UNIFORM LAW
CONFERENCE OF CANADA

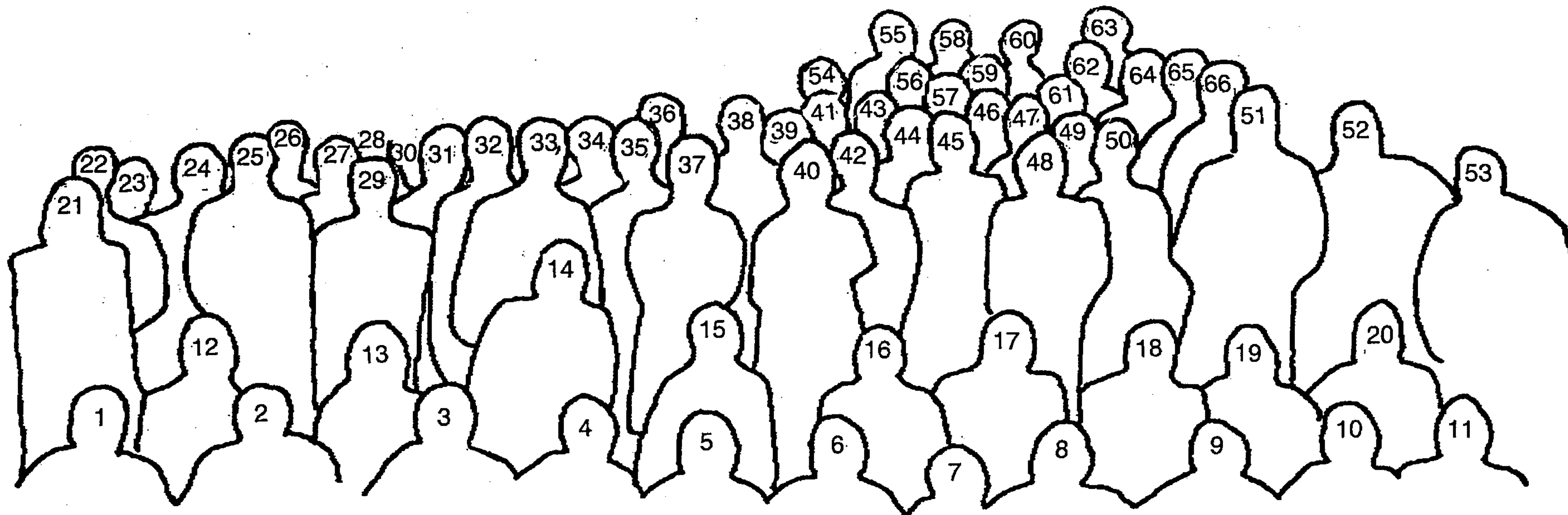
CONFERENCE SUR
L'UNIFORMISATION
DES LOIS AU CANADA

PROCEEDINGS
OF THE
SEVENTY-FIRST ANNUAL MEETING

HELD AT

YELLOWKNIFE, NORTHWEST TERRITORIES

August, 1989



1. Bobiasz, Can.
2. Wakefield, Can.
3. Hubley, PEI
4. Gorman, Nfld.
5. Greaves, Alta.
6. McCrank, Alta.
7. Bentivegna, NWT
8. Trahan, Can.
9. McCarroll, N.B.
10. Sanders, NWT
11. Bickert, NWT
12. Cochrane, Ont.
13. Dier, Ont.
14. Bugge, USA
15. Préfontaine, Can.
16. Ritchie, Ont.
17. MacFarlane, Can.
18. Gates, NWT
19. Casey, Ont.
20. Zigayer, Can.
21. Strutt, Man.
22. Thornton, Sask.
23. Lown, Alta.
24. Regel, NWT
25. Edwards, Man.
26. Hodges, Sask.
27. Mosley, Can.
28. Not identified
29. Fried, N.S.
30. Pringle, Alta.
31. Horn, Yukon
32. Giokas, Can.
33. Curran, Nfld.
34. Hunter, Alta.
35. Schnoor, Man.
36. Gregory, Ont.
37. Amrud, Sask.
38. Langille, PEI
39. Tollefson, Can.
40. Fuller, Ont
41. Dionne, Que.
42. Callas, Alta.
43. Fox, Sask.
44. Bellemare, Can.
45. Doleman, N.B.
46. Stapleton, N.B.
47. Jackson, Sask.
48. Dawson, Man.
49. Morency, Que.
50. Gervais, Que.
51. Levert, Can.
52. Fordham, N.S.
53. Weinstein, Man.
54. Gregoire, Que.
55. Mulligan, B.C.
56. Not identified
57. Moen, Sask.
58. Fruchtman, Ont.
59. Perozzo, Man.
60. Getz, B.C.
61. Watt, B.C.
62. Morton, Ont.
63. Yacowar, B.C.
64. Frenette, Que.
65. Cossette, Que.
66. Johnson, N.S.

