UNIFORM LAW CONFERENCE OF CANADA

CONFERENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

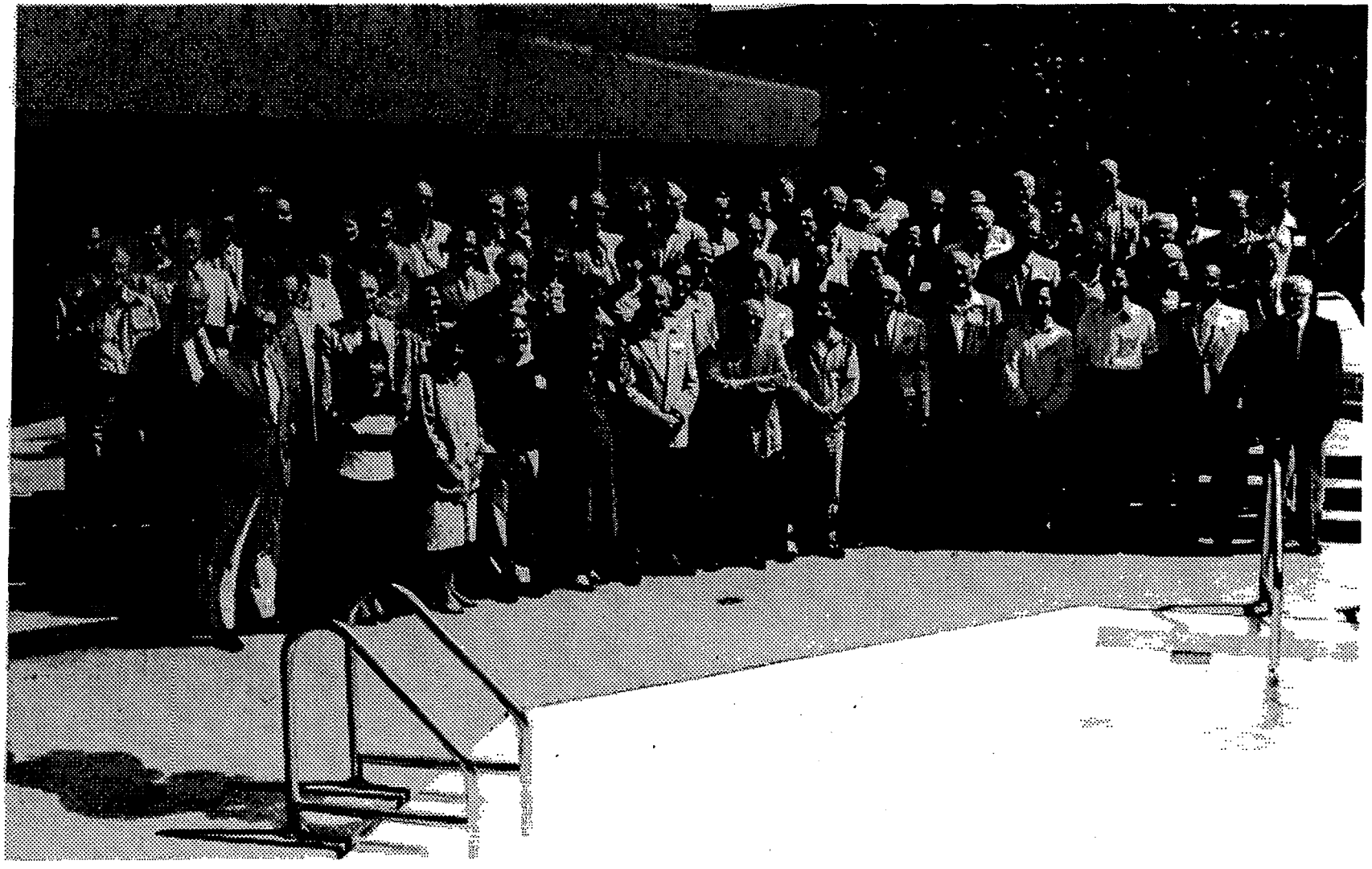
PROCEEDINGS
OF THE

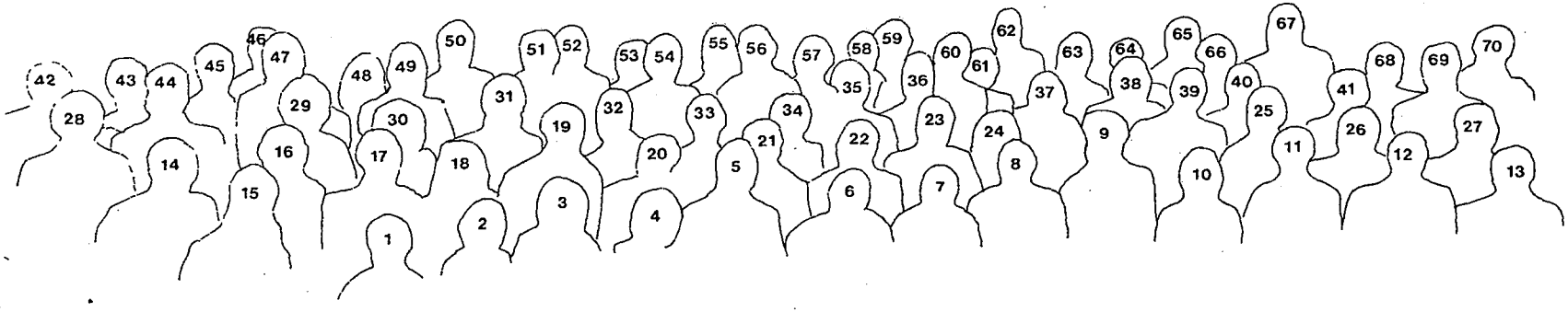
SIXTY-FIFTH ANNUAL MEETING

HELD AT

QUEBEC, QUEBEC

August, 1983





1. Charowsky, Sask.
2. Veins, Que.
3. Lalonde, N.B.
4. Longtin, Que.
5. Stone, Ont.
6. Bertrand, Can.
7 Prefontaine, Can.
8. Colas, Que.
9. Leal, Ont.
10. Pagano, Alta.
11. Yost, Man.
12. Balkaran, Man.
13. Gibson, Can.
14. Coles, N.S.
15. Tollefson, Can.
16. Murray, N.B.
17 Bouchard, Que.
18. Ozirny, Sask.
19. Johnson, N.S.
20. Macaulay, B.C.
21. Walker, N.S.
22. Menard, Que.
23. Edwards, Man.
24. Miller, Man.
25. Moore, P.E.I.
26. Gamache, Alta.
27 Filmer, B.C.
28. Tasse, Can.
29. Dawson, Can.
30. Einbinder-Miller, Can.
31. Reid, Can.
32. Harris, Can.
33. Noonan, Nfld.
34. Morton, Ont.
35. Mapp, Alta.
36. Mendes da Costa, Ont.
37. Roche, Nfld.
38. Kujawa, Sask.
39. Hodges, Sask.
40. Perras, Alta.
41. Roslak, Alta.
42. Mosley, Can.
43. Sansfacon, Que.
44. Letourneau, Que.
45. Lagace, Que.
46. Guerette, N.B.
47. Lal, N.W.T
48. Jackson, Sask.
49. Schmeiser, Sask.
50. Perkins, Ont.
51. Gregory, N.B.
52. Hurlburt, Alta.
53. Root, Ont.
54. Rioux, Que.
55. Takach, Ont.
56. Smethurst, Man.
57. Chaloner, Ont.
58. Goodman, Man.
59. Thomas, Ont.
60. Teed, N.B.
61. Pilkey, Man.
62. Weinstein, Man.
63. Bellemare, Can.
64. Archambault, Can.
65. MacKay, Sask.
66. Piragoff, Can.
67. Gale, N.S.
68. Becker, Can.
69. Hewitt, Sask.
70. Gosse, Sask.

Absent: *Alta.*, Clegg; *Canada*, Jewett, McCalla, Linden, Biron, duPlessis, Beaupre, Davidson, Pelletier, Stoltz, Pigeon, Greenspan, Silins, Burrowes; *Man.*, Penner; *Nfld.*, Noel, Black; *N.W.T.*, Meldazy; *N.B.*, Pardons, Doleman; *N.S.*, MacDonald; *Que.*, Jacoby, Allaire, Dionne, Boisvert, Smith; *Ont.*, Fader, Campbell, Ewart, Richardson.

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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
Arthur N. Stone, Q.C., Toronto	1982-1983

OFFICERS: 1983-84

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(For addresses of the above, see List of Delegates, page 9.)

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DELEGATES

1983 Annual Meeting

The following persons (100) attended one or more Sections of the Sixth-Fifth Meeting of the Conference

Legend

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

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1983 Annual Meeting

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Attorney General of Manitoba: HON. ROLAND PENNER, Q.C.
Attorney General of New Brunswick: HON. FERNAND G. DUBE, 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-ANDRE BEDARD, Q.C.
Attorney General for Saskatchewan: HON. J. GARY LANE, Q.C.
Minister of Justice of the Yukon: HON. CLARKE L. ASHLEY

HISTORICAL NOTE

More than sixty-five 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.
1983. Aug. 18-27, Quebec.

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.

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LEGISLATIVE DRAFTING SECTION

MINUTES

Attendance

Twenty-nine delegates were in attendance. In addition, the Section was pleased to welcome two guests: Mr. Geoffrey Kolts, Q.C., First Parliamentary Counsel, Australia and Mr. James Ryan, Q.C., Legislative Counsel and visiting professor University West Indies.

Opening

The Section opened with the Chairman, Mr. Walker, presiding. M. Lalonde acted as vice-chairman and Mrs. Charowsky acted as secretary.

Hours of sitting

It was agreed to sit on Thursday, August 18th, and Friday, August 19th, 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.

Adoption of Minutes

The minutes of the 1982 meeting of the Section were adopted.

Education, Training and Retention of Draftsmen

Each jurisdiction commented briefly on local problems relating to this topic. It was suggested that it would be more appropriate to discuss matters of particular interest at the meeting rather than leaving everything to be dealt with by written submission only.

Commonwealth Association of Parliamentary Counsel

Mr. Geoffrey Kolts provided an explanation of the events leading to the proposal to form a Commonwealth Association of Parliamentary Counsel and pointed out to the Section some of the more important features of the draft constitution of the proposed organization.

Purposes and Procedures

The Section conducted a general discussion of its purposes and procedures on the basis of a working paper prepared by its Committee on Purposes and Procedures. As a result of the discussion, it was

> RESOLVED that the Committee on Purposes and Procedures be continued, consisting of Mr. Arthur Stone as Chairman, M. Bruno Lalonde and Mr. Graham Walker, with the authority to add other members as the need arises, and that the committee review the purposes and procedures of the Section and make a further report to the Section at its next meeting.

In addition, it was

RESOLVED that the Section meet in 1984 on the Saturday and Sunday immediately preceding the meetings of the Uniform Law Section.

Young Offenders Act

The Section received a report and conducted a general discussion of the problems faced by the provinces as a result of the enactment and pending proclamation of the federal Young Offenders Act.

Charter of Rights and Freedoms

The Section conducted a general discussion of the methodology and techniques being considered or adopted in each jurisdiction for reviewing its legislation in the light of the new Charter of Rights and Freedoms and for effecting necessary amendments to legislation as a result of that review.

Bilingual Uniform Interpretation Act

The Section considered the French and English versions of the draft Uniform Interpretation Act prepared by M. Beaupré and Mr. Stone. As a result of these deliberations, the Section

RESOLVED that the draft Act prepared by the Section in both its English and French versions be reviewed by the Beaupré-Stone Committee in light of the comments made by the Section, that comments from jurisdictions be forwarded to the committee by January 1, 1984, that the committee have authority to add other members as the need arises and that a revised draft Act be presented to the Section at its next meeting.

Criminal Injuries Compensation Act

The Section reviewed the French language version of the Uniform Criminal Injuries Compensation Act.

RESOLVED that the Uniform Criminal Injuries Compensation Act drafted in the French text and certain changes in the English text be referred to the Uniform Law Section for adoption.

Officers

Bruno Lalonde was elected Chairman, Allan Roger Vice-Chairman and Merrilee Charowsky Secretary for 1983-84. The Section agreed that the Chairman would represent the Section on the Board of the Canadian Law Information Council. Mr. Stone, on behalf of the Section expressed the appreciation of the Section to Mr. Walker for his excellent work as Chairman of the Section for the past three years.

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 21, in the Auberge des Gouverneurs in Quebec City with Mr. Stone, 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. Carlyle C. Ring

The President introduced our guest of honour, Mr. Carlyle C. Ring of Washington, DC. Mr. Ring is President of the National Conference of Commissioners on Uniform State Laws. Mr. Ring brought greetings from our colleagues in the United States who share with us the pleasure and opportunity of working in a special and unique way to improve the laws of our respective countries.

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 64th annual meeting as printed in the 1982 Proceedings be adopted.

President's Report

Mr. Stone presented his report, Appendix A, page 51.

Resolved that the report be received.

Treasurer's Report

Mr. Walker presented his report regarding a Statement of Receipts and Disbursements and Cash Position as of July 15, 1983, together with a report of the Conference's Auditors, Clarkson, Gordon, Chartered Accountants.

RESOLVED that the Treasurer's Report, Appendix B, page 53 be adopted.

RESOLVED that the amount of $1,500 for Newfoundland, $700 for Prince Edward Island and $1,500 for Saskatchewan for the 1982 contributions be written off unless these amounts are paid before December 1, 1983.

RESOLVED that the same auditors, Clarkson, Gordon be appointed Auditors for the coming year.

RESOLVED that the usual banking motion be passed authorizing the Treasurer to draw upon the Conference's accounts.

Executive Secretary's Report

Mr. Hoyt presented his report, Appendix C page 56.

RESOLVED that the report be received.

Appointment of Resolutions Committee

RESOLVED that a Resolutions Committee be constituted, composed of Messrs. Ewart, Mapp and Moore, for a report 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.

Media Relations

Mr. Bertrand presented his report on Media Relations at meetings of the Uniform Law Conference, Appendix D, page 57.

RESOLVED that the report be received.

Canadian Bar Association

RESOLVED that the President of the Uniform Law Conference be authorized to enter into discussions with the President of the Canadian Bar Association for the purpose of improving liaison.

Adjournment

There being no further business, the meeting adjourned at 9 p.m. to meet again in the closing Plenary Session on Saturday, August 27.

UNIFORM LAW SECTION

MINUTES

Attendance

Forty-six delegates were in attendance. For details see list of delegates, page 9.

Sessions

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

Distinguished Visitor

The Section was honoured by the participation of Mr. Carlyle C. Ring, Jr., President of the National Conference of Commissioners on Uniform State Laws.

Arrangement of Minutes

A few of the matters discussed were opened 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. Bertrand as Chairman and Mr. Hoyt as Secretary.

Hours of Sitting

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

Agenda

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

Class Actions

This is to be retained on the agenda for a further report from the Quebec and Ontario Commissioners in 1984.

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 was referred to the Quebec, Ontario and Federal Commissioners for a report in 1984. A report submitted in 1982 was set out in Appendix H, page 106 of the 1982 Proceedings and a further report submitted in 1983 is set out in Appendix E, page 64, of these Proceedings.

Contributory Fault

A report on this matter by the Alberta Commissioners is set out in Appendix 1, page 118 of the 1982 Proceedings. At this meeting in 1983, they presented a draft Act for consideration.

RESOLVED that if the draft Contributory Fault Act is not disapproved by two or more jurisdictions on or before November 30, 1983, by notice to the Executive Secretary, it be adopted by the Conference as a Uniform Act and recommended for enactment in that form.

Note: Disapprovals were received from two jurisdictions before November 30, 1983. The Alberta Commissioners have agreed to make certain changes in the draft and deal further with it in 1984.

Criminal Injuries Compensation Act

A verbal report was given by the Nova Scotia and Federal Commissioners.

RESOLVED that the draft Criminal Injuries Compensation Act in both English and French be circulated as set out in Appendix F page 67 and if the Act is not disapproved by two or more jurisdictions on or before November 30, 1983, by notice to the Executive Secretary, it be adopted by the Conference as a uniform Act in both languages and recommended for enactment in that form.

Note: No disapprovals were received.

Defamation

An extensive report was presented on this matter by the Saskatchewan Commissioners as set out in Appendix G page 94. It was referred back to them for a further report in 1984 dealing with those matters requiring further study and such further recommendations as they see fit to make. The Saskatchewan Commissioners with assistance from the Manitoba Commissioners are to prepare a draft Act in both English and French reflecting the decisions made at this 1983 meeting.

Effect of Adoption

It was decided that the Manitoba Commissioners should review the Effect of Adoption Act in light of discussions relating to Intestate Succession.

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 H page 167. It was the wish of those present that a similar report from those Commissioners would be forthcoming in 1984.

Extra-Provincial Child Welfare Orders

This was referred to the Alberta Commissioners for a report and draft provisions in 1984.

Foreign Judgments

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

Franchises

A report was submitted by the Alberta, Quebec and Federal Commissioners together with a supplementary report by the Alberta Commissioners dealing with the aspects of termination and failure to renew. These reports are set out in Appendix I page 171.

RESOLVED that the uniform draft Act follow the disclosure system and that the matter be referred back to the Alberta, Quebec and Federal Commissioners for a further report in 1984 with Allan Leal and Robert Smethurst as consultants.

Interpretation Act

This Act stands referred to the Legislative Drafting Section for a report in 1984.

Intestate Succession

A report was presented by the Alberta Commissioners on policy issues in the form of a proposed new draft Act with extensive comments under each section. It is set out in Appendix J page 215. The matter was referred back to the Alberta, Saskatchewan and Quebec Commissioners for a further report and draft Act in 1984.

Judicial Decisions Affecting Uniform Acts

The report of the Prince Edward Island Commissioners was received.

Limitations

This was referred to the Alberta and Saskatchewan Commissioners for a report in 1984.

Matrimonial Property

The 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

In 1982 this was referred to a joint committee of this Conference and the Canadian Bar Association. There was no report available at this meeting. However the matter is to be left on the agenda for a report from the joint committee when it is ready.

Private International Law

A report of the Special Committee on Private International Law as set out in Appendix K page 237 was received. A further report by the

Federal Commissioners on Canadian Activities in the Area of Private International Law as set out in the same Appendix was also received.

Products Liability

The paper submitted by the Manitoba and Ontario Commissioners is set out in Appendix L page 253. The matter was referred back to them and to any other jurisdiction that wishes to participate in a report for 1984.

Protection of Privacy: Tort

There was some discussion on the desirability of keeping this on the agenda. The Saskatchewan Commissioners agreed to study the matter further and report back in 1984.

Purposes and Procedures

The Committee presented its report on this matter. That report, as amended at this meeting, is set out in Appendix M page 256.

RESOLVED that the Rules of Procedure of the Uniform Law Section attached to the Report be adopted as amended at this meeting.

RESOLVED that the Uniform Law Section ask the Executive Committee, through the President of the Conference

(a) to advise the responsible minister in each jurisdiction of the Uniform Acts adopted at each meeting of this Conference;

(b) to urge the various governments to appoint more private practitioners to take part in this Section, pointing out the desirability of some continuity in the individual membership, and further that there also be a report from this Section to the Plenary Session encouraging the presence of more members from the Bar;

(c) to make international treaties and arrangements known to the various governments for the purpose of promoting the implementation of private international law conventions in Canada, and to ensure an active Canadian participation in the work being done in this area.

Reciprocal Enforcement of Maintenance Orders

In view of the modifications that various jurisdictions have made in enacting the Reciprocal Enforcement of Maintenance Orders Act, the Act was referred to the Alberta Commissioners for a report in 1984.

Time Sharing: Accommodation

A report of the Manitoba Commissioners on this matter is set out in Appendix N page 262. The same commissioners are to make a further report in 1984.

Transboundary Pollution Reciprocal Access Act

A verbal report was given on this Act. Montana has adopted it, and Maine, Minnesota and New Jersey have introduced it. Several other

states have it under discussion, North Dakota being one. None of the jurisdictions in Canada have adopted it yet, but several provinces have it under active consideration.

Vital Statistics

The British Columbia and Federal Commissioners presented a report on this matter as set out in Appendix O page 277.

RESOLVED that the matter be referred back to the British Columbia and Federal Commissioners for a draft Act incorporating the complex provisions already discussed together with other items as they come to light.

Wills

It was decided that the formal requirements of the Uniform Wills Act not be changed and the matter of substantial compliance in the execution of wills not be reopened. However the Act was referred to the Nova Scotia Commissioners for a report in 1984 on the provisions relating to the revocation and alteration of wills.

Officers: 1983-1984

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

Close of Meeting

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

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

CRIMINAL LAW SECTION

MINUTES

Attendances

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

Opening

Mr. G. Gregory, Q.C. presided and 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-three delegates included representatives from the provinces, the federal Department of Justice and the Ministry of the Solicitor General, the President and a Commissioner of the Law Reform Commission of Canada and members of the private bar. During the week the delegates participated with remarkable enthusiasm in the deliberations of the Section.

Thirty-seven resolutions were presented calling for amendments to the *Criminal Code*, being both procedural and substantive in nature. These resolutions concerned such matters as: amendments to the current provisions concerning the prohibition of the disclosure of the existence of an authorization to intercept a private communication, the creation of an expeditious means to obtain an interception during the course of a hostage taking incident and the legitimacy of citizens assisting the police in lawful interceptions; the extension of the current evidentiary presumptions concerning possession of stolen articles to cases where articles are obtained by fraud; re-elections during a preliminary inquiry; the procedure with respect to appeals to the Court of Appeal or Superior Court in respect of appeals by stated case; the ability to appeal a stay of proceedings or the quashing of an indictment; the circumstances under which leave to appeal to the Supreme Court of Canada should be required; the protection from sexual assault of feeble-minded persons, foster children and wards; sexual assaults and threats to third parties; the prohibition of solicitations of jurors for information or disclosures of the proceedings of jury deliberations; the definition of the offence of joy-riding; the ability of an accused to rebut the evidence of the Crown on a bail hearing in respect of the circumstances of the offence; the offence of personation; the creation of a new offence of vandalism; the charging of reasonable user fees for inmates serving intermittent sentences; the power of a court to determine the place of detention of an accused who is found to be unfit to stand trial; the offence of failing to comply with a

probation order; the use of affidavits to prove service of notice; and the creation of a uniform warrant of committal; among other proposed resolutions. In addition, the current provisions of the *Criminal Code* concerning criminal rate of interest, obscenity and prostitution, and hate propaganda were discussed.

Considerable time was devoted to the discussion of the proposed revision of the sentencing provisions of the *Criminal Code* undertaken by the federal Department of Justice and the Ministry of the Solicitor General, which are expected to be introduced in the forthcoming session of Parliament.

An extensive discussion occurred of a package of proposed amendments to the *Criminal Code*, and other Acts, which was released in July 1983 by the federal Minister of Justice. The proposed amendments contained approximately 50-60% of the 220 resolutions passed by the Criminal Law Section from 1977-1981. The federal Department of Justice indicated that another 25% were under consideration by the Department or the Law Reform Commission of Canada, and in only 19 out of 220 resolutions has an affirmative decision been made not to proceed with amendments proposed by the Section. Approximately 20% of the amendments in the proposed package of amendments originated from the bench, provincial Attorneys General, the bar, the Law Reform Commission of Canada, Lieutenant Governor Advisory Boards and international conventions to which Canada is a signatory. Another 20% of the amendments originated from studies within the Department of Justice and other government departments.

The Section also established a Committee, to be chaired by the province of New Brunswick, to develop a policy and to report within a year in respect of the confiscation of the proceeds of the publication of crime.

M. Rémi Bouchard was elected Chairman of the Section for next year.

Resolutions

The resolutions were presented by each jurisdiction as follows:

ALBERTA

Item 1

The proposed resolution that subsection 453.3(4) of the *Criminal Code* be amended to delete the requirement for the signature of the

accused on an appearance notice, was withdrawn in favour of a new resolution:

Subsection 453.3(4) be amended as proposed in clause 84 of the *Proposed Act to amend the Criminal Code et al.*, 1983, to provide that the lack of a signature by the accused would not invalidate an appearance notice, a promise to appear or a recognizance.

CARRIED (28-1)

Item 2

Section 178.2 of the *Criminal Code* be amended to include as an offence the disclosure of the existence of an authorization to intercept a private communication.

DEFEATED (7-23)

Item 3

Section 483 of the *Criminal Code* be amended to increase the monetary limit of offences within the absolute jurisdiction of a magistrate from two hundred dollars ($200) to two thousand and five hundred dollars ($2,500).

DEFEATED (6-19)

Item 4

The proposed resolution, that section 483 of the *Criminal Code* be amended to provide that the absolute jurisdiction of a magistrate extend to all *Criminal Code* offences, indictable or hybrid, for which the maximum penalty by indictment is less than five years, was withdrawn.

Item 5

The proposed resolution, that section 178.1 of the *Criminal Code* be amended to include in the definition of "offence" those offences described in section 133 and 305.1 was amended (16-9) to delete the reference to section 133, and the resolution, as amended, was:

CARRIED (29-0)

It was proposed from the floor that section 178.1 of the *Criminal Code* be amended to include in the definition of "offence" those offences described in subsection 133(1).

CARRIED (22-6)

Item 6

Subsection 178.18(2) be amended to provide that persons, in possession of equipment mentioned in subsection 178.18(1), who assist

police officers in the investigation of an offence be exempted from liability.

CARRIED (26-1)

Item 7

The proposed resolution that section 317 of the *Criminal Code* be amended to apply in respect of property "obtained by the commission of an indictable offence" was amended to propose: Section 317 be amended to apply in respect of property obtained by fraud as well as theft.

CARRIED (21-2)

Item 8

The proposed resolution, that section 178.11 of the *Criminal Code* be amended to provide that subsection 178.11(1) not apply to a peace officer or police constable engaged in an investigation of an offence under section 247, was withdrawn in favour of the following resolution:

"That an amendment to Part IV.1 of the *Criminal Code* be considered providing for a police officer or police constable to intercept any communication made to, from or within a place without an authorization where

(1) such police officer or police constable is engaged in an investigation of an offence under section 247 of the *Criminal Code* while the alleged offence is in progress;

(2) the place of the alleged offence is known to the police officer or police constable; and,

(3) to proceed with an application for an authorization under section 178.12 and/or 178.15 would be impractical.

And further that amendments be made to assure that such interception is for the purpose of gathering information and is to be converted into an authorized interception under either 178.12 or 178.15 when the emergent conditions cease to exist."

CARRIED (16-0)

Item 9

The proposed resolutions, that section 463 of the *Criminal Code* be amended to provide that upon the consent of the accused and the prosecutor (given at any stage of the preliminary inquiry, or prior thereto) a preliminary inquiry which is commenced or continued before a justice may be continued before another justice, notwithstanding that the justice would be able to continue with the preliminary inquiry, and that such continuation not be reviewable, were withdrawn.

Item 10

Section 463 of the *Criminal Code* be amended to provide that, on the consent of the accused and prosecutor, a magistrate who has presided at the preliminary inquiry from its commencement may, if the charge is of a class that may be tried before that magistrate, convert, at any stage of the preliminary inquiry, the proceedings into a trial and proceed with the matter accordingly.

CARRIED (25-3)

The proposed resolution, that the exercise of the discretion of a magistrate to convert a preliminary inquiry into a trial (as proposed above) be unreviewable, was not proposed and, accordingly was withdrawn.

BRITISH COLUMBIA

Item 1

The *Criminal Code* be amended to provide that in the province of British Columbia an appeal on stated case in Part XXIV be heard in the first instance by a judge of the Supreme Court, with a further appeal to the Court of Appeal.

CARRIED (6-4)

Item 2

The proposed resolution, that section 98 of the *Criminal Code* be amended to empower a judge, upon prohibiting a person from possessing a firearm, ammunition or explosive substance, to order the disposal of any such items seized or in the possession of the person that are subject to forfeiture, was withdrawn.

Item 3

The proposed resolution, that the Criminal Law Section of the Uniform Law Conference recommend to the commercial publishers of the *Criminal Code* of Canada that they jointly prepare and publish identical indexes, was withdrawn.

Item 4

The proposed resolution, that the current scheme for suspended sentences in the *Criminal Code* be repealed in favour of a scheme similar to that which exists in England, was withdrawn. The item was deferred for discussion to the item entitled, "Criminal Law Review, Phase II: Sentencing".

Item 5

The proposed resolution, that section 388 and 653 of the *Criminal Code* be repealed in favour of a new section concerning orders for

compensation, was withdrawn. The item was deferred for discussion to the item entitled, "Criminal Law Review, Phase II: Sentencing".

Item 6

Pursuant to the resolution, the application and operation of section 305.1 of the *Criminal Code* was discussed by the delegates.

MANITOBA

Item 1

The proposed resolution, that section 246.1 of the *Criminal Code* be amended to provide that it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge if the person is, and the accused knows or has good reason to believe that the person is, feeble-minded, insane or an idiot or an imbecile, was withdrawn in favour of the following resolution:

Subsection 244(3) of the *Criminal Code* be amended to provide that a consent obtained by the exploitation of the mental capacity of the complainant be invalid.

CARRIED (14-1)

Item 2

The proposed resolution was amended to propose: Section 153 of the *Criminal Code* be amended to provide that "every person who has illicit sexual intercourse with his step-child, foster child or ward is guilty of an indictable offence and is liable to imprisonment for 10 years.

CARRIED (20-10)

Item 3

Section 576.2 of the *Criminal Code* be amended to clarify that jury discussions are not to be disclosed by members of a jury either during a trial or following the trial.

CARRIED (10-5)

It was proposed from the floor that section 576.2 of the *Criminal Code* be amended to provide that, with the consent of the Chief Justice or the Attorney General, a juror or former juror may, for the purpose of scientific research concerning juries, disclose information relating to the proceedings of the jury.

CARRIED (15-14)

A vote by delegation was called:

DEFEATED (10-20)

Item 4

A new section of the *Criminal Code*, section 576.3, be enacted to provide that it be an offence for anyone to solicit information relating to proceedings of the jury conducted outside of the courtroom and which were not disclosed in open court.

CARRIED (16-8)

NEW BRUNSWICK

Item 1

Paragraph 457.3(1)(b) of the *Criminal Code* be amended to permit an accused to waive the protection afforded by the said paragraph and, at the option of the accused, testify as to the circumstances of the alleged offence by way of rebuttal to the evidence that the prosecutor has tendered with respect to such issue.

CARRIED (11-8)

It was proposed from the floor that the proposed amendment to section 457.3(1)(b) of the *Criminal Code* be amended to provide that any statement made by the accused during a hearing for judicial interim release not be admissible in subsequent proceedings in respect of the same offence or any other proceeding, other than a proceeding in respect of the offence of perjury or giving contradictory evidence.

DEFEATED (5-15)

Item 2

Section 361 of the *Criminal Code* be amended to provide that a fraudulent personation of a person may occur whether or not the person is real or fictitious.

DEFEATED (1-19)

Item 3

The proposed resolutions, that the *Criminal Code* offence of criminal negligence in the operation of a motor vehicle be amended to provide a minimum sentence of not less than 30 days imprisonment and that the offence be prosecuted by indictment only, and that the offence of dangerous driving in the *Criminal Code* be amended to provide a minimum sentence of not less than a fine of $500 and a maximum sentence of 5 years imprisonment in respect of proceedings by indictment, and a minimum sentence of not less than $300 and not more than $3000, with a maximum sentence of 2 years imprisonment, in respect of proceeding on summary conviction, were withdrawn.

Item 5

Section 295 of the *Criminal Code* be amended to provide that the offence of "joy driving" consist of "a temporary taking possession of and use of a motor vehicle without the owner's consent and without intent to permanently deprive the owner thereof"; and further that the offence of "joy riding" be deemed to be an included offence of theft.

CARRIED (19-5)

Item 6

The proposed resolution was amended (23-0) to provide: The Criminal Law Section of the Uniform Law Conference of Canada undertake a study to develop a policy for a legislative response to the phenomenon of the publication of literary accounts of crime to the financial advantage of the criminal or his assigns, in order to ensure the payment of damages from such profits to the victim of the crime or his/her survivors and to compensate taxpayers for the expense of policing, prosecuting and incarcerating the criminal with respect to his crime.

CARRIED (21-0)

It was agreed that a committee, chaired by the province of New Brunswick, be formed consisting of representatives from the delegations of Canada, Ontario, New Brunswick, British Columbia and Saskatchewan.

NEWFOUNDLAND

No submissions presented.

NORTHWEST TERRITORIES

No submissions presented.

NOVA SCOTIA

The proposed resolution, that the *Criminal Code* be amended either by amending 1) section 608 to provide that a judge of the Court of Appeal does not include the Chief Justice or the Acting Chief Justice, or 2) section 608.1 to provide that where the Chief Justice or Acting Chief Justice grants bail the application for review may be made before another member of the Court of Appeal, was withdrawn.

ONTARIO

Item 1

The proposed resolution was amended to propose: Paragraph 605(1)(a) of the *Criminal Code* be amended to provide that an acquital

include any order made at trial in the nature of an order staying proceedings or quashing an indictment.

CARRIED (26-0)

Item 2

Section 608.2 of the *Criminal Code* be amended to provide that a judge of the Court of Appeal may exercise the powers referred to in subsections 608.1(1) and 608.1(2) in cases where the Attorney General is the appellant or applicant and the respondent is in custody pursuant to the sentence imposed on him at trial.

DEFEATED (7-8)

Item 3

The proposed resolutions, that section 518 of the *Criminal Code* be amended to provide that an indictment that charges murder may include charges relating to offences arising from the same factual situation which relate to the murder charge, or that section 518 be repealed, were withdrawn.

Item 4

Paragraph 171(1)(d) of the *Criminal Code* be amended to remove the requisite element of "public place" in the offence of causing a disturbance.

DEFEATED (7-18)

Item 5

The proposed resolution was amended to propose: Section 246.2 of the *Criminal Code* be amended to provide that it is an offence to threaten or cause bodily harm to "any person".

CARRIED (19-11)

Item 6

Subsection 687(b) of the *Criminal Code* be amended to include the offence of buggery (section 155) as a "serious personal injury offence" for the purposes of an application to find a person to be a dangerous offender.

DEFEATED (8-20)

Item 7

Section 543 of the *Criminal Code* be amended to permit the trial judge, upon a determination of unfitness to stand trial, to specify the place of detention pending receipt of the Lieutenant Governor's warrant.

CARRIED (26-0)

Item 8

It was proposed that section 428 of the *Criminal Code* be amended to provide that judicial process affecting an accused in one judicial district of a province may be determined in an adjacent district, provided that in the opinion of the presiding judge or justice it is in the interest of the administration of justice.

An amendment from the floor was proposed that the resolution be amended to require the consent of the accused and the prosecutor.

DEFEATED (5-12)

The proponent delegation proposed that the resolution be amended to provide that the transfer of jurisdiction be subject to the general direction of the Chief Justice of the Court, instead of the opinion of the presiding judge or justice.

CARRIED (13-4)

The proposed resolution, as amended, was:

CARRIED (12-6)

Item 9

It was proposed that subsections 618(2) and 620(3), and paragraphs 618(1)(a), of the *Criminal Code* be repealed, thereby providing that leave to appeal be required for all appeals to the Supreme Court of Canada.

An amendment was proposed from the floor that the sections and paragraphs referred to in the proposed resolution not be repealed and that only paragraph 618(2)(b) be repealed, thereby requiring that leave to appeal be required in the circumstances described in that paragraph.

DEFEATED (11-11)

A vote by Delegation was called:

CARRIED (15-12-3)

The proposed resolution, as amended, was:

CARRIED (18-1)

Item 10

The proposed resolution was amended to propose: The *Criminal Code* be amended to provide that everyone commits vandalism who, without lawful excuse, wilfully (as defined in section 386) destroys or damages property, and is guilty of an indictable offence or an offence punishable on summary conviction where the alleged amount of destruction or damage does not exceed $1000, or is guilty of an indictable offence and liable to imprisonment for 14 years where the

alleged amount of destruction or damage exceeds $1000; and that where a person is convicted of a summary conviction offence, the court may, in addition to any punishment that is imposed, order the accused to pay to a person aggrieved an amount not exceeding $1000 that appears to the court to be reasonable compensation for the destruction or damage.

CARRIED (18-12)

Item 11

The *Prisons and Reformatories Act* be amended to provide for the prescribing, by a province, of reasonable user fees and charges from inmates serving intermittent sentences in order to recover costs.

CARRIED (15-9)

Item 12

With the permission of Ontario, this item, concerning the current laws related to obscenity, was deferred for discussion under Item 3 of Canada.

PRINCE EDWARD ISLAND

No submissions presented.

QUEBEC

Item 1

Section 666 of the *Criminal Code* be amended to provide that the offence of failing to comply with a probation order may be prosecuted either by indictment or on summary conviction, no person shall be prosecuted by indictment unless he has previously been convicted of an offence under section 666, and the offence of failing to comply with a probation order be included in the list of offences within the absolute jurisdiction of a magistrate (s. 483).

CARRIED (21-0)

Item 2

The proposed resolution was amended to propose: Sections 237, 592 and 740 of the *Criminal Code*, section 9 of the *Narcotic Control Act* and section 30 of the *Food and Drugs Act* be amended to provide that proof of service of a notice required to be in writing may be proved orally or by affidavit, in a manner similar to the procedure for proof of service in subsection 453.3(5) and 455.5(3) of the *Criminal Code.*

CARRIED (22-0)

SASKATCHEWAN

The proposed item for discussion, being section 168(1) of the

Saskatchewan Vehicles Act (which provides for the taking of blood samples from suspected impaired drivers), was withdrawn.

Yukon

No submissions presented.

CANADA

Item 1

The proposed resolution was amended to propose: The principle of a uniform warrant of committal be endorsed by the delegates.

CARRIED (19-0)

Item 2

A *Proposed Act to amend the Criminal Code et al.*, 1983, released by the Minister of Justice on July 25, 1983, was extensively discussed by the delegates. (See Chairman's Report). The Department of Justice indicated that these, or similar, proposals would be introduced in Parliament during the forthcoming session.

Item 3

A *Proposed Act to amend the Criminal Code* in respect of pornography and prostitution, released by the Minister of Justice on June 23, 1983, was discussed by the delegates. The recommendations of Ontario (see Item 12) were concurrently discussed.

Item 4

The hate propaganda provisions of the *Criminal Code*, in particular section 281.2, was discussed by the delegates. Discussion centred on the mental element of the offence, the fiat of the Attorney General and the onus of proof for the statutory defences.

Item 5

The appropriate scope and limitations for the adoption of a "telewarrant" procedure were discussed by the delegates.

Other matters for discussion on the agenda

Criminal Law Review, Phase II: Sentencing

A significant proportion of the Section's deliberations were devoted to an extensive discussion of the proposals for the reform of the sentencing provisions of the *Criminal Code*, which was being undertaken by the federal Department of Justice and the Ministry of the Solicitor General as part of the Criminal Law Review. It was expected that these, or similar, proposals would be introduced in Parliament during the forthcoming session.

CLOSING PLENARY SESSION

MINUTES

The Closing Plenary Session opened with the President, Mr. Stone, 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 that the work of the Section was not completed at the time, but a report would be made and published in the Proceedings.

Criminal Law Section

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

Resolutions Committee's Report

Mr. Mapp 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 Quebec and, in particular, the Honourable Marc-Andre Bedard, Le Ministre de la Justice et Procureur general du Quebec, for their generous hospitality in hosting the Sixty-fifth Annual Meeting of the Uniform Law Conference, for the reception given for members of the Legislative Drafting Section and the reception and dinner for delegates to the Conference, and for arranging the program for the entertainment of les conjoints;

2. the Communaute Urbaine de Quebec for the distribution of tourist information enabling delegates to join in the celebration of the 375th anniversary of the City and to enjoy its architectural and gastronomical delights;

3. Me Victoria Meikle and members of the Canadian Intergovernmental Conference Secretariat for their valuable assistance in facilitating the operation of the Conference;

4. Mlle Joyce Menzies and Mme Micheline Hardy and members of their staff for the provision of excellent translation services;

5. our American counterpart, the National Conference of Commissioners on Uniform State Laws for the hospitality extended to

our President Mr. Arthur Stone and his wife at its recent meeting in Boca Raton, Florida;

6. Mr. Carlyle C. Ring and his wife Jane for honouring this Conference with their presence and him for giving us the benefit of his counsel;

7. Mr. Geoffrey Kolts, First Parliamentary Counsel of the Commonwealth of Australia for attending the meetings of the Legislative Drafting Section and for his work in connection with creation of the Commonwealth Association of Parliamentary Counsel;

8. Mr. Jim Ryan, a former officer of the Conference, for his contributions at the meetings of the Legislative Drafting Section and for again giving us the pleasure of his company; and

9. Mr. W. D. Burrows, former Director of Vital Statistics of British Columbia, for his invaluable assistance to the Uniform Law Section in connection with its deliberations on the Uniform Vital Statistics Act.

