UNIFORM LAW CONFERENCE OF CANADA

CONFERENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

PROCEEDINGS
OF THE
SIXTY-NINTH ANNUAL MEETING

HELD AT

VICTORIA, BRITISH COLUMBIA

August, 1987

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PAST PRESIDENTS

SIR JAMES AIKINS, K.C., Winnipeg (five terms)	1918-1923
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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
SERGE KUJAWA, Q.C., Regina	1983-1984

GÉRARD BERTRAND, c.r., Ottawa 1984-1985
GRAHAM D. WALKER, Q.C., Halifax 1985-1987

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1987 Annual Meeting

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

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

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1987 Annual Meeting

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Minister of Justice and Attorney General of Quebec: HON. HERBERT MARX
Minister of Justice and Attorney General for Saskatchewan: HON. BOB ANDREW
Minister of Justice of the Yukon: HON. ROGER KIMMERLY

HISTORICAL NOTE

More than sixty-seven 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.
1984. Aug. 18-24, Calgary.
1985. Aug. 9-16, Halifax.
1986. Aug. 8-15, Winnipeg.
1987. Aug. 8-14, Victoria.

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, representa-

tion 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 Director, and, among the members of the *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.

The most concrete example of sustained collaboration between the American and Canadian conferences is the Transboundary Pollution Reciprocal Access Act. This Act was drafted by a joint American-Canadian Committee and recommended by both Conferences in 1982. That was the first time that we have joined in this sort of bilateral lawmaking.

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-seven delegates were in attendance.

Opening

The Section opened with the Chairman, Bruno Lalonde, presiding. Peter Pagano was elected to act as Vice-Chairman and Merrilee Rasmussen acted as Secretary. Hours of sitting were set at 9:30 a.m. to 12:30 p.m. and 2:00 p.m. to 5:00 p.m. on Saturday and Sunday, August 8th and 9th and an agenda was adopted.

Recording of Deliberations

It was agreed that the Conference Secretariat proceed with recording the deliberations of the meeting for the internal use of the Conference only.

Adoption of Minutes

The Minutes of the 1986 meeting of the Section were adopted subject to the following correction:

> The first line of the item headed *"Non-sexist Drafting"* appearing on page 26 of the 1986 Proceedings should have referred to the paper prepared by Don Revell, Cornelia Schuh and Michel Moisan.

Nominating Committee

Graham Walker was appointed as chairman of the Nominating Committee and was authorized to add other members to the Committee.

Uniform Mental Health Act

> RESOLVED that the draft Uniform Mental Health Act be accepted and referred to the Uniform Law Section for adoption.

Uniform Change of Name Act

> RESOLVED that the draft Uniform Change of Name Act be accepted and referred to the Uniform Law Section for adoption.

Uniform Conflict of Laws and Rules for Trusts Act

> RESOLVED that the draft Uniform Conflict of Laws and Rules for Trusts Act be accepted and referred to the Uniform Law Section for adoption.

Procedure

The Section discussed its internal procedures and its relationship with the Uniform Law Section. It was suggested that the annual meeting of

the Section would be best utilized if it were devoted to issues of general interest handled in an informal manner as well as by more formal presentations of papers by section members.

RESOLVED that the drafting of Acts by the Drafting Section be dealt with as much as possible outside the annual meetings and that only drafting issues that cannot be resolved in this manner be brought before the annual meeting for discussion; and

that any draft Act recommended to the Uniform Section for adoption as a Uniform Act must be formally approved by resolution of the Drafting Section.

Bilingual Drafting Conventions

RESOLVED that a committee be established to review the drafting conventions of the Conference, to prepare in French and English drafting conventions and to report to the 1988 Annual Meeting, and that the Committee be chaired by an Ontario delegate.

Miscellaneous Matters

The Section discussed a number of matters of general interest to delegates. Topics covered included the following:

— Money Bills
— Legislative review procedure
— French drafting course at the University of Ottawa
— Reciprocal exchange of statutes
— French version of *Constitution Acts*
— House amendments review procedure
— Commonwealth Association of Legislative Counsel
— Uniform Wills Act amendment relating to substantial compliance

Officers

The Nominating Committee reported that for 1987-88 the following persons be elected to the offices indicated:

Merrilee Rasmussen - Chairman
Peter Pagano - Vice-chairman
Jean Allaire - Secretary

RESOLVED that the thanks of the Section be extended to the outgoing executive for all the work they have done for the Section and, in particular, to the outgoing Chairman, Bruno Lalonde.

Close

There being no further business, on 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 9, in the Harbour Towers Hotel, in Victoria with Graham Walker in the chair and Mel Hoyt as secretary.

Address of Welcome

The President extended a warm welcome to all those delegates in attendance. He also announced that the Conference is planned to go until Friday, August 14, or depending on the Chairman of a section, perhaps the following day, Saturday.

National Conference of Commissioners on Uniform State Laws

The President of the National Conference of Commissioners on Uniform State Laws, Mr. Michael P. Sullivan and his wife, Marilyn, were introduced to the Conference. Mr. Sullivan is a practicing attorney from Minneapolis, Minnesota.

Introduction of the Executive

Each officer identified himself and named the office he fulfills on the Conference.

Introduction of Delegates

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

President's Report

The President brought it to our attention that the annual assessment has been increased to take care of our financial straits. He urged each jurisdiction to make sure that the assessment for the Conference is paid as soon as possible.

The President reported that he had just spent ten days with the National Conference of Commissioners on Uniform State Laws which was a most instructive session. Some of the items considered by that group are items we are also considering; for example, that Conference adopted an Anatomical Gift Act and one of our items is the Human Tissue Gift Act so there is a benefit to us from our President attending that Conference.

As a result of negotiations that started about two years ago, the National Conference of Commissioners on Uniform State Laws has established an executive committee to work with the Uniform Law Conference of Canada to create a greater liaison with the two Conferences and to deal with current problems between the two countries. We hope that group will also have some success.

Auditor's Report

The President presented the Auditor's Report regarding a statement of Receipts and Disbursements and Cash Position as of June 30, 1987.

RESOLVED that the Auditors' Report, Appendix A, page 91 be approved.

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.

Appointment of Resolutions Committee

RESOLVED that a Resolutions Committee be constituted, composed of Rod Rath as Chairman, Elaine Doleman and Donald Revell, whose report will be presented at the Closing Plenary Session.

Appointment of 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 present shall be Chairman.

Future Meetings

The meeting next year is scheduled for Ontario at the King Edward Hotel in Toronto from August 4 to 12.

The 1989 meeting is scheduled for Yellowknife.

The 1990 meeting is scheduled for New Brunswick.

Obituary

The President brought our attention to the death of Mr. Gerald S. Rutherford, Q.C. of Winnipeg, who was a long time member of the Conference and President from 1952 to 1953.

RESOLVED that an appropriate letter be sent to the members of his family.

Events of the Week

Ms. Claire Reilly gave us a run of events for the week.

Adjournment

There being no further business, the meeting adjourned at 9 p.m. to meet again in the Closing Plenary Session on Friday, August 14th.

UNIFORM LAW SECTION

MINUTES

Attendance

Sixty delegates were in attendance. For details see list of delegates, page 6.

Sessions

The Section held ten sessions, two each day from Monday to Friday, August 10-14, 1987.

Distinguished Visitor

The Section was honoured by the participation of Mr. Michael P. Sullivan, President of the National Conference of Commissioners on Uniform State Laws and also by Mr. Stephen Herne, principal legal officer in the Executive and Policy Division of the Department of Law, Northern Territory of Australia.

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 Georgina Jackson as Chairman and Mel Hoyt as Secretary.

Hours of Sitting

RESOLVED that the Section sit from 8:30 a.m. to 12:30 p.m. and from 2 p.m. to 5:30 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.

Change of Name

The Saskatchewan and Ontario Commissioners presented a report and draft Act on Change of Name.

RESOLVED that the Saskatchewan and Ontario Commissioner's Report on Change of Name be received and printed in the Proceedings and that the revised draft Act with commentaries as set out in Appendix B, page 94 be circulated and if the Act is not disapproved by two or more jurisdictions on or before November 30, 1987 by notice to the Executive Director, it be adopted by the Conference as a Uniform Act and recommended for enactment in that form.

Note: No disapprovals were received.

Class Actions

The matter was referred to the Ontario Commissioners for a report in 1988.

Custody Jurisdiction and Enforcement (Interprovincial Child Abduction)

The Ontario Commissioners gave a report on Custody Jurisdiction and Enforcement (Interprovincial Child Abduction).

RESOLVED that the matter be referred back to Quebec and Ontario for the preparation of a report and draft Act with commentaries to be forwarded to the Executive Director before December 31, 1987 for distribution to delegates next year.

Defamation

The Saskatchewan Commissioners presented a Report on Defamation as set out in Appendix C, page 113.

RESOLVED that the Saskatchewan Commissioner's Report on Defamation be received and printed in the Proceedings and that the matter be referred back to the Saskatchewan Commissioners for the preparation of a draft Act and commentaries which draft and commentaries are to be forwarded to the Drafting Section.

Extra-Provincial Child Welfare Guardianship and Adoption Orders

The matter was referred to the Alberta Commissioners for a report in 1988.

Financial Exploitation of Crime

The matter was referred back to the Nova Scotia Commissioners for a report in 1988.

French Version of the Consolidation of Uniform Acts

The New Brunswick Commissioners gave a report on the French Version of the Consolidation of Uniform Acts.

RESOLVED that the Permanent Editing Committee be chaired by a delegate from New Brunswick for the year 1987-88.

Human Tissue Act

The Alberta Commissioners presented a report on the Human Tissue Act as set out in Appendix D, page 199.

RESOLVED that the Alberta Commissioner's Report be received and printed in the Proceedings.

RESOLVED further

1. that the Alberta Commissioners continue to have charge of the project;

2. that in doing the project, the Alberta Commissioners consult as broadly as possible, preferably by having meetings with those jurisdictions that wish to participate;

3. that the meetings be held in Ottawa, Toronto or Montreal;

4. that the Uniform Law Section request the Executive to provide funding from the Research Fund for the Alberta Commissioners to perform the task we have asked them to perform and that includes travel expenses for one Alberta Commissioner.

International Trusts Act

The Alberta Commissioners presented a report and draft Act on the International Trusts Act.

RESOLVED that the revised draft Act with commentaries as set out in Appendix E, page 251 be circulated and if the Act is not disapproved by two or more jurisdictions on or before November 30, 1987, by notice to the Executive Director, it be adopted by the Conference as a Uniform Act and recommended for enactment in that form.

Note: No disapprovals were received.

Matrimonial Property - Conflict of Laws Rules in Relation to

The matter was referred back to the Quebec Commissioners for a report in 1988.

Mental Health

A Report of the Committee on Mental Health was presented by the Chairman, Arthur N. Stone, and the draft Uniform Mental Health Act was discussed clause by clause.

RESOLVED that the Report of the Committee on Mental Health be received and printed in the Proceedings and that the revised draft Mental Health Act as set out in Appendix F, page 262 be adopted by the Conference as a Uniform Act and recommended for enactment in that form.

Note: The French Version was not available at press time on November 30. It will be printed in later Proceedings.

Private International Law

The Federal Commissioners presented a Report on Private International Law as set out in Appendix G, page 311.

RESOLVED that the Federal Commissioner's Report on Private International Law be received and printed in the Proceedings.

Protection of Privacy: Tort

The matter was referred back to the Saskatchewan Commissioners for a report in 1988.

Sale of Goods Act

The matter was referred to the Saskatchewan Commissioners for a report in 1988.

Steering Committee's Report

The Chairman presented the Steering Committee's Report as set out in Appendix H, page 314.

RESOLVED that the Steering Committee's Report be received and printed in the Proceedings.

Time Sharing

This matter was withdrawn from the agenda.

Trade Secrets

The Alberta Commissioners presented a report and draft Act on Trade Secrets.

RESOLVED that the Alberta Commissioner's Report on Trade Secrets be received and printed in the Proceedings (see also a report entitled "Trade Secrets" issued by the Alberta Institute of Law Research and Reform and a federal/provincial Working Party) and that the revised draft Act with commentaries as set out in Appendix I, page 318 be circulated and if the Act is not disapproved of by two or more jurisdictions on or before January 31, 1988, by notice to the Executive Director, it be adopted by the Conference as a Uniform Act and recommended for enactment in that form.

Note: The revised Act was not available at press time on November 30. It will be printed in later Proceedings.

Trusts – Conflict of Laws Relating To

The New Brunswick Commissioners presented a Report concerning the Draft Uniform Conflict of Laws Rules for Trusts Act.

RESOLVED that the New Brunswick Commissioner's Report concerning the Draft Uniform Conflict of Laws Rules for Trusts Act be received and printed in the Proceedings together with the Concordance with Convention, and that the revised draft Act with commentaries as set out in Appendix J, page 326, be circulated and if the Act is not disapproved by two or more jurisdictions on or before November 30, 1987, by notice to the Executive Director, it be adopted by the Conference as a Uniform Act and recommended for enactment in that form.

Note: No disapprovals were received.

Wills – Substantial Compliance

The Saskatchewan Commissioners presented a report and draft amending Act on Substantial Compliance in Wills.

RESOLVED that the Saskatchewan Commissioner's Report on Substantial Compliance in Wills be received and printed in the Proceedings and that the revised draft Act as set out in Appendix K, page 353 be adopted by the Conference as a Uniform Act and recommended for enactment in that form.

Note: No disapprovals were received.

New Business

A Notice of Motion was given by the Alberta Commissioners as follows:

RESOLVED that the Rules of Procedure of the Uniform Law Section be amended by adding thereto the following section:

When a meeting of the Section is considering a draft Uniform Act for final adoption, any amendment of the substantive provisions thereof may be made only after the Committee presenting the draft has been given a reasonable opportunity to comment upon such amendment.

The matter was referred to the Steering Committee.

Nominating Committee's Report

Basil D. Stapleton, Q.C. was elected Chairman of the Uniform Law Section for the year 1987-88.

Close of Meeting

Special tributes were paid to the Chairman, Georgina Jackson, for her outstanding contribution to the work of the Section.

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

CRIMINAL LAW SECTION

MINUTES

Attendance

Forty-seven (47) delegates were in attendance representing all of the provinces, the Northwest Territories and the Federal Government. There were no representatives from the Yukon. For details, see list of delegates.

Opening

Mr. Howard F. Morton presided and Michael E. N. Zigayer acted as secretary. The delegates introduced themselves.

Report of the Chairman

The Criminal Law Section of the Uniform Law Conference met and deliberated from Monday, August 10, 1987 through Friday, August 14, 1987, inclusive.

Forty-six delegates sat in the Criminal Law Section. Sixty-nine resolutions were considered by the delegates, which represented a substantial increase over recent years. The debate was lively and informative.

One-half day was devoted to a panel discussion with respect to the recommendations set out in the Report of the Canadian Sentencing Commission which was recently submitted to the Minister of Justice. The panel was composed of three members of the Sentencing Commission, including the Chairman. The discussion was most informative and we were fortunate to have the members of the Commission attend our session.

One day was devoted to the consideration of proposals and working papers prepared by the Department of Justice. Included among the topics were issues with respect to Trade Secrets, Victim Surcharge Publicity with respect to search warrants, and improving the information flow from the Justice System to Correctional Facilities with respect to classification and parole.

A special resolution was unanimously passed expressing our deep regret in the untimely passing of our colleague Wayne Myskowsky, Chief Crown Prosecutor in Manitoba.

Hal Yacowar of British Columbia was elected Chairman for next year's conference in Toronto.

Closing

Mr. Hal Yacowar of the Province of British Columbia was elected Chairman of the Criminal Law Section for the 1988 Conference which is to take place in Toronto.

RESOLUTIONS

Special Resolutions

The Criminal Law Section requests the Manitoba Delegation to express our deepest sympathy to the family of Wayne Myskowsky; his untimely death is a great loss to the legal profession and criminal law reform in this country.

I - ALBERTA

Item 1(a)

That subsection 4(3) of the *Canada Evidence Act* be repealed and replaced with:

> "4(3) No spouse is compellable to disclose any communication made to that spouse by the other spouse during their marriage if at the time that the spouse is called upon to make such disclosure, the spouses are still married, and if the proceeding in which the disclosure is called upon is not a proceeding for an offence mentioned in this Section as being one in which the spouse is a competent and compellable witness without the consent of the person charged."

(DEFEATED: 3-22-4)

Item 1(b)

That section 4 of the *Canada Evidence Act* be reviewed and re-evaluated to determine whether it reflects contemporary values and whether it should be retained.

(CARRIED: 20-0-12)

Item 2

Proposed amendments to make sections 85 and 243.4 of the *Criminal Code* hybrid offences were withdrawn.

Item 3

The proposed creation of a new offence of parental failure to protect or rescue children subjected to abuse at section 197.1 of the *Criminal Code* was withdrawn.

Item 4

A proposed amendment to delete reference to recklessness in subparagraph 212(a)(ii) of the *Criminal Code* was withdrawn.

Item 5

That paragraph 241(1)(d) of the *Criminal Code* be amended to include sample of blood taken for medical purposes and seized under section 443 warrant.

Paragraph 241(1)(d) of the *Criminal Code* would read as follows:

> "In any proceeding under subsection 239(1) in respect of an offence committed under section 237 or in any proceeding under subsection 239(2) or (3), (d) where a sample of the blood of the accused has been taken pursuant to a demand made under subsection 238(3) or otherwise with the consent of the accused, or pursuant to a warrant issued under section 240, or for medical purposes relating to the health or safety of the accused, under the direction of a qualified medical practitioner, if the sample of blood is subsequently seized pursuant to any of the provisions of this Act, and if (i) . . .

(DEFEATED: 4-17-11)

Item 6

Proposed amendments to subsections 242(1) and 242(2) of the *Criminal Code* to provide that driving prohibition orders commence after the time of release from imprisonment or, absent imprisonment, from the time of conviction or discharge were withdrawn.

Item 7

That the status of the 1977 recommendation (regarding contempt of court) be reviewed and the section amended as proposed or otherwise to give the provincial court necessary powers.

(CARRIED: 21-1-5)

Item 8(a)

That there be added to section 574 of the code a subsection 574(6) reading as follows:

> "574(6) In any case
>
> (a) where a trial is declared to be a mistrial by the Trial Judge and the case is adjourned for the purposes of a new trial, or
>
> (b) where a trial verdict is overruled by an appeal court or a court of appeal and a new trial is ordered,
>
> the new trial so conducted shall be deemed to be a continuation of the proceedings leading up to and including the earlier trial, whether or not that new trial is conducted upon the same Information or Indictment as was the basis of the earlier trial."

(DEFEATED: 8-15-5)

Item 8(b)

That the Federal Government examine the decision of the Supreme Court of Canada in *Regina v. Mannion* with a view to counteracting the effect thereof.

A suggested amendment to be placed in the *Canada Evidence Act* would be as follows:

> (1) Where the accused is a witness in a proceeding, his previous testimony may be used to cross-examine the accused at another proceeding if his testimony is inconsistent in a material particular with his testimony in the previous proceeding and if the cross-examination is for the purpose of impeaching the credibility of the accused.
>
> (2) This form of cross-examination shall not be construed as "incriminating" the accused at the latter proceeding.

(CARRIED: 9-2-3)

Item 9

That it should be open to the Court to revoke an accused's suspended sentence or discharge upon proven non-compliance with probationary conditions, as well as for the subsequent conviction for a criminal offence.

The relevant sections of the *Criminal Code* would read as follows:

1. Section 664(4) - Where an accused who is bound by a Probation Order is convicted of an offence, including an offence under section 666, or has wilfully failed or refused to comply with any of the conditions of the Probation Order, and . . .

2. Section 662.1(4) - Where an accused who is bound by the conditions of a Probation Order made at a time when he was directed to be discharged under this section is convicted of an offence, including an offence under section 666, or has wilfully failed or refused to comply with any of the conditions of the Probation Order, the Court that made the Probation Order may . . .

(CARRIED: 16-2-7)

Item 10

That section 670 be repealed and section 671 be amended such that the reference to the jury recommendation (the trial judge must consider this recommendation and other items before passing sentence) be eliminated.

(CARRIED: 28-0-0)

Item 11

That section 672 of the *Criminal Code* be repealed.

(DEFEATED: 4-14-11)

II - BRITISH COLUMBIA

Item 1

That there be approval in principle for the inclusion of provisions in the *Criminal Code* dealing with intrusive video surveillance.

(CARRIED: 27-4-1)

Item 2

A proposed amendment to the *Criminal Code* making it an offence to possess or use a Police Radio Monitor (Scanner) while committing or attempting to commit an indictable offence was withdrawn after some discussion.

Item 3

(a) That section 85 of the *Criminal Code* be amended to provide that:

85. "Everyone who *without lawful excuse, the proof of which lies upon him*, carries or has in his possession a weapon or imitation thereof *under circumstances that give rise to a reasonable inference that the weapon has been used or is or was intended to be used*, for a purpose dangerous to the public peace or for the purpose of committing an offence, is guilty of an indictable offence and is liable to imprisonment for ten years."

(CARRIED: 12-11-8)

(CARRIED: 17-12-5 IN JURISDICTIONAL VOTE)

(b) a proposal to amend section 86 of the *Criminal Code* to reword it as follows was withdrawn.
"Everyone who, without lawful excuse, has a *firearm or weapon* in his possession while *in a public place* is guilty of an offence punishable on summary conviction."

(c) That section 87 of the *Criminal Code* be reworded as follows:

"Everyone who carries a weapon concealed is guilty . . ."

(DEFEATED 2-24-5)

(d) That subsection 83(1) of the *Criminal Code* be amended to expand its ambit to include knives used in the commission of an offence.

(DEFEATED: 4-19-8)

Item 4

That section 446 of the *Criminal Code* be amended to relieve police from the obligation to renew a detention order for exhibits.

(DEFEATED: 8-15-5)

III - MANITOBA

Item 1

That section 457 of the *Criminal Code* be amended by the addition of a new subsection (2.2) as follows:

(2.2) Where by this act the appearance of the accused is required for the purposes of judicial interim release, that appearance may be actual physical attendance of the accused, or may be accomplished by means of any suitable telecommunication device, including telephone, that is satisfactory to the justice on consent of prosecutor and accused.

(CARRIED: 26-3-4)

Item 2

That subsection 469(2) be reworded to read as follows:

Do you wish to say anything in answer to these charges or to any other charges which the evidence may have disclosed? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour and nothing to fear from any threat that may have been held out to you to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you at your trial notwithstanding the promise or threat.

(CARRIED AS AMENDED: 18-1-11)

Item 3

That section 762 of the *Criminal Code* be amended to require appellants to obtain leave to appeal from the provincial Courts of Appeal.

(DEFEATED: 1-13-13)

IV - NEW BRUNSWICK

Item 1

That paragraph 240(1)(a) of the *Criminal Code* be amended to alter the phrase "within the preceding two hours", to read, "within the preceding four hours".

(CARRIED: 20-1-8)

Item 2

Proposed amendments to section 281.1 of the *Criminal Code* regarding the promotion of hatred were withdrawn and replaced with the following resolution:

That the Criminal Law Section of the Uniform Law Conference record its concern with the difficulties inherent in existing section 281.1 and that we urge the Federal Government to move at an early date to render the section more readily enforceable.

(CARRIED: 21-0-6)

Item 3

That subsection 171(1) of the *Criminal Code* be amended to change "causes a disturbance" to read "causes annoyance, disturbance or discomfort in or near a public place to any person or persons."

(DEFEATED: 1-30-1)

Item 4

That subsection 9(1) of the *Canada Evidence Act* be amended to define the word "adverse" as "hostile or contrary in interest".

(CARRIED AS AMENDED: 31-0-1)

Item 5

A proposal that subsection 387(3) of the *Criminal Code* be amended to alter the phrase "the value of which exceeds one thousand dollars" to read "the value of which damage exceeds one thousand dollars" was withdrawn following a brief discussion.

V - ONTARIO

Item 1

That the *Criminal Code* be amended to contain one general provision for adjournments in all situations.

(CARRIED: 27-0-0)

Item 2

A proposed amendment to the *Criminal Code* dealing with the powers of a justice at a preliminary inquiry to adjourn the hearing from time to time was withdrawn.

Item 3

That the *Criminal Code* be amended to allow for the reflection of the realities of current sentencing practices. The sentence on the printed criminal record, therefore, could read:

- three months (two months pre-trial custody already served and taken into account); or
- suspended sentence (two months pre-trial custody taken into consideration).

(DEFEATED: 4-23-3)

Item 4

That paragraph 233(1)(a) of the *Criminal Code* be amended to delete the reference to "on a street road, highway or other public place".

(CARRIED: 27-2-3)

Item 5

That subsection 738(3) of the *Criminal Code* be amended to allow for *ex parte* proceedings, regardless of method of release (process).

(CARRIED: 24-0-1)

Item 6

That section 322 of the *Criminal Code* be amended to include beverages.

(CARRIED: 15-4-8)

Item 7

That paragraph 483(b) of the *Criminal Code* be amended to include conspiracy to commit section 483 offences within it.

(CARRIED: 25-0-2)

Item 8

That subsection 419(3) of the *Criminal Code* be amended to refer to subsections 241(6) and 241(7) rather than to subsections 237(4) and 237(5).

(CARRIED: 31-0-0)

Item 9

That section 85 of the *Criminal Code* be amended to make it a hybrid offence.

(CARRIED: 12-11-7)
(DEFEATED ON JURISDICTIONAL VOTE: 12-12-0)

Item 10

That the *Criminal Code* be amended to create a new hybrid offence to apply to those persons who use a weapon in a manner dangerous to the public peace regardless of their reason for having the weapon.

Penalty - indictable offence: 2 years
- summary conviction: as set by Code

(DEFEATED AS AMENDED: 5-18-5)

Item 11

A proposal to amend the *Criminal Code* to deal with the erroneous discharge of an accused at preliminary inquiry was withdrawn after a brief discussion.

Item 12

That section 36.1 of the *Canada Evidence Act* be amended to ensure that the provincial crown is permitted entry to *in camera* hearings regarding objections relating to international relations or national defence or security.

(CARRIED: 23-0-7)

Item 13

That subsection 443(1) of the *Criminal Code* be amended to allow for a search of premises for evidence that could assist in the investigation.

(DEFEATED: 4-28-0)

Item 14 (as redrafted)

That it be made mandatory that the sentencing judge inquire into the ability of a convicted person to pay a fine and, if the convicted person acknowledges such ability, order that a jail term in default of payment of such fine be imposed.

(CARRIED: 12-11-1)

Item 15

That subsection 178.16(1) of the *Criminal Code* be amended to remove the absolute prohibition to the admissibility of interceptions where authorizations have been quashed.

(DEFEATED: 6-11-15)

VI - QUEBEC

Item 1

That the French version of subsection 236(2) of the *Criminal Code* be amended to read as follows:

(2) preuve *prima facie*

dans les poursuites prévues au paragraphe (1), la preuve qu'un accusé a omis d'arrêter son véhicule, bateau ou aéronef, d'offrir de l'aide, *lorsqu'une personne a été blessée ou semble avoir besoin d'aide* et de donner ses noms et adresse, constitue en l'absence de toute preuve contraire, une preuve de l'intention d'échapper à toutes responsabilités civile *ou* criminelle.

(CARRIED: 30-0-0)

Item 2

That the French text of paragraphs 241(1)(d) and (e) of the *Criminal Code* be corrected to make it clear that only one analysis is to be made of each sample.

(CARRIED: 30-0-0)

Item 3

That paragraph 483(a) of the *Criminal Code* be amended by the addition of the text of an additional subparagraph (iv) to make the French and English versions consistent as follows:

(iv) *par supercherie, mensonge ou autre moyen dolosif, frustré le public ou toute personne, déterminée ou non, de quelque bien, argent ou valeur,*

(CARRIED: 30-0-0)

Item 4

That paragraph 240(1)(a) of the *Criminal Code* be amended to provide this provision applies *even where* the driver is the only person injured in the accident.

(CARRIED: 20-0-4)

Item 5

That subsection 387(3) of the *Criminal Code* be amended so that anyone who caused mischief in respect of a testamentary instrument or

where the damage is of a value more than $1,000 would commit a hybrid offence.

(CARRIED: 28-0-1)

Item 6

That section 597.1 of the *Criminal Code* be amended to provide clearly that where a judge sitting with a jury is unable to continue and where no verdict has been rendered, the trial may, at the discretion of the replacing judge, *either* be continued before the same jury without the evidence already taken being presented again *or* be commenced again before a new jury.

(CARRIED: 11-2-4)

Item 7

A proposal to create the new offence of breaking and entering a motor vehicle was withdrawn.

Item 8

That section 731 of the *Criminal Code* be amended by removing the expression "except section 545" from the English version and the expression "à l'exception de l'article 545" from the French version.

(DEFEATED: 3-15-1)

VII – SASKATCHEWAN

Item 1

That the *Criminal Code* be amended to allow a judge sentencing an accused who is already subject to an intermittent sentence, to change the earlier sentence to straight time.

(CARRIED: 17-0-0)

Item 2

That section 653 of the *Criminal Code* be amended to allow the section to apply where the witnesses cannot be located, on presentation of appropriate information to the court as to the efforts made to locate the witness (and the inability to locate the witness).

(CARRIED: 14-5-0)

Item 3

That subsection 29(2) of the *Canada Evidence Act* be amended to allow the evidence to be given by the custodian of the records or other qualified witness who has access to the records.

(CARRIED: 15-2-0 AS AMENDED)

Item 4

That subsection 82(1) be amended to remove the expression "weapon" from the definition of "Prohibited Weapon" and to replace it with "item" or "device".

(CARRIED: 8-0-10)

Item 5

That subsection 665(1) of the *Criminal Code* be amended replacing the phrase "on the application of the prosecutor" with "on the application of a probation officer".

(CARRIED: 16-0-0)

VIII - FEDERAL GOVERNMENT

Item 1

That section 98 of the *Criminal Code* be amended to include an additional subsection which would provide for the reception of hearsay evidence and be similar in effect to present paragraphs 457.3(1)(d) and 457.3(1)(e) of the *Criminal Code* .

(CARRIED: 19-1-11)

Item 2

Recognizing that an accused person has the right to have the Crown prove all of its case against him;

(a) That Part VII of the *Criminal Code* be amended to provide that a certificate be admissible to establish the *ownership* and *value* of property which has been the object of an alleged offence.

(b) That a certificate as described in (a) above would carry the same consequences as an affidavit if falsely sworn.

(c) That a reasonable notice to the other party of the intention to tender such a certificate must be given along with particulars of the certificate's contents.

(d) That the accused may with leave of the Court require the Crown to call the affiant for the purposes of testifying.

(e) That the affiant, prior to completing the certificate described in (a) above, will be advised of the contents of subsection 120(1) of the *Criminal Code*.

120.(1) Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.

(CARRIED: 27-1-2 AS AMENDED)

The delegates also discussed the Report of the Canadian Sentencing Commission with several of the Commissioners. Discussion Papers submitted by the Federal Government dealing with Trade Secrets, An Examination of the Legislative Options regarding the Victims Surcharge, the Restrictions on Publicity of Information Relating to Search Warrants (section 443.2) of the *Criminal Code* , and the Recommendations of the Coroner's Jury in the Inquest into the Death of Celia Ruygrok were also discussed. Finally, the delegates were presented with a report by the Federal Government with respect to the implementation of the resolutions adopted by the Criminal Law Section of the Uniform Law Conference from 1982 through 1986 (a copy of which is provided as Annex I to these minutes).

CRIMINAL LAW SECTION

MINUTES

ANNEX I

UNIFORM LAW CONFERENCE OF CANADA - 1982

42 delegates present
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ALBERTA	1	Sections 85, 331(1)(a) and 361 of the *Criminal Code* be amended such that they become hybrid offences.	re: s.85 18-11 (carried) re: s.331(1)(a) 22-7 (carried) re: s.361 21-9 (carried)	re: s.85 - none re: s.331(1)(a) - repealed by 1985, C.19, s.54 re: s.361 - none
FLOOR		Maximum penalty under s.361 of the *Criminal Code* be reduced from 14 years to 10 years.	15-10 (carried)	
ALBERTA	2	Section 211 of the *Criminal Code* be repealed.	13-3 (carried)	
ALBERTA	3	Maximum penalty under 2.247(2) of the *Criminal Code* be increased from 5 years to 10 years.	28-4 (carried)	resolution implemented by 1985, C.19, s.40(2) as s.247(2) of the *Criminal Code*
ALBERTA	4	Sections 294, 313, 320 and 338(1) of the *Criminal Code* be amended such that they become hybrid offences, where the amount does not exceed $1,000.	26-1 (carried)	re: 2.294 - resolution implemented by 1985, C.19, s.44(1), (2) as s.294 of the *Criminal Code*

UNIFORM LAW CONFERENCE OF CANADA - 1982

42 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
				re: s.313 - resolution implemented by 1985, C.19, s.50(1), (2) as s.313 of the *Criminal Code* re: s.320 - resolution implemented by 1985, C.19, s.53(2), (3) as s.320 of the *Criminal Code* re: s.338(1) - resolution implemented by 1985, C.19, s.55(1), (2) as s.338(1) of the *Criminal Code*
ALBERTA	4	Maximum penalty under ss.294, 313, 320 and 338(1) of the *Criminal Code*, where the Crown proceeds summarily, to coincide with the general penalty framework for summary conviction offences.	unanimous (carried)	* resolution already reflected in the *Criminal Code*
ALBERTA	5	Consolidate the duplicate election procedures of ss.464 and 484.	unanimous (carried)	resolution implemented by 1985, C.19, s.105 by repealing s.484(2), (3), (4)

UNIFORM LAW CONFERENCE OF CANADA - 1982

42 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
BRITISH COLUMBIA	5	Amend s.497 of the *Criminal Code* to read: Where two or more persons are charged with the same offence and: (a) if one or more of them, but not all, elect to be tried by a court composed of a judge and jury, the magistrate may, in his discretion, decline to record the elections of those who have not elected trial by a court composed of judge and jury. The magistrate shall then hold a preliminary inquiry, and the trial of anyone committed for trial at the conclusion of the preliminary inquiry shall be by a court composed of a judge sitting with a jury.	unanimous (carried)	modified version of resolution implemented by 1985, C.19, s.111 as s.497 of the *Criminal Code*

42 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
BRITISH COLUMBIA	5	Amend s.497 of the *Criminal Code* to provide that where two or more persons are charged with the same offence and: (b) if none of the accused elect to be tried by a court composed of a judge and jury, but one or more of the persons charged with the offence, but not all of them, elect to be tried by a judge alone, then the magistrate may, in his discretion, decline to record the election of any of the accused. The magistrate shall then hold a preliminary inquiry and the trial of any of the accused committed for trial shall be by a court composed of a judge and jury.	21-4 (carried)	modified version of resolution enacted by 1985, C.19, s.111 as s.497 of the *Criminal Code*

UNIFORM LAW CONFERENCE OF CANADA - 1982

42 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ALBERTA	6	Amend ss. 618, 620-622 of the *Criminal Code* to provide that it only be necessary to file the notice of appeal within the required time limit and that it not be necessary that leave to appeal need also be granted within that time limit.	unanimous (carried)	
ALBERTA	6	Amend ss. 618, 620-622 of the *Criminal Code* to increase the time limitation from 21 days to 45 days.	18-11 (carried)	
FLOOR	8	Amend s.244(1)(c) of the *Criminal Code* to read "he begs or without lawful excuse impedes another person" as opposed to "he accosts or impedes another person or begs" on condition that an equivalent French expression be drafted.	24-6 (carried)	

42 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
BRITISH COLUMBIA	2	Amend s.664(3)(c) of the *Criminal Code* to permit the granting of an increase, not exceeding one year, of the period for which a probation order is to remain in force.	Free vote: 15-14 Delegation vote: 17-11-2 (carried)	
BRITISH COLUMBIA	3	Amend s.594(1) of the *Criminal Code* such that it applies to summary conviction and indictable offences and repeal s.594(2).	unanimous (carried)	re: s.594(1) - resolution implemented by 1985, C.19, s.134(1) as s.594(1) of the *Criminal Code* re: s.594(2) - none
BRITISH COLUMBIA	4	Amend s.460 of the *Criminal Code* to provide that a person may be brought before the court, judge, justice or magistrate in respect of any court appearance at which his attendance is required and not just with respect to the purposes described in s.460(1)(a)-(c).	unanimous (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1982

42 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
BRITISH COLUMBIA	5	Amend s.771(1) of the *Criminal Code* to provide that either the appeal court or a judge thereof may grant leave to appeal.	19-6 (carried)	resolution implemented by 1985, C.19, s.183 as s.771(1) of the *Criminal Code*
BRITISH COLUMBIA	7	Amend the *Criminal Code* to provide that a justice acting on a preliminary inquiry has the power to amend an information during the proceedings in order that it may conform to the evidence.	18-1 (carried)	resolution implemented by 1985, C.19, s.123(1) as s.529(2) of the *Criminal Code*
NEW BRUNSWICK	1	Amend ss.234(1), 234.1(2) and 236 of the *Criminal Code* to provide that the maximum penalty is two years where the charge is proceeded with by indictment.	unanimous (carried)	modified version of resolution adopted by 1985, C.19, s.212(2) as s.239(1)(b) of the *Criminal Code* - maximum penalty stipulated is 5 years
NEW BRUNSWICK	1	Provide that the maximum penalty under ss.234(1), 234.1(2) and 236 be 6 months imprisonment and/or a fine of $2,000 where the Crown has elected to proceed summarily.	22-3 (carried)	resolution implemented by 1985, C.19, s.212(2) as s.239(1)(c) of the *Criminal Code* (imposing the 6 months imprisonment) and by 1985 C.19, s.170(1) as s.722(1) of the *Criminal Code* (imposing the $2,000 fine)

UNIFORM LAW CONFERENCE OF CANADA - 1982

42 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
NEW BRUNSWICK	1	Amend ss. 234(1), 234.1(2) and 236 to stipulate that a court cannot consider convictions occurring more than five years prior to the date of the present offence.	24-7 (carried)	
NEW BRUNSWICK	1	Raise the minimum fine under ss.234(1), 234.1(2) and 236 from $50 to $200.	unanimous (carried)	modified version of resolution adopted by 1985, C.19, s.212(2) as s.239(1)(a)(i) of the *Criminal Code* (fine imposed is $300)
NEW BRUNSWICK	1	Raise the minimum imprisonment term under ss.234(1), 234.1(2) and 236 from 14 days to 21 days, upon proof of one prior conviction.	19-6 (carried)	resolution not adopted in the new amendments under 1985, C.19, s.212(2)
ONTARIO	1	To include "rental" of obscene material in s.159(2) of the *Criminal Code*.	unanimous (carried)	resolution adopted in s.159(2) of Bill C-54 (First Reading 04/05/87)
ONTARIO	1	To include a forfeiture clause in s.159 of the *Criminal Code* upon a finding of guilt or conviction.	19-3 (carried)	modification of the resolution contained in ss.160(2), (4) of Bill C-54 (First Reading 04/05/87)

UNIFORM LAW CONFERENCE OF CANADA - 1982

42 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ONTARIO	2	ss.646(10) and 722(9) of the *Criminal Code* to be repealed or amended to provide the courts with a discretionary remedy to bring the offender back before the court in order to determine his ability to pay.	unanimous (carried)	re: s.646(10) - variation of resolution enacted as s.646.1 of the *Criminal Code* by 1985, C.19, s.155 re: s.722(9) - resolution adopted in that the section has been repealed by 1985, C.19, s.170(2)
ONTARIO	2	Amend s.610 of the *Criminal Code* to confer in the Court of Appeal the express power to amend or dismiss an indictment or information.	26-1 (carried)	resolution adopted by 1985. C.19, s.142(1) as s.610(g) of the *Criminal Code*
ONTARIO	2	Amend s.331(1) of the *Criminal Code* to make all threats to cause death, injury or to burn or destroy property belonging to any person, irrespective of the means employed, an offence.	17-9 (carried)	resolution adopted by 1985, C.19, s.39 by repealing s.331 and enacting s.243.4
ONTARIO	5	Allow provincial court judges to hear *ex parte* applications described in s.101(4) in the same circumstances as a summary conviction court may proceed in the absence of the accused, pursuant to Part XXIV.	unanimous (carried)	resolution adopted under s.17(2) of the Criminal Law Amendment Act, 1983

UNIFORM LAW CONFERENCE OF CANADA - 1982

42 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ONTARIO	7	Amend s.627(2) of the *Criminal Code* to empower a magistrate to issue a subpoena to compel the attendance of witnesses who are not within the province in which the case is to be tried.	unanimous (carried)	
ONTARIO	10	Amend the *Criminal Code* to restrict public access to sworn informations used to obtain search warrants.	19-5 (carried)	modified version adopted by 1985, C.19, s.70 as s.443.2 of the *Criminal Code* (restriction on publicity)
ONTARIO	11	To allow a court to issue process under s.507.1 of the *Criminal Code* to require the accused to attend to his trial, irrespective of whether the court is a trial court ready to proceed with the trial of the accused.	unanimous (carried)	resolution adopted by 1985, C.19, s.116 as s.507.1(1)
ONTARIO	12	To include in s.106 of the *Criminal Code* the production, for inspection, of the permit or certificate of the restricted weapon and the weapon upon demand by a peace officer.	Free vote: 12-12 (defeated) Delegation vote: 16-14 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1982

42 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ONTARIO	7	Amend s.627(2) of the *Criminal Code* to empower a magistrate to issue a subpoena to compel the attendance of witnesses who are not within the province in which the case is to be tried.	unanimous (carried)	
ONTARIO	10	Amend the *Criminal Code* to restrict public access to sworn informations used to obtain search warrants.	19-5 (carried)	modified version adopted by 1985, C.19, s.70 as s.443.2 of the *Criminal Code* (restriction on publicity)
ONTARIO	11	To allow a court to issue process under s.507.1 of the *Criminal Code* to require the accused to attend to his trial, irrespective of whether the court is a trial court ready to proceed with the trial of the accused.	unanimous (carried)	resolution adopted by 1985, C.19, s.116 as s.507.1(1)
ONTARIO	12	To include in s.106 of the *Criminal Code* the production, for inspection, of the permit or certificate of the restricted weapon and the weapon upon demand by a peace officer.	Free vote: 12-12 (defeated) Delegation vote: 16-14 (carried)	

42 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ONTARIO	13	To increase the maximum punishment under s.423(1)(a) of the *Criminal Code* from 14 years to life imprisonment.	unanimous (carried)	resolution adopted by 1985, C.19, s.62(1) as section 423(1)(a) of the *Criminal Code*
ONTARIO	14	Amend the *Criminal Code* to extend jurisdiction of the courts, to try persons for counselling in Canada crimes to be committed abroad and for counselling abroad crimes to be committed in Canada.	19-2 (carried)	resolutions implemented by 1985, C.19, s.62(4) as ss.423(3) and (4) of the *Criminal Code*
QUEBEC	1	To delete the phrase "and who wilfully fails or refuses to comply with that order" in s.666(1) of the *Criminal Code* and replace it with "and who fails or refuses, without lawful excuse, the proof of which lies upon him, to comply with that order."	17-2 (carried)	
QUEBEC	2	Amend s.483 of the *Criminal Code* to include all of the offences listed in s.133 of the *Criminal Code*.	16-1 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1982

42 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
QUEBEC	4	Repeal s.623(2) of the *Criminal Code*.	unanimous (carried)	
NEW BRUNSWICK		Amendments pertaining to blood sample acquisition in relation to impaired driving offences.	14-10 (carried)	resolution implemented, in part, by 1985, C.19, s.36 as s.238 of the *Criminal Code*

UNIFORM LAW CONFERENCE OF CANADA - 1983

43 delegates present
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ALBERTA	1	Amend s.453.3(4) of the *Criminal Code* to provide that the lack of signature will not invalidate the appearance notice, promise to appear or recognizance.	28-1 (carried)	resolution implemented by 1985, C.19, s.77(3) as s.453.3(4) of the *Criminal Code*
ALBERTA	5	Amend s.178.1 of the *Criminal Code* to include in the definition of "offence" those described in s.305.1 of the *Criminal Code.*	29-0 (carried)	resolution implemented by 1985, C.19, s.7(2) as s.178.1(c) of the *Criminal Code*
FLOOR	5	Amend s.178.1 of the *Criminal Code* to include in the definition of "offence" those described in s.305.1 of the *Criminal Code.*	22-6 (carried)	resolution implemented by 1985, C.19, s. 7(2) as s.178.1(c) of the *Criminal Code*
ALBERTA	6	To provide a defence under s.178.18(2) of the *Criminal Code* for those who are assisting police officers.	26-1 (carried)	resolution implemented by 1985, C.19, s.26 as s.178.18(2)(b.1) of the *Criminal Code*
ALBERTA	7	Section 317 of the *Criminal Code* to apply in respect of property obtained by fraud and theft.	21-2 (carried)	resolution implemented by 1985, C.19, s.52 as s.317(1) of the *Criminal Code*

UNIFORM LAW CONFERENCE OF CANADA - 1983

43 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ALBERTA	8	Amendments be made to Part IV.1 of the *Criminal Code* to ensure that police interception of communications be for the purpose of gathering information to be later converted into an authorized interception under ss.178.12 or 178.15 of the *Criminal Code.*	16-0 (carried)	
ALBERTA	10	Allow for the conversion of a preliminary inquiry into a trial on consent by both parties.	25-3 (carried)	
BRITISH COLUMBIA	1	Amend the *Criminal Code* to provide that in British Columbia an appeal on stated case in Part XXIV be heard in the first instance by a Supreme Court Judge, with a further appeal to the Court of Appeal.	6-4 (carried)	refer to the newly re-enacted ss.761-770 of the *Criminal Code*

UNIFORM LAW CONFERENCE OF CANADA - 1983

43 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
MANITOBA	1	Section 244(3) of the *Criminal Code* to provide that a consent obtained by the exploitation of the mental capacity of the complainant be invalid.	14-1 (carried)	
MANITOBA	2	Section 153 of the *Criminal Code* be amended to read "step-child, foster child or ward" and penalty imposed be increased from two years imprisonment to ten years.	20-10 (carried)	
MANITOBA	3	Clarify s.576.2 of the *Criminal Code* concerning jury discussions.	10-5 (carried)	
MANITOBA	4	Expand s.576 of the *Criminal Code* to include the offence of soliciting information relating to proceedings of the jury conducted outside the court room.	16-8 (carried)	
NEW BRUNSWICK	1	Amend s.457.3(1)(b) of the *Criminal Code* to permit the accused to waive this protection and to testify.	11-8 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1983

43 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
NEW BRUNSWICK	5	To revise the definition of "joy riding" under s.295 of the *Criminal Code* and to deem it an included offence of theft.	19-5 (carried)	
ONTARIO	1	Amend s.605(1)(a) of the *Criminal Code* to provide that an acquittal include any order made at trial in the nature of an order staying proceedings or quashing an indictment.	26-0 (carried)	resolution implemented by 1985, C.19, s.137(1) as ss.605(1)(b), (c) of the *Criminal Code*
ONTARIO	5	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".	19-11 (carried)	
ONTARIO	7	To allow the trial judge to specify the place of detention under s.543 of the *Criminal Code.*	26-0 (carried)	
ONTARIO	8	To expand jurisdiction over the person under s.543 of the *Criminal Code.*	12-6 (carried)	

43 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
FLOOR	9	To repeal s.618(2)(b) of the *Criminal Code.*		
ONTARIO	10	To expand the penalties under vandalism in the *Criminal Code* to order the accused to pay to the aggrieved party an amount not exceeding $1,000.	18-12 (carried)	None. There is the *Crime Victims Assistance Act* pending, however, contained in Bill C-233. (has had one reading before the House in October, 1986.)
ONTARIO	11	Amend the *Prisons and Reformatories Act* to permit provinces to prescribe reasonable user fees and charges from inmates serving intermittent sentences in order to record costs.	15-9 (carried)	
QUEBEC	1	Amend s.666 of the *Criminal Code* such that it becomes a hybrid offence within the absolute jurisdiction of a magistrate under s.483 of the *Criminal Code.*	21-0 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1983

43 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
QUÉBEC	2	Amend ss.237, 592, 740 of the *Criminal Code*, s.9 *Narcotic Control Act*, and s.30 *Food and Drugs Act* to allow proof of service to be proven orally or by affidavit, similar to ss.453.3(5) and 455.5(3) of the *Criminal Code.*	22-0 (carried)	re: ss.237, 592, 740 of the *Criminal Code* – no implementation re: s.30 *Food and Drugs Act* – resolution adopted by 1985, C.19, s.193 as s.30(4) *Food and Drugs Act* re: s.9 *Narcotic Control Act* – resolution adopted by 1985, C.19, s.199 as s.9(4) *Narcotic Control Act*

UNIFORM LAW CONFERENCE OF CANADA - 1984

39 delegates present
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ALBERTA	1	Amend s.615(2) of the *Criminal Code* to provide that an accused not be present at the hearing of an appeal or leave to appeal unless the Court of Appeal or Judge thereof grants leave to be present where the accused is represented by counsel and is in custody.	15-12-1 (carried)	
ALBERTA	2	Amend the *Criminal Code* provisions with reference to witnesses refusing to testify to provide a clear and effective mode of procedure to deal with such situations. Further to repeal s.472 of the *Criminal Code.*	19-0-6 (carried)	
ALBERTA	4	That a provision be adopted in the *Criminal Code* similar to s.57 of the *Young Offenders Act* to facilitate proof of age or parentage when it is in issue.	24-3-4 (carried)	
BRITISH COLUMBIA	1	Amend s.629(1) of the *Criminal Code* to provide that a subpoena can be served by anyone qualified within the province to serve civil process.	31-0-0 (carried)	

39 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
BRITISH COLUMBIA	3	That standard forms for the technician's and analyst's certificate be prescribed in the *Criminal Code* (re: ss.237(1)(f) and 237(1)(d) and (e)).	24-0-0 (carried)	
BRITISH COLUMBIA	4	Amend the *Criminal Code* to allow to order any minimum time to be served before parole eligibility on a life sentence be extended by that portion of a latter sentence that would be required to be served before consideration for parole if the latter sentence were the sole sentence to which the person was subject.	20-6-0 (carried)	
MANITOBA	1	Amend the *Criminal Code* to provide a provision to empower a court to remand a person, arrested and charged with an offence, for a psychiatric examination concerning his fitness to instruct counsel and elect his mode of trial and enter a plea.	21-6-2 (carried)	*Criminal Code* contains such provision already under s.465(c)

UNIFORM LAW CONFERENCE OF CANADA - 1984

39 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
NEW BRUNSWICK	1	Amend *Narcotic Control Act* to provide that the offences of trafficking and possession for the purpose of trafficking become hybrid offences (with an appropriate reduction in maximum penalty for summary conviction offences).	26-0-5 (carried)	
ONTARIO	2	Amend s.222 of the *Criminal Code* to provide that an intention to use bodily harm that one knows is likely to cause death, and being reckless whether death ensues or not, is sufficient to support a conviction.	18-6-5 (carried)	
ONTARIO	3	Amend the *Criminal Code* under Part IV.I to permit electronic surveillance anywhere in Canada, subject to the consent of the host province's Attorney General.	21-8-1 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1984

39 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ONTARIO	4	Amend the *Criminal Code* to provide that the trial judge, with consent of all parties, has jurisdiction to try in a single trial several informations or indictments against one or more accused persons.	30-0-0 (carried)	
QUEBEC	1	Amend s.88 of the *Criminal Code* to create an offence where a legal weapon is transformed into an illegal weapon.	13-0-9 (carried)	
QUEBEC	1	Amend s.88 of the *Criminal Code* to provide that the penalty for such an offence be consecutive to any other penalty imposed.	9-8-7 (carried)	
QUEBEC	2	Amend s.178.2(2)(e) of the *Criminal Code* to read "peace officer or prosecutor".	18-0-6 (carried)	
QUEBEC	3	Increase the penalty under s.165(a) of the *Criminal Code* from two to five years.	14-6-4 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1984

39 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
QUEBEC	3	Amend s.498 of the *Criminal Code* to read "court composed of a judge and jury if the alleged . . . is punishable with imprisonment for more than five years or the alleged offence is an offence under s.159, 161, 162, 163 and 164 . . ?.	12-9-2 (carried)	resolution rejected in s.498 of the *Criminal Code* re-enacted by 1985, C.19, s.111.
QUEBEC	4	Sections 246.6 and 246.7 of the *Criminal Code* be amended to include references to ss.146(1) and 150 of the *Criminal Code.*	18-0-5 (carried)	resolution adopted in Bill C-15, ss.12 and 13. (Royal Assent 30-6-87)
CANADA	1	Amend s.773 of the *Criminal Code* to provide for bilingual forms in Part XXV.	19-2-6 (carried)	
CANADA	2	Allow the accused to be represented by an agent in some situations where he is charged with an indictable matter, and authorize the Court to issue a summons in order to maintain jurisdiction.	25-1-0 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1985

36 delegates present
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ALBERTA	1	Amendment to s.106.2(3) of the *Criminal Code* to simplify the procedure concerning the transport of restricted weapons within the province for purposes of display at gun shows.	20-5-3 (carried)	resolution adopted in the Criminal Law Amendment, 1983, s.22
ALBERTA	2	Amendment to ss.101(1) and (2) of the *Criminal Code* to include seizure of the firearms acquisition certificate.	25-0-4 (carried)	
ALBERTA	5	Amendment to ss.451(a), 452(1)(a), 453(1)(a) and 453.1(a) of the *Criminal Code* to broaden the range of offences for which Appearance Notices and Promises to Appear can issue.	22-0-3 (carried)	
ALBERTA	6	Delete the words "appearance notice" from s.453.3(4) of the *Criminal Code*.	19-0-2 (carried)	

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ALBERTA	7	Amendment to ss.603 and 605 of the *Criminal Code* to grant jurisdiction to the Court of Appeal to deal with a sentence imposed by summary conviction where there is an appeal of sentence for an indictable offence.	23-3-2 (carried)	
ALBERTA	8	Section 670 of the *Criminal Code* be repealed.	22-0-3 (carried)	
ALBERTA	9	Amendment to s.719(1) of the *Criminal Code* to include the phrase "if leave to appeal is granted by the Court of Appeal or judge thereof" immediately following the present section.	20-3-3 (carried)	
NEW BRUNSWICK	1	Amendment to the *Criminal Code* to provide that the defense of consent is not available on a charge of sexual assault where the accused is the natural parent, step-parent, grand-parent or foster parent of the complainant.		

UNIFORM LAW CONFERENCE OF CANADA - 1985

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
NEW BRUNSWICK	2	Amendment to the *Identification of Criminals Act* to provide for the return of fingerprints where a person has not been charged or when the charges have been withdrawn.	22-3-3 (carried)	
NEWFOUND-LAND	1	Amendment to s.705(2) of the *Criminal Code* to make provision for substituted service or that notice under ss.(1)(b) be dispensed with.	21-6-0 (carried)	
ONTARIO	2	Amendment to Form 29 as contained in Part XXV of the *Criminal Code* to provide for an endorsement of default in circumstances where a person has breached any terms in the recognizance.	18-1-5 (carried)	
ONTARIO	3	That s.305 be included in s.442(3) of the *Criminal Code*.	26-2-1 (carried)	
ONTARIO	3	That s.305.1 be included in s.442(3) of the *Criminal Code*.	14-9-3 (carried)	

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ONTARIO	4	Amendment to the definition of "prohibited weapon" in s.82(1)(c) of the *Criminal Code* to include any firearm "designed, altered or intended to fire bullets in rapid succession during one pressure of the trigger".	24-0-3 (carried)	section 82(1)(c) presently adopted this definition by incorporation by reference to the definition of restricted weapon (s.82(1))
ONTARIO	5	Amendment to s.137 of the *Criminal Code* such that it is not mandatory that the sentence for a "escape" offence be made concurrent or consecutive to the unexpired portion of the term of imprisonment being served at the time of escape.	25-0-3 (carried)	
BRITISH COLUMBIA		Amendment to s.137(1) of the *Criminal Code* to provide that any sentence imposed for escape lawful custody must be made consecutive to the unexpired portion of the sentence being served at the time of escape.	Free Vote: 13-11-4 Delegation Vote: 17-10-6 (carried)	resolution adopted in Bill C-68, s.10 as s.14(1) of the *Parole Act*; the latter having been incorporated by reference in s.137(2) of the *Criminal Code*

UNIFORM LAW CONFERENCE OF CANADA - 1985

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
QUEBEC	1	Amendment to the *Criminal Code* to cover cases of abandonment of a restricted weapon so as to implement fully the legislator's intent that restricted weapons be controlled.	25-0-1 (carried)	*Criminal Code* covers situations where a restricted weapon has been lost or mislaid (s.102(2)) but does not deal specifically with the issue of abandonment. The Bills before the House have not addressed the issue of abandonment either section 158
QUEBEC	3	Amendment to s.158(1)(b) of the *Criminal Code* to reduce the age limit from 21 years to 18.	23-0-3 (carried)	section 158 is repealed in Bill C-15, s.4 (Royal Assent 30-6-87)
QUEBEC	7	Provision be added to the *Criminal Code* so as to protect the privacy of a child or young person aggrieved by an offence or who appears as a witness in connection with an offence in criminal proceedings against adults.	Free Vote: 14-11-4 Delegation Vote: 14-12-7 (carried)	resolution adopted in Bill C-15, ss.14 and 16 (permits out-of-court testimony, restriction on publication and videotaped evidence of the witness)
QUEBEC	8	Provision in the *Criminal Code* to allow an accused to be released by a justice of a territorial division other than the one that issued the warrant, provided the Crown gives its consent.	23-0-2 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1986

36 delegates present
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ALBERTA	2	That reference in s.178.1 of the *Criminal Code* to s.243.5 should be changed to s.243.4.	29-0-0 (carried)	
ALBERTA	4	That s.243(4) of the *Criminal Code* should be amended to specify that mailing a notice of disqualification to the person's last recorded address as shown by the records of the Registrar of Motor Vehicles will suffice for the purposes of s.242.	26-0-1 (carried)	
ALBERTA	6	That s.442 of the *Criminal Code* be amended to prevent publication of the identity of a complainant aged less than 18 years.	16-4-7 (carried)	resolution adopted in Bill C-15, s.14 (received Royal Assent 30/6/87)
ALBERTA	7(a)	That the Federal Government study and examine s.446 of the *Criminal Code* in order to draft a clear practical provision relating to the reporting and detention of seized items . . .	29-0-1 (carried)	
	7(b)	with emphasis on placing the responsibility on the person from whom the item was seized to seek the return of the seized item.	15-8-4 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1986

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ALBERTA	8	That s.446(17) of the *Criminal Code* be amended to allow both parties to appeal an order for detention or release of items seized.	27-3-0 (carried)	
ALBERTA	9	Amend s.454(2.1) of the *Criminal Code* by attaching a provision to enable a justice effecting the release of an accused arrested on an out-of-province warrant to require that the accused appear in the appropriate court in the province of origin.	14-12-2 (carried)	
ALBERTA	10	That s.458(1)(b) of the *Criminal Code* be amended to delete the word "indictable".	13-11-2 (carried)	
ALBERTA	11	Amend s.592 of the *Criminal Code* with respect to the timing of the notice to be provided by the prosecutor when seeking a greater penalty, to read: "before making his guilty plea or on reasonable notice being given before his trial, as the case may be . . ."	13-11-6 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1986

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ALBERTA	12	That s.643(1) of the *Criminal Code* be amended to remove the requirement that the Court be required to sign the transcript of evidence at a previous trial or preliminary inquiry into the charge in a manner similar to the recent amendment to s.468(5).	29-0-0 (carried)	
ALBERTA	13	Amend the *Criminal Code* to provide for a provision for reviewable orders sealing search warrants and informations.	27-1-2 (carried)	
ALBERTA	15	That the applicable provincial legislation be amended to allow interprovincial waiver of provincial offences for guilty plea.	19-2-10 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1986

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
BRITISH COLUMBIA	1	That the *Criminal Code* be amended to provide that a judge in the course of sentencing may make an order prohibiting contact between a convicted accused and other persons subject to appropriate limitations, review procedures and penalties.	27-0-3 (carried)	
BRITISH COLUMBIA	2(b)	That ss.663(1)(b) and 664(2)(b) of the *Criminal Code* be amended by adding "subject to section 664.1" and that proposed s.664.1 read as follows: "Where an accused has been convicted of an offence under s.150, 157, 246.1, 246.2 or 246.3. The time limits stipulated in s.663.1(b) and 664(2)(b) do not apply".	Free Vote: 7-7-12 (defeated) Delegation Vote: 14-8-8 (carried)	
BRITISH COLUMBIA	2(c)	That s.666(1) of the *Criminal Code* be amended to create a hybrid offence.	19-0-8 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1986

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
MANITOBA	1	That the *Criminal Code* make provision for a publication ban on evidence given during a voir dire which is deemed inadmissible, prior to the expiration of time for final appeal.	22-2-1 (carried)	
NEW BRUNSWICK	2	That s.160 of the *Criminal Code* be amended so as to provide forfeiture provisions relating to video films which are the subject matter of a conviction under s.159 of the *Criminal Code.*	24-0-0 (carried)	resolution adopted by Bill C-54, s.2 (First Reading 04/05/87)
NEW BRUNSWICK	5	That s.242(1) of the *Criminal Code* be amended to clarify that an order issued thereunder is enforceable Canada-wide by the addition of the phrase "in Canada".	13-0-10 (carried)	
NEW BRUNSWICK	6	That s.243.4(1)(a) of the *Criminal Code* be amended to create a hybrid offence.	23-0-2 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1986

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
NEW BRUNSWICK	10	That the *Canada Evidence Act* be amended to provide for the admissibility of telephone company records made in the course of a police investigation.	23-1-1 (carried)	
ONTARIO	1	That Prohibited Weapons Order No. 5 be amended to include devices commonly known as "hand claws".	21-0 (carried)	
ONTARIO	2(a)	That the maximum penalty available under s.236 of the *Criminal Code* be increased to 5 years imprisonment.	21-3-1 (carried)	
ONTARIO	2(b)	That the minimum penalties identical to those provided in s.239 of the *Criminal Code* also apply with respect to s.236 convictions.	17-8-0 (carried)	
ONTARIO	4	That the *Criminal Code* be amended to allow proof by certificate of analysis where a breach of probation or recognizance is charged based on a condition prohibiting use of non-medically prescribed drugs.	24-0-2 (carried)	

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
ONTARIO	5	That where a sentencing judge is imposing a probation order as part of a sentence, he may order that any of the terms or conditions of the probation order may apply during incarceration.	16-4-2 (carried)	
ONTARIO	6	That s.3(7) of the *Criminal Code* be amended to delete the phrase "may be proved by oral evidence given under oath by" and replace it with: "may be proved viva voce".	19-0-0 (carried)	
QUEBEC	1(a)	That the definition of "court of criminal jurisdiction" at s.2 of the *Criminal Code* be amended to delete the second half of the definition, beginning at "or in the cities of . . .".	17-0-1 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1986

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
QUEBEC (CONT'D)	1(b)	That the French expression "juge de la cour provinciale" in s.2 of the *Criminal Code* be replaced by the expression "juge d'une cour provinciale".		
	1(c)	That the expression "provincial court judge" be substituted for the term "magistrate" whenever: (i) this term appeared before the 1985 amendment contained in s.206; (ii) this term still appears despite that amendment in particular in ss.9(1), 101(9), 104(6), 106.4(14), 439, 440, 484, 485, 487, 500(5), 501, 502, 700(1), 700(3), 704.		
	1(d)	That capitals be used in the names of the courts in the French and English versions of s.482(g).		re: 1(d) The necessity of this resolution has been dispensed with upon the proclamation of the 1986, C.35, s.14 amendments.

