."

12. The Provinces of Alberta and Quebec, the only jurisdictions in Canada having enacted franchising legislation, have adopted the second approach which calls for the registration of franchisors together with disclosure requirements. Some American states have also adopted that approach including California which has been at the forefront of the development of franchise legislation in the United States having enacted in 1970, a Franchise Investment Law which became effective on January 1, 1971.

13. Briefly, the Alberta legislation requires franchisors to register their offer of franchises by filing an application and a proposed offering prospectus with the Alberta Securities Commission. Large and experienced franchisors may be exempted from registration, but must nevertheless submit, in lieu of a prospectus, a Statement of Material Facts which discloses to prospective franchise purchasers information under some twenty-five headings. Registration of a prospectus or of a Statement of Material Facts has a renewable one-year life span and provision is made for amendments. Salesmen must also be registered on an annual basis. The Commission has extensive powers to demand any additional information which it considers necessary in the public interest to enforce the Act, including the power to deny or suspend the offer and sale of a franchise and the power to require franchisors to place in escrow pre-opening funds paid by franchisees. It is worthwhile pointing out that the Commission's approval to trade cannot be described as an endorsement of the franchise involved.

14. The Quebec Legislation, which has yet to come into force, is substantially along the lines of the Alberta one except that it is intended to apply also to franchises for which a fee is not required.

15. An example of the third legislative approach — the regulation of substantive elements of the contracts — is the law recently adopted by California under the title "California Franchises Termination Law". Under that law franchising contracts may be terminated for good cause which is defined to include, among others, violation of the

provisions of the contract, bankruptcy, failure to operate the business for a prescribed number of days, etc. The law provides also for non-renewal of the franchise agreement in certain circumstances.

Alternatives

16. Before assessing the above four options, the Uniform Law Section may wish to consider the possibility of deciding not to act and to let matters stand as they are. It could indeed be said in support of that position that the current situation does not justify further action and that existing remedies at law and public awareness of the problem are sufficient. On the other hand, one could successfully argue that the situation is not static and that abuses of consumers in that particular area of commercial activity are not likely to decrease. For instance an inquiry into the franchising methods of Beckers and Mac's Milk, well known large franchisors, is now being conducted by Ontario. Moreover, as mentioned earlier, franchising has become big business.

17. One could therefore reasonably expect that jurisdictions in Canada other than Alberta and Quebec might in the not too distant future deem it advisable to take some form of legislative action. It would be unfortunate if there was not then an approved Uniform Act on which to model such legislation. Already there are differences of substance between the statutes adopted by Alberta and Quebec and discrepancies could therefore only increase thus adding to costs and possibly harming small Canadian franchisors in competition with larger and well-established national and international corporations engaged in franchising. It is a known fact that non-uniform state franchise legislation in the United States has created difficulties and added to the cost of doing business. It explains as well the efforts by the Franchise Regulation Subcommittee of the Merit Regulation Committee of the North American Securities Administrators Association aiming at the adoption, by the Association, of Guidelines for Registration and Regulation and Sales and for Preparation of a Uniform Franchise Offering Circular. The Uniform Franchise Offering Circular (UFOC) developed by the Midwest Securities Commissioners Association, Inc., which groups 14 states, is another illustration of the need that is felt in the United States for some form of uniformity.

18. Assuming that it is agreed that uniform legislative action is desirable then the question arises as to which of the four options to choose. The first would be the adoption of a Uniform Act along the lines of the trade regulation rule of the US Federal Trade Commission. Disclosure only would be required according to a standard format reflected in the legislation of the provinces. That course of action

would save time and legal costs, make it less easy for unethical or incompetent franchises of little or no value and keep government intervention to a minimum. The experience acquired so far by the US Federal Trade Commission shows however that this option is not adequate in the absence of mechanisms for the review of the disclosure document. The FTC Staff Franchise Attorney has publicly indicated that there are a number of violations of FTC disclosure requirements, the most common violations being failure to include audited financial statements, failure to provide potential investors with earning statements, not following the cover page format or giving disclosure documents on time, failure to disclose company litigation, and failure to fully disclose limitations on goods a franchisee may offer his customers.

19. For its part, the registration and disclosure option, as adopted by the Province of Alberta, offers a number of advantages that can be summarized as follows:

- —It limits also government intervention in contractual matters in that the sole object is to protect potential investors from franchisors whose ethics, solvency and methods of operations do not meet accepted business standards;
- —the registration requirements make it very difficult, if not impossible, for unethical or incompetent franchisors to conduct intensive national advertising campaigns as is now frequently the case: powers vested in the administrator of the Act do permit effective enforcement against such operators;
- —the cost to franchisors is not high and the time required to prepare a prospectus or statement of material facts need not be greater than would be the case under the first approach;
- —it gives the administrator sufficient flexibility in the application of the act to allow experienced and well-established franchises to be exempted from the registration requirements;
- —it provides additional rights to franchisees which may be used in conjunction with existing civil and contractual rights without interfering unduly with the operations of franchisors. These additional rights may be summarized as follows:
  - —a franchisee has four business days after he receives the Prospectus or Statement of Material Facts to cancel the agreement, without giving any reason for such cancellation.
  - —a franchisee has a right to rescind the contract if the Prospectus or Statement of Material Facts is found to contain any misrepresentation of a material fact, or omits to state a material fact. Such right must be exercised within two (2) years of

the date on which the franchisee receives the Prospectus or Statement of Material Facts or the date of the contract, whichever is the later.

20. Costs of administering legislation requiring both registration and disclosure would of course vary from province to province in light of the number of applications received. In Alberta for instance, 7 person-years are required to administer the province's Franchises Act.

21. The third option provides for regulation of certain aspects of the franchise agreements, especially termination and renewal clauses. California, which is at the forefront of developments in the field of franchising legislation has recently adopted legislation of this nature, as reported earlier. Threats of termination of franchises or arbitrary termination of franchises are current evils most detrimental to franchisees. It is inevitable that some form of regulation of certain substantive aspects of franchise agreements will sooner or later become necessary. The fourth option is self-explanatory.

Conclusions

22. Developments in Canada and in the United States point to the need for some form of intervention in the field of franchises in order to:

a) control and, if needed, remove from it, operators whose reputation, solvency and methods of operation leave something to be desired; b) to assist franchisees in their dealings with legitimate franchisors; c) to save the parties legal costs and time; and d) to facilitate the growth of Canadian franchisors. Various factors indicate that there is a strong requirement as well for uniformity of legislation between the provinces. The form and scope of that legislation is a matter for discussion and resolution, four basic options being open. The first one was found inadequate, the second one is that that was adopted by Alberta and Quebec and the third one whether by itself or combined with other options is most likely to become a necessity in the future.

Recommendations

23. It is therefore recommended that the Uniform Law Section agree that Alberta be asked to prepare, in cooperation with other jurisdictions that may wish to participate, an in-depth policy analysis on the topic of franchises including a draft Uniform Act based on the conclusions of that policy analysis.

Peter Pagano (Alberta)
Gérard Bertrand (Canada)
Marie-José Longtin (Québec)

APPENDIX P

(See page 32)

UNIFORM SERVICE OF PROCESS BY MAIL

(1962 Consolidation, page 311)

It is intended that this provision be inserted in appropriate statutes and rules. Changes necessary to fit the context should be made.

Service by mail

1. In addition to any other method of service, a writ of summons (*or as the case may be*) may be served upon a defendant or other person to be served by sending to him a true copy thereof (*or a certified or sealed copy therefore as the case may be*) by registered mail in an envelope upon which there is written "Deliver to addressee only. If not delivered within . . . . . days return to (*address of sender*)"; and the service shall be deemed to be sufficient if the post office receipt therefor purporting to be signed by the defendant or other person to be served is produced as an exhibit to the affidavit of service which may be in the form set out in the Schedule.

Day of Service

2. A document that has been served under section 1 shall be deemed to have been served on the day of the date of the receipt that purports to be signed by the person to be served.

SCHEDULE

AFFIDAVIT OF SERVICE

(Style of Cause)

I . . . . . of . . in the Province of . . . . . make oath and say:

I did on the . . day of . . . . . 19 . , send to the above-named defendant (*or as the case may be*) by registered mail a true copy of (*description of document*) hereunto annexed and marked Exhibit A in an envelope addressed to him at . . . . . and upon which there was written: Deliver to addressee only. If not delivered within . . . . . days return to (*address of sender*)", and hereunto annexed and marked Exhibit B in the post office receipt of the defendant therefor.

SWORN before me . . . . . .

APPENDICE P

(Voir page 32)

DISPOSITIONS UNIFORMES SUR LA SIGNIFICATION PAR COURRIER

(Refonte de 1962, page 311)

Les présentes dispositions sont destinées à être insérées dans les lois et règlements pertinents. On y apportera les modifications nécessaires selon le contexte.

Signification par la poste

1. En plus de tout autre mode de signification, un bref d'assignation (*ou selon le cas*) peut être signifié à un défendeur au à un autre destinataire, en lui en expédiant une copie conforme (*ou une copie certifiée ou scellée selon le cas*) par courrier recommandé dans une enveloppe portant la mention "A ne livrer qu'au destinataire. A défaut de livraison dans un délai de . . . . . jours retourner à (*addresse de l'expéditeur)*"; la signification est réputée avoir été valablement faite si le reçu du bureau de poste donné comme signé paar le défendeur ou autre destinataire est produit à titre de pièce à l'appui du certificat de signification fait sous serment qui peut être rédigé selon la formule prévue à l'annexe.

Date de la signification

2. Le document signifié en application de l'article 1 est réputé avoir été signifié à la date de l'accusé de réception signé par le destinataire.

ANNEXE

CERTIFICAT DE SIGNIFICATION

(Intitulé de la cause)

Je . de . . . . province de . jure que:

Le . . 19 . j'ai expédié au défendeur susmentionné (*ou selon le cas*) par courrier recommandé une copie conforme de (*indiquer la nature du document*) ci-annexé et visé comme pièce A, dans une enveloppe qui lui était addressée à . et portant la mention suivante: "A ne livrer qu'au destinataire. A défaut de livraison dans un délai de . . . . . jours, retourner à

(*addresse de l'expéditeur)*"; l'accusé de réception signé par le défendeur est annexé au présent certificat et visé comme pièce B.

SERMENT PRÊTÉ devant moi . . . . .

APPENDIX Q

(See page 32)

UNIFORM FOREIGN JUDGMENTS ACT

(1964 Proceedings, pages 26, 107)

1. This Act applies to foreign judgments in civil and commercial matters. Application

2. In this Act Interpretation

(a) "foreign judgment"

(i) means a final judgment or order of a court of a foreign state in civil proceeding granting or denying recovery of a sum of money, and

(ii) includes an award in an arbitration proceeding if the award, under the law in force in the foreign state, has become enforceable in the same manner as a final judgment given by a court in that state, but

(iii) does not include a judgment or order for taxes, a fine or other penalty, or for the periodical payment of money as alimony or as maintenance for a wife or former wife, or reputed wife, or child, or any other dependant for the person against whom the judgment or order was given or made;

(b) "final judgment" means a judgment that is capable of being enforced in the state of the original court although there may still be in that state a right of appeal or a right to attack the judgment by any method;

(c) "foregin state" means a governmental unit other than this province, including a kingdom, republic, commonwealth, state, province, territory, colony, possession or protectorate, or a part thereof;

(d) "judgment debtor" means a person against whom a foreign judgment has been given, and includes a person against whom that judgment is enforceable in the foreign state in which it has been given;

(e) "original court" means a court by which a foreign judgment has been given.

Jurisdiction

3. For the purpose of this Act, a court of a foreign state has jurisdiction in actions *in personam* where

(a) the defendant has submitted to the jurisdiction of that court

(i) by having become a plaintiff in the action, or

(ii) by having voluntarily appeared in the action other than with the sole purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him, or

(iii) by having expressly or impliedly agreed to submit to the jurisdiction;

(b) at the time of the commencement of the action, the defendant is ordinarily resident in the foreign state or, being a body corporate, has its principal place of business, is incorporated or has otherwise acquired corporated status in that state;

(c) the action involves a cause of action arising out of business done in the foreign state by the defendant through a business office operated by him in that state; or

(d) the defendant operated a motor vehicle or airplane in the foreign state and the action involves a cause of action arising out of that operation.

Effect of a foreign judgment

4. Where under section 3 a court of a foreign state had jurisdiction over a judgment debtor in an action *in personam,* the foreign judgment given against him shall be recognized as conclusive, is enforceable between the parties and may be relied upon as a defence or counter-claim except where

(a) the original court acted without authority under the law in force in the foreign state to adjudicate concerning the cause of action or subject matter that resulted in the judgment or concerning the person of the judgment debtor;

(b) the judgment was obtained by fraud;

(c) the judgment is in respect of a cause of action that for reasons of public policy of for some similar reason would not have been entertained by a court of this province;

(d) the judgment debtor in the proceeding in the original court did not receive notice of the proceeding in a reasonably sufficient time to enable him to defend;

(e) the proceeding in the original court was contrary to natural justice;

(f) the judgment conflicts with another final and conclusive judgment;

(g) the proceeding in the original court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by a proceeding in that court; or

(h) the judgment has been satisfied or for any other reason is not a subsisting judgment.

Judgment for injury to immovable property

5. Section 4 applies to a foreign judgment given in respect of an injury to immovable property situated in this province or elsewhere.

Stay in case of appeal

6. Where a judgment debtor satisfies a court of this province that he has taken or is about to take an appeal from a foreign judgment of institute a proceeding to set aside a foreign judgment, the court may, from time to time, pending the determination of the appeal or proceeding, and upon such terms as may be deemed proper, grant a stay of proceeding.

Enforcement

7. A foreign judgment, [other than a judgment given by a court in a state declared under the *Reciprocal Enforcement of Judgments Act* to be a reciprocating state,] may be enforced by an action on the judgment brought in [a court of competent jurisdiction] in this province.

Action on original cause

8. A judgment creditor who has recovered a foreign judgment may bring an action in this province on his

original cause of action against the judgment debtor only where the foreign judgment debtor is not recognized as conclusive and is not enforceable in this province.

Saving

9. This Act does not prevent the recognition of a foreign judgment in situations not covered in this Act.

APPENDICE Q

(Voir page 32)

LOI UNIFORME SUR LES JUGEMENTS ÉTRANGERS

(Procès-verbal de la réunion de 1964, pages 26, 107)

Champ d'application

1. La présente loi s'applique aux jugements étrangers rendus en matière civile et commerciale.

Définitions

2. Les définitions qui suivent s'appliquent à la présente loi.

"débiteur condamné" / *"judgment"*

"débiteur condamné" La personne contre qui le jugement étranger a été rendu, y compris la personne contre qui le jugement est exécutoire dans l'Etat étranger où il a été rendu.

"État étranger" / *"foreign state"*

"État étranger" Le gouvernement autre que celui de la province, notamment le gouvernement d'un royaume, d'une république, d'un commonwealth, d'un État, d'une province, d'un territorire, d'une colonie, d'une possession ou d'un protectorat ou d'une partie de l'un d'eux.

"jugement étranger" / *"foreign judgment"*

"jugement étranger"

a) Soit le jugement ou l'ordonnance au fond rendu par le tribunal d'un État étranger en matière civile ou commerciale et qui accorde ou refuse le recouvrement d'une somme d'argent;

b) soit le jugement accordant une indemnité par suite d'une procédure d'arbitrage, dans le cas où l'indemnité, en application du droit en vigueur dans l'État étranger, est devenue exécutoire de la même manière qu'un jugement au fond rendu par un tribunal de cet État.

La présente définition ne s'applique pas au jugement ou à l'ordonnance en recouvrement d'impôts, à une amende ou une autre pénalité ni au versement périodique d'un montant d'argent à titre de pension alimentaire ou pour l'entretien de l'épouse, de l'ex-épouse ou d'une personne assimilée à

l'épouse, de l'enfant ou de toute autre personne à la charge de la personne contre qui le jugement ou l'ordonnance a été rendu.

"jugement au fond" *"final*

"jugement au fond" Le jugement qui peut être exécuté dans l'État où se trouve le tribunal d'origine bien qu'il soit susceptible d'appel ou de tout autre recours.

"tribunal d'origine" *"original*

"tribunal d'origine" Le tribunal qui a rendu le jugement étranger.

Compétence

3. Pour l'application de la présente loi, le tribunal d'un État étranger est compétent pour connaître des actions *in personam* dans les cas suivants:

a) le défendeur a reconnu la compétence de ce tribunal

(i) soit en se portant demandeur à l'action,

(ii) soit en ayant volontairement comparu à l'instance en ne se donnant pas pour seul but de protéger des biens saisis ou menacés de saisie dans le cadre du procès ou de décliner la compétence du tribunal à son égard,

(iii) soit en ayant accepté expressément ou implicitement d'en reconnaître la compétence;

b) au moment, de l'introduction de l'instance, le défendeur a sa résidence habituelle dans l'État étranger ou, dans le cas d'une personne morale, y a son principal établissement, y a été constitué en société ou y a le statut de société;

c) la cause d'action résulte des affaires que le défendeur a traitées dans l'État étranger par l'entremise d'un établissement qu'il y exploite;

d) la cause d'action découle de l'exploitation d'un véhicle automobile ou d'un avion par le défendeur dans l'État étranger.

Effet d'un jugement etranger

4. Lorsqu'un tribunal d'un État étranger était, au sens de l'article 3, compétent à l'égard du débiteur condamné dans une action *in personam*, le jugement étranger qui a été rendu contre ce débiteur doit être reconnu comme définitif, est exécutoire entre les parties et peut être invoqué en

défense ou en demande reconventionnelle sauf dans les cas suivants:

a) le tribunal d'origine n'était pas compétent en vertu du droit en vigueur dans l'État étranger soit pour rendre une décision concernant la cause d'action ou la question qui a donné lieu au jugement soit à l'égard du débiteur condamné;

b) le jugement a été obtenu par des manoeuvres frauduleuses;

c) le jugement se rapporte à une cause d'action qui, pour des motifs d'ordre public ou pour tout autre motif semblable, n'aurait pas été accueillie par un tribunal de la province;

d) le débiteur condamné n'a pas reçu notification des procédures engagées devant le tribunal d'origine dans un délai lui permettant de se défendre;

e) le manière de procéder du tribunal d'origine était contraire aux principes de justice naturelle;

f) le jugement entre en conflit avec un autre jugement au fond et définitif;

g) les procédures engagées devant le tribunal d'origine étaient contraires à un accord conclu entre les parties en vertu duquel le litige en question devait être soustrait à tout recours devant ce tribinal;

h) le jugement a été exécuté ou est devenu inopérant pour tout autre motif.

Jugement portant sur des dommages causés à des biens immeubles

5. L'article 4 s'applique à un jugement étranger rendu en raison de dommages causés à des biens immeubles qu'ils soient situés dans la province ou ailleurs.

Suspension en cas d'appel

6. Le tribunal de la province s'il constate que le débiteur condamné a interjeté ou est sur le point d'interjeter appel d'un jugement étranger, ou qu'il a engagé un recours en annulation de ce jugement, peut, en attendant qu'il soit statué sur l'appel ou sur le recours en annulation, surseoir à statuer selon les modalités qu'il juge appropriées.

Exécution

7. Le tribunal (compétent) de la province, saisi d'une

demande à cette fin, peut faire exécuter par les voies d'exécution appropriées un jugement étranger, (qui n'a pas été rendu par un tribunal situé dans un État visé par la *Loi sur l'exécution réciproque des jugements*).

Action en vertu de la cause d'action originale

8. Le créancier qui a bénéficié d'un jugement étranger ne peut intenter dans la province, contre le débiteur condamné, une action sur la cause d'action originale que si le jugement étranger n'est pas reconnu comme étant définitif dans la province et qu'il n'y est pas exécutoire.

Réserve

9. La présente loi ne fait pas obstacle à la reconnaissance d'un jugement étranger dans les cas qu'elle n'a pas prévus.

APPENDIX R

(See page 32)

STATUTES ACT

(1975 Proceedings, pages 32, 216)

Form of enacting clause

1. The enacting clause of an Act of the Legislature may be in the following form:

> Her Majesty, by and with the advice and consent of the Legislative Assembly of ....., enacts as follows:

Endorsement of date of assent

2. (1) The Clerk of the Legislative Assembly shall endorse on each Act the date of assent to the Act.

Idem

(2) The endorsement is part of the Act.

Reserved Bills

(3) Every Bill reserved by the Lieutenant Governor for the signification of the Governor General's pleasure shall be endorsed by the Clerk of the Legislative Assembly with the date of the reservation.

Original Acts

3. All original Acts of the Legislature shall be and remain of record in the custody of the Clerk of the Legislative Assembly.

Publication of Acts

4. The Acts shall be published by (*the Queen's Printer*).

Implied powers

5. Every Act shall be construed to reserve to the Legislature the power or repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

Amendment at same session

6. An Act may be amended or repealed by an Act passed in the same session.

Citation of Acts

7. An Act may be cited

(*a*) by reference to its chapter number in the Revised Statutes;

(*b*) by reference to its chapter number in the statutes for the year, regnal year of the session in which it was enacted; or

(*c*) by reference to its title, with or without reference to its chapter number.

APPENDICE R

(Voir page 32)

LOI SUR LA LÉGISLATION

(Procès-verbal de la réunion de 1975, pages 32 et 216)

1. La formule d'édiction (de promulgation) des lois de la Législature peut être ainsi conçue: Formule d'édiction (de promulgation)

> Sa Majesté, sur l'avis et avec le consentement de l'Assemblée législative de . . . . . , édicte (promulgue):

Remarque: Il s'agit ici de décider ce qu'il est préférable d'utiliser; "Édicter" ou "promulguer".

2. (1) Le greffier (secrétaire) de l'Assemblée législative inscrit sur chaqwue loi la date de sa sanction. Inscription de la date de sanction

Remarque: Ici aussi il s'agit de faire un choix entre "greffier" ou "secrétaire".

(2) L'inscription fait partie de la loi. Idem

(3) Le greffier (secrétaire) de l'Assemblée législative inscrit sur chaque projet de loi la date à laquelle le lieutenant-gouverneur l'a réservé pour la signification du bon plaisir du gouverneur général. Projets de loi réservés

3. La conservation des lois de la Législature incombe au greffier (secrétaire) de l'Assemblée législative. Originaux des lois

4. Les lois sont publiées par (*l'imprimeur de la Reine . . .*) (*par l'Éditeur officiel de . . .*). Publications des lois

5. Toute loi s'interprète de manière à réserver à la Législature le pouvoir de l'abroger ou de la modifier et d'annuler ou modifier tout pouvoir ou avantage conféré par cette loi (à quiconque). Pouvoirs d'annulation ou de modification

6. Une loi peut être modifiée ou abrogée par une autre loi adoptée au cours de la même session. Interaction en cours de session

7. Les lois peuvent être désignées par: Désignation des lois

(*a*) le numéro de chapitre qui leur est donné dans le recueil des lois révisées;

(*b*) le numéro de chapitre qui leur est donné dans le recueil des lois de l'année, de l'année du règne ou de la session au cours de laquelle elles ont été adoptées;

(*c*) leur titre, avec ou sans mention de leur numéro de chapitre.

APPENDIX S

(See page 32)

RE: AMENDMENTS TO THE UNIFORM INTESTATE SUCCESSION ACT REPORT OF THE BRITISH COLUMBIA COMMISSIONERS

Background

In 1919 the Commissioners on Uniformity of Legislation in Canada commenced a project on intestate succession. A Uniform Act was adopted in 1925, and has been revised periodically. The Act was last revised in 1963.

Most of the Provinces have enacted legislation based upon this Uniform Act. Some parts of the Uniform Act, however, have not been universally accepted. Moreover, some Provinces have made departures from the Act, indicating either disagreement with the policy of the Uniform Act, or that some of the provisions of the Uniform Act are no longer in step with contemporary needs. The most sweeping revisions are to be found in the Ontario *Succession Law Reform Act, 1977*. Provincial divergence suggests that it is appropriate for the Uniform Law Conference of Canada to review the *Uniform Intestate Succession Act*. A copy of the Act is annexed as Annex A to this document.

At the 1980 meeting of the Conference, the British Columbia delegates accepted the task of reviewing the *Uniform Intestate Succession Act* and it was resolved that the British Columbia Commissioners would present a report to the Conference by 1982. This document is the report contemplated by that resolution.

A table comparing intestate succession across Canada has been prepared and is annexed as Annex B to this document. It discloses several issues upon which jurisdictions have taken different positions and consideration should be given to those issues to determine whether increased uniformity is possible. A caveat should be lodged with respect to the table's references to Quebec. Intestate succession in Quebec possesses several differences from other Canadian jurisdictions. The information contained in the table is simplified, and not all points of departure are noted. Nevertheless, the comparison is useful. It discloses that the basic approach adopted in Quebec possesses marked similarities to the Uniform Act.

Question No. 1

Is the lack of uniformity in Canadian intestate succession legislation such that a re-examination of the Uniform Act is called for?

If the answer to question No. 1 is "Yes" then questions 2 to 11 should be considered.

Part I— Spousal Share

Under the Uniform Act, the surviving spouse is entitled to:

(a) one-half the estate if one child of the intestate survives;

(b) one-third of the estate if more than one child of the intestate survives;

(c) a first charge on the estate of $20,000 if no issue survive, and one-half of the remainder of the estate; the other one-half of the remainder of the estate goes to those who would have been entitled had the deceased not left spouse or issue.

Issue of a child who predeceases the testator share in the child's portion by representation.

Only Newfoundland, Prince Edward Island and the Yukon Territories follow the Uniform Act as to the spouse's share. Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Saskatchewan and the Northwest Territories provide that the surviving spouse is entitled to a preference share or a first charge of a fixed sum on the estate in any event. New Brunswick gives the surviving spouse the deceased's personal chattels. The remainder of the estate is divided between a spouse and a child or children of the intestate as it would have been divided under the Uniform Act, except if no issue survive the intestate, the spouse takes the whole of the estate.

These variations from the Uniform Act suggest a belief that most people would expect or want the surviving spouse to take a generous portion of the estate. (It is pertinent to note that several Provinces provide that a spouse is entitled to apply under matrimonial property legislation for an interest in family property upon the demise of the other spouse; in those Provinces, therefore, it is not essential that intestate succession ensure the surviving spouse receives a generous portion of the estate, except that an adequate scheme of intestate succession will mean less litigation pursuant to matrimonial property legislation.)

A table has been prepared which compares the share that the surviving spouse and children of the deceased would receive on the intestate distribution of several hypothetical estates, depending on the

approach taken by the governing legislation. The examples indicate significant variation occurs depending on whether the surviving spouse is entitled to no preference share (Uniform Act), a small preference share (British Columbia), or a large preference share (Ontario). That table is annexed as Annex C to this document.

Question No. 2

Should the Uniform Act be amended to give the surviving spouse a preference share in the estate?

Question No. 3

If no issue survive the intestate, should the surviving spouse be entitled to the whole of the estate?

If the answer to question 2 is yes, it will be necessary to consider the size of the surviving spouse's first charge. Figures set by provincial legislation vary between $20,000 (British Columbia, Northwest Territories) and $75,000 (Ontario). A difficulty in setting the sum by legislation is that inflation may quickly make it inadequate. A more flexible and responsive procedure than setting the sum by legislation might be to provide that the sum may be set by regulation. Another option is to index any amount set so that it automatically adjusts to changes in the economy if an appropriate indexing technique can be developed.

Question No. 4

What amount would be appropriate for the spouse's first charge?

Question No. 5

Should the figure determined in 4 be set by legislation or regulation? If by legislation, can it be indexed? Are there other options?

The one-third share to the surviving spouse, in the event that more than one child survives the intestate, is arbitrarily determined. If contemporary policy is to prefer the interests of the surviving spouse over those of other kin of the intestate, it makes little sense to determine the surviving spouse's share by reference to the number of children of the marriage. The American *Uniform Probate Code* gives the surviving spouse one half of the residue no matter how many children of the marriage survive the deceased.

Question No. 6

Should the share of the surviving spouse be one-half of the remainder of the estate, notwithstanding that more than one child of the intestate survives?

Part II—Next of Kin

Intestate successors prescribed in sections 6 to 9 seem to be universally accepted by the Provinces. There would appear to be no need to review these sections.

Part III—Advancement

Section 12 provides that an intestate successor must account for *inter vivos* advancements made to him. This is known as "hotchpot." The statute is aimed at distributing what remains of the deceased's estate, not at redressing *inter vivos* injustices. Ontario is the only Province to have abolished hotchpot. In the interests of uniformity, therefore, this section need not be revised. Nevertheless, consideration might be given whether the Conference still agrees with the policy behind the doctrine of advancement.

Question No. 7

Does the Conference agree with the policy of the doctrine of advancement in the context of intestate succession?

Part IV—Partial Intestacies

Section 13 of the *Uniform Intestate Succession Act* provides:

> 13. All such estate as is not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate.

All of the Provinces, except Manitoba and Ontario, follow the Uniform Act on this question. In Manitoba the spouse shares in the intestacy only up to an amount which, when added to benefits received under the will, would equal the surviving spouse's share had the entire estate been distributed on an intestacy. In Ontario the spouse is entitled to the amount which, when added to the benefits received under the will by the surviving spouse, would equal the surviving spouse's preference share had the entire estate been distributed on an intestacy.

Question No. 8

Should the surviving spouse's share be limited on a partial intestacy? If so, how should it be limited?

Part V—Marital Breakdown

Section 17 provides that a surviving spouse, living in adultery at the time of the deceased's death, takes no part of the deceased's estate. Judicially interpreted the section does not function very well. For

example, a woman who lived in an adulterous relationship for many years may still be entitled to take if the relationship ends before the deceased's death. (*See, e.g., Re Mullins*, (1981) 9 E.T.R. 167 (Nfld. S.C.); *Burns* v. *Burns*, (1938) 4 D.L.R. 513 (1938) 3 W.W.R. 477 (P.C.). In Ontario, Manitoba and British Columbia, adultery does not disqualify the surviving spouse. In British Columbia separation for a period greater than one year may bar the surviving spouse from sharing in the intestacy. An option is to enact a provision similar to section 17 of the *Uniform Wills Act*, which provides that upon various kinds of marital breakdown, the surviving spouse is deemed to predecease the deceased spouse. Presumably, such a provision is desirable only if the surviving spouse had become entitled to an interest in family or matrimonial property on the marital breakdown.

Question No. 9

Should a provision similar to section 17 of the *Uniform Wills Act* be added to the *Uniform Intestate Succession Act*, to provide that upon certain kinds of marital breakdown a surviving spouse will be treated as having predeceased the intestate?

Part VI—Matrimonial Home

In many cases, the only asset of value in the deceased's estate will be the matrimonial home. Increasing the surviving spouse's share and providing a first charge on the estate does not ensure the surviving spouse will be entitled to the matrimonial home. In British Columbia, in addition to the surviving spouse's other rights under intestate succession, he or she is also entitled to a life estate in the matrimonial home. In Nova Scotia the widow may elect to take the matrimonial home instead of the preference share. (Note: Some provinces provide, in legislation other than that modelled on the *Uniform Intestate Succession Act*, that a surviving spouse is entitled to a life estate in the homestead upon an intestacy: see, for example, section 14(1) of the Manitoba *Dower Act*.)

Question No. 10

Should the surviving spouse be entitled to an interest in the matrimonial home? If so, what interest and should there be any abatement of the preference share?

Part VII—Drafting

Various drafting points arise on a consideration of the Act. Section 16 provides that the Act applies equally if the surviving spouse is the husband. This seems more awkward than the approach taken in British

Columbia, Saskatchewan and Ontario where the term "surviving spouse" is used throughout. Section 15 should be deleted from the intestate succession Acts of those Provinces which adopt the *Uniform Child Status Act*, and the *Uniform Intestate Succession Act* might set out draft options for Provinces that do not adopt that Act. Moreover, the definition of "issue" should be amended to correspond to the provisions of the *Child Status Act.* Sections 6 through 9 are clear, but repetitive and clumsy. An option would be to list in one section the order of intestate successors in the event the deceased is not survived by spouse or issue. Nevertheless, it should be noted that all of the Provinces, except Quebec, have adopted the drafting of the Uniform Act with respect to sections 6 to 9.

Questions No. 11

Should the Act be redrafted as noted above?

The B.C. Commissioners

Annex A

Uniform Intestate Succession Act

(1962 Consolidation, page 165; 1963 Proceedings, pages 23, 79)

1. In this Act — Interpretation

(*a*) "estate" includes both real and personal property;

(*b*) "issue" includes all lawful lineal descendants of the ancestor.

2. This Act applies only in cases of death after its commencement. — Application

3. (1) If an intestate dies leaving a widow and one child, one-half of his estate goes to the widow. — Widow and child

(2) If he leaves a widow and children, one-third of his estate goes to the widow. — Widow and children

(3) If a child has died leaving issue and the issue is alive at the date of the intestate's death, the widow takes the same share of the estate as if the child had been living at that date. — Widow and child with issue

4. If an intestate dies leaving issue, his estate shall be distributed, subject to the right of the widow, if any, *per stirpes* among the issue. — Distribution among issue

5. (1) If an intestate dies leaving a widow but no issue, — Widow and no issue

(*a*) where the net value of his estate does not exceed twenty thousand dollars, his estate goes to his widow;

(*b*) where the net value of his estate exceeds twenty thousand dollars, the widow is entitled to the sum of twenty thousand dollars and has a charge upon the estate for that sum, with legal interest from the date of the death of the intestate; and

(*c*) of the residue of the estate,

(i) one-half goes to the widow, and

(ii) one-half goes to those who would take the estate, if there were no widow, under section 6, 7, 8 or 9, as the case may be.

(2) In this section "net value" means the value of the estate wherever situate, both within and without the — "net value"

province, after payment of the charges thereon and the debts, funeral expenses, expenses of administration and succession duty.

Father and mother

6. If an intestate dies leaving no widow or issue, his estate goes to his father and mother in equal shares if both are living, but, if either of them is dead, the estate goes to the survivor.

Brothers and sisters

7. If an intestate dies leaving no widow, issue, father or mother, his estate goes to his brothers and sisters in equal shares, and, if any brother or sister is dead, the children of the deceased brother or sister take the share their parent would have taken if living.

Nephews and nieces

8. If an intestate dies leaving no widow, issue, father, mother, brother or sister, his estate goes to his nephews and nieces in equal shares and in no case shall representation be admitted.

Next-of-kin

9. If an intestate dies leaving no widow, issue, father, mother, brother, sister, nephew or niece, his estate goes in equal shares to the next of kin of equal degree of consanguinity to the intestate and in no case shall representation be admitted.

Computation of degrees of kindred

10. For the purposes of this Act, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative, and the kindred of the half-blood inherit equally with those of the whole-blood in the same degree.

Persons *en l'entre sa mere*

11. Descendants and relatives of the intestate begotten before his death but born thereafter inherit as if they had been born in the lifetime of the intestate and had survived him.

Advancements

12. (1) If a child of a person who has died wholly intestate has been advanced by the intestate by portion, the portion shall be reckoned, for the purposes of this section only, as part of the estate of the intestate distributable according to law, and

(*a*) if the advancement is equal to or greater than the share of the estate that the child would be entitled to receive as above reckoned, the child and his

descendants shall be excluded from any share in the estate; but

(*b*) if the advancement is not equal to such share, the child and his descendants are entitled to receive so much only of the estate of the intestate as is sufficient to make all the shares of the children in the estate and advancement equal as nearly as can be estimated.

Value of advancements

(2) The value of any portion advanced shall be deemed to be that which has been expressed by the intestate or acknowledged by the child in writing, otherwise the value is the value of the portion when advanced.

Onus of proof

(3) The onus of proving that a child has been maintained or educated, or has been given money, with a view to a portion, is upon the person so asserting, unless the advancement has been expressed by the intestate, or acknowledged by the child, in writing.

Estate not disposed of by will

13. All such estate as is not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate.

Dower

14. Subject to (*Dower Act* or any similar Act), no widow is entitled to dower in the land of her deceased husband dying intestate, and no husband is entitled to an estate by the courtesy in the land of his deceased wife so dying.

Illegitimate child

15. For the purposes of this Act, an illegitimate child shall be treated as if he were the legitimate child of his mother.

Married woman

16. The estate of a woman dying intestate shall be distributed in the same proportions and in the same manner as the estate of a man so dying, the word "husband" being substituted for "widow", the word "her" for "him", the word "she" for "he", and the word "her" for "him" where such words respectively occur in sections 3 to 9 and 11.

Disqualification by adultery

17. (1) If a wife has left her husband and is living in adultery at the time of his death, she takes no part of her husband's estate.

Idem

(2) If a husband has left his wife and is living in adultery at the time of her death, he takes no part of his wife's estate.

Annex

COMPARISON OF INTESTATE SUCCESSION

	UNIFORM ACT	ALTA	B C	MAN.	N B.	NFLD	N.W. TERRI-TORIES
Spouse's Share							
(a) Preference Share	No	$40,000	$20,000	$50,000	Personal Chattels	No	$20,000
(b) If intestate is survived by:							
(i) 1 Child	1/2	1/2	1/2	1/2	1/2	1/2	1/2
(ii) 1+ Child	1/3	1/3	1/3	1/3	1/3	1/3	1/3
(iii) Next-of-kin	$20,000+ 1/2 residue	ALL	ALL	ALL	ALL	$30,000+ 1/2 residue	ALL
Child's share:							
(a) If intestate is survived by spouse and							
(i) 1 Child	1/2	1/2	1/2	1/2	1/2	1/2	1/2
(ii) 1+ Child	2/3	2/3	2/3	2/3	2/3	2/3	2/3
(b) If intestate is not survived by spouse	ALL PER STIRPES	ALL PER STIRPES	ALL PER STIRPES	ALL PER STIRPES	ALL PER STIRPES	ALL PER STIRPES	ALL PER STIRPES
(a) If intestate is survived by neither spouse nor issue, the order of succession is: (i) Parents (ii) Brothers and Sisters (iii) Nieces and Nephews (iv) Next-of-kin	ss 6-9	ss. 6-9	ss. 99-102	ss 8-9	ss. 25-28	ss 7-9	ss. 6-9
(b) Computation of Next-of-Kin	s 10	s 10(1)	s. 103	s 10	s. 29	s 10	s. 10
(c) Kin of Half-Blood	s 10	s 10(2)	s. 103	s. 10	s. 29	s 11	s. 10
Posthumous Children	s. 11	s. 11	s. 104	s 11	s. 30	s 12	s. 11
Advancements	s 12	s. 12	s. 105	s. 12	s 31	s. 13	s 12
Partial Intestacy	s. 13	s 13	s. 106	ss. 13-14 (widow must deduct testate share from intestate share) See s. 32 *Wills Act*	s. 32	s 14	s. 13
(a) Succession from Mother of Illegitimate	s. 15	s. 15	s. 110	s. 15	s 34	s 15	s. 14
(b) Succession from Illegitimate	No provision	No provision	No provision	ss. 15, 16	ss. 34, 35	ss. 15, 16	s 15
(c) Succession from Father of Illegitimate	No	s. 16	No	No	No	No	No
Adultery Disqualifies Surviving Spouse	s. 17	s. 18 (s. 16(2) re spouse of illegitimate	No (Separation a bar. s. 111)	No	s 37(1)	s. 18	s. 17
Married Woman	s. 16	s 17	"spouse"	s. 17	s. 36	s. 17	s. 16
Matrimonial Home*	No	No	ss 108-109	No	No	No	No
Miscellaneous					Spouse may disclaim intestate rights and elect dower or curtesy, s. 111		

* Some provinces provide that the surviving spouse is entitled to a life interest in the homestead, but those provisions are not contained in their Acts which govern intestate succession.

NOTE: Where only a section number is cited, that section substantially follows the equivalent section in the Uniform Act.

B

IN CANADIAN JURISDICTIONS

N S.	ONT.	P E I	QUEBEC	SASK	YUKON TERRI-TORIES
$50,000	$75,000	No	No	$40,000	No
1/2 1/3 ALL	1/2 1/3 ALL	1/2 1/3 $50,000+ 1/2 residue	1/3) provided other rights disclaimed 1/3) and deceased not a minor. 1/3: if deceased survived by father or mother and one or more brothers and sisters, nieces and nephews 1/2: if deceased survived by parents or brothers and sisters and nieces and nephews in certain cases.	1/2 1/3 ALL	1/2 1/3 ALL
1/2 1/3 ALL PER STIRPES	1/2 1/3 ALL PER STIRPES (commencing with nearest surviving generation)	1/2 1/3 ALL PER STIRPES	2/3 2/3 ALL PER STIRPES	1/2 1/3 ALL PER STIRPES	1/2 1/3 ALL PER STIRPES
ss. 6-9	s 48	ss. 90-93	(i) parents 1/2 and brothers and sisters, or nieces and nephews 1/2; (ii) no parents: brothers and sisters with representation; (iii) ascendants; (iv) collaterals (b) Art 616-618	ss. 7-10	ss 6-9
s 10 s 10	s 48(8) s. 48(8)	s 94 s. 94	(c) Half-blood relatives can claim only in the line which linked them to the deceased.	s 11 s 11	s. 10 s. 10
s. 11	s 48(9)	s. 95	Art 608, 838, 900	s. 12	s 11
s. 12	No	s 96	Art. 712: Every heir must return to the general mass all *inter vivos* gifts.	s. 13	s 12
s. 13 (equitable interest devolves as if it were a legal interest s. 13(2))	s. 46 (limited to $75,000)	s. 97	Similar Provision	s. 14	s 13
s. 15 No provision No	s. 1 s 1 s 1	s 99 ss. 99, 100, 101 No	No No No	s. 17 No provision s. 17	s 14 ss. 14, 15 No
s. 17	No	s 103	No	s 18	s 17
s. 16	"spouse"	s. 102	"Consort"	"spouse"	s 16
s 4	No	No	No	No	No
(Widow may elect to receive home in-stead of $50,000		Provision respecting tracing descent, ss. 104-106	Note: This table is very simplified; exceptions not noted include: (a) whether consorts held property separate or in community; (b) distinction between preferred and ordinary descendants and collaterals; (c) return of gift to surviving ascendant.		If spouse and minor children only, court may order entire estate to spouse, s 18

Annex C

COMPARISON OF INTESTATE SHARE OF SPOUSE AND CHILDREN IN SEVERAL JURISDICTIONS FOR MEDIUM AND LARGE ESTATES

	Uniform Act	British Columbia	Ontario
1. Estate: $50,000 Cash; $50,000 House			
Spouse and 1 Child			
Spouse's share	$ 50,000	$ 60,000	$ 97,500
Child's share	$ 50,000	$ 40,000	$ 2,500
Spouse & 2 or More Children			
Spouse's share	$ 33,333	$ 46,666	$ 83,333
Children's share	$ 66,666	$ 53,333	$ 16,666
2. Estate: $ 50,000 Cash; $150,000 House			
Spouse and 1 Child			
Spouse's share	$100,000	$110,000	$137,500
Child's share	$100,000	$ 90,000	$ 62,500
Spouse & 2 or More Children			
Spouse's share	$ 66,666	$ 80,000	$116,666
Children's share	$133,333	$120,000	$ 83,333
3. Estate: $500,000 Cash; $500,000 House			
Spouse and 1 Child			
Spouse's share	$500,000	$510,000	$537,500
Child's share	$500,000	$490,000	$462,500
Spouse & 2 or More Children			
Spouse's share	$333,333	$346,666	$383,333
Children's share	$666,666	$653,333	$616,666

APPENDIX T

(See page 32)

JUDGMENT INTEREST SUPPLEMENTARY REPORT
by
Saskatchewan Commissioners with Commentary and Alternative Recommendations, Where Appropriate, by the Manitoba Commissioners

Introduction and Background

In 1980 the Uniform Law Section considered and made certain decisions based on the "Saskatchewan Report on Prejudgment Interest", hereinafter referred to as the "Saskatchewan Report". These decisions were recorded by a member of the Drafting Section and put into draft form for the 1981 meeting of that section. The resulting Act forms Annex "A" to this report. Unfortunately the work load of the Uniform Law Section at its 1981 meeting did not allow it to consider the Draft Act. To refresh the memory of the section, it has been decided to prepare this supplementary report which will record the 1980 decisions of the Uniform Law Section and review the issues remaining. A summary of the decisions made at the 1980 conference forms Annex "B" to this report. Since 1980 the Manitoba Law Reform Commission has released its "Report on Prejudgment Compensation on Money Awards: Alternatives to Interest", hereinafter referred to as the "Manitoba Report", and there have been a number of cases which shed new light on some of the decisions already taken by the section. Accordingly, this review will examine some of the decisions already made in the context of these new developments.

In addition, at the request of last year's Conference, this paper will also discuss possible post-judgment interest rates.

I. *Whether the Conference Should Adopt the Approach of the Manitoba Report With Respect to the Calculation of Loss of Use and Loss of Value on Money Awards?*

The main recommendations made by the Manitoba Report on this issue are as follows:

(a) that the legislation provide that the court be given authority to award compensation at a real interest rate of 3% where the plaintiff has sustained loss of use of a money award prior to the date of judgment;

(b) that the legislation provide that the court be given authority to award compensation at a rate of interest which reflects the

inflation rate where the plaintiff has sustained loss of value on a money award prior to judgment;

(c) that the measure of compensation for loss of value be determined by converting the point change in the "Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)" to a percentage figure which when applied to the award will ensure the plaintiff receives judgment for an amount equivalent in purchasing power to the amount that would have been awarded if reparation had taken place at the time loss was first sustained.

The full text of the recommendations contained in the Manitoba Report form Annex "C" to this report.

The Manitoba Report begins with an examination of the commercial and economic character of interest. From this examination it is determined that interest has two components:

(1) an amount which represents the plaintiff's loss of use or, in other words, the plaintiff's inability to have made his money work for him; and

(2) an amount which is equivalent to the loss of value of the money due to the effect of the passage of time in an inflationary economy.

If an interest rate like the prime rate, which is composed of both components, is used to calculate the prejudgment interest to which a plaintiff is entitled, the plaintiff is compensated for both loss of use and loss of value.

The question which the report asks is whether there are some money awards which build in a factor to compensate the plaintiff for loss of value so as to make the use of the prime rate or any other current interest rate inapplicable. To apply such an interest rate to an award which pays the plaintiff in day of judgment dollars will over-compensate the plaintiff to the detriment of the defendant and may, especially if the trial judge has no discretion to vary the rate, discourage settlement. The report concludes that trial judges do award judgment for unliquidated damages which implicitly compensate the plaintiff for loss of value and accordingly recommends that the legislation should recognize both a loss of use and a loss of value component. Compensation for loss of use would be allowed in all cases where the plaintiff is entitled to interest whereas compensation for loss of value would only be awarded in addition to loss of use in those cases where the court has ordered the plaintiff to be paid in day of judgment dollars. Thus on a liquidated damage claim the plaintiff would be

compensated for loss of use at 3% and after that calculation is performed, the trial judge would apply a factor for the loss of value.

The conclusion of the Manitoba Report that interest is composed of a real rate of return and an inflationary factor is a recognized economic fact. The statement that a trial judge implicitly recognizes the effect of inflation on a plaintiff's award may not be as readily acceptable but it is clearly supported by case authority. The Manitoba Report refers to the decision of *Mitchell v. Mulholland (No. 2),* [1971] 2 W.L.R. 1271 (C.A.) where Lord Justice Widgery at page 1284 makes this comment:

> "No one doubts that an award of damages must reflect the value of a pound sterling at the date of the award and conventional sums attributed to, say, the loss of an eye, have been adjusted upwards in recent years on that account. Inflation which has reduced the value of money at the date of the award must, thus, be taken into account."

Canadian cases which clearly recognize the forces of inflation on the trial judge's assessment include: *Andrews v. Grant & Toy Alberta Ltd. et al.* [1978] 2 S.C.R. 229; *Arnold v. Teno; J.B. Jackson Ltd. v. Teno; Teno v. Arnold* [1978] 2 S.C.R. 287; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)* [1978] S.C.R. 267. One Canadian case which expressly recognized and required the trial judge to increase the award because of inflation is *Julian v. Northern and Central Gas Corporation Ltd.* (1981), 31 O.R. (2d) 388 (Ont. C.A.) at 404-413. In this case the parties had agreed that the plaintiff would not seek prejudgment interest. The appellate court found that by setting up the capital fund at the time of trial rather than at the time of injury resulted in a much smaller fund in real terms, being established. Accordingly, the Court of Appeal increased the award by an interest factor which would ensure complete compensation and found this increase to be "really part of the award itself rather than interest". A more recent pronouncement to the same effect is contained in *Lewis v. Todd* (1980), 115 D.L.R. 257 at 274.

The possibility of over-compensating a plaintiff by awarding prejudgment interest in inflationary times is not new. Lord Denning first raised the issue in *Cookson v. Knowles* [1977] 2 All E.R. 820 (C.A.) at page 823 where he makes the following obiter comment:

> "In *Jefford v. Gee*, in 1970, we said that, in personal injury cases, when a lump sum is awarded for pain and suffering and loss of amenities, interest should run "from the date of service of the writ to the date of trial". At that time inflation did not stare us in the

> face. We had not in mind continuing inflation and its effect on awards. It is obvious now that the guidelines should be changed. The courts invariably assess the lump sum on the "scale" for figures current at the date of trial, which is much higher than the figure current at the date of the injury or at the date of the writ. The plaintiff thus stands to gain more by the delay in bringing the case to trial. He ought not to gain still more by having interest from the date of service of the writ. We would alter the guideline, therefore, by suggesting that no interest should be awarded on the lump sum awarded at the trial for pain and suffering and loss of amenities."

In *Cookson v. Knowles*, there was no need for the Court of Appeal to vary the interest rate. However, in the case of *Pickett v. British Rail Engineering Ltd.*, [1979] 1 All E.R. 774 (H.L.), Lord Denning did vary the interest rate set by the trial judge which rate on appeal was restored by the House of Lords. Lord Wilberforce made this comment at page 782:

> "As to interest on damages, I would restore the decision of the judge. This was varied by the Court of Appeal on the theory that as damages are now normally subject to increase to take account of inflation, there is no occasion to award interest as well. I find this argument, with respect, fallacious. Increase for inflation is designed to preserve the "real" value of money, interest to compensate for being kept out of that "real" value. The one has no relation to the other. If the damages claimed remained, normally, the same, because there was no inflation, interest would normally be given. The same should follow if the damages remain in real terms the same."

In the case of *Henderson v. Hatton et al.*, [1981] 5 W.W.R. 624 (B.C.C.A.) it was argued that a court should not take inflation into account when making an award for nonpecuniary loss on the basis that an allowance for inflation and an allowance for prejudgment interest would result in over-compensation for the plaintiff and would be incentive for the plaintiff to delay his action as long as possible in order to obtain a greater award. The court did not accept these arguments. After referring to the *Pickett* decision, Mr. Justice Craig made these comments at pages 636 and 637:

> "Although there is some logic to this argument (referred to above), I think that it should not prevail. I think that even before prejudgment legislation applied trial judges were taking inflation into consideration in making personal injury awards... If a judge is being asked to base his award in part by reference to what was awarded in somewhat similar earlier cases, he should not ignore the fact of inflation. To what extent inflation may be taken into consideration will depend, generally, on the specific evidence in

> any case, but the fact that there is not any specific evidence does not preclude a trial judge from giving some recognition to the fact that there is inflation when making an award.
>
> In dealing with the nonpecuniary aspect of the loss, a court is concerned with not only pain and suffering and loss of amenities between the date the cause of action arose and the date of trial but also the future effect of these items. In attempting to assess the damages, the court is concerned with what is the "real" value of the loss. The court attempts to compensate the plaintiff for his nonpecuniary loss in terms of the present-day value of money. An award of interest does not fit into that concept. Under our legislation, prejudgment interest would be payable regardless of inflation or deflation. Although in one sense there may be duplication in awarding interest as well as taking inflation into account, the duplication is incidental, not fundamental."

Given the logic of the Manitoba Report and some recent decisions, which I will refer to later in this report, these superior court decisions clearly do not represent the last word in the area.

The first observation that can be made with respect to the approach advocated by the Manitoba Report with respect to the calculation of loss of use separately from loss of value is the complexity. Annex "D" to this report takes examples from the Manitoba Report. The trial judge must categorize each amount of the award into those for which he has already included a component for loss of value to determine which interest rate he will apply. For those money amounts for which he has not considered inflation he must calculate the percentage equivalent of the point change for the Consumer Price Index and apply this percentage change in addition to an application of the rate for loss of use. This is to be compounded. One can ask whether we can graft this degree of specificity on an unlegislated method of arriving at the amount of damages in any given case. To quote from Lord Scarman in the *Pickett* case at page 800:

> "In theory the higher award at trial has the same purchasing power at the lower award which would have been made at the date of the service of the writ; in truth, of course judicial awards of damages follow, but rarely keep pace with, inflation so that in all probability the sum awarded at trial is less, in terms of real value, than would have been awarded at the earlier date."

The next observation that can be made with respect to the Manitoba Report is that the trial courts at least in Great Britain and British Columbia, in spite of the decisions in *Pickett* and *Hatton, supra*, have been unable to avoid the logic of the argument that to award interest on a nonpecuniary loss award results in twice compensating

the plaintiff for inflation. The *Times* from March 19, 1982 reports that in the case of *Birkett v. Hayes*, [1982] 1 W.L.R. 816 (C.A.), the Master of the Rolls recognized that the trial judge was required to award the plaintiff on the value of the money at the date of trial and accordingly reduced prejudgment interest to 2%. Lord Denning recommended this to be a guideline for all future cases. A similar development seems to be occurring in British Columbia. In *Fitzpatrick v. Mann*, [1982] B.C.D. CIV. 3389-02, Meredith, J. dealt with the issue in this way:

> "At what rate should prejudgment interest be ordered in respect of the award for pain and suffering? I have taken inflation fully into account to the date of judgment. Prejudgment interest, if awarded at the rates now routinely prescribed and applied will result in the plaintiff receiving an amount approaching double what he would otherwise expect. This is because the current interest rates attracted in the market inevitably reflect an inflation component. In fixing prejudgment interest, I think I should try to exclude the inflation component."

After referring to Mr. Justice Craig's comments in the *Hatton* case, *supra*, the learned trial judge continued:

> "Of course, whether there is a duplication or not will depend upon the rate of interest awarded. Under the *Court Order Interest Act*, the court has a discretion to add interest "at a rate the court considers appropriate in the circumstances, but the rate shall not be less than the rate that applies to interest on a judgment under the *Interest Act (Canada)*, from the date on which the cause of action arose to the date of the Order". The *Interest Act (Canada)* prescribes 5% per annum. On the evidence on this case, 5% is something more than the difference between current interest rates and inflation. In any case, 5% is the minimum amount. Interest shall therefore be added to the amount which the plaintiff will be entitled for damages for pain and suffering in the amount of 5%."