Report of the Executive

The Chairman, Mr. Stone, announced that future meeting places for the Conference have been arranged as follows:

1984 Calgary, Alberta
1985 Halifax, Nova Scotia
1986 Manitoba
1987 British Columbia subject to final confirmation

Nominating Committee's Report

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

Honorary President:	Arthur N. Stone, Q.C., Toronto
President:	Serge Kujawa, Q.C., Regina
1st Vice President:	Gerard Bertrand, Q.C., Ottawa
2nd Vice President:	Graham D. Walker, Q.C., Halifax
Treasurer:	Remi Bouchard, Sainte-Foy
Secretary:	Georgina R. Jackson, Regina

Close of Meeting

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

Special tributes were paid to Mr. Stone for his outstanding contribution to the work of the Conference.

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

UNIFORM LAW CONFERENCE OF CANADA
REPORT TO THE CANADIAN BAR ASSOCIATION

by

ARTHUR N. STONE, Q.C.

The Uniform Law Conference of Canada held its sixty-fifth annual meeting here in Quebec City during the period from August 18th to August 26th.

The legislative Drafting Section met on August 18th and 19th under the Chairmanship of Graham D. Walker, Q.C., of Halifax, Nova Scotia. The section is made up of legislative draftsmen from all 13 jurisdictions in Canada. Also attending as guests were Mr. Geoffrey Kolts, Q.C., First Parliamentary Council, Australia and Mr. James Ryan, Q.C., Legislative Counsel in Barbados and visiting professor of the University of West Indies.

The section received a report and conducted a general discussion of the methodology of transferring the basic elements of the Young Offenders Act to provincial offences.

The section conducted a general discussion of the methodology and techniques being considered or adopted in each jurisdiction for reviewing its legislation in light of the new Charter of Rights and Freedoms and for effecting necessary amendments to Legislation as a result of that review.

The section debated drafting techniques arising in the preparation of bilingual legislation and considered the French and English versions of the Uniform Interpretation Act and of the Uniform Criminal Injuries Compensation Act.

The section also exchanged information on experience in the education, training and retention of draftsmen, received and discussed information relating to the formation of a Commonwealth Association of Parliamentary Counsel and discussed reforms in its procedures.

The Legislative Drafting Section members also continued the section's function of providing drafting services as called upon by the Uniform Law Section in the course of its meeting in the following week; as well as participating in the work of that section.

The officers of the Section for 1983-84 are:

Chairman—Bruno Lalonde, New Brunswick
Vice-Chairman—Allan Roger, British Columbia
Secretary—Merrilee Charowsky, Saskatchewan

The Uniform Law Section met August 22nd to 26th, inclusive, under the chairmanship of Gerard Bertrand, Q.C. of Ottawa.

The Section completed consideration of, and adopted, the Uniform Contributory Fault Act and the French version of the Uniform Criminal Injuries Compensation Act. Other projects in progress that were reported on and debated for ultimate uniform Acts were:

1. Intestate Succession
2. Defamation
3. Franchises
4. Vital Statistics
5. Products Liability

The Section also adopted reforms in its organization and procedures, principally to create a Steering Committee for year round active management of the agenda and the work of working committees.

Graham Walker, Q.C. of Nova Scotia was elected Chairman for the year 1983-84.

The Criminal Law Section met concurrently with the Uniform Law Section under the Chairmanship of Gordon Gregory, Q.C. of New Brunswick.

Forty-three delegates included representatives from the provinces, the federal Department of Justice and the Ministry of the Solicitor General, the President and a Commissioner of the Law Reform Commission of Canada and members of the private bar. During the week the delegates participated with remarkable enthusiasm in the deliberations of the Section.

Thirty-seven resolutions were presented calling for amendments to the *Criminal Code*, being both procedural and substantive in nature. These resolutions concerned such matters as the "wire-tap" provisions of the *Criminal Code*, and in particular the prohibition of the disclosure of the existence of an authorization, the need for an expeditious means to seek an interception in cases of hostage taking and the legitimacy of citizens assisting the police in lawful interceptions; the extension of the absolute jurisdiction of a magistrate; the extension of evidentiary presumptions concerning the possession of stolen

articles to cases where articles are obtained by fraud; the procedure of appeal to the Court of Appeal or Superior Court in the case of stated cases, the staying of proceedings or quashing of an indictment and leaves to appeal to the Supreme Court of Canada; the protection from sexual assault of feeble-minded persons, foster children and wards; the prohibition of solicitations or disclosures of the proceedings of jury deliberations; the offence of joy-riding; the ability of an accused to rebut the evidence of the Crown on a bail hearing in respect of the circumstances of the offence; the creation of a new offence of vandalism; the charging of reasonable user fees for inmates serving intermittent sentences; the power of a court to determine the place of detention of an accused who is found to be unfit to stand trial; the use of affidavits to prove service of documents; probation; and a uniform warrant of committal. In addition, the subjects of criminal rate of interest, obscenity and prostitution, hate propaganda and telephonic search warrants, were discussed.

Considerable time was devoted to the discussion of the proposed revision of the sentencing provisions of the *Criminal Code* undertaken by the federal Department of Justice and the Ministry of the Solicitor General, which are expected to be introduced as legislation in the new session of Parliament in the autumn.

An extensive discussion of a white paper proposing amendments to the *Criminal Code*, and other Acts, which was released in July 1983 by the federal Minister of Justice, took place. The proposed amendments contained approximately 60% of the resolutions passed by the Criminal Law Section from 1977-1981. The federal Department of Justice indicated that another 25% were under consideration by the Department or the Law Reform Commission of Canada, and in only 19 out of 220 resolutions has an affirmative decision been made not to proceed with proposed amendments of the Section.

The Section also nominated a Committee, to be chaired by the province of New Brunswick, to develop a policy and to report within a year in respect of the confiscation of the proceeds for the publication of crime.

Remi Bouchard of Quebec was elected chairman for the year 1983-84.

The Conference enjoys an exchange with the National Conference of Commissioners on Uniform State Laws. As President of our Conference I attended the annual meeting of the American Conference held at Boca Raton, Florida from July 22nd to 29th as an

Advisory Member. Our conference was honoured by the attendance of the President of the NCCUSL, Carlyle C. Ring Jr. of Alexandria, Virginia.

The Uniform Law Conference of Canada in plenary session on the recommendation of its Executive authorized the President to enter into discussion with the President of the Canadian Bar Association for improved liaison between the two organizations.

The Executive for 1983-84 was constituted as follows:

Honorary President	Arthur N. Stone, Q.C., Ontario
President	Serge Kujawa, Q.C., Saskatchewan
First Vice-President	Gerard Bertrand, Q.C., Ottawa
Second Vice-President	Graham D. Walker, Q.C., Nova Scotia
Treasurer	Remi Bouchard, Quebec
Secretary	Georgina Jackson, Saskatchewan

APPENDIX A

(See page 25)

PRESIDENT'S REPORT

I propose to use this occasion to briefly review the developments over the past year.

Arising out of the report of the Special Committee on Private International Law last year, it was left to the Executive to reconstitute the Committee. After canvassing the jurisdictions in which change was necessary, the Committee was reconstituted as follows:

Atlantic Provinces	—Graham D. Walker, Q.C.
Quebec	—M. Emile Colas, C.R.
Ontario	—Douglas Ewart
Canada	—Mark Jewett
Western Provinces	—Rae Tallin (who is Chairman)

It was also left to the Executive to appoint three members to the Joint Committee with the Canadian Bar Association on the Uniform Personal Property Security Act. Again, after canvassing the jurisdictions, the U.L.C. appointments were made as follows:

Professor R. C. C. Cumming, Q.C.	—Saskatchewan
H. Allan Leal, Q.C.	—Ontario
Graham D. Walker, Q.C.	—Nova Scotia

Arrangements were made, through the efforts and considerable contribution of Gerard Bertrand, to obtain the publication in French of the Report of the Task Force on Evidence. The publication was undertaken commercially by Les Editions Yvon Blais Inc. and became available to the public through the year with copies supplied to the members of the Conference.

Severe constraints on government spending for travel expenses have hampered the meetings of the Executive, as it has the meetings of working committees and indeed of this meeting. I hope it is recognized that the reduction in activity imposed for this reason is temporary.

The relationship of this Conference to the Canadian Bar Association has been a matter of concern this year, sparked in particular by the nature of the representations of that Association to the Senate Committee that was considering the Uniform Evidence Act. The subject is on the agenda for discussion later in this meeting.

In April of this year, Bob Smethurst, Q.C. gave a lecture at the University of North Dakota on uniformity of laws in Canada and the make-up and work of this Conference. I would like to take this opportunity to recognize not only Bob's considerable contribution to this Conference, but also his personal efforts to see that the work of the Conference is broadcast.

I have referred to attending the annual meeting of the NCCUSL. I believe the link is well worth sustaining, for exchange in both working methods and subject matter of projects. For example, that Conference completed consideration of a marital property Act which could well form the basis for a similar project here.

This Conference is, I believe, the finest national professional association in Canada. What has made it so has been the dedication, ability and hard work of those carrying subjects on working committees and the stimulation of vigorous and informed debate at these meetings. Our contribution to uniformity of legislation in Canada depends squarely upon the quality of the content and draftsmanship of our statutes.

I want to acknowledge the very great contribution of the members of the Executive over the past year and the considerable assistance of our Executive Secretary, Mel Hoyt.

APPENDIX B

(See page 25)

AUDITOR'S 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, 1983. 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, 1983 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.

Halifax, Canada
August 1, 1983

Clarkson Gordon
Chartered Accountants

UNIFORM LAW CONFERENCE OF CANADA

Statement of Receipts and Disbursements and Cash Position

Year Ended July 15, 1983

	General Fund	Research Fund	Total 1983	Total 1982
Receipts:				
Annual contributions (note 2)	$52,599	$	$52,599	34,300
Government of Canada (note 2)				25,000
Interest	1,035	750	1,785	6,268
	53,634	750	54,384	65,568
Disbursements:				
Printing of—1982 proceedings	8,360		8,360	
—1981 proceedings				18,227
—1980 proceedings				13,071
Executive secretary—honorarium	13,583		13,583	12,151
—other				300
Secretarial services	3,360		3,360	5,218
National Conference of Commissions on Uniform State Laws	5,477		5,477	5,000
Executive travel	2,470		2,470	4,821
Annual meeting	1,403		1,403	1,547
Executive meeting				878
Professional fees	964		964	810
Joint Liaison Committee meeting				438
Postage	1,252		1,252	315
Printing and stationery	659		659	217
Miscellaneous	76		76	235
Telephone	770		770	167
Products Liability Project		1,338	1,338	
Sale of Goods Act Project				4,749
Evidence Task Force Meeting				646
Evidence Task Force Printing		8,135	8,135	
Personal Property Security Act Committee				281
	38,374	9,473	47,847	69,071
Excess (deficiency) of receipts over disbursements before interfund transfers	15,260	(8,723)	6,537	(3,503)
Interfund transfer (note 3)	4,317	(4,317)		
Balance in bank, beginning of year	14,135	54,901	69,036	72,539
Balance in bank, end of year	$33,712	$41,861	$75,573	$69,036
Balance in bank consists of:				
Term deposits	$45,000	$25,000	$70,000	$29,840
Current account (overdraft)	(14,588)	16,761	2,173	39,196
Savings account	3,300	100	3,400	—
	$33,712	$41,861	$75,573	$69,036

(See accompanying notes to the statement)

UNIFORM LAW CONFERENCE OF CANADA

Notes to the Statement of Receipts and Disbursements and Cash Position July 15, 1983

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*

Annual contributions have yet to be received as of July 15, 1983 from the following members:

	1983 Contributions	1982 Contributions	Total
Alberta	$4,000		$ 4,000
Newfoundland		$1,500	1,500
Prince Edward Island		700	700
Saskatchewan	4,000	1,500	5,500
	$8,000	$3,700	$11,700

The anticipated annual grants to the Research Fund from the Government of Canada to a maximum of $25,000 per year for both 1982 and 1983 have not yet been received.

3. *Interfund Transfer*

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

4. *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.

5. *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.

APPENDIX C

(See page 26)

EXECUTIVE SECRETARY'S REPORT

There are two things to report this year.

First, through the efforts of the executive, most of our reports are being filed before or near the deadline, June 1. As a result, the reports are circulated to the local secretaries in plenty of time for study by those commissioners who are concerned with the various topics.

Secondly, your attention should be directed to the table of Uniform Acts in our proceedings. We specifically show jurisdictions as having enacted Uniform Acts in part only, or incorporated with other provisions, or under a different title. In some cases we show jurisdictions as having enacted something similar in effect. Our standard resolution on adopting a draft Act is that it be adopted as a Uniform Act and recommended for enactment in that form. It should be noted, therefore, that many so called Uniform Acts are not enacted as recommended; in fact, in some cases, what we might find is an enactment of principle in part only, incorporated with other provisions in another Act. We try to identify those modifications the best we can.

M. M. Hoyt
Executive Secretary

APPENDIX D

(See page 26)

MEDIA RELATIONS AT MEETINGS OF THE UNIFORM LAW CONFERENCE OF CANADA

Background

At the closing session of its sixty-first annual meeting held at Saskatoon in August 1979, the Uniform Law Conference of Canada adopted the following resolution concerning media relations:

> RESOLVED that all meetings of the Conference and its Sections be held /in camera/ unless it is determined otherwise on a particular occasion.
>
> RESOLVED that the Executive review the wording of the above resolution at its next meeting.
>
> RESOLVED that in the Executive's review of the subject the matter of the establishment of guidelines for delegates vis-à-vis the media be considered.

It must be remembered that earlier in the proceedings of that meeting, the Uniform Law Section had discussed the question of defamation which happened, at the time, to be of special interest to the local media, in light of /Cherneskey v. Armadale Publishers Ltd. 1979/ S.C.R. 1067. That case had its origin in a letter to the editor of a Saskatoon newspaper.

The above may explain the sudden and isolated interest of the media in the proceedings of the Uniform Law Conference of Canada. Other similar situations might however arise, hence the importance for the Conference to adopt a policy for the guidance of delegates on relations with the media and on the confidentiality of the Conference documents as requested in the following resolution adopted during the closing plenary session of the 1982 annual meeting:

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

Factors

The following factors or questions must be taken into account or addressed:

— the low profile of the Conference, its advisory character and the fact that the views of the delegates are their own and therefore do not necessarily commit the Governments, Commissions or bodies for which they work or to which they belong;

—the fact that the Conference publishes its annual proceedings and makes them available on request;

—whether the Conference wishes to have some publicity or whether it ought to maintain its current low profile.

—The practice of the Canadian Intergovernmental Conference Secretariat which assigns the security classification "CONFIDENTIAL" to most documents of the Uniform Law Conference even though they are not generally of a confidential nature.

Discussion

It is open to question whether meetings of the Uniform Law Conference of Canada are newsworthy enough to attract the media's attention. This is not to say that the mandate of the conference is not important but rather to suggest that in light of the nature of its work, its advisory role and the informal nature of the participants' views, it does not appear to need media attention.

The work of the Conference is of a specialized nature and it is doubtful whether opening the meetings to the media would serve any useful purpose. Actually, it might have the reverse effect since having the press in attendance might put a damper on frank and open discussion or, worse, encourage posturing. It would unfavourably alter the nature of the Conference since remarks of officials of a government could end up being attributed to that government.

It would seem desirable, therefore, to maintain the general policy adopted in 1979 that all meetings of the Conference and of its sections be closed to the public and media unless special circumstances exist that would justify that they be open, and that this policy be broadened to provide that all reasonable assistance be extended to the media. Such assistance could be extended through opening and closing statements in the two official languages and, if warranted by the circumstances, through briefings after each session or a particular session by the President of the Section or a delegated spokesperson. It would be important that such briefings be conducted by a single designated person since unfortunate situations could arise for lack of a uniform procedure were some jurisdictions to maintain a pledge of confidentiality while others would feel free to talk.

Some form of assistance as just outlined is essential because the fact that meetings are classified as "closed" or "in camera" rarely acts as a deterrent to the media. On the contrary, this may simply stimulate the interest of the most enterprising among them who are expert at

digging up the news in the corridors and lobbies. Also, the fact that delegates at the Uniform Law Conference are officials who speak for themselves, not Cabinet ministers, would not necessarily reduce interest on the part of the media if they consider a particular topic or question as being newsworthy, as was the case in Saskatoon in 1979.

One should bear in mind that the job of journalists is to find news which will be of interest to the majority of their readers or audience in a language which they can understand. It is therefore in the interest of the Conference and of its sections to assist the media by providing such information or material through an agreed procedure as can be made public in order to ensure accurate reporting. Otherwise, the news will nevertheless be reported and often in an unsatisfactory manner.

Media coverage should not be left to chance and one should remember that very often a terse statement, easily convertible into a headline is, especially with the electronic media, all that is required.

Finally, with regard to the general practice of marking documents "Confidential", it ought to be discontinued for the very reason that it is more often than not unnecessary and can lead to a misunderstanding of the informal and advisory role of delegates. It could also be misleading and thus attract unnecessary attention. The "confidential classification" ought to be the exception, not the rule, and, by way of consequence, should therefore be strictly observed by the delegates.

Recommendations

It is recommended that it be:

RESOLVED that all meetings of the conference and of its Sections be closed to the public and media unless it is determined otherwise by the Conference or the appropriate section on a particular occasion.

RESOLVED that any interest shown by the media be satisfied by statements or interviews given by the President in general, and on any particular subject by the chairperson of the section in which the subject arises, but this resolution is not to preclude an individual member from producing reports not classified as confidential and giving his own opinion thereon.

RESOLVED that all official documents of the Conference be marked /unclassified/ unless the originators ask that they be marked /confidential/ and that no official documents be released by the Secretariat unless the originators have given their authorization.

APPENDICE D

(Voir page 26)

RELATIONS AVEC LES MEDIA À L'OCCASION DES RÉUNIONS DE LA CONFÉRENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

Historique

À la séance de clôture de sa soixante et unième réunion annuelle à Saskatoon, en août 1979, la Conférence canadienne sur l'uniformisation des lois a adopté la résolution suivante concernant ses relations avec les media:

> IL EST RÉSOLU que toutes les réunions de la Conférence et de ses sections soient tenues à huis clos, à moins de décision contraire dans un cas particulier.
>
> IL EST RÉSOLU que l'Exécutif examine la teneur de la résolution qui précède à l'occasion de sa prochaine réunion.
>
> IL EST RÉSOLU qu'à l'occasion de cet examen l'Exécutif examine aussi la question de l'établissement de lignes directrices à suivre par les délégués auprès des media.

Il convient de signaler que plus tôt à l'occasion de cette réunion la Section de l'uniformisation des lois avait discuté de la question de la diffamation qui intéressait particulièrement les media locaux à cause de l'affaire /Cherneskey c. Armadale Publishers Ltd. 1979/ R.C.S. 1067. C'est une lettre au rédacteur en chef d'un journal de Saskatoon qui était à l'origine de cette affaire.

Cette cause explique peut-être cet intérêt soudain et exceptionnel des media pour les délibérations de la Conférence canadienne sur l'uniformisation des lois. Il pourrait cependant y avoir d'autres cas semblables, d'où l'importance pour la Conférence d'adopter une politique à suivre pour ses délégués concernant les relations avec les media et le caractère confidentiel des documents de la conférence, comme le requiert la résolution qui suit adoptée lors de la séance plénière de clôture de la réunion annuelle de 1982:

> «Il a été résolu que le Comité exécutif examine la question de savoir quel caractère confidentiel il convient de donner aux rapports de la Conférence et qu'il fasse un compte rendu de cet examen.»

Éléments

Il convient de tenir compte des questions ou éléments qui suivent:

— le rôle effacé de la Conférence, son caractère consultatif et le fait

que les points de vue exprimés par les délégués sont personnels et n'engagent donc pas nécessairement les gouvernements, les commissions ou les organismes pour lesquels ils travaillent ou auxquels ils appartiennent;

—le fait que la Conférence publie ses travaux annuels et les distribue à quiconque le demande;

—la question de savoir si la Conférence souhaite une certaine publicité ou préfère rester dans l'ombre;

—la pratique du Secrétariat des conférences intergouvernementales canadiennes qui qualifie de «CONFIDENTIEL» la plupart des documents de la Conférence canadienne sur l'uniformisation des lois bien que ceux-ci n'aient généralement pas ce caractère.

Examen de la Question

On peut se poser la question à savoir si les réunions de la Conférence sur l'uniformisation des lois au Canada sont susceptibles de présenter un intérêt suffisant pour les media. Ce n'est pas que le mandat de la Conférence ne soit pas important, mais compte tenu de la nature du travail de celle-ci, de son rôle consultatif et du caractère officieux des points de vue exprimés par les participants, il ne semble pas nécessaire que les media en assure la couverture.

Les travaux de la Conférence ont un caractère spécialisé et il est douteux que la présence des media puisse servir une fin utile. De fait, il se pourrait que ce soit le contraire qui se produise étant donné que la présence des media risquerait d'empêcher les discussions franches et ouvertes, ou, ce qui serait pire, d'encourager des prises de position exagérées. La nature de la Conférence serait défavorablement changée car des remarques faites par des fonctionnaire d'un gouvernement pourraient fort bien être attribuées à ce gouvernement.

Il semblerait donc souhaitable de continuer d'appliquer le principe d'ordre général adopté en 1979 suivant lequel toutes les réunions de la Conférence et de ses sections sont tenues à huis clos, à moins de circonstances exceptionnelles qui justifient que le public y assiste, mais d'élargir ce principe afin de prévoir que la Conférence prête dans la mesure de ses moyens assistance aux media. Telle assistance pourrait se traduire par des déclarations d'ouverture et de clôture dans les deux langues officielles et, si les circonstances l'exigent, par des séances d'information tenues après chaque séance ou après une séance particulière et dirigées par le président de la section ou par un porte-parole délégué. Il s'imposerait que ces séances d'information

soient dirigées exclusivement par la personne désignée car il se pourrait en l'absence d'uniformité de procédure que des situations regrettables surviennent si certaines délégations s'étaient engagées à garder le secret alors que d'autres se sentiraient libres de parler.

Une certaine forme d'assistance s'impose puisque le fait que des réunions soient catégorisées «fermées» ou «à huis clos» exerce rarement un effet de dissuasion auprès des media. Au contraire, ce genre de réunions peut for bien stimuler l'intérêt des journalistes les plus entreprenants qui sont habiles à trouver les nouvelles dans les couloirs et les antichambres. En outre, le fait que les délégués à la Conférence canadienne sur l'uniformisation des lois soient des fonctionnaires qui parlent en leur propre nom, et non pas des ministres du Cabinet, ne diminuera pas nécessairement l'intérêt des media, si ceux-ci estiment qu'une question mérite leur attention, comme fut le cas à Saskatoon en 1979.

Il faut se souvenir que le rôle des journalistes consiste à recueillir des éléments d'information qui sont susceptibles d'intéresser leurs lecteurs ou leur public et à leur transmettre ces éléments d'information en language clair et simple. Il y va donc de l'intérêt de la Conférence et de ses sections d'aider, le cas échéant, les media en fournissant à ceux-ci, selon une procédure bien établie, des renseignements ou documents qui peuvent être rendus publics de manière à assurer l'exactitude des reportages. Sinon les informations seront quand même portées à la connaissance du public et souvent de façon inadéquate.

La couverture de la Conférence par les media ne doit pas être laissée au hasard. Il ne faut pas non plus oublier que très souvent tout ce qui est requis est une courte déclaration qui puisse se transformer facilement en manchette, surtout en ce qui concerne les media électroniques.

Finalement, il conviendrait de mettre fin à la pratique d'inscrire le mot «confidentiel» sur tous les documents de la conférence car, dans la plupart des cas, cette pratique n'est pas nécessaire et peut donner lieu à une conception erronée du rôle officieux et consultatif des délégués. Cette pratique peut également être trompeuse et attirer l'attention sans aucune raison. La mention «confidentiel» devrait constituer l'exception et non la règle et, par voie de conséquence, ce caractère confidentiel devrait être rigoureusement préservé par les délégués.

Recommandations

Il est recommandé qu'il soit:

IL EST RÉSOLU que le public et les media ne soient pas invités à assister aux réunions de la Conférence et de ses sections, à moins de décision contraire par la Conférence ou une section dans un cas particulier.

IL EST RÉSOLU que le président de la Conférence réponde à l'intérêt manifesté par les media par des déclarations ou entrevues, et que le président d'une section en fasse autant lorsqu'il s'agit d'une question qui intéresse particulièrement cette section, étant entendu que la présente résolution ne doit pas empêcher un délégué de communiquer des rapports qui ne sont pas considérés confidentiels et d'exprimer son avis à leur sujet.

IL EST RÉSOLU que tous les documents officiels de la Conférence ne portent pas de classification de sécurité, à moins que les initiateurs ne demandent qu'ils soient marqués «confidentiels» et qu'aucun document ne soit distribué par le Secrétariat à moins que ses auteurs ne l'aient autorisé.

APPENDIX E

(See page 28)

PROVINCIAL COMPANIES LEGISLATION PROVISIONS REGARDING RIGHTS OF ACTION OF EXTRA-PROVINCIAL CORPORATIONS

Background

1. The matter of the capacity of corporations to sue and carry on business in another jurisdiction in Canada without extra-provincial licensing or registration was first raised by Canada at the 1982 annual meeting of the Conference. It was then decided that this matter would be placed on the agenda and referred to the Quebec, Ontario and Canada Commissioners for a report in 1983.

2. The suggestion by Canada that consideration be given to corporations in one province or territory being able to sue without restriction in another emanated from an approach to the Minister of Justice by a Member of Parliament in response to representations from a constituent.

Present Situation with Regard to the Right to Sue

3. With the exception of Quebec, all the provinces and both territories have provisions in their statutes governing the right of companies incorporated in another province or territory, and doing business within the limits of their jurisdiction, to institute proceedings. In general, a company doing business in a jurisdiction without being registered is prohibited from bringing an action regarding a contract, concluded wholly or partly within that jurisdiction in the course of, or in connection with, its business. Some provinces, like Prince Edward Island and New Brunswick, go even further and extend the inability to sue to contracts which do not arise in the ordinary course of the company's business and for which the company would not even have to be registered.

4. It should be noted that the phraseology used in the various statutes is not always the same. They also differ in other respects. For instance it is sometimes possible in certain provinces to bring proceedings before being registered in order not to lose a right of action as a result of prescription, while in others this is not permitted. Some statutes also provides for retroactive registration for companies which bring an action before being registered.

5. It should also be noted that the fact for a corporation to bring an action in an outside jurisdiction does not in itself mean that it is doing

business in that jurisdiction. In other words if the institution of proceedings is not included in the definition of doing business in the applicable statute, a non-registered company which does not do business in the jurisdiction of that statute could as a result bring an action unless there were specific restrictions such as those existing in Prince Edward Island and New Brunswick with regard to transactions that are not part of a corporation's business.

6. In the case of Quebec where an unregistered company is not prohibited from instituting proceedings, the fact of doing business in breach of provisions in the statute requiring registration will generally be subject to no penalty other than a fine. Failure to register is only a ground of defence that can be raised in attempting to have the contract in litigation set aside. The plaintiff company is however likely to be required to provide security, usually as the result of a request by the opposing party as a preliminary motion.

Present Situation with Regard to Outside Corporations Being Sued

7. The absence of a permit or licence would not prevent an outside corporation from being sued, but would prevent it from filing a countersuit if it were carrying on its activities in breach of the applicable statute. The Quebec and Alberta statutes, for example, allow actions against outsiders where the cause of action arose in the province or the defendant is resident therein. The courts have long recognized the jurisdiction of a province on non-residents who have committed illegal acts or caused damage on its territory. Problems arise however with regard to the service of documents when the corporation is not a resident of the province or has no place of business within the province. It should be borne in mind that the term "residence" has been the subject of different interpretations by the Courts.

Present Situation with Regard to the Right to Conduct Business

8. Existing provincial and territorial legislation provides that companies incorporated elsewhere must register in order to conduct business within the province or territories. Federal companies are, however, exempt from registration, and there is also a reciprocal agreement between Quebec and Ontario which allows companies incorporated in one of those provinces to operate within the other without complying with registration requirements. The obtention of a permit is closely linked with the concept of doing business. All statutes, except for Quebec and Manitoba, include a definition of that concept, but the definitions differ significantly. Only Alberta, Nova Scotia and the Northwest Territories have similar definitions. New

Brunswick has a comprehensive definition. In other words there is no uniformity and there is no definition, except maybe that of New Brunswick, that indicates precisely the limits of this concept. This concept is important in the determination of whether a company should be registered and of its place in one of the following four possible situations.

1. The company does business and is registered.
2. The company does business and is not registered.
3. The company does not do business and does not have to be registered.
4. The company does business but does not have to be registered because of an inter-provincial agreement.

Conclusions

9. In light of existing legislation, it might be unrealistic to try to proceed further with the proposal that extra-provincial corporations be entitled to sue without being subject to registration requirements. Indeed there seems to be near unanimity on this subject and in the only jurisdiction where this is not a requirement, measures exist that make it possible to compel those corporations to provide security. No matter what decision is taken in that regard, the fact remains that a superficial review of existing legislation has disclosed lack of uniformity in provisions dealing with:

a) the definition of the concept of doing business;
b) the right to bring in an action prior to registration;
c) the type of contracts for which registration is required if an extra-provincial corporation is to be able to bring an action;
d) service of documents on extra-provincial corporations being sued.

Recommendations

10. It is recommended that

a) the Uniform Law Section be asked whether it wishes that the concept of registration as a prerequisite to instituting legal proceedings be maintained;
b) whether, regardless of the answer to recommendation a), it sees merit in efforts to achieve uniformity in existing legislation in the areas listed in paragraph 9 above; and
c) if the answer to b) is in the affirmative, that the commissioners for Canada and other jurisdictions interested be asked to bring proposals, as appropriate, to the next meeting of the Conference.

APPENDIX F

(See page 28)

UNIFORM CRIMINAL INJURIES COMPENSATION ACT

(1970 proceedings; pages 39, 299)

Interpretation

1. (1) In this Act

(*a*) "Board" means the Criminal Injuries Compensation Board established under this Act;

(NOTE: Where a province prefers to add to the duties of an existing board, insert here the name of the appropriate board.)

(*b*) "child" includes an illegitimate child and a child to whom a victim stands *in loco parentis;*

(*c*) "dependant" means a spouse, child or other relative of a deceased victim who was, in whole or in part, dependent upon the victim for support at the time of his death and includes a child of the victim born after his death;

(*d*) "injury" means actual bodily harm;

(*e*) "peace officer" means a peace officer as defined in the *Criminal Code* (Canada); R S C. 1970, c 34

(*f*) "victim" means a person injured or killed in the circumstances set out in section 5(1).

Pregnancy and mental or nervous shock

(2) For the purpose of this Act, pregnancy, mental or nervous shock are deemed to be an injury.

Unmarried spouse

(3) The Board may direct that persons were spouses of each other for the purposes of this Act where the Board finds that,

(*a*) although not married, they cohabited as man and wife and were known as such in the community where they lived; and

(*b*) the relationship was of some permanence,

and the Board may direct that any person to whom a victim or applicant was married and who was living apart from the victim or applicant under circumstances that would have disentitled such person to alimony was not a spouse of the victim or applicant for the purposes of this Act.

Administration of Act

2. The Attorney General (*or other Minister*) is responsible for the administration of this Act.

The Criminal Injuries Compensation Board established

3. (1) The Criminal Injuries Compensation Board is established and shall be composed of not fewer than three and not more than five members who shall be appointed by

the Lieutenant Governor in Council, and the Lieutenant Governor in Council shall appoint one of such members as chairman and one or more of them as vice-chairmen.

Board a corporation

(2) The Board is a corporation to which the *Companies Act, (or as appropriate)* does not apply.

Quorum

(3) Two members of the Board, one of whom must be the chairman or a vice-chairman, constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board.

Duties of chairman

(4) The Chairman shall have general supervision and direction over the conduct of the affairs of the Board, and shall arrange the sittings of the Board and assign members to conduct hearings as circumstances require.

(*NOTE: Where an existing board is adopted under paragraph 1(1)(a), the province should omit the parts of section 4 that are provided for elsewhere in its legislation.*)

Publishing reports

4. The Board shall prepare and periodically publish a summary of its decisions and the reasons therefor.

Injuries compensable

5. (1) Where any person is injured or killed, by any act or omission in the Province of any other person occurring in or resulting from

(*a*) the commission of an offence within the description of any criminal offence mentioned in the Schedule, except an offence arising out of the operation of a motor vehicle but including assault by means of a motor vehicle;

(*b*) lawfully arresting or attempting to arrest any offender or suspected offender, or assisting a peace officer in making or attempting to make an arrest; or

(*c*) lawfully preventing or attempting to prevent the commission of any offence or suspected offence, or assisting a peace officer in preventing or attempting to prevent the commission of such offence or suspected offence,

the Board, on application therefor, may make an order that it, in its discretion exercised in accordance with this Act, considers proper for the payment of compensation to,

(*d*) the victim;

(*e*) a person who is responsible for the maintenance of the victim;

(*f*) where the death of the victim has resulted, the victim's dependants or any of them or the person who was responsible for the maintenance of the victim immediately before his death or who has, on behalf of the victim or his estate, incurred an expense referred to in section 7(1)(*a*) or (*e*).

Peace officers excepted

(2) Subsection (1) does not apply in respect of the injury or death of a peace officer occurring under circumstances entitling him or his dependants to compensation payable out of public moneys under any other Act of the Province of Canada or payable by an organization that is supported in whole or in part by public funds.

Minimum Loss

(3) Where a claim is for less than $100, no application shall be entertained by the Board and where the award determined is less than $100, no award shall be made.

Limitation period for application

6. An application for compensation shall be made within one year after the date of the injury or death but the Board, before or after the expiry of the one-year period, may extend the time for such further period as it considers warranted.

Compensation

7. Compensation may be awarded for

(*a*) expenses actually and reasonably incurred or to be incurred as a result of the victim's injury or death;

(*b*) pecuniary loss or damages incurred by the victim as a result of total or partial disability affecting the victim's capacity for work;

(*c*) pecuniary loss or damages incurred by dependants as a result of the victim's death;

(*d*) maintenance of a child born as a result of rape;

(*e*) other pecuniary loss or damages resulting from the victim's injury and any expense that, in the opinion of the Board, it is reasonable to incur.

Idem

(2) Where the injury to a person occurred in the circumstances mentioned in section 5(1)(*b*) or (*c*) the Board may, in addition to the compensation referred to in subsection (1), award compensation to the injured person for any other damage resulting from the injury for which compensation may be recovered at law, other than punitive or exemplary damages.

Notice of hearing

8. (1) Where an application is made to the Board, the Board shall fix a time and place for the hearing of the

application and shall at least ten days before the day fixed cause notice thereof to be served upon the applicant, upon the Attorney General, upon the offender where practicable and upon any other person appearing to the Board to have an interest in the application.

Idem

(2) The notice of hearing shall contain

(*a*) a statement of the time and place of the hearing;

(*b*) a reference to the rules of procedure applicable to the proceedings;

(*c*) a concise statement of the grounds for the application; and

(*d*) a statement that, if a party who has been duly notified does not attend at the hearing, the Board may proceed in his absence and he is not entitled to notice of any further proceedings.

Parties

9. (1) Every person upon whom notice of a hearing is served and any other person specified by the Board is a party to the proceedings.

Failure to attend

(2) If any party to the proceedings does not attend the hearing, the Board may proceed in his absence.

Hearing dispensed with

10. With the consent of the applicant, the Board may make an order for compensation without a hearing and sections 8 and 9 do not apply.

Adjournment

11. (1) A hearing may be adjourned from time to time by the Board on reasonable grounds,

(*a*) on its own initiative; or

(*b*) on the request of any party to the proceedings.

Summonses

(2) The Board may, in the prescribed form, command the attendance before it of any person as a witness.

Oaths

(3) The Board at a hearing may require any person

(*a*) to give evidence under oath; and

(*b*) to produce such documents and things as the Board may require.

Evidence

(4) The Board may receive in evidence any statement, document, information or matter that, in its opinion, may assist it to deal effectually with the matter before it, whether or not the statement, document, information or matter is given or produced under oath or would be admissible as evidence in any court of law.

Conviction as conclusive evidence

(5) If a person is convicted of a criminal offence in respect of an act or omission on which a claim under this Act is based, proof of the conviction shall, after the time for an appeal has expired or if an appeal was taken, it was dismissed and no further appeal is available, be taken as conclusive evidence that the offence has been committed.

Protection for witnesses

(6) A witness at a hearing shall be deemed to have objected to answer any question asked him upon the ground that his answer may tend to criminate him or may tend to establish his liability to civil proceedings at the instance of the Crown, or of any person, and no answer given by a witness at a hearing shall be used or be receivable in evidence against him in any trial or other proceedings against him thereafter taking place, other than a prosecution for perjury or for the giving of contradictory evidence.

Offences

(7) Any person who, without lawful excuse,

(*a*) on being duly summoned as a witness before the Board, makes default in attending;

(*b*) being in attendance as a witness before the Board refuses to take an oath legally required by the Board to be taken, or to produce any document or thing in his power or control legally required by the Board to be produced by him, or to answer any question to which the Board may legally require an answer; or

(*c*) does any other thing that if done in a court of law would be contempt,

is guilty of an offence punishable under subsection (8).

Enforcement

(8) The Board may certify an offence under subsection (7) to the appropriate court and that court may thereupon inquire into the offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

Administration of oaths

(9) A member of the Board has power to administer oaths and receive affirmations for the purposes of any of its proceedings.

Right of party to counsel

12. Any party may be represented before the Board by counsel.

Right of parties at hearing

13. At a hearing before the Board, any party may call and examine his witnesses, cross-examine opposing witnesses and present his arguments and submissions.

Right of witness to counsel

14. (1) Any witness may be represented before the Board by counsel, but at the hearing the counsel may only advise the witness and state objections under the provisions of the relevant law.

Idem

(2) Where a hearing is held in *camera*, a counsel for a witness is not entitled to be present except when that witness is giving evidence.

Hearings to be opened to public; exceptions

15. All hearings shall be open to the public except where,

(*a*) the person whose act or omission caused the injury or death has not been charged with a criminal offence or, if charged, had not been convicted of any criminal offence;

(*b*) it would not be in the interests of the victim, or of the dependants of the victim, of an alleged sexual offence to hold the hearings in public; or

(*c*) it would not be in the interest of the public morality to hold the hearings in public.

Publication of evidence

16. (1) The Board may make an order prohibiting the publication of any report or account of the whole or any part of the evidence at a hearing where the Board considers it necessary for one of the reasons mentioned in section 15, but in making an order under this subsection the Board shall have regard to the desirability of permitting the public to be informed of the principles and nature of each case.

Offence

(2) Any person who publishes a report or account of any evidence at a hearing contrary to an order of the Board under subsection (1) is guilty of an offence and on summary conviction is liable to a fine of not more than two thousand dollars or to imprisonment for a term of not more than one year, or to both.

Corporations

(3) Where a corporation is convicted of an offence under subsection (2), the maximum penalty that may be imposed upon the corporation is twenty-five thousand dollars and not as provided therein.

Interim compensation

17. Where

(*a*) the applicant is in actual financial need; and

(*b*) it appears to the Board that it will probably award compensation to the applicant,

the Board may, in its discretion, order interim payments to the applicant in respect of maintenance and medical expenses and, if compensation is not awarded, the amount so paid is not recoverable from the applicant.

Decision to be in writing

18. (1) The final decision of the Board, including reasons therefor, shall be in writing.

Contents of reasons for decision

(2) The reasons for the final decision shall include

(*a*) any agreed findings of facts;

(*b*) the findings of fact on the evidence;

and

(*c*) the conclusions of law based on the findings mentioned in clauses (*a*) and (*b*).

Notice of decision

(3) The Board shall cause to be served on the parties a copy of its final decision, including the reasons therefor.

Service

19. (1) Any notice or document required to be served under this Act or the regulations is sufficiently served if delivered personally or sent by registered mail addressed to the person upon whom service is required to be made at the latest address for service appearing on the records of the Board.

Idem

(2) Where any notice or document mentioned in subsection (1) is served by registered mail, the service shall be deemed to be made on the third day after the day of mailing.

Exception

(3) Notwithstanding subsections (1) and (2), the Board may order any other method of service of any notice or document mentioned in subsection (1).

Compensation not dependent on a conviction

20. (1) An order for compensation may be made whether or not any person is prosecuted for or convicted of the offence giving rise to the injury or death but the Board may, on its own initiative or upon the application of the Attorney General, adjourn its proceedings pending the final determination of a prosecution or intended prosecution.

Capacity for *mens rea*

(2) Notwithstanding that a person for any reason is legally incapable of forming criminal intent, he shall, for the purposes of this Act, be deemed to have intended an act or omission that caused injury or death for which compensation is payable under this Act.

Release of exhibits

21. The Board shall, upon request, release documents and things put in evidence at a hearing to the lawful owner or

the person entitled to possession thereof within a reasonable time after the matter in issue has been finally determined.

Variation of award

22. (1) The Board may at any time on its own initiative or on the application of the victim, any dependant of the victim, the Attorney General or the offender, vary an order for payment of compensation in such manner as the Board thinks fit, whether as to terms of the order or by increasing or decreasing the amount ordered to be paid, or otherwise.

Idem

(2) In proceedings under subsection (1), the Board shall consider

(*a*) any new evidence that has become available;

(*b*) any change of circumstances that has occurred since the making of the order or any variation thereof, as the case may be, or that is likely to occur; and

(*c*) any other matter the Board considers relevant.