Absent: *Alta.* Hurlburt, Pagano; *B.C.* Close, Peck; *Can.* Archambault, Davidson, Dawson, Desjardins, du Plessis, Gates, Johnson, Létourneau, Piragoff, Pollack, Rivard, Tait, Tremblay; *Man.* Nantel, Perry, Whitley; *N.B.* Lalonde, Miller; *Nfld.* Green, Noel; *N.W.T.* Aitken, Armstrong, Drysdale, Ginn, La Flamme, Robichaud, Sitken; *Ont.* Baldwin, Greenspan, Mifsud, Revell, Schuh, Stone, Tucker, Wood; *P.E.I.* Moore; *Que.* Allaire, Bouchard, Monty; *Sask.* Brown, Gunn, Snell.

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PAST PRESIDENTS

SIR JAMES AIKINS, K.C., Winnipeg (five terms)	1918-1923
MARINER G. TEED, K.C., Saint John	1923-1924
ISAAC PITBLADO, K.C., Winnipeg (five terms)	1925-1930
JOHN D. FALCONBRIDGE, K.C., Toronto (four terms)	1930-1934
DOUGLAS J. THOM, K.C., Regina (two terms)	1935-1937
I. A., HUMPHRIES, K.C., Toronto	1937-1938
R. MURRAY FISHER, K.C., Winnipeg (three terms)	1938-1941
F. H. BARLOW, K.C., Toronto (two terms)	1941-1943
PETER J. HUGHES, K.C., Fredericton	1943-1944
W. P. FILLMORE, K.C., Winnipeg (two terms)	1944-1946
W. P. J. O'MEARA, K.C., Ottawa (two terms)	1946-1948
J. PITCAIRN HOGG, K.C., Victoria	1948-1949
HON. ANTOINE RIVARD, K.C., Quebec	1949-1950
HORACE A. PORTER, K.C., Saint John	1950-1951
C. R. MAGONE, Q.C., Toronto	1951-1952
G. S. RUTHERFORD, Q.C., Winnipeg	1952-1953
LACHLAN MACTAVISH, Q.C., Toronto (two terms)	1953-1955
H. J. WILSON, Q.C., Edmonton (two terms)	1955-1957
HORACE E. READ, O.B.E., Q.C., LL.D., Halifax	1957-1958
E. C. LESLIE, Q.C., Regina	1958-1959
G. R. FOURNIER, Q.C., Quebec	1959-1960
J. A. Y. MACDONALD, Q.C., Halifax	1960-1961
J. F. H. TEED, Q.C., Saint John	1961-1962
E. A. DRIEDGER, Q.C., Ottawa	1962-1963
O. M. M. KAY, C.B.E., Q.C., Winnipeg	1963-1964
W. F. BOWKER, Q.C., LL.D., Edmonton	1964-1965
H. P. CARTER, Q.C., St. John's	1965-1966
GILBERT D. KENNEDY, Q.C., S.J.D., Victoria	1966-1967
M. M. HOYT, Q.C., B.C.L., Fredericton	1967-1968
R. S. MELDRUM, Q.C., Regina	1968-1969
EMILE COLAS, K.M., C.R., LL.D., Montreal	1969-1970
P. R. BRISSENDEN, Q.C., Vancouver	1970-1971
A. R. DICK, Q.C., Toronto	1971-1972
R. H. TALLIN, Winnipeg	1972-1973
D. S. THORSON, Q.C., Ottawa	1973-1974
ROBERT NORMAND, Q.C., Quebec	1974-1975
GLEN ACORN, Q.C., Edmonton	1975-1976
WENDALL MACKAY, Charlottetown	1976-1977
H. ALLAN LEAL, Q.C., LL.D., Toronto	1977-1978
ROBERT G. SMETHURST, Q.C., Winnipeg	1978-1979
GORDON F. COLES, Q.C., Halifax	1979-1980
PADRAIG O'DONOGHUE, Q.C., Whitehorse	1980-1981
GEORGE B. MACAULAY, Q.C., Victoria	1981-1982
ARTHUR N. STONE, Q.C., Toronto	1982-1983
SERGE KUJAWA, Q.C., Regina	1983-1984