Mr. Justice Meredith came to the same conclusion in the case of *Dalskog v. Kroy*, Vancouver Registry No. D791312, December 18, 1981 (not yet reported). At least one other British Columbia trial judge has followed this approach.

It must be noted that the main criticism by the Manitoba Report was directed against the prime rate as reflected in the Saskatchewan Report on prejudgment interest. This criticism is not applicable to the Draft Act which recommends an averaging of prejudgment interest rates in effect during the prejudgment period. This more closely approximates the plaintiff's loss than the prime rate in effect on the date the cause of action arose. Accordingly, it would be appropriate

for the section to acknowledge the need for a trial judge to be cognizant of the effects of inflation on the award but to not legislate the mechanism for this approach.

Recommendation 1:

The conference should acknowledge the principles contained in the Manitoba Report with respect to a separate calculation for loss of use and loss of value but these principles should not form part of the draft Act.

II. *Whether the point of commencement for determining prejudgment interest should be the day the cause of action arose or the day when each damage or loss to be compensated was first sustained?*

The Saskatchewan Report reviewed the existing statute law as to the point from which prejudgment interest on general and special damages should be awarded. In Great Britain, New Brunswick, Quebec and many American states interest runs from the date of service of the writ. In Ontario, for liquidated damages interest is calculated from the date the cause of action accrued. For unliquidated damages the Ontario legislation provides that the right to interest arises upon notification to the defendant. In British Columbia, interest for the prejudgment period is calculated from the date the cause of action arises. Since writing the Saskatchewan Report, Nova Scotia has amended its *Judicature Act* to provide for the awarding of prejudgment interest. This amendment forms Annex "E" to this report. The Nova Scotia Act follows the British Columbia legislation on this point. In 1980, the Uniform Law Section accepted the recommendation of the Saskatchewan Report to the effect that a plaintiff's entitlement to interest arises upon the accrual of the cause of action. The trial judge is given the power to vary the length of the prejudgment interest period.

Some criticism has been directed at the use of the accrual of the cause of action for the commencement point. In any case where the cause of action arises prior to the plaintiff's suffering loss or damage it is inaccurate to provide for, or for the judge to award, interest from the day the cause of action arose. It is also correct that it may be difficult and unnecessary for any other purpose for the trial judge to determine when the cause of action arose. The Manitoba Report recommends the day for the commencement of the prejudgment period to be the day the loss or damage was first sustained, with power to vary in calculating certain kinds of interest. This terminology may more accurately reflect the plaintiff's loss.

Recommendation 2:

The point of commencement for the prejudgment period should be the day the loss or damage was first sustained.

III. *Whether the Judge or the Jury Should Decide the Plaintiff's Entitlement to Interest in a Jury Trial?*

One potential issue which has not yet been litigated and for which no legislation provides a solution is the question as to who decides the plaintiff's entitlement to interest in a jury trial. This question only becomes meaningful where the legislation provides a discretionary power in relation to interest. It appears in British Columbia that the present practice is for the trial judge to decide the rate of interest after the jury has determined the plaintiff's entitlement to the principal sum. Under legislation which provides discretion on all matters, as the Draft Act purports at this time to so do, it is perhaps important for the legislation to determine to whom the discretionary powers belong.

The argument in favour of the jury determining all issues in relation to interest proceeds on the basis that interest is an integral part of the award. The Manitoba Report recommends that since the jury determines the award, it should also determine the amount of the interest payable. However, since the determination of interest is easily separated from the finding as to the main award it seems more appropriate for the matter to be resolved by the trial judge.

Recommendation 3:

In a jury trial, the judge should determine the amount of interest to which the plaintiff is entitled.

IV. *Whether the Court should have the Power to Disallow the Whole or Any Part of a Plaintiff's Interest Award?*

The Draft Act provides that where a court considers it to be just to do so in the circumstances, it may, with respect to the whole or any part of the amount for which judgment is given, disallow interest. However, the Uniform Law Section was divided on this issue and, accordingly, it was deferred for further consideration. The Section did decide that the trial judge should have the power to vary the rate and period for which prejudgment interest is payable.

The approach taken by the British Columbia government is to provide that prejudgment interest is payable as of right. There is no discretion in the trial judge except to set the rate which shall not be lower than 5% per annum. Although the Ontario legislation prescribes the rate of interest and the period for which it is payable, the Ontario

Act also provides that the trial judge has the discretion to disallow interest, fix a rate of interest higher or lower than the prime rate and to allow interest for a period other than that provided, in respect to the whole or any part of the amount for which judgment is given.

New Brunswick allows the trial judge even greater discretion. Instead of prescribing the rate and the period for which interest is payable, the court is given an absolute discretion as to when interest will be awarded, what the rate will be and the period for which it is payable. Unlike the British Columbia and Ontario approaches, no initial guidelines are provided for the New Brunswick court.

The Nova Scotia legislation provides that the court may decline to award interest or may reduce the rate of interest or the period for which it is awarded if the claimant has not during the whole of the prejudgment period been deprived of the use of money now being awarded or if the claimant has been responsible for undue delay in the litigation.

The British experience is useful. Subsection 3(1) of *The Law Reform (Miscellaneous Provisions) Act* provides a judicial discretion approach to the awarding of interest not unlike that passed by New Brunswick in 1973. It is quite clear that interest is awardable prior to judgment on any claim for debt or damages, without any restriction related to the nature of the cause of action in respect of which the claim is made. Nevertheless in England between 1934 and 1969 only one contested personal injury case was reported. In 1957 the Scottish Law Reform Committee, in its third report declared that its inquiries revealed that subsection 3(1) of the 1934 legislation is seldom used by the English courts and scarcely ever invoked by the parties to litigation. The Commission went on to say that it appears that British judges in assessing the amount of damages will consider the loss of interest to the plaintiff only where there has been inordinate delay. Thus as a result of the courts' refusal to exercise their discretion, Parliament passed the 1969 legislation providing that in any award which includes damages in respect to personal injury or in respect of wrongful death, the court shall exercise its power and award interest on such amounts.

The judicial experience in Canada and Great Britain on when a court will disallow interest or exercise its discretion to vary the interest rate would seem to indicate the courts' unwillingness to compensate the plaintiff without reference to the conduct of the plaintiff or defendant or the merits of the particular case. In the leading case of *Jefford v. Gee*, Lord Denning established certain guidelines regarding

the payment of prejudgment interest. With respect to the courts' discretion to disallow interest, the Master of the Rolls felt that it would be appropriate to depart from the guidelines "in exceptional cases, such as when one party or the other has been guilty of gross delay".

There have been many Canadian cases indicating that the conduct of the plaintiff is a factor, principally, the delay of the plaintiff: *Canada Square v. V. S. Services* 34 O.R. (2d) 250 (Ont. C.A.); *City of Moncton v. Aprile Contracting Ltd. et al.* 29 N.B.R. (2d) 631 (N.B.C.A.). It can be queried whether in any of these cases there was a proper exercise of the discretion to refuse interest. If the factor is not one which the court would consider on the making of the initial award, it is similarly inappropriate to the interest claim. The courts appear to consider the awarding of interest to be an extension of their powers regarding costs as a means of adjudicating on intangibles inherent in the judicial process.

There may be cases where interest should not be awarded but these should be determined before legislation is passed and incorporated into the legislation. Two such cases may be where there is a matrimonial property distribution or where damages are awarded instead of specific performance. In both of these cases it cannot be said that the plaintiff has been kept out of his money. In fact, in both types of awards there is built into the award a component which represents the plaintiff's inability to use the funds. Furthermore, it would seem that where there is a power to vary the interest rate or the period for which interest is payable that there is no further need to allow the court the power to disallow interest.

Recommendation 4:

The court should not be given the power to disallow the plaintiff's right to interest under any prejudgment interest legislation.

V. *What Should be the Post-Judgment Interest Rate?*

Sections 12 to 15 of the *Interest Act*, R.S.C. 1970, c. I-18 provides as follows:

> **12.** Sections 13, 14 and 15 apply to the Provinces of Manitoba, British Columbia, Saskatchewan and Alberta and to the Northwest Territories and the Yukon Territory only. R.S., c. 156, s. 12.
>
> **13.** Every judgment debt shall bear interest at the rate of five per cent per annum until it is satisfied. R.S., c. 156, s. 13.
>
> **14.** Unless it is otherwise ordered by the court, such interest shall be calculated from the time of the rendering of the verdict or of the giving of the judgment, as the case may be, notwithstanding

that the entry of judgment upon the verdict or upon the giving of the judgment has been suspended by any proceedings either in the same court or in appeal. R.S., c. 156, s. 14.

15. Any sum of money or any costs, charges or expenses made payable by or under any judgment, decree, rule or order of any court whatever in any civil proceeding shall for the purposes of this Act be deemed to be a judgment debt. R.S., c. 156, s. 15.

Officials in the federal Department of Justice are considering the possible repeal of the above sections. Thus, it is appropriate to consider a uniform rate of interest to be enacted by the provinces and territories.

In those provinces that can establish a post-judgment interest rate, the rate varies. In Ontario, subsection 37(1) of the *Judicature Act*, R.S.O. 1980, c. 223 provides that a judgment bears interest from the time of giving the judgment at the prime rate, presumably in existence at the date of judgment as determined by reference to the *Bank of Canada Review.*

Article 1077 of the Quebec *Civil Code* sets the post-judgment interest rate at 5% with one exception. Article 1056c allows a judge in tort actions to add to the legal rate an amount equal to the excess of the interest rate fixed by section 53 of the *Revenue Department Act*, R.S.Q. 1964, c. 66 over the legal interest rate. This currently sets a post-judgment interest rate of 19%.

The rate in Prince Edward Island is 6%. In the remaining jurisdictions the rate is 5%: see the *Judicature Act*, R.S.N.B. 1973, c. J-2, the *Rules of the Supreme Court* for Newfoundland, Orders 32, 38, 50, 52 and 54, the *Interest on Judgments Act*, R.S.N.S. 1967, c. 150, s. 1.

In Great Britain the *Judgments Act*, 1838, section 17 provides for a post-judgment interest rate of 4%. However, according to the *Administration of Justice Act*, 1970, s. 44(1) the Lord Chancellor may vary this interest rate by Order. By *Judgment Debts (Rate of Interest) Order 1980*, s. 11980, no. 672, the Lord Chancellor ordered a post-judgment interest rate of 15%.

The Manitoba Report, recommendations 39 and 40, contained in Annex C recommends the post-judgment rate to be the highest rate for Chartered Bank Non-chequable Savings Deposits in effect at the date of judgment as determined by reference to the *Bank of Canada Review.*

If the conference reaffirms its decision to set the prejudgment interest rate at the rate derived from an average of rates published by a

Government official, it would seem appropriate to set the post-judgment interest rate at that rate which appears as the prejudgment interest rate in the most recent *Gazette* prior to the judgment date.

If the Conference adopts a rate based on the Manitoba Report, a different decision with respect to a post-judgment interest may be dictated.

Recommendation 5:

The post-judgment interest rate should be that rate of interest published in the *Gazette* prior to the judgment date adjusted at each six month period.

Saskatchewan Commissioners

Commentary with Alternative Recommendations, Where Appropriate, by Manitoba Commissioners

The Manitoba Commissioners agree with the Saskatchewan Commissioners that the point of commencement for determining prejudgment interest should be the date each damage or loss to be compensated is first sustained (page 306 of supplementary report). We also agree with many previous recommendations the Saskatchewan Commissioners have advanced. These include:

(1) the exceptions to prejudgment compensation set forth in section 7 of the draft Uniform Act (Annex A);
(2) the Act be binding on the Crown (section 2 of the draft Act);
(3) there be special rules concerning payment into court similar to section 5(3) of the draft Uniform Act to induce settlement.

However, we do not agree with recommendations 1 and 4 contained on pages 305 and 308 of their supplementary report, attached. These are concerned generally with the issue of separate calculations for loss of use and loss of value and whether the court should be given the discretion to disallow a prejudgment interest claim. We have prepared alternative recommendations on both of these issues. Our reasons are set forth in the commentary succeeding each of the two headings. (For ease of reference, we have adopted the same headings as Saskatchewan to highlight the two issues.) We also propose two further recommendations at the conclusion of our commentary which differ from the recommendations advanced by the Saskatchewan Commissioners at the 1980 proceedings.

I. *Whether the Conference Should Adopt the Approach of the Manitoba Report with Respect to the Calculation of Loss of Use and Loss of Value on Money Awards?*

The Saskatchewan Commissioners recommend that the principles contained in the Manitoba Law Reform Commission Report on Prejudgment Compensation ("the Manitoba Report") with respect to a separate calculation for loss of use and loss of value be acknowledged by the Conference (Recommendation 1, page 305). We support this part of their recommendation. In our view, separate calculations for each loss will lend assistance to the courts to ensure the amount awarded for the postponement in payment of a money award (which is, after all, the loss prejudgment interest attempts to redress) mirrors the actual loss a plaintiff has sustained. Separate calculations will also allow the courts to take into account a deflationary, as well as an inflationary, economy.

However, the Saskatchewan Commissioners also recommend that these separate calculations not form part of the Uniform Act. We diverge with them on this point.

The Saskatchewan Commissioners suggest that one of the reasons for recommending against inclusion of loss of use and loss of value in legislation is their complexity. However, many legislatures have already passed legislation setting forth a discount rate to apply to personal injury awards. The real interest rate we propose to be included in legislation is identical in economic terms to the *discount rate*; the two differ only in result. The real *interest rate* will enlarge the principal award whereas the *discount rate* will reduce that award. This is because in the first place, loss precedes the damage award while in the second, loss succeeds an award. In any event, the inclusion of economic concepts in legislation pertaining to damage awards is not without precedent.

Furthermore, problems could arise if the concepts of loss of use and loss of value are not included in prejudgment interest legislation. To illustrate, assume a court awards an accident victim an amount for non-pecuniary loss which accounts for inflation (and, as the Saskatchewan Commissioners point out, this approach is clearly supported by Canadian case law). Admittedly, the present draft Uniform Act (see section 6, Annex A) would allow a court to award interest at a lower rate. But what rate should that be? Could a judge take judicial notice of the historical rate of real return on investment being in the range of 2%-4%? The answer to these questions are not clear; what is clear, however, is that the present draft Uniform Act provides no guidance.

The recommendation in the Manitoba Report that legislation should provide for a real rate of return of 3% for loss of use would provide a proper solution.

The Manitoba Report would also avoid the problems which have arisen with respect to *discount rates.* That is, in *Lewis v. Todd* (1980), 115 D.L.R. 257, the Supreme Court of Canada re-affirmed that "the discount rate is normally a factual issue which will turn on the evidence advanced in individual cases" (p. 268, per Dickson, J.). The negative consequences of this law are well-known; it results in an inconsistency in the calculation of awards and, as well, high costs for expert testimony which is often conflicting. The fact that at least three provinces have already legislated on discount rates and that others are considering such legislation should also point to the need to legislate a *real interest rate.*

The present draft *Uniform Act* would apply an average or mean of the rates in effect from the commencement date to the date of judgment. Assuming that the rate to be published in the *Gazette* is a commercial rate (the Act gives no guidance on this issue) we question the propriety of this provision. First, statisticians tell us that where a distribution of numbers has an extreme score (and this would apply to interest rates), the median or the mode of a series will give you a more accurate point of central tendency than will an average or mean figure. Quite apart from this, however, is the suitability of applying commercial rates to "long-winded" legal disputes when the inflation forecast built into these rates is based on a short-term (91 days) forecast. When separate calculations for loss of use and loss of value are employed, these problems do not arise.

We are also of the view that separate calculations for loss of use and loss of value would allow for a more just approach to the court's power to disallow a prejudgment interest claim. This will be discussed in the commentary preceding our alternative to recommendation 4 of the Saskatchewan Commissioners.

Alternative Recommendation of Manitoba Commissioners to Recommendation 1 (p. 305)

The Conference should acknowledge the principles contained in the Manitoba Report with respect to a separate calculation for loss of use and loss of value and that these principles should form part of the draft Act.

II. *Whether the court should have the power to disallow the whole or any part of a plaintiff's award?*

The Saskatchewan Commissioners recommend that the court "not be given the power to disallow the plaintiff's right to interest under any prejudgment interest legislation" (p. 308). The Manitoba Commissioners disagree, in part, with this recommendation.

With respect to the loss of value component (the *"inflation rate"*), we agree that the court should not have any discretion to disallow a plaintiff's claim for compensation. As the Manitoba Report points out, if conduct is in issue, "it should influence loss assessment before any inflationary adjustments [for loss of value] are made".

However, we recommend that the court have a discretion to disallow compensation for loss of use (the "*real interest rate*"). This is because this component compensates a party for the loss of money that (s)he has sustained as a result of the postponement in payment of a money award prior to judgment. If that postponement arises because the plaintiff has unnecessarily protracted the litigation, for example, why should the court not have the power to deny this part of his or her prejudgment compensation claim? The Saskatchewan Commissioners state (p. 12) that "if the factor [that is, conduct] is not one which the court would consider on the making of the initial award, it is similarly inappropriate to the interest claim". We would reply that recovery for loss of use differs from all other forms of compensations in that it arises solely because of the time lapse between the date of loss and the date of the award. The plaintiff should not be enriched if (s)he unnecessarily caused that delay. We therefore recommend:

Alternate Recommendation of Manitoba Commissioners to Recommendation 4 (p. 308)

The court not be given the power to disallow compensation for loss of value of a money award but that it have the statutory authority to deny compensation for loss of use of a money award prior to judgment.

III. *Further Matters of Concern*

(a) Should the Conference adopt the approach of the Manitoba Report with respect to the compounding of the real interest rate?

The Manitoba Commissioners agree with the Manitoba Report that legislation should provide that the *real interest rate* of 3% be compounded annually. We also agree with the Saskatchewan Commissioners that if a single rate of interest is used, that compounding would amount to a formidable deterrent which might serve to deprive a defendant of the right to put forward a reasonable defence (1980 Conference, p. 244). However, if the 3% *real interest rate* is compounded,

this problem does not arise. Moreover, an annually compounded rate is more indicative of a fair and adequate real rate of return, given that even interest on bank savings is compounded semi-annually. This was also the approach adopted by the National Conference of Commissioners on Uniform State Laws. That is, in 1980, the Conference adopted a real rate of return of 3% compounded annually, to discount awards in their *Model Periodic Payment of Judgments Act.*

Recommendation 6:

That the Uniform Act provide that the 3% real interest rate be compounded annually.

(b) Should the Conference adopt the approach of the Manitoba Report with respect to the requirement of claiming or pleading prejudgment compensation?

The Manitoba Commissioners are of the view that prejudgment compensation should be treated as any other claim for special relief; it should be pleaded. This will ensure that defendants (especially those without legal representation) will be aware of the full extent of the plaintiff's claim. This need is especially apparent should the Conference agree that a court have the power to disallow a claim for loss of use.

Recommendation 7:

That the Uniform Act provide that prejudgment compensation be specifically claimed or pleaded.

The Manitoba Commissioners

Annex A

Draft Uniform Prejudgment Interest Act

Interpretation **1.** In this Act

(a) "judgment" includes order

(b) "pecuniary loss" does not include pain and suffering, loss of amenities and of expectation of life, physical inconvenience and discomfort, social discredit, injury to reputation, mental suffering, injury to feelings or loss of society of spouse or child;

(c) "prejudgment interest rate" means the rate of interest published in the *Gazette* as required in section 4.

2. Her Majesty is bound by this Act. Application

3. Where a person obtains a judgment for the payment of money or a judgment that money is owing, the court or, in the case of a default judgment, the registrar of the court, shall add on the judgment an award of interest calculated in accordance with section 5. Award of interest

4. The (*fill in title of appropriate official*) shall determine and publish in the *Gazette* prejudgment interest rates in accordance with the regulations. Prejudgment interest rates

5. (1) Interest under this Act shall be calculated from the day the cause of action arises to the day of judgment at the rate determined by averaging the prejudgment interest rates in effect during that period. General damages calculation

(2) Notwithstanding subsection (1), interest in respect of damages for expenses incurred or income lost shall be calculated on the total of those damages as at the end of each three-month period from the day the cause of action arose to the day of judgment at the prejudgment interest rate that is in effect on the last day of the three-month period in which the damages are incurred. Special damages calculation

(3) Notwithstanding subsection (1), where a party pays money into court in satisfaction of a claim and another party does not accept the payment and obtains a judgment for an amount less than or equal to the amount paid into court, the court shall add on to the judgment Payment into court

(a) an award of interest calculated in accordance with this Act from the day the cause of action arose to the day of payment into court; and

(b) an award of interest in an amount equal to the actual interest earned on the portion of the money paid to court that is equal to the amount of the judgment from the day of payment into court to the day of judgment.

6. Where a court considers it to be just to do so in all the circumstances, it may, Discretion in court

with respect to the whole or any part of the amount for which judgment is given,

(a) disallow interest under this Act;

(b) award interest under this Act at a rate other than by reference to the prejudgment interest rate;

(c) award interest under this Act for a period other than that described in section 5.

Exceptions to awards of interest

7. No interest shall be awarded under this Act

(a) on that part of a judgment that represents pecuniary loss arising after the day of judgment and that is identified by the court;

(b) on interest awarded under this Act;

(c) on exemplary or punitive damages;

(d) on an award of costs;

(e) where the judgment is given on consent, unless agreed to by the parties;

(f) where there is an agreement between the parties respecting interest or where interest is payable by another rule of law;

(g) on money and interest on money that is borrowed by a party who receives judgment in respect of damages described in subsection 5(2); or

(h) on money that is paid into court and accepted in satisfaction of a claim.

Interest deemed part of judgment

8. For the purpose of enforcing a judgment, interest added on to the judgment shall be deemed to be included in the judgment.

Regulations

9. The Lieutenant Governor in Council may make regulations respecting the method of determining and publishing prejudgment interest rates.

Transitional

10. This Act does not apply to a cause of action that arises before the coming into force of this Act.

Annex B

Summary of Decisions From the 1980 Conference

1. Prejudgment interest should be awarded in all cases where economic or non-economic harm arises as a result of a tort or breach of contract or statute. The uniform Act should utilize a wording which ensures that a person who is entitled to a judgment

for the payment of money is entitled to have included in the judgment an award of interest. This wording will ensure that a plaintiff will be entitled to interest on a default judgment and will be able to enforce that part of the judgment which represents prejudgment interest. The plaintiff should not have to claim prejudgment interest.

2. Prejudgment interest should not be awarded on that part of a judgment that represents economic loss arising after the date of judgment unless it is not possible to differentiate between economic loss arising before and after judgment in which case the court shall award interest on the total amount. This recommendation is confined to "future economic loss" and does not refer to those types of losses such as "pain and suffering, loss of amenities and of expectation of life, physical inconvenience and discomfort, social discredit, injury to reputation, mental suffering, injury to feelings, or loss of society of spouse or child".

3. Prejudgment interest should not be awarded on exemplary or punitive damages.

4. Prejudgment interest should not be awarded with respect to costs awarded in the action.

5. The court should have the power to vary the prescribed prejudgment interest rate and award interest for a period other than the prejudgment interest period which is provided by the legislation.

6. Interest with respect to general damages should be calculated from the date the cause of action arose until the date of judgment.

7. Interest with respect to special damages should be calculated from the end of each three month period after the cause of action to the date of judgment on the total of such damages incurred during each three month period, and from the end of the last three month period to the date of judgment.

8. The Act should authorize a government official to publish in the Gazette an interest rate on a periodic basis. To determine the prejudgment interest rate the court should be directed to average the published interest rates for the prejudgment period.

9. The interest rate with respect to special damages should be the published interest rate in effect on the last day of the three month period in which the damages are incurred and with respect to the period from the last three month period until the date of judgment

should be the published interest rate in effect on the day of judgment.

10. The phrase "special damages" should be defined or replaced with the phrase "damages for expenses incurred or income lost".

11. Prejudgment interest should not be compounded.

12. A plaintiff who accepts money into court should not be entitled to prejudgment interest on the amount so accepted.

13. Where a plaintiff does not accept money paid into court and is awarded an amount less than or equal to the amount paid into court, the trial judge should be required to award interest from the day the cause of action arose to the day of payment into court and to award the plaintiff the interest actually earned in the court account on the money so paid in.

14. Prejudgment interest should not be awarded on consent judgments unless the parties have agreed in the judgment.

15. Prejudgment interest legislation should not apply where there is an agreement between the parties respecting interest or where there is any other rule of law respecting the payment of interest.

16. The Act should not affect causes of action arising before the Act comes into force.

17. The Act should bind the Crown.

18. The Act should apply to all courts within the legislative jurisdiction of the province.

Annex C

VI. SUMMARY OF RECOMMENDATIONS

General Principles

1. That legislation pertaining to prejudgment interest be reformed.

2. That the legal principle governing reform legislation be to award that sum of money which will restore, as nearly as possible, the plaintiff to the position (s)he would have held had no cause of action arisen.

3. That the legislation provide that the courts be given authority to award compensation where a plaintiff has sustained loss of use of a money award prior to the date of judgment.

4. That the mechanism measuring this loss be called the *"real interest rate"*.

5. That the legislation provide that the court be given authority to award compensation where a plaintiff has sustained loss of value on a money award prior to the date of judgment.

6. That the mechanism measuring this loss be called the *"inflation rate"*.

Compensation for Loss of Use

7. That the measure of compensation for the loss of use of money be that amount which the plaintiff would have gained had there been no loss of use of money and the plaintiff had invested that sum and received a real rate of interest thereon.

8. That the legislation provide for a *real interest rate* of 3%.

9. That the legislation specify that the *real interest rate* of 3% apply uniformly to all parties who are awarded compensation for loss of use of money arising prejudgment.

10. That the legislation provide that the *real interest rate* of 3% be compounded annually.

11. That the legislation provide that the commencement date for determining compensation for loss of use be the date each damage or loss to be compensated is first sustained.

Compensation for Loss of Value

12. That the legislation provide that the commencement date for determining compensation for loss of value be when each damage or loss to be compensated is first sustained, except where the court chooses a later date to measure such damage of loss, in which case that shall be the appropriate commencement date.

13. That the measure of compensation for loss of value be that sum of money which, when added to the principal sum, will allow the amount awarded at the time of trial to be equivalent in purchasing power to the amount that would have been awarded if reparation had taken place at the commencement date, as defined in recommendation 12.

14. That the measure for loss of value be determined at the time of

trial with reference to the *Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)* table, published on a monthly basis by Statistics Canada.

15. That the legislation provide that the measure for determining loss of value be calculated by reference to the *Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)* table, except in those very special circumstances where the court is satisfied that there is an alternative index which more accurately reflects the plaintiff's loss of value and it grants leave prior to trial to allow evidence in support of that alternative index.

16. That the legislation provide that for the purposes of establishing the *"inflation rate"* the monthly publication entitled *"The consumer price index"*, purporting to be published by Statistics Canada be admissible in evidence as conclusive proof of the *Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)* as set out therein, without further proof of the authenticity of the publication.

17. That where a plaintiff sustains loss of value on a money award, but not loss of use, loss of value be determined by calculating the point change in the *Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)* from the commencement date (as defined in recommendation 12) to the date of trial, and by converting that point change to a percentage figure which is then applied to the principal sum, as shown in Appendices E and F of this Report.

18. That, where a plaintiff sustains loss of use and loss of value on a money award, loss of value be determined by calculating each annual point change in the *Consumer Price Index for Canada, All-items (Not Seasonally Adjusted)* from the commencement date (as defined in recommendation 12) to the date of trial, and by converting that annual point change to a percentage figure which, when added to the 3% *real interest rate*, is applied to the principal sum and compounded annually, as shown in Appendices E and F to this Report.

Judicial Discretion

19. That a plaintiff be awarded compensation for loss of use where it is claimed or pleaded, unless the court is satisfied that, for exceptional reasons, it would be unfair and inequitable to award such compensation, in which case, the court may either

(i) disallow the claim for loss of use, or

(ii) reduce the claim for loss of use by allowing compensation for only part of the prejudgment period.

20. That, if the court is satisfied that the principal sum awarded no longer equals its original purchasing power, a plaintiff be awarded compensation for loss of value where it is claimed or pleaded.

Exclusions

21. That the court not award compensation for loss of use and loss of value where adequate prejudgment compensation derives from other bases in law.

22. That the court not award compensation for loss of use and loss of value on exemplary or punitive damages.

23. That the court not award compensation for loss of use and loss of value where there is an existing valid agreement respecting interest between the parties.

24. That the court not award compensation for loss of use and loss of value where interest is payable by another statute.

25. That, where a plaintiff is entitled to judgment for the borrowing of money and interest thereon, the court not award any compensation for loss of use and loss of value on that amount from the date of borrowing.

26. That the court not award any compensation for loss of use and loss of value on damages expressly identified by a finding of the court as compensation for pecuniary loss arising after the date of judgment.

Special Matters of Concern

27. That where an action for a money award is tried by a judge and jury, compensation for loss of use and loss of value be assessed by the jury.

28. That a payment into court in satisfaction of a claim include any loss of use and loss of value to which the plaintiff is entitled, up to the date of payment in.

29. Where the plaintiff elects to proceed to trial rather than accept a payment into court, and the amount of the judgment awarded (including any loss of use and loss of value to the date of payment in) is equal to or less than the amount paid in, no loss of use or loss

of value should be recoverable by the plaintiff for any period after the date on which (s)he received notice that a payment into court was made.

30. That compensation for loss of use and loss of value be determined and calculated by a judge or jury after all questions of liability and the amount of the principal sum of the award have been decided.

31. That compensation for loss of use and loss of value in respect of special damages be calculated on six month totals commencing from the date loss or damage was first sustained.

32. That, for the purpose of recommendation 31, "special damages" be defined as expenses incurred or income lost prior to the date of trial.

33. That the reforming legislation specifically provide that the Crown is bound thereby.

Mechanics of Reform

34. That section 71 and section 72(1), (2) and (3) of *"The Queen's Bench Act"* be repealed along with the comparable sections of *"The County Courts Act"* (those being section 78 and section 79(1), (2) and (3) of that Act) and that recommendations 1 to 38 of this Report be introduced via separate statute to be entitled *"An Act to Provide for Prejudgment Compensation on Money Awards"*.

35. That the Act authorize the Court of Queen's Bench and the County Courts to award prejudgment compensation in accordance with the Commission's recommendations in this Report.

36. That in order to ensure that recommendations 19 and 20 of this Report are applied to claims under Part II of *"The County Courts Act"*, a claim for compensation for loss of use and loss of value be printed directly onto the prescribed claim form.

37. That compensation for loss of use and loss of value be excluded in determining whether the County Courts have jurisdiction to hear an action under Part I or Part II of *"The County Courts Act"*.

38. That the authority to award prejudgment compensation extend to plaintiffs who have commenced action prior to the effective date of the legislation but that compensation be confined to that loss of use and loss of value which arises after the effective date.

Post-judgment Compensation

39. That, should sections 12 to 15 of the *Interest Act* (Canada) be repealed, legislation pertaining to post-judgment interest be introduced in Manitoba to allow interest on judgment debts to accrue at the reported rate for *Chartered Bank Non-chequable Savings Deposits* in effect at the date of judgment, until fully satisfied.

40. That for the purpose of establishing the reported rate for *Chartered Bank Non-chequable Savings Deposits*, reference shall be made to the highest rate of interest quoted by chartered banks to holders of *Non-chequable Savings Deposits*, as determined and published by the Bank of Canada in the periodic publication entitled the *Bank of Canada Review.*

Annex D

Three examples of the application of loss of use and loss of value compensation to actions based in tort and contract

Causes of action based in contract

Example 1

A and *B* enter into a contract. *B* agrees to pay *A* five thousand dollars ($5,000) on March 1, 1979 in exchange for certain goods to be supplied. *A* supplies the goods; *B* wrongfully withholds payment.

A sues *B* and claims as damages the five thousand dollars ($5,000). He also includes in his prayer for relief a claim for interest.

To what amount of compensation is *A* entitled under the proposed legislation, assuming the date of judgment is June 1, 1981?

ANSWER: Assume the court disallows compensation for loss of use because it decides, for exceptional reasons, that it would be unfair and inequitable to award such compensation. Assume also that the court is satisfied that the principal sum ($5,000) no longer equals its original purchasing power. Compensation would be calculated as follows:

loss of value: in March, 1979, CPI = 186.6
in June, 1980, CPI = 236.8
point change = 50.2
percentage change = $\frac{50.2}{186.6} \times 100 = 26.9\%$

26.9% x $5,000 = $1,345.12

Total award = $5,000 + $1,345.12 = $6,345.12

Example 2

Assume the same facts as in Example 1 with one exception: here, the court decides to award compensation for loss of use and loss of value. Compensation would be calculated as follows:

First year of prejudgment period:

loss of value: in March, 1979, CPI = 186.6
in March, 1980, CPI = 204.0
point change = 17.4
percentage change = $\frac{17.4}{186.6} \times 100 = 9.3\%$

loss of use = 3%

loss of use and loss of value = 12.3% (3% + 9.3%)

compensation = 12.3% x $5,000 = $615.00

Second year of prejudgment period:

loss of value: in March, 1980, CPI = 204.0
in March, 1981, CPI = 229.4
point change = 25.4
percentage change = $\frac{25.4}{204.0} \times 100 = 12.4\%$

loss of use = 3%

loss of use and loss of value = 15.4% (3% + 12.4%)

compensation = 15.4% x $5,615 = $864.71

Third year of prejudgment period:

loss of value: in March, 1981, CPI = 229.4
in June, 1981, CPI = 236.8
point change = 7.4
percentage change = $\frac{7.4}{229.4} \times 100 = 3.2\%$

loss of use for 1 month $\frac{3\%}{12} = .25\%$

from March, 81-June, 81 = .25% x 3 = .75%

loss of use and loss of value = 3.95% (.75% + 3.2%)

compensation = 3.95% x $6,479.61 = $255.94

Total compensation on $5,000 = $1,735.65

Total award: $5,000 + $1,735.65 = $6,735.65

Cause of action based in tort

Example 3

On January 1, 1975, *A* stops his car at a pedestrian crosswalk to allow a pedestrian to cross. *B* negligently hits *A*'s car from behind, causing A to suffer a whiplash injury.

A attends a chiropractor's office for a period of 6 weeks, commencing January 5, 1975, and ending February 9 of that year. In total, there are 6 sessions (January 5, 12, 19, 26 and February 2, 9) each costing $25.00.

A is confined to bed for the first month and is unable to perform household duties. She pays a cleaning lady $50 per week over the course of 4 weeks (January 5, 12, 19, 26).

A is unable to work for a six week period (January 5 to February 9). She suffers lost earnings of $1,200 in total. She is usually paid $400 each pay day through bi-weekly cheques (January 5, 19 and February 9).

Assume that *A* is awarded non-pecuniary loss of $3,000 for pain and suffering. Assume also that the $3,000 represents present dollar value in that the court has already included an adjustment for inflation in assessing quantum. Her special damages amount to $1,550 and this is included in her prayer for relief. To what amount of compensation would *A* be entitled under the proposed legislation assuming the date of judgment is June 1, 1981?

ANSWER:

STEP 1: Compensation on $3,000 general damages

There has been no loss of value on $3,000. Assume the court awards loss of use. Compensation would be calculated as follows:

Loss of use:

Jan. 1975 - Jan. 1976:	$3,000	x 3%	= $ 90.00
Jan. 1976 - Jan. 1977:	$3,090	x 3%	= 92.70
Jan. 1977 - Jan. 1978:	$3,182.70	x 3%	= 95.48
Jan. 1978 - Jan. 1979:	$3,278.18	x 3%	= 98.34
Jan. 1979 - Jan. 1980:	$3,376.52	x 3%	= 101.29
Jan. 1980 - Jan. 1981:	$3,477.81	x 3%	= 104.33
Jan. 1981 - June 1981:	$3,582.14	x 1¼%	= 44.77
			$626.91

STEP 2: Compensation on $1,550 special damages

Assume court awards loss of use and loss of value on the special damages. Recommendation 31 states that compensation on special damages would be calculated on six month totals commencing from the date loss or damage was first sustained. Compensation would be calculated as follows:

First year of prejudgment period:

loss of value: in July, 1975, CPI = 139.8
in July, 1976, CPI = 149.3
point change = 9.5
percentage change = $\frac{9.5}{139.8}$ x 100 = 6.8%

loss of use = 3%

loss of use and loss of value = 9.8% (6.8% + 3%)

compensation = 9.8% x $1,550 = $151.90

Second year of prejudgment period:

loss of value: in July, 1976, CPI = 149.3
in July, 1977, CPI = 161.8
point change = 12.5
percentage change = $\frac{12.5}{149.3}$ x 100 = 8.4%

loss of use = 3%

loss of use and loss of value = 11.4% (8.4% + 3%)

compensation = 11.4% x ($1,550 + $151.90) = $194.01

Third year of prejudgment period:

loss of value: in July, 1977, CPI = 161.8
in July, 1978, CPI = 177.7
point change = 15.9
percentage change = $\frac{15.9}{161.8}$ x 100 = 9.8%

loss of use = 3%

loss of use and loss of value = 12.8% (9.8% + 3%)

compensation = 12.8% x $1,795.81 = $242.67

Fourth, fifth, sixth and seventh years of prejudgment period:

Following the same method of calculation, compensation would be $237.38 ($2,138.58 x 11.1%) for the fourth year; $311.25 ($2,375.96 x 13.1%) for the fifth year; $427.26 ($2,687.21 x 15.9%) for the sixth year; and $457. 82 ($3,114.47 x 14.7%) for the final 11 months.

Total award:	General damages	$3,000.00
	compensation on general	521.28
	special damages	1,550.00
	compensation on special	1,528.87
		$6,600.15

Annex E

An Act to Amend Chapter 2 of the Acts of 1972, the Judicature Act

(Assented to the 5th day of June, A.D. 1980)

Be it enacted by the Governor and Assembly as follows:

1. Section 38 of Chapter 2 of the Acts of 1972, the Judicature Act, is amended by adding immediately following clause (8) thereof the following clauses:

(9) In any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment.

(10) Where a party pays money into court in satisfaction of a claim and another party becomes entitled to judgment for an amount equal to or less than that paid into court, the Court shall award interest under clause (9) hereof only to the date of payment into court as if said date had been the date of judgment.

(11) The Court in its discretion may decline to award interest under clause (9) hereof or may reduce the rate of interest or the period for which it is awarded

(a) if interest is payable as of right by virtue of an agreement or otherwise by law;

(b) if the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded;

(c) if the claimant has been compensated in whole or in part by insurance or other payment prior to judgment; or

(d) if the claimant has been responsible for undue delay in the litigation.

2. Sections 4 and 5 of Chapter 82 of the Revised Statutes, Second Series, are repealed.

APPENDIX U

(See page 32)

JUDGMENT INTEREST ACT

Part I
General

Interpretation

1. In this Act,

(a) "interest rate" means the rate of interest published in *The Gazette* as required in section 3;

(b) "judgment" includes order of a court.

Application

2. Her Majesty is bound by this Act.

Regulations

3. (1) The Lieutenant Governor in council may make regulations respecting the method of determining and the frequency of publishing interest rates and the periods with respect to which interest rates are in effect.

Interest Rates

(2) The (*fill in title of appropriate official*) shall determine and publish in *The Gazette* interest rates in accordance with the regulations.

Part II
Interest Before Judgment

Interpretation

4. In this Part, "pecuniary loss" does not include pain and suffering, physical inconvenience and discomfort, social discredit, injury to reputation, mental suffering, injury to feelings, loss of amenities and of expectation of life or loss of society of spouse or child.

Award of Interest

5. (1) Where a person obtains a judgment for the payment of money or a judgment that money is owing, the court shall award interest on the judgment calculated in accordance with this Part.

Exceptions

(2) The court shall not award interest

(a) or that part of a judgment that represents pecuniary loss arising after the day of judgment and that is identified by the court;

(b) on interest awarded under this Part;

(c) on exemplary or punitive damages;

(d) on an award of costs in the action;

(e) on money, and interest on that money, borrowed by a party in respect of damages described in section 6(2);

(f) on money that is paid into court and accepted in satisfaction of a claim;

(g) where the judgment is given on consent, unless agreed to by the parties;

(h) where there is an agreement between the parties respecting interest; or

(i) where the payment of interest is otherwise provided by law.

Discretion to vary or disallow interest

(3) Where it is proven to the satisfaction of the court that it is just to do so having regard to the circumstances, the court may, with respect to the whole or any part of the amount for which judgment is given, refuse to award interest under this Part, or award interest under this Part at a rate or for a period or both other than a rate or period determined pursuant to section 6.

Jury trials

(4) In a jury trial, the judge shall exercise the powers of the court under this Part.

Default judgments

(5) In the case of a default judgment, the registrar of the court shall award interest calculated in accordance with this Part, but shall not exercise any discretion granted to the court under subsection (3).

General damages calculation

6. (1) Subject to subsections (2) and (3), the court shall calculate interest under this Part from the day on which loss or damage is first sustained to the day of judgment at the rate determined by averaging the interest rates in effect during that period.

Special damages calculation

(2) Where a judgment includes damages for expenses incurred or income lost, the court shall

(a) determine the total of those damages sustained within the three-month period commencing on the day on which loss or damage is first sustained and within each subsequent three-month period; and

(b) calculate interest from the last day of each

three-month period described in clause (a) to the day of judgment, on the total of the damages sustained within the three-month period, at the interest rate in effect on the last day of the three-month period.

Payment into court

(3) Where a party pays money into court in satisfaction of a claim and another party does not accept the payment and obtains a judgment for an amount less than or equal to the amount paid into court, the court shall award interest,

(a) from the day on which loss or damage is first sustained to the day of payment into court, calculated in accordance with this Part; and

(b) from the day of payment into court to the day of judgment, in an amount equal to the actual interest earned on the portion of the money paid into court that is equal to the amount of the judgment.

NOTE: Jurisdictions should review their Rules of Court to ensure that it is specified whether a judgment is inclusive or exclusive of interest in comparing the amount of the judgment awarded to the amount paid into the court for the purpose of determining costs.

Interest deemed part of judgment

7. For the purpose of enforcing a judgment, interest awarded under this Part is included in the judgment.

Transitional

8. This part does not apply to a cause of action that arises before the coming into force of this Part.

Part III

Post-judgment Interest

Post-judgment interest

9. Notwithstanding that the entry of judgment may have been suspended by any proceeding in an action, including an appeal, every judgment debt bears interest from the day on which it is payable by or under the judgment until it is satisfied

(a) with the respect to interest to be applied during the period from January 1 to June 30 in a year,

at the interest rate in effect on January 1 of the year; and

(b) with respect to interest to be applied during the period from July 1 to December 31 in a year, at the interest rate in effect on July 1 of the year.

NOTE: This Part only deals with the determination of the past-judgment interest rate in the context of the situation of those jurisdictions that are subject to the *Interest Act* (Canada). Other issues, such as the extent of the definition of the term "judgment debt", coming into force and transitional application of the existing regime are dependent upon the precise terms of the Act amending the *Interest Act* (Canada).

APPENDIX V

(See page 33)

JUDICIAL DECISIONS AFFECTING UNIFORM ACTS

PRINCE EDWARD ISLAND REPORT

BULK SALES ACT

Larosa Food Importing & Distributing Ltd. v. Mel-J Holdings Ltd. 33 B.C.L.R. 113 B.C. County Court

A statement of creditors under s.4 of the Sale of Goods in Bulk Act R.S.B.C. 1979 [similar to s.4 Uniform Act] which fails to indicate that the vendor was a corporation, describe the capacity of the deponent and indicate that the deponent had personal knowledge of the matters set forth, is defective in substance as well as form and is void.

CONTRIBUTORY NEGLIGENCE

Anderson and G. W. Anderson Holdings v. Stevens et al 29 B.C.L.R. 355 B.C.S.C.

The defendant vendors were found liable in fraud and the defendants Smith and Fan were found liable in negligence with regard to the sale of a business to the plaintiffs.

No apportionment of the fault pursuant to s.4 Negligence Act R.S.B.C. 1979 c.298 [s.2 Uniform Act] the vendors contended that the Act did not apply to intentinal torts. The word "fault" must be given its ordinary meaning and is not synonymous with "negligence" (Bell Canada v. Cope (Sarnia) Ltd. referred to at p. 224, 1980 Proceedings applied.) The fraudulent vendors were held 90 per cent at fault.

The degree of fault attributable to failure to wear a seat belt is a question of fact to be determined on the basis of the circumstances of each case. It ranges up to 35 per cent. Burton v. Groening and Advance U Drive (1977) Inc. 30 B.C.L.R. 396 but the norm appears to be 15 per cent. Holstein v. Berzolla (1981) 4 W.W.R. 159 (Sask. Q.B.) and Godin and Brun v. Borque (1981) 32 N.B.R. (2d) 45 (N.B.C.A.)

DEFAMATION

Bennett v. Stupich 30 B.C.L.R. 58 B.C.S.C.

The case concerned certain remarks made by a member of the Legislative Assembly in response to the "scotch and cornflakes" comments of the Premier. It is of interest in relation to the comments of Mackoff J. on apology "The apology contemplated by s.6 and 7 Libel and Slander Act R.S.B.C. 1979 c.234 [s.4 Uniform Act] is not the parliamentary form of apology. By these sections is meant a full and unqualified apology and a full and fair retraction which would be understood by the average person to be such.

The so-called apology contained in the "open letter" while it may pass as such in the legislature does not meet the basic requirements of the Act."

DEPENDANTS' RELIEF

Re Cooper 30 O.R. (2d) 113 Ont. Div. Ct.

In an application for support under s.65 of the Succession Law Reform Act 1977 (Ont.) c.40 [now R.S.O. 1980 c.488] in order to qualify as a "dependant" within the meaning of s.64 of the Act it is not necessary for a common law spouse to show that she was actually dependant upon the deceased, but merely that the deceased was under a legal obligation to provide support prior to his death. A person is under an obligation to provide support for his common law spouse by reason of ss.14(b) and 15 of the Family

Law Reform Act 1978 (Ont.) c.2. In an application by the common law "wife" for support the court may consider her contributions to the deceased's welfare and to the acquisition, maintenance and improvement of his property, business or occupation under s.69(1)(a)(vii), (viii) of the Succession Law Reform Act. Where the common law spouses both contributed to the expenses of their home, but the deceased contributed less in proportion to his income, and as a result of his common law spouse's contribution, was able to build up his assets, an order for her support may be made out of his estate where he has died intestate, leaving nothing to her, and where she has not been able to build up any assets during their cohabitation. The fact that the deceased did not marry his common law spouse and did not make a will are not to be taken as evidence that the deceased did not intend to provide for her. Moreover, it is erroneous to award her less merely because she is the deceased's second "wife".

The case raises a point on the variation of wording between the Ontario Act and the Uniform Act. The Ontario Act s.64 defines a dependant in terms of a person "to whom the deceased was providing support or was under a legal obligation to provide support immediately before his death". The Uniform Act s.1(d)(vi) requires that a dependant must be "dependant upon the deceased for maintenance and support". The test under the Uniform Act appears to be actual dependence rather than the existence of a legal obligation to support. In view of the adoption by the Conference in 1980 of the Uniform Family Support Act creating such legal obligation it appears necessary to amend the definition of dependant in the Uniform Dependants' Relief Act to include persons to whom the deceased had a legal obligation to support under the Uniform Family Support Act.

Jensen v. Jensen et al 34 B.C.L.R. 163 B.C.S.C.

The plaintiff, an 85 year old widower, had been left $1 by his wife. He had at one stage deserted his wife and lived with another woman but reconciliation took place six months prior to her death. The main asset of the estate was the matrimonial home which had been pruchased and maintained by the plaintiff.

HELD the plaintiff was entitled to a life interest in the house. The test of "adequate provision" under s.2 Wills Variation Act R.S.B.C 1979 c.435 [same Uniform Act] was what a judicious wife and mother in the position of the testatrix would have done having regard to her marital and parental duties.

EFFECT OF ADOPTION

Williams v. Hillier and Hillier 13 Man R(2d) 259 Man. C.A.

The applicant was the natural father of two children who had been adopted by the natural mother and her second husband.

The application was made under the unique provisions of section 100 of the Child Welfare Act R.S.M. 1970 c.22 which authorize the making of an order in cases of step-parent adoptions granting the natural parent a right of visitation.

These provisions were enacted in consequence of criticism by the Manitoba Court of Appeal of the harshness of the existing law (s.96 Child Welfare Act equivalent to s.1 Uniform Act) under which the rights, duties and obligations of the natural parent are extinguished in consequence of the adoption.

The county court judge dismissed the application on the basis that only in an extraordinary case should a right of access be granted. The Court of Appeal enunciated the proper test to be the best interests of the child.

The case is included in this report for the purpose of raising the issue whether the Uniform Effect of Adoption Act should be amended to qualify the general rule on the effect of adoption and enable a court to order access by a natural parent following a step-parent adoption.

FATAL ACCIDENTS

Lousi v. Esslinger et al. 121 D.L.R. (3d) 17 B.C.S.C.

Section 3(1) of the Family Compensation Act R.S.B.C. 1979 c.120 [equivalent to s.3 Uniform Act] provides that a cause of action for wrongful death "shall be for the benefit of the wife, husband, parent, child and person to whom the deceased stood *in loco parentis*". A woman living with the deceased at the time of his death and a child of their union do not come within the words "wife" and "child". The statute is silent with respect to unmarried spouses (a man and woman living together without having gone through a form of marriage) and with respect to children born of such a union. In construing the statute the word "wife" must be given its ordinary meaning. A wife is a woman who has acquired that status through a ceremony of marriage with her husband in accordance with the law of an appropriate jurisdiction. Wife is a legally unambiguous word which describes a status that can only properly be applied to a woman who has voluntarily taken on an obligation, in accordance with the applicable law, to tie herself in a particularly well understood relationship with one man during their joint lives. A wife accepts that her union with her husband is dissoluble during their joint lives only in accordance with the law. The status of "wife" under the statute cannot be acquired by living with a man "as his wife", a so-called common law wife. In Family Compensation Act cases "child" means a legitimate child. However the child could recover as one to whom the deceased stood *in loco parentis.*

Note that the Uniform Fatal Accidents Act includes "an illegitimate child" in the definition of "child". It would seem necessary to delete these words in view of the adoption of the Uniform Child Status Act in 1980. It remains for consideration whether the benefit of Fatal Accidents legislation should be extended to embrace persons in a common law relationship (cf. Uniform Dependants' Relief and Family Support Acts).

In S.(E.S.) v. B(D.J.) 34 B.C.L.R. 376 the B.C. Supreme Court confirmed that the definition of "child" in the Family Compensation Act does not include an illegitimate child.

Fera v. Uguccioni 1980 29 O.R. (2d) 65 Ont. High Ct.

The central question in this case was whether an action for damages lies under the Family Law Reform Act 1978 (Ont.) c.2 [now R.S.O. 1980 c.152] at the suit of a widow and children, against the estate of a deceased husband and father whose death resulted from an accident caused by his own negligence.

HELD that pursuant to s.60 of the Act[similar to Uniform Fatal Accidents ACt s.21] a cause of action created in case of death exists only if the deceased, had he not been killed, could himself have recovered damages. Since the death was caused by his own negligence, the deceased could not have recovered damages. Although Part II of the Act creates a support obligation, with a corresponding right to enforce that obligation, it does not create a cause of action for damages in lieu of that support obligation when the spouse is no longer alive to discharge it.

Goudie et al v. Township of Eramosa et al. 1981 31 O.R. (2d) 414 Ont. High Ct.

While the Family Law Reform Act 1978 (Ont.) c.2, s.60(4) [now R.S.O. 1980 c.152 similar to s.8(1) Uniform Act] contemplates only one action in a claim for pecuniary loss resulting from the injury or death of a family member, the intent of the section is to avoid a person outside the family group being the subject of more than one action. Accordingly, where as the result of a motor vehicle accident resulting in a mother's death the father brings action against the other driver, joining the children as co-plaintiffs, the children are not precluded from commencing a separate action against the father in respect of his own negligence.

This case was distinguished in Duffin v. Mehegan et al 1982 35 O.R. (2d) 563.

INTERPRETATION ACT

Potter Distilleries Ltd. v. The Queen in Right of British Columbia 132 D.L.R. (3d) 191 B.C.C.A.

The decision of the Supreme Court judge (reported at p.143 1980 Proceedings) was affirmed.

A provision in an amending statute which repeals an unproclaimed section of the principal statute and substitutes a new section therefor, does not proclaim the unproclaimed section, even though the amending statute is itself proclaimed. Before the amendment becomes effective, the repealed section must first be proclaimed.

Orca Investments v. Vaughier 129 D.L.R. (3d) 756 B.C.S.C.

The case concerned the determination of a question of priority between a mortgage and a lien for unpaid wages. A lien for wages was registered under the Employment Standards Act R.S.B.C. 1979 c.107.

The Act was repealed and replaced by a new Act. A new lien was filed under the new Act but in the interval the mortgage was registered.

HELD the original lien was not affected by the repeal and replacement of the Act by vritue of section 35(c) of the Interpretation Act R.S.B.C. 1979 c.206 [s.31(c) Uniform Act].

King v. Liquor Control Board of Ontario 125 D.L.R. (3d) 661 Ont. High Ct.

The Liquor Control Act R.S.O. 1980 c.243 constituted the Board a corporation but expressly excluded the application of the provisions of the Corporations Act R.S.O. 1980 c.95.

HELD that the exclusion of the Corporations Act was intended merely to relieve the Board of certain administrative duties and did not evince a contrary intention so as to prevent the Board suing or being sued pursuant to the provisions of section 26(a) of the Interpretation Act R.S.O. 1980 c.219 [s.16 Uniform Act] vesting such capacity in all corporations established by an enactment.

For construction of "shall" see Albert v. Cookshaw Electric (1975) Ltd. 30 A.R. 426.

For example of the use of a preamble as an aid to construction see Labourers' International Union of North America, Local 506 v. The Georgian Building Corporation 1981 O.L.R.B. Rep. Man. 275.

INTESTATE SUCCESSION

Locke v. Locke's Estate 12 Sask. R. 54 Sask. Q.B.

Section 8 of the Intestate Succession Act R.S.S. 1978 c.1-13 [which replicates s.7 Uniform Act] provides that if an intestate dies leaving no spouse, issue, father or mother, his estate shall go to his brothers and sisters in equal shares, and if any brother or sister is dead, the children of the deceased brother or sister shall take the share their parent would have taken if living.