Procedure, etc., on review

(3) This Act, except section 6, applies to a review under subsection (1) in the same manner as to an application for compensation.

Costs

23. The Board may, with respect to any hearing or other proceeding under this Act, make such order as to costs as it thinks fit, including a counsel fee not exceeding fifty dollars.

Appeal

24. Subject to section 22, a decision of the Board is final except that an appeal lies to the Court of Appeal from any decision of the Board on any question of law.

Considerations of Board

25. (1) In determining whether to make an order for compensation and the amount thereof, the Board shall have regard to all relevant circumstances, including any behaviour of the victim that may have directly or indirectly contributed to his injury or death.

Idem

(2) In determining the amount of compensation, if any, to be awarded to an applicant, the Board shall deduct

(*a*) any amount recovered from the person whose act or omission resulted in the injury or death, whether as damages or compensation, pursuant to an action at law or otherwise; and

(*b*) any benefits received or to be received

(i) by the victim in respect of his injury,

or

(ii) by the applicant in respect of the death of the victim, under an Act of Canada or of the Province or of any other Province of Canada other than benefits under a pension plan or program under such an Act.

Form of compensation

26. The Board may order compensation to be paid in a lump sum or in periodic payments, or both, as the Board thinks fit.

"rate" defined

27. (1) In this section, "rate" means the rate for Government of Canada securities of ten years and over as published in the Bank of Canada Statistical Summary.

Maximum awards

(2) The amount awarded by the Board to be paid in respect of the injury or death of one victim shall not exceed,

(*a*) in the case of lump sum payments, fifteen thousand dollars; and

(*b*) in the case of periodic payments, the income from a capital sum of fifty thousand dollars calculated at the rate for the month of January in respect of the first six months of each year and for the month of July in respect of the second six months of each year,

and where both lump sum and periodic payments are awarded, one only but not both may exceed half of the maximum therefor prescribed in clause (*a*) or (*b*), as the case may be.

Pro rata distribution

(3) When the total amount of the awards that would, but for subsection (2), have been made in respect of the injury or death of one victim exceeds the maximum amount prescribed by subsection (2), such maximum award shall be distributed in proportion to the amounts of the awards that would, but for subsection (2), have been made.

Maximum total of payments for occurrence

(4) The total amount awarded by the Board to be paid to all applicants in respect of any one occurrence shall not exceed,

(*a*) in the case of lump sum payments, a total of one hundred thousand dollars; and

(*b*) in the case of periodic payments, the income from a capital sum of three hundred and fifty thousand dollars, calculated in the manner prescribed by paragraph (2)(*b*).

Pro rata distribution

(5) Where the total amount of the awards that would, but for subsection (4), have been made in respect of any one occurrence exceeds the maximum amount prescribed by

subsection (4), such maximum award shall be distributed in proportion to the amounts of the awards that would, but for subsection (4), have been made.

Acts deemed an occurrence

(6) For the purposes of this section the Board may deem more than one act to be one occurrence where the acts have a common relationship in time and place.

Exception re claims under cls. (*b*), (*c*) of subs (1) of s 5

(7) Subsections (1) to (5) do not apply to amounts awarded in respect of an injury or death incurred in the circumstances referred to in section 5(1)(*b*) or (*c*), and such amounts shall not be taken into account in determining maximum awards.

Award not subject to garnishment

28. Any compensation or other amount awarded as costs paid or payable under this Act is not subject to garnishment, attachment, seizure or any other legal process and the right thereto is not assignable.

Conditions of payment

29. (1) An order for the payment of compensation may be made subject to such terms and conditions as the Board thinks fit,

(*a*) with respect to the payment, disposition, allotment or apportionment of the compensation; or

(*b*) as to the holding of the compensation or any part thereof in trust for the victim or the dependants, or any of them, whether as a fund for a class or otherwise.

Idem

(2) Any compensation payable for expenses under section 7 may, in the discretion of the Board, be paid directly to the person entitled thereto.

Civil proceedings

30. (1) Subject to subsections (2), (3) and (4), nothing in this Act affects the right of any person to recover from any other person by civil proceedings damages in respect of the injury or death.

Subrogation

(2) The Board is subrogated to all the rights of the person to whom payment is made under this Act to recover damages by civil proceedings in respect of the injury or death and may maintain an action in the name of such person against whom such action lies, and any sum recovered by the Board shall be applied

(*a*) first, to payment of the costs actually incurred in the action and in levying execution; and

(*b*) second, to reimbursement to the Board of the value of the compensation awarded,

and the balance, if any, shall be paid to the person whose rights were subrogated.

Settlement

(3) Any settlement or release does not bar the rights of the Board under subsection (2) unless the Board has concurred therein.

Civil actions

(4) An applicant for or a person awarded compensation shall forthwith notify the Board of any action he has brought against the offender who caused the injury or death of the victim.

Payment of compensation

31. (1) Compensation ordered to be paid shall be paid out of (the moneys appropriated therefor by the Legislature *or* the Consolidated Revenue Fund, *as the Province considers appropriate*.)

Disposition of money recovered

(2) Any money to which the Board is entitled under section 30 shall be paid into the Consolidated Revenue Fund.

Regulations

32. The Lieutenant Governor in council may make regulations

(*a*) prescribing rules of practice and procedure in respect of applications to the Board and proceedings of the Board;

(*b*) requiring the payment of fees in respect of any matter in the jurisdiction of the Board, including witness fees, and prescribing the amounts thereof;

(*c*) prescribing forms for the purposes of this Act and providing for their use; and

(*d*) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

Agreements with Canada

33. The Crown in right of the Province represented by the Attorney General (*or other Minister named in section 2*), with the approval of the Lieutenant Governor in Council, may make agreements with the Crown in right of Canada respecting the payment by Canada to the Province of such part of the expenditures required for the purposes of this Act as is agreed upon.

Application of Act

34. This Act applies in respect of claims for compensation arising from an injury or death resulting from an act or omission that occurs after this Act comes into force.

SCHEDULE

(Subsection 5(1))

Section of Criminal Code	*Description of Offence*
17	compulsion by threats
18	compulsion of spouse
66	taking part in a riot
78	failure to take care
79	causing injury with intent
146	sexual intercourse with female under 14 or between 14 and 16 years of age
176	common nuisance
179(1)	prostitute
197	failure to provide necessaries
200	abandoning child
202	criminal negligence
203	causing death by criminal negligence
212	murder
213	murder in commission of offences
214(5)	hijacking, sexual assault or kidnapping
217	manslaughter
222	attempted murder
228	causing bodily harm with intent
229	administering noxious thing
230	overcoming resistance to commission of offence
231	traps likely to cause death or bodily harm
232	interfering with transportation facilities
240(2)	failure to keep watch on person towed
240(4)	impaired operation of vessel
241	impeding attempt to save life
244	assault
245.1	assault with a weapon or causing bodily harm
245.2	aggravated assault
246(1)	assaulting a peace officer
246.1	sexual assault
246.2	sexual assault with weapon, threat to a third party or causing bodily harm
246.3	aggravated sexual assault
247	kidnapping
247(2)	illegal confinement
249	abduction of a person under sixteen

250	abduction of a person under fourteen
250.1	abduction in contravention of custody order
250.2	abduction where no custody order
256(1)	procuring feigned marriage
302	robbery
381(1)(*a*)	intimidation
387(1)	mischief causing actual danger to life
389	arson
392(2)	fire: presumption against person in control of premises
393	false alarm of fire

(NOTE: The above Schedule has been amended as of January 4, 1983 to take into account amendments to the Criminal Code that have been enacted since the adoption of this model Act.)

APPENDICE F

(Voir page 28)

LOI UNIFORME SUR L'INDEMNISATION DES VICTIMES D'ACTES CRIMINELS

(Procès-verbal de la réunion de 1970, pages 39,299)

Définitions

1. (1) Les définitions qui suivent s'appliquent à la présente loi.

«agent de la paix» *"peace officer"*

«agent de la paix» L'agent de la paix au sens du *Code criminel* (canadien).

«blessure» *"injury"*

«blessure» La lésion corporelle.

«Commission» *"Board"*

«Commission» La Commission d'indemnisation des victimes d'actes criminels constituée en application de la présente loi.

(REMARQUE: *Lorsqu'une province préfère confier les attributions de la Commission à un organisme existant, inscrire le nom de cet organisme au présent alinéa.*)

«enfant» *"child"*

«enfant» S'entend également de l'enfant illégitime et de l'enfant pour lequel la victime tient lieu de père ou de mère.

«personne à charge» *"dependant"*

«personne à charge» La personne qui est le conjoint, l'enfant né ou à naître ou un autre parent d'une victime et qui, à la mort de celle-ci, dépendait d'elle en tout ou en partie pour assurer son entretien.

Grossesse, choc mental ou nerveux

(2) Pour l'application de la présente loi, la grossesse, le choc mental ou nerveux sont assimilés à une blessure.

«victime» *"victim"*

«victime» La personne qui est blessée ou tuée dans les circonstances prévues au paragraphe 5(1).

Cohabitation notoire

(3) La Commission peut considérer comme des conjoints pour l'application de la présente loi les personnes qui sans être mariées cohabitent notoirement comme si elles l'étaient et dont les relations ont une certaine permanence. La Commission peut par contre ne pas reconnaître, pour l'application de la présente loi, la qualité de conjoint à l'époux qui vit séparé de la victime ou du requérant à qui il est marié, et qui, dans ces circonstances n'aurait pas droit à une pension alimentaire.

Ministre responsable

2. Le procureur général (*ou autre ministre*) est chargé de l'application de la présente loi.

3. (1) Est constituée la Commission d'indemnisation des victimes d'actes criminels, composée de trois à cinq membres, dont le président et au moins un vice-président, nommés par le lieutenant-gouverneur en conseil. Constitution de la Commission d'indemnisation des victimes d'actes criminels

(2) La Commission est une personne morale exclue de l'application de la *Loi sur les compagnies (ou la loi pertinente).* La Commission est une personne morale

(3) Le quorum pour l'exercice, par la Commission, de sa compétence et de ses pouvoirs est constitué par deux de ses membres dont le président ou un vice-président. Quorum

(4) Le président assure la direction et le contrôle général de la Commission, prévoit la tenue des assemblées et désigne des membres pour siéger aux audiences. Fonctions du président
(REMARQUE: *Dans le cas d'un organisme existant mentionné à l'alinéa 1(1)a), la province omet les parties de l'article 4 qui sont déjà prévues par sa législation.)*

4. La Commission publie un recueil périodique résumant ses décisions et leurs motifs. Publication des recueils de décisions

5. (1) Une demande d'indemnisation est recevable lorsqu'une personne est blessée ou tuée dans la province d'une autre personne par un acte ou une omission de cette personne à l'occasion Cas où les blessures sont susceptibles d'être indemnisées

a) soit de la perpétration d'une infraction mentionnée dans l'annexe, à l'exception d'une infraction relative à la conduite d'un véhicule automobile, mais y compris les voies de fait commises au moyen d'un véhicule automobile,

b) soit de l'arrestation légale ou de la tentative d'arrestation légale d'un contrevenant réel ou présumé, ou de l'aide apportée à un agent de la paix pour lui permettre de faire ou de tenter une arrestation,

c) soit des efforts déployés légalement pour empêcher ou prévenir la perpétration d'une infraction réelle ou présumée, ou de l'aide apportée à un agent de la paix pour empêcher ou prévenir la perpétration d'une telle infraction.

Après examen de la demande, la Commission peut exercer le pouvoir discrétionnaire que lui accorde la présente loi et rendre l'ordonnance qu'elle estime convenable pour assurer le versement d'une indemnité à la victime, à la personne qui est responsable de l'entretien de la victime, et, dans le cas du décès de la victime, aux personnes qui étaient à sa

charge ou à celle de l'une d'entre elles ou à la personne qui était responsable de son entretien alors ou qui a, au nom de la victime ou de sa succession, fait une dépense visée à l'alinéa 7(1)*a*) ou *e*).

Exclusion des agents de la paix

(2) Le paragraphe (1) ne s'applique pas au cas d'un agent de la paix blessé ou tué dans des circonstances donnant droit à une indemnité payable à l'agent ou aux personnes à sa charge et versée soit par l'État en application d'une autre loi de la province ou du Canada, soit par un organisme entièrement ou partiellement subventionné par l'État.

Indemnité minimale

(3) La Commission n'accueille aucune demande d'indemnisation d'un montant inférieur à cent dollars et n'accorde aucune indemnité inférieure à cette somme.

Prescription

6. La demande d'indemnisation se prescrit par un an à compter de la date des blessures ou du décès, mais la Commission peut, même après l'expiration de ce délai, le proroger d'une durée qu'elle estime indiquée.

Indemnité

7. (1) L'indemnité peut être accordée pour

a) les dépenses réelles et raisonnables qui sont ou seront engagées par suite du décès de la victime ou des blessures qu'elle a subies;

b) le préjudice pécuniaire qu'a subi la victime par suite d'une invalidité totale ou partielle affectant son aptitude à travailler;

c) le préjudice pécuniaire qu'ont subi les personnes à la charge de la victime par suite de décès de celle-ci;

d) l'entretien de l'enfant issu d'un viol;

e) tout autre préjudice pécuniaire résultant des blessures de la victime et toute dépense raisonnable que, de l'avis de la Commission, ces blessures peuvent entraîner.

Idem

(2) Lorsqu'une personne a été blessée dans les circonstances visées à l'alinéa 5(1)*b*) ou *c*), la Commission peut lui accorder, outre l'indemnité visée au paragraphe (1), des dommages-intérêts autres que punitifs ou exemplaires en réparation de tout autre préjudice qui résulte de la blessure et dont réparation peut être réclamée en justice.

Avis de la tenue de l'audience

8. (1) Lorsqu'elle est saisie d'une demande, la Commission fixe la date, l'heure et le lieu de l'audience où la demande sera examinée et fait signifier, au moins dix jours

avant la date fixée, un avis de la tenue de l'audience au requérant, au procureur général, à l'auteur de l'infraction lorsque c'est possible et à toute autre personne qu'elle estime intéressée par la demande.

Idem

(2) L'avis de la tenue de l'audience indique

a) la date, l'heure et le lieu de l'audience;
b) les règles de procédure applicables;
c) les motifs succincts de la demande;
d) l'avertissement selon lequel l'audience prévue aura lieu même si la partie avisée ne comparaît pas et, dans ce cas, la Commission n'est pas tenue de l'informer des audiences subséquentes.

Parties

9. (1) Les personnes qui ont reçu un avis de la tenue de l'audience et tout intéressé nommé par la Commission sont parties à l'instance.

Défaut de comparaître

(2) La non-comparution d'une partie ne fait pas obstacle à la tenue de l'audience prévue.

Audience non nécessaire

10. La Commission peut rendre une ordonnance d'indemnisation sans tenir d'audience si le requérant y consent; dans ce cas les articles 8 et 9 ne s'appliquent pas.

Ajournement

11. (1) La Commission peut, pour des motifs valables, ajourner une audience

a) soit d'office;
b) soit à la demande d'une partie à l'instance.

Citation à comparaître

(2) La Commission peut, au moyen de la formule prescrite, citer une personne à comparaître devant elle à titre de témoin.

Serments

(3) La Commission peut exiger à l'audience qu'une personne

a) témoigne sous serment;
b) produise les documents et les objets qu'elle lui demande.

Preuve

(4) La Commission peut recevoir en preuve toute déclaration, pièce, information ou objet qu'elle estime utile à l'examen de la demande dont elle est saisie, que ces éléments de preuve soient ou non reçus sous serment et qu'ils soient ou non admissibles en preuve devant une cour de justice.

Autorité de la déclaration de culpabilité

(5) Lorsqu'elle a acquis force de chose jugée, la déclaration de culpabilité de l'infraction visée dans la demande d'indemnisation établit irréfutablement la perpétration de l'infraction.

Protection des témoins

(6) Le témoin entendu à l'audience est réputé avoir objecté à chaque question qui lui a été posée pour le motif que sa réponse pourrait tendre à l'incriminer ou à établir sa responsabilité dans une procédure civile. La réponse donnée par le témoin à l'audience est inadmissible en preuve contre lui dans une procédure subséquente, sauf aux fins d'une poursuite pour parjure ou pour témoiguage contradictoire.

Infractions

(7) Comment une infraction punissable en vertu du paragraphe (8) quiconque, sans excuse légitime,

a) Soit ne comparaît pas à titre de témoin après avoir été dûment cité par la Commission;

b) soit comparaît à titre de témoin devant la Commission et refuse de prêter le serment légalement requis, de produire les documents ou objets légalement exigés qui sont sous sa responsabilité ou sa garde, ou de répondre à une question à laquelle la Commission peut légalement exiger qu'il réponde;

c) Soit accomplit un acte de la nature d'un outrage au tribunal.

Application

(8) La Commission peut dresser procès-verbal de la perpétration d'une infraction prévue au paragraphe (7) et saisir le tribunal compétent. Le tribunal ainsi saisi peut instruire l'infraction et, après avoir entendu les témoins à charge et à décharge qui peuvent être appelés à déposer ainsi que toute déclaration que le prévenu peut faire valoir en défense, il peut punir ou faire punir le prévenu, comme si celui-ci était coupable d'un outrage au tribunal.

Prestation de serment

(9) Un membre de la Commission a le pouvoir de faire prêter les serments et de recevoir les affirmations solennelles dans le cadre de la procédure qui se déroule devant elle.

Représentation par avocat

12. Une partie peut être représentée par avocat devant la Commission.

Droit des parties à l'audience

13. Lors d'une audience devant la Commission, une partie peut citer et interroger ses témoins, contre-interroger les

témoins de la partie adverse et présenter ses arguments et ses conclusions.

Témoin assisté par un avocat

14. (1) Un témoin peut être assisté d'un avocat devant la Commission, mais à l'audience l'avocat ne peut que conseiller le témoin et soulever des objections conformément au droit applicable.

Idem

(2) L'avocat d'un témoin ne peut assister à une audience tenue à huis clos qu'au moment de la déposition de ce témoin.

Exceptions à la tenue d'audiences publiques

15. Les audiences de la Commission sont publiques sauf, si, selon le cas:

a) la personne dont l'acte ou l'omission a causé la blessure ou le décès n'a pas été inculpée ou n'a pas été déclarée coupable d'une infraction criminelle;

b) l'intérêt de la victime ou des personnes à sa charge, dans le cas d'une infraction d'ordre sexuel, exige le huis clos;

c) les bonnes moeurs exigent le huis clos.

Publication de la preuve

16. (1) La Commission peut, par ordonnance, interdire la publication de tout compte rendu, même partiel, des éléments de preuve présentés au cours d'une audience si elle l'estime nécessaire pour l'une des raisons énumérées à l'article 15; en rendant une telle ordonnance, la Commission doit toutefois examiner s'il est souhaitable d'informer le public des principes et de la nature de chaque affaire.

Infraction

(2) Quiconque enfreint l'ordonnance visée au paragraphe (1) comment une infraction et est passible sur déclaration sommaire de culpabilité d'une amende d'au plus deux mille dollars et d'un emprisonnement d'au plus un an ou de l'une de ces peines.

Personnes morales

(3) La personne morale qui est déclarée coupable de l'infraction visée au paragraphe (2) est passible d'une amende maximale de vingt-cinq mille dollars au lieu des peines qui y sont prévues.

Provision

17. Si la Commission estime qu'un requérant se trouve dans une situation matérielle difficile et que sa demande d'indemnisation sera probablement agréée, elle peut, à sa discrétion, ordonner le versement d'une provision au requérant pour subvenir à son entretien et à ses frais

médicaux. Si l'indemnité n'est pas accordée, la provision ainsi versée n'est pas recouvrable.

Décision écrite

18. (1) La décision définitive de la Commission doit être écrite et motivée.

Motifs de la décision

(2) Les motifs de la décision définitive indiquent

a) les faits reconnus par les parties;

b) les faits établis par la preuve;

c) les conclusions de droit découlant des constatations visées aux alinéas *a*) et *b*).

Avis de la décision

(3) La Commission fait signifier aux parties une copie de sa décision définitive et de ses motifs.

Signification

19. (1) Les avis ou documents dont la signification est requise par la présente loi ou ses règlements d'application sont réputés signifiés lorsqu'ils sont remis en main propre ou expédiés par courrier recommandé à leurs destinataires, à leurs dernières adresses inscrites dans les dossiers de la Commission.

Idem

(2) Lorsque l'avis ou le document visé au paragraphe (1) est signifié par courrier recommandé, la signification est réputée avoir eu lieu le troisième jour aprés la date de mise à la poste.

Exception

(3) Par dérogation aux paragraphes (1) et (2), la Commission peut ordonner que l'avis ou le document visé au paragraphe (1) soit signifié suivant un autre mode de signification.

L'indemnité ne dépend pas d'une déclaration de culpabilité

20. (1) Une ordonnance d'indemnisation peut être rendue même s'il n'a pas été engagé de poursuites pénales ou prononcé de déclaration de culpabilité à la suite de l'infraction ayant causé les blessures ou le décès, mais la Commission peut, soit d'office, soit à la demande du procureur général, surseoir à statuer jusqu'à ce que les poursuites engagées ou prévues fassent l'objet d'un jugement définitif.

mens rea

(2) Pour l'application de la présente loi, l'auteur d'un acte ou d'une omission ayant causé la mort ou des blessures donnant droit au versement d'une indemnité est réputé avoir agi volontairement, même s'il est légalement incapable pour quelque raison que ce soit de former une intention coupable.

Remise de pièces

21. La Commission doit, sur demande, remettre dans un délai raisonnable les documents et les objets présentés en preuve au cours d'une audience à leur propriétaire ou détenteur légitime dans un délai raisonnable après le règlement définitif de la question à laquelle ils se rapportent.

Modification de l'ordonnance d'indemnisation

22. (1) La Commission peut, soit d'office, soit à la demande de la victime, d'une personne à sa charge, du procureur général ou de l'auteur de l'infraction, modifier à sa discrétion une ordonnance d'indemnisation, notamment quant à ses dispositions ou au montant de l'indemnité.

Idem

(2) Dans l'application du paragraphe (1), la Commission tient compte

a) des nouveaux éléments de preuve qui sont disponibles;

b) des circonstances servenues depuis l'ordonnance ou sa modification ou susceptibles de survenir, selon le cas;

c) de toute autre question qu'elle estime pertinente.

Procédure de modification

(3) Toutes les dispositions de la présente loi, à l'exception de celles de l'article 6, s'appliquent à la modification que prévoit le paragraphe (1) de la même manière que s'il s'agissait d'une demande d'indemnisation.

Dépens

23. La Commission peut rendre l'ordonnance qu'elle estime indiquée concernant les dépens occasionnés lors d'une audience ou d'une autre procédure visée dans la présente loi, y compris les honoraires d'avocats d'au plus cinquante dollars.

Appel

24. Sous réserve de l'article 22, la décision de la Commission est définitive, sauf qu'il peut en être interjeté appel devant la Cour d'appel sur un point de droit.

Éléments à considérer

25. (1) Pour déterminer s'il y a lieu à indemnisation et pour fixer le montant de l'indemnité, la Commission tient compte de toutes les circonstances pertinentes, y compris de tout comportement de la victime qui aurait pu contribuer, directement ou indirectement, à son décès ou à ses blessures.

Idem

(2) Dans le calcul de l'indemnité à accorder s'il y a lieu au requérant, la Commission déduit

a) le montant de tout dédommagement obtenu en justice ou autrement de l'auteur de l'acte ou de l'omission qui a causé le décès ou les blessures;

b) le montant de toute prestation reçue ou à recevoir, selon les cas,

(i) par la victime en raison de ses blessures,

(ii) par le requérant en raison du décès de la victime, en vertu d'une loi du Canada, de la province ou d'une autre province du Canada, à l'exception des pensions ou rentes prévues par une telle loi.

Mode de versement de l'indemnité

26. La Commission peut ordonner que l'indemnité soit réglée en un versement global, en des versements échelonnés ou en un mode mixte, selon qu'elle l'estime indiqué.

Définition de «taux»

27. (1) Pour l'application du présent article, «taux» désigne le rendement moyen applicable aux titres du gouvernement du Canada dont l'échéance est de dix ans au bulletin statistique de la Banque du Canada.

Indemnité maximale

(2) L'indemnité accordée par la Commission en raison de blessures ou du décès d'une victime ne doit pas dépasser

a) quinze mille dollars dans le cas du versement d'une somme globale, et

b) le revenu produit par un capital de cinquante mille dollars calculé au taux en vigueur au mois de janvier en ce qui concerne les six premiers mois de chaque année, et au taux en vigueur au mois de juillet en ce qui concerne les six derniers mois de chaque année, dans le cas de versement échelonnés.

Dans les cas où le mode de règlement de l'indemnité est mixte, une seule des deux formes de règlement peut dépasser la moitié du plafond prescrit par l'alinéa *a*) ou *b*), selon le cas.

Réduction proportionnelle

(3) Lorsque le montant total des indemnités qui auraient dû être accordées en raison des blessures ou du décès d'une victime dépasse l'indemnité maximale prescrite par le paragraphe (2), ces indemnités sont réduites proportionnellement aux plafonds prévus au paragraphe (2).

Indemnité maximale à légard d'un même événement

(4) Le montant total des indemnités accordées par la Commission à tous les requérants relativement à un même événement ne doit pas dépasser,

a) cent mille dollars dans le cas du versement d'une somme globale;

b) le revenu produit par un capital de trois cent cinquante mille dollars calculé de la manière prescrite à l'alinéa (2)*b*), dans le cas de versement échelonnés.

Réduction proportionnelle

(5) Lorsque le montant total des indemnités qui auraient dû être accordées à l'égard d'un même événement dépasse l'indemnité maximale prescrite par le paragraphe (4), les indemnités sont réduites proportionnellement aux plafonds prévus au paragraphe (4).

Actes constituant un même événement

(6) Pour l'application du présent article, la Commission peut considérer comme constituant un même événement des actes qui ont un lien commun quant au lieu et au moment de leur survenance.

Exception relative aux demandes faites en vertu de l'alinéa 5(1)*b*) ou *c*)

(7) Les paragraphes (1) à (5) ne s'appliquent pas aux indemnités accordées en raison des blessures subies ou du décès causé dans les circonstances visées à l'alinéa 5(1)*b*) ou *c*) et ces indemnités ne doivent pas entrer dans le calcul des indemnités maximales.

Insaisissabilité de l'indemnité

28. Les indemnités ou les autres sommes accordées à titre de frais qui sont payées ou payables en vertu de la présente loi sont insaisissables et incessibles.

Modalités de paiement

29. (1) Une ordonnance d'indemnisation peut comporter les modalités que la Commission estime indiquées

a) soit quant au paiement, à la disposition, à l'attribution ou à la répartition de l'indemnité;

b) soit quant à la détention de tout ou partie de l'indemnité en fiducie pour la victime ou les personnes à sa charge, ou l'une d'entre elles, notamment sous la forme d'une caisse collective.

Idem

(2) La Commission peut à sa discrétion ordonner que toute indemnité payable en raison des dépenses visées à l'article 7 soit versée directement au bénéficiaire.

Procédures civiles

30. (1) Sous réserve des paragraphes (2), (3) et (4), la présente loi ne porte pas atteinte au droit d'une personne d'intenter une action civile en dommages-intérêts contre toute personne en raison des blessures ou du décès.

Subrogation

(2) La Commission est subrogée dans tous les droits du bénéficiaire d'une indemnité payée en application de la présente loi pour intenter une action civile en dommages-intérêts en raison des blessures ou du décès. Elle peut soutenir au nom du bénéficiaire une action contre toute

personne contre qui une telle action peut être intentée et toute somme recouvrée par la Commission doit servir

a) en premier lieu, à payer les frais subis pour obtenir le jugement et son exécution,

b) en second lieu, à rembourser à la Commission la valeur de l'indemnité versée,

et le solde, le cas échéant, est versé au bénéficiaire subrogé.

Règlement

(3) Le règlement à l'amiable ou la libération ne font pas obstacle à l'exercice des droits que le paragraphe (2) accorde à la Commission sauf si elle y a souscrit.

Poursuites au civil

(4) Le requérant ou le bénéficiaire de l'indemnité accordée par la Commission doivent sans délai aviser celle-ci de toute action qu'ils ont intentée contre l'auteur de l'infraction qui a causé les blessures ou le décès de la victime.

Versement de l'indemnité

31. (1) Les indemnités prévues par la présente loi sont payées (sur les crédits affectés à cette fin par la Législature ou le Fonds du revenu consolidé, *selon que la province l'estime indiqué*).

Disposition de l'argent obtenu

(2) toute somme à laquelle la Commission a droit en vertu de l'article 30 est versée au Fonds du revenu consolidé.

Règlements

32. Le lieutenant-gouverneur en conseil peut, par règlement,

a) prescrire les règles de pratique et de procédure applicables aux demandes d'indemnisation et à leur audition;

b) fixer les droits exigibles, y compris la rémunération des témoins dans les affaires pour lesquelles la Commission est compétente;

c) prescrire les formules à employer pour l'application de la présente loi et déterminer leur utilisation;

d) prévoir toute disposition qu'il estime nécessaire ou souhaitable à la mise en oeuvre de la présente loi.

Accords avec le Canada

33. Le procureur général (*ou tout autre ministre visé à l'article 2*) peut, au nom de Sa Majesté du chef de la province et avec l'approbation du lieutenant-gouverneur en conseil, conclure avec Sa Majesté du chef du Canada, des accords prévoyant la contribution du Canada aux dépenses entraînées par l'application de la présente loi.

34. La présente loi s'applique aux demandes d'indemnisation fondées sur des blessures ou le décès résultant d'un omission survenu après son entrée en vigueur.

Application de la loi

ANNEXE

(Paragraphe 5(1))

Article du Code criminel	*Description de l'infraction*
17	contrainte par menaces
18	contrainte d'un conjoint
66	participation à une émeute
78	manque de précautions
79	intention de causer des blessures ou des dommages
146	rapports sexuels avec une personne du sexe féminin âgée de moins de 14 ans ou âgée de 14 à 16 ans
176	nuisance publique
179(1)	prostitué
197	refus de pourvoir
200	abandon d'un enfant
202	négligence criminelle
203	le fait de causer la mort par négligence criminelle
212	meurtre
213	infraction accompagnée d'un meurtre
214(5)	détournement, agression sexuelle ou enlèvement
217	homicide involontaire coupable (*manslaughter*)
222	tentative de meurtre
228	le fait de causer intentionnellement des lésions corporelles
229	le fait d'administrer une substance délétère
230	le fait de vaincre la résistance à la perpétration d'une infraction
231	trappes susceptibles de causer la mort ou des lésions corporelles
232	le fait de nuire aux moyens de transport
240(2)	omission de surveiller la personne remorquée
240(4)	conduite d'un bateau pendant que la capacité de conduire est affaiblie
241	empêcher de sauver une vie
244	voies de fait
245.1	agression armée ou infliction de lésions corporelles
245.2	voies de fait graves
246(1)	voies de fait contre un agent de la paix
246.1	agression sexuelle
246.2	agression sexuelle armée, menaces à une tierce personne ou infliction de lésions corporelles
246.3	agression sexuelle grave

247	enlèvement
247(2)	séquestration illégale
249	enlèvement d'une personne de moins de 16 ans
250	enlèvement d'une personne de moins de 14 ans
250.1	enlèvement en contravention d'une ordonnance de garde
250.2	enlèvement en l'absence d'une ordonnance de garde
256(1)	mariage feint
302	vol qualifié
381(1)*a*)	intimidation
387(1)	méfait qui cause un danger réel pour la vie des gens
389	crime d'incendie
392(2)	incendie: présomption contre une personne ayant la charge d'un lieu
393	fausse alerte

(REMARQUE: La présente annexe est conforme aux dispositions du Code criminel en vigueur le 4 janvier 1983.)

APPENDIX G

(See page 28)

DEFAMATION

REPORT OF THE SASKATCHEWAN COMMISSIONERS

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I. SCOPE OF THE REPORT

The goal of the Uniform Law Conference being a revised *Uniform Defamation Act*, the Saskatchewan Commissioners have undertaken a major review of the Law of defamation. The report identifies aspects of the Law of defamation which are unclear or problematic and contains proposals, for consideration by the Conference, as to what the Uniform Act should encompass. A number of the issues discussed in this report are currently provided for in the Uniform Act, but are in need of modification. Other proposals contained in this report are in respect of issues which are not dealt with in the Uniform Act but which we propose should be codified.

The following points form the basis for the determination of the issues discussed in this report:

1. An action in defamation permits a person to be compensated in respect of an injury to his character caused by a statement that is untrue in substance and in fact; ideally, to restore his reputation if such a remedy is available.

2. Although the protection of one's reputation is the purpose behind the law respecting defamation, liability should not necessarily be strict liability. The Canadian Charter of Rights and Freedoms makes it imperative that we strive for a balance between the rights and freedoms at issue in the context of defamation law. Protection of individual reputations should not be achieved at the cost of other rights. Case study shows that in some circumstances the delicate balance has been considered, but this consideration has been applied inconsistently and the current state of Canadian Law illustrates the substantial imbalance. In contrast we see the approach of the United States in this respect has been to lean heavily on the side of freedom of speech.[1]

3. The purpose of this report is to examine the current state of defamation law and find resolutions to ambiguities and inconsistencies that exist. The revised Uniform Act can then provide a more clear framework than now exists for which an action in defamation is determined and be of assistance to those who risk having to pay high damages in a defamation action in order to bring information to the public. The Saskatchewan Commissioners do not see their role as one in which we totally abandon the law of defamation as we know it today, or to reassess the underlying philosophy of tort law as it relates to defamation and devise a drastically new approach and very different system of compensation from what we presently have in respect of defamation. This approach has been alluded to in varying degrees from time to time in critiques on the law of defamation.[2]

Rather we see our role in terms of clarifying and balancing the concepts of defamation law which currently exist.

4. A model defamation statute should provide the following:
   (a) a repository of the basic constituents and perimeters of the tort to which recourse could be had in all cases;
   (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.

II. THE MEANING OF DEFAMATORY MATTER AND THE SCOPE OF DEFAMATION

A. *Definition 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.[3] 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.

Experience elsewhere initially 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."[4] The Commission recommended the repeal of the Act and a return of 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."[5] The report resulted in the 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.[6]

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 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.[7]

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.[8]

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 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 on 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". While none of the definitions discussed thus far are satisfactory, the ambiguities of the common law are no more satisfactory.

In none of the attempted definitions of defamatory matter do we find reference to falsity of the statement. The law in this respect is that if a publication tends to adversely affect a person's reputation, it is defamatory and falsity is presumed. The defendant must then rely on the defence of justification and prove the truth of the statement. It could be argued that because what the law of defamation in fact does is compensate a person for damage to his reputation caused by the false statement of another person, the definition of defamation should then refer to falsity. The damage to the plaintiff's reputation is caused solely by the act of another person and originates from no misconduct on the plaintiff's part. In defamation, we are dealing with false statements. To introduce circumstances in which we compensate a person for damage to his reputation from the publication of a true statement would hamper the clear and logical resolution of the other issues we are attempting to clarify. Compensation in that respect is more properly within the scope of an action such as an action in privacy.

If reference to falsity were made in the definition, it would effect some other changes in the law as it exists. The onus would no longer be on the defendant in his defence to prove that the statement is true. The position of the plaintiff in this respect in a defamation action is not a position enjoyed by plaintiffs in other types of action. For instance, in an action for malicious falsehood, the plaintiff must plead and prove as part of his case that the words are false. If the element of falsity were introduced in the definition, the plaintiff would have to establish falsity of the statement for the statement to be held to be defamatory. Further, it would change the defence of justification as we know it. This report, however, does not recommend that the element of falsity be inserted in the definition.

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 meanings of "defamatory matter" found in the case law:

> "Defamatory matter" is published matter concerning a person that tends to:
> (a) affect adversely the reputation of that person in the estimation of ordinary persons; or
> (b) deter ordinary persons from associating or dealing with that person; or
> (c) injure that person in his occupation, trade, office or financial credit.

B. *Range of Plaintiffs*

1. 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."[9] 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."[10] 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 com-

mon 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."[11] 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 on 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:

> We 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.[12]

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. Symmons 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.[13]

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.[14]

While there is general agreement that in common law 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."[15] 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.[16]

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 "references 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."[17]

Debate has also waged as to whether the general rule that a defamation action dies with the plaintiff should be changed.[18] 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.[19]

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.[20] 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.[21]

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.[22] 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."[23]

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."[24] 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.[25] 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 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.

2. Right of an artificial legal person to sue:

Since the English case of *Bogner Regis U.D.C.* v. *Campion,* [1972] 2 All ER 61 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."[26] It is assumed that an artificial legal person is not 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 those considerations must not obtrude in a defamation claim made by, for instance, a corporate body or a trade union. In the case of a 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 of action. Lord Reid in *Lewis* v. *Daily Telegraph Ltd.* stated that a corporation cannot be injured in its feelings, only in its pocket. The plaintiff corporation would have to prove loss of income or damage to its goodwill ie. it must establish that it suffered special damage or that the works were likely to cause it pecuniary damage.[27] The Faulk's 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"[28] in that they should have to establish either special damages or that the defamation was likely to cause it financial damage.

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 most 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.[29]

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."[30]

The range of entities with special kinds of reputation is considerable: trading and non-trading corporations and companies, partnerships, trade unions, professional associations and incorporated 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."[31] 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 complication in actions which "are likely to be rare."[32] Although the application of the law of defamation to these bodies may not be entirely clear, the number of actions is not considerable and an attempt to codify the law in this respect is not necessarily effective.

RECOMMENDATIONS

1. The *Uniform Defamation Act* should not codify, that is not make special provision in respect of, the rights of non-natural persons and bodies to sue in defamation.

3. 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.[33] 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 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.[34]

However, the weight of 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.[35] 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. For example, groups such as pro-life groups and planned parenthood organizations emerge to promote a certain philosophy. For each group that emergers to espouse a cause, another group emerges to espouse a cause contrary. Such groups evolve from controversy and to extend the scope of defamation to include defamation of such groups does not appear to be consistent. A civil defamation claim would only inflame problems

which are better resolved through public discussion and conciliation. Certain other groups, such as racial groups and ethnic groups, are afforded other protection in human rights legislation.[36]

RECOMMENDATION

1. The scope of defamation should not be extended to include defamation of a group.

C. *Meaning of Words in Reference to the Plaintiff*

The plaintiff must establish that the words are defamatory and have been published of and concerning him. The plaintiff must set out in his pleadings the words he is complaining of and specify the defamatory meaning or meanings that he contends the words have in reference to him. If he contends that the words convey an extended meaning beyond the natural and ordinary meaning of the words, that is an innuendo, he must specifically plead the innuendo. The requirements as to pleadings have been argued to be unclear, however it appears that the current approach is that suggested in Gatley on Libel and Slander:

> "Where there is any unclarity as to the natural and ordinary meaning, or any uncertainty as to the meaning for which the plaintiff will contend at the trial, or there is room for disagreement as to what inferences may reasonably be drawn from the words themselves in the light of the ordinary man's knowledge, the plaintiff must plead the meaning he alleges the words to have. If he does so he should make it clear that he is relying on the natural and ordinary meaning of the words, and is not seeking to plead a true innuendo without support of extrinsic facts".[37]

Where the plaintiff pleads a legal innuendo, he must also specify the extrinsic facts he relies on to establish that the words published and the extrinsic facts convey a defamatory meaning in reference to him.

The defendant may answer only within the bounds of the meanings set out in the pleadings of the plaintiff. He cannot place his own meaning on the words, a meaning other than that complained of by the plaintiff, and succeed by establishing the truth of that meaning. The defendant's state of mind is irrelevant to the issue of truth. The recent case of *Loos et al* v. *The Leader Post Ltd and Williams*[38] stated that the defendant "could not, for example, plead what the defendant *intended* the words to mean or seek to lay the groundwork for calling evidence of *what in fact the words were taken to have meant*; neither is relevant". If the ordinary reader or hearer would understand the statement in the defamatory sense that the plaintiff complains of, the plaintiff succeeds, whether or not anyone in fact understood it in that

sense and whether or not the defendant intended it in that sense. The defendant can plead justification only in respect of the meaning alleged by the plaintiff.

That the defendant is tied to the meaning alleged by the plaintiff has caused some concern. For example, where the plaintiff relies on the natural and ordinary meaning of words and establishes that the hearer or reader would ordinarily understand that to be the meaning, the defendant cannot introduce into evidence certain extrinsic facts to establish that the natural and ordinary meaning was not in fact conveyed. The defendant cannot raise in his defence a legal innuendo not pleaded by the plaintiff when in actuality the hearer or reader had some extrinsic knowledge and understood the words in the sense of the innuendo. In this case, if the defendant were permitted to plead and establish another meaning, he could then establish that either in the circumstances the words were not published of the plaintiff or, if the words were in reference to the plaintiff, that they are true.

The second area of concern is in respect of the pleading by the plaintiff of both the natural and ordinary meaning of the words and a legal innuendo. Where the words are defamatory in both senses, the defamatory innuendo constitutes a separate cause of action. This then constitutes two causes of action based on one set of words. It is common practice however, that, through agreement between the parties to the action, the result is a single cause of action with only one award of damages.