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
QUEBEC	2	That s.3(7) of the *Criminal Code* be amended to include the phrase "or delivery" immediately following the phrase "for the purposes of this Act, service . . .".	19-0-0 (carried)	
QUEBEC	3	That the word "grave" (serious) be removed from s.243.4(1) of the *Criminal Code* with respect to the bodily harm threatened.	14-5-0 (carried)	
QUEBEC	4	That the word "province" be removed from s.434(3)(b) of the *Criminal Code* and replaced by the word "place" and that the word "not" be added immediately following the phrase "his consent to plead guilty and plead . . .".	16-0-3 (carried)	
QUEBEC	7(a)	That s.453 of the *Criminal Code* be amended to make provision for the officer in charge or the peace officer, if appropriate, to impose the following conditions:	18-0-1 (carried)	

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
		(1) keep the peace and be of good behaviour; (2) report his address and not change address without prior notification to a designated police officer; (3) not contact the complainant or other designated persons directly or indirectly; (4) not frequent a given place.		
	7(b)	That provision be made under s.453 of the *Criminal Code* for a review by a justice of the district in which the release was made, at the request of the accused, on two days' notice in writing being given to the complainant.		
	7(c)	That s.133 of the *Criminal Code* be amended to include a penalty for breach of a condition imposed by a police officer.		

UNIFORM LAW CONFERENCE OF CANADA - 1986

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
QUEBEC	8	That s.457(5.1) of the *Criminal Code* be amended to include cases where the accused person has appeared on a summons or appearance notice without being released in a pending case.	14-2-1 (carried)	
QUEBEC	9(a)	That the content of form 44 of the *Criminal Code* be amended to include the wording of s.664(3).	20-0-0 (carried)	
	9(b)	That s.663(4)(c) be amended to read as follows: cause the accused to be informed of the provisions of subsections 664(3) and (4) and the provisions of section 666.		
SASKATCHEWAN	1	That s.643(3) of the *Criminal Code* be amended by inserting the words "or a preliminary hearing" after the word "trial" in the second line thereof.	21-0-1 (carried)	

UNIFORM LAW CONFERENCE OF CANADA - 1986

36 delegates present (CONT'D)
individual voting, with the right to call for a delegation vote (3 votes per delegation)

JURISDICTION	ITEM #	RESOLUTION	VOTE	STEPS TOWARD IMPLEMENTATION
SASKATCHEWAN	2	That s.445.1 of the *Criminal Code* be amended so that it clearly applies only in cases of seizure pursuant to a warrant.	15-0-6 (carried)	

CLOSING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting opened at 11:00 a.m. on Friday, August 14 with Graham Walker in the chair and Mel Hoyt as Secretary.

Legislative Drafting Section

The Chairman, Bruno Lalonde, reported on the work of the Section.

Uniform Law Section

The Chairman, Georgina Jackson, reported on the work of the Section.

Criminal Law Section

The Chairman, Howard Morton, Q.C., reported on the work of the Section.

Resolutions Committee's Report

The Chairman, Rod Rath, presented the Resolutions Committee's Report.

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

1. The Government of British Columbia, for its generous hospitality in hosting the Sixty-ninth Annual Meeting of the Uniform Law Conference of Canada and in particular:

   a) for the reception and dinner at Royal Roads on Saturday evening for the Legislative Drafting Section;

   b) for the tour of the Butchart Gardens on Monday evening;

   c) for the logging demonstration, dinner and entertainment provided by the Sooke Community Association in Sooke on Tuesday evening;

   d) for the softball game arrangements on Wednesday evening (the West was victorious, with the Conference score now standing at West 3 and East 1);

   e) for the reception and dinner on Thursday evening, and

   f) for the city bus tour, Provincial Museum tour and visit to China Beach Provincial Park provided during the week.

2. Ian Izard, Law Clerk of the Legislative Assembly of British Columbia, for his contribution to the reception and dinner at Royal Roads.

3. The Government of Canada, for hosting the reception following the Opening Plenary Session.

4. The British Columbia Conference Committee made up of Cliff Watt, Berke Maddaford, Claire Reilly and Ray Thomas, and to Linda Dudman, Mary Pottinger, John Hogg, Jan Wheeler, Lori Dudman, Mike Ford, Wendy Schwartz, Peter Wilkinson, Pamela Woroniecki and Annette Minvielle, all of whom contributed to the success of the Conference and made our visit to Victoria most enjoyable.

5. Michael P. Sullivan, the President of the National Conference of Commissioners on Uniform State Laws, for the hospitality extended to our President at the recent meeting in Newport Beach, California, and for contribution to the enhancement of relations between our conferences by honouring our Conference with the attendance of himself and his wife, Marilyn.

6. Judge Archambault, Judge Wong and Anthony Doob, members of the Canadian Sentencing Commission, for presenting to the Criminal Law Section an overview of the Commission's recent report on sentencing.

7. Gary Champagne, Francine Chrétien, Marc Laroche, Sylvie Guitard, Johanne Marquis, Raymond Mercure, Josette Duchesne, Jean-Pierre Beccat, Matthew Julian, Jacques Guthrie, Louise Petitclerc, Jean-Pierre Lessard, Chris Hudson and Perry Schmidt for the excellent interpretation, translation and other administrative support services provided to the Conference by the Canadian Intergovernmental Conference Secretariat.

National Conference of Commissioners on Uniform State Laws

The President reported that the Executive has appointed to the American Liaison Committee of the N.C.C.U.S.L. the Chairman of the Uniform Law Section, the Chairman of the Criminal Law Section and the President of this Conference. These appointments apply to the incoming officers. The President has power to add one more at his discretion.

Committee on Private International Law

The President reported that the Committee is made up of five persons, one from Ontario, one from Quebec, one from the Government of

Canada, one from the Atlantic Provinces and one from the Western Provinces. The representative from the Government of Canada, Marc Jewett, Q.C., has been replaced by Christiane Verdon. If Douglas Ewart is not available, the incoming President has been asked to contact the Deputy Attorney General in Ontario for a recommendation on his replacement.

Personal Property Security

The President reported that this Conference, along with the Canadian Bar Association, formed a joint committee to review and work on Personal Property Security. This Conference has supported that committee to date. We have a further request for assistance and that raises a question about the participation of the Canadian Bar Association which has not been supporting that committee. The Executive has asked the incoming President to contact the President of the Canadian Bar Association to determine whether that Association wishes to continue involvement with the Committee. Depending on the results of that conversation, the incoming President will bring this matter before the Executive for further consideration.

Assessments

The Executive has appointed the incoming Treasurer to be a one man committee with power to add to review the Conference's financial situation and the contributions that are made by the governments. The incoming Treasurer is to report to the Conference next year.

Adoption of Uniform Acts

In 1984, the Conference adopted a resolution that the President of the Conference send a copy of the Uniform Acts and commentaries, as they are adopted, to all Attorneys General with a letter stating that the Conference recommends their enactment.

The form and style of those Acts and commentaries raise a question. The Executive appointed Georgina Jackson and Mel Hoyt as a committee of two to look into the matter and to report back to the Executive.

Future Meetings

The President, Graham Walker, announced that future meetings of the Conference will be held as follows:

1988 - Ontario, from August 4 to 12 at the King Edward Hotel in Toronto

1989 - Northwest Territories in Yellowknife from August 5 to 11, subject to final confirmation
1990 - New Brunswick, dates to be determined

It was suggested that in fixing dates for future meetings and also in fixing the agenda for the sections, some thought should be given by the Executive as to what, if anything, might be done to avoid week-end travel. On week-ends, reservations are difficult to get and delays occur often.

Nominating Committee's Report

The following officers were elected for the year 1987-88:

Honorary President	Graham D. Walker, Q.C., Halifax
President	M. Rémi Bouchard, Sainte-Foy
1st Vice-President	Georgina R. Jackson, Regina
2nd Vice-President	Gordon F. Gregory, Q.C., Fredericton
Treasurer	Peter Pagano, Edmonton
Secretary	Daniel C. Préfontaine, c.r., Ottawa

Close of Meeting

Mr. Walker, after making his closing remarks, turned the chair over to the incoming President, Mr. Bouchard.

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

Special tributes were also paid to Gerard Bertrand, Q.C., for his six years on the Executive.

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

APPENDIX A

(See page 24)

AUDITORS' REPORT

To the Members of the
Uniform Law Conference of Canada:

We have examined the statement of receipts and disbursements and cash position of the Uniform Law Conference of Canada for the year ended June 30, 1987. 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 June 30, 1987 and the cash transactions for the year then ended, in accordance with the basis of accounting described in Note 1 to the statement applied on a basis consistent with that of the preceding year.

Saint John, Canada
July 23, 1987.

Clarkson Gordon
Chartered Accountants

UNIFORM LAW CONFERENCE OF CANADA

Statement of Receipts and Disbursements and Cash Position

Year Ended June 30, 1987

	General Fund	Research Fund	Total 1987	Total 1986
Receipts:				
Annual contributions	$46,000		$46,000	$46,000
Government of Canada		$ 5,123	5,123	1,107
Interest	3,875		3,875	4,531
	49,875	5,123	54,998	51,638
Disbursements:				
Printing	14,686		14,686	22,119
Executive Director honorarium	19,445		19,445	18,519
Secretarial services	3,168		3,168	4,234
National Conference of Commissions on Uniform State Laws	2,466		2,466	209
Executive travel	3,723		3,723	8,191
Annual meeting	5,955		5,955	3,403
Professional fees	712		712	677
Postage	826		826	734
Stationery	386		386	971
Miscellaneous	3	12	15	12
Telephone	1,920		1,920	1,200
Sale of Goods Project				125
Personal Property Security Project		250	250	996
Uncitral Law on International Commercial Arbitration Project				4,000
Mental Health Project		1,684	1,684	
	53,290	1,946	55,236	65,390
Excess (deficiency) of receipts over disbursements	(3,415)	3,177	(238)	(13,752)
Cash position, beginning of year	9,995	69,877	79,872	93,625
Cash position, end of year	$ 6,580	$73,054	$79,634	$79,873
Cash position consists of:				
Term deposits		$65,000	$65,000	$65,000
Current account	$ 6,580	8,054	14,634	14,873
	$ 6,580	$73,054	$79,634	$79,873

(See accompanying notes)

UNIFORM LAW CONFERENCE OF CANADA

Notes to the Statement of Receipts and Disbursements and Cash Position June 30, 1987

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. *Tax status*

   The Conference qualifies as a non-profit organization and is exempt from income taxes.

APPENDIX B

(See page 27)

UNIFORM CHANGE OF NAME

COMMENTARY

Most of the changes in the draft *Uniform Change of Name Act* being presented at this Conference result from decisions made at the 1985 Uniform Law Conference. However, at that time certain decisions were left to be made, some questions came up in the course of drafting and certain issues were raised while the *Uniform Vital Statistics Act* was discussed at the 1985 Conference. Thus, the following changes were made as a result of decisions made subsequent to the 1985 Conference:

1. Definitions that have been dropped are:

   (a) "application" – because it seemed unnecessary;

   (b) "change of name" – the intention is to explain the scope of the Act clearly to the reader, thus a substantive provision is added instead;

   (c) "court" – in earlier drafts "court" was defined to mean the Provincial Court of the enacting jurisdiction. However, this led to problems because it is desirable to give the court with divorce or annulment jurisdiction the power to change the name of a person after granting a divorce or annulment (subsection 15(1)). In addition, any court should have the power to order disclosure of information where the records have been sealed (subsection 18(2)) or revocation of a change of name where it was obtained by misrepresentation or for a fraudulent or unlawful purpose. The suggested solution to these difficulties presented in this draft is to remove the definition of court, specifically refer to the provincial court or court with divorce or annulment jurisdiction where appropriate (sections 7, 15, 16 and 17) and otherwise, refer to "a court" (sections 18 and 19).

   (d) "name" – the 1985 Conference decided that a substantive provision should be added which provides that the name a person adopts under this Act must include a surname and a forename and may not include initials, numbers, etc.

2. The provision requiring consent of the applicant's spouse to change of name of a child has been deleted. It is no longer needed in light of the new requirement for consent of the child's parents.

3. In the process of preparing this draft, a question arose in relation to the "parental consent" issue. It is suggested that it might be more

straightforward to provide that a person (not a "parent") with lawful custody of a child may apply to change the child's name, with the consent of everyone who also has lawful custody of the child and of everyone who has lawful access to the child. This way, no definition of "parent" would be required and the Director's task would be easier. The Minister's application would also be covered, so section 5 could be dropped. This is considered to be a new policy choice for the Uniform Law Commissioners. Thus, it is not included in the draft but is suggested as an alternative.

4. Saskatchewan's 1985 draft Act contained a provision allowing the person with custody of a child as a result of an *ad hoc* adoption to apply to the registrar for a change of the child's name. A restriction to limit a change of the child's surname to the applicant's surname and a requirement to obtain the consent of the child's parents was also included. One suggestion was made at that Conference that the section should be changed to require the applicant to be ordinarily resident and have a settled intention to treat the child as a child of his family. However, our notes also indicate that it was suggested that the provision should be removed from the Act. Thus it has been deleted. But to resolve the continuing uncertainty, we would like directions from the Conference regarding whether such a provision should remain in the Act. It should also be noted that if we remove the requirement for parental consent and refer to the person with custody (as suggested in #3) there would be no reason for this provision.

5. An unresolved issue relates to the legal effect of the change of name of a married person (section 10). The question is whether the legal effect of this "change" which does not require an application is intended to be the same as the legal effect of a change made on application? Other records would still show the old name and a person could establish two identities. In Saskatchewan this is now the case. However, if this Act is intended to apply only to the "registered name" perhaps changes under this section, like changes under sections 2 and 3, should result in registration of the change of name and annotation of the existing records. Subsections 10(2) and 12(1) have been worded accordingly.

6. The notes taken by persons from Ontario and Saskatchewan at the 1985 Conference differ with respect to the provision allowing a married person's name to be changed only once without the necessity for application. Thus, although it is included in this draft (subsection 10(3)) we have some doubt as to whether it is wanted in the Act.

7. The provision describing the effect of registration was considered by the 1985 Conference to negate the need for a provision for substitution of the new name in documents. Therefore, the latter provision has been deleted.

8. Saskatchewan's 1985 draft contained a provision duplicating section 146 of the *Uniform Evidence Act* (which states that an official certificate is *prima facie* evidence of its contents). This provision has been dropped because section 146 of the *Uniform Evidence Act* applies in any case.

   That draft also contained provisions similar to section 32 of the new *Uniform Vital Statistics Act* (which deals with the method of the Director's signature and the validity of documents). Rather than repeating that section verbatim, we have (in section 20 of the current draft) simply provided that it also applies to documents issued under the *Uniform Change of Name Act*.

9. The provision relating to appeal from the Director's decision has been reworked. This occurs as a result of reductions in the director's discretionary powers because parental consent is now required for change of a child's name. Thus, rather than any person aggrieved by a Director's decision who has a substantial interest being able to appeal to a judge, it is more appropriate to specify that a person whose application has been rejected may appeal. Where a change has been made, a person with substantial interest can make an application for revocation pursuant to section 17.

10. The provision describing the powers of the court on appeal (subsection 16(2) of this draft) was approved at the 1985 Conference. However, it is suggested that unless we intend to displace the ordinary rules of evidence by allowing the court to consider evidence that is "relevant" but would normally be excluded, we should drop the words "may consider any relevant evidence."

11. The Uniform Law Conference of Canada in August, 1986, in the context of consideration of the *Uniform Vital Statistics Act* (draft #6) raised the issue as to whether sections 10, 12 and 27 of that Act should be placed in the *Uniform Change of Name Act*. Section 10 refers to the alteration or addition of a given name by the Director upon application by both parents, the surviving parent, the guardian of the child, the person procuring the name to be changed or given or the child after he has attained the age of majority. This section should remain in the *Uniform Vital Statistics Act* because it is linked to the notion of birth registration as such. That goes for

cases where the forename shown on the birth registration is not the name the person has actually used since infancy, as well as for cases where the birth registration does not include a forename. In our opinion, this provision is not intended to deal with true name changes.

12. Section 13 of the *Uniform Vital Statistics Act* refers to changing the birth record where a change of sex has occurred. Both a person's name and his or her sex are essential components of a person's "identity". It is suggested that because the *Uniform Change of Name Act* is restricted to the subject of change of name rather than change of identity, this provision should not be included.

13. Section 10 of the new *Uniform Vital Statistics Act* deals with notation of a change of name on birth and marriage records in the province, in other provinces and, if requested by the person, in other countries. It is an expanded version of the provision in the previous *Uniform Change of Name Act* which provided for notation of a change of name on birth and marriage records in the province. Rather than similar but not the same provisions which deal with the same subject matter appearing in two different Uniform Acts, it is proposed that the provision as it exists in the *Uniform Vital Statistics Act* should be moved into the *Uniform Change of Name Act*. Our draft (11(2) and (3) and 12(2)) actually carries this proposal out. As a result, the provision respecting registration of a change of name made outside the enacting jurisdiction has also been deleted from this draft.

14. Section 4 of the most recent draft of the *Uniform Vital Statistics Act* (draft #8) provides that parents can choose any name for their children. The *Uniform Change of Name Act* was to be consistent with that Act. Therefore, in this draft it is provided (by implication) that a child's surname may be changed to any name.

15. Other new policy choices for the Commissioners relate to the following possible *Charter* issues:

    (a) The "married minor". Treating some persons under 18 differently than others only because of their marital status appears to be discriminatory. Is there sufficient justification for this discrimination? A possible safer approach may be to allow persons below 18 (or some other "standard" cut-off age such as 16 or even 12) to apply, with the consent of the persons who have custody of them. This would allow emancipated minors to apply independently. Perhaps a power to dispense with consent would also be needed.

(b) Partners who are not married to each other but wish to adopt each other's surnames may argue that section 10 discriminates against them on the grounds of marital status. Perhaps this section should be extended to persons who live together in a relationship that resembles marriage.

16. The possibility of section 96 problems was raised at the 1985 Conference. It was also decided at that Conference that parental consent to a change of a child's name should be required. Thus, the Director's discretionary powers are greatly reduced. The only decisions the Director has left are requiring additional information and documents under paragraph 8(2) and (4) or rejecting an application because he is of the opinion that it is made for the purpose of fraud or misrepresentation (subsection 9(2)). This significant reduction of the Director's discretionary powers should probably alleviate section 96 concerns.

17. Minor amendments to the *Uniform Vital Statistics Act* will be required as a result of the inclusion of section 10 (draft #8) of that Act into the *Uniform Change of Name Act*. Also, we note that the term "given name" is used in the *Uniform Vital Statistics Act* while our Act uses the term "forename" to describe the same thing. For consistency's sake, we recommend that this discrepancy be removed. In this regard, it is suggested that "forename" is a less ambiguous term.

UNIFORM CHANGE OF NAME ACT

1. In this Act, *Interpretation*

"director" means the Director of Vital Statistics appointed under the *Uniform Vital Statistics Act*;

"prescribed" means prescribed by the regulations made under this Act.

2. (1) For all purposes of (enacting jurisdiction) law, *Person's name*

(a) a person whose birth is registered in (enacting jurisdiction) is entitled to be recognized by the name appearing on the person's birth certificate or change of name certificate, unless clause (c) applies;

(b) a person whose birth is not registered in (enacting jurisdiction) is entitled to be recognized by,

(i) the name appearing on the person's change of name certificate, if the person's name has been changed under this Act or a predecessor of it, or

(ii) in all other cases, the name recognized in law in the last place with which the person had a real and substantial connection before residing in (enacting jurisdiction),

unless clause (c) applies; and

(c) a person who adopted a name on marriage before the coming into force of this Act is entitled to be recognized by that name unless the person subsequently changed that name under this Act or a predecessor of it.

(2) The name a person adopts under this Act shall include a surname and at least one given name, written in the Roman alphabet, and shall not include numbers or symbols. *What name includes*

3. (1) A person who is not in another person's lawful custody and who has ordinarily resided in (enacting jurisdiction) for at least three months immediately before making the application may apply to the director for a change of name. *Change of name*

(2) The application of a married person shall be accompanied by proof of notice of the application to the person's *Notice to spouse, etc.*

spouse, or by the applicant's affidavit that the spouses are living separate and apart from each other.

Change of name of person who is in another's custody

4. (1) If a person who is in another person's lawful custody has ordinarily resided in (enacting jurisdiction) for at least three months immediately before the application is made, the custodian may apply to the director for a change of the person's name.

Consent of others with custody or access

(2) The application shall be accompanied by the written consent of every other person who has lawful custody of the person whose name is to be changed or who is lawfully entitled to access to him or her.

Consent of person twelve or older

(3) If the application relates to the name of a person who is twelve years of age or older, it shall be accompanied by the person's written consent.

Dispensing with consent

(4) The applicant may apply to the (appropriate court of enacting jurisdiction) for an order dispensing with the consent.

Best interests of person

(5) The court shall determine an application under subsection (1) in accordance with the best interests of the person whose name is to be changed.

Form and contents of application

5. (1) An application made under section 3 or 4 shall be in the prescribed form and shall state the following, by way of statutory declaration:

1. The present and proposed names, in full, of the person whose name is to be changed.
2. The applicant's address and place of ordinary residence at the time of making the application and during the preceding three months.
3. In the case of an application under subsection 4(1), the address and place of ordinary residence of the person whose name is to be changed, at the time the application is made and during the preceding three months.
4. In the case of an application under subsection 4(1), that the applicant has lawful custody of the person, and the relationship between the applicant and the person.

5. Details with respect to any previous change of name of the person whose name is to be changed.

6. The date and place of birth of the person whose name is to be changed.

Supporting material

(2) An application shall be accompanied by the following:

1. If subsection 3(2) applies, an acknowledgment of notice, apparently signed by the applicant's spouse, an affidavit of notice to the spouse, or the applicant's affidavit that the spouses are living separate and apart from each other.

2. If subsection 4(2) or (3) applies, the written consent referred to in that subsection, or a certified copy of a court order dispensing with the consent.

3. The prescribed information and documents.

4. The additional information and documents that the director, in his or her discretion, requires the applicant to provide.

Registration of change of name

6. (1) On receiving an application together with all necessary supporting material under subsection 5(2) and the prescribed fee, the director shall register the change of name, subject to subsection (2).

Exception

(2) The director shall not register a change of name if, in his or her opinion, the application contains a misrepresentation or the change of name is sought for a fraudulent or unlawful purpose.

Certificate of change of name

7. (1) On registering a change of name under section 6, the director shall issue to the applicant a certificate of the change of name in the prescribed form.

Notice to official in other province or territory

(2) If the person whose name is changed was born or married in Canada but outside (enacting jurisdiction), the director shall send a copy of the certificate to the official responsible for the registration of births or marriages, as the case may be, in the relevant jurisdiction.

Notice to official outside Canada

(3) If the person whose name is changed was born or married outside Canada the director shall, at the person's request, send a copy of the certificate to the official respon-

sible for the registration of births or marriages, as the case may be, in the relevant jurisdiction.

Exception: surname of married person

8. (1) A married person who ordinarily resides in (enacting jurisdiction) may change his or her surname to,

(a) the spouse's current surname;

(b) a surname consisting of the surname the person had immediately before marriage and the spouse's current surname, hyphenated or combined.

Certificate of change of name

(2) On receiving notice in the prescribed form of a change of surname under subsection (1), together with the prescribed fee, the director shall register the change of surname and issue to the married person a certificate of the change of name.

Change of name to be noted on existing records

9. (1) On registering a change of name under section 6 or 8, the director shall, without charging an additional fee, note the change of name on any records under the *Uniform Vital Statistics Act* that relate to the person whose name is changed.

New birth and marriage certificates

(2) After the director has noted the change of name in accordance with subsection (1), birth and marriage certificates that are issued in respect of the person whose name is changed shall show the new name and make no reference to the change.

Publication in Gazette

10. (1) Subject to subsection (4), on registering a change of name under section 6 the director shall cause notice of the change of name to be published in the *Gazette* at the applicant's expense.

Cost of publication

(2) The director may require the applicant to pay the cost of publication before registering the change of name.

Form of notice

(3) The notice shall be in the prescribed form and shall contain the name and former name of the person whose name is changed.

Exceptions

(4) Notice of a change of name shall not be published in the *Gazette*,

(a) if the director is satisfied that publication would cause undue hardship;

(b) if the person whose name is changed is a child who has been committed permanently to (Minister) under the (child welfare legislation);

(c) if the Attorney General has made an order under subsection 15(2) with respect to the change of name;

(d) in the prescribed circumstances.

Registration of change of name made outside (enacting jurisdiction)

11. (1) On receiving proof that a person's name has been changed in accordance with the law of another jurisdiction, together with an application for registration of the change of name and the prescribed fee, the director may register the change of name.

Section 9 applies

(2) Section 9 applies, with necessary modifications, to the change of name.

Change of name after divorce or annulment

12. (1) When the (court with divorce and annulment jurisdiction) has granted a divorce or made an order annulling a marriage, the court may at any time, on the application of one of the former spouses, order that the former spouse's surname be changed to the surname he or she had immediately before the marriage.

Copy to director

(2) The registrar of the court shall send a copy of an order made under subsection (1) to the director, who shall issue to the person to whose name the order relates a certificate of change of name in the prescribed form.

Appeal from director's decision

13. (1) A person whose application is rejected by the director may, within thirty days after receiving notice of the director's decision, appeal to the (appropriate court of enacting jurisdiction).

Powers of court on appeal

(2) The court may consider any relevant evidence and make any appropriate order.

Duty of director

(3) On receiving a certified copy of the order, the director shall treat it as if it were his or her own decision and shall make all necessary changes in the records under this Act and the *Uniform Vital Statistics Act*.

Revocation of change of name

14. (1) Any person with a substantial interest in the matter may apply to the (appropriate court of enacting jurisdiction) for the revocation of a change of name made under this Act.

Powers of court

(2) If the court is satisfied that the change of name ought not to have been made, the court may revoke it.

Search of change of name records

15. (1) On receiving an application in the prescribed form together with the prescribed fee, the director may conduct a search of the records with respect to the change of any persons's name and provide the applicant with a duplicate original of any certificate issued under this Act with respect to that change of name.

Attorney General's order sealing record

(2) When the Attorney General has ordered that the director's records with respect to a particular person's change of name be sealed, the director shall not disclose information from those records to any person, unless a court orders the disclosure or the person whose name was changed consents to the disclosure.

Fraud or misrepresentation

16. (1) A person who obtains a change of name under this Act by misrepresentation or for a fraudulent or unlawful purpose is guilty of an offence and liable on summary conviction to a fine not exceeding (amount), or to imprisonment for not more than three months.

Revocation of change of name

(2) If a court is satisfied that a person has obtained a change of name under this Act by misrepresentation or for a fraudulent or unlawful purpose the court may, by order, revoke the change of name, on another person's application or in the course of a preceeding under subsection (1) against the person who obtained the change of name.

Director may be added as party

(3) In a proceeding under this section, the court shall add the director as a party on his or her motion.

Copy to be sent to director

(4) When the court revokes a change of name, the registrar of the court shall send a certified copy of the order to the director.

Duty of director

(5) On receiving the certified copy of the order, the director shall note the revocation in his or her records wherever the change of name was noted and shall cause a notice of the revocation to be published in the *Gazette*.

Director's signature on certificates

17. (1) When the director's signature is to appear on a certificate issued under this Act, it may be written or may be reproduced by any method of visible reproduction.

Idem

(2) A certificate issued under this Act and bearing the director's signature is valid even if the director ceased to hold office before the certificate was issued.

Regulations

18. (1) The Lieutenant Governor in Council (or equivalent authority in the enacting jurisdiction) may make regulations prescribing,

(a) forms;

(b) fees;

(c) information and documents for the purpose of paragraph 3 of subsection 5(2);

(d) circumstances for the purposes of clause 10(4)(d).

LOI UNIFORME SUR LE CHANGEMENT DE NOM

Définitions

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

"directeur" Le directeur de l'état civil nommé aux termes de la *Loi uniforme sur les statistiques de l'état civil.*

"prescrit" Prescrit par les règlements pris en application de la présente loi.

Nom de la personne

2 (1) À toutes fins de la loi (de la compétence législative) :

a) la personne dont la naissance a été enregistrée (dans la compétence législative) a le droit d'être connue sous le nom qui figure dans son certificat de naissance ou de changement de nom, à moins que l'alinéa c) ne s'applique;

b) la personne dont la naissance n'a pas été enregistrée (dans la compétence législative) a le droit d'être connue :

(i) sous le nom qui figure dans son certificat de changement de nom, si le nom de la personne a été changé en vertu de la présente loi ou d'une loi qu'elle remplace,

(ii) sous le nom reconnu par la loi du dernier ressort avec lequel elle avait des liens étroits et véritables avant de résider (dans la compétence législative), dans tous les autres cas,

à moins que l'alinéa c) ne s'applique;

c) la personne qui, avant l'entrée en vigueur de la présente loi, a pris un nom lors de son mariage, a le droit d'être connue sous ce nom à moins qu'elle ne l'ait changé par la suite en vertu de la présente loi ou d'une loi que celle-ci remplace.

Éléments d'un nom

(2) Le nom qu'adopte un personne en vertu de la présente loi comporte un nom de famille et au moins un prénom, rédigés en caractères romains. Le nom n'inclut pas de chiffres ni de symboles.

Changement de nom

3 (1) La personne qui n'est pas sous la garde légitime d'une autre personne et qui a résidé ordinairement (dans la compétence législative) pendant les trois mois, au moins, précédant la demande peut demander au directeur que son nom soit changé.

Avis au conjoint, etc.

(2) La demande de la personne mariée est accompagnée soit d'une preuve que son conjoint a été avisé de la demande, soit de l'affidavit de l'auteur de la demande attestant que les conjoints vivent séparément.

Changement de nom de la personne qui est sous la garde d'une autre personne

4 (1) Si la personne qui est sous la garde légitime d'une autre personne a résidé ordinairement (dans la compétence législative) pendant les trois mois, au moins, précédant la demande, le gardien peut demander au directeur que le nom de cette personne soit changé.

Consentement des personnes intéressées

(2) La demande est accompagnée du consentement écrit de toute autre personne qui a la garde légitime de la personne dont le nom doit être changé ou qui a un droit de visite à l'égard de cette personne.

Consentement de la personne ayant douze ans ou plus

(3) Si la demande se rapporte au nom d'une personne ayant douze ans ou plus, elle est accompagnée de son consentement écrit.

Requête pour dispenser une personne du consentement

(4) L'auteur de la demande peut demander (au tribunal compétent dans la compétence législative) par voie de requête, de rendre une ordonnance la dispensant d'obtenir le consentement.

Intérêt véritable de la personne

(5) Le tribunal statue sur la requête présentée en vertu du paragraphe (1) conformément à l'intérêt véritable de la personne dont le nom doit être changé.

Contenu de la demande

5 (1) La demande présentée en vertu de l'article 3 ou 4 est rédigée selon la formule prescrite et inclut, sous forme de déclaration solennelle, les renseignements suivants :

1. Les nom et prénoms actuels et les nom et prénoms proposés de la personne dont le nom doit être changé.
2. L'adresse et la résidence ordinaire de l'auteur de la demande au moment de la présentation de celle-ci et pendant les trois mois précédents.
3. S'il s'agit d'une demande présentée en vertu du paragraphe 4(1), l'adresse et la résidence ordinaire de la personne dont le nom doit être changé au moment où la demande est présentée et pendant les trois mois précédents.

4. S'il s'agit d'une demande présentée en vertu du paragraphe 4(1), une déclaration portant que l'auteur de la demande a la garde légitime de la personne et indiquant le lien existant entre l'auteur de la demande et la personne.

5. Les détails de tout changement antérieur du nom de la personne dont le nom doit être changé.

6. La date et le lieu de naissance de la personne dont le nom doit être changé.

Documents à l'appui

(2) La demande est accompagnée des documents et renseignements suivants :

1. Si le paragraphe 3(2) s'applique, un accusé de réception d'avis, qui paraît être signé par le conjoint de l'auteur de la demande, un affidavit d'avis au conjoint, ou l'affidavit de l'auteur de la demande attestant que les conjoints vivent séparément.

2. Si le paragraphe 4(2) ou (3) s'applique, le consentement écrit visé à ce paragraphe ou une copie certifiée conforme de l'ordonnance du tribunal dispensant l'auteur de la demande du consentement.

3. Les renseignements et les documents prescrits.

4. Les autres renseignements et documents que le directeur, à sa discrétion, exige que l'auteur de la demande fournisse.

Enregistrement du changement de nom

6 (1) Sous réserve du paragraphe (2), le directeur enregistre le changement de nom lorsqu'il reçoit la demande accompagnée de tous les documents à l'appui qui sont exigés aux termes du paragraphe 5(2), ainsi que les droits prescrits.

Exception

(2) Le directeur n'enregistre pas le changement de nom s'il est d'avis que la demande contient une fausse déclaration ou qu'elle est présentée dans un but frauduleux ou illégitime.

Certificat de changement de nom

7 (1) Lorsqu'il a enregistré le changement de nom en vertu de l'article 6, le directeur délivre à l'auteur de la demande un certificat de changement de nom rédigé selon la formule prescrite.

Avis au fonctionnaire d'une autre province ou d'un autre territoire

(2) Si la personne dont le nom est changé est née ou s'est mariée au Canada, mais à l'extérieur (de la compétence législative), le directeur envoie une copie du certificat au fonctionnaire responsable de l'enregistrement des naissances ou des mariages, selon le cas, dans la compétence législative pertinente.

Avis au fonctionnaire à l'extérieur du Canada

(3) Si la personne dont le nom est changé est née ou s'est mariée à l'extérieur du Canada, le directeur, à la demande de cette personne, envoie une copie du certificat au fonctionnaire responsable de l'enregistrement des naissances ou des mariages, selon le cas, dans la compétence législative pertinente.

Exception : nom de famille de la personne mariée

8 (1) La personne mariée qui réside ordinairement (dans la compétence législative) peut changer son nom de famille pour l'un ou l'autre des noms suivants :

a) le nom de famille actuel de son conjoint;

b) un nom de famille qui se compose du nom de famille que la personne portait immédiatement avant le mariage et du nom de famille actuel de son conjoint, réunis ou reliés par un trait d'union.

Certificat de changement de nom

(2) Lorsqu'il reçoit l'avis de changement de nom effectué en vertu du paragraphe (1) rédigé selon la formule prescrite, ainsi que les droits prescrits, le directeur enregistre le changement de nom de famille et délivre à la personne mariée un certificat de changement de nom.

Inscription aux registres

9 (1) Lorsqu'il a enregistré le changement de nom en vertu de l'article 6 ou 8, le directeur, sans percevoir de droits additionnels, inscrit le changement de nom sur tous les registres conservés en vertu de la *Loi uniforme sur les statistiques de l'état civil* qui se rapportent à la personne dont le nom est changé.

Nouveaux certificats de naissance et de mariage

(2) Lorsque le directeur a inscrit le changement de nom conformément au paragraphe (1), les certificats de naissance et de mariage qui sont délivrés par la suite relativement à la personne dont le nom est changé indiquent le nouveau nom et ne contiennent aucune mention du changement.

Publication dans la Gazette

10 (1) Sous réserve du paragraphe (4), lorsqu'il a enregistré le changement de nom en vertu de l'article 6, le directeur fait

publier dans la *Gazette*, aux frais de l'auteur de la demande, un avis de changement de nom.

Frais de publication

(2) Le directeur, avant d'enregistrer le changement de nom, peut exiger que l'auteur de la demande paie les frais de publication.

Avis

(3) L'avis est rédigé selon la formule prescrite et inclut le nom et l'ancien nom de la personne dont le nom est changé.

Exceptions

(4) L'avis de changement de nom n'est pas publié dans la *Gazette* :

a) si le directeur est convaincu que la publication entraînerait un préjudice grave;

b) si la personne dont le nom est changé est un enfant qui est pupille permanent (du ministre) en vertu (des lois sur le bien-être de l'enfance);

c) si le procureur général a pris un arrêté en vertu du paragraphe 15(2) relativement au changement de nom;

d) dans les circonstances prescrites.

Enregistrement du changement de nom effectué à l'extérieur (de la compétence législative)

11 (1) Lorsqu'il reçoit la preuve que le nom d'une personne a été changé conformément à la loi d'une autre compétence législative, accompagnée de la demande d'enregistrement du changement de nom, ainsi que des droits prescrits, le directeur peut enregistrer le changement de nom.

Champ d'application de l'article 9

(2) L'article 9 s'applique, avec les adaptations nécessaires, au changement de nom.

Changement de nom après le divorce, etc.

12 (1) Lorsque (le tribunal ayant compétence en matière de divorce et d'annulation du mariage) a prononcé un jugement de divorce ou a rendu une ordonnance annulant un mariage, le tribunal peut, à la requête de l'un des anciens conjoints, ordonner que le nom de famille de cet ancien conjoint soit changé pour le nom de famille qu'il portait immédiatement avant le mariage.

Copie au directeur

(2) Le greffier du tribunal envoie une copie de l'ordonnance rendue en vertu de paragraphe (1) au directeur. Ce dernier délivre un certificat de changement de nom rédigé selon la formule prescrite à la personne dont le nom fait l'objet de l'ordonnance.

13 (1) La personne dont la demande est rejetée par le directeur peut, dans les trente jours après la réception d'un avis de la décision du directeur, interjeter appel de la décision (au tribunal compétent dans la compétence législative). *Appel d'une décision du directeur*

(2) Le tribunal peut examiner la preuve pertinente et rendre l'ordonnance appropriée. *Pouvoirs du tribunal*

(3) Lorsqu'il reçoit la copie certifiée conforme de l'ordonnance, le directeur la traite comme s'il s'agissait de sa propre décision. Il apporte les modifications nécessaires aux registres conservés en vertu de la présente loi et de la *Loi uniforme sur les statistiques de l'état civil.* *Devoir du directeur*

14 (1) Quiconque a un intérêt important en l'espèce peut demander (au tribunal compétent dans la compétence législative) par voie de requête, la révocation d'un changement de nom effectué en vertu de la présente loi. *Révocation de changement de nom*

(2) Si le tribunal est convaincu que le changement de nom n'aurait pas dû être effectué, il peut le révoquer. *Pouvoirs du tribunal*

15 (1) Lorsqu'il reçoit une demande rédigée selon la formule prescrite, accompagnée des droits prescrits, le directeur peut mener une recherche dans les registres relativement au changement de nom d'une personne. Il peut fournir à l'auteur de la demande un double original de tout certificat délivré en vertu de la présente loi relativement à ce changement de nom. *Recherche dans les registres de changement de nom*

(2) Lorsque le procureur général a ordonné que les registres du directeur se rapportant au changement de nom d'un particulier soient scellés, le directeur ne divulgue à personne les renseignements qui s'y trouvent, sauf si un tribunal en ordonne la divulgation ou que la personne dont le nom a été changé donne son consentement à la divulgation. *Arrêté du procureur général pour sceller les registres*

16 (1) La personne qui obtient un changement de nom en vertu de la présente loi un moyen de fausses déclarations ou dans un but frauduleux ou illégitime est coupable d'une infraction et passible, sur déclaration de culpabilité par procédure sommaire, d'une amend d'au plus (montant) ou d'une peine d'emprisonnement d'au plus trois mois. *Fraude, etc.*

(2) Si un tribunal est convaincu qu'une personne a obtenu un changement de nom en vertu de la présente loi au moyen de fausses déclarations ou dans un but frauduleux ou *Révocation*

illégitime, le tribunal peut, au moyen d'une ordonnance, révoquer le changement de nom à la requête d'une autre personne ou au cours d'une instance introduite en vertu du paragraphe (1) contre la personne qui a obtenu le changement de nom.

Le directeur peut être joint à l'instance

(3) À la suite d'une motion du directeur, le tribunal joint celui-ci à l'instance introduite en vertu du présent article en qualité de partie.

Copie au directeur

(4) Lorsque le tribunal révoque un changement de nom, le greffier envoie au directeur une copie certifiée conforme de l'ordonnance.

Devoir du directeur

(5) Lorsqu'il a reçu la copie certifiée conforme de l'ordonnance, le directeur inscrit la révocation sur ses registres à chaque endroit où le changement de nom a été inscrit. En outre, il fait publier un avis de la révocation dans la *Gazette.*

Signature du directeur

17 (1) Lorsque la signature du directeur doit figurer sur un certificat délivré en vertu de la présente loi, elle peut être manuscrite ou reproduite par tout mode de reproduction visible.

Idem

(2) Le certificat qui est délivré en vertu de la présente loi et qui porte la signature du directeur est valide même si le directeur a cessé d'exercer ses fonctions avant que le certificat n'ait été délivré.

Règlements

18 (1) Le lieutenant-gouverneur en conseil (ou l'autorité équivalente dans la compétence législative) peut, par règlement, prescrire ce qui suit :

a) des formules;

b) des droits;

c) les renseignements et les documents prévus à la disposition 3 du paragraphe 5(2);

d) les circonstances prévues à l'alinéa 10(4) d).

APPENDIX C

(See page 27)

DEFAMATION

REPORT OF THE SASKATCHEWAN COMMISSIONERS

INTRODUCTORY NOTE

The Uniform Law Conference has considered several reports on defamation since 1935. In 1944, a Uniform Act was adopted, and various modifications have been made to the Act since then, but its basic shape has remained intact. The most notable modification, made in 1979, was a direct response to the decision of the Supreme Court of Canada in *Cherneskey* v. *Armdale Publishers Ltd.*

In 1983, the Saskatchewan Commissioners presented a report (Proceedings of the 65th Annual Meeting, Appendix G, pages 94 to 143) that identifies aspects of the law of defamation which are unclear or problematic, and proposed substantial amendment of the Uniform Act.

Most of the recommendations were adopted, some were not and, in some instances, the Saskatchewan Commissioners were asked to reconsider the subject matter. Concern was also expressed about the effect of *The Charter of Rights and Freedoms* on the law of defamation.

This report re-visits the 1983 Proceedings. The Saskatchewan Commissioners believe it is desirable that every effort be made to resolve the outstanding issues at this Conference.

Table of Contents

I. DEFINITION OF DEFAMATORY MATTER

A. Introduction

The 1983 report[1] on defamation recommended that a definition of the tort of defamation be included within the Uniform Defamation Act.[2] It was felt that the common law did not provide an entirely satisfactory definition, and that without a statutory definition there would be a risk of disparity of treatment of plaintiffs. After reviewing definitions of "defamatory matter" recommended in a number of common law jurisdictions, the Australian proposal was found to be the most acceptable.[3] The Conference agreed in principle, but requested further consideration. In particular, concern was raised about the scope of the proposed definition: whether in its present form it accurately reflects the common law. In our view, the problem in formulating a satisfactory definition suggests that the merits of taking the definition of "defamatory matter" outside of the realm of the common law should be re-examined. The material which follows addresses both that threshold question, and the content of the proposed definition.

B. The Argument Against Codification

The Conference's decision to adopt a statutory definition of "defamation" was not intended to modify the common law. The statutory definition should be in essence declaratory of the common law. The courts have defined "defamation" in a variety of specific contexts. A single, all-encompassing definition that summarizes the common law can do no more than list the various formulations developed by the courts. It is difficult to see how such a statutory definition would be an improvement over the common law.

There are always risks of inadvertent injustice in any codification. Such risks are particularly serious in the case of defamation. The New Zealand Committee on Defamation rejected adoption of a statutory definition on these grounds:

(a) A statutory definition must successfully embrace the existing common law definitions without extending their scope so as to include statements which previously were not considered defamatory and without restricting their scope so as to exclude statements which formerly were considered defamatory.

(b) The existence of various common law definitions yields greater flexibility in dealing with individual cases of defamation as they arise. On the other hand a statutory definition tends to become more rigid in its application and in the case of defamation may result in a definition which is unable to respond to changing attitudes and beliefs.

(c) A statutory definition which simply lists the various common law definitions of defamation is undesirable because none of the definitions are intended to apply to every case of defamation and such a course would not constitute an improvement upon the existing approach.

(d) Even if a satisfactory definition of defamation could be found, in practice this would be of no more assistance than the existing common law definitions. Any statutory definition could only define what is defamatory in general terms and it would still be left to the courts to fix the exact boundaries in the same way as they have done with the common law definitions. The enactment of a statutory definition of defamation would create greater uncertainty than is evident in the existing common law definitions until sufficient time had passed to allow a body of case law to build up which clearly determined the ambit of the statutory defintion. The advantage of retaining the common law definition is that this, to a large extent, has already been accomplished.[4]

In a Canadian context, there is an additional reason why the arguments in favour of a statutory definition lose some of their persuasive force. In Australia some states have adopted conflicting definitions of defamatory matter. The pursuit of uniformity in Australia requires formulation of a uniform definition. In Canada, on the other hand, no provincial defamation legislation has attempted to define the tort. We have a uniform definition provided by the common law.

In our opinion the risks associated with a statutory definition of defamation are greater than any of the benefits to be attained. The definition should be left within the realm of the common law – at least until the common law no longer provides a serviceable base, or a new approach becomes necessary in the interests of uniformity.

C. The Scope of the Definition

1. The Problem

The definition of "defamatory matter" proposed in the 1983 report provides that:

> "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.[5]

A question arose at the Conference as to the scope of paragraph (c) of this definition. It was suggested that this third example of "defamatory matter" closely resembles the tort of "injurious falsehood"[6] which traditionally is not included within the law of defamation. We have been asked to reconsider the wording of the definition to determine whether the proposed definition accurately encapsules the case law.

No single definition of defamatory matter has been found that would adequately cover every case encountered in practice. The individual paragraphs of the proposed definition are meant to be a codification of the most commonly used judicial formulations,[7] which when taken together cover the range of statements which are considered by the law to be defamatory.

2. Paragraph (a): "affect adversely . . . reputation"

The first paragraph of the proposed definition restates one of the most universally accepted judicial definitions. It was first expressed by Lord Atkin in *Sim* v. *Stretch*.[8] His Lordship stated that the test of whether a statement is defamatory is: "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"[9] In our view this limb of the proposed definition accurately reflects this common law formulation.

3. *Paragraph (c): "injure that person in his occupation, trade, office or financial credit"*

(a) *Defamation and Injurious Falsehood*

At common law, the torts of "defamation" and "injurious falsehood", although similar in nature and overlapping at times, remain separate and distinct causes of action.

The gist of the law of defamation is the protection of individual reputations. The law of injurious falsehood is similar in certain respects. A false statement made about the plaintiff to a third party forms the basis of both actions. They differ however, in that the tort of injurious falsehood concerns a false statement respecting a person or his property that results in a loss of economic advantage, which may or may not also be a reflection upon the person's reputation or character. Salmond noted that care must be taken to distinguish between the wrong of injurious falsehood and the wrong of defamation "to which it is analogous but from which it is distinct".[10] The learned author continues: "Both in defamation and in injurious falsehood the defendant is liable because he has made a false and hurtful statement respecting the plaintiff; but in one case the statement is an attack upon his reputation, and in the other it is not".[11]

Although there is some overlap in the protection afforded by the torts of defamation and injurious falsehood, there are significant consequences dependent upon how the action is framed. Liability for defamation is strict and actionable *per se*. Once the defamatory nature of the statement has been established, the onus shifts to the defendant to prove the truth of the statement. The plaintiff in an injurious falsehood action has a much more onerous task. It is established law that written or oral falsehoods, which do not amount to defamation because they do not adversely affect the reputation of the plaintiff, may still be actionable wrongs. However, the action will only lie "where they are maliciously published, where they are calculated in the ordinary course of things to produce and where they do produce actual damage".[12]

In addition to protecting an individual's private reputation and character, the law of defamation protects an individual's trading, business, professional or official reputation. It is to be noted however, that not all disparaging statements in that category are defamatory. To be defamatory a statement "must impute to the plaintiff some quality which would be detrimental, or the absence of some quality which is essential to the successful carrying on of his office, profession or trade. If they do not invoke any reflection upon the personal character or official, pro-

fessional or trading reputation of the plaintiff, they are not defamatory".[13] But a statement that does not meet that test may still be actionable as an injurious falsehood. Salmond gives the following examples to illustrate the difference between the actions:

> Thus, it is not defamatory to state in a newspaper that a certain tradesman has ceased to carry on business; yet if this statement is wilfully false, and causes him actual damage, an action will lie for it. But to state falsely that he carries on his business incompetently or dishonestly is defamatory, and an action will lie even though the statement is not wilfully false and even though actual damage has not been caused by it. Similarly, to say falsely of a shopkeeper that his goods are of a quality inferior to those of another trader is not the wrong of defamation, but that of injurious falsehood; but to say of him tht he fraudulently sells inferior goods as of superior quality is an attack, not merely upon his business, but upon his reputation and is therefore defamatory.[14]

Paragraph (c) of the proposed UDA definition is drafted in very broad terms. In its present form it includes any statement which has the effect of causing injury to a person in his occupation, trade or office, irrespective of the common law requirement that the injury be referable to the person's character or reputation. Statements concerning a person, although not defamatory in the traditional sense of striking at one's reputation or character, may nonetheless fall within the ambit of the definition. By characterizing these statements as defamatory, rather than merely injurious falsehoods, the plaintiff's burden will be considerably lightened.

(b) *The Australian Model*

The proposed definition of defamatory matter is the equivalent of that which has been recommended by both the Law Reform Commissions of the Commonwealth of Australia and the State of Western Australia.[15] This formulation has been patterned after a definition which first appeared in 1889 in the Criminal Code of Queensland[16] and which was subsequently adopted in Tasmania (1895),[17] to a limited extent in Western Australia (1902),[18] and for a time in New South Wales (1958-74).[19] In these States defamatory matter is defined as:

> . . . any imputation concerning any person . . . by which the reputation of that person is likely to be injured, or by which he is likely to be injured in his profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise him.[20]

After the adoption of this definition in New South Wales, it was noted, in an article prepard by Professor Morison for the Sydney Law Journal, that although: "The words making defamatory of a person any imputation concerning him by which he is likely to be injured in his profession or trade were intended to be declaratory of the common law . . . in fact they do not represent the common law as it stands today".[21] The statutory definition was viewed as an expansion of the common law. The tort of defamation had become "a more comprehensive wrong of verbal injury",[22] which included two branches: the one being defamation in the traditional sense of affecting one's reputation or character and the other being concerned with statements tending to injure a man in his trade or profession.

This expanded interpretation has been borne out by judicial decisions that have considered the scope and effect of the Australian statutory definition. One of the first cases to consider the scope of this definition was *Hall-Gibbs* v. *Dun*,[23] a case which was eventually heard by the High Court of Australia. The plaintiff in this case was a trade protection society that brought an action against the publishers of a newspaper. The plaintiff alleged that the defendant had insinuated that the plaintiff had ceased to carry on business in Queensland. The plaintiff contended that the effect of the statutory definition was to make the unlawful publication of any matter "likely to injure a person in his trade or profession" an actionable wrong, without proof of actual damage. The defendant argued that the action was not properly framed in defamation, that words defamatory in nature had to imply something derogatory or discreditable of the plaintiff, and that if any actionable wrong was done to the plaintiff, the action was one for injurious falsehood.

Chief Justice Griffiths, of the High Court of Australia, was unwilling to allow his decision to be based on whether the published matter complained of would have been actionable as defamation before the passing of the law of 1889. Rather, he viewed the sole issue for determination as being whether the matter properly fell within the words of the statute. In delivering his judgment he stated:

> If the act or condition imputed is such that (inter alia) the plaintiff's reputation is likely to be injured by it, or he is likely to be injured in his profession or trade, the Queensland law calls it defamatory, and says that it is an actionable wrong. It seems to me to be nothing to the purpose to say that in textbooks on libel and slander the word "imputation" was generally (and naturally) used in a disparaging sense . . . As I have already suggested, the question is not

> whether the action would lie in England, or if it would, what it would be called, or on what conditions it could be maintained, but whether the publication complained of is within the words of the law in Queensland.[24]

The High Court of Australia reaffirmed its interpretation of this statutory definition in *Sungravure* v. *M.E. Airlines* over six decades later.[25] It is now recognized that a new concept of "statutory defamation" has emerged in the Code States of Australia.[26] Whatever the intention of the legislators who enacted the Codes of Queensland and New South Wales, the legislation has fallen to be interpreted "according to its language, regardless and free from any presumption that it was intended to re-enact the pre-existing law".[27]

(c) *The Law Reformers React*

The New South Wales Law Reform Commission in its report on defamation in 1974 concluded that the law of New South Wales "ought not to persist in the kind of codification attempted by the 1958 Act".[28] They were of the view "that the risks of inadvertent injustice, inherent in any Code, are peculiarly serious in the law of defamation".[29] Thus they recommended (inter alia) that the constituent elements of the tort be governed by the common law. In the same year, the *Defamation Act* of New South Wales effectively repealed the law of 1958, and reinstated the common law notion of "defamatory matter".[30]

The Australian Law Reform Commission, on the other hand, continues to recommend a statutory definition patterned after the earlier codes. It has concluded that there is no evidence that the use of a statutory definition has caused any problems in the Australian states where codes have been in place.[31]

Although the views of the framers of the legislation and the reformists on this subject are valuable, it will ultimately be the courts that will be called upon to construe and apply the Act. The Australian courts have refused to place any gloss upon the words of the statutory definition – even though to give effect to the plain meaning of the words resulted in many statements being given a defamatory meaning that would be a long way short of such a meaning at common law.

Some have argued that expansion of the tort of defamation is justified because "If a person makes an untrue statement about another which causes that person loss, it seems correct in principle that the maker of the statement should bear the loss".[32] However, to include within the class of defamatory statements those statements which do not reflect upon the personal or business reputation of a person is to

lose sight of the prime purpose of the law of defamation. Because of the special recognition given to a person's reputation by the law of defamation, and its primary goal of vindicating reputation, the law in this area provides that liability is strict and that both damages and falsity of the statement are presumed. If a person makes an untrue statement about another which causes that person loss, it is perhaps correct in principle that the maker of the statement should bear the loss. However, as pecuniary loss, rather than protection of reputation, is the gist of such actions, the rationale does not exist for affording to such actions the special treatment afforded to defamation actions.

4. Paragraph (b): "deter ordinary persons from associating or dealing with that person"

Paragraph (b) of the proposed definition also is drafted in very broad terms. In drafting this paragraph, the Australian Law Reform Commission merely intended to "cast the old formula of 'shun and avoid' into modern language".[33] The present wording however, may have the effect of significantly expanding this limb of the common law notion of "defamatory matter".

Although the element of damage to the plaintiff's reputation is the gist of defamation at common law, statements concerning a person which had the effect of causing that person to be shunned or avoided by society were presumed to be capable of a defamatory meaning. This class of defamatory statements is dependent upon a tendency to exclude the plaintiff from society, rather than on damage to his reputation *per se*. This distinction was pointed out in *Boyd* v. *Mirror Newspapers Ltd.*, where Hunt J said:

> At common law, in general, an imputation to be defamatory of the plaintiff, must be disparaging of him . . . I say that this is "in general" the position, as the common law also recognizes as defamatory an imputation which, although not disparaging, tends to make other persons "shun or avoid" the plaintiff.[34]

It is to be noted that just as was the case with imputations tending to "injure a person in his occupation, trade, office or financial credit", it is not every statement having the effect of causing a person to be "shunned or avoided" that is properly classified as defamatory. In the *Boyd* case, after recognizing that not all defamatory statements need to be disparaging of the plaintiff, Hunt J proceeded to give certain examples of this class of statements that are capable of bearing a defamatory meaning:

> . . . for example by attributing to him that he is insane . . . or by attributing to her that she has been raped, as well as an imputation that displays the plaintiff in a ridiculous light, notwithstanding the absence of any moral blame on his part.[35]

Other than tending to cause others to shun or avoid the person to whom they refer, what then do the statements referred to in the *Boyd* case have in common? They do not necessarily make others think worse of the person to whom they refer by imputing any moral discredit. Many of the conditions being imputed are misfortunes rather than faults, not involving any suggestion of moral blame.

Professor Fleming, in *The Law of Torts*,[36] concludes that the common thread running through these cases is that "they impute to the plaintiff a condition calculated to diminish the respect and confidence in which he is held".[37] He does not overlook the fact that many of the statements in question do not impute contemptible conduct to the plaintiff, however, he notes that statements that attribute misfortune are just as likely to impair a person's standing in the community. "In this matter, it is to shut one's eyes to realities to indulge in nice distinctions.[38] The authors of *Duncan & Neill on Defamation*[39] make a similar observation. It is suggested, when considering statements that have the effect of causing a person to be shunned and avoided, that ". . . words should not be regarded as defamatory unless they involve some lowering of the plaintiff's reputation or of the repsect with which it is regarded".[40]

When defining defamatory matter of the class here under discussion, the proposed definition includes statements concerning a person that tend to "deter ordinary persons from associating or dealing with that person" – without any further qualification. The proposed definition appears once again to be extending the common law notion of defamatory matter. The proposed definition does not provide that the statements involve any "lowering of the plaintiff's reputation" or of the "respect and confidence in which he is held". This being the case, it would be defamatory within the meaning of the section to say, for example, that a plaintiff's airline is susceptible to hijacking attacks; or is the target of a group of terrorists;[41] or to report on a shooting at a local beverage room;[42] – providing the tendency of each statement was to "deter ordinary persons from associating or dealing with that person".