The nephew of the deceased was illegitimate and his father died before the deceased.

HELD the illegitimate child of the deceased brother was not a "child" despite the provisions of section 17 of the Act which gave him a right of succession to his father's estate. It is for consideration whether s.15 of the Uniform Act [which treats an illegitimate child as the legitimate child of his mother] should be repealed in view of the provisions of the Uniform Child Status Act adopted in 1980.

LIMITATION OF ACTIONS

Enns v. Mason et al 10 M.R. (2d) 349 Man. C.A.

The Limitation of Actions Act, R.S.M. 1970 c.L50 s.6 [no Uniform Act equivalent] provides that any limitation provision contained in any other Act of the Legislature shall be subject to a two-year limitation period provided by the Limitation of Actions Act unless the other Act is specially mentioned in a Schedule to the Limitation of Actions Act. That Schedule was repealed and re-enacted, and came into force on the same day as the Veterinary Medical Act 1974 (Man.) c.27 (C.C.S.M. c.V-30) s.22, which provides for a one-year limitation period. However, the Veterinary Medical Act was not listed in the Schedule. Accordingly, the Legislature had in error enacted two contradictory pieces of legislation on the same day. Where there is an ambiguity in the limitation legislation, the court should opt for an interpretation which would not deprive the plaintiff of his right to commence an action, and accordingly, the conflict should be resolved in favour of the longer limitation period.

Revelstroke Companies v. Lindsay 17 Alta. (2d)339 Alta. Q.B.

The applicant R. applied for a declaratory judgment quieting R. in the exclusive possession of certain lands. R. had been in adverse possession of the lands for over 12 years. The respondent, executrix of the estate of the registered owner, counterclaimed for possession and compensation for use and occupation of the lands by R.

HELD application granted.

Although R. was aware that it did not own the lands in question, its conduct in relation to the land was neither illegal nor fraudulent within the meaning of s.31(1) of the Limitation of Actions Act [s.27 Uniform Act]. There was no special relationship between R. and the respondent that would have required R. to inform the owner of the lands of their occupancy, and at all times R.'s use and enjoyment of the lands was open and without any form of concealment.

Great West Acceptance Corporation Ltd. v. Wascana Hotel (1965) Limited 1981 3 W.W.R. 747 Sask. Q.B.

The plaintiff commenced an action for foreclosure of its mortgage claiming accelerated principal, arrears of interest, and interest on arrears of principal and interest. The defendant redeemed the mortgage by paying the principal sum owing with interest thereon for six years. The issue was whether the six year limitation period under s.14 Limitation of Actions Act R.S.S. 1978 c.L-15 [s.13 Uniform Act] applicable to arrears of rent and interest applied or whether the ten-year limitation period under s.12(1)(b) [11(1)(b) Uniform Act] for "any sum of money secured by any mortgage" applied.

HELD ten-year limitation period applicable.

Interest payable under the mortgage was secured by the mortgage. As the ten-year limitation applicable to recovery of mortgage moneys applied not only to principal, but to "any sum" secured by the mortgage, arrears of interest were recoverable within ten years. Furthermore, although the defendant did not bring an action for redemption, the defendant's decision to redeem in response to the plaintiff's action was a proceeding similar to an action for redemption and thus was expressly excluded from the operation of the six-year limitation period.

MARRIED WOMEN'S PROPERTY

Landstrom v. Ringrose 121 C.L.R. (3d) 78 B.C.C.A.

The plaintiff, a woman, was injured while a passenger in a car as a result of the male driver's negligence. The plaintiff commenced action against the driver and the owners of the car for damages for personal injuries. Shortly thereafter the plaintiff and the driver were married. The defendants brought a motion to determine whether the provisions of the Married Women's Property Act R.S.B.C. 1960 c.233 [now R.S.B.C. 1979 c.252] and in particular s.13 which corresponds to s.6 Uniform Act, barred the plaintiff from continuing or maintaining her claim against the driver. The Chambers Judge held that it did. The plaintiff appealed to the B.C. Court of Appeal. HELD, the appeal should be

allowed. A man cannot escape liability for a tort that causes personal injury to a woman by marrying her. Until the late 19th century there were two separate legal propositions. The first was a rule of procedure. It was that a wife could not bring an action in tort against her husband. He would have had to be joined as a co-plaintiff and would have been suing himself. The second was a principal law. It was that the wife had no right to recover damages against her husband if he committed against her what would have been a tort if committed against anyone else. The principal of substantive law was not that no wrong was done to the spouse. It was that the law provided no remedy for the wrong. The Married Women's Property Act was first enacted in 1888. The relevant sections are ss.2, 4 and 13 [now ss. 1, 3 and 10]. Section 2 provides that "property" includes a thing in action. Section 4 abolishes the old procedural rule. A married woman may sue or be sued in her own name, as if she were a single woman, and her husband need not be a party to the litigation. Section 13 modifies the old substantive principle. A married woman has the same remedies as a single woman for the protection of her separate property. Provided that the remedy is sought for the protection of her separate property she may obtain the remedy against her husband. But, with that exception, she may not sue her husband in tort.

HELD that a personal injury tort committed by a man against a woman creates a thing in action which is the woman's separate property to protect which she may obtain a remedy against him after marriage. The judgment of Lambert JA, a former commissioner, contains an eloquent plea for the reform of the Act.

Strang v. Cheney 123 D.L.R. (3d) Alta. C.A.

A fondue pot exploded in Ms Strang's suite prior to her marriage to Mr. Cheney. They were both named as defendants in an action commenced prior to their marriage.

The question was whether Ms Strang could, subsequent to her marriage, claim contribution from her husband and required consideration of the provision in s.3 of the Married Women's Act R.S.A. 1970 c.227 [equivalent to s.6(2) Uniform Act] for inter-spousal immunity in tort.

HELD the claim for contribution is not a "suit for a tort" but a separate and distinct cause of action of a different class than the tort action which gives rise to it.

OCCUPIERS' LIABILITY

Preston v. Canadian Legion 123 D.L.R. (3d) 645 Alta. C.A.

The plaintiff fell and was seriously injured while crossing an icy parking lot. The court analysed the effect of s.5 Occupiers' Liability Act 1973 Alta. c.79 which is expressed in terms similar to s.3 Uniform Act. First, it does away with the difference between invitees and licensees. Secondly, it imposes an affirmative duty upon occupiers to take reasonable care for the safety of people who are permitted on the premises.

It does away with the old common law position that an occupier is only liable for unusual dangers of which he is aware or ought to have been aware.

PERPETUITIES

Roberts v. Hansen 15 Alta. L.R (2d) 11 Alta. C.A.

The appellant granted a five-year lease of his veterinary clinic to the respondent and others. The lease contained four options to renew the lease for four successive five-year terms and an option to purchase. The interest of the original lessees was assigned to the respondent.

The issue was the option to purchase clause infringed the rule against perpetuities. Perpetuities Act 1972 Alta. c.121 [same Uniform Act].

HELD the respondent could not be considered a life in being and the relevant perpetuity period was therefore 21 years (s.5(1)(b)). The option had to be exercised

within the five-year period of the lease or the five-year renewal periods. It was not exercisable for a period of twenty-five years but only within the currency of each particular term as renewed. It therefore did not offend the rule as a new option was created with each renewal.

PERSONAL PROPERTY SECURITY

Joseph Group of Companies Inc. v. Pickles, Tents and Awning Ltd. 127 D.L.R. (3d) 176 Man. C.A.

The case involved a contest on priority between a conditional seller and the receiver under a prior security agreement executed by the buyer.

Where goods are sold under an arrangement whereby title is reserved in the seller until payment by the buyer, the transaction is a conditional sale and is governed by the Personal Property Security Act 1973 (Man.) c.5 (C.C.S.M. c.P-35). Thus, a seller in such a case cannot enforce his rights against a third party interested in the goods unless the provisions of the Act including registration and formalities are complied with. The seller did not perfect his interest by registration under section 25. Section 3(2) of the Act [same Uniform Act] providing that "the rights of buyers and sellers under the Sale of Goods Act are not affected by this Act" should be construed to apply only to rights of buyers and sellers between themselves. It cannot be construed to exclude sale transactions altogether, for this would be contrary to the general scheme of the Act.

Per Monnin J.S., dissenting: Section 3(2) has the effect of preserving the seller's rights.

A security agreement giving an interest in all the debtor's inventory "now owned or hereafter acquired" applies to goods bought by the debtor from a seller under an agreement reserving title in the seller until payment. Although the buyer does not, as against the seller, obtain title to the goods, he does "acquire" them within the meaning of the security agreement, and s.12(1)(c) of the Personal Property Security Act 1973 (Man.) c.5 (C.C.S.M. c.P-35) [same Uniform Act] requiring the debtor to have "rights" in the collateral is satisfied.

Per Monnin J.A., dissenting: The goods, being owned by the seller, are not "acquired" by the debtor, and so are not affected by the security agreement.

PROCEEDINGS AGAINST THE CROWN

Handsaeme v. Administrator, Motor Vehicle Accident Claims Act 1982 2 W.W.R. 764 Alta. C.A.

A plaintiff suing the administrator as a nominal defendant under the Motor Vehicle Accident Claims Act for damages caused by an allegedly negligent but unknown driver is entitled to a jury trial. Section 14 of the Proceedings Against the Crown Act R.S.A. 1970 c.28 now R.S.A. 1980 c.P-18 [same as s.13 Uniform Act] which precluded trial by jury, did not apply to this statutory proceeding. That Act was directed towards claims against Her Majesty the Queen and required that the Crown be so designated. The Motor Vehicles Accident Claims Act, however, specifically provided that the administrator should be the defendant unless the identity of the driver became known. Lastly, the administrator was not, in his capacity as nominal defendant, an agent of the Crown entitled to raise its immunity to the provisions of the Jury Act.

Mannix v. Alberta, Province of 31 A.R. 169 Alta. C.A.

HELD that neither s.11 Proceedings Against the Crown Act R.S.A. 1970 c.285 [same as s.10 Uniform Act] nor s.35 Alberta Evidence Act [equivalent of s.39, 1962 version Uniform Act] preclude the court from review of a document for which Crown privilege is claimed.

Gloucester Properties Ltd. et al v. The Queen in Right of British Columbia et al 129 D.L.R. (3d)275 B.C.C.A.

An assertion of privilege by the Crown pursuant to s.9 Crown Proceedings Act R.S.B.C. 1979 c.86 [similar to s.10 Uniform Act] with respect to Cabinet minutes and discussions does not attract an absolute privilege. A claim of privilege will prevail only when it is necessary in the public interest. Accordingly, in an action attacking the validity of an Order in Council which by statute required a committee decision as a condition precedent, a Cabinet Minister can be required on discovery to disclose Cabinet discussion, especially where the interest in non-disclosure is not elaborated and is put on the basis of a bare claim to absolute privilege.

In New Brunswick Telephone Company Limited v. Minister of Municipal Affairs, Minister of Finance and Minister of Justice of the Province of New Brunswick 34 N.B.R. 63 section 10 of the Proceedings Against the Crown Act R.S.N.B. 1973 c.P-18 [same Uniform Act] was successfully invoked to preclude an examination for discovery of Ministers.

Section 10 applies only where the Crown itself is a party and not merely a Minister of the Crown in his personal capacity. Thornhill v. Dartmouth Broadcasting Limited and Patterson 45 N.S.R. (2d) 111.

RECIPROCAL ENFORCEMENT OF JUDGMENTS

RE Overseas Food Importers and Distributors Ltd. v. Brandt 126 D.L.R. (3d) 422 B.C.C.A.

Subsection 3(6) of the Reciprocal Enforcement of Judgments Act R.S.B.C. 1960 c.331 (now the Court Order Enforcement Act R.S.B.C. 1979 c.75) which is the same as s.2(6) of the Uniform Act provides that an order for registration shall not be made if the court is satisfied that the judgment debtor "did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of (the foreign court)".

The defendant was served with a complaint and a notice of hearing through the German Consulate and responded by sending a letter to the court indicating the basis of his defence.

The court record indicates that the letter was read and considered.

HELD the letter constituted a submission to the jurisdiction.

RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS

Rubenstein v. Rubenstein 129 D.L.R. (3d) 744 Man. C.A.

An order for maintenance made by the court of another province under the Divorce Act R.S.C. 1970 c.D-8 may be registered and enforced in Manitoba under the Reciprocal Enforcement of Maintenance Orders Act. R.S.M. 1970 c.M20. Section 3(1) of the Reciprocal Enforcement of Maintenance Orders Act (same as 1973 version of the Uniform Act) provides for the registration and enforcement of maintenance orders made by a court in a reciprocating state, and the court of another province is a court of a reciprocating state even when it is exercising jurisdiction under a federal statute. While s.15 of the Divorce Act and the Rules made pursuant to it provide for the registration and enforcement of a maintenance order made by the court of another province in the Court of Queen's Bench, the enforcement procedure provided for in s.15 was not intended to be exclusive. there is therefore no inconsistency which would render the provincial procedure inoperative by application of the paramountcy doctrine.

The contrary conclusion was reached by the Newfoundland Court of Appeal in Re Murphy and Murphy 127 D.L.R. (3d) 473.

The point has also been considered at appellate level in New Brunswick (Brewer 125 D.L.R. (3d) 183) and Saskatchewan (Gould 114 D.L.R. (3d) 646) both of which are referred to in the 1981 Proceedings p. 146.

In Rubenstein all the other appellate decisions were considered but in view of the division of opinion (2 for and 2 against) at appellate level a Supreme Court of Canada ruling would appear necessary to resolve the issue.

Support for the Rubenstein position in Ontario is given by James v. Lockhart (1981) 24 R.F.L. (3d) 333 and in Alberta by P v. P 1981 A.R. 412.

WAREHOUSEMEN'S LIEN

Abbass v. Hoyts Moving and Storage Limited 1982 48 N.S.R. (2d) 155 N.S.S.C. App. Div.

A warehouseman sold goods at public auction for unpaid storage charges after giving notice under the Warehousemen's Lien Act R.S.N.S. 1967 c.334 [same as Uniform Act].

The trial judge held that the sale was unlawful because the storage contract expressly provided for sale in accordance with the Storage Warehouse Keepers Act R.S.N.S. 1967 c.125 which imposed requirements concerning advertising which had not been met.

HELD the sale was lawful. The trial judge had neglected the opening words of subsection 4(1) of the Warehousemen's Lien Act [same Uniform Act]. "In addition to all other remedies provided by law for the enforcement of liens . . . a warehouseman may sell".

RE Sprague 1981 36 C.B.R. (N.S.) 49 Ont. S.C.

An automobile was repaired by the respondent. However, the automobile was released to the owner before the account owing was paid. Subsequently, the same car was repaired by the same garage and another account was incurred, but this time the garage retained the automobile in its possession. The question whether there was a valid claim for two liens.

HELD that claim for first lien disallowed. When possession is released voluntarily by the garage, the first lien on the automobile was lost; however, the garage had a good lien for the second repair bill. For a lien to be effective, possession must be continuous. Storage cannot be charged when the lien claimant retains possession. Section 2(1) of the Warehousemen's Lien Act R.S.O. 1970 c.488 [now R.S.O. 1980 c.529; same as Uniform Act] says that every warehouseman has a lien on goods deposited with him for storage.

WILLS

Re Forest 1981 2 W.W.R. 116 Sask. C.A.

Section 7(2) of the Wills Act R.S.S. 1978 c.W-14 [equivalent of s.6 Uniform Act], which speaks of a holograph will as valid if wholly in the handwriting of the testator and signed by him, precludes the admission to probate of a will on a printed form which is filled in by the testator, unless the portions written in his handwriting include dispositive words.

In that event, the written portion may be admitted to probate. The section does not permit the court to have regard to the printed portions of the document where a testamentary intention can be gathered from the handwritten parts standing alone.

APPENDIX W

(See page 33)

LIMITATIONS ACT

Definitions.

1 In this Act

"action" means any proceeding in a court and any exercise of a self-help remedy;

"judgment" means a judgment or order of a court or an award made in an arbitration to which (The Arbitrations Act) applies;

"limitation period" means the period allowed for bringing an action or for bringing an action on a cause of action;

"possession" includes the right to receive any rents and profits from property without being in physical possession of the property;

"security interest" means an interest in property that secures payment or performance of an obligation and includes the interest of a vendor of property who retains title to property as security for the purchase price;

"trust" includes

(i) an express, implied, resulting or constructive trust, whether or not the trustee has a beneficial interest in the trust property and whether or not the trust arises by reason only of an impeached transaction, and

(ii) the duties incident to the office of a personal representative,

but does not include the duties incident to the estate or interest of a holder of a security interest (*other than the holder of a security interest who holds the interest as trustee for others under a deed of trust which creates the security interest*).

Limits on application of Act.

2 Nothing in this Act affects

(a) a rule of equity that refuses relief, on the grounds of acquiescence, to a person whose right to bring an action is not barred by this Act:

(b) a rule of equity that refuses relief, on the ground of laches, to a person who claims equitable relief in aid of a legal right and whose right to bring the action is not barred by this Act; or

(c) a rule of law that establishes a limitation period, or otherwise refuses relief, in respect of proceedings by way of judicial review of the exercise of a statutory power.

Two year limitation period for injury to persons or property.

3(1) No action for damages for breach of a duty of care, if based on contract, tort or statutory duty, where the damage arises from injury to persons or property, including any economic loss arising from the injury, shall be brought after the expiration of 2 years after the day on which the damage resulting from the injury *first* occurs.

Two year limitation period.

3(2) The following actions shall not be brought after the expiration of 2 years after the day on which the right to bring the action arose:

(a) An action for damages in respect of injury to persons or property, including economic loss arising from the injury, that is not an action mentioned in subsection (1).

(b) An action for trespass to property that is not an action mentioned in subsection (1).

(c) An action for defamation.

(d) An action for false imprisonment.

(e) An action for malicious prosecution.

(f) An action for seduction.

(g) An action for breach of promise of marriage, for alienation of affection, for jactitation of marriage or for criminal conversation.

(h) An action for conspiracy to commit any of the wrongs mentioned in clauses (a) to (g) or in subsection (1).

(i) A civil action by the Crown or any person to recover a fine or other penalty imposed under an Act, except an action to by the Crown or a municipality to recover taxes or royalties imposed under an Act or a penalty or interest imposed for non payment or late payment of the taxes or royalties.

(j) An action under the Fatal Accidents Act.

(k) An action for payment from a statutory fund of damages arising from a motor vehicle accident.

(Note: Clause (k) will be unnecessary in provinces where there is no statutory fund for payment of damages arising out of motor vehicle accidents.)

Subsecs. (1) and (2) not to apply to breach of trust.

3(3) Subsections (1) and (2) do not apply to an action for breach of trust against the trustee by a person entitled to a benefit under the terms of the trust to obtain recovery of the benefit.

Ten year limitation period.

4(1) The following actions shall not be brought after the expiration of 10 years after the day on which the right to bring the action arose:

(a) An action against a personal representative of a deceased person for a share of the estate.

(b) An action against a trustee in respect of a fraud or fraudulent breach of trust to which the trustee was party or privy.

(c) An action against a trustee for the conversion of trust property to the trustee's own use.

(d) An action against a trustee or any other person to recover trust property or property into which trust property can be traced.

(e) An action to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed or a successor to that person.

(f) An action on a judgment, other than a foreign judgment, for the payment of money, for the return of personal property (or for possession of land).

Actions for possession of land.

4(2) *No action for possession of land shall be brought after the expiration of 10 years after the day upon which the right to bring the action accrues to the claimant or to any person from or through whom the claimant acquired his right to possession.*

Running of time in actions for possession of land.

4(3) In respect of an action for possession of land

(a) the right to possession accrues to, and the limitation period runs against a co-tenant upon ouster or retention of the rents and profits by another co-tenant; and

(b) *the right to possession does not accrue to and the limitation period does not commence running against a person holding an estate or interest in land until the right to possession of the land vests in that person.*

(Note: In provinces in which title to land cannot be acquired by possession, subsections (2) and (3) and the reference to judgments for possession of land in clause (f) of subsection (1) should be deleted and clauses (h) and (i) of section 5 should be included.)

Meaning of "debtor" in secs. 5 and 6.

5 In sections 6 and 7, "debtor" means a person who owes payment or performance of an obligation secured by a security interest whether or not he owns or has rights in or to the property which is subject to the security interest.

Where no limitation period applies.

6 The following actions may be brought at any time:

(a) An action by a debtor in possession of property subject to a security interest to redeem the property.

(b) An action by a secured party in possession of property subject to a security interest to realize on the property.

(c) An action relating to the enforcement of an injunction or a restraining order.

(d) An action to enforce an easement, restrictive covenant, profit à prendre, or other incorporeal hereditament, except an action for damages for interference with or a breach of the easement, restrictive covenant, profit à prendre or incorporeal hereditament.

(e) An action for a declaration as to personal status.

(f) An action for a declaration as to the title to property by a person in possession of the property.

(g) An action to correct a register in respect of the ownership of any estate or interest in land under (The Land Titles Act).

(h) An action for possession of land.

(i) An action on a judgment for possession of land.

(Note: In provinces in which title to land may be acquired by possession, clauses (h) and (i) should be deleted and subsections (2) and (3) of section 4 should be included with a reference to judgments for possession of land under clause (f) of subsection (1) of section 4).

General limitation period.

7(1) Any action for which a limitation period is not specifically pro-

vided in this Act (or in any other Act) and to which section 5 does not apply shall not be brought after the expiration of 6 years after the date on which the right to do so arose.

Specific 6 year limitation periods.

7(2) Without limiting the generality of subsection (1), and notwithstanding sections 3, 4 and 6, the following actions shall not be brought after the expiration of 6 years after the date on which the right to do so arose:

(a) An action for breach of contract that does not come within subsection (1) of section 3 or clause (a) of subsection (2) of section 3.

(b) An action to recover a debt, whether secured or not.

(c) An action by a secured party not in possession of property subject to a security interest to realize on the property.

(d) An action by a debtor not in possession of property subject to a security interest to redeem the property.

(e) An action for damages for conversion or detention of goods or chattels.

(f) An action to recover goods or chattels wrongfully taken or detained.

(g) An action to realize on a foreign judgment.

(Note: The words "or any other Act" in subsection (1) could be deleted if the intent is to confine all limitation periods to The Limitations Act.)

Limitation period for new conversion, etc.

7(3) Where a cause of action for damages for the conversion or detention of goods or chattels accrues to a person and afterwards, possession of the goods or chattels not having been recovered by him or by a person claiming through him,

(a) a further cause of action for damages for the conversion or detention of the goods or chattels; or

(b) a new cause of action for damage to the goods or chattels; or

(c) a new cause of action to recover the proceeds of a sale of the goods or chattels;

accrues to him or a person claiming through him, no action shall be brought by him on the further or new cause of action after the ex-

piration of 6 years from the date on which the first cause of action accrued to him or to a person through whom he claims.

Actions for contribution.

8 An action by a wrongdoer for contribution from another wrongdoer shall not be brought after the expiration of the limitation period for the cause of action of the person wronged against the wrongdoers.

(Note: This seems to deny relief to the wrongdoer sued on the last day of the limitation period.)

Extinction of certain causes of action.

9 Subject to section 19, the right and title of a person to property or to recover money out of property is extinguished

(a) in the case of personal property wrongfully taken or detained, on the expiration of the limitation period for an action to recover the property; and

(b) in the case of land, a rent charge or money charged upon land, on the expiration of the limitation period for an action to recover possession of the land or to recover the rent charge or money.

(Note: 1. In provinces in which title to land cannot be acquired by adverse possession, this section, particularly clause (b), should be varied to exclude its application to those situations relating to adverse possession.

2. A province with a property title registration system may wish to provide a procedure for varying the registrations relating to the property to reflect the application of this section.)

Prescriptive rights.

10 Except as provided in section 9 and after the expiry of the limitation period for an action to recover possession of the land as set out in subsection (2) of section 4, no person acquires a right in or over land by prescription.

(Note: This section will not be suitable in provinces which have abolished the right to acquire any right or interest in or over land by prescription.)

Time running under Fatal Accidents Act.

11(1) In respect of an action under The Fatal Accidents Act, the right to bring the action arises and the limitation period begins to run against the claimant on the day on which the deceased died.

Time running in action against auto accident fund.

11(2) In respect of an action for payment from a statutory fund of damages arising from a motor vehicle accident, the right to bring the action arises and the limitation period begins to run against the claimant on the day on which the death, personal injury, loss or property damage occurred.

(Note: This subsection is unnecessary in provinces which do not have a statutory fund to pay automobile accident claims.)

Time running against beneficiary of trust.

11(3) In respect of an action by a beneficiary of a trust to obtain his benefits under the trust, the right to bring the action does not arise and the limitation period does not begin to run against the beneficiary until his right to enjoyment of the benefits arises.

Action for fraudulent breaches of trust, etc.

12(1) In respect of an action

(a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy; or

(b) to recover from a trustee trust property, or the proceeds thereof, in the possession of the trustee, or previously received by the trustee and converted to his own use;

the right to bring the action does not arise and the limitation period does not begin to run against a beneficiary until the beneficiary knows of the fraud, fraudulent breach of trust, conversion, or other act of the trustee upon which the action is based.

Burden of proof.

12(2) For the purposes of subsection (1), the burden rests on the trustee to prove when the beneficiary knew of the fraud, fraudulent breach of trust, conversion, or other act of the trustee upon which the action is based.

Application of section.

13(1) This section applies only to

(a) an action for damages for breach of duty of care, if based on contract, tort or statutory duty, where the damages arise from injury to persons or property, including any economic loss arising from the injury;

(b) an action for damages in respect of injury to persons or property, including economic loss arising from the injury, that is not an action mentioned in clause (a);

(c) an action for damages for economic loss arising from a breach of duty of care in the rendering of services under a contract other than a contract of employment;

(d) an action based on fraud or deceit;

(e) an action where the material facts relating to the cause of action have been wilfully concealed;

(f) an action for relief from the consequences of a mistake;

(g) an action under The Fatal Accidents Act; or

(h) an action for breach of trust that is not an action mentioned in section 12.

Postponement of limitation period.

13(2) The beginning of the limitation period for an action is postponed until the plaintiff knows or, in all circumstances of the case, he ought to know

(a) the identity of the defendant; and

(b) the facts upon which his action is founded.

Limitation on postponement.

13(3) This section does not allow an action

(a) after the expiration of 10 years after the date of the act or omission on which the action is based; or

(b) in the case of an action based upon a series of acts or omissions or a continuing course of conduct, after the expiration of 10 years after the date of the last of the series or the termination of the course of conduct.

Burden of proof.

13(4) The burden of proving that the beginning of the limitation period for an action has been postponed by reason of subsection (2) rests on the person claiming the benefit of the postponement.

Effect of secs. 12 and 13 on bona fide purchaser.

14(1) Sections 12 and 13 do not operate to the detriment of a bona fide purchaser for value.

Effect of knowledge of others.

14(2) Sections 12 and 13 do not postpone the beginning of the limitation period for an action by a person who suffers damage or injury beyond the day when

(a) his agent;

(b) his guardian or committee;

(c) his personal representative; or

(d) his predecessor in right, title or interest;

knew or ought to have known the facts upon which the action is based.

Persons under disability.

15(1) For the purpose of this section, a person is under a disability

(a) while he is a minor;

(b) while he is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition.

Where disability postpones time.

15(2) Where a person who has a cause of action is under a disability when, except for this section, the limitation period for the action begins to run, the beginning of the limitation period is postponed until he is no longer under a disability.

Time for bringing action after postponement.

15(3) Where the beginning of a limitation period for an action is postponed under subsection (2), and the person who has the cause of action ceases to be under a disability, the action may be brought before the later of

(a) the date of the expiration of the limitation period for the action that would have applied if the person had never been under a disability; or

(b) the date of the expiration of the limitation period for the action beginning on the date the disability ceased but not later than 6 years after the date the disability ceased.

Where the disability suspends time.

15(4) Where a person who has a cause of action comes under a disability after the limitation period for the action has begun to run but before the expiration thereof, the running of the limitation period for the action is suspended until he is no longer under a disability.

Time for bringing action after suspension.

15(5) Where the running of a limitation period for an action is suspended under subsection (4), and the person who has the cause of

action ceases to be under a disability, the action may be brought before the later of

(a) the date of the expiration of the limitation period for the action as it would have applied if the person had never been under disability; or

(b) one year after the date the disability ceased.

Notice to proceed with action.

15(6) Notwithstanding subsections (2) and (4), where a person under a disability has a cause of action against another person, that other person may cause a notice to proceed with the action to be delivered in accordance with this section, in which case the limitation period set out in subsection (3) or (5), as the case may be, begins to run against the person under the disability as if he had ceased to be under the disability on the date on which the notice to proceed was delivered.

Form of notice.

15(7) A notice to proceed mentioned in subsection (6) shall

(a) be in writing;

(b) be addressed and delivered

(i) in the case of a minor, to his parent or guardian, as the case may be and to (name of appropriate government official), and

(ii) in the case of a person incapable of the management of his affairs because of disease or impairment of his physical or mental condition, to his parent or committee, as the case may be, and to (name of appropriate government official);

(c) state the name of the person under the disability;

(d) specify the circumstances out of which the cause of action may arise or may be claimed to arise with such particularity as is necessary to enable a determination to be made as to whether the person under the disability has or may have a cause of action;

(e) give warning that the cause of action arising or which may arise out of the circumstances stated in the notice is liable to be barred by this Act:

(f) state the name of the person on whose behalf the notice is delivered; and

(g) be signed by the person delivering the notice or his solicitor.

Where subsec. (6) does not apply.

15(8) Subsection (6) does not apply to a person under a disability in bringing an action against

(a) his parents;

(b) his guardian;

(c) his committee; or

(d) (here name appropriate government officials mentioned in (7)(b)).

Benefits of notice to proceed restricted.

15(9) The delivery of a notice to proceed under this section operates to benefit only those persons on whose behalf the notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

Onus as to postponement or suspension.

15(10) The onus of proving that the beginning of a limitation period for an action has been postponed or suspended under this section rests on the person claiming the benefit of the postponement or suspension.

Notice to proceed not an admission.

15(11) A notice to proceed delivered under this section is not a confirmation for the purposes of this Act and is not an admission for any purpose.

Duty of (government official)

15(12) Where a notice to proceed under this section is delivered to (name of government official) and it appears to him that the other person to whom the notice was delivered has failed to take reasonable steps to protect the interests of the person under the disability, (name of appropriate government official) shall

(a) investigate the circumstances specified in the notice; and

(b) if he believes that an action for the benefit of the person under the disability would have a reasonable prospect of succeeding and would result in a judgment that would justify the bringing of the action, commence and maintain such an action.

Regulations.

15(13) The Lieutenant Governor in Council may make regulations prescribing the form, content and method of delivery of and other matters relating to notices to proceed to be delivered under this section.

Cumulative effect of secs. 13 and 15.

16 Subject to section 18, the effect of sections 13 and 15 is cumulative.

Effect of confirmation.

17(1) Where a person against whom an action lies confirms the cause of action, the time before the date of the confirmation shall not be counted in determining the limitation period for the action by a person having the benefit of the confirmation against the person bound by the confirmation.

Confirmation not effect extinguished rights.

17(2) In the case of an action to enforce or declare a right or title referred to in section 9, subsection (1) does not apply unless the confirmation takes place before the expiration of the limitation period for the action.

Description of confirmations and their effect.

17(3) For the purposes of this section

(a) a person confirms a cause of action only if

(i) he acknowledges a cause of action, right or title of another, or

(ii) he makes a payment in respect of a cause of action, right or title of another;

(b) an acknowledgement of a judgment, debt or obligation has effect

(i) whether or not a promise to comply with the judgment, to pay the debt or to perform the obligation can be implied therefrom, and

(ii) whether or not it is accompanied by a refusal to comply with the judgment, pay the debt or perform the obligation;

(c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money; and

(d) a confirmation of a cause of action to recover income due at a particular time operates also as a confirmation of a cause of action to recover income due at a later time on the same amount.

Effect of payment as confirmation.

17(4) Where a secured party has a cause of action to realize on property subject to a security interest

(a) a payment to him of principal or interest secured by the property; or

(b) any other payment to him in respect of his right to realize on the property or any other performance by another person of the obligation secured;

is, as against the payor or performer, a confirmation of the cause of action.

Acceptance of money as confirmation.

17(5) Where a secured party is in possession of property which is subject to a security interest in his favour

(a) his acceptance of a payment to him of principal or interest secured by the property; or

(b) his acceptance of

(i) payment to him in respect of his right to realize on the property, or

(ii) any other performance by another person of the obligation secured;

is a confirmation by him to the payor or performer of the payor's or performer's cause of action to redeem the property.

Acknowledgment to be in writing.

17(6) For the purposes of this section, an acknowledgment of a cause of action is not binding unless it is in writing and signed by the person giving the acknowledgment.

Beneficiaries of confirmations.

17(7) For the purposes of this section, a person does not have the benefit of a confirmation unless the confirmation is made

(a) to him;

(b) to a person through whom he claims; or

(c) in the curse of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act (Canada).

Persons bound by confirmation.

17(8) For the purposes of this section, a person is not bound by a confirmation unless

(a) he is a maker of the confirmation;

(b) after the making of the confirmation, he becomes, in relation to the cause of action, a successor of the maker;

(c) the maker is, when he makes the confirmation, a trustee, and the first mentioned person is at the date of the confirmation or afterwards becomes a trustee of the trust of which the maker is a trustee; or

(d) he is bound under subsection (9).

Confirmation binding successors.

17(9) Where a person who confirms a cause of action

(a) to recover property;

(b) to enforce an equitable estate or interest in property;

(c) to realize on property subject to a security interest;

(d) to redeem property subject to a security interest;

(e) to recover principal money or interest secured by a security agreement, by way of the appointment of a receiver of property subject to a security interest or of the income or profits of such property or by way of sale, lease or other disposition of such property or by way of other remedy affecting such property; or

(f) to recover trust property or property into which trust property can be traced;

is, on the date of the confirmation, in possession of the property, the confirmation binds any other person in possession during the continuance of the limitation period unless that other person was in possession of the property on the date of the confirmation or claims through a person, other than the maker of the confirmation, who was in possession of the property on the date of the confirmation.

Confirmation to agents.

17(10) For the purposes of this section, a confirmation made by or to an agent has the same effect as if made by or to the principal.

Restriction on confirmations.

17(11) Except as otherwise provided in this section, nothing in this Act operates to allow confirmation of an unliquidated sum or to make any right, title or cause of action capable of being confirmed that was not capable of being confirmed before this Act came into force.

Ultimate limitation period.

18 Subject to section 6, but notwithstanding a confirmation under section 17 or a postponement or suspension of a limitation period under section 13 or 15,

(a) no action for which a limitation period is fixed shall be brought after; and

(b) all rights and claims arising out of a cause of action for which a limitation period is fixed are extinguished on;

the expiration of 30 years after the occurrence of the act, omission or breach which gave rise to the cause of action or on which the action is based.

(Note: Should this section operate notwithstanding section 12 or should section 12 operate without the 30 year limitation.)

Assertion of statute barred claims in other actions.

19(1) Where an action has been brought, the expiry of the limitation period for bringing an action or a claim does not bar the making of that claim in the action originally brought

(a) by way of counterclaim, including the addition of a new party as a defendant by counterclaim;

(b) by way of third party proceedings; or

(c) by way of set off;

under any applicable law if the claim is related to or connected with the cause of action or the action originally brought.

Limitation on third party proceedings on statute barred claim.

19(2) Without leave of the court, a notice of third party proceedings permitted under subsection (1) in respect of a claim on which an

action cannot be brought because of the expiration of the limitation period therefor, shall not be served by a defendant in an action after the expiration of 1 year after the service of the statement of claim or other process by which the original action against the defendant was begun.

Restriction on operation of subsec. (1).

19(3) Subsection (1) does not permit a person to make a claim against another person in an action where the claim by that other person

(a) against the first mentioned person; and

(b) to which or with which the clainm of the first mentioned person is related or connected;

is or will (*may*) be defeated by the first mentioned person pleading that the limitation period for an action on the claim has expired.

Changing claims after expiry of limitation period.

20(1) The court may allow an amendment changing the claim made in an action after the expiration of the limitation period for the action if the claim sought to be added by the amendment arose out of the facts set forth in the original pleadings.

Changing plaintiffs after expiry of limitation period.

20(2) The court may allow an amendment adding or substituting a plaintiff in an action or changing the capacity in which a plaintiff in an action sues, after the expiration of the limitation period for the action if

(a) the claim to be asserted by the new plaintiff, or by the original plaintiff in the new capacity, arose out of the facts set forth in the original pleadings;

(b) the defendant has, before the expiration of the limitation period for the action and the additinal period provided by law for service of process, received formal or informal notice that he will not be prejudiced by the addition, substitution or change if allowed in defending on the merits; and

(c) the court is satisfied that the addition, or substitution of the new plaintiff or the change in the capacity of the plaintiff is necessary or desirable to ensure the effective enforcement of the claims originally made (or intended to be made) in the action.

Changing defendant after expiry of limitation period.

20(3) The court may allow an amendment adding or substituting a defendant in an action, or changing the capacity in which a defendant in an action is sued, after the expiration of the limitation period for the action if

(a) the claim to be asserted against the new defendant, or against the original defendant in the new capacity, arose out of the facts set forth in the original pleadings; and

(b) the party to be added or substituted or the defendant to be assigned a new capacity in the action has, before the expiration of the limitation period for the action and the additional period provided by law for service of process, received formal or informal notice that he will not be prejudiced by being added or substituted, or by the change in capacity, if allowed, in defending on the merits.

Conflict of laws.

21 This Act applies to actions in the province to the exclusion of laws of all other jurisdictions

(a) imposing limitation periods for bringing of actions; or

(b) in any other manner prohibiting or restricting the bringing of actions because of lapse of time or delay.

Crown bound.

22(1) Except as provided in subsection (2), Her Majesty is bound by this Act.

Actions by Crown for possession of land.

22(2) An action by Her Majesty for possession of land may be brought at any time and the title of Her Majesty to land is not extinguished by possession by another person.

(Note: Subsection (2) may not be necessary in provinces where the general law provides that title to land is not extinguished by adverse possession and clause (h) of section 5 is included.)

APPENDIX X

(See page 33)

UNIFORM PERSONAL PROPERTY SECURITY ACT, 1982

Submitted for joint adoption
by the Uniform Law Conference of Canada
and the Canadian Bar Association

August 1982

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UNIFORM PERSONAL PROPERTY SECURITY ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of _____, enacts as follows:

DEFINITIONS

1. In this Act,

"accessions" (a) "accessions" means goods that are installed in or affixed to other goods;

"account" (a.1) "account" means any monetary obligation not evidenced by chattel paper, an instrument or a security, whether or not it has been earned by performance;

"building" (b) "building" includes a structure, erection, mine or work built, erected, constructed or opened on or in land;

"building materials" (b.1) "building materials" includes goods that are or become so incorporated or built into a building that their removal would necessarily involve the removal or destruction of some other part of the building and thereby cause substantial damage to the building, apart from the value of the goods removed, but does not include

(i) goods that are severable from the building or land merely by unscrewing, unbelting, unclamping or uncoupling, or by some other method of disconnection; or

(ii) machinery installed in a building for use in the carrying on of an activity where the only substantial damage, apart from the value of the machinery removed, that would necessarily be caused to the building in removing the machinery therefrom is that arising from the removal or destruction of the bed or casing on or in which the machinery is set and the making or enlargement of an opening in the walls of the building sufficient for the removal of the machinery;

"chattel paper" (c) "chattel paper" means one or more than one writing that evidences both a monetary obligation and a security interest in or lease of specific goods;

"collateral" (c.1) "collateral" means personal property that is subject to a security interest;

(d) "consignment" means a transaction under which goods are delivered for sale, resale or lease by a consignor who "consignment"

(i) in the ordinary course of his business deals in goods of that description; and

(ii) reserves title to the goods;

to a consignee who in the ordinary course of his business deals in goods of that description, but does not include a transaction under which goods are delivered to a person for sale, resale or lease if the person is generally known in the area in which he carries on business to be selling or leasing goods as a consignee;

(d.1) "consumer goods" means goods that are used or acquired by the debtor for use primarily for personal, family or household purposes; "consumer goods"

(e) "Court" means (*each province to insert its own provision*); "Court"

(e.1) "creditor" includes an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver, a receiver-manager, an executor, an administrator or a committee; "creditor"

(f) "debtor" means "debtor"

(i) a person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes one or more of the following:

(A) a person who receives goods from another person under a consignment;

(B) a lessee under a lease;

(C) an assignor of an account or chattel paper;

(D) a transferee of or successor to a debtor's interest in collateral; or

(ii) where a debtor is not the owner of collateral,

(A) an owner of the collateral in any provision of this Act dealing with collateral; or

(B) an obligor, in any provision of this Act dealing with the obligation;

"default" (f.1) "default" means the failure to pay or otherwise perform the obligation secured when due or the occurrence of any event whereupon under the terms of the security agreement the security becomes enforceable;

"document of title" (g) "document of title" means any writing

(i) that purports to be issued by or addressed to a bailee,

(ii) that purports to cover goods in the bailee's possession that are identified, or fungible portions of an identified mass, and

(iii) that in the ordinary course of business is treated as establishing that the person in possession of the writing is entitled to receive, hold and dispose of it and the goods it covers;

"equipment" (g.1) "equipment" means goods that are not inventory or consumer goods;

"financing change statement" (h) "financing change statement" or "financing statement" means a document, in the prescribed form, that is required or permitted to be registered pursuant to this Act, and financing statement includes a financing change statement unless the context otherwise requires;

"fungibles" (h.1) "fungibles" means, with respect to goods or securities, goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit, and includes unlike units to the extent that they are treated as equivalents under a security agreement;

"future advance" (i) "future advance" means the payment of money, the provision of credit or the giving of other value by the secured party pursuant to the terms of a security agreement, whether or not the secured party is obligated to pay the money, provide the credit or give the value;

"goods" (i.1) "goods" means tangible personal property other than money, and includes fixtures, growing crops and the unborn young of animals, but does not include timber until it is cut or minerals or hydrocarbons until they are extracted;

"instrument" (j) "instrument" means a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada), or any

other writing that evidences a right to the payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, but does not include

(i) chattel paper;

(ii) a document of title; or

(iii) a security;

(j.1) "intangible" means personal property other than goods, chattel paper, a document of title, an instrument or a security; "intangible"

(k) "inventory" means goods "inventory"

(i) that are held by a person for sale or lease, or that have been leased;

(ii) that are to be furnished or have been furnished under a contract of service; or

(iii) that are raw materials, works in process or materials used or consumed in a business;

(k.1) "lease for a term of more than one year" includes "lease for a term of more than one year"

(i) a lease for a term of one year or less that is automatically renewable or that is renewable at the option of one of the parties or by agreement for one or more terms, the total of which may exceed one year;

(ii) a lease initially for an indefinite term or for a term of less than one year, where the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the goods leased for a period in excess of one year after the date he first acquired possession of the goods, and the lease becomes a lease for more than one year as soon as the lessee's possession extends beyond one year;

but does not include a lease by a lessor who is not engaged in the business of leasing goods;

(l) "money" means a medium of exchange designated by the Parliament of Canada as part of the currency of Canada or designated by a foreign government as part of its currency; "money"

"person" (1.1) "person" includes a person as defined in the regulations;

"prescribed" (m) "prescribed" means prescribed by the regulations;

"proceeds" (n) "proceeds" means identifiable or traceable personal property in any form or fixtures derived directly or indirectly from any dealing with the collateral or proceeds therefrom, and includes

(i) an insurance payment or any other payment as indemnity or compensation for loss of or damage to the collateral or proceeds therefrom, or any right to that payment, and

(ii) any payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or a security;

"purchase" (o) "purchase" includes taking by sale, lease, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other consensual transaction creating an interest in property;

"purchase-money security interest" (p) "purchase-money security interest" means

(i) a security interest taken or reserved in collateral to secure payment of all or part of its purchase price;

(ii) a security interest taken by a person who gives value for the purpose of enabling the debtor to acquire rights in or to collateral to the extent that the value is applied to acquire the rights;

(iii) the interest of a lessor of goods under a lease for a term of more than one year; or

(iv) the interest of a consignor of goods delivered under a consignment;

"purchaser" (q) "purchaser" means a person who takes by purchase;

"registrar" (r) "registrar" means the Registrar of Personal Property Security;

"regulations" (s) "regulations" means the regulations made under this Act;

"secured party" (t) "secured party" means

(i) a person who has a security interest, and

(ii) the trustee, if a security agreement is embodied in or evidenced by a trust indenture, equipment trust or similar document

and for the purposes of sections 16, 55 to 59, 61 and 62 includes a receiver and receiver-manager;

"security" (u) "security" means a share, stock, warrant, bond, debenture or debenture stock or similar document, issued by a person,

(i) that is in a form recognized in the area in which it is issued or dealt with as evidencing a share, participation or other interest in property or an enterprise or that evidences an obligation of the issuer, and

(ii) that is of a type that in the ordinary course of business is transferred by delivery with the necessary endorsement, assignment or registration in the records of the issuer or agent for the issuer, or by compliance with restrictions on transfer;

"security agreement" (v) "security agreement" means an agreement that creates or provides for a security interest, and includes a writing evidencing a security agreement when the context permits;

"security interest" (w) "security interest" means an interest in goods, a document of title, an instrument, a security, a chattel paper, an intangible or money that secures payment or performance of an obligation, and includes

(i) the interest of an assignee of an account or chattel paper;

(ii) the interest of a consignor under a consignment; and

(iii) the interest of a lessor under a lease for a term of more than one year;

notwithstanding that the interests described in subclauses (i) to (iii) may not secure payment or performance of an obligation;

"serial numbered goods" (x) "serial numbered goods" means goods of a type prescribed to be serial numbered goods;

"trust indenture"

(y) "trust indenture" means a security agreement, under which a body corporate, with or without share capital and wherever or however incorporated,

(i) issues or guarantees debt obligations or provides for the issue or guarantee of debt obligations, and

(ii) appoints a person as trustee for the holders of the debt obligations so issued, guaranteed or provided for;

"value"

(z) "value" means any consideration sufficient to support a simple contract, and includes an antecedent debt or liability.

PART I

GENERAL

Application of Act

2 Subject to sections 3 and 53, this Act applies to every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest, including, without limiting the foregoing,

(a) a chattel mortgage, conditional sale, equipment trust, floating charge, pledge, trust indenture, trust receipt, assignment, lease and consignment; and

(b) an assignment of an account, a transfer of chattel paper, a consignment and a lease for a term of more than one year notwithstanding that the assignment, transfer, consignment or lease may not secure payment or performance of an obligation.

Non-application of Act

3 Except as otherwise provided in this Act, this Act does not apply to

(a) a lien, charge, right or other interest created by law;

(b) an assignment of an interest or claim under any contract of annuity or policy of insurance except insofar as the money payable under the policy of insurance is or would be proceeds;

(c) a sale of goods that are shipped by a seller under a bill of lading issued to the order of the seller or his agent;

(d) a creation or assignment of an interest in or lien, charge or mortgage on real property, including a lease;

(e) an assignment of a right to payment or rent that arises in connection with an interest in or lien, charge or mortgage on real property, other than a right to payment evidenced by a security;

(f) an assignment of an unearned right to payment to an assignee who is to perform the assignor's obligations under the contract;

(g) an assignment for the general benefit of creditors made pursuant to a statute.

(*No references are made to legislation dealing with pawnbrokers, first, because most provinces do not have a Pawnbrokers Act and secondly, because the Acts that do exist do not deal with other aspects of transactions such as the right of third parties. Part V infra deals with the rights of the parties inter se.*

It may be necessary to have complementary legislation to permit registration of assignments of payments arising out of leases of land. Many provincial land registry Acts do not require or presently permit the registration of leases of land for less than a prescribed period.)

Validity and perfection of foreign security interests in specified collateral

4(1) Except where otherwise provided in this Act, the validity, perfection and effect of perfection or non-perfection of

(a) a security interest in goods, and

(b) a possessory security interest in a security, an instrument, a negotiable document of title, money and chattel paper,

shall be governed by the law of the jurisdiction where the collateral is situated at the time the security interest attaches.

Reperfection of security interests in Province

(2) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the Province continues perfected in the Province if it is perfected in the Province

(a) within sixty days after the goods are brought into the Province;

(b) within fifteen days after the day the secured party receives notice that the goods have been brought into the Province; or

(c) prior to the date that perfection ceases under the law of the jurisdiction in which the goods are situated at the time the security interest attached,

whichever is the earliest, but if the goods are consumer goods, the security interest is subordinate to the interest of a buyer or lessee of those goods who acquires the goods as consumer goods without knowledge of the security interest and before the security interest is perfected in the Province.

Perfection otherwise

(3) A security interest that is not perfected in the Province as provided in subsection (2) may otherwise be perfected under this Act.

Perfection in Province

(4) Where a security interest mentioned in subsection (1) is not perfected under the law of the jurisdiction in which the collateral was situated at the time the security interest attached and before being brought into the Province, it may be perfected under this Act.

Unpaid Seller's Rights

(5) Where goods brought into the Province are subject to an unpaid seller's right to revendicate or to resume possession of the goods under the laws of the Province of Quebec or any other jurisdiction, unless the seller registers a financing statement in the prescribed form or repossesses the goods within twenty days after the day on which the goods were brought into the Province, the right is unenforceable in the Province thereafter.

Choice of law where parties understand goods are to be taken to another province

5(1) Subject to section 6, if the parties to a security agreement creating a security interest in goods in one jurisdiction understand at the time the security interest attaches that the goods will be kept in another jurisdiction, and the goods are removed to that other jurisdiction, for purposes other than transportation through the other jurisdiction, within thirty days after the security interest attached, the validity, perfection and effect of perfection or non-

perfection of the security interest shall be governed by the law of the other jurisdiction.

Perfection in Province

(2) If the other jurisdiction mentioned in subsection (1) is not the Province, and the goods are later brought into the Province, the security interest in the goods is deemed to be one to which section 4(2) applies if it was perfected under the law of the jurisdiction to which the goods were removed.

Validity and perfection of foreign security interests in intangible and mobile goods

6(1) The validity, perfection and effect of perfection or non-perfection of

(a) a security interest in

(i) an intangible, or

(ii) goods that are of a type that are normally used in more than one jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others, and

(b) a non-possessory security interest in a security, an instrument, a negotiable document of title, money and chattel paper,

shall be governed by the law of the jurisdiction where the debtor is located at the time the security interest attaches.

Determination of location of debtor

(2) For the purposes of this section, a debtor is deemed to be located at his place of business if he has one, at his chief executive office if he has more than one place of business and otherwise at his place of residence.

Continuity of perfection where change in debtor's locations

(3) If a debtor changes his location to another jurisdiction, a perfected security interest referred to in subsection (1) continues perfected in the Province if it is perfected in the new jurisdiction

(a) within sixty days from the day the debtor changes his location,

(b) within fifteen days from the day the secured party receives notice that the debtor has changed his location, or

(c) prior to the day that perfection ceases under the law of the first jurisdiction,

whichever is the earliest.

Perfection in Province where no registry

(4) If the jurisdiction in which a debtor is located does not provide for public registration or recording of security interests mentioned in subsection (1) and the collateral is not in the possession of the secured party, a security interest in the collateral that is not perfected under this Act is deemed to be an unperfected security interest in relation to an interest in the collateral acquired by a person in the Province.

Idem

(5) A security interest that is not perfected as provided in subsection (3) or is deemed to be unperfected in the Province under subsection (4) may be perfected under this Act.

Security interests in minerals or hydrocarbons

(6) Notwithstanding section 5 and subsection (1) of this section, the validity, perfection and effect of perfection or non-perfection of a security interest that

(a) is created by a debtor who, before extraction, has an interest in minerals or hydrocarbons, and

(b) attaches in respect of the minerals or hydrocarbons upon extraction, or attaches to an account resulting from the sale thereof at the wellhead or minehead,

is governed by the law of the jurisdiction in which the wellhead or minehead is located.

Choice of law for procedural and substantive issues

7 Notwithstanding sections 4, 5 and 6,

(a) procedural matters affecting the enforcement of the right of a secured party in respect of collateral other than intangibles are governed by the law of the jurisdiction in which the collateral is located at the time of the exercise of those rights;

(b) procedural matters affecting the enforcement of the rights of a secured party against intangibles are governed by the law of the forum;

(c) substantive matters affecting the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.

PART II

VALIDITY OF SECURITY AGREEMENTS AND RIGHTS OF PARTIES

Effectiveness of security agreement

8 Except as otherwise provided by this or any other Act, a security agreement is effective according to its terms.

Enforceability of security interest

9(1) A security interest is not enforceable against a third party unless

(a) the collateral is in the possession of the secured party; or

(b) the debtor has signed a security agreement that contains a description of the collateral sufficient to enable it to be identified.

(2) A security interest in proceeds is not unenforceable against a third party by reason only that the security agreement does not contain a description of the proceeds as required by subsection (1)(b).

Delivery of copy of security agreement

10 The secured party shall deliver a copy of the security agreement to the debtor within ten days after the execution of the security agreement and, if he fails to do so after a request by the debtor, the Court may on application by the debtor make an order for the delivery of a copy to the debtor and may make an order as to costs that it considers just.

(*Adopting provinces should consider what procedure should be adopted in applications under this section.*)

When security interest attaches

11(1) A security interest attaches when

(a) value is given;

(b) the debtor has rights in the collateral; and

(c) except for the purposes of enforcing rights between the parties to the security agreement, it becomes enforceable within the meaning of section 9,

unless the security agreement contains a term that expressly provides that it shall attach at a later time, in which case it attaches at that time.

Idem

(2) For the purpose of subsection (1), the debtor has no rights in

(a) crops until they become growing crops;

(b) the young of animals until they are conceived;

(c) minerals or hydrocarbons until they are extracted; and

(d) timber until it is cut.

After-acquired property

12(1) Except as provided in subsection (2), a security agreement may cover after-acquired property.

Exceptions

(2) A security interest does not attach under an after-acquired property provision in a security agreement

(a) to crops that become crops more than one year after the security agreement has been executed, except that a security interest in crops that is given in conjunction with a lease, purchase or mortgage of land may, if so agreed, attach to crops to be grown on the land concerned during the term of the lease, purchase or mortgage; or

(b) to consumer goods, other than accessions, unless the debtor acquires rights in them within ten days after the secured party gives value.

Future advances

13(1) A security agreement may secure future advances whether or not the advances are given pursuant to commitment.

When obligation not binding

(2) Unless the agreement expressly provides otherwise, an obligation to make future advances is not binding on the secured party if the collateral has been seized, attached or charged under the circumstances described in section 19(1)(a) of (b).