RECOMMENDATIONS

The Uniform Act should make provision for the following:

1. The defendant is entitled to plead a meaning (innuendo) that has not been pleaded by the plaintiff.
2. A claim in defamation based on a single publication, with or without a plea of legal innuendo, constitutes a single cause of action giving rise to one award of damages only.

III. 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. 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.

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. *Availability of Statutory Defences*

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,[40] 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.

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".[41]

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, fibreoptic linkages or laser beams". An alternative technique is to expand the definition with reference to federal licencing.[42]

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 definition.
>
> 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.[43]

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 (Canada) 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.[44]

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 (Canada) 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.

B. *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. 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 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 insisting upon fault in most cases of physical damage.[45] Professor 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".[46] 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.[47]

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.[48]

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.[49] 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.[50]

The "offer of amends" provisions in the Nova Scotia Act offer the opportunity for resolution by the parties themselves and 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.

RECOMMENDATIONS:

1. The Uniform Defamation Act should contain provisions to alleviate the hardships caused to the innocent defamer. (One aspect of this is dealt with in heading H under this Part)
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. (Discussed in remedies)

C. *Justification*

The Uniform Act does not codify the defence of justification. The defence of justification is that the defamatory words are true in substance and in fact, that is, for the defence to succeed the defendant must establish the truth of the facts alleged and also of any comments made in respect of those facts.[51] The defendant does not have to prove the truth of every detail however. As set out in *Edwards* v. *Bell* (1824) 1 Bing 403 at 409: "As much must be justified as meets the sting of the charge, and if anything be contained in the charge, which does not add to the sting of it, that need not be justified". The burden of proving truth resting on the defendant is on a balance of probabilities. The

defendant must prove the truth of the meaning complained of by the plaintiff.

We propose that the defence of justification be codified because of two changes we recommend in the area of justification. The first issue in this respect was dealt with by the Faulk's Committee, that is, where the defamatory words complained of by the plaintiff form part of a longer publication, the defendant in putting forth the defence should not be limited to only the words extracted from the publication as complained of by the plaintiff, but should be able to rely on the whole of the publication. The criticism is summarized in the following extract from the Faulk's report:

> Under the law as it stands at present, a plaintiff can bring an action in respect of one untrue defamatory statement which he has selected from a number of others which were true. Plaintiff's do do this. Where this is done, section 5 of the Defamation Act 1952 does not entitle the defendant to plead as a defence that the plaintiff's reputation was not materially injured, having regard to the truth of the other defamatory statements on which the plaintiff has not relied. If, however, the plaintiff had chosen to complain of all the defamatory statements, the defendant could rely on the truth of the majority of them to provide a good defence under the section. The Council urges that this section should be amended so as to provide that where an action is brought in respect of a defamatory publication, the defendant shall be entitled to rely on the defence of justification in respect of the whole publication, so that if the truth of every allegation of fact is not proved, the defence shall not fail if the words not proved to be true do not materially affect the plaintiff's reputation, taking the publication as a whole.[52]

The second issue is in respect of an expansion to the defence as we know it. Earlier in this report, we recommended that the defendant be entitled to introduce the meaning he attributes to the defamatory words, that is, where the plaintiff relies on the natural and ordinary meaning of the words, the defendant would be entitled to plead in his defence an innuendo and justify that meaning. The defendant is currently not so entitled. We would be allowing the defendant to bring evidence as to his state of mind and as to what the words were actually understood to mean by the persons to whom the statements were published. The defendant would have to establish that whatever other knowledge or extrinsic matters he relied on in making the publication are true and that the meaning thereby conveyed was in fact the meaning that the reader or hearer took from the words.

What the defendant is establishing is that although the meaning that the plaintiff contends in his pleadings is a meaning that ordinary men

could infer, the public on the whole, by reason of other facts or matters extrinsic to the words, did not actually believe what the plaintiff contends and the defamatory words are thereby justified. In such a case, the plaintiff has not in fact suffered damage to his reputation. We are in this circumstance not limiting the defendant's position as currently is the case to the often narrow context of the plaintiff's pleadings.

There is perhaps an argument for an even further expansion of this defence in the circumstances where the defendant has acted under a mistake of fact, ie. another instance of an innocent defamer. It could be said that where the defendant honestly (where he establishes no malice on his part) and reasonably (where he establishes no negligence on his part and took reasonable steps to determine the truth) believed certain facts to be true (whether the facts are actually true or not) that he was thereby justified in publishing the words. Justification in this circumstance could be codified so that it does not act as a complete defence but would have an impact on the remedies available to the plaintiff, ie. the plaintiff could have the right of reply or retraction, but would have no right to aggravated or punitive damages. We, however, do not propose to expand the defence of justification in this respect because in this case, the damage has been done, that is, the defamatory matter has been published.

RECOMMENDATIONS:

1. The defence of justification should be codified as follows:
   (a) with respect to the meaning attributed to the words by the plaintiff, the provisions respecting the burden on the defendant in relying on the defence of justification will state the law as it exists and will entitle the defendant to rely on the whole of the publication in answer to a claim by a plaintiff complaining of only part of it;
   (b) the defence will be expanded to entitle the defendant to plead a meaning other than the meaning attributed by the plaintiff and to justify that meaning.

D. *Fair Comment*

Section 9 of the Uniform Act with respect to fair comment 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."[53] The Supreme Court held in the case of *Cherneskey* v. *Armadale Publishers Ltd.* [1978] 6 W.W.R. 618 that for

the defence of fair comment to succeed the publication would have to represent an honest expression of the real view of the person making the comment and an honest expression of the real view of the newspaper and its editor. 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'".[54] 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.[55]

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 have been insisting for some time 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 on 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 permissable criticism, since the law freely permits expression of opinion couched in ironical, bitter or even extravagant language.[56] 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.[57]

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 direct or improper motive which may have actuated the defendant in making the comment complained of" was to show that "the comment was not a genuine expression of his opinion but was a counterfeit. This, and this alone, is the material significance of malice in fair comment".[58] 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.[59]

As stimulating as the above arguments seem to be, this report does not recommend abolishing the concept of malice. The reason, presumably, for the defence of fair comment is to allow comment on a matter of public interest, although defamatory, in order to protect the principle of freedom of speech. However if a comment is motivated by some other reason such as ill-will, rather than public interest, and we allow that comment to be protected by this defence, we are no longer balancing the freedoms, we are tipping the scale far in favour of freedom of speech at the cost of all else.

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 permissable 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.[60]

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".[61] 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.[62]

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 permit the defence to the originator, provided always that the publication is an opinion on a matter of public interest based upon substantial fact, if the originator 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 its 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.[63]

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 words 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 comment. Indeed sometimes the publication may contain no explicit statements of fact at all.[64]

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."[65]

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, albeit biased, person to make concerning those facts and provided the person making the statement (the originator) honestly or genuinely held the opinion.

3. The concept in section 9 of The Uniform Act should be retained.
4. "Malice" should defeat the defence of fair comment.
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. For the defence to succeed the facts on which the comment is based must be either stated by the commentator or indicated by him with sufficient clarity to enable the reader or listener to ascertain the matter on which the comment is being made.

E. *Qualified Privilege*

The law of defamation recognizes that there are times when public convenience must take precedence over private interests and therefore, in certain cases, allows a person to make, without malice, a defamatory statement about another person and not incur any legal liability for that statement. There must be a reciprocal relationship between the interest in the public to receive the information and a duty on the person providing the information.[66] The defence is lost if there is an excess of publication. This amounts to the defence of qualified privilege and this defence is available in connection with statements made in the following circumstances: in the performance of a duty, in protection of an interest, in a privileged report and in professional communications. An historical development of this defence can be found in the March 1983 edition of The Canadian Bar review.[67]

The defence of qualified privilege assumes a broad constitutional significance with the passing of the *Constitution Act, 1982.* Once again we should be mindful of the United States constitutional debate and the decision in *New York Times* v. *Sullivan* wherein the court held that the minimum protection which must be afforded to newspaper criticism of public officials for their official conduct is the defence of qualified privilege. 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. 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 causes 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 attract the statutory qualified privilege. One might argue that the public interest is just as strong in such a situation as it is the case of a newspaper or a broadcast.

The narrowness of section 10 is probably dictated by the request provisions of subsection 10(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 own 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 in Appendix D. 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.

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.[68] The plaintiff's interests are sufficiently protected by the explanation of 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 problems for the courts. 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".[69] But this seems merely to substitute one set of difficulties for another. "Improper advantage" is an even more nebulous concept than "malice".

The 1975 House of Lords decision in *Horrocks* v. *Lowe*[70] does however clarify the concept of malice as it relates to qualified privilege, and we do not recommend abolishing the concept of malice.

RECOMMENDATIONS

Provisions respecting the defence of qualified privilege contained currently in the Uniform Act should be retained with the following revisions (i.e., the entire defence should not be codified):

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. Rather than attempt to list every occasion to which qualified privilege attaches, section 10 should expressly state that any defences of qualified privilege existing outside the Act are preserved.

F. *Section 18: Protection of Freedom of Speech*

The issue for consideration is whether section 18 of the Uniform Act goes 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".[71] 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 18 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 financially 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.[72]

We should also be mindful of the words of Mr. Justice Dickson in the *Cherneskey* case when, apropos 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".[73]

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.[74]

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 the plaintiff.[75]

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.[76]

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 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.

RECOMMENDATIONS:

1. No special defence for newsmedia should be incorporated within the Uniform Defamation Act, and section 18 should be retained.

G. *Rolled-up Plea*

The rolled-up plea incorporates the defences of justification and fair comment, and in some cases has even included an element of qualified privilege; the plea means that insofar as the words complained of consist of allegations of fact, they are true, and insofar as they consist of expressions of opinion they are fair comment, made in good faith and without malice respecting those facts which are matters of public interest. It appears to be to the advantage of the defendant to use the rolled-up plea rather than deal specifically with each of the defences. This is most evident when considering justification raised on its own and the element of justification when using the rolled-up plea. In respect of the plea of justification, the plaintiff is generally entitled to particulars. The plaintiff does not appear to be so entitled where justification is rolled in with other defences.[77] Further to the advantage of the defendant in using the rolled-up plea is that usually an unsuccessful defence of justification pleaded on its own results in

aggravated damages when considered by the jury; as part of an unsuccessful rolled-up plea, it does not.

The case of *Sutherland* v. *Stopes*, [1925] A.C. 47 at p. 62-63 dealt with the issue of the rolled-up plea:

> For a good many years past practice has prevailed of raising this defence (fair comment) by what has been called the "rolled-up plea" but it will be found that this term is a misnomer based on a misconception of the nature of the plea. . . .
> There has been a good deal of misconception as to the nature of this plea. It has been sometimes treated as containing two separate defences rolled into one, but it in fact raises only one defence, that being the defence of fair comment on matters of public interest. The averment that the facts are truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct.

Gatley on Libel and Slander states that in England the rolled-up plea is now in general disuse.[78] The recent case of *Vogel* v. *C.B.C.*, (1981) 26 B.C.L.R. 340 (B.C. Sup. Ct.) illustrates the lack of clarity specifically with respect to the degree of particularity necessary on the part of the defendant in specifying the facts and matters when he is utilizing the rolled-up plea.

In the context of the recommendations with respect to defences contained in this report whereby the defendant's position is enhanced and in order to achieve a clear framework within which an action in defamation can be efficiently determined, the rolled-up plea serves no constructive purpose.

RECOMMENDATIONS:

1. The Uniform Act should state that each defence relied upon shall be expressly pleaded and that the use of rolled-up plea is not recognized.

H. *Live Broadcasts of Parliamentary Proceedings*

Words spoken by a member of Parliament within Parliament and words spoken by members of legislative assemblies in the provincial legislatures are absolutely privileged as well. This privilege also extends to documents tabled in parliament or a legislature. The rationale for the privilege is based on the belief that "fear of liability might induce caution destructive of the frankness that the public has a right to expect".[79] There is no reason to think that the rationale for such privilege has been eroded.

The concept of parliamentary or legislative privilege is complicated by the fact that it is now possible for a member's words to be broadcast or telecast simultaneously throughout the whole nation. Presumably, as the words are still spoken within the confines of Parliament or a legislature, public policy will still require total freedom of expression even when there is express malice. The position of the broadcaster or telecaster is, however, uncertain. A few years ago, in the *Dalhousie Law Journal*, Keith Evans stated 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".[80] We have also now, admittedly under rather extraordinary circumstances, had live coverage of a Supreme Court decision.

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 of 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.[81]

The fact that parliamentary or legislative proceedings are absolutely privileged would seem to support extension of that privilege to a broadcast or telecast of those proceedings. There may be some validity to the distinction drawn by the Faulk's Committee, however, there seems to be little justification for placing what would be a heavy onus on a telecaster to avoid telecasting defamatory material when to do so would distort the public's perception of the proceedings.

It is recommended, therefore, that live broadcasts and live telecasts of absolutely privileged proceedings should also be absolutely privileged. Further, the absolute privilege should cover delayed broadcasts, re-broadcasts, delayed telecasts and re-telecasts which are unedited.

When edited excerpts from recorded proceedings in parliament are used as part of a news report, the absolute privilege is not appropriate because the editing may take the excerpt out of context, creating a misleading impression. However, section 10 of the Uniform Act provides a qualified privilege in such cases, that is, the report or broadcast must be fair and accurate and must not have been made "maliciously". It might be noted that there may be some ambiguity as

to whether or not section 10 applies to telecable and closed circuit transmissions. Perhaps the definition of broadcast should be clarified.

Although this portion of the report is concerned with parliamentary proceedings, the whole area of live broadcast statements should be considered. Live broadcasts such as "phone-in" shows pose special problems. The broadcaster ordinarily will have no prior knowledge of or control over the words that will be spoken. It is submitted that where there is no reason to anticipate that a defamatory statement will be made by the speaker whose words are to be broadcast, and provided it is reasonably in the public interest for the program to be carried live, the broadcaster should not be liable in the event that a defamatory statement is aired. The speaker will not be exonerated by this qualified privilege; only the ordinary defences will be available to him.

RECOMMENDATIONS:

1. Live broadcasts and telecasts of absolutely privileged proceedings should be absolutely privileged.
2. Qualified privilege should attach to excerpts of absolutely privileged proceedings.
3. No action should lie against the broadcaster of live broadcasts such as "phone-in" shows.

IV 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. *Notice Requirements—section 14 of the Act.*

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 on 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 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 on 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.[82] 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 on the uniform provision in terms of giving guidance as to specificity. "Matter" seems better than "language" because it is a wider term.

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.

RECOMMENDATIONS:

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:

   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. *Limitations*

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 retained 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.[83]

This means, for instance, that in a province such as Saskatchewan, the relevant limitation rule for a defamation action will vary depending on 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 be 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 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.

RECOMMENDATIONS:

1. The *Uniform Defamation Act* should contain a limitation rule applicable to all actions for defamation setting out the following:

   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.

V. 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.[84]

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 . . .".[85]

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 repose* 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".[86]

A. *Apology and Retraction*

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 newspaper and broadcasts. They are, in effect, extremely limited and circumscribed defences.

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".[87] 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 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.[88]

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.[89]

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".[90]

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 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".[91]

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.[92]

Retraction provisions are reasonable, well-intentioned devices designed to encourage the corrections of wrongs done to the plaintiff's good name. However, they tend to be problematic because they place publishers in unrealistic positions. 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 replay. 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

The provisions currently contained in sections 17 and 18 of the Uniform Act with respect to apology and retraction should be retained, and the use of these remedies should also be utilized in the following cases:

1. The court should have the power to order retraction instead of:
   (a) damages in group defamation;
   (b) damages in respect of defamation of a person who is dead.

B. *Right of Reply*

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.[93] 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.[94] A statutory right of 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 of

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".[95] 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".[96]

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".[97]

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 extrolling his non-existent virtue".[98] 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 to 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.[99]

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.[100]

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. The Uniform Defamation Act should provide for a right of reply in the following circumstances:

   (a) where the defendant has, in a circumstance within qualified privilege, abused that privilege;

   (b) where, at present, the law confines the plaintiff to special damages if the defendant can show retraction and apology.

C. *Injunction*

The Uniform Act contains no provision with respect to the use of injunctions. The court exercises its discretion to grant an injunction to prevent a libel only on rare occasions when it is satisfied that the alleged libel is untrue. The use of injunctions further complicates the task of balancing the competing interests of freedom of the press and the administration of justice.[101]

RECOMMENDATIONS

1. The Uniform Act should not attempt to codify the remedy of injunction in respect of defamation actions.
2. The Uniform Act should provide that an injunction may be ordered in the case set out in Recommendation 2(d) of II B. 1.

FOOTNOTES

1. *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254; 84 S. Ct. 710.
2. *As illustration see*, P. Weiler, "Defamation, Enterprise Liability, Freedom of Speech" (1967), 17 *U.T.L.J.* 278.
3. *See, for example*, the discussion of several well-known common law formulations in Duncan & Neill, *Defamation* (London: Butterworths, 1978), chap. 7.
4. *See,* New South Wales Law Reform Commission, *Report of the Law Reform Commission on Defamation* (1971), L.R.C. 11, para. 14.
5. *Ibid.*, paras. 17-18.
6. *See,* The Committee on Defamation, *Recommendations on the Law of Defamation*, (1977).
7. *Report of the Committee on Defamation* (1975), H.M.S.O. Cmnd. 5909, para. 65.
8. The Law Reform Commission of Western Australia, *Report on Defamation*, (1979), para. 5.1.
9. *See, Report of the Committee on Defamation*, para. 421.
10. *Ibid* , para. 422.
11. *Ibid.*, para. 420.
12. *Ibid.*, 205.
13. C.R. Symmons, "New Remedies Against Libellers of the Dead?" 18 *U.W.O.L. Rev.* (1980), p. 527.
14. *See, Report on Defamation*, paras. 9.2-9.8.
15. *See,* Wilfred H. Kesterton, *The Law and the Press in Canada*, (Toronto: McClelland and Stewart, 1976), p. 45 and p. 165, fn. 17.
16. *See,* Symmons, "New Remedies Against Libellers of the Dead?" p. 525.
17. These are the words used by the minority of the Faulk's Committee. *See, Report of the Committee on Defamation*, p. 206.
18. *See*, for instance, *The Trustee Act*, R.S.S. 1978, c. T-23, s. 58.
19. *See,* for instance, The Law Reform Commission of Western Australia, Report on Defamation, paras. 9.9-9.13.
20. *See,* for instance, *The Trustee Act*, R.S.S. 1978, c. T-23, s. 59.
21. *Report of the Committee on Defamation*, para. 402.
22. *Report on Defamation*, para. 9.10.
23. *Ibid* , para. 9.13.
24. *Ibid.*, para. 9.14.
25. *See, Report of the Committee on Defamation*, paras. 392-416.
26. *The Law of Defamation in Canada*, p. 23.
27. *Lewis* v. *Daily Telegraph Ltd.* [1964] AC 234; [1963] 2 All ER 151.
28. *Report of the Committee on Defamation*, para. 342.
29. Toni Weir, "Case Comment—Local Authority v. Critical Ratepayer—A Suit in Defamation." (1972) *Camb. L.J.* p. 241.
30. John P. S. McLaren, "The Defamation Action and Municipal Politics," (1980) 29 *U.N.B. Law Journal*, p. 127.
31. *Defamation*, p. 46, fn. 4.
32. *Ibid.*, 47, fn. 4.
33. *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.

34. *See,* Australian Law Reform Commission, *Defamation—Options for Reform* (1977), p. 7.
35. *See,* sections 281.1 and 281.2 of the Criminal Code dealing with "Hate Propaganda."
36. *See,* for example, *The Saskatchewan Human Rights Code*, R.S.S. c. S-24.1, s. 14.
37. *Gatley on Libel and Slander*, 7th ed. (1974), pp. 412-413.
38. *Loos et al.* v. *The Leader-Post Ltd. and Williams*, [1982] 2 W.W.R. 459. (Sask. C.A.).
39. Duncan and Neill, *Defamation* (1978), p. 58.
40. Patricia Johns, et al. "Defamation on Cable Television Systems: The Legal and Practical Problems." (1970) 2 *Can. Com. L.R.*, p. 15.
41. Law Reform Commission of British Columbia, *Report on Cable Television and Defamation*, (1981), p. 14.
42. *Ibid.*, 14.
43. *Ibid.*, 14.
44. *Ibid.*, 15-16.
45. *See,* for instance, the discussion in Paul C. Weiler, "Defamation Enterprise Liability, and Freedom of Speech," (1967) 17 *U.T.L.J* 278.
46. *The Law of Torts*, p. 543.
47. "Defamation in Broadcasting", p. 668.
48. *Report of the Committee on Defamation.* See, however, the reservations of Michael Rubinstein and Elizabeth Clarke in Minority Report C., p. 200.
49. *Ibid.*, paras. 281-287.
50. G. H. L. Fridman, *Introduction to the Law of Tort* (Toronto: Butterworths, 1978), p. 161.
51. *Edwards* v. *Bell* (1824) 1 Birg 403, at p. 409.
52. *Report of the Committee on Defamation*, para. 133.
53. John P. S. McLaren, "The Defamation Action and Municipal Politics," p. 145.
54. Lewis N. Klar, "Memorandum Re: Cherneskey v. Armdale Publishers Limited," prepared for the Alberta Institute of Law Research and Reform, April, 1979, p. 5.
55. *Proceedings of the Uniform Law Conference*, (1979), p. 120.
56. John G. Flemin, *The Law of Torts*, p. 580.
57. *Report of the Committee on Defamation*, para. 152.
58. *Ibid.*, para. 157.
59. *Ibid.*, para. 159.
60. *Cambell* v. *Spottiswoode* (1863) 3 B. & S., pp. 776-777.
61. *The Law of Torts*, p. 579.
62. *Report of the Committee on Defamation*, para. 168.
63. *See, Defamation—Options for Reform* (1977), para. 130.
64. *Report of the Committee on Defamation*, para. 172.
65. *Ibid.*, para. 174.
66. *Banks* v. *Globe and Mail Limited* (1961) 28 D.L.R. (2d) 343 (S.C.C.).
67. *See,* Michael R. Doody, "Freedom of the Press, The Canadian Charter of Rights and Freedoms, and a New Category of Qualified Privilege", 61 *Can Bar Rev*, No. 1, p. 124.
68. *See,* for instance, Law Reform Commission of Western Australia, *Report on Defamation*, para. 15.9.
69. *Report of the Committee on Defamation*, para. 240.
70. *Horrocks* v. *Lowe* [1975] A.C. 135 (H.L.).
71. 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.

72. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).
73. *Cherneskey* v. *Armdale Publishers Ltd.*, 90 D.L.R. (3d), 321.
74. *See, Report of the Committee on Defamation*, paras. 211-215.
75. Australian Law Reform Commission, *Unfair Publications: Defamation and Privacy* (1979), para. 126.
76. *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.
77. *Burnes* v. *Sykes*, [1927] 1 D.L.R. 282 (Man. Q.B.).
78. Gatley on *Libel and Slander*, 7th ed. (1974), p. 437.
79. Fleming, *The Law of Torts* (6th ed.) p. 528.
80. Keith R. Evans, "Defamation in Broadcasting" (1979) 5 *Dalhousie L.J.*, p. 659.
81. *Report of the Committee on Defamation*, para. 220.
82. *See* Williams, *The Law of Defamation in Canada*, p. 124.
83. J. S. Williams, *Limitation of Actions in Canada*, 2nd ed. (Toronto: Butterworths, 1980), pp. 65-66.
84. John G. Fleming, "Retraction and Reply" Alternative Remedies for Defamation," (1978), 12 *U.B.C L. Rev.*, p. 15.
85. *Ibid.*, 30-31.
86. *See,* 3 Restatement 2d, Torts 326, "Special Note on Remedies for Defamation other than Damages".
87. *Report of the Committee on Defamation*, para. 281.
88. *See, Defamation—Options for Reform* (1977), paras. 251-253.
89. "Retraction and Reply: Alternative Remedies for Defamation," pp. 25-26.
90. *Report on Defamation*, para. 19.2
91. *Ibid.*, para. 19.4.
92. *Ibid.*, para. 19.5.
93. *See,* for instance, the discussion in Lawrence H. Eldridge, *The Law of Defamation* (New York: Bobbs-Merrill, 1978), pp. 297-299.
94. *See, Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1973).
95. "Retraction and Reply: Alternative Remedies for Defamation," p. 21.
96. *Ibid.*, 22.
97. *Ibid.*, 25.
98. *Report of the Committee on Defamation*, para. 623.
99. *Ibid.*, para. 619.
100. *Defamation—Proposals for Reform*, paras. 8-11.
101. *Pac. Press Ltd.* v. *R.* [1977] 5 W.W.R. 173, 46 D.L.R. (3d) 459 (B.C.C.A.).

ANNEX A

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 perseverence 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 is 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 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]

FOOTNOTE

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.*, 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.

ANNEX B

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.

1. *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 hither to a subject beset with archaic rules and distinctions,"[1] had 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 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 publications 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.

2. *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)(iii) makes a significant extension 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".

3. *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 publications 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 publications". 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 defence "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 if the formalities required by the *Newspaper Declaration Act* . . . have not been complied with".

4. *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.

5. *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 than 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 is not excluded and reports of 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 of 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.

6. *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 provi-

sion 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.

7. *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 if did not impute to the plaintiff the commission of a 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 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".

8. *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 of 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 manner 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 and 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 continued 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 intention 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.

9. *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;
> (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.

10. *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 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 judgment. The amount of security in each instance will be left to the sole discretion of the judge.

11. *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 they 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.

12. *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 libel in 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 that by words, exhibited in public or caused to be seen or shown or circulated or delivered with a veiw 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 provision 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 otherlike 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".

13. *Conclusions*

Generally speaking, and with 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.

FOOTNOTES

1. J. S. Williams, *The Law of Defamation in Canada*, (Toronto: Butterworths, 1976), p. 57.

ANNEX C

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 story which, for the most, is committed through the medium of 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.[1]

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.

FOOTNOTES

1. *The Law of Torts*, 516.

ANNEX D

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.[1]

In 1975, the Faulk's Committee compiled the following list. Some of the contents are already covered by existing Canadian legislation:

REPORTS AND STATEMENTS PRIVILEGED SUBJECT TO EXPLANATION OR CONTRADICTION

11. A fair and accurate report of the findings or decisions 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 action 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 ajudication.

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 of discussion of any matter of public concern, whether the admission to the meeting is general or restricted.

(*b*) a fair and accurate report on 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 authority;

(*c*) any commission, tribunal, committee or person appointed for the purposes 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 consulted 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.

(*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 or 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 British Broadcasting Corporation Complaints Committee;

(*e*) the Independent Broadcasting Authority Broadcasting Panel;

(*f*) a district auditor;

(*g*) the Parliamentary Commissioner for Administration and any other Commissioner for Administration appointed by or under 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, nationalized 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 of State of the European Communities.

(*b*) A fair and accurate report of the 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 by or under the authority of the government or legislature of any foreign State which is not a member of the European Communities.[2]

FOOTNOTE

1. *See, Report on Defamation*, para. 15.13.
2. *Report of the Committee on Defamation*, Appendix XI.

APPENDIX H

(See page 28)

ENACTMENT OF AND AMENDMENTS TO UNIFORM ACTS 1982-83

REPORT OF MANITOBA COMMISSIONERS

Assignment of Book Debts act

During its last session Alberta amended The Assignment of Book Debts Act as well as The Bills of Sale Act. These amendments according to the Chief Legislative Counsel for Alberta were not substantive.

Contributory Negligence Act

Newfoundland repealed section 9 of its Contributory Negligence Act (section 4 of the Uniform Contributory Negligence Act). The effect of the repeal is to give to each partner to a marriage the same right of action in tort against the other as if they were married to each other.

Custody Jurisdiction and Enforcement Act

Manitoba enacted The Child Custody And Enforcement Act (The Uniform Custody Jurisdiction and Enforcement Act). The Manitoba Act included The Uniform International Child Abduction (Hague Convention) Act without any significant change.

Manitoba's Child Custody and Enforcement Act contains some variations from The Uniform Act. In the first place the Manitoba Act is called The Child Custody Enforcement Act because Manitoba chose to retain the real and substantial connection test which existed in The Extra-provincial Custody Orders Enforcement Act. This meant that large sections of The Uniform Act dealing with the grounds upon which a court would take jurisdiction became irrelevant.

Also, the government decided that it would have a definition of child as a person under the age of 18 so that Manitoba courts would not be enforcing orders from jurisdictions where the age of majority is above our own age of majority.

In summary then The Manitoba Act gives the courts the powers to grant orders to locate and take children and to vary orders made outside the province and adopted the international conventions on child abduction.

Evidence Act

Under subsection 41(2) of The Alberta Evidence Act a photographic film of a bill of exchange, promissory note and certain other documents is admissible in evidence in all cases and for all purposes for which the object photographed would have been admissible. Subsection 41(3) of that Act gives to the court a discretion, that is to say the court may refuse to admit in evidence a photographic film of the kind mentioned under subsection 41(2).

Alberta amended their Evidence Act to simply add certain local bodies such as the Northlands School Division and local Boards of Health to a list of other bodies to whom subsection 41(3) does not apply.

Human Tissue Gift Act

Saskatchewan amended their Human Tissue Gift Act by adding subsection 12(3) which in essence states that a consent in writing by a donor may authorize a named person to disclose certain information respecting the donor where that named person has reason to believe that the disclosure would result in the tissue being used as permitted by the Act.

Innkeepers Act

Newfoundland as at December 3, 1982 enacted a new Innkeepers Act part of which followed The Uniform Hotelkeepers Act with some modifications.

Interpretation

Alberta amended its Interpretation Act by amending the definition of "bank" to conform to the new Bank Act (Canada) and as well the definition of "holiday" was amended so as to change "Dominion Day" to "Canada Day".

Saskatchewan added section 15.1 to their Interpretation Act which provides that a person who, on the day on which an Executive Council is first installed following a general election is an appointed member of a government board, commission or agency, the term of office of that person is deemed to end on the earlier of

(a) the last day of the term for which he was appointed; or

(b) the day designated by the Lieutenant-Governor in Council or the person who made the appointment.

Married Women's Property Act

Newfoundland amended its Married Women's Property Act to give to each of the partners to a marriage the same right of action in tort against the other as if they were not married to each other.

Personal Property Security Act

The Yukon Territory amended its Personal Property Security Act which was modelled after The Uniform Personal Security Act. The purposes of the amendments, I am advised was better to implement the provisions of that Act and in some cases, to make minor adaptations unique to Yukon.

The amendments extend over 18 printed pages. Anyone interested in the details of the amendments is advised to contact the Legislative Counsel for Yukon for a copy of their amending Act.

Powers of Attorney Act

Saskatchewan enacted The Powers of Attorney Act which is same as the uniform Act of the same name.

Reciprocal Enforcement of Maintenance Orders Act

Saskatchewan enacted The Reciprocal Enforcement of Maintenance Orders Act, 1983 which is substantially the same as the uniform Act.

Prince Edward Island also enacted The Reciprocal Enforcement of Maintenance Orders Act which is essentially the uniform Act including the modifications adopted by the Conference in 1982. Also included are some five refinements to the legislation enacted by Ontario.

Nova Scotia enacted The Maintenance Orders Act this year. The Act is identical to The Uniform Reciprocal Enforcement of Maintenance Orders Act adopted in 1979. It does not include the amendments adopted by the Conference in 1982. The Nova Scotia legislation contains 3 areas of difference from the 1979 uniform Act. These are as follows:

(a) Section 11 of The Nova Scotia Act, which provides that a government agency which is providing or has provided support to a claimant has the same right to bring proceedings as the claimant, refers to a municipal unit rather than a political subdivision as forming one of these government agencies.

(b) Subsection 13(3) of The Uniform Act is not included in the Nova Scotia statute. This subsection provides that where an order or other document received by a court is not in English or French, the order shall have attached to it a translation of the order in English or French.

(c) Subsection 19(3) of the Nova Scotia state provides that the exercise of the authority to make regulations shall be regula-

tions within the meaning of The Regulations Act. There is no such provision in The Uniform Act.

Manitoba enacted The Reciprocal Enforcement of Maintenance Orders Act which is substantially the same as The Uniform Reciprocal Maintenance of Orders Act.

Regulations Act

Legislative Counsel for British Columbia has indicated that before the Conference meets in August this year they will have enacted The Regulations Act which is The Uniform Regulations Act with some modifications.

Saskatchewan amended their Regulations Act in1982 to deal with the numbering and citation of Revised Regulations and in 1983 to authorize the Registrar of Regulations to correct printing errors in regulations by publishing an errata notice in their Gazette and giving it a regulation number to empower the Registrar of Regulations to correct clerical or typographical errors in regulations prior to the publication thereof and to provide for the publication of a consolidated loose-leaf version of the regulations.

Vital Statistics Act

New Brunswick made a number of amendments to their Vital Statistics Act which included the following 3 significant changes:

(a) The phrase "born out of wedlock" was changed to "born to an unmarried mother".

(b) Clarification of the provisions allowing the mother of a child born while she was married and the person acknowledging himself to be the father of the child to have the birth re-registered to show them as married on the registration if they subsequently intermarry, and if the required statutory declaration by the mother has been made prior to the registration of the birth of the child.

(c) Changes in birth registrations in the situation of a person having undergone trans-sexual surgery will be made, not on the basis of the intended results of the surgery, but on the basis of the perceived results of the surgery. Furthermore, the application for a change in the birth registration shall be accompanied by a certificate of the medical practitioner who performed the surgery and a certificate of a medical practitioner qualified to practise medicine in a jurisdiction in Canada.

APPENDIX I

(See page 29)

UNIFORM FRANCHISES ACT

The Uniform Franchises Act is drafted in such a way that either the Registration or Disclosure System could be adopted by a province. Where appropriate, it is indicated whether the provision is applicable to both Systems, only to one System or to one System plus drafting changes.

UNIFORM FRANCHISES ACT

Definitions

1(1) In this Act,

(a) "area franchise" means the right to trade in a franchise;

(COMMENT: Both Registration and Disclosure Systems.)

(b) "area franchise agreement" means a contract, agreement or arrangement either express or implied, whether oral or written between a franchisor and a subfranchisor whereby the subfranchisor, for consideration given or agreed to be given in whole or in part for that purpose, is granted an area franchise;

(COMMENT: Both Registration and Disclosure Systems.)

(c) "associate", when used to indicate a relationship with any person, includes

(i) a corporation of which that person beneficially owns, directly or indirectly, equity shares carrying more than 10% of the voting rights attached to all equity shares of the corporation for the time being outstanding,

(ii) an associated corporation within the meaning of the *Income Tax Act* (Canada),

(iii) an affiliated corporation,

(iv) a trust or estate in which that person has a beneficial interest or as to which that person serves as trustee or in a similar capacity,

(v) a relative or spouse of that person or a relative of that spouse who, in any such case, has the same home as that person, or

(vi) a partner, fellow member of a syndicate or joint trustee;

(COMMENT: Both Registration and Disclosure Systems.)

(d) "Commission" means the Alberta Securities Commission;

(COMMENT: Registration System.)

(e) "Director" means the Director or a Deputy Director of the Commission;

(COMMENT: Registration System.)

(f) "franchise" means any one or more of the following:

(i) the right to engage in the business of offering, selling or distributing the goods manufactured, processed or distributed or the services organized and directed by the franchisor,

(ii) the right to engage in the business of offering, selling or distributing any goods or services under a marketing plan or system prescribed or controlled by the franchisor,

(iii) the right to engage in a business that is associated with the franchisor's trademark, service mark, trade name, logotype, advertising or any business symbol designating the franchisor or its associate,

(iv) 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

(v) the right to recruit additional franchisees or subfranchisors;

(COMMENT: Both Registration and Disclosure Systems.)

(g) "franchise agreement" means a contract, agreement or arrangement, either expressed or implied, whether oral or written, between 2 or more persons whereby a person is granted a franchise in consideration of the payment of a franchise fee but does not include contracts, agreements or arrangements between manufacturers;

(COMMENT: Both Registration and Disclosure Systems.)

(h) "franchisee" means a person to whom a franchise is granted;

(COMMENT: Both Registration and Disclosure Systems.)

(i) "franchise fee" means any consideration exchanged or agreed to be exchanged for the granting of a franchise and, without limiting the generality of the foregoing, the consideration may include

(i) any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay,

(ii) any payment for goods or services,

(iii) any service which the franchisee or subfranchisor is required to perform or agrees to perform, or

(iv) any loan, guarantee or other commercial consideration exigible from the franchisee or subfranchisor at the discretion of the franchisor or subfranchisor 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 or 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 accepting or honouring the credit card;

(COMMENT: Both Registration and Disclosure Systems.)

(j) "franchisor" means a person who grants a franchise but does not include the Crown in Right of the Province or a municipality;

(COMMENT: Both Registration and Disclosure Systems.)

(k) "Minister" means the Minister of Consumer and Corporate Affairs;

(COMMENT: Registration System.)

(l) "officer" means the chairman or a vice-chairman of the board of directors, the president, vice-president, secretary, assistant secretary, treasurer, assistant treasurer or general manager of a corporation, or any other person designated an officer of a corporation by by-law or similar authority;

(COMMENT: Both Registration and Disclosure Systems.)

(m) "register" means register in accordance with this Act;

(COMMENT: Registration System.)

(n) "registrant" means a person registered or required to be registered under this Act;

(COMMENT: Registration System.)

(o) "Registrar" means the Registrar of the Commission;

(COMMENT: Registration System.)

(p) "salesman" means an individual who engages on behalf of a franchisor in negotiating or concluding a trade in a franchise;

(COMMENT: Registration System.)

(q) "subfranchisor" means a person to whom an area franchise is granted;

(COMMENT: Both Registration and Disclosure Systems.)

(r) "trade" or "trading" includes

(i) a purchase or sale or disposition of or other dealing in or a solicitation in respect of a franchise for valuable consideration whether the terms of the payment are by instalment or otherwise, or any attempt to do any of the foregoing,

(ii) any act, advertisement, conduct or negotiation, directly or indirectly in furtherance of any of the activities referred to in subclause (i).

(COMMENT: Both Registration and Disclosure Systems.)

(2) A corporation shall be deemed to be an affiliate of another corporation if one of them is the subsidiary of the other or if both are subsidiaries of the same corporation or if each of them is controlled by the same person.

(COMMENT: Both Registration and Disclosure Systems.)

(3) A corporation shall be deemed to be controlled by another person or persons if

(a) equity shares of the corporation carrying more than 50% of the votes for the election of directors are held, otherwise than by way of security only, by or for the benefit of that other person or persons, and

(b) the votes carried by those shares are sufficient, if exercised, to elect a majority of the board of directors of the corporation.

(COMMENT: Both Registration and Disclosure Systems.)

(4) A corporation shall be deemed to be a subsidiary of another corporation if

(a) it is controlled by

(i) that other,

(ii) that other and one or more corporations each of which is controlled by that other, or

(iii) 2 or more corporations each of which is controlled by that other,

or

(b) it is a subsidiary of a corporation that is that other's subsidiary.

(COMMENT: Both Registration and Disclosure Systems.)

(5) A corporation shall be deemed to be another's holding corporation or parent corporation if that other is its subsidiary.

(COMMENT: Both Registration and Disclosure Systems.)

PART I
REGULATION OF FRANCHISE TRADING
Exemptions

Statutory exemptions

2 Any trade in a franchise is exempt from section 6.

(a) if the franchisor has a net worth on a consolidated basis, according to its most recent audited financial statement,

(i) of not less than $5,000,000, or

(ii) of not less than $1,000,000 if the franchisor is at least 80% owned by a corporation that meets the requirements of subclause (i),

and

(b) if the franchisor

(i) has had at least 25 franchisees conducting business at all times during the 5-year period immediately preceding the trade,

(ii) has conducted business which is the subject of the franchise continuously for not less than 5 years immediately preceding the trade, or

(iii) is at least 80% owned by a corporation that meets the requirements of subclause (i) or (ii).

(COMMENT: Registration System.)

Exemption from registration

3(1) The Director may, if he is satisfied that to do so would not be prejudicial to the public interest, make an order exempting a trade from any 1 or more of the following provisions:

(a) section 4;

(b) section 5 or any part thereof;

(c) section 6;

(d) a regulation or part thereof made under this Act.

(2) An order under subsection (1) may be made by the Director on his own motion or on an application of a person directly affected by the trade in respect of which the application is being made.

(3) An order under subsection (1) may be subject to those terms of conditions that the Director considers necessary.

(4) An order made under subsection (1) may, at the direction of the Director, come into force on a date prior to the date on which the order is made.

(COMMENT: Registration System.)

Renewal of exemption

4(1) No franchisor who claims an exemption under section 2 shall trade in a franchise until the franchisor has obtained an acknowledgement of the exemption under section 2 from the Director and has filed with the Commission a copy of the statement of material facts.

(2) An acknowledgement of the exemption expires 1 year from the date of the acknowledgement unless the Director by order specifies a different period.

(3) The acknowledgement of an exemption may be renewed for additional periods of 1 year each by submitting to the Director an application for renewal in the prescribed form no later than 30 business days prior to the expiration of the acknowledgement unless that period is waived by an order of the Director.