D. Recommendations

1. That a definition of defamatory matter not be included in the UDA, such being left to the common law.

Should recommendation #1 be defeated –

2. That the following definition of defamatory matter be included in the UDA:

"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) *lower the respect with which that person is regarded* with the result that ordinary persons are deterred from associating or dealing with that person; or

(c) injure *the reputation of* that person in his occupation, trade, office or financial credit.

II. THE RANGE OF PLAINTIFFS: THE RELATIONSHIP BETWEEN DEATH AND DEFAMATION

A. *Introduction*

The 1983 report considered the effect of the death of either the person claiming to have been defamed or the tortfeasor. At common law if either party to a defamation action dies after the action has been commenced the action abates, and no action can be brought on behalf of a deceased in respect of defamatory statements made before death. At one time this common law rule applied to all actions for personal injuries.[43] Many jurisdictions have reversed the general rule by enacting legislation which provides for the survival of tort actions. In most instances, actions for defamation have been exempted from such "survival statutes". However, the *Uniform Survival of Actions Act* does apply to defamation.[44]

Separate and apart from the non-survivability rule, the death of a person may become an issue in a defamation action in yet another way. At common law no action lies for defamation of the dead. It is assumed that only living persons can be defamed. The reversal of the non-survivability rule would not alter the actionability of a defamatory publication concerning a deceased person. Actionability in such an instance would only arise if a significant extension was made to the common law concept of what is defamatory. In the former situations, it is a question of modifying the law to allow for the *continuation* of a cause of action; whereas in the latter situation the controversy concerns the merits of *creating* a new cause of action, which does not exist at common law.

B. *Defamation Survivability*

The 1983 Conference adopted the recommendation that "defamation survivability" be incorporated within the UDA. Upon reconsideration, we have concluded that the survivorship provisions in the *Uniform Survival of Actions Act* should not be reproduced in the UDA. If this approach is adopted, some of the more technical questions relating to survival of defamation actions discussed at the 1983 Conference will be less difficult to resolve.

The 1983 report recommended that the following principles should be adopted by the Conference:

i) defamation actions should be included within the class of actions that survive death of either party; and

ii) when an action survives for the benefit of the estate of a deceased person, the right to claim damages should be restricted to actual pecuniary loss.

In addition, the Conference asked us to consider whether a special limitation period should be prescribed for defamation actions that survive death. The *Uniform Survival of Actions Act* has provisions similar to the recommendations, and includes a special limitation period. It is preferable in our view to encourage jurisdictions to enact one comprehensive set of rules which will apply to all actions that survive death within their jurisdiction, in conformity with the approach taken by the Conference to survival of actions legislation in the past.

C. *Defaming the Dead*

1. *The Desirability of Protection for the Reputation of the Dead*

At common law, a dead person cannot be defamed: "Any living person may be defamed, but no action lies for defamation of the dead, however distressing to relatives and friends".[45] This aspect of the law of defamation has been the topic of considerable debate over the years. Many jurisdictions are presently considering an extension of the traditional law of defamation to afford a right of action to a deceased person's family or personal representative.[46] As the 1983 Report noted, "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".[47] Although most jurisdictions favour modification of the common law, there are significant differences in the means of redress being proposed.

2. *What are the limitations to be imposed upon actions for defamation of the dead?*

The law of defamation affords protection to individual reputation, thus giving recognition to "the essential dignity and worth of every human being – the concept at the root of any decent system of ordered liberty".[48] Equal recognition is given to the competing demands of free speech: "both interests are highly valued in our society, the one is perhaps the most clearly prized attribute of civilized man, the other the very foundation of a democratic society".[49] Throughout the development of the law of defamation, an attempt has been made to strike an acceptable balance between the preservation of reputation on the one hand and the right of free speech on the other. Any extension of one interest necessarily results in a corresponding restriction of the other. To create a new cause of action which extends protection to the reputation of deceased persons is to shift the balance in favour of greater protection of reputation at the expense of freedom of speech. Can this further interference with freedom of speech be justified?

The Porter Committee's 1948 report on defamation[50] presented arguments against the expansion of the tort of defamation to cover the reputation of the dead. The Committee viewed such an expansion as an unjustified interference with freedom of speech:

> Historians and biographers should be free to set out facts as they see them, and to make their comments and criticism upon the events which they have chronicled . . . If those engaged in writing history were compelled, for fear of proceedings for libel, to limit themselves to events of which they could provide proof acceptable to a court of law, records of the past would, we think, be unduly and undesirably curtailed.[51]

The issue resurfaced in England in 1979. The Faulks Committee concluded that the Porter Committee did not "take sufficiently into account the interests of the public and of the near relatives of the deceased."[52] Although it was recommended that defamation of the dead be actionable, the Committee concluded that only defamatory statements published "within a short time" of the deceased's death should be civilly actionable.[53] Presumably, by creating this new cause of action, but limiting its full scope, it was felt that the balance between the competing interests of freedom of expression and protection of reputation would be protected. The Faulks Committee stipulated that to be actionable as defamation, statements concerning the deceased had to be published within five years of death. The Committee was of the view

that this recommendation would bring about the desired changes in the common law without unduly curtailing historical writing:

> Records of his (i.e., the deceased's) past will not be unduly and desirably (sic) curtailed if for a few years after a man's death historians and biographers are limited to saying what they can prove to be true. Where publications contain false accusations against dead men, they constitute a highly objectionable method of profiteering out of his death and in our opinion, while grief is fresh and for rather longer, such accusations should be actionable. We put the period at five years, but some of us would prefer three.[54]

All jurisdictions that are presently advocating the introduction of an action to vindicate the reputation of the dead concur that such actions should be limited to a relatively short period after death.[55]

The general consensus of the 1983 Conference was that the UDA should provide some form of redress against statements defamatory of the dead. The interests of freedom of speech were identified as being of particular importance in this context, especially for those engaged in the writing of history and biography. Thus, it was acknowledged that any right of action ultimately created would have to be limited in some fashion so as to ensure that due recognition is given to such interests.

While other jurisdictions have addressed this concern by limiting the right of action to a short period following death, we are not convinced of the necessity of such an approach. We question the desirability of imposing a time restriction that would introduce an element of arbitrariness. Further, we are concerned that undue emphasis should not be placed on the distress caused to the relatives of the deceased, rather than on the damage to the deceased's reputation.

A time restriction approach, does not give sufficient recognition to the fact that a person's reputation survives death, and that the potential for damage exists at virtually any time after death. Society's interest in vindication of a damaged reputation does not significantly diminish over time after death. In fact, it has been a similar false assumption ("that there is not a reputation after death meriting legal remedy")[56] which has supported the common law rule that only living persons are capable of being defamed.

No doubt, as time passes after death, fewer allegations of defamation will arise. We suggest that this is not an indication of the diminishing importance of individual reputation, but rather is an example of how short-lived the public interest is in the affairs of most deceased citizens.

On the other hand, individuals who have attained celebrity status or historical significance will, in most cases, be of greater public interest for a longer period of time after their death. Individuals who rise to a high level of notoriety during their lives are particularly susceptible to reputational attack years after death because matter concerning such individuals continues to be published. Moreover, the time restriction approach is tied to emphasis on the grief suffered by family members. The essence of an action for defamation of the dead is not to redress the indignity or outrage to the relatives' feelings. An arbitrary cutoff date which allows such actions only during the period when "grief is fresh" overlooks the underlying purpose of creating the action - to redress the attack upon the reputation of the deceased. It is our submission that reputation is worthy of the law's protection at any juncture before or after death.

We ask the Conference to consider the following alternative approaches:

(1) The argument that an action for defamation of the dead is an inhibition on the writing of history becomes less cogent if damages are eliminated from such an action. An action for defamation would be sustainable for a declaration that the statement made was defamatory, an injunction to prohibit further publication of the defamatory matter, and costs. An action could be brought at any time after death (subject only to general limitation running from the date of the defamatory statement). Limiting remedies in this way would ensure a fair balance between the countervailing interests of freedom of speech and preservation of reputation; there would be no need for an arbitrary cutoff period.

This approach would also be justified by the nature of the interests protected by a post-death defamation action. The purpose of the action is to vindicate the reputation of the deceased by setting the record straight, not to compensate relatives or others for the injury done to the deceased's reputation. Plaintiffs in such actions are in essence acting in a representative capacity and should not be allowed to profit from a wrong which did them no harm. The proposed action is not based upon the injury done to the relatives and was not created for the purpose of compensating them for the grief they suffer. There is nothing unique about the stress laid upon family members in such a case; it is in kind the same whether the person defamed is living or dead. Such consequential damages should not be recoverable by awarding a solatium, unless of course the material defamatory of the deceased also reflects disparagingly upon their own reputation.

(2) Since it is "yellow journalism" and vindictive writers, rather than the writings of the historian that this cause of action is meant to address,[57] the cause of action itself could be restricted to cover only the most blatant cases of defamation. On this approach, an action would only be maintainable where the publisher knew that the words published were untrue.[58] Once again, the restriction would ensure minimal interference with the writings of the bona fide historian or biographer, and would render an arbitrary cutoff period unnecessary.

(3) It may be argued that to require that the plaintiff prove that the defendant knew the statements to be false may tip the scales too far in favour of the defendant because of "the extreme difficulty in proving the state of another person's mind".[59] The Conference may want to consider a variation on the approach suggested above, and include a requirement of "malice" similar to that which the Supreme Court of the United States imposed (in another context) in the case of *New York Times* v. *Sullivan*.[60] This would require that a plaintiff establish "that the defendant made the defamatory statement with malice, that is, with the knowledge that the statement was false or at least with a reckless disregard of whether or not the statement was false".[61]

This approach would relieve the evidentiary prejudice that might otherwise be experienced by writers of history or biography when called upon to establish the truth of defamatory statements published many years after death. Such publishers would not be liable for statements innocently made, providing they are not careless to the point of being reckless when publishing material. This would be a reversal of the common law strict liability rule applicable to defamation actions, but would be justified because of the special concerns arising in this context.

(4) Another approach that may warrant consideration would be one that shifted the burden of proof concerning truth to the plaintiff. The shift would relieve the defendant from establishing the truth of the statement. Such an approach would alter the common law presumption that falsity is presumed, but this could once again be justified because of the particular concerns arising in this context. On this approach, if the plaintiff was successful in establishing falsity, the action would succeed. However, in a situation where time had destroyed much of the relevant evidence, and conclusive proof of truth or falsity was no longer available, the action would be dismissed.

(5) So as to ensure equal protection is afforded to writers when publishing opinions, rather than factual accounts, concerning deceased persons, the Conference may want to consider the inclusion of a provision providing a defence to an action for posthumous defamation analogous to the defence of fair comment. The publication would be justified provided it was honestly made and concerned a matter of historical or biographical significance. This defence might be incorporated in any of the approaches outlined above.

3. *Who are the potential litigants?*

One of the difficulties often associated with the creation of an action for defamation of the dead has been to determine who should be competent to commence the action. Most jurisdictions propose that the potential plaintiffs be limited to a designated group of relatives, and in some cases it is suggested that the personal representative of the deceased also be included.[62] The debate has revolved around the requisite degree of consanguity that should be required.

The Law Reform Commission of Australia has suggested spouses, parents, children and brothers and sisters, as the competent potential relatives. The legal representative is also included "to cover cases where there is no immediately available close relative".[63] They are confident that such a designated class of potential plaintiffs will be adequate for "if none of the nominated persons is available or interested, to take action injustice is unlikely to occur by denial of a remedy".[64] The Faulks Committee recommended that only relatives would be entitled to sue. The group of eligible relatives was defined in very broad terms: "namely a surviving spouse, descendants or ascendants in any degree of relationship to the deceased and brothers and sisters of the deceased and their descendants in any such degree".[65] Such a designation ensures a remedy to relatives outside the deceased's most immediate family.

We question whether the class of potential plaintiffs should be limited exclusively to family members, or whether a more diverse group of "interested persons" would be more appropriate. The traditional concept of the family as a monolithic structure offering continual, unconditional support to its members is outdated. There may be many cases in which well-known public figures are defamed, but family members are disinterested or unavailable to take action.

If the class of persons competent to commence action is to be extended to include other "interested persons" outside the deceased's family, what criteria should be used to justify the sufficiency of the interest? What type of connection with the deceased, if any, should be required?

We suggest that no attempt be made in the legislation to define what would qualify as "sufficient interest". This is best left to the court on a case by case basis. The UDA should allow an action to be commenced by any person on behalf of the deceased with leave of the court. A dual motive and interest test should be set out to give the court a framework in which to exercise its discretion. The court should be authorized to grant leave if it was satisfied that:

(1) the action is motivated primarily by a concern about the attack on the reputation of the deceased; and

(2) there is a sufficient blood, business, professional or other interest to justify the bringing of the action on behalf of the deceased.

D. *Recommendations*

1. Survival of defamation actions should be a matter for survival of actions legislation, rather than the UDA. The *Uniform Survival of Actions Act* provisions in regard to defamation are satisfactory. A note reflecting this recommendation has been appended to the draft legislation.

2. The UDA should provide:

   (a) Where a person publishes matter in relation to a deceased person which would have constituted defamation had the deceased been alive, an interested person may, with leave of the court, bring an action for defamation against the publisher of the alleged defamatory matter for

      (i) a declaration that the defendant has published defamatory matter regarding the deceased person,

      (ii) an injunction preventing the further publication of the defamatory matter,

      but not for damages.

   (b) For the purposes of this section, an interested person is a person who, in the opinion of the court

      (i) has sufficient connection by way of a blood, business, professional or other relationship with the deceased person to bring an action in defamation with respect to the publication of alleged defamatory matter about the deceased person, and

(ii) is motivated primarily, in bringing the action, by a concern about the attack on the reputation of the deceased person.

The following alternative provisions should be considered as possible further restrictions to be imposed on the right of action created by this recommendation:

(a) An action is only maintainable where, in publishing a defamatory statement of a deceased person, the publisher knew that the words published were defamatory.

(b) An action is only maintainable where the plaintiff can establish that the defendant made the defamatory statement with malice, that is, with the knowledge that the statement was false or at least with a reckless disregard of whether or not the statement was false.

(c) The common law presumption of falsity is inapplicable in this context. The burden of proving the falsity of the statement lies with the plaintiff.

(d) In addition to any of the above, a defence fashioned after the defence of "fair comment" would be available for honest expressions of historical or biographical significance.

III. THE INNOCENT DEFAMER

A. *Introduction*

At common law, liability for defamation rests upon the mere fact of defamation, the intention of the defamer is irrelevant. Unlike most other torts, strict liability is imposed; a defamer is liable unless a specific defence can be invoked. Some commentators have disapproved of this common law position and have argued that it is unfair to make the defendant liable for all defamatory statements however innocent they appear when they are made.

However, this reversal of the rule has not found favour in common law jurisdictions. Providing a complete defence to any action for defamation where the defendant lacked the intention to defame would leave the equally innocent victim without redress. As the Porter Commission concluded, "It would not seem right that a person whose reputation had been seriously affected by a defamatory statement should have no opportunity to claim to have his reputation vindicated in our courts merely because no one had intended to defame him".[66]

The Porter Commission did, however, propose an amendment to the existing law to deal with certain cases of "unintentional defamation" not preventable by the exercise of due care. It was decided at the 1983 Conference that an "offer of amends" provision should be included in the UDA. Such a provision would be aimed at mitigating the hardships on defendants who published defamatory statements innocently (so-called "unintentional defamers"), rather than all defamers generally. The "offer of amends" provision found in section 15 of the Nova Scotia Act is such a provision.[67] It is based on the Porter Commission's recommendations, as enacted in the *English Defamation Act*, 1952.[68] It provides the machinery for resolution by the parties themselves and offers a defence to the innocent defamer only if his offer is refused. An apology and correction is substituted for an action for damages in such cases because "practical justice will be done without the award of monetary damages".[69] The offer of amends made to the complainant must include an offer to publish a suitable correction and apology and be accompanied by an affidavit identifying the facts relied upon to show that the words were published innocently. If the offer is accepted, no further proceedings for defamation in respect of the publication may be brought. If the offer of amends is rejected, the publisher has a defence to any subsequent action providing it can be established that the words were published innocently, all reasonable care was exercised in relation to the publication, the offer was made as soon as practicable after notice of their defamatory nature was received, and that the words were written by the author without malice.

While the "offer of amends" approach approved by the Conference in 1983 is desirable in principle, in our opinion several issues must be addressed before a suitable draft provision for the UDA can be formulated.

B. *Who is an innocent defamer?*

At common law it is always open to the parties themselves to settle any dispute by making amends, and any apology or offer of amends can be taken into account in determining the assessment of damages. However, the statutory "offer of amends" provision goes beyond a mere codification of the common law. It offers a defence to a certain class of defamers providing specified conditons are met. It is not, however, every unintentional defamer who can take advantage of the "offer of amends" defence as formulated by the Porter Commission and the Nova Scotia Act. The publisher must be able to make a claim that the words were published by him "innocently". The defendant is said to be "innocent" in two cases:

a) where the publisher did not intend the publication to refer to the plaintiff and did not know of circumstances by virtue of which they might be understood to refer to him;[70] or

b) where the words were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of the plaintiff.[71]

"Innocent defamation" is quite narrowly defined. It does not cover the case of a plainly defamatory publication, which the publisher reasonably but erroneously believed to be true. Thus, the risk to the defendant is greater when publishing matter which is defamatory on its face. In our view this policy is sound. The "offer of amends" provision has the effect of taking away a victim's right to claim monetary relief. This, we believe, should be done only in the most obvious cases of "unintentional defamation". It should be remembered that the right of a defendant to offer to publish a correction or apology as the basis for mitigation of damages would not be affected by the proposed "offer of amends" provision.

C. *Extension of the Definition*

Imposing a strict liability standard can have particularly hard consequences in the field of live broadcasting. The special problems associated with live phone-in shows were discussed at the 1983 Conference, although no formal recommendation was adopted. Broadcasts of live programs ordinarily will have no prior knowledge of or control over the words that will be spoken, yet liability may be incurred. To provide a complete defence in such cases would, however, be to overlook the fact that a plaintiff nonetheless may be seriously defamed, and have no effective remedy as the actual speaker is, more often than not, unidentified.

This is another area where the "offer of amends" provision would provide a particularly effective and speedy form of redress. Accordingly we recommend that broadcasters of live phone-in programs be classified as "innocent defamers" to whom the defence is made available. The draft provision contained in this report extends only to phone-in programs.[72] We seek the Conference's views as to whether this third category should be extended even further to include all programs broadcast live, including programs where interviews, planned or spontaneous, are broadcast live. In all situations, however, it should be incumbent upon the broadcaster to establish that the defamation was not preventable by the exercise of due care. Presumably the standard of

care required in each instance would vary and be dependent upon the extent of the broadcaster's control in each situation.

D. *Suggested Procedural Improvements*

There have been criticisms that the procedures required by statutory "offer of amends" provisions are far too cumbersome.[73] The Faulks Committee reviewed the merit of retaining such a statutory defence and concluded that, although the provisions fulfil an extremely valuable purpose, the "section as at present drafted contain(s) defects which render it difficult to operate if not unworkable".[74] Other committees on reform have also been critical.

1. It is difficult to claim the protection of the section when the publisher is not the author of the statement. The section as presently drafted requires that the publisher show that the author made the statement without malice. This requirement has been criticized as being exceedingly onerous and might at times be quite impossible to comply with. Both the Faulks Committee and the New Zealand Committee recommended that the defence should be available to the publisher if he published the matter innocently, without having to consider the state of mind of the author.

2. A second difficulty surrounds the requirement that the defendant submit an affidavit with his offer setting out the basis of his claim that the publication was innocent. The wording of the affidavit is extremely important because if the Plaintiff rejects the offer and proceeds with a court action, the defendant would be precluded from raising circumstances extraneous to the affidavit in support of his allegation of "innocence". The Faulks Committee was of the opinion that this procedure involved too much expensive rigamarole, was laborious and time-consuming, and placed the defendant in a dilemma. It has been recommended, by both the Faulks Committee and the New Zealand Committee that the affidavit requirement be dispensed with in order to encourage offers of amends to be made more promptly.[75] However, their specific suggestions for legislative amendment differ.

   The New Zealand Committee substituted for the affidavit a requirement that a "statement of explanation" be forwarded with the offer of amends. It thought it important to ensure that the plaintiff is informed of the circumstances surrounding the publication of the defamatory statement. This would put the plaintiff in a position to assess the merits of accepting or rejecting an offer of

amends. The contents of the "statement of explanation" would have the same significance as the affidavit previously required: Only evidence specified in the statement would be admissible to prove that the words were published innocently in relation to the plaintiff.

The Faulks Committee recommended more drastic changes to the legislation. It called for the removal of the requirement of an affidavit and left it to the defendant, who it was believed would, "as a matter of course set out in his accompanying letter the salient matters he relies upon in support of the innocence of his publication, so that the complainant will be aware of them at the outset".(76) The defendant would be able to rely on all matters particularized in his defence, and would not be limited to the circumstances set out in the letter accompanying the offer of amends.

We agree with the New Zealand Committee that an explanation may not be offered "as a matter of course" in all cases. If all the pertinent circumstances are not provided to the aggrieved person at the time the offer is tendered, the offer could quite reasonably be rejected by the complainant. If the defendant was then allowed to plead circumstances, previously undisclosed, in support of a claim to statutory defence, the plaintiff's action for damages could be defeated. At this point it might be too late for any apology or correction to be effective in restoring the reputation of the plaintiff, and yet the plaintiff would be left with no means of vindicating the damage to his reputation.

The requirement of a "statement of explanation", the contents of which limit further pleadings, will not totally alleviate the defendant's dilemma. The same care will still be required to ensure that all circumstances surrounding the publication of that statement are included as required in the affidavit. It is a necessary requirement however, from the complainant's point of view. The New Zealand Committee has pointed out that "This is not a case where other, perhaps unknown, facts are in existence which would prejudice a defendant if he could not plead them in his defence".(77) We do, however, suggest that the court be allowed, in appropriate cases, to grant leave to the defendant to plead circumstances extraneous to the statement, providing the plaintiff is not unduly prejudiced thereby.(78)

3. The Faulks Committee and the New Zealand Committee recognized that initial acceptance of an "offer of amends" does not always result in a final resolution of the matter. Amendments have

been suggested which would assist the parties when disputes arise after the acceptance of the offer.

(a) Disputes may arise as to the form or manner of publication of the correction or apology. The Faulks Committee recommended that the parties have access to a judge in chambers in such cases, whereas the New Zealand Committee preferred an arbitration procedure.[79]

We agree with both Commissions that speed and informality are essential to this defence if it is to fulfil its intended purpose. In our view having access to a judge in chambers is the most expeditious manner of dealing with disputes of this nature which may arise.

(b) Since the complainant in accepting an "offer of amends" is giving up the right to claim damages, all the costs associated with such a procedure should be recoverable against the publisher.[80] Such costs would include: costs of publication of the apology, legal costs on a solicitor-client basis, and all other expenses reasonably incurred by the complainant.

We recommend that an innocent defendant should be liable to pay the plaintiff's legal costs and expenses on a solicitor and client basis. In default of such an agreement, the dispute would be referred to a judge in chambers.

(c) Disputes may also arise as to what the defendant's responsibility is with respect to any unsold copies of a publication containing the words complained of.

We recommend that, upon application, the court should be given the power to order the rectification or withdrawal of unsold copies of the offending publication.[81]

4. In some situations an offer of amends may be refused and the complainant may proceed to trial on a matter which is unsubstantial or trivial. The New Zealand and Faulks Committees recommended that the legislation should allow an application for security for costs in such cases.[82]

We do not recommend that an application for security for costs be included within the "offer of amends" provision. In our view such a determination can only be made after hearing viva voce evidence, and thus is best reserved for the trial judge. If the trial judge finds that the plaintiff, for whatever reason, acted unreasonably in commencing an action, this can always be dealt with by way of an order denying the

plaintiff's costs or an order assessing costs against him. It perhaps should also be noted that an application for security for costs is always available to a complainant in a defamation action, providing the requirements of the general rules in this regard are met.

5. An unaccepted offer should not be regarded as an admission of liability or be referred to in later court proceedings without the consent of the defendant who made the offer.[83]

We recommend that a provision to this effect be included in the "offer of amends" section.

E. *Recommendations*

1. To alleviate the hardships caused to the innocent defamer, the *Uniform Defamation Act* should contain an "offer of amends" provision similar to that contained in section 15 of the Nova Scotia *Defamation Act*.

2. Because speed and informality are essential to this defence, the following additional elements should be incorporated in it:

   (a) the defence should be available to a publisher if he published the matter innocently (as defined within the Nova Scotia Act) without consideration of his state of mind;

   (b) any offer of amends should include an explanation of the circumstances that surrounded the publication;

   (c) where the offer of amends is rejected, and the offer raised as a defence, the defendant should not be permitted to plead circumstances extraneous to the statement, except with leave of the court where the court is satisfied that the plaintiff is not unduly prejudiced thereby;

   (d) an unaccepted offer of amends should not be admissible in court proceedings without consent of the defendant who made it;

   (e) disputes as to the form and manner of publishing a correction or apology should be referred to a judge in chambers;

   (f) the court should be given power, upon application, to order the rectification or withdrawal of unsold copies of an offending publication where an offer of amends has been accepted;

   (g) costs arising out of any offer of amends should be borne by the defendant on a solicitor and client basis.

3. The definition of "innocent defamation" should be extended to include broadcasting companies involved in broadcasting or televising live phone-in programs. Quaere: Should this category be extended to include broadcasting companies involved in all types of live programming.

IV. THE DEFENCE OF FAIR COMMENT

The Conference agreed with the essence of the recommendations that were presented with respect to the defence of "fair comment". We have been asked to respond to two further queries.

A. *"Honestly or genuinely"*

The 1983 report recommended codification in the UDA of the defence of fair comment. One of the proposed statutory requirements of this defence is that the person making the impugned statement of opinion "honestly or genuinely" holds the opinion. The question has been asked whether the reference to the words "or genuinely" is necessary. At common law the test is whether the opinion is honest, that is, is an expression of the defendant's real opinion: ". . . a defence of fair comment is dependent upon the fact that the words in issue represent an honest expression of the real view of the person making the comment".[84] The phrase "or genuinely" is merely descriptive of the word "honestly"; both concepts are meant to be identically construed.

The phrase "or genuinely" being superfluous to the word "honestly", its inclusion in the new statutory definition of the defence of fair comment could give rise to unnecessary litigation to determine what changes, if any, were intended to be made to existing law on this topic. We recommend that the reference to "or genuinely" be deleted from the provision in question.

B. *Section 9 of the UDA*[85]

We have been asked to consider whether section 9 of the *Uniform Defamation Act* should be retained, or the comparable Ontario provision adopted in its place.[86] The provisions are equally effective in their intended purpose: reversal of the rule established in the *Cherneskey* decision, which held that it is a requirement of the defence of fair comment that the publisher honestly holds the opinion expressed, even when the publisher is not the author of the opinion. Both provisions replace this subjective requirement with an objective requirement which

allows the publisher to rely on the defence of fair comment if (in addition to the other requirements of the defence) it can be shown that "a person could honestly hold the opinion".

In addition to this objective requirement, the UDA provision goes on to add a second requirement. A person who publishes an opinion of which he is not the author must also establish that he "did not know that the person expressing the opinion did not hold the opinion". This incorporates a subjective element into the defence. The requirement does not go so far as to insist upon proof of the author's honest opinion, rather the onus is simply to show lack of any specific knowledge that the author did not hold the opinion. This is emphasized in subsection (2) of the provision, where it is clearly stated that there is no duty upon the defendant "to inquire into whether the person expressing the opinion does or does not hold the opinion". Presumably, in the absence of any direct evidence to the contrary, the publisher would discharge the onus simply by testifying that he did not know that the author did not hold the opinion in question – the reasonableness of his lack of knowledge in this regard being irrelevant.

The Ontario provision has simplicity on its side. However, when applying such a pure objective test to a defence of fair comment, protection is being afforded to a publisher even when he knew the author did not honestly hold the opinion in question. No doubt, in most cases an allegation of malice could be made under these circumstances but this may not always be the case.

We recommend retaining section 9 of the UDA without change.

C. *Recommendations*

We recommend that:

1. The requirement in the 1983 Report that an opinion be held "honestly or genuinely" to raise a defence of fair comment be amended to delete "or genuinely".
2. That section 9 of the *Uniform Defamation Act* be retained without change.

V. QUALIFIED PRIVILEGE

A. *Issues*

It was recommended at the 1983 Conference that the special categories of reports protected by statutory privilege should not be restricted

only to reports in newspapers and broadcasts but should be extended to reports in books and other publications. We have implemented this recommendation by amending sections 10 and 11 of the UDA accordingly.

Another issue was raised concerning the special categories of reports protected by qualified privilege. Section 10 of the UDA supplements the common law by extending a qualified privilege to reports of bodies which were either unprivileged or of doubtful status at common law.[87]

The statutory qualified privilege is dependant upon the following requirements:

(i) the publication must not be made maliciously;

(ii) the publication must not be seditious, blasphemous or indecent;

(iii) the defendant must have complied with any request for reply or correction; and

(iv) the publication must be of public concern and for the public benefit.

The section does not limit the privilege existing at common law. Therefore even if a defendant cannot rely on section 10 because, for example, he fails to comply with a request to publish a letter of explanation, he may still, in a proper case, be entitled to rely on a common law privilege.

Although there is general consensus that the list contained in section 10 is almost certainly too confined for modern needs, there is considerable scope for disagreement over which bodies are of sufficient interest to the public to attract qualified privilege. We have reviewed various categories of reports which other jurisdictions have thought should qualify and have assessed their suitability in a Canadian context. A list has been prepared and is reproduced in Schedule E. We will, however, seek the Conference's views and further direction as to:

(i) the merits of expanding the special categories of reports protected by statutory qualified privilege;

(ii) the inclusion of the various categories set out in Schedule E and any further additions;

(iii) the geographical limit to be prescribed in each instance. (For example: should fair and accurate reports of the

proceedings in public of legislative bodies of any *foreign state* be privileged?)

B. *Recommendations*

1. That the bodies which attract statutory qualified privilege should be extended to include the bodies referred to in Schedule E.

VI. PROCEDURE

A. *Notice Requirements: Section 14 of the Act*

1. *Issues*

Section 14 of the UDA makes notice a condition precedent to a defamation action commenced against a newspaper or broadcaster. If an aggrieved party fails to give the notice as prescribed, the section provides a defence.[88] Failure to give notice constitutes an absolute bar. The purpose of the provision is to call to the publisher's attention the alleged defamatory matter so as to enable the publisher to investigate the complaint and if deemed appropriate "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".[89]

The great drawback with the UDA provision, and with most of its provincial counterparts, is that it functions as a limitation period within a limitation period. The defendant requires notice in order to avail himself of the apology and special damage provisions of the Act, yet the objectives of the notice requirements are not served by removing the plaintiff's rights if he fails to give notice within a prescribed time. It forces the plaintiff to act quickly, which should be the job of a limitation period proper.

When the Conference last studied this provision, it was in the context of considering a proposed amendment. The amendment in question was designed to mitigate the effect of the notice requirement while continuing to afford to the defendant an opportunity to apologize. The proposed amendment reads as follows:

> 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.

Although English law does not require a notice of action before commencement,[90] most Canadian jurisdictions have adopted some form of notice as a condition precedent to launching a defamation action against the media. However, the B.C. Law Reform Commission recommended against a notice requirement.[91] It pointed out that whether or not the law contains a notice requirement, an apology or retraction can always be demanded. Even if the defendant first becomes aware of the matter upon being served with a claim, he can still apologize and thereby take advantage of the general rules of mitigation. This being the case, the B.C. Commissioners concluded:

> In our view a notice requirement such as that contained in the Uniform Defamation Act would serve no useful purpose, but would have several disadvantages: it would create a new limitation period; and increase the difficulties and expense of litigation, and the law's technical complexity.[92]

We tend to agree with this position. Removal of the formal notice requirement will not unduly prejudice the defendant in his ability to mitigate the damages suffered by the plaintiff. In the vast majority of instances the defendant is made aware of the defamed victim's complaint relatively soon after publication, either directly or through the victim's solicitor. Ample opportunity is available to make amends even after the action is commenced. Even when the plaintiff chooses to commence an action after a fairly lengthy period of time has elapsed from publication, any apology tendered will still be as effective to deflect the sting of the statement as it would be under section 14 as presented in 1983.

2. *Recommendations*

1. We recommend that section 14 of the UDA be deleted. (Note: Consequential amendments to sections 13, 18 and 19 also have to be included in the draft Act.)

B. *Limitations*

1. *Issues*

Recommendations were made at the 1983 Conference in an attempt to simplify the law of limitations applicable to defamation actions. The Conference, however, was of the view that any limitation provisions

ultimately adopted for inclusion within the UDA should be more consistent with the philosophy of the *Uniform Limitation of Actions Act* (ULAA). We have thus abandoned the recommendations previously made and suggest that the following approach be considered.

In 1982 a new ULAA, viewed as a significant improvement to the law of limitation of actions, was tentatively adopted. As far as possible, an attempt was made to make this Uniform Act more comprehensive so as to avoid "the scattering throughout the statute book of limitation periods" which were "considered to be a trap for the unwary and to be likely to lead to undesirable complexity and to inconsistent treatment of similar cases".[93] In addition to its comprehensiveness, its structure was also greatly simplified. Rather than having different parts of the Act deal with different categories of legal rights, the new Act groups classes of actions according to the length of the limitation period. It has retained fixed limitation periods, and the traditional common law rules of accrual of actions are used to determine the commencement point of the limitation period. For most causes of action the limitation period begins to run on the day on which "the right to bring the action arose". In other respects, an attempt was made to modernize the law of limitations. Special provisions are set out which apply to some or all of the limitation periods, relating to postponement or suspension of the running of time, conflict of laws and amendment of pleadings. For example, in the case of actions in tort or contract, the Act imposes a two year fixed period which commences when the right to bring the action arises, but the consequences of such an approach have in part been tempered by inclusion of the "hidden cause of action" provisions (section 13), but the section does not extend to defamation.

The question of whether actions for defamation should be added to section 13 was raised during the discussions preceding the adoption of the ULAA. It was then concluded that limitation problems were not common in connection with defamation actions and the ULAA "should extend the new hidden cause of action provision only to areas in which practical problems are likely".[94]

We agree with the approach taken by the ULAA. We recognize that to single out defamation actions, by imposing a different limitation period and commencement period, would, in addition to providing a "trap for the unwary", be contrary to the general philosophy of the ULAA. So as to achieve simplicity and uniformity in the law of limitations, we recommend adhering to the approach utilized by the ULAA. A two year limitation period should be adopted for all actions for defamation; the period to commence upon publication. There is no need in our view to

duplicate this provision in the UDA. In keeping with the philosophy of the ULAA, the use of limitation periods in particular Acts should be discouraged. We do, however, suggest that a note be appended to the Act which refers jurisdictions to the provisions of the ULAA which apply to defamation actions.

2. *Recommendations*

1. Section 15 of the UDA should be deleted. A note has been appended to the draft Act referring to the ULAA.

VII. FREEDOM OF INFORMATION: STATUTORY PROVISIONS

The law of defamation recognizes that freedom of speech and freedom of information are of vital importance in a democratic society, and particularly so in regard to matters of public or general concern. The various defences available in defamation actions are intended to strike a proper balance between protecting individual reputations and the need for freedom of speech and information. However, the statutory defences in the UDA which attempt to strike such a balance are limited in scope. For the most part, they only apply to newspapers and broadcasters. They were adopted in recognition of the special status and importance of these mediums of communication. We have been asked to consider whether the time has come to extend such provisions to other forms of publication.

A. *Statutory Defences*

Sections 10 and 11 of the UDA extend the common law defences of qualified and absolute privilege to certain "fair and accurate" reports which are "published in a newspaper or by broadcasting". Arguably, a fair and accurate report of proceedings of the type described in section 10 or 11 contained in a book or some other publication not falling within the statutory definition of "newspaper" should equally be entitled to the same statutory privileges. The 1983 Report recommended that such privileges be extended.

Additional protection is afforded to the news media by section 18 of the Act. It does not provide a complete defence but rather serves to limit the plaintiff to "special" or "actual" damages when the conditions specified in the section have been met. The scales are tipped in favour of freedom of speech for the news media when the publication concerns matters of public interest, is made in good faith, does not impute to the plaintiff the commission of a criminal offence, and takes place in

mistake or misapprehension of the facts. The 1983 Report recommended retention of section 18 in its present form.

Our recommendation in this regard has not changed. We suggest there are sound policy reasons why section 18 should not extend beyond the news media. The section alleviates some of the hardships resulting from the application of the strict liability rule but in doing so it significantly restricts the defamed victim's remedies. A claim for special damages is difficult, if not impossible to establish in most cases. Thus what the section has accomplished is the substitution of an apology and retraction for an action for damages. This is tolerable only because of the vital role of newspapers and broadcasters, and because of the time constraints under which they must operate. It is a way of reducing the "chilling effect" on free speech that would otherwise result if the news media were held financially responsible to the fullest extent for publications taking place in mistake or misapprehension of the facts.

B. *Notice Periods*

It is recommended elsewhere in this report that section 14 of the UDA be deleted. If that section is retained, however, it should be applicable to *all* actions of defamation.

C. *Apology*

Section 17 of the UDA provides for a plea of apology in mitigation of damages when, in the case of a newspaper, a full and fair apology and retraction of a defamatory statement is published "before the commencement of the action or at the earliest opportunity afterwards" and, in the case of a broadcast, when such retraction and apology is broadcast "from the broadcasting station from which the alleged defamatory matter was broadcast, on at least two occasions on different days". We suggest that the Conference consider the repeal of this section, together with section 4 of the UDA, and the adoption of a new "apology" provision which would have general application to all defamation actions.

The precursors to sections 4 and 17 of the UDA are sections 1 and 2 of *Lord Campbell's Libel Act*, 1843 (as amended by the *Libel Act* of 1845).[95] Pursuant to section 2 of this Act, evidence of a "full apology" is an element of a statutory defence created by the Act. The defence is available providing a payment of amends is made into Court, and the defendant succeeds at the trial in proving: absence of malice, absence of gross negligence, and the sufficiency of the apology.[96] In England, all three requirements must be met in order to afford a defence. However,

even where the defendant cannot successfully raise this defence, any apology made or offered by the defendant may still be tendered in mitigation of damages.[97]

Section 17 of the UDA, unlike the English provision from which it is derived, does not create a statutory defence of apology for newspapers and broadcasting authorities. It merely stipulates that an apology may be considered in mitigation of damages. At first glance this would appear to be merely declaratory of the common law. The section however, has adopted portions of the exact phrasing of *Lord Campbell's Act* which links the mitigating effect of an apology with the absence of malice and gross negligence. By including these two additional factors, the section would seem to qualify the mitigating force of apologies provided by the common law.

At least two jurisdictions with provisions similar to section 17 have found such an interpretation unsatisfactory. Both the British Columbia Court of Appeal and the Supreme Court of Ontario have decided that, wholly apart from such statutory "apology" provisions, defendants may tender evidence of an apology or retraction in mitigation of damages.

Mr. Justice Holland of the Ontario Supreme Court chose to adopt the English solution to the problem, despite the wording of the Ontario provision, which is similar to the UDA. He held that "the common law right to consider the apology in mitigation continued after the passing of the statute".[98] With respect, we submit that this approach fails to give significance to the distinction between the wording of the English Act and the Ontario provision. John Irvine, in an annotation to the *Munroe* v. *Toronto Sun* case, comments on this difficulty:

> It is perfectly logical to say with Gatley, that: "If you fail to satisfy all the exacting requirements for the complete statutory defence, you may still fall back upon your apology as evidence in (partial) mitigation of damages". It is quite another thing to say: "If you fail to satisfy the various requirements required by section 9(1) to admit evidence of an apology in mitigation of damages, you may without qualification or restriction claim that same privilege at common law."[99]

Mr. Justice Hinkson of the B.C. Court of Appeal decided to approach the problem from a different perspective.[100] His decision gives recognition to the distinction between the English and British Columbia legislation. He ruled that since the B.C. provision does not afford a

defence, it should not be construed as setting up requirements which must be established before any plea of mitigation will be accepted. In his view such an approach casts a heavy burden on the defendant and is only reasonable when dealing with a plea that would afford a defence. Since the B.C. provision provides for a plea in mitigation, it should be construed as laying down ground rules for arguments by way of mitigation of damages. The section merely indicates some of the many factors the defendant may plead in mitigation of damages. To illustrate this point Hinkson J stated:

> Thus, the defendant may plead, and to the extent that the plea is proved, the Court may take into account by way of mitigation, that the broadcast was made without actual malice and without gross negligence and that a full and timely apology has been made. Of course, to the extent that the defendant fails to provide any of those factors, the Court will not take them into account in mitigation of damages. Approached in that way, I conclude that a distinction is to be made between the requirements which must be proved to establish a defence and factors which may be pleaded in mitigation of damages.[101]

We suggest that the apology rules be simplified. Apology provisions which have application to all actions in defamation and which clearly indicate that an apology is but one of the many factors which may be pleaded in mitigation of damages should be adopted. The intention of such a provision would be declaratory of the common law. The Law Reform Commission of British Columbia has recently recommended the adoption of such a provision. In their report on defamation the *Tait* case is cited as exemplifying how section 6 of their Act "introduces unnecessary and confusing technical refinements".

D. *Recommendations*

1. In light of the confusion surrounding the interpretation of section 17 of the Uniform Defamation Act we recommend that sections 4 and 17 be deleted and a new section encompassing the following be included:

   (a) the defendant may plead or adduce evidence in mitigation of damages that he made or offered to make an apology or retraction at an appropriate time, and in an appropriate manner;

(b) the plaintiff may plead or adduce evidence in aggravation of damages that the defendant refused or failed to make an apology or retraction at any appropriate time and in an appropriate manner;

(c) the defendant may prove in mitigation of damages that the plaintiff has already brought action for, or has recovered damages, or has received or agreed to receive compensation in respect of the same defamation, or a defamation substantially the same, as that for which such action is brought.

VIII. THE CHARTER OF RIGHTS AND FREEDOMS

The preservation of good reputation and the right of free expression are both interests highly valued by democratic societies. In certain respects, however, these interests conflict with each other. It is impossible to afford recognition to one without a corresponding restriction of the other. Throughout the development of the law of defamation, the judiciary has attempted to reconcile these competing demands, seeking a balance between both interests. The result is the complex set of rules that characterizes the law of defamation. It can be explained "in part as the law's, however inadequate, attempt to come to terms with this difficult dilemma".[102]

Even before the enactment of The Charter of Rights and Freedoms, there were those who questioned whether a proper balance had been struck by the common law. The law of defamation has been criticized for according inordinate importance to preservation of individual reputation.[103] Now, with the entrenchment of freedom of expression within the Canadian Charter, the opportunity arises for this debate to resurface through the process of constitutional scrutiny. The scope of the Charter's potential impact on the law of defamation will depend, of course, on the extent to which the Charter is interpreted as affecting private rights in disputes between citizens as well as disputes between citizens and governmental bodies. However, the American experience suggests that the Charter will have an impact at least upon actions for defamation brought against the news media by public officials.[104] It is virtually inevitable that the law of defamation will have to be justified anew against the standards set by the Charter.

It is difficult to anticipate whether the common law rules which afford protection against defamation will be reaffirmed as reasonable limits that can be "demonstrably justified in a free and democratic society", or whether constitutional restrictions will be superimposed on the traditional law of defamation in the name of freedom of speech. But

it must be remembered that the rules of defamation did not develop in isolation from the competing demands of freedom of expression. The law in this area developed alongside the legal tradition of respect for civil liberties.

Protections for free speech in Canadian civil rights legislation prior to the Charter have not been found to conflict with the traditional law of defamation. The Saskatchewan *Human Rights Code*, for example, protects free expression "under law". The phrase "under law", like section 1 of the Charter, is a limit on free expression. It has been held to preserve the law of defamation.[105] It may well be that the law of defamation will withstand the test of constitutional scrutiny.

The 1983 Conference called into question the effect of the Charter on certain provisions of the UDA: Is defamation law per se unconstitutional? Should the notwithstanding clause be implemented? Has the burden of establishing falsity of the statement been misplaced? Would a right of reply be upheld in light of the constitutional guarantee given to the press?

This is a mere sampling of the various issues that may arise in future cases. It is beyond the scope of this report to address these complex issues in detail. Many of them revolve around the underlying philosophy of tort law as it relates to defamation. Our terms of reference did not include a re-examination of this underlying philosophy. As was set out in our initial report to the Conference:

> 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 . . . Rather we see our role in terms of clarifying and balancing the concepts of defamation law which currently exist.[106]

In making recommendations for the Conference's consideration, we have not departed from the underlying philosophy of the law of defamation. We have, however, recommended that certain new UDA provisions be adopted and that certain existing provisions be modified. This we have done in an attempt to clarify and modernize traditional defamation law. Although we have left intact many of the impugned aspects of the law of defamation, we have also attempted to correct perceived imbalances between the rights and freedoms at issue. We are of the view

that it would be premature to recommend changes to the UDA in anticipation of successful Charter challenges.

One issue that we do feel warrants specific comment is the suggestion that the UDA should include an express declaration that it is to operate nothwithstanding section 2 of the Charter. Presumably, the suggestion was offered as a means of insulating the law of defamation from the effects of the Charter. We do not see this as necessary or desirable.

Although the protection of reputation is the purpose behind the law of defamation, we believe our law should continue to strive for the least restrictive means of attaining this purpose. Protection cannot be afforded in absolute terms. Through the process of constitutional scrutiny, imbalances in our present law may be brought to light and rectified. If we choose to opt out of the Charter, that opportunity would be lost. Defamation legislation can and should co-exist with The Charter of Rights and Freedoms, as a reasonable limit upon freedom of speech. What amounts to defamation will be adjusted from time to time as public attitudes change; adjustments may also be required as the scope of freedom of expression is further defined by the courts. In that way, the Charter may assist in the continuing effort to achieve and maintain the balance between conflicting rights that has always been at the core of defamation law.

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(1) Uniform Law Conference of Canada, Proceedings of the 65th Annual Meeting, (1983), at 96. (Hereafter referred to as "the 1983 report".)

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(2) Appended to this report as Schedule B. (Hereafter referred to as UDA).

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(3) See: Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (1979) at para. 84; Western Australia Law Reform Commission, *Report on Defamation*, 1979, at para. 5.1.

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(4) Report of the Committee on Defamation, *Recommendations on the Law of Defamation* (1977), at p. 20, para. 60.

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(5) *Supra* footnote 1, at p. 99.

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(6) It should be noted that the tort of "injurious falsehood", a term coined by Salmond, encompasses a diverse group of actions including slander of goods, slander of title, passing off, trade libel and analogous cases, even of a non-commercial nature. See generally: *Salmond on the Law of Torts*, 11th ed. London: Sweet & Maxwell Limited, 1953, p. 73; Fleming John G., *The Law of Torts*, 6th ed. Sydney: The Law Book Company Limited, 1983, p. 668. For an historical analysis as to the scope of this tort, see: Morison, "Verbal Injury", 3 Syd. L. Rev. 4, 6-11 (1959).

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(7) For examples of common law formulations, see generally: *Duncan & Neill on Defamation*, 2nd ed., London: Butterworths, 1983, chap. 7; Jeremy S. Williams, *The Law of Defamation in Canada*, Toronto: Butterworth, 1976, p. 6.

(8) [1936], 2 All E.R. 1237.

(9) *Ibid.*, at 1240. This definition was cited by Dickson J. in *Cherneskey* v. *Armadale Publishers Ltd.* (1978), 90 D.L.R. (3d) 321 at 342-43, as being virtually the most universally accepted test, Spence and Estey JJ. concurring.

(10) *Salmond on the Law of Torts*, supra footnote 6, at p. 703.

(11) *Ibid.*, p. 704. Passage cited in *Hein* v. *Canadian Fairbanks Morse Co. and Burrows*, [1938] 4 D.L.R. 63 (N.B.C.A.), at 68, per Harrison J.

(12) *Ratcliffe* v. *Evans* [1981-4] All E.R. Rep. 699 at p. 702, per Bowen L.J. Cited with approval in: *Smith* v. *Dun* (1911) 19 W.L.R. 518 (Man. C.A.); *Shore* v. *Britski* (1942), 2 W.W.R. 343 (Sask. C.A.); *Goldmanis* v. *Kajaks* (1976), 6 W.W.R. 506.

(13) *Gatley on Libel and Slander*, 8th ed., London: Sweet & Maxwell, 1981 at p. 58.

(14) *Salmond on the Law of Torts, supra* footnote 6, p. 423.

(15) *Supra* footnote 3.

(16) By the *Defamation Law of Queensland*, 1889, 53 Vic. No. 12 the tort of defamation is declared to be an actionable wrong. The definition of defamatory matter is found in the *Queensland Criminal Code*, 1899, 63 Vic. No. 9.

(17) Now: *The Defamation Act* (Tas.), No. 42 of 1957.

(18) Now: the *Criminal Code* (W.A.), ch. 35; for the purposes of criminal defamation.

(19) *The Defamation Act* (N.S.W.), No. 39 of 1958. Now: *The Defamation Act* (N.S.W.) No. 18 of 1974; which has repealed the statutory definition in question.

(20) The *Criminal Code* (Qld.), s. 366; *The Defamation Act* 1957 (Tas.), s. 5; the *Criminal Code* (W.A.), s. 346; *Defamation Act*, 1958 (N.S.W.), s. 5 (now repealed).

(21) Morison, "Verbal Injury", *supra* footnote 6, at p. 6.

(22) *Ibid.*, at p. 4.

(23) (1910), 12 C.L.R. 84.

(24) *Ibid.*, at p. 24.

(25) (1975), 134 C.L.R. 1.

(26) "Under *The Defamation Act* 1958 what had previously been the common law torts 'defamation' and 'injurious falsehood' were subsumed under a single statute in section 5": *World Hosts* v. *Mirror Newspapers* (1975), 2 N.S.W.L.R. 16; (1979), 53 A.L.J.R. 243 at p. 5, per Aickin J. See also: *Murphy* v. *Australian Consolidated Press* (1968) 3 N.S.W.R. 200; *Livingstone-Thomas* v. *Assoc. Newspapers*, [1969] 90 W.N. (Pt. 1) (N.S.W.) 223; and *infra* footnote 30.

(27) *Calwell* v. *Ipec Australia Ltd.* [1976], 5 A.L.J.R. 152, at p. 154 per Mason J.

(28) Law Reform Commission of New South Wales, *Report on Defamation*, 1974, para. 21.

(29) *Ibid.*, at para. 18.

(30) "In my opinion, it is clear that the new Act removes the expansion of the common law made by section 5 of *The Defamation Act*, 1958 . . . it is now no longer actionable merely to publish an imputation of a person by which he 'is likely to be injured in his profession or trade' and that the common law notion of 'disparaging imputation' referred to by Mason J in the *Sungravure* case is now the relevant law": *Dawson Bloodstock Agency* v. *Mirror Newspapers* (1979), 1 N.S.W.L.R. 16, at 18, per Begg J. See also: *Boyd* v. *Mirror Newspapers* (1980), 2 N.S.W.L.R. 448.

(31) *Unfair Publication: Defamation and Privacy, supra* footnote 3, at para. 78.

(32) *Ibid*, at para. 84.

(33) *Unfair Publication: Defamation and Privacy, supra* footnote 3, para. 84.

(34) (1980), 2 N.S.W.L.R. 449 at 453.

(35) *Ibid.*, at p. 453. Also see: *Youssoupoff* v. *M.G.M. Pictures Ltd.*, [1934] 50 T.L.R. 581 at p. 587 as per Slesser L J: ". . . not only is the matter defamatory if it brings the plaintiff into hatred, ridicule or contempt by reason of some moral discredit on her part, but also if it makes the plaintiff be shunned and avoided and that without any moral discredit on her part".

(36) *The Law of Torts, supra* footnote 6.

(37) *Ibid.*, at p. 499.

(38) *Ibid.*, at p. 499.

(39) *Duncan & Neill on Defamation, supra* footnote 7.

(40) *Ibid.*, at p. 32.

(41) Factual scenario found in *Sungravure* v. *M.E. Airlines, supra* footnote 26. "It is clear that at common law it would be no libel to publish of a carrier by air that, for reasons not associated with any blameworthiness on his part, those who might patronize his airline face a serious risk of hijacking, with its attendant dangers": per Stephen J at p. 13.

(42) See: *George's Tavern Ltd.* v. *Fundy Broadcasting Co.* (1975), 10 N.B.R. (2d) 592 (N.B.Q.B.) where newspaper reports of a shooting outside plaintiff's tavern were held not to be defamatory because there was no degradation or lowering of the plaintiff's reputation.

(43) See generally: *Gatley on Libel and Slander, supra* footnote 13, at p. 950; *The Law of Torts, supra* footnote 6, at p. 501.

(44) See Schedule H.

(45) Fleming, *supra* footnote 6 at p. 501. However, statements about the dead that reflect upon the reputation of a living person may be actionable. See: *Broom* v. *Ritchie* (1904), 6 Court of Sessions Cases, 5th series, 942; *Small* v. *The Globe Printing Co. Ltd.* [1940], O.W.N. 163 (Ont. H.C.).

(46) See: *Unfair Publication: Defamation and Privacy* (ALRC), *supra* footnote 3 at para. 99-102; *Report on Defamation* (WALRC), *supra* footnote 3 at para. 9.2-9.8; *Recommendations on the Law of Defamation* (N.Z.) *supra* footnote 4 at para. 436-442; Faulks Committee Report, *Report of the Committee on Defamation* (1975) (UK) at para. 417-422.

(47) *Supra* footnote 1 at p. 99.

(48) *Gertz* v. *Robert Welch Inc.*, 418 U.S. 323 (1974) as cited in Madott, D., *Libel Law Fiction and the Charter* (1983) 21 O.H.L.J. 741 at 765.

(49) Fleming, *supra* footnote 6 at p. 497.

(50) Porter Committee Report, *Report of the Committee on the Law of Defamation* (1948) (U.K.).

(51) *Ibid.*, at para. 29.

(52) *Faulks Report, supra* footnote 46, at para. 419.

(53) *Ibid.*, at para. 420.

(54) Faulks Report, *supra* footnote 46 at para. 420.

(55) Australian Law Reform Commission set the period at three years, *supra* footnote 3 at para. 102; New Zealand Committee specified six years, *supra* footnote 4 at para. 441; Western Australia Law Reform Commission agreed with the five year time limit suggested by the Faulks Committee, but noted that it would support the Australian Law Reform Commission's suggestion of three years "if this were commonly accepted, for the purposes of a uniform law", *supra* footnote 3 at para. 9.4.

(56) Cameron, S.F. "Defamation Survivability and the Demise of the Antiquated Actio Personalis Doctrine" 1985, 85 C.L. Rev. 1833 at 1842.

(57) The Faulks Committee used the apt phrase "highly objectionable method of profiteering" to describe the real problem created by defamation of the dead.

(58) This alternative is based on an approach proposed by the New Zealand Committee on Defamation, *supra* footnote 4, para. 440: "We are only concerned with the blatant cases of defamation and we do not see that there is any need to innovate beyond this prime area of concern. We have therefore limited our recommendation to cases where the words are not only proved to be untrue but the writer, in publishing the words, knew that they were untrue".

(59) ALRC's criticism of the New Zealand approach, *supra* footnote 3, at para. 101.

(60) (1964) 376 U.S. 254.

(61) Hogg, Peter W., *Constitutional Law of Canada*, 2nd ed. Toronto: The Carswell Company Limited, 1985, at 717.

(62) See *Unfair Publication: Defamation and Privacy* (ALRC), *supra* footnote 3 at para. 102; *Report on Defamation* (WALRC), *supra* footnote 3 at para. 9.3; *Recommendations on the Law of Defamation* (New Zealand), *supra* footnote 4, at para. 441; Faulks Report, *supra* footnote 46, at para. 422.

(63) *Unfair Publication: Defamation and Privacy* (Aust.), *supra* footnote 3, at para. 102.

(64) *Ibid.*, at para. 102.

(65) Faulks Report, *supra* footnote 46 at para. 422.

(66) This was the view expressed in the Porter Committee Report, *supra*, footnote 50 at para. 59.

(67) See Schedule C.

(68) Similar provisions have been enacted in New South Wales, Tasmania and New Zealand. See: *Defamation Act*, 1974 (N.S.W.) ss, 36-45; *Defamation Act*, 1957 (Tas.) s. 27; *Defamation Act*, 1954 (N.Z.) s. 6.

(69) Porter Committee Report, *supra* footnote 50 at para. 62.

(70) The case of *Hulton* v. *Jones* [1908-1910] All E.R. 29 is usually cited as an example of "innocent defamation" where the defendant did not intend to refer to the plaintiff at all. The statements were intended to refer to a fictitious character but in fact were defamatory of a person whose existence was not known to the publisher.

(71) The case of *Cassidy* v. *Daily Mirror* [1929] All E.R. 117 is usually cited as an example of "innocent defamation" where, although the publisher intended to refer to the plaintiff, he neither knew nor had reason to know that what he published was defamatory of anyone. The case involved the publishing of an engagement announcement, on its face harmless, which announcement was published at the request of a Mr. M.C. Although the defendant had no reason to believe there already was a Mrs. M.C. in existence, she succeeded in her action for defamation against the defendant.

(72) See draft legislation section 14(5)(c).

(73) Fleming, *The Law of Torts, supra* footnote 6, p. 512.

(74) Faulks Committee Report, *supra* footnote 46 at para. 281.

(75) *Ibid.*, para. 283; New Zealand Report, *supra* footnote 4 at para. 298.

(76) Faulks Committee Report, *supra* footnote 46, para. 283.

(77) New Zealand Report, *supra* footnote 4, para. 305.

(78) See Draft Uniform Defamation Act section 14(4).

(79) Faulks Committee Report, *supra* footnote 46, para. 287; New Zealand Report, *supra* footnote 4 at para. 314.

(80) Faulks Committee Report, *supra* footnote 46, 287(a)(iii); New Zealand Report, *supra* footnote 4, para. 311 & 314(iv).

(81) New Zealand Report, *ibid.*, para. 314(v); Faulks Committee Report, *ibid.*, para. 287(a)(iv).

(82) New Zealand Report, *ibid.*, 314(vi); Faulks Committee Report, *ibid.*, 287(a)(v).

(83) New Zealand Report, *ibid.*, para. 314(viii); Faulks Committee Report, *ibid.*, 287(a)(vii).

(84) *Cherneskey* v. *Armadale* [1979] 1 S.C.R. 1067 at 1073; see also *Gatley on Libel and Slander, supra* footnote 13 at para. 729.

(85) For a general discussion as to the background to the adoption of this section see: "*Uniform Defamation Act* - Fair Comment - Report of Alberta and Ontario", Proceedings of the Sixty-first Annual Meeting of the Uniform Law Conference of Canada, 1979, p. 116.

(86) Both provisions are appended to this report as Schedule D.

(87) *Gatley on Libel and Slander, supra* footnote 13, para. 591.

(88) The notice that is required by the section is notice of one's "intention to bring an action". As to whether notice of the commencement of an action is, in and of itself, sufficient compliance, see, *Stuart's Furniture* v. *No Frills Appliances* (1983), 40 O.R. (2d) 52 at p. 53 as per Smith J: ". . . the notice must precede the start of the action . . . the statement of claim can accordingly not constitute notice within the meaning of the Act".

(89) *Barber* v. *Lapton* (1970), 9 D.L.R. (3d) 635 at 636 per Hall J.

(90) Gatley *supra* footnote 13, para. 1001.

(91) Law Reform Commission of British Columbia, *Report on Defamation*, 1985, p. 58.

(92) *Ibid.*

(93) Limitation of Actions (Alberta Report) Proceedings of the Sixty-first Annual Meeting Uniform Law Conference of Canada, 1979, page 158.

(94) *Ibid.*, at p. 191.

(95) Appended to this report as Schedule F.

(96) *Gatley on Libel and Slander, supra* footnote 13 at para. 866-876.

(97) See: *ibid.*, at 589, para. 1441 and *Smith* v. *Harrison* (1956), 175 E.R. 854.

(98) *Ibid.*, at 297.

(99) *Ibid.*, at 268.

(100) *Tait* v. *New Westminster Radio* (1984), 31 C.C.L.T. 189.

(101) *Ibid.*, at 199.

(102) *The Law of Torts, supra* footnote 6 at 497.