Application of sales law

14 Where a seller retains a purchase-money security interest in goods,

(a) the law relating to contracts of sale governs the sale and any disclaimer, limitation or modification of the seller's conditions and warranties, and

(b) the conditions and warranties in a sale agreement shall not be affected by any security agreement.

Provision to accelerate

15 Where a security agreement provides that the secured party may accelerate payment or performance if he considers that he is insecure or that the collateral is in jeopardy, the agreement shall be construed to mean that he may accelerate payment or performance only if he in good faith believes and has commercially reasonable grounds to believe that the prospect of payment or performance is or is about to be impaired or that the collateral is or is about to be placed in jeopardy.

Care of collateral

16(1) A secured party shall use reasonable care in the custody and preservation of collateral in his possession and, in the case of an instrument, a security or chattel paper, reasonable care includes, unless otherwise agreed, the taking of necessary steps to preserve rights against prior parties.

Idem, rights & duties of secured party re: collateral

(2) Unless otherwise agreed, where collateral is in the secured party's possession,

(a) reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in the custody and preservation of the collateral, are chargeable to the debtor and are secured by the collateral;

(b) the risk of loss or damage, except where caused by the negligence of the secured party, is on the debtor to the extent of any deficiency in any insurance coverage;

(c) the secured party may hold as additional security any increase or profits, except money, received from the collateral, and money so received, unless remitted to the debtor, shall be applied forthwith upon its receipt to reduce the secured obligation;

(d) the secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and

(e) the secured party may create a security interest in the collateral on terms that do not impair the debtor's right to redeem it.

Liability for loss

(3) A secured party is liable for any loss or damage caused by his failure to meet any obligations imposed by subsection (1) or (2), but does not lose his security interest.

Use of collateral by secured party

(4) A secured party may use the collateral

(a) in the manner and to the extent provided in the security agreement;

(b) for the purpose of preserving the collateral or its value; or

(c) pursuant to an order of the Court

(i) before which a question relating thereto is being heard, or

(ii) upon application with notice to all persons concerned.

Information from the secured party

17(1) A debtor, creditor, sheriff or person with a legal or equitable interest in the collateral may, by a demand in writing, containing an address for reply and sent or delivered to the secured party at the address set forth in the security agreement or the financing statement, or a more recent address if known, require the secured party to send or deliver to him at the address for reply or, if the demand is made by the debtor, to a person at any address specified by the debtor, any one or more of the following:

(a) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness as of the date specified in the demand;

(b) a written approval or correction as of the date specified in the demand of the itemized list of the collateral attached to the demand;

(c) a written approval or correction as of the date specified in the demand of the amount of the indebtedness and of the terms of payment of the indebtedness;

(d) a true copy of the security agreement;

(e) sufficient information as to the location of the security agreement and any copy thereof to enable a person entitled to receive a true copy of the security agreement, or his authorized representative, to inspect it, if he so desires.

Inspection of security agreement

(2) The secured party, on the request of a person entitled to receive a true copy of the security agreement, shall

permit him, or his authorized representative, to inspect the security agreement or a true copy thereof during normal business hours, at the location disclosed in the information provided pursuant to subsection (1).

Security interest in type of collateral

(3) If the secured party claims a security interest in all of a particular type of collateral owned by the debtor, or the proceeds thereof, he shall so indicate in addition to approving or correcting the itemized list of the collateral contained in the statement of the collateral attached to the demand.

Reply by secured party

(4) The secured party shall reply to a demand served under subsection (1) within ten days after it is served and if, without reasonable excuse, he fails to do so, or his reply is incomplete or incorrect, the person who has served the demand is entitled, in addition to any other remedy provided by this Act, to apply, on notice to the secured party, to the Court for an order requiring the secured party to comply with the demand.

Failure to reply

(5) Where a secured party fails to comply with an order granted under subsection (4), the Court, on application of the party who obtained the order, on notice to the secured party, may

(a) declare the security interest of the secured party to be unperfected and order any registration relating thereto to be removed from the registry; or

(b) make any order that it considers necessary to ensure compliance with the order.

Disclosure of successors in interest

(6) Where the person receiving a demand under subsection (1) no longer has an interest in the obligation or collateral, he shall, within ten days after he receives the demand, disclose the name and address of the latest successor in interest if known to him, and, if without reasonable excuse he fails to do so or his reply is incomplete or incorrect, subsections (4) and (5) apply with all necessary modifications.

Application to Court

(7) Upon application of the secured party or in an application under subsection (4), the Court may make any order that is reasonable and just, including

(a) an order exempting the secured party in whole or in part from complying with the demand or extending the time for answering the demand; and

(b) an order as to costs.

Charges for reply

(8) The secured party may require payment in advance of the charges prescribed for each reply to a demand under subsection (1), but the debtor is entitled to a reply without charge once every six months.

Certain writings need not be supplied

(9) The secured party is not required to provide a copy of any writing registered in the registry.

PART III

PERFECTION AND PRIORITIES

Time when security interest is perfected

18 A security interest is perfected when

(a) it has attached; and

(b) all steps required for perfection under this Act have been completed;

regardless of the order of occurrence.

Where unperfected security interest subordinate

19(1) A security interest in collateral is subordinate to the interest of

(a) a person who seizes or causes the collateral to be seized under legal process including execution, attachment or garnishment, or who obtains a charging order or equitable execution affecting the collateral;

(b) a representative of creditors, but only for the purposes of enforcing the rights of persons mentioned in clause (a), and a trustee in bankruptcy; and

(c) a transferee of

(i) a document of title, a security, an instrument, chattel paper or goods, where the transferee receives delivery of the collateral; or

(ii) an intangible

who is not a secured party and who acquires his interest for value and without knowledge of the security interest

if that security interest is unperfected at the time the interests of the persons mentioned in clauses (a) to (c) arose.

Where perfected security interest subordinate

(2) A perfected security interest is subordinate to the rights of persons mentioned in subsections (1)(a) and (b), except to the extent that a security interest secures

(a) advances made before the interests of those persons arise;

(b) advances made before the secured party has knowledge of the interest of those persons;

(c) reasonable costs and expenses incurred by the secured party for the protection, maintenance, preservation or repair of the collateral.

Priority of purchase-money security interest

20 A purchase-money security interest in

(a) collateral, other than an intangible, that is registered within ten days after the day the debtor obtains possession of the collateral;

(b) an intangible that is registered within ten days after the day the security interest attaches;

has priority over the interest of persons mentioned in section 19(1)(a) and (b).

Continuity of perfection

21(1) If a security interest is originally perfected in a way permitted under this Act and is again perfected in some other way under this Act without an intermediate period when it is unperfected, the security interest is deemed to be perfected continuously for the purposes of this Act, and is deemed, for the purposes of section 33, to be continuously perfected in the way in which it was originally perfected.

Assignees

(2) An assignee of a security interest has the same priority with respect to perfection of the security interest as the assignor had at the time of the assignment.

Perfection by possession

22 Possession of the collateral by the secured party, or on his behalf by a person other than the debtor or the debtor's agent, perfects a security interest in

(a) chattel paper;

(b) goods;

(c) an instrument;

(d) a security;

(e) money; or

(f) a negotiable document of title;

but, subject to section 21, only during its actual holding as collateral.

Perfection by registration

23 Registration of a financing statement perfects a security interest in any type of collateral.

Temporary perfection

24(1) A security interest in an instrument, a security or a negotiable document of title is a perfected security interest for the first ten days after it attaches to the extent that it arises for new value given under a written security agreement.

Idem

(2) A security interest perfected under section 22

(a) in an instrument or a security that a secured party delivers to the debtor for

(i) ultimate sale or exchange,

(ii) presentation, collection or renewal, or

(iii) registration; or

(b) in a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for

(i) ultimate sale or exchange,

(ii) loading, unloading, storing, shipping or transshipping, or

(iii) manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange,

remains perfected for the first ten days after the collateral comes under the control of the debtor.

Idem

(3) Beyond the period of ten days referred to in subsection (1) or (2), a security interest under this section be-

comes subject to the provisions of this Act for perfecting a security interest.

Perfecting as to proceeds

25(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest in the collateral

(a) continues as to the collateral, unless the secured party expressly or impliedly authorized those dealings; and

(b) extends to the proceeds.

Continuity of perfection

(2) A security interest in proceeds is a continuously perfected security interest, if the interest in the original collateral is perfected

(a) by the registration of a financing statement that covers the original collateral and proceeds and contains a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same type or kind;

(b) by the registration of a financing statement that covers the original collateral and proceeds, if the proceeds are of a type or kind that are within the description of the original collateral; or

(c) by the registration of a financing statement that covers the original collateral and proceeds, if the proceeds consist of money, cheques or deposit accounts in banks or similar financial institutions.

Idem

(3) If the interest in the original collateral was perfected other than in a manner mentioned in subsection (2), the security interest in the proceeds is a continuously perfected security interest but becomes unperfected on the expiration of ten days after receipt of the proceeds by the debtor unless the security interest in the proceeds is otherwise perfected by any of the methods and under the circumstances prescribed in this Act for original collateral of the same type or kind.

Perfection of goods held by bailee

26(1) A security interest in goods in the possession of a bailee is perfected by

(a) issuing a document of title in the name of the secured party;

(b) holding the goods on behalf of the secured party pursuant to section 22;

(c) registering a financing statement with respect to the goods; or

(d) if the bailee has issued a negotiable document of title covering the goods, perfecting a security interest in the negotiable document of title.

Other interest may arise

(2) The issuance of a negotiable document of title covering goods does not preclude any other security interest in the goods from arising during the period that the negotiable document of title is outstanding.

Goods returned or repossessed

27(1) Where a debtor sells or leases goods that are subject to a security interest, the security interest in the goods reattaches to the goods, if

(a) the buyer or lessee has taken free of the security interest under section 25(1)(a) or 28(1),

(b) the goods are returned to or repossessed by the debtor, and

(c) the obligation secured remains unpaid or unperformed.

Idem

(2) Where a security interest in goods reattaches under subsection (1) then any question as to

(a) whether or not the security interest in the goods is perfected; and

(b) the time of its perfection or registration

shall be determined as if the goods had not been sold or leased.

Where sale or lease creates an account or chattel paper

(3) If a sale or lease of goods creates an account or chattel paper, and

(a) the account or chattel paper is transferred to a secured party, and

(b) the goods are returned to or repossessed by the seller or lessor,

the transferee has a security interest in the goods.

Temporary perfection

(4) A security interest in goods arising under subsection (3)

is perfected if the security interest in the account or chattel paper was also perfected but becomes unperfected on the expiration of ten days after the return or repossession of the goods unless the transferee registers his security interest in or takes possession of the goods before the expiry of that period.

Transferee of account

(5) Where a transferee of an account has a perfected security interest in goods under subsections (3) and (4), for the purpose of determining his priority as to the goods, he is deemed to have perfected his security interest in the goods at the time his security interest in the amount was perfected.

Transferee of chattel paper

(6) Where a transferee of chattel paper has a perfected security interest in goods under subsections (3) and (4)

(a) as between the transferee and the holder of a perfected security interest that attached under subsection (1), the person who had priority as to the chattel paper also has priority as to the goods; and

(b) as between the transferee and a person other than the holder of a perfected security interest that attached under subsection (1), for the purpose of determining the transferee's priority as to the goods, the transferee is deemed to have perfected his security interest in the goods at the time his security interest in the chattel paper was perfected.

Buyer or lessee takes free of security interest

28(1) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 27, notwithstanding that the buyer or lessee knew of it, unless the buyer or lessee also knew that the sale or lease constituted a breach of the security agreement.

Idem

(2) A buyer or lessee of goods bought or leased primarily for personal, family, household or farming uses takes free of a perfected security interest in the goods if

(a) he gives new value for his interest;

(b) he bought or leased the goods without notice of the security interest; and

(c) he receives delivery of the goods.

(*THIS IS AN OPTIONAL SUBSECTION*)

Exception

(3) Subsection (2) does not apply to a security interest in

(a) a motor vehicle as defined in the regulations;

(b) fixtures; or

(c) goods whose purchase price exceeds $750 or, in the case of a lease, whose retail market value exceeds $750.

(*THIS IS AN OPTIONAL SUBSECTION*)

Serial numbered equipment

(4) Where serial numbered goods are sold or leased other than in the ordinary course of business of the seller or lessor and the goods were equipment of the seller or lessor, the buyer or lessee takes free from any security interest in the goods given by the seller or lessor and perfected under section 23 if

(a) the buyer or lessee did not know that the goods were subject to the security interest, and

(b) the goods were not described by serial number in a financing statement.

Priority of buyer or lessee

(5) A buyer or lessee of goods takes free of a security interest that is temporarily perfected under section 24(1), 25(3) or 27(4) or a security interest, the perfection of which is continued under section 47(2) during any of the ten-day periods mentioned in that subsection, if

(a) he gives new value for his interest;

(b) he bought or leased the goods without notice of the security interest; and

(c) he receives delivery of the goods.

Manner of sale or lease

(6) A sale or lease under subsections (1), (2), (4) and (5) may be

(a) for cash;

(b) by exchange for other property; or

(c) on credit;

and includes delivering goods or documents of title under a

pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a monetary obligation.

Priority of purchaser of chattel paper or instrument

(7) A purchaser of chattel paper or an instrument who takes possession of it in the ordinary course of business and who gives new value for it has priority over

(a) any security interest that, in the case of chattel paper or an instrument claimed as original collateral, was perfected under section 23 or any security interest in it as proceeds other than proceeds of inventory, if the purchaser acquired the chattel paper or instrument without knowledge that it was subject to a security interest, or

(b) any security interest in it as proceeds of inventory whether or not the purchaser has knowledge of the security interest.

Rights to be determined without regard to Act

29 The rights of

(a) a holder in due course of a negotiable instrument;

(b) a holder of a negotiable document of title who takes it in good faith for value;

(c) a bona fide transferee of a security; or

(d) a transferee from the debtor of money;

are to be determined without regard to this Act.

Priority of liens for materials and services

30 Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that he has in respect of those materials or services has priority over a perfected security interest unless an Act in force in the Province provides that the lien does not have priority.

Alienation of rights of debtors

31 The rights of a debtor in collateral may be transferred consensually or by operation of law notwithstanding a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but no transfer prejudices the rights of the secured party under the security agreement or otherwise, including the right to treat a prohibited transfer as an act of default.

Special priorities, purchase-money security interests

32(1) Subject to sections 28 and 29, a purchase-money security interest in inventory or, subject to section 25, its

proceeds, has priority over another security interest in the same collateral given by the same debtor, if

(a) the purchase-money security interest in the inventory was perfected at the time the debtor received possession of it;

(b) the purchase-money secured party gives notice in writing to any other secured party who has registered a financing statement covering the same type or kind of inventory before the date of registration by the purchase-money party;

(c) the other secured party receives the notice mentioned in clause (b) within *(insert period corresponding to minimum registration period of adopting province)* years before the debtor receives possession of the inventory; and

(d) the notice mentioned in clause (b) states that the person giving the notice has or expects to acquire a purchase-money security interest in inventory of the debtor, describing such inventory by type or kind.

Purchase-money security interests other than inventory

(2) Subject to sections 28 and 29 a purchase-money security interest in

(a) collateral or, subject to section 25, its proceeds, other than a purchase-money security interest in intangibles or inventory perfected before or within ten days after the day the debtor obtains possession of the collateral; or

(b) an intangible or, subject to section 25, its proceeds, perfected within ten days after the day the security interest in the intangibles attaches;

has priority over any other security interest in the same collateral or its proceeds given by the same debtor.

Priority of non-proceeds purchase-money security interest

(3) A non-proceeds purchase-money security interest has priority over a purchase-money security interest in proceeds under subsections (1) and (2) in the same collateral if the non-proceeds purchase-money security interest is perfected at the time the debtor obtains possession of the collateral or within ten days thereafter.

Priority of vendor, lessor, or consignor purchase-money security interest in collateral

(4) A purchase-money security interest in collateral or its proceeds, other than a purchase-money security interest in inventory or its proceeds, held by a seller, lessor or consignor of the collateral and which,

(a) in the case of collateral other than an intangible, is perfected within ten days after the day the debtor obtains possession of the collateral; or

(b) in the case of an intangible, is perfected within ten days after the day the security interest in the intangible attaches;

has priority over any other purchase-money security interest in the same collateral.

Special priority, crops

(5) A perfected security interest in crops or their proceeds given for value to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise has priority over an earlier perfected security interest to the extent that the earlier interest secures obligations that were contracted more than six months before the crops become growing crops by planting or otherwise, notwithstanding that the person giving the value knew of the earlier security interest.

Priorities, general rule

33(1) If no other provision of this Act is applicable,

(a) priority between perfected security interests in the same collateral shall be determined by the order of

(i) registration,

(ii) possession of the collateral under section 22, or

(iii) perfection

whichever is the earliest;

(b) a perfected security interest has priority over an unperfected security interest; and

(c) priority between unperfected security interests shall be by the order of attachment.

Continuity of perfection

(2) For the purposes of subsection (1), a continuously perfected security interest

(a) shall be treated at all times as if perfected by

registration, if it was originally so perfected, and

(b) shall be treated at all times as if perfected otherwise than by registration, if it was originally perfected otherwise than by registration.

Future advances

(3) If future advances are made at a time during which a security interest is perfected, the security interest has the same priority for the purposes of this section with respect to the future advances as it has with respect to the first advance.

Priority of proceeds

(4) For the purposes of subsection (1), a date of registration, possession or perfection as to collateral is also the date of registration, possession or perfection as to its proceeds.

Fixtures

34(1) This section does not apply to building materials.

Priority of security interests in fixtures

(2) Subject to subsection (3), a security interest in goods that attached

(a) before they became fixtures, has priority with respect to the goods over the claim of any person who has an interest in the real property;

(b) after they became fixtures, has priority over the claim of any person who subsequently acquired an interest in the real property, but not over any person who had a registered interest in the real property at the time the security interest in the goods attached and who has not consented in writing to the security interest or disclaimed an interest in the goods as fixtures.

Interest in fixtures subordinate

(3) A security interest mentioned in subsection (2)

(a) is subordinate to the interest of

(i) a creditor with a prior registered encumbrance on the real property with respect to subsequent advances made by the creditor; and

(ii) a subsequent purchaser for value of an interest in the real property;

if the subsequent advance under the prior encumbrance or the subsequent purchase is made or contracted for without fraud *(without knowledge of the*

security interest) and before the security interest is registered in accordance with the _____ Act;

(b) is subordinate to the interest of

(i) a creditor of the debtor; and

(ii) a sheriff;

who has acquired through legal process a lien or charge against the real property to enforce a judgment if the lien or charge arises before the security interest is filed in accordance with section 52.

(THE WORDS IN PARENTHESES ARE SUGGESTED AS ALTERNATIVES IN NON-TORRENS TITLE SYSTEM PROVINCES

THE NAME OF THE LAND REGISTRY ACT OF THE PROVINCE SHOULD BE INSERTED.)

Priority over purchase-money security interest

(4) A lien or charge mentioned in subsection (3)(b) shall not take priority over a purchase-money security interest in the goods that is filed in accordance with section 52 before or within ten days from the time the debtor received possession of the goods.

Reimbursement for damage to interest

(5) Any person, other than the debtor, who has an interest in real property at the time goods subject to a security interest are affixed to the real property is entitled to reimbursement for any damage to his interest in the real property resulting from the removal of the goods, but is not entitled to reimbursement for diminution in the value of the real property caused by the absence of the goods removed or by the necessity for replacement.

Security for reimbursement

(6) The persons entitled to reimbursement as provided in subsection (5) may refuse permission to remove the goods until the secured party has given adequate security for the reimbursement.

Notice of intention to remove goods

(7) The secured party who has the right to remove goods from real property shall serve, on each person who appears by the records of the _____ office to have an interest in the real property, a notice in writing of his intention to remove the goods containing

(a) the name and address of the secured party;

(b) a description of the goods to be removed sufficient to enable them to be identified;

(c) the amount required to satisfy the obligations secured by his security interest;

(d) a description of the real property to which the goods are affixed sufficient to enable the real property to be identified; and

(e) a statement of intention to remove the goods unless the amount secured is paid on or before a specified day that is not less than ten days after service of the notice in accordance with subsection (8).

(THE NAME OF THE LAND REGISTRY OFFICE SHOULD BE INSERTED IN SUBSECTION (7).)

Service of notice

(8) The notice mentioned in subsection (7) shall be served in accordance with section 67 at least ten days before the goods are removed.

Retention of collateral

(9) A person having an interest in real property that is subordinate to a security interest by virtue of subsection (2) may, before the collateral has been removed from the real property by the secured party, retain the collateral upon payment to the secured party of the amount owing under the security interest having priority over this interest.

Priority re: accessions

35(1) Subject to subsection (2) of this section and to section 36, a security interest in goods that attached

(a) before they became accessions, has priority with respect to the goods over the claim of any person who has an interest in respect of the whole;

(b) after they became accessions, has priority over the claim of any person who subsequently acquired an interest in the whole, but not over any person who had an interest in the whole at the time the security interest in the whole attached and who has not consented in writing to the security interest or disclaimed an interest in the accessions as part of the whole.

Interest is accessions subordinate

(2) A security interest mentioned in subsection (1)

(a) is subordinate to the interest of

(i) a creditor with a prior perfected security interest

in the whole to the extent that he makes subsequent advances; and

(ii) a subsequent buyer of an interest in the whole;

if the subsequent advance under the prior perfected security interest or subsequent sale is made or contracted for without knowledge of the security interest and before the security interest is perfected;

(b) is subordinate to the interest of a purchaser other than a buyer who acquires his interest before the security interest is perfected; and

(c) is subordinate to the interest of

(i) a creditor of the debtor; and

(ii) a sheriff;

who has caused the whole to be seized under judicial process to enforce a judgment, if the seizure occurs before the security interest is perfected

Priority over purchase-money security interest

(3) The interest of a creditor or the sheriff mentioned in subsection (2)(c) shall not take priority over a purchase-money security interest in accessions that is perfected before or within ten days after the time the debtor obtains possession of the collateral.

Reimbursement for damage to interest

(4) Any person, other than the debtor, who has an interest in the other goods at the time the goods subject to a security interest become accessions is entitled to reimbursement for any damage to his interest in the other goods resulting from the removal of the accessions, but is not entitled to reimbursement for diminution in the value of the other goods resulting from the removal of the accessions caused by the absence of the accessions removed or by the necessity for replacement.

Security for reimbursement

(5) The persons entitled to reimbursement as provided in subsection (4) may refuse permission to remove accessions until the secured party has given adequate security for the reimbursement.

Notice of intention to remove goods

(6) The secured party who has the right to remove accessions from the whole shall serve, on each person known to him as having an interest in the other goods and

on any person who has registered a financing statement indexed in the name of the debtor and referring to the other goods or according to the serial number where such is required, a notice in writing of his intention to remove the accessions containing:

(a) the name and address of the secured party;

(b) a description of the accessions to be removed sufficient to enable them to be identified;

(c) the amount required to satisfy the obligations secured by his security interest;

(d) a description of the other goods sufficient to enable them to be identified; and

(e) a statement of intention to remove the accessions from the whole unless the amount secured is paid on or before a specified day that is not less than twelve days after service of the notice in accordance with subsection (7).

Service of notice

(7) The notice mentioned in subsection (6) shall be served in accordance with section 67 at least ten days before the goods are removed.

Retention of accessions

(8) A person having an interest in goods that is subordinate to a security interest by virtue of subsection (1) may, before the accessions have been removed from the goods, retain the whole upon payment to the secured party of the amount owing with respect to the security interest having priority over his interest.

Commingled goods

36 A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass, and, if more than one security interest attaches to the product or mass, the security interests rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass.

Subordination of security interest

37 A secured party may, in the security agreement or otherwise, subordinate his security interest to any other security interest.

Rights of assignee

38(1) Unless a debtor with respect to an account or chattel paper has made an enforceable agreement not to assert defences or claims arising out of a contract, the rights of an assignee are subject to

(a) the terms of the contract between that debtor and the assignor and any defence or claim arising therefrom; and

(b) any other defence or claim of that debtor against the assignor that accrued before the debtor received notice of the assignment.

Modification etc effective against assignee

(2) To the extent that the right to payment or part payment under an assigned contract right has not been earned by performance, and notwithstanding notice of the assignment, and modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards and without material adverse effect upon the assignee's right under or the assignor's ability to perform the contract is effective against an assignee unless the debtor with respect to an account or chattel paper has otherwise agreed, but the assignee acquires corresponding rights under the modified or substituted contract.

Exception

(3) Nothing in subsection (2) affects the validity of a term in an assignment agreement which provides that a modification or substitution mentioned in that subsection is a breach of the agreement by the assignor.

Debtor may pay assignor

(4) The debtor with respect to an account or chattel paper may pay the assignor until he receives notice that the amount due or to become due under an identified transaction has been assigned and that payment is to be made to the assignee.

Idem

(5) A debtor with respect to an account or chattel paper may pay the assignor, if the assignee, when requested to do so by the debtor, fails to furnish to the debtor proof within a reasonable time that the assignment has been made.

Prohibition of assignment void

(6) A term in any contract between a debtor with respect to an account or chattel paper and an assignor that prohibits assignment of the whole of an account is ineffective.

PART IV

REGISTRATION

(EACH ADOPTING PROVINCE SHOULD REVIEW THIS PART IN LIGHT OF THE TYPE OF REGISTRY SYSTEM IT INTENDS TO ADOPT, THE NEEDS OF THAT SYSTEM AND LOCAL POLICY REGARDING THE PROPER BALANCE BETWEEN DETERMINING REGISTRY RULES BY STATUTE, BY REGULATION OR BY ADMINISTRATIVE POLICY.)

Registry established

39 A registration system, to be known as the Personal Property Registry, is hereby established for the purposes of registration under this Act and for registration that is authorized or required under any other Act to be made in the registry.

Appointment of registrar and other staff

40(1) The *(insert title of responsible Minister)* shall appoint a Registrar of Personal Property Security and any deputy registrars that may be required for the proper operation of the registry.

(2) The registrar shall, under the direction of the *(insert title of responsible Minister),* supervise the operation of the registry.

(3) The registrar may designate one or more persons or deputy registrars under his administration to act on his behalf.

Requisition of search

41(1) Upon payment of the prescribed fee in the prescribed manner, any person may, in person at the office of the registry in *(city where central registry located)* or by mail,

(a) requisition a search against the name of any individual or business debtor or according to the serial number of the collateral, if the collateral is required by the regulations to be described by serial number, and obtain the results of the search;

(b) requisition the printed results of the search mentioned in clause (a);

(c) obtain a certified copy of any registered document.

Idem

(2) Upon receipt of the prescribed fee in the prescribed manner, a deputy registrar employed at a place other than

(city were central registry located) shall requisition, by telephone, telegraph message or mail,

(a) oral or printed search results of a search against the name of any individual or business debtor or according to the serial number of the collateral, if the collateral is required by the regulations to be described by serial number;

(b) a certified copy of any registered document.

Registrar may substitute printed search

(3) If oral search results are requested and the results of the search are, in the opinion of the registrar, of such length as to preclude oral search results, the registrar may, after informing the person searching of his decision, forward by mail the printed results of the search.

Making of requisition

(4) Requisitions authorized by subsection (2) may be made by persons other than the deputy registrar with the approval of the registrar.

Idem

(5) Where so approved by the *(insert title of Minister responsible)*, searches may be requisitioned and provided in a manner other than that provided in subsection (1) or (2).

Contents of search result

(6) The results of any search conducted under this section may contain information actively maintained for inquiries in the registry and may include information corresponding to search criteria similar to those provided by the person requisitioning the search.

Printed search result prima facie proof

(7) A printed search result issued under subsection (1)(b), (2)(a) or (3) and certified by the registrar is receivable in evidence as prima facie proof of its contents without proof of his signature or official position.

Certified copy prima facie proof

(8) A copy of any registered document certified by the registrar is receivable in evidence as prima facie proof for all purposes, without proof of his signature or official position.

Effective time of registration

42(1) A financing statement or financing change statement may be tendered for registration, by personal delivery or by mail, at the office of the registry in *(city where central registry located)*, and the registration of the document is effective from the time recorded on the document by the registrar.

Registration of statements

(2) Except as otherwise provided in this Act, a financing statement or financing change statement may be registered at any time and may be registered before the security agreement is made or before a security interest attaches.

Financing change statements

43(1) Where a financing statement is registered and the secured party has assigned his interest, a financing change statement in the prescribed form may be registered.

Where collateral is assigned

(2) Where a part of the collateral is assigned, the financing change statement shall so indicate and shall contain a description of the assigned collateral in the prescribed manner.

Assignee disclosed as secured party

(3) Where no financing statement has been registered with respect to a security interest and the secured party has assigned his interest, a financing statement may be registered in which the assignee is disclosed as the secured party.

Assignee is secured party

(4) After disclosure of an assignment or registration of a financing change statement under this section, the assignee is the secured party.

Time when registered

(5) A financing statement disclosing an assignment may be registered before or after an agreement to assign the security interest has been completed.

Amendment to registered document

44 An amendment, in the prescribed form, to a financing statement or other writing registered under this Act may be registered at any time during the period that the registration of the amended writing is effective, and the amendment is effectively registered as to the change from the time of registration of the amendment.

Subordinated interest

45 Where a secured party has subordinated his interest to the interest of another person, a financing change statement may be registered at any time during the period that the registration of the subordinated interest is effective.

Renewal of registration

46(1) Where a financing statement has been registered with respect to a security interest, the registration may be renewed by registering a financing change statement at any time before the writing to which it refers expires.

Effect of registration

(2) Subject to the regulations, registration under this Act of

(a) a financing statement is effective for the length of time indicated on the financing statement;

(b) a financing change statement renewing the registration is effective for the length of time indicated on the financing change statement;

(c) any other writing is effective for the remainder of the period for which the financing statement or the financing change statement to which the writing relates is effective.

Removal of registration

(3) Financing statements and financing change statements referring to a financing statement, or information provided on a financing statement or financing change statement, as the case may require, may be removed from the records of the registry

(a) when the financing statement is no longer effective;

(b) upon the receipt of a financing change statement discharging or partially discharging the financing statement;

(c) when the secured party fails to register a Court order maintaining the financing statement under section 48(5);

(d) upon receipt of a Court order compelling the discharge or partial discharge of a financing statement or a financing change statement.

Where debtor transfers interest in collateral

47(1) Where a security interest has been perfected by registration and the debtor transfers his interest in collateral or part of the collateral, with the consent of the secured party, the transferee is deemed to be a debtor with respect to the transferred collateral, for the purpose of registration, and the security interest is unperfected as against any interest in the transferred collateral unless the secured party registers a financing change statement amending the original financing statement within ten days after the date of the transfer.

When security interest becomes unperfected

(2) Where a security interest has been perfected by registration, the security interest becomes unperfected,

(a) where the debtor has transferred his interest in all or part of the collateral, with respect to the transferred collateral, or

(b) where the debtor has changed his name, with respect to all of the collateral,

ten days after the secured party has notice that the debtor has transferred his interest in collateral or part of the collateral, or changed his name, as the case may be, unless the secured party registers a financing change statement amending the original financing statement within fifteen days after the date of notice of the transfer or change of name.

Effect of section

(3) This section does not have the effect of unperfecting

(a) a security interest in collateral that is described by serial number in accordance with the regulations and is described by its serial number in a registered financing statement; or

(b) a prior security interest registered under a prior registration law deemed to be registered under section 72.

Re-perfecting security interest

(4) A security interest that becomes unperfected under this section may thereafter be perfected by registering a financing statement or as may otherwise be provided in this Act.

Financing change statement re: consumer goods

48(1) Where a financing statement relating to a security interest in consumer goods is registered, the secured party shall register, within one month after all obligations under the security agreement creating the security interest are performed, a financing change statement discharging the financing statement unless prior to the expiry of one month the registration of the financing statement ceases to be effective.

Demand for financing change statement

(2) Where a financing statement is registered under this Act and

(a) all the obligations under the security agreement to which it relates are performed;

(b) it is agreed to release all or part of the collateral in which a security interest is taken; or

(c) it contains a claim to a security interest in property of the debtor which the secured party does not have, or is not entitled to claim;

any person having an interest in the collateral that is the subject of the security agreement, financing statement or

financing change statement may serve a written demand on the secured party demanding a financing change statement mentioned in subsection (1), and the secured party shall, within fifteen days after service of the demand, sign and deliver or send to the registry the financing change statement together with financing change statements in respect of all assignments by the secured party or transfers by the debtor in respect of which financing change statements have not been registered.

Notice of discharge

(3) Where the secured party fails to deliver the required financing change statements within the time provided by subsection (2), the person who has made the demand may require the registrar to serve a notice in writing on the secured party stating that registration of the financing statement will be discharged or that a part of the collateral will be released, as the case may be, upon the expiration of forty days after the day the registrar serves notice on the secured party, unless in the meantime the secured party registers with the registrar a Court order accompanied by a financing change statement maintaining the registration of the interest of the secured party.

Service of notice

(4) The notice mentioned in subsection (2) and the demand mentioned in subsection (3) may be served in accordance with section 67 or by registered mail addressed to the post office address of the secured party as it appears on the security agreement or financing statement.

Application to Court

(5) Upon application to the Court by a secured party, the Court may order that the registration of a financing statement

(a) be maintained on any conditions and, subject to section 46, for any period of time that it considers just;

(b) be discharged or that a financing change statement releasing the collateral or part of the collateral be registered, as the case may be.

No discharge of certain documents

(6) Subsection (3) does not apply to an agreement registered under the *(insert name of appropriate legislation)* Act or to a financing change statement registered with respect to a security interest taken under a trust indenture if the financing statement indicates that the security agreement with respect to which the financing statement was registered is a trust indenture.

Application to Court

(7) Where the secured party under a registration to which the *(insert name of appropriate legislation)* Act applies or under a trust indenture fails to deliver the financing change statement demanded under subsection (2), the person making the demand may apply to the Court, upon notice to all persons concerned, for an order directing that the financing statement or financing change statements be removed from the registry.

No constructive notice

49 Registration of a writing in the registry does not constitute constructive notice or knowledge of its contents to third parties.

Registrar may refuse registration

50(1) Where, in the opinion of the registrar or deputy registrar, a writing tendered for registration in the registry does not comply with this Act or the regulations or with any other Act under which registration of the writing in the registry is authorized, he may refuse to register it, and shall give the reason why he is of the opinion that it does not comply.

Writing to be original

(2) Any writing that is required or permitted to be registered under this Act must be the original.

(3) For the purpose of this Act a writing is deemed to be signed by a person when it is signed by the person or his agent.

Certificate of registrar

(4) A certificate of the registrar is receivable in evidence as prima facie proof of the time of the registration of a writing, without proof of his signature or offical position.

Microfilm

(5) When directed to do so by the *(insert title of appropriate Minister)*, the registrar shall cause any writing registered in the registry to be photographed on microfilm and the microfilm, for the purposes of this Act or an Act authorizing registration in the registry, is deemed to be the writing that was registered.

Destruction of records

(6) When directed to do so by the *(insert title of appropriate Minister)*, the registrar shall authorize the destruction of any books, writings, records, cards, papers or forms that have been preserved in the registry for so long that it appears that they need not be preserved any longer.

Action against registrar

51(1) Subject to this section, any person who suffers loss or damage as a result of his reliance on a registered writing or

printed search result that is incorrect because of an error in the operation of the registry may bring an action against the registrar in the Court for recovery of damages, but no award of damages to any single claimant shall exceed the prescribed amount.

Limitation of actions

(2) No action for damages under this section lies against the registrar unless it is commenced within one year after the time of the loss or damage.

Class actions

(3) Any action for recovery of damages under this section brought by a person shall be brought as an action on behalf of all other persons who relied on the same registered writing or printed search result, and the judgment in the action, except to the extent that it relates to the finding of the fact of reliance by each person and provides for subsequent determination of the amount of damages suffered by each person, constitutes a judgment between each person and the registrar in respect of an error or omission in the operation of the registry.

Idem

(4) An action for recovery of damages under this section brought by a trustee under a trust indenture or any person with an interest in a trust indenture shall be brought as an action on behalf of all persons with interests in the same trust indenture, and the judgment in the action, except to the extent that it provides for subsequent determination of the amount of damages suffered by each person, constitutes a judgment between each person and the registrar in respect of the error or omission.

Proof of reliance

(5) In an action brought by a trustee under a trust indenture or by any person with an interest in a trust indenture, proof that each person relied on the registered writing or printed search results is not necessary if it is established that the trustee relied on the registered writing or printed search results, but no person is entitled to recover damages under this section if he knew at the time he acquired his interest that the registered writing or printed search results relied on by the trustee were incorrect.

Total claims

(6) The total of all claims for compensation paid under subsections (3) and (4) in any single action shall not exceed the prescribed amount.

Powers of court

(7) In proceedings under subsections (3) and (4), the Court

may make any order that it consider appropriate in order to give notice to members of the class.

Payment of damages

(8) Subject to subsection (6), the Court may order payment of all or a portion of the damages awarded to identified members of the class at any time after judgment, and the obligation of the registrar to satisfy the judgment is satisfied to the extent that payment is made.

Payment of claim

(9) The *(insert appropriate name of Minister)* may, without action brought, pay the amount of a claim against the registrar when authorized to do so by the *(insert appropriate name of Minister)* on the report of the registrar setting forth the facts and receipt of a certificate of the registrar that in his opinion the claim is just and reasonable.

Payment of award of damages

(10) When an award of damages has been made in favour of the claimant and the time for appeal has expired or when an appeal is taken and it is disposed of in favour of the plaintiff, the *(insert title of appropriate Minister)* shall authorize payment out of the *(insert title of appropriate Fund)* in the manner and in the amount specified in the judgment, including any costs awarded to the claimant.

Immunity from action

(11) Notwithstanding the *(insert name of appropriate legislation)* Act, no action shall be brought against the Crown in right of the Province, the registrar or any officer or employee of the registry for any act or omission of the registrar or an officer or employee of the registry in respect of the discharge or purported discharge of any duty or function under this or any other Act or under the regulations, other than as provided in this section.

Notice filed in land registry office

52(1) In order to take priority over interest in real property according to section 34, a notice in the prescribed form shall be filed in the appropriate *(insert name of land registry office)* office upon payment of the prescribed fee, and upon the notice being so filed the registrar of the *(insert name of land registry office)* office shall make a memorandum of the notice on the certificate of title to the parcel of land to which the notice relates and the condominium plan or replacement plan as the case requires.

Renewal of notice

(2) Where a notice has been filed in the *(insert name of land registry office)* office under subsection (1) and the filing of the notice has not expired, notice of a document

renewing, amending, assigning or discharging the security interest to which the original notice relates, or of a document subordinating the security interest to another security interest, may be filed in the *(insert name of land registry office)* office in the prescribed form, an, upon the notice being so filed the registrar of the *(insert name of land registry office)* office shall make a memorandum thereof on the proper certificate or title.

Application of section 46

(3) Section 46 applies, with all the necessary modifications, to any notice filed under this section.

Fixtures

(4) A security interest in fixtures may be perfected as a security interest in goods without a notice being filed under subsection (1).

Registrar may vacate notice

(5) Where the filing of a notice of a security interest in fixtures expires, the registrar of the *(insert name of land registry office)* office may vacate the filing of the notice and any other notice that relates to the same security interest and may strike out any memorandum of the notice that is made on the certificate of title.

Discharge of notice

(6) A notice filed under subsection (1) or (2) may be discharged by filing a certificate in the prescribed form in the appropriate *(insert name of land registry office)* office.

Contesting filing of notice

(7) Where a notice is filed under subsection (1) and

(a) all the obligations under the security agreement are performed;

(b) it is agreed to release part of the collateral in which a security interest is taken upon payment or performance of certain of the obligations under the security agreement, then upon payment or performance of those obligations; or

(c) the notice purports to give the secured party a security interest in property of the debtor in which the secured party does not have, or is not entitled to claim, a security interest;

any person having an interest in the collateral, the registered owner of the real property or any other person claiming an interest in the real property may contest the

registration of the notice according to the procedure established in the *(insert the name of the appropriate legislation)* Act for contesting the filing of a caveat.

(RE: SECTIONS 48-52

EACH ADOPTING PROVINCE SHOULD EXAMINE THESE SECTIONS AND TAILOR THEM TO THEIR OWN PARTICULAR REGISTRATION REQUIREMENTS.

IN PARTICULAR, IT SHOULD BE NOTED THAT SECTION 52(2) CONTEMPLATES EXPIRY AND RENEWAL OF A NOTICE FILED IN THE LAND REGISTRY OFFICE. MANY LAND REGISTRY SYSTEMS DO NOT MAKE ANY PROVISION FOR EXPIRY AND RENEWAL OF NOTICES. NOTICES ARE EFFECTIVE UNTIL WITHDRAWN. IN SUCH A CASE, SECTION 52(2) SHOULD BE AMENDED.)

PART V

DEFAULT—RIGHTS AND REMEDIES

Application of Part

53(1) Except as provided in this section, this Part applies only to a security interest that secures payment of performance of an obligation.

Pawnbrokers

(2) Notwithstanding subsection (1), this Part does not apply to a transaction between a pledgor and a pawnbroker.

Rights and remedies cumulative

(3) The rights and remedies mentioned in this Part are cumulative.

Appointment of receiver or receiver-manager

54(1) A security agreement may provide for the appointment of a receiver or a receiver-manager and, except as provided in this or any other Act, prescribe his rights and duties.

Application to court

(2) Upon application of the secured party, the debtor or any interested person, and after notice to any other person that the Court directs, the Court may

(a) appoint a receiver or receiver-manager;

(b) remove, replace or discharge a receiver or receiver-

manager whether appointed by the Court of pursuant to a security agreement;

(c) give directions on any matter relating to the duties of a receiver or receiver-manager;

(d) approve the accounts and fix the remuneration of receiver or a receiver-manager;

(e) make any order with respect to a receiver or receiver-manager that it thinks fit in the exercise of its general jurisdiction over receivers or receiver-managers.

Rights and remedies of secured party

55(1) Where the debtor is in default under a security agreement, the secured party has, in addition to any other rights and remedies,

(a) subject to subsections (3) and (4), the rights and remedies provided in the security agreement;

(b) the rights and remedies provided in this Part; and

(c) when in possession of the collateral, the rights, remedies and duties provided in section 16.

Application of Act to receivers and receiver-managers

(2) Unless the Court otherwise orders,

(a) sections 16 and 56 to 59 do not apply to a receiver-manager if he disposes of collateral in the course of carrying on the business of the debtor;

(b) section 60 does not apply to a receiver or receiver-manager.

Waiver and variation prohibited

(3) Subject to subsection (4), the parties to a security agreement may determine the standards by which the rights of the debtor and the duties of the secured party are to be measured, so long as those standards are not manifestly unreasonable having regard to the nature of the rights and duties.

(4) To the extent that they give rights to the debtor and impose duties upon the secured party, the provisions of section 16 and sections 58 to 62 shall not be waived or varied, except in accordance with the provisions of sections 16, 60 and 61.

Remedies of secured party

(5) Where a security agreement covers both real and personal property, the secured party may proceed under this

Part as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property, in which case this Part does not apply.

Interest does not merge

(6) A security interest does not merge only because a party has reduced his claim to judgment.

Collection rights of secured party

56(1) Where so agreed and in any event upon default under a security agreement, a secured party is entitled

(a) to give notice to any debtor in respect of an account or chattel paper or any obligor in respect of an instrument to make payment to him whether or not the assignor was making collections on the collateral; and

(b) to take control of any proceeds to which he is entitled under section 25.

Expenses of collection

(2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise is entitled to full or limited recourse against the debtor and who undertakes to collect from the debtor in respect of accounts or chattel paper or an obligor in respect of an instrument shall proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections.

Secured party's right to take possession upon default

57 Upon default under a security agreement,

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law;

(b) if the collateral is equipment and the security interest has been perfected by registration, the secured party may render the equipment unusable without removal of the equipment from the debtor's premises, and the secured party shall thereupon be deemed to have taken possession of such equipment; and

(c) the secured party may dispose of collateral on the debtor's premises in accordance with section 58.

Secured party's right to dispose of collateral upon default

58(1) Upon default under a security agreement, the secured party may dispose of any of the collateral either before or after any repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied in the following order:

(a) the reasonable expenses of seizing, holding, repairing, processing, preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party;

(b) the satisfaction of the obligation secured by the security interest of the party making the disposition;

(c) the satisfaction of the obligation secured to any subordinate security interest in the collateral if written demand therefor is received by the party making the disposition before the distribution of the proceeds is completed.

Request for proof of interest

(2) Where a written demand under subsection (1)(c) is received by the secured party, he may request the holder of the subordinate security interest to furnish him with reasonable proof of the holder's interest, and, unless the holder furnishes the proof within a reasonable time, the secured party is not required to comply with the demand.

Methods of disposition

(3) Collateral may be disposed of in whole or in part, and the disposition may be by public sale, private sale, lease or otherwise and, subject to subsection (5), may be made at any time and place and on any terms so long as every aspect of the disposition is commercially reasonable.

Secured party's right to defer disposition of collateral

(4) The secured party may retain the collateral in whole or in part for a period of time that is commercially reasonable.

Secured party to give notice of disposition of collateral

(5) Unless the collateral is perishable or the secured party believes on reasonable grounds that the collateral will decline speedily in value, the secured party shall give not less than fifteen days' notice in the prescribed form of his intention to dispose of the collateral to

(a) the debtor; and

(b) any other person who has a subordinate security interest in the collateral who has registered a financing statement indexed in the name of the debtor or according to the serial number of the collateral, prior to disposition of the collateral.

Secured party's right to purchase collateral

(6) Unless the Court otherwise permits, the secured party may not purchase the collateral or any part of the collateral except at a public sale.

Effect of disposition of collateral

(7) Where collateral is disposed of in accordance with this section, the disposition

(a) discharges the security interest of the secured party making the disposition, and

(b) if the disposition is made to a bona fide purchaser for value, also discharges any subordinate security interest and terminates the debtor's interest in the collateral.

Idem

(8) Where collateral is disposed of by a secured party after default otherwise than in accordance with this section, then,

(a) in the case of a public sale, if the purchaser has no knowledge of any defect in the sale and if he does not purchase in collusion with the secured party, other bidders or the person conducting the sale, or

(b) in any other case, if the purchaser acts in good faith,

the disposition discharges the security interest of the secured party making the disposition and, where the disposition is made to a purchaser for value, discharges also any subordinate security interest and terminates the debtor's interest in the collateral.

Certain transfers of collateral

(9) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party, and such a transfer of collateral is not a disposition of the collateral.

Application of surplus

59(1) Where a security agreement secures an indebtedness and the secured party has dealt with the collateral under section 56 or 57 or has disposed of it in accordance with section 58 or otherwise, he shall account for and pay over any surplus in the following order:

(a) to any person who has a subordinate security interest in the collateral who has registered a financing statement indexed in the name of the debtor or according to the serial number of the collateral prior to the distribution of the proceeds;

(b) to any other person who has an interest in the surplus, if that person has delivered a written demand therefor on the secured party prior to distribution of the proceeds;

(c) to the debtor;

and upon payment being made as aforesaid the secured party shall be relieved from liability in respect of the sums so paid.

Proof of interest

(2) The secured party may request a person who has a subordinate security interest or a person who has delivered a written demand to furnish him with proof of that person's interest, and, unless the person furnishes the proof within ten days after the secured party's demand, the secured party is not required to pay over any portion of the surplus to him.

Debtor liable for deficiency

(3) Unless otherwise agreed to in the security agreement, or unless otherwise provided in this or any other Act, the debtor is liable for any deficiency.

Statement of results of dealing

(4) If the security interest secures an indebtedness, the secured party shall, if requested in writing by the debtor or any other person with an interest in the collateral, provide a statement of the results of any dealing with the collateral under section 56 or 57 or a disposition of the collateral under section 58 or otherwise.

Advance payment of prescribed charges

(5) The secured party may require payment in advance of charges prescribed for each statement under subsection (4), but the debtor is entitled to a statement without charge.

Retention of collateral in satisfaction of obligation

60(1) After default, the secured party in possession of the collateral may propose to retain the collateral in satisfaction of the obligation secured, and shall serve a notice of the proposal on

(a) the debtor or any other person who is known by the secured party to be an owner of the collateral;

(b) a person who has a security interest in the collateral

(i) whose interest is subordinate to that of the secured party, and

(ii) who has registered a financing statement that is

indexed in the name of the debtor or according to the serial number of the collateral; and

(c) any other person with an interest in the collateral who has delivered a written notice of his interest in the collateral to the secured party prior to the date that notice is served on the debtor.

Objection

(2) If any person who is entitled to notice under subsection (1), and whose interest in the collateral would be adversely affected by the secured party's proposal, delivers to the secured party a written objection within fifteen days after service of the notice, the secured party shall dispose of the collateral in accordance with section 58.

Irrevocable election to retain collateral

(3) If no objection is made by any person mentioned in subsection (1), the secured party in possession is deemed to have irrevocably elected to retain the collateral in full satisfaction if the obligation secured and thereafter is entitled to hold or dispose of the collateral free from all rights and interests in the collateral

(a) of any person entitled to notice under subsection (1)(b), and

(b) of any person entitled to notice under subsections (1)(a) and (c) whose interest is subordinate to that of the secured party

who has been served with the notice.

Proof of interest

(4) The secured party may require any person who has made an objection to his proposal to furnish him with proof of that person's interest in the collateral and, unless the person furnishes proof within ten days of the secured party's demand, the secured party may proceed as if he had received no objection from that person.

Application to court

(5) Upon application by a secured party, and after notice to all persons affected, the Court may determine that an objection to the proposal of a secured party is ineffective on the ground that

(a) the person made the objection for a purpose other than the protection of his interest in the collateral or the proceeds of a disposition of the collateral; or

(b) the market value of the collateral is less than the

total amount owing to the secured party and the costs of disposition.

Disposal of collateral to bona fide purchaser

(6) When a secured party in possession disposes of the collateral to a bona fide purchaser for value who takes possession of it, the purchaser acquires the collateral free from any interest subordinate to that of the secured party, whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by those subordinate interests are deemed to be performed for the purposes of section 48.

Redemption of collateral

61(1) At any time before the secured party has disposed of the collateral or contracted to dispose of the collateral under section 58, or before the secured party is deemed to have irrevocably elected to retain the collateral in satisfaction of the obligation under section 60, the debtor, or any person other than the debtor who is the owner of the collateral, or any secured party other than the secured party in possession, may, unless he has otherwise agreed in writing after default,

(a) redeem the collateral by tendering fulfilment of all obligations secured by the collateral, or

(b) subject to subsection (2), reinstate the security agreement by paying the sums actually in arrear, exclusive of the operation of any acceleration clause, or by curing any other default by reason whereof the secured party is entitled to dispose of the collateral,

together with a sum equal to the reasonable expenses of seizing, holding, repairing, processing, preparing the collateral for disposition and arranging for its disposition, and any other reasonable expenses incurred by the secured party.

Right of debtor to reinstate security agreement

(2) The right to reinstate under subsection (1)(b) may be exercised,

(a) if the collateral is consumer goods, once during the term of the agreement, unless the Court orders otherwise;

(b) in all other cases, pursuant to a Court order.

Application to Court

62 Upon application by a debtor, a creditor of a debtor,

a secured party of any other person who has an interest in collateral which may be affected by an order under this section, and after notice has been given to any person that the Court directs, the Court may

(a) make any order, including binding declarations of right and injunctive relief, that is necessary to ensure compliance with this Part or section 16;

(b) give directions to any party regarding the exercise of his rights or discharge of his obligations under this Part or section 16;

(c) relieve any party from compliance with the requirements of this Part or section 16, but only on terms that are just and reasonable for all parties concerned;

(d) stay enforcement of rights provided in this Part, section 16 on such terms that the Court considers just and reasonable;

(e) make any order necessary to ensure protection of the intersts of any person in the collateral;

(f) make an order requiring a receiver or receiver-manager, or a secured party or other person by or on whose behalf he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody, management or disposition of the collateral or to releive from liability for such default on such terms as the Court thinks fit, and to confirm any act of the receiver or receiver-manager.

PART VI

MISCELLANEOUS AND TRANSITIONAL

Common law etc applies

63 The principles of law and equity, including the law merchant, the law relating to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake and other validating or invalidating rules of law, shall supplement this Act and shall continue to apply.

Rights, etc to be exercised in commercially reasonable manner

64(1) All rights, duties or obligations arising under a security agreement, under this Act of under any other applicable was shall be exercised or discharged in a commercially reasonable manner.

Right to recover loss or damage

(2) Where a person fails to discharge any duties or obligations imposed upon him by this Act, the person to whom the duty or obligation is owed has a right to recover compensation for loss or damage that he suffered and that was reasonably foreseeable as liable to result from the failure.

Agreement to limit liability void

(3) Except as otherwise provided in this Act, any provision in any security agreement which purports to exclude any duty imposed on a person under this Act of to exclude or limit the liability of a person for failure to discharge duties imposed by this Act is void.

Assessment of damages

(4) In assessing damages under this Act, the Court may consider as a mitigating factor evidence that the defendant employed reasonable diligence and took all reasonable precautions to discharge the duties and obligations imposed upon him by this Act.

Extension of time

65 Where in this Act, other than in sections 4, 5, 6 and 12, Parts III and IV and this Part, a time is prescribed within which or before which any act or thing must be done, the Court, on application, may extend or abridge the time for compliance on any term that it considers just and reasonable.

Remedial provision re errors, omissions, etc

66(1) The validity or effectiveness of a document to which this Act applies in not affected by reason of a defect, iregularity, omission or error in the document or in the execution or registration of the document unless the defect, irregularity, omission or error is seriously misleading.

Failure to provide description

(2) Failure to provide a description in a document required by this Act is relation to any type or kind of collateral in a document does not affect the validity or effectiveness of the document with respect to any other collateral.

Service of notices or writings

67(1) Where under this Act a notice or any writing may be or is required to be served, it may be served on

(a) an individual, by personal service or by registered mail addressed to him at his residence or place of business and, if he has more than one residence or place of business, at any one his residences or places of business;

(b) a partnership,

(i) by personal service upon

(A) any one or more of the partners;

(B) any person having, at the time of service, control or management of the partnership business at the principal place of business of the partnership within the Province;

(ii) by registered mail addressed to

(A) the partnership;

(B) any one or more of the partners;

(C) any person having, at the time of service, control or management of the partnership business, at the principal place of business of the partnership within the Province;

at the post office address of the principal place of business of the partnership within the Province;

(c) a body corporate, by delivery to the registered office of the body corporate or by registered mail addressed to the body corporate at its registered office;

(d) an extra-provincial body corporate, by delivery to . . .