(4) An application for renewal submitted under subsection (3) shall be accompanied by a copy of the franchisor's most recent statement of material facts.

(5) When a material adverse change occurs after the date of the application for acknowledgement of an exemption or the submission of an application for renewal that may have an effect on the granting of the acknowledgement or renewal, notice of the change shall be filed with the Director as soon as practicable and in any event within 10 days from the date the change occurs.

(COMMENT: Registration System.)

Statement of material facts

5(1) When a trade in a franchise is exempt under section 2, the franchisor shall nevertheless, at least 4 days, exclusive of Saturdays, Sundays or holidays, prior to

(a) the execution by the prospective franchise of any binding franchise agreement or any other agreement, or

(b) the receipt of any consideration,

supply each prospective franchisee with a statement of material facts.

(COMMENT: In a Disclosure System, that portion preceding clause (a) is deleted and the following is substituted:

"A franchisor shall at least 4 days, exclusive of Saturdays, Sundays or holidays, prior to")

(2) The statement of material facts shall contain the following information:

(a) the name of the franchisor, the name under which the franchisor is doing or intends to do business, and the name of any associate that will engage in business transactions with the franchisee;

(b) the franchisor's principal address and the name and address of his agent for service in the Province;

(c) the business form of the franchisor, whether corporate, partnership or otherwise;

(d) the business experience of the franchisor, including the length of time the franchisor

(i) has conducted a business of the type to be operated by the franchisee,

(ii) has granted franchises for that business, and

(iii) has granted franchises in other lines of business;

(e) a copy of the typical franchise contract or agreement proposed for use or in use in the Province;

(f) a statement of the franchise fee charged, the proposed application of the proceeds of the fee by the franchisor and the formula by which the amount of the fee is determined if the fee is not the same in all cases, together with a notation concerning the existence of any continuing royalties;

(g) a statement describing any payments or fees other than franchise fees that the franchisee or subfranchisor is required to pay to the franchisor, including royalties and payments or fees which the franchisor collects in whole or in part on behalf of a third party or parties, together with the names of the third party or parties;

(h) a statement indicating whether the cash investment required for the franchise business covers payment for fixtures and equipment;

(i) a statement of the conditions under which the franchise agreement may be terminated or renewal refused, or repurchased at the option of the franchisor;

(j) a statement as to whether the franchisee is able to sell the franchise business and if so, what conditions, if any, attach to the sale;

(k) a statement as to whether, by the terms of the franchise agreement or by other device or practice, the franchisee or subfranchisor is required to purchase from the franchisor or his designate, services, supplies, products, fixtures or other goods relating to the establishment or operation of the franchise business together with a description of them;

(l) a statement as to whether the services, supplies, products, fixtures, or other goods relating to the establishment or operation of the franchise business are available from sources other than the franchisor;

(m) a statement as to whether, by the terms of the franchise agreement or other device or practice, the franchisee is limited in the goods or services which may be offered by him to his customers;

(n) a statement as to whether the franchisor has, whether by contract, agreement, arrangement or otherwise, agreed with a third party or parties that the products or services of the third party or parties will be made available to the franchisee or subfranchisor on a discount or bonus basis;

(o) a statement of the terms and conditions of any financing arrangements when offered directly or indirectly by the franchisor or his associate;

(p) a statement of any past or present practice of or any intent of the franchisor to sell, assign or discount to a third party any note, contract or other obligation of the franchisee or subfranchisor in whole or in part;

(q) if any statement of estimated or projected franchisee earnings is made or is to be made to the franchisee or subfranchisor, the data on which it is based;

(r) a statement as to whether franchisees or subfranchisors receive any exclusive rights or territory and if so, the extent thereof;

(s) a statement indicating whether the franchisee is required to participate in a franchisor sponsored promotion or publicity campaign;

(t) a statement as to whether the benefit of any patent or liability

insurance protection of the franchisor is extended to the franchisee;

(u) a statement as to whether any procedure has been adopted by the franchisor for the settlement of disputes between the franchisor and franchisee;

(v) a statement as to whether the franchisor provides continuing assistance in any form to the franchisee and if so, the nature, extent and cost of the assistance;

(w) a list of other franchisees operating in the Province and if no such franchisees exist, a list of the franchisees operating in the next closest jurisdiction;

(x) the provisions governing withdrawal from the franchise agreement;

(y) the provisions relating to the right to rescind the franchise agreement;

(z) a statement of the rights of a purchaser under section 34.

(COMMENT: Both Registration and Disclosure Systems.)

Registration

Registration

6(1) No person shall trade in a franchise in the Province either on his own account or on behalf of any other person until there have been filed with the Commission both an application for registration of the franchise offering in the prescribed form and a prospectus with respect to the franchise offering and until a receipt for the prospectus has been obtained from the Registrar.

(COMMENT: Registration System.)

(2) The applicant for registration of a franchise offering shall provide the information requested in the application form and any additional information requested by the Director and shall pay the prescribed fee.

(COMMENT: Registration System.)

(3) A trade in a franchise is deemed to have occurred in the Province if

(a) an offer to sell or a sale is made in the Province,

(b) an offer to buy is accepted in the Province,

(c) the franchisee is domiciled or ordinarily resident in the Province,

(d) the franchise business will be operated in the Province,

(e) an offer to sell is made from the Province, or

(f) an offer to sell or an offer to buy is accepted by communicating the acceptance to a person in Alberta either directly or through an agent in the Province.

(COMMENT: Both Registration and Disclosure Systems.)

"This Act applies if

(a)

(b)

(c)

(d)

(e)

(f) . . ."

Amendment of application

7 If a material adverse change occurs

(a) after the date of the application for registration of a franchise offering, and

(b) before the issuance of a receipt for a prospectus

that makes contrary or misleading any statement of a material fact contained in the application for registration, an amendment to the application for registration shall be filed with the Commission as soon as practicable, and in any event within 10 days from the date the change occurs.

(COMMENT: Registration System.)

Prospectus

8(1) A prospectus shall provide full, plain and true disclosure of all material facts relating to the proposed franchise offering.

(2) A prospectus shall comply as to form and content with the requirements of this Act and the regulations.

(3) The Director may require any additional information that he considers necessary to be included in the prospectus.

(4) The applicant shall file with a prospectus the documents, financial statements, reports and material, in a form satisfactory to the Director, and pay the fees prescribed by the regulations.

(COMMENT: Registration System.)

Certificate of full disclosure

9(1) An application for registration, prospectus, registration renewal statement and any amendments to them, shall contain a certificate in the following form:

> The foregoing constitutes full, plain and true disclosure of all material facts relating to the franchise offered by this prospectus as required by Part 1 of the *Franchises Act* and the regulations thereunder.

(2) The certificate shall be signed

(a) by the sole proprietor, partners, unit holders, trustee, or

(b) in the case of a corporation, by the chief executive officer and the chief financial officer and on behalf of the board of directors by any 2 directors of the corporation, authorized to sign,

and by any other person who has a substantial interest in the franchisor.

(COMMENT: Registration System.)

Consents of experts

10(1) If a solicitor, auditor, accountant, engineer, appraiser or any other person is named as having prepared or certified any part of the (*prospectus or*) statement of material facts, the written consent of that person to the inclusion of that report or valuation shall be (*filed with the Commission not later than the time the prospectus or statement of material facts is filed.*)

(COMMENT: In a disclosure system the words in brackets are deleted and substituted by the following:

"included in the statement of material facts".)

(2) The director may dispense with the filing of a consent required by subsection (1) if, in his opinion, the filing is impracticable or involves undue hardship.

(COMMENT: Registration System.)

(3) The consent of an auditor or accountant referred to in subsection (1).

(a) Shall refer to the report required to be made by him under the regulations, stating the date of it and the dates of the financial statements on which the reports are made, and

(b) shall contain a statement that he has read the (*prospectus or*) statement of material facts and that the information contained in the (*prospectus or*) statement, which is derived from the financial statements contained in the (*prospectus or*) statement of material facts or that is within his knowledge, is, in his opinion, presented fairly and is not misleading.

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

(4) If a solicitor, auditor, accountant, engineer, appraiser or other person referred to in subsection (1)

(a) has directly or indirectly received or expects to receive any interest, direct or indirect, in the property of the franchisor or an affiliate, or

(b) beneficially owns, directly or indirectly, any securities of the franchisor or an affiliate,

that interest or ownership shall be disclosed in the (*prospectus or*) statement of material facts.

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

(5) If a person referred to in subsection (1) is or is expected to be elected, appointed or employed as a director, officer or employee of the franchisor or an affiliate, the fact shall be disclosed in the (*prospectus or*) statement of material facts.

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

(6) Notwithstanding subsections (4) and (5), the Director may direct the Registrar not to issue a receipt for a prospectus if a person referred to in subsection (1) is not acceptable to him.

(COMMENT: Registration Systems.)

(7) When a change is proposed to be made in a prospectus or statement of material facts that in the opinion of the Director materially affects any consent required by subsection (1), the Director may require that a further consent be filed with the Commission before a receipt for the amended prospectus or statement of material facts is issued.

(COMMENT: Registration System.)

Security for performance

11 If the Director finds that the applicant for registration has failed to demonstrate that adequate financial arrangements have been made to fulfil the franchisor's obligations to provide improvements, equipment, inventory, training or other items included in the offering, the Director may by order require

(a) the escrow or impounding of franchise fees and other funds paid by franchisees or subfranchisors, or

(b) at the option of the franchisor, the furnishing of a surety bond in the form and amount required by the Director,

until no later than the time of opening by the franchisee of the franchise business if the Director finds that such a requirement is necessary and appropriate to protect prospective franchisees or subfranchisors.

(COMMENT: Registration System.)

Receipt for prospectus

12(1) The Director may in his discretion direct the Registrar to issue a receipt for any prospectus filed under this Part unless it appears to the Director that

(a) the prospectus or a document required to be filed with it

(i) fails to comply in any substantial respect with any of the requirements of this Part or the regulations,

(ii) contains any statement, promise, estimate or forecast that is misleading, false or deceptive, or

(iii) conceals or omits to state any material facts necessary in order to make any statement contained in it not misleading in the circumstances in which it was made,

(b) any person identified in the application has a criminal record or is subject to an order or has a civil judgment entered against him and the involvement of that person in the sale of the franchise or management of the franchise business is not in the public interest,

(c) the financial position of the franchisor is such that the granting of the right to distribute franchises is not in the public interest,

(d) the business experience of the applicant is such that the granting of the right to distribute franchises is not in the public interest, or,

(e) the ability of the franchisor to provide the goods and services outlined in the prospectus is such that the granting of the right to trade in franchises is not in the public interest.

(2) A determination by the Director under subsection (1) shall be made in writing within 30 days of the receipt of the application for registration, the prospectus and any amending document and the person who filed the prospectus has a prior opportunity to be heard.

(3) The Lieutenant Governor in Council may make any regulations he considers necessary or appropriate in the public interest respecting the matters referred to in subsection (1)(c), (d) and (e) and, without limiting the generality of the foregoing, respecting

(a) the paid-up capital and surplus,
(b) the liquidity of assets,
(c) the ratio of debts to paid-up capital and surplus,
(d) the audit procedures,
(e) the furnishing of interim financial statements, and
(f) the qualifications and obligations of the franchisor.

(COMMENT: Registration System.)

Bond

13 The Director may, and when so directed by the Commission shall,

(a) require any applicant or registrant to deliver a bond to the Commission within a specified time, or
(b) require a registrant who had previously delivered a bond to deliver a new bond to the Commission,

and the bond or new bond shall be in the prescribed form and shall be approved by the Director as to the amount and otherwise.

Reapplication

14 If an application for registration is refused, the applicant may

(a) reapply on other or additional material, or
(b) on the same material if there has been a significant change in circumstances.

(COMMENT: Registration System.)

Order to cease trading

15(1) When it appears to the Commission

(a) that any of the circumstances set out in section 12 exist,

(b) that there has been a failure to comply with this Act or the regulations or any rule or order of the Commission, or

(c) that the trade would constitute deceit or fraud of the purchasers,

the Commission may order that all trading in the franchise shall cease.

(2) No order shall be made under subsection (1) without a hearing unless in the opinion of the Commission the length of time required for a hearing could be prejudicial to the public interest, in which case a temporary order may be made that shall expire 15 days from the date of the making of the order.

(3) A notice of every order made under this section shall be served on the person to whose franchise the prospectus relates and on every salesman of the franchise, and immediately on the receipt of the notice

(a) no further trades shall be made in the franchise named in the order by any person, and

(b) any receipt issued by the Registrar for the prospectus is revoked.

(COMMENT: Registration System.)

Application to amend registration

16(1) A franchisor shall advise in writing, by an application to amend the registration and prospectus, of any material change in the information contained in the application or prospectus as originally submitted, amended or renewed and the application shall be filed with the Registrar as soon as practicable and in any event within 10 days from the date the change occurs.

(2) The Director shall determine whether any changes as submitted pursuant to subsection (1) are to be accepted, but in no case shall a refusal be made without an opportunity to be heard.

(3) An amendment approved by the Director becomes effective on any date the Director determines, having due regard to the public interest and the protection of franchisees.

(COMMENT: Registration System.)

Expiry of registration

17 The registration of a franchise offering expires one year from the date of registration, unless the Director by order specifies a different period.

(COMMENT: Registration System.)

Renewal of registration

18 The registration of a franchise offering may be renewed for additional periods of one year each by submitting to the Director a registration renewal statement in the prescribed form no later than 30 business days prior to the expiration of the registration unless that period is waived by the order of the Director.

(COMMENT: Registration System.)

Registration of salesman

19(1) No person shall act as a salesman on behalf of a franchisor whose franchise offering is registered under this Act unless

(a) he is listed on the franchisor's application for registration of a franchise offering, and

(b) he is registered under this Act.

(2) The termination of the employment of a salesman with a person whose franchise offering is registered shall operate as a withdrawal of the registration of the salesman until notice in writing has been received by the Registrar from another person whose franchise offering is registered under this Act of the employment of the salesman by that other person and the employment has been approved by the Director.

(COMMENT: Registration System.)

Expiry of registration

20 Subject to subsections 20 and 24, the registration of the salesman expires one year from the date of registration.

(COMMENT: Registration System.)

Renewal of registration

21 The registration of a salesman may be renewed for additional periods of one year each by submitting to the Director a registration renewal statement in the prescribed form no later than 30 business days prior to the expiration of the registration unless that period is waived by the order of the Director.

(COMMENT: Registration System.)

Bond

22(1) The Director shall grant registration or renewal of registration to a prospective salesman when in the opinion of the director the applicant is suitable for registration and the proposed registration is not objectionable.

(2) The Director shall not refuse to grant or refuse to renew registration as a salesman without giving the applicant an opportunity to be heard.

(3) The Director may in his discretion restrict a registration of a salesman by imposing terms and conditions on it.

(4) The Director may, and when so directed by the Commission shall,

(a) require any applicant for registration as a salesman or any person who has been registered as a salesman to deliver a bond to the Commission within a specified time, or

(b) require a salesman who had previously delivered a bond to deliver a new bond to the Commission,

and the bond or new bond shall be in the prescribed form and shall be approved by the Director as to amount and otherwise.

(COMMENT: Registration System.)

Suspension or cancellation of registration

23(1) The Director, after giving the registered salesman an opportunity to be heard, shall suspend or cancel a salesman's registration or may reprimand a salesman when in his opinion that action is in the public interest.

(2) Notwithstanding subsection (1), if the granting of an opportunity to be heard would be prejudicial to the public interest, the Director may suspend the registration of a salesman without giving the salesman an opportunity to be heard, in which case he shall forthwith notify the salesman of the suspension and of a hearing and review to be held before the Commission within 15 days of the date of the suspension.

(3) The hearing and review shall be deemed to be a hearing and review under section 49.

(COMMENT: Registration System.)

Reapplication

24 If an application for registration as a salesman is refused the applicant may reapply on other or additional material or on the same material when there has been a significant change in circumstances.

(COMMENT: Registration System.)

Form of application

25 An application for registration as a salesman shall be made in writing on a prescribed form provided by the Commission and shall be accompanied by the prescribed fee.

(COMMENT: Registration System.)

Additional information required

26 The Director

(a) may require further information or material to be submitted by an applicant for registration as a salesman within a specified time and may require verification by affidavit or otherwise of any information or material then or previously submitted, or

(b) may require the applicant for registration as a salesman or the registered franchisor or any partner, joint trustee, joint unit holder, joint personal representative or director or officer of the latter to submit to an examination under oath by a person designated by the Director.

(COMMENT: Registration System.)

Refusal of registration

27 Without limiting the generality of section 22(1), the Director may refuse registration to a prospective salesman if he is satisfied, on the basis of statements on the application and from any other sources of information, that the applicant

(a) has not been a resident of Canada for at least one year prior to the date the application is made,

(b) is not a resident of Alberta at the date the application is made, or

(c) does not intend to make his permanent home in Alberta after the application is granted.

(COMMENT: Registration System.)

Refund of fees

28 When an application for registration or renewal of registration of a franchise offering or of a salesman is refused or cancelled or when a receipt for a prospectus is not obtained, the Director may refund the fee or any part of it that he considers fair and reasonable.

(COMMENT: Registration System.)

Prohibition

29 No franchisor shall conclude a trade in a franchise without providing to the purchaser a statement of material facts, prospectus or amended prospectus in accordance with section 35.

(COMMENT: In a Disclosure System, section 29 should read as follows:

29 No franchisor shall conclude a trade in a franchise without providing to the purchaser a statement of material facts in accordance with section 35.)

General

Representations as to registration

30(1) Except as may be permitted by the regulations in the case of a prospectus, no person shall hold himself out as being a registrant by having printed in a circular, pamphlet, advertisement, letter, telegram or other stationery anything indicating that he is a registrant.

(2) No person who is not a registrant shall either directly of indirectly hold himself out as being a registrant.

(COMMENT: Registration System.)

Prohibition

31 No person shall make any representation, written or oral, that the Commission has in any way passed on

(a) the financial standing, fitness or conduct of any registrant,
(b) the quality of any franchise, or
(c) the results to be expected by a franchisee operating under the terms of the franchise agreement.

(COMMENT: Registration System.)

Records

32 A franchisor and subfranchisor trading in franchises shall at all times keep and maintain a complete set of books, records and accounts of their respective sales in Alberta at their principal place of business within Alberta shown on the *(prospectus or)* statement of material facts, (as the case may be).

(COMMENT: In a Disclosure System the words in brackets are deleted.)

PART 2

ENFORCEMENT

Offences and Penalties

Offences and penalties

33(1) A person who

(a) *(in any material, evidence or information submitted or given under this Act or the regulations to the Commission, its representative, the Director or the Registrar or to a person appointed to make an investigation or audit under this Act makes a statement)*

(i) that, at the time and in the circumstances under which it is made, is false or misleading with respect to a material fact, or

(ii) that omits to state a material fact, the omission of which makes the statement false or misleading,

(COMMENT: In a Disclosure System the words in brackets are deleted and the following are substituted:

"in a statement of material facts makes a statement")

(b) in an application, report, prospectus, return, financial statement or other document required to be filed or furnished under this Act or the regulations makes a statement

(i) that, at the time and in the circumstances under which it is made, is false or misleading with respect to a material fact, or

(ii) that omits to state a material fact, the omission of which makes the statement false or misleading,

(COMMENT: Registration System.)

(c) contravenes this Act or the regulations, or

(COMMENT: Both Registration and Disclosure Systems.)

(d) fails to observe or comply with an order, ruling, direction or other requirements made under this Act or the regulations

(COMMENT: Registration System.)

is guilty of an offence and liable to

(e) a fine of not more than $2,000 or to imprisonment for a term of not more than one year, or to both, or

(f) in the case of a corporation, a fine of not more than $25,000.

(2) No person is guilty of an offence under subsection (1)(a) *or* (*b*) if he establishes that he did not know that the statement was false or misleading and in the exercise of reasonable diligence could not have known that the statement was false or misleading.

(COMMENT: In a Disclosure System "or (b)" is deleted.)

(3) if a corporation is found guilty of an offence under subsection (1) every director or officer of the corporation who authorized, permitted or acquiesced in the offence is also guilty of an offence and is liable to a fine of not more than $2,000 or to imprisonment for a term of not more than one year, or to both.

(COMMENT: Both Registration and Disclosure Systems.)

Commencement of proceedings

34 No proceedings under section 34 shall be commenced more than one year after the facts on which the proceedings are based first came to the knowledge of the Commission.

(COMMENT: In a Disclosure System section 34 should read:

34 A prosecution under this Act may be commenced within 1 year of the commission of the alleged offence, but not afterward.)

Civil Remedies and Liabilities

Withdrawal from trade agreement

35(1) A person, not acting as agent of the purchaser, who receives an order for a franchise (*to which section 4, 6 or 19 is applicable*) shall, unless he has previously done so, send by prepaid mail or deliver to the purchaser the statement of material facts (, *prospectus or amended prospectus, whichever is the last required to be filed with the Commission,*)

(a) before entering into an agreement of purchase and sale resulting from the order, or

(b) not later than midnight on the 4th day, exclusive of Saturdays, Sundays and holidays, after entering into the agreement.

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

(2) An agreement of purchase and sale or a sale referred to in subsection (1) is not binding on the purchaser if the person from whom

the purchaser purchased the franchise receives written or telegraphic notice evidencing the intention of the purchaser not to be bound by the agreement of purchase and sale or the sale not later than midnight on the 4th day, exclusive of Saturdays, Sundays and holidays, after receipt by the purchaser of the statement of material facts (, *prospectus or amended prospectus, whichever is the last required to be filed with the Commission*).

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

(3) Subsection (2) does not apply if the purchaser (*is a registrant or if the purchaser*) sells or otherwise transfers beneficial ownership of the franchise referred to in subsection (2), otherwise than to secure indebtedness, before the expiration of the time referred to in subsection (2).

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

(4) For the purpose of this section, when a statement of material facts, (*prospectus or amended prospectus*) is sent by prepaid mail, the statement of material facts (, *prospectus or amended prospectus*) shall be deemed conclusively to be received in the ordinary course of mail by the person to whom it was addressed.

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

(5) The receipt of a statement of material facts (, *prospectus or amended prospectus*) by a person who is acting as agent of or who thereafter commences to act as agent of the purchaser with respect to the purchase of a franchise referred to in subsection (1) is, for the purpose of this section, receipt by the purchaser as of the date on which the agent received the statement of material facts (, *prospectus or amended prospectus*).

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

(6) The receipt of the notice referred to in subsection (2) by a person who acted as agent of the vendor with respect to the sale of a franchise referred to in subsection (1) shall, for the purpose of this section, be receipt by the vendor as of the date on which the agent received the notice.

(COMMENT: Both Registration and Disclosure Systems.)

(7) For the purpose of this section, a person shall not be considered to be acting as agent of the purchaser unless the person is acting solely as the agent of the purchaser with respect to the purchase and sale in question and has not received and has no agreement to receive compensation from or on behalf of the vendor with respect to the purchase and sale.

(COMMENT: Both Registration and Disclosure Systems.)

(8) The onus of proving that the time for giving notice under subsection (2) has expired is on the person from whom the purchaser agreed to purchase the franchise.

(COMMENT: Both Registration and Disclosure Systems.)

(9) Every statement of material facts (*or prospectus*) shall contain a statement of the rights given to a purchaser by this section.

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

Rescission of trade agreement

36(1) A person who is a party to a contract as purchaser (*resulting from the offer of a franchise to which section 5, 6 or 16 is applicable*) has a right to rescind the contract while still the owner of the franchise if the statement of material facts (*or the prospectus and any amended prospectus then filed with the Commission in compliance with section 16 and*) received by the purchaser, as of the date of receipt, contains an untrue statement of a material fact or omits to state a material fact necessary in order to make any statement contained therein not misleading in the light of the circumstances in which it was made.

(COMMENT: In a Disclosure System, the words in brackets are deleted. Alternative wording:

(1) A franchise may rescind a franchise agreement if he was not supplied a statement of material facts in accordance with section 5.)

(2) No action shall be commenced under this section after the expiration of 2 years from

(a) the receipt of the statement of material facts (, *prospectus or amended prospectus*) by the purchaser, or

(b) the date of the contract referred to in subsection (1),

whichever is the later.

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

(3) Subsection (1) does not apply to an untrue statement or a material fact or an omission to state a material fact

(a) if the untruth of the statement or the fact of the omission was unknown to the person whose franchises are being offered by the statement of material facts (*or prospectus*) and, in the exercise of reasonable diligence, could not have been known to that person,

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

(b) if the statement or omission is disclosed in an amended prospectus filed in compliance with section 17 and the amended prospectus was received by the purchaser, or

(COMMENT: In a Disclosure System, clause (b) should read as follows:

(b) if the statement or omission is disclosed in an amended statement of material facts and the statement was received by the purchaser; or

(c) If the purchaser knew of the untruth of the statement or knew of the omission at the time he purchased the franchise.

(4) For the purpose of this section, when a statement of material facts, (*prospectus or amended prospectus*) is sent by prepaid mail, it shall be deemed conclusively to be received in the ordinary course of mail by the person to whom it was addressed.

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

(5) The receipt of a statement of material facts (, *prospectus or amended prospectus*) by a person who is acting as agent of or who thereafter commences to act as agent of the purchaser with respect to the purchase of a franchise referred to in subsection (1) is, for the purpose of this section, receipt by the purchaser as of the date on which the agent received the statement of material facts (, *prospectus or amended prospectus*).

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

(6) For the purpose of this section, a person shall not be considered to be acting as agent of the purchaser unless the person is acting solely as the agent of the purchaser with respect to the purchase and sale in question and has not received and has no agreement to receive

compensation from or on behalf of the vendor with respect to the purchase and sale.

(COMMENT: Both Registration and Disclosure Systems.)

(7) The cause of action conferred by this section is in addition to and without derogation from any other right the purchaser may have at law.

(COMMENT: Both Registration and Disclosure Systems.)

(8) Every statement of material facts (*or prospectus*) shall contain a statement of the right of rescission provided by this section.

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

Subfranchisors

37(1) When a franchise offering has been registered under this Act, a subfranchisor may, instead of providing his own prospectus, provide to a prospective franchisee a copy of the franchisor's prospectus, and the prospectus shall be deemed to be the prospectus of the subfranchisor except as it may be varied in writing by the subfranchisor.

(COMMENT: Registration System).

(2) When a trade in a franchise is exempt under this Act, a subfranchisor shall provide a prospective franchisee a copy of the franchisor's statement of material facts and the statement binds the subfranchisor except as it may be varied in writing by the subfranchisor.

(COMMENT: In a Disclosure System, subsection (2) is substituted by the following:

(2) A subfranchisor shall provide to a prospective franchisee a copy of the franchisor's statement of material facts, and the statement binds the sub-franchisor except as it may be varied in writing by the sub-franchisor.)

(3) The franchisor shall provide each subfranchisor with sufficient copies of the (*prospectus or*) statement of material facts to enable him to comply with this section.

(COMMENT: In a Disclosure System, the words in brackets are deleted.)

Reliance on prospectus

38(1) When a receipt for a prospectus has been issued by the Registrar, notwithstanding that the receipt is thereafter revoked, every

purchaser of the franchise to which the prospectus relates shall be deemed to have relied on the statements made in the prospectus whether the purchaser has received the prospectus or not, and, if a material false statement is contained in the prospectus, every person who, at the time of the issue of a receipt for the prospectus, is a director of a corporation issuing the franchises or a person who signed the certificate required by section 9 is liable to pay compensation to all persons who have purchased the franchise for any loss or damage those persons have sustained as a result of the purchase unless it is proved

(a) that the prospectus was filed with the Commission without his knowledge or consent, and that, on becoming aware of its filing with the Commission, he forthwith gave reasonable public notice that it was so filed,

(b) that, after the issue of a receipt for the prospectus and before the purchase of the franchise by the purchaser, on becoming aware of any false statement therein, he withdrew his consent thereto and gave reasonable public notice of the withdrawal and of the reason for it,

(c) that, with respect to every false statement, he had reasonable grounds to believe and did believe that the statement was true,

(d) that he had no reasonable grounds to believe that an expert who made a statement in a prospectus or whose report or valuation was produced or fairly summarized in it was not competent to make the statement, valuation or report, or

(e) that, with respect to every false statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document.

(2) The liability under subsection (1) of a person as a director or as a signatory of the certificate is joint and several with all other such persons and with the corporation.

(COMMENT: Registration System.)

Protection from action

39(1) Except with the consent of the Attorney General, no action whatever and no proceedings by way of injunction, mandamus, prohibition or other extraordinary remedy lies or shall be instituted against any person, whether in his public capacity, in respect of any act or omission in connection with the administration or the carrying out

of this Act or the regulations when that person is a member of the Commission, a representative of the Commission or the Director or Registrar, or when that person was proceeding under the written oral direction or consent of any one of them or under an order of the Minister made under this Act.

(2) No person has any rights or remedies and no proceedings lie or shall be brought against any person in respect of any act or omission of that person done or omitted in compliance or intended compliance with

(a) a requirement, order or direction under this Act of

(i) the Commission or any member of it,
(ii) the Director,
(iii) the Registrar,
(iv) any person appointed by order of the Minister,
(v) the Minister, or
(vi) any representative of the Minister, the Commission, the Director or Registrar or of any person appointed by the Minister, !

or

(b) this Act and the regulations.

(COMMENT: Registration System.)

PART 3 (All of Part 3 Applies to Registration System)

INVESTIGATION AND ACTION BY THE COMMISSION

Examination re financial affairs

40(1) The Commission or a person to whom as its representative it, in writing, delegates the authority may at any time make an examination of the financial affairs of a registrant or of any person whose franchises have been the subject of a registration with the Commission, and prepare a balance sheet as of the date of the examination and any other statements and reports required by the Commission.

(2) The Commission or a person making an examination under this section is entitled to free access to all books of account, securities, cash, documents, bank accounts, vouchers, correspondence and records of every description of the person whose financial affairs are being examined, and no person shall withhold, destroy, conceal or refuse to give any information or thing reasonably required for the purpose of the examination.

(3) The Commission may charge the fees prescribed by the regulations for any examination made under this section.

Experts

41(1) The Commission may appoint one or more experts to assist the Commission in any manner it considers expedient.

(2) The Commission may submit any agreement, prospectus, financial statement, report or other document to one or more experts appointed under subsection (1) for examination, and the Commission has the like power to summon and enforce the attendance of witnesses before the expert and compel them to produce documents, records and things as is vested in the Commission in conducting an investigation and section 42(3) and (4) apply with all necessary modifications.

(3) An expert appointed under subsection (1) shall be paid such amounts for services and expenses as the Lieutenant Governor in Council determines.

Investigations

42(1) When on a statement made under oath it appears probable to the Commission that any person has

(a) contravened this Act or the regulations, or

(b) committed an offence under the *Criminal Code* (Canada) in connection with a trade in franchises,

the Commission may by order appoint a person to make any investigation it considers expedient for the due administration of this Act, and in the order shall determine and prescribe the scope of the investigation.

(2) The Commission may, on its own motion by order, appoint one or more persons to make any investigation it considers expedient for the due administration of this Act or into any matter relating to trading in franchises, and in the order shall determine and prescribe the scope of the investigation.

(3) For the purposes of an investigation ordered under this section, the person appointed to make the investigation may investigate, inquire into and examine

(a) the affairs of the person in respect of whom the investigation is being made and any books, papers, documents, correspondence, communications, negotiations, transactions, investigations, loans, borrowings and payments to, by, on behalf of or in relation to or connected with that person and any property, assets or things

owned, acquired or alienated in whole or in part by that person or by any person acting on behalf of or as agent for that person, and

(b) the assets at any time held, the liabilities, debts, undertakings and obligations at any time existing, the financial or other conditions at any time prevailing in or in relation to or in connection with any such person and the relationship that may at any time exist or have existed between that person and any other person by reason of a sale or an agreement of purchase and sale, commissions promised, secured or paid, interests held or acquired, the loaning or borrowing of money or other property, interlocking directorates, common control, undue influence or control or any other relationship.

(4) The person making an investigation under this section has the same power to summon and enforce the attendance of witnesses and compel them to give evidence on oath or otherwise, and to produce documents, records and things, as is vested in the Court of Queen's Bench for the trial of civil actions, and the failure or refusal of a person to attend, to answer questions or to produce the documents, records and things that are in his custody or possession makes the person liable to be committed for contempt by a judge of the Court of Queen's Bench as if in breach of an order of judgment of the Court of Queen's Bench, and no provision of the *Alberta Evidence Act* exempts any bank or any officer or employee of a bank from the operation of this section.

(5) A person giving evidence at an investigation under this section may be represented by counsel.

(6) When an investigation is ordered under this section, the person appointed to make the investigation may seize and take possession of any documents, records, securities or other property of the person whose affairs are being investigated.

(7) When any documents, records, securities or other property are seized under subsection (6), the documents, records, securities or other property must be made available for inspection and copying by the person from whom seized at a mutually convenient time and place.

(8) When an investigation is ordered under this section the Commission may appoint an accountant or other expert to examine documents, records, properties and matters of the person whose affairs are being investigated.

(9) A person appointed under subsection (1), (2) or (8) shall report the result of his investigation or examination to the Commission.

(10) The provisions of any rules of court or of law relating to the service of subpoenas to witnesses and to the payment of conduct money or witness fees do not apply with respect to investigations under this section or section 44.

(11) An order under subsection (1) or (2) may provide for the appointment of 2 or more persons to make the investigation.

Report to Minister

43 When on the report of an investigation made under section 42 it appears to the Commission that any person may have

(a) contravened this Act or the regulations, or

(b) committed an offence under the *Criminal Code* (Canada) in connection with a transaction relating to franchises,

the Commission shall send a full and complete report of the investigation, including the report made to it, any transcripts of evidence and any material in the possession of the Commission relating thereto, to the Minister and to the Attorney General.

Order for investigation

44 Notwithstanding section 42, the Minister may by order appoint one or more persons to make any investigation he considers expedient for the due administration of this Act or into any matter relating to trading in franchises, in which case the person or persons so appointed, for the purposes of the investigation, have the same authority, powers rights and privileges as a person appointed under section 42.

(COMMENT: This provision could be included in a Disclosure System.)

Secrecy of evidence

45 No person, without the consent of the Commission, shall disclose, except to his counsel, any information or evidence obtained or the name of any witness examined or sought to be examined under section 42 or 44.

Publication of findings

46 When an investigation has been made under section 42, the Commission may, and, when an investigation has been made under section 44, the person making the investigation shall, report the result of the investigation, including the evidence, findings, comments and

recommendations, to the Minister and to the Attorney General, and the Minister, with the consent of the Attorney General, may publish the report in whole or in part in any manner he considers proper.

(COMMENT: If in a Disclosure System, section 44 is adopted, then section 45 would also apply.)

Order to preserve funds

47(1) When

(a) the Commission is about to order an investigation under section 42 or during or after an investigation under section 42 or 44,

(b) the Commission is about to make or has made a direction, decision, order or ruling suspending or cancelling the registration of a person or affecting the right of a person to trade in franchises, or

(c) criminal proceedings or proceedings in respect of a contravention of this Act or the regulations are about to be or have been instituted against a person, that in the opinion of the Commission are connected with or arise out of a franchise or a trade in a franchise or out of any business conducted by that person,

the Commission may, in writing or by telegram,

(d) direct any person having on deposit or under control or for safekeeping any funds or securities of the person referred to in clause (a), (b) or (c) to hold the funds or securities, or

(e) direct the person referred to in clause (a), (b) or (c) to refrain from withdrawing any of the funds or securities from any other person having any of them on deposit, under control or for safekeeping or to hold all funds or securities of clients or others in his possession or control

in trust for an interim receiver, custodian, trustee, receiver or liquidator appointed under the *Bankruptcy Act* (Canada), the *Judicature Act*, the *Companies Act* or the *Winding-up Act* (Canada), or until the Commission in writing revokes the direction or consents to release any particular fund or security from the direction, and in the case of a bank, loan or trust company the direction applies only to the offices, branches or agencies named in the direction.

(2) A person in receipt of a direction given under subsection (1), if in doubt as to the application of the direction to any funds or franchise or in the case of a claim being made to the funds or franchise by a person not named in the direction, may apply to the Court of Queen's

Bench which may direct the disposition of the funds or franchise and may make any order as to costs that seems just to it.

(3) In any of the circumstances mentioned in subsection (1)(a), (b) or (c), the Commission may in writing or by telegram notify any registrar of land titles that proceedings are being or are about to be taken that may affect land belonging to the person referred to in the notice, and the notice shall be registered or recorded against the land mentioned in it and has the same effect as the registration or recording of a certificate of lis pendens or a caution, but the Commission may in writing revoke or modify the notice.

(COMMENT: Registration System.)

Application for receiver, etc.

48(1) When

(a) the Commission is about to order an investigation under section 41, or during or after an investigation under section 41 or 43,

(b) the Commission is about to make or has made a direction, decision, order or ruling suspending or cancelling the registration of any person or affecting the right of any person to trade in franchises, or

(c) criminal proceedings or proceedings in respect of a contravention of this Act or the regulations are about to be or have been instituted against a person that in the opinion of the Commission are connected with or arise out of any franchise or any trade in a franchise, or out of any business conducted by that person,

the Commission may apply to the Court of Queen's Bench for the appointment of a receiver or a receiver and manager or a trustee of the property of that person.

(2) On an application made under subsection (1), the Court may, if it is satisfied that the appointment of a receiver or a receiver and manager or a trustee of the property of any person is in the best interests of the creditors of that person or of persons whose property is in the possession or under the control of that person, appoint a receiver or a receiver and manager or a trustee of the property of that person.

(3) On an ex parte application made by the Commission under this section, the Court may make an order under subsection (2) appointing a receiver or a receiver and manager or a trustee for a period not exceeding 8 days.

(4) A receiver or a receiver and manager or a trustee of the property of a person appointed under this section is the receiver or the receiver and manager or the trustee of all the property belonging to the person or held by the person on behalf of or in trust for any other person, and the receiver or the receiver and manager or the trustee shall have authority, if so directed by the Court, to wind up or manage the business and affairs of the person and all powers necessary or incidental thereto.

(5) An order made under this section may be enforced in the same manner as any order or judgment of the Court of Queen's Bench and may be varied or discharged on an application made by notice.

(6) The rules of practice of the Court of Queen's Bench apply to an application made under this section.

(COMMENT: Registration System.)

PART 4 (All of Part 4 Applies to Registration System)

APPEALS

Appeal to commission

49(1) Any person primarily affected by a direction, decision, order or ruling of the Director may, by notice in writing sent by registered mail to the Registrar within 30 days after the mailing of the notice of the direction, decision, order or ruling, request and be entitled to a hearing and review thereof by the Commission.

(2) On a hearing and review, the Commission may by order confirm the direction, decision, order or ruling under review or make any other direction, decision, order or ruling the Commission considers proper.

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Appeal to Court of Appeal

50(1) Any person primarily affected by a direction, decision, order or ruling of the Commission may appeal to the Court of Appeal.

(2) An appeal shall be by notice of motion sent by registered mail to the Registrar within 30 days after the mailing of the notice of the order, and the practice and procedure on and in relation to the appeal shall be the same as on an appeal from a judgment of a judge of the Court of Queen's Bench in an action.

(3) The Registrar of the Commission shall certify to the Registrar of the Court of Appeal

(a) the direction, decision, order or ruling that has been reviewed by the Commission,

(b) the order of the Commission, together with any statement of reasons for it,

(c) the record of the review, and

(d) all written submissions to the Commission or other material that is relevant to the appeal.

(4) The Commission may appear and be represented by counsel appointed by the Attorney General for that purpose on the hearing of an appeal under this section.

(5) When an appeal is taken under this section, the Court of Appeal may by its order direct the Commission to make a direction, decision, order or ruling or to do some other act that the Commission is authorized and empowered to do under this Act or the regulations and as the Court considers proper, having regard to the material and submissions before it and to this Act and the regulations, and the Commission shall make that direction, decision, order or ruling or do that act accordingly.

(6) Notwithstanding an order of the Court of Appeal, the Commission has power to make any further direction, decision, order or ruling on new material or when there is a material change in the circumstances, and every such direction, decision, order or ruling is subject to this section.