(103) Proponents of this view see the following common law rules as paradigm examples of their position: falsity of defamatory words is presumed and the burden of proving them true is placed on the defendant; libel is actionable without proof of damage, as general damages are presumed; intention and bona fides is irrelevant as a strict liability scheme is adopted; the defences of fair comment and qualified privilege do not go far enough to ensure untrammeled debate of matters of public interest.

(104) See: Doody, "Freedom of the Press, the Charter, and a New Category of Qualified Privilege" (1983) 61 *Can. Bar Rev.* 124, 136-139; Madott, "Libel Law, Fiction and the Charter" (1983), 21 *Osgoode Hall L.J.* 741, 756-766; Hogg, Peter W., *Constitutional Law of Canada*, 2nd ed. Toronto: The Carswell Company Limited, 1985, pp. 674-678.

(105) *Merchant* v. *Benchers of the Law Society of Saskatchewan et al*, [1972] 4 W.W.R. 664.

(106) *Supra* footnote 2 at p. 95.

SCHEDULE "A"

Recommendations set out in the report on defamation which appears in the Proceedings of the Sixty-fifth Annual Meeting held at Quebec, Quebec, August, 1983.

Definition of Defamation

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." (page 98)

2. In the interests of simplicity, uniformity and general guidance, the Uniform Defamation Act should contain a definition of "defamatory matter." (page 98)

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. (page 99)

Range of Plaintiffs

Relationship between death and defamation

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. (page 103)

2. Such provisions should be drafted in accordance with the following principals:

   (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 injuction 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. (pages 103 and 104)

Right of an artificial legal person to sue

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. (page 105)

Defamed groups

1. The scope of defamation should not be extended to include defamation of a group. (page 107)

Meaning of Words in Reference to the Plaintiff

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. (page 108)

Availability of Statutory Defences

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. (page 111)

The Innocent Defamer

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) (page 113)

Justification

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. (page 115)

Fair Comment

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. (pages 120 and 121)

Qualified Privilege

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. (page 123)

Section 18: Protection of Freedom of Speech

1. No special defence for newsmedia should be incorporated within the Uniform Defamation Act, and section 18 should be retained. (page 126)

Rolled-up Plea

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. (page 127)

Live Broadcasts of Parliamentary Proceedings

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. (page 129)

Notice Requirements - section 14 of the Act

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. (page 131)

Limitations

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. (page 133)

Apology or Retraction

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. (page 138)

Right of Reply

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. (page 140)

Injunction

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. (page 141)

SCHEDULE B

Uniform Defamation Act

(1962 Consolidation, page 79)
(Amended 1979)

Interpretation

1. In this Act

(a) "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;

(b) "defamation" means libel or slander;

(c) "newspaper" means a paper,

(i) containing news, intelligence, occurrences, pictures or illustrations, or remarks or observations thereon,

(ii) printed for sale, and

(iii) published periodically, or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two of such papers, parts or numbers;

(d) "public meeting" means a meeting *bona fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether admission thereto is general or restricted.

Presumption of damage

2. An action lies for defamation and in an action for defamation where defamation is proved, damage shall be presumed.

Allegations of plaintiff

3. In an action for defamation the plaintiff may allege that the matter complained of was used in a defamatory sense, specifying the defamatory sense without alleging how the matter was used in that sense, and the pleading shall be put in issue by the denial of the alleged defamation; and where the matters set forth, with or without the alleged meaning, shows a cause of action, the pleading is sufficient.

Apology in mitigation of damages

4. In an action for defamation in which

(a) the defendant has pleaded a denial of the alleged defamation only; or

(b) the defendant has suffered judgment by default; or

(c) judgment has been given against the defendant on motion for judgment on the pleadings,

he may give in evidence in mitigation of damages that he made or offered a written or printed apology to the plaintiff for the defamation

(d) before the commencement of the action; or

(e) if the action was commenced before there was an opportunity of making or offering the apology, as soon afterwards as he had an opportunity.

Payment into court by way of amends

5. The defendant may pay into court with his defence a sum of money by way of amends for the injury sustained by the publication of the defamatory matter, with or without a denial of liability, and the payment has the same effect as payment into court in other cases.

General or special verdict

6. On the trial of an action for defamation

(a) the jury may give a general verdict upon the whole matter in issue in the action, and shall not be required or directed to find for the plaintiff merely on proof of publication by the defendant of the alleged defamation and of the sense ascribed to it in the action;

(b) the court shall, according to its discretion, give its opinion and directions to the jury on the matter in issue as in other cases; and

(c) the jury may on such issue find a special verdict, if they think fit so to do,

and the proceedings after verdict, whether general or special, shall be the same as in other cases.

Consolidation of actions for same defamation

7. Upon an application by two or more defendants in two or more actions brought by the same person for the same or substantially the same defamation, the court may make an order for the consolidation of the actions so that they will be tried together; and after an order has been made, and before the trial of the actions, the defendants in any new actions, instituted in respect of any such defamation are also entitled to be joined in a common action upon a joint application by

the new defendants and the defendants in the action already consolidated.

Assessment of damages and apportionment of damages and costs in consolidated action

8. (1) In a consolidated action under section 7 the court or jury shall assess the whole amount of the damages, if any, in one sum, but a separate verdict shall be given for or against each defendant in the same way as if the actions consolidated had been tried separately.

Idem

(2) If the court or jury gives a verdict against defendants in more than one of the actions so consolidated, it shall apportion the amount of the damages between and against those defendants; and, if the plaintiff is awarded the costs of the action, the judge shall make such order as he considers just for the apportionment of the costs between and against those defendants.

Fair comment

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

(a) the defendant did not know that the person expressing the opinion did not hold the opinion; and

(b) a person could honestly hold the opinion.

Idem

(2) For the purpose of this section, the defendant is not under a duty to inquire into whether the person expressing the opinion does or does not hold the opinion. *New, 1979.*

Certain reports and other publications privileged

10. (1) A fair and accurate report, published in a newspaper or by broadcasting, of a public meeting or, except where neither the public nor any reporter is admitted, of proceedings in

(a) the Senate or House of Commons of Canada;

(b) the Legislative Assembly of this province or any other province of Canada;

(c) a committee of any of such bodies;

(d) a meeting of commissioners authorized to act by or pursuant to statute or other lawful warrant or authority; or

(e) a meeting of

(i) a municipal council,

(ii) a school board,

(iii) a board of education,

(iv) a board of health, or

(v) any other board or local authority formed or constituted under any public Act of the Parliament of Canada or the Legislature of this province or any other province of Canada, or of a committee appointed by any such board or local authority,

is privileged, unless it is proved that the publication was made maliciously.

Idem

(2) The publication in a newspaper or by broadcasting, at the request of any Government department, bureau or office or public officer, of any report, bulletin, notice or other document issued for the information of the public is privileged, unless it is proved that the publication was made maliciously.

Exception

(3) Nothing in this section applies to the publication of seditious, blasphemous or indecent matter.

Where subs. (1), (2) do not apply

(4) Subsections (1) and (2) do not apply where,

(a) in the case of publication in a newspaper,

(i) the plaintiff shows that the defendant has been requested to insert in the newspaper a reasonable letter or statement of explanation or contradiction by or on behalf of the plaintiff, and

(ii) the defendant fails to show that he has done so; or

(b) in the case of publication by broadcasting,

(i) the plaintiff shows that the defendant has been requested to broadcast a reasonable statement of explanation or contradiction by or on behalf of the plaintiff, and

(ii) the defendant fails to show that he has done so from the 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.

Idem

(5) Nothing in this section limits or abridges any privilege now by law existing, or applies to the publication of any matter

(a) not of public concern; or

(b) the publication of which is not for the public benefit.

Reports of proceedings in court privileged

11. (1) A fair and accurate report, published in a newspaper or by broadcasting, of proceedings publicly heard before any court is absolutely privileged if

(a) the report contains no comment;

(b) the report is published contemporaneously with the proceedings that are the subject-matter of the report, or within thirty days thereafter; and

(c) the report contains nothing of a seditious, blasphemous or indecent nature.

Where subs. 1 does not apply

(2) Subsection (1) does not apply where,

(a) in the case of publication in a newspaper,

(i) the plaintiff shows that the defendant has been requested to insert in the newspapers a reasonable letter or statement of explanation or contradiction by or on behalf of the plaintiff, and

(ii) the defendant fails to show that he has done so; or

(b) in the case of publication by broadcasting,

(i) the plaintiff shows that the defendant has been requested to broadcast a reasonable statement of explanation or contradiction by or on behalf of the plaintiff, and

(ii) the defendant fails to show that he has done so from the 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.

12. Sections 10 and 11 apply to every headline or caption in a newspaper that relates to any report therein. *Application of ss. 9 and 10*

13. Sections 14 to 19 apply only to actions for defamation against *Application of ss. 13 to 18*

(a) the proprietor or publisher of a newspaper;

(b) the owner or operator of a broadcasting station; or

(c) an officer, servant or employee thereof,

in respect of defamatory matter published in the newspaper or from the broadcasting station.

14. (1) No action lies unless the plaintiff, within three months after the publication of the defamatory matter came to his notice or knowledge, has given to the defendant, in the case of a daily newspaper, seven, and in the case of any other newspaper or where the defamatory matter was broadcast, fourteen days' notice in writing of his intention to bring an action, specifying the defamatory matter complained of. *Notice of action*

(2) The notice shall be served in the same matter as a statement of claim. *Service of notice*

15. An action against *Limitation of actions*

(a) the proprietor or publisher of a newspaper;

(b) the owner or operator of a broadcasting station; or

(c) any officer, servant or employee of the newspaper or broadcasting station,

for defamation contained in the newspaper or broadcast from the station shall be commenced within six months after the publication of the defamatory matter came to the notice or knowledge of the person defamed; but an action brought and maintainable for defamation published within that period may include a claim for any other defamation published against the plaintiff by the defendant in the same newspaper or from the same station within a period of one year before the commencement of the action.

16. The action shall be tried *Place of trial*

(a) in the county (*or* judicial district) where the chief office of the newspaper or of the owner or operator of the broadcasting station is situated; or

(b) in the county (*or* judicial district) wherein the plaintiff resides at the time the action is brought,

but, upon the application of either party, the court may,

(c) direct the action to be tried, or the damages to be assessed, in any other county (*or* judicial district) if it appears to be in the interests of justice; and

(d) impose such terms as to payment of witness fees and otherwise as the court considers proper.

Evidence in mitigation of damages

17. (1) The defendant may prove in mitigation of damages

(a) that the defamatory matter was inserted in the newspaper or was broadcast without actual malice and without gross negligence; and

(b) that before the commencement of the action, or at the earliest opportunity afterwards, the defendant

(i) inserted in the newspaper in which the defamatory matter was published a full and fair retraction thereof and a full apology for the defamation, or, if the newspaper is one ordinarily published at intervals exceeding one week, that he offered to publish such retraction and apology in any newspaper to be selected by the plaintiff; or

(ii) broadcast such retraction and apology, from the 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.

Idem

(2) The defendant may prove in mitigation of damages that the plaintiff has already brought action for, or has recovered damages, or has received or agreed to receive compensation in respect of defamation to the same purport or effect as that for which action is brought.

When plaintiff to recover special damage only

18. (1) The plaintiff shall recover only special damage if it appears on the trial

(a) that the alleged defamatory matter was published in good faith;

(b) that there was reasonable ground to believe that the publication thereof was for the public benefit;

(c) that it did not impute to the plaintiff the commission of 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.

Non-application of subs. (1)

(2) Subsection (1) does not apply to the case of defamation against any candidate for public office unless the retraction and apology are

(a) made editorially in the newspaper in a conspicuous manner; or

(b) broadcast,

at least five days before the election, as the case may require.

Non-application of ss. 14, 15 and 18

19. (1) No defendant in an action for defamation published in a newspaper is entitled to the benefit of sections 14, 15 and 18 unless the name of the proprietor and publisher and address of publication are stated in a conspicuous place in the newspaper.

Printed copy of newspaper

(2) The production of a printed copy of a newspaper is *prima facie* evidence of the publication of the printed copy, and of the truth of the statements mentioned in subsection (1).

Where ss. 13, 14, 17 do not apply

(3) Where a person, by registered letter containing his address and addressed to a broadcasting station

(a) alleges that defamation against him has been broadcast from the station; and

(b) requests the name and address of the owner or operator of the station, or the names and addresses of the owner and the operator of the station,

sections 14, 15 and 18 do not apply with respect to an action by the person against the owner or operator for the alleged defamation unless the person whose name and address are so requested delivers the requested information to the first mentioned person, or mails it by registered letter addressed to him, within ten days from the date on which the first-mentioned registered letter is received at the broadcasting station.

SCHEDULE C

Nova Scotia Defamation Act, Section 15

Unintentional defamation

15 (1) A person who has published words alleged to be defamatory of another person may, if he claims that the words were published by him innocently in relation to that other person, make an offer of amends under this Section: and in any such case,

(a) if the offer is accepted by the party aggrieved and is duly performed, no proceedings for defamation shall be taken or continued by that party against the person making the offer in respect of the publication in question (but without prejudice to any cause of action against any other person jointly responsible for that publication);

(b) if the offer is not accepted by the party aggrieved, then, except as otherwise provided by this Section, it shall be a defence, in any proceedings by him for defamation against the person making the offer in respect of the publication in question, to prove that the words complained of were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff, and has not been withdrawn.

Form of offer of amends

(2) An offer of amends under this Section must be expressed to be made for the purposes of this Section, and must be accompanied by an affidavit specifying the facts relied upon by the person making it to show that the words in question were published by him innocently in relation to the party aggrieved; and for the purposes of a defence under clause (b) of subsection (1) no evidence, other than evidence of facts specified in the affidavit, shall be admissible on behalf of that person to prove that the words were so published.

Idem

(3) An offer of amends under this Section shall be understood to mean an offer,

(a) in any case, to publish or join in the publication of a suitable correction of the words complained of, and a sufficient apology to the party aggrieved in respect of those words;

(b) where copies of a document or record containing the said words have been distributed by or with the knowledge of the person making the offer, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the words are alleged to be defamatory of the party aggrieved.

Acceptance of offer

(4) Where an offer of amends under this Section is accepted by the party aggrieved,

(a) any question as to the steps to be taken in fulfilment of the offer as so accepted shall in default of agreement between the parties be referred to and determined by the Supreme Court or a judge thereof, whose decision thereon shall be final;

(b) the power of the Court or judge to make orders as to costs in proceedings by the party aggrieved against the person making the offer in respect of the publication in question, or in proceedings in respect of the offer under clause (a) of this subsection, shall include power to order the payment by the person making the offer to the party aggrieved of costs on an indemnity basis and any expenses reasonably incurred or to be incurred by that party in consequence of the publication in question;

and if no such proceedings as aforesaid are taken, the Court or judge may, upon application made by the party aggrieved, make any such order for the payment of such costs and expenses as aforesaid as could be made in such proceedings.

"Innocent publications" defined

(5) For the purposes of this Section words shall be treated as published by one person (in this subsection referred to as the publisher) innocently in relation to another person if and only if the following conditions are satisfied, that is to say:

(a) that the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him; or

(b) that the words were not defamatory on the face of them, and the publisher did not know of circum-

stances by virtue of which they might be understood to be defamatory of that other person;

and in either case that the publisher exercised all reasonable care in relation to the publication; and any reference in this subsection to the publisher shall be construed as including a reference to any servant or agent of his who was concerned with the contents of the publication.

(6) Cause (b) of subsection (1) shall not apply in relation to the publication by any person of words of which he is not the author unless he proves that the words were written by the author without malice. 1960, c. 4, s. 16. *Exception*

SCHEDULE D

Uniform Defamation Act, Section 9

Fair Comment

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

(a) the defendant did not know that the person expressing the opinion did not hold the opinion; and

(b) a person could honestly hold the opinion.

(2) For the purpose of this section, the defendant is not under a duty to inquire into whether the person expressing the opinion does or does not hold the opinion. *New, 1979.*

Ontario Libel and Slander Act, Section 25

Fair Comment

25. 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. *1980, c. 35, s. 2.*

SCHEDULE E

Reports and Statements Afforded a Qualified Privilege by Statute

1. A fair and accurate report of any of the following proceedings that are open to the public:

(a) any legislative body or any part or committee thereof of any Commonwealth country;

(b) any commission of inquiry that is constituted by a public authority in any Commonwealth country;

(c) any international organization or agency carrying out functions under the United Nations organization;

(d) any international organization of which Canada is a member or any international conference to which the Canadian government sends a representative;

(e) an international court;

(f) a court exercising jurisdiction throughout any part of the Commonwealth outside Canada.

2. A fair and accurate report of any publication issued by or under the authority of the government or legislature of any Commonwealth country.

3. A fair and accurate report of the findings or decisions of any of the following associations, or any committee or governing body thereof, being a finding or decision relating to a person who is a member of or is subject, by virtue of any contract, to the control of the association:

(a) an association formed in Canada for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion or learning, and empowered by its constitution to exercise control over or adjudicate upon matters of interest or concern to the association, or the actions or conduct of any persons subject to such control or adjudication;

(b) an association formed in the United Kingdom for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, or the actions or conduct of those persons;

(c) an association formed in Canada 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 Canada for the purpose of promoting a charitable object or other objects beneficial to the community and empowered by its constitution to exercise control over or to adjudicate on matters of interest or concern to the association or the actions or conduct of any persons subject to such control or adjudication.

4. The fair and accurate report of the following proceedings held in Canada:

(a) any public meeting;

(b) any press conference convened to inform the press or other media of a matter of public concern;

and a fair and accurate report of any such public meeting or press conference may include a fair and accurate report of any documents circulated at the public meeting or press conference to the persons lawfully admitted thereto.

5. A fair and accurate report of the proceedings at any meeting or sitting in any part of Canada of:

(a) any local authority or committee of a local authority or local authorities;

(b) any commission of inquiry authorized to act by or pursuant to statute or other lawful warrant or authority;

(c) any tribunal, board, committee or body formed or constituted under and exercising functions under any public act of the Parliament or Legislatures;

not being a meeting or proceeding admission to which is denied to publishers of newspapers, or broadcast programs and to other members of the public.

6. A copy or fair and accurate report or summary of any report, bulletin, notice or other document issued for the information of the public by or on behalf of any government department, bureau or office, or public officer.

SCHEDULE F

Libel Act 1843 (Lord Campbell's Act)

[*6 & 7 Vict. c. 96*]

1. . . . In any action for defamation it shall be lawful for the defendant (after notice in writing of his intention to do so, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

2. In an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; *and every such defendant shall upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel, and such payment into court shall be of the same effect and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court under an Act passed in the session of Parliament held in the fourth year of his late Majesty, intituled "An Act for the further Amendment of the Law, and better advancement of justice,"*[4] and to such plea to such action it shall be competent to the plaintiff to reply generally denying the whole of such plea.

4. If any person shall maliciously publish any defamatory libel knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned . . . for any term not exceeding two years, and to pay such fine as the court shall award.

5. If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprison-

ment, or both, as the court may award, such imprisonment not to exceed the term of one year.

6. On the trial of any indictment or information for a defamatory libel, the defendant having pleaded such a plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and if after such plea the defendant shall be convicted on such indictment or information it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or disprove the same:

Provided always, that the truth of the matter charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification:

Provided also, that in addition to such plea it shall be competent to the defendant to plead a plea of not guilty:

Provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment, or information for defamatory words or libel.

7. Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.

9. And . . . wherever throughout this Act, in describing the plaintiff or defendant . . . words are used importing the singular number or the masculine gender only, yet they shall be understood to include several

persons as well as one person, and females as well as males, unless when the nature of the provisions or the context of the Act shall exclude such construction.

10. . . . Nothing in this Act contained shall extend to Scotland.

Libel Act 1845

[*8 & 9 Vict. c. 75*]

2. It shall not be competent to any defendant in such action, whether in England or in Ireland, to file any such plea, without at the same time making a payment of money into court by way of amends *as provided by the said Act,*[5] but every such plea so filed without payment of money into court shall be deemed a nullity and may be treated as such by the plaintiff in the action.

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(4) The words in italics were repealed by the Civil Procedure Acts Repeal Act 1879, Sched., Part II, as to the Supreme Court of Judicature in England, and generally throughout the United Kingdom by the Statute Law Revision Act 1892, 1.

SCHEDULE G

Draft Uniform Defamation Act

Interpretation "broadcasting"

1. In this Act

(a) "broadcasting" means the dissemination of writing, signs, signals, pictures, sounds and intelligence of all kinds, intended to be received by the public directly or through the medium of relay stations

(i) by means of any device which uses Hertzian waves propagated in space,

(ii) by means of cables, wires, fibre-optic linkages or laser beams,

(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;

Section 1(a)
Note: Definition approved (1983).

"defamation"

(b) "defamation" means libel or slander;

"defamatory matter"

(c) "defamatory matter" is published matter concerning a person that tends to

(i) affect adversely the reputation of that person in the estimation of ordinary persons,

(ii) lower the respect with which that person is regarded with the result that ordinary persons are deterred from associating or dealing with that person, or

(iii) injure the reputation of that person in his occupation, trade, office or financial credit;

Section 1(c)
Note: Inclusion of this definition approved (1983). Conference is now being asked, in the first instance, to reconsider the merits of including such a statutory definition, and secondly, if need be, to consider the exact wording of the proposed draft.

(d) "newspaper" means a paper that *"newspaper"*

(i) contains news, intelligence, occurrences, pictures or illustrations or remarks or observations thereon,

(ii) is printed for sale, and

(iii) is published periodically, or in parts or numbers, at intervals not exceeding 31 days between the publication of any two of such papers, parts or numbers;

(e) "public meeting" means a meeting lawfully held in good faith for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether admission to the meeting is general or restricted. *"public meeting"*

2. An action lies for defamation and, in an action for defamation where defamation is proved, damage shall be presumed. *Damage presumed*

3. (1) Where a person publishes matter in relation to a deceased person which would have constituted defamation had the deceased been alive, an interested person may, with leave of the court, bring an action for defamation against the publisher of the alleged defamatory matter for *Defamation of deceased*

(a) a declaration that the defendant has published defamatory matter regarding the deceased person,

(b) an injunction preventing the further publication of the defamatory matter,

but not for damages.

(2) For the purposes of this section, an interested person is a person who, in the opinion of the court *Interested person*

(a) has sufficient connection by way of a blood, business, professional or other relationship with the deceased person to bring an action in defamation with respect to the publication of alleged defamatory matter about the deceased person, and

(b) is motivated primarily, in bringing the action, by a concern about the attack on the reputation of the deceased person.

Section 3

Note: This is a new provision, implementing what was agreed to in principle at the 1983 Conference. It has been suggested that the Conference reaffirm its original decision to create a new cause of action for defamation of the dead. If such a right of action is to be afforded, then the following alternative provisions should be considered as possible further restrictions to be imposed upon this right of action:

(a) An action is only maintainable where, in publishing a defamatory statement of a deceased person, the publisher knew that the words published were defamatory.

(b) An action is only maintainable where the plaintiff can establish that the defendant made the defamatory statement with malice, that is, with the knowledge that the statement was false or at least with a reckless disregard of whether or not the statement was false.

(c) The common law presumption of falsity is inapplicable in this context. The burden of proving the falsity of the statement lies with the plaintiff.

(d) In addition to any of the above, a defence fashioned after the defence of "fair comment" would be available for honest expressions of historical or biographical significance.

Allegations of plaintiff

4. In an action for defamation, the plaintiff may allege that the matter complained of was used in a defamatory sense, specifying the defamatory sense without alleging how the matter was used in that sense, and the pleading shall be put in issue by the denial of the alleged defamation and, where the matters set forth, with or without the alleged meaning, show a cause of action, the pleading is sufficient.

Legal innuendo

5. A claim in defamation based on a single publication and relying both on the natural and ordinary meaning of words and on a legal innuendo shall constitute a single cause of action.

Section 5

Note: Approved (1983).

6. In an action for defamation, each defence relied on shall be expressly pleaded, and the plea known as the rolled-up plea is hereby abolished. *Rolled-up plea abolished*

Section 6
Note: Approved (1983).

7. The defendant may pay into court with his defence a sum of money by way of amends for the injury sustained by the publication of the defamatory matter, with or without a denial of liability, and the payment has the same effect as payment into court in other cases. *Payment into court by way of amends*

8. (1) A defamation action shall be tried *Place of trial*

(a) in the country (*or* judicial district) where the chief office of the newspaper or of the owner or operator of the broadcasting station is situated, or

(b) in the country (*or* judicial district) where the plaintiff resides at the time the action is brought,

but, on the application of either party, the court may

(c) if it appears to be in the interests of justice, direct the action to be tried, or the damages to be assessed, in any other county (*or* judicial district), and

(d) impose any terms as to payment of witness fees and otherwise that the court considers appropriate.

(2) Subsection (1) applies only to actions for defamation against

(a) the proprietor or publisher of a newspaper,

(b) the owner or operator of a broadcasting station, or

(c) an officer, servant or employee of a person mentioned in clause (a) or (b),

in respect of defamatory matter published in the newspaper or from the broadcasting station.

Section 8
Note: This provision is reproduced, without amendment, from the present UDA. It is suggested that the Conference consider the merits of retaining such a provision. Of note in this regard is the recent

recommendation of the B.C. Law Reform Commission to remove this "technical obstacle" from their *Libel and Slander Act*. (See: Report on Defamation: Law Reform Commission of B.C. 1985, p. 60.)

General or special verdict

9. On the trial of an action for defamation

(a) the jury may give a general verdict on the whole matter in issue in the action, and shall not be required or directed to find for the plaintiff merely on proof of publication by the defendant of the alleged defamation and of the sense ascribed to it in the action,

(b) the court shall, according to its discretion, give its opinion and directions to the jury on the matter in issue as in other cases, and

(c) the jury may find a special verdict on the issue, if it thinks fit to do so,

and the proceedings after verdict, whether general or special, shall be the same as in other cases.

Consolidation of actions for same defamation

10. On an application by two or more defendants in two or more actions brought by the same person for the same or substantially the same defamation, the court may make an order for the consolidation of the actions so that they will be tried together and, after an order has been made and before the trial of the action, the defendants in any new action instituted in respect of any such defamation are also entitled to be joined in a common action on a joint application by the new defendants and the defendants in the action already consolidated.

Assessment of damages and apportionment of damages and costs in consolidated action

11. (1) In a consolidated action under section 10, the court or jury shall assess the whole amount of the damages, if any, in one sum, but a separate verdict shall be given for or against each defendant in the same way as if the actions consolidated had been tried separately.

Idem

(2) If the court or jury gives a verdict against defendants in more than one of the actions so consolidated, it shall apportion the amount of the damages between and against those defendants and, if the plaintiff is awarded the costs of the action, the judge shall make any order that he considers just for the apportionment of the costs between and against those defendants.

Other damages, compensation

12. In an action for defamation, the defendant may plead or adduce evidence in mitigation of damages that the plaintiff has already recovered damages in an action or received or agreed to receive compensation in respect of the same defamation or a substantially similar defamation.

Section 12
Note: Reproduced from section 17(2) of the present UDA.

Apology

13. (1) In an action for defamation, the defendant may plead or adduce evidence in mitigation of damages that he made or offered to make an apology or retraction at a time and in a manner that was adequate or reasonable in the circumstances.

Idem

(2) In an action for defamation, the defendant may plead or adduce evidence in aggravation of damages that the defendant refused or failed to make an apology or retraction at a time and in a manner that was adequate or reasonable in the circumstances.

Section 13
Note: New provision that is consequential upon our proposals to repeal sections 4 and 7 of the present UDA.

Unintentional defamation

14. (1) A person who claims that alleged defamatory matter was published by him innocently may make an offer of amends to the aggrieved person pursuant to this section.

Offer of amends

(2) An offer of amends pursuant to this section shall

(a) be in writing,

(b) be expressed to be made for the purposes of this section,

(c) include a statement of explanation setting out the facts relied on to show that the words complained of were published innocently in relation to the aggrieved person,

(d) be made as soon as practicable after the publisher receives notice that the matter is or might be defamatory of the aggrieved person, and

(e) include an offer to publish, or join in the publication of, a suitable correction of the alleged defamatory matter and a sufficient apology.

Where offer accepted

(3) If an offer of amends is accepted by the aggrieved person and is duly performed, no action for defamation shall be taken or continued by that person against the publisher in respect of the publication of the alleged defamatory matter in question, but this subsection does not prejudice any cause of action against any other person jointly responsible for the publication of that alleged defamatory matter.

Where offer not accepted

(4) If an offer of amends is not accepted by the aggrieved person, it shall be a defence, in any action for defamation by him against the publisher in respect of the publication in question, to allege and prove

(a) facts and circumstances which establish that the alleged defamatory matter was published innocently in relation to the plaintiff,

(b) that the offer of amends fulfilled the requirements of subsection (2), and

(c) that the offer has not been withdrawn,

but, for the purposes of such a defence, no evidence, other than evidence of the facts set out in the statement of explanation mentioned in clause (2)(c), is admissible on behalf of the defendant to prove that the words were published innocently in relation to the plaintiff unless the court directs otherwise.

Innocent publication

(5) For the purposes of this section, alleged defamatory matter shall be treated as published by the publisher innocently in relation to the aggrieved person if the publisher exercised all reasonable care in relation to the publication, and

(a) the publisher did not intend to publish the alleged defamatory matter of and concerning the aggrieved person, and did not know of circumstances by virtue of which it might be understood to refer to him,

(b) the matter was not defamatory on the fact of it, and the publisher did not know of circumstances by virtue of which it might be understood to be defamatory of the aggrieved person, or

(c) the publisher is a broadcaster against whom an action for defamation is brought or proposed as a

result of opinions expressed or statements made by a member of the public in the course of a broadcast during which members of the public are invited to telephone the broadcasting station and express opinions and make statements which are broadcast live.

Agents, etc.

(6) Any reference in subsection (5) to the publisher shall be construed as including a reference to any servant or agent of the publisher who was concerned with the contents of the publication.

Power of court

(7) Where an offer of amends is accepted by the aggrieved person, a judge may, in default of agreement between the parties and on application by one of them

(a) determine the form or manner of publication of the correction or apology, and the judge's decision is final,

(b) order the publisher to pay the costs of the aggrieved person on a solicitor-client basis and any expenses reasonably incurred by that person as a result of the publication in question,

(c) where there are unsold copies of the published matter in question, make any order that he considers appropriate, including an order

(i) permitting the continuation or resumption of the distribution of those copies unamended,

(ii) requiring the inclusion in those copies of a correction of the words complained of that is adequate or reasonable in the circumstances,

(iii) prohibiting the continuation or resumption of the distribution of those copies.

(8) An offer of amends which is not accepted by the aggrieved person shall not be construed as an admission of liability on the part of the publisher and shall not, without the consent of the publisher, be referred to in an action for defamation brought against him in respect of the publication in question.

Section 14
Note: Approved in principle (1983).

Defence of justification

15. Where an action for defamation has been brought in respect of the whole or any part of alleged defamatory matter, the defendant may allege and prove the truth of any part of such matter, and the defence of justification shall be held to be established if the alleged defamatory matter, taken as a whole, does not materially injure the plaintiff's reputation having regard to any part which is proved to be true.

Section 15

Note: This is a partial implementation of the recommendations adopted in 1983. Complete codification of this defence has been avoided. The Conference's ratification of this approach is required.

Fair comment

16. (1) In an action for defamation, the defence of fair comment may be raised where the alleged defamatory matter is a statement of opinion on a matter of public interest, and the statement of opinion is

(a) grounded on a substantial basis of fact,

(b) one which a normal, albeit biased person, might hold concerning those facts, and

(c) honestly held by the person making the statement, but the defence is defeated where the plaintiff established that the defendant published the defamatory matter for malicious purposes.

Publication of opinion of another

(2) Where the defendant published alleged defamatory matter that is an opinion expressed by another person on a matter of public interest, a defence of fair comment is not defeated by reason only that the defendant did not hold the opinion if

(a) the defendant did not know that the person expressing the opinion did not hold the opinion, and

(b) a person could honestly hold the opinion,

but, the defendant is not under a duty to inquire into whether the person expressing the opinion does or does not hold the opinion.

Fair comment, factual

(3) In an action for defamation in respect of words including or consisting of an expression of opinion, a defence of fair comment is not defeated by reason only that the defendant has failed to prove the truth of every relevant

assertion of fact relied on by him as a foundation for the opinion, if the assertions that are proved to be true are relevant and afford a foundation for the opinion.

Section 16
Note: Approved in principle (1983).

Broadcasts of Parliament, Assemblies

17. Where a broadcast is made primarily to communicate to the public the proceedings of the Parliament of Canada or of the Assembly of any province of Canada, the absolute privilege that attaches to those proceedings attaches to the broadcast of those proceedings.

Section 17
Note: Approved in principle (1983).

Reports of public proceedings

18. (1) A fair and accurate report of a public meeting or, except where neither the public nor any reporter is admitted, of proceedings in

(a) the Senate or House of Commons of Canada,

(b) the Assembly of this province or any other province of Canada,

(c) a committee of a body mentioned in clause (a) or (b),

(d) a meeting of commissioners authorized to act by or pursuant to statute or other lawful authority, or

(e) a meeting of

(i) a municipal council,

(ii) a school board,

(iii) a board of education,

(iv) a board of health,

(v) any other board or local authority formed or constituted under any public Act of the Parliament of Canada or the Assembly of this province or any other province of Canada, or of a committee appointed by any such board or local authority,

is privileged, unless it is proved that the publication was made maliciously.

Other information

(2) The publication, at the request of any government department, bureau or office or public officer, of any report, bulletin, notice or other document issued for the information of the public is privileged, unless it is proved that the publication was made maliciously.

Exception

(3) Nothing in this section applies to the publication of seditious, blasphemous or indecent matter.

Where defence not available

(4) In an action for defamation in respect of the publication of a report or other matter in circumstances mentioned in subsection (1), the provisions of this section shall not be a defence if it is proved that:

(a) the plaintiff has asked the defendant to publish at the defendant's expense and in a manner that is adequate or reasonable in the circumstances a reasonable letter or statement of explanation or contradiction, and

(b) the defendant has refused or neglected to do so or has done so in a manner that is not adequate or not reasonable in the circumstances.

Idem

(5) Nothing in this section limits or abridges any privilege now by law existing, or applies to the publication of any matter

(a) that is not of public concern, or

(b) the publication of which is not for the public benefit.

Section 18

Note: This provision is primarily a reproduction of section 10 of the present UDA. It has been amended so as to have application to all types of publications (approved 1983). Further amendment is suggested.

Reports of proceedings in court privileged

19. (1) A fair and accurate report of proceedings publicly heard before any court is absolutely privileged if the report

(a) contains no comment,

(b) is published contemporaneously with the proceedings that are the subject matter of the report, or within 30 days thereafter, and

(c) contains nothing of a seditious, blasphemous or indecent nature.

(2) In an action for defamation in respect of the publication of a report or other matter in circumstances mentioned in subsection (1), the provisions of this section shall not be a defence if it is proved that: *Where defence not available*

(a) the plaintiff has asked the defendant to publish at the defendant's expense and in a manner that is adequate or reasonable in the circumstances a reasonable letter or statement of explanation or contradiction, and

(b) the defendant has refused or neglected to do so or has done so in a manner that is not adequate or not reasonable in the circumstances.

Section 19

Note: This provision is primarily a reproduction of section 11 of the present UDA. It has been amended so as to have application to all types of publications (approved 1983).

20. Sections 18 and 19 apply to every headline or caption that relates to a report contained in a newspaper or other publication. *Headlines and captions*

21. (1) The plaintiff shall recover only special damages if it appears on the trial that *Where plaintiff to recover special damages only*

(a) the alleged defamatory matter was published in good faith,

(b) there was reasonable ground to believe that the publication of the alleged defamatory matter was for the public benefit,

(c) the alleged defamatory matter did not impute to the plaintiff the commission of a criminal offence,

(d) 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, a full and fair retraction of and a full apology for any statement therein alleged to be erroneous were published in the newspaper within a reasonable time 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, a retraction and apology were broadcast from broadcasting stations from which the alleged defamatory matter was broadcast within a reasonable time and 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.

Non-application of subsection (1)

(2) Subsection (1) does not apply in the case of defamation against any candidate for public office unless the retraction and apology are

(a) made editorially in the newspaper in a conspicuous manner, or

(b) broadcast,

at least five days before the election, as the case may require.

Section 21

Note: This provision is reproduced from section 18 of the present UDA, with amendments consequential upon the proposal to repeal section 14 of the present UDA (notice provision).

Application of section 21

22. (1) Section 21 applies only to actions for defamation against

(a) the proprietor or publisher of a newspaper,

(b) the owner or operator of a broadcasting station, or

(c) an officer, servant or employee of a person mentioned in clause (a) or (b),

in respect of defamatory matter published in the newspaper or from the broadcasting station.

(2) No defendant in an action for defamation published in a newspaper is entitled to the benefit of section 21 unless the name of the proprietor and publisher and address of publication are stated in a conspicuous place in the newspaper.

(3) No defendant in an action for defamation published by broadcasting is entitled to the benefit of section 21

if he fails, within 10 days of the receipt by the broadcasting station of a registered letter from a person

(a) containing the person's return address,

(b) alleging that defamation against the person has been broadcast from the station, and

(c) requesting the name and address of the owner or operator of the station, or the names and addresses of the owner and the operator of the station,

to deliver or send by registered mail to that person the requested information.

Printed copy newspaper

(4) The production of a printed copy of a newspaper is *prima facie* evidence of the publication of the printed copy, and of the truth of the information mentioned in subsection (2).

Section 22

Note: This provision is a reproduction of sections 13 and 19 of the present UDA, with amendments consequential upon our recommendations to repeal section 14 (notice) and section 15 (limitation) of the present UDA.

General Notes (to be attached to the draft Act)

1. The general limitation period for defamation actions is to be found in the *Uniform Limitation of Actions Act.*

2. The general provisions pertaining to defamation survivability are to be found in the *Uniform Survival of Actions Act.*

SCHEDULE H

Uniform Survival of Actions Act

(1963 Proceedings, pages 28, 136)

Interpretation

1. In this Act "cause of action" means the right to institute a civil proceeding, and includes a civil proceeding instituted before death, but does not include a prosecution for contravening a statute, regulation or by-law.

What causes of action survive

2. (1) All causes of action vested in a person who dies after the commencement of this Act, other than causes of action in respect of,

(a) adultery;

(b) seduction; or

(c) inducing one spouse to leave or remain apart from the other,

survive for the benefit of his estate.

(2) The rights conferred by subsection (1) are in addition to and not in derogation of any rights conferred by the *Fatal Accidents Act*.

Idem

3. All causes of action subsisting against a person who dies after the commencement of this Act survive against his estate.

Idem

4. Where damage has been suffered by reason of an act or omission as a result of which cause of action would have subsisted against a person if that person had not died before or at the same time as the damage was suffered, there is deemed to have been subsisting against him before his death whatever cause of action as a result of the act or omission would have subsisted if he had not died before or at the same time as the damage was suffered.

What damages are recoverable by estate of deceased person

5. Where a cause of action survives for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the deceased person or the estate are recoverable and, without restricting the generality of the foregoing, the damages recoverable shall not include punitive or exemplary damages or damages for loss of expectation of life, pain and suffering or physical disfigurement.

Calculation of damages

6. Where the death of a person was caused by the act or omission that gave rise to the cause of action, the damages

shall be calculated without reference to any loss or gain to his estate consequent on his death, except that there may be included in the damages awarded an amount sufficient to cover the reasonable expenses of the funeral and the disposal of the body of the deceased [not exceeding ..... dollars in all,] if those expenses were, or liability therefor was, incurred by the estate.

(NOTE: The words in brackets are optional.)

Nature of cause of action

7. Every cause of action that survives under this Act and every judgment or order thereon or relating to the costs thereof is an asset or liability, as the case may be, of the estate for the benefit of which or against which the action was taken or the judgment or order made.

Administration ad litem

8. (1) Where a cause of action survives against the estate of a deceased person and there is no personal representative of the deceased person against whom such an action may be brought or continued in this Province, a court of competent jurisdiction, or any judge thereof, may,

(a) on the application of a person entitled to bring or continue such an action; and

(b) on such notice as the court or judge may consider proper,

appoint an administrator *ad litem* of the estate of the deceased person.

Idem

(2) The administrator *ad litem* is an administrator against whom such an action may be brought or continued and by whom such an action may be defended.

Administrator ad litem *as defendant*

(3) The administrator *ad litem* as defendant in any such action may take any steps that a defendant may ordinarily take in an action, including third party proceedings and the bringing, by way of counterclaim, of any action that survives for the benefit of the estate of the deceased person.

Judgment by or against administrator ad litem

(4) Any judgment obtained by or against the administrator *ad litem* has the same effect as a judgment in favour of or against the deceased person, or his personal representative, as the case may be, but it has no effect for or against the administrator *ad litem* in his personal capacity.

Special limitation periods

9. (1) Notwithstanding the *Limitation of Actions Act* or any other Act limiting the time within which an action may be brought, a cause of action that survives under this Act is not barred until the expiry of the period provided by this section.

Idem

(2) Proceedings on a cause of action that survives under section 2 or 3 may be brought

(a) within the time otherwise limited for the bringing of the action; or

(b) within one year from the date of death,

whichever is the longer period.

Idem

(3) Proceedings on a cause of action that survives under section 4 may be brought

(a) within the time otherwise limited for the bringing of the action, which shall be calculated from the date the damage was suffered; or

(b) within one year from the date the damage was suffered,

whichever is the longer period.

Barred causes of action not revived

(4) [Subject to subsection (5)], this Act does not operate to revive any cause of action in or against a person that was barred at the date of his death.

Counterclaims and third party proceedings

[(5) Any enactment that permits action to be instituted by way of counterclaim or third party proceedings after the expiry of the time otherwise limited for the bringing of the action applies with respect to proceedings under this Act.]

NOTE: The words in brackets may be adopted in jurisdictions that have provisions similar to section 131(2) of the Vehicles and Highway Traffic Act *(Alberta) which permits counterclaims and third party proceedings after the expiry of the one year limitation period for motor vehicle negligence cases.*

10. The Crown is bound by this Act.

11. Sections .....
of [the *Trustee Act*] and section .....
of [the *Limitation of Actions Act*] are repealed.

NOTE: To be varied to meet the requirements of each jurisdiction.

APPENDIX D

(See page 28)

REPORT OF THE ALBERTA COMMISSIONERS

UNIFORM HUMAN TISSUE ACT

BACKGROUND

Prior to the meeting of the Uniform Law Conference of Canada in 1986, the Government of Alberta had prepared a report dealing with human tissue transplant and procurement. This report was reviewed by the Alberta Department of Hospitals and Medical Care. Potential legal issues arising out of the report were referred to the Legislative Counsel Office to determine what, if any, steps would be necessary if it were thought that Alberta's *Human Tissue Gift Act* or the *Uniform Human Tissue Act* should be amended. As a result, the Alberta Commissioners raised the *Uniform Human Tissue Act* at the 1986 meeting of the Conference. The project was referred back to the Alberta Commissioners for a Report and recommendations to be brought back to the Conference in August, 1986.

In now dealing with the project that was referred to Alberta at the 1986 Conference, the Alberta Commissioners propose to approach the project in the following manner. Four reports have been prepared recently in Canada dealing with the procurement and transplant of human tissue, as follows:

1 Report of the working Group on Vital Organ Transplant Centres, prepared for the Deputy Ministers of Health by the Federal/Provincial Advisory Committee on Institutional and Medical Services, September 1985 (called "the Federal Report");

2 Report of the Alberta Human Tissue Procurement Task Force, prepared for the Minister of Hospitals and Medical Care, October 1985 (called "the Alberta Report");

3 Organ Donation in the Eighties, prepared for the Ontario Ministry of Health by the Minister's Task Force on Kidney Donation, undated (called "the Ontario Report");

4 Report on the *Human Tissue Act*, prepared by the Manitoba Law Reform Commission, March 1986 (called "the Manitoba Report").

The Alberta Commissioners have reviewed all of the recommendations in these 4 reports, noting where similar recommendations were made and where the reports differed. What follows is an analysis of these reports, rather than a new research paper covering the same issues. The 4 reports contain recommendations to amend various Acts, but the focus of the following analysis has been confined to the *Uniform Human Tissue Act*.

It may be said at the outset that each of the 4 reports was designed to respond to a particular issue. As a result, there is no continuity from one report to the next. However, on reading the 4 reports together, some of the same issues can be seen arising repeatedly. On at least 1 major issue, the possible codification of a definition of "brain death", all 4 reports made similar comments and recommendations. It is useful to look briefly at each of the Reports to gain an overview of the material each covers.

Federal Report:

The Federal Report was intended to focus on general issues related to transplantation of vital organs. These generally are "living" organs or organs that are not capable of storage outside the human body for long periods. The kidney, heart, liver, pancreas and lung are vital organs. Although bone marrow is capable of storage, it is also covered in the report. This report deals with issues such as the following:

1 how transportation compares with other conventional treatment, as regards cost and effectiveness;

2 what procedures of the full transplantation process should be included in federal or provincial insurance plans for reimbursement to physicians;

3 difficulties encountered by travelling transplant teams as regards hospital privileges and licensure to practise in provinces across the country;

4 what types of treatment centre transplantation should occur in and on what basis such centres should be established throughout Canada.

Alberta Report:

The Alberta Report was intended to make recommendations on more effective means for donation and utilization of all human organs and tissues for transplant purposes. It reviews many practical questions, such as:

1 the need for proper and uniform policies across the province covering donor selection, disposal of human tissue, admission and transfer of brain-dead donors to transplant centres, etc.;

2 the issues associated with codifying a definition of "death";

3 reimbursement to physicians;

Ontario Report:

The main thrust of the Ontario Report was to investigate the barriers to donation and to suggest ways to increase the number of organs being donated. The Report focuses specifically on kidney donation but recognizes that many of its findings and recommendations are equally applicable to other organs. The Report suggests that barriers to donation exist within the hospital environment, among the public, as a result of certain perceived legal problems and among medical personnel. In suggesting ways to overcome these problems, the Report focuses heavily on promoting public awareness and education, expanding the Multiple Organ Retrieval and Exchange Program (M.O.R.E.) in Ontario and establishing a Canadian Organ Retrieval and Exchange Program (C.O.R.E.) nation-wide, and providing 24-hour toll-free telephone numbers. It also promotes the use of the concept of "recorded consideration" which requires medical personnel attending a patient to state on the patient's record that attention has been given to the possibility of that patient becoming a donor.

Manitoba Report:

The Manitoba Report deals with the many legal issues that arise in the whole spectrum of organ donation, not only for transplantation purposes but for research, education and anatomical examination as well. It contains a draft bill which could presumably replace the *Uniform Human Tissue Act*.

The recommendations and findings contained in the 4 reports are summarized in Schedules 1 to 4 as follows:

Schedule 1 – Federal Working Group – Recommendations

Schedule 2 – Alberta – Recommendations

Schedule 3 – Ontario – Minister's Task Force on Kidney Donation – Recommendations and Findings

Schedule 4 – Manitoba Law Reform Commission – Recommendations

REPORT OF THE ALBERTA COMMISSIONERS

The recommendations in the 4 reports have been analyzed in this way. Of the 123 recommendations set out in Schedules 1 to 4, almost all have been grouped within the 20 recommendation headings which follow. The Alberta Commissioners divided the 20 headings into 2 lists. The first list is comprised of recommendations of a legislative nature. If

accepted at the Conference, it is our opinion that these could not be implemented without a legislative amendment. The second list is comprised of recommendations of an administrative nature. It is our view that, if implemented, these recommendations do not necessitate amendments to legislation.

The report in which each recommendation was found and the number of that recommendation have been noted immediately following the recommendation. The recommendations have been listed according to the number of reports in which each recommendation appears. In other words, the recommendations that appeared most often throughout the 4 reports appear first. This does not indicate that a recommendation which appears in only 1 report is of little importance. Each recommendation has then been analyzed for its suitability as a proposed amendment of the *Uniform Human Tissue Act*.

There is a certain number of recommentations contained in the Schedules that will not be found within the 20 recommendation headings that follow. For example, recommendation 4 in Schedule 1 is not included in the 20 recommendation headings. Some of the recommendations appeared to be purely to convey information. Others were so varied and numerous that they could not be grouped under any heading, and if these had no possible context in a discussion about uniform amendments in the Act in question, then we left them out of our detailed analysis.

RECOMMENDATIONS OF A LEGISLATIVE NATURE

RECOMMENDATION 1: That the definition of "brain death" be clarified and made universal.

Alberta – Recommendation 20
Manitoba – Recommendation 21
Ontario – Recommendation 5
Federal – Recommendation 9

The only jurisdiction in Canada that has a statutory statement about the definition of "death" or "brain death" is Manitoba. The following definition appears in *The Vital Statistics Act*, C.C.S.M. c. V60 at s. 2.1:

> 2.1 For all purposes within the legislative competence of the Legislature of Manitoba the death of a person takes place at the time at which irreversible cessation of all that person's brain function occurs.

Other jursidictions, notably the U.S., have placed such a definition in a separate Act. The *Uniform Determination of Death Act* (U.S.) reads as follows:

> Section 1. [Determination of Death.] An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.
>
> Section 2. [Uniformity of Construction and Application.] This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.
>
> Section 3. [Short Title.] This Act may be cited as the *Uniform Determination of Death Act*.

There are 2 points to be made in respect of the question of whether a definition of death should be codified in the law. First, it is felt that because the moment of death, and thus the moment after which organs can be removed for transplant, is not legislated to be uniform across Canada, that perhaps there can be a time of death for one purpose in 1 province which would not be the same time of death for all purposes in all provinces. This lack of uncertainty has apparently led to a fear being generated in the public surrounding the point at which death is declared and the point at which organs may be removed. The fear of premature removal of organs has been cited as one of the possible barriers to donation found to exist in the public. Some of the reports predict that a universal statutory definition of "brain death" could set the public mind at rest on this point.

On the other hand, the Alberta Report points out that difficulties do arise once death has been pinpointed at a certain point in time anywhere along the continuum of dying from permanent loss of ability to interact with one's surroundings, to death of the whole brain, to total cellular death. Once a patient is declared brain dead, he or she becomes a dead body rather than a live patient. The practical result is that hospitals have no admitting procedures for dead bodies, even though they are on life support systems and are treated as living until transplantation can occur. The Alberta Report does not oppose the codification of a definition of death, but rather cautions that such practical problems may occur if the point at which death is pinpointed occurs before a brain dead donor can be transferred to the appropriate hospital. The Alberta Commissioners feel that these problems can be handled administratively.

The Manitoba and Ontario Reports recommend a universal definition of death, but would endorse, at the least, a universal policy adopted at all hospitals where organ donation and transplantation may occur, setting out the criteria for the determination of brain death.

Commissioners' Recommendation:

The Alberta Commissioners do recommend a statutory definition of "brain death" but recommend that such a definition should only be arrived at in consultation with the Canadian Medical Association. Attached as Schedule 5 are the Guidelines for the Diagnosis of Brain Death, developed by the Canadian Congress of Neurological Sciences and endorsed by the Canadian Medical Association in 1986. Any definition would have to accord with these Guidelines. Remaining questions relating to this issue are:

- Whether the *Uniform Act* is the proper location for such a definition?
- Whether such a definition can be utilized for all purposes of the law?

RECOMMENDATION 2: That there not be presumed or mandatory consent to donation of human tissue

Alberta - Recommendation 21
Manitoba - Recommendation 2,3
Ontario - Recommendation 32

Presumed consent is the general rule in many European countries and this approach has not appreciably increased the number of organs being donated. Further, where studies of the public response to organ donation have been carried out, it has been shown that the public is very much opposed to anything other than a voluntary system of donation. The recommendations from the Alberta, Manitoba and Ontario Reports agree that there should be no change to bring about presumed or mandatory donation of tissue in a general sense. The Alberta Commissioners agree.

However, a related question was raised in the Manitoba Report. Most provinces have an implied consent in their legislation to retain the pituitary gland, when an autopsy is being carried out. The Manitoba Report looked at the question of whether the presumed consent to remove the pituitary gland in section 6 of the *Manitoba Act* should be broadened to extend to other tissue as well.

The only Canadian province of which we are aware to have adopted presumed consent legislation in relation to tissue other than pituitary gland is Saskatchewan. Under their *Coroners Act*, the corneoscleral button may be removed on autopsy if the person performing the autopsy has no reason to believe that the deceased's family or personal representative objects.

The following passage quoted from page 38 of the Manitoba Report is useful:

> While we believe that there is some merit in the suggestiion that the presumed consent approach be extended to cover the retention during an autopsy of useful tissue in addition to the pituitary gland, we are not prepared to recommend such legislative change in Manitoba at this time. In part, we rely on the reasons for which we rejected the adoption of a general scheme of presumed consent. Most importantly, we believe that the supply of human tissue can be significantly increased without the introduction of such legislation.

The Manitoba Report, therefore, did not recommend that the limited presumed consent contained in the *Manitoba Act* be expanded to include any other organ.

Commissioners' Recommendation:

The Alberta Commissioners agree that presumed consent not be broadened to apply to tissue other than the pituitary gland.

RECOMMENDATION 3: That next-of-kin should not be able to countermand the wishes of a deceased to donate.

Alberta – Recommendation 22
Manitoba – Recommendation 13
Ontario – Recommendation 33

Recommendation 3 has arisen as a concern as a result of hospital personnel deferring to the personal wishes of the next-of-kin of a deceased person who has expressed, during his lifetime in writing or otherwise, a desire to make a donation. Out of respect for the grief of relatives, hospitals have not as a rule made an attempt to enforce the wishes of a deceased where the surviving family do not wish donation to occur. This situation can be cured by legislation, but the question is whether that is the preferred remedy. The provincial Acts are designed to enable a person to consent to donation either on his or her own behalf or on behalf of another person who has passed away. That would seem to

be all that is necessary for a consent to operate. The real problem lies perhaps with medical personnel who insist on conferring or double-checking with the relatives, giving them the opportunity to override the wishes of the deceased.

Commissioners' Recommendation:

The Alberta Commissioners recommend that this problem should be handled through education. Consequently, no amendment to the *Uniform Act* is recommended.

RECOMMENDATION 4: That the donor card be legislated to be a formal part of the driver's licence.

Alberta – Recommendation 1
Manitoba – Recommendation 6

In Alberta, the donor card appears as part of the driver's licence as a result of s. 3(1)(b)(vii) of the Motor Vehicle Administration Order (Alta. Reg. 25/76) passed pursuant to the *Motor Vehicle Administration Act*. Section 3(1) does not refer to the donor card specifically but rather in general terms in clause (b). Section 3(1)(b) reads as follows:

3(1) An operator's licence issued under the *Motor Vehicle Administration Act* shall be in two parts, designated as Part I and Part II, and shall be signed by the Registrar and contain such information as is required for identification of the licensee and

(b) Part II shall contain the following particulars of the licensee:

(i) his height,

(ii) his weight,

(iii) his sex,

(iv) his operator's licence number,

(v) the classification that has been assigned to the licensee,

(vi) the expiry date of his licence,

(vii) any special conditions and endorsements on his licence,

(viii) his surname,

(ix) his first name,

(x) his postal address,

(xi) his date of birth,

(xii) his signature, and

(xiii) the date of issue of his licence.

The Alberta Report recommends that the donor card be specifically referred to in section 3(1) for these reasons:

(a) this measure would emphasize the government's commitment to transplantation,

(b) it would provide a relatively inexpensive method of public education, and

(c) it would ensure the continued existence of the donor card.

The Manitoba Report also makes reference to implementing such a change. However, Manitoba does point out that the donor card often is not used as authority to procure tissue because it cannot be found. This passage from page 25 of the Manitoba Report is useful.

> Moreover, the majority of donors are accident victims. In these circumstances the potential donor is often unconscious. A health care professional may have neither the time nor the authority to search the possessions of the individual, the personal effects are therefore usually locked away or turned over to the family. Where the potential donor has been in an accident, the wallet or purse, which would normally contain the donor card or driver's licence, is often destroyed or lost at the scene of the accident. If it is an accident in which the police have become involved, the police may keep the victim's personal effects, and the hospital staff would have no access to them.

Commissioners' Recommendation:

The Alberta Commissioners feel that this is not a change that need be legislated.

RECOMMENDATION 5: That names of donors and recipients be released, subject to the consent of the person to whom the information relates.

Manitoba - Recommendation 33, 34
Federal - Recommendation 8

This recommendation deals with the release of name of donors and recipients of human tissue. The Manitoba Report and the Federal Report both made comments in respect of this point. At the present

time, the *Uniform Act* does contain the following section dealing with confidentiality:

12(1) Except where legally required, no person shall disclose or give to any other person any information or document whereby the identity of any person

(a) who has given or refused to give a consent;

(b) with respect to whom a consent has been given; or

(c) into whose body tissue has been, is being, or may be transplanted,

may become known publicly.

(2) Where the information or document disclosed or given pertains only to the person who disclosed or gave the information or document, subsection (1) does not apply.

Alberta, Ontario, Nova Scotia, P.E.I., Newfoundland and the Yukon have the same provision in their Acts. Manitoba, Quebec, New Brunswick and the N.W.T. have no provision relating to release of information. British Columbia has added a subsection (3) to their Act, which reads as follows:

(3) Notwithstanding subsection (1), where

(a) a recipient of body tissue consents in writing to the publication of his identity;

(b) if the recipient is under the age of majority, his parent or guardian consents in writing to the publication of the recipient's identity;

(c) a donor of body tissue consents in writing to the publication of his identity;

(d) if the donor is dead or under the age of majority, any one of the persons referred to in section 5(1)(a) to (d) consents to the publication of the donor's identity,

the identity may be published by any person not sooner than one month after the date of the transplant.

The Federal Report commented on this issue and recommended that the *Uniform Act* be amended to reflect the British Columbia amendment. The change amounts to this. Under the *Uniform Act*, only the donor or recipient himself or herself can give out information and presumably the information he or she gives out can only relate to

himself or herself. The donor, in other words, could release the information that he or she is a donor, but could not release the name of the recipient of the organ that was donated. The B.C. amendment broadens the field, allowing any person to release the name of a donor or a recipient, provided the recipient (or his or her parent or guardian in the case of a minor recipient) or the donor (or certain named relatives in the case of a deceased or minor donor) consents to publication of the name, subject to certain time limitations.

The Manitoba Report also commented on the issue. Since Manitoba does not have a provision in its Act relating to release of information, the Manitoba Report recommended as follows:

RECOMMENDATION 32: That, subject to Recommendation 33, the legislation provide that no person shall disclose or give to any other person any information or document whereby the identity of any person

(a) who has given or refused to give a direction or consent;

(b) with respect to whom a direction or consent has been given;

(c) into whose body tissue has been, is being or may be transplanted;

may become publicly known.

RECOMMENDATION 33: That Recommendation 32 not apply to or in relation to information disclosed

(a) in pursuance of an order of a Court or when otherwise required by law;

(b) for the purposes of hospital administration or bona fide medical research;

(c) with the consent of the person to whom the information relates.

Commissioners' Recommendation:

The Alberta Commissioners recommend that the *Uniform Act* be amended to include a subsection (3) similar to that contained in s. 11 (3) of the *British Columbia Act*. However, as it was not possible to determine exactly why the one-month period was chosen in B.C. (the explanantion was offered that this period protects donors and recipients from inappropriate media attention), the Alberta Commisisoners recommend that the one-month period be discussed and perhaps eliminated.

RECOMMENDATION 6: That minors be able to donate organs.

Manitoba - Recommendation 8, 24 to 29
Federal - Recommendation 8

(a) General Comments re: Tissue Donation by Minors

The Federal Report states that the *Uniform Act* should be amended "to deal with organ donation by minors and the taking of regenerative tissue from living persons who are not capable of giving consent". That Report points out that "the taking of skin and bone marrow for transplant from living mentally incompetent persons as well as from living minors who are not capable of giving consent is of doubtful legality at common law". The following passage, quoted from page 57 of the Federal Report is noteworthy.

> The position of the *Human Tissue Gift Act* with respect to organ donation by minors has been seriously questioned. There are two issues to be examined: the first is whether or not a minor should be able to give consent for his or her organs to be removed after death and the second is the question of *inter vivos* transplantation. It has been argued that if people are able to obtain a driver's licence when they are 16 years old, they then should be mature enough to decide if they want to give written permission for *post mortem* organ removal. The issue of *inter vivos* transplantation is more serious and must be considered carefully with respect to minors. Neither minors nor their parents can give consent to *inter vivos* transplantation of non-regenerative tissues from the minor. The donation of a non-regenerative tissue by a minor may have serious consequences for the person later in life.