(ADOPTING PROVINCES WITH DIFFERENT SERVICE PROVISIONS FOR EXTRA-PROVINCIAL CORPORATIONS SHOULD AMEND THE ABOVE SUBSECTION ACCORDINGLY.)

Service by registered mail

(2) Service by registered mail is affected when the addressee actually receives the notice or writing, or upon the expiry of four days after the day of registration, whichever is earlier.

Service by registered mail

(3) Where a notice or writing may be served by registered mail to the post office address as it appears on a registered financing statement or security agreement and

(a) no financing statement was required to be registered and no sufficient address appears on the security agreement; or

(b) no document is registered and the security interest is deemed to be perfected under section 72(3);

the notice or writing shall be served in accordance with subsection (1).

(ADOPTING PROVINCES SHOULD CONSIDER THIS SECTION IN THE LIGHT OF THEIR INTERPRETATION ACTS AND OTHER LEGISLATION.)

Notice or knowledge

68 For the purposes of this Act, a person knows or has notice or is notified when

(a) in the case of an individual, information comes to his attention under circumstances in which a reasonable person would take cognizance of it;

(b) in the case of a partnership, information has come to the attention of one or more of the general partners or of a person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it;

(c) in the case of a body corporate, information has come to the attention of

(i) a managing director or officer of the corporation; or

(ii) a senior employee of the corporation with responsibility for matters to which the information relates;

under circumstances in which a reasonable person would take cognizance of it, or the information in

writing has been delivered to the registered office of the body corporate or in the case of an extra-provincial body corporate has been delivered to . . .

(ADOPTING PROVINCES WITH DIFFERENT NOTICE PROVISIONS FOR EXTRA-PROVINCIAL CORPORATIONS SHOULD AMEND THE ABOVE SUBSECTION ACCORDINGLY.)

Conflict between Act and other legislation

69(1) Where there is a conflict between a provision of this Act and a provision of any Act for the protection of consumers, the provision of that Act prevails.

Idem

(2) Except as otherwise provided in this or any other Act, where there is a conflict between a provision of this Act and a provision of any general or special Act other than those mentioned in subsection (1), the provision of this Act prevails.

(THIS SECTION SHOULD BE ADAPTED TO MEET THE POLICY REQUIREMENTS OF EACH ADOPTING PROVINCE.)

References

70(1) A reference to . . . *(adopting provinces should insert references to the relevant Acts of their jurisdiction.)* or any provision of those Acts, in any general or special Act that relates to a security interest in personal property or fixtures to which the Act applies, shall be deemed to refer to this Act or to the corresponding provision of this Act.

Idem

(2) A reference in any Act to a chattel mortgage, lien note, conditional sales contract, floating charge, pledge, assignment of book debts, or any derivative of the terms, or to any transaction which under this Act is a security agreement, is deemed to be a reference to the corresponding type of security agreement under this Act.

Idem

(3) A reference in this Act to . . . *(adopting provinces should insert references to the relevant Acts of their jurisdiction.)*

is deemed to be a reference to that Act as it existed on the day before the coming into force of this Act.

Transitional application of Act

71(1) This Act applies

(a) to every security agreement made after this Act comes into force;

(b) subject to subsections (2) and (3), to every prior security interest as defined in section 72 that is not validly terminated, completed, consummated or enforced in accordance with the prior law before this section comes into force;

(c) a security interest created under

(i) a renewal, extension, refinancing or consolidation of a security agreement made or taking place after this Act comes into force, or

(ii) revolving credit transactions entered into before and continuing after this Act comes into force.

Validity of prior security interest

(2) The validity of a prior security interest as defined in section 72 is governed by the prior law.

Priorities

(3) The order of priorities

(a) between security interests is determined by the prior law, if all of the competing security interests arose under security agreements entered into before this Act comes into force; and

(b) between a security interest and the interests of a third party is determined by the prior law, if the third party interest arose before this Act comes into force and the security interest arose under a security agreement entered into before this Act comes into force.

Interpretation

72(1) In this section,

"prior security interest"

(a) "prior security interest" means an interest created, reserved or provided for by a security agreement or other transaction validly created or entered into, before this section comes into force, that is a security interest within the meaning of this Act and to which this Act would have applied if it had been in force at the time the security agreement or other transaction was created or entered into;

"Prior registration law"

(b) "prior registration law" means an Act referred to in section 70(3).

(ADOPTING PROVINCES SHOULD SUBSTITUTE REFERENCES TO THE RELEVANT ACTS OF THEIR JURISDICTION.)

Prior security interest deemed to be registered and perfected

(2) A prior security interest that, when this section comes into force,

(a) is covered by

(i) an unexpired filing or registration under a prior registration law is, subject to subclause (ii), deemed to have been registered and perfected under this Act and, subject to this Act, such filing or registration continues for the unexpired portion of the filing or registration period; and

(ii) an unexpired registration under *(insert names of relevant Acts)* is deemed to have been registered and perfected under this Act, and such registration continues for a period of three years from the day this section comes into force;

and the filing or registration, as the case may be, may be further continued by registration of a renewal statement under this Act where the security interest could be perfected by registration if it were to arise after this Act comes into force; and

(b) is covered by a registration under . . . *(adopting provinces should insert references to the relevant Act of their jurisdiction)* is deemed to have been registered and perfected under this Act, and the registration continues from the day this section comes into force until discharged under section 48.

(SUBSECTION (2)(a)(i) RELATES TO REGISTRATION ACTS WITH LIMITED REGISTRATION PERIODS: SUBSECTIONS (2)(a)(ii) AND (b) RELATE TO ACTS WITH PERPETUAL REGISTRATION PERIODS. ADOPTING PROVINCES SHOULD ADAPT THESE PROVISIONS IN ACCORDANCE WITH THEIR OWN LEGISLATION. SECTION (2)(b) RELATES SPECIFICALLY TO LEGISLATION DEALING WITH CORPORATE SECURITIES.)

Idem

(3) A prior security interest validly created, reversed or provided for under any prior law that gave that interest the status of a perfected security interest without filing or registration under any prior registration law and without the secured party taking possession of the collateral is perfected within the meaning of this Act as of the date the security interest attached, and, subject to subsection (4), that perfection continues for two years from the day this section comes into force, after which it becomes unperfected unless otherwise perfected under this Act.

Exception

(4) The time limit in subsection (3) does not apply to trust indentures.

Perfection of prior security interest

(5) A prior interest security interest that, when this section comes into force, could have been but was not

(a) covered by a filing or registration under a prior registration law;

(b) perfected under prior law through possession of the collateral by the secured party;

may, if permitted by this Act, be perfected by registration or possession in accordance with this Act.

Perfection by possession

(6) A prior security interest that, under this Act, may be perfected by the secured party's taking possession of the collateral is perfected for the purposes of this Act by the possession, whether the possession occurred before or after this section comes into force and notwithstanding that the prior law did not permit the perfection of the security interest by the possession.

Perfection continues

(7) The perfection of a prior security interest that, when this section comes into force, was covered by an unexpired filing or registration under a prior registration law, and for the perfection of which under this Act no registration of a financing statement is required, continues under this Act.

Perfection or prior security interest

(8) A prior security interest that, when this section comes into force, could have been, but was not, covered by a filing or registration under a prior registration law and that, under this Act, may be perfected without registration of a financing statement and without possession of the collateral by the secured party is perfected under this Act provided

that all other conditions for the perfection of the security interest are satisfied.

Act binds the Crown

73 This Act binds the Crown.

Regulations

74 The Lieutenant Governor in Council may make regulations

(a) designating office branches;

(b) approving the form of the seal of the registrar and each branch registrar;

(c) prescribing the duties of the registrar and branch registrars;

(d) prescribing business hours for the offices of the registration system of any of them;

(e) respecting the registration system;

(f) requiring the payment of fees and prescribing the amounts thereof;

(g) governing practice and procedure applicable to proceedings under this Act;

(h) prescribing forms and providing for their use;

(i) prescribing the information referred to in section 43;

(j) governing the right of a secured party to indicate the length of time during which a financing statement or a financing change statement renewing the financing statement shall be effective;

(k) defining any word or expression used in this Act that is required to be defined in the regulations;

(l) prescribing any matter required or authorized by this Act to be prescribed by regulation;

(m) increasing or decreasing the amounts referred to in section 28(3);

(THIS CLAUSE IS NECESSARY IF SECTION 28(3) IS ADOPTED.)

(n) respecting any matter necessary or advisable to carry out effectively the intent and purposes of this Act.

Repeal

75 The *(insert relevant legislation)* are repealed.

APPENDIX Y

REPORT OF THE SPECIAL COMMITTEE ON PRIVATE INTERNATIONAL LAW

The desirability of uniformity of legislation is not limited to domestic law. On the international plane, it is clearly preferable that the rules of private international law be harmonized and made uniform to the greatest extent possible. Institutions such as the Hague Conference on Private International Law, the Institute for the Unification of Private International Law (UNIDROIT), and the United Nations' Commission on International Trade Law (UNCITRAL) have been established to work towards this end.

Canada has played a significant role in this international uniformity movement, drawing on the reservoir of conflicts expertise it has developed in working out conflict of laws rules within a federal state. Nevertheless its contribution to the development of uniform international law-making has not been matched by ratification or enactment of the product of such law-making within Canada. To a great extent this is due to internal constitutional difficulties within Canada.

Where an international convention or treaty is self-executing or deals with a subject matter domestically solely under federal jurisdiction, there is of course no problem. Canada deals with such international instruments in the same way as unitary states and faces no additional difficulties as a result of its federal structure. However, when the subject matter falls domestically under provincial legislative jurisdiction, legislative action will be requird at the provincial level to implement it within Canada. Accordingly, close co-operation is required between federal and provincial authorities in this area; representatives from the provincial governments have been members of Canadian delegations to numerous private international law conferences.

Increasingly international instruments contain federal state clauses which permit implementation on a phased-in basis; this development helps to overcome the constitutional structures on treaty implementation. However, some instruments lack federal state clauses; their implementation requires uniform legislation at the provincial level.

It was to deal with these difficulties that the Uniform Law Conference established nine years ago a Special Committee on Private International Law. The function of this Committee is to encourage effective co-operation between the federal and provincial govern-

ments and to smooth the way of Canadian ratification or accession to international treaties or conventions. It also maintains close liaison with the Federal Department of Justice's Advisory Committee on Private International Law.

The Special Committee has not met formally during the last year. Certain developments during the year necessitate a re-examination of the membership of this Conference's Special Committee. Firstly, the Federal Department of Justice's Advisory Committee on Private International Law has been reconstituted. Traditionally there has been an overlap in the membership of the two Committees thus ensuring a close liaison and co-operation between them. The two Committees fulfill complementary roles in promoting Canadian adherence to international conventions. The Advisory Committee now has the following members:

> Marcus Jewett (Federal Government), Denis Carrier (Québec), Ronald C.C. Cuming, Q.C. (Saskatchewan), J. Douglas Ewart (Ontario), and Basil Stapleton (New Brunswick). The Conference's Special Committee on Private International Law currently consists of H. Allan Leal (Ontario), Emile Colas (Quebec), D. Martin Low (Canada), Alan Reid (New Brunswick), Rae Tallin (Manitoba), and R.S.G. Chester (Ontario-Rapporteur). However, three of these individuals have recently moved to new positions, and their continued participation in the work of the Conference is by no means certain. Thus it has become necessary to re-examine the composition of the Special Committee so that its important work can be continued and expanded in coming years. The work of Unidroit, Uncitral, and the forthcoming Hague Conference project on Trusts will have important implications for the provincial authorities in Canada and the Special Committee will have a valuable role to play in analyzing their impact. In the light of all these matters, the Special Committee recommends that the Executive should reconsider the question of the composition of the Special Committee.

INTERNATIONAL CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

During the past year, a number of member jurisdictions have passed implementing legislation to bring the Hague Conference's International Convention on the Civil Aspects of International Child Abduction into force within their territory. These include Nova Scotia, British Columbia, New Brunswick, Ontario and Manitoba.

APPENDIX Y

CONVENTION BETWEEN CANADA AND THE UNITED KINGDOM PROVIDING FOR THE RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

This subject is dealt with in a separate report filed with the Conference.

HAGUE CONVENTION ON INTERNATIONAL ACCESS TO JUSTICE

This Convention was concluded at The Hague on October 25, 1980. It deals with Legal Aid, Security for Costs and Enforceability of Orders for Costs, Copies of Entries and Decisions, and Physical Detention and Safe Conduct. The text of the Convention is set forth in an appendix to this Report.

Prior to the conclusion of the Convention, officials in Nova Scotia undertook a review of the Hague draft proposals on Legal Aid, and Ontario reviewed the Security for Costs proposals. The final text of the Convention did not affect the conclusion of these two reviews, which was that adherence to the Convention would not be in the interests of Canada.

The Chapter concerning legal aid gives national and habitual residents of contracting states equal access to legal aid for court proceedings in civil and commercial matters in other contracting states; they receive the same rights as nationals or habitual residents of those states. They can also receive legal advice if they are actually present in the jurisdiction. Following the practice in other recent Hague Conventions, a system of central authorities is proposed to oversee the local administration of the Convention and to act as formal conduits for documentation. When legal aid has been granted, no charges are to be made for any consequential service of documents. In addition when a decision has been given in proceedings for which an applicant has received legal aid under the Convention, he is automatically and without further examination entitled to legal aid in any other Contracting State in which he seeks to secure the recognition or enforcement of the decision.

It is not necessary to explore the details of the Convention. The Government of Canada has indicated that it does not wish to adhere to the Convention, and it is unlikely that provincial authorities would wish to entertain a convention with an open-ended potential for expenditures from the public purse, scant or indeterminate benefits

for its own citizens and which might in some circumstances place non-residents in a more advantageous position than residents. We do not believe any further action is required of the Conference.

The second Chapter of the Access to Justice deals with Security for Costs. Instead of our traditional rules on this topic, costs would constitute a first charge on the award, enforceable without charge by a summary procedure, consisting of a review of the required documentation. Security for costs, bonds or other deposits by non-nationals or non-residents is specifically outlawed. The provisions run squarely counter to the Canadian tradition of requiring security for costs to be posted by non-resident litigants. The stance adopted by the Government of Canada is against Canadian accession to these provisions; we agree with this position and would not recommend further review by this Conference.

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS; CONVENTION CONCERNING THE INTERNATIONAL ADMINISTRATION OF THE ESTATES OF DECEASED PERSONS

The Special Committee has not met formally during the past year. Accordingly it has not been possible for us to re-consider Mr. Tallin's memorandum on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1980 Proceedings at page 196-202) in the light of the discussion that took place in Whitehorse last year. At page 16, paragraph 1.13 of the Evidence Task Force Report it was noted that this review may affect procedures to be followed in taking evidence outside a jurisdiction. Nor have we been able to consider Mr. Tallin's memorandum on the Hague Convention concerning the International Administration of the Estates of Deceased Persons (1980 Proceedings at page 175-194).

CONCLUSION

The major recommendation in this report is a request that the executive review the membership of the Special Committee having regard to the resolution set out in the Proceedings of the 53rd Annual Meeting of the Conference of Commissioners held August 23-27 1971 at page 108 which states:

> HEREBY, RESOLVES: (1) that a committee be appointed, consisting of a Commissioner from one of the four western provinces, from one of the Atlantic provinces and one from each of the Ontario, Québec and Canada Commissioners, the members where-

of shall be designated by the Commissioners from those jurisdictions, to make comments on the various matters relating to international conventions drawn to the attention of this Conference by the appropriate federal authority, on behalf of the Conference, if time permits the Committee to bring the matter before the Conference for direction, or on their own initiative, without binding the Conference, when time does not permit the matter being brought before the Conference;

All of which is respectfully submitted.

R.S.G. Chester
Rapporteur

CONVENTION ON INTERNATIONAL ACCESS TO JUSTICE
(Concluded October 25, 1980)

The States signatory to this Convention.
Desiring to facilitate international access to justice.
Have resolved to conclude a Convention for this purpose and have agreed upon the following provisions—

CHAPTER I—LEGAL AID

Article 1

Nationals of any contracting State and persons habitually resident in any Contracting State shall be entitled to legal aid for court proceedings in civil and commercial matters in each Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Persons to whom paragraph 1 does not apply, but who formerly had their habitual residence in a Contracting State in which court proceedings are to be or have been commenced, shall nevertheless be entitled to legal aid as provided by paragraph 1 if the cause of action arose out of their former habitual residence in that State.

In States where legal aid is provided in administrative, social or fiscal matters, the provisions of this Article shall apply to cases brought before the courts or tribunals competent in such matters.

Article 2

Article 1 shall apply to legal advice provided the person seeking advice is present in the State where advice is sought.

Article 3

Each Contracting State shall designate a Central Authority to receive, and take action on, applications for legal aid submitted under this Convention.

Federal States and States which have more than one legal system may designate more than one Central Authority. If the Central Authority to which an application is submitted is not competent to deal with it, it shall forward the application to whichever other Central Authority in the same Contracting State is competent to do so.

Article 4

Each Contracting State shall designate one or more transmitting authorities for the purpose of forwarding applications for legal aid to the appropriate Central Authority in the requested State.

Applications for legal aid shall be transmitted, without the intervention of any other authority, in the form of the model annexed to this Convention.

Nothing in this Article shall prevent an application being submitted through diplomatic channels.

Article 5

Where the applicant for legal aid is not present in the requested State, he may submit his application to a transmitting authority in the Contracting State where he has his habitual residence, without prejudice to any other means open to him of submitting his application to the competent authority in the requested State.

The application shall be in the form of the model annexed to this Convention and shall be accompanied by any necessary documents, without prejudice to the right of the requested State to require further information or documents in appropriate cases.

Any Contracting State may declare that its receiving Central Authority will accept applications submitted by other channels or methods.

Article 6

The transmitting authority shall assist the applicant in ensuring that the application is accompanied by all the information and documents known by it to be necessary for consideration of the application. It shall ensure that formal requirements are met.

If it appears to the transmitting authority that the application is manifestly unfounded, it may refuse to transmit the application.

It shall assist the applicant in obtaining without charge a translation of the documents where such assistance is appropriate.

It shall reply to requests for further information from the receiving Central Authority in the requested State.

Article 7

The application, the supporting documents and any communications in response to requests for further information shall be in the official language or in one of the official languages of the requested State or be accompanied by a translation into one of those languages.

However, where in the requesting State it is not feasible to obtain a translation into the language of the requested State, the latter

shall accept the documents in either English or French, or the documents accompanied by a translation into one of those languages.

Communications emanating from the receiving Central Authority may be drawn up in the official language or one of the official languages of the requested State or in English or French. However, where the application forwarded by the transmitting authority is in either English or French, or is accompanied by a translation into one of those languages, communications emanating from the receiving Central Authority shall also be in one of those languages.

The costs of translation arising from the application of the preceding paragraphs shall be borne by the requesting State, except that any translations made in the requested State shall not give rise to any claim for reimbursement on the part of that State.

Article 8

The receiving Central Authority shall determine the application or shall take such steps as are necessary to obtain its determination by a competent authority in the requested State.

The receiving Central Authority shall transmit requests for further information to the transmitting authority and shall inform it of any difficulty relating to the examination of the application and of the decision taken.

Article 9

Where the applicant for legal aid does not reside in a Contracting State, he may submit his application through consular channels, without prejudice to any other means open to him of submitting his application to the competent authority in the requested State.

Any Contracting State may declare that its receiving Central Authority will accept applications submitted by other channels or methods.

Article 10

All documents forwarded under this Chapter shall be exempt from legalization or any analogous formality.

Article 11

No charges shall be made for the transmission, reception or determination of applications for legal aid under this Chapter.

Article 12

Applications for legal aid shall be handled expeditiously.

Article 13

Where legal aid has been granted in accordance with Article 1, service of documents in any other Contracting State in pursuance of the legally aided person's proceedings shall not give rise to any charges regardless of the manner in which service is effected. The same applies to Letters of Request and social enquiry reports, except for fees paid to experts and interpreters.

Where a person has received legal aid in accordance with Article 1 for proceedings in a Contracting State and a decision has been given in those proceedings in a Contracting State and a decision has been given in those proceedings, he shall, without any further examination of his circumstances, be entitled to legal aid in any other Contracting State in which he seeks to secure the recognition or enforcement of that decision.

CHAPTER II – SECURITY FOR COSTS AND ENFORCEABILITY OF ORDERS FOR COSTS

Article 14

No security, bond or deposit of any kind may be required, by reason only of their foreign nationality or of their not being domiciled or resident in the State in which proceedings are commenced, from persons (including legal persons) habitually resident in a Contracting State who are plaintiffs or parties intervening in proceedings before the courts or tribunals of another Contracting State.

The same rule shall apply to any payment required of plaintiffs or intervening parties as security for court fees.

Article 15

An order for payment of costs and expenses of proceedings, made in one of the Contracting States against any person exempt from requirements as to security, bond, deposit or payments by virtue of Article 14 or of the law of the State where the proceedings have been commenced shall, on the application of the person entitled to the benefit of the order, be rendered enforceable without charge in any other Contracting State.

Article 16

Each Contracting State shall designate one or more transmitting authorities for the purpose of forwarding to the appropriate Central Authority in the requested State applications for rendering enforceable orders to which Article 15 applies.

Each Contracting State shall designate a Central Authority to receive such applications and to take the appropriate steps to ensure that a final decision on them is reached.

Federal States and States which have more than one legal system may designate more than one Central Authority. If the Central Authority to which an application is submitted is not competent to deal with it, it shall forward the application to whichever other Central Authority in the requested State is competent to do so.

Applications under this Article shall be transmitted without the intervention of any other authority, without prejudice to an application being transmitted through diplomatic channels.

Nothing in this Article shall prevent applications from being made directly by the person entitled to the benefit of the order unless the requested State has declared that it will not accept applications made in this manner.

Article 17

Every application under Article 15 shall be accompanied by

(a) a true copy of the relevant part of the decision showing the names and capacities of the parties and of the order for payment of costs or expenses:

(b) any document necessary to prove that the decision is no longer subject to the ordinary forms of review in the State of origin and that it is enforceable there:

(c) a translation certified as true, of the above-mentioned documents into the language of the requested State, if they are not in that language.

The application shall be determined without a hearing and the competent authority in the requested State shall be limited to examining whether the required documents have been produced. If so requested by the applicant, that authority shall determine the amount of the costs of attestation, translation and certification, which shall be

treated as costs and expenses of the proceedings. No legalization or analogous formality may be required.

There shall be no right of appeal against the decision of the competent authority except in accordance with the law of the requested State.

CHAPTER III – COPIES OF ENTRIES AND DECISIONS

Article 18

Nationals of any Contracting State and persons habitually resident in any Contracting State may obtain in any other Contracting State, on the same terms and conditions as its nationals, copies of or extracts from entries in public registers and decisions relating to civil or commercial matters and may have such documents legalized, where necessary.

CHAPTER IV – PHYSICAL DETENTION AND SAFE-CONDUCT

Article 19

Arrest and detention, whether as a means of enforcement or simply as a precautionary measure, shall not, in civil or commercial matters, be employed against nationals of a Contracting State or persons habitually resident in a Contracting State in circumstances where they cannot be employed against nationals of the arresting and detaining State. Any fact which may be invoked by a national habitually resident in such State to obtain release from arrest or detention may be invoked with the same effect by a national of a Contracting State or a person habitually resident in a Contracting State even if the fact occurred abroad.

Article 20

A person who is a national of or habitually resident in a Contracting State and who is summoned by name by a court or tribunal in another Contracting State, or by a party with the leave of the court or tribunal, in order to appear as a witness or expert in proceedings in that State shall not be liable to prosecution or detention, or subjected to any other restriction on his personal liberty, in the territory of that State in respect of any act or conviction occurring before his arrival in that State.

The immunity provided for in the preceding paragraph shall commence seven days before the date fixed for the hearing of the

witness or expert and shall cease when the witness or expert having had, for a period of seven consecutive days from the date when he was informed by the judicial authorities that his presence is no longer required, an opportunity of leaving has nevertheless remained in the territory, or having left it, has returned voluntarily.

CHAPTER V – GENERAL PROVISIONS

Article 21

Without prejudice to the provisions of Article 22, nothing in this Convention shall be construed as limiting any rights in respect of matters governed by this Convention which may be conferred upon a person under the law of any Contracting State or under any other convention to which it is, or becomes, a party.

Article 22

Between Parties to this Convention who are also Parties to one or both of the Conventions on civil procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 17 to 24 of the Convention of 1905 or Articles 17 to 26 of the Convention of 1954 even if the reservation provided for under paragraph 2c) of Article 28 of this Convention has been made.

Article 23

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, to the extent that they are compatible therewith, unless the Parties otherwise agree.

Article 24

A Contracting State may by declaration specify a language or languages other than those referred to in Articles 7 and 17 in which documents sent to its Central Authority may be drawn up or translated.

Article 25

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept for the whole of its territory documents referred to in Articles 7 and 17 drawn up in one of those languages shall by declaration specify the language in which such documents or translations thereof shall be drawn up for submission in the specified parts of its territory.

Article 26

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 that declaration by submitting another declaration 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 27

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 Article 26 shall carry no implication as to the internal distribution of powers within that State.

Article 28

Any Contracting State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right to exclude the application of Article 1 in the case of persons who are not nationals of a Contracting State but who have their habitual residence in a Contracting State other than the reserving State or formerly had their habitual residence in the reserving State, if there is no reciprocity of treatment between the reserving State and the State of which the applicants for legal aid are nationals.

Any Contracting State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right to exclude—

(a) the use of English or French, or both, under paragraph 2 of Article 7:

(b) the application of paragraph 2 of Article 13:

(c) the application of Chapter II:

(d) the application of Article 20.

Where a State has made a reservation—

(e) under paragraph 2a of this Article, excluding the use of both

English and French, any other State affected thereby may apply the same rule against the reserving State:

(f) under paragraph 2b of this Article, any other State may refuse to apply paragraph 2 of Article 13 to persons who are nationals of or habitually resident in the reserving State:

(g) under paragraph 2c of this Article, any other State may refuse to apply Chapter II to persons who are nationals of or habitually resident in the reserving State.

No other reservation shall be permitted.

Any Contracting 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.

Article 29

Every Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Kingdom of the Netherlands of the designation of authorities pursuant to Articles 3, 4 and 16.

It shall likewise inform the Ministry, where appropriate, of the following—

(a) declarations pursuant to Articles 5, 9, 16, 24, 25, 26 and 33:

(b) any withdrawal or modification of the above designations and declarations:

(c) the withdrawal of any reservation.

Article 30

The model forms annexed to this Convention may be amended by a decision of a Special Commission convoked by the Secretary General of the Hague Conference to which all Contracting States and all Member States shall be invited. Notice of the proposal to amend the forms shall be included in the agenda for the meeting.

Amendments adopted by a majority of the Contracting States present and voting at the Special Commission shall come into force for all Contracting States on the first day of the seventh calendar month after the date of their communication by the Secretary General to all Contracting States.

During the period provided for by paragraph 2 any Contracting State may by notification in writing to the Ministry of Foreign Affairs of the Kingdom of the Netherlands make a reservation with respect to the amendment. A Party making such reservation shall until the reservation is withdrawn be treated as a State not a Party to the present Convention with respect to that amendment.

CHAPTER VI – FINAL CLAUSES

Article 31

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 and by non-Member States which were invited to participate in its preparation.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 32

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.

Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the twelve months after the receipt of the notification referred to in sub-paragraph 2 of Article 36. Such an objection may also be raised by Member States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 33

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 34

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 31 and 32.

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 26 or 33, on the first day of the third calendar month after the notification referred to in that Article.

Article 35

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 34 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 36

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 32 of the following—

1 the signatures and ratifications, acceptances and approvals referred to in Article 31:

2 the accessions and objections raised to accessions referred to in Article 32:

3 the date on which the Convention enters into force in accordance with Article 34:

4 the declarations referred to in Articles 26 and 33:

5 the reservations and withdrawals referred to in Articles 28 and 30:

6 the information communicated under Article 29:

7 the denunciations referred to in Article 35.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the day of 1983, 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 and to each other State having participated in the preparation of this Convention at this Session.

ANNEX TO THE CONVENTION

FORM FOR TRANSMISSION OF APPLICATION FOR LEGAL AID

Convention on International Access to Justice, signed at The Hague, the 198

Identity and address of the transmitting authority	Address of the receiving Central Authority

The undersigned transmitting authority has the honour to transmit to the receiving Central Authority the attached application for legal aid and its annex (statement concerning the applicant's financial circumstances), for the purpose of Chapter 1 of the above-mentioned Convention.

Remarks concerning the application and the statement, if any:

Other remarks, if any:

Done at the
Signature and/or stamp

APPLICATION FOR LEGAL AID

Convention on International Access to Justice, signed at the Hague, the 198

1 Name and address of the applicant for legal aid

2 Court or tribunal in which the proceedings have been or will be initiated (if known)

3 *a* Subject-matter(s) of proceedings; amount of the claim, if applicable

b If applicable, list of supporting documents pertinent to commenced or intended proceedings*

c Name and address of the opposing party*

4 Any date or time-limit relating to proceedings with legal consequences for the applicant, calling for speedy handling of the application*

5 Any other relevant information*

6 Done at the

7 Applicant's signature

*Delete if inappropriate

Annex to the application for legal aid

Statement concerning the applicant's financial circumstances

I *Personal situation*

8 name (maiden name, if applicable)

9 first name(s)

10 date and place of birth

11 nationality

12 *a* habitual residence (date of commencement of the residence)

b former habitual residence (date of commencement and termination of the residence)

13 civil status (single, married, widow(er), divorced, separated)

14 name and first name(s) of the spouse

15 names, first names and dates of birth of children dependent on the applicant

16 other persons dependent on the applicant

17 supplementary information concerning the family situation

II *Financial circumstances*

18 occupation

19 name and address of employer or place of exercise of occupation

20 income	of the applicant	of the spouse	of the persons dependent on the applicant
a salary (including payments in kind)			
b pensions, disability pensions, alimonies, allowances, annuities			
c unemployment benefits			
d income from non-salaried occupations			
e income from securities and floating capital			
f income from real property			
g other sources of income			

21 real property	of the applicant	of the spouse	of the persons dependent on the applicant
(please state value(s) and obligations)			

22 other assets	of the applicant	of the spouse	of the persons dependent on the applicant
(securities, sharings in profits, claims, bank accounts, business capital, etc.)	. .	.	
23 debts and other financial obligations	of the applicant	of the spouse	of the persons dependent on the applicant
a loans (state nature, balance to be paid and annual/ monthly repayments)		.	.
b maintenance obligations (state monthly payments)	. . .		
c house rent (including costs of heating, electricity, gas and water)		.	. .
d other recurring obligations		.	.

24 income tax and social security contributions *for the previous year*

25 remarks of the applicant

26 if applicable, list of supporting documents

27 The undersigned, being fully aware of the penalties provided by law for the making of a false statement, declares that the above statement is complete and correct.

28 Done at . . . . . (place)

29 the . . . . . (date)

30 . . . . . (applicant's signature)

APPENDIX Z

(See page 34)

PRODUCTS LIABILITY REPORT OF THE NOVA SCOTIA COMMISSIONERS

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PRODUCTS LIABILITY

General Policy Considerations

A person who suffers damage resulting from a defect in a product should, without establishing negligence, have a cause of action against a supplier who is in the business of selling the product. We include within the expression "supplier" not only the retailer, but also the manufacturer, distributer, wholesaler, and all who participate in making the product available to the public.

Not only the producer or manufacturer of the product, but also the middleman, such as an importer, distributer, wholesaler or retailer of the product should be exposed to this strict liability. All these persons participate in the distribution of the product to members of society,

and it is our view, therefore, that all persons who, with a view to gain, encourage the distribution of the product in the community and its use by members of the community should be responsible for the consequences if the product is defective.

However, unlike the middleman, it is the person who creates or in some way processes the product or has some control over its quality who must bear the ultimate responsibility. Although the ultimate manufacturer and the middleman all share in the creation of the risk, to a greater or lesser extent, by promoting the sale and use of a product, the ultimate manufacturer is the prime cause of the danger to society created by a defective product being on the open market.

It is our view that all members of society should, as a result, have the same cause of action against any person who contributes to the risk, whether that person is the ultimate manufacturer, or a distributer, wholesaler or retailer. Every injured member of society should also be free to choose that person who contributes to the risk by being in the chain of distribution who is best able to respond to any judgment and against whom it is the most convenient for the injured party to proceed.

We have reached this conclusion because, in our view, any system of liability should be weighted in favour of the member of society who has suffered damage, and against those in the chain of distribution who have caused the damage by making the product available.

However, as between the ultimate manufacturer and the various middlemen, a system of products liability should be weighted against the ultimate manufacturer, for it is he who is responsible for the quality of the product.

What is a Defective Product?

It is submitted that the "safety" test adopted by the English and Scottish Law Commission in its Report on Liability for Defective Products (1977) (the English and Scottish Report) (page 16) is not wide enough for the system of strict liability which we propose. The system proposed in the English and Scottish Report provides for the recovery of damage arising from personal injury only, while the system we propose provides for recovery of damages arising not only from personal injury but also property damage and pure economic loss.

The Ontario Law Reform Commission in its Report on Products Liability (1979) (the Ontario Report), on the other hand, recommends that damages for loss of or damage to property should also be

recoverable. As a result, the Ontario Report recommends that a "defective product" be defined as "a product that falls short of the standard that may reasonably be expected of it under all the circumstances". (See Section (1)(a) of the draft Bill attached as Appendix 1 to the Ontario Report.)

In our view, the definition should be flexible; it is impossible to predict what the circumstances may be in each case. For example, the injured party may be peculiarly sensitive to the product. Again, a person may be injured by carelessly using a product.

The English and Scottish Report gives three examples of cases where damages may be suffered:

(a) damages arising from a person breaking out in a rash as a result of consuming strawberries where that person has a peculiar allergy to strawberries;

(b) damages arising from a person becoming ill after taking an overdose of a drug;

(c) damages arising from a person cutting himself with a safety razor.

In all of the above cases there are two elements: some weakness in the injured party which is peculiar to that party, and the use of a product for purposes for which is was not intended, under all the circumstances.

It follows, therefore, that an objective test must be applied and that the manufacturer, supplier or retailer should not be liable if the person injured is peculiarly sensitive to the product or the product is used in a manner other than the manner intended, under all the circumstances.

In our view, the test proposed in the Ontario Report is both flexible and objective and should be adopted.

Should liability arise if the product falls short of standards reasonably expected of it at the time it leaves the supplier's hands or at the time the loss or damage is sustained?

In our view, it is wrong to impose liability if the supplier can show that the product was tampered with by some other party after it left the supplier's hands. We recommend, however, that the burden be on the supplier to show that the product was not defective when it left his hands. If this burden is placed on the injured party who sues the manufacturer, the injured party will be faced with the almost impossible task of analyzing a complex and sophisticated process with

which he is totally unfamiliar. The manufacturer should be the one to explain his own manufacturing process, and the supplier is the one to explain the practices he follows when handling products.

We therefore respectfully adopt the definition of a defective product recommended in the Ontario Report and the recommendation in the English and Scottish Report that the burden of proving that a defective product was not defective when it left the supplier's hands be on the supplier.

Existing Products Liability Law

Under the existing law in most provinces, a person who has suffered damage as a result of a defect in a product may

(a) sue in contract the person who sold the product to him for breach of the warranties of quality and fitness implied by the Sale of Goods Act; or

(b) sue the seller, the manufacturer or any other supplier in tort for negligence.

In an action sounding in contract, the injured party need not prove that the defect resulted from the fault of the seller, but in tort, there is no cause of action unless negligence is established.

Adequacy of Existing Products Liability Law

It is immediately apparent that this state of the law results in an anomaly: the person who has control over the quality of the product may successfully defend an action for damages resulting in a defect in the product if he can prove that the defect did not result from his negligence and that there was no privity of contract between himself and the person who has suffered the damages. This defence is, however, irrelevant in an action sounding in contract and, therefore, the defence based on absence of fault is not available to a retailer, wholesaler or distributer, who, in most cases, has absolutely no control over the quality of the product.

Also, under the existing law damages arising from pure economic loss are not recoverable in a tort action, while such damages are recoverable in an action in contract. Therefore, if a person purchases a car from a dealer and discovers that the brakes are defective, he may recover from the dealer the cost of curing the defect. However, if he successfully sues the manufacturer in tort, he may recover only damages for injury to property or his person resulting from the defect, although the defect was caused by the manufacturer.

In the result, the existing law is wrongly weighted in favour of the manufacturer and against the middleman.

We have recommended that the person who is not in the chain of distribution and therefore does not contribute to the risk should be free to choose his defendant from the chain of suppliers. The existing law, by its very nature, restricts this choice because the burden on the injured party is heavier if he chooses a defendant who has no privity of contract with him. He must sue in tort ins such a case and therefore must prove fault. As a result, the injured party must discharge a very heavy burden: he must show that the manufacturing process is defective. In many cases, this involves an injured party in great expense as he must attempt to deal with a highly technical and sophisticated process with which he is totally unfamiliar.

It is true that the doctrine of *res ipsa loquitur,* or presumed fault, has, in such cases, been almost uniformly invoked by the courts. Nevertheless, this doctrine still is based on a finding of ultimate fault: fault is still in issue in all cases and the unsophisticated claimant, therefore, must still deal with the manufacturing process. Indeed, the existence of the doctrine of *res ipsa loquitur* does not foreclose the possibility of the manufacturer escaping liability. If, for example, a manufacturer could prove the damage was caused by a defect in a component of the product manufactured by somebody else and assembled by him, then the manufacturer would escape liability. This fact may not emerge until after a considerable length of time has elapsed and after a limitation period has expired. As a result, the injured party would have spent a great deal of money in probing the mysteries of a complex and unfamiliar manufacturing process and yet be left without a remedy.

The existing law, therefore, is unfair not only to the injured party, but also to the commercial suppliers of a defective product, other than the ultimate manufacturer. It is therefore recommended that strict liability, or liability without fault, be imposed on the manufacturer and on all other suppliers of the defective product. By "suppliers" we mean all those who are in the business of selling the defective product.

It could be argued that the distributors, wholesalers, retailers and other "middlemen" should not be exposed to this liability because normally they do not control its quality. For example, a wholesaler simply stores a product and then ships it on to the retailer. It must be remembered, however, that each supplier, subject to contracting out, is already exposed to an action in contract by an immediate purchaser from him in the distributive chain. For example, the retailer has an

action in contract against a wholesaler who has sold a defective product to him. In all such actions, strict liability applies anyway.

It must also be remembered that each middleman contributes, to a greater or lesser extent, to the creation of the risk, participating, as he does, in the ultimate introduction of the product into society.

On the other hand, the injured party should, for reasons already stated, be free to choose his defendant and should not be forced to rely on his defendant joining that defendant's immediate seller as a third party in an action commenced by the injured party.

Reform of Existing Products Liability Law

It is our view that the injured party should not have to prove that he purchased the defective product, or, indeed, that he has any interest in it. The manufacturer and the various middlemen introduced the product into the market and therefore should be responsible to all persons who suffer damage as a result of any defect in the product. As a result, considerations of sales and title should be irrelevant in products liability action. Otherwise, anomalies will result. An example of such an anomaly is given in the Ontario report:

> A enters a supermarket and places a bottle containing a product in his shopping cart. While waiting in line to pay the purchase price, the bottle explodes and injures him. Because he has not yet purchased the product he must prove that the accident resulted from the negligence of the person who bottled the product or the manufacturer of the bottle or the negligence of the supermarket. His only cause of action sounds in tort. However, if the accident occurs after he had paid for the product at the cash register he has an action in contract against the supermarket and can succeed against the supermarket without proving fault.

A supplier should be liable for damage caused by a defective free sample given out by him for promotional purposes.

Also, a supplier should be liable to any person who suffers from a defective product even if that person has had no dealings with the supplier and has no title to the product. We see no reason why the owner of a defective car should have an action, while a pedestrian run down by the car has no action unless he proves fault.

The controlling policy consideration is, in our opinion, that anybody promoting the sale of a product must be responsible for the consequences of that product being defective and injuring or causing damage to some member of society. Considerations of sale and title are, therefore, irrelevant.

Contract or Tort?

Having concluded that a system of strict liability must be imposed, we now consider the legal technique which should be adopted to implement it. Two techniques are available:

(a) abolition of the doctrine of privity of contract so that any express or implied warranty of fitness is extended to all persons injured by the product; or

(b) creation of a new cause of action which would have all the elements of a cause of action sounding in the tort of negligence, except for the element of fault.

We recommend the latter techniques for the following reasons:

(a) it is undesirable to create unnecessary legal fictions like imaginary contracts. To create a new cause of action in tort is simple and direct and is more consistent with the "neighbour" concept enunciated by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562 (H.L.), now so firmly imbedded in Anglo-American jurisprudence;

(b) a simple and more direct approach is meaningful to laymen. For example, a minister in charge of a products liability bill implementing this proposal would find the "tort" technique much easier to explain to members of his legislature who are not lawyers.

The "tort" approach has been recommended in both the Ontario Report and the English and Scottish Report. The "tort" approach is advocated by Professor S. M. Waddams in his recent book entitled "Products Liability", at p. 230.

Damages

What damages should be recoverable by a successful plaintiff? Three types of damage could result, for example, from a defective brake in a car:

(a) damages for personal injuries caused by a defective brake, such as medical expenses and lost wages resulting from absence from employment because of injury sustained in an accident;

(b) property damage, such as damage to the plaintiff's house resulting from the plaintiff's car colliding with the house because its brakes failed to function;

(c) damages caused by a product being defective when the product has not caused personal injury or damage to other property. An example of this type of damage, commonly referred to as "pure economic loss", would be expenses incurred in fixing the defective brake in the car. Another example would be business losses, such as lost time resulting from the car, which was intended to be used in the business, being unsafe for use.

It will be remembered that in tort damages resulting from pure economic loss are not recoverable.

The English and Scottish Report (page 35—paragraphs 120 and 121), recommends that only damages resulting from personal injury be recoverable in an action arising from a defective product. In reaching this conclusion, the English and Scottish Law Commission relied heavily on an argument which assumes that the injured party always insures himself against property loss. The Commission concluded that making property loss recoverable would be of no advantage to the injured party and, at the same time, the injured party would, as a consumer, be faced with higher product prices resulting from producers being forced to pay more for liability insurance.

The Ontario Report, however, recommends that damages resulting from personal injuries, or death, and damage to other property should be recoverable in a products liability action (Pages 81-82).

The Ontario Report points out that many injured parties may be inadequately insured or not insured at all. This Report also points out that a system of strict liability may work to the advantage of first party insurers by assisting them in pursuing claims, under subrogation rights, arising from property damage.

We are not persuaded by the argument advanced by the English and Scottish Commission in support of its recommendation and therefore recommend that damages resulting both from personal injury, or death, and property damage be recoverable in the products liability system which we are proposing.

We are of the view that pure economic loss should also be recoverable. It is our opinion that, subject to certain exceptions mentioned below, all reasonably foreseeable damages resulting from the breach of a legal obligation should be recoverable. The minority of the Ontario Law Reform Commission recommended that damages for pure economic loss other than business losses be recoverable in a strict

liability system and we respectfully adopt that recommendation but would go beyond it.

We are of the view that pure economic loss should only be recoverable when the injured party has shown that he has purchased the product which has caused the loss. This recommendation is consistent with the general principle that a party who is injured by the breach of an obligation to him of another party should be put in the same position, as far as possible, as if the guilty party had performed the obligation. Therefore, if a person purchases an electric razor for fifty dollars and the razor does not work properly because of a defect, and that person spends fifteen dollars to have the defect put right, that person should recover fifteen dollars from the manufacturer or one of the middlemen. He bargained for a razor which would work and it cost him fifteen dollars to put himself in the position of owning a razor which does work. If, however, he had been given the razor as a free sample, the element of bargain and sale is absent and the fifteen dollars should not be recoverable in that case.

However, if personal injury or damage to other property results from the defect, the element of bargain and sale is irrelevant. In such cases the damage would never have occurred but for the defective razor.

Should the consumer be able to recover damages for pure economic loss from any person in the chain of distribution when he purchases "shoddy" goods from a retailer when the "shoddy" goods have been sold to the retailer at a reduced price and on the express understanding that the goods were, in fact, "shoddy" or "seconds"?

The subsidiary question is whether, in such a case, the "tort" approach is appropriate or whether a "contract" approach should apply so that the consumer would be entitled only to those rights which the retailer has, in contract, against the supplier. If the "contract" approach applies in the case mentioned above, the consumer would have no remedy against the supplier but only against the retailer.

It is our view that in the above case, the consumer should be entitled to recover against the supplier not only damages for personal injury and damage to other property, but also damages for pure economic loss as a result of the quality or fitness of the goods falling short of the quality or fitness which would be expected as a result of the goods being sold by the retailer as first class. In this case, the supplier has placed "shoddy" goods in the hands of a person in the business of selling goods in the retail market and therefore, ought reasonably to

have foreseen that the goods could be passed off by the retailer as first class. At the same time, the supplier had the advantage of converting into cash goods which would otherwise have to be stored or destroyed.

On the other hand, it is always open to the supplier to protect himself by getting an indemnity from the retailer.

In our opinion, the interests of the innocent consumer must, in this case, be paramount, and he must be free, as in all other cases, to choose his defendant.

We recommend, therefore, that the following damages caused by a defective product be recoverable:

(a) damage resulting from personal injuries;

(b) damage to other property; and

(c) damage resulting from pure economic loss in cases where the injured party has purchased the defective product from a supplier even if the injured party had no privity of contract with the ultimate manufacturer or supplier he chooses to sue.

If pure economic loss is recoverable, any supplier who is required to pay a claim and then proceed against any of the suppliers in the chain of distribution would be protected. If pure economic loss is not recoverable by him, he would have no cause of action against another supplier with whom he has no privity, because he would be unable to establish that the defective product damaged his property or caused him personal injury.

The Ontario Report recommends that no damages be recoverable for loss of or damage to property used for business purposes. In view of the general policy which we adopt, that is, that any member of society is entitled to be compensated for damages resulting from a defective product, we fail to see why any distinction should be drawn between damaged business property and non-business property. If, for example, a defective light bulb explodes in a retailer's store and burns the store, why should the retailer not be able to proceed against the person who has the ultimate control of the quality of the light bulb, without establishing fault, while a person using the light bulb in his home for personal purposes can succeed against the manufacturer for any damage to his house caused by the bulb without proving fault.

We recommend, therefore, that the system of strict liability which we propose include entitlement to damages for loss of, or damage, to all types of property.

Defences

What defences should be available in our proposed strict liability system?

One possible defence which has been widely discussed is the so called "state of the art" defence. The essence of this defence is that if a manufacturer can prove that the product was manufactured in accordance with standards generally followed in the industry when the product left his hands, then he is not liable for damages caused by a defect in the product.

It is our view that there should not be such a defence. The availability of such a defence would put in issue, in many cases, a complex and technical manufacturing process with which an injured party is totally unfamiliar.

In addition, the practice generally followed in an industry may be designed to cut corners so that all manufacturers in the industry may make a greater profit and therefore the practice may be totally inadequate to safeguard the interests of people who use or consume the product.

Both the English and Scottish Report (page 31) and the Ontario Report (page 95) have recommended against this defence being available in a products liability action.

Contributory Negligence and Voluntary Assumption of Risk

We recommend that a plaintiff in a products liability case should not succeed without establishing that the defective product was the cause of the damage he has suffered. In the result, we recommend that the defences of voluntary assumption of risk and the statutory defence of contributory negligence be available as they now are in an action in negligence and that any draft Act provide that damages be divided proportionately according to the degree of fault of the plaintiff and the defendant.

Both the English and Scottish Report (at pages 31 and 32) and the Ontario Report (pages 96 and 97) recommend that both defences be available. The Ontario Report further recommends that where it is not practicable to determine the respective degree of responsibility of the supplier and the claimant, the supplier and the claimant shall be deemed to be equally responsible for the injury or damage suffered, and each shall contribute to the amount of damages accordingly. We recommend that a provision to the same effect be included in any draft Uniform Act.

Contracting Out

Should a party escape liability if he shows that the injured party contracted out of his right to recover damages?

The prohibition of exclusionary clauses stems form a desire to protect persons in an inferior bargaining position. It is extremely difficult to generalize, but it can be said that the ordinary consumer using a product other than in the course of business is, in the vast majority of cases, in an inferior bargaining position. Normally, he is totally unfamiliar with the manufacturing process and does not negotiate before buying, such as a distributer, wholesaler or large retailer often does, particularly when buying products in large quantities. We recommend, therefore, that the draft Uniform Act provide that exclusionary clauses intended to bind a person who uses or consumes a product other than in the course of his business, be void.

Should an exclusionary clause be binding on an injured party who has suffered damage from a defective product which he has purchased for resale or which he is using or consuming in the ordinary course of his business?

The Ontario Report recommends that exclusionary clauses should not be prohibited in such cases. In reaching this conclusion, the Ontario Law Commission said (at page 98 of the Ontario Report):

> "Between business persons, however, and in relation to business costs, exemption clauses are not always unfair or in anyway improper. In such cases, exemption clauses are subject to judicial control, now widely recognized to rest on a principle of unconscionability."

This statement assumes, however, that persons making a contract in the normal course of business are always in an equal bargaining position. This is not always the case. It cannot be said, for example, that the owner of a small corner grocery store is in an equal bargaining position with a large distributer carrying on a nation-wide, or even a province-wide business. The reverse example is a small manufacturer negotiating with a large retail chain to have his product marketed by the chain. It is impossible to generalize when dealing with businesses, and we therefore recommend that exclusionary clauses intended to apply to persons who acquire products for use in business or for resale be subject to judicial control. We suggest that a court be given power to declare exclusionary clauses void in these cases, and that when exercising this discretion the court take certain things into consideration, particularly the bargaining positions of the parties. We recommend,

therefore, that the court, before exercising this discretion, apply tests similar to the tests provided in the U.K. Supply of Goods (Implied Terms) Act, 1973. That Act provides for the following tests:

(1) The strength of the bargaining positions of the seller and buyer relative to each other, taking into account, among other things, the availability of suitable alternative products and sources of supply;

(2) Whether the buyer received an inducement and agreed to the term or in accepting it had an opportunity of buying the goods or a suitable alternative without it from any source of supply;

(3) Whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(4) Whether it was reasonable at the time of the contract to expect compliance with the term;

(5) Whether the goods were manufactured, processed or adapted to the special order of the buyer.

Limitation Periods

We recommend that a limitation period be included in the system of strict liability which we propose.

The purpose of limitation periods is to remove the possibility of a potential claim indefinitely hanging over a person's head.

From the point of view of the supplier, it would be ideal to provide that the limitation period begin to run from the time the product leaves his hands, for he then can calculate with certainty when potential claims arising from that product will be extinguished.

However, in our opinion this test is totally unsatisfactory to the injured party. It is conceivable that the injured party will not be aware that the product is defective until after the limitation period expires. For example, a very long period could pass between the time a defective product leaves the hands of a manufacturer, and proceeds through the hands of distributers, wholesalers and other suppliers. More time could elapse between the time the product is used or consumed and the time damage is suffered. For example, a defective food product may only result in noticeable illness long after a person has eaten it.

It is our recommendation, therefore, that the limitation period

begin to run, as it does in tort, from the time the damage is suffered by the injured party.

What should be the length of the limitation period? In our view, the creation of yet another limitation period in addition to existing limitation periods which vary greatly, is undesirable. Practitioners rightly complain that there are already too many limitation periods for different causes of action. The cause of action in the system we propose has the same elements as a cause of action in negligence, save only for the element of fault. Accordingly, we recommend that the length of the limitation period be the same as if the cause of action is in negligence and therefore the draft Uniform Act should provide that for the purposes of any Limitation Act in force in the enacting jurisdiction, the cause of action created in our proposed system to be deemed to be in negligence.

Jury Trials

The Ontario Report recommends that all products liability cases be tried without a jury (see pages 102-104). The Ontario Report makes this recommendation because excessive damage awards which have been made in the United States have been blamed largely on juries.

The English and Scottish Report, on the other hand, does not recommend that product liability cases be tried without a jury (pages 14-15). That Report makes the following points:

1. In the United States, lawyers and witnesses may stipulate for remuneration on a contingency basis by receiving a percentage of the damages.

2. Medical expenses included in damage awards are small in the United Kingdom because of the National Health Service.

3. Juries are used in civil cases less frequently in the United Kingdom than in the United States.

4. Exemplary or punitive awards are made by juries in the United States in cases where such damages would not be allowed in the United Kingdom.

The Ontario Report argues that the main purpose of a jury is to apply community standards to conduct, that such standards only apply when fault is in issue, and therefore a jury would serve no useful purpose in a system of strict liability.

However, it must be remembered that a very similar standard must be applied when determining whether or not a product falls short of

the standards that may be reasonably expected of it in all the circumstances. In our view, therefore, jury trials should not be completely excluded in product liability causes.

It will be remembered that the problem in the United States arising from excessive damage awards has been blamed on juries. It is submitted that this danger can be avoided without abolishing the application of community standards in determining whether or not a product is defective if only the determination of quantum of damages is removed from the jury.

We recommend, therefore, that the draft Uniform Act provide that only a judge may determine the quantum of damages in a products liability case.

Limits on Quantum of Damages

A limit could be imposed in the following ways:

(a) the amount recoverable by each injured party could be limited; or

(b) the aggregate of all amounts recoverable by all persons injured by a particular product could be limited.

The English and Scottish Report makes the following arguments in support of its recommendation against imposing a limit by method (a):

(a) since most products are mass produced, a defective product which is mass produced could give rise to a substantial number of claims in any event, and therefore the imposition of a limit by method (a) would be unlikely to reduce the amount of the manufacturer's liability substantially unless the limit was so low that the compensation to each individual injured party would be totally inadequate;

(b) if the amount claimed in an action was above the limits, the burden of proof would be on the injured party to show negligence. Therefore, the whole purpose of a strict liability system would be defeated.

The English and Scottish Report argue that the use of method (b) would result in a dilemma: the amount recoverable by an injured party would depend on the total successful claims arising from the total run of the product, but at the time of any one claim is adjudicated, it would be impossible to determine what the total claims may be with respect to that product.

The Ontario Report argues that if the injured party is only partly

compensated due to monetary limits on the amount recoverable, the manufacturer is unjustly enriched.

We are persuaded by all these arguments and would simply add that the risk of excessive damage awards is eliminated in the system we propose, since the determination of quantum of damages is removed from juries.