PART 5 (All of Part 5 Applies to Registration System)

ADMINISTRATION

Rules re hearings

51 For the purposes of a hearing required or permitted under this Act to be held before the Commission or the Director, the following rules apply:

(a) in addition to any other person to whom notice is required to be given, notice in writing of the time, place and purpose of the hearing shall be given to any person who, in the opinion of the Commission or the Director, is primarily affected by the hearing, and the notice is sufficient if sent to the person by prepaid mail at the last address of the person appearing on the records of the Commission or, if not so appearing, to an address directed by the Commission or the Director;

(b) for the purposes of the hearing any of the persons convening the hearing or before whom the hearing is held has the same

power to summon and enforce the attendance of witnesses and compel them to give evidence on oath or otherwise, and to produce documents, records and things, as is vested in the Court of Queen's Bench for the trial of civil actions, and the failure or refusal of a person to attend to answer questions or to produce the documents, records and things that are in his custody or possession makes the person liable to be committed for contempt by a judge of the Court of Queen's Bench as if in breach of an order or judgment of that Court;

(c) at the hearing, the person presiding shall receive all evidence submitted by any person to whom notice has been given or by any other person submitting evidence that is relevant to the hearing, but the person presiding is not bound by the legal or technical rules of evidence;

(d) at the hearing or hearing and review by the Commission, all oral evidence received shall be taken down in writing and together with the documentary evidence and things received in evidence by the Commission shall form the record;

(e) when the direction, decision, order or ruling made after a hearing adversely affects the right of a person to trade in franchises, the person presiding at the hearing shall, at the request of the person, issue written reasons for the direction, decision, order or ruling;

(f) notice of every direction, decision, order or ruling, together with a copy of the written reasons for it, if any, shall be given on the issuance of it to every person to whom notice of the hearing was given and to any person who, in the opinion of the person who presided at the hearing, is primarily affected by it, and the notice is sufficient if sent to the person by prepaid mail at the last address of the person appearing on the records of the Commission or, if not so appearing, to an address directed by the Commission or the Director;

(g) a person attending or submitting evidence at a hearing pursuant to clause (a) may be represented by counsel;

(h) the provisions of any rules of court or of law relating to witnesses and to the payment of conduct money or witness fees apply.

Statements receivable in evidence

52 A statement as to

(a) the registration of a franchise offering,

(b) the registration or non-registration of a person,

(c) the filing or non-filing of a document or material required or permitted to be filed with the Commission, or

(d) any other matter pertaining to such registration, non-registration, filing or non-filing or to any such person, document or material,

purporting to be certified by the Commission or a member of it or by the Director or the Registrar shall, without proof of the office or signature of the person certifying, be admitted in evidence, so far as relevant, for all purposes in any action, proceeding or prosecution.

Warrants from another province

53(1) If a judge or justice of another province issued a warrant for the arrest of a person on a charge of contravening any statute of that province similar to this Act, any provincial judge or justice of the Province, within whose jurisdiction that person is or is suspected to be, may, on satisfactory proof of the handwriting of the provincial judge or justice who issued the warrant, make an endorsement on the warrant in the form prescribed by the regulations.

(2) A warrant endorsed pursuant to subsection (1) is sufficient authority to the person bringing the warrant and to all persons to whom it was originally directed and to all peace officers in the Province to execute it and to take the person arrested under it either out of or anywhere in the Province and to re-arrest that person anywhere in the Province.

(3) A peace officer of the Province or of any other province of Canada who is passing through the Province having in his custody a person arrested in another province under a warrant endorsed pursuant to subsection (1) is entitled to hold, take and re-arrest the accused anywhere in the Province under that warrant without proof of the warrant or the endorsement of it.

Order to comply with Act

54(1) When it appears to the Commission that a person has failed to comply with or is contravening any provision of this Act or the regulations, notwithstanding the imposition of any penalty in respect of the non-compliance or contravention and in addition to any other rights it may have, the Commission may apply to the Court of Queen's Bench by way of originating notice for an order directing that person to comply with the provision or for an order restraining that person from contravening the provision, and on the application the Court may make that order or any other order that it thinks fit.

(2) The originating notice shall be served at least 2 clear days before the day named in the notice for hearing the application.

(3) An appeal lies to the Court of Appeal from an order made under subsection (1).

Forfeiture of bond

55(1) Any bond mentioned in section 13 or section 22 is forfeited and the amount of it becomes due and owing, by the person bound by it, as a debt to the Crown in Right of the Province

(a) when a person or an officer or director of a corporation in respect of whose conduct the bond is conditioned has been convicted of

(i) an offence under this Act or the regulations,

(ii) an offence involving fraud or theft or conspiracy to commit an offence involving fraud or theft under the *Criminal Code* (Canada), or

(iii) an offence in connection with a transaction relating to securities under the *Criminal Code* (Canada),

(b) when judgment based on a finding of fraud has been given against a registered person or an officer or director of a registered corporation, in respect of whose conduct the bond is conditioned, or

(c) when proceedings by or in respect of a registrant or an officer or director of a registered company, in respect of whose conduct the bond is conditioned, have been taken under the *Bankruptcy Act* (Canada) or by way of winding up and a receiving order under the *Bankruptcy Act* (Canada) or a winding-up order has been made,

and the conviction, judgment or order has become final by reason of lapse of time or of having been confirmed by the highest court to which an appeal may be taken.

(2) A bond may be cancelled by any person bound under it by giving to the Registrar at least 3 months' notice in writing of intention to cancel and, subject to subsection (3), it shall be deemed to be cancelled on the date stated in the notice, which date shall be not less than 3 months after receipt of the notice by the Registrar.

(3) For the purposes of every act and omission occurring during the period of registration or the period prior to cancellation under subsection (2), every bond continues in force and the collateral security, if any, shall remain on deposit for a period of 2 years after the lapse or cancellation of the registration to which it relates, or the cancellation of the bond, whichever occurs first.

(4) When a bond secured by the deposit of collateral security with the Provincial Treasurer is forfeited under subsection (1) the Lieutenant Governor in Council may direct the Provincial Treasurer to sell the collateral security at the current market price.

(5) When the Crown in Right of the Province becomes a creditor of any person in respect of a debt to the Crown arising from the provisions of subsection (1), the Commission may take any proceedings it considers fit under the *Bankruptcy Act* (Canada), the *Judicature Act,* the *Companies Act,* the *Business Corporations Act* or the *Winding-up Act* (Canada) for the appointment of an interim receiver, custodian, receiver or liquidator.

(COMMENT: Provinces should insert the relevant Acts.)

(6) The Lieutenant Governor in Council may direct the Provincial Treasurer

(a) to assign a bond forfeited under subsection (1) and transfer the collateral security, if any,

(b) to pay over any money recovered under such a bond, or

(c) to pay over any money realized from the sale of the collateral security under subsection (4),

to any person, or to the clerk of the Court of Queen's Bench in trust for persons who may become judgment creditors of the person bonded or to any trustee, custodian, interim receiver, receiver or liquidator of that person.

(7) When

(a) a bond has been forfeited under subsection (1) by reason of a conviction or judgment under subsection (1)(a) or (b), and

(b) the Commission has not

(i) within 2 years of the conviction or judgment having become final, or

(ii) within 2 years of the registered person in respect of whom the bond was furnished having ceased to carry on business as such, whichever occurs first, received notice in writing of any claim against the proceeds of the bond or of such portion of the bond as remains in the possession of the Provincial Treasurer,

the Lieutenant Governor in Council may direct the Provincial Treasurer to pay the proceeds or portion of them to that person or to any person who on forfeiture of the bond made any payments under it,

after first deducting the amount of any expenses that have been incurred in connection with any investigation or other matter relating to that person.

PART 6 – In a Disclosure System, clauses (c), (d), (g), (i) and (j) could be included

REGULATIONS

Regulations

56 The Lieutenant Governor in Council may make regulations

(a) prescribing the form and content of prospectuses to be filed with the Commission by persons in accordance with the Act;

(b) prescribing requirements respecting applications for registration and renewal of registration;

(c) regulating the trading in franchises and the keeping of records relating to that trading;

(d) governing the furnishings of information to the public (*or to the Commission by a registrant*) in connection with franchises or trades in franchises;

(COMMENT: In a Disclosure System the words in brackets are deleted.)

(e) governing the keeping of accounts and records, the preparation and filing of financial statements of franchise issuers and the audit requirements with respect thereto;

(f) prescribing the fees payable to the Commission, including fees for filing, fees on applications for registration, fees in respect of audits made by the Commission and other fees in connection with the administration of this Act and the regulations;

(g) prescribing the documents, reports, statements, agreements and other information and the form, content and other particulars relating to them that are required to be filed, furnished or delivered under this Act and the regulations;

(h) prescribing the practice and procedure of investigations under sections 42 and 44;

(i) prescribing the forms for use under this Act and the regulations;

(j) prohibiting or otherwise regulating the distribution of written or printed material by a person in respect of a franchise whether in the course of trading or otherwise;

(k) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

SUPPLEMENTARY REPORT BY THE ALBERTA COMMISSIONERS

(See page 29)

UNIFORM FRANCHISE RELATIONS ACT

Definitions

1 Words and expressions used in this Act have the same meaning as in the *Uniform Franchises Act.*

Waiver

2 The waiver of any provision of this Act is contrary to public policy and is void.

Domicile

3 This Act applies with respect to franchise agreements where the franchisee is domiciled in this Province or the franchise business is or has been operated in this Province.

4(1) In this section, "good cause" includes the failure of the franchisee to comply with any requirement of the franchise agreement after being given notice of the failure and a reasonable opportunity to cure the failure.

(COMMENT: "Reasonable opportunity" could be further defined to set a maximum time period.)

(2) Except as otherwise provided in this Act, no franchisor may terminate a franchise agreement prior to the expiration of its term, except for good cause.

5 If, during the period in which the franchise agreement is in effect, there occurs any of the following events that is relevant to the franchise agreement, immediate notice of termination, without an opportunity to correct, shall be deemed reasonable.

(a) the business to which the franchise relates is declared bankrupt or judicially determined to be insolvent, or all or a substantial part of the assets of the business are assigned to or for the benefit of any creditor, or the franchisee admits his inability to pay his debts as they come due;

(b) the franchisee abandons the franchise business by failing to operate the business for 5 consecutive days during which the franchisee is required to operate the business under the fran-

chise agreement, or any shorter period after which it is not unreasonable under the facts and circumstances for the franchisor to conclude that the franchisee does not intend to continue to operate the franchise business, unless the failure to operate is due to fire, flood, earthquake or other similar causes beyond the franchisee's control;

(c) the franchisor and franchisee agree in writing to terminate the franchise agreement;

(d) the franchisee makes any material misrepresentations relating to the acquisition of the franchise business or the franchisee engages in conduct that reflects materially and unfavourably on the operation and reputation of the franchise business or system;

(e) the franchisee fails, for a period of 10 days after notification of noncompliance, to comply with any enactment or by-law in force in the Province applicable to the operation of the franchise;

(f) the franchisee, after correcting any failure referred to in clause (e), engages in the same noncompliance whether or not the noncompliance is corrected after notice;

(g) the franchisee repeatedly fails to comply with one or more requirements of the franchise agreement, whether or not corrected after notice;

(h) the franchise business or business premises of the franchise are seized, taken over or foreclosed by a creditor, lienholder or lessor, if

(i) a final judgment against the franchisee remains unsatisfied for 30 days, or

(ii) execution has been made on the licence granted by the franchise agreement or on any property used in the franchise business, and it is not discharged within 5 days of the levy;

(i) the franchisee is convicted of a criminal offence that is relevant to the operation of the franchise;

(j) the franchisee fails to pay any franchise fees or other amounts due to the franchisor or its affiliate within 5 days after receiving written notice that the fees are overdue;

(k) the franchisor makes a reasonable determination that continued operation of the franchise business by the franchisee will result in an imminent danger to public health or safety.

6 In addition to providing a franchisee with at least 180 days prior

written notice, a franchisor may refuse to renew a franchise agreement under any of the following conditions:

(a) during the 180 days prior to expiration of the franchise agreement the franchisor permits the franchisee to sell his business to a purchaser meeting the franchisor's then current requirements for granting new franchises, or if the franchisor is not granting a significant number of new franchises, the then current requirements for granting renewal franchises;

(b) the refusal to renew is not for the purpose of converting the franchisee's business premises to operation by employees or agents of the franchisor for the franchisor's own account, and on the expiration of the franchise agreement, the franchisor agrees not to seek to enforce any covenant of the nonrenewed franchisee not to compete with the franchisor or franchisees of the franchisor;

(c) termination is permitted pursuant to section 4 or 5;

(d) the franchisor and the franchisee agree not to renew the franchise agreement;

(e) the franchisor withdraws from distributing its products or services through franchises in the geographic market served by the franchisee, and

(i) on the expiration of the franchise agreement, the franchisor agrees not to enforce any covenant of the nonrenewed franchisee not to compete with the franchisor or franchisees of the franchisor;

(ii) the refusal to renew is not for the purpose of converting the business conducted by the franchisee pursuant to the franchise agreement to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) where the franchisor determines to sell, transfer or assign its interest in a marketing premises occupied by a franchisee whose franchise agreement is not renewed pursuant to this clause

(A) the franchisor, during the 180 day period after giving notice, offers the franchisee a right of first refusal of at least 30 days duration of a bona fide offer made by another to purchase such franchisor's interest in such premises; or

(B) in the case of the sale, transfer or assignment to another person of the franchisor's interest in one or more other controlled marketing premises, such other person in

good faith offers the franchisee a franchise on substantially the same terms and conditions currently being offered by such other person to other franchisees; or

(f) the franchisor and the franchisee fail to agree to changes or additions to the terms and conditions of the franchise agreement, if the changes or additions would result in renewal of the franchise agreement on substantially the same terms and conditions on which the franchisor is then customarily granting renewal franchises or, if the franchisor is not then granting a significant number of renewal franchises, the terms and conditions on which the franchisor is then customarily granting new franchises.

(2) The franchisor may give the franchisee written notice of a date that is at least 30 days from the date of the notice, on or before which a proposed written agreement of the terms and conditions of the renewal franchise shall be accepted in writing by the franchisee.

(3) Such notice, when given not less than 180 days before the end of the franchise term, may state that in the event of failure of such acceptance by the franchisee, the notice shall be deemed a notice of intention not to renew at the end of the franchise term.

7(1) Nothing in section 6 prohibits a franchisor from offering or agreeing before expiration of the current franchise term to extend the term of the franchise for a limited period in order to satisfy the time of notice of nonrenewal requirement of that section.

(2) Nothing in section 6(b) prohibits a franchisor from exercising a right of first refusal to purchase the franchises business.

8 All notices of termination or nonrenewal required by this Act

(a) shall be in writing,

(b) shall be sent by registered or certified mail, delivered by telegram or personally delivered to the franchisee, and

(c) shall contain a statement of intent to terminate or not renew the franchise, as the case may be,

(i) together with the reasons for the termination or nonrenewal, and

(ii) the effective date of the termination or nonrenewal.

9 Where a franchisor terminates or refuses to renew a franchise agreement other than in accordance with this Act, the franchisor shall offer to repurchase from the franchisee the franchisee's resaleable current inventory meeting the franchisor's present standards that is

required by the franchise agreement or commercial practice and held for use or sale in the franchised business at the lesser of

(a) the fair wholesale market value, and

(b) the price paid by the franchisee.

(2) The franchisor shall not be liable for offering to purchase personalized items which have no value to the franchisor in the business in which it grants franchises.

10 The franchisor may offset against any repurchase offer made pursuant to section 9 any sums owed the franchisor or its affiliates by the franchisee pursuant to the franchise agreement or any ancillary agreement.

11 Except as expressly provided, nothing in sections 9 and 10 shall abrogate the right of a franchisee to bring an action under any other law.

12 This Act applies only to franchise agreements entered into or renewed on or after _____.

APPENDIX J

(See page 29)

PROPOSED

UNIFORM INTESTATE SUCCESSION ACT

Interpretation

1. (1) In this Act,

(a) "estate" includes both real and personal property;

(b) "heirs" means those persons, including the surviving spouse, who are entitled to the estate of a decedent through succession under this Act;

(c) "issue" means all lineal descendants of a person through all generations.

(2) If the relationship of parent and child must be established at any generation to determine succession by, through or from a person under this Act, that relationship shall be established, insofar as it is applicable, under either

(a) the Uniform Child Status Act, or

(b) subject to subsection (3), the Uniform Effect of Adoption Act.

(3) The adoption of a child by a spouse of a natural parent does not terminate the relationship of parent and child between the child and [that] [either] natural parent for purposes of succession under this Act.

(4) Under this Act,

(a) kindred of the half blood inherit equally with kindred of the whole blood of the same degree of kinship to the decedent, and

(b) kindred of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.

Comment

1.1 Subsection (1) contains definitions. The definition of "estate" is the same as in the present Act. A definition of "heirs" has been included in order to provide a word for use in subsequent sections when any person entitled to a share by succession under the Act is intended. The words "through

all generations" have been added to the definition of "issue" to provide a signal to a nonlawyer that grandchildren and great-grandchildren, etc., are issue; the word "lawful" before the words "lineal descendants" has been eliminated for the reasons stated in comment 1.2.

1.2 Subsection (2) states how the relationship of parent and child shall be established for purposes of succession under the Act by reference to the Uniform Child Status Act and the Uniform Effect of Adoption Act. As this relationship is relevant to the meaning of "issue", the subject is included in section 1 which is devoted to matters of interpretation. Section 15 of the present Act, which applies to illegitimate children, and the word "lawful" in the definition of "issue" in clause 1(b) of the present Act have been eliminated because they are inconsistent with the Uniform Child Status Act. A province which has not enacted the substance of either of the Acts referred to in subsection (2) which is relevant to intestate succession should do so by additions to subsection (2).

1.3 Subsection (3) solves an intestate succession problem which is caused by the Uniform Effect of Adoption Act. Clause 1(1)(b) of that Act provides:

> 1. (1) For all purposes, as of the date of the making of an adoption order,
>
> (a) . . .
>
> (b) the adopted child ceases to be the child of the person who was his parent before the adoption order was made and that person ceases to be the parent of the adopted child,
>
> as if the adopted child had been born in lawful wedlock to the adopting parent.

After a divorce of natural parents, or the death of one of them, it is becoming increasingly common in Canada for the new spouse of the natural parent with custody of a child to adopt the child. Under the above quoted statute, *both* natural parents cease to be parents of the child, and the child loses its succession rights from them and their kindred. Most frequently the adopting spouse is the new husband of the natural mother, and that example will be used. Apparently lawyers who are aware of this trap for the unwary solve the problem by routinely having the natural mother adopt her own child when her husband does so. Subsection

(3) will automatically preserve the child's succession rights from his natural mother and from her kindred if the subsection is enacted with the word "that" in brackets; these succession rights will not depend on whether or not a lawyer is aware of the potential problem and has the natural mother adopt her own child.

What, however, of the child's succession rights from and through his natural father? In the context under consideration, there is a problem which may not be immediately apparent. In the typical adoption situation, an adopting couple adopt a child who is seldom more than a few weeks old; neither the natural parents nor their kindred have had any family contact with the child, and the social policy of the Uniform Effect of Adoption Act is to substitute the adopting parents and their kindred for the natural parents and their kindred for all purposes. However, in the situation under consideration, the child will be older and will probably have had close ties to his father and his paternal kindred, particularly his paternal grandparents. Paternal kindred are most likely to see the child as remaining part of their family when the natural father has died. One solution is to leave the adopted child's legal relationship with his natural father and paternal kindred severed; if any of these persons wish to leave property to the child at their death they can do so by will. The other solution is for a province to enact subsection (3) with the word "either" in brackets; this will automatically preserve the child's succession rights from his natural father and from his paternal kindred; if any of these persons do not desire this result they can avoid it by will. It is impossible to predict what a particular natural father and set of paternal kindred would prefer. However, preserving the child's succession rights has the advantage of resolving the uncertainty in his favor, for it requires his natural father and paternal kindred to disinherit him by will.

1.4 Clause 4(a) defines the succession rights of kindred of the half blood in the same substantive terms as they are defined in section 10 of the present Act. Clause 4(b) defines the succession rights of afterborn kindred and replaces section 11 of the present Act with no change in substance. As both of these clauses are relevant to the meaning of "kindred", they also affect the meanings of "issue" and

"heirs". Consequently, these subjects are included in section 1 which is devoted to matters of interpretation.

Application

2. (1) This Act applies only in cases of death after its commencement.

(2) Any part of the estate of a decedent not effectively disposed of by will shall be distributed under this Act.

Comment

1.1 Both subsections (1) and (2) are concerned with matters of application. Subsection (1) provides, in substance, that the Act only applies to estates of decedents who die after its commencement, and is identical to section 2 of the present Act. Subsection (2) provides, in substance, that the Act applies to all of the estate of a decedent not disposed of by his will, and replaces section 13 of the present Act with no change in effect.

Share of spouse

3. The intestate share of the surviving spouse is as follows:

(a) if there is no surviving issue of the decedent, the entire intestate estate;

(b) if there are surviving issue of the decedent all of whom are also issue of the surviving spouse, the first [$100,000] and one-half of the remainder of the intestate estate;

(c) if there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

Comment

3.1 Section 3 provides for the intestate share of the surviving spouse and replaces sections 3, 5 and 16 of the present Act. It contains significant changes in substances which required redrafting of the present sections. Consequently, in addition to making substantive changes, it modernizes and simplifies the drafting of the provisions for the surviving spouse. Sections 3 and 5 of the present Act provide for the intestate share of a widow, and section 16 makes correlative provisions for a surviving husband. Because section 3 adopts the modern style of reference to the surviving spouse, section 16 of the present Act is unnecessary. Section 3 also contains all of the provisions for the surviving spouse, and arranges them in a logical sequence. Subsections 3(1) and (2) of the present Act are drafted in terms of "child" and

"children", and subsection 3(3) then provides, in substance, that the same results flow as if the word "issue" had been used in subsections 3(1) and (2). In the proposed Act the word "issue" is used throughout, thus eliminating this circular drafting.

3.2 Clause 3(a) gives all of the intestate estate to the surviving spouse if the decedent leaves no surviving issue. In this situation sections 5 and 16 of the present Act give the surviving spouse a preferential share of $20,000, and divide the residue one-half to the surviving spouse and one-half to the kindred of the decedent. Clause 3(a) is based on the conclusion that testators of relatively small estates usually will their entire estates to their surviving spouse if they leave no issue, and that an intestate succession act should reflect this preference. Indeed, clause 3(a) is consistent with the present intestate succession Acts of nine of the Canadian jurisdictions.

3.3 Clause 3(b) gives the surviving spouse a preferential share of $100,000 of the intestate estate of the decedent, and one-half of the remainder, if there are surviving issue of the decedent all of whom are also issue of the surviving spouse. Sections 3 and 16 of the present Act give the surviving spouse one-half of the intestate estate if the decedent leaves one child or its issue, and one-third of the estate if more than one child, or one child and the issue of a deceased child, survive the decedent. The present Act is presumably based on the assumption that a decedent would prefer to leave more of his estate to his children, and their issue, if he left more than one child, or one child and the issue of a deceased child, and commensurately less to a surviving spouse. The British Columbia Report suggests that this assumption is arbitrary; and there is no perceptible pattern in the wills of testators of relatively small estates to support it. To the contrary, most testators of small estates leave all of their estate to their surviving spouse, irrespective of the number of their children if all of their children are also issue of the surviving spouse, and irrespective of the age of the testator. There are cogent reasons which support this testamentary pattern. If a testator leaves a surviving spouse and one or more minor children, the entire estate is normally left to the surviving spouse who will have the sole responsibility of supporting and educating the

child or children. If a testator leaves a surviving spouse and only adult children, the entire estate will still normally be left to the surviving spouse, for the children will usually be self-supporting and the surviving spouse will be reaching an age when self-support is increasingly difficult. Moreover, when all of the issue of the testator are also issue of the surviving spouse, the usual assumption is that any remaining estate of the testator will eventually reach his issue through succession from and at the death of the surviving spouse.

In effect, because of the $100,000 preferential share, clause 3(b) will leave all of a relatively small estate to the surviving spouse if the intestate's issue are also issue of the surviving spouse. Indeed, the $100,000 figure has been deliberately chosen in an attempt to achieve this result and to conform intestate succession with the pattern of testate succession in relatively small estates. In addition to reaching a solution which most intestates in this situation would probably prefer, clause 3(b) has a further advantage. Under many marital property regimes in Canada today, a surviving spouse is entitled to a share of the marital property at the death of the first spouse to die. However, the division of the marital property requires judicial intervention and expense. If the entire estate of an intestate goes to the surviving spouse in any event, this judicial process can be avoided in intestate situations.

Nevertheless, one may ask why the $100,000 figure was chosen, and one may question whether or not it will succeed in giving all of a relatively small estate to the surviving spouse. No intestate succession Act in Canada today provides a preferential share as high as $100,000. However, the Ontario Succession Law Reform Act, effective March 31, 1978, established a preferential share of $75,000, and considering inflation since 1978, $100,000 is close to the current equivalent. Although $100,000 is a relatively small amount of money, it will probably cover the great majority of intestate estates when one considers the typical assets of an intestate of relatively modest means. The family home, automobile, checking and savings accounts, and any stocks will probably be held in joint tenancy with the surviving spouse and will not be part of the intestate estate. Insurance and lump-sum pension benefits will proba-

bly be payable to the surviving spouse, who will also frequently have a survivor pension option. In short, for most decedents of modest means, the substantial assets will not be part of the estate, whether testate or intestate!

Keeping the preferential share of the surviving spouse current is a problem. Clause 3(b) establishes the share as a fixed amount by legislation. Any method of changing the share, whether by legislation, regulations or indexing, will require the time of government officials and expense. Indexing would certainly keep the share current, but even annual changes would impose administrative burdens on governments which would have to communicate the changes to interested persons, principally lawyers. Once established, this method would likely not be altered even if the inflation rate subsided and the changes became too slight to justify the inconvenience of making them. Any province can adopt a system of having changes to the preferred share made and communicated to interested persons through regulations if that is more efficient than the legislative system.

3.4 Clause 3(c) gives the surviving spouse one-half of the intestate estate if the decedent left surviving issue one or more of whom are not issue of the surviving spouse. Because of the dramatic increase in divorce and remarriage in recent years, a substantial percentage of decedents will leave a surviving spouse and surviving issue from a prior marriage. Clause 3(c) is based on the conclusion that testators of relatively small estates leave a generous portion of their estate to their surviving issue when any of the surviving issue are from an earlier marriage. This testamentary pattern is even stronger when all of the surviving issue are from a prior marriage, and several reasons support it. If any of the surviving children are minors, the decedent will usually wish to provide funds for their support and education, and the surviving spouse will seldom have custody of these children. If all of the surviving children are adults, the decedent will usually wish to guarantee that a goodly portion of his estate goes to his issue, and he cannot assume that any part of his estate left to the surviving spouse will ever reach his issue through succession from and at the death of that spouse. Finally, the parties to a second marriage will be older at the time of that marriage; the surviving spouse will likely have been self-supporting for a significant

period of years, and the decedent will usually feel that his obligations to his surviving spouse and his surviving issue are roughly equal.

3.5 This Act contains no provision comparable to section 17 of the present Act, which disinherits a surviving spouse who has left the decedent and who is living in adultery at the time of the decedent's death. 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 have predeceased the decedent, has not been included.

It must be presumed that spouses know that unless they leave wills providing to the contrary, the survivor will take an intestate share of the estate of the first to die. This presumption would certainly not have less probity when the spouses remain married after marital breakdown. Spouses may remain married for various reasons. Religion is a frequent reason; elderly persons may be indifferent with respect to their legal status; and some spouses may remain married in order to preserve benefits for the survivor through pensions and various welfare systems. After marital breakdown, if a decedent does not leave a will disinheriting his spouse, should it nevertheless be presumed that most decedents in this situation would still not want the surviving spouse to take an intestate share? Many separated spouses retain feelings of mutual obligation, and some even of mutual affection. The fact that some spouses remain married with the designed object of preserving benefits for the survivor, which could be a mutually beneficial gamble, has been mentioned. A decedent may want his surviving spouse to take a substantial share of his estate, marital breakdown notwithstanding, in order to provide for minor children for which the survivor will be responsible, or to provide support for the survivor. This Act is based on the conclusion that the probable intention of most decedents in this situation is too uncertain to justify specific treatment.

3.6 This Act contains no provision relating property a surviving spouse may have obtained under a marital property regime to the intestate share of that spouse, and at the present time no intestate succession Act in Canada contains such a provision. However, it has been suggested that

any property received by a surviving spouse through an allocation of marital property should be charged against the intestate share of that spouse, thus reducing the net intestate share. Presumably this suggestion is based on the assumption that, if the surviving spouse has received a just share of the marital property, the decedent would not desire the survivor to receive as much of his estate, that is, the property which remains subject to testate or intestate succession from him, and that the survivor's intestate share should be reduced by the amount of the marital property share.

Under the marital property regimes of British Columbia, Alberta, Manitoba, Ontario and Prince Edward Island, a spouse is only entitled to a marital property share upon marriage breakdown. If the marriage remains sound when a decedent dies, the surviving spouse will not be entitled to a marital property share, and hence nothing could be charged against the intestate share of the survivor. Marital breakdown is not related to death, and in the vast majority of cases it will have occurred, if at all, years before one of the spouses dies. The allocation of the marital property would have occurred then, and in most cases the spouses would have been divorced then. Hence there will be no surviving spouse of the marriage in these cases, and no intestate share to reduce. However, in some cases a divorce will not have been obtained after the marital breakdown and the allocation of the marital property, and the spouses will still be married when one of them dies. And, in a very few cases one of the spouses will die after the marital breakdown but before the marital property has been allocated. In these cases the survivor can still obtain an allocation of the marital property. Under the marital property regimes of the provinces under consideration, it can be argued that a decedent would want the intestate share of the surviving spouse reduced by the amount of the marital property share. However, the existence of the marital property share in these provinces depends on marital breakdown; and because of the marital breakdown a decedent might not want the surviving spouse to receive any intestate share. This is the same issue which was discussed in comment 3.5. The decedent could leave a will making any provision for the surviving spouse deemed appropriate, including no

provision at all. If no will is left, the decedent might not want the surviving spouse to receive any intestate share; an intestate share reduced by the marital property share might be preferred; or the full intestate share might be preferred. All of the intestate succession Acts in Canada give the surviving spouse the full intestate share, as does this Act.

Under the marital property regimes of Saskatchewan, Nova Scotia, Newfoundland and New Brunswick, a surviving spouse is entitled to a marital property share upon the death of the first spouse to die, whether or not there has been a marital breakdown. In the first three provinces, the marital property share is not charged against either the testate or intestate share of the surviving spouse. There are sound reasons for this, in both theory and practice. Under marital property analysis, the spouse is entitled to a share because of the marriage partnership; the marital property share is the spouse's share of the partnership assets, rather than a share derived from the estate of the decedent by succession. Thus the issue is what part of the property of the decedent subject to his testamentary volition would he wish to go to his surviving spouse if he died intestate. This Act is based on the conclusion that most decedents with relatively small estates would not want the intestate share of the surviving spouse reduced by the amount of any marital property share. Moreover, severe practical problems could result under any theory that the intestate share of the surviving spouse should be reduced because of assets received, directly or indirectly, from the decedent in ways other than by succession from him. The surviving spouse might be: the surviving joint tenant as to assets held in joint tenancy with the decedent; the beneficiary of an inter-vivos trust created by the decedent; the beneficiary under insurance of the decedent; or the beneficiary under the decedent's pension plan. If the intestate share of the surviving spouse were reduced by the amount of any marital property share, should it also be reduced to reflect other assets received "from" the decedent, but not by succession?

In New Brunswick, the share of a surviving spouse under the Marital Property Act supersedes a provision in a will, or benefit upon intestacy. The intestate share of the surviving spouse is not reduced by the marital property share; it is replaced by it. However, this provision is con-

tained in the New Brunswick Marital Property Act, not the Devolution of Estates Act.

3.7 This Act contains no provision with respect to the matrimonial home, and is based on the conclusions (1) that an intestate successions act should not be framed in terms of specific kinds of property, and (2) that a generous share of the decedent's estate will give the surviving spouse flexibility; she will be able to retain the family home if one exists and if she desires to keep it. An increasing percentage of Canadian couples will probably never own homes. When a couple do own a home, it will probably be held in joint tenancy and subject to a mortgage debt which exceeds the equity. With increased longevity, the average decedent will be older at the time of death, and many elderly couples who owned homes sell them shortly after retirement and become renters. Consequently, it is believed that a specific provision for the family home will operate too capriciously and will as likely disrupt an intended succession as promote it.

Share of kindred

4. (1) The part of the intestate estate not included in the share of the surviving spouse, or the entire estate if there is no surviving spouse, shall be distributed as follows:

(a) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take in equal shares, but if of unequal degree, then those of more remote degree take by representation;

(b) if there is no surviving issue, to the parents of the decedent in equal shares or to the survivor of them;

(c) if there is no surviving issue or parent, to the issue of the parents of the decedent or either of them; if they are all of the same degree of kinship to the decedent they take in equal shares, but if of unequal degree, then those of more remote degree take by representation;

(d) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents,

(i) one-half of the estate to the paternal grandparents in equal shares or to the survivor of them, but if there is no surviving paternal grandparent,

to the issue of the paternal grandparents or either of them; if they are all of the same degree of kinship to the decedent they take in equal shares, but if of unequal degree, then those of more remote degree take by representation, and

(ii) one-half of the estate to the maternal grandparents or their issue in the same manner as provided in subclause (i),

but if there is only a surviving grandparent or issue of a grandparent on either the paternal or maternal side, the entire estate to the kindred on that side in the same manner as provided in subclause (i).

(2) When a distribution "by representation" is required under this section, the estate or the part thereof which is to be so distributed shall be divided into as many shares as there are surviving heirs in the nearest degree of kinship to the decedent and deceased persons in the same degree who left issue surviving the decedent; each surviving heir in the nearest degree shall receive one share, and the share of each deceased person in the same degree shall be divided among and distributed to his issue by representation in the same manner.

Comment

4.1 Section 4 provides for the descendants, ascendants and collateral relatives of the decedent and replaces sections 4 and 6 through 10 of the present Act. The British Columbia Report states that sections 6 through 9 of the present Act are repetitive and clumsy, and suggests that the content of these sections could be set out in one section. Section 4 adopts this suggestion, and takes a further step by including the issue of the decedent.

It is unlikely that section 4 will produce any significant change in the actual distribution of an intestate estate. However, it replaces the civil law system of counting degrees of kinship, adopted by the Statute of Distribution of 1670, with a parentelic system based on universal representation throughout from stated ancestors.

4.2 Clause (1)(a) provides for the issue of the decedent, and replaces section 4 of the present Act. Section 4 of the

present Act states that the estate shall be distributed "per stirpes among the issue", but does not define how the per stirpes distribution shall be accomplished. Clause (1)(a) uses the phrase "by representation", as do clauses (1)(b) through (d), and subsection (2) describes how a by representation distribution shall be accomplished.

"Per stirpes" means by roots or stocks; by representation. However, it is not clear which root or stock line under an ancestor should be used to govern a by representation distribution. The situation covered by clause (1)(a) will be used as an example. The decedent is the ancestor. Under one view, his children are used as the root generation to govern a by representation distribution, whether or not any of his children survived him. Assume that he had two children, C1 and C2; that C1 predeceased him leaving two surviving grandchildren, GC1 and GC2; and that C2 survived him. The estate would be divided into two shares; C2 would take ½ of the estate, and GC1 and GC2 would take C1's share by representation and would each receive ¼ of the estate. If C2 also predeceased the deceased, but left one surviving grandchild, GC3, GC3 would take C2's share by representation and would receive ½ of the estate. Although the surviving issue of the decedent in this example were all grandchildren, they would not take equally. Under a second view, the generation closest to the decedent on which there are survivors is used as the root generation to govern a by representation distribution. If the decedent left no surviving children, but left surviving grandchildren, the estate would be divided into as many shares as there were surviving grandchildren and deceased grandchildren who left surviving issue.

Section 4 accepts the second view and uses the closest generation to the ancestor on which there are survivors to govern a distribution by representation. Both views have merit. Indeed, although one may have a subjective preference, it is difficult to avoid the conclusion that they are of equal merit. The Ontario Succession Law Reform Act adopts the view expressed in section 4, as does the Uniform Probate Code in the United States.

4.3 Clause (1)(b) provides for the parents of the decedent and replaces section 6 of the present Act with no change in substance.

4.4 Clause (1)(c) provides for the issue of parents of the decedent, and thus provides for brothers and sisters, nephews and nieces, grandnephews and grandnieces, etc., by universal representation from the parents. In concept and drafting style, it is identical to clause (1)(a). Clause (1)(c) replaces sections 7 and 8 of the present Act, and changes the pattern of succession provided by those sections in one situation which is likely to be of any practical importance. Section 8 of the present Act does not permit representation below nephews and nieces. Rather, under section 9 of the present Act, a grandnephew, who is in the fourth degree of kinship to the decedent, will share equally with a cousin, who is also in the fourth degree of kinship. Clause (1)(c) prefers the grandnephew over the cousin. Because of the increase in longevity of persons in recent years, decedents of present generations are older than were those of prior generations. Clause (1)(c) is based on the conclusion that, because of age, a decedent today is likely to have developed a closer relationship with young grandnephews and grandnieces than he has maintained with cousins of his own generation, and that he would prefer to bestow his wealth on the former class.

4.5 Clause (1)(d) provides for the grandparents of the decedent and for their issue. In concept and drafting style it parallels clauses (1)(a) and (c). If a decedent leaves no issue, parent or issue of a parent, there will rarely be a surviving grandparent. Hence clause (1)(d) in effect provides for aunts and uncles, cousins, cousins once removed, etc., by universal representation from the grandparents. Clause (1)(d) replaces sections 9 and 10 of the present Act, and has three distinct advantages over the system those sections provide.

(1) Section 9 of the present Act gives the estate in equal shares to the next of kin of the decedent in the nearest degree of kinship to him, and does not permit representation. Consequently, it will frequently give all of the estate to kindred of the decedent on either the paternal or maternal side, even though there are kindred on both sides. For example, if the decedent is survived by an aged paternal uncle, who is in the third degree of kinship to him, and by two maternal cousins, who are in the fourth degree of kinship, the paternal uncle will take the entire estate. Clause

(1)(d) divides the estate between the surviving kindred on the paternal and maternal sides, unless there are only surviving kindred on one side, and is based on the conclusion that a decedent would prefer a distribution which provided equal treatment for his paternal and maternal kindred.

(2) Clause (1)(d) limits inheritance by collateral kindred to grandparents and persons descended from grandparents. Distant kindred descended from great-grandparents and beyond are eliminated. This change will very rarely ever produce any alteration in the actual distribution of an intestate estate; it will very rarely ever produce an escheat for these distant relatives very rarely ever actually inherit. However, clause (1)(d) will simplify proof of heirship. For example, if the decedent is survived by a cousin, who is in the fourth degree of kinship to him, it will not be necessary to search for possible great-uncles and great-aunts, who although descended from great-grandparents, are also in the fourth degree of kinship.

(3) The more important advantage of limiting inheritance to descendants of grandparents is that it will reduce will contests. It is extremely unlikely that a decedent will have any close contact with descendants of great-grandparents; he will seldom even know of their existence. If a decedent has no kindred closer than descendants of grandparents, he will most probably die intestate, and will leave his estate to close friends, to charities, or to both. Potential heirs descended from great-grandparents, frequently referred to as "laughing heirs", are relevant because so long as they exist they have standing to challenge wills. Moreover, if a testate estate is relatively large and is not left to kindred, it is worthwhile for heir hunters to search for kindred, no matter how distant. Allegations that a testator lacked testamentary capacity, or that a will was procured through duress or fraud, are frequently enough to extort the settlement of a spurious will contest.

Survival for five days

5. (1) Any person who fails to survive the decedent for five days, excluding the dates of death of the decedent and of the person, shall be treated as if he had predeceased the decedent for purposes of succession under this Act.

(2) If it cannot be established that the person who would otherwise be an heir has survived the decedent for

the period required by subsection (1), that person shall be treated as if he had failed to survive the decedent for the required period.

(3) This section is not applicable when its application would result in a taking of intestate estate [by escheat] [under the Ultimate Heir Act].

Comment

5.1 Section 5 imposes a requirement that a person survive the decedent for five full days in order to qualify as an heir. The present Act contains no comparable provision. However, provisions similar to that contained in section 5 are routinely included in wills. Such provisions are designed to apply when the decedent and one or more members of his family are in a common accident and die within a few days of each other, and they have two objectives.

(1) They avoid multiple estate administration. Assume that a testator has left his estate to his children or to the survivor of them; that he has two children; that he and one child are in a car accident; that the first child who was in the car accident survives by three days; and that the second child also survives. The second child would take the entire estate under the will if the first child had predeceased the testator, and would do so if the will contained a provision similar to section 5. Without such a provision one-half of the decedent's estate will pass to the first child and will have to be administered again as part of that child's estate.

(2) A survivorship provision may prevent the decedent's property from passing to persons against the wishes of the decedent. In the above example, if the first child had predeceased the testator, the second child would take the entire estate under the will. It is unlikely that the testator would desire a different result simply because the first child survived him by three days. Nevertheless, unless the second child takes the one-half of the estate which passed to the first child by succession from him, persons who are not objects of the testator's bounty could take the property.

Section 5 is only intended for the situation in which the decedent and one or more persons who would be his heirs suffer fatal injuries in a common disaster. The selection of five full days as the survivorship period, although some-

what arbitrary, is based on the conclusion that most persons who suffer injuries in a common disaster which are serious enough to cause death will die within a few days of each other. Although a longer period, such as 14 days, could be chosen, it is unlikely that this would alter the operative effect of section 5; fatally injured persons who linger on for five full days after an accident will probably survive a 14 day period as well.

Section 5 is included in the Act because it is a simple section and should support the preferences of decedents in the situations in which it becomes applicable.

Advancements

6. (1) If a person dies intestate as to all of his estate, property which he gave in his lifetime to a prospective heir shall be treated as an advancement against that heir's share of the estate only if the property was either

(a) declared in a contemporaneous writing by the decedent, or

(b) acknowledged in writing by the recipient to be an advancement.