PAST PRESIDENTS

GÉRARD BERTRAND, c.r., Ottawa 1984-1985
GRAHAM D. WALKER, Q.C., Halifax 1985-1987
M. REMI BOUCHARD, Sainte-Foy 1987-1988
GEORGINA R. JACKSON, Regina 1988-1989

OFFICERS:1989-90

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British Columbia	Clifford S. Watt
Canada	Serge Lortie
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New Brunswick	Basil D. Stapleton, Q.C.
Newfoundland	A. John Noel
Northwest Territories	Miles Pepper, Q.C.
Nova Scotia	Graham D. Walker, Q.C.
Ontario	Donald L. Revell
Prince Edward Island	M. Raymond Moore
Quebec	Marie-José Longtin
Saskatchewan	Douglas E. Moen
Yukon Territory	Sydney B. Horton

(For addresses of the above, see List of Delegates, page 5.)

EXECUTIVE SECRETARY

Melbourne M. Hoyt, Q.C.
Centennial Building
670 King St.
P.O. Box 6000
Fredericton, N.B. E3B 5H1
(506) 458-1247

DELEGATES

1988 Annual Meeting

The following persons (109) attended one or more of the Seventy-first Meeting of the Conference

Legend

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

Alberta:

ELAINE CALLAS, Legislative Counsel, Legislative Counsel Office, Department of the Attorney General, 2nd Floor, Bowker Building, 9833-109th Street, Edmonton T5K 2E8 [403-427-2217] *(U.L.S.)*

DARWIN J. GREAVES, Chief Crown Prosecutor, Department of the Attorney General, Medicine Hat T1A 0K8 [403-529-3672] *(C.L.S.)*

ALAN D. HUNTER, Q.C., Code Hunter, Barristers and Solicitors, 1900, 736-6th Avenue, S.W., Calgary T2P 3W1 [403-298-1000] *(U.L.S.)*

W. H. HURLBURT, Q.C., Director Emeritus, Alberta Law Reform Institute, 402 Law Centre, The University of Alberta, 89th Avenue and 114th Street, Edmonton T6G 2H5 [403-492-5291] *(U.L.S.)*

PROFESSOR P. J. M. LOWN, Director, Alberta Law Reform Institute, 402 Law Centre, The University of Alberta, 89th Avenue and 114th Street, Edmonton T6G 2H5 [403-492-5291] *(U.L.S.)*

NEIL MCCRANK, Assistant Deputy Minister (Criminal Justice), Department of the Attorney General, 2nd Floor, Bowker Building, 9833-109th Street, Edmonton T5K 2E8 [403-427-5046] *(C.L.S.)*

PETER PAGANO, Chief Legislative Counsel, Legislative Counsel Office, Department of the Attorney General, 2nd Floor, Bowker Building, 9833-109th Street, Edmonton T5K 2E8 [403-427-2217] *(L.D.S. & U.L.S.)*

ALEX PRINGLE, Pringle and Associates, Suite 200, 10237-104th Street, Edmonton T5J 4A1 [403-424-8866] *(C.L.S.)*

British Columbia:

ARTHUR CLOSE, Chairman, Law Reform Commission of British Columbia, 601-865 Hornby Street, Vancouver V6Z 2H4 [604-660-2366] *(U.L.S.)*

RUSSELL GETZ, Policy Analyst, Ministry of Attorney General, 5th Floor, 910 Government Street, Victoria V8V 1X4 [604-387-4574] *(U.L.S.)*

ROBERT A. MULLIGAN, Counsel, Criminal Justice Branch, Ministry of Attorney General, 3rd Floor, 910 Government Street, Victoria V8V 1X4 [604-387-3840] *(C.L.S.)*

RICHARD C. PECK, Q.C., Barrister & Solicitor, 1811-808 Nelson Street, Vancouver V6Z 2H2 [604-669-1277] *(C.L.S.)*