As a result, we recommend that no monetary limits on the amount recoverable be included in the system which we propose.

False Statements

Earlier in this paper, we recommended that a product should not be considered defective if it does not fall short of the standard that may be reasonably expected of it in all the circumstances.

Should a manufacturer, or any supplier be liable if he makes a statement that a product is above that standard and a party suffers damages as a result of the product being below the standard which the statement suggests it has reached?

The Ontario Report points out that under existing law, an action arising from a false statement only lies in contract.

We recommend that our proposed system of products liability include liability for such false statements.

We are of the view that a person in the business of selling a product must be held responsible for all statements he makes concerning the product when he is promoting its sale and use.

We recommend that if the injured party has purchased the product he should recover damages for personal injury, property damage and pure economic loss resulting from his reliance on the statement. However, if the injured party has not purchased the product, for example if the product was given to him as a free sample as part of a promotional campaign, accomplished by a statement which grossly exaggerates the quality of the product, and that statement is false, the injured party should not be entitled to damages arising from pure economic loss. We have already recommended the exclusion of damages arising from pure economic loss in cases where the injured party is not a purchaser. Here the element of bargain and sale is absent and the same principle we advanced in support of our recommendation to exclude pure economic loss where the injured party is not a purchaser would apply in this case.

However, we recommend that the draft Uniform Act provide that

before the false statement is actionable is must be shown not only that the injured party relied on the false statement, but also that it was reasonable for him to rely on the statement. The latter test is imposed by subsection 4(1) of the *New Brunswick Consumer Product Warranty and Liability Act, 1978*. We make this recommendation because many statements made in advertising could not possibly be credited by a reasonable person and some burden must be on the injured party to examine the promotional statements critically.

Existing Rights and Remedies

The Ontario Report recommends that the system of strict liability recommended in that Report be in addition to and not in substitution for any rights and liabilities which already exist. The Ontario Report advances two arguments in support of this recommendation:

(a) no statutory draftsman can be certain that he has covered every case. Therefore, if an existing right is abrogated, it may not be provided for in legislation providing a new system of liability;

(b) every plaintiff should be in a position to plead additional causes of action. It is often unclear, when proceedings are commenced, which cause of action is the most advantageous to plead. The Ontario Report gives as an example a case where it is unclear, at the time a proceeding is commenced, whether damages have arisen from a defective product or from the defendant dealing negligently with a product which is not defective.

We are persuaded by these arguments and therefore recommend that existing rights and liabilities continue side by side with the system of strict liability which we propose.

Conflict of Laws

In considering existing conflict of laws rules in the context of products liability, two problems must be considered:

(a) the "jurisdictional" question: when will a court assume jurisdiction in a products liability case?; and

(b) the "recognition and enforcement" question: when will a court of one province (the receiving court) recognize a judgment given by the court of another province (the rendering court) and therefore when will the mechanism of the receiving court be available for realizing on the judgment?

These questions are of the utmost importance. More and more goods which are mass produced cross provincial boundaries.

We will now consider the existing conflict of law rules governing jurisdiction and recognition and enforcement.

Jurisdiction

A court will assume jurisdiction in a proceeding where

(a) a document commencing the proceeding is served on a defendant within the territorial jurisdiction of the court; or

(b) the defendant submits voluntarily to the jurisdiction of the court; or

(c) the document commencing the proceedings is served on a defendant outside the territorial jurisdiction of the court if such service is in accordance with the rules of that court.

The rules of court differ from province to province. For example, Rule 10.08 of the Nova Scotia Civil Procedure Rules and Rule 10.08 of the Prince Edward Island Rules of Court provide that a person may, as of right, and without leave, serve a document commencing a proceeding anywhere in Canada or the United States. In Ontario, however, service out of the jurisdiction is allowed only in cases where the claim is "in respect of damage sustained in Ontario arising from a tort or breach of contract committed elsewhere" — Ontario Rule 25(1)(h). The New Brunswick Rules of Court permit service out of the jurisdiction where "the plaintiff has any good cause of action against the defendant and it is in the interest of justice that the same shall be tried in this jurisdiction" — Order 11 Rule 1(2).

It is immediately apparent that a court in one province will assume jurisdiction in a case while a court in another jurisdiction will not.

Therefore, if a resident of Nova Scotia, on holiday in Prince Edward Island suffers damage in Prince Edward Island as a result of a defective product, manufactured in Manitoba, which he purchased in Prince Edward Island, he may bring the action in the Nova Scotia courts. This is certainly the most convenient forum for the Nova Scotia resident. It is unclear whether a Nova Scotia or Prince Edward Island court could, notwithstanding this wide Rule of Court, decline jurisdiction on the grounds of *forum non conveniens.* In *Benedict v. Antuofermo* (1975), 60 D.L.R. (3d) 469, Jones, J., as he then was, expressed doubt as to whether or not the doctrine of *forum non conveniens* still exists in Nova Scotia because of this rule (see pages 470-472).

If, however, the injured party is a resident of Ontario he cannot sue in the courts of his home province since Rule 25(1)(g) of the Ontario Rules provides for service outside Ontario only where the claim is in respect of a tort committed within Ontario or in respect of damage sustained in Ontario arising from a tort or breach of contract committed elsewhere. Here the tort, or the negligent act, was committed by the manufacturer in Manitoba and the damage was sustained outside Ontario, therefore neither Rule 25(1)(g) or (h) applies. If the Ontario resident did not sustain the injury until after he returned to Ontario from holiday, he could sue the manufacturer in the Ontario courts.

Accordingly, if, in this example, the defective product was a car with defective brakes and the Ontario resident, out of necessity, had to have the defective brakes repaired in Prince Edward Island the damage would be incurred in Prince Edward Island, not Ontario, and he would have to sue either in Manitoba or Prince Edward Island.

If the injured party in the example is a resident of Newfoundland, his right to bring an action in the courts of his home province is restricted even more than the Ontario resident. The Newfoundland Rules of Court provide that a document commencing a tort action may be served outside Newfoundland only if the tort is committed within Newfoundland (Order XI Rule 1(ee)). Accordingly, the injured Newfoundland resident cannot sue in his home province even if he waits until he returns to Newfoundland from holiday before having the defective brake in his car repaired.

Several tests for determining when a tort has been committed within a jurisdiction have been propounded by the courts. For example, one test is that the tortious act must be committed within the jurisdiction, while another test, called the "last event" test, is whether the damage was incurred within the jurisdiction. Until recently the prevailing view was that all elements of the tort, that is, the negligent act and the damage, must occur within the jurisdiction.

A much more flexible jurisdictional test was recently propounded by the Supreme Court of Canada in *Moran & Moran v. Pyle (National) Canada Ltd.* [1975] 1 S.C.R. 393. This test is described by Dickson, J., speaking for a unanimous court, in the following passage from his judgment:

> "Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm

> theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence . . . . Cheshire [*Private International Law*] 8th ed. 1970, p. 281 . . . says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly of through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce."

It is apparent that before *Moran* the rules governing assumption of jurisdiction were totally inadequate to deal with cases involving damage caused by defective products which are marketed interprovincially. In our view, provincial boundaries are totally irrelevant in this context. In our opinion, it is unrealistic to say that the injured resident of Newfoundland should be put to the expense of litigating his claim in a forum distant from his home because of the artificial idea that the tort was committed in a foreign country, or that the Ontario resident in the above example cannot litigate in his home province because he incurred damage in a foreign country. In a recent study entitled Interprovincial Product Liability Litigation: Jurisdiction, Enforcement and Choice of Law (the Sharpe Report), Professor Robert J. Sharpe makes the following point (at page 14):

> "These traditional procedures and principles of interpretation are undoubtedly pro-defendant in nature. It is remarkable that Canadian courts should have applied similar reasoning to cases involving

> Canadian defendants. Clearly, there are many factors which call for a different approach in Canada. The concern over offending foreign sovereignty is simply inappropriate in a federal state. Not only are the provinces members of the same federation, but each of them has service ex juris legislation in more or less the same terms. Moreover, in the common law provinces at least, there is a shared legal tradition, and a Canadian defendant from one province is not faced with a totally foreign legal regime when called upon to defend his conduct in another province."

From the point of view of the injured party, the ideal approach would be to treat Canada as a unitary state in the context of assumption of jurisdiction.

It must be remembered, however, that it is not always fair to force a defendant to litigate at a great distance from his home province. Also, manufacturers, like everybody else, are accustomed to the present rules and if they are changed the position of the manufacturer must be kept in mind.

It will be remembered that the main consideration underlying our proposals is that the manufacturer, or indeed any supplier, should be strictly liable in damages arising from defective products produced or sold by him if it is his business to produce or sell the products. The pivotal point is that he does so with a view to profit, and in the ordinary course of business of selling the product and as a result, encourages its use. We feel that this principle should apply in a geographical context in any formulation of conflict rules governing jurisdiction of courts in product liability cases.

One method is to adopt the principle enunciated in *Moran*. The adoption of this principle would result in a jurisdictional rule to the following effect: the court of the home jurisdiction of the injured party has jurisdiction to deal with the claim if the supplier of the product could reasonably foresee that the product would be used or consumed where the injured party used or consumed it.

This rule would protect an injured party who acquires a defective product in his home province and uses and consumes it in that province and suffers damage in that province. As Dickson, J. pointed out during the course of his judgment:

> "The rule recognizes the important interest a state has in injuries suffered by persons within its territory."

Any rule which incorporates the *Moran* principle is not, however,

of any help to the resident of Newfoundland who suffers damages from a defective product purchased by him while on holiday in Prince Edward Island: he would still have to sue either in Manitoba or Prince Edward Island but could not sue in his home province.

The Sharpe Report suggests, at page 64, that service out of the jurisdiction ought to be permitted in any case involving a product liability claim where

(a) the supplier maintained any place of business, office, warehouse, agent, salesman or did any act of distribution, advertising or encouragement of distribution or sale of the product or similar products within the jurisdiction;

(b) the supplier knew of or could reasonably foresee distribution or use of the product within the jurisdiction;

(c) the defendant put the product in question into the normal channels of interprovincial commerce, or because of the very nature of the product, ought to have foreseen that the product would enter the normal channels of interprovincial commerce, even though the particular jurisdiction in question was not contemplated; or

(d) there is a claim against another party properly sued to which the supplier in question is a necessary or proper party.

Although these proposed rules are a vast improvement on the existing rules it is submitted that they are of no help for the resident of Newfoundland who suffers damages in Prince Edward Island as a result of a defective product purchased by him in Prince Edward Island. For example, if the Manitoba manufacturer did not maintain any place of business or have any employees in Newfoundland or did not do any advertising in Newfoundland and could not reasonably foresee the distribution of the product in Newfoundland but only in Prince Edward Island and there is no claim against another person in Newfoundland to which the supplier could be said to be necessary or proper party, the injured party would still have to sue in Prince Edward Island or Manitoba.

It is our view that any jurisdictional rules should be tied not only to the jurisdiction in which it is reasonable to foresee that the defective product would be used, but should also be tied to the injured party. Surely it is reasonable to foresee that residents of one province can be present in any other province, particularly in this age of fast transportation. It is our opinion, therefore, that in addition to the

tests suggested in the Sharpe Report, which we respectfully adopt, the following rule should apply:

> Service out of the jurisdiction is permitted by a court of any province where the supplier who places the defective product in the normal channels of interprovincial trade knows or ought reasonably to foresee that a resident of that province could suffer damage as a result of a product being defective.

In our opinion, however, the additional rule which we have proposed should not be applied in all cases because in some cases its application would have a harsh and unfair result. For example, if a resident of the Yukon, while visiting Nova Scotia, suffers damages as a result of consuming food manufactured by a small Nova Scotia supplier, the supplier could be put to a great expense, since he may be required to produce a large number of witnesses, and transport them to the Yukon to give evidence. On the other hand, the supplier could be a large supplier with great financial resources, when compared to the financial resources of the consumer and that supplier may only be required to produce one or two witnesses and could easily bear the cost of taking the witnesses to the Yukon to give evidence.

It is immediately apparent that it is impossible to deal with each situation in a uniform act, and, therefore, we propose that this rule would not apply if the defendant satisfies the court that its application would cause him undue hardship.

It is our recommendation, therefore, that service out of the jurisdiction should be permitted by the courts of each province of Canada where

(1) The supplier maintained any place of business, office, warehouse, agent, salesman or did any act of distribution, advertising or encouragement of distribution or sale of the product or similar products within that province.;

(2) The supplier knew of or could reasonably foresee distribution or use of the product within that province;

(3) The supplier put the product in question into the normal channels of interprovincial commerce or, because of the very nature of the product, ought to have foreseen that the product would enter the normal channels of interprovincial commerce, even though the particular province in question was not contemplated;

(4) There is a claim against another party properly sued to which the supplier in question is a necessary or proper party; or

(5) The supplier knew or ought reasonably to have foreseen that a resident of that province could suffer damages if the product was defective, when the Court which is asked to assume jurisdiction is satisfied that, on balance, greater hardship and inconvenience would be caused to the plaintiff rather than the defendant if it refuses to assume jurisdiction.

Recognition and Enforcement

Even if the injured party is successful in getting a judgment in his home jurisdiction, and the defendant has no assets in that jurisdiction to answer the judgment, then the judgment is worthless unless the courts of the jurisdiction where the assets are located (the receiving jurisdiction) recognize the judgment rendered by the court in the injured party's home jurisdiction (the rendering jurisdiction).

The Sharpe Report summarizes the existing conflict of laws rules (at page 13) as follows:

> A court of the receiving jurisdiction will only recognize and enforce a judgment of the rendering jurisdiction if
>
> (a) the defendant was physically present within the rendering jurisdiction at the time the proceedings were commenced, or
>
> (b) the defendant, either voluntarily appeared to defend the action on the merits in the rendering jurisdiction or agreed to submit to the jurisdiction of the court of the rendering jurisdiction.

The first test is satisfied if the defendant was physically present in the rendering jurisdiction at the time the action is commenced. If the supplier of a defective product is a corporation, it must be shown that the corporation had an agent or officer present in the rendering jurisdiction at the time the action is commenced. However, the agent or officer must have authority to enter into contracts on behalf of the supplier: *Sfier & Co.* v. *National Insurance Co. of New Zealand* [1964] 1 Ll. L.R. 330. In *Vogel* v. *R. & A. Kohnstamn Ltd.* [1973] Q.B. 133, an English company had a representative in Israel who was paid a commission on sales, but who had no authority to make contracts binding on the English company and the English courts refused to enforce the judgment because the salesman did not have the authority to make contracts for the company.

In the result, the defendant must have a substantial presence in the

rendering jurisdiction at the time the action is commenced if a receiving jurisdiction is to enforce a judgment given in the action.

It is easy, therefore, for a supplier to do business in a jurisdiction without being answerable to a judgment rendered in that jurisdiction simply by keeping its more responsible officials out of the jurisdiction or by choosing not to appear in that jurisdiction and defend an action commenced against it in the courts of that jurisdiction.

The existing conflict of laws governing recognition and enforcement of judgments are, therefore, inconsistent with the general policy considerations on which our recommendations are based.

It is our view that any person who supplies a product in the normal course of its business should be responsible for damage caused by that product. The ultimate manufacturer who is the prime cause of the risk should be ultimately responsible to all his distributors, wholesalers and retailers.

Accordingly, recognition and enforcement rules should facilitate not only recovery by the injured party but also recovery by a middleman who has paid a claim by the injured party although the middleman did nothing to process the product before it was placed on the open market.

Therefore, we recommend that a judgment against a supplier be enforceable by a court in a receiving jurisdiction when

(a) the supplier maintained any place of business, office, warehouse, agent, salesman or did any act of advertising or encouragement of distribution or sale of the product or similar products within the rendering jurisdiction;

(b) the supplier knew of or could reasonably foresee distribution or use of the product within the rendering jurisdiction;

(c) the supplier put the product into the normal channels of interprovincial commerce, or, because of the very nature of the product, ought to have foreseen that the product would enter the normal channels of interprovincial commerce, even though the rendering jurisdiction was not contemplated;

(d) there was a claim against another party in the action in which the judgment was given by the court of the rendering jurisdiction, and the supplier was a necessary or proper party in that action; or

(e) the supplier knew or ought to have known that the product

supplied by him would, if defective, cause damage to a resident of the rendering jurisdiction.

SUMMARY OF RECOMMENDATIONS

1. In this Summary of Recommendations,

(a) "defective product" means a product which falls short of the standard that may be reasonably expected of it under all the circumstances,

(b) "supplier" means any person who is in the business of selling a product, including not only the retailer, but also the manufacturer, distributor and wholesaler and all those who participate in making the product available on the open market.

2. We recommend that

(a) a person who suffers damages by reason of a product being defective may, in an action (a products liability action) recover damages from any supplier of the product he chooses to sue upon establishing that

(i) the product was defective, and

(ii) the damages were caused by the product being defective,

and that the question of whether or not the defect was caused by the negligence of the supplier be irrelevant for the purposes of the action;

(b) the injured party be entitled to proceed against any supplier he chooses;

(c) the injured party be entitled to recover damages for personal injury, or death, damage to or loss of other property and damages arising from pure economic loss, once he has discharged the burden of proof described in paragraph (a);

(d) notwithstanding paragraph (c), the injured party must also prove that he purchased the defective product before being entitled to recover damages for pure economic loss;

(e) a products liability action be tortious in nature, but without the element of fault, and that a products liability action not be founded on contract law or any extension of existing principles of contract law;

(f) a cause of action as described in the preceding paragraphs be available to any supplier against another supplier;

(g) the defences of contributory negligence and voluntary assumption of risk be available to a supplier in a products liability action;

(h) that the "state of the art" defence not be available in a products liability action;

(i) that a clause in a contract between a supplier and the ultimate consumer of the product is void if the clause purports to exclude the supplier from liability arising from the product being defective;

(j) that an "exclusionary clause" as described in paragraph (i), in contracts between suppliers be subject to certain "fairness" tests to be applied by the court;

(k) the cause of action of an injured party be subject to a limitation period which begins to run at the same time and for the same length of time as the limitation period which applies to causes of action based on the tort of negligence;

(l) a jury be available in a products liability action but only to determine the question of liability, the question of quantum of damages to be determined by the judge in all cases;

(m) no limit be placed on the quantum of damages recoverable in a products liability action;

(n) that where a product falls short of the standard which a supplier represents the product has attained, a person who has relied on the statement and has suffered damages because the product has fallen short of that standard be entitled to recover damages when he has established that;

(i) the representation was false;

(ii) he has relied on the representation,

(iii) he has suffered damages as a result of the representation being false, and

(iv) it was reasonable for him to rely on the representation;

(o) notwithstanding paragraph (n), where damages arising from pure economic loss resulting from a false statement are claimed, the plaintiff must also establish that he purchased the product;

(p) existing rights and remedies continue side by side and in addition to the system of products liability proposed in this paper;

(q) that a court assume jurisdiction in a products liability case where

(i) the supplier maintained any place of business, office warehouse, agent, salesman or did any act of distribution, advertising or encouragement of distribution or sale of the product or similar products in the territorial jurisdiction of the courts

(ii) the supplier knew or could reasonably foresee distribution or use of the product within the territorial jurisdiction of the court;

(iii) the supplier put the product in question into the normal channels of interprovincial commerce or, because of the very nature of the product, ought to have foreseen that the product would enter the normal channels of interprovincial commerce, even though the territorial jurisdiction of the court was not contemplated;

(iv) there is a claim against another party properly sued to which the supplier in question is a necessary or proper party; or

(v) the supplier knew or ought reasonably to have foreseen that a resident within the territorial jurisdiction of the court could suffer damages if the product was defective, when the court is satisfied that, on balance, greater hardship and inconvenience would be caused to the plaintiff rather than the defendant if the court refuses to assume jurisdiction;

(r) that the court of the jurisdiction where the assets of the defendant are located (the receiving jurisdiction) recognize a judgment rendered by the court of the injured party's home jurisdiction (the rendering court) when

(i) the defendant maintained any place of business, office, warehouse, agent, salesman or did any act of advertising or encouragement of distribution or sale of the product or similar product within the rendering jurisdiction;

(ii) the supplier knew or could reasonably foresee distribution or use of the product within the rendering jurisdiction;

(iii) the supplier put the product into the normal channels of interprovincial commerce or, because of the very nature of the product, ought to have foreseen that the product would enter the normal channels of interprovincial commerce, even though the rendering jurisdiction was not contemplated;

(iv) there is a claim against another party properly joined in the action in which the judgment was given by the court of the rendering jurisdiction, and the supplier was a necessary or proper party to that action; or

(v) the supplier knew or ought to have known that the product supplied by him would, if defective, cause some damage to a resident of the rendering jurisdiction.

Products Liability Supplementary Paper of the Nova Scotia Commissioners

1. This paper recommends an objective test to determine when a product is defective, and that test as is follows: a product is defective when it falls short of the standards that may be reasonably expected of it under all the circumstances.

The New Brunswick *Consumer Product Warranty and Liability Act* (Stats. N.B., 1978 c. C-18.1) (the New Brunswick Act) provides that there shall be several implied warranties including an implied warranty that a product is of such quality, in such state or condition and is fit for the purpose or purposes for which products of that kind are normally used as it is reasonable to expect having regard to the seller's description of the product, if any, the price, when relevant, and all other relevant circumstances. (Section 10(1)(a))

The Quebec Consumer Protection Act S.Q. 1978, (the Quebec Act) provides for an action for damages resulting from a "latent defect".

The *Consumer Products Warranties Act,* 1977, of Saskatchewan (Stats. Sask., 1976-77, c. 15) (the Saskatchewan Act) provides for several implied warranties, including a warranty that the product and all of its components shall be durable for a reasonable period of time, having regard to all the relevant circumstances" and that the product is supplied is "of acceptable quality". The Saskatchewan Act defines "acceptable quality" as the characteristics and the quality of a consumer product that consumers can reasonably expect the product to have, having regard to all the relevant circumstances of the sale of

the product, including the description of the product, its purchase price and the express warranties of the retail seller or manufacturer of the product, and includes merchantable quality within the meaning of The Sales of Goods Act.

It is our view that like the test recommended in this paper, the tests provided in the New Brunswick and Saskatchewan Acts are objective tests and, subject to some difference in wording, are substantially the same.

2. (a) This paper recommends strict liability for damages suffered by reason of *any product* being defective and that an injured party not be required to prove that the defect was caused by the negligence of the supplier of the product, and that the injured party have a cause of action, without proving negligence, against the manufacturer, distributor, wholesaler, retailer or any other person who sells the product in the ordinary course of business.

The New Brunswick and Saskatchewan Acts provide for strict liability of all those who sell a product to any party who suffers loss because the product is defective, providing, as they do, for

(i) implied warranties, as already mentioned; and;

(ii) extending the benefits of the implied warranties to persons other than the immediate purchaser of the product.

However, while this paper recommends that the cause of action be tortious in nature, both the New Brunswick and Saskatchewan Acts base liability in most cases on contract by abolishing the principle of privity of contract by extending the benefit of the implied warranties to those who suffer the loss.

The Quebec Act also abolishes privity of conduct in consumer transactions.

The approaches in the New Brunswick and Saskatchewan Acts are not, however, completely contractual. The Saskatchewan Act uses tortious approach, providing a remedy in damages arising from personal injuries suffered by a person who "may reasonably be expected to use, consume or be affected" by the product (Section 5). The New Brunswick Act provides for a remedy to any person who suffers loss as a result of a product being "unreasonably dangerous to person or property" (Section 17(1)).

Another difference is that while this paper recommends that the system of strict liability extend to all defective products, and provide

for recovery of all damages resulting from a product being defective, the strict liability systems in the New Brunswick and Saskatchewan Acts extend only to consumer products which are defined in the New Brunswick Act as being "of a kind that is commonly used for personal, family or household purposes", and being defined in the Saskatchewan Act as "ordinarily used for personal, family or household purposes, including any goods bought for agricultural or fishing purposes by an individual or by an individual or by a family, farm or corporation".

With respect to damages, the New Brunswick Act provides for recovery of damages of all kinds, including economic loss, damage to property and personal injury, where the claim is made by a buyer in privity of contract with the supplier, and where there is no privity of contract provides for the recovery of all damage but only if the damages are not suffered in a business capacity, unless the damages are suffered in a business capacity to the extent that they consist of liability to another person or loss that is not suffered in a business capacity. It is submitted that the Saskatchewan Act, providing, as it does, for liability based on contract, permits recovery of all damages, including pure economic loss. However, the class of persons entitled to recover under the Saskatchewan Act is much narrower than under the New Brunswick Act, since the Saskatchewan Act provides that the implied warranties apply only to "persons who have a property or interest in the defective product" (Section 4) and that a person who has no title to the defective product may recover damages for personal injury only, if he may reasonably be expected to use, consume or be affected by a consumer product.

It is immediately apparent that this paper recommends a much broader approach both with respect to the range of damages and the class of persons to be protected in the strict liability system proposed.

(b) This paper recommends that an injured party can only recover pure economic loss when he has proved that he has purchased the defective product.

The result is not the same in the Saskatchewan Act providing, as it does, for a remedy based on breach of contract which is available not only to the purchaser but to anyone who has title to the product not only by way of purchase, but also by way of "gift, operation of law or otherwise". (Section 4)

This paper recommends that payment of the purchase price by the injured party should be a condition precedent to recovery of damages

for pure economic loss, since the element of bargain and sale should be present before such damages are recoverable.

(f) We have recommended that the cause of action based on strict liability be available not only to a consumer, but also to any supplier as against any other supplier or as against the manufacturer.

The benefit of strict liability, however, is restricted in the Saskatchewan Act to those persons "who derive their property or interest in a product from or through the consumer", who is defined in the Act (Section 2(d)) as "a person who buys a consumer product from a retailer seller not for the purpose of resale and not for the purpose of use in a business or for use in an individual or family agricultural or fishing business.

The New Brunswick Act, is, however, closer, in this respect, to the system which is proposed in this paper, since it provides that the cause of action based on the implied warranty be available to a person when that person suffers a loss in a business capacity to the extent of the liability that he or another person incurs for a loss that is not suffered in a business capacity.

In addition, this provision of the New Brunswick Act tends to stream liability back to the person most often the source of the problem — the manufacturer. Such an approach is recommended in this paper.

However, the system proposed in this paper goes even further and provides for strict liability for all damages suffered in a business capacity or otherwise, even if the business loss does not take the form of incurring an obligation to pay a nonbusiness loss to a consumer.

(g) This paper recommends that the defences of contributory negligence and voluntary assumption of risk be available to a supplier in a products liability action.

Since the New Brunswick and Saskatchewan Acts base liability on contractual principles, these defences are, in a technical sense, irrelevant to the contractual approach.

However, a defence based on the basic principle underlying the defence of voluntary assumption of risk is provided by both acts. The New Brunswick Act provides that there is no implied warranty with respect to any defect that is known to the buyer before the contract is made or with regard to any defect that the seller has reason to believe exists and that he discloses to the buyer before the contract is made

(Section 10(2)), while the Saskatchewan Act (Section 11, Paragraph 4) provides that no such warranty shall be deemed to be given with respect to defects drawn to the consumer's attention or where the consumer examines the product before the contract is made with respect to defects that that examination ought to have revealed.

(h) This paper recommends that the "state of the art defence" not be available in a products liability action.

Neither the New Brunswick or Saskatchewan Act provides for such a defence.

(i)(j) This paper recommends that "exclusionary clauses" or clauses that purport to exclude the supplier from liability be void when the contract is made between the supplier and consumer, and that such agreements when made between suppliers be subject to certain "fairness" tests. The New Brunswick Act also provides that certain "exclusionary" clauses are void if they purport to exclude warranties implied by the Act. However, in so far as exclusionary clauses purport to exclude express warranties, they are valid under the New Brunswick Act, if they can be considered "fair or reasonable" under all the circumstances.

The Saskatchewan Act (Section 7) provides that all agreements which purport to exclude the remedies provided by the Act, are void.

(k) This paper recommends that the limitation period begin to run at the same time and for the same length of time as the limitation period which applies to causes of action based on the tort of negligence.

The New Brunswick Act, however, does not provide for any limitation period. Therefore, it would appear that a cause of action under those Acts is subject to the normal limitation period for an action based on a breach of contract, and unlike the recommendation made in this paper would begin to run from the breach rather than from the date damages are actually incurred or when the injured party actually knew or ought to have known of the damages.

The Saskatchewan Act, on the other hand, provides (Section 30) a special limitation period of two years but also provides that the time does not begin to run until the time the breach of warranty is first discovered by the person bringing the action.

(l) This paper recommends that a jury be available in a products liability action but only to determine the question of liability,

the question of quantum of damages to be determined by the judge in all cases.

Neither the New Brunswick or Saskatchewan Acts deal with this matter. Accordingly the ordinary rules with respect to jury trials would apply in New Brunswick and Saskatchewan.

(m) This paper recommends that no limit be placed on the quantum of damages recoverable in a products liability action. The New Brunswick and Saskatchewan Acts also impose no limit on this amount.

(n) This paper proposes strict liability where a supplier represents that a product is of a certain standard of quality but the product falls below that standard when it can be shown that

(i) the representation was false,

(ii) the injured party has relied on the representation,

(iii) the injured party has suffered damages as a result of the representation being false, and

(iv) it was reasonable for the injured party to rely on the representation.

Such representations, including advertising and statements on labels, are dealt with in both the New Brunswick and Saskatchewan Acts as express warranties: they are deemed by those Acts to be express warranties forming part of the contract of sale (New Brunswick — Section 4; Saskatchewan — Section 8).

This paper recommends that before an action lies, there must be actual reliance on the statement and that it was reasonable for the injured party to rely on the statement.

However, both the New Brunswick and Saskatchewan Acts differ from the recommendation made in this paper by providing that actual reliance on a statement need not be proved if it is shown that it was reasonable to rely on the statement.

It is our view that the "reliance" test be necessary in all cases because actual reliance on an exaggerated statement is, in our view, a necessary link in the chain of causation between the false statement and the damages.

It will also be recalled that this paper recommends that damages arising from pure economic loss resulting from a false statement are

only recoverable when the injured party proves that he has purchased the product.

(p) This paper recommends that the existing rights and remedies continue side by side in addition to the system of products liability proposed in this paper.

Both the New Brunswick Act (Section 28) and the Saskatchewan Act (Section 3) contain provisions which preserve existing rights and remedies.

(q) This paper recommends an expansion of the conflicts rule dealing with the degree of physical presence of a supplier required in a jurisdiction before the courts of that jurisdiction can assume jurisdiction in a products liability action. The recommendation includes the maintenance of any place of business, office, warehouse, agent, salesman or any act of distribution, advertising or encouragement of distribution or sale of the product of similar products in the jurisdiction as a basis for assuming jurisdiction. The New Brunswick Act contains no such expanded basis for assuming jurisdiction but the Saskatchewan Act does not expand the definition of "carrying on business" providing that a manufacturer, retail seller or warrantor should be deemed to carry on business in Saskatchewan if one or more of the following conditions are met:

(i) he holds title to land in Saskatchewan or any interest in land in Saskatchewan for the purposes of carrying on business in Saskatchewan;

(ii) he maintains an office, warehouse, or place of business in Saskatchewan;

(iii) he is licensed or registered under any statute of Saskatchewan entitling him to do business or to sell securities of his own issue;

(iv) his name and telephone number are listed in a current telephone directory and the telephone is located in a place in Saskatchewan for the purposes of carrying on business in Saskatchewan;

(v) an agent, salesman, representative or other person conducts business in Saskatchewan on his behalf;

(vi) he directly or indirectly markets consumer products in Saskatchewan; or

(vii) he otherwise carries on business in Saskatchewan.

APPENDIX AA

(See page 34)

UNIFORM RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS ACT

(As adopted by the Conference in 1979 and Amended in 1982)

1. In this Act — Interpretation

(a) "Attorney General" includes a person authorized in writing by the Attorney General to act for him in the performance of a power or duty under this Act;

(b) "certified copy" means, in relation to a document of a court, the original or a copy of the document certified by the original or facsimile signature of a proper officer of the court to be a true copy;

(c) "claimant" means a person who has or is alleged to have a right to maintenance;

(d) "confirmation order" means a confirmation order made under this Act or under the corresponding enactment of a reciprocating state;

(e) "court" means an authority having jurisdiction to make an order;

(f) "final order" means an order made in a proceeding of which the claimant and respondent had proper notice and in which they had an opportunity to be present or represented and includes

(i) the maintenance provisions in a written agreement between a claimant and a respondent where those provisions are enforceable in the state in which the agreement was made as if contained in an order of a court of that state, and

(ii) a confirmation order made in a reciprocating state;

(g) "maintenance" includes support or alimony;

(h) "order" means an order or determination of a court providing for the payment of money as maintenance by the respondent named in the order for the benefit of the claimant named in the order, and includes the maintenance provisions of an affiliation order;

(i) "provisional order" means an order of a court in (*the Province*) that has no force or effect in (*the Province*) until confirmed by a court in a reciprocating state or a corresponding order made in a reciprocating state for confirmation in (*the Province*);

(j) "reciprocating state" means a state declared under section 18(2) or under an enactment repealed by this Act to be a reciprocating state and includes a province;

(k) "registered order" means

(i) a final order made in a reciprocating state and filed under this Act or under an enactment repealed by this Act with a court in (*the Province*),

(ii) a final order deemed under section 2(3) to be a registered order, or

(iii) a confirmation order that is filed under section 5(8);

(l) "registration court" means the court in (*the Province*)

(i) in which the registered order is filed under this Act, or

(ii) that deemed a final order to be a registered order under this Act or under an enactment repealed by this Act;

(m) "respondent" means a person in (*the Province*) or in a reciprocating state who has or is alleged to have an obligation to pay maintenance for the benefit of a claimant, or against whom a proceeding under this Act, or a corresponding enactment of a reciprocating state, is commenced;

(n) "state" includes a political subdivision of a state and an official agency of a state.

Final orders of reciprocating state

2. (1) Where the Attorney General receives a certified copy of a final order made in a reciprocating state before, on or after the day on which this Act comes into force with information that the respondent is in (*the Province*), the Attorney General shall designate a court in (*the Prov-*

ince) for the purposes of the registration and enforcement and forward the order and supporting material to that court.

Filing for registration

(2) On receipt of a final order transmitted to a court under subsection (1) or under a provision in a reciprocating state corresponding to section 5(8)(a), the proper officer of the court shall file the order with the court and give notice of the registration of the order to the respondent.

Claimant leaving province after final order made in province

(3) Where a final order is made in (*the Province*) before, on or after the day on which this Act comes into force and the claimant subsequently leaves (*the Province*) and is apparently resident in a reciprocating state, the court that made the order shall, on the written request of the claimant, the respondent or the Attorney General, deem the order to be a registered order.

Variation of registered order

(4) A registered order varied in a manner consistent with this Act, continues to be a registered order.

Setting aside a registered order

(5) A respondent may, within one month after receiving notice of the registration of a registered order, apply to the registration court to set the registration aside.

Grounds

(6) On application under subsection (5) the registration court shall set aside the registration if it determines that the order was obtained by fraud or error or was not a final order.

Disposition

(7) An order determined not to be a final order and set aside under subsection (6) may be dealt with by the registration court under section 5 as a provisional order.

Making of provisional orders

3. (1) On application by a claimant before, on or after the day on which this Act comes into force, a court may, without notice to and in the absence of a respondent, make a provisional order against the respondent.

Maintenance provisions in provisional orders

(2) An order under subsection (1) may only include the maintenance provisions the court could have included in a final order in a proceeding of which the respondent had notice in (*the Province*) but in which he failed to appear.

Transmission of provisional orders

(3) Where a provisional order is made, a proper officer

of the court shall send to the Attorney General for transmission to a reciprocating state

(a) three certified copies of the provisional order;
(b) a sworn document setting out or summarizing the evidence given in the proceeding;
(c) a copy of the enactments under which the respondent is alleged to have an obligation to maintain the claimant; and
(d) a statement giving available information respecting identification, location, income and assets of the respondent.

Further evidence

(4) Where, during a proceeding for a confirmation order, a court in a reciprocating state remits the matter back for further evidence to the court in (*the Province*) that made the provisional order, the court in (*the Province*) shall, after giving notice to the claimant, receive further evidence.

Evidence and recommendations

(5) Where evidence is received under subsection (4), a proper officer of the court shall forward to the court in the reciprocating state a sworn document setting out or summarizing the evidence with such recommendations as the court in (*the Province*) considers appropriate.

New provisional orders

(6) Where a provisional order made under this section comes before a court in a reciprocating state and confirmation is denied in respect of one or more claimants, the court in (*the Province*) that made the provisional order may, on application within six months from the denial of confirmation, reopen the matter and receive further evidence and make a new provisional order for a claimant in respect of whom confirmation was denied.

Affiliation

4. (1) Where the affiliation of a child is in issue and has not previously been determined by a court of competent jurisdiction, the affiliation may be determined as part of a maintenance proceeding under this Act.

Relation in proceeding respecting provisional order

(2) If the respondent disputes affiliation in the course of a proceeding to confirm a provisional order for maintenance, the matter of affiliation may be determined even though the provisional order makes no reference to affiliation.

Limited effect of determination

(3) A determination of affiliation under this section has effect only for the purpose of maintenance proceedings under this Act.

Making of confirmation orders

5. (1) Where the Attorney General receives from a reciprocating state documents corresponding to those described in section 3(3) with information that the respondent is in (*the Province*), the Attorney General shall designate a court in (*the Province*) for the purpose of proceedings under this section and forward the documents to that court.

Procedure

(2) On receipt of the documents referred to in subsection (1), the court shall, whether the provisional order was made before, on or after the day on which this Act came into force, (*issue process against*) the respondent in the same manner as it would in a proceeding under (*Provincial enactment*) for the same relief and shall proceed, taking into consideration the sworn document setting out or summarizing the evidence given in the proceeding in the reciprocating state.

Report to Attorney General

(3) Where the respondent apparently is outside the territorial jurisdiction of the court and will not return, a proper officer of the court, on receipt of documents under subsection (1), shall return the documents to the Attorney General with available information respecting the whereabouts and circumstances of the respondent.

Orders of confirmation or refusal

(4) At the conclusion of a proceeding under this section, the court may make a confirmation order in the amount it considers appropriate or make an order refusing maintenance to any claimant.

Commencement of payments

(5) Where the court makes a confirmation order for periodic maintenance payments, the court may direct that the payments begin from a date not earlier than the date of the provisional order.

Further evidence

(6) The court, before making a confirmation order in a reduced amount or before denying maintenance, shall decide whether to remit the matter back for further evidence to the court that made the provisional order.

Interim order

(7) Where a court remits a matter under subsection (6), it may make an interim order for maintenance against the respondent.

Report and filing

(8) At the conclusion of a proceeding under this section, the court, or a proper officer of the court, shall

(a) forward a certified copy of the order to the court that made the provisional order and to the Attorney General;
(b) file the confirmation order, where one is made; and
(c) where an order is made refusing or reducing maintenance give written reasons to the court that made the provisional order and to the Attorney General.

Choice of law

6. (1) Where the law of the reciprocating state is pleaded to establish the obligation of the respondent to maintain a claimant resident in that state, the court in (*the Province*) shall take judicial notice of that law and apply it.

Proof of foreign enactment

(2) An enactment of a reciprocating state may be pleaded and proved for the purposes of this section by producing a copy of the enactment received from the reciprocating state.

Adjournment

(3) Where the law of the reciprocating state is not pleaded under subsection (1), the court (*in the Province*) shall

(a) make an interim order for maintenance against the respondent where appropriate;
(b) adjourn the proceeding for a period not exceeding 90 days; and
(c) request the Attorney General to notify the appropriate officer of the reciprocating state of the requirement to plead and prove the applicable law of that state if that law is to be applied.

Application of local law

(4) Where the law of the reciprocating state is not pleaded after an adjournment under subsection (3), the court shall apply the law of (*the Province*).

Statement of local law

(5) Where the law of a reciprocating state requires the court in (*the Province*) to provide the court in the reciprocating state with a statement of the grounds on which the making of the confirmation order might have been opposed if the respondent were served with (*process*) and had appeared at the hearing of the court in (*the Province*), the Attorney General shall be deemed to be the proper officer

of the court for the purpose of making and providing the statement of the grounds.

Variation or rescission of registered orders

7. (1) The provisions of this Act respecting the procedure for making provisional orders and confirmation orders apply with the necessary modification to proceedings, except under subsection (5), for the variation or rescission of registered orders.

Restricted jurisdiction

(2) This section does not

(a) authorize a provincially appointed judge to vary or rescind a registered order made in Canada by a Federally appointed judge; or

(b) allow a registered order originally made under a Federal enactment to be varied or rescinded except as authorized by Federal enactment.

Powers of provincially appointed judge

(3) Notwithstanding subsection (2), a provincially appointed judge may make a provisional order to vary or rescind a registered order made in Canada under a provincial enactment by a Federally appointed judge.

Acceptance of jurisdiction

(4) Subject to subsections (2) and (3) a registration court has jurisdiction to vary or rescind a registered order where both claimant and respondent accept its jurisdiction.

Variation and rescission where respondent resides in the Province

(5) Where the respondent is ordinarily resident in (*the Province*) a registration court may, on application by the claimant, vary or rescind a registered order.

Confirmation of provisional orders of variation and rescission

(6) A registration court may make a confirmation order for the variation or rescission of a registered order where

(a) the respondent is ordinarily resident in (*the Province*);

(b) the claimant is ordinarily resident in a reciprocating state;

(c) a certified copy of a provisional order of variation or rescission made by a court in a reciprocating state is received by the registration court through the Attorney General; and

(d) the respondent is given notice of the proceeding and an opportunity to appear.

Application by respondents residing in the Province

(7) A registration court may, on application by the respondent, make a provisional order varying or rescinding a registered order where

(a) the respondent is ordinarily resident in the Province; and
(b) the claimant is ordinarily resident in a reciprocating state in which the order was first made,

and section 3 applies with the necessary modifications to the proceeding.

(8) A registration court may, on application by the respondent, vary or rescind a registered order where

(a) the respondent is ordinarily resident in the Province;
(b) the claimant is ordinarily resident in a reciprocating state other than the state in which the order was first made; and
(c) the registration court, in the course of the proceeding, remits the matter to the court nearest to the place where the claimant lives or works for the purpose of obtaining evidence on behalf of the claimant,

or where

(d) the respondent is ordinarily resident in the Province;
(e) the claimant is not ordinarily resident in a reciprocating state; and
(f) the claimant is given notice of the proceeding.

Application by claimant resident in the Province

(9) Where a claimant ordinarily resident in (*the Province*), applies for a variation or rescission of a final order and the respondent is apparently ordinarily resident in a reciprocating state, the court may make a provincial order of variation or rescission and section 3 applies with the necessary modification to the proceeding.

Effect of variation or rescission of orders of (the Province) by courts in reciprocating states

8. Where an order originally made in (*the Province*) is varied or rescinded in a reciprocating state under the law in that state corresponding to section 7, the order shall be deemed to be so varied or rescinded in (*the Province*).

Enforcement

9. (1) The registration court has jurisdiction to enforce a registered order notwithstanding that the order

(a) was made in a proceeding in respect of which

the registration court would have had no jurisdiction; or

(b) is of a kind that the registration court has no jurisdiction to make.

(2) The provisions of (*the deserted spouses' and children's maintenance enactment of the Province*) for the enforcement of maintenance orders apply with the necessary modification to registered orders and interim orders made under this Act.

Effect of registered order

(3) A registered order, has, from the date it is filed or deemed to be registered, the same effect as if it had been a final order originally made by the registration court and may, both with respect to arrears accrued before registration, and with respect to obligations accruing after registration, be enforced, varied or rescinded as provided in this Act whether the order is made before, on or after the day on which this Act comes into force.

Status of order

(4) Where a registered order is registered with (*Supreme Court of Province*), it may be enforced as if it were an order of that court.

Service not necessary

(5) Where a proceeding is brought to enforce a registered order, it is not necessary to prove that the respondent was served with the order.

Recording variations

(6) Where a registered order is being enforced and the registration court finds that the order has been varied by a court subsequent to the date of registration, the registration court shall record the fact of the variation and enforce the order as varied.

Remedies of a state

10. Where (*the Province*), a province, a state or a political subdivision or official agency of (*the Province*), a province or a state is providing or has provided support to a claimant, it has, for the purpose of obtaining reimbursement or to obtain continuing maintenance for the claimant, the same right to bring proceedings under this Act as the claimant.

Duties of the Attorney General

11. (1) The Attorney General shall, on request in writing by a claimant or an officer or court of a reciprocating state, take all reasonable measures to enforce an order made or registered under this Act.

Transmission of documents

(2) On receipt of a document for transmission under

this Act to a reciprocating state, the Attorney General shall transmit the document to the proper officer of the reciprocating state.

Delegation

(3) The Attorney General may, in writing, authorize a person to perform or exercise a power or duty given to the Attorney General under this Act.

Documents from reciprocating states

12. (1) Where a document signed by a presiding officer of the court in a reciprocating state or a certified copy of the document is received by a court in (*the Province*) through the Attorney General, the court in (*the Province*) may deem the document to be a provisional order or a final order, according to the tenor of the document, and proceed accordingly.

Terminology

(2) Where in a proceeding under this Act a document from a court in the reciprocating state contains terminology different from the terminology of this Act or customarily in use in the court in (*the Province*), the court in (*the Province*) shall give a broad and liberal interpretation to the terminology so as to give effect to the document.

Conversion to Canadian currency

13. (1) Where confirmation of a provisional order or registration of a final order is sought and the documents received by a court refer to amounts of maintenance or arrears not expressed in Canadian currency, a proper officer of the court shall first obtain from a bank a quotation for the equivalent amounts in Canadian currency at a rate of exchange applicable on the day the order was made or last varied.

Certification

(2) The amounts in Canadian currency certified on the order by the proper officer of the court under subsection (1) shall be deemed to be the amounts of the order.

Translation

(3) Where an order or other document received by a court is not in (*English or French*), the order or other document shall have attached to it from the other jurisdiction a translation in (*English or French*) approved by the court and the order or other document shall be deemed to be in (*English or French*) for the purposes of this Act.

Appeals

14. (1) Subject to subsections (2) and (3), a claimant, respondent or the Attorney General may appeal any ruling, decision or order of a court in (*the Province*) under this

Act and (*the deserted spouses' and children's maintenance enactment of the Province*) applies with the necessary modification to the appeal.

Time for appeal by appellant

(2) A person resident in the reciprocating state and entitled to appear in the court in the reciprocating state in the proceeding being appealed from, or the Attorney General on that person's behalf, may appeal within seventy-five days after the making of the ruling, decision or order of the court in (*the Province*) appealed from.

Time for appeal by person responding to appeal

(3) A person responding to an appeal under subsection (2) may appeal a ruling, decision or order in the same proceeding within fifteen days after receipt of notice of the appeal.

Order in force pending appeal

(4) An order under appeal remains in force pending the determination of the appeal, unless the court appealed to otherwise orders.

Evidentiary matters

15. (1) In a proceeding under this Act, spouses are competent and compellable witnesses against each other.

Proof of documents

(2) In a proceeding under this Act, a document purporting to be signed by a judge, officer of a court or public officer in a reciprocating state shall, unless the contrary is proved, be proof of the appointment, signature and authority of the person who signed it.

Sworn documents and transcripts

(3) Statements in writing sworn by the maker, depositions or transcripts of evidence taken in a reciprocating state may be received in evidence by a court in (*the Province*) under this Act.

Proof of default

(4) For the purposes of proving default or arrears under this Act, a court may receive in evidence a sworn document made by any person, deposing to have knowledge of, or information and belief concerning, the fact.

Statement of payments

16. A registration court or a proper officer of it shall, on reasonable request of a claimant, respondent, the Attorney General, a proper officer of a reciprocating state or a court of the state, furnish a sworn itemized statement showing with respect to maintenance under an order

(a) all amounts that became due and owing by

the respondent during the twenty-four months preceding the date of the statement; and

(b) all payments made through the court by or on behalf of the respondent during that period.

Transmission of documents by court where respondent leaves (the Province)

17. Where a proper officer of a court in (*the Province*) believes that a respondent under a registered order has ceased to reside in (*the Province*) and is resident in or proceeding to another province or state, the officer shall inform the Attorney General and the court that made the order of any information he has respecting the whereabouts and circumstances of the respondent and, on request by the Attorney General, a proper officer of the court that made the order or the claimant, shall send to the court or person indicated in the request

(a) three certified copies of the order as filed with the court in (*the Province*); and

(b) a sworn certificate of arrears.

Regulations

18. (1) The Lieutenant Governor in Council may make such regulations as are ancillary to this Act and not inconsistent with it.

(2) The Lieutenant Governor in Council may, where satisfied that laws are or will be in effect in a state for the reciprocal enforcement of orders made in (*the Province*) on a basis substantially similar to this Act, by order, declare that state to be a reciprocating state.

Saving

19. This act does not impair any other remedy available to a claimant or another person, (*the Province*), a province, a state or a political subdivision or official agency of (*the Province*), a province or a state.

Transitional

20. Any order made under an enactment repealed by this Act continues, insofar as it is not inconsistent with this Act, valid and enforceable, and may be rescinded, varied, enforced or otherwise dealt with under this Act.

Repeal

21. *The reciprocal enforcement of maintenance orders enactment presently in force in (the Province)* is repealed.

APPENDIX BB

(See page 35)

REPORT OF THE COMMITTEE ON A PROPOSED NEW UNIFORM REGULATION ACT

At the 1981 meeting of the Conference, policy decisions were made and the preparation of a draft Act incorporating those decisions was referred to the Committee of British Columbia, Alberta and Saskatchewan. A draft Act is appended to this report. Following are notes respecting each of the Act's provisions.

Section 1

"local authority"

The actual content of this definition will vary considerably from jurisdiction to jurisdiction and therefore the definition from the present Uniform Act is continued.

"minister"

The exact form of this definition varies from jurisdiction to jurisdiction but the general pattern is similar.

"registrar"

Use of the term "public officer" in the definition of "registrar" brings in the definition of public officer in section 1 of the *Uniform Interpretation Act*. It eliminates the need to include a special section allowing for the employment of a registrar.

"regulation"

The conference decided that the definition of "regulation" should include both the "legislative nature" test and the "key word" test. This is reflected in paragraphs (a) and (b). Note that paragraph (b) includes words to ease the transition to the "key word" test. However, the Conference did not deal in detail with other aspects of the definition of "regulation" that are found in the current Uniform Act and in other jurisdiction's legislation.

Most of the existing Regulation Acts contain some overlap between the definition contained in the *Interpretation Act* and the one in the *Regulation Act*. The draft attempts to resolve this difference by relying on the definition in the *Interpretation Act*. Although it is not legally necessary to refer to the *Interpretation Act* as the draft does, it was felt by the Committee that because of the difficult nature of the definition and because we are using the defined term itself, it was more beneficial to include the reference to the *Interpretation Act* than to rely on its application without an express statement.

The device of using a schedule to make it clear that certain regulations are, or are not, regulations is one that is used partially in Manitoba and goes part of the way to add some clarity to the inherent vagueness of "legislative nature".

Paragraph (d) is contained in most Regulation Acts.

Paragraph (e) is an attempt to deal with the conference decision to provide a power to exempt a regulation from the requirement for depositing under the Act. The Committee found it very difficult to describe the circumstances under which an exemption should be given. The only clear example seemed to be the adoption by reference of a document made or kept elsewhere. Because it seemed inevitable that such an adoption would be exempted it was felt that it would be preferable to simply exclude it in the first place by way of the definition.

In some jurisdictions there is a strong policy preference to avoid adopting materials by reference and to have such material, if adopted, form part of the regulation and be deposited in the normal manner. This can still be done even with the definition as shown in the draft. However, the Conference may wish to add a note to their particular subparagraph to the effect that each jurisdiction should consider whether it wants to adopt that portion of the definition. It was also mentioned at the Conference that there is some case law to the effect that material adopted by reference need not comply with the *Regulation Act*. Even if this is so, it would seem appropriate to spell out that result in the Act itself.

Section 2

This section reflects the major policy thrust of the legislation which is to require all regulations to be deposited with the registrar before they have effect.

Section 3

This section provides that if no other date is stated, a regulation comes into force on the date of its deposit. Some Regulation Acts presently state that a regulation does not come into force before the day of filing and the Conference asked us to consider whether or not that statement was necessary. In our view the statement is unnecessary because the general law would preclude its having effect before that date. However, where the legislature has expressly granted the power to make a regulation with retroactive effect, then that expressly stated power would override the general provision in the *Regulation Act*.

This result is even clearer when an express earlier date (authorized by an Act) is provided in the regulation.

Section 4

This section reflects the Conference decision to have an express statement in the Act requiring publication within one month after deposit. By providing in subsection (2) that publication must occur within one month after deposit, we must then either provide for an extension power or in some other way state the consequence for failure to publish within the month. It was generally agreed by the conference that no consequence should flow from the failure to publish within one month. Therefore subsection (2) makes that result clear. However, such clarity may offend the sensibilities of some legislators. Your Committee still is of the view that the one month requirement is unnecessary if nothing follows from its breach but if the requirement is retained it is preferrable to answer the question of what flows from the failure to comply with the requirement.

Section 5

No comments.

Section 6

This exemption from publication is similar to many present provisions but note the use of the key words "by regulation". Use of these words eliminates the need to expressly require that the exemption order must be deposited and published.

The Conference may prefer to give the power to exempt the Lieutenant Governor in Council rather than the minister. The Committee feels that the power is suitable for a minister to exercise.

Section 7

This section is required to make it clear that a regulation exempted from publication will, after publication of the *exempting* regulation, have its full effect and convictions can still be obtained notwithstanding that the *exempted* regulation is not published in the Gazette.

Section 8

This section of the draft is similar to sections in other Regulation Acts but note that use of the word "evidence" ties it into section 22 of the *Uniform Interpretation Act.*

Section 9

Paragraphs (e) and (f) that allow the Lieutenant Governor in Council to add to or delete from the Schedules may offend some

jurisdictions and the Conference may decide to omit them or to include them with a note about the optional nature of their adoption.

Section 10

Because the scope of the new definition varies from the scope of definitions currently in place, some transition may be required and the draft attempts to deal with this in the simplest way possible. Basically, something that was not a regulation under the former Act definition may be one under the new definition. The transition section allows one year's grace to have it deposited under the new Act.

Schedules

Determination of the contents of the schedules are left up to each jurisdiction.