The Alberta Report indicates that the whole question of donation by minors is an ethical question that should be studied further, and made no recommendation.

Currently, only Quebec allows minors who are "capable of discernment" to make *inter vivos* and *post mortem* gifts. The *Uniform Act*, which has been adopted in B.C., Alberta, Saskatchewan, Ontario, Nova Scotia, P.E.I., Newfoundland and the Yukon, does not allow minors to make *inter vivos* donatons and only allows parents to consent to a *post mortem* donation by the child after the child's death. The Acts in place in Manitoba, New Brunswick and the N.W.T. do not deal with *inter vivos* gifts at all.

(b) Inter vivos donation

The *Uniform Act* allows only an adult to make an *inter vivos* donation of tissue. A person under the age of 18 therefore may not donate tissue while he or she is alive.

The Manitoba Report makes several recommendations, all dealing with the ability of a minor (mature or immature) to donate tissue, either on an *inter vivos* or *post mortem* basis. These recommendatinos are not based on age alone, but on whether the minor understands the nature of the proposed surgery. Manitoba takes the view that absolute prohibitions against donation should not be legislated where life is being jeopardized. The Report recommends, in respect of *inter vivos* donation, that mature minors be enabled to donate tissue, but only for transplant to the body of an immediate family member, and only with the consent of a parent. The donated tissue can be either regenerative or non-regenerative in Manitoba's proposals. The Report also recommends that immature minors (minors who are unable to appreciate the nature and effect of a proposed removal of tissue) should be able to donate regenerative tissue only, subject to the following conditions:

(a) that the transplant be to the body of an immediate family member,

(b) that the recipient is likely to die without the donation,

(c) that risk to the donor is not substantial, and

(d) that the Court of Queen's Bench has determined that the parents' consent in such circumstances is fair and reasonable.

Respecting the question of enabling a child to donate tissue on an *inter vivos* basis, many issues arise as part of the question, such as the following:

- Should there be an absolute prohibition against all persons under the age of 18 donating *inter vivos* tissue?
- Should the case of transplant of bone marrow (which may require compatibility that only a young sibling could provide) be an exception to an absolute prohibition?
- Should the mature minor be able to make an *inter vivos* donation of both regenerative and non-regenerative tissue?
- Should the immature minor be able to do so, with restrictions?

- Should it make a difference if the tissue to be donated is regenerative (skin, bone marrow) or non-regenerative (kidney)?
- Is risk the only factor? What about trauma to the donor child? *Inter vivos* donation is usually very painful.
- Whose opinion counts in a prediction that the recipient is likely to die without the donation?
- Should the law distinguish between minors who understand the nature and effect of a proposed removal of tissue and those who don't?
- Would children be subjected to coercion or unfair pressures from family or others enabling them to donate *inter vivos* tissue?
- Does Part 1 of the *Uniform Act* include any tissue besides one kidney?

(c) Post mortem donation

Turning next to the question of *post mortem* donation by children, the Manitoba Report recommends that minors 16 years of age should be able to make donations of any kind of tissue if a parent also consents in writing to the donation. Manitoba made this decision on the basis that if a mature minor can donate *inter vivos*, then surely he or she should be allowed to donate *post mortem* as well. In respect of a *post mortem* donation, the *Uniform Act* allows an adult to donate tissue after his or her death. Further, after the death of any person (including a child) who had not made a donation in his or her lifetime, a relative of the deceased may consent to a donaton by the deceased. Presumably then, although a child can't consent before death to a *post mortem* donation, a parent can consent on the child's behalf after the child dies.

The Alberta Commissioners recognize that there are questions here too that need to be considered such as the following:

- Since, currently, parents can donate tissue from their child's body as soon as the child dies, is there any need to make a change at all in the area of *post mortem* donation by minors?
- Will this change bring about an increase in the number of organs donated?

- If the *Uniform Act* is amended to give mature donors the right to donate tissue *post mortem*, should the parent have to consent as well, as the Manitoba Report recommends? Should there have to be a Court order approving the donation?

- What criteria should be used to distinguish between minors who should be able to donate and minors who should not? Age? Ability to understand the proposed surgery?

- Should there be restructions on a *post mortem* donation by a minor?

Commissioners' Recommendation:

The Alberta Commissions feel that there is not yet enough information available to make a recommendation regarding donation of tissue by minors. Therefore the Commissioners have raised here many of the questions that should be discussed in order to arrive at any conclusions. The ethical considerations that accompany these decisions, such as the need to look to children for tissue, the pain that necessarily attends transplant procedures, and the potential to allow coercion to make children feel that they have to donate, have been raised in more than 1 of the reports as matters that require further study. The Alberta Commissioners are taking the cautious approach in recommending that

(a) in the area of *inter vivos* donation, minors are not permitted to consent to a donation, and

(b) in the area of *post mortem* donation, minors aged 16 and 17 be permitted to consent to a donation.

RECOMMENDATION 7: That mentally incapacitated persons be able to donate organs.

Manitoba - Recommendation 30 to 32
Federal - Recommendation 8

Under the *Uniform Human Tissue Act*, mental competence is a requirement to be able to make *inter vivos* donation but is not an express requirement to be able to make a *post mortem* donation. Perhaps the earlier drafting of Part 2 of the *Uniform Act* was intended to imply mental competence. However, the juxtaposition of Parts 1 and 2 leaves an inference that mental competence is required in 1 case and not in the other.

The Manitoba Report discusses the difficulty with labelling persons as "mentally disordered" or "mentally handicapped". Such a label does not mean that the person cannot consent to his or her own medical treatment. The following passage at page 98 of the Manitoba Report clarifies this situation:

> To determine whether an individual is mentally competent for the purposes of medical treatment, reference must be made to each person's capacity rather than to his/her label as a "mentally disordered" person. It should not be assumed that a mentally disordered person is incapable of rendering consent even if (s)he is institutionalized or subject to a court order or interdiction. Indeed,
>
> > [l]ikewise, a person who is committed under the Criminal Code by Lieutenant-Governor's Warrant, or under The Penitentiaries Act does not lose his right to refuse or consent to treatment.
>
> As in any instance where competency to medical treatment is at issue, the question is whether a person is able reasonably to understand the nature and consequences of the proposed treatment so as to be capable of rendering an informed decision. We are of the view that persons who are competent to consent to the proposed procedure should be permitted to donate, notwithstanding that they may have a mental disability or handicap.

Manitoba made 3 recommendations in this area, basically enabling a mentally incapacitated person who understands the nature and effect of the removal of tissue (regenerative or non-regenerative) to donate the tissue, and prohibiting a mentally incapacitated person who does not understand the nature and effect of the removal of tissue from donating. In other words, a person fitting into the latter category could never be required to undergo an *inter vivos* donation procedure.

The Federal Report does endorse mentally incapacitated persons being able to donate, but confines the donation to regenerative tissue only.

Again, the Alberta Report merely pointed out that the question of donation by a mentally incapacitated person is an ethical question which requires further study, and made no recommendation.

This discussion would not be complete without some reference to the recent Supreme Court decision in *E. (Mrs.) v. Eve* [1986] 2 S.C.R. 388.

That case involved an application by Mrs. E. for the non-therapeutic sterilization of her adult, mentally incompetent daughter. The facts are confined to the issue of consent to health care on behalf of a mentally incapacitated person. However, the statements of the Supreme Court might well be applied to an application by a parent wanting to give consent on behalf of a mentally incapacitated child to an *inter vivos* or *post mortem* donation of tissue, if the *Uniform Act* is opened up to allow such donation. Indeed, many would argue that the decision is pertinent to parental consent to donation on behalf of a child.

The following passages from the judgment of LaForest, J. are important:

At p. 425:

> "In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its rationale is obviously applicable to children, ..."

At p. 427:

> "Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised . . . . The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual."

At p. 429:

> "One may sympathize with Mrs. E. To use Heilbron J.'s phrase, it is easy to understand the natural feelings of a parent's heart. But the *parens patriae* jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve. And a court, as I previously mentioned, must exercise great caution to avoid being misled by this all too human mixture of emotions and motives. So we are left to consider whether the purposes underlying the operation are necessarily for Eve's benefit and protection."

At p. 434:

> "The importance of maintaining the physical integrity of a human being ranks high in our scale of values, particularly as it affects the privilege of giving life. I cannot agree that a court can deprive a woman of that privilege for purely social or non-therapeutic purposes without her consent. The fact that others may suffer inconvenience or hardship from failure to do so cannot be taken into account. The Crown's *parens patriae* jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them."

The Supreme Court restored the decision of the trial judge which was to deny the application for authorization to sterilize Eve.

Commissioners' Recommendation:

It is possible that whatever is recommended in respect of donation by minors should be reflected here. It is also possible that the number of persons who might be affected by this proposal is so small that any change to the *Uniform Act* cannot be justified. The Commissioners feel that this area too is fraught with questions of ethics that make decisions far from clear-cut. However, the Alberta Commissions, again taking the cautious approach, recommend that mentally incapacitated persons not be permitted to consent to a donation.

RECOMMENDATION 8: That the *Uniform Human Tissue Act* be broadened to include donation of organs for anatomical inspection in addition to therapeutic, educational and research purposes.

Manitoba - Recommendation 7

Manitoba has an Act entitled *The Anatomy Act* under which unclaimed bodies can be utilized by the university for anatomical or other scientific instruction. A person may donate his or her body for these purposes after death. Apparently, a difficulty has arisen in Manitoba as to whether, when a person signs his or her donor card, he or she is

(a) donating a part or parts of his or her body under *The Human Tissue Act*, or

(b) donating his or her whole body under *The Anatomy Act*.

It does make a difference, since

(a) the purposes for which the donation may be used are different, and

(b) there is no protection under *The Anatomy Act* whereby tissue cannot be removed if there is reason to believe that the deceased would have objected to the removal, as exists under *The Human Tissue Act*.

The Manitoba Report recommends that the provision in *The Anatomy Act* be consolidated with Manitoba's *The Human Tissue Act*. This would make both procedures subject to the qualification in clause (b) above, thus providing more protection to the deceased. Slight changes in the donor card could clear up any ambiguity as to which purpose the donation was intended for. The Manitoba Report is the only report that makes this recommendation, although other jurisdictions do have legislation similar to *The Anatomy Act*.

British Columbia, Saskatchewan, Ontario, New Brunswick and Nova Scotia all have a separate *Anatomy Act* under which an unclaimed body may be used for research purposes. In Alberta, ss. 55 to 59 of the *Universities Act* cover the use of unclaimed bodies by universities for anatomical purposes and for scientific instruction and research.

Under these Acts, bodies are usually the bodies of persons who have been living in public institutions at public expense, or bodies that are unclaimed by friends or relatives where burial has to be carried out at public expense. However, where a person has consented under the Human Tissue legislation in his or her province to the use of his or her body for medical research, that body would also be covered by the *Anatomy Act* or similar provisions after death.

Commissioners' Recommendation:

The Alberta Commissioners recommend that the *Uniform Act* not be amended to include provincial legislation relating to the use of bodies (unclaimed or otherwise) for medical research. Under the *Uniform Act*, some inquiry must be made to determine whether a deceased had withdrawn his consent or would have objected to a donation. Presumably there are relatives and friends available who could provide this information. In the case of an unclaimed body, even if a physician were required to make a similar inquiry, from whom might he elicit such information? If the rationale for combining the legislation dealing with consents under the *Human Tissue Act* with legislation relating to unclaimed bodies is to afford protection to the corpse where the deceased had changed his mind about donating, it is possible that the protection can't practically be given to unclaimed bodies.

RECOMMENDATION 9: That the list of relatives who may consent to donation on behalf of a deceased person be expanded to include a common law spouse and a guardian of the deceased appointed under provincial child welfare legislation.

Manitoba – Recommendation 17

This recommendation concerns the situation where a person who has died or whose death is imminent has not consented to a donation of tissue. Other groups of people can consent on his or her behalf, namely:

(a) his or her spouse of any age,

(b) if none or if his or her spouse is not readily available, any one of his or her children who has attained the age of majority,

(c) if none or if none is readily available, either of his or her parents,

(d) if none or if none is readily available, any one of his or her brothers or sisters who has attained the age of majority,

(e) if none or if none is readily available, any other of his or her next of kin who has attained the age of majority,

(f) if none or if none is readily available, the person lawfully in possession of the body other than, where he or she died in hospital, the administrative head of the hospital, or

(g) if none or if none is readily available and he or she died in hospital, the administrative head of the hospital.

Manitoba has made a number of recommendations here which are already contained in the *Uniform Act*. One suggestion that has not been added to the *Uniform Act* is to expand the above list by adding a common law spouse to clause (a) and by adding a guardian appointed under provincial child welfare legislation to clause (c). None of the other Reports made similar comments.

Commissioners' Recommendation:

The Alberta Commissioners suggest that on the basis that a common law spouse or a child's guardian might be the only persons available, they should be added to the list as recommended by Manitoba. These additions would appropriately reflect the state of society in the present age.

RECOMMENDATIONS OF AN ADMINISTRATIVE NATURE

RECOMMENDATION 1: That fees be paid to doctors for their participation in the transplantation process.

Alberta - Recommendation 4
Manitoba - Recommendation 21
Ontario - Recommendation 9

The Alberta, Manitoba and Ontario Reports made reference to the fact that physicians are not currently paid for all the services they give in connection with the transplantation process. Recognition of a physician's counselling services in asking the family of a deceased person about the possibility of a donation would greatly encourage physicians to speak with families and thus increase the number of organs donated. However, the Alberta Commissioners are of the view that the whole question of what fees should be paid to physicians and for which services under Canada's Medicare Plan is not a matter that belongs in the *Uniform Human Tissue Act*.

RECOMMENDATION 2: That policies be set up to regulate

(a) donor selection:

Alberta - Recommendation 2,5
Manitoba - Recommendation 21
Ontario - Recommendation 2

(b) organ retrieval, donor maintenance and storage:

Manitoba - Recommendation 21

(c) techniques for removal, perfusion and preservation of organs:

Alberta - Recommendation 6

(d) donor maintenance, transport of donors, consent forms:

Ontario - Recommendation 5

(e) a transportation system for donors, retrieval teams and organs:

Manitoba - Recommendation 21

This recommendation calls for the establishment of policies to cover a number of things. Policy of this kind is often contained within regulations, however these matters might be handled differently from province to province. The Alberta Commissioners suggest that policies of this nature can be handled administratively.

RECOMMENDATION 3: That a means be worked out so that payment is made to hospitals or to others to cover costs of surgery, transporting the transplant team, transporting organs, maintaining cadavers and returning them for burial, etc.

Ontario - Recommendation 3, 18, 25
Federal - Recommendation 13
Manitoba - Recommendation 21
Alberta - Recommendation 11

The Alberta Commissioners are of the view that each province will have to work out how payments should be made to cover such costs.

RECOMMENDATION 4: That a register or record of transplants should be kept.

Federal - Recommendation 3
Ontario - Recommendation 4, 17
Manitoba - Recommendation 11

The 4 Reports are not at all in accord as to whether a register or record should be necessary to list available organs for transplantation or names of possible donors of tissue or transplant operations that have been carried out. The Federal Report promoted having a national register. The Ontario Report recommended an "audit" of organ retrieval and exchange with follow-up research on the question. The Manitoba Report indicates that a donor registry is not necessary. The Alberta Report is silent on the question. In any event, the Alberta Commissioners do not feel that this is a legislative matter, whether a register is necessary or not. If it is felt to be needed, a register of any type can be set up quite independently of legislation.

RECOMMENDATION 5: That training be provided for medical personnel in various aspects of the transplantation process.

Alberta - Recommendation 7
Manitoba - Recommendation 21
Federal - Recommendation 23
Ontario - Recommendation 2

The question of training for medical personnel involved at any stage of the donation-transplantation process is one that necessarily involves provincial departments of education, faculties of medicine and medical licensing associations.

RECOMMENDATION 6: That a tissue bank be established.

Alberta - Recommendation 8, 9
Federal - Recommendation 6

In respect of a tissue bank, the 2 Reports that contained a reference to storage facilities indicate that a nation-wide storage facility is not needed. This is largely because whatever organs are donated are used immediately. Alberta, however, does have a provincial facility to house storable tissue and did not recommend expansion of that storage facility.

RECOMMENDATION 7: That hospitals make operating privileges available to visiting transplant teams.

Ontario - Recommendation 5
Federal - Recommendation 18, 19

The question of hospital operating privileges can only be handled administratively by the hospitals involved in transplant work across Canada. The Federal Report noted that provincial medical licensing authorities would have to enable visiting teams to practise medicine in each province. The right to practise medicine outside one's home province may also involve an amendment to the provincial *Medical Profession Acts*.

RECOMMENDATION 8: That donation of organs be promoted through massive educational programs:

Ontario - Recommendation 1, 6, 12-15, 19, 20, 23
Manitoba - Recommendation 4, 10, 21

One of the most important factors in promoting organ donation is a massive public education program, designed to stimulate support for transplantation and organ donation and to focus on the urgent and increasing need for donor organs. Apparently, the task of breaking down the barriers to donation that presently exist is a large one, but the extent to which the *Uniform Human Tissue Act* can be utilized to assist in this process is questionable.

RECOMMENDATION 9: That 24-hour toll-free telephone numbers be circulated to the public for use in connection with the organ donation and transplant process.

Ontario - Recommendation 16, 21
Manitoba - Recommendation 21

Toll-free telephone numbers are part of the public education program and would be primarily a matter of funding in each jurisdiction.

RECOMMENDATION 10: That standards be set for admission and transfer of brain dead donors.

Alberta - Recommendation 10

The Alberta Report raised the problem of transferring and admitting to hospital a brain dead donor on life support systems. Because the donor is in fact declared to be dead, certain hospital policies will require amendment in order for these donors to be properly admitted to hospital and treated as live patients.

RECOMMENDATION 11: That a policy of "recorded consideration" or "routine request" be implemented.

Ontario - Recommendation 2, 11
Manitoba - Recommendation 20

The Ontario Report recommends that a policy of "recorded consideration" be implemented in hospitals. This means that the attending physician of a patient would have to document on the patient's chart that he or she has given consideration to asking the patient or family members for an organ donation. The chart would also have to indicate the outcome of such a request or the reason why no request was made. This recommendation stems from the belief that one of the major obstacles to organ procurement is the failure of health care professionals to ask family members about organ donation.

Manitoba has carried this recommendation a bit further and recommends that, in hospitals and in offices where post-mortem examinations are conducted, the attending physician, nurse or medical examiner follow a policy of routinely requesting a consent to donation of tissue from the family of a potential donor. Manitoba made this recommendation partly on the basis that in 1985, the Chief Medical Examiner's Office in Alberta began routinely making requests for donation of corneal tissue from families of bodies that were brought to that office for post-mortem examinations. This policy has proven successful, and no criticism has been voiced by the families who were approached for donation.

SCHEDULE 1

Federal Working Group - Recommendations

1 The following factors should determine when the different transplant services can be provided in each province or region:

- the number of referrals by physicians;

- finances;
- transportation and distance to transplant centres.

(p. 5)

2 Organ transplantation should be viewed as only one part of a broader end-stage organ failure program. This can result in "trade-offs" in costs rather than "add-ons" in costs to the health care program.
(p. 7)

3 As the knowledge and practice in transplant surgery changes quickly, there should be some Canadian record system so that information respecting all surgery is kept. At time of this report, the only recording system involves kidney transplant (Canadian Renal Failure Registry).
(p. 11)

4 The working group pointed out that the fear of an endless increase in the number of transplant surgeries is misplaced. The number of transplants is limited by the supply of organs. Each organ can only survive for a limited time outside the body. For example:

liver – 8 hrs.
heart – 1½ hrs.
kidney – 48 hrs.

(p. 12)

5 Transplant centers should be established only in medical teaching centres. Where more than 1 team exists in a city, the teams should work on a co-operative basis. This will

- promote a high standard of care,
- reduce hospital rivalries, and
- have required staff on hand 24 hours per day.

(p. 14)

6 Re: storage, guidelines for organ preservation centres are not needed immediately, and bone marrow tissue banks are not of demonstrated usefulness.
(p. 15)

7 New treatment programs should be funded on a "trade-off" basis. Start-up costs only should be regarded as "add-on" costs. (Really part of recommendation number 2.)
(p. 52)

8 The provincial *Human Tissue Acts* should be amended to allow the names of donors and recipients of organs to be released, subject to obtaining written consent, and to deal with:

(a) organ donation by minors, and

(b) the taking of regenerative tissue from living persons who are not capable of giving consent

and the provincial acts should be uniform on all these points.
(p. 58)

9 All hospitals where organ donation and transplant occur should adopt a set of criteria to determine brain death. (It would be better to enshrine in legislation the criteria and have it uniform across Canada.)
(p. 60)

10 There should be no change to the present policy "Agreement on Eligibility and Portability", but some changes to cover organ transplant will be required. These changes are set out in items 11 to 17.
(p. 65)

11 Transportation costs of recipients of vital organs (in or out of province) should be set by each province, and in cases where transplant is not available in a province, consideration should be given to covering the transport costs to and from the site of the service.
(p. 65)

12 The donor should receive no payment for loss of wages or income.
(p. 66)

13 The following costs of obtaining the organ should be covered:

(a) transport, accommodation and living expenses of a team to harvest the organ;

(b) maintaining the heart-beating cadaver;

(c) surgical procedure to remove the organ;

(d) transporting the organ to site of implantation;

(e) transporting the heart-beating cadaver and staff and equipment;

(f) returning the cadaver to original site;

(g) returning equipment.

(p. 66)

14 Costs (noted in item 13) associated with organ procurement (from a living or dead donor) should be covered by the home province of the recipient, and these should be billed over and above the per diem, at actual cost.
(p. 67)

15 Funeral expenses of a cadaver should not be covered.
(p. 67)

16 Costs of maintaining a heart-beating cadaver should be billed to the home province of the donor, not the recipient.
(p. 68)

17 Where a procured organ is not transplanted, costs of procurement and travel should be borne by the province in which the organ acquisition team is based.
(p. 68)

18 Medical licensing authorities in each province should have clear policies and procedures in place to ensure that organ retrieval teams from other jurisdictions are properly entitled to carry out their procedures.
(p. 70)

19 Hospitals with organ retrieval/procurement programs should develop clear policies and procedures for the granting of privileges to organ retrieval teams from elsewhere.
(p. 70)

20 Customs and immigration regulations relating to transfer between Canada and the U.S. of heart-beating cadavers, cadavers and organs should be available to hospitals and procurement agencies.
(p. 71)

21 The working group felt it would be appropriate for each jurisdiction to have a Health Services Research Group. This was given as a general comment, not as a recommendation.
(p. 80)

22 The working group noted that special Canadian training programs for surgeons, nurses and other personnel are not necessary, as training is available.
(p. 84)

23 The working group recommended that an information system be set up to record organ failure and transplant information for all of Canada. Until a Canadian Register is established, each province could collect information within that province.
(p. 86)

24 The working group also expressed the view that it is preferable to have a transplant team that can work in both adult and pediatric institutions rather than housing minor patients in an adult-care hospital.
(p. 92)

25 The working group expressed the view that there need not be only 1 institution in which all transplants occur. There should be more than 1 transplant center with a sharing of services and skills.
(p. 93)

26 The Report of the working group should be revised not later than 1988.
(p. 96)

SCHEDULE 2

Alberta - Recommendations

1 The Donor Card on a driver's licence should be authorized by statute

(See Alta. Reg. 123/78) - *Motor Vehicle Administration Act*
- s. 3(1)(b)(vii).)

(p. 12)

2 Alberta Police organizations should establish a uniform province-wide policy of organ donor identification.
(p. 15)

3 The Task Force considered the question of professional fees for doctors for identifying and counselling families of potential donors, but made no recommendation on this point.
(p. 19)

4 Physicians should receive reimbursement for pre-donation care of brain-dead donors.
(p. 20)

5 Facilities that carry out transplants should put in place proper policies for donor selection criteria, including the obtaining of a complete medical history of the donor.
(p. 21)

6 In non-transplant centres, strict criteria should be in place for:

(1) identification of potential donors;

(2) determination of brain death;

(3) techniques for removal and perfusion and preservation of organs.

(p. 22)

7 Technicians should receive proper training for procurement procedures at a recognized centre and proper procedures should be in place regarding their duties and responsibilities.
(p. 22)

8 A large, comprehensive (national) tissue bank is not a reasonable proposition for Alberta at this time.
(p. 30)

9 The provincial government should establish a tissue bank for skin, bone and corneas, to be known as the H.O.P.E. Tissue Unit, that is administered by the Council for Transplantation.
(p. 32)

10 Uniform standards should be established to allow admission, transfer and transport of brain-dead donors, on organ support systems, to transplant centres.
(p. 39)

11 The Provincial Government should develop a policy for

(a) payment of expenses to transport donors and organs;

(b) payment of hospitals costs;

(c) return of donor body for burial.

(p. 40)

12 The Task Force considered the question of whether a donor card is a will that could be altered by a later will, and decided that the card is not a will. No recommendation made.
(p. 41)

13 Additional funding should be provided to the H.O.P.E. program to establish (6) positions for nurses who would be trained for the O.R. in transplant procedures.
(p. 44)

14 The Chief Medical Examiner's Program for donation of storable tissue should become a permanent provincial program and become an integral part of the proposed Council for Transplantation.
(p. 48)

15 Each hospital's consent to autopsy form should be broadened to include authorization for retention of tissue and organs as part of the autopsy process.
(p. 50)

16 Each hospital should review its procedures to ensure proper, dignified disposal of human tissue.
(p. 50)

17 The Task Force considered whether the manner of disposal of human tissue should be legislated and decided this was not necessary at this point in time.

(See s. 44(1)(f) *Hospitals Act*; s. 68(d) *Mental Health Act*.)
(p. 51)

18 A Council for Transplantation should be established to:

(1) promote transplantation through education;

(2) facilitate procurement of organs;

(3) provide storage of organs and tissue;

(4) establish standards on all aspects of transplantation;

(5) provide information on availability of organs and tissue.
(p. 54)

19 The Task Force raised 5 areas which encompass both ethical/legal and ongoing concerns related to transplantation. They did not make recommendations, but indicated that some means is needed to continue to look at and provide resolutions to these issues:

1 General ethical issues in transplantation

(a) Religious issues in organ transplantation.

(b) The ethical dilemma for governments in supporting transplant programs when resources are limited.

(c) Ethical and legal aspects of exchanging organs between different countries, especially when they have wide cultural differences.

(d) Use of the media to promote poorly tested, high-profile treatments and convert them from research to therapy, without adequate scientific peer review.

(e) Distortion of public perception of health care priorities by undue media attention to dramatic health care issues, affecting small numbers of people.

(f) How to maintain confidentiality of donors and recipients in the glare of publicity surrounding dramatic transplant events and media pressure "for the story".

(g) The ethics of institutions not adopting positive public policies towards transplantation, yet having transplant programs.

(h) Transplant recipient rights and their advocacy.

(i) Need to define the ethics in private for-profit operations in promoting high-visibility health care projects, leaving the more mundane or more expensive problems to the public sector.

(j) Ways of ensuring equality of access to expensive procedures.

(k) The philosophical, ethical and legal aspects of commerce in human organs and tissues obtained from brain-dead donors.

2 The living donor of organs and tissues (especially kidneys)

(a) Living related kidney donors, from family members:

(1) issues in poorly bonded families.

(2) the coercion of the "HLA-identical imperative".

(3) inter-family live donor exchange contracting, where families without well matched donors are brought into contact with other similar families with which inter-family mutual exchange would be HLA compatible, with a view to kidney transplantation between such families.

(b) Spousal and emotionally-related organ donation.

(c) The whole issue of altruism in society, with special regard to altruistic donation of organs and tissues by living unrelated members of the public.

(d) Donation of tissues and organs by children.

(e) Donation from other legal incompetents.

(f) Living donors of organs for covert compensation; the commerce of organ donations from living donors; when does compensation for "time lost on the job" or compensation for inconvenience become "payment for the donation"?

3 Procurement of organs from the dead

(a) Equitable Distribution of Cadaveric Organs

(i) Who legally owns, and therefore decides on distribution of *extra corporeal* organs?

(ii) In relation to processing and transportation fees, what constitutes the "sale" of an organ?

(iii) How can patients be assured of equal opportunity for transplantation?

(iv) What should determine relative needs of patients of different parts of society, parts of the country, or between countries, when all are in need?

(v) How can regional and international sharing of human organs and tissues best be regulated?

(vi) Other issues in the equity of distribution.

(b) The Issue of Premortem Permission (for Post-mortem Organ Procurement)

(i) "opting in" versus "opting out" legislation: pros and cons; an on-going issue involving repeated sounding of public opinion and public education.

(ii) pre-mortem consent for post-mortem donation:

(A) the best site to record donation consent: driving licence or provincial health care card?

(B) non-issuance of driving licence or health care card until individuals make a decision with regard to disposition of organs at death. The question of a mandatory requirement to answer "Yes", "No", or "Refuse to answer" to a question on this matter with the answer to be recorded on the card. The latter is another ongoing issue, which is not yet resolved.

(C) pros and cons of registries; another unresolved issue.

(iii) for doctors who are looking after a potential brain dead donor, in hospital, there is the issue of "required request" or obligation to ask for consideration by the family of organ donation after death of their relative. An active issue in USA, at present. This is an issue on which the Boards of Directors of hospitals might well have to make decisions.

(iv) the question of having an audit of the Organ Donation Rate in hospital accreditation. Perhaps, in contemporary medical practice, this is more important indicator for accreditation than some others, such as the autopsy rate.

(v) the need for a changed professional ethic to one where all doctors feel a responsibility towards determining dying patients' wishes for disposal of their body.

4 Respect for the dead, in a transplantation context

(a) philosophical/religious aspects,

(b) medical aspects,

(c) legal aspects.

5 Ongoing ethical and legal aspects of organ storage

The proposed Council on Transplantation was indicated as the group that could study these questions and advise the Minister.
(p. 68)

20 Appendix L. 2 makes it clear that some confusion arises as a result of a universal definition of "death". The Task Force commented that the moment of death is not universally the same moment, but did not comment on whether a recommendation should or should not be made. The Appendix illustrates the non-uniform use of the word "dead".
(p. 138)

21 Although no recommendation was made, the Task Force commented that there was evidence of strong public objection to any attempt to make donation of organs mandatory rather than voluntary, as is presently the case.
(p. 11)

22 The public opinion poll also indicated that the public feels the next-of-kin should not have the right to alter the wishes of a donor in respect of donation of organs. No recommendation.
(p. 11)

SCHEDULE 3

Ontario – Minister's Task Force on Kidney Donation

Recommendations of Task Force:

1 The Board of Directors of each acute care hospital in Ontario should be encouraged to establish policies which promote and facilitate organ donation in their hospital.

2 Each hospital administration should establish an Organ Donation Committee to implement policies and procedures that affect the supply of organs for transplantation, using guidelines developed by the Task Force to:

(a) designate a team or individual to act as an Organ Donation Coordinator overseeing the stages of the donation process including donor maintenance, assistance with relatives, and interaction with the provincial organ retrieval program (M.O.R.E.) and the regional retrieval programs,

(b) ensure regular in-service training and education,

(c) apply the criteria to be used for the identification of potential donors which can also be used for auditing the effectiveness of such identification,

(d) consider employing a system of "recorded consideration" of donation request by the attending physician or his or her designate to record, on the hospital chart, the fact that consideration had been given to request for organ donation. This recording would be required in every hospital death in which the patient fulfilled the established donor criteria. The record would state the outcome of the request or the reason why a request was not made.

3 Appropriate recognition of hospital costs incurred in organ procurement and donor care should be given by the Ministry and out-of-province insuring agencies.

4 A means should be established to provide an accurate audit of organ retrieval and inter-institutional organ exchange.

5 A set of guidelines should be provided to each hospital for consideration and adoption into its policy and procedures manual. Topics to be covered would include:

- consent forms and methods of obtaining consent
- declaration of brain death
- optimal donor maintenance
- transportation of potential organ donors from centre to centre
- provision of temporary operating privileges for renal and non-renal retrieval teams from other hospitals.

6 Health care professional organizations should be encouraged to include in their continuing education programs information concerning transplantation and the need for donor organs. Materials for this should be developed by the Ministry in conjunction with M.O.R.E. and the regional retrieval programs.

7 Faculties of Medicine in the Province of Ontario should be approached and encouraged to include in their curriculum programs information outlining the physician's responsibility as an initiator and participant in the organ donation process.

8 Suitably qualified physicians on hospitals staff should be identified to assist in the declaration of brain death.

9 Appropriate remuneration should be given to physicians participating in the activities of organ procurement.

10 In conjunction with medical and nursing staff, hospital chaplaincy and social work services should be utilized as integral participants in the donation process with particular responsibility for ministering to the needs of the donor and the donor's family.

11 Discussions should be held with the medical, hospital and nursing associations to establish a professional medical consensus regarding the concept of "recorded consideration" of donation request by the attending physician or his or her designate.

12 An imaginative, ongoing public information program is required to focus on the urgent need for donor organs, the successes of transplantation and the positive effects of transplantation, both medical and economic.

13 The public should be urged to make a commitment by signing drivers' licences and other organ donor cards.

14 A professional campaign should be used in all media to stimulate public and professional support for transplantation and organ donation.

15 Market research should be employed as a follow-up to measure the effectiveness of this campaign.

16 The M.O.R.E. toll-free number (1-800-387-LIFE) should be widely publicized and should continue to provide the public with further information concerning transplantation and organ donation.

17 Research should be conducted regarding a universal record of consent and the best means of recording post-mortem donation wishes, including the concept of a central registry.

18 Coverage should be provided for the following:

- recipient transportation costs and, in the case of children, parent/guardian transportation costs;

- living related donor transportation (in and out of province);
- the cost and means of transporting a cadaveric donor body to the recipient centre (by air ambulance if available) and back home for burial preparation (This should include both out-of-province and Ontario donors.);
- the transportation costs incurred by the designated hospital Organ Retrieval Teams.

19 The provincial Multiple Organ Retrieval and Exchange Program (M.O.R.E.) should be expanded and suitably funded by the Government of Ontario in order to continue to function as the province-wide body responsible for coordinating retrieval and distribution of all organs, organizing ongoing public and medical education, reviewing and recommending technical standards, and maintaining all organ retrieval and transplant data for the purpose of periodic analyses and reports. This provincial program should be a democratic and fully participatory group of the renal programs utilizing the present and potential strengths of all the participating centres.

20 A Canadian Organ Retrieval and Exchange program (C.O.R.E.) should be established to interact with M.O.R.E. and other provincial Organ Retrieval Programs. C.O.R.E. should also facilitate national collaboration for public and professional awareness programs and interact with the Royal College of Physicians and Surgeons and the Canadian Hospital Association.

21 A 24-hour toll-free number (1-800-387-MORE) should continue to provide ready access to the central program for provincial health care professionals or by programs outside Ontario offering organs to M.O.R.E.

22 The regional programs in Hamilton, Kingston, London, Ottawa and Toronto should be suitably funded in order that they provide maximum efficiency for regional organ procurement. Necessary expenses include personnel to coordinate organ donation and to interact with the central program, regional public relation costs and funds for local computerization. The availability of a transplant retrieval team, reliable tissue typing and cross-match facilities and economical air and ground transportation should be part of the guidelines defining the constitution of a Regional Retrieval Program.

23 Appropriate educational material should be prepared to inform patients and their families of the potential for living-related kidney donation.

24 Any prospective living-related donor should be evaluated and informed of all details by an independent physician.

25 Full reimbursement of all direct costs associated with organ donation, including transportation, should be provided.

26 A study of the potential for the "emotionally related donor" should be carried out. Individuals should be able to act as emotionally related donors but only after extensive determination of medical and psychiatric suitability.

27 A working party should be established under the direction of the Task Force in order to execute the recommendations of the Task Force and to report back on a timely basis.

28 The accepted recommendations should be applied simultaneously, recognizing that failure to relieve a single obstruction prevents any benefits from the removal of other barriers.

Findings of Task Force:

29 Of the thousands who die each year, a very small number become donors. However, a large number of deaths could result in potential donation.
(p. 14)

30 There is lack of initiative in medical institutions and in the medical profession in obtaining donations from the families of deceased persons.
(p. 15)

31 Six reasons for the public not signing donor cards are:

(a) concern over hasty declaration of brain death;

(b) mutilation;

(c) fatalism, superstition;

(d) religious attitudes;

(e) age;

(f) "Never thought of it".

(p. 16)

32 There is uniform public opposition to presumed consent, mandatory donation and any form of commerce in organ donation.
(p. 16)

33 The public feels that relatives should not be able to countermand a signed donor card.
(p. 16)

34 Medical barriers to donation are:

(a) failure to identify a suitable donor (often identified as non-suitable);
(p. 18)

(b) failure to initiate the donation process;
(p. 18)

(c) financial and legal concerns;
(p. 19)

(d) personal inhibitions in initiating the donation process with grieving relatives.
(p. 20)

35 Transportation barriers to donation are:

(a) access to Ontario Air Ambulance system;
(p. 20)

(b) costs of transportation re: aspects of transplant.
(p. 21)

36 Distribution barriers to donation are:

(a) cold storage v. continuous perfusion of organs – better function of kidneys preserved on machine;
(p. 21)

(b) inappropriate methods of transport of organs and lack of system centralization and policy have been noted;
(p. 22)

(c) immunological considerations could be a barrier against transplant in future;
(p. 22)

(d) deficiencies in the retrieval system are noted.
(p. 23)

SCHEDULE 4

Manitoba Law Reform Commission – Recommendations

A. Procurement of Cadaveric Tissue

1 That the requirement of consent to remove human tissue after death for therapeutic, educational and research purposes be retained.
(p. 39)

2 That presumed consent provisions in section 6 of the *Human Tissue Act* (Manitoba) not be extended to permit the removal and retention of tissue other than the pituitary gland.
(pp. 36, 38)

3 That compulsory tissue removal be rejected as a viable alternative system of obtaining tissue.
(p. 31)

4 That an ongoing educational program be implemented, aimed at increasing public awareness of organ transplantation and medical research, informing the public about the donation process and encouraging the public to record and make known their wishes to donate organs.
(p. 41)

5 That the *Human Tissue Act* provide that where a successful transplant requires the donor to have sustained brain death with intact circulation, the determination of death be made by 2 physicians who

(a) have no association with the proposed recipient, and

(b) do not participate in the transplant.

(p. 42)

6 That the *Highway Traffic Act* be amended to provide that the form of consent to the donation of tissue be part of the particulars of the licence.
(p. 43)

7 That the *Human Tissue Act* be broadened to include donation of the whole body for anatomical examination in addition to the donation of tissue for therapeutic, education and research purposes.
(p. 45)

8 That the Act be amended to allow a minor who has attained 16 years of age to donate tissue or the whole body, where a parent also consents in writing to the direction.
(p. 45)

9 Manitoba proposes a specific wording for the donor form on the driver's licence, as follows:

> IF YOU WISH TO DONATE YOUR BODY OR PART OF YOUR BODY FOR USE FOR HUMANITARIAN PURPOSES AFTER DEATH, PLEASE COMPLETE THE FORM BELOW.
>
> CONSENT UNDER THE *HUMAN TISSUE ACT*, C.C.S.M. c. H180
>
> I,_____
>
> CONSENT TO THE USE, AFTER MY DEATH OF (Check Appropriate Box)
>
> (a) ANY NEEDED ORGANS OR PARTS OF MY BODY; or
>
> THE FOLLOWING SPECIFIED PARTS OF MY BODY, NAMELY:
>
> _____
>
> FOR (Strike Out Purposes Not In Accordance with Your Wishes)
>
> TRANSPLANT AND OTHER THERAPEUTIC PURPOSES
> MEDICAL EDUCATION PURPOSES/ SCIENTIFIC RESEARCH PURPOSES.
>
> OR
>
> (b) MY WHOLE BODY FOR PURPOSES OF ANATOMICAL EXAMINATION.
>
> _____ _____
>
> CO-SIGNATURE OF PARENT WHERE DONOR UNDER 18 YEARS OF AGE — SIGNATURE

(p. 46)

10 That an information pamphlet be distributed with an application for renewal of a driver's licence containing information respecting the need for human tissue, the procedure for declaration of death, etc.
(p. 47)

11 That a donor registry not be established.
(p. 48)

12 That a mechanism of donor identification known as obligatory indication of wish not be established.
(p. 49)

13 That hospitals follow organ donation policy in the *Human Tissue Act*, that is, they should not give relatives the option of countermanding earlier wishes of a deceased regarding donation.
(p. 50)

14 That the *Act* be amended to prohibit the nearest relative from making a direction under the *Act* if the relative knows that the deceased would have objected.
(p. 51)

15 That the *Act* be amended so that if the nearest relative is not available, the hospital may confer with the next nearest relative identified in the legislation.
(p. 52)

16 That the *Act* be amended to ensure that no person act on a direction of a relative if he knows that another person, who is of the same or closer relationship to the deceased as the relative who gave the direction, objects.
(p. 52)

17 That the definition of nearest relative under the *Act* be expanded to allow

(a) a common law spouse of the deceased, and

(b) a guardian of the deceased appointed under the *Child and Family Services Act* (Manitoba)

to authorize the donation.
(p. 53)

18 That the *Act* provide that a direction under the *Act* be given

- in writing signed by the nearest relative,
- orally by the nearest relative in the presence of at least 2 witnesses,
- by telegraphic, recorded telephonic, or other recorded message of the nearest relative, or
- by a telephonic message received and heard by 2 persons from the nearest relative where the 2 persons subsequently record in writing the direction.

(p. 53)

19 That the *Act* be amended to ensure that no person removes tissue pursuant to a direction of the deceased, if the person knows that an inquiry or investigation may be required, except with the consent of a medical examiner or chief medical examiner appointed under the *Fatality Inquiries Act* (Manitoba).
(p. 54)

20 That hospitals and offices in which post-mortem examinations are conducted be asked to consider adopting a policy of routine request, to be followed whenever a suitable candidate for donation is identified who is not known to have consented or objected to donation.
(p. 57)

21 That consideration be given by members of the medical profession, the nursing profession, hospital administrators, hospital and medical associations, organ procurement agencies and government agencies involved with hospital administration and the provision of medical services to the following suggestions

(a) regarding hospital policy and direction:

- Every hospital should establish or adopt
  - an Organ Donation Committee (which is not an ad hoc committee) to implement policies and guidelines respecting the initiation and execution of the organ donation process: lay representation should be included on this Committee:
  - an individual or team responsible for co-ordinating organ donation within the hospital;
  - guidelines and criteria for the identification of suitable organ donors;
  - guidelines for the diagnosis of brain death;
  - guidelines for organ retrieval and donor maintenance;
  - guidelines for effective methods of organ storage.
- The above policies and guidelines should be developed by the hospital Organ Donation Committee in conjunction with provincial hospital and medical associations, and The Manitoba Organ Procurement Committee. Appropriate modifications may be required for small hospitals and hospitals with no Intensive Care Unit.
- The establishment of guidelines and criteria for organ donation within a hospital should be made a necessary requirement for hospital accreditation.

(b) regarding education and expertise:

- A specialized team should be available to travel to hospitals to declare brain death when required.
- An organ retrieval team should be available to travel to hospitals when required.
- A 24-hour telephone advice service should be provided for hospitals seeking information or assistance respecting the organ donation process.
- A transportation system for the rapid and efficient transport of donors, retrieval teams and organs should be developed.
- Hospital personnel who participated in procuring an organ for transplantation should be given recognition for their efforts and provided with feedback as to the outcome of the organ transplant.
- A provincial body responsible for co-ordinating organ retrieval and distribution within the province, and co-ordinating activities with other jurisdictions, should be funded and supported.
- Medical schools, nursing schools and professional associations should provide educational programmes
  - to make physicians and nurses aware of organ transplantation and medical research, the critical shortage of organs, and the important role of medical staff in the organ donation process;
  - to encourage a positive attitude in medical professionals toward organ donation;
  - to educate medical professionals in the identification of suitable organ donors and the procedures involved in the declaration of brain death;
  - to instill within physicians a sense of ethical obligation and professional responsibility to consider organ donation at the time of death of one of their patients.

(c) regarding resources:

- Physicians should receive remuneration for time spent identifying potential organ donors, declaring brain death, obtaining consent to donation and maintaining organ donors.
- Hospitals should be reimbursed for expenses involved in donor maintenance and transportation.

- Families of organ donors should be reimbursed for any costs incurred by them in relation to the donation process.
- Regional hospitals capable of donor support should be clearly identified.

B. Procurement of Inter Vivos Tissues from Adults:

22 That legislation authorize adult living donors to donate

(a) specified non-regenerative tissue for the purpose of a transplant, and

(b) specified regenerative tissue for therapeutic, scientific or medical purposes.

(p. 72)

23 That the *Act* provide that donation under recommendation 22 be authorized where a physician, who has no association with the proposed recipient, certifies in writing that

(a) the consent in writing and terms of consent were given in his presence,

(b) he explained to the donor, before the consent was given, the nature and effect of the removal of the tissue, and

(c) he is satisfied that the donor is 18 years of age, understands the nature and effect of the removal, and that the consent has been freely given.

(p. 75)

C. Procurement of Inter Vivos Tissue from Minors:

24 Where a minor is capable of understanding the nature and effect of the removal and transplant of specified regenerative or non-regenerative tissue from his body, he may consent in writing to the removal of the specified tissue, for the purpose of the transplant of that tissue to a member of his immediate family.
(p. 93)

25 That, subject to Recommendation 26, the determination of whether a minor is capable of understanding the nature and effect of the removal and transplant of tissue may be made by an independent physician who certifies in writing that

(a) the consent of the minor and a parent of the minor, the terms of which are set out in the certificate, was given in his presence,

(b) the minor and recipient are members of the same immediate family

(c) he explained to the minor and parent the nature and affect of the removal of the tissue, and

(d) he is satisfied that

(i) the minor understands the nature and effect of the removal and transplant, and

(ii) the consents are freely given.

(p. 94)

26 That where the physician is not satisfied that a minor understands the nature and effect of the removal and transplant, an application be brought before the Queen's Bench for an order that the minor is competent to consent to the removal of the tissue.
(p. 94)

27 That, subject to Recommendations 28 and 29, where a minor by reason of his age is not capable of understanding the nature and effect of the removal and transplant of tissue, a parent of that minor may consent, in writing, to the removal of specified regenerative tissue from that minor for the purpose of transplanting it to a member of the same immediate family.
(p. 96)

28 That a consent under Recommendation 27 be given in the presence of a physician who shall certify in writing that

(a) the consent, the terms of which are set out in the certificate, was given in his presence,

(b) the minor and recipient are members of the same immediate family,

(c) he explained to the parent and minor before the consent was given the nature and effect of the removal and transplant of the tissue, and

(d) he is satisfied that

(i) the recipient is likely to die unless tissue is transplanted,

(ii) the minor does not object to the removal of the tissue, and

(iii) the risk to the health of the minor is not substantial.

(p. 97)

29 That a consent under Recommendation 27 be reviewed by a judge of the Queen's Bench who may determine that the consent of the parent is fair and reasonable.
(p. 97)

D. Procurement of Inter Vivos Tissue from Mentally Disordered Persons

30 That the determination of whether a mentally disordered person is capable of understanding the nature and effect of the removal of tissue may be made by a physician who has had no association with the proposed recipient of the tissue.
(p. 99)

31 That where a physician is not satisfied that a mentally disordered person understands the nature and effect of the removal of tissue, an application may be brought before the Queen's Bench for an order that the person is competent to consent to the removal.
(p. 99)

32 Where a person is not found to be capable of understanding the nature and effect of the removal of tissue otherwise than by reason of age, that person be prohibited from donating tissue for any purpose.
(p. 107)

Recommendations relating to Cadaveric and Inter Vivos Donation:

33 That, subject to Recommendation 34, the *Act* provide that no person shall disclose or give to any other person any information or document whereby the identity of any person

(a) who has given or refused to give a direction or consent,

(b) with respect to whom a direction or consent has been given, or

(c) into whose body tissue has been, is being or may be transplanted

may become publicly known.
(p. 109)

34 That Recommendation 33 not apply to or in relation to information disclosed

(a) pursuant to an order of a Court or where otherwise required by law,

(b) for the purposes of hospital administration or bona fide medical research, or

(c) with the consent of the person to whom the information relates.

(p. 109)

35 That the *Act* prohibit the purchase or sale, for valuable consideration, of tissue for therapeutic, educational or scientific purposes.
(p. 111)

36 That the *Act* clarify that Recommendation 35 does not preclude:

(a) the provision of reasonable remuneration to a person for his services rendered in relation to the lawful donation of tissue, and

(b) the reimbursement of expenses to a donor of tissue or to his family, which expenses have been reasonably incurred in relation to the lawful donation of tissue.

(p. 112)

37 That the *Act* provide that a maximum penalty for infringement be a fine of $10 000 or imprisonment for 1 year or both.
(p. 113)

38 That the *Act* protect a person for any act done in good faith and without negligence in the exercise or intended exercise of any authority conferred by the *Act*.
(p. 114)

39 That the *Act* clarify that any dealing with the whole body or any tissue that was lawful before the *Act* comes into force shall continue to be lawful except as provided in the *Act*.
(p. 114)

SCHEDULE 5

GUIDELINES FOR THE DIAGNOSIS OF BRAIN DEATH[1]

Preamble. The development of techniques for the ventilatory and circulatory support of critically ill patients has created a need for new definitions of death. Although irreversible cessation of circulatory and respiratory functions acceptably defines death, irreversible cessation of brain function is also equivalent to death of the individual even though the heart continues to beat while the person is on a respirator.[1] In 1968, following the publication of the "Harvard Criteria"[2] for the diagnosis of brain death, the Canadian Medical Association provided guidelines[3] that were subsequently revised.[4,5] In 1976, guidelines were published for the U.K.[6] and in 1981 revised guidelines were published in the Journal

of the American Medical Association.[7] The following set of guidelines was prepared by a subcommittee of the Canadian Congress of Neurological Sciences and has been approved by the memberships of the Canadian Neurological Society, the Canadian Neurosurgical Society, the Canadian Association for Child Neurology and the Canadian Society of Clinical Neurophysiologists.

The determination of brain death is a clinical decision that must be made by an experienced physician in accordance with accepted medical standards.[7] Thus, the guidelines described below are based on current medical information and experience. As knowledge advances, it can be anticipated that further revisions will become necessary. Because of the major consequences of the diagnosis of brain death, consultation with other physicians experienced in the relevant clinical examinations and diagnostic procedures is usually advisable.

Guidelines. The clinical diagnosis of brain death can be made when all of the following criteria have been satisfied:

1. An etiology has been established that is capable of causing brain death and potentially reversible conditions have been excluded (see Comment 2, below).
2. The patient is in deep coma and shows no response within the cranial nerve distribution to stimulation of any part of the body. No movements such as cerebral seizures, dyskinetic movements, decorticate or decerebrate posturing arising from the brain are present (see 1a, below).
3. Brain-stem reflexes are absent (see 1b, below).
4. The patient is apneic when taken off the respirator for an appropriate period of time (see 1c, below).
5. The conditions listed above persist when the patient is reassessed after a suitable interval (see 2, below).

Comments. Although the purpose of this document is to state general principles and recommend guidelines rather than outline a set of rules, certain features of the guidelines merit more detailed explanations.

1. *Cessation of Brain Function.* The clinical absence of brain function is defined as: profound coma, apnea, and the absence of brain-stem reflexes.

    a. *Coma.* The patient should be observed for spontaneous behaviour and response to noxious stimuli. In particular, there should be no motor response within the cranial nerve distribu-

tion to stimuli applied to any body region. There should be no spontaneous or elicited movements (dyskinesias, decorticate or decerebrate posturing, epileptic seizures) arising from the brain. However, various spinal reflexes may persist in the state of brain death.[8]

b. *Brain-stem Reflexes*. The pupillary light, corneal, vestibulo-ocular and pharyngeal reflexes must be absent. The pupils should be mid-size or larger and must be unreactive to light. Care should be taken that atropine or related drugs that could block the pupillary response to light have not been given to the patient. The vertibulo-ocular reflexes should be tested by doing caloric tests while the head is 30 degrees above the horizontal. In adults, a minimum of 120 ml of ice water should be used.[9] Grimacing or any other motor response to pharyngeal or tracheal suctioning is incompatible with a diagnosis of brain death.

c. *Apnea* was originally defined as a lack of respirations when the patient was disconnected from the respirator for three minutes. This failed to take into consideration whether an adequate $PaCO_2$ level was present to trigger respirations. The threshold for respiratory stimulation in comatose patients may be elevated to $PaCO_2$ levels as high as 50–55 mm Hg and many patients on respirators have low $PaCO_2$ levels which rise slowly (e.g. 2–3 mm Hg per minute) when the respirator is stopped.[10] In patients who fulfill the other clinical criteria of brain death, the technique of apneic oxygenation, described below, is a safe way of testing respiratory activity.[11]

If blood gas determinations are available, the $paCO_2$ should be 40 +/–5 mm Hg before testing for apnea begins. The respirator is then disconnected for 10 minutes while, to prevent hypoxemia, 100% O_2 is delivered at 6 litres/minute through an endotracheal cannula. This should ensure an adequate rise in $paCO_2$ to serve as a respiratory stimulant. *If blood gas determinations are not available*, an adequate test of brainstem responsiveness to hypercarbia can be provided by ventilating the patient for 10 minutes with a 95% O_2–5% CO_2 mixture before the 10 minute period of apneic oxygenation.[7] In patients with severe respiratory disease, it is advisable to obtain the opinion of a respiratory physician to determine the safety and validity of this test for apnea.

Testing for apnea *without* passive oxygenation is not recommended. In addition to its potential deleterious effects on brain, the resultant hypoxemia can occasionally cause complex movements of the limbs and trunk, presumably due to spinal cord ischemia, that could be confused with reflex movements of cerebral origin.[12]

2. *Irreversibility:* Cessation of brain function is determined to be irreversible when potentially reversible causes have been excluded and the changes are judged to be permanent. Drug intoxication (particularly barbituates, sedatives, and hypnotics), treatable metabolic disorders, hypothermia (core temperature less that 32.2°C), shock and peripheral nerve, cranial nerve or muscle dysfunction due to disease or neuro-muscular blocking drugs must be excluded.

   Re-evaluation is essential to ensure that the non-functioning state of the brain is persistent[13] and to reduce the possibility of observer error.[6] Depending on the etiology, the interval between such examinations may be as short as 2 hours or as long as 24 hours; observation for at least 24 hours is usually recommended to confirm brain death due to anoxia-ischema (e.g. post-cardiac arrest).[7] In situations where brain death is declared for purposes of organ transplantation, local regulations may stipulate specific intervals for reassessment.

Special Circumstances:

1. *Infants and Children.* Brain death has not been sufficiently well studied in neonates, infants and young children to determine if the clinical criteria listed above apply to the pediatric age groups. In one study, the presence of these criteria for three days was associated with brain death in all children studied.[14] When clinical criteria alone are used to make the diagnosis of brain death in children, a longer period of observation than in adults may be required. Where facilities exist for the demonstration of absent cerebral blood flow by radionuclide scintigraphy or cerebral angiography these methods may allow a diagnosis of brain death to be made in the pediatric population in a shorter period of time.
2. *Inability to Apply the Clinical Criteria.* Some clinical situations such as uncertainty regarding etiology, inability to examine one or both eyes due to trauma, middle ear injuries, cranial neuropathies or severe pulmonary diseases may preclude the valid application of the listed clinical criteria. In these circumstances, the only reliable means of confirming brain death is the absence of cerebral perfusion, determined by cerebral angiography or radionuclide scintigraphy.

Laboratory Tests:

Although brain death can be established reliably by clinical criteria alone,[1,2,6,7,13] special tests can be used to support and, in some instances, to supplement the clinical diagnosis. The electroencephalogram (EEG) assesses cerebral cortical function. Electrocerebral inactivity is confirmatory evidence of brain death only if the full clinical criteria apply and established techniques[15] are followed to ensure proper sampling of cortical activity. Visual, auditory, and somatosensory evoked responses, or other tests may eventually prove to be useful but, at present, there are no standard guidelines for their use in assessing patients with suspected brain death.

The absence of intracranial perfusion, demonstrable by cerebral angiography or radionuclide scintigraphy, is reliable evidence of brain death.[16] The mean arterial pressure should be greater than 80 mm Hg when cerebral perfusion is assessed. If cerebral angiography or radionuclide scintigraphy is used to determine the absence of cerebral perfusion, the procedure should be performed by an appropriately qualified specialist.

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1 These guidelines were developed by the Canadian Congress of Neurological Sciences and endorsed by the Canadian Medical Association in 1986.

APPENDIX E

(See page 28)

COMMENTARY

UNIFORM INTERNATIONAL TRUSTS ACT

The purpose of this Uniform Act is to provide for the implementation of the "Convention on the Law Applicable to Trusts and their Recognition".

Section 2 provides that the Convention applies in the enacting jurisdiction.

Section 3 provides that the Convention is extended to trusts declared by judicial decisions including constructive trusts and resulting trusts. If the Convention is not extended it will only apply to voluntary trusts that are in writing.

Section 4 provides that the Crown is bound by this Act.

The Convention provides that certain reservations to the Convention can be made

1. Pursuant to Article 16(2) of the Convention, the "law of immediate application" of a State, other than the forum or the governing law, may be given effect in exceptional circumstances. Article 16(3) provides that a reservation may be made.
2. Pursuant to Article 21 of the Convention, Chapter III (Recognition) may be made applicable only to trusts the validity of which is governed by the law of a Contracting State.
3. Pursuant to Article 22, the Convention will apply to a trust whether created before or after the Convention comes into effect. Alternative provisions have been drafted. The first provides that the Convention will apply only to trusts created after the Convention comes into effect while the second provides that, although applicable to trusts created before and after the Convention comes into effect, the Convention should not be prejudicial to any prior act or omission.

UNIFORM INTERNATIONAL TRUSTS ACT

Definition

1. In this Act, "Convention" means the Convention on the Law Applicable to Trusts and their Recognition set out in the Schedule.

Application of Convention

2. The Convention applies in (enacting jurisdiction).

NOTE: Jurisdictions that wish to make reservations to the Convention should redraft section 2 to make it subject to those sections of the Act that provide for the reservation.

RESERVATIONS

The following are reservations that jurisdictions may wish to make. If a reservation is made the provision should be incorporated in the draft:

1. Jurisdictions wishing to make a reservation under Article 16 of the Convention should include the following:

   Paragraph 2 of Article 16 of the Convention does not apply in [enacting jurisdiction].

2. Jurisdictions wishing to make a reservation under Article 21 of the convention should include the following:

   Chapter III of the Convention applies only to trusts the validity of which is governed by the law of a Contracting State under the Convention.

3. Jurisdictions wishing to make a reservation under Article 22 should substitute one of the following:

   (Complete reservation)
   This Act does not apply to trusts created or declared before the coming into force of this Act.

   NOTE: "or declared" should be deleted if the Convention is not extended pursuant to section 3.

   (Qualified reservation)
   Article 22 is not to be construed as affecting the law to be applied in relation to anything done or omitted under a trust before the coming into force of this Act.

Extension of Convention

3. (1) The Convention is extended to trusts declared by judicial decisions including constructive trusts and resulting trusts.

(2) Nothing in this Act is to be construed as requiring that recognition or effect be given to a trust declared by judicial decision in another state or a severable aspect of such a trust, if [*the appropriate court in enacting jurisdiction*] is satisfied that there is a substantial reason for refusing to give recognition or effect to the trust or aspect.

NOTE: Jurisdiction not wishing to extend the Convention should delete section 3.

Crown bound

4. This Act binds the Crown.

Commencement

5. *(Proclamation section).*

NOTE: This Act should be brought into force only when Canada has acceded to the Convention on behalf of the enacting jurisdiction.

SCHEDULE

CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND ON THEIR RECOGNITION

The States signatory to the present Convention,

Considering that the trust, as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique legal institution,

Desiring to establish common provisions on the law applicable to trusts and to deal with the most important issues concerning the recognition of trusts,

Have resolved to conclude a Convention to this effect, and have agreed on the following provisions –

CHAPTER ONE - SCOPE

Article 1

This Convention specifies the law applicable to trusts and governs their recognition.

Article 2

For the purposes of this Convention, the term "trust" refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficially or for a specified purpose.

A trust has the following characteristics –

(a) the assets constitute a separate fund and are not a part of the trustee's own estate;

(b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

(c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed on him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

Article 3

The Convention applies only to trusts created voluntarily and evidenced in writing.