CLIFFORD S. WATT, Chief Legislative Counsel, 609 Broughton Street, Victoria V8V 1X4 [604-356-8800] *(U.L.S.)*

HAL YACOWAR, Director, Policy and Support Services, Criminal Justice Branch, Ministry of Attorney General, 3rd Floor, 910 Government Street, Victoria V8V 1X4 [604-387-5176] *(C.L.S.)*

Canada:

ROBERT ARCHAMBAULT, Acting General Legislative Counsel, House of Commons, 151 Sparks Street-Room 610, Ottawa K1A 0A6 [613-992-1511] *(L.D.S.)*

DANIEL BELLEMARE, Acting Senior General Counsel, Ministry of the Solicitor General Legal Services, 340 Laurier Avenue West - 13th Floor, Ottawa K1A 0P8 [613-991-2883] *(C.L.S.)*

FRED BOBIASZ, Policy Advisor, Enforcement Powers and Legislation, Policy and Security Branch, Ministry of the Solicitor General, 340 Laurier Avenue West - 8th Floor, Ottawa K1A 0P8 [613-991-3311] *(C.L.S.)*

DIANE DAVIDSON, Acting General Legal Counsel, Office of the Law Clerk and Parliamentary Counsel, House of Commons, 151 Sparks Street - Room 610, Ottawa K1A 0A6 [613-992-1511] *(L.D.S.)*

MARY DAWSON, Associate Deputy Minister - Public Law, Department of Justice of Canada, 239 Wellington Street - Room 650, Ottawa K1A 0H8 [613-957-4898] *(U.L.S.)*

JACQUES DESJARDINS, Senior Counsel, Privy Counsel Office Legal Services, Department of Justice of Canada, West Memorial Building - Room 2114, 344 Wellington Street, Ottawa K1A 0H8 [613-957-0087] *(L.D.S.)*

RAYMOND DU PLESSIS, Law Clerk and Parliamentary Counsel, The Senate, 140 Wellington Street - Room 907, Ottawa K1A 0A4 [613-992-2416] *(L.D.S.)*

DAVID GATES, General Counsel, Yellowknife Regional Office, Department of Justice of Canada, Precambrian Building - 11th Floor, Yellowknife X1A 2N1 [403-920-8564] *(C.L.S.)*

JOHN GIOKAS, Director of Legislation and Law Reform, Canadian Bar Association, 50 O'Connor Street - Suite 902, Ottawa K1P 6L2 [613-237-2925] *(U.L.S.)*

PETER JOHNSON, Chief Legislative Counsel, Department of Justice of Canada, West Memorial Building - Room 2040, 344 Wellington Street, Ottawa K1A 0H8 [613-957-0013] *(L.D.S.)*

GILLES LÉTOURNEAU, Vice-President, Law Reform Commission of Canada, 130 Albert Street, Ottawa K1A 0L6 [613-996-2284] *(C.L.S.)*

LIONEL LEVERT, Deputy Chief Legislative Counsel, Department of Justice of Canada, West Memorial Building - Room 2065, 344 Wellington Street, Ottawa K1A 0H8 [613-957-0041] *(U.L.S.)*

BRUCE MACFARLANE, Assistant Deputy Attorney General - Criminal Law, Department of Justice of Canada, 239 Wellington Street - Room 462, Ottawa K1A 0H8 [613-957-4756] *(C.L.S.)*

RICHARD MOSLEY, Senior General Counsel, Policy, Programs and Research Sector, Department of Justice of Canada, 239 Wellington Street - Room 725, Ottawa K1A 0H8 [613-957-4725] *(C.L.S.)*

DONALD PIRAGOFF, Acting General Counsel, Policy, Programs and Research Sector, Department of Justice of Canada, 239 Wellington Street - Room 722, Ottawa K1A 0H8 [613-957-4730] *(C.L.S.)*

ROBERT POLLACK, Skywark, Myers, Kussin & Weinstein, Cargill Building - Room 724, 240 Graham Avenue, Winnipeg R3C 0J7 [204-942-0501] *(C.L.S.)*

DANIEL PRÉFONTAINE, Assistant Deputy Minister, Policy, Programs and Research, Department of Justice of Canada, 239 Wellington Street - Room 750, Ottawa K1A 0H8 [613-957-4701] *(C.L.S.)*