(2) Property advanced shall be valued as declared by the decedent or acknowledged by the recipient, in writing; otherwise the property advanced shall be valued as of the time of the advancement.

(3) If the recipient of the property advanced fails to survive the decedent, the property advanced shall not be treated as an advancement against the share of the estate of the recipient's issue unless the declaration or acknowledgement of the advancement so provides.

(4) Under this section, the shares of the heirs shall be determined as if the property advanced were part of the estate available for distribution, and

(a) if the value of the property advanced equals or exceeds the share of the estate of the heir who received the advancement, that heir shall be excluded from any share of the estate; but

(b) if the value of the property advanced is less than the share of the estate of the heir who received the advancement, that heir shall receive as much of the estate as is required, when added to the value of the

property advanced, to give him his share of the estate.

Comment

6.1 Section 6 covers the subject of advancements and replaces section 12 of the present Act, with some relatively important changes.

6.2 Subsection (1) contains two of these changes. Subsection (1) is based on the conclusion that most inter vivos gifts today are not intended to be advancements. Consequently, in order to reduce acrimonious litigation and to protect donees, this subsection requires written evidence of the advancement, in the form of either a declaration by the decedent or an acknowledgement by the recipient. It is believed that this change will significantly restrict the application of the advancement doctrine. However, section 6 does not accept the conclusion that the advancement doctrine is so troublesome that it should be abolished as a matter of public policy, for it may serve the legitimate donative plans of some decedents. Section 12 of the present Act limits the advancement doctrine to gifts to children. Subsection (1) is based on the conclusion that this limitation is arbitrary, and that if the advancement doctrine is to be retained at all, it should be made available when a decedent wishes to make gifts by way of portion to any prospective heirs. For example, a grandparent may quite properly want to make advancements to some grandchildren, and an aunt may wish to do the same with respect to nephews and nieces. Hence, subsection (1) permits advancements to any prospective heirs.

6.3 Subsection (3) provides that if a prospective heir fails to survive the decedent, any property advanced shall not be treated as an advancement against the share of the prospective heir's issue unless the declaration or acknowledgement of the advancement so provides. This reverses the position taken by the present Act. Using an advancement to a child as an example, the present Act is presumably based on the assumption that the decedent intends that the shares established for children satisfy his donative intent for the children and their issue, and that he has no independent donative intent with respect to grandchildren. In short, it assumes that an advancement to a child is intended as an advance-

ment against the share which might pass by representation to the issue of that child. This may or may not be the case. Subsection (1), by requiring written evidence of an advancement, seeks to limit the advancement doctrine to cases in which it is clearly intended. Consistent with this policy, subsection (3) does not treat an advancement to a prospective heir as an advancement against the share of that heir's issue without written evidence that this result was intended.

7. Subject to [the Dower Act or any similar Act] the common law estates of dower and curtesy are abolished. Dower and curtesy abolished

Comment

7.1 Section 7 abolishes common law dower and curtesy, and replaces section 14 of the present Act with fewer words and no change in substance.

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

Widow and no issue

5. (1) If an intestate dies leaving a widow but 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.

"net value"

(2) In this section "net value" means the value of the estate wherever situate, both within and without the 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 "his", 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.

APPENDIX K

(See page 29)

REPORT OF THE SPECIAL COMMITTEE ON PRIVATE INTERNATIONAL LAW

Ten years ago the Uniform Law Conference established a Special Committee on Private International Law. The function of this Committee is to urge effective cooperation between the Federal and Provincial Governments and to smooth the way of Canadian ratifications or accession to international treaties or conventions. The Committee maintains a close liaison with the Federal Department of Justice's Advisory Committee on Private International Law. As a result of this close liaison it is not necessary for the Committee to file a report with the Uniform Law Conference of Canada separate and apart from the *Report on Canadian Activities in the Area of Private International Law* compiled by Mr. Marc Jewett and published below.

During the coming year the Committee will continue to maintain its close relationship with the Federal Department of Justice's Advisory Committee on Private International Law and report to this Conference at its 1984 meeting.

All of which is respectfully submitted

Rae Tallin, Chairman
Emile Colas, Q.C., LL.D.
Doug Ewart
Marc Jewett
Graham D. Walker, Q.C.

REPORT ON CANADIAN ACTIVITIES IN THE AREA OF PRIVATE INTERNATIONAL LAW

Efforts to promote the implementation of private international law conventions in Canada and to ensure an active Canadian participation in the work being done in this area on the international level have continued during 1982-83. Federal-provincial co-operation has led to the first Canadian ratification of a Hague Conference Convention and concrete measures being taken to implement another one. The Advisory Group on Private International Law and Unification of Law has also continued to study specific draft and completed conventions in relation to the Canadian position. Following is a summary of the major developments regarding implementation of conventions and subjects being studied in this area.

The Hague Convention on International Child Abduction

On June 2, 1983, Canada ratified the *Hague Convention on the Civil Aspects of International Child Abduction.* Making use of the federal state clause for the first time at the Hague Conference, Canada specified that the Convention would extend to Ontario, New Brunswick, Manitoba and British Columbia, and designated four central authorities to discharge the duties imposed by the Convention. Canada also registered a reservation declaring that in cases involving the provinces of Ontario, New Brunswick and British Columbia, it will assume the costs referred to in paragraph 2 of Article 26 only insofar as those costs are covered by the system of Legal Aid of the province concerned. Attached you will find a copy of the declarations and the reservations made at the time of the Canadian ratification.

On the international level, France and Canada are the only States which have ratified so far. The Convention must be ratified by at least three States before it comes into force. Five States – Belgium, Greece, Portugal, Switzerland and the United States – have already signed the Convention. The Swiss ratification is expected shortly, while the American ratification could take as long as three years.

On the internal level, Nova Scotia has adopted the necessary legislation but has not yet requested the federal Minister of Justice to extend the Convention to that province. The Yukon Territory is expected to modify an Ordinance which has already been adopted to implement the Convention. The other provinces have declared that they intend to adopt the necessary legislation in the near future.

The Convention on the Service Abroad of Documents

Last summer, pursuant to enquiries by the federal Deputy Minister of Justice, all jurisdictions in Canada had agreed to implement *The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* with a view to permitting a Canadian accession. In August 1982, Mr. Tassé wrote to all jurisdictions requesting their advice on certain policy decisions to be made and information to be gathered for transmission to the Hague Conference to ensure the implementation of the Convention. Eleven jurisdictions having answered this first letter, Mr. Tassé wrote again in May 1983 raising questions that still had to be addressed.

The decisions that had to be taken related to the designation of certain authorities required by the Convention, to the costs, to the guarantees under the Convention, and to the transmission to other channels. Information to be gathered touched upon the forwarding

authorities, the method of service employed by the central authorities, and the translation requirements. It is to be noted that there is a general agreement that Canada should make the declarations permitted under Articles 15-16 of the Convention. These provisions, however, have to be referred to the Committees on Rules of Court in most Canadian jurisdictions. This could delay the process somewhat but an eventual Canadian accession seems assured.

Special Commissions of the Hague Conference

Two special commissions at the Hague Conference are presently preparing draft conventions. The first one deals with the law applicable to trusts, and the second to the law applicable to the international sale of goods.

The special commission on trusts has met twice, in June 1982 and in March 1983, and is scheduled to meet again in October 1983. Canada was represented at these meetings by Professor D.W.M. Waters of the University of Victoria and Mr. M.L. Jewett of the Department of Justice. The Advisory Group on private international law has commented on the draft conventions and provided suggestions to the Canadian representatives with a view to ensuring that the Convention eventually adopted by the Hague Conference could be implemented in Canada. Consultations with other groups are presently taking place. The Hague Conference intends to adopt a Convention on the law applicable to trusts during its plenary sessions scheduled for October 1984.

The other Hague Conference special commission, to revise the *1955 Convention on International Sale of Goods*, held its initial meeting in December 1982. Professor R.C.C. Cuming of the University of Saskatchewan and M. Langlois from the Department of Justice represented Canada. The Conference is taking advantage of the revision of this Convention to open participation to all States by organizing in October 1985 an extraordinary session and inviting non-member States. The provinces will be directly consulted on the preliminary draft convention which was prepared by the Special Commissions.

UNIDROIT—Convention on Agency in the International Sales of Goods

A diplomatic conference was held in February 1983 in Geneva and adopted a convention. Canada was represented at this conference by D.M. Low of the Department of Justice. The federal government intends to forward the text of this convention (copy of which you will find attached) to all Canadian jurisdictions for comments.

UNCITRAL—Arbitration Matters

In light of representations made by Canadian firms doing business abroad, the federal government is reviewing the *Convention on the Settlement of Investment Disputes between states and nationals of other states* (ICSID), in force since 1966, in the context of possible Canadian accession.

If it is considered feasible to proceed, the federal government will be in touch with the provinces prior to accession with a view to the enactment of federal and provincial legislation to implement the Convention. In particular, Article 54 obliges contracting states to recognize and enforce Conventions awards as if they were final judgments of their courts.

Draft Convention between the United Kingdom and Canada providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters

Mr. D.M. Low of the Department of Justice met with British representatives in June to finalize the text of the draft convention. This final text will be forwarded to the Canadian jurisdictions shortly, requesting that they consider implementation.

In concluding, the Department of Justice would like to inform the members of the Uniform Law Conference that a seminar on international trade law will be held in Ottawa in October. It is hoped that such a forum will provoke discussions in this area and provide to the Department of Justice guidance as to the needs of Canadians relating to international trade law questions. In particular, attention will be given to the *1980 United Nations Convention on Contracts for the International Sale of Goods.*

Declarations and reservations relating to the ratification by Canada of the *Convention on the Civil Aspects of International Child Abduction* (The Hague, 25 October 1980)

Extension of the Convention

1. In accordance with the provisions of Article 40, the Government of Canada declares that the convention shall extend to the Provinces of Ontario, New Brunswick, British Columbia and Manitoba.

Central Authorities

2. In accordance with the provisions of Article 6, paragraph 2, the Minister of Justice and Attorney General of Canada, as represented by

the Domestic Legal Services in the Department of External Affairs, is designated as the Central Authority to which applications may be addressed for transmission to the appropriate Central authority within Canada.

3. In accordance with the provisions of Article 6, paragraph 2, the Ministry of the Attorney General of Ontario is designated as the Central Authority for the Province of Ontario.

4. In accordance with the provisions of Article 6, paragraph 2, the Attorney General of New Brunswick is designated as the Central Authority for the Province of New Brunswick.

5. In accordance with the provisions of Article 6, paragraph 2, the Attorney General of British Columbia is designated as the Central Authority for the Province of British Columbia.

6. In accordance with the provisions of Article 6, paragraph 2, the Attorney General of Manitoba is designated as the Central Authority for the Province of Manitoba.

Reservations

7. In accordance with the provisions of Article 42 and pursuant to Article 26, paragraph 3, the Government of Canada declares that, with respect to applications submitted under the Convention concerning the provinces of Ontario, New Brunswick and British Columbia, Canada will assume the costs referred to in paragraph 2 of Article 26 only insofar as these costs are covered by the system of legal aid of the Province concerned.

Other Declarations and Reservations

8. The Government of Canada further declares that it may at any time submit other declarations or reservations, pursuant to Articles 6, 40 and 42 of the Convention, with respect to other territorial units.

Annex I

CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS

THE STATE PARTIES TO THIS CONVENTION,

DESIRING to establish common provisions concerning agency in the international sale of goods,

BEARING IN MIND the objectives of the United Nations Convention on Contracts for the International Sale of Goods,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, bearing in mind the New International Economic Order,

BEING OF THE OPINION that the adoption of uniform rules which govern agency in the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:

CHAPTER I — SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

(1) This Convention applies where one person, the agent, has authority or purports to have authority on behalf of another person, the principal, to conclude a contract of sale of goods with a third party.

(2) It governs not only the conclusion of such a contract by the agent but also any act undertaken by him for the purpose of concluding that contract or in relation to its performance.

(3) It is concerned only with relations between the principal or the agent on the one hand, and the third party on the other.

(4) It applies irrespective of whether the agent acts in his own name or in that of the principal.

Article 2

(1) This Convention applies only where the principal and the third party have their places of business in different States and:

(a) the agent has his place of business in a Contracting State, or

(b) the rules of private international law lead to the application of the law of a Contracting State.

(2) Where, at the time of contracting, the third party neither knew nor ought to have known that the agent was acting as an agent, the Convention only applies if the agent and the third party had their places of business in different States and if the requirements of paragraph 1 are satisfied.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract of sale is to be taken into consideration in determining the application of this Convention.

Article 3

(1) This Convention does not apply to:

(a) The agency of a dealer on a stock, commodity or other exchange;

(b) the agency of an auctioneer;

(c) agency by operation of law in family law, in the law of matrimonial property, or in the law of succession;

(d) agency arising from statutory or judicial authorisation to act for a person without capacity to act;

(e) agency by virtue of a decision of a judicial or quasi-judicial authority or subject to the direct control of such an authority.

(2) Nothing in this Convention affects any rule of law for the protection of consumers.

Article 4

For the purposes of this Convention:

(a) an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity in so far as, in the exercise of his functions as such, he acts by virtue of an authority conferred by law or by the constitutive documents of that entity;

(b) a trustee shall not be regarded as an agent of the trust, of the person who has created the trust, or of the beneficiaries.

Article 5

The principal, or an agent acting in accordance with the express or implied instructions of the principal, may agree with the third party to exclude the application of this Convention or, subject to Article 11, to derogate from or vary the effect of any of its provisions.

Article 6

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 7

(1) The principal or the agent on the one hand and the third party on the other are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) They are considered, unless otherwise agreed, to have impliedly made applicable to their relations any usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to agency relations of the type involved in the particular trade concerned.

Article 8

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract of sale, having regard to the circumstances known to or contemplated by the parties at the time of contracting;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

CHAPTER II – ESTABLISHMENT AND SCOPE OF THE AUTHORITY OF THE AGENT

Article 9

(1) The authorisation of the agent by the principal may be express or implied.

(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authorisation was given.

Article 10

The authorisation need not be given in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 11

Any provision of Article 10, Article 15 or Chapter IV which allows an authorisation, a ratification or a termination of authority to be made in any form other than in writing does not apply where the principal or the agent has his place of business in a Contracting State which has made a declaration under Article 27. The parties may not derogate from or vary the effect of this paragraph.

CHAPTER III – LEGAL EFFECTS OF ACTS CARRIED OUT BY THE AGENT

Article 12

Where an agent acts on behalf of a principal within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly bind the principal and the third party to each other, unless it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind himself only.

Article 13

(1) Where the agent acts on behalf of a principal within the scope of his authority, his acts shall bind only the agent and the third party if:

(a) the third party neither knew nor ought to have known that the agent was acting as an agent, or

(b) it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind himself only.

(2) Nevertheless:

(a) where the agent, whether by reason of the third party's failure of performance or for any other reason, fails to fulfil or is not in a position to fulfil his obligations to the principal, the principal may exercise against the third party the rights acquired on the principal's behalf by the agent, subject to any defences which the third party may set up against the agent;

(b) where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party, the third party may exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent may set up against the third party and which the principal may set up against the agent.

(3) The rights under paragraph 2 may be exercised only if notice of intention to exercise them is given to the agent and the third party or principal, as the case may be. As soon as the third party or principal has received such notice, he may no longer free himself from his obligations by dealing with the agent.

(4) Where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party because of the principal's failure of performance, the agent shall communicate the name of the principal to the third party.

(5) Where the third party fails to fulfil his obligations under the contract to the agent, the agent shall communicate the name of the third party to the principal.

(6) The principal may not exercise against the third party the rights acquired on his behalf by the agent if it appears from the circumstances of the case that the third party, had he known the principal's identity, would not have entered into the contract.

(7) An agent may, in accordance with the express or implied instructions of the principal, agree with the third party to derogate from or vary the effect of paragraph 2.

Article 14

(1) Where an agent acts without authority or acts outside the scope of his authority, his acts do not bind the principal and the third party to each other.

(2) Nevertheless, where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

Article 15

(1) An act by an agent who acts without authority or who acts outside the scope of his authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.

(2) Where, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, he shall not be liable to the principal if, at any time before ratification, he gives notice of his refusal to become bound by a ratification. Where the principal ratifies but does not do so within a reasonable time, the third party may refuse to be bound by the ratification if he promptly notifies the principal.

(3) Where, however, the third party knew or ought to have known of the lack of authority of the agent, the third party may not refuse to become bound by a ratification before the expiration of any time agreed for ratification or, failing agreement, such reasonable time as the third party may specify.

(4) The third party may refuse to accept a partial ratification.

(5) Ratification shall take effect when notice of it reaches the third

party or the ratification otherwise comes to his attention. Once effective, it may not be revoked.

(6) Ratification is effective notwithstanding that the act itself could not have been effectively carried out at the time of ratification.

(7) Where the act has been carried out on behalf of a corporation or other legal person before its creation, ratification is effective only if allowed by the law of the State governing its creation.

(8) Ratification is subject to no requirements as to form. It may be express or may be inferred from the conduct of the principal.

Article 16

(1) An agent who acts without authority or who acts outside the scope of his authority shall, failing ratification, be liable to pay the third party such compensation as will place the third party in the same position as he would have been in if the agent had acted with authority and within the scope of his authority.

(2) The agent shall not be liable, however, if the third party knew or ought to have known that the agent had no authority or was acting outside the scope of his authority.

CHAPTER IV – TERMINATION OF THE AUTHORITY OF THE AGENT

Article 17

The authority of the agent is terminated:

(a) when this follows from any agreement between the principal and the agent;

(b) on completion of the transaction or transactions for which the authority was created;

(c) on revocation by the principal or renunciation by the agent, whether or not this is consistent with the terms of their agreement.

Article 18

The authority of the agent is also terminated when the applicable law so provides.

Article 19

The termination of the authority shall not affect the third party unless he knew or ought to have known of the termination or the facts which caused it.

Article 20

Notwithstanding the termination of his authority, the agent remains authorised to perform on behalf of the principal or his successors the acts which are necessary to prevent damage to their interests.

CHAPTER V – FINAL PROVISIONS

Article 21

The Government of Switzerland is hereby designated as the depositary for this Convention.

Article 22

(1) This convention is open for signature at the concluding meeting of the Diplomatic Conference on Agency in the International Sale of Goods and will remain open for signature by all States at Berne until 31 December 1984.

(2) This convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Government of Switzerland.

Article 23

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions of substantive law concerning the matters governed by this Convention, provided that the principal and the third party or, in the case referred to in Article 2, paragraph 2, the agent and the third party have their places of business in States parties to such agreement.

Article 24

(1) If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this Article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph 1 of this Article, the Convention is to extend to all territorial units of that State.

Article 25

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 24 shall carry no implication as to the internal distribution of powers within that State.

Article 26

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply where the principal and the third party or, in the case referred to in Article 2, paragraph 2, the agent and the third party have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply where the principal and the third party or, in the case referred to in Article 2, paragraph 2, the agent and the third party have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 27

A Contracting State whose legislation requires an authorisation, ratification or termination of authority to be made in or evidenced by

writing in all cases governed by this Convention may at any time make a declaration in accordance with Article 11 that any provision of Article 10, Article 15 or Chapter IV which allows an authorisation, ratification or termination of authority to be other than in writing, does not apply where the principal or the agent has his place of business in that State.

Article 28

A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Article 2, paragraph 1(b).

Article 29

A Contracting State, the whole or specific parts of the foreign trade of which are carried on exclusively by specially authorised organisations, may at any time declare that, in cases where such organisations act either as buyers or sellers in foreign trade, all these organisations or the organisations specified in the declaration shall not be considered, for the purposes of Article 13, paragraphs 2(b) and 4, as agents in their relations with other organisations having their place of business in the same State.

Article 30

(1) A Contracting State may at any time declare that it will apply the provisions of this Convention to specified cases falling outside its sphere of application.

(2) Such declaration may, for example, provide that the Convention shall apply to:

(a) contracts other than contracts of sale of goods;

(b) cases where the places of business mentioned in Article 2, paragraph 1, are not situated in Contracting States.

Article 31

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month follow-

ing the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under Article 26 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under Article 26 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that Article.

Article 32

No reservations are permitted except those expressly authorised in this Convention.

Article 33

(1) This Convention enters into force on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 34

This Convention applies when the agent offers to sell or purchase or accepts an offer of sale or purchase on or after the date when the Convention enters into force in respect of the Contracting State referred to in Article 2, paragraph 1.

Article 35

(1) A Contracting State may denounce this convention by a formal notification in writing to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention.

DONE at Geneva this seventeenth day of February, one thousand nine hundred and eighty-three, in a single original, of which the English and French texts are equally authentic.

APPENDIX L

(See page 30)

INTERIM REPORT OF THE COMMITTEE ON PRODUCTS LIABILITY

1. The question of products liability came before the 64th Annual Meeting of the Uniform Law Conference of Canada in 1982, in the form of a report from the Nova Scotia Commissioners. This report was not adopted by the Conference, but the matter was referred to the Ontario and Manitoba Commissioners and to any other jurisdiction that wished to participate for further consideration and report in 1983.

2. Alberta and Saskatchewan subsequently agreed to participate, and a preliminary meeting was held in Toronto on October 22, 1982. A further meeting was held in Winnipeg on May 13 and 14, 1983. The following persons were present: Professor E. Arthur Braid (Manitoba); Professor Ronald C. C. Cuming, Q.C. (Saskatchewan); Baz Edmeades, Esq. (Alberta); George C. Field, Esq., Q.C. (Alberta); Ms. Donna J. Miller (Manitoba); Professor Clifford H. C. Edwards, Q.C. (Manitoba) (Co-chairman); and, Dr. Derek Mendes da Costa, Q.C. (Ontario) (Co-chairman). Professor S. M. Waddams acted as the Committee's Expert Consultant.

3. The Committee first reviewed the events that led to its meeting.

At the 1982 Conference, Mr. King Hill, President of the National Conference of Commissioners on Uniform State Laws, drew attention to legislation in American jurisdictions that restricted the rights of plaintiffs in product liability cases. It appeared that this development had been found necessary in order to alleviate the excessive burden on defendants that had been created by the common law.

The Committee was advised that 27 American States have enacted legislation since 1976. The legislation varies widely, but common features are as follows: the introduction of short limitation periods; the introduction of "cut-off" periods that extinguish the liability of a manufacturer after a number of years from the product's manufacture or first commercial sale; the introduction of a defence where the manufacturer shows that his product complied with standards prevailing at the time of manufacture; the creation of the defences of consumer misuse or alteration of the product, or contributory negligence; and, the introduction of various measures designed to reduce awards of damages, including prohibition of reference at trial to specific

money claims, restriction of punitive damages, and reduction of damages by amounts of benefits received from collateral sources such as workers' compensation. In no case is the principle of the strict liability of a manufacturer affected, though some of the States have restricted the strict liability of other suppliers.

4. It seemed to the Committee that this legislation largely stemmed from features of the American civil litigation system that are absent in Canada.

The American concern is with large and unpredictable jury awards, and the thrust of the legislation is to subject juries to judicial control. The adoption of strict liability, as opposed to negligence liability, has had very little to do with these features, as is indicated by the fact that the American legislation leaves the strict liability of a manufacturer intact, and, further, by the fact that the restrictions apply equally to negligence based liability.

There are important differences in Canadian civil litigation. Jury trials are less common, and large jury awards of damages are rare. The Supreme Court of Canada established, in 1978, a $100,000 limit on damages for non-pecuniary loss, and though this will probably increase with inflation, it falls very far short of comparable American awards. Canadian law already has a large measure of strict liability in practice (through warranty law and presumptions in the negligence context and by statute in some jurisdictions) and the statutory adoption of such a principle would not, in the Committee's view, in the context of Canadian civil litigation practices, impose any undue burden on suppliers or their insurers.

5. The Committee then turned to the question of the basis of any new statutory liability. It considered a contractual approach, but rejected it on the ground that contractual considerations are often irrelevant in determining liability for injuries, where there may have been no contractual dealings between the parties. The Committee favoured a statutory liability that would operate outside contract and without proof of negligence. It saw no need for further categorization or description of the nature of the liability as "tortious" or as "strict" liability.

6. The Committee then considered the Report of the Ontario Law Reform Commission on Products Liability (1979) and agreed, subject to the conclusions mentioned in the preceding paragraph, to take the Report as a starting point in its deliberations. The Committee reviewed each of the recommendations of the Report, reaching tentative conclu-

sions on some points, but reserving several important matters for further consideration.

7. It was agreed that the Committee would meet again in Toronto in October.

Professor Clifford H. C. Edwards, Q.C.
Co-chairman

Dr. Derek Mendes da Costa, Q.C.
Co-chairman

June 3, 1983

APPENDIX M

(See page 30)

REPORT OF COMMITTEE ON PURPOSES AND PROCEDURES

The Uniform Law Conference has existed for sixty-five years. Its make up, procedures and function have evolved over that time in response to changing times. This process must continue, more especially as changing times have put the Conference under greater strains in the past ten years than in all its previous history. Areas of new emphasis are:

1. Reform legislation involving an element of policy uniformity.
2. More expertise, not only in legal subjects but other areas of experience usually found in government administrative bodies.
3. Promptness of action in rapidly developing areas of legislation.
4. Greater participation by governments in the Conference for purpose of their own policy development.

The Committee feels that these changes ought not to be resisted but that adaptations should be made consciously and cautiously for maximum effectiveness in achieving the single objective of the Conference — uniformity of legislation in Canada.

Membership

Participation in the Uniform Law Section is voluntary by jurisdictions which, by various means, designate persons to take part.

There is an increasing trend for governments to sponsor the placing of subjects on the agenda and to designate government employees on a short term basis to take part in subjects in which the government has a current interest. This is a trend that is new to the Uniform Law Section but not new to the Legislative Drafting Section and the Criminal Law Section in which both the agenda and members are central to implementation by governments. The jurisdictional vote has done much to permit government policy participation in the Uniform Law Section without embarrassment. This trend ought not to be resisted as it can be dynamic in the interests of uniformity. A factor in gauging the relevance of a subject for uniformity may be the willingness of governments to pay the incidental expenses of attendance at meetings of working committees on the subject.

The developing use of the Conference by governments ought to be

faced directly and be the subject of continuing study to preserve independent participation by members and at the same time make use of the interest of governments in having input and using the Section as an information exchange.

The Committee recommends that the practice of also designating law reform commission chairmen, legislative counsel and private practitioners be encouraged to continue.

Legislative Drafting

The Committee stresses the importance of the work of the Legislative Drafting Section as integral to the work of the Uniform Law Section. The Legislative Drafting Section has been developing its function successfully and is encouraged to continue to do so. The availability of *ad hoc* drafting committees to work concurrently with meetings of the Uniform Law Section has greatly expedited the work of the Section.

Conduct of Business

The most immediate and pressing need of the Uniform Law Section is for more vigorous management of its business throughout the year with the object of expediting progress and making the highest use of the time available at the annual meeting.

The committee's recommendations for this purpose are reflected in the revision of the Rules of the Section appended to this Report as a Schedule.

Commentaries on draft rules:

Sections 1 and 2: These are carried forward from the present rules without change.

Section 3: The principal change is for the election of chairman for a term of two years. A degree of continuity in this office, especially with its extended functions, is very valuable. The Committee also recommends that nomination for the office of chairman should not bear any necessary relationship to the holding of any other office on the Conference.

Section 4: The chairman, assisted by a small committee, would take on the supervision of the business of the Section throughout the year. The powers and duties set out do not supersede the authority of the Section to direct otherwise at a meeting.

Clause 4(2)(a)—The ability to accept and assign new items of business permits the saving of time. It is intended that the Committee would canvass all jurisdictions as to interest and willingness to participate. The factors should be:

1. The nature of the subject matter as suitable for uniformity.
2. The number of jurisdictions willing to participate (at least three).
3. The availability of funds in the participating jurisdictions to pay incidental expenses of participants.
4. All jurisdictions volunteering on the basis set out in paragraph 3 should be allowed to do so.

Clause 4(2)(b)— Referral to the Legislative Drafting Section through the year is proposed to save time and ensure the maximum of progress before the general meeting.

Clause 4(2)(c)— This clause would formulate the practice in the past two years and does much to overcome the six-month delay necessary to publish the Proceedings.

Clause 4(2)(d)— A continuing central interest in the progress of working committees would have a salutary effect as well as being necessary for the functioning of the Steering Committee.

Clause 4(2)(e)— The fixing of deadlines for the distribution of reports would permit a June 1st deadline or another deadline in the case of particular reports with the object of adequate preparation in the curcumstances.

Clause 4(2)(f)— The chairman would have an opportunity to have reports in a form suitable for focussing discussion and disposition at the meeting.

Clause 4(2)(g)— Early distribution of the agenda showing the state of preparedness of subjects to be dealt with at the meeting has been the practice in the past two years and has been found to assist members to prepare for them.

Clause 4(2)(h)— The Section has the ultimate say in matters dealt with by the Steering Committee. The Committee's Report would give an opportunity for review.

Section 5: This section is a repeat of the existing voting procedures in which no change is recommended.

Section 6: This section formalizes a recommendation of this Committee made in 1978. It would create a record of policy decisions which do not appear in any other form.

Section 7: It is felt that, if time permits, much detailed discussion can be carried on in committees by those particularly interested. All decisions would remain with the general meeting of the Section.

Section 8: This section keeps open the possibility of a special meeting, possibly on a major lengthy subject similar to the Evidence project.

Emile Colas, Q.C., Chairman
Robert G. Smethurst, Q.C.
Arthur N. Stone, Q.C.
Rae H. Tallin,
Graham D. Walker, Q.C.

SCHEDULE

RULES OF PROCEDURE OF THE UNIFORM LAW SECTION

1. In these rules "jurisdiction" means the Commissioners and representatives from,

(a) a province of Canada;
(b) a territory of Canada; or
(c) the Government of Canada.

2. In the case of any matter undertaken by the Section, consideration shall be given to the form and method most appropriate to accomplish uniformity, taking into consideration the following methods or any combination thereof;

(a) the adoption of a statement of principle;
(b) a draft of operative provisions only of a Uniform Act;
(c) a draft Uniform Act;
(d) the recognition by one province of acts done in another province if valid under the laws of that other province;
(e) uniform provisions in alternative form.

3. (1) The chairman of the Section shall be elected by the Section for a term of two years and is eligible for re-election.

(2) In the event that the office of chairman is vacant, the Executive of the Conference shall appoint another person as chairman for the remainder of the former chairman's term or until the end of the next annual meeting whichever is earlier.

(3) A meeting of the Section shall be presided over by the chairman, a person designated by the chairman or a person elected at the meeting for the purpose.

4. (1) There shall be a Steering Committee consisting of the chairman of the Section, who shall be the chairman of the Steering Committee, and two members appointed by the chairman.

(2) The Steering Committee shall have the general management of the agenda of the Section, subject to the decisions of the Section, and in particular shall, throughout the year,

(a) receive and decide upon proposals for new items of business and assign jurisdictions to prepare reports;

(b) refer matters directly to the Legislative Drafting Section as the committee thinks appropriate;

(c) within two months after the close of a meeting of the Section, distribute the text of the resolutions of the meeting;

(d) inform itself on the progress of working committees;

(e) set deadlines for the distribution of reports of working committees;

(f) advise working committees on the form of reports;

(g) settle and distribute, at least two months before a meeting of the Section, the agenda for the meeting showing the items that are ready to be dealt with in substance, and allot the times and determine the priorities, if any, for their consideration;

(h) report its activities to the annual meeting of the Section.

(3) The Steering Committee shall have the assistance of the Executive Secretary.

5. (1) Except as provided in this section, a motion at a meeting of the Section shall be carried by the affirmative votes of the majority of those persons voting on the motion.

(2) A motion shall be decided by way of a poll of the jurisdictions where,

(a) the chairman declares that the motion shall be so decided; or

(b) any jurisdiction requests that the motion shall be so decided, whether or not the motion has been previously decided by a vote conducted in accordance with subsection (1).

(3) Where a motion is voted upon by way of a poll of the jurisdictions,

(a) each jurisdiction is entitled to cast three votes;

(b) the three votes cast by a jurisdiction may be cast in any combination,

(i) for the motion,

(ii) against the motion, or

(iii) as an abstention;

(c) the votes of a jurisdiction may be cast only by one of the members of the jurisdiction who shall be selected beforehand by the members of that jurisdiction;

(d) any votes not actually cast shall be counted as abstentions;

(e) the motion is carried if the number of votes cast for the motion exceeds the number cast against it;

(f) the minutes of the proceedings shall show only where the motion was carried or defeated.

6. Where, after considering a report, the Section refers it again for a further report incorporating the decisions or policy directions of the meeting, the working committee to which it is referred shall prepare a summary of the decisions or policy directions and file it with the Executive Secretary within two months after the meeting, for distribution.

7. A general meeting of the Section may authorize the formation of committees to sit concurrently with each other for the purpose of discussing the content of reports or proposed reports, but no such committee shall be convened during the conduct of business by the Section sitting as a whole.

8. The Steering Committee may convene such additional general meetings of the Section as the Committee considers necessary in the circumstances.

APPENDIX N

(See page 30)

TIME SHARING

REPORT OF THE MANITOBA COMMISSIONERS

Time sharing of real estate is a relatively new concept but one that has developed very quickly in the 10 years since its introduction in America. In that short time industry sources report that annual sales of resort time sharing alone are now in excess of $1½ billion and still expanding.

Notwithstanding this explosive growth, there are still only a limited number of states in the U.S.A. that have passed specific time share legislation. In those jurisdictions that have adopted such legislation it seems to have gone in one of two directions—either enabling and regulatory in nature, or alternatively, disclosure type legislation.

In Canada to our knowledge there are at present no separate statutes dealing solely with time sharing although B.C., Alberta and P.E.I. have recently passed some amendments to existing legislation incorporating some provisions relating to time sharing.

Our report is therefore based on an assumption that most of you have probably not had any direct contact with time sharing whether it be resort time sharing, urban time sharing or commercial time sharing.

With this in mind we have set out on the following pages a very preliminary draft Act that was prepared by Mr. Harvey Korman, a Calgary lawyer and a director of the Resort Time Share Institute of Canada. This rough draft is included in order to give you a better idea of the types of matters that might be incorporated in such a statute. It is certainly not all inclusive and many of the suggested provisions might be more suitable for inclusion in regulations rather than in the statute itself.

You will notice that many of the sections are followed by Questions. These questions are intended in order to direct your attention to some of the policy decisions that should be resolved before a draft uniform Act can be prepared for your consideration.

DRAFT TIME SHARE ACT

Short Title.

1. This Act may be cited as the _____ Time Share Act.

Definitions

2. In this Act,

A. "Accommodations" means any apartment, condominium or cooperative unit, hotel or motel room or any other private or commercial structure, situated on real property and designed for occupancy by one or more individuals.

B. "Common Expenses" means those expenses properly incurred for the maintenance, operation and repair of all accommodations or facilities, or both, constituting the time share plan.

C. "Contract" means any agreement conferring the rights and obligations of the time sharing plan on the purchaser.

D. "Developer" means the person creating a time share plan.

E. "Facilities" means every structure, service, improvement or real property, whether improved or unimproved, which is made available to the purchasers of a time sharing plan.

F. "Manager" means the person, firm, partnership, corporation or entity responsible for operating and maintaining the time sharing plan.

G. "Offer", "Offer for Sale" means the solicitation either orally or by writing of purchasers, the taking of reservations or any other method whereby a purchaser is offered the opportunity to participate by way of a purchase in a time sharing plan.

H. "Owner's Association" means the association constituted by all purchasers of a time sharing plan who have purchased a fee simple interest in real property.

I. "Person" means one or more natural persons, corporation, firms, partnerships, associations, trusts and other legal entities or any combination thereof.

J. "Project" means and shall be synonymous with the real property, the subject of the time share plan located in or without the Province of

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K. "Public Offering Statement" means the statement required by this Act.

L. "Purchaser" means any person or entity who is buying or who has purchased a time share period in a time share plan other than a developer or lender.

M. "Sale" means the transferring of the legal interest purchased in the time share plan.

N. "Seller" means any developer, person, firm, corporation or other entity, whether an agent or employee or not, who is offering time share periods for sale except a person who has already purchased a

time share period for his or her own occupancy and thereafter offers it for resale.

O. "Superintendent" means the Superintendent of Real Estate.

P. "Time Share Period" means that period of time when a purchaser of a time share plan is entitled to use, possession and occupancy of the accommodations or facilities, or both, of a time share plan.

Q. "Time Share Unit" means an accommodation or facility the subject of a time share plan which is divided into time share periods.

R. "Time Share Plan" means any arrangement, plan, scheme or similar device, excluding external exchange services, whereby a purchaser purchases a right to use, possess and occupy accommodations or facilities or both, for a specific period of time, less than a full year during any year, which extends for a period in excess of three years, whether by fee simple ownership, contract, licence, sale, lease, right to use contract or by any other means.

QUESTIONS

1. Should it be possible for purchasers of Time Share units to record their ownership interest against the land in question in the L.T.O.? If so, how and what type of instrument?

2. Should the legislation be enabling and regulatory per se, or should it simply require disclosure?

3. Who should be responsible for supervision and administration of the Act — The real estate governing body, the securities Commission, consumer protection or a specially set up department?

4. Should the legislation apply to time share projects both within and outside the Province?

5. Should reciprocity be spelled out in some way for projects filed elsewhere?

6. How should the legislation treat projects already in existence or underway (grandfathering)?

Public Offering Statement Requirement

3. A. Each Developer shall file with the Superintendent, a completed public offering statement to be used in the sale of time share periods.

B. Until the Superintendent approves by way of written certificate, the public offering statement, any executed sale and purchase Contracts of time share periods are voidable at any time by the Purchaser.

QUESTION

1. Should it be called a "Public Offering Statement" or "Prospectus" or "Information Statement" or ?

2. Should the developer be able to sell time share periods before filing, and/or approval?

3. Should the contents of the Offering Statement be in the Act or in Regulations?

Contents of Public Offering Statement

4. Every public offering statement shall contain the following:

(a) A cover page stating:

(i) the name of the time sharing plan and the name of the project, and

(ii) the following, in conspicuous type:

"This public offering statement contains important information to be considered prior to acquiring a time share period.

This Public offering statement is neither an endorsement nor an approval by the government of _____.

The prospective Purchaser should consult a lawyer before entering into any agreement to purchase any real estate wherever located.

The prospective Purchaser should see the project before buying.

The Time Share Act provides in effect that a Purchaser is entitled to rescind a time share contract for any reason and without incurring any liability for doing so, within five (5) days of its execution by all parties to it, and until five (5) days after the Purchaser has received the public offering statement."

(b) An index of the contents of the public offering statement.

(c) An explanation of the time share form of ownership offered for sale.

(d) A description of the time share plan, number of total time share units and time share periods.

(e) An explanation of the Purchaser's rights of rescission and those of the Developer, if any.

(f) A copy of the type of Contract to be utilized in the offering.

(g) An explanation of the status of the title of the real estate the subject of the time share plan.

(h) A statement of any liens, encumbrances or judgments affecting the title.

(i) A description of insurance coverage.

(j) A complete statement concerning all material particulars relating to the exchange programs both external and internal, if applicable.

(k) The name of the time share management company, if any.

(l) The time share management contract proposed to be used in the offering.

(m) A copy of any financial instrument to be signed by a purchaser of a time share period if the Developer is providing financing.

(n) A list of those improvements or facilities that are not yet completed in the project, which are part of the offering, and a schedule for completion and a date.

(o) A statement as to any restrictions or prohibitions imposed on transferring a time share period purchased.

(p) A copy of the rules and regulations on the use of accommodations or facilities available to Purchasers.

(q) An estimated operating budget, if applicable.

(r) Notice of any pending law suits that are material to the time share plan.

(s) Estimate of dues, maintenance fees, real property, taxes and similar periodic expenses.

(t) A statement as to any voting rights of a Purchaser.

(u) The name and occupation of every Director, person or trustee of the Developer.

(v) Particulars of any matters concerning public utilities including water, electricity, telephone and sewage facilities.

(w) All other circumstances or features affecting the time share project determined by the Developer in good faith to be included in and material to the project.

QUESTIONS

1. Is it necessary to provide that the Offering Statement shall be accompanied by an affidavit attesting to "full and true disclosure"?

2. Are there other matters that should be set out in Section 4?

Obligtion of Superintendent

5. The superintendent shall deal with the proposed public offering statement in the following manner:

(1) Immediately upon receipt of the proposed public offering statement, mail the Developer a receipt of acknowledgment.

(2) Within twenty-one (21) days from the date of the receipt of a proposed public offering statement, determine the adequacy of same only as to compliance with the requirements of this Section and notify the Developer by mail that the Superintendent has approved the proposed public offering statement or the Superintendent has found specified deficiencies therein. In the event the Superintendent fails to respond within the twenty-one (21) day period, the filing shall be deemed approved.

(3) In the event of specified deficiencies, the Developer may respond to the specified deficiencies and the Superintendent shall, within fourteen (14) days after receipt of correction of specified deficiencies, notify the Developer as to approval or additional specified deficiencies. If the Superintendent fails to reply within fourteen (14) days, the corrected filing shall be deemed approved.