Article 4

The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.

Article 5

The Convention does not apply to the extent that the law specified by Chapter II does not provide for trusts or the category of trusts involved.

CHAPTER II – APPLICABLE LAW

Article 6

A trustee shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.

Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply.

Article 7

Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to –

(a) the place of administration of the trust designated by the settlor;

(b) the situs of the assets of the trust;

(c) the place of residence or business of the trustee;

(d) the objects of the trust and the places where they are to be fulfilled.

Article 8

The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects, and the administration of the trust.

In particular that law shall govern –

(a) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;

(b) the rights and duties of trustees among themselves;

(c) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;

(d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;

(e) the powers of investment of trustees;

(f) restrictions on the duration of the trust, and on the power to accumulate the income of the trust;

(g) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;

(h) the variation or termination of the trust;

(i) the distribution of the trust assets;

(j) the duty of trustees to account for their administration.

Article 9

In applying this Chapter, a severable aspect of the trust, particularly matters of administration, may be governed by a different law.

Article 10

The law applicable to the validity of the trust shall determine whether that law or the law governing a severable aspect of the trust may be replaced by another law.

CHAPTER III - RECOGNITION

Article 11

A trust created in accordance with the law specified by the preceding Chapter shall be recognized as a trust.

Such recognition shall imply as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear to act in this capacity before a notary or any person acting in an official capacity.

In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular –

(a) that personal creditors of the trustee shall have no recourse against the trust assets;

(b) that the trust assets shall not form part of the trustee's estate on his insolvency or bankruptcy;

(c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate on his death;

(d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.

Article 12

Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed.

Article 13

No State shall be bound to recognize a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.

Article 14

The Convention shall not prevent the application of rules of law more favourable to the recognition of trusts.

CHAPTER IV - GENERAL CLAUSES

Article 15

The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters -

(a) the protection of minors and incapable parties;

(b) the personal and proprietary effects of marriage;

(c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;

(d) the transfer of title to property and security interests in property;

(e) the protection of creditors in matters of insolvency;

(f) the protection, in other respects, of third parties acting in good faith.

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.

Article 16

The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws.

If another State has a sufficiently close connection with a case then, in exceptional circumstances, effect may also be given to rules of that

state which have the same character as mentioned in the preceding paragraph. Any Contracting State may, by way of reservation, declare that it will not apply the second paragraph of this article.

Article 17

In the Convention the word 'law' means the rules of law in force in a State other than its rules of conflict of laws.

Article 18

The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (*ordre public*).

Article 19

Nothing in the Convention shall prejudice the powers of States in fiscal matters.

Article 20

Any Contracting State may, at any time, declare that the provisions of the Convention will be extended to trusts declared by judicial decisions. This declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and will come into effect on the day when this notification is received.

Article 31 is applicable to the withdrawal of this declaration in the same way as it applies to a denunciation of the Convention.

Article 21

Any Contracting State may reserve the right to apply the provisions of Chapter III only to trusts the validity of which is governed by the law of a Contracting State.

Article 22

The Convention applies to trusts regardless of the date on which they were created.

However, a Contracting State may reserve the right not to apply the Convention to trusts created before the date on which, in relation to that State, the Convention enters into force.

Article 23

For the purposes of identifying the law applicable under the Convention, where a State comprises several territorial units each of which has its own rules of law in respect of trusts, any reference to the law of that State to be construed as referring to the law in force in the territorial unit in question.

Article 24

A State within which different territorial units have their own rules of law in respect of trusts is not bound to apply the Convention to conflicts solely between the laws of such units.

Article 25

The Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes, a Party.

CHAPTER V - FINAL CLAUSES

Article 26

Any State may, at the time of signature, ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 29, make the reservations provided for in Articles 16, 21 and 22.

No other reservation shall be permitted.

Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

Article 27

The Convention shall be open for signature by the States which were members of the Hague Conference on Private International Law at the time of its Fifteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 28

Any other State may accede to the convention after it has entered into force in accordance with Article 30, paragraph 1.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the twelve months after the receipt of the notification referred to in Article 32. Such an objection may also be raised by Member States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 29

If a State has two or more territorial units in which different systems of law are applicable, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all of its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time. Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

If a State makes no declaration under this article, the Convention is to extend to all territorial units of that State.

Article 30

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 27.

Thereafter the Convention shall enter into force–

(a) for each State ratifying, accepting or approving it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance or approval;

(b) for each acceding State, on the first day of the third calendar month after the expiry of the period referred to in Article 28;

(c) for a territorial unit to which the Convention has been extended in conformity with Article 29, on the first day of the third calendar month after the notification referred to in that article.

Article 31

Any Contracting State may denounce this Convention by a formal notification in writing addressed to the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

The denunciation takes effect on the first day of the month following the expiration of six months after the notification is received by the depositary or on such later date as is specified in the notification.

Article 32

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference and the States which have acceded in accordance with Article 28, of the following –

(a) the signatures and ratifications, acceptances or approvals referred to in Article 27;

(b) the date on which the Convention enters into force in accordance with Article 30;

(c) the accessions and the objections raised to accessions referred to in Article 28;

(d) the extensions referred to in Article 29;

(e) the declarations referred to in Article 20;

(f) the reservation or withdrawals referred to in Article 26;

(g) the denunciations referred to in Article 31.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the ..... day of ....., 19 ....., in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fifteenth Session.

APPENDIX F

(See page 28)

UNIFORM LAW CONFERENCE OF CANADA

REPORT OF THE COMMITTEE ON MENTAL HEALTH

At the 1984 annual meeting of the Conference it was agreed to undertake the preparation of Uniform Mental Health Legislation in respect of involuntary committal and treatment with particular regard to the Charter of Rights. The project was requested by a meeting of the Provincial Mental Health Directors and the Mental Health Division of Welfare Canada.

A working committee was established consisting of the Mental Health Director, or his nominee, and one other Commissioner from each jurisdiction that wished to participate. Ontario provided the Chairman, French and English drafting services and a Project Co-ordinator.

The jurisdictions were canvassed and seven indicated their desire to participate. They are:

British Columbia
Northwest Territories
Alberta
Ontario
Quebec
New Brunswick
Newfoundland

The Committee adopted the following terms of reference:

To recommend uniform provisions for,

1. criteria for involuntary admission of persons to psychiatric facilities,
2. procedures for involuntary admission including due process safeguards and mechanisms for review and appeal,
3. consent to treatment and authority for involuntary treatment,
4. confidentiality of, and access to, mental health patient information,

with particular regard to compliance with the Charter of Rights.

To have authority to add to the terms of reference respecting the subject matter of the uniform provisions, to add to the membership of

the working group and to consult and receive representations from relevant interest groups, and

To report progress and conclusions to the Uniform Law Section.

The following groups were invited to make representations on the Committee's consultation drafts:

Advocacy Resource Centre for the Handicapped
Bible Holiness Movement
Canadian Association of Chiefs of Police
Canadian Association of Social Workers
Canadian Bar Association
Canadian Civil Liberties Association
Canadian Friends of Schizophrenics
Canadian Hospital Association
Canadian Legal Advocacy, Information and Research Association of the Disabled
Canadian Medical Association
Canadian Mental Health Association
Canadian Nurses Association
Canadian Psychiatric Association
Canadian Psychological Association
Citizens' Commission on Human Rights
Coalition of Provincial Organizations of the Handicapped
Mr. Gerald Green
Seventh-Day Adventist Church in Canada

Most of the groups participated vigorously. Their participation was of assistance to the Committee but, because of the conflicting interests of the groups, their participation does not necessarily imply agreement.

The Committee recommends the adoption of the attached draft Uniform Mental Health Act by the Conference.

The Committee has encountered a great deal of interest in having the Conference's Uniform Act on the part of governments in Canada, including those who did not participate in the Committee. Therefore, the Committee recommends that this report be considered at a special meeting of the Uniform Law Section at as early a date as the Steering Committee considers appropriate.

Arthur N. Stone
Chairman, Committee on
Uniform Mental Health Act

Uniform Mental Health Act

General Commentary

In 1984, a meeting of the Provincial Mental Health Directors and the Mental Health Division of Welfare Canada requested the Uniform Law Conference to undertake the preparation of uniform mental health legislation dealing with involuntary committal and treatment, having particular regard to the Charter of Rights. The Conference established a committee to prepare draft legislation, consult with national organizations interested in the subject and report back to the Conference. The Committee consisted of the Mental Health Directors and lawyers contributed by seven jurisdictions in Canada.

The Uniform Mental Health Act was prepared by the Committee after receiving comments and criticisms on two earlier drafts of the Act from a wide range of interested national organizations. The Act was adopted by the Uniform Law Conference at its meeting in August, 1987.

Table of Contents

Definitions

1. (1) In this Act,

"attending physician" means the physician who is responsible for the examination, care and treatment of a patient of a psychiatric facility;

"chief administrative officer" means the person who is responsible for the administration and management of a psychiatric facility or a person designated in writing by such responsible person;

"designated health professional" means a member of a class of health professionals, other than physicians, designated in the regulations;

"mental disorder" means a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life;

Commentary

The civil commitment criteria depend on the existence of a mental disorder. The definition of "mental disorder" is based on the definition contained in the civil commitment legislation of Vermont. Although attempting to express the medical concept of mental disorder in precise legal terms presents difficulties, the Vermont definition appears to have received widespread acceptance in many jurisdictions.

"Minister" means the Minister of (Health);

"patient advisor service" means the service or organization designated by the regulations as the patient advisor service and "patient advisor" means a representative or member of the staff of the patient advisor service;

Commentary

Section 20 contemplates the possible existence of a patient advisor service that would be given notice of the decision to admit a person as an involuntary patient, the decision to change the status of a voluntary patient to that of an involuntary patient, the filing of a certificate of renewal in respect of an involuntary patient, every application to the review board in respect of an involuntary patient and every determination by a physician that an involuntary patient is

not mentally competent. It is intended that the patient advisor service would meet with the patient, explain his or her rights and assist in the exercise of those rights. In some jurisdictions, a government office could be designated as the patient advisor service, while other jurisdictions could choose to designate community agencies to perform this function.

"physician" means a legally qualified medical practitioner;

"psychiatric assessment" means an assessment of a person's mental condition by a physician under section 11;

"psychiatric facility" means a facility for the examination, care and treatment of persons who suffer from mental disorder, and designated as such by the regulations;

"psychiatrist" means a physician whose specialist status in psychiatry is recognized by the (governing body of the medical profession in enacting jurisdiction);

"related medical treatment" means medical treatment or procedures necessary for,

(a) the safe and effective administration of the psychiatric treatment, or

(b) the control of the unwanted effects of the psychiatric treatment;

"Review Board" means a review board established under section 32.

Commentary

Subsection 26(1) permits the physician of an involuntary patient to apply to a review board in certain circumstances for authority to give specified psychiatric treatment and other related medical treatment. The definition of "related medical treatment" makes clear that it must be necessary for the administration of the psychiatric treatment or for the control of unwanted effects of the psychiatric treatment.

Mental competence

(2) For the purposes of consent under this Act, a person is mentally competent if the person is able to understand the

subject-matter in respect of which consent is requested and able to appreciate the consequences of giving or refusing consent, and, where the consent relates to a proposed treatment for the person, the subject-matter is the nature of the person's illness and the nature of the proposed treatment.

Commentary

Several provisions of the Act permit certain actions to be taken with a person's consent. For example, clause 25(1)(a) permits psychiatric treatment to be given to an involuntary patient with the patient's consent. An informed consent cannot be given by a person who is mentally incompetent. Subsection 1(2) is intended to indicate that "mental competence" has two components. First, the person must be able to understand the subject-matter in respect of which the consent is requested. Second, the person must be able to appreciate the consequences of giving or refusing consent. Where the consent relates to a proposed treatment, subsection 1(2) also indicates that the subject-matter component of mental competence has two aspects. The first involves the nature of the person's illness and the second involves the nature of the proposed treatment.

Purposes

2. The purposes of this Act are,

(a) to protect persons from dangerous behaviour caused by mental disorder;

(b) to provide treatment for persons suffering from a mental disorder that is likely to result in dangerous behaviour;

(c) to provide when necessary for such involuntary examination, custody, care, treatment and restraint as are the least restrictive and intrusive for the achievement of the purposes set out in clauses (a) and (b).

Commentary

Section 2 is intended to state the major purposes of the Act. A provision of this kind can sometimes be useful as a guide to the interpretation of other provisions in the legislation. Clauses 2(a) and (b) indicate that the purposes of the Act include the protection of persons from dangerous behaviour caused by mental disorder and the provision of treat-

ment for persons suffering from mental disorders that are likely to result in dangerous behaviour. Clause 2(c) specifically indicates that, to achieve these purposes, it may sometimes be necessary to take steps without the consent of the person. The clause states that it is a purpose of the Act to provide when necessary for such involuntary examination, custody, care, treatment and restraint as are least restrictive and intrusive for the achievement of the purposes set out in clauses 2(a) and (b).

INVOLUNTARY PSYCHIATRIC EXAMINATION AND ASSESSMENT

Recommendation for involuntary psychiatric assessment

3. (1) A physician or designated health professional who has examined a person may recommend involuntary psychiatric assessment of the person, if the physician or designated health professional is of the opinion that the person is apparently suffering from mental disorder and if one of the following two conditions is also fulfilled:

1. The physician or designated health professional has reasonable cause to believe that the person, as a result of the mental disorder,

   i. is threatening or attempting to cause bodily harm to himself or herself, or has recently done so,

   ii. is behaving violently towards another person, or has recently done so, or

   iii. is causing another person to fear bodily harm, or has recently done so,

and the physician or designated health professional is of the opinion that the person, as a result of the mental disorder, is likely to cause serious bodily harm to himself or herself or to another person.

2. The physician or designated health professional has reasonable cause to believe that the person, as a result of the mental disorder, shows or has recently shown a lack of ability to care for himself or herself and the physician or designated health professional is of the opinion that the person, as a result of the mental disorder, is likely to suffer impending serious physical impairment.

Contents of recommendation

(2) The recommendation shall be in the form prescribed by the regulations and the physician or designated health professional who signs the recommendation,

(a) shall set out in the recommendation,

(i) that the physician or designated health professional personally examined the person who is the subject of the recommendation,

(ii) the date on which the physician or designated health professional examined the person,

(iii) that the physician or designated health professional made careful inquiry into the facts necessary to form an opinion as to the nature and degree of severity of the person's mental disorder, and

(iv) the reasons for the recommendation, including the facts upon which the physician or designated health professional bases his or her opinion as to the nature and degree of severity of the person's mental disorder and its likely consequences; and

(b) shall distinguish in the recommendation between facts observed by the physician or designated health professional and facts communicated to the physician or designated health professional by another person.

Signing

(3) The recommendation is not effective unless the physician or designated health professional signs it within seven days after the examination.

Commentary

The Act gives a physician the initial authority to determine whether a person should be assessed in a psychiatric facility for possible admission as an involuntary patient. It also provides for the possibility that some jurisdictions may wish to designate other health professionals who can make this determination in addition to physicians.

Subsection 3(1) sets out the criteria which must be met before the physician or designated health professional can recommend a psychiatric assessment. First, the physician or

designated health professional must be of the opinion that the person is apparently suffering from a mental disorder. Second, he or she must have reasonable cause to believe that, as a result of the mental disorder, the person has already manifested some indication of a risk of bodily harm or an inability to care for himself or herself. Third, the physician or designated health professional must be of the opinion that, as a result of the mental disorder, the person is likely to cause serious bodily harm to himself or herself or to another person, or that the person is likely to suffer impending serious physical impairment.

The criteria relating to serious bodily harm deal with the situation of persons who are actively dangerous to themselves or others. The other criteria, relating to impending serious physical impairment, deals with persons who may not be actively dangerous but who, through failing to care for themselves, are passively deteriorating.

Objective evidence of recent manifestations of mental disorder is required at this stage to justify referring the patient to a psychiatric facility for a more thorough professional examination and assessment under clause 10(c).

Where a physician or designated health professional is satisfied that the criteria for recommending a psychiatric assessment are met, subsection 3(2) requires him or her to complete a form setting out in detail the reasons for the recommendation.

(Judge's) order for examination

4. (1) Any person may make a written statement under oath or affirmation before a (judge or other judicial officer who receives informations) requesting an order for the involuntary examination of another person by a physician or designated health professional and setting out the reasons for the request, and the (judge) shall receive the statement.

Procedure

(2) A (judge) who receives a statement under subsection (1) shall consider the statement and, where the (judge) considers it desirable to do so, hear and consider without notice the allegations of the person who made the statement and the evidence of any witnesses.

Order

(3) The (judge) may issue an order for the involuntary examination of the other person by a physician or designated health professional if the (judge) has reasonable cause

to believe that the person is apparently suffering from mental disorder and will not consent to undergo examination by a physician or designated health professional and also that one of the following two conditions in fulfilled:

1. As a result of the mental disorder, the person,

   i. is threatening or attempting to cause bodily harm to himself or herself, or has recently done so,

   ii. is behaving violently towards another person, or has recently done so, or

   iii. is causing another person to fear bodily harm, or has recently done so,

and the person is likely to cause serious bodily harm to himself or herself or to another person.

2. As a result of the mental disorder, the person shows or has recently shown a lack of ability to care for himself or herself and is likely to suffer impending serious physical impairment.

Idem

(4) Where the (judge) considers that the criteria set out in subsection (3) have not been established, the (judge) shall so endorse the statement.

Order to police

(5) An order under subsection (3) for the involuntary examination of a person by a physician or designated health professional shall direct one or more of,

(a) a member of a police force named in the order;

(b) an individual named in the order; or

(c) an individual of a class named in the order or designated in the regulations,

to take the person named or described in the order into custody and take the person forthwith to a place where the person may be detained for the involuntary examination.

Term of order

(6) An order under subsection (3) is valid for a period of seven days from and including the day that it is made.

Commentary

The Act gives a physician or designated health professional the initial power to decide whether a psychiatric assessment should be conducted. A physician could exercise

this power, for example, where a person voluntarily comes to the physician for an examination.

However, if a person will not voluntarily submit to an examination, a mechanism is required to bring the person before a physician or designated health professional. Section 4 creates a procedure that would permit a judicial officer to order that a person submit to an examination. The purpose of this procedure is not to determine whether criteria for a formal psychiatric assessment are met. The purpose is to bring the individual before a person who has the power to decide whether a psychiatric assessment should be recommended. In other words, the procedure is analogous to the issuance of a warrant.

Before a judicial officer may issue an order for the involuntary examination of a person, section 4 requires that he or she have reasonable grounds to believe that criteria similar to the criteria set out in section 3 have been established.

Police officer

5. A police officer may take a person into custody and take him or her forthwith to a place for involuntary examination by a physician or designated health professional, if the police officer has reasonable cause to believe that the person is apparently suffering from mental disorder, that the person will not consent to undergo examination by a physician or designated health professional and that it is not feasible in the circumstances to make application to a (judge or other officer who receives information) for an order for involuntary examination by a physician or designated health professional, and if one of the following two conditions is also fulfilled:

1. The police officer has reasonable cause to believe that the person, as a result of the mental disorder,
   - i. is threatening or attempting to cause bodily harm to himself or herself, or has recently done so,
   - ii. is behaving violently towards another person, or has recently done so, or
   - iii. is causing another person to fear bodily harm, or has recently done so,

and the police officer is of the opinion that the person, as a result of the mental disorder, is likely to cause serious bodily harm to himself or herself or to another person.

2. The police officer has reasonable cause to believe that the person, as a result of the mental disorder, shows or has recently shown a lack of ability to care for himself or herself, and the police officer is of the opinion that the person, as a result of the mental disorder, is likely to suffer impending serious physical impairment.

Commentary

Section 5 provides another mechanism for bringing a person before a physician or designated health professional for the purpose of an examination under section 3. A police officer may take a person to a physician or designated health professional if criteria similar to those set out in section 3 are established. The police officer's power, however, may only be exercised if it is not feasible in the circumstances to make application to a judicial officer for an order under section 4. For example, if a violent incident occurs at a time or in a location where a judicial officer would not be readily available, section 5 is intended to permit the police officer to take the person directly for an examination.

Time of examination

6. (1) Where a person is taken in custody for involuntary examination by a physician or designated health professional under this Act, the examination shall take place forthwith after the person arrives at the place of examination.

Place of examination

(2) Where practicable, the place of examination shall be a psychiatric facility or other appropriate health care setting.

Commentary

Where a person is taken into custody for an involuntary examination pursuant to section 4 or 5, subsection 6(1) requires that the examination take place forthwith after the person arrives at the place of examination. Section 6 also indicates that, where practicable, the place of examination shall be a psychiatric facility or other appropriate health care setting, where specially trained staff and useful equipment are more likely to be available.

Involuntary patient from another jurisdiction

7. Where the (Director of Mental Health or equivalent official in enacting jurisdiction) has reasonable cause to believe that a person who is an involuntary patient in a psychiatric facility outside (enacting jurisdiction) may come or be brought into (enacting jurisdiction) and the (Director) has

reasonable cause to believe that the prerequisites for admission as an involuntary patient set out in subsection 11(1) are likely to be met, the (Director) may issue an order that the person be taken to a psychiatric facility for an involuntary psychiatric assessment.

Commentary

The primary method of getting a person to a psychiatric facility for a formal psychiatric assessment is by way of a recommendation made by a physician or designated health professional under section 3. Section 7 provides an additional procedure that would be available where an involuntary patient of a facility in another jurisdiction manages to enter the enacting jurisdiction. In these circumstances, section 7 is intended to give the Director of Mental Health, or an official performing similar functions, the power to order that the person be taken directly to a psychiatric facility for an involuntary psychiatric assessment. The order can only be made if it appears likely that the criteria in subsection 11(1) for admission as an involuntary patient will be met.

Duty to inform

8. (1) A police officer or other person who takes a person into custody for the purpose of taking the person for an involuntary examination by a physician or designated health professional or for an involuntary psychiatric examination under this Act shall promptly inform the person,

(a) where the person is being taken;

(b) that the person is being taken for an involuntary examination by a physician or designated health professional or for an involuntary psychiatric assessment, as the case may be, and the reasons therefor; and

(c) that the person has the right to retain and instruct counsel without delay.

Information to family

(2) The police officer or other person who takes a person into custody for a purpose mentioned in subsection (1) shall use his or her best efforts to ensure that the person's nearest family member is informed as soon as practicable that the person has been taken into custody, the reason for taking the person into custody and the place where the person is being detained or to which the person is being taken.

Information at place of examination

(3) Upon arrival at the place of examination or involuntary psychiatric assessment, and again as soon thereafter as the person appears to be mentally competent to understand the information, the individual in charge of the place shall ensure that the person is informed promptly,

(a) where the person is being detained;

(b) the reason for the detention; and

(c) that the person has the right to retain and instruct counsel without delay.

Commentary

Where a person is being taken to a physician or designated health professional for the purpose of an initial examination (pursuant to section 4 or 5) or where a person is being taken to a psychiatric facility for the purpose of an involuntary psychiatric assessment (pursuant to a recommendation under section 3 or an order under section 7), subsection 8(1) requires that the person be informed of where he or she is being taken, the reasons why the person is being taken and that the person has the right to retain and instruct counsel without delay. Subsection 8(3) requires this information to be communicated again when the person arrives at the place of examination or psychiatric assessment. These provisions are intended to ensure that persons taken involuntarily for examinations or psychiatric assessments are aware at an early stage of their right to seek legal advice.

As an additional safeguard, subsection 8(2) requires that efforts be made to notify a close family member that the person has been taken into custody. The family member will also be advised of the reasons for taking the person into custody and the place where the person can be found.

Duty to retain custody

9. (1) A police officer or other person who takes a person into custody to take the person for involuntary examination by a physician or designated health professional or to take the person to a psychiatric facility shall remain at the place of examination or at the facility and shall retain custody of the person until the examination is completed or the psychiatric facility accepts custody of the person, as the case may be.

Duty to return person

(2) Where a person is taken to a psychiatric facility or another health facility for involuntary examination by a

physician or designated health professional or for an involuntary psychiatric assessment and it is decided not to recommend involuntary psychiatric assessment of the person or it is decided not to admit the person as a patient of the psychiatric facility, as the case may be, the person in charge of the psychiatric facility or other health facility shall promptly inform the person that the person has the right to leave the psychiatric facility and, unless the person indicates otherwise, shall arrange and pay for the return of the person to the place where the person was taken into custody or, at the person's request, to some other appropriate place.

Commentary

Subsection 9(1) is intended to ensure that, where someone is taken to a place for the purpose of an involuntary examination or psychiatric assessment, the person who takes the person remains at the place until his or her presence is no longer required. For example, if a police officer takes a person for a psychiatric assessment to a hospital that is designated as a psychiatric facility, subsection 9(1) is intended to ensure that the officer does not simply drop the person off at the emergency ward and leave. Subsection 9(1) requires the officer to remain at the hospital until the hospital has accepted custody of the person.

Subsection 9(2) deals with the situation of a person who is taken to a psychiatric facility or other health facility for an involuntary examination or psychiatric assessment but who is not recommended for a psychiatric assessment or admitted as a patient, as the case may be. The subsection requires the facility to arrange for the return of the person to the place where he or she was taken into custody or some other appropriate place, unless the person indicates otherwise.

Involuntary psychiatric assessment

10. A recommendation by a physician or designated health professional or an order under this Act by the (Director of Mental Health or equivalent official in enacting jurisdiction) for involuntary psychiatric assessment of a person is sufficient authority,

(a) for any police officer or other person to take the person into custody as soon as possible, but not later than seven days from and including the day that the recommendation is signed or the order is issued, and to take the person to a psychiatric facility as soon as possible;

(b) to detain, restrain and observe the person in a psychiatric facility for not more than forty-eight hours; and

(c) for a physician, preferably a psychiatrist, to examine the person and assess the person's mental condition for the purposes of section 11.

Commentary

There are two methods of getting a person to a psychiatric facility for the purpose of conducting a psychiatric assessment. The principal method involves a recommendation by a physician or designated health professional under section 3. The second method involves an order of the Director of Mental Health under section 7, relating to an involuntary patient from another jurisdiction. The authority given by a recommendation under section 3 or an order under section 7 is described in section 10. First, the recommendation or order is authority for any police officer or other person to take the person into custody as soon as possible (but not later than seven days from the date of the recommendation or order). Once taken into custody, the person must be taken as soon as possible to a psychiatric facility. Second, the recommendation or order is authority to detain, restrain and observe the person in the psychiatric facility for not more than forty-eight hours. Third, the recommendation or order is authority for a physician, preferably a psychiatrist, to examine the person in the psychiatric facility and assess his or her mental condition.

The length of time for which a person may be detained in a psychiatric facility pursuant to a recommendation under section 3 or an order under section 7, without being admitted as an involuntary patient, is limited to forty-eight hours. This period is an attempt to balance the objective of minimizing the restriction on the person's liberty with the need for a time period that will permit a thorough and careful assessment of the person's mental condition.

It will be noted that the assessment of the person's mental condition need not be conducted in every case by a psychiatrist. While the use of psychiatrists may be highly desirable, it would simply not be possible in many smaller communities and remote areas where psychiatrists are not available.

For this reason, while the Act states that a psychiatrist would be preferable, it permits the assessment to be conducted by any physician.

INVOLUNTARY PATIENT

Involuntary admission

11. (1) A physician who has examined a person in a psychiatric facility and who has assessed the person's mental condition may admit the person as an involuntary patient of the psychiatric facility by completing and filing with the chief administrative officer a certificate of involuntary admission in the form prescribed by the regulations if,

(a) the physician is of the opinion that the person is suffering from mental disorder that, unless the person remains in the custody of a psychiatric facility, is likely to result in,

(i) serious bodily harm to the person or to another person, or

(ii) the person's impending serious physical impairment; and

(b) the physician is of the opinion that the person is not suitable for admission as a voluntary patient.

Duty of physician, voluntary admission

(2) A physician who has examined a person in a psychiatric facility and who has assessed the person's mental condition may admit him or her as a voluntary patient of the psychiatric facility if the physician is of the opinion that the person is suffering from mental disorder, is in need of the psychiatric treatment provided in a psychiatric facility and is suitable for admission as a voluntary patient.

Duty of physician, release

(3) A physician who has examined a person in a psychiatric facility, has assessed the person's mental condition and is of the opinion that the prerequisites set out in this section for admission as an involuntary patient or as a voluntary patient are not met shall release the person, subject to any detention that is lawfully authorized otherwise than under this Act.

Idem

(4) A physician who completes a recommendation for involuntary psychiatric assessment of a person shall not complete the certificate of involuntary admission in respect of the person.

Release of person after 48 hours

(5) If, after forty-eight hours of detention, the person has not been,

(a) admitted to the psychiatric facility as an involuntary patient under subsection (1) or as a voluntary patient under subsection (2); or

(b) released by a physician under subsection (3),

the chief administrative officer shall ensure that the person is promptly informed that the person has the right to leave the psychiatric facility, subject to any detention that is lawfully authorized otherwise than under this Act.

Contents of certificate

(6) The physician who signs the certificate of involuntary admission,

(a) shall set out in the certificate,

(i) that the physician personally examined the person who is the subject of the certificate,

(ii) the date or dates on which the physician examined the person,

(iii) the physician's opinion as to the nature and degree of severity of the person's mental disorder,

(iv) the physician's diagnosis or provisional diagnosis of the person's mental disorder,

(v) the reasons for the certificate including the facts upon which the physician bases his or her opinion as to the nature and degree of severity of the mental disorder and its likely consequences; and

(b) shall distinguish in the certificate between facts observed by the physician and facts communicated to the physician by another person.

Commentary

Subsection 11(1) sets out the criteria that must be met before a person may be admitted as an involuntary patient. The criteria are similar to the criteria in section 3 for the making of a recommendation for a psychiatric assessment. In particular, the physician must be of the opinion that the

person is suffering from a mental disorder that, unless the person remains in the custody of the psychiatric facility, is likely to result in serious bodily harm to the person or to another person, or is likely to result in the person's impending serious physical impairment. Unlike the section 3 criteria, however, the criteria for involuntary committal do not require evidence of actual conduct arising from the mental disorder. This is because of the authority in section 10 permitting a person detained in the psychiatric facility for the purpose of an assessment to be restrained. The circumstances in which restraint is permitted are spelled out in greater detail in section 27. Where restraint is used, the person may not exhibit the same behaviour during the period of the assessment that he or she would otherwise exhibit. For example, violent outbursts may be suppressed. For these reasons, the criteria for involuntary committal do not require actual evidence of recent behaviour.

Subsections 11(2) and (3) deal, respectively, with the admission of a person as a voluntary patient and with the physician's obligation to release a person if the physician is of the opinion that the prerequisites for admission as an involuntary patient or a voluntary patient are not met (unless the person is subject to detention under some other authority, e.g. the *Criminal Code*). Subsection 11(5) makes clear that, if the person has not been admitted as an involuntary patient, admitted as a voluntary patient or released by the physician at the end of the forty-eight hour period, the person is entitled to leave the psychiatric facility unless he or she is subject to detention under some other authority.

Subsection 11(4) states that a physician who completes a recommendation for involuntary psychiatric assessment under section 3 shall not complete a certificate of involuntary admission. This provision ensures that two different persons will be involved before an involuntary admission occurs.

Subsection 11(6) requires the physician who signs the certificate of involuntary admission to set out in detail the reasons for doing so. The provision specifically requires the physician to set out his or her diagnosis (or provisional diagnosis). In other respects, the provision is similar to subsection 3(2).

Change from voluntary to involuntary patient

12. After examining a voluntary patient and assessing the patient's mental condition, the attending physician may change the status of the patient to that of an involuntary patient by completing and filing with the chief administrative officer a certificate of involuntary admission that meets the requirements of subsection 11(6), if the prerequisites for admission as an involuntary patient set out in subsection 11(1) are met.

Commentary

Section 12 provides a procedure for changing the status of a voluntary patient to that of an involuntary patient. This change can only be made if the patient meets the criteria set out in subsection 11(1) for admission as an involuntary patient. Such a change might be made, for example, if a person became a patient of the psychiatric facility voluntarily but subsequently decided to leave. As long as the person met the involuntary admission criteria, section 12 would permit the patient's status to be changed to that of an involuntary patient.

Person detained under Criminal Code *(Canada) R.S.C. 1970, c. C-34*

13. Where a person has been detained under the *Criminal Code* (Canada) as unfit to stand trial, not criminally responsible on account of mental disorder or not guilty by reason of insanity and the person's detention under the *Criminal Code* (Canada) is about to expire, a physician, preferably a psychiatrist, who is employed in or is on the staff of a psychiatric facility, may examine the person and assess the person's mental condition and may, if the prerequisities for admission as an involuntary patient set out in subsection 11(1) are met, admit the person as an involuntary patient of the psychiatric facility by completing and filing with the chief administrative officer a certificate of involuntary admission that meets the requirements of subsection 11(6).

Commentary

Section 13 relates to federal proposals that would amend the *Criminal Code* to establish an upper limit on the length of time during which persons found unfit to stand trial or not criminally responsible on account of mental disorder could be detained under the criminal legislation. If these proposals are enacted, it is expected that they would also apply to persons who, in the past, were found not guilty by

reason of insanity. These proposals contemplate the existence of a mechanism in provincial civil commitment legislation that would permit the involuntary admission of violent persons who would otherwise be released under the criminal legislation. Section 13 provides authority for a psychiatric assessment of a person who is about to be released pursuant to the federal *Criminal Code* proposals and for the admission of the person as an involuntary patient if the involuntary admission criteria are met.

Re-assessment certificate or renewal

14. (1) Shortly before the expiry of a certificate of involuntary admission or a certificate of renewal, the attending physician shall examine the patient and assess the patient's mental condition and may renew the patient's status as an involuntary patient by completing and filing with the chief administrative officer a certificate of renewal, if the prerequisites for admission as an involuntary patient set out in subsection 11(1) are met.

Release

(2) If the attending physician does not renew the patient's status as an involuntary patient, the physician shall promptly inform the patient that the patient has the right to leave the psychiatric facility, subject to any detention that is lawfully authorized otherwise than under this Act.

Contents of certificate

(3) Subsection 11(6), which relates to the contents of a certificate of involuntary admission, applies with necessary modifications in respect of a certificate of renewal.

Term of certificates

(4) An involuntary patient may be detained, restrained, observed and examined in a psychiatric facility,

(a) for not more than two weeks under a certificate of involuntary admission; and

(b) for not more than,

(i) one additional month under a first cerificate of renewal,

(ii) two additional months under a second certificate of renewal, and

(iii) three additional months under a third or subsequent certificate or renewal.

Commentary

Section 14 provides a mechanism for the renewal of certificates of involuntary admission as long as the criteria for admission as an involuntary patient set out in subsection 11(1) continue to be met. Subsection 14(4) sets out the time periods for which a certificate of involuntary admission and renewal certificates are valid. Since many admissions to psychiatric facilities are for relatively short periods of time, the Act fixes time periods that require more frequent reassessment of a patient's condition in the early stages of hospitalization.

Subsection 14(3) requires a certificate of renewal to set out the same type of detail as a certificate of involuntary admission with respect to the reasons for the renewal.

Examination of certificate

15. (1) Forthwith after the filing of a certificate of involuntary admission or a certificate of renewal, the chief administrative officer shall examine the certificate to ascertain whether or not the certificate has been completed in accordance with this Act.

Duty to inform

(2) If, in the opinion of the chief administrative officer, the certificate has not been completed substantially in accordance with this Act before the expiry of the period of detention authorized by this Act, the chief administrative officer shall ensure that the physician or attending physician is so informed.

Commentary

A certificate of involuntary admission and a certificate of renewal require the physician to set out in some detail the reasons for issuing the certificate. The purpose of these provisions is to provide a clear record of the physician's decision and to promote thorough and careful assessments. Experience has indicated that it is desirable to have an administrative review of the forms completed by physicians in order to ensure that they contain all the information required by the Act. Section 15 provides for such an administrative review. If the review discloses that a certificate has not been completed substantially in accordance with the Act and before the expiry of the period of detention authorized by the Act, the physician will be informed.

16. (1) An involuntary patient whose authorized period of detention has expired shall be deemed to be a voluntary patient. *Change from involuntary to voluntary patient*

(2) If at any time the attending physician is of the opinion, *Idem*

(a) that the prerequisites for admission as an involuntary patient set out in subsection 11(1) are no longer met; and

(b) that the prerequisites for admission as a voluntary patient set out in subsection 11(2) are met,

the attending physician shall change the status of an involuntary patient to that of a voluntary patient by completing and filing with the chief administrative officer a certificate of change of status.

(3) Where a patient's status changes or is changed to that of a voluntary patient, the chief administrative officer shall ensure that the patient is promptly informed that the patient is a voluntary patient and has the right to leave the psychiatric facility, subject to any detention that is lawfully authorized otherwise than under this Act. *Duty to inform*

Commentary

Section 16 permits an involuntary patient's status to be changed to that of a voluntary patient if the criteria for admission as a voluntary patient set out in subsection 11(2) are met and the criteria for admission as an involuntary patient set out in subsection 11(1) are no longer met. This change may be made at any time.

17. Where it appears to the (Director of Mental Health or equivalent official in enacting jurisdiction), *Transfer of patients to institutions outside (enacting jurisdiction)*

(a) that an involuntary patient in a psychiatric facility has come or been brought into (enacting jurisdiction) from elsewhere and the patient's hospitalization is the responsibility of another jurisdiction; or

(b) that it would be in the best interest of an involuntary patient in a psychiatric facility to be hospitalized in another jurisdiction and the patient consents to the transfer to the other jurisdiction,

and the (Director) has arranged for the patient's hospitalization in the other jurisdiction, the (Director) may by order authorize the patient's transfer to the other jurisdiction.

Commentary

Section 17 gives the Director of Mental Health (or other official performing similar functions) the power to order that an involuntary patient of a psychiatric facility be transferred out of the province in two situations. The first situation relates to a patient who came from another jurisdiction and whose hospitalization is apparently the responsibility of that jurisdiction. The second situation permits transfer with the consent of the patient if it appears that the transfer would be in his or her best interest.

Information as to patient's status

18. (1) A physician who admits an involuntary patient or who completes and files a certificate of renewal or a certificate of change of status to that of an involuntary patient shall promptly inform the patient in writing,

(a) that the patient has been admitted or continued as an involuntary patient or had his or her status changed to that of an involuntary patient, as the case requires, of the psychiatric facility and the reasons therefor;

(b) that the patient has the right to apply to the Review Board for a review of his or her status; and

(c) that the patient has the right to retain and instruct counsel without delay.

Idem

(2) If, at the time of admission or renewal, the patient is apparently incapable of understanding the information mentioned in subsection (1), the physician shall give or make reasonable efforts to give the information in writing to a person who would be able to give or refuse a consent on behalf of the patient under section 24.

Commentary

Section 18 requires the physician who admits a person as an involuntary patient or files a certificate of renewal or a certificate of change of status to that of an involuntary patient to promptly inform the patient in writing of the action that has been taken, the reasons for the action, that the patient has a right to apply for a review of the action and

that the patient has the right to retain and instruct counsel without delay. This provision is intended to ensure that patients are informed promptly of their legal rights.

The section also provides for the notification of a person having authority to make decisions for the patient if, at the time of admission or renewal, the patient is apparently incapable of understanding the information.

Substitute decision maker

19. (1) A patient of a psychiatric facility who is at least sixteen years of age and who is mentally competent to do so has the right to appoint in writing a person to make decisions for the purposes of this Act on behalf of the patient while the patient is an involuntary patient.

Notice by physician

(2) A physician who admits a patient to a psychiatric facility or who changes the status of a voluntary patient to that of an involuntary patient shall promptly inform the patient in writing of the patient's right under subsection (1).

Contents of notice

(3) The notice by the physician shall be in the form prescibed by the regulations and shall inform the patient of the duties of the chief administrative officer under this section and the powers and responsibilities of a person appointed to make decisions for the purposes of this Act on behalf of the patient.

Appointment

(4) If a patient gives or transmits to the chief administrative officer a statement in writing appointing a person to make decisions for the purposes of this Act on behalf of the patient, the chief administrative officer shall transmit a copy of the statement to the person forthwith.

Revocation

(5) A patient who has appointed a person to make decisions for the purposes of this Act on behalf of the patient may revoke in writing the appointment and may appoint in writing a new person while mentally competent to do so, and subsection (4) applies with necessary modifications in respect of the revocation and new appointment.

Notice

(6) The chief administrative officer shall ensure that the person appointed to make decisions is given notice of,

(a) the decision to admit or to change the status of the patient;

(b) the filing of each certificate of renewal in respect of the patient;

(c) every application to the Review Board in respect of the patient; and

(d) every determination by a physician that the patient is not mentally competent.

Access

(7) A person appointed to make decisions for the purposes of this Act on behalf of a patient has the right at all reasonable times to meet and confer with the patient.

Commentary

Section 19 requires that, on becoming a patient of a psychiatric facility, the patient be given an opportunity to appoint a person to act as a substitute decision-maker for the patient. Section 24 of the Act allows decisions to be made on behalf of a patient who is not mentally competent to make those decisions. Section 19 requires that notice of all major decisions affecting the patient be given to the substitute decision-maker, so that he or she is kept informed of the patient's status and is able to assist the patient.

Patient advisor service

20. (1) The Lieutenant Governor in Council (or equivalent authority in enacting jurisdiction) may make regulations designating a service or organization as a patient advisor service.

Duty of patient advisor service

(2) It is the duty of a patient advisor service to offer advice and assistance to involuntary patients in psychiatric facilities and to provide patient advisors to meet, confer with and advise and assist involuntary patients who want such advice and assistance.

Notice to patient advisor service

(3) The chief administrative officer shall ensure that the patient advisor service is given notice of,

(a) each decision to admit an involuntary patient to a psychiatric facility;

(b) each decision to change the status of a voluntary patient to that of an involuntary patient or to change the status of an involuntary patient to that of a voluntary patient;

(c) the filing of each certificate of renewal in respect of an involuntary patient;

(d) every application to the Review Board in respect of an involuntary patient; and

(e) every determination by a physician that an involuntary patient is not mentally competent.

Access

(4) A patient advisor has the right at all reasonable times to meet and confer with an involuntary patient in a psychiatric facility.

Commentary

Section 20, which is optional, contemplates the existence of a patient advisor service that would be given notice of all major decisions affecting an involuntary patient. It is intended that the patient advisor service would meet with the patient, explain his or her rights and assist in the exercise of those rights. In some jurisdictions, a government office could be designated as the patient advisor service, while other jurisdictions could choose to designate community agencies to perform this function.

REVIEW

Review of admission or renewal

21. (1) On application, the Review Board shall promptly review a patient's status to determine whether or not the prerequisites for admission as an involuntary patient set out in subsection 11(1),

(a) were met when the certificate of admission or the certificate of renewal, as the case requires, was filed in respect of the patient; and

(b) continue to be met at the time of the hearing of the application.

Confirming order

(2) The Review Board by order may confirm the patient's status as an involuntary patient if the Review Board determines that the prerequisites for admission as an involuntary patient set out in subsection 11(1),

(a) were met when the certificate was filed and continued to be met at the time of the hearing of the application; or

(b) were not met when the certificate was filed but were met at the time of the hearing of the application.

Rescinding order

(3) The Review Board by order shall rescind the certificate if the Review Board determines that the prerequisites for admission as an involuntary patient set out in subsection 11(1),

(a) were not met when the certificate was filed and were not met at the time of the hearing of the application; or

(b) were met when the certificate was filed but did not continue to be met at the time of the hearing of the application.

Application of order

(4) An order of the Review Board confirming or rescinding a certificate applies to the certificate of involuntary admission or the certificate of renewal in force immediately before the making of the order.

Commentary

Section 21 provides for an application to the Review Board for an impartial determination of whether a person meets the criteria for admission as an involuntary patient. Pursuant to subsection 33(2), the application could be made by the patient or any other person having a substantial interest in the issue.

Six-month review

22. (1) On the filing of a fourth certificate of renewal and on the filing of every second certificate of renewal thereafter, the patient shall be deemed to have applied to the Review Board for review of the status of the patient to determine whether or not the prerequisites for admission as an involuntary patient set out in subsection 11(1) continued to be met when the certificate was filed and continued to be met at the time of the hearing of the application.

Second opinion

(2) As part of the review, the Review Board shall arrange for the examination of the patient by a second physician, preferably a psychiatrist, and shall obtain the opinion of the second physician as to whether or not the prerequisites set out in subsection 11(1) for admission as an involuntary patient continue to be met at the time of the hearing of the application.

Commentary

Section 22 provides that, on the filing of a fourth certificate of renewal and on the filing of every second certificate of renewal thereafter, the patient shall be deemed to have applied to the Review Board for review of his or her status as an involuntary patient. This provision ensures that, even if the patient does not object to the filing of involuntary

certificates, there will be an independent review of the patient's situation roughly every six months.

Since the automatic review will take place even without the active participation of the patient, subsection 22(2) requires the Review Board to obtain the opinion of a second physician as to whether the criteria for involuntary admission are met. The opinion of the second physician will be available as evidence at the hearing and ensures that there is independent evidence relating to the patient's mental condition available to the Review Board.

COMPETENCE TO CONSENT

Physician's opinion as to mental competence

23. (1) A physician who is of the opinion that an involuntary patient is not mentally competent to consent for a purpose under this Act shall compete and file with the chief administrative officer a certificate that the patient is not mentally competent to consent.

Certificate as to other person

(2) A physician who is of the opinion that a person other than an involuntary patient is not mentally competent to consent for a purpose under this Act shall, at the request of the person but not otherwise, complete and file with the chief administrative officer a certificate that the person is not mentally competent to consent.

Reasons

(3) The physician shall include in the certificate written reasons for the opinion that the involuntary patient or other person is not mentally competent.

Notice

(4) The chief administrative officer shall give to the involuntary patient or other person a copy of the certificate and written notice that the patient or other person is entitled to have the physician's opinion reviewed by the Review Board if the patient or other person gives a written request for the review to the Review Board.

Effect of application

(5) If an application is made to the Review Board to review a physician's opinion that an involuntary patient is or is not mentally competent to consent, neither a physician nor the chief administrative officer shall act upon the opinion pending the outcome of the application.

Effect of finding by court or Review Board

(6) A finding by a court or by the Review Board that an involuntary patient is mentally competent or is not mentally competent applies only for the purposes for which the proceeding is held.

Commentary

Section 23 provides a procedure where a physician is of the opinion that a person is not mentally competent to consent for a purpose under the Act. The procedure involves filing with the chief administrative officer a certificate stating the opinion and giving reasons. A copy of the certificate must be given to the person considered to be mentally incompetent, along with a notice advising the person of his or her right to have the opinion reviewed by the Review Board. If an application is made to the Review Board, no action can be taken as a result of the opinion given by the physician pending the outcome of the application. The section also makes clear that a finding by a court or by the Review Board with respect to mental competence applies only for the purposes for which the proceeding was held. This reflects the fact that a person's mental competence may change.

Consent on behalf of patient

24. (1) For the purposes of this Act, a consent may be given or refused on behalf of an involuntary patient of a psychiatric facility who has not reached the age of sixteen years, or who is not mentally competent by a person who has reached the age of sixteen years, is apparently mentally competent, is available and willing to make the decision to give or refuse the consent and is in one of the following categories:

1. The patient's guardian appointed by a court of competent jurisdiction.

2. The person appointed under this Act to make decisions on behalf of the patient.

3. A person living in a conjugal relationship with the patient.

4. A child of the patient, a parent of the patient or a person who has lawful authority to stand in the place of a parent.

5. A brother or sister of the patient.

6. Any other next of kin of the patient.

Refusal

(2) If a person in a category in subsection (1) refuses consent on the patient's behalf, the consent of a person in a subsequent category is not valid.

Preference

(3) If two or more persons who are not described in the

same paragraph of subsection (1) claim the authority to give or refuse consent under that subsection, the one under the paragraph occurring first in that subsection prevails.

Consent by relative

(4) A person referred to in paragraphs 3 to 6 of subsection (1) shall not exercise the authority given by that subsection unless the person,

(a) has been in personal contact with the patient over the preceding twelve-month period;

(b) is willing to assume the responsibility for consenting or refusing consent;

(c) knows of no conflict or objection from any other person in the list set out in subsection (1) of equal or higher category who claims the right to make the decision; and

(d) makes a statement in writing certifying the person's relationship to the patient and the facts and beliefs set out in clauses (a) to (c).

Basis for consent on behalf of patient

(5) A person authorized by subsection (1) to consent on behalf of a patient shall, where the wishes of the patient, expressed when he or she was mentally competent and sixteen or more years of age, are clearly known, give or refuse the consent in accordance with those wishes and shall otherwise give or refuse the consent in accordance with the best interest of the patient.

Best interest

(6) In order to determine the best interest of the patient in relation to specified psychiatric treatment and other related medical treatment, regard shall be had to,

(a) whether or not the mental condition of the patient will be or is likely to be substantially improved by the specified psychiatric treatment;

(b) whether or not the mental condition of the patient will improve or is likely to improve without the specified psychiatric treatment;

(c) whether or not the anticipated benefit from the specified psychiatric treatment and other related medical treatment outweighs the risk of harm to the patient; and

(d) whether or not the specified psychiatric treatment is the least restrictive and least intrusive treatment that meets the requirements of clauses (a), (b) and (c).

Reliance on statement

(7) Whoever seeks a person's consent on a patient's behalf is entitled to rely on that person's statement in writing as to the person's relationship with the patient and as to the facts and beliefs mentioned in clauses (4)(a) to (c), unless it is not reasonable to believe the statement.

Reasonable inquiries

(8) The person seeking the consent is not liable for failing to request the consent of a person entitled to give or refuse the consent on the patient's behalf, if the person seeking the consent made reasonable inquiries for persons entitled to give or refuse the consent but did not find the person.

Commentary

Section 24 provides a procedure whereby a consent may be given on behalf of an involuntary patient who has not reached the age of sixteen years or who is not mentally competent. The section provides a list of persons who may give such consent. This list gives priority to a court-appointed guardian, followed by the substitute decision-maker that may be appointed by the patient under section 19. If there is no guardian or appointed substitute decision-maker, the list then continues with various relatives of the patient. A person seeking to exercise authority to make decisions on behalf of a patient, other than a court-appointed guardian or a patient-appointed substitute decision-maker, must make a written statement certifying his or her relationship to the patient and indicating that the person has been in personal contact with the patient over the preceding twelve-month period, is willing to assume responsibility for making the decision and knows of no conflict or objection from any other person in the list who has an equal or higher right to make the decision.

Subsections 24(5) and (6) are intended to clarify the responsibility of a substitute decision-maker. They state that, where the wishes of the patient when mentally competent and sixteen or more years of age are clearly known, the substitute decision-maker must give or refuse consent in

accordance with those wishes. If the patient's wishes are not clearly known, the substitute decision-maker has an obligation to give or refuse consent in accordance with the best interest of the patient. Specific considerations for determining the best interest of the patient in relation to specified psychiatric treatment and related medical treatment are set out in subsection 24(6).

Section 24 also contains provisions intended to simplify for physicians the task of finding a substitute decision-maker. The physician is entitled to rely on a person's written statement as to his or her relationship with the patient, unless it is not reasonable to believe the statement. A physician is also not liable for failing to request the consent of a person entitled to make a decision on behalf of the patient, if the physician made reasonable inquiries and those inquiries did not disclose the existence of the person.

TREATMENT

Treatment

25. (1) An involuntary patient of a psychiatric facility has the right not to be given psychiatric treatment or other medical treatment without,

(a) the consent of the patient;

(b) a consent given on behalf of the patient in accordance with section 24; or

(c) an order of the Review Board authorizing the giving of specified psychiatric treatment and other related medical treatment.

Emergency medical treatment

(2) Medical treatment may be given without the patient's consent to an involuntary patient of a psychiatric facility who, in the opinion of a physician, is not mentally competent or is under sixteen years of age where the physician has reasonable and probable grounds to believe that there is imminent and serious danger to the life, a limb or a vital organ of the patient requiring immediate medical treatment.

Objection by patient

(3) Where the attending physician is of the opinion that an involuntary patient is not mentally competent to consent to specified psychiatric treatment or other related medical treatment and the patient objects to the treatment, the treat-

ment shall not be given pursuant to the consent of a person described in paragraphs 3 to 6 of subsection 24(1) unless a second physician is also of the opinion that the patient is not mentally competent to consent to the treatment.

Commentary

Subsection 25(1) provides that an involuntary patient has the right not to be given psychiatric treatment or other medical treatment without the patient's consent, a consent given on his or her behalf or an order of the Review Board.

Section 24 sets out the circumstances in which a consent may be given on the patient's behalf. Under subsection 25(3), where the attending physician is of the opinion that the patient is not mentally competent to consent and the patient is objecting to the treatment, a consent by a person other than a court-apppointed guardian or a patient-appointed substitute decision-maker cannot be relied on to authorize treatment unless a second physician is also of the opinion that the patient is not mentally competent to consent.

Section 26 sets out the circumstances in which an order of the Review Board authorizing specific psychiatric treatment and other related medical treatment may be made.

Subsection 25(2) permits the giving of medical treatment to an involuntary patient who is not mentally competent or who is under sixteen years of age without the patient's consent, if there is imminent and serious danger to the life, a limb or a vital organ of the patient requiring immediate medical treatment.

Application to Review Board

26. (1) The attending physician of an involuntary patient may apply to the Review Board for an order authorizing the giving of specified psychiatric treatment and other related medical treatment to the patient if,

(a) the patient, or a person acting for the patient under section 24 has refused consent to being given the specified psychiatric treatment or other related medical treatment;

(b) there is no person available to give or refuse consent for the patient under section 24 and the patient is either under the age of sixteen years or apparently is not mentally competent to consent; or

(c) two or more persons described in the same paragraph of subsection 24(1), who do not agree among themselves, claim the authority to give or refuse consent for the patient.

Material on application

(2) The Review Board shall not consider the application unless it is accompanied by statements signed by the attending physician and a psychiatrist who is not a member of the medical staff of the psychiatric facility, each stating that they have examined the patient and that they are of the opinion, stating the reasons of each of them, that,

(a) the mental condition of the patient will be or is likely to be substantially improved by the specified psychiatric treatment;

(b) the mental condition of the patient will not improve or is not likely to improve without the specified psychiatric treatment;

(c) the anticipated benefit to the patient from the specified psychiatric treatment and other related medical treatment outweighs the risk of harm to the patient, and

(d) the specified psychiatric treatment and other related medical treatment are the least restrictive and least intrusive treatments that meet the requirements of clauses (a), (b) and (c).

Basis for decision

(3) The Review Board by order may authorize the giving of the specified psychiatric treatment and other related medical treatment if the Review Board is satisfied that,

(a) the mental condition of the patient will be or is likely to be substantially improved by the specified psychiatric treatment;

(b) the mental condition of the patient will not improve or is not likely to improve without the specified psychiatric treatment;

(c) the anticipated benefit to the patient from the specified psychiatric treatment and other related medical treatment outweighs the risk of harm to the patient; and

(d) the specified psychiatric treatment and other related medical treatment are the least restrictive and least intrusive treatments that meet the requirements of clauses (a), (b) and (c).

Terms and conditions

(4) An order may include terms and conditions and may specify the period of time during which the order is effective.

Commentary

Section 26 permits the attending physician of an involuntary patient to apply to the Review Board for an order authorizing specified psychiatric treatment and other related medical treatment in three circumstances. The first possible circumstance would occur if the patient, or a person authorized to make a decision on behalf of the patient under section 24, has refused consent to the treatment. The second situation in which an application is permitted is where there is no person available to make a decision on behalf of the patient and the patient is either under the age of sixteen years or apparently is not mentally competent to consent to the treatment. The third situation in which an application is permitted would occur where there are two or more persons of equal authority who claim the right to make a decision on behalf of the patient. This situation would arise, for example, if two children of the patient both claimed the authority to make a decision on behalf of the patient but were unable to agree on what decision should be made.

An application seeking the Review Board's order authorizing treatment must be accompanied by statements from the attending physician and from a psychiatrist who is not a member of the medical staff of the psychiatric facility, each expressing the opinion, with reasons, that the mental condition of the patient will be or is likely to be substantially improved by the specified psychiatric treatment, that the mental condition of the patient will not improve or is not likely to improve without the specified psychiatric treatment, that the benefit anticipated from the treatment outweighs the risk of harm and that the proposed treatment is the least restrictive and least intrusive treatment that meets the requirements of the legislation. The Review Board may authorize the specified psychiatric treatment and other re-

lated medical treatment only if it is satisfied that the opinions of the two physicians are correct.

RESTRAINT

Restraint

27. (1) The authority given in this Act to restrain a person is authority to keep the person under control to prevent harm to the person or to another person by the minimal use of such force, mechanical means or chemicals as is reasonable having regard to the physical and mental condition of the person.

Idem

(2) Measures necessary for the exercise of the authority given in this Act to restrain a person may be taken without the person's consent, but the measures shall be recorded in detail in the clinical record of the person's care and treatment in the psychiatric facility, including the entry in the clinical record of a statement that the person was restrained, a description of the means of restraint, a statement of the period of time during which the person was restrained and a description of the behaviour of the person that required that he or she be restrained or continue to be restrained.

Chemical restraint

(3) If a chemical restraint is used, the entry shall include a statement of the chemical used, the method of administration and the dosage administered.

Commentary

Clause 10(b) authorizes a person to be restrained during the period he or she is detained for the purpose of an involuntary psychiatric assessment. Subsection 14(4) permits a person to be restrained while he or she is an involuntary patient. Section 27 spells out in more detail the circumstances that must exist before restraint can be applied. The restraint can only be used to keep the person under control to prevent harm to the person or to other persons. The restraint can only involve the minimal use of such force, mechanical means or chemicals as is reasonable having regard to the physical and mental condition of the person. In addition, measures taken to restrain a person must be recorded in detail in the person's clinical record.

CERTIFICATE OF LEAVE

Leave to live outside facility

28. (1) The attending physician of an involuntary patient, in order to provide psychiatric treatment that is less restrictive and less intrusive to the patient than being detained in a psychiatric facility, may issue a certificate of leave allowing the patient to live outside the psychiatric facility subject to specific written conditions as to treatment.

Consent

(2) A certificate of leave is not effective without the patient's consent.

Status of patient

(3) The provisions of this Act respecting an involuntary patient continue to apply in respect of a patient who is subject to a certificate of leave.

Cancellation

(4) The attending physician, by a certificate of cancellation of leave, may without notice cancel the certificate of leave for breach of a condition or if the attending physician is of the opinion that the treatment specified in the certificate of leave is not effective.

Return to psychiatric facility

(5) A certificate of cancellation of leave is sufficient authority for one month after it is signed for a police officer to take the patient named in it into custody and take the patient forthwith to a psychiatric facility.

Review

(6) On application, the Review Board shall review the status of the patient to determine whether or not there has been a breach of a specific written condition of the certificate of leave or whether or not the treatment specified in the certificate of leave has been ineffective.

Order

(7) The Review Board by order may confirm or rescind the certificate of cancellation of leave.

Certificate effective pending order

(8) The certificate of cancellation of leave is effective pending the order of the Review Board.

Commentary

Section 28 is intended to provide a patient who meets the criteria for involuntary admission, and would otherwise be detained in the psychiatric facility, with the possibility of a treatment program that would permit him or her to live outside the facility. It is intended that this type of leave would provide for a treatment program that is less restrictive and less intrusive to the patient than being detained in the

psychiatric facility. The section states that the attending physician of the patient may only issue a certificate of leave with the patient's consent, so the patient has final authority to determine whether he or she would prefer to remain in the psychiatric facility rather than comply with conditions as to treatment while on a certificate of leave.

The issuance of a certificate of leave is not intended to affect the validity of a certificate of involuntary admission or a certificate of renewal. In other words, the system of regular re-assessments of the patient's mental condition would continue and if, at any point, the patient no longer met the criteria for admission as an involuntary patient, he or she would be entitled to be released from the control of the psychiatric facility. Also, the issuance of a certificate of leave would not affect the patient's ability to challenge before the Review Board a certificate of involuntary admission or a certificate of renewal.

Section 28 permits the attending physician to cancel a certificate of leave if the patient breaches a condition of the certificate or if the physician is of the opinion that the treatment specified in the certificate of leave is not effective. The patient, however, has an opportunity to challenge the cancellation of a certificate of leave before the Review Board.

DISCLOSURE

Patient access to clinical record

29. (1) A person who has attained sixteen years of age and is mentally competent is entitled to examine and to copy the clinical record or a copy of the clinical record of the person's examination, assessment, care and treatment in a psychiatric facility.