DRAFT UNIFORM REGULATION ACT

Interpretation

1. In this Act
   (a) "local authority" means (each province define);
   (b) "minister" means the member of the Executive Council charged by order of the Lieutenant Governor in Council with the administration of this Act;
   (c) "registrar" means the public officer designated by the minister as Registrar of Regulations;
   (d) "regulation" means a regulation, as defined in the *Interpretation Act*,
      (i) of legislative nature,
      (ii) made after the coming into force of this Act under a power in an Act where the word regulation is used in conferring the power, or
      (iii) identified in Schedule A,
      but does not include,
      (iv) subject to Schedule A, a bylaw or resolution of a corporation or local authority,
      (v) that part of a regulation, as defined in the *Interpretation Act*, that is adopted or incorporated by reference, or
      (vi) a regulation, as defined in the *Interpretation Act*, identified in Schedule B.

Effect only if deposited

2. A regulation has no effect unless it or a copy of it is deposited with the registrar.

Effect when deposited

3. The date of coming into force of all or part of a regulation for which no other date of coming into force is provided is the date of its deposit.

Publication within one month

4. (1) The registrar shall publish each regulation in the Gazette.

(2) A regulation must be published in the Gazette within one month after the regulation is deposited with the registrar but failure to publish the regulation within one month has no consequence.

Consequence of non-publication

5. A regulation that is not published in the Gazette is ineffective against a person unless he has had actual notice of the regulation.

Exemption from publication

6. (1) Where the minister considers that a regulation

(a) is or will be available to any person who is likely to be affected by it, and

(b) is of a length to render publication in the Gazette impractical or unduly expensive,

the minister may by regulation exempt it from publication in the Gazette.

Exemption of maps, etc.

(2) Where a regulation includes a map, illustration, plan, diagram, photograph, graph, table or any other similar document or thing, the minister may by regulation exempt that part of the regulation from publication.

Notice of exemption

(3) The minister shall include in a regulation made under this section a notice indicating where and when the unpublished regulation or part of the regulation can be inspected.

Non-application of section 5

7. After publication of a regulation made under section 6, section 5 does not apply to the regulation or part of the regulation that is exempted from publication.

Proof of deposit

8. A certificate that purports to be signed by the registrar to the effect that a regulation was deposited with the registrar on a specified date is evidence that it was deposited on the date specified.

Regulations

9. The Lieutenant Governor in Council may make regulations

(a) prescribing the form, numbering and arrangement of regulations,

(b) providing for the times and manner of inspection of deposited regulations,

(c) prescribing fees for copies of regulations provided by the registrar,

(d) providing for the consolidation, revision and re-publication of regulations deposited under this Act,

(e) adding to Schedule A, and

(f) deleting from Schedule B.

Transition

10. A regulation as defined in this Act would under the former Act be effective without being filed under that Act ceases to have effect one year after the coming into force of this Act unless it is deposited under this Act, but if the regulation is deposited later it becomes effective on the date of its deposit.

Schedule A

The following are regulations:

Schedule B

The following are not regulations:

APPENDIX CC

(See page 35)

UNIFORM REGULATIONS ACT

Interpretation

1. In this act,
   (a) "local authority" means (each province define);
   (b) "minister" means the member of the Executive Council charged by order of the Lieutenant Governor in Council with the administration of this Act;
   (c) "registrar" means the Registrar of Regulations;
   (d) "regulation" means a regulation, as defined in the *Interpretation Act*,
      (i) of a legislative nature,
      (ii) made after the coming into force of this Act under a power in an Act where the word ("regulation")* is used in conferring the power, or
      (iii) identified in Schedule A,
      but does not include,
      (iv) a bylaw or resolution of a corporation or local authority, unless the bylaw or resolution is identified in Schedule A,
      (v) that part of a regulation, as defined in the *Interpretation Act*, that is adopted or incorporated by reference, or
      (vi) a regulation, as defined in the *Interpretation Act*, identified in Schedule B.

*Jurisdictions may wish to use another word or phrase.

Registrar

2. The (minister) may appoint a person as Registrar of Regulations.

Effect only if deposited

3. (1) A regulation has no effect unless it or a copy of it is deposited with the registrar.

(2) The registrar shall make regulations deposited with him available for inspection at his office during regular office hours.

Effect when deposited

4. A regulation or part of a regulation comes into force on the date of its deposit unless
   (a) a later date is specified in the regulation, or
   (b) an earlier date is specified in the regulation, and the Act under which the regulation is made authorizes the regulation to come into force on the earlier date

Publication within one month

5. The registrar shall publish in the Gazette each regulation deposited with him.

Consequence of non-publication

6. A regulation that is not published in the Gazette is ineffective against a person unless he has had actual notice of the regulation.

Exemption from publication

7. (1) The (minister) may by regulation exempt a regulation from publication in the Gazette if he considers that

(a) it is or will be available to persons who are likely to be affected by it, and

(b) it is of a length to render publication in the Gazette impractical or unduly expensive.

Exemption of maps, etc.

(2) Where a regulation includes a map, illustration, plan, diagram, photograph, graph, table or any other similar document or thing, the (minister) may by regulation exempt that part of the regulation from publication.

Notice of exemption

(3) The (minister) shall include in a regulation made under this section a notice indicating where and when the unpublished regulation or part of the regulation may be inspected.

Non-application of section 6

8. After publication of a regulation made under section 7, section 6 does not apply to the regulation or part of the regulation that is exempted from publication.

Proof of deposit

9. A certificate that purports to be signed by the registrar to the effect that a regulation was deposited with the registrar on a specified date is evidence that it was deposited on the date specified.

Regulations

10. The Lieutenant Governor in Council may make regulations

(a) prescribing the form, numbering and arrangement of regulations,

(b) prescribing fees for copies of regulations provided by the registrar,

(c) providing for the consolidation, revision and re-publication of regulations,

(d) adding to Schedule A, and
(e) deleting from Schedule B.

Transition

11. A regulation as defined in this Act that would under the former Act be effective without being filed under that Act ceases to have effect one year after the coming into force of this Act unless

(a) it was filed under the former Act,
(b) it was exempted from filing under the former Act, or
(c) it is deposited under this Act,

but if the regulation is deposited after the end of that year it becomes effective on the date of its deposit.

Schedule A
1(d)(iii)

Schedule B
1(d)(vi)

Note — Jurisdictions may wish to substitute "Lieutenant Governor in Council" for "Minister".

APPENDIX DD

(See page 35)

UNIFORM TRANSBOUNDARY POLLUTION RECIPROCAL ACCESS ACT

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

MEETING IN ITS NINETY-FIRST YEAR, MONTEREY, CALIFORNIA

JULY 30 - AUGUST 6, 1982

UNIFORM TRANSBOUNDARY POLLUTION RECIPROCAL ACCESS ACT

With Prefatory Note and Comments

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UNIFORM TRANSBOUNDARY POLLUTION RECIPROCAL ACCESS ACT

PREFATORY NOTE

In 1979, the Canadian Bar Association and the American Bar Association each adopted a report prepared by a joint committee of the two Associations on "The Settlement of International Disputes Between Canada and the United States of America." One of the areas on which the report focussed was the equalization of rights and remedies of citizens in Canada and the U.S.A. affected by pollution emanating from the other jurisdiction. The Committee drafted enacting legislation on this topic, in treaty form, basing its draft upon the Organization for Economic Co-operation and Development's Recommendation for the Implementation of A Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution.

The ABA-CBA Committee's Report suggested that a liaison group ought to be established between the National Conference of Commissioners on Uniform State Laws and the Uniform Law Conference of Canada, the two organizations in their respective countries dedicated to the promotion of uniformity of law. The group was to have a mandate covering review, co-ordination and drafting of legislation on topics of mutual interest. The liaison committee was established in 1979 and has held five meetings in Canada and the U.S. to discuss the drafting of a Transboundary Pollution Reciprocal Access Act.

Pollution is no respecter of artificial lines on maps. Damage can occur in one jurisdiction from pollution produced in another jurisdiction. Reported caselaw reveals many examples of this phenomenon. A discharge of waste into a river in one jurisdiction can damage property in states downstream: see for example *Missouri* v. *Illinois*, 200 US 496. Smoke can blow from one adjoining city to another: see for example *Michie et. al.* v. *Great Lakes Steel Division, National Steel Corporation*, 495 F.2d 213 (6th Circ.), cert. den. 419 US 997. Metal smelters can generate pollutants that can travel into other jurisdictions: see for example *The Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1905 (1941) or *Ducktown Sulphur, Copper and Iron Company* v. *Barnes et. al.*, 60 S.W. 593 (Tenn. 1900). At times, pollution from a number of jurisdictions may contribute to the damage: see for example *Ohio* v. *Wyandotte Chemicals Corp. et. al.*, 401 U.S. 493 (1971). Pollution crossing boundaries may take a variety of forms ranging from simple

escapes between adjacent land to immensely difficult problems, such as acid rain and nuclear emissions whose very complexity renders them as intractable to coherent policy or legislative treatment as they are to definitive scientific analysis and explanation.

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 may reduce the significance of this rule because valid in personam jurisdiction over the defendant can be obtained under a long-arm statute and judgment rendered, and that judgment is entitled to full faith and credit within the United States. But even if a long-arm statute is involved, two suits may be necessary—first to obtain the judgment and a second in another state to enforce the judgment. Furthermore, whether equitable relief will be granted by the second state, is open to question.

If there is no long-arm statute, or it is not as extensive 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 that 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. A fish hatchery there is severely damaged. Assuming that a person in New York, who is damaged can establish causation, can he bring suit?

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, N.Y.C.P.L.R. §302, 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:"

Albert v. *Fraser Companies Ltd.,* [1937] 1 D.L.R. 39,45, 11 M.P.R. 209, 216 [N.B.C.A.]. 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 in the United States. 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) (Cir. Ct. D. Va. 1811).

This Act is designed to eliminate this particular problem with respect to pollution. While conceptually the Act could be extended to deal with all unintentional tort actions affecting property, the committee's mandate, and indeed the earlier work of the Joint ABA/CBA Committee and the OECD, was limited to inter-jurisdictional pollution problems and the difficulties which the local action rule presented in preventing non-resident litigants getting inside the courthouse door. 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.

While the joint committee of the ABA/CBA had recommended that the local action rule should be changed by way of bilateral treaty, the joint uniform law committee took a different position. Because of the difficulty of achieving such a treaty and the desirability of providing local rather than federal solutions to problems, the Committee

decided at an early stage that changing the rules could be done more effectively and expeditiously through the enactment of uniform state and provincial laws than through a treaty.

The basic thrust of reform is to change the local action rules and provide equal access for the victims of transfrontier pollution to the courts of the jurisdiction where the contaminant originated. As Stephen 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": Stephen McCaffrey, "Transboundary Pollution Injuries: Jurisdictional Considerations in Private Litigation Between Canada and the United States" (1973), 3 Cal. W. Int. L.J. 191.

The proposed statute also provides that in the event suit is brought in the province or state where the alleged pollution actually originated, the local law of that state (as distinguished from its whole law including conflict of laws rule) applies. 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, and he has the opportunity to defend the action on the basis of the substantive and procedural rules with which he is most familiar. Everyone would prefer to be sued in the courts of his own jurisdiction.

Of course, if service of process is achieved in the state where the pollution actually caused harm, then the state would be free, within constitutional restraints, to apply either its own law or the law of the state where the alleged pollution originated. That situation is not changed by this Act. Although total uniformity and predictability are not established, an injured party will know when choosing a particular court what law will be applied. The Act is designed to fill a procedural gap, and is not intended to alter substantive laws or standards, or change the ground rules under which individuals, corporations, or governments conduct their affairs.

UNIFORM TRANSBOUNDARY POLLUTION RECIPROCAL ACCESS ACT

SECTION 1. *Definitions*

As used in this [Act]:

(1) "Reciprocating jurisdiction" means a state of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States of America, or a province or territory of Canada, which has enacted this [Act] or provides substantially equivalent access to its courts and administrative agencies.

(2) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government in its private or public capacity, governmental subdivision or agency, or any other legal entity.

COMMENT

The definition of "jurisdiction" performs a number of functions. It enables the Act to be applied in interstate and inter-provincial pollution actions, in addition to actions involving pollution spanning the U.S./Canada International boundary. The Act does not apply to U.S./Mexico transboundary pollution or to pollution from any other nation.

The reciprocal aspect of the Act is achieved by Section 1(1) providing that both the "polluting" and "polluted" jurisdictions must have "enacted this Act" or "provide substantially equivalent access to the courts and administrative agencies." The requirement of reciprocity applies to access only. This threshhold test is applied by the courts in the U.S. on a case by case basis, it being regarded as a question of fact whether a particular jurisdiction is a reciprocating jurisdiction. In Canada, by contrast, it is usual for reciprocity to be formally recognized through provincial governments designating by regulation lists of reciprocating states, where they are satisfied that reciprocity exists. Section 7(b) is designed to permit this procedure to be followed. For jurisdictions, such as Minnesota by judicial decision and New York by statute, that already provide access to their courts for non-resident pollution victims by abandoning the rule of *Livingston* v. *Jefferson*, the words "provide substantially equivalent access" ensure that these jurisdictions will be recognized as reciprocating jurisdictions without the need to enact formally the Act. Finally, it should be noted that Section 1(1) concludes with the words "access to

the courts and administrative agencies," a specific reference to the fact that it is contemplated that the Act will also apply to proceedings before tribunals.

The definition of "person" derives from standard wording used in many uniform acts adopted by the National Conference of Commissioners on Uniform State Laws. It is designed to include all natural and legal persons within the ambit of the Act. In addition, if the Attorney General, or another public official of the state or province where the injury occurred, is able to bring action with respect to environmental injury, then the Attorney General of another state harmed by the "originating state's" pollution should also be able to bring an action in the "originating state."

SECTION 2. *Forum.*

An action or other proceeding for injury or threatened injury to property or person in a reciprocating jurisdiction caused by pollution originating, or that may originate, in this jurisdiction may be brought in this jurisdiction.

COMMENT

Together with Section 3, this section forms the main operative provision of the statute. Section 2 provides access to the courts in one jurisdiction for pollution victims in another jurisdiction. A question may arise whether the pollution originated in a particular jurisdiction, and this is a question of fact which the courts must decide. It should be noted that the statute is not restricted in its scope to civil trials; it also extends to other proceedings before tribunals concerning environmental injury or threatened injury.

As used in this Act "injury" includes wrongful death and "property" includes both real and personal property.

It has been suggested that enactment of this proposed statute would cause a rush of litigants from out of state to the state where the alleged pollution originated or where it may originate. So far as is known states with very extensive long-arm statutes have not experienced this rush of litigation, and this suggests that it would not happen if a new, and less convenient forum was made available to them.

SECTION 3. *Right to Relief.*

A person who suffers or is threatened with injury to his person or property in a reciprocating jurisdiction caused by pollution originating, or that may originate, in this jurisdiction has the same rights to relief

with respect to the injury or threatened injury, and may enforce those rights in this jurisdiction, as if the injury or threatened injury occurred in this jurisdiction.

COMMENT

This section equates the rights of an extra-jurisdictional pollution victim to those of a victim who is a resident of the jurisdiction. It is designed to ensure 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 for injury or threatened injury in the case of pollution caused locally. Whether or not particular pollution did originate in a jurisdiction is a question of fact for the court to decide.

SECTION 4. *Applicable Law.*

The law to be applied in an action or other proceeding brought pursuant to this [Act] including what constitutes "pollution", is the law of this jurisdiction excluding choice of law rules.

COMMENT

This section provides that the law of this jurisdiction will apply in actions brought under the Act. In the United States this includes federal, state and local law where applicable. The applicable law is defined to exclude choice of law rules so as to avoid the whole problem or *renvoi.* While the committee initially considered drafting a definition of "pollution" for inclusion in this Act, it was decided that it would be exceptionally difficult to draft such a definition without it degenerating into an unmanageable "shopping list" and difficult to harmonize such a list in practice with the definitions provided in the substantive law of a particular jurisdiction. Jurisdictions differ markedly in their treatment of matters such as smells, radiation, vibration, and visual pollution. To avoid difficulties in interpretation, it was decided that what constitutes pollution would be decided by reference to the law of an enacting jurisdiction; such a definition might encompass both statutory definitions as well as any applicable judicial decisions under the common law. It is contemplated that it would include but not be limited to discharges and emissions into land, air or water.

SECTION 5. *Equality of Rights.*

This [Act] does not accord a person injured or threatened with injury in another jurisdiction any rights superior to those that the person would have if injured or threatened with injury in this jurisdiction.

COMMENT

See Comment following section 6.

SECTION 6. *Right Additional to Those Now Existing.*

The right provided in this [Act] is in addition to and not in derogation of any other rights.

COMMENT

These two sections clarify that the Act is designed to put non-residents on the same footing as residents with respect to access to courts and tribunals in claims involving transboundary pollution. The rights of non-residents under this Act will be no higher than those of residents, and they must accept any procedural or substantive limitations that may happen to exist under the applicable law of the originating jurisdiction. Section 6 ensures that the right of access provided by the Act is supplementary and is not intended in any way to diminish existing rights under the laws of this jurisdiction, which may be enforced independently of this Act.

ALTERNATIVE FOR THE U.S.A.

[SECTION 7. *Waiver of Sovereign Immunity.*

The defense of sovereign immunity is applicable in any action or other proceeding brought pursuant to this [Act] only to the extent that it would apply to a person injured or threatened with injury in this jurisdiction.]

ALTERNATIVE FOR CANADA

[SECTION 7(a). [*Act*] *Binds Crown.*

This [Act] binds the Crown in right of (Province or Territory) only to the extent that the Crown would be bound if the person were injured or threatened with injury in this jurisdiction.]

SECTION 7(b) FOR CANADA ONLY

[Section 7(b). *Regulations.*

Notwithstanding section 1(a), the Lieutenant Governor in Council may by regulation declare a jurisdiction to be a reciprocating jurisdiction for the purposes of this Act.

COMMENT

The two alternative drafts, the one applicable in Canada, and the other in the United States, are provided to deal with the question of

sovereign or crown immunity, and to ensure that extra-jurisdictional actions will be treated under the doctrines in the same way as actions brought by residents.

Section 7(b) establishes a procedure for Canadian provinces and territories to develop and maintain an authoritative list of reciprocating jurisdictions. In developing such a list, regard might be had to this lists of enacting jurisdictions contained in the Annual Handbook of the National Conference of Commissioners on Uniform State Laws.

SECTION 8. *Uniformity of Application and Construction.*

This [Act] shall be applied and construed to carry out its general purpose to make uniform the law with respect to the subject of this [Act] among jurisdictions enacting it.

SECTION 9. *Title.*

This [Act] may be cited as the Uniform Transboundary Pollution Reciprocal Access Act.

SECTION 10. *Time of Taking Effect.*

This [Act] takes effect on _____.

COMMENT

[To be included in the Canadian version only.

NOTE: This Act is the cooperative effort of the National Conference of commissioners on Uniform Law Conference of Canada. Sections containing equivalents of sections 8, 9 and 10 are included in the Uniform or Model Acts of the National Conference in the United States by reason of Rule 22 of its Drafting Rules. Each jurisdiction will want to examine these sections for enactment in the light of its own requirements and the drafting conventions of the Canadian Conference.

APPENDIX EE

(See page 35)

AMENDMENTS TO THE UNIFORM VITAL STATISTICS ACT

REPORT OF THE BRITISH COLUMBIA COMMISSIONERS

It was resolved at last year's annual meeting of the Uniform Law Section that the Uniform Vital Statistics Act be referred for a report to the 1982 Annual Meeting.

A number of major problems in the administration of the Provincial Vital Statistics Acts have been identified in the course of a study conducted by Mr. W. D. Burrowes, of Victoria, B.C., for the Vital Statistics Council and Statistics Canada. These problems have led to divergent statutory provisions among the provinces.

Enclosed is a list of the items which have been identified for consideration with explanatory notes on each item.

It is recommended that the British Columbia and Canada Commissioners be asked to submit to the 1983 conference proposed amendments in both English and French to the Uniform Vital Statistics Act, including provisions dealing with new subjects such as artificial insemination. It is further recommended that the draft amendments be prepared in consultation with the Vital Statistics Council and Statistics Canada in order to ensure their ready acceptance by all jurisdictions concerned.

Respectfully submitted.

Uniform Vital Statistics Act

List of items for consideration

I. Registration of birth—surname of child of married women.

II. Registration of birth—surname of child of unmarried women.

III. Registration of adoptions and related procedures.

IV. Stillbirths: (1) definition of stillbirths
(2) coroner's responsibility in case of unnatural stillbirth.

V. Registration of death—provisions relating to security.

VI. Events on high seas and in aircraft.

VII. Transsexualism—sex changes on birth registration.

VIII. Artificial insemination and surrogate motherhood.

IX. Issue of certificates and photocopies.

X. Administration — position of the Provincial Registrars.

XI. Change of Name Act — surnames of women.

I. *Registration of birth — naming of child of married women*

Following the draft "Uniform Vital Statistics Act" of 1949, most provincial Acts relating to registration of vital events have in the past two decades included the provision that the child of a married woman must (subject to one special circumstance) be registered *in the surname of the husband.* This provision made obligatory a practice which previously prevailed, with few exceptions, by convention only.

In the past few years however, Ontario, Quebec and Alberta have modified this requirement, in response to demands for greater recognition of women's rights in connection with family names. These provinces have made provision that a child may, instead, be registered in a surname composed of the husband's surname hyphenated or combined with that of the wife. In Ontario, but not in Quebec or Alberta, the mother's surname must *follow* the father's in a hyphenated or combined name. Quebec has further provided that the child may alternatively be given the *mother's* surname. These provisions in all three provinces extend mutatis mutandis to the naming of children born out of wedlock, that is, if the father acknowledges paternity.

One or two other provinces have proposed similar amendments.

Unfortunately these unilateral departures from the Uniform Act in three provinces have created a fragmented system of assigning family names in Canada as a whole. Not only is it impracticable to ensure that all members of a family residing, for example, in Ontario, will be given the same surname, but parents who gave a non-patronymic surname to their first child in Ontario, Quebec or Alberta, would be compelled to give a different (patronymic) surname to the next child if they happened to move to one of the remaining seven provinces in the interim. If the recent course of unilateral initiatives continues, there may well be ten different sets of provisions for dealing with this important subject.

The Canadian Charter of Rights and Freedoms will no doubt provide new impetus to female objections to the current legislation

in the remaining provinces on grounds of sex discrimination. Canada's ratification of the U.N. Convention on Elimination of all forms of Discrimination against Women has also focussed attention on the relevant sections of the Vital Statistics and Change of Name Acts.

In 1976-76 The Ontario Law Reform Commission issued two valuable reports entitled "A Woman's Name" and "A Report on Changes of Name" which thoroughly explore the issues involved, in light of the circumstances and the climate of opinion in the province of Ontario. The exclusively provincial frame of reference of both reports is however a shortcoming to anyone concerned with the subject at the national level. In view of the self evident importance of the subject of surnames, it seems important that the whole question of surnames, which affects both Vital Statistics and certain provisions of Change of Name legislation, be reviewed in depth as early as possible within a national frame of reference.

An important subsidiary question for consideration is whether a married woman, legally separated from her husband, should be allowed to register her child in *her own surname* (like an unmarried woman). Many separated women revolt strongly against both options available, in most provinces, namely to register the child in the separated husband's surname or in the natural father's. Yet the fact remains that she is legally married. Does the long-term separated category deserve a special provision in the matter of naming of children? In Quebec separated women do not have this problem, since *all* married women now have the choice of surnaming children in their maiden surnames.

II. *Registration of birth — surname of child of unmarried women*

Consideration of this item would follow naturally and inevitably from the study of the provisions relating to *married* women.

Until a few years ago, *all* provincial Vital Statistics Acts, following the Model Act of 1949, provide that the child of an unmarried woman must be registered *in the mother's surname* as the general rule. Upon joint request of the mother and father, the child could be given the natural father's surname.

The Provinces which have recently extended the option for naming the children of married women, have made the same options available to unmarried mothers (widowed or divorced).

This has relieved the pressure of complaints in those provinces, and consequently increased the complaints in the remaining provinces.

Even if the general direction of the Quebec, Ontario, Alberta amendments relating to married mothers is corroborated by further study, the question arises whether the arguments for approving combined surnames apply with equal force in the case of birth to unmarried mothers.

The general requirement to register the birth in the mother's surname also involves the unsettled and sometimes vexed question as to what is the true legal surname of a widowed or divorced woman who has subsequently reverted to her maiden surname, but who has never formally changed it through the Divorce Courts or by application under the Change of Name Act. This question involves consideration of the status of assumed names, in the light of provincial Change of Names Acts. (see Item XI.).

III. *Registration of Adoptions and related procedures*

The 1949 Model Act provides in Section 10(2) that the original birth registration be retained on file and *annotated* with particulars of the adoption and any name changes involved. This procedure is simple, and preserves the integrity of the original record in accord with good principles of vital statistics, but unfortunately it reveals the entire pre and post-adoption particulars on one document, the birth registration. This situation involves undue security risks today in view of persistent "parent finders", and the new risk of wholesale leakage through computerised files. Because of these risks, five provinces (Nova Scotia, New Brunswick, Ontario, Manitoba and Alberta) have changed to a procedure whereby the original birth registration is *substituted* by another.

In view of the sensitive nature of this subject, an objective study of the problem by the Uniform Law Conference is desirable, and might lead to a better solution which would appeal to all provinces.

Also, there is some question whether the current provisions for exchange of adoption information with other countries (Model Act Sec. 10(3) and 10(4)) should be limited so that Registrars are not required by statute to transmit such information to "unfriendly" nations.

IV. *Stillbirths*

(1) *Definition of Stillbirths*

In the Model Act of 1949, the *gestation period* is the sole criterion of stage of development (28 weeks in 1949)

The Vital Statistics Council from 1963 proposed that a *weight* criterion should be included in view of inexactness of estimates of gestation period. It appears highly desirable that all provinces should have this addition inserted. B.C. and Nova Scotia still have no weight criterion.

(2) *Coroner's responsibility in case of non-natural cause of stillbirth*

The Model Act in Section 9 makes it clear that all requirements governing death registrations apply also to stillbirths, mutatis mutandis, including the coroner's involvement in appropriate cases. Yet stillbirths from unnatural causes have been registered without the coroner's involvement because they are not "persons" in terms of the Coroner's Acts. A special case of unnatural stillbirths has arisen since 1969 in the form of legally induced abortions past 20 week's gestation, which by definition are stillbirths. These events in general remain entirely unregistered, not being reported to the Registrar, and accordingly do not come to the Coroner's attention. As guardians of the integrity and completeness of accounting for human life, and because of the resulting breach of legislation which they administer, Registrars are properly concerned with this ill-defined situation.

V. *Registration of death*

(1) *Movement of Bodies*

In the Model Act, no movement of bodies is permitted outside of the Registration district, without issue of a burial permit by the District Registrar, "*except temporarily for the purpose of preparing the body for burial*". (Section 18). The practical significance of this exception is not entirely clear, and has caused a loophole in this provision. In addition, the control of movement of bodies between *provinces and countries*, is not generally adequate, in the opinion of Dr. Butt, who has given thorough study to this subject, and has introduced special safeguards in Alberta.

(2) *Definition of Coroner's cases*

In the Model Act, the Coroner is required to be involved if any of four listed circumstances apply (Section 14(5)). A major concern regarding the definition of coroner's cases is the manner of dealing with *borderline and uncertain situations.* In the absence of any clear statement in the Vital Statistics Acts, physicians tend to use their discretion to ignore the coroner in cases where a conscientious coroner would wish to be involved. In Alberta the chief Medical Examiner has focussed attention on this problem, and has instigated the requirements that *all* death registrations be forwarded to his office for review.

(3) *Burial permits*

The Model Act provides that before burial or cremation, a burial permit issued by the District Registrar is required in *all* cases of death, (Section 18). Some provinces have Cemetery Act provisions which permit burial on the basis of a coroner's warrant only. The Gosse Report on the Provisions of Funeral and Cemetery Services in B.C. to the Ministry of Consumer and Corporate Affairs, supported the Model Act provision, and has made other recommendations relative to handling dead bodies, which affect Vital Statistics legislation.

VI. *Events on High Seas and in Aircraft*

The Model Act, followed by all provinces except Alberta and Newfoundland, provides for registration by the Registrar upon receipt of information from Ministry of Transport re birth or death on board a ship registered with the Province. *There is no similar provision for aircraft events.*

This provision regarding events on the High Seas is important as being the only stated exception to the essential vital statistics principle that only events which occur within the respective jurisdictions are registered. Uncertainty in this regard will lead to duplication of registrations and/or controversy between jurisdictions.

If the principle of registration by jurisdiction of *occurrence* is broken in this case, it may spread to other cases. Since there is no existing international forum for settling the question, we in Canada should at least have clear rules for our own system. It may be that the section could be reworded to provide some flexibility in special cases of hardship, and specific provisions should be made for registering events in aircraft.

VII. *Transsexualism — sex change on birth registration*

The Model Act made no provision, as it was not relevant in 1949.

Provisions for *change of designated sex*, upon documentation of physical changes, now exist in all but three provinces.

The legislation was forced upon Registrars, and is abnormal in terms of vital statistics principles. Assuming the present provisions stand, some outstanding questions are: (1) should *married* people be allowed to have the desired sex change, following transsexual surgery? (2) Is a Registrar free to marry a person who to his knowledge had a sex change following transsexual surgery?

An objective re-examination of the existing provincial legislation by the conference would be most welcome and appropriate.

VIII. *Artificial Insemination and surrogate motherhood*

The Advisory Committee on Storage and Utilisation of Human Sperm in a recent report recommends that babies born to a married woman as a result of artificial insemination should be registered as legitimate. As the number of cases is becoming significant and as sensitive moral and ethical questions are involved, the need for early consideration of the subject is apparent, including the implications for Vital Statistics.

Attention has been focussed on this subject by the recent case involving a married woman who became a surrogate mother for a married couple.

IX. *Issue of Certificates and Photocopies*

The Model Act Section 31, provides for:

(1) Who can receive certificates.
(2) Content of birth certificates.
(3) Restrictions on photocopies

Since the issue of various kinds of certificates is a prime function of Registrars, it is not surprising that the maintenance of these restrictions had caused a strain on their operations, and various relaxations have occurred in the *application* of these restrictions, and in the legal provisions themselves. Furthermore, circumstances today make some of the restrictions less necessary than in 1949, and probably *untenable* for long in the face of "freedom of information" legislation and the Canadian Charter of Rights and Freedoms.

In the circumstances, a general review of the whole underlying philosophy behind the 1949 Model Act provisions seems appropriate at this stage, and urgent.

X. *Administration—position of the Provincial Registrars*

Provides that Lieutenant Governor in Council may appoint a Director of Vital Statistics "who shall (*under the control of the Minister*) be responsible for administration of the Act" etc.

Most Registrars are attached to monolithic Health Ministries, whose Minister is preoccupied with Medicare, Hospital care, and Public Health problems which are politically demanding.

Consequently the function of Vital Statistics and the demands of the Registrar have become a minor and oversighted Ministerial responsibility. Yet the fundamental social significance of the Registrar's duties require that he have direct and regular access to the Minister for policy discussions. Even where such access is statutorily provided,* it has tended to fall by the wayside and has to be insistently pursued. If the Canadian Vital Statistics system is to maintain and improve its standards and its due influence within the Public Service, it must be somehow ensured that Registrars do not become lost in preoccupied Ministries of Health. To this end it is important that the provisions relating to the Director's appointment should more specifically indicate his/her direct responsibility to the Minister concerned.

XI. *Change of Name Act—surnames of women*

This subject is outside of the present scope of Vital Statistics legislation, but is involved in the formulation of legislative policy relative to names.

Provincial Change of Name Acts originally followed a uniform pattern in restricting surname changes of women after marriage, and in effect confining them to the use of their husband's surname.

In recent years several provinces have modified this pattern by permitting married women to retain their maiden surnames at the time of marriage, or to resume that surname after marriage.

This question has been aired several times in Vital Statistics Council meetings. The apparently sex-discriminatory provisions in provincial Change of Name Acts arise mainly from the fact that the legislation was drawn up in the context of the common-law assumption that families are named in terms of the hereditary patronymic system with which we are familiar. Hence for example it was natural, on this view, to exclude a woman's change of

*as in British Columbia

surname upon marriage from the requirements of the Act,—it was taken for granted.

Similarly, whenever a married man changed his surname, it was provided in Change of Name Acts that his wife and childrens' surnames were thereby changed accordingly, without a separate application. He simply had to list them in order to have the changes formally recorded on the change of name certificate.

The passing of change of name statutes in the forties, mainly stimulated by war conditions, threw into relief the "discriminatory" nature of the prevailing system, which had prevailed by convention since the 16th century, without statutory enforcement. Hence, when woman's rights began to be stressed in the sixties and seventies, protagonists of equality pounced upon the statutory "discriminations" against women as if they were newly-hatched chauvinistic schemes.

Because it was clearly implicit (though not explicit) in provincial Change of Name Acts that a woman acquires her husband's surname by marriage, these Acts did in fact have the probably unintentional effect of obfuscating, if not entirely eliminating, her traditional freedom to *use* her maiden surname for various purposes or even to use it exclusively. The recent amendments have made it possible for married women to retain or resume their maiden surnames, but the resulting situation is in general, less flexible and less elegant than the original, and warrants early reconsideration. Dr. Gilbert Kennedy has been strongly critical of Change of Name Acts.

* * *

APPENDIX FF

(See page 35)

AMENDMENTS TO THE UNIFORM WILLS ACT: THE FORMALITIES OF WILL-MAKING AND GIFTS TO WITNESSES

Report of the Manitoba and British Columbia Commissioners

Background

This matter was added to the agenda of the Conference in 1980, as new business, under the title "Substantial Compliance in Execution of Wills". It was agreed that Manitoba present a Report to the 1981 Annual Meeting.

At the 1981 meeting of the Conference the Manitoba Commissioners submitted their Report. That Report pointed out that since the 1980 meeting the Manitoba Law Reform Commission had published a final Report on this topic. The Report to the Conference set out two proposals for amendment of the *Uniform Wills Act*.

At the 1981 meeting the British Columbia delegates advised the Conference that the British Columbia Law Reform Commission would be publishing its final Report on the Making and Revocation of Wills very shortly and that this Report would also make recommendations on this topic. The British Columbia delegates suggested that consideration of this matter be deferred until 1982 when that Report would be available. It was agreed that this was an appropriate course of action and it was further resolved that the Manitoba and British Columbia Commissioners present a joint Report to the Conference in 1982. This document is the joint Report contemplated by that resolution.

PART I

THE MAKING, ALTERATION AND REVOCATION OF WILLS

A. Present Position

With the exception of the special provisions relating to holograph wills, those parts of the *Uniform Wills Act* which prescribe the formalities for the making, alteration or revocation of a will basically reflect English legislation of the 19th Century, in particular, the *Wills Act, 1837.*

The Report of the Manitoba Law Reform Commission (hereafter "Manitoba Report") and the British Columbia Law Reform Commission Report (hereafter "B.C. Report") will be referred to throughout.

Briefly stated, in order that a document constitute a valid will it must be in writing and signed by the testator, and that signature must be made or acknowledged in the presence of two or more witnesses, present at the same time, who then subscribe the will in the presence of the testator. Revocation may be achieved by the making of a later inconsistent will, a written revocation that complies with the provisions for will making, or by burning, tearing or destruction with the intention of revoking it. The Act also contemplates that alterations be made with the same degree of formality as the original will.

The description set out above is highly simplified and the Act does provide for some relaxation of the formal requirements in particular cases. For example, there is some flexibility as to the placement of signatures; the requirements are relaxed for members of the Armed Forces; and a will may be signed by another person in the presence of and by the direction of the testator. In addition, the *Uniform Wills Act* permits holograph wills. Section 6 provides:

> 6. A testator may make a valid will wholly by his own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

B. The Formalities of Will-Making

1. Difficulties of the Existing Law

Provisions substantially identical to those in the *Uniform Wills Act* have been in force in most common law provinces for many years; similar provisions exist in England, Australia and most of the United States. There is therefore a substantial accumulation of case law, which suggests that adherence to the prescribed formalities is a frequent source of difficulty, with the result that testamentary documents which undoubtedly embody the wishes of a testator are rendered ineffective through want of formality.

Against the "hard cases" that may arise from the imposition of formal requirements must be balanced the benefits which may flow from those formalities. This involves a consideration of the social purposes served by formal requirements. Both the B.C. and Manitoba Reports agree that four basic functions are performed by the formalities. They may be described as "protective", "evidentiary", "cautionary" and "channelling". Both Reports agree that formalities do serve a useful purpose.

A significant relaxation of the formalities is found in the provision which permits holograph wills. Both Reports, however, point out that such a provision creates problems and uncertainties of its own.

Both the B.C. and the Manitoba Commissioners agree that a further relaxation of the formal requirements of the *Uniform Wills Act* in relation to will-making is desirable. What follows is a consideration of the possible approaches to such relaxation.

2. Recommended Reform—A Dispensing Power

The Reports of both the B.C. and the Manitoba Law Reform Commissions recommended what for brevity can be referred to as "a dispensing power". This would leave the present formalities intact but give the Probate Court an overriding power to allow a testamentary document to probate provided certain conditions are met.

Recommendation 1

That the formal requirements of the *Uniform Wills Act* be relaxed by giving the court an overriding power to dispense with formal compliance provided certain specified conditions are met.

3. Conditions for the Exercise of a Dispensing Power

If the "dispensing power" is adopted as the appropriate vehicle for reform, one must then consider the circumstances in which the power may be exercised. In other words, what preconditions or threshold requirements must be met before a Probate Court can validly exercise the power and admit a document to probate which does not comply with the formal requirements? Some possibilities are set out below.

(a) Writing

Should it be necessary that the testator's wishes be recorded in a writing? Both the Manitoba and B.C. Commissioners agree that writing should be specified as a threshold requirement.

(b) Signature

Assuming the testator's wishes are to be embodied in writing, must it be signed by him or on his behalf as a precondition of the exercise of the dispensing power? It is on this issue that the Manitoba and B.C. Commissioners diverge significantly: The British Columbia recommendations would impose a signature requirement but the Manitoba recommendations would not.

The position of the B.C. Commissioners is that it is generally accepted by the public that affixing one's signature to a document is the usual means of approving and adopting its contents. They believe that insisting on signature as a threshold requirement is a valuable safeguard which will help prevent injustice, confusion and the unnecessary expense of litigation far more often than it will cause hardship. The following is an excerpt from the B.C. Report:

> We acknowledge the formality has some purpose. Here the requirement of a signature performs a valuable channelling and evidentiary function. The point of introducing a dispensing power is to temper the arbitrariness with which rules respecting formalities have been applied, and not to deny the general desirability of formalities. We have simply concluded that the harm which would ensue from relaxing this particular requirement outweighs any benefit which would accrue from its abolition. . . . [I]n our view adopting the requirement of a signature recognizes that in some respect formalities serve a valuable function. It restricts the application of a dispensing power to documents which are most likely to represent attempts to communicate a settled testamentary intent.

The Manitoba Commissioners, on the other hand, believe that circumstances can be envisioned where strict application of a threshold requirement of signature could defeat the testator's intention. For example, a testator may simply forget to sign, be too ill to sign, or die before he has been able to sign. Such cases would be rare, but the Manitoba Commissioners are of the view that the dispensing power should not be restricted any more than is absolutely necessary. They stress that the burden on anyone propounding an unsigned document as a will would, of course, be an extremely onerous one. They believe that the problem is one more properly handled by judicial discretion than by a formal legislative requirement.

(c) Burden of Proof

It is possible to place a high burden of proof on the person propounding a technically defective will. This has been done in remedial legislation enacted in South Australia which provides that the court must be "satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will".

The Manitoba Commissioners and the B.C. Commissioners reject this high onus, both perferring the civil litigation standard which can be expressed by use of the words "proven to the satisfaction of the court".

Recommendation 2

Alternate 1

A precondition of the exercise of a dispensing power should be that the following requirements are met:

(1) The testator's wishes are embodied in a written document;

(2) The document has been signed by or on behalf of the testator;

(3) The necessary testamentary intent is proven to the satisfaction of the court.

Alternate 2

A precondition of the exercise of a dispensing power should be that the following requirements are met:

(1) The testator's wishes are embodied in a written document;

(2) The necessary testamentary intent is proven to the satisfaction of the court.

The recommendation set out above refers to the "necessary testamentary intent". There are different ways of capturing this notion, as indicated by the different language employed in the B.C. and Manitoba Reports. They are set out as follows:

(a) "[the will] embodies the testamentary intent of the deceased person" (Manitoba)

(b) "the testator knew and approved of the contents of the will and intended it to have testamentary effect" (B.C.)

The Manitoba Commissioners believe that the B.C. proposal places a heavier burden on the propounder of a will than is appropriate. They acknowledge that a will cannot be a valid one if the testator did not know and approve of the contents; however, the case law in this area indicates that the propounder of a will is required to prove affirmatively knowledge and approval of contents only if there are "suspicious circumstances" surrounding the making of the will. The fact that a will does not meet all of the formal requirements would, under the B.C. proposal, be considered in itself as a suspicious circumstance. The Manitoba Commissioners believe that this may be appropriate in cases of a very informally prepared will, but would be inappropriate where the only informality in a will is a small technical one.

Recommendtion 3

Alternate 1

The form of words to be adopted to express a testamentary intent which must be established for the exercise of the dispensing power should be:

"the will embodies the testamentary intent of the deceased person".

Alternate 2

The form of words to be adopted to express a testamentary intent

which must be established for the exercise of the dispensing power should be:

> "the testator knew and approved of the contents of the will and intended it to have testamentary effect".

4. Holograph Wills

If the *Uniform Wills Act* were amended by the addition of a dispensing power, it is arguable that the need for any separate provisions concerning holograph wills would vanish. The B.C. Commissioners are of the view that the only advantage to retaining a separate category of holograph wills is that in particular provinces the probate procedure for them is more streamlined than would be the case if they were processed through the dispensing power. The B.C. Report, at 85, points out that even without specific provision in a *Wills Act* it would be possible to devise subordinate legislation in the form of special probate rules that would retain these procedural advantages.

The Manitoba Commissioners, on the other hand, believe that section 6 of the *Uniform Wills Act*, which permits holograph wills, should be retained. They agree that the introduction of holograph wills into a province which does not now permit them would be unnecessary once a dispensing power were in place. However, given the long history of such wills in some of the provinces, Manitoba included, they are in favour of retaining the right to make such wills which is now provided for in the *Uniform Wills Act*.

Recommendation 4

Alternate 1

If a dispensing power is introduced, section 6 of the *Uniform Wills Act*, which permits holograph wills, should not be retained.

Alternate 2

If a dispensing power is introduced, section 6 of the *Uniform Wills Act*, which permits holograph wills, should be retained.

C. The Formalities of Amendment and Revocation

1. Amendment

The case for a relaxation of the formal requirments in relation to will making through the availability of a dispensing power applies with equal force to alteration and revocation.

Both the B.C. and Manitoba Commissioners are of the view that rather than try to cross-reference the dispensing power to the alteration provision, it would be preferable to amend the alteration

provision by adding a separate, but parallel, dispensing power. Both the B.C. and Manitoba Commissioners also agree that a parallel dispensing power should not require writing. They disagree on the issue of signature with respect to alterations, as they did with respect to the making of the will; the B.C. Commissioners would impose a requirement of signature for alterations but the Manitoba Commissioners would not.

Recommendation 5

The dispensing power enacted with respect to the making of wills should also extend to alterations to wills. This should be effected by amending the section of the Act concerning amendments to provide a separate but parallel dispensing power with respect to alterations.

Recommendation 6

Alternate 1

A precondition of the exercise of the dispensing power with respect to alterations should be that the alteration is signed by the testator.

Alternate 2

There should be no precondition of signature to the exercise of the dispensing power with respect to alterations.

2. Revocation

The notion of extending the theory of a dispensing power to revocation raises different considerations. The difficulty is that the list of physical acts that might be directed at a will with the intention of revoking it is relatively confined. The list includes acts of destruction such as burning and tearing, but stops short of a number of other acts such as writing "cancelled" on the face of the will with the intent to revoke it.

The major problem with an amendment is whether there should be any threshold requirement. Writing and signature are obviously inappropriate, as even under the current law the destruction of a will is effective to revoke it. It is possible to frame a dispensing power with respect to revocation which turns solely on the intention to revoke. The Manitoba Commissioners favour this view and are opposed to the introduction of threshold requirements; they prefer the issue to be dealt with by judicial discretion rather than a legislative requirement. The B.C. Commissioners, however, suggest a threshold requirement of a "dealing with the will", i.e. that an act of the testator to revoke be sufficient only if the consequence of the act is apparent on the face of the will.

Recommendation 7

Alternate 1

That the dispensing power should extend to the revocation of a will, and should turn solely on whether or not the court is satisfied that the testator intended to revoke his will.

Alternate 2

That the dispensing power should extend to the revocation of a will and that the dispensing power be subject to a threshold requirement of an act by the testator the consequence of which is apparent on the face of the will.

PART II

GIFTS TO WITNESSES

Section 12 of the *Uniform Wills Act* voids a gift made to an attesting witness or to the spouse of such a witness. Legislation to that effect has been a feature of the *Wills Act* of the common law provinces for many years.

Remedial legislation has recently been enacted in Ontario. Section 12(3) of *"The Succession Law Reform Act"* provides:

> Notwithstanding anything in this section, where a surrogate court is satisfied that neither the person so attesting or signing for the testator nor the spouse exercised any improper or undue influence upon the testator, the devise, bequest or other disposition or appointment is not void.

Legislation comparable to that provision was endorsed in both the Manitoba Report and the B.C. Report.

Recommendation 8

That a provision comparable to section 12(3) of the *Succession Law Reform Act* of Ontario be added to the *Uniform Wills Act.*

The Manitoba Commissioners
The B.C. Commissioners

APPENDIX GG

(See page 36)

REPORT ON WORKERS' COMPENSATION and CONTRIBUTION under the CONTRIBUTORY NEGLIGENCE ACT PRINCE EDWARD ISLAND COMMISSIONERS

1. *History*

This report has been prepared pursuant to the resolution of the conference that appears in the 1981 Proceedings, page 35:

> 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.

2. *Issues*

The policy issues addressed by this report arise under the following circumstances:

(1) The wrongful conduct of A and B together causes injury to C.
(2) B is not protected by the Workers' Compensation Act.
(3) The Workers' Compensation Act protects A from being sued by C.

This report does not challenge the proposition that the Workers' Compensation Acts should protect employers, etc. from action by injured workers.

Two issues arise:

(1) If A is partially responsible for C's injury should C be able to recover from B in legal proceedings,
    (a) all his assessed common law damages, *or only*
    (b) the portion of his damages that remains after deducting A's share of the responsibility for the injury.
(2) If 1(b) is accepted, then in such circumstances
    (a) should C be required to account for the reduced recovery before receiving compensation or,
    (b) should C be entitled to receive compensation without accounting for the reduced recovery as long as the combination of compensation and reduced recovery does not equal the full common law damages?

Issue No. 1

Should C be able to recover from B in legal proceedings

(a) all his damages, *or only*

(b) the portion of his damages that remains after deducting A's share of the responsibility for the injury.

In the absence of legislation, C can recover *all* his assessed damages from B (subject to any reduction by reason of C's contributory fault).[1]

Option (b) has been instituted in differing word formulae in the following jurisdictions:

1. *Workers Compensation Act*, R.S.B.C. 1979, Cap. 437, section 10(7)
2. *The Workers' Compensation Act 1981*, Stats. Alta. 1981, Cap. W-16, section 18(2)
3. *The Workers Compensation Act*, R.S. Man. 1970, Cap. W200 section 7(8)
4. *Workmen's Compensation Act*, R.S. Ont. 1980, Cap. 539, section (8)11
5. *Workmen's Compensation Act*, R.S.N.B. 1973, Cap. W-13, section 10(12).

The argument in favour of option 1(b) is as follows:

(1) It is unfair to require one wrongdoer, B, to pay for all of the injury caused to a worker, C, when the law prohibits B from recovering contribution from the other wrongdoer, A.

(2) The unfairness to B is made greater if the reason for prohibiting B from recovering contribution from A is that C is given a statutory right to claim for compensation in lieu of his claim against A and the prohibition against B suing A flows from that statutory right.

As against option (b), there is the argument that C, as the injured person, should receive the full common law damages that the law determines is the fair recompense for his injury. Any statutory reduction in B's liability should be to prevent hardship to B not to transfer the hardship to C.

The P.E.I. Commissioners agree that the unfairness to B should be eliminated and recommend that the *Uniform Contributory Fault Act* be amended for this purpose if the adverse effect on C's right to the better recovery can be mitigated.

Issue No. 2

If 1(b) is accepted, then in such circumstances

(a) should C be required to account for the reduced recovery before receiving compensation, or
(b) should C be entitled to receive compensation without accounting for the reduced recovery as long as the combination of compensation and reduced recovery does not equal the full common law damages?

Under the law of all provinces except possibly Alberta, C, an injured worker, can in principle keep the fruits of an action brought by him or in his name against B only to the extent that they exceed the amount of compensation which he receives under the *Workers' Compensation Act*; in effect, he is restricted to the greater of the compensation and the recovery.

In those provinces that reduce C's common law damages, C is restricted to the greater of the compensation and the *reduced* common law recovery.

In the Quebec case of *Plaisance v. Brink's Express Co. of Canada et al.*,[2] the facts were as follows:

(1) A and B were equally responsible for C's injury but only A was protected by the Workmen's Compensation Act.
(2) C received slightly more than $25,000 in compensation benefits.
(3) C sued B and obtained judgment for the difference between the compensation received and the assessed common law damages of $50,000.
(4) A, the City of Montreal, which appears to have been the compensation paying authority, was subrogated to C's claim, but its subrogated right was postponed to C's claim against B.
(5) C received in dollar terms at least the amount of his full common law damages as assessed.

On these same facts, in any other Canadian jurisdiction, the workers' compensation authority would receive the entire proceeds of the judgment against B, and C would receive nothing from the judgment. (Alberta may be a partial exception). Unless the compensation scheme provided $50,000 in benefits, the amount by which the quantum of common law damages exceeds compensation entitlement is lost to the worker.

Under the Quebec law[3] as indicated by the *Plaisance* case, the risk associated with the reduction in the common law damages would be borne by the compensation scheme; elsewhere it would be borne by the worker. For example, in Quebec, if the compensation paid to C had

a value of $10,000 and C could recover $25,000 from B as statutorily reduced total damages of $50,000, C would at least receive the $25,000 plus the $10,000 which is better than the $25,000 maximum which he would receive in other jurisdictions.

The common requirement (except in Alberta and Saskatchewan) that the worker elect between suit and compensation has produced confusion. It is submitted that the object of the election is merely to limit the worker to the greater of the two possible recoveries. Where a person protected by the compensation legislation is not causally responsible, the worker at the least is able to receive all of his common law damages as assessed. Where a person protected by the compensation scheme is causally responsible, but the liability of those responsible is *not* reduced, the worker is able to receive all of his common law damages. However, where a person protected by the compensation legislation is causally responsible and the liability of those not protected is correspondingly reduced, there is a very real likelihood that the worker will not receive in dollars an amount at least equal to his full common law damages.

The P.E.I. Commissioners recommend that when damages recoverable from B are reduced because of option 1(b), the worker's compensation benefits should not be affected as long as the combination of reduced damages and compensation payments does not exceed the full assessed common law damages. The recommendation seeks to have C recover in dollar terms the same amount whether A is or is not responsible for the injury for the purpose of common law damages.

The conference does not have a *Uniform Workers Compensation Act* nor even a uniform Act that relates solely to the regulation of the worker's concurrent common law right and compensation right. The legislation that does exist in several jurisdictions on the subject is not uniform.

It is understood that the Workers' Compensation Boards have their own national organization and that uniform legislation that relates to workers compensation is one of their goals. If the Conference accepts the Quebec result in principle, a recommendation to that effect could be directed by the Conference to the Boards' national organization and, by the participating jurisdictions, to their local Board.

Footnotes

1. This is the generally accepted position. Institute of Law Research and Reform (Alberta), Report No. 17, *Small Projects*, Appendix A (1975) outlines some conflicting views
2. (1975) 9 N.R. 11 (S.C.C.)

3. *Workmen's Compensation Act*, R.S.Q. 1964, Cap. 159, section 8 as enacted by Stats. Que. 1978, Cap. 57, section 8 in the following words:

> "Malgre toute disposition contraire et malgre le fait d'avoir obtenu une prestation en vertu de l'option visee dans le paragraphe 1 de l'article 7, le beneficiarie peut, avant que la prescription edictee a l'article 2262 du Code Civil ne soit acquise, reclamer, en vertu du travailleur, la somme additionnelle requis pour former, avec l'indemnite qui lui est due en vertu de la presente loi, un montant equivalent a la perte reelement subie".

A similar Alberta provision is a more limited context is the *Motor Vehicles Accident Claims Act* R.S. Alta. 1980, Cap. M-21, section 16:

16. In the discretion of the Minister and notwithstanding anything in the Workers' Compensation Act, if compensation or an award is made by the Workers' Compensation Board of any province or territory of Canada in respect of bodily injury or death of any person as a result of an automobile accident, and there is a larger judgment or settlement for the same injury or death made in respect of a claim under this Act, then
    (a) there shall be paid out of the Fund the difference between the compensation or award made by the Workers' Compensation Board and the judgment or settlement under this Act, and
    (b) the Workers' Compensation Board is not subrogated to the rights of the claimant, his legal personal representatives or his dependants and has no right whatsoever in respect of the sum paid pursuant to clause (a).