Filing Fee

6. The Developer shall pay a one time filing fee of an amount equal to ____ cents for each time share period to be sold.

QUESTIONS

1. What is a reasonable filing fee for each time share period sold?
2. Should the filing fee be in the Act or in the Regulations?
3. Should there be a maximum fee and/or a minimum fee?

Public Interest

7. The Superintendent has no power or authority to make any determination as to whether or not time sharing, the project, or the time share plan is beneficial or in the public interest.

Material Change

8. Any material change to the public offering statement, shall be filed immediately with the Superintendent within fourteen (14) days of the occurrence of the material change. The Superintendent shall approve or by way of notice cite deficiencies in the material change within seven (7) days after the date of filing. If the Superintendent fails to respond within seven (7) days, the material change shall be deemed approved.

Receipt

9. A. Each seller shall obtain a signed and dated receipt from the prospective Purchaser, acknowledging delivery of the public offering statement.

B. Unless the prospective Purchaser received the documentation required by this Act, the prospective Purchaser, without incurring any liability for so doing, may rescind the contract.

Contract

10. A Developer selling a time share period in a time share plan shall utilize a Contract which shall be fully completed, containing the following:

(A) Name and address of the Developer.
(B) Legal description of the time share project.
(C) Location of the time share project.
(D) Date the Contract is executed by Purchaser and Developer.
(E) Total financial obligation of the Purchaser including the initial purchase price and charges or adjustments the purchaser is obligated to pay including but not limited to maintenance, management, recreation, reservation or exchange.
(F) Identification of time share period purchased.
(G) Estimated date of availability of the time share unit and facilities.
(H) Term of time share period.
(I) Description of nature of time share plan and period being sold, including whether any interest in real property is being conveyed.
(J) In larger type, in bold-faced, conspicuous red ink, on the first page of the contract, the following statement.

> "The Purchaser may, for any reason and without incurring any liability for doing so, rescind this contract within five days of its execution by all the parties to it, and until five (5) days after you receive the public offering statement.
>
> Rescission must be made by notification to the Seller of your intent to rescind and is effective upon the date posted.
>
> No Purchaser should rely upon any representations or warranties other than those contained in this Contract."

(K) A statement that oral representations cannot be relied upon and neither the Developer nor Seller makes any representations other than those contained in the Contract and public offering statement.
(L) A covenant that upon rescission in compliance with and as set forth in the Contract, the Developer shall refund to the Purchaser all payments made pursuant to the contract within fourteen (14) days of receipt of written notice.

Escrow

11. A. The Developer must place in escrow, in an account designated solely for that purpose in _____, in a financial institution such as a bank, trust company or credit union or in the Developer's

lawyer's trust account any and all funds received from Purchasers of time share periods during the rescission period provided for in this Act, except for funds received from Purchasers who waive their rights of rescission, until the Purchasers statutory right of rescission is expired.

B. The escrowed funds may be paid out to the Developer only after the expiration of the rescission period.

C. The escrowed funds may only be paid to the Developer after the Developer signs a sworn declaration that no notice of rescission was received from the Purchaser whose funds are being released.

D. In the event the seller is selling a fee simple interest to a Purchaser, and prior to releasing escrow funds to the Developer, the Purchaser shall be furnished with a copy of a recorded non-disturbance instrument from every encumbrance registered on title, charging that title, which shall provide that in the event of foreclosure, the title to the fee simple interest shall be subject to the time share possession rights of the Purchasers as a first priority.

E. Said escrow funds may be placed or invested in interest bearing certificates or in savings or term deposits of a financial institution as defined herein and the right to receive interest generated thereof shall be as set forth by contract.

QUESTIONS

1. How long should the funds be held in escrow—for rescission period only or until premises are ready for occupation?
2. Should the developer have access to any of the funds prior to completion for use in construction, or furnishings?
3. Should purchaser be allowed to waive rescission periods?

Deposit

12. A. Prior to obtaining approval from the Superintendent of a public offering statement, the Developer may accept a deposit for the purpose only of reserving a time share period, pursuant to a fully executed contract approved by the Superintendent, provided that:

(i) all funds received are escrowed in accordance with Section 11. of this Act.

(ii) the Developer has an ownership interest or leasehold interest in the lands of a duration at least equal to the duration of the proposed time share plan on the land, the subject of the time share plan.

B. Unless a Developer complies with Section 3. B. or this Section, a Developer or seller shall not offer a time share plan for sale.

Exemption from Filing

13. A. A Developer shall not be required to prepare and distribute a public offering statement under this Act if the Developer has requested and there has been issued a prospectus or similar disclosure document which is provided to Purchasers under the Securities Act of _____.

B. A public offering statement need not be prepared or delivered if there is:

(i) a transfer of a time share by a time share owner, other than the Developer or Seller, of less than five timeshare periods.

(ii) any disposition pursuant to a Court order.

(iii) a gratuitous timeshare transfer.

(iv) a disposition on a time share project, or all time shares conveying same to one Purchaser.

(v) a disposition of a time share period, in a time share project located outside the Province of _____ provided that all solicitations, negotiations and contracts take place wholly outside the Province of _____ and the contract was executed wholly outside the Province of _____.

(vi) group reservations made for fifteen (15) or more people as a single transaction between an hotel and travel agent or travel groups for hotel accommodations, where deposits are made and held for more than two years in advance.

(vii) in any other circumstance approved by the Superintendent.

Additional Developers' and Sellers' Obligations

14. The Developer or Seller shall not:

A. fail to honor requests for rescission if made as provided for in the contract.

B. misrepresent the Purchaser's right to cancel.

C. fail to refund funds.

Partition

15. No action for partition of any time share unit shall lie, unless otherwise provided for in the contract between Seller and Purchaser and the _____ Partition and Sales Act relating hereto is inapplicable.

Advertising

16. A. All advertising materials to be used in selling time share periods, to be generally distributed to the public at large, shall be filed with the Superintendent prior to their use.

B. No advertising shall

(i) misrepresent facts.

(ii) predict or comment on value increases or investment potential of time share periods.

(iii) refer to anything not yet completed or built unless otherwise conspicuously labelled.

(iv) misrepresent notice of exchange service.

(v) make any misleading remarks or representations concerning the public offering statement, the contract or the Purchaser's rights, benefits or remedies.

(vi) utilize any promotional device or give away, contest, gift, award, drawings or any other device without disclosing that:

(a) same are utilized to sell time share periods, and

(b) same are utilized to obtain names and addresses of potential Purchasers in order to solicit sales.

(c) complete particulars as to sales governing how prizes are to be won and all particulars relating to prizes.

(d) in the event the Superintendent determines that any advertising fails to meet the requirements of this Section, the Superintendent may take action under Section 24.

QUESTIONS

1. Should there be a requirement that copies of all advertising be filed and/or approved prior to use?

Improvements

17. Developer shall complete all promised improvements being offered in the public offering statement provided that the Developer shall be excused for the period or periods of delay in completion when precluded from doing so by any cause beyond the Developer's control, including riots, civil insurrection, war, government restrictions, inability to obtain materials, fire or other casualty or acts of God not within the control of the Developer.

Owners' Association

18. A. The developer shall create or provide for an Owners' Association to provide for the maintenance, repair and furnishing of time share units and for the overall management and operation of the time share plan, including but not limited to:

1. Management and maintenance of all accommodation and facilities constituting the time share plan.

2. Collection of all assessments for common expenses.

3. Provision of standards and procedures for upkeep, repair and interim finishing of time share units and for the replacement of same.

4. Providing for maid, cleaning, linen and similar services to the units during use, possession and occupation by the Purchasers.

5. Adoption of standards and rules of conduct governing the use, enjoyment and occupancy of time share units.

6. Providing each year an itemized annual budget, including all receipts and expenditures.

7. Maintenance of books and records.

8. Obtaining comprehensive general liability insurance for death, bodily injury and property damage arising out of the use, possession or occupation of time share units by time share Purchasers, their guests and other users.

9. Methods to compensate a time share Purchaser of a time share unit shall be made available for the time share period contracted for or reserved.

10. Procedures for imposing penalty or suspension of rights in cases of default.

11. Arranging for an annual independent audit if required by a majority of time share owners.

12. Making available for inspection by the Superintendent any books or records of the time sharing plan.

13. Providing any and all other functions and data necessary to maintain and manage the accommodations or facilities as provided in the contract and as advertised.

B. This section shall apply to fee simple owners and other owners of a time share period.

C. In the event there already exists an association of owners in a condominium project, then the Owners' Association shall be in addition thereto and any By-Laws or rules and regulations of the Owners' Association shall be in addition to any other condominium By-Laws, rules or regulations.

D. The Owners' Association shall elect a Board who shall have authority to contract with a Manager to provide services set forth in this Section.

QUESTIONS

1. Should an Owners Association be mandatory?

2. If so, should the bylaws setting up same be required to be filed as part of the filing requirements and also disclosed in detail in the offering statement?

3. Should it be given status to sue etc. as in Condominium-legislation?

Management Contract

19. In a fee simple time share project the management contract shall be renewable automatically every second year, unless the purchasers by a majority vote decide to terminate said contract.

QUESTIONS

1. Should the legislation require that managers of time share projects be registered?

2. If so, what about situations where the owners themselves take on the responsibility?

3. Should there be a requirement that management contracts be filed as part of the filing requirements or simply given to each purchaser at time of sale?

4. Should there be any provisions in the Act re managers duties eg. preparing budgets, keeping books, register of owners etc.?

5. Should their be provision for replacement of managers?

Maintenance

20. Each seller of a time share plan shall maintain:

(i) a copy of each contract.

(ii) a list of all sales persons and their addresses.

(iii) a copy of all receipts.

Exchange Programs

21. If the Developer or Seller offers an exchange program to any Purchaser, the Seller shall deliver to the Purchaser, in addition to any other documents required under this Act, and prior to the execution of any contract between the Purchaser and the exchange company, an exchange information statement including but not limited to the following:

(i) name and address of the exchange company.

(ii) names of all the officers, directors and shareholders of the exchange company.

(iii) any interest of any named person in any time share project other than an exchange interest, and the nature of said interest.

(iv) that the Purchaser's participation in the exchange program is voluntary.

(v) what the actual contractual relationship with the exchange company is.

(vi) an accurate description of all limitations or restrictions employed in the exchange program.

(vii) what guarantees of fulfillment of requests for exchange time.

(viii) whether an owner can lose the possession, use and occupation of his own time share unit without being provided with a substitute.

(ix) fees and costs.

(x) other resorts participating in exchange program.

(xi) number of time share units available for occupancy.

(xii) audited financial statements including:

(a) the number of Purchasers currently enrolled in the exchange program.

(b) number of accommodations and facilities that have current affiliation agreements with exchange program.

(c) the percentage of confirmed exchanges and criteria utilized.

(d) number of exchanges confirmed by exchange program during the year.

QUESTIONS

1. Should information re any exchange program being offered to Purchasers be filed as part of the filing requirements or simply given to each purchaser at time of sale?

Licenses

22. Any Seller of a time sharing plan shall be a licensed real estate salesperson, as required by or as exempted by and in accordance with the Real Estate Agents Licensing Act of _____.

QUESTIONS

1. Should "Sellers" be required to be licensed? If so, what requirements, if any, should be set out in the Act?

2. Should employees of developer be exempt?

Zoning

23. A zoning subdivision or other ordinance or registration shall not impose any requirement upon a time share project which it would

not otherwise impose upon a similar project under a different form of ownership.

Superintendent's Authority

24. The Superintendent may adapt, amend, and repeal rules and regulations, prescribe forms and procedures and issue orders consistent with and in furtherance of the objectives of this Act. In performing its duties, the Superintendent shall have the following power and duties:

A. May conduct any investigations it deems necessary.

B. May cooperate with other governmental bodies performing similar functions for the purpose of developing uniform procedures and properties.

C. May, after a hearing, issue a cease and desist order if:

(i) there is any misrepresentation in any document filed with the Superintendent.

(ii) any Developer, Seller or agent, or either, in connection with the sale of time share periods, has engaged or is engaging in unlawful practice or acts.

(iii) any developer, seller or agent disseminates any false or misleading promotional material.

(iv) any developer, seller or agent conceals, misappropriates, divestes or disposes of any funds in contravention of this Act.

(v) the Developer has failed to file a public offering statement or any other documents required under this Act.

(vi) there has been any violation of this Act or any regulations or rules related hereto.

D. May bring an action in any court of competent jurisdiction for declaratory or injunctive relief.

E. May impose civil penalties for violations of this Act up to and including a maximum of _____ per violation. Said imposition shall not be effective for a period of twenty-one days in order that the Developer or seller may appeal the penalty to a court of competent jurisdiction.

QUESTIONS

1. Should there be a right of Appeal of the Superintendant's decisions?

2. If so, to who and how should the appeal be dealt with?

3. What about the handling of sales while the appeal is in progress?

Exemption

25. The Superintendent may, on such terms and conditions as the Lieutenant Governor in Council may from time to time prescribe, exempt any person or class of persons from complying with all or any of the requisites of this Act.

MISCELLANEOUS QUESTONS

1. Should the provision re rescission period be set out in a separate section in the Act?

2. To what extent, if any, should the developer be able to amend any of the project documents that might adversely affect the rights of prior purchasers? e.g., with permission of the Superintendant?

3. Should purchasers be entitled to receive annual financial statements, and if so, should they be audited?

APPENDIX O

(See page 31)

VITAL STATISTICS

REPORT OF THE BRITISH COLUMBIA AND CANADIAN COMMISSIONERS

Following a submission by the British Columbia Commissioners at Montebello, it was resolved by the Uniform Law Section that the *Uniform Vital Statistics Act* warranted thorough review both as to matters of policy and drafting. The task was assigned to the British Columbia Commissioners and the Canadian Commissioners, the latter because of their jurisdictional interest in national statistics.

This report does not extend to questions of drafting, but confines itself purely to matters of policy which the reporting Commissioners have identified as matters which require the decision of the Conference. Such decisions will form the basis of drafting instructions. Suffice for us to say that in the area of drafting many consequential changes appear to be necessary to bring form and terminology into line with the Uniform statutes passed since 1949 when the *Vital Statistics Act* was first recommended. We refer in particular to the passage of the *Uniform Child Status Act* and to the recommendations made with respect to drafting conventions. It is true that the *Uniform Child Status Act* makes consequential amendments to the *Vital Statistics Act*, but a thorough study will show that these are surface changes only.

We are indebted to the administrative staff of the Ministry of Health in British Columbia for their assistance in identifying and discussing many problems dealt with in this report. Particular reference in this regard must be paid to the former Director of Vital Statistics, Mr. W.D. Burrows and to his report on the Uniform Act of 1949 to the Federal Government. This report is attached as a schedule to this paper and is referred to for terms. It is recommended that his report be examined in some detail.

Policy issues discussed in this paper are dealt with in the order in which they appear in the current Act.

REGISTRATION OF BIRTHS

The main provisions governing registration of birth are contained within sections 2 to 7 of the Uniform Act. There are other provisions in the Act which relate to the birth registry, such as notation following

registration of an adoption (section 9); special provisions for registration of a birth on the high seas (section 18); notations following change of name (section 20), following fraudulent registration (section 21) and corrections of errors in the register (section 22). It is between sections 2 and 8 that 3 essential policy features are contained—

(a) reporting of the birth;
(b) registering the birth;
(c) the name to be given to the child following registration.

I. *Reporting of the Birth*

Section 2 of the Uniform Act requires every person who assists at the birth to deliver or mail a notice of the birth to the division registrar in the prescribed form. The purpose of this section appears to be precautionary to inform the appropriate division registrar that a birth has taken place and that he should expect the law to be complied with respecting registration. We find this to be a useful section since most persons are born in hospital, and it is very simple to obtain the physician's report who attended the birth. If we have any objection to section 2 at all, it is in its present wording, i.e., "every person who assists at the birth of a child." The Conference will wish to consider whether this is too broad and indistinct and whether the reporting initiative should lie more closely with the physician who was present at the birth.

The real duties of reporting for the purposes of registration of the birth are contained in section 3 of the Act. The prime obligation is with the mother; and only if she is incapable does any obligation fall upon the father. In the event of incapability of both the mother and father, the Act at section 3 (2) lists 3 groups of persons all of whom stand in order of incapability, i.e.,

(1) the person standing in place of the parents. Presumably this means the guardian of the person of the child;
(2) the person required to give notice of the birth under section 2, i.e., the persons who assist at the birth of the child;
(3) the occupier of the premises in which the child is born if he has knowledge of the birth.

Section 3 (3) provides that the father of an illegitimate child is not required to comply with subsection (2). The Act creates the sanction of an offence for failing to report a birth and the effect of subsection (3) is to remove any sanction on the father of the illegitimate child.

The first question for policy consideration is whether the prime obligation to report the birth should rest with the mother of the child; or whether this obligation should be placed jointly on the mother and the father. Allied to this is the question of whether the father of "an illegitimate" child should be relieved from any obligation at all. Clearly the concept of illegitimacy is no longer acceptable to this legislative scheme in view of the principles in the *Child Status Act*.

The following questions are posed—

1. Should section 3 (2) (a) and (b) of the current Uniform Act remain as stated; or should these 2 paragraphs be substituted with one paragraph worded "either of the natural parents of the child"?
2. Should the father of a child born out of wedlock be treated differently from the father of a child born in wedlock?

We make no recommendation as to which alternative in question 1 should be adopted as we see advantages in continuing to place the prime obligation on the mother because she alone is the person who is most qualified to give particulars respecting the birth of the child. However we might be conscious of recent developments in the law culminating in the *Charter of Rights and Freedoms* which point to equality between the sexes. On the other hand we see no justification for relieving the father of the "illegitimate" child from the obligation because natural parents of the child must exist irrespective of whether the parties are or are not in wedlock, or the child is conceived by artificial insemination.

The second question is whether the order of persons who are required to register is the most appropriate order within the scheme. We have some doubt as to whether there should be any obligation upon the person required to give notice of the birth under section 2. In practice this places a dual obligation on the attending physician. He is also required to comply with section 3. Irrespective of the question of order, we do suggest that there should be an additional category added "in the event of everyone being incapable, any other person having knowledge of the birth".

We gave thought to the descending order of duty. In Britain, the prime obligation rests with the father and mother. The list of alternatives is not placed in order of priority, presumably because Parliament was unable to decide which was most important. On the other hand the Canadian system has a degree of orderliness about it. The Commissioners will wish to consider this point, but should note that we found no

practical problem with the existing version. Accordingly, we make no recommendation, except to suggest a provision which states that the duty on the others is discharged if it is implemented by anyone on the list.

II. *Registration of the Birth*

We find that the existing provisions of the Uniform Act are confusing as to the requirement to register a birth and seek direction from the Commissioners on what must amount to the philosophy behind registration at all.

The alternative questions are:

1. should the registrar be required to register the birth if he is satisfied that a birth has taken place?;

2. should the obligation to register exist only when the registrar is satisfied as to the truth and sufficiency of the statement received by him from the person required to provide it?

In other words, is the rationale for registration the keeping of a record of all births which have taken place; or only the keeping of records of those births in respect of which the facts disclosed in the statement are true?

The present Act speaks about the requirement to register "as provided in the Act" (section 3(1)). However, the Act provides that registration only takes place when the registrar is satisfied as to truth and sufficiency (section 3(11)).

The obligation on the mother, father or other qualified person is to provide the statement within a specified time (see section 3 (2)). This time is left to each province. British Columbia has opted for 30 days. It may be possible to recommend a stated period. We think a limitation period is desirable. Subject to the one year rule referred to below, it does not prevent registration after that period. Apparently all that it means is that if the statement is provided later, the person obliged to deliver it might be prosecuted. We understand that prosecution for breach of the time limit never takes place. This breach of time limit might be penalized by the imposition of a late registration fee.

Section 4 of the Uniform Act introduces the one year time limit, after which the divisional registrars cannot register. The matter must then be referred to the Director of Vital Statistics. If the philosophy behind the Act is to maintain statistics of all births, we question the need for this reference, and the fact that additional material, such as statutory declarations, are relevant to the main issue.

It is evident that the present Act is concerned with the answer to questions—who is the mother? who is the father? are they married? did they live together at conception? what name is to be given to the child? is it legitimate? etc. If the title to the Act is to have any meaning, it should be concerned with keeping statistics relative to births.

III. *Name of the Child*

This is the method of identifying the child whose birth has been registered and is perhaps the most politically sensitive part of the Act. Traditionally this has been done by a mandatory surname and permissive given names. We consider that this tradition should be maintained although not necessarily in its present form. The Uniform Act controls the surname by dictating what it shall be—sections 3(5) to (8) and 5. There is no control over the given name or names except provisions concerning changes to it—section 7. The Conference must consider whether there is any place in this legislation for change of name. While there is no Uniform Act on the subject, provinces have enacted legislation in this field outside of the area of birth registration. Section 20 of the Uniform Act enables the birth registry to be annotated to take account of change. We question whether section 7 of the Uniform Act has much, if any, relevance to registration of births.

The existing control over the surname is as follows:

1. Legitimate child born in wedlock—father's surname obligatory—section 3(5);
2. Illegitimate child to unmarried woman—mother's surname obligatory, unless particulars of father given at time of registration and joint request of parents for father's surname—sections 3(7) and (8);
3. Illegitimate child to married woman—husband's surname obligatory, unless particulars of father given at time of registration and both parents request, father's surname is name of child—section 3(6).

It must be noted that some provinces (i.e. Ontario, Quebec and Alberta whose combined populations exceed 50% of national population) have moved away from the Uniform provision. In some instances the legislatures have permitted the hyphenated name containing the surnames of both father and mother. With the possible exception of Quebec, however, the law continues to dictate to parents what the surname of their children shall be. In the normal family birth, irrespective of the wishes of the parents, the surname is that of the father (or in limited instances hyphenated with that of the mother); and in the case of the illegitimate child, the surname follows the mother, unless both parties agree.

The rationale for the existing provisions in the Act is presumably to maintain tradition or history, that is to follow the lifelong pattern of the male name as being the family name. There is also no doubt that specificity maintains a degree of orderliness in the register itself. So far as tradition is concerned, it is submitted that the present Act does not preserve it. It takes a convoluted view of history. Historically people were given one name only.

If the object is to maintain orderliness, clearly a number allocation may be appropriate. It follows that if history and orderliness is the key, the child should have one name only and a number. Clearly this runs counter to current social values.

It is submitted that the philosophy of the existing Uniform Act strikes at the objects of the *Uniform Child Status Act*. They may also run contrary to principles of equality of the sexes reflected in the Charter of Rights and sundry Human Rights Codes. We will make no specific recommendation to solve a problem which appears to have reached the forefront politically, particularly in Ontario, but rather will identify the alternatives which will form the basis for resolution by the Conference. In putting forward these alternatives, it is assumed that registration of a surname is considered to be necessary and desirable to maintain accepted values of identification long recognized in Canadian Society.

1. *No Choice*—The legislation could indicate what the surname should be with reference to the surname of one parent. This is the method adopted by the present legislation, with a limited element of choice in the case of children born out of wedlock. If this method is adopted, we see no change in the present legislation since any criticism of the name following the mother would apply equally to the name following the father.

   The advantage of this option is that it maintains a degree of orderliness in the register, and if the father's surname is the key, continues a practice of pointing to geneology of male name. The disadvantages have been identified.

2. *Limited Choice*—The legislation could dictate the name within limits of the surnames of either parent or both—father, mother or hyphenated. Any element of choice between parents involves consent and this is discussed below.

   It is believed that this option would be the one most acceptable politically throughout the country, subject to satisfactory solution to the problem of consent; and to a lesser extent maintaining names which do not violate public policy i.e. double

hyphenation as may occur when Smith-Jones marries Brown-Richards; and maintaining consistency of name within the family.

3. *Freedom of Choice*—The legislation could permit the name to be anything chosen by the parents, and not be limited to their names or surnames. There appears to be no legal barrier to the use by a person of a surname other than the one by which he is registered. Such use may cause him difficulty in the administration of his affairs without going through the legal formalities of change of name; but that appears to be as far as the law extends. Thus the choice of any surname appears to be not inappropriate for consideration.

   The same consideration of consent of the parents arises as in "Limited Choice" above. It also points to the need for conferring upon the Registrar power of control within a sphere which would fall within the bounds of public policy and morality i.e. Jones and Smith opting for Stinker.

On the question of consent of the parent which must be addressed for options 2 and 3 above, we are also unable to give clear recommendation except to say that the Director of Vital Statistics (or registrar being a term which we prefer) must be given legislative direction, apart from the power to decide questions of public policy and morality. We consider that no arbitrator could decide for example whether the name should be Smith or Jones. The Conference will wish to consider whether in the absence of agreement the name should be hyphenated or follow the surname of the mother or father. We are inclined towards maintenance of the father's surname in this instance.

Finally, the Conference will wish to decide on whether children in the same family can have different surnames.

IV. *Stillbirths*

We have a few comments on section 8 of the Act as it relates to stillbirths. We consider that the philosophy behind registration in a separate register of stillbirths is good, but we strongly recommend a change in the definition of stillbirth as it appears in section 1 of the Act. It appears to be generally accepted in most provinces that a foetus over 500 grams can support life and that period of pregnancy of 7 months is too long. Most provinces appear to recognize 20 weeks pregnancy as being the appropriate period as coroners regard a foetus over that period as being "persons" within their jurisdiction.

We observe a possible improvement to section 8(5). The registrar only registers the stillbirth on being satisfied that the statement produced under section 8(1) is truthful and sufficient. We believe there is

merit in registration taking place upon production of the certificate of the medical practitioner or coroner made under section 8(3).

The phrase "burial permit" may warrant change to "disposition permit" in view of cremation, transportation of body, etc.

V. *Transexualism; Artificial Insemination; Surrogate Motherhood*

Before closing on the subject of births it is relevant to consider these phenomena.

(a) *Transexualism*—The existing Act is silent on the effect of sex change on the birth registration. All provinces except Newfoundland, Manitoba and Prince Edward Island have enacted on the subject. They provide that where sex has been changed, the Registrar shall change the birth registry. In Quebec and British Columbia the change is only permitted if the person is unmarried. This may have been done to protect married couples who end up in the same sex.

The issue must be addressed. We make no recommendation except to regard any distinction between married and unmarried persons as being irrelevant. The law respecting marriage or annulment of it should not be confused with law respecting registration of a birth. We are inclined to view that if birth registration can be changed (by adoption or application under a change of name Act, etc.) no damage is done if the registration of the sex of a person can be changed. The proof of such change must be carefully analyzed.

(b) *Artificial Insemination and Surrogate Motherhood*—These are dealt with together because in essence the principles of parenthood are similar. Artificial insemination flows mainly because of inability of the male; surrogate motherhood from inability of the female. The one difference is that in artificial insemination it may be effected between married couples.

Our analysis leads us to conclude that the legislation need not necessarily speak in these areas. A child is either born to parents who are in wedlock or are not in wedlock. In any event, the Act will take account of the situation. The method of conception seems to us to be entirely irrelevant. The *Child Status Act* (section 11) deals with deemed parenthood. This can arise in or out of wedlock. If a person is the parent, adoption is not necessary. If the person is not the parent, adoption is necessary. We conclude therefore that the provisions respecting change in registered particulars following adoption of a child would apply in these cases.

REGISTRATION OF ADOPTIONS

This subject is covered by section 9 of the Uniform Act. Essentially endorsation of the adoption order constitutes registration (section

9(1)). Annotation of the registration of birth must be made if the director is satisfied on the identity of the person adopted. In essence this means that the birth registry discloses the names of the natural parents and adoptive parents.

British Columbia, Saskatchewan and Prince Edward Island have the uniform provision in force. The remainder have moved to an alternative method of substituting the particulars of the original birth registration with the adoption particulars. There are advantages and disadvantages in each method:

(a) for those who subscribe to substitution of the birth registry, the argument against is that this violates a principle of registration that the facts existing at the birth are not true;
(b) for those who argue for annotation, the disadvantage is that the register discloses dual particulars and, unless strict security is enforced, the door is opened to satisfying the zeal of "parent finders".

In view of the fact that the majority of provinces have elected for the substitution method, we make no recommendation, although we have sympathy for any argument that truthful facts should remain on record and not be permanently erased from the record.

Perhaps the legislation could achieve a compromise by moving towards substitution of the birth registry, but keeping the original substituted version on a separate file under control of the registrar with powers to limit or refuse disclosure except for good cause.

The question has been raised as to whether the obligations on the registrar imposed by section 9(3) and (4) when information is exchanged with other jurisdictions should be made permissive rather than mandatory. It has been argued that exchange with "unfriendly nations" may operate to the disadvantage of persons related to the adopted person in these nations.

REGISTRATION OF MARRIAGE AND DISSOLUTION

I. *Marriage*

In the area of registration of marriage which is covered by sections 10 and 11 of the Uniform Act, we have little comment on policy, although we foresee drafting section involvement. The only question we submit for possible change is the obligation on the solemnizor to submit the marriage statement to the division registrar within 2 days of the marriage. This may be considered too short a period.

Section 11 is similar to the principles set out in section 4 and provides for registration after one year by the Director of Vital Statistics.

If our questions on section 4 have any relevance (see page 7), the Conference will wish to consider the same issues here.

II. *Dissolution of Marriage*

Section 12 of the Uniform Act is not being applied in practice and changes to this section are necessary. Because of Canada's involvement in the area of divorce and a centralized registry of divorces exists in Ottawa, subsection (5), which requires decrees and orders to be submitted by Provincial Directors to their counterparts in other jurisdictions in which the marriage was solemnized, is not a practical solution.

We see no need of *registering* a dissolution of marriage as contemplated by section 12(1) of the Uniform Act and recommend repeal. It is for policy consideration to what extent a dissolution of marriage should be *annotated* on the marriage register at all. We are inclined to recommend annotation when a marriage is declared void. In that case, the marriage is deemed not to have existed in law (although it did in fact). In such case annotation would show that true state on the marriage register and Court Registrars might be obliged to forward decrees of nullity ab initio to the Director of Vital Statistics.

If it is decided to annotate all dissolutions (i.e. divorces and orders declaring the marriage voidable or void) a mechanism for requiring all orders to be passed to the director for annotation should be included. In cases of divorce, we forsee the central registry in Ottawa being the disseminating source.

REGISTRATION OF DEATHS

This subject is covered by sections 13 to 17 of the Uniform Act. It goes further than the mere subject of recording of a death. Section 17 places obligations on cemetery owners concerning funerals. Section 13 imposes duties between persons having knowledge of the death and the person in charge of the body (funeral director); and between doctors and that person respecting cause of death. It attempts to differentiate death from natural causes and death from unnatural causes.

It can be seen that the Uniform Act respecting registration of death may impinge upon topics which are more appropriate for other statutes. These include Burial Acts, Cemetery Acts and Coroners (or Medical Examiner) Acts.

Death is a question of fact. We acknowledge that there is much debate on when death actually occurs, but that is for another branch of law. When it does occur, the fact should be registered. In our opinion, registration should not depend on a funeral director making a request

for personal particulars of the death to the next of kin (or other on the list): nor should it depend on a doctor giving a medical certificate of the cause of death to a "funeral director". It should depend upon the divisional Director of Vital Statistics being satisfied that a death has in fact occurred within his jurisdiction. If he is satisfied he should register the death. The statute should speak clearly on the documentary or other evidence which is necessary to enable the registrar to be satisfied; and set out who has the duty to supply it. We see no justification for registering or delaying registration of an obvious death just because of the circumstances.

It will be seen that the subjects touched upon by sections 13 to 17 of the Uniform Act do not focus directly on registration of the fact of death; but rather upon procedures prerequisite to registration and what can or cannot happen until after registration occurs.

We recommend that this Part of the Act be re-examined entirely to express an intent which focuses on

1. registration of death occurring within a division when the fact of death is established to the satisfaction of the divisional director,
2. reporting obligations to the director i.e. duties on the list of persons set out at section 13(2) of the present Act, and on doctors or coroners who sign medical certificates of death,
3. rights to registrars
   (a) to demand further information concerning a death not only to satisfy him that death has occurred but also for statistical purposes, and
   (b) to report situations to law enforcement agencies if a death appears to him to have occurred in peculiar circumstances, or in circumstances that may require the involvement of the coroner or medical examiner under the appropriate Act,
4. contents of death certificates—should the certificate specify the causes of death set out in the International List of Causes?, and
5. if provinces do not have existing legislation governing burial (or cremation), cemetaries or coroners, impose controls on duties consistent with registration and issuance of burial certificates in those areas.

In this report, we do not focus on the individual provisions which exist at sections 13 to 17 of the Uniform Act. There are many drafting areas which require clarification and reference in this respect should be made to the report of Mr. W. D. Burrowes on the proposed revision of the Uniform Act made to the Federal Government. We see a more direct approach to registration of death focusing on the areas identified above.

This concludes our report on the individual subjects which require registration, but there are many other aspects concerning registration which warrant special attention for review. They are outlined as follows:

I. *Births and Deaths on High Seas (section 18)*

The Uniform Act only deals with ships and not with births and deaths on aircraft. We recommend change to cover this aspect. The criteria in the present Act depends upon the port of registry of the ship in which the event occurs.

We understand the philosophy of registering an event in a geographical place where it occurs irrespective of nationality or residence, but we cannot think of aircraft in the air or a ship at sea being part of a geographical place. In any event, although ships have ports of registry, aircraft do not have places of registry within provinces, and to achieve uniformity in registering births and deaths in both, a new system should be devised.

We recommend a simple and hopefully practical solution which might be considered if it does not breach International Convention. It is that registration of a birth or death should take place within the Canadian jurisdiction which is the first port of entry or the first place of landing after the birth or death occurs.

II. *Fraudulent Registrations and Certificates (section 21)*

We do not like the specific reference to "fraudulent" in the heading, because the section contemplates "improper" registrations. Nor do we agree with a concept that if a registration has been made improperly the registration continues with "annotation".

If investigation reveals that the fact which requires registration i.e. birth, marriage or death, did not take place, then the registration should be cancelled—not annotated. If the investigation reveals a material factor in the registration to be improperly given i.e. wrong mother in a birth or fraudulent death certificate, then the registration should be substituted.

III. *Correction of Errors (section 22)*

It should be made clear in this section that it deals with minor matters and not errors of major kind which might result in improper registration covered by section 21.

We consider this section is one for drafting improvement rather than main policy change. For example, we do not think that "registration" is capable of being possessed—subsection (1); or capable of being received—subsection (3). Documents are possessed or received.

We wonder if there is any real relevance to subsections (1) and (2). It raises the question of what constitutes registration and when it occurs. The Uniform Act appears to regard a signature at the foot of documents produced as being the act of registration. In Britain registration occurs when the registrar enters information given in documents produced into a separate register.

IV. *Administration (sections 23 to 28)*

It is for policy decision of the Conference to what extent it wishes to recommend legislation in the area of administration of the law, as distinct from the law itself. The existing Uniform Act makes some attempt at this from sections 23 to 28 while at the same time including a footnote indicating that each province can do as it likes.

If it is decided to continue the practice of attempting to guide jurisdictions in this area, it is vital for commissioners to pay regard to the comments of Mr. Burrowes at Item X of his report to the Federal Government. In that report he suggests that there should be more ministerial involvement in vital statistics and greater public recognition of the director's position. If the Conference agrees, it follows that these sections may require review. The question really boils down to whether the legislation should follow the British pattern which creates greater public recognition by styling the officers as registrars against the less prestigous title of directors.

V. *Issuance of Certificates and Copies (section 30)*

(a) Certificates

There are individual subsections of section 30 of the Uniform Act dealing with the content of birth certificates (subsection (1)), marriage certificates (subsection (3)) and death certificates (subsections (5) and (6)). It will be seen that there is considerable duplication of drafting in these subsections. For birth certificates 6 items may be included. For marriage certificates 5 items are permitted. For death certificates no specific number—the contents may be prescribed, but with limitations on disclosure of cause of death.

Five provinces currently have uniform provisions. We are inclined to recommend that the matters to be included in certificates should be prescribed in all cases. If this were done subsections (1), (3) and (5) could be combined. It is for consideration whether the policy in subsection (6) be retained in whole or in part. The limitation in showing the cause of death in a death certificate may be considered out of date and we tend to recommend removal of subsection (6); or at least a considerable relaxation of its strictness.

On the question of who is entitled to receive a certificate of birth,

marriage and death, the Uniform Act confers the power of control on the Registrar, subject to being satisfied on legality and propriety of purpose. Most provinces have the uniform provision. Newfoundland confers a right on the person registering the birth to get a certificate. We do not see any need for the Newfoundland provision, because by normal application of the uniform provision, such person would qualify for a certificate in any event. British Columbia has introduced limitation on possible recipients of birth and marriage certificates. The prime reason for any control, particularly on issuance of birth certificates is to police against fraud. We see no real need to impose controls which are additional to the wide scope given to Directors—satisfaction that the certificate is not to be used for an unlawful or improper purpose—and we are inclined to recommend retention of the policy in the Uniform Act.

(b) Photocopies or Prints

The Uniform Act imposes restrictions on who may get copies. In the case of death registration only the Minister or the Court can authorize release of a copy. Alberta has extended the right to the next of kin. Newfoundland and New Brunswick have no provision and obviously rely on administrative discretion, which may be a desirable solution. In the case of a marriage or birth there is greater relaxation in the sense that in addition to the Minister or Court, parties to a marriage or if needed for adoption or by a Crown officer, the appropriate copy will be supplied.

These are public records and in considering whether to loosen these rigid "secrecy" provisions, we consider that regard must be had to the following:

1. Current thoughts on freedom of information which would not be contrary to the public interest or the interest of the person affected by the entry;
2. Whether the Minister should ever be required to make decisions on release or whether the power should rest with the Director (or Registrar); and
3. The desire of persons to trace their lineage. In this connection we strongly recommend that after a period, all records should be freely photocopied for release, because beyond this period secrecy achieves nothing. A suggested period is 100 years.

We tend towards a recommendation which loosens the strictness of the existing Uniform Act. This might be achieved by having greater faith in the Director and delegating decision making power to him.

VI. *General*

To a large extent the remaining sections of the Uniform Act (31 to 46) are necessary for the successful operation of the Act. Re-drafting and consequential change will be necessary throughout to accord with policy determined on the main issues. For example, if the recommendation against registering divorces is accepted, references to dissolution of marriage will disappear. We list below outstanding issues which we identify for policy decision:

1. In section 29 (Searches) we foresee conflict with provincial legislation on adoption;
2. We introduce a new issue for consideration—Birth/Death linkage. Impersonation for the purpose of obtaining a birth certificate is on the increase. Impersonators frequently apply for certificates of persons who are dead. Interprovincial movement of people creates a vacuum in the record. We recommend a provision either specifically or by enabling legislation which enables provinces to keep track of birth registrations. This would involve interprovincial exchange of death registrations where the birth is recorded in another province;
3. We see no legislative need for section 37(2) and recommend repeal;
4. In section 39(b), we recommend that annotations should be signed and not initialled;
5. Section 32(2) conflicts with *Uniform Child Status Act* and should be repealed;
6. Offences and penalties to be reviewed;
7. Regulation making powers to be reviewed in the light of policy intent; and
8. In section 45 we do not believe that the Attorney General or Minister of Justice of a province should have to obtain a consent to prosecution from the Director.

This closes our report and we await policy direction from the Conference.

George B. Macaulay

for Commissioners of British Columbia

Gérard Bertrand

for Commissioners of Canada

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	Rev. '83
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	

TABLE I

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.

Custody Jurisdiction and Enforcement Act—Enacted by Man.* ('83). Total: 1.

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—Enacted by 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—Enacted by 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—Enacted by Nfld.° ('82). Total: 1.

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—Enacted by N.B. ('76). Total: 1.

Occupiers' Liability Act—Enacted by 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—Enacted by Man. ('77); Ont.° ('67); Sask.° ('79); Yukon° ('81). Total: 4.

Powers of Attorney Act—Enacted by B.C* ('79); Man.° ('79); Ont.° ('79); Sask. ('83). Total: 4.

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, '83); N.B. ('51, '81); Nfld.* ('51, '61); N.W.T.° ('51); N.S.* ('49, '83); Ont.° (48, '59); P.E.I.° ('51, '83); Que. ('52); Sask. ('68, '81, '83); Yukon ('81). Total: 12.

Regulations Act—Enacted by Alta.° ('57); B.C. ('83); Can.° ('50); Man.° ('45); N.B. ('62), Nfld. ('56); N.W.T.° ('73); Ont.° ('44); Sask.° ('63, '82); Yukon° ('68). Total: 10.

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—Enacted by 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, '83); 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; Regulations Act ('83); 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); Custody Jurisdiction and Enforcement Act ('83); 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, '83); 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, '83); 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); Hotelkeepers Act ('82); 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, '83); 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, '83); 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); Powers of Attorney Act ('83); Proceedings Against the Crown Act° ('52); Reciprocal Enforcement of Judgments Act ('24, '25); Reciprocal Enforcement of Maintenance Orders Act ('68, '81, '83); Regulations Act° ('63, '82); 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.

PART I

CONFERENCE: GENERAL

PART II

LEGISLATIVE DRAFTING SECTION

PART III

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CRIMINAL LAW SECTION

Subjects considered each year are listed in the minutes of the year and published in the Proceedings of that year.

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