Duty of chief administrative officer

(2) Subject to subsection (3), the chief administrative officer shall give the person access to the clinical record.

Application to Review Board

(3) The chief administrative officer, within seven days after the person asks to examine the clinical record, may apply to the Review Board to authorize the withholding of all or part of the clinical record.

Order by Review Board

(4) Upon the application, the Review Board shall review the clinical record and by order shall direct the chief administrative officer to give the person access to the clinical record unless the Review Board is of the opinion that disclo-

sure of the clinical record is likely to result in serious harm to the treatment or recovery of the person while the person is a patient or is likely to result in serious physical harm or serious emotional harm to another person.

Idem

(5) Where, in the Review Board's opinion, disclosure of a part of the clinical record is likely to have a result mentioned in subsection (4), the Review Board shall mark or separate the part and exclude the marked or separated part from the application of the order.

Submissions

(6) The person and the chief administrative officer are each entitled to make submissions to the Review Board in the absence of the other before the Review Board makes its decision.

Right of correction

(7) If the person is allowed to examine the clinical record or a part or copy of the clinical record, the person is entitled,

(a) to request correction of the information in the clinical record, if the person believes there is an error or omission in the clinical record;

(b) to require that a statement of disagreement be attached to the clinical record reflecting any correction that is requested but not made; and

(c) to require that notice of the amendment or statement of disagreement be given to any person or organization to whom the clinical record was disclosed within the year before the amendment was requested or the statement of disagreement was required.

Commentary

Section 29 establishes the principle that a mentally competent person over the age of sixteen years is entitled to examine and copy the clinical record of his or her examination, assessment, care and treatment in a psychiatric facility.

This section does, however, permit the chief administrative officer of the psychiatric facility to apply to the Review Board for an order authorizing the withholding of information from the person. The Board may make the order if it is of the opinion that disclosure is likely to result in serious harm to the treatment or recovery of the person while the

person is a patient or is likely to result in serious physical harm or serious emotional harm to another person. If such an application is made, the patient and the chief administrative officer are each entitled to make submissions to the Review Board in the absence of the other, since arguments for the withholding of the record would necessarily involve disclosure of the record's contents.

Subsection 29(7) would permit a person who has examined his or her clinical record to request correction of any information that the person believes is erroneous or has been omitted and to require that a statement of disagreement be attached to the clinical record reflecting any correction that is requested but not made. The subsection also permits the patient to require that notice of any amendment or statement of disagreement be given to any person or organization to whom the clinical record was disclosed during the previous year.

Disclosure of information

30. (1) No person shall disclose information in respect of the mental condition or care or treatment of another person as a patient of a psychiatric facility.

Information

(2) Subsection (1) applies in respect of information obtained by the person,

(a) in the course of the assessment, care or treatment of the patient;

(b) in the course of employment in the facility;

(c) from a person who obtained the information in the manner described in clause (a) or (b); or

(d) from a clinical record or other record kept by the facility.

Request by patient

(3) Notwithstanding subsection (1), the chief administrative officer may disclose information in respect of a patient or former patient at the request of the patient or former patient or, at the request of another person, with the consent of the patient or former patient.

Where disclosure permitted

(4) Notwithstanding subsection (1), the chief administrative officer may disclose information,

(a) with a consent given on behalf of the patient in accordance with section 24;

(b) for the purpose of research, academic pursuits or the compilation of statistical data; or

(c) to the chief administrative officer of a psychiatric facility or other health facility to which the patient is transferred, admitted or referred.

Application to Board for direction

(5) If no person claims the authority to give or refuse a consent in accordance with section 24 or if two or more persons described in the same paragraph of subsection 24(1), who do not agree among themselves, claim the authority, the person seeking the consent may apply to the Review Board.

Order

(6) The Review Board by order shall, where the wishes of the patient, expressed when he or she was mentally competent and sixteen or more years of age, are clearly known, give or refuse the consent in accordance with those wishes and shall otherwise give or refuse the consent in accordance with the best interest of the patient.

Idem

(7) Notwithstanding subsection (1), information may be disclosed,

(a) for the purpose of the assessment, care or treatment of the patient in the psychiatric facility;

(b) for the purpose of the assessment, care or treatment of the former patient in another health facility;

(c) to a physician in charge of the patient's care;

(d) to a board or committee or the counsel or agent of a board or committee of a health facility or of the governing body of a health profession, for the purpose of an investigation or assessment of the care or treatment provided by a member of the health profession, or for the purpose of a discipline proceeding against a member of the health profession;

(e) to the Review Board for the purpose of a hearing;

(f) in compliance with an Act;

(g) to a court for examination under this section; or

(h) in compliance with a court order under this section.

Stay of disclosure

(8) If an application for review of a decision as to mental competence in connection with consent to a proposed disclosure is made to the Review Board, the disclosure shall not be made until the matter is finally determined.

Disclosure for research

(9) A person to whom information is disclosed under subsection (4) for the purpose of research, academic pursuits or the compilation of statistical data shall not disclose the name of or any means of identifying a patient and shall not use or communicate the information for a purpose other than research, academic pursuits or the compilation of statistical data.

Disclosure to court

(10) Where the disclosure of information mentioned in subsection (1) is required in a proceeding before a court, the court upon motion may order the disclosure of the information.

Disclosure to tribunal

(11) Where the disclosure of information mentioned in subsection (1) is required in a proceeding before a tribunal that is not a court, the (appropriate court in enacting jurisdiction) upon application may order the disclosure of the information.

Examination by court

(12) The court may examine the information without disclosing it to the party seeking the disclosure.

Submissions

(13) The party seeking the disclosure and the chief administrative officer are each entitled to make submissions to the court in the absence of the other before the court makes its decision.

Grounds for disclosure to court

(14) If the court is satisfied that the disclosure of the information is likely to result in serious harm to the treatment or recovery of the person while the person is a patient or is likely to result in serious physical or emotional harm to another person, the court shall not order the disclosure of the information unless satisfied that to do so is essential in the interests of justice.

Offence

31. Every person who contravenes section 30 is guilty of an offence and on conviction is liable to a fine of not more than ($).

Commentary

Section 30 establishes the general principle that information relating to the mental condition or care or treatment of

a patient in a psychiatric facility should not be disclosed by persons who acquired the information while employed in the facility or while caring for the patient. The section also sets out a number of limited circumstances in which disclosure of information is permitted.

Section 31 makes it an offence to contravene section 30.

HEARINGS AND APPEALS

Review boards

32. (1) The Lieutenant Governor in Council (or other equivalent authority in enacting jurisdiction) may establish review boards for psychiatric facilities or groups of psychiatric facilities.

Appointment of members

(2) The (Lieutenant Governor in Council) may appoint the members of each review board.

Head

(3) The (Lieutenant Governor in Council) may designate one of the members of a review board to head the review board.

Panel

(4) A panel of not fewer than three members of a review board, including at least one psychiatrist, appointed to the panel by the head of the review board, may exercise all the jurisdiction and powers of the review board.

Jurisdiction

(5) Reference in this Act to a Review Board means the review board established for the psychiatric facility in connection with which the matter in question arises.

Applications to Review Board

33. (1) An application to a Review Board may be made,

(a) to review a certificate of involuntary admission, a certificate of renewal or a certificate of cancellation of leave;

(b) to authorize withholding of all or part of a clinical record from a person;

(c) to review a physician's opinion that a person is or is not mentally competent to consent or refuse consent; or

(d) to authorize specified psychiatric treatment and other related medical treatment.

Applicants

(2) An application may be made by any person having a substantial interest in the subject-matter of the application.

(3) In every application to the Review Board, the applicant, the patient and the attending physician are parties and the chief administrative officer is entitled to be a party. *Parties*

(4) In an application for authority to give treatment in a case where the consent of a person has been refused on the patient's behalf, the person is also a party. *Idem*

(5) The Review Board may add as a party any person who, in the opinion of the Review Board, has a substantial interest in the matter under review. *Idem*

34. The Review Board shall give written notice of the application to every party and to every person who is entitled to be a party and to any person who, in the opinion of the Review Board, may have a substantial interest in the subject-matter of the application. *Notice*

35. (1) In every proceeding before the Review Board there shall be a hearing. *Hearing*

(2) Every party is entitled to be represented by counsel or agent in a hearing before the Review Board. *Counsel*

(3) Every party shall be given an opportunity to examine and to copy, before the hearing, any recorded evidence that will be produced or any report the contents of which will be given in evidence at the hearing. *Examination of recorded evidence*

(4) Every party is entitled to present such evidence as the Review Board considers relevant and to question witnesses. *Evidence*

(5) It is the duty of the Review Board to inform itself fully of the facts by means of the hearing and for this purpose the Review Board may require the attendance of witnesses and the production of documents in addition to the witnesses called and documents produced by the parties. *Duty of Review Board*

(6) Every proceeding before the Review Board shall be recorded and copies of documents filed in evidence or a transcript of the oral evidence shall be furnished only to the parties upon the same terms as in the (superior court). *Record*

(7) Subject to subsection (8), all Review Board hearings shall be closed to the public. *Public hearings*

(8) The Review Board shall permit the public to be present during a hearing where, *Exception*

(a) the patient consents; and

(b) there is, in the opinion of the Board, little risk of serious harm or injustice to any person.

Appeal to court

36. (1) Any party to a proceeding before the Review Board may appeal from the final decision or order of the Review Board to the (appropriate court in enacting jurisdiction).

Powers of court

(2) An appeal under this section may be made on questions of law or fact or both and the (court) may affirm or may rescind the decision of the Review Board and may exercise all powers of the Review Board and for the purpose the (court) may substitute its opinion for that of the Review Board, or the (court) may refer the matter back to the Review Board for rehearing, in whole or in part, in accordance with such directions as the (court) considers proper.

Interim order

(3) If the final decision of the Review Board authorizes specified psychiatric treatment and other related medical treatment, the (court) on motion may make an interim order authorizing the giving of the specified psychiatric treatment and other related medical treatment pending the final disposition of the appeal.

Standard of proof

37. In a proceeding under this Act before a (judge or other judicial official who receives informations), the Review Board or a court, the standard of proof is proof on the balance of probabilities.

Counsel for involuntary patient

38. In a proceeding before the Review Board or an appeal therefrom in respect of an involuntary patient of a psychiatric facility,

(a) the patient shall be deemed to have capacity to instruct counsel or agent; and

(b) if the patient does not have legal representation, the Review Board or the (court), as the case may be, may direct that legal representation be provided for him or her.

Commentary

Sections 32 to 38 of the Act contain a number of provisions relating to Review Board proceedings. These include:

1. Provisions establishing the review boards (section 32).

2. Parties to Review Board proceedings (section 33).

3. Notice of proceedings before the Review Board (section 34).

4. Hearings before the Review Board, including the right of every party to be represented by counsel or agent, to examine and copy recorded evidence that will be produced and to question witnesses. These provisions include a positive duty on the Review Board to inform itself fully of the facts and give the Review Board power to require the attendance of witnesses and the production of documents in addition to the witnesses called and documents produced by the parties (section 35).

5. Appeals from Review Board decisions (section 36).

6. Standard of proof in proceedings under the Act (section 37).

7. Review Board power to direct that legal representation be provided for an involuntary patient (section 38).

Provision should be made for the following in cases where provision is not made elsewhere in the law of the enacting jurisdiction:

1. For the recording of proceedings before the Review Board sufficient for appeals to a court.

2. Power of the Review Board to require the attendance of witnesses and production of documents and to require answers under oath. Provision should also be made for the enforcement of the powers.

3. For the Review Board to give notice of its decisions and reasons for its decisions to the parties.

4. The enforcement of orders of the Review Board.

REGULATIONS

Regulations

39. The Lieutenant Governor in Council (or equivalent authority in the enacting jurisdiction) may make regulations,

(a) designating psychiatric facilities;

(b) designating classes of health professionals;

(c) designating classes of individuals for the purposes of orders under subsection 4(5);

(d) prescribing the manner in which applications may be made to a review board;

(e) governing proceedings before review boards;

(f) prescribing the time in which decisions of review boards shall be made;

(g) prescribing forms and providing for their use.

APPENDIX G

(See page 29)

Le 25 septembre 1987

RAPPORT SUR LES ACTIVITÉS CANADIENNES DANS LE DOMAINE DU DROIT INTERNATIONAL PRIVÉ

Madame le Président, la Conférence sur l'uniformisation des lois joue un rôle très important en facilitant la mise en oeuvre par le Canada de conventions internationales dans le domaine du droit international privé. Le court rapport qui suit vise à vous faire part des développements survenus depuis l'an dernier qui touchent à des conventions ou projets de conventions dans ce domaine. J'espère qu'il vous convaincra de l'utilité du travail accompli par la Conférence en ce domaine et du besoin de continuer ce travail car il y a encore du pain sur la planche si nous voulons mettre en oeuvre d'autres conventions.

Convention de Vienne sur la vente

Le premier événement à signaler est l'entrée en vigueur le 1er janvier 1988 de la Convention de Vienne sur la vente internationale de marchandises rendue possible suite aux ratifications des États-Unis, de la Chine et de l'Italie. Cet événement nous amène à reconsidérer l'opportunité d'une ratification canadienne et le Ministre de la Justice, l'Honorable R. Hnatyshyn, a écrit à ses collègues provinciaux le 17 mars 1987 pour les encourager à considérer l'adoption d'une législation mettant en oeuvre la Convention.

It is encouraging to note that seven replies to Mr. Hnatyshyn's letter indicate support for the Convention. Other jurisdictions have asked for more information on the Convention or suggested the establishment of a group to consult and coordinate actions with respect to the Convention. The Convention will be on the agenda of the federal/provincial meeting of deputy ministers responsible for justice scheduled for the fall. It is expected that the replies and suggestions received in response to the Minister of Justice's letter will be discussed at that meeting.

International Child Abduction

Another significant event to note is that as a result of the enactment of implementing legislation in the Northwest Territories on June 17, 1987, The Hague Convention on the Civil Aspects of International Child Abduction will be in force throughout Canada. This is particularly noteworthy since it will demonstrate that the use of federal state clauses does not necessarily lead to partial implementation of a Convention by a Federal State.

Again on international child abduction the federal Minister of Justice wrote to his provincial colleagues last December to seek their views on the approval by Canada of Hungary's accession to the Hague Convention. Canada's approval was required because Hungary was not a member of the Hague Conference on Private International Law when the Convention on child abduction was drafted by that Conference. All replies have expressed support with the recommendations to approve the accession. One reply is missing but we understand that there should be no difficulty with the recommendation.

Nine (9) States are now parties to that Convention; Australia, Canada, Spain, France, Hungary, Luxemburg, Portugal, Switzerland and the United Kingdom.

Convention on the Law Applicable to Trusts and their Recognition

I do not have much to add on the subject of the Trusts Convention as you all know that the Minister of Justice wrote on May 1, 1987 to his provincial colleagues asking them if they would be prepared to favourably consider implementing the Trusts Convention. In his letter, the Minister recommends that no reservation be made but that a declaration should be made extending the Convention to judicial trusts. Out of the five replies received three indicate that the Convention should be signed, two indicate that they will review the matter after this year's discussions at this Conference.

Convention sur la signification de documents

Les consultations nécessaires pour permettre au Canada de ratifier cette convention se poursuivent. Une des questions qui était restée en suspens était celle des coûts qui seraient exigés. Il semble maintenant que la question est réglée et qu'un montant de $50.00 satisferait toutes les provinces. Le Ministre fédéral de la Justice devra recommuniquer avec les provinces sous peu à ce sujet. L'on espère que nous serons en mesure d'adhérer à cette Convention à l'automne.

Canada-United Kingdom Judgments Convention

The Convention came into force on January 1, 1987 and applied at the time to five provinces (Ontario, Nova Scotia, New Brunswick, British Columbia and Manitoba); the Yukon Territory has since adopted the necessary legislation. I would encourage the other jurisdictions who have indicated their support for the Convention to adopt the necessary legislation. This would help our position when we ask for the inclusion of a federal state clause in a convention.

Conventions being negotiated

I would like now to mention three conventions now being developed in the area of private international law, in the development of which we participate. The first one is the Convention on successions being developed at the Hague Conference on Private International Law. Our two legal systems are represented at the negotiations by our delegates Professors Waters and Talpis. Professor Waters has been appointed Special Rapporteur, the first time Canada has a Special Rapporteur at a Special Commission of the Hague Conference. We expect to consult the provinces on the draft convention this Fall. It is expected that the Convention will be adopted in 1988. The two other conventions are the Conventions on factoring and leasing now being developed by UNIDROIT - Professor Ron Cuming from Saskatchewan is our delegate. Canada will be the host to the Diplomatic Conference that will be convened to adopt these two conventions. The Conference will take place in Ottawa in May 1988. We expect to come back to the Conference on those three draft conventions.

En terminant j'aimerais mentionner que le Groupe consultatif en droit international privé du ministère de la Justice a été reconstitué et que Terre-Neuve et l'Alberta en font maintenant partie. Je constate d'ailleurs que le représentant de l'Alberta, Me Peter Pagano, est ici. J'aimerais aussi porter à l'attention de la Conférence que le cinquième Séminaire de droit commercial international du ministère de la Justice aura lieu le 15 octobre à Ottawa. The agenda of the seminar is being finalized. It is expected that it will deal with the following topics:

— UNCITRAL and the Harmonization of International Commercial Law

— recent developments in the intellectual property and international trade

— Legal Guide on Construction contracts being developed by the UNCITRAL (the United Nations Conference on International Trade Law)

— dispute settlement in a trade agreement with the United States

Merci Madame le Président de m'avoir fourni l'occasion de présenter ce rapport sur les activités canadiennes en droit international privé.

APPENDIX H

(See page 29)

REPORT OF THE STEERING COMMITTEE, 1987

The Steering Committee is composed of Marie José Longtin of Quebec, Graham D. Walker, Q.C. of Nova Scotia, James Breithaupt of Ontario and Georgina Jackson of Saskatchewan. Melbourne M. Hoyt, Q.C., the Executive Director of the Uniform Law Conference of Canada, serves as Secretary to the Committee.

The Committee discussed Uniform Law Section matters by telephone on a number of occasions. The Steering Committee will also be meeting several times during the week of the 1987 Conference.

The Steering Committee is required by the Rules of the Conference to have the general management of the agenda of the Section, to be 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 the 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.

Report on the 1986 Recommendations of the Uniform Law Section

Last year the Steering Committee undertook the following changes in procedure:

(a) August distribution of a tentative agenda for the 1987 Conference which agenda is to contain agreed upon deadlines, names of persons responsible for topics, history and expected product;

(b) direct communication with reporters, drafters and delegates, where possible, in addition to local secretaries;

(c) release of an interim Steering Committee report in February reflecting the status of papers.

The Uniform Law Section also accepted the Steering Committee's recommendation that on joint jurisdictional projects, if a paper is sent to another jurisdiction and no reponse is received after 30 days, consent to the provisions is to be presumed and the paper is then to be sent to the Executive Director and the Chairman of the Steering Committee for general distribution.

Also to aid the ongoing contact during the year, each of the delegates to the Conference indicated their name, address and phone number at the 1986 Conference to ensure that no delays would be experienced in the distribution of material in September.

With these changes to the management of the Uniform Law Section, the Committee ensured that an agenda in the recommended format was distributed, in August, at the close of the 1986 Conference. In addition, the Chairman of the Steering Committee distributed a further refined version of the agenda to all delegates on September 15, 1986.

Each person who undertook a projet either as a reporter or a drafter was contacted by September 8, 1986 and again on December 31, 1986 regarding the progress of his or her particular project. Further contacts were made by phone by a member of the Steering Committee to each of the reporters involved.

The Steering Committee also distributed an interim report in March of 1987 providing a status report on all topics.

The results of these efforts were worthwhile. Reporters and drafters were receptive to the contact. Seven major papers were distributed prior to July 15, 1987 with one paper being distributed in each of February, March, April and May and two in June. This work enabled the Steering Committee to release a final agenda on July 1, 1987 which was divided into the following categories:

I. Matters of General Concern
II. 1987 Topics for which Papers were Received by June 30
III. 1987 Topics for which Papers were not Received by June 30
IV. Reports for Information
V. Topics Deferred to 1988
VI. New Business

Decisions Taken by the Steering Committee, 1986-87

The Committee decided not to convene a special meeting to consider the Uniform Mental Health Act Report. It appeared that the urgency previously felt for this topic was no longer present. A few provinces had passed amendments to their Acts. Other provinces did not intend on introducing new mental health legislation until the fall of 1987. Other reasons for not convening a special meeting related to the need for the whole section to consider the report and the costs to participating jurisdictions of having a separate meeting. It was decided instead to begin with the Uniform Mental Health Act project at our annual meeting in Victoria.

After consultation with Manitoba and Alberta, it was decided that Alberta would provide a reporter and drafter for the project involving the writing of a report regarding the enactment by the Conference of a Uniform Human Tissue Gift Act.

The Steering Committee was approached by Quebec early in the year regarding the possibility of deferring the Uniform Matrimonial Property Conflict of Laws Act until 1988. The Committee agreed to defer this project until 1988.

The Committee was approached by a delegate from Alberta to include on the agenda a report and Draft Act regarding the establishment of a Uniform Trade Secrets Act. It was agreed that this topic should be added to the agenda with a report to be distributed prior to July 1, 1987. Similarly, the Steering Committee was also approached by a delegate from Ontario who indicated it was his intention to be in a position to report on the subject of Class Actions in Ontario at the Conference in Victoria, and accordingly asked that the matter be placed on the agenda. With this submission, the Steering Committee placed Class Actions again on the agenda.

I. Amendments to Uniform Sale of Goods Act – Special Committee
Reporter: Merrilee Rasmussen

1. Waiting for Report and draft amendments with respect to changes – Committee revived in 1985.

2. History
(a) 1985 – Resolution page 35

J. Uniform Act re: Financial Exploitation of Crime

1. Following a positive communication from the President to the Chairman of the Steering Committee, the Steering Committee decided to undertake this project and Nova Scotia volunteered to prepare a report.

K. Uniform Act Re: Class Actions

1. Ontario has asked that this matter be placed on the agenda of the section and expects to distribute a report before this year's Conference.

L. Uniform Act Re: Extra-Provincial Child Welfare Guardianship and Adoption Orders.

1. Expected to receive report and draft Act in French and English with commentaries by March 31, 1987.

2. History

(a) 1987 – Placed on the agenda

(b) 1982 – Resolution
Report

Reports for Information

M. Joint Canadian Bar Association Committee / Uniform Law Conference on Personal Property Security

N. Special Committee on Private International Law

O. Editing Committee on French Consolidation of Uniform Acts

P. Steering Committee

New Business

APPENDIX I

(See page 29)

TO: All Delegates to the Uniform Law Section

DATE: June 23, 1987

FROM: R. G. Hammond, Alberta

RE: *Trade Secrets*

1. *PURPOSE OF MEMORANDUM*

In July 1986, the Alberta Institute of Law Research and Reform and a federal/provincial Working Party issued a report entitled "Trade Secrets". This report was published in French by the federal government and in English by the Institute. It suggested that there is a case for certain new offences relating to misappropriation of trade secrets in the Criminal Code; and that the provinces should enact a new civil statute under the suggested title of a Trade Secret Protection Act. The report itself contained a draft civil Act.

Subsequently the report was considered by the relevant Canadian Deputy Ministers and agreement was expressed in principle with the recommendations of the report. Attached is a copy of a letter from the Deputy Minister of Justice (federal) to Mr. M. M. Hoyt, Q.C. dated January 15, 1986. It will be noted that Mr. Iacobucci states (in the second paragraph thereof):

> "In order to promote uniformity of legislation, it was decided that the civil aspects of the report should be referred to the Uniform Law Conference of Canada for preparation of uniform legislation. At their meeting, the Deputy Ministers agreed to the policy and premises upon which the report is based, as reflected therein. Accordingly, the Deputy Ministers would like to ask the Uniform Law Conference to review the report and the attached draft legislation with a view towards preparing a uniform draft Act *at this year's meeting* of the Uniform Law Conference." (my italics)

The Steering Committee on receipt of this letter took the matter under advisement, and in February 1987 agreed to include the topic of Trade Secrets on the agenda for this year's Conference.

The exercise which the Conference has been asked to conduct appears at first sight a formidable one. However, on closer examination, it is, in light of the request from the Deputy Ministers relatively limited. As we apprehend the terms of reference suggested by the Deputy Ministers, the suggested task for the Conference is: Given a governmental policy

which favours protection of trade secrets and the enactment of legislation by the provinces for that purpose, is the draft civil statute attached to the report the best that can be evolved? This would appear to be a task for which, with respect, the Conference would appear to be eminently suited.

2. *A SUGGESTED MANNER OF PROCEEDING*

As noted above, the report *per se* (which covers nearly 300 pages) appears to be fairly formidable reading. However, for present purposes, and bearing in mind the terms of reference, much of it is not relevant. (At least half the report is devoted to criminal law reform, which need not concern us at all.)

We will endeavour hereafter to summarize matters shortly, but we would respectfully suggest that the Conference ends might best be served by concentrating on the draft statute (which appears at pages 256–261 of the report). The statute is not a long one – it comprises some fifteen sections and it has already been the subject of a good deal of discussion and consultation across the country, and we would respectfully suggest that the best manner of proceeding would be for the Conference to see if it can improve on or point out difficulties with the existing draft.

3. *PROBLEMS OF TIMING AND PROCEDURE*

The request from the Deputy Ministers is perhaps unusual and difficult for the Conference, in that it asks the Conference, if at all possible, to bring down a statute *this year.* It is our understanding that normally the procedures of the Conference are such that normally a considerably longer period is required.

However, we would point out that there is distinct governmental interest in this subject area. In the United States, a Uniform Act was adopted by the National Conference of Commissioners on Uniform State Laws in 1979. Since that statute was adopted there has been steady enactment of this model by almost half the U.S. states (in some cases with local state amendments).

In this country the jurisdictions which participated in the federal/provincial Working Party have expressed distinct interest in legislation in this subject area, and Ontario and Alberta in particular have expressed ongoing interest in considering enactment of the legislation if agreement can be reached on same.

There is fairly widespread agreement that uniform legislation in this subject area is desirable, and that a high degree of compatibility with the American legislation would also be desirable. Many companies utilize the same technology on both sides of the border and a continental protection system is thought by everybody to be the best solution.

4. *WHAT IS A TRADE SECRET?*

This is discussed at pages 36 to 42 of the report. In essence a trade secret is not just any piece of confidential information: It is a very specific piece of information or know how which is not generally known within a particular trade or industry and in respect of which particular efforts have been to keep the secret as a secret. It has, on that account, acquired a distinct economic value. Perhaps the two best known examples in everyday commerce are the formula for Coke, and the recipe for Kentucky Fried Chicken.

Considerable resources are often expended to develop a trade secret in order to gain a competitive edge in product or services over a competitor. If the nature of the information were publicly known, the competitive advantage would be lost.

Having said that, the report notes that there are potentially four subcategories of trade secrets: Specific product secrets (such as chemical formula); technological secrets (that is, knowledge of some process or know how that nobody else has yet developed); strategic business information (secret marketing information or customer lists); and specialized compilations of information that, in sum, are not publicly known and sometimes unique value on that account.

It is a fact of business life in North America today that competitors now frequently seek to "short cut" the costs associated with independently developing information, either by industrial espionage, or by luring away key employees from a competitor.

5. *SHOULD TRADE SECRETS BE PROTECTED?*

This question is discussed in chapter 5 of the report. The report argues that there are economic, moral and pragmatic reasons for protecting trade secrets, notwithstanding that we do have a patent system which is designed to encourage the disclosure of certain kinds of "inventions". The report suggests that the arguments for legal protection of trade secrets in the end come down to this – there should be a recognition that everyone who generates valuable, non-public, information has a legitimate interest in turning it to account. The notion – often expressed

by judges – that what should be prohibited is "free rider" behaviour, encapsulates the various arguments. At the same time, the law should not allow recognition of an interest in a trade secret to unduly hinder employee mobility or the free flow of information in society. The Deputy Ministers accepted these policy arguments as set out in the report.

6. *HOW ARE TRADE SECRETS PROTECTED AT THE MOMENT?*

The existing law is summarized in chapter 3 of the report. In various ways, the statutory monopolies of patents and copyright, and judicially developed doctrines of tort law, contract, fiduciary duties, unjust enrichment and breach of confidence all assist in one way or another in the protection of trade secrets. The report identifies however, five difficulties with the existing civil law.

7. *THE DIFFICULTIES IN THE EXISTING LAW*

The existing judge made law on the subject is subject to the following difficulties:

First, in general these causes of action assume the existence of some kind of prior relationship between the parties which the law can then classify in accordance with the established legal taxonomy. But in cases of industrial espionage there is routinely no such prior relationship. The "thief" had no relationship with the creator to which the civil law can attach any legal consequences. The result is that industrial espionage *per se* may not be actionable in Canada.

Second, even where there is some kind of relationship between the creator of the trade secret and the misappropriator, Courts have had great difficulty dealing with the situation of the third party who innocently acquires information in good faith from the "thief". This is the familiar problem in the law of which of two innocent parties must bear a loss, but in the absence of any distinct theory of trade secret law the Courts have never satisfactorily resolved this issue.

Third, even when a cause of action can be made out, there is great difficulty over the exact remedies that are available to a plaintiff.

Fourth, there are difficulties in the existing law as to some of the defences a defendant may mount. In particular, there has been much concern expressed by both Courts and commentators over the so-called "public interest" defence. This involves an assertion by a defendant that such person was justified in taking and publishing the secret in the name of some greater public good.

Fifth, some doubt has recently been expressed as to whether a right to the protection of a confidence is assignable. Thus, there is now some doubt as to how far successor interests may be created in a trade secret, which may well unduly inhibit the dissemination and application of this sort of information.

8. *THE GENERAL SHAPE OF REFORM*

It was the view of both the Institute and the federal/provincial Working Party that the essential thrust of civil law reform in this subject area should be to create a specific new statute designed to protect to the extent necessary, but no further than necessary, the distinct interest in a trade secret. In short, the general doctrines of law were thought – for one reason or another – either to be inherently incapable of, or unlikely to develop sufficiently in such a way as to enable the proper protection of a trade secret.

Against this background the report suggests (in paragrph 10.2 thereof) that Canadian civil law with respect to trade secrets should reflect certain major premises:

(a) If there is a legally enforceable agreement as to how particular kinds of trade secrets are to be treated, the law should respect that agreement.

(b) If there is no agreement, the law should recognize, by means of a statutory tort or torts a duty to respect trade secrets in specified situations.

(c) The term "trade secret" should, for this purpose, be defined in such a way that it will catch all four categories of information described in Chapter two.

(d) The law must state with reasonable precision at what point appropriation of information within those categories becomes misappropriation.

(e) The law should provide a non-hierarchical range of remedies for misappropriation of a trade secret. A court should be able to select that remedy (or, if need be, those remedies) which are most appropriate in a particular case.

(f) A court should be given an over-riding discretion to refuse relief where some other public interest outweighs the public and private interest in preserving the trade secret.

(g) Such other civil remedies as there may be with respect to the improper use of information should not be displaced.

(h) The law relating to the protection of trade secrets should, if possible, be uniform throughout Canada.

As noted, the Deputy Ministers endorsed those principles. The draft statute endeavours to reflect those premises.

9. *THE SUGGESTED STATUTORY SCHEME*

It is proposed hereafter to touch briefly on the critical features of the proposed statute.

(a) *The definition of a trade secret*
See section 1(b). The definition of a trade secret closely tracks the U.S. uniform act. It is a functional definition and states four *conjunctive* requirements that have to be made out for a trade secret to exist.

(b) *Application of the new act*
Under section 2(ii) the existing common law and equity causes of action are *not* interfered with. Thus there could be concurrent liability both under the existing common law or equity doctrines and under this statute. Subsection 4 of section 2 is designed to emphasize that the existing law relating utilization or enhancement of personal skill by a departing employee is not actionable.

(c) *Improper acquisition actionable*
Under section 3(1) "Acquisition of a trade secret by improper means" becomes a tort. This statutory tort is directly aimed at industrial espionage. There was much discussion both in the Institute and the federal/provincial Working Party as to whether "improper means" should be defined. The English Law Commission in its report on Breach of Confidence did provide a fairly exhaustive and lengthy definition of improper means. Many thought it technology bound, cumbersome and unworkable. In the result the report argues that the concept of improper means has been in U.S. tort jurisprudence since 1939 and the courts have had little difficulty in employing the term. There is therefore a good deal of U.S. case law which is available, but beyond that the term is one which is designed to be built upon by judges. Under subsection 3 of section 3 improper means specifically includes "commercial espionage by electronic or other means". Subsection 2 makes it plain that independent development or reverse engineering alone do not constitute improper means.

(d) *Improper use or disclosure actionable*
Section 4(1) creates a second statutory tort. This is the situation where somebody improperly *discloses or uses* a trade secret where they do not have "lawful authority" to do so. This would cover the situation of, for instance, the company employee who is properly in possession of a trade secret, but wrongly sells it to somebody else or leaves and sets up their own business to use the secret.

(e) *Remedies*
Section 5 deals with remedies. Essentially the existing remedies of injunction damages and an account of profits are all preserved. The most innovative feature of the remedies sections is section 10 which enables the court to make what is termed an "adjustment order". Frequently in trade secret cases the problem is that the horse has bolted: Often a company will not know that there has been a trade secret purloining until the secret is actually being utilized by somebody else. At that stage shutting down the defendant's operation or trying to calculate damages may be a very difficult, and even impossible task. Section 10 would enable a court to order a royalty payment along with adjustments between the parties as to expenditure incurred and so on.

(f) *The innocent third party acquirer*
Section 11 endeavours to deal wtih the situation of the innocent third party. This has been one of the most intractable problems in this subject area. If B purchases a trade secret from A, not knowing that A has in fact wrongfully misappropriated it from Z, what is the position of B? This has greatly troubled Commonwealth courts who have been much troubled by whether a pesonal or a proprietary right is at stake. In the result what section 11 endeavours to do is to enable a court to adjust the position between the parties according to the equities of the particular situation.

(g) *Preservation of secrecy*
One of the difficulties of trade secret litigation has always been that commencement of litigation signals the value of the trade secret, and competitors will try to take advantage of the "open court" procedures which are embodied in our law to learn of the secret during the course of the trial. The basis on which the record or the court is to be "closed down" have given rise to some difficulties in practice. In the result section 13 endeavours to provide some assistance on this difficult practical problem.

(h) *Assignability*

There is a recent Australian Court of Appeal decision which holds that the interest in a trade secret is based upon a purely personal right, and not a proprietary right. Hence, in the view of that court such an interest cannot be assigned. No Canadian court has yet decided that point. If however the economic investment in trade secrets is to be recognized, it seems extraordinary that that interest should not be assignable and section 14 is designed to overcome that particular decision.

(i) *Defences*

An issue which has caused the courts great concern in the area of breach of confidence and trade secret law generally, is the so called public interest defence. Assuming that a trade secret exists, when, if ever, is it justifiable for somebody to disclose that trade secret? And, what if the trade secret was learned by means which were otherwise unlawful? In the result the section as drafted provides for a limited public interest defence. That is, the report says that there is a public interest in the disclosure of a crime, for other unlawful conduct or a matter affecting public health or safety. Hence, if somebody could show that the formula for Coke actually contained ingredients which infringed the (say) food and drug regulations, then a newspaper would be justified in disclosing that information.

10. *CONCLUSION*

Having regard to the course which events have followed in the evolution of this suggested legislation, and the (to date) governmental support for its development and implementation, we would respectfully suggest that the delegates to the Conference focus their attention on the particular draft statute and endeavour to identify any particular problems which the drafting of it may have obscured or overlooked, and any suggested improvements which might be made in the draft statute.

Respectfully submitted,
The Alberta Commissioners
to the Uniform Law
Conference of Canada

RGH:sje

APPENDIX J

(See page 30)

I.D. #48 November 10, 1987

REPORT OF THE NEW BRUNSWICK COMMISSIONERS TO THE UNIFORM LAW SECTION OF THE UNIFORM LAW CONFERENCE OF CANADA CONCERNING THE DRAFT UNIFORM CONFLICT OF LAWS RULES FOR TRUSTS ACT

At the request of the Uniform Law Section, the New Brunswick Commissioners undertook to prepare draft legislation to give effect to the decisions of the Section arising out of the Report presented by the New Brunswick Commissioners at the 1986 meeting of the Conference in Winnipeg. This report provides explanatory notes to the provisions of the draft Uniform Conflict of Laws Rules for Trusts Act that is appended hereto.

Section 1

Subsection (1) - Definitions

"law" means the rules of law in force in a province or territory of Canada other than the rules of conflict of laws;

Note: The Act will apply only where the applicable law is that of a Canadian jurisdiction. The applicable law will not include the rules of conflict of laws, thus avoiding the application of the doctrine of renvoi.

"settlor" means a person who creates a trust;

Note: While an enacting jurisdiction may choose to include trusts created by judicial decision and statutory trusts within the scope of the Act, only those trusts created by persons will have settlors for the purposes of the Act, including the choice of applicable law. The law applicable to a trust created other than by a settlor would be determined objectively, based on the connecting factors.

"trust" means the legal relationship that exists when

(a) assets are under the control of a trustee,

(b) the assets constitute a separate fund and are not a part of the estate of the trustee,

(c) title to the assets stands in the name of the trustee or in the name of another person on behalf of the trustee, and

(d) the trustee has the power and the duty, in respect of which the trustee is accountable, to hold, manage, employ, dispose of or deliver the assets in accordance with the terms of the legal relationship and the special duties imposed by law;

Note: This definition is based on and incorporates the essence of the concept of trust that appears in the Trusts Convention. It is intended to encompass common law trusts as well as those legal relationships in Quebec law which satisfy the listed criteria.

Unlike the Trusts Convention the Act is not restricted to trusts created voluntarily and evidenced in writing. Consequently, it will apply to any legal relationship which falls within the definition of "trust", regardless of how that relationship is created. However, optional provisions are provided in subsections 2(5) and (6) for those enacting jurisdictions that may wish to exclude trusts created by judicial decision and statutory trusts from the operation of the Act.

"trustee" means a person who has control of assets for the benefit of a beneficiary or for a specified purpose;

Note: This definition serves to complete the definition of "trust" by specifying the capacity in which a person must be in control of assets in order that the trust relationship can exist.

"validity of a trust" means essential validity of a trust.

Note: The inclusion of this definition is intended to clarify the concept of validity which appears at several places. It is consistent with subsection 2(3) by which issues relating to formal validity are excluded from the Act.

Subsection (2) – Existence of Trust

(2) For the purposes of this Act,

(a) the reservation by a settlor of rights and powers, and the fact that a trustee may have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust, and

(b) the fact that a settlor is a trustee or a beneficiary, or both, of a trust created by the settlor is not inconsistent with the existence of a trust unless the settlor is both the sole trustee and the sole beneficiary of a trust created by the settlor.

Note: These provisions state well-established principles in relation to recognized common law trusts and are intended to ensure that the same principles apply to the recognition of legal relationships in Quebec law that may qualify as trusts under the Act.

Section 2 – Application of Act

Subsection (1)

(1) This Act applies if the law governing the trust as determined under this Act is that of a province or territory of Canada *[and if the *Uniform International Trusts Act* does not apply to the trust].

Note: The application of the Act is confined to cases in which the applicable law is that of a Canadian jurisdiction and there is no international element that would cause the matter to come under the Trusts Convention. The Act is not intended to overlap or conflict with the Trusts Convention.

If a jurisdiction decides to adopt this Act but not the Trusts Convention, consideration should be given to extending the application of this Act to trusts whose applicable law is that of non-Canadian jurisdictions. That could be done by striking "a province or territory of Canada" from the definition of "law" and substituting "jurisdiction", and by striking out subsection 2(1).

Subsection (2)

(2) This Act applies to trusts arising before it comes into force as well as to trusts arising after it comes into force, but shall not be construed as affecting the law to be applied in relation to anything done or omitted under a trust before the coming into force of this Act.

Note: Since the legislation is entirely beneficial in nature it is recommended that it be made applicable to existing trusts as well as those arising in the future. However, its enactment should not be prejudicial to any prior act or omission.

Subsection (3)

(3) This Act does not apply to preliminary issues relating to the validity of instruments or acts by which trusts are created.

Note: As with the Trusts Convention, the Act applies only to questions that arise once it has been established that a trust exists. It is not

concerned with the preliminary questions as to the means of creating trusts. Such questions will continue to be determined in accordance with existing principles of law.

Subsection 4

(4) This Act does not apply to the extent that the law governing the trust as determined under this Act does not provide for the type of trust involved.

Note: If the applicable law as determined in accordance with the Act does not recognize the type of trust in question, the Act does not apply. This may be particularly relevant where the applicable law is that of Quebec where the variety of types of available trusts will probably continue to be more limited than in the common law jurisdictions.

Subsections (5) and (6)

**[(5) This Act does not apply to a trust that exists only by virtue of a judicial declaration.]

***[(6) This Act does not apply to trusts imposed by statute.]

Note: An enacting jurisdiction which does not want the Act to apply to the recognition and enforcement of trusts that are created by judicial decisions in other jurisdictions and/or statutory trusts imposed in other jurisdictions may do so by enacting one or both of these provisions. These are suggested as optional provisions since they may not be equally relevant to all enacting jurisdictions.

Section 3 – Crown is Bound

[3. This Act binds the Crown]

Section 4 – Law Governing Trust

(1) A trust is governed by the law chosen by the settlor, which choice may be express or implied.

(2) If the law chosen by the settlor to govern the trust does not provide for the type of trust involved, the choice is not effective and the trust is governed by the law with which it is most closely connected.

(3) If the settlor has not chosen the law to govern the trust, the trust is governed by the law with which it is most closely connected.

(4) In ascertaining the law with which a trust is most closely connected, reference shall be made in particular to

(a) the place of administration of the trust expressly or impliedly chosen by the settlor, or

(b) failing the choice referred to in paragraph (a), the place of residence or business of the trustee, or, if there are two or more trustees, the place where the administration of the trust is principally carried out.

Note: This section contains the essence of the Act, namely, the rules by which the applicable law is to be determined. The scheme of the section is that the applicable law is within the determination of the settlor whose choice may be express or implied. If he fails to make a choice or if his choice is not effective because the chosen law does not recognize the type of trust in question, the applicable law is to be determined objectively as the law with which the trust is most closely connected. Subsection (4) contains a non-exhaustive list of factors that are to be taken into account in making that determination. Fewer factors are listed than in the case of the Trusts Convention since the intention is to direct the attention of the courts particularly to considerations that are most relevant to the due administration of the trust. The courts are free, however, to consider and apply any other factors that they deem to be relevant.

Section 5 – Severability

Subsection (1)

(1) Severable aspects of a trust, including the validity of a trust, the construction of a trust, the administration of a trust, and different assets subject to a trust, may be governed by different laws determined in accordance with section 3.

Note: This provision recognizes that validity, construction and administration are different and severable aspects of a trust that may be subject to different applicable laws either by the choice of the settlor or by the application of the connecting factors. Similarly, various assets of a trust may be subject to different applicable laws, depending on the circumstances.

Subsection (2)

(2) The law governing the validity of a trust determines whether the question to be resolved is one of validity, construction or administration.

Note: Before subsection (1) can be applied to determine the law applicable to a severable aspect, it may be necessary to characterize the question at issue as being one of validity, construction or administration. To assist in that determination, subsection (2) provides that such matters of characterization are to be decided in accordance with the law governing the validity of the trust.

Section 6 – Replacement of Applicable Law

6. The law governing the validity of a trust determines whether that law or the law governing the administration or any other severable aspect of a trust may be replaced by another law.

Note: This provision recognizes and accommodates the common practice of including in Canadian trust documents a power in the trustee to change both the validity law and the administration law. Such a power will be effective if it accords with the law governing the validity of the trust from time to time.

Section 7 – Residence of a Trust

****[7. The residence of a trust is the place where the administration of the trust is carried out, or is principally carried out.]

Note: One of the most perplexing questions that may arise in relation to a trust is that concerning its place of residence. Since this is not essentially a conflicts question, it has been included as an optional provision. Those jurisdictions which see fit to adopt such a provision may find it more appropriate for inclusion in trusts legislation of more general application since this Uniform Act applies only to cases involving inter-jurisdictional issues.

Section 8 – Recognition and Enforcement

Subsection (1)

(1) Nothing in this Act shall be construed as requiring that recognition or effect be given to a trust or a severable aspect of a trust if the significant elements of the trust or aspect, other than the settlor's choice of law, are most closely connected with a jurisdiction the law of which does not provide for the type of trust or aspect involved.

Note: A settlor should not be able to impose on a jurisdiction a type of trust that its law does not include. An attempt by a settlor to do so by using the choice of law provision may not be successful. This provision

may be most relevant to Quebec whose residents might attempt to import into that jurisdiction types of trusts not provided for in Quebec law by selecting as the applicable law the law of another Canadian jurisdiction which does provide for such trusts.

Section 8 – Recognition and Enforcement

Subsection (2)

(2) Nothing in this Act shall be construed as requiring that recognition or effect be given to a trust or a severable aspect of a trust if the giving of recognition or effect would be contrary to the public policy of (enacting jurisdiction) or would contravene a fundamental principle of the law of a jurisdiction having a stronger policy interest in the matter than has any other jurisdiction.

Note: An enacting jurisdiction should not be under any obligation to recognize and give effect to a trust if to do so would be contrary to its public policy. This is so even if the forum has no close connection with the trust. Where it appears that the enforcement of a trust would be contrary to a basic principle of law of a jurisdiction having a close connection with the trust, such enforcement may be refused. Such refusal may be based on considerations of principle and practicalities, there being little point in awarding a judgment that would not be recognized and enforced in the jurisdiction in question.

The reference to a "fundamental principle of law" is intended to be comparable, in common law terms, to the civil law concepts of "mandatory laws", "laws of immediate application" and "l'ordre public" for which protection is provided in the Trusts Convention. It signifies, at least, that the matter must be of particular importance in the connected jurisdiction in order to warrant recognition and protection in the forum.

Subsection (3)

*****[(3) Nothing in this Act shall be construed as requiring that recognition or effect be given to a trust that exists only by virtue of a judicial declaration in another jurisdiction, or to a severable aspect of such a trust, if (the appropriate court in enacting jurisdiction) is satisfied that there is a substantial reason for refusing to give recognition or effect to the trust or aspect.]

Note: In the course of the discussion at the 1986 annual meeting of the Uniform Law Section some concern was expressed about having to recognize and enforce judicial trusts coming from outside the forum. Since such trusts are actually declared by judicial decisions their enforcement constitutes the enforcement of judgments rendered by courts outside the forum. That being the case, interest was expressed in providing some safety valve which might be used in a case where valid questions are raised as to the circumstances under which such a judgment was rendered. This provision would supply the court of the forum with a discretion in such a case.

Where an enacting jurisdiction expressly excludes judicial trusts from the application of the Act, it will not be necessary to include subsection (3) in the Act in any event.

Subsection (4)

******[(4) Nothing in this Act shall be construed as requiring that recognition or effect be given to a trust imposed by statute in another jurisdiction, or to a severable aspect of such a trust, if (the appropriate court in enacting jurisdiction) is satisfied that there is substantial reason for refusing to give recognition or effect to the trust or aspect.]

Note: As in the case of trusts declared by judicial decision, concern was expressed about having to recognize and enforce trusts imposed by statute in jurisdictions outside the forum. Subsection (4) would serve in the case of statutory trusts essentially the same purpose that subsection (3) would serve in relation to judicial trusts.

Where an enacting jurisdiction expressly excludes statutory trusts from the application of the Act, it will not be necessary to include subsection (4) in the Act in any event. If, however, a jurisdiction excludes only certain types of statutory trusts, such, for example, as those imposed for fiscal purposes, an appropriately revised version of subsection 7(4) should be included.

Section 9 – Conflict with Uniform Wills Act

*******[9. If there is a conflict between a provision of this Act and a provision of Part II of the *Uniform Wills Act* with respect to the law governing a trust created by a will or a severable aspect of such a trust, this Act prevails.]

Note: This provision would limit the scope of application of Part II of the *Uniform Wills Act* as regards the essential validity and administration of a trust. In such matters the proposed Act would prevail.

I.D. #10 November 10, 1987

UNIFORM CONFLICT OF LAWS RULES FOR TRUSTS ACT

Definitions 1. (1) In this Act

"law" "law" means the rules of law in force in a province or territory of Canada other than the rules of conflict of laws;

"settlor" "settlor" means a person who creates a trust;

"trust" "trust" means a legal relationship that exists when

(a) assets are under the control of a trustee,

(b) the assets constitute a separate fund and are not a part of the estate of the trustee,

(c) title to the assets stands in the name of the trustee or in the name of another person on behalf of the trustee, and

(d) the trustee has the power and the duty, in respect of which the trustee is accountable, to hold, manage, employ, dispose of or deliver the assets in accordance with the terms of the legal relationship and the special duties imposed by law;

"trustee" "trustee" means a person who has control of assets for the benefit of a beneficiary or for a specified purpose;

"validity of a trust" "validity of a trust" means essential validity of a trust.

Existence of trust (2) For the purpose of this Act

(a) the reservation by a settlor of rights and powers, and the fact that a trustee may have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust, and

(b) the fact that a settlor is a trustee or a beneficiary, or both, of a trust created by the settlor is not inconsistent with the existence of a trust unless the settlor is both the sole trustee and the sole beneficiary of a trust created by the settlor.

Application of Act

2. (1) This Act applies if the law governing the trust as determined under this Act is that of a province or territory of Canada *[and if the *Uniform International Trusts Act* does not apply to the trust].

(2) This Act applies to trusts arising before it comes into force as well as to trusts arising after it comes into force, but shall not be construed as affecting the law to be applied in relation to anything done or omitted under a trust before the coming into force of this Act.

(3) This Act does not apply to preliminary issues relating to the validity of instruments or acts by which trusts are created.

(4) This Act does not apply to the extent that the law governing the trust as determined under this Act does not provide for the type of trust involved.

**[(5) This Act does not apply to a trust that exists only by virtue of a judicial declaration.]

***[(6) This Act does not apply to trusts imposed by statute.]

Crown is bound

****[3. This Act binds the Crown.]

Law governing trust

4. (1) A trust is governed by the law chosen by the settlor, which choice may be express or implied.

(2) If the law chosen by the settlor to govern the trust does not provide for the type of trust involved, the choice is not effective and the trust is governed by the law with which it is most closely connected.

(3) If the settlor has not chosen the law to govern the trust, the trust is governed by the law with which it is most closely connected.

(4) In ascertaining the law with which a trust is most closely connected, reference shall be made in particular to

(a) the place of administration of the trust expressly or impliedly chosen by the settlor, or

(b) failing the choice referred to in paragraph (a), the place of residence or business of the trustee, or, if there are two or more trustees, the place where the administration of the trust is principally carried out.

Law governing severable aspects of trust

5. (1) Severable aspects of a trust, including the validity of a trust, the construction of a trust, the administration of a trust, and different assets subject to a trust, may be governed by different laws determined in accordance with section 4.

(2) The law governing the validity of a trust determines whether the question to be resolved is one of validity, construction or administration.

Replacement of law governing trust

6. The law governing the validity of a trust determines whether that law or the law governing the administration or any other severable aspect of a trust may be replaced by another law.

Residence of trust

*****[7. The residence of a trust is the place where the administration of a trust is carried out or is principally carried out.]

Recognition and enforcement of trusts

8. (1) Nothing in this Act shall be construed as requiring that recognition or effect be given to a trust or a severable aspect of a trust if the significant elements of the trust or aspect, other than the settlor's choice of law, are most closely connected with a jurisdiction the law of which does not provide for the type of trust or aspect involved.

(2) Nothing in this Act shall be construed as requiring that recognition or effect be given to a trust or a severable aspect of a trust if the giving of recognition or effect would be contrary to the public policy of (enacting jurisdiction) or would contravene a fundamental principle of the law of a jurisdiction having a stronger policy interest in the matter than has any other jurisdiction.

******[(3) Nothing in this Act shall be construed as requiring that recognition or effect be given to a trust that exists only by virtue of a judicial declaration in another jurisdiction, or to a severable aspect of such a trust, if (the appropriate court in enacting jurisdiction) is satisfied that there is a substantial reason for refusing to give recognition or effect to the trust or aspect.]

*******[(4) Nothing in this Act shall be construed as requiring that recognition or effect be given to a trust imposed by statute in another jurisdiction, or to a severable aspect of such a trust, if (the appropriate court in enacting jurisdiction) is satisfied that there is substantial reason for refusing to give recognition or effect to the trust or aspect.]

********[9. If there is a conflict between a provision of this Act and a provision of Part II of the *Uniform Wills Act* with respect to the law governing a trust created by a will or a severable aspect of such a trust, this Act prevails.] *Conflict with Uniform Wills Act*

*These words will be required only in jurisdictions that have brought the Trusts Convention into force.

**Optional provision for use by jurisdictions that wish to exclude constructive trusts, and those resulting trusts that exist only by virtue of a judicial declaration, from the scope of the Act.

***Optional provision for use by jurisdictions that wish to exclude statutory trusts from the scope of the Act. Jurisdictions that wish to restrict the exclusion to statutory trusts imposed for fiscal purposes should adopt an appropriately revised version of subsection 2(6).

****Optional provision for use by jurisdictions that wish to bind the Crown.

*****Optional provision for use by jurisdictions that wish to establish by statute the residence of a trust.

******This provision will not be required in jurisdictions where subsection 2(5) is included.

*******This provision will not be required in jurisdictions where subsection 2(6) is included. If a revised version of subsection 2(6) is included with respect to statutory trusts imposed for fiscal purposes, an appropriately revised version of subsection 8(4) will be required.

********This provision will be required only if the enacting jurisdiction has enacted Part II of the *Uniform Wills Act* or comparable provisions.

I.D. #32 November 10, 1987

UNIFORM CONFLICT OF LAWS RULES FOR TRUSTS ACT

(Concordance with Convention)

Uniform Act	*Convention*
Subsection 1(1) "law"	Article 17
Subsection 1(1) "settlor"	Article 2
Subsection 1(1) "trust"	Article 2 (1st and 2nd para.)
Subsection 1(1) "trustee"	No comparable provision
Subsection 1(1) "validity of a trust"	No comparable provision
Subsection 1(2)	Article 2 (3rd para.) in part
Subsection 2(1)	No comparable provision
Subsection 2(2)	Article 22
Subsection 2(3)	Article 4
Subsection 2(4)	Article 5
Subsection 2(5)	No comparable provision
Subsection 2(6)	No comparable provision
Section 3	No comparable provision
Subsection 4(1)	Article 6 (1st para.)
Subsection 4(2)	Article 6 (2nd para.)
Subsection 4(3)	Article 7 (1st para.)
Subsection 4(4)	Article 7 (2nd para.)
Subsection 5(1)	Article 9
Subsection 5(2)	No comparable provision
Section 6	Article 10
Section 7	No comparable provision
Subsection 8(1)	Article 13
Subsection 8(2)	Article 18
Subsection 8(3)	No comparable provision
Subsection 8(4)	No comparable provision
Section 9	No comparable provision

RAPPORT DES COMMISSAIRES DU NOUVEAU-BRUNSWICK À LA SECTION D'UNIFORMISATION DES LOIS DE LA CONFÉRENCE SUR L'UNIFORMISATION DES LOIS AU CANADA CONCERNANT LE PROJET DE LOI UNIFORME SUR LES RÈGLES DE CONFLIT DE LOIS EN MATIÈRE DE FIDUCIE

À la demande de la Section des lois uniformes, les Commissaires du Nouveau-Brunswick ont entrepris de préparer un projet de loi pour donner effet aux décisions de la Section qui résultent du Rapport présenté par les Commissaires du Nouveau-Brunswick lors de la réunion de 1986 de la Conférence à Winnipeg. Ce rapport fournit des notes explicatives aux dispositions du projet de la Loi uniforme sur les règles de conflit de lois en matière de fiducie.

Article 1

Paragraphe (1) – Définitions

"règle de droit" désigne les règles de droit en vigueur dans une province ou un territoire du Canada, à l'exclusion des règles de conflit de lois;

Note: La Loi ne s'appliquera que lorsque la règle de droit applicable relève d'une autorité législative canadienne. La règle de droit applicable ne comprendra pas les règles de conflit de lois évitant ainsi l'application de la doctrine du renvoi.

"constituant" désigne une personne qui crée une fiducie;

Note: Alors qu'une autorité législative peut choisir d'inclure les fiducies établies par décision judiciaire et par la loi dans le champ de la Loi, seules les fiducies créées par des personnes seront pourvues de constituants aux fins de la Loi, y compris le choix de la règle de droit applicable. La règle de droit applicable à une fiducie créée autrement que par un constituant devra être déterminée objectivement sur la base des facteurs connexes.

"fiducie" désigne la relation juridique qui existe

a) lorsque des avoirs sont sous le contrôle d'un fiduciaire,

b) lorsque des avoirs constituent un fonds distinct et ne fond pas partie du patrimoine du fiduciaire,

c) lorsque le titre de ces avoirs est établi au nom d'un fiduciaire ou au nom d'une autre personne pour le compte du fiduciaire, et

d) lorsque le fiduciaire est investi du pouvoir et chargé de l'obligation, dont il doit rendre compte, de détenir, d'administrer, d'utiliser des avoirs ou d'en disposer ou les rendre selon les termes de la relation juridique et les obligations particulières imposées par règle de droit;

Note: La définition est fondée sur l'essence du concept de fiducie qui apparaît dans la Convention sur les *trusts* et l'incorpore. Il est projeté d'englober les fiducies de *Common Law* aussi bien que les relations juridiques selon les règles de droit du Québec qui rencontrent les critères énumérés.

Contrairement à la Convention sur les *trusts*, la Loi n'est pas limitée aux fiducies créées volontairement et formulées par écrit. Conséquemment, elle s'appliquera à toute relation juridique comprise dans la définition de "fiducie", peu importe comment la relation est créée. Toutefois, des dispositions facultatives sont fournies aux paragraphes 2(5) et (6) pour les autorités législatives qui peuvent vouloir exclure du champ d'application de la Loi les fiducies établies par décision judiciaire ou par une loi.

"fiduciaire" désigne une personne qui a le contrôle d'avoirs pour le bénéfice d'un bénéficiaire ou pour une fin précise;

Note: Cette définition sert à compléter la définition "fiducie" en précisant en quelle capacité une personne doit contrôler des avoirs afin que la relation fiduciaire existe.

"validité d'une fiducie" désigne la validité essentielle d'une fiducie.

Note: Il est projeté par l'inclusion de cette définition de clarifier le concept de validité lequel apparaît à plusieurs endroits. Cela est cohérent avec le paragraphe 2(3) par lequel les questions se rapportant à la validité formelle sont exclues de la Loi.

Paragraphe (2) – L'existence de la fiducie

(2) Aux fins de la présente loi,

a) la réserve de certains droits par le constituant ou le fait que le fiduciaire ait des droits à titre de bénéficiaire ne sont pas nécessairement incompatibles avec l'existence d'une fiducie; et

b) le fait qu'un constituant soit fiduciaire ou bénéficiaire d'une fiducie créée par lui ou soit les deux

n'est pas nécessairement incompatible avec l'existence d'une fiducie à moins que le constituant ne soit le seul fiduciaire et le seul bénéficiaire d'une fiducie qu'il a créée.

Note: Ces dispositions énoncent les principes bien établis relativement aux fiducies de *Common law* reconnues et existent dans l'intention d'assurer que les mêmes principes s'appliquent à la reconnaissance des relations juridiques selon les règles de droit du Québec qui peuvent se qualifier à titre de fiducies en vertu de la Loi.

Article 2 – Application de la Loi

Paragraphe (1)

(1) La présente loi s'applique si la règle de droit régissant la fiducie telle que déterminée en vertu de la présente loi est celle d'une province ou d'un territoire du Canada *[et si la *Loi uniforme sur les fiducies internationales*, ne s'applique pas].

Note: L'application de la Loi est restreinte aux cas où la règle de droit applicable relève d'une autorité législative canadienne et qu'il n'existe aucun élément international qui ferait en sorte que la question soit régie par la Convention sur les *trusts*. Il n'est pas prévu que la Loi chevauche ou soit en confit avec la Convention sur les *trusts*.