APPENDIX HH

(See page 36)

UNIFORM SALE OF GOODS ACT

PART I

INTERPRETATION

1 In this Act, Definitions

(a) "action" includes a counterclaim;

(b) "agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances, including those circumstances described in section 26;

(c) "bill of lading" means a document that:

(i) evidences the receipt of goods for shipment by any mode of carriage; and

(ii) is issued by a person engaged in the business of transporting or forwarding goods;

(d) "buyer" means a person who buys or contracts to buy goods;

(e) "buyer in the ordinary course of business" means a person who, in good faith and without knowledge that a sale to him is in violation of the ownership rights or security interest of a third party in the goods, buys in the 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;

(f) "C.F" or "C. & F." means that the price for the goods includes cost and freight to the named destination;

(g) "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;

(h) "commercial unit" means a unit of goods that by commercial usage is a single whole for the purpose of sale, the division of which would materially impair its character or value on the market or its use, and includes a single article, a set of articles or a quantity treated in use or in its market as a single whole;

(i) "conforming", with respect to a contract of sale, means that goods or conduct, including any part of performance, are in accordance with the obligations under the contract;

(j) "contract" means the legal obligations that result from the parties' agreement as affected by this Act and any other applicable rules of law;

(k) "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

(i) 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,

(ii) a contract in which the seller retains a security interest in the goods, and

(iii) a contract to which section 43(2) applies;

(l) "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;

(m) "cure" means

(i) tender or delivery of any missing part or quantity of the goods;

(ii) tender or delivery of other conforming goods or documents or, in the case of a sale of identified goods, goods that differ in no material respect from those goods,

(iii) the remedying of any other non-conformity in performance,

(iv) a money allowance or other form of adjustment of the terms of the contract, or

(v) any appropriate combination of subclauses (i) to (iv);

(n) "delivery" means the voluntary transfer of possession;

(o) "document of title" means a writing that

(i) purports to be issued by or addressed to a bailee,

(ii) purports to cover goods in a bailee's possession that are identified or that are 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;

(p) "express warranty" means

(i) a term of the contract,

(ii) a statement, in any form or language made by a seller before or at the time of the contract, including a promise or a representation of fact or opinion, whether or not made fraudulently, negligently or with contractual intention, that 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,

(iii) a statement described in section 42(5), (6), or (7), or

(iv) an express warranty described in section 42(9);

(q) "F.A.S." means free alongside;

(r) "fault" means a wrongful act, omission or breach;

(s) "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 the ordinary course to make or collect a

payment due or claimed under the contract of sale, whether or not documents of title accompany the bill;

(t) "F.O.B." means free on board;

(u) "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;

(v) "good faith" means honesty in fact and observance of reasonable standards of fair dealing;

(w) "goods means tangible personal property and includes the unborn young of animals and anything attached to or forming part of real property as provided in section 9 or 10, but does not include things in action or the money in which the price is to be paid;

(x) "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);

(y) "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;

(z) "lease" includes hire;

(aa) "merchant" means a person

(i) who deals in goods of the kind involved in a transaction,

(ii) who, by his occupation, holds himself out as having skill or knowledge appropriate to the practices or goods involved in a transaction, or

(iii) to whom the skill or knowledge described in subclause (ii) may be attributed by his employment of an agent or broker or other intermediary who, by his occupation, holds himself out as having that skill or knowledge;

(bb) "notify" means to take any steps that are reasonably required to give information to the person to be notified so that the information

(i) comes to his attention, or

(ii) is directed to him at the place of business or residence through which the contract or offer was made or at any other place that is held out by him as the place for receipt of such information;

(cc) "prescribed" means prescribed in the regulations;

(dd) "receipt", with respect to goods, means taking physical possession of them;

(ee) "security interest" means an interest in personal property, including goods, that secures payment or performance of an obligation;

(ff) "seller" means a person who sells or contracts to sell goods;

(gg) "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;

(hh) "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;

(ii) "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;

(jj) "usage of trade" means any reasonable practice or method of dealing that is observed in a place, vocation or trade with sufficient regularity to justify an expectation that it will be observed with respect to a specific transaction;

(kk) "value" means a consideration sufficient to support a contract;

(ll) "writing" includes any mechanical, electronic or other form of recording of information.

Interpretation re contracts of sale

2 In this Act, in relation to a contract of sale,

(a) termination of a contract of sale 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;

(b) cancellation of a contract of sale 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 of the contract;

(c) where any action is required to be taken within a reasonable time, any time that is not manifestly unreasonable may be fixed by agreement;

(d) what is a reasonable time for taking any action depends on the nature or purpose of the action and all the other surrounding circumstances;

(e) 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.

PART II

SCOPE AND APPLICATION OF ACT

(Application of Act) Application of Act

3(1) This Act applies to every contract of sale and other transaction governed by this Act that is entered into on or after the day on which this Act comes into force.

What constitutes a contract of sale

(2) 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"

(3) If relevant in principle and appropriate in the circumstances, any of the provisions of this Act 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.

[NOTE: Subsection (3) is an optional provision.]

Non-application of Act

4 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.

Crown bound

5 The Crown is bound by this Act.

Passing of interest in goods

6 Any interest in goods that are the subject of a contract of sale may only pass if the goods are both existing and identified.

(Future goods) Meaning of "future goods"

7(1) Goods that are not both existing and identified are future goods.

Purported sale of future goods

(2) A purported present sale of future goods or of any interest in future goods operates as a contract to sell.

Fungible goods

8 An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined, and any proportion of such a bulk or any quantity of the bulk 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.

Sale of minerals, etc

9 A contract of sale of minerals, hydrocarbons or other substances to be extracted from real property is a contract of sale of goods if they are to be severed by the seller, but, until severed, a purported present sale of any such substances that is not effective as a transfer of an interest in real property operates as a contract to sell.

(Sale of fixtures, etc) Sale of fixtures, etc

10(1) A contract of sale of growing crops, timber, fixtures or other things attached to real property that are intended to be severed from the real property under the contract is a contract of 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 real property at the time of contracting and severance is to take place at a later time;

and the parties can by identification effect a present sale before severance.

Rights of third parties

(2) The rights of a buyer under subsection (1) are subject to

(a) 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

(b) the interest of

(i) a subsequent purchaser or mortagagee for value of an interest in the real property,

(ii) a creditor with a lien on the real property subsequently obtained as a result of judicial process, or

(iii) a creditor with a prior registered encumbrance on the real property in respect of subsequent advances;

if the subsequent purchase or mortgage was made, the lien was obtained or the subsequent advance under the prior encumbrance was made or contracted for without actual notice of the contract of sale.

Registration

(3) For the purposes of subsection (2), a notice in the prescribed form registered in the appropriate land registry office (*or* land titles office) constitutes actual notice of the buyer's rights under the contract of sale.

(Price) Price, how payable

11(1) The price under a contract of sale 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 and a buyer of the goods that he is to receive.

Price includes real property

(3) Where the price is payable in whole or in part by the transfer of an interest in real property, this Act applies to the transfer of the goods and to the seller's obligations in connection with the transfer of goods, but this Act does not apply to the transfer of the interest in real property or to the buyer's obligations in connection with the transfer of the interest in real property.

PART III

GENERAL

Waiver, variation of provisions of Act

12 Except as otherwise provided in this Act, any provision of this Act may be varied or waived by agreement of the parties.

Standards of performance of obligations

13 The obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be waived by the parties, but the parties may agree on the standards by which the performance of those obligations are to be measured if the standards agreed on are not manifestly unreasonable.

Obligation of good faith

14 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.

Rights, etc., enforceable by action

15 Unless otherwise provided by this Act, where any right is conferred or any duty or liability is imposed by this Act, it may be enforced by an action.

General principles of law applicable

16 The principles of law and equity, including the law merchant, the law relating to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake and other validating or invalidating rules of law supplement this Act and continue to apply.

Parol evidence rule not applicable

17 No rule of law or equity respecting parol or extrinsic evidence and no provision in a writing prevents or limits 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.

Limitation on effect of Act

18 Nothing in this Act affects

(a) the rights of a holder in due course of a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada),

(b) the rights of a holder of a document of title under an Act of the Parliament of Canada; or

(c) an Act of the Province other than this Act.

PART IV

FORMATION, ADJUSTMENT AND ASSIGNMENT OF CONTRACTS

(Capacity to buy and sell) Definition

19(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) Where necessaries are sold and delivered to a minor or to a person who is incompetent to contract, he shall pay a reasonable price for the necessaries.

(Making of contract of sale) Making of contract of sale

20(1) A contract of sale may be made in any manner sufficient to show agreement.

Moment of making may be undetermined

(2) A contract of sale may be found even though the specific time 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 that do not materially alter the terms of the offer constitutes an acceptance and, in that 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 that materially alter the terms of the offer.

(Conflicting terms) Conflicting terms

21(1) Subject to section 20(3), this section applies where, under the law of contract, the parties are considered to have concluded a contract of sale because 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 court

(2) When a court concludes that, having regard to all of

the circumstances, a party, by his conduct in receiving or shipping the goods or otherwise, has not in fact assented to the conflicting terms of the other party and that it would be unreasonable to hold him to those terms, the court may

(a) ignore the conflicting terms and apply this Act as if the contract contained no such terms,

(b) substitute any terms that, in the court's opinion, the parties would have adopted had their attention been drawn to the conflicting terms, or that, in the court's opinion, represent a reasonable compromise of the conflicting terms, or

(c) find that no contract was concluded between the parties and make any consequential order that the court considers 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

(a) the usage of trade in the vocation or trade in which the parties are engaged,

(b) the parties' course of dealings and course of performance, and

(c) the extent to which a 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.

(Firm offers) Firm offers

22(1) An offer by a merchant to buy or sell goods that 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 exceeding three months.

Form supplied by offeree

(2) An assurance of irrevocability described in subsection (1) in a form supplied by the offeree is not binding unless the assurance is separately signed by the offeror.

Revoked offers

23 Where an offer to buy or sell goods that the offeror should reasonably expect to induce substantial action or

forbearance by the offeree before acceptance induces such action or forebearance and is revoked, the offeror is bound to compensate the offeree, and in any such 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, to the recovery of any losses incurred as a result of reliance on the offer or generally, to the extent necessary to avoid injustice.

(Forms of acceptance) Forms of acceptance

24(1) Unless otherwise indicated by the language or the circumstances

(a) an offer to make a contract of sale is to 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 is to 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 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, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance and binds the offeree to render complete performance.

Duty to notify of acceptance by performance

(3) If an offeree who accepts by performance knew or should reasonably have known 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.

(Sales by auction)

Sales by auction; lots

25(1) Where goods are sold by auction in lots, each lot is the subject of a separate contract of sale.

When auction sale complete

(2) A sale by auction is complete when the auctioneer announces completion of the sale in any customary manner.

Reserve bids

(3) A sale by auction is with reserve, unless the goods are put up for sale without reserve.

Auctions with reserve

(4) In a sale by auction with reserve, the auctioneer may withdraw the goods at any time until he announces completion of the sale.

Auctions without reserve

(5) In a sale by auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn, unless no bid is made within a reasonable time.

Bidder's right to retract bid

(6) In a sale by 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.

Seller's right to bid

(7) A right to bid at a sale by auction may be reserved expressly by or on behalf of the seller.

Wrongful bid by seller

(8) Where a seller has not reserved the right to bid at a sale by auction, the seller or his agent shall not bid and the auctioneer shall not knowingly take any bid from the seller or his agent.

Consequences

(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.

(Course of dealing and usage of trade)

Course of dealing and usage of trade

26(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 with respect to that part of the performance.

Course of performance

(3) Where an agreement involves repeated occasions for performance by a party with knowledge of the nature of the performance and opportunity for objection to it by the other party, any course of performance accepted or acquiesced in without objection is relevant in determining the meaning of the agreement.

Relationship to express terms

(4) The express terms of the agreement, any course of performance and any course of dealing and usage of trade are, whenever reasonable, to be construed as consistent with each other but, when such a construction is unreasonable,

(a) the express terms of the agreement govern the course of performance, the course of dealing and usage of trade,

(b) the course of performance governs the course of dealing and the usage of trade, and

(c) the course of dealing governs the usage of trade.

Course of performance as waiver or variation

(5) Subject to section 27, course of performance is relevant to show a waiver or variation of any term inconsistent with the course of performance.

Variation or resicssion of contract of sale

27 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 the 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.

Delegation of performance

28 A party to a contract of sale may perform his duty under it through a delegate, unless the other party has a substantial interest in having the 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.

(Assignments) Assignment of rights

29(1) 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 opportunity to obtain return performance.

Assignment of right to damages etc

(2) 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 notwithstanding contrary agreement, but then only in its entirety, whether or not the assignment occurs before or after performance of the assignor's obligation.

Construction of term prohibiting assignment

(3) Unless the circumstances indicate the contrary, a term prohibiting assignment of a contract is to be construed as barring only the delegation to the assignee of the assignor's duty of performance.

Assignments in general terms

(4) 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 under the contract, and

(b) unless the language or the circumstances indicate the contrary, a delegation of performance of the duties of the assignor, other than the duty to pay damages for a breach arising before the assignment.

Acceptance of assignment by assignee

(5) The acceptance by the assignee of an assignment under subsection (4) constitutes a promise by him to perform the duties of the assignor that is enforceable by either the assignor or the other party to the original contract.

Grounds for insecurity

(6) A party to a contract other than an assignor may treat an assignment that delegates performance as creating reasonable grounds for insecurity for the purposes of section 87.

PART V

GENERAL OBLIGATIONS AND CONSTRUCTION OF CONTRACT

(General obligations of parties) General obligations of parties

30(1) The seller shall deliver the goods and the buyer shall 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 any steps and complying with any formalities that are required under

the contract and any relevant law to enable payment to be made or to ensure that it will be made.

(Unconscionable contracts) Unconscionable contracts or parts of contracts

31(1) If the court finds the whole or any part of a contract of sale to have been unconscionable at the time it was made, the court may

(a) refuse to enforce the whole contract or rescind it on any terms that may be just,

(b) enforce part of the contract without the unconscionable part, or

(c) limit the application of any unconscionable part or revise or alter the contract so as to avoid any unconscionable result.

Factors to be considered in determining unconscionability

(2) In determining whether the whole or any part of a contract of sale is unconscionable, the court may consider, among other factors

(a) the commercial setting, purpose and effect of the contract and the manner in which it is made,

(b) the relative bargaining strength of the seller and the buyer, 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 under the transaction,

(d) whether the party seeking relief knew or should reasonably have known of the existence and extent of the 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 a party has taken advantage of the inability of the other party to reasonably protect his interests because of his physical or mental infirmity,

illiteracy, inability to understand the language of the agreement, lack of education, lack of business knowledge or experience, financial distress or other 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 a party, when entering into the contract, that the other party will be substantially deprived of the 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) This section applies notwithstanding any agreement or waiver to the contrary.

Application of section

(5) For the purposes of this section, a contract of sale includes any agreement to vary or rescind the contract under section 27 and any assurance of irrevocability under section 22.

(Open price) Open price

32(1) An agreement may constitute a contract of sale even though the price is not settled and, in that 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 another person and they fail to agree or the other 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 another person or agency and it is not so set or recorded.

Where party to fix price

(2) Where the price is to be fixed by a party, he shall do so in good faith.

Where there is failure to fix a price

(3) Where the price left to be fixed otherwise than by agreement of the parties fails to be fixed through the fault of a party, the other party may treat the contract as cancelled or may himself fix a reasonable price.

Where no price fixed

(4) 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 that case, the buyer shall return any goods already received or, if he is unable to do so, shall pay their reasonable value at the time of delivery, and the seller shall return any part of the price paid on account.

Output and requirements agreements

33 Where an agreement measures the quantity of goods to be bought or sold by the output of the seller or the requirements of the buyer, the quantity required is any reasonable quantity that 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

34 Unless the circumstances show a contrary intention, 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 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.

Delivery in single lot or in lots

35 All goods called for by a contract of sale are required to 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 and where the price can be apportioned, payment may be demanded for each lot.

Place for delivery of goods

36 The place for delivery of goods under a contract of sale is governed by the following:

(a) if the seller has only one place of business, it is the place for delivery;

(b) if the seller has two or more places of business only one of which is known to the buyer, that place of business is the place for delivery;

(c) if the seller has two or more places of business and the buyer knows two or more of them, the place of business at or from which the seller conducted the negotiations for the sale is the place for delivery;

(d) if the seller has no place of business, his residence is the place for delivery;

(e) if the seller has no place of business and two or

more residences only one of which is known to the buyer, that place of business is the place for delivery;

(f) if the seller has no place of business and two or more residences and the buyer knows two or more of them, the place of business at or from which the seller conducted the negotiations for the sale is the place for delivery;

(g) 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

37 Documents of title may be delivered through customary banking channels.

Action to be taken within reasonable time

38 Except where otherwise provided in this Act, any action that is required to be taken by either party under a contract of sale is required to be taken within a reasonable time.

(Termination of certain contracts) Successive performances

39(1) 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

(2) Except where a contract of sale described in subsection (1) terminates upon the happening of an agreed event, it may be terminated only if the terminating party gives the other party reasonable notification of the termination.

(Payment) When and where payment due

40(1) Payment is due at the time and place which the buyer is to receive the goods even though the place of shipment is the place of delivery

(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 their 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 receives the documents regardless of where the goods are received.

Goods shipped on credit

(4) Where the seller is required or authorized to ship the

goods on credit, the credit period commences at the time of shipment, the date of the invoice or the date of the dispatch of the invoice, whichever is latest.

(Open particulars of peformance) Open particulars of performance

41(1) An agreement that is sufficiently definite to be a contract of sale is not invalid by the fact only that it leaves particulars of performance to be specified by one of the parties, but any such specification is required to be within the limits set by commercial reasonableness.

Specifications re assortnment 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 relating to shipment are at the seller's option.

Effect of failure to co-operate

(3) Where a specification mentioned in subsection (2) would materially affect the other party's performance but is not seasonably made, or where a party's co-operation 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 from any resulting delay in his own performance, and

(b) subject to sections 88, 89 and 99, may proceed to perform in any reasonable manner.

(Express warranties) Qualified statements

42(1) 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.

Liability of seller for statements of others

(2) A seller is deemed to make any statements of a manufacturer, distributor or other person relating to the goods that by word or conduct he has adopted.

Liability of merchant sellers for statements of others

(3) Where the seller is a merchant, he is deemed to make any 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 a brochure, pamphlet or other writing associated with the goods, except where, in all the circumstances, it is apparent that the seller did not adopt the statement.

Seller's right to indemnity

(4) A seller liable under subsection (2) or (3) is entitled to be indemnified by the maker of the statement in respect of his liability.

Buyer's statements

(5) 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

(6) 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 to rely, on the statement.

Statements made to public

(7) A statement made by a seller or a person mentioned in subsection (6) to the public that has a tendency to induce reliance is an express warranty, whether or not the buyer actually relied on the statement.

Irrelevant factors

(8) The liability of the maker of a statement mentioned in subsection (6) is not affected by the fact that

(a) there is no privity of contract between him and the buyer, or

(b) the buyer gave no consideration in respect of the statement.

Sale by sample

(9) 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.

(Implied warranties re title) Implied warranty of title

43(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 insofar as it may be disturbed by a person entitled to the benefit of any security interest,

lien, encumbrance or industrial of intellectual property right that is 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 another person may have, there is an implied warranty by the seller

(a) that all defects in title and all security interests, 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,

(ii) in a case where the parties to the contract intend that the seller will transfer only such title as another person may have, the other person, or

(iii) any person claiming through or under the seller or the other 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.

Effective time of implied warranty

(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.

(Implied warranty of merchantable quality) Definition

44(1) In this section, "merchantable quality" means

(a) that the goods, whether new or used, are

(i) as fit for the one or more purposes for which goods of that kind are commonly bought or used,

(ii) of such quality, and in such condition, as is reasonable to expect having regard to any description applied to them, the price and all other relevant circumstances;

(b) without limiting the generality of clause (a), that the goods

(i) are goods that pass without objection in the trade under the contract description,

(ii) in the case of fungible goods, are of fair or average quality within the description,

(iii) within the variations permitted by the agreement, are of the same 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 for any length of time that is reasonable having regard to all the circumstances, and

(c) in the case of a 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 a 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) to defects specifically drawn to the buyer's attention before the contract was made,

(b) if the buyer examines the goods before the contract was made, to any defect that the examination should have revealed,

or

(b) in the case of a sale by a sample or model, to any defect that would have been apparent on reasonable examination of the sample or model.

(Implied warranty of fitness) Implied warranty of fitness

45(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 it is a purpose for which goods of that kind are commonly supplied, and that the goods will so remain for any length of time that 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.

Warranties re contracts of work and materials

46 Sections 42 to 45 apply, with all the necessary modifications, to goods supplied under a contract of work and materials.

Warranties re leases of goods

47 Sections 42, 43(1)(a) and (c), 44 and 45 apply, with all the necessary modifications, to a contract for the lease of goods.

(Exclusion and modification of warranties) Exclusion and modification of warranties

48(1) Subject to subsection (2) and section 17,

(a) a warranty implied under this Act,

(b) the effect of a statement that would otherwise amount to an express warranty, and

(c) the remedies for breach of a warranty,

may be modified, limited or excluded by the parties.

Unconscionable modification, etc.

(2) A modification, limitation or exclusion of a warranty or of a remedy for breach of a 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 creation of an express warranty and words or conduct tending to negate or limit a warranty are, where reasonable, to be construed as consistent with one another, but, to the extent that such a construction is unreasonable, the negation or limitation has no effect.

Application of section

(4) This section applies to an express warranty mentioned in sections (1)(p)(iii) and (iv)

(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 segment 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.

(Cumulative construction of warranties) Cumulation and conflict of warranties

49(1) Implied or express warranties are to be construed as consistent with one another and as cumulative, but, if that construction is unreasonable, the intention of the parties determines which warranty is dominant.

(2) For the purpose of subsection (1), the following presumptions apply:

(a) exact or technical specifications supersede an inconsistent sample or model or general language of description;

(b) a sample from an existing bulk supersedes inconsistent general language of description;

(c) express warranties supersede inconsistent implied warranties, other than any implied warranties of fitness for a particular purpose.

(Rights of subsequent buyers) Definitions

50(1) In this section

(a) "goods" includes goods that have been converted into, incorporated in or attached to other goods or that have been incoporated in or attached to real property;

(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 42, a prior seller's warranty, express or implied, and any remedies for breach of any such warranty, 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 the prior seller in an action against him for breach of the same warranty by the immediate buyer.

Subsequent buyer's damages

(4) The amount of damages recoverable by a subsequent buyer for breach of warranty by a prior seller is not to exceed the amount of damages that the immediate buyer could have recovered from the prior seller if the immediate buyer had suffered the injury sustained by the subsequent buyer.

(Obligations of parties re F O B. and F A S delivery terms) Obligations of parties re F.O B term

51(1) Where a contract contains the term F.O.B. at a named place, even though used only in connection with the stated price,

(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 69 and bear the expense and risk of putting them into the possession of the carrier and the buyer shall seasonably give any necessary instructions for making delivery.

(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 68,

(c) if the term is also F.O.B. vessel, car or other mode of carriage, the seller shall, in addition to his obligations under clause (a), at his own expense and risk, load the goods on board and the buyer shall seasonably give any necessary instructions for making delivery,

(d) if the term F.O.B. vessel, in addition to the obligations under clause (c), the buyer shall name the vessel and, in an appropriate case, the seller shall comply with section 54 on the form of bill of lading.

F A S. vessel

(2) Where a contract contains the term F.A.S. vessel at a named port, even though used only in connection with the stated price, 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,

and the buyer shall seasonably give any necessary instructions for making delivery.

Effect of failure to given instructions

(3) The seller may

(a) treat the failure to give any necessary instructions as a failure to co-operate under section 41, and

(b) at his option, move the goods in any reasonable manner preparatory to delivery or shipment.

Payment against tender of documents

(4) Where a contract contains the term F.O.B. vessel or F.A.S. vessel, 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.

Seller's obligations under C.I F term

52(1) Where a contract contains the term C.I.F. destination or its equivalent, even though used only in connection with the stated price and destination, the seller shall, at his own expense and risk,

(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 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 the 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 width any endorsement necessary to perfect the buyer's rights.

and 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.

C & F term

(2) Where a contract contains the term C. & F., C.F. or its equivalent, subsection (1), except clause (c), applies to the seller and the buyer.

Seller's duty under "net landed weights" and similar terms

(3) Where a contract contains the term C.I.F., C.F. or C. & F. and the price is based on or it is to be adjusted according to "net landed weights", "delivered weights", "out turn quantity" or "out turn quality" or a similar term, the seller shall reasonably estimate the price.

Settlement of price

(4) The price estimated under subsection (3) is the payment due on tender of the documents required by the contract and, after final adjustment of the price, a settlement is to be made with commercial promptness.

Risk of ordinary deterioration, etc

(5) A contract under subsection (3) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and similar risks in transportation, but the placing of that risk on the seller 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

(6) Where a contract under subsection (3) provides for payment on or after arrival of the goods, the seller shall, before payment, allow any preliminary inspection that is feasible, but, if the goods are lost, delivery of the documents and payment are due when the goods should have arrived.

(Delivery ex-ship) Delivery ex-ship

53(1) Where a contract contains a term for delivery of goods "ex-ship" or its equivalent, the term is not restricted to a particular ship and requires delivery from a ship that has reached a place at the named port of destination where goods of the kind are usually unloaded, and

(a) the seller shall discharge all liens arising out of the carriage and furnish the buyer with a direction that 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 are properly unloaded.

(Overseas shipments) Definition

54(1) In this section, "overseas", with respect to a shipment, means a shipment by water or by air or a contract contemplating such a shipment insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep-water commerce.

Overseas shipment; form of bill of lading

(2) Where a contract contemplates overseas shipment and contains the term C.I.F., C.F., 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

(3) Where, in a case described in subsection (2), 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 there is a stipulation requiring a full set of documents, the person tendering an incomplete set may require payment upon furnishing an adequate indemnity.

("No arrival, no sale" terms) "No arrival, no sale" terms

55 Where a contract contains the term "no arrival, no sale" or its equivalent,

(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 the fault of the seller, the goods suffer partial loss or arrive after the contract time, the buyer may proceed under section 92 as if there had been casualty to identified goods.

(Letter of Credit, etc) Definitions

56(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 abroad, of good international repute;

(b) "confirmed credit" means that a letter of credit or banker's credit also carries the direct obligation of an agency of the kind described 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 suspends payment obligation

(3) The delivery to the seller of a 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 to him.

Sale on approval

57 In a sale on approval,

(a) even though 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 on a trial basis 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 shall follow any reasonable instructions.

Sale or return

58 In a sale or return,

(a) the option to return extends to the whole or any commercial unit of the goods if their condition remains substantially unchanged, but the option is required to 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.

PART VI

TRANSFER OF TITLE AND GOOD FAITH BUYERS

Interpretation

59 In this part, other than in sections 60 and 62, "goods" includes a document of title.

(General rules re transfer of title)

60(1) Except as otherwise provided in this Act, the provisions of this Act relating 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 irrelevance of title

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 67, 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:

(a) title passes at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, notwithstanding the reservation of a security interest and that a document of title is to be delivered at a different time or place;

(b) where delivery is to be made without moving the goods, title passes

(i) where the seller is required to deliver a document of title, at the time when, and the place where, he delivers the document,

(ii) where the goods are held by a 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

(iii) in any other case, when the buyer receives 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.

(*Nemo dat* rule)

Nemo dat rule

61(1) 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 that of the seller.

Exceptions

(2) Subsection (1) does not apply where the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Idem

(3) Subsection (1) does not affect

(a) [*jurisdictions should insert a reference to The Factors Act*] or any other enactment enabling the apparent owner of goods to dispose of them as if he were the true owner of them, or

(b) the validity of any contract or 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

(4) Without limiting the generality of subsection (2), 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 entrusting 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

(5) If, in an action between the owner and the buyer pursuant to subsection (4), the court finds that both have failed to exercise reasonable care, the court may allocate the loss between them and make any other order with respect to the goods that it considers fair in the circumstances.

Registration re entrusted goods

(6) Subsection (4) does not apply to an entrusting of goods under a transaction governed by [*jurisdictions should insert a reference to 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.

(Voidable title) Effect of voidable title

62(1) A person with a voidable title has power to transfer a good title to a buyer who receives the goods in good faith,

for value and without notice of the defect in the title of the transferor, even though the owner has purported to avoid the sale to the transferor.

Extended meaning of voidable title

(2) A person with a voidable title has the power to transfer described in subsection (1), even though

(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 a character that renders the agreement void at common law.

(Transfer of goods in possession) Definitions

63(1) In this section,

(a) "prospective buyer" means a person who receives the goods

(i) under a sale on approval or under a contract of sale or return,

(ii) under an agreement containing an option to purchase, or

(iii) under a contract of sale that is subject to approval by another person or the fulfillment of any other condition;

(b) "prospective seller" means a person from whom a prospective buyer receives the goods.

Effect of possession of goods by seller, etc

(2) Where a seller, buyer or prospective buyer is in possession of goods, he has the capacity 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.

Application of subsection (2)

(3) Subsection (2) 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.

Non-application of subsection (2)

(4) Subsection (2) does not apply

(a) where, 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) where, 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.

(Transfer of entrusted goods) Definitions

64(1) In this section, "entrust" includes any delivery and any acquiescence in retention of possession regardless of

(a) any condition expressed between the parties to the delivery or acquiescence; and

(b) whether the procurement of the entrusting or the possessor's disposition of the goods has been fraudulent.

Entrustment of goods to merchant

(2) Where the possession of goods is entrusted 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.

Effect of avoidance of sale and revocation of consent

65 Unless goods are recovered by their owner before they have been delivered by the person in possession of them to a third party, sections 63 and 64 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.

Right of owner to recover goods

66(1) In this section, "buyer" includes a person claiming from or under a buyer.

(2) Where sections 61(3), 62, 63 and 64 apply, a court may,

where it considers it fair, make an order that the owner may recover the goods from the buyer if the owner repays the buyer the price or its equivlaent value in money that was paid by the buyer for the goods, together with any other reliance losses that the buyer would otherwise suffer.

PART VII

PERFORMANCE

(Insurable interests in goods) Buyer's special property and insurable interest

67(1) The buyer obtains a special property and an insurable interest in goods by the identification of existing goods as goods to which the contract refers, even though the goods so identified are non-conforming and he has a right to return or reject them.

Manner of identification

(2) An identification described in subsection (1) may 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) in the case of a contract for the sale of goods already existing and agreed upon by the parties as the goods to be delivered under the contract, when the contract is made,

(b) in the case of a contract for the sale of future goods other than those described in clause (c) or (d), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers,

(c) in the case of a contract for the sale of crops to be harvested within 12 months or the next normal harvest season after contracting, whichever is longer, when the crops are planted or otherwise become growing crops,

(d) in the case of a contract for the sale of unborn young to be born within 12 months after contracting, when the young are conceived.

Seller's insurable interest

(4) The seller retains an insurable interest in goods so long as he has title to or any security interest in the goods or the risk of loss of the goods.

Seller's right to substitute goods

(5) Where identification is by the seller alone, he may substitute other goods for those identified until

(a) the buyer's default or insolvency, or

(b) he has notified the buyer that the identification is final.

Other insurable interests not affected

(6) Nothing in this section impairs any insurable interest recognized under any other law of the province.

(Tender of delivery) Seller's tender of delivery

68(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.

Manner of tender

(2) The manner, time and place for tender are determined by the agreement and this Act, and in particular

(a) tender is required to be at a reasonable hour and, if it is of goods, they are to be kept available for the period reasonably necessary to enable the buyer to take possession, and

(b) the buyer is required to furnish facilities reasonably suited to the receipt of the goods.

Goods in possession of bailee

(3) Where goods are in the possession of a bailee and are to be delivered without being moved, tender requires

(a) that the seller tender to the buyer a negotiable document of title covering the goods or an acknowledgement by the bailee to the buyer of the buyer's right to possession of the goods, or

(b) that the seller tender to the buyer a non-negotiable document of title or a written direction to the bailee to deliver, unless the buyer seasonably objects.

Fixing of buyer's rights

(4) The receipt by the bailee of a notification of the buyer's rights fixes those rights as against the bailee and all other 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, he shall tender all documents in correct form, except as provided in section 54 with respect to bills of

lading in a set, and he may tender those documents through customary banking channels.

Dishonoured bill of exchange

(6) If a bill of exchange accompanying documents is dishonoured, it constitutes non-acceptance or rejection of the contract.

Shipment by seller

69 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, tender requires that the seller

(a) put the goods in the possession of any carrier and make any contract for their transportation that may be reasonable having regard to the nature of the goods and other circumstances of the case,

(b) obtain and promptly deliver or tender in correct 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.

(Seller's reservation of security interest)

70(1) Where the seller has identified goods to the contract by or before shipment

Seller s shipment under reservation

(a) the seller's 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 a negotiable bill of lading to the order of a financing agency or of the buyer indicates, in addition, the seller's expectation of transferring that interest to the person named, and

(c) the seller's procurement of a non-negotiable bill of lading to himself or his nominee reserves in him a security interest in the goods but, except in the case of a conditional delivery governed by section 72, 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 unreasonable contract for transportation contrary to section 69, but does not impair the rights given to the buyer

by shipment and identification of the goods to the contract or to the seller as holder of a negotiable document of title.

(Rights of financing agency) Rights of financing agency

71(1) By paying or purchasing for value a bill of exchange that relates to a shipment of goods, a financing agency 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.

Defective document regular on its face

(2) The right to reimbursement of a financing agency that 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 that was apparently regular on its face.

(Buyer s duty to accept and pay) Tender of delivery by seller

72(1) Tender of delivery is a condition of the buyer's duty to accept and pay for the goods.

Buyer's rights conditional

(2) Where the goods or documents of title are delivered to the buyer and payment is due and demanded, the buyer's rights as against the seller to retain or dispose of them is conditional upon his making the payment due.

(Right to cure) Seller's right to cure

73(1) 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

(2) Notwithstanding subsection (1), 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.

(3) Nothing in this section affects the buyer's right to recover damages arising out of a breach by the seller. Right to damages preserved

74(1) Subject to sections 57, 58 and 75, the following rules govern the transfer of risk of loss of the goods: (Transfer of risk of loss) Risk of loss, absence of breach

(a) where the contract requires or authorizes the seller to ship the goods by carrier,

(i) unless it requires 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 tendered there so as to enable the buyer to take delivery, and

(ii) if the seller is a merchant, the risk passes to the buyer when the goods are tendered to the buyer at the destination;

(b) 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

(i) on his receipt of a negotiable document of title covering them,

(ii) on acknowledgment by the bailee to the buyer of the buyer's right to possession of them, or

(iii) after his receipt of a non-negotiable document of title or other written direction to deliver as provided in section 70(5);

(c) where clauses (a) and (b) do not apply, the risk passes to the buyer on his receipt of the goods.

(2) Nothing in this section affects the rights, duties or liabilities of either the seller or the buyer as a bailee of the goods of the other party. Saving

75(1) Where a tender or delivery of goods fails to conform to the contract in a manner that gives a right of rejection of the goods, 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. (Effect of breach on transfer of risk of loss) Effect of breach on risk of loss

Where buyer in breach

(2) Subject to section 88(3), where the buyer of conforming goods already identified to the contract repudiates the contract or is responsible for any delay in delivery of the goods before risk of loss has passed to him, the risk of loss, to the extent of any deficiency in the seller's insurance coverage, rests on the buyer for a commercially reasonable time sufficient to enable him to insure the goods.

(Tender of payment) Tender of payment by buyer

76(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 acceptable 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.

(Payment before inspection) Payment before inspection

77(1) Where the contract requires payment before inspection, non-conformity of the goods does not excuse the buyer from making the payment unless

(a) the non-conformity appears without inspection, or

(b) the seller has acted fraudulently.

Buyer's rights unimpaired

(2) Payment pursuant to subsection (1) does not constitute an acceptance of goods and does not impair the buyer's right to inspect or any of his remedies.

(Inspection of goods) Buyer's right to inspect goods

78(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.

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) The buyer shall bear the expenses of inspection but may recover them from the seller if the goods do not conform and are rejected.

Inspection before payment

(4) Subject to section 52(5), (6) and (7), the buyer is not entitled to inspect the goods before payment of the price if 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 manner 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 manner fixed by the parties becomes impossible, rights of inspection are those provided in this section, unless the place or manner fixed was clearly intended as an indispensable condition, failure of which would avoid the contract.

When documents deliverable

79 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.

(Preserving evidence of goods in dispute), Preserving evidence of goods in dispute

80(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, that 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 or sample the goods, he may apply to a court [*jurisdiction should insert name of appropriate court*] and a judge of the court may, upon any terms as to notice and otherwise that he considers proper, make any order that he considers 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.

PART VIII

BREACH, REPUDIATION AND EXCUSE

(Improper delivery) Buyer's rights on improper delivery

81(1) Subject to section 90, 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 remainder.

Payment for accepted goods

(2) The buyer shall pay at the contract rate for any goods accepted by him.

(Acceptance of goods) Loss of right to reject on acceptance

82(1) They buyer loses the right to reject goods when he has accepted them.

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 should reasonably 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 nature 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.

Buyer's duties after rejection

83 Subject to sections 84 and 85,

(a) after rejection, use of the goods or other acts of ownership by the buyer do not nullify the rejection unless the seller has been materially prejudiced by them; and

(b) if, before rejection, the buyer has taken physical possession of goods on which he does not have a lien, he shall, 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 with regard to goods rightfully rejected.

(Merchant buyer's duties re rejected goods)
Merchant buyer's duties re rejected goods

84(1) Subject to any lien of the buyer arising under section 109, when the seller has no agent or place of business at the place 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 any instructions described in clause (a), to make reasonable efforts to sell them for the seller's account if they are perishable or are likely to decline rapidly in value.

Reasonable instructions and indeminification

(2) For the purpose of subsection (1), instructions are not reasonable if the buyer is not indemnified for expenses on demand.

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

(a) reasonable expenses of caring for and selling them; and

(b) if expenses do not include a selling commission, to the commission that is usual in the trade or, if there is none, to a reasonable sum not exceeding 10% of the gross proceeds.

Other rights not affected

(4) Where the parties do not agree as to the buyer's right to reject the goods, any instructions given to or actions taken by the buyer pursuant to subsection (1) do not affect any other rights of the parties.

Buyer to act in good faith

(5) In complying with this section, the buyer shall act in a commercially reasonable manner.

Effect of good faith conduct

(6) Any action by the buyer under this section taken in good faith is deemed not to be acceptance or conversion of the goods or to give rise to a claim in damages.

(Salvage of rejected goods)
Buyer's options as to salvage of rejected goods

85(1) Subject to section 84, with respect to perishable goods or goods that are likely 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 sections 84(3) to (6).

Salvage not acceptance, etc

(2) Any action by the buyer pursuant to subsection (1) taken in good faith is deemed not to be acceptance or conversion of the goods or to give rise to a claim in damages.

(Effect of unstated non-conformity)
Waiver of buyer's objections

86(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.

Payment against documents

(2) If the buyer makes payments 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.

Seller not prejudiced

(3) Subsections (1) and (2) do not apply where the seller has not been duly prejudiced by the buyer's failure to state a non-conformity or to reserve his rights.

(Adequate assurance of performance)
Interpretation

87(1) In this section, "adequate assurance of due performance" means any assurance that is commercially reasonable in the circumstances and may include the provision, whether by a party to the contract or another person, 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.

Right to adequate assurance of performance

(2) 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 that assurance, may, if reasonable, suspend any performance for which he has not already received the agreed return.

Acceptance of improper tender

(3) 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

(4) After receipt of a demand under subsection (3), failure to provide, within a reasonable time not exceeding 30 days, adequate assurance of due performance constitutes a repudiation of the contract.

Where adequate assurance is provided

(5) Upon adequate assurance being provided, the aggrieved party's obligation to perform is restored, but he is not liable for any delay resulting from his suspension of performance.

(Consequences of repudiation) Anticipatory repudiation

88(1) Where either party's refusal or inability to perform a future obligation constitutes a repudiation of the contract, the other party may

(a) resort to any remedy for breach, 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 notwithstanding his repudiation;

(b) suspend his own performance; or

(c) where the contract is repudiated by the buyer, proceed in accordance with section 101.

Where repudiating party suffers loss

(2) Where the repudiating party has suffered forseeable detriment or loss as a result of his reliance upon a notification or urging under section (1)(a), 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 any foreseeable detriment or loss that he has suffered before receipt of the notice mentioned in clause (a).

Duty to mitigate loss

(3) The repudiating party is not liable for loss or damage that the aggrieved party should have foreseen and could have mitigated or avoided without undue risk, expense or prejudice.

(Retraction of repudiation) Retraction of repudiation

89(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 87.

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.

(Instalment contacts) Remedies for breach of instalment

90(1) Subject to subsection (2), the buyer's rights and remedies with respect to a non-conforming instalment of an instalment contract and the seller's rights and remedies with respect to breach by the buyer of his obligations in relation to an instalment of an instalment contract are the same with respect to that instalment as if it were a separate contract.

Breach of the whole contract

(2) Subject to section 73, if a non-conformity or breach with respect to one or more instalments of an instalment contract substantially impairs the value of the whole contract, the aggrieved party may cancel the contract.

(Failure of pre-supposed conditions) Excuse by failure of pre-supposed conditions

91(1) Subject to sections 92 to 94, 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 an underlying assumption of the contract; or

(b) by a compliance in good faith with any applicable foreign or domestic law, even if the law is later found 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 is liable for any damage suffered by the buyer arising from a failure to do so.

Buyer's performance

(3) This section applies with all the necessary modifications where the buyer's agreed performance has been made impracticable.

(Non-existence of or casualty to identified goods) Non-existence of or casualty to identified goods

92(1) Where the seller's performance is or becomes impracticable under section 91(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:

(a) 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 has not passed to the buyer;

(b) if the loss or non-existence is partial and the risk has not passed to the buyer, the buyer may

(i) inspect the goods, and

(ii) 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;

(c) where the events referred to in clause (b) 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 subsection (1)

(2) Subsection (1) applies to

(a) 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) a contract that contains a "no arrival, no sale" term or its equivalent.

Substituted performance

(3) Except for a contract that contains a "no arrival, no sale" term or its equivalent, subsections (1)(a) and (b) 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, but each party's obligation is excused if it would cause him undue hardship.

(Prorated performance) Prorated performance

93(1) Where the causes mentioned in section 91(1) affect only a part of the seller's capacity to perform, he shall, in any manner that is fair and reasonable, 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.

Notification to buyer

(2) A seller allocating under subsection (1) shall notify the buyer seasonably of the estimated quota 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 91(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 a notification pursuant to subsection (2), the buyer fails to modify the contract pursuant to subsection (3)(b) within a reasonable time not exceeding 30 days, the contract is terminated with respect to any deliveries affected.

(5) Subsections (3) and (4) apply

Application of subsections (3) and (4)

(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 with all the necessary modifications where the buyer's agreed performance has been made impracticable.

94(1) Where, without fault of either party,

(Substituted performance) Substituted performance, shipment, delivery or payment

(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, that substitute performance is required to be tendered and accepted.

(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 the law is discriminatory, oppressive or confiscatory.

Substituted performance; payment after delivery

95(1) [*jurisdictions should include a reference to their Frustrated Contracts Act or other similar provision*] applies to

(Application of frustrated contracts legislation) Application of frustrated contracts legislation

(a) a contract of sale that has been terminated pursuant to sections 91 to 94; and

(b) a partial or delayed performance pursuant to section 91, 92 or 93.

(2) If there is a conflict between the provisions of this Act and the provisions of [*jurisdictions should include a reference to their Frustrated Contracts Act or other similar provision*], this Act prevails.

Act prevails

PART IX

REMEDIES

Remedies for breach of non-contractual warranties

96 Except as otherwise provided in this Part, the remedies for breach of a warranty that does not constitute a term of the contract are the same as the remedies for breach of a contract of sale.

Remedies for breach of collateral contracts

97 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.

Seller's remedies on buyer's insolvency

98 Where the buyer is insolvent, the seller may withhold delivery as provided in section 103 and stop delivery under section 104.

Seller's remedies

99 Where the buyer breaches the contract, the seller may, as provided in this Act

(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 103 respecting goods unidentified to the contract,

(h) resell and recover damages.

(Seller's right to cancel) Seller's right to cancel

100(1) The seller may cancel a 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 88(1), or

(d) the buyer wrongfully rejects the seller's tender or delivery;

but goods in the buyer's possession may not be recovered by the seller unless he is otherwise entitled to reclaim them.

Meaning of failure to pay and failure to take delivery

(2) For the purpose of subsection (1),

(a) a failure to pay includes a failure to make any arrangements for payment that are required under section 30(1), and

(b) a failure to take delivery includes a failure to perform any acts that are required of the buyer under the terms of the contract to enable the seller to make delivery.

(Rights of seller consequent on cancellation) Seller's right to identify goods

101(1) Where the seller is entitled to cancel the contract, he may

(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 that have demonstrably been intended for the particular contract, even though those goods are unfinished.

Unfinished goods

(2) Where the seller is entitled to cancel the contract and the goods are unfinished at the time of the breach, he shall exercise reasonable commercial judgment for the purposes of effective realization and avoidance of loss, and may,

(a) complete the manufacturer and wholly identify the goods to the contract,

(b) cease manufacture and resell the goods for scrap or salvage value, or

(c) proceed in any other reasonable manner.

Person in position of seller

102 In sections 103, 104 and 105, "seller" includes

(a) an agent of the seller to whom the bill of lading has been endorsed,

(b) a consignor or agent who has himself paid or is directly responsible for the price,

(c) anyone who otherwise holds a security interest in the goods, or

(d) any person who is in the position of a seller.

(Seller's right to withhold delivery) Seller's right to withhold delivery

103(1) The seller may withhold delivery of goods in his possession

(a) until the buyer pays any amount 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 89, or

(d) where the seller has requested adequate assurance of due performance under section 87(2), until adequate assurance of due 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 bailee 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 circumstances that 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 104 does not lose his right to do so by reason only that he has obtained judgment for the price of the goods.

(Seller's right to stop delivery) Seller's stoppage of delivery

104(1) The seller may stop delivery of goods in the possession of a carrier or other bailee

(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 provided in 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 the 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 is 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 is 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 circumstances that show an agreement to give up possession of the whole of the goods.

Notification to bailee

(7) To stop delivery, the seller shall notify the bailee in sufficient time to enable the bailee by reasonable diligence to prevent delivery of the goods.

Bailee's duty to hold the goods

(8) After receiving a notification pursuant to subsection (7), 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 charges or damages resulting from compliance with the seller's directions.

Negotiable document of title

(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.

Non-negotiable bill of loading

(10) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop delivery of the goods that is received from a person other than the consignor.

(Seller's right to resell) Seller's right to resell

105(1) Where the seller is entitled to cancel, he may resell the goods concerned or the undelivered balance of the goods and, if the resale is made in commercially reasonable time and manner, may recover the difference between the resale price and the contract price, less any expenses saved in consequence of the buyer's breach.

Method of resale

(2) The resale may be 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.

Sale must be commercially reasonable

(3) The resale may be as a unit or in parcels or at any time and place on any terms, but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable.

Identification of resale to contract

(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.

Purchaser in good faith

(5) A purchaser who buys in good faith at a resale take 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.

(Seller's action for the price) Seller's action for the price

106(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 he would be unable to resell them at a reasonable price.

Anticipatory repudiation

(2) Where the buyer repudiates the contract before the seller has made delivery, section 88 governs the seller's rights.

Seller's obligation to hold goods

(3) Where the seller sues for the price, he shall hold for the buyer any goods that have been identified to the contract and are 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 resale are to be credited to the buyer and payment of the judgment entitles the buyer to any goods not resold.

Meaning of delivery

(4) For the purposes of this section, delivery takes place

(a) where the contract requires or authorizes the seller to ship the goods by carrier 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,

(b) where the contract requires or authorizes the seller to ship the goods by carrier and requires 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,

(c) if the seller is a merchant and the buyer is not a merchant and the contract requires or authorizes the seller to ship the goods by carrier, when the goods are tendered to the buyer at the destination,

(d) where the goods are held by a bailee other than the seller and are to be delivered without being moved

(i) on the buyer's receipt of a negotiable document of title covering the goods,

(ii) on acknowledgment by the bailee to the buyer of the buyer's right to possession of them, or

(iii) on the buyer's receipt of a non-negotiable document of title or other written direction to deliver as provided in section 68(5), or

(e) where clauses (a) to (d) do not apply, when the buyer receives the goods.

Buyer's remedies

107 Where the seller breaches the contract, the buyer may, as provided in this Act

(a) exercise this rights under section 81(1),

(b) maintain an action for damages,

(c) obtain specific performance,

(d) exercise his rights under section 111,

(e) cancel the contract,

(f) recover so much of the price as has been paid.

Buyer's right to cancel

108 The buyer may cancel the contract and recover any portion of the purchase price paid where

(a) he has a right to cancel under section 73(3) or 90(2),

(b) the seller repudiates the contract under section 88(1), or

(c) subject to section 73(2), the buyer has rejected a non-conforming tender or delivery.

Buyer's lien on rejected goods

109 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 105 applies with all the necessary modifications.

Buyer's claim for return of price

110 Any claim by the buyer for the return of the purchase price is subject to any reduction because of any benefits derived by him from the use or possession of the goods that is just in the circumstances.

(Buyer's procurement of substitute goods)
Buyer's procurement of substitute goods

111(1) Where the buyer is entitled to cancel the contract, he may cover by making in a commercially reasonably time and manner any purchase of, or contract to purchase, goods in substitution for those due from the seller.

Buyer's 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 does not bar him from any other remedy.

(Buyer's damages for breach re accepted goods)

112(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 re 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.

Measure of damages

(2) In the case of a breach of warranty, the buyer's 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.

Right to maintain action

(3) The fact that the buyer has set up a 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.

(Action for damages) Right to damages

113(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 that the party in breach should have foreseen at the time of the contract as not unlikely to result from this breach of contract.

Mitigation of damages

(3) An aggrieved party shall 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 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 105; or

(c) the buyer has bought substituted goods as provided in section 111.

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 law as to remoteness of damage in tort apply to consequential claims for injury to person or property.

(Discretionary awards in certain cases) Discretionary awards for some breaches of warranty and of contract

114(1) Where there is

(a) a breach of contract by a non-merchant seller and it would be inequitable to award damages under section 113, 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 mentioned in section 42(6);

the court may in lieu of or in addition to any other remedy on any terms and conditions that it considers just

(c) grant rescission of the contract,

(d) order a reduction in or return of the price of the goods,

(e) award damages, including an amount to compensate for loss or liability incurred in reliance on the warranty or contractual undertaking, or

(f) make an order involving any combination of the remedies described in clauses (c) to (e).

Factors court may consider

(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 circumstance.

(Specific performance Specific performance

115(1) In any action for breach of contract of sale, the court may order that the contract be performed specifically and may, in connection with that direction, impose any terms and conditions as to damages, payment of the price and otherwise that seem just to the court.

Relevant factors

(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

(a) a special property in the goods under section 67, and

(b) paid the whole or a part of the purchase price.

(Other right and remedies) Other causes of action

116(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 an express warranty, 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 int 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.

PART X

MISCELLANEOUS

Repeal

117 *The Sale of Goods Act* is repealed except with respect to contracts of sale entered into before the day on which this Act comes into force.

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.
Canada-U.K. Convention on the Recognition and Enforcement of Judgements	1982	
Child Abduction Act	1981	
Child Status Act	1980	Rev. '82.
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	
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.
Judgment Interest Act	1982	
Jurors' Qualifications Act	1976	

Title	Year First Adopted and Recommended	Subsequent Amendments and Revisions
Legitimacy Act	1920	Rev. '59
Limitation of Actions Act	1931	Am. '33, '43, '44; Rev. '82.
—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	Rev. '82.
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; Am. '82.
Regulations Act	1943	Rev. '82.
Retirement Plan Beneficiaries Act	1975	
Sale of Goods Act	1981	Rev. '82.
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	
Transboundary Pollution Reciprocal Access Act	1982	
Trustee (Investments)	1957	Am. '70.
Variation of Trusts Act	1961	
Vital Statistics Act	1949	Am. '50, '60.
Warehousemen's Lien Act	1921	
Wills Act		
—General	1953	Am. '66, '74, '82.
—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); ('29, '57); N.B.[x]; Nfld.° ('55); N.W.T.° ('48); N.S. ('30); P.E.I.* ('47, '82). Total: 7.

Bulk Sales Act—Enacted by Alta. ('22); Man. ('21, '51); N.B. ('27, '82); Nfld.° ('55); N.W.T.† ('48); N.S.[x]; P.E.I. ('33); Yukon° ('56). Total: 8.

Child Abduction (Hague Convention) Act—Enacted by B.C.° ('82); Man. ('82); N.B.[x] ('82); N.S. ('82); Yukon ('81). Total: 5.

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, '82); 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.° ('82); Nfld. ('76); N.W.T. ('81); N.S. ('76); Ont. ('82); 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 Report 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 Succesion 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); N.B. ('82); Ont. ('77 *sub nom.* Law Succession Reform Act: Part V); P.E.I.[x]; Yukon ('81). Total: 5.

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 Actˣ; Survivorship Act ('48, '64); Testators Family Maintenance Act° ('47); Variation of Trusts Act ('64); Vital Statistics Act° ('59); Warehousemen's Lien Act ('22); Warehouse Receipts Act ('49); Wills Act° ('60); International Wills ('76). Total: 32.

British Columbia

Child Abduction (Hague Convention) Act ('82); Criminal Injuries Compensation Act ('72); Condominium Insurance Act ('74); *sub nom.* Condominium Act*; Defamation Act*; *sub nom.* Libel and Slander Act; Evidence — Affidavits before Officersˣ; Foreign Affidavits* ('53); *Hollington v. Hewthorne* ('77) Judicial Notice of Acts, etc. ('32), Photographic Records ('45), *Russell v. Russell* ('47); Extra-Provincial Custody Orders Enforcement Act ('76); *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. 7008 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: 37.

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); Child Abduction (Hague Convention) Act ('82); Condominium Insurance Act ('76); Defamation Act ('46); Extra Provincial Custody Orders Enforcement Act° ('82); Evidence Act* ('60); Affidavits before Officers ('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: 40.

New Brunswick

Accumulations Act *sub nom.* Property Act; Bills of Sale Act[x]; Bulk Sales Act ('27, '82); Child Abduction (Hague Convention) Act ('82); 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); Retirement Plan Beneficiaries Act ('82); Survival of Acts Act ('68); Survivorship Act ('40); Testators Family Maintenance Act ('59); Trustee (Investments) ('70); Vital Statistics Act° ('79); Warehousemen's Lien Act ('23); Warehouse Receipts Act ('47); Wills Act° ('59). Total: 31.

Newfoundland

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]; Child Abduction (Hague Convention) Act ('82); 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: 22.

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); Extra-Provincial Custody Orders Enforcement Act ('82); 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); Perpetuities Act ('66); Proceedings Against the Crown Act° ('63); Reciprocal Enforcement of Judgments Act ('29); Reciprocal Enforcement of

Maintenance Orders Act° ('59); Regulations Act° ('44); Retirement Plan Beneficiaries Act ('77) *sub nom.* Succession Law Reform Act: Part V; Survivorship Act ('40); Variation of Trusts Act ('59); Vital Statistics Act ('48); Warehousemen's Lien Act ('24); Warehouse Receipts Act° ('46); Wills — Conflict of Laws ('54). Total: 27.

Prince Edward Island

Bills of Sale Act* ('47, '82); 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'interpretation, 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 declarations des compagnies et societes, 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. 981 to 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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