Si une autorité législative décide d'adopter cette Loi mais non la Convention sur les *trust*, l'extension de l'application de cette Loi aux fiducies dont la règle de droit applicable relève d'une autorité législative non-canadienne devrait être envisagée. Cela pourrait être accompli par la suppression des mots "dans une province ou un territoire du Canada" de la définition "règle de droit" et leur remplacement par les mots "sous une autorité législative" et, par la suppression du paragraphe 2(1).

Paragraphe (2)

(2) La présente loi s'applique aux fiducies qui surviennent tant avant qu'après son entrée en vigueur, mais elle ne doit pas être interprétée de façon à affecter la règle de droit qui doit s'appliquer à ce qui a été fait ou omis en vertu d'une fiducie avant l'entrée en vigueur de la présente loi.

Note: Puisque la législation est entièrement bénéfique par sa nature, il est recommandé qu'elle soit applicable aux fiducies existantes aussi bien qu'à celles qui surviennent par la suite. Toutefois, son adoption ne devrait pas être préjudiciable à tout acte ou omission antérieur.

Paragraphe (3)

(3) La présente loi ne s'applique pas aux questions préliminaires se rapportant à la validité des instruments ou des actes par lesquels des fiducies sont créées.

Note: Tout comme la Convention sur les *trusts*, la Loi s'applique seulement aux questions soulevées après que l'existence d'une fiducie ait été établie. Elle ne se soucie pas des questions préliminaires portant sur les moyens de création des fiducies. Ces questions continueront d'être déterminées conformément aux principes de droit existants.

Paragraphe (4)

(4) La présente loi ne s'applique pas dans la mesure où la règle de droit régissant la fiducie telle que déterminée en vertu de la présente loi ne prévoit pas le genre de fiducie en cause.

Note: Si la règle de droit applicable telle que déterminée conformément à la Loi ne reconnaît pas le genre de fiducie en question, la Loi ne s'applique pas. Ceci peut être particulièrement pertinent lorsque la règle de droit applicable en est celle du Québec où la variété des genres de fiducies disponibles continuera probablement d'être plus limitée que celle qui provient des autorités législatives de *Common law*.

Paragraphes 5 et 6

**[(5) La présente loi ne s'applique pas à une fiducie qui n'existe qu'en vertu d'une déclaration judiciaire.]

***[(6) La présente loi ne s'applique pas aux fiducies imposées par une loi.]

Note: Une autorité législative qui ne veut pas que la Loi s'applique à la reconnaissance et l'application des fiducies établies par décision judiciaire émanant d'autres autorités législatives et/ou des fiducies établies par une loi imposées par d'autres autorités législatives peuvent le faire en adoptant l'une ou l'autre de ces dispositions. Ces dispositions sont suggérées à titre facultatif puisqu'elles ne peuvent être également pertinentes à toutes les autorités législatives.

Article 3 – Applicable à la couronne

[3. La présente loi lie la couronne.]

Article 4 – Règle de droit régissant la fiducie

(1) Une fiducie est régie par la règle de droit choisie par le constituant, que ce choix soit exprès ou implicite.

(2) Si la règle de droit régissant la fiducie choisie par le constituant ne prévoit pas le genre de fiducie en cause, son choix est sans effet et la fiducie est régie par la règle de droit avec laquelle la fiducie présente les liens les plus étroits.

(3) Si le constituant n'a pas choisi la règle de droit régissant la fiducie, celle-ci est régie par la règle de droit avec laquelle la fiducie présente les liens les plus étroits.

(4) Pour établir la règle de droit avec laquelle une fiducie présente les liens les plus étroits, il faut tenir compte particulièrement

a) du lien d'administration de la fiducie choisi expressément ou implicitement par le constituant, ou

b) à défaut du choix visé à l'alinéa a), le lieu de résidence ou d'affaires du fiduciaire, ou s'il y a plusieurs fiduciaires, le lieu où la fiducie est administrée principalement.

Note: Cet article renferme ce qui est l'essence de la Loi, notamment, les règles par lesquelles la règle de droit applicable devra être déterminée. La structure de cet article consiste à ce que la règle de droit applicable repose sur la décision du constituant dont le choix peut être exprès ou implicite. S'il omet de faire un choix ou si son choix n'a pas d'effet parce que la règle de droit choisie ne reconnaît pas le genre de fiducie en question, la règle de droit applicable doit être déterminée objectivement comme étant la règle de droit avec laquelle la fiducie présente les liens les plus étroits. Le paragraphe (4) renferme une liste non exhaustive des facteurs qui doivent être pris en considération lors de la détermination. Un plus petit nombre de facteurs sont énumérés comparativement à la Convention sur les *trusts* puisque l'intention est d'attirer l'attention des cours particulièrement sur les considérations qui sont les plus pertinentes à la saine administration des fiducies. Toutefois, les cours sont libres de prendre en considération et de mettre en application tous autres facteurs qu'elles jugent pertinents.

Article 5 – Règles de droit régissant des aspects séparables

Paragraphe (1)

(1) Des aspects séparables d'une fiducie, y compris la validité d'une fiducie, l'interprétation d'une fiducie, l'administration d'une fiducie, et différents avoirs assujettis à une fiducie, peuvent être régis par différentes règles de droit déterminées conformément à l'article 3.

Note: Cette disposition reconnaît que la validité, l'interprétation et l'administration constituent des aspects différents et séparables d'une fiducie et peuvent être assujetties à des règles de droit différentes soit au choix du constituant soit par l'application de facteurs connexes. De la même façon, des avoirs variés d'une fiducie peuvent être assujettis à différentes règles de droit applicables, dépendant des circonstances.

Paragraphe (2)

(2) La règle de droit régissant la validité d'une fiducie détermine si la question soumise en est une de validité, d'interprétation ou d'administration.

Note: Avant que le paragraphe (1) puisse s'appliquer afin de déterminer la règle de droit applicable à un aspect séparable, il peut s'avérer nécessaire de caractériser une question soulevée, comme en étant un concernant la validité, l'interprétation ou l'administration. Afin de faciliter cette détermination, le paragraphe (2) prévoit que ces questions de caractérisation doivent être décidées conformément à la règle de droit régissant la validité de la fiducie.

Article 6 – Remplacement de la règle de droit régissant la fiducie

6. La règle de droit régissant la validité d'une fiducie détermine si cette règle de droit ou la règle de droit régissant l'administration ou un autre aspect séparable d'une fiducie peut être remplacée par une autre règle de droit.

Note: Cette disposition reconnaît et s'adapte à la pratique courante d'inclure dans les documents d'une fiducie canadienne un pouvoir dévolu au fiduciaire de changer et la règle de droit sur la validité et la règle de droit sur l'administration. Un tel pouvoir prend effet s'il peut être concilié avec la règle de droit régissant la validité de la fiducie à l'occasion.

Article 7 – Résidence d'une fiducie

****[7. La résidence d'une fiducie est le lieu où la fiducie est administrée ou encore le lieu où elle est principalement administrée.]

Note: Une des questions soulevant le plus de perplexité qui peut surgir relativement à une fiducie est celle qui concerne son lieu de résidence. Puisqu'il ne s'agit pas d'une question de conflit essentiellement, la disposition est incluse à titre facultatif. Les autorités législatives qui considèrent opportun d'adopter une telle disposition peuvent juger plus approprié de l'inclure dans les lois concernant les fiducies d'application

plus générale puisque la présente Loi uniforme s'applique seulement aux cas impliquant des questions inter-juridictionnelles.

Article 8 – Reconnaissance et Effet

Paragraphe (1)

(1) Rien de la présente loi ne peut être interprété de façon à exiger que reconnaissance ou effet soit accordé à une fiducie ou à un aspect séparable d'une fiducie si les éléments importants de la fiducie ou d'un aspect, autre que le choix de la règle de droit par le constituant, ont les liens les plus étroits avec un autorité législative dont la règle de droit ne prévoit pas le genre de fiducie en cause.

Note: Il ne devrait pas être possible pour un constituant d'imposer à une autorité législative un genre de fiducie que sa règle de droit ne comprend pas. Une tentative de ce faire par un constituant en utilisant une disposition offrant le choix ne saurait être couronnée de succès. Cette disposition peut prendre toute sa pertinence au Québec dont les résidents pourraient tenter d'importer sous cette autorité législative des genres de fiducies non prévus par les règles de droit du Québec en élisant à titre de règle de droit applicable la règle de droit d'une autre autorité législative canadienne laquelle prévoit de telles fiducies.

Article 8 – Reconnaissance et Effet

Paragraphe (2)

(2) Rien de la présente loi ne peut être interprété de façon à exiger que reconnaissance ou effet soit accordé à une fiducie ou à un aspect séparable d'une fiducie si cette reconnaissance ou cet effet devait être contraire à l'ordre public de (autorité législative) ou devait contrevenir aux principes fondamentaux de la règle de droit d'une autorité législative ayant un intérêt politique plus grand en cette matière que toute autre autorité législative.

Note: Une autorité législative ne devrait pas être soumise à l'obligation de reconnaître et de donner effet à une fiducie si cela était contraire à ses politiques publiques. Il en va de même si le for n'a aucun lien étroit avec la fiducie. Lorsqu'il appert que l'effet d'une fiducie irait à l'encontre d'un principe de droit de base d'une autorité législative ayant un lien étroit avec la fiducie, cet effet peut être refusé. Un tel refus peut être fondé sur des considérations de principe ou de practicabilité réduisant ainsi à peu de fin la nécessité de rendre un jugement qui ne pourrait être reconnu ou avoir d'effet sous l'autorité législative en question.

Le renvoi a "des principes fondamentaux de la règle de droit" vise à être comparable, selon la terminologie de *Common Law*, aux concepts de droit civil "de lois obligatoires", "de lois d'application immédiate" et "d'ordre public" pour lequels une protection est prévue par la Convention sur les *trusts*. Cela signifie, à tout le moins, que le sujet revêt une importance particulière sous l'autorité législative liée en vue de garantir la reconnaissance et la protection par le for.

Paragraphe (3)

*****[(3) Rien de la présente loi ne peut être interprété de façon à exiger que reconnaissance ou effet soit accordé à une fiducie qui n'existe qu'en vertu d'une déclaration judiciaire sous une autre autorité législative ou à un aspect séparable d'une telle fiducie si (cour compétente de l'autorité législative) est convaincue qu'il y a un motif important de refuser de reconnaître de donner effet à la fiducie ou à l'aspect.]

Note: Au cours de la discussion lors de l'assemblée annuelle de 1986 de la Section de lois uniformes, des inquiétudes ont été exprimées sur le fait d'avoir à reconnaître et de donner effet aux fiducies établies par décision judiciaire qui proviennent de l'extérieur du for. Puisque de telles fiducies sont actuellement établies par décision judiciaire, leur donner effet équivaut à donner effet aux jugements rendus par les cours étrangères au for. Ceci étant le cas, un intérêt a été exprimé quant à offrir une soupape de sûreté qui pourrait être utilisée dans le cas où des questions valables sont soulevées quant aux circonstances en vertu desquelles un tel jugement a été rendu. Cette disposition fournirait à la cour du for un pouvoir discrétionnaire dans un tel cas.

Lorsqu'une autorité législative qui adopte la loi exclut expressément les fiducies établies par décision judiciaire de l'application de la Loi, il ne sera pas nécessaire, en aucun cas, d'inclure le paragraphe (3) dans la Loi.

Paragraphe (4)

******[(4) Rien de la présente loi ne peut être interprété de façon à exiger que reconnaissance ou effet soit accordé à une fiducie imposée par une loi d'une autre autorité législative ou à un aspect séparable d'une telle fiducie si (cour compétente de l'autorité législative) est convaincue qu'il y a un

motif important de refuser de reconnaître ou de donner effet à la fiducie ou à l'aspect.]

Note: Dans le cas des fiducies établies par décision judiciaire, une certaine inquiétude a été exprimée quant à avoir à reconnaître et donner effet à des fiducies imposées par la loi qui relèvent d'autorités législatives étrangères au for. Le paragraphe (4) pourrait servir dans le cas de fiducies établies par une loi aux mêmes fins que le paragraphe (3) sert relativement aux fiducies établies par décision judiciaire.

Lorsqu'une autorité législative qui adopte la loi excluant expressément de l'application de la Loi, les fiducies établies par une loi, il ne sera pas nécessaire, en aucun cas, d'inclure le paragraphe (4) dans la Loi. Toutefois, si une autorité législative n'exclut que certains types de fiducies établies par une loi, telles que par exemple celles imposées pour fins fiscales, une version révisée du paragraphe 7(4) en conséquence devrait être incluse.

Article 9 - Conflit avec la Loi uniforme sur les testaments

[9. La présente loi l'emporte s'il y a conflit entre une de ses dispositions et une disposition de la Partie II de la loi intitulée *Uniform Wills Act* relativement à la règle de droit régissant une fiducie créée par testament ou un aspect séparable d'une telle fiducie.]

Note: Cette disposition limiterait le champ d'application de la Partie II de la loi intitulée *Uniform Wills Act* en ce qui a trait à la validité essentielle et l'administration d'une fiducie. Dans de tels cas, la Loi proposée devrait prévaloir.

I.D. #9 — le 10 novembre 1987 (le 10 novembre 1987)

Loi uniforme sur les règles de conflit de lois en matière de fiducie

1. (1) Dans la présente loi — *Définitions*

"constituant" désigne une personne qui crée une fiducie; — *"constituant"*

"fiduciaire" désigne une personne qui a le contrôle d'avoirs pour le bénéfice d'un bénéficiaire ou pour une fin précise; — *"fiduciaire"*

"fiducie" désigne la relation juridique qui existe — *"fiducie"*

a) lorsque des avoirs sont sous le contrôle d'avoirs pour le bénéfice d'un bénéficiaire ou pour une fin précise;

b) lorsque des avoirs constituent un fonds distinct et ne font pas partie du patrimoine du fiduciaire,

c) lorsque le titre de ces avoirs est établi au nom d'un fiduciaire ou au nom d'une autre personne pour le compte du fiduciaire, et

d) lorsque le fiduciaire est investi du pouvoir et chargé de l'obligation, dont il doit rendre compte, de détenir, d'administrer, d'utiliser des avoirs ou d'en disposer ou les rendre selon les termes de la relation juridique et les obligations particulières imposées par règle de droit;

"règle de droit" "règle de droit" désigne les règles de droit en vigueur dans une province ou un territoire du Canada, à l'exclusion des règles de conflit de lois;

"validité d'une fiducie" "validité d'une fiducie" désigne la validité essentielle d'une fiducie.

Existence d'une fiducie (2) Aux fins de la présente loi,

a) la réserve de certains droits par le constituant ou le fait que le fiduciaire ait des droits à titre de bénéficiaire ne sont pas nécessairement incompatibles avec l'existence d'une fiducie; et

b) le fait qu'un constituant soit fiduciaire ou bénéficiaire d'une fiducie créée par lui ou soit les deux n'est pas nécessairement incompatible avec l'existence d'une fiducie à moins que le constituant ne soit le seul fiduciaire et le seul bénéficiaire d'une fiducie qu'il a créée.

Application de la loi 2. (1) La présente loi s'applique si la règle de droit régissant la fiducie telle que déterminée en vertu de la présente loi est celle d'une province ou d'un territoire du Canada *[et si la *Loi uniforme sur les fiducies internationales* ne s'applique pas à la fiducie].

(2) La présente loi s'applique aux fiducies qui surviennent tant avant qu'après son entrée en vigueur, mais elle ne doit pas être interprétée de façon à affecter la règle de droit applicable relativement à quoi que ce soit qui a été fait ou omis en vertu d'une fiducie avant l'entrée en vigueur de la présente loi.

(3) La présente loi ne s'applique pas aux questions préliminaires se rapportant à la validité des instruments ou des actes par lesquels des fiducies sont créées.

(4) La présente loi ne s'applique pas dans la mesure où la règle de droit régissant la fiducie telle que déterminée en vertu de la présente loi ne prévoit pas le genre de fiducie en cause.

**[(5) La présente loi ne s'applique pas à une fiducie qui n'existe qu'en vertu d'une déclaration judiciaire.]

***[(6) La présente loi ne s'applique pas aux fiducies imposées par une loi.]

****[3. La présente loi lie la couronne.] *Applicable à la couronne*

Règle de droit régissant la fiducie

4. (1) Une fiducie est régie par la règle de droit choisie par le constituant, que ce choix soit exprès ou implicite.

(2) Si la règle de droit régissant la fiducie choisie par le constituant ne prévoit pas le genre de fiducie en cause, son choix est sans effet et la fiducie est régie par la règle de droit avec laquelle la fiducie présente les liens les plus étroits.

(3) Si le constituant n'a pas choisi la règle de droit régissant la fiducie, celle-ci est régie par la règle de droit avec laquelle la fiducie présente les liens les plus étroits.

(4) Pour établir la règle de droit avec laquelle une fiducie présente les liens les plus étroits, il faut tenir compte particulièrement

a) du lieu d'administration de la fiducie choisi expressément ou implicitement par le constituant, ou

b) à défaut du choix visé à l'alinéa a), le lieu de résidence ou d'affaires du fiduciaire, ou s'il y a plusieurs fiduciaires, le lieu où la fiducie est administrée principalement.

Règles de droits régissant des aspects séparables

5. (1) Des aspects séparables d'une fiducie, y compris la validité d'une fiducie, l'interprétation d'une fiducie, l'administration d'une fiducie, et différents avoirs assujettis à une fiducie, peuvent être régis par différentes règles de droit séparables déterminées conformément à l'article 4.

(2) La règle de droit régissant la validité d'une fiducie détermine si la question soumise en est une de validité, d'interprétation ou d'administration.

Remplacement de la règle de droit régissant la fiducie

6. La règle de droit régissant la validité d'une fiducie détermine si cette règle de droit ou la règle de droit régissant l'administration ou un autre aspect séparable d'une fiducie peut être remplacée par une autre règle de droit.

Résidence d'une fiducie

*****[7. La résidence d'une fiducie est le lieu où la fiducie est administrée ou encore le lieu où elle est principalement administrée.]

Reconnaissance et effet d'une fiducie

8. (1) Rien de la présente loi ne peut être interprété de façon à exiger que reconnaissance ou effet soit accordé à une fiducie ou à un aspect séparable d'une fiducie si les éléments importants de la fiducie ou d'un aspect, autre que le choix de la règle de droit par le constituant, ont les liens les plus étroits avec une autorité législative dont la règle de droit ne prévoit pas le genre de fiducie en cause.

(2) Rien de la présente loi ne peut être interprété de façon à exiger que reconnaissance ou effet soit accordé à une fiducie ou à un aspect séparable d'une fiducie si cette reconnaissance ou cet effet devait être contraire à l'ordre public de (autorité législative) ou devait contrevenir aux principes fondamentaux de la règle de droit d'une autorité législative ayant un intérêt politique plus grand en cette matière que toute autre autorité législative.

******[(3) Rien de la présente loi ne peut être interprété de façon à exiger que reconnaissance ou effet soit accordé à une fiducie qui n'existe qu'en vertu d'une déclaration judiciaire sous une autre autorité législative ou à un aspect séparable d'un telle fiducie si (cour compétente de l'autorité législative) est convaincue qu'il y a un motif important de refuser de reconnaître ou de donner effet à la fiducie ou à l'aspect.]

*******[(4) Rien de la présente loi ne peut être interprété de façon à exiger que reconnaissance ou effet soit accordé à une fiducie imposée par une loi d'une autre autorité législative ou à un aspect séparable d'une telle fiducie si (cour compétente de l'autorité législative) est convaincue qu'il y a un motif important de refuser de reconnaître ou de donner effet à la fiducie ou à l'aspect.]

Conflit avec la Loi uniforme sur les testaments

********[9. La présente loi l'emporte s'il y a conflit entre une de ses dispositions et une disposition de la Partie II de la *Loi uniforme sur les testaments* relativement à la règle de

droit régissant une fiducie créée par testament ou un aspect séparable d'une telle fiducie.]

*Ces mots ne seront requis que par les autorités législatives qui auront mis en vigueur la convention sur les *trusts*.

**Disposition facultative à l'usage des autorités législatives qui veulent exclure du champ d'application de la Loi des fiducies établies par décision judiciaire, et ces fiducie par déduction qui n'existent qu'en vertu d'une déclaration judiciaire.

***Disposition facultative à l'usage des autorités législatives qui veulent exclure du champ d'application de la Loi des fiducies établies par une loi. Les autorités législatives qui veulent limiter l'exclusion aux fiducies imposées par une loi à des fins fiscales devraient adopter une version modifiée du paragraphe 2(6).

****Disposition facultative à l'usage des autorités législatives qui veulent lier la couronne.

*****Disposition facultative à l'usage des autorités législatives qui veulent établir par loi la résidence d'une fiducie.

******Cette disposition ne sera pas nécessaire au cas où les autorités législatives auraient inclus le paragraphe 2(5).

*******Cette disposition ne sera pas nécessaire au cas où les autorités législatives auraient inclus le paragraphe 2(6). Si une version modifiée du paragraphe 2(6) est incluse relativement aux fiducies imposées par loi à des fins fiscales, l'adoption d'une version modifiée du paragraphe 7(4) sera nécessaire.

********Cette disposition sera nécessaire seulement si l'autorité législative compétente a adopté la Partie II de la *Loi uniforme sur les testaments* ou des dispositions comparables.

I.D. #17 le 10 novembre 1987

Loi uniforme sur les règles de conflit de lois en matière de fiducie

(Table de concordance avec la Convention)

Loi uniforme	*Convention*
Paragraphe 1(1) "constituant"	Article 2
Paragraphe 1(1) "fiduciaire"	Aucune disposition semblable
Paragraphe 1(1) "fiducie"	Article 2 (1er et 2e alinéas)
Paragraphe 1(1) "règle de droit"	Article 17
Paragraphe 1(1) "validité d'une fiducie"	Aucune disposition semblable
Paragraphe 1(2)	Article 2 (3e alinéa) en partie
Paragraphe 2(1)	Aucune disposition semblable
Paragraphe 2(2)	Article 22
Paragraphe 2(3)	Article 4
Paragraphe 2(4)	Article 5
Paragraphe 2(5)	Aucune disposition semblable
Paragraphe 2(6)	Aucune disposition semblable
Article 3	Aucune disposition semblable
Paragraphe 4(1)	Article 6 (1er alinéa)
Paragraphe 4(2)	Article 6 (2e alinéa)
Paragraphe 4(3)	Article 7 (1er alinéa)
Paragraphe 4(4)	Article 7 (2e alinéa)
Paragraphe 5(1)	Article 9
Paragraphe 5(2)	Aucune disposition semblable
Article 6	Article 10
Article 7	Aucune disposition semblable
Paragraphe 8(1)	Article 13
Paragraphe 8(2)	Article 18
Paragraphe 8(3)	Aucune disposition semblable
Paragraphe 8(4)	Aucune disposition semblable
Article 9	Aucune disposition semblable

APPENDIX K

(See page 30)

REPORT OF THE SASKATCHEWAN COMMISSIONERS ON SUBSTANTIAL COMPLIANCE

I. BACKGROUND

Substantial compliance in the context of the *Uniform Wills Act* was broached with the Uniform Law Conference in 1982 at Montebello. It arose again in 1983 but the Conference declined at that time to consider the matter further. In 1985, the Saskatchewan Commissioners presented a report on the formalities respecting the execution of wills, and in 1986 the Conference adopted amendments to the *Uniform Wills Act*, based on the 1985 recommendations. However, there was a general consensus among those present at the 1986 Conference that no amount of "tinkering" with the formal requirements on execution of wills would completely attenuate all the problems which can arise; the potential for human error is too great and the variety of errors too diverse. Accordingly, it was determined that a second look at "substantial compliance" was warranted, and the Saskatchewan commissioners were asked to study the options available and to produce a report and a draft Act.

II. INTRODUCTION

Substantial compliance is a legislative mechanism which permits a court to admit a will to probate where it does not meet the formal requirements respecting execution. To allow such wills to probate guarantees that, to the greatest extent possible, testamentary intention is recognized and effected, and technical arguments will be all but useless.

There are several options available. They differ in their treatment of three important questions:

1. minimum requirements – should there be certain minimum requirements, such as the expression of testamentary intention, signature and writing?
2. burden of proof – should the burden of proof be the ordinary civil burden or should the burden be greater?
3. attempted compliance – should the testator have to attempt to comply with the formal requirements?

Those jurisdictions which have enacted or embraced a substantial compliance provision have not done so with unanimous resolution on these three questions. In addition, the Conference must consider the scope of the provision. Specifically, should substantial compliance extend to alteration and to revocation?

III. TWO APPROACHES TO SUBSTANTIAL COMPLIANCE

A. *GENERAL DISPENSING POWER*

The essence of this approach is that the court has a very broad dispensing power, but certain minimum requirements must be met before the court can find that there is substantial compliance with the formal requirements. Testamentary intention is always a minimum requirement. A signature may also be required. Some may argue that writing should be required as well.

The Manitoba *Wills Act*, S.M. 1982-83-84, c. 31, Cap. W150, section 23 reads as follows:

> "23 Where, upon application, if the court is satisfied that a document or any writing on a document embodies:
>
> (a) the testamentary intentions of a deceased; or
>
> (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;
>
> the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be."

It should be noted that only clause (a) relates to execution; clause (b) addresses the issues of alteration and revocation. The Manitoba provision does not require a signature, nor does it seem to require that the document be in writing. The threshold requirement is testamentary intention.

The courts in Manitoba have confirmed this interpretation. In *Re Pouliot*, (1984) 5 W.W.R. 765, 17 E.T.R. 225 the Manitoba Court of Queen's Bench held that the provision need not be restricted to remedying attempted compliance with the formalities. Hanssen, J. noted that the marginal note read "substantial compliance" but that the term itself did not appear in the legislation:

> "The exercise of the power of section 23 is not contingent upon substantial compliance with the formalities of *The Wills Act*. The threshold requirement is the expression of a testamentary intention in some form of document."

Again, in *Re Briggs*, 21 E.T.R. 127, (1986) 1 W.W.R. 719, the Manitoba Court of Queen's Bench held that a will signed at the beginning rather than at the end was saved by section 23 because it met the threshold requirement of displaying testamentary intention.

It will probably be argued by some that the Manitoba approach is too broad, that it encourages submission of letters, forms, contracts and other documents which arguably contain some sort of testamentary intention. Moreover, such a broad provision would unnecessarily breed litigation (so the argument goes), resulting in defeat of the purpose of a substantial compliance provision which should be designed primarily to reduce litigation over technical defects. A review of reported cases for the three year period that the provision has existed in Manitoba does not seem to bear out this criticism. As of this writing, only the two cases referred to have been reported.

It should be noted, as well, that Manitoba is not the only jurisdiction to favour the threshold approach. South Australia has a similar provision, which reads:

> "A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will."[1]

In Australia, an identical provision has now been adopted in the Northern Territory as well.[2] In addition, the Law Reform Commission of Western Australia has recommended adoption of the South Australian provision in its November, 1985 report on substantial compliance.[3] Schedule 1 contains examples of cases decided under the South Australian provision, to illustrate the scope of the provision and the jurisprudence that has arisen.

Critics argue that the Manitoba/South Australia approach encourages sloppiness. Others counter that the provision is remedial only, that it will not affect in any way the process by which wills will be executed, and that solicitors will still attempt to follow the formalities in order to try to ensure validity. The Law Reform Commission of Manitoba, in its 1980 report, for example, stated:

> "It will be used only at final stages to save a will which is defectively executed, revoked or altered. The doctrine is not

applicable at initial stages of execution. Reliance on it at that stage would mean subjecting an estate to needless litigation. A remedial provision should not discourage or in any way affect the use of formalities."[4]

B. *SUBSTANTIAL COMPLIANCE PROPER*

This approach requires that there be attempted compliance with the formalities. It is therefore restricted to correction of harmless errors by testators who have attempted to meet the formal requirements, but who have failed to do so. It would not, for example, remedy a situation where the testator fails to sign the will, nor likely one where he uses only one witness rather than two. This approach will undoubtedly be regarded by some as excessively narrow, but will nevertheless provide a means which does not now exist whereby the courts can overlook minor technical errors which would otherwise defeat the patent intention of a testator.

The "substantial compliance proper" approach was adopted in Queensland, following a 1978 report of the Queensland Law Reform Commission.[5] Section 9(a) of the *Queensland Succession Act*, 1981-84 states that:

> "[T]he Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator . . ."

Very few reported decisions have arisen under this provision, and in three out of four cases the application was dismissed. *Re Grosert*, [1985] 1 Qd. R. 513 indicates that contrast between the "general dispensing power" (the Manitoba/South Australia model) and the more restrictive "substantial compliance proper" (Queensland) approach. In *Re Grosert*, the testator did not sign or acknowledge his signature in the joint presence of the witnesses. Vasta, J. said:

> "In those circumstances there has been a lack of compliance with what I would regard as a most important provision of the section. It is difficult, therefore, to say in those circumstances, there has been substantial compliance with the formalities prescribed by the section. *It is true that there can be no doubt that the instrument expresses the testamentary intention of the testator, but the view I take is that unless there is substantial compliance, the satisfaction in the court of the testator's testamentary intention becomes irrelevant*." (emphasis added).

This restrictive approach adopted by the Queensland courts has been criticized by the Law Reform Commission of Western Australia as defeating the purposes of a substantial compliance provision, by "not admitting informal wills to probate in cases where no harm would be done in admitting them."[6]

The Tasmanian Law Reform Commission has recommended that a provision be enacted to empower the court:

> ". . . to declare an otherwise defectively executed will to be valid, if it can be shown that the defects are inconsequential and do not detract from the overall purposes of the *Wills Act* and that the testator had at least attempted to comply with those formalities."[7]

Although generally an endorsement of the substantial compliance proper approach, it is submitted that such a provision would unnecessarily invite debate (and perhaps, also, confusion) over what sorts of things "detract" from the purposes of the *Wills Act*.

The substantial compliance proper approach was preferred by the Legislature of Saskatchewan which gave First Reading to a Bill in 1986 providing as follows:

> "35.1 Where the execution of an instrument fails to meet the formalities as to execution of a will as prescribed by this Act but a court is satisfied that there has been substantial compliance with those formalities and that the maker of the instrument intended it to constitute his will, the court may admit the instrument to probate notwithstanding the deficiency."[8]

The Saskatchewan approach is restricted in two other respects: it applies only to execution (not to revocation and probably not to alteration) and it does not purport to extend beyond "instruments" which are required to be in writing.[9] The rationale for restricting the provision to execution is probably the fact that alteration and revocation were addressed by the Saskatchewan Legislature by other proposed amendments which substantially relaxed the formal requirements.

On balance, the Saskatchewan commissioners favour the Queensland/Saskatchewan approach to the more general dispensing power contained in the Manitoba and South Australia statutes.

*RECOMMENDATION***

It is recommended that the substantial compliance provision require testamentary intention, that there be an attempt to comply with the formal requirements and that it be restricted to written documents.

III. BURDEN OF PROOF

The South Australian provision adopts a different approach from that of the Manitoba statute on burden of proof. It would seem to require that the criminal burden of proof be met, rather than the ordinary civil burden.

The rationale for adopting the criminal burden of proof appears to be that the higher burden guards against the provision being used to attempt to probate unmeritorious documents. As stated by White, J. in *Estate of Blakely* (1983), 32 S.A.S.R. 473 at 479:

> "The brake against a flood of fraudulent or unmeritorious applications is the very high standard of proof required by s. 12(2)."

The Manitoba Law Reform Commission,[10] however, and the British Columbia Law Reform Commission[11] argued in favour of the civil burden of proof to maintain consistency with other areas of probate law. This approach was carried forward into the Manitoba statute which, as previously mentioned, has not led to a floodgate of unmeritorious claims, at least according to the reported cases.

RECOMMENDATION

The Saskatchewan commissioners recommend that the ordinary civil burden of proof should apply.

IV. SCOPE OF SUBSTANTIAL COMPLIANCE PROVISION

Regardless of which approach is followed (a general dispensing power or substantial compliance proper), it is necessary to consider the scope of the provision. Specifically, should substantial compliance extend to alterations and revocation?

The arguments in favour of substantial compliance apply with equal force to alteration. On the other hand, it could be argued that the formal requirements having been substantially relaxed already, further relaxation on the rules of alteration are not required and/or should not be permitted. On balance, however, it may seem paradoxical if, for example, a will could be probated without a signature and yet an

unsigned alteration to the same will would be invalid. Accordingly, the Saskatchewan commissioners recommend extension of the substantial compliance provision to alteration.

RECOMMENDATION

Substantial compliance should extend to alteration of a will.

The mandate of the 1985, 1986 and 1987 reports have not extended to issues relating to revocation. It is submitted, therefore, that it would be inappropriate to launch a discussion of revocation from the springboard of substantial compliance, and that should the Uniform Law Conference wish to consider changes relating to revocation, a report should be commissioned specifically on that issue. Therefore, with respect to revocation, the Saskatchewan commissioners make no specific recommendation.

SUMMARY OF RECOMMENDATIONS:

The substantial compliance provision to be adopted by the Uniform Law Conference should consist of the following components:

(a) It should require that testamentary intention be found to exist.

(b) It should apply only to written documents ("instruments").

(c) The ordinary civil burden of proof should apply.

(d) There should be a requirement that the testator attempt to comply with the formalities, and the words "substantial compliance" should specifically be used.

(e) It should extend to alteration as well as execution of wills.

** When the report was presented, the Saskatchewan Commissioners withdrew this recommendation because it appeared the Queensland approach was proving to be ineffective and instead the Saskatchewan Commissioners made recommendation that the Manitoba approach be adopted.

Schedule 1

The Supreme Court of South Australia has:

— refused probate to a document which was read by the "testator", who directed that some small changes be made but died before the document was retyped and brought back. The court said that the unexecuted document was not a will. (*Baumanis* v. *Praulin* (1980) 25 S.A.S.R. 423).

— admitted to probate a will where the testator and the witnesses did not all sign in the presence of each other. (*In the Estate of Kolodnicky, deceased* (1981) 26 S.A.S.R. 324).

— admitted to probate a will prepared at the instructions of the testator and read over to him, where the testator made some marks at the beginning of his signature but was unable to complete it and died shortly thereafter. (*In the estate of Radzisewski, deceased* (1982) 29 S.A.S.R. 256).

— admitted to probate a document which was signed in the presence of one witness with a second witness subsequently signing, and which included an even later alternation to the clause appointing an executor. (*In the Estate of Standley* (1982) 29 S.A.S.R. 490).

— admitted to probate an unwitnessed will signed by a soldier who followed the instructions on the will form which wrongly indicated that no witnesses were needed under the circumstances. (*In the estate of Crocker, deceased* (1982) 30 S.A.S.R. 321.)

— admitted to probate an unwitnessed will made on a printed will form. The principal beneficiary was the deceased's "de facto" wife. (*In the estate of Clayton, deceased* (1982) 31 S.A.S.R. 153.)

— admitted to probate a will first signed in the presence of one witness, who signed, and then signed in the presence of the second witness, who signed. (*In the estate of Dale, deceased, Dale* v. *Wills* (1982) 32 S.A.S.R. 215.)

— admitted to probate, as altered, a will with alterations initialled by the testator and giving effect to changes in circumstances occurring after the execution of his will. (*In the estate of Possingham, deceased* (1983) 32 S.A.S.R. 227.)

— admitted to probate a hand written document contained in a note book and prepared by a medical practitioner who was also a legal practitioner. The note book had been handed to an employee for the taking of notes. The document was signed and started with the words "My last will and testament", and the testator explained in the document that he had written it as he had considerable cardiac pain and irregularity. (*In the estate of Kelly, deceased; Duggan* v. *Hallion* (1983) 32 S.A.S.R. 413.)

Schedule 2

FOOTNOTES

1. (SA) Wills Act 1936-1980, s.12(2), inserted by Wills Amendment Act (No. 2) 1975, s.9.

2. (NT) Wills Act 1968-85, s.12(2), inserted by Wills Amendment Act, 1984, s.5.

3. *Report on Wills: Substantial Compliance*, Project No. 76, Part I, November 1985.

4. Manitoba Law Reform Commission, *Report on "The Wills Act" and Doctrine of Substantial Compliance*, (No. 43, 1980), p.20.

5. *Report on the Law Relating to Succession*, (No. 22, 1978).

6. Supra, note 3, p.45.

7. *Report on Reform in the Law of Wills*, (No. 35, 1983).

8. Bill 29 of 1986, *An Act to Amend the Wills Act*, section 8.

9. Mozley and Whitely's Law Dictionary, 9th Edition, defines "instrument" as "a deed, will, or other formal legal document in writing."

10. Supra, note 4.

11. *Report on the Making and Revocation of Wills*, (No. 52, 1981).

Schedule 3

TABLE OF CASES

1. *Baumanis* v. *Praulin* (1980) 25 S.A.S.R. 423
2. *In the Estate of Blakely* (1983) 32 S.A.S.R. 473
3. *Re Briggs* (1986) 21 E.T.R. 127, (1986) 1 W.W.R. 719 (Man. Q.B.)
4. *In the Estate of Clayton, deceased* (1982) 31 S.A.S.R. 153
5. *In the Estate of Crocker, deceased* (1982) 30 S.A.S.R. 321
6. *In the Estate of Dale, deceased, Dale* v. *Wills* (1982) 32 S.A.S.R. 215
7. *Re Grosert* (1985) 1 Qd. R. 513
8. *In the Estate of Kolodnicky, deceased* (1981) 27 S.A.S.R. 324
9. *In the Estate of Kelly, deceased, Duggan* v. *Hallion* (1983) 32 S.A.S.R. 413

10. *In the Estate of Possingham, deceased* (1983) 32 S.A.S.R. 227

11. *In the Estate of Radzisewski, deceased* (1982) 29 S.A.S.R. 256

12. *Re Pouliot*, (1984) 5 W.W.R. 765, 17 E.T.R. 225 (Man. Q.B.)

13. *In the Estate of Standley* (1982) 29 S.A.S.R. 490

Schedule 4

An Act to amend *The Uniform Wills Act*

1. The *Uniform Wills Act* is amended in the manner set forth in this Act.

2. The following is added after section 19:

Substantial compliance

"19.1 Notwithstanding a Lack of compliance with all the formal requirements as to execution that are imposed by this Act, a [court] that is satisfied that

(a) a document intended by a deceased to constitute a will embodies the testamentary intentions of the deceased, or

(b) a document or writing on a document embodies the intention of a deceased to revoke, alter or revive a will of the deceased or a document described in clause (a),

may order that the document or writing is fully effective, as though it had been executed in compliance with all the formal requirements imposed by this Act, as the will of the deceased or as the revocation, alteration or revival of a will of the deceased or of a document described in clause (a)."

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.
Change of Name Act	1987	
Child Status Act	1980	Rev. '82.
Condominium Insurance Act	1971	Am. '73.
Conflict of Laws Rules for Trusts Act	1987	
Conflict of Laws (Traffic Accidents) Act	1970	
Contributory Fault Act	1984	
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; Rev. '81.
— 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	
Family Support Act	1980	Am. '86.
Fatal Accidents Act	1964	
Foreign Arbitral Awards Act	1985	
Foreign Judgments Act	1933	Rev. '64.
Franchises Act	1984	Rev. '85.
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	
International Child Abduction Act	1981	
International Commercial Arbitration Act	1986	
International Sale of Goods Act	1985	
International Trusts Act	1987	
Interpretation Act	1938	Am. '39; Rev. '41; Am. '48; Rev. '53, '73; Rev. '84.

Title	Year First Adopted and Recommended	Subsequent Amendments and Revisions
Interprovincial Subpoenas Act	1974	
Intestate Succession Act	1925	Am. '26, '50, '55; Rev. '58; Am. '63; Rev. '85.
Judgment Interest Act	1982	
Jurors' Qualifications Act	1976	
Legitimacy Act	1920	Rev. '59.
Limitation of Actions Act	1931	Am. '33, '43, '44.
Limitations Act	1982	
— Convention on the Limitation Period in the International Sale of Goods	1976	
Maintenance and Custody Enforcement Act	1985	
Married Women's Property Act	1943	
Medical Consent of Minors Act	1975	
Mental Health Act	1987	
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	
Products Liability Act	1984	
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; Rev. '85.
Reciprocal Recognition and Enforcement of Judgments Act	1981	
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	
Trade Secrets Act	1987	
Transboundary Pollution Reciprocal Access Act	1982	
Trustee (Investments)	1957	Am. '70.
Variation of Trusts Act	1961	
Vital Statistics Act	1949	Am. '50, '60, Rev. '86.
Warehousemen's Lien Act	1921	
Warehouse Receipts Act	1945	
Wills Act		
— General	1953	Am. '66, '74, '82, '86.
— Conflict of Laws	1966	
— International Wills	1974	
— Section 17 revised	1978	
— Substantial Compliance	1987	

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 Beneficiaries	1957	8	1975	Retirement Plan Beneficiaries Act
— Perpetuities	1954	8	1975	In part by Retirement Plan Beneficiaries Act and in part by Perpetuities Act Dependants' Relief Act
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.ˣ *sub nom.* Property Act; Ont. ('66). Total: 2.

Assignment of Book Debts Act—Enacted by Man. ('29, '51, '57). Total: 1.

Bills of Sale Act—Enacted by Alta.† ('29); Man. ('29, '57); N.B.° ('52); Nfld.° ('55); N.W.T.° ('48); N.S. ('30); P.E.I.* ('47, '82). Total: 7.

Bulk Sales Act—Enacted by Alta.† ('22); Man. ('51); N.B.† ('27); Nfld.° ('55); N.W.T.† ('48); N.S.ˣ; Yukon ('56). Total: 7.

Child Abduction (Hague Convention) Act—Enacted by B.C. ('82); Man. ('82); N.B.ˣ ('82); Nfld. ('83); N.S. ('82); P.E.I.° ('84) *sub nom.* Custody Jurisdiction and Enforcement Act; Yukon ('81). Total: 7.

Child Status Act—Enacted by N.B. ('80) sub nom. Family Services Act; P.E.I. ('87). Total: 2.

Condominium Insurance Act—Enacted by B.C. ('74) *sub nom.* Strata Titles Act; Man. ('76); Yukon ('81). Total: 3.

Conflict of Laws (Traffic Accidents) Act—Enacted by Yukon ('72). Total: 1.

Contributory Negligence Act—Enacted by Alta.† ('37); N.B.° ('25, '62); Nfld.° ('51); N.W.T.° ('50); N.S. ('26, '54); P.E.I.ˣ ('78); Sask. ('44); Yukon° ('55). Total: 8.

Criminal Injuries Compensation Act—Enacted by Alta.† ('69); B.C. ('72); N.B.ˣ ('71); Nfld.ˣ ('68); N.W.T. ('73); Ont. ('71); Yukon° ('72, '81). Total: 7.

Custody Jurisdiction and Enforcement Act—Enacted by Man. ('83); N.B.ˣ ('80); Nfld.° ('83); P.E.I.° ('84). Total: 4.

Defamation Act—Enacted by Alta.† ('47); B.C.* *sub nom.* Libel and Slander Act; Man. ('46); N.B.* ('52); Nfld.° ('83); N.W.T.° ('49); N.S.* ('60); P.E.I.° ('48); Yukon ('54, '81). Total: 9.

Dependants' Relief Act—Enacted by N.B.ˣ ('59); N.W.T.* ('74); Ont. ('73) *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: 5.

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—Enacted by N.B.ˣ ('80); N.W.T. ('69); P.E.I.ˣ. Total: 3.

Evidence Act—Enacted by Alta. ('47, '52, '58); B.C. ('32, '45, '47, '53, '77); Can. ('42, '43); Man.* ('57, '60); Nfld. ('54); N.W.T.° ('48); N.S. ('45, '46, '52); P.E.I.* ('39); Ont.* ('45, '46, '52, '54); Sask. ('45, '46, '47); Yukon° ('55). Total: 11.

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); Sask.° ('77). Total: 8.

Family Support Act—Enacted by Yukonˣ ('81). Total: 1.

Fatal Accidents Act—Enacted by N.B.* ('69); N.W.T.† ('48); Ont. ('77); *sub nom.* Family Law Reform Act: Part V; P.E.I.ˣ. Total: 4.

Foreign Judgments Act—Enacted by N.B.° ('50); Sask. ('34). Total: 2.

Frustrated Contracts Act—Enacted by Alta.† ('49); B.C. ('74); N.B. ('49); Nfld. ('56); N.W.T.† ('56); Ont. ('49); Yukon ('81). Total: 7.

Highway Traffic and Vehicles Act, Part III: Responsibility of Owner and Driver for Accidents—0.

Hotelkeepers Act—Enacted by N.B.ˣ. Total: 1.

Human Tissue Gift Act—Enacted by Alta. ('73); B.C. ('72); N.B.ˣ; Nfld.° ('71); N.W.T. ('66); N.S. ('73); Ont. ('71); P.E.I.° ('74, '81); Sask.° ('68); Yukon ('81). Total: 10.

International Commercial Arbitration Act—Enacted by B.C.° ('86); Can. ('86); N.B. ('86); Nfld. ('86); N.W.T. ('86); N.S. ('86); Ont. ('86); P.E.I. ('86); Sask. ('86); Yukon ('86). Total: 10.

Interpretation Act—Enacted by Alta.° ('80); B.C. ('74); N.B.ˣ; 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.° ('79); N.W.T.° ('76); Ont. ('79); P.E.I. ('87); Sask.° ('77); Yukon ('81). Total: 10.

Intestate Succession Act—Enacted by Alta. ('28); B.C. ('25); Man.° ('27, '77) *sub nom.* Devolution of Estates Act; N.B.° ('26); Nfld. ('51); N.W.T.° ('48); Ont.° ('77) *sub nom.* Succession Law Reform Act: Part II; P.E.I.* ('39) *sub nom.* Probate Act: Part IV; Sask. ('28); Yukon° ('54). Total: 10.

Judgment Interest Act—Enacted by N.B.ˣ; Nfld. ('83). Total: 2.

Jurors Act (Qualifications and Exemptions)—Enacted by B.C. ('77); *sub nom.* Jury Act; Man. ('77); N.B.[x]; Nfld. ('81); P.E.I.[o] ('81). Total: 5.

Legitimacy Act—Enacted by Alta. ('28, '60); B.C. ('22, '60); Man. ('28, '62); N.W.T.[o] ('49, '64); N.S.[x]; Ont. ('21, '62); P.E.I.* ('20) *sub nom.* Children's Act: Part I; Sask.[o] ('20, '61); Yukon* ('54). Total: 9.

Limitation of Actions Act—Enacted by Alta.[o] ('35); Man.[o] ('32, '46); N.B.* ('52); N.W.T.* ('48); P.E.I.* ('39); Sask. ('32); Yukon ('54). Total: 7.

Married Women's Property Act—Enacted by Man. ('45); N.B.[o] ('51); N.W.T. ('52, '77); Yukon[o] ('54). Total: 4.

Medical Consent of Minors Act—Enacted by N.B.[o] ('76). Total: 1.

Occupiers' Liability Act—Enacted by B.C. ('74); P.E.I.[o] ('84). Total: 2.

Partnerships Registration Act—Enacted by N.B.[o] ('51); P.E.I.[x]; Sask.[x] ('41) *sub nom.* Business Names Registration Act. Total: 3.

Pensions Trusts and Plans—Appointment of Beneficiaries—Enacted by Alta. ('58); Man. ('59); N.B. ('55); Nfld. ('58); N.S. ('60); Sask. ('57). Total: 6.

Perpetuities Act—Enacted by Alta. ('72); B.C. ('75); Man. ('59); Nfld. ('55); N.W.T.* ('68); N.S. ('59); Ont. ('66); Yukon ('81). Total: 8.

Personal Property Security Act—Enacted by Man. ('77); Sask.[o] ('79); Yukon[o] ('81). Total: 3.

Powers of Attorney Act—Enacted by B.C. ('79); Sask.[o] ('83). Total: 2.

Presumption of Death Act—Enacted by B.C. ('58, '77) *sub nom.* Survivorship and Presumption of Death Act; Man. ('68); N.B.[x] ('60); N.W.T. ('62, '77); N.S.[o] ('83); Yukon ('81). Total: 6.

Proceedings Against the Crown Act—Enacted by Alta.[o] ('59); Man. ('51); N.B.[o] ('52); Nfld.[o] ('73); N.S. ('51); Ont.[o] ('63); P.E.I.* ('73); Sask.[o] ('52). Total: 8.

Reciprocal Enforcement of Judgments Act—Enacted by Alta. ('25, '58); B.C. ('25, '59); Man. ('50, '61); N.B.[x] ('25, '51); Nfld.[o] ('60); N.W.T.* ('55); N.S.[o] ('73); Ont. ('29); P.E.I.[o] ('74); Sask. ('40); Yukon ('56, '81). Total: 11.

Reciprocal Enforcement of Maintenance Orders Act—Enacted by Alta. ('47, '58); B.C.[o] ('72); Man. ('46, '61, '83); N.B.† ('52); Nfld.[x] ('51, '61); N.W.T.[o] ('51); N.S.* ('49, '83); Ont.[o] ('59); P.E.I.[o] ('51, '83); Que. ('52); Sask. ('68, '81, '83); Yukon ('81). Total: 12.

Regulations Act—Enacted by Alta.[o] ('57); B.C. ('83); Can.[o] ('50); Man.[o] ('45); N.B.[o] ('62); Nfld.[o] ('77); N.W.T.[o] ('73); Ont.[o] ('44); Sask.[o] ('63, '82); Yukon[o] ('68). Total: 10.

Retirement Plan Beneficiaries Act—Enacted by Alta. ('77, '81); Man. ('76); N.B.° ('82); Ont. ('77) *sub nom.* Law Succession Reform Act: Part V; P.E.I.ˣ; Yukon ('81). Total: 6.

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); N.B.° ('73); P.E.I.ˣ. Total: 3.

Survival of Actions Act—Enacted by Alta.° ('79); B.C.* *sub nom.* Estate Administration Act; N.B.* ('69); P.E.I.° ('78); Yukon ('81). Total: 5.

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); Sask. ('42, '62); Yukon ('81). Total: 10.

Testamentary Additions to Trusts Act—Enacted by Yukon ('69) *sub nom.* Wills Act,s 29. Total: 1.

Testators Family Maintenance Act—Enacted by 6 jurisdictions before it was superseded by the Dependants Relief Act.

Transboundary Pollution Reciprocal Access Act—Enacted by Colorado ('84); Man. ('85); Montana ('84); New Jersey ('84); P.E.I. ('85). Total: 5.

Trustee Investments Act—Enacted by B.C. ('59); Man.° ('65); N.B. ('71); N.W.T. ('71); 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.ˣ ('79); N.W.T.° ('52); N.S.° ('52); Ont. ('48); P.E.I.* ('50); Sask. ('50); Yukon° ('54). Total: 10.

Warehousemen's Lien Act—Enacted by Alta. ('22); B.C. ('52); Man. ('23); N.B.ˣ ('23); Nfld. ('63); N.W.T.° ('48); N.S. ('51); Ont. ('24); P.E.I.° ('38); Sask. ('21); Yukon ('54). Total: 11.

Warehouse Receipts Act—Enacted by Alta. ('49); B.C.* ('45); Man.° ('46); N.B.° ('47); Nfld. ('63); N.S. ('51); Ont.° ('46). Total: 7.

Wills Act—Enacted by Alta.° ('60); B.C.° ('60); Man.° ('64); N.B.° ('59); Nfld. ('76); N.W.T.° ('52); Sask. ('31); Yukon° ('54). Total: 8.

—Conflict of Laws—Enacted by B.C. ('60); Man. ('55); Nfld. ('76); N.W.T. ('52); Ont. ('54). Total: 5.

—(Part 4) International—Enacted by Alta. ('76); Nfld. ('76). Total: 2.

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
ˣindicates 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° ('80); 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); 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 Officers: 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); International Commercial Arbitration Act° ('86); 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*; 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: 35.

Canada

Evidence—Foreign Affidavits ('43), Photographic Records ('42); International Commercial Arbitration Act ('86); Regulations Act° ('50), superseded by the Statutory Instruments Act, S.C. 1971, c. 38. Total: 4.

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*; Survivorship Act ('42, '62); Transboundary Pollution Reciprocal Access Act ('85); 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: 34.

New Brunswick

Accumulations Act[x] *sub nom.* Property Act; Bills of Sales Act[o] ('52); Bulk Sales Act† ('27); Canada U.K. Convention on the Recognition and Enforcement of Judgments[o] ('82); Child Status[x] ('80) *sub nom.* Family Services Act; Contributory Negligence Act ('25)[o] ('62); Criminal Injuries Compensation Act[x] ('71); Custody Jurisdiction and Enforcement Act[x] ('80) *sub nom.* Family Services Act; Defamation Act* ('52); Dependants Relief Act[x] ('59); Devolution of Real Property Act[o] ('34) *sub nom.* Devolution of Estates Act; Effect of Adoption Act[x] ('80) *sub nom.* Family Services Act; Fatal Accidents Act* ('69); Family Support Act[x] ('80) *sub nom.* Family Services Act; Foreign Judgments Act[o] ('50); Highway Traffic Act[x]; Hotelkeepers Act[x] *sub nom.* Innkeepers Act; Human Tissue Gift Act[x] *sub nom.* Human Tissue Act; International Commercial Arbitration Act ('86); Interpretation Act[x]; Interprovincial Subpoenas Act[o] ('79); Intestate Succession Act[o] ('26) *sub nom.* Devolution of Estates; Judgment Interest[x] *sub nom.* Judicature Act, see also Rules of Court; Jurors Qualification Act[x] *sub nom.* Jury Act; Limitations of Actions* ('52); Married Women's Property Act[o] ('51); Medical Consent of Minors[o] ('76); Partnership Registration Act[o] ('51); Presumption of Death Act[x] ('60); Proceedings Against the Crown[o]('52); Reciprocal Enforcement of Judgments ('25),[x] ('51); Reciprocal Enforcement of Maintenance Orders† ('52); Reciprocal Recognition and Enforcement of Judgments[o] ('84); Regulations Act[o] ('62); Retirement Plan Beneficiaries[o] ('82); Sale of Goods[x]; Statutes Act[o] ('73) *sub nom.* Interpretation Act; Survival of Actions Act* ('69); Survivorship Act† ('40); Trustees (Investments) ('71); Vital Statistics[x] ('79); Warehousemen's Lien Act[x] ('23); Warehouse Receipts[o] ('47); Wills Act[o] ('59). Total: 38.

Newfoundland

Bills of Sale Act[o] ('55); Bulk Sales Act[o] ('55); Contributory Negligence Act[o] ('51); Criminal Injuries Compensation Act[x] ('68); Custody Jurisdiction and Enforcement Act[o] ('83); Defamation Act ('83); Evidence – Affidavits before Officers ('54); Extra-Provincial Custody Orders Enforcement Act[o] ('76); Foreign Affidavits ('54) *sub nom.* Evidence Act; Frustrated Contracts Act ('56); Human Tissue Gift Act[o] ('71); International Child Abduction Act ('83); International Commercial Arbitration Act ('86); International Wills ('76) *sub nom.* Wills Act; Interpretation Act[o] ('51); Interprovincial Subpoena Act[o] ('76); Intestate Succession Act ('51); Judgment Interest Act[o] ('83); Jurors Act (Qualifications and Exemptions) ('81) *sub nom.* Jury Act; Legitimacy Act[ox]; Pension

Trusts and Plans–Appointment of Beneficiaries ('58) *sub nom.* Pension Plans (Designation of Beneficiaries) Act; Perpetuities Act ('55); Photographic Records ('49) *sub nom.* Evidence Act; Proceedings Against the Crown Act° ('73); Reciprocal Enforcement of Judgments Act° ('60); Reciprocal Enforcement of Maintenance Orders Act× ('51, '61) *sub nom.* Maintenance Orders (Enforcement) Act; Regulations Act° ('77) *sub nom.* Statutes and Subordinate Legislation Act; Survivorship Act ('51); Warehousemen's Lien Act ('63); Warehouse Receipts Act ('63); Wills-Conflict of Laws Act ('76) *sub nom.* Wills Act. Total: 31.

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); International Commercial Arbitration Act ('86); 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: 33.

Nova Scotia

Bills of Sale Act ('30); Bulk Sales Act×; 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); International Commercial Arbitration Act ('86); Legitimacy Act×; 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); Trustee Investments* ('57); Variation of Trusts Act ('62); Vital Statistics Act° ('52); Warehousemen's Lien Act ('51); Warehouse Receipts Act ('51). Total: 21.

Ontario

Accumulations Act ('66); Criminal Injuries Compensation Act ('71) *sub nom.* Compensation for Victims of Crime Act° ('71); Dependants' Relief Act ('73) *sub nom.* Succession Law Reform Act: Part V; Evidence Act* ('60)—Affidavits before Officers ('54), Foreign Affidavits ('52, '54), Photographic Records ('45), *Russell v. Russell* ('46); 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); International Commercial Arbitration Act ('86); Interprovincial Subpoenas Act ('79); Intestate Succession Act° ('77) *sub nom.* Succession Law Reform Act: Part II; Legitimacy Act ('21, '62), rep. '77; 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: 29.

Prince Edward Island

Bills of Sale Act*('47, '82); Child Abduction (Hague Convention) *sub nom.* Custody Jurisdiction and Enforcement Act° ('84); Child Status Act ('87); Contributory Negligence Act^x ('78); 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); Fatal Accidents Act^x; Human Tissue Gift Act° ('74, '81); International Commercial Arbitration Act ('86); Interpretation Act° ('81); Interprovincial Subpoenas Act; Intestate Succession Act *sub nom.* Part IV Probate Act* ('39); Jurors Act (Qualifications and Exemptions)° ('81); Legitimacy Act* ('20) *sub nom.* Part I of Children's Act; Limitation of Actions Act* ('39); Occupiers' Liability Act° ('84); 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; Transboundary Pollution (Reciprocal Access) Act ('85); Variation of Trusts Act ('63); Vital Statistics Act* ('50); Warehousemen's Lien Act° ('38). Total: 22.

Quebec

The following is a list of 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 sur l'indemnisation des victimes d'actes criminels, L.R.Q. (1977) ch. I-6 - quite similar; Evidence Act; Affirmation in lieu of oath: see a. 299 C.P.C. - similar; Judicial Notice of Acts, Proof of State Documents: see a. 1207 C.C. similar to «Proof of State Documents»; Human Tissue Gift Act: see a. 20, 21, 22 C.C. - similar: Interpretation Act: see Loi d'interprétation L.R.Q. (1977) ch. I-16 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 sur les déclarations des compagnies et sociétés, L.R.Q. (1977) ch. D-1 - similar; Presumption of Death Act: see a. 70, 71 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. 981a et.sq. C.C. - very similar; Warehouse Receipts Act: see Loi sur les connaissements L.R.Q. (1977) ch. C-53 - 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. ofs. 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

Contributory Negligence Act ('44); Devolution of Real Property Act ('28); Evidence—Foreign Affidavits ('47), Photographic Records ('45), *Russell v. Russell* ('46); Extrajudicial Custody Order Act° ('77); Foreign Judgments Act ('34); Human Tissue Gift Act° ('68); International Commercial Arbitration Act ('86); Interpretation Act° ('43); Interprovincial Subpoenas Act° ('77); Intestate Succession Act ('28); Legitimacy Act° ('20, '61); Limitation of Actions Act ('32); Partnership Registration Act[x] ('41) *sub nom.* Business Names Registration Act; Pension Trusts and Plans—Perpetuities ('57); Personal Property Security Act° ('79); Powers of Attorney Act° ('83); Proceedings Against the Crown Act° ('52); Reciprocal Enforcement of Judgments Act ('40); Reciprocal Enforcement of Maintenance Orders Act ('68, '81, '83); Regulations Act° ('63, '82);

Service of Process by Mail Act[x]; Survivorship Act ('42, '62); 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[o] ('55); Criminal Injuries Compensation Act[o] ('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[o] ('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); International Commercial Arbitration Act ('86); Interpretation Act* ('54); Interprovincial Subpoena Act ('81); Intestate Succession Act[o] ('54); Legitimacy Act* ('54); Limitation of Actions Act ('54); Married Women's Property Act[o] ('54); Perpetuities Act[o] ('81); Personal Property Security Act[o] ('81); Presumption of Death Act ('81); Reciprocal Enforcement of Judgments Act ('56, '81); Reciprocal Enforcement of Maintenance Orders Act ('81); Regulations Act[o] ('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[o] ('54); Warehousemen's Lien Act ('54); Wills Act[o] ('54). Total: 38.

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

UNIFORM LAW SECTION

PART IV

CRIMINAL LAW SECTION

Subjects considered each year are listed in the minutes of the year and published in the Proceedings of that year.

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