GLEN RIVARD, Senior Counsel, Policy, Programs and Research Sector, Department of Justice of Canada, 239 Wellington Street - Room 738, Ottawa K1A 0H8 [613-957-4717] *(U.L.S.)*

JOHN TAIT, Deputy Minister of Justice, Department of Justice of Canada, 239 Wellington Street, Ottawa K1A 0H8 [613-957-4997] *(C.L.S. & U.L.S.)*

ED TOLLEFSON, Senior General Counsel, Policy, Programs and Research Sector, Department of Justice of Canada, 239 Wellington Street - Room 703, Ottawa K1A 0H8 [613-957-4747] *(C.L.S.)*

ANNE-MARIE TRAHAN, Associate Deputy Minister - Civil Law, Department of Justice of Canada, 239 Wellington Street, Room 150, Ottawa K1A 0H8 [613-957-4660] *(U.L.S.)*

GÉRALD TREMBLAY, Q.C., Counsel, Clarkson & Tétreault, 1170 Peel Street - 5th Floor, Montréal H3B 4S8 [514-397-4157] *(U.L.S.)*

ROBERT WAKEFIELD, Counsel, 200 Elgin Street - Suite 204, Ottawa K2P 1L5 [613-238-1895] *(C.L.S.)*

MICHAEL ZIGAYER, Counsel, Policy, Programs and Research Sector, Department of Justice of Canada, 239 Wellington Street - Room 714, Ottawa K1A 0H8 [613-957-4736] *(C.L.S.)*

Manitoba:

ELEANOR DAWSON, Q.C., Aikins MacAulay & Thorvaldson, Barristers, 30th Floor - 360 Main Street, Winnipeg R3C 3L6 [204-957-0050] *(U.L.S.)*

CLIFFORD EDWARDS, Q.C., Chairman, Law Reform Commission, Faculty of Law, Robson Hall, University of Manitoba, Winnipeg R3T 2N2 [204-474-9773] *(U.L.S.)*

MICHEL A. NANEL, Director, Legal Translation, Manitoba Justice, 350-444 St. Mary Avenue, Winnipeg R3C 3T1 [204-945-4597] *(L.D.S.)*

RON PEROZZO, Assistant Deputy Minister, Justice Division, 5th Floor, Woodsworth Building, 405 Broadway, Winnipeg R3C 3L6 [204-945-0230] *(U.L.S.)*

VALERIE PERRY, Crown Counsel (Legislation), Manitoba Justice, 350-444 St. Mary Avenue, Winnipeg R3C 3T1 [204-945-1727] *(L.D.S.)*

JEFFREY SCHNOOR, Director of Legal Research, Law Reform Commission, 12 Floor, Woodsworth Building, 405 Broadway, Winnipeg R3C 3L6 [204-945-2900] *(U.L.S.)*

SHIRLEY STRUTT, Legislative Counsel and Assistant Deputy Minister, 350-444 St. Mary Avenue, Winnipeg R3C 3T1 [204-945-3708] *(L.D.S. & U.L.S.)*

HYMIE WEINSTEIN, Q.C., Skwark Meyers Kussin Weinstein, Barristers & Attorneys-at-Law, 24 Cargill Building, 240 Graham Avenue, Winnipeg R3C 0J7 [204-942-0501] *(C.L.S.)*

STUART WHITLEY, Assistant Deputy Minister, Criminal Justice Division, 5th Floor, Woodsworth Building, 405 Broadway, Winnipeg R3C 3L6 [204-945-2873] *(C.L.S.)*

New Brunswick:

ELAINE E. DOLEMAN, Legislative Counsel, Department of Justice, P.O. Box 6000, Fredericton E3B 5H1 [506-453-2544] *(L.D.S. & U.L.S.)*

BRUNO LALONDE, Conseiller legislatif associé, Ministère de la Justice, Case Postale 6000, Fredericton E3B 5H1 [506-453-2651] *(L.D.S.)*

WILLIAM J. MCCARROLL, Q.C., Regional Crown Prosecutor, Department of Justice, P.O. Box 5001, Saint John E2K 1E8 [506-658-2580] *(C.L.S.)*

GARY A. MILLER, Barrister and Solicitor, Breen, Miller, Regent Place, 210-1133 Regent Street, Fredericton E3B 3Z2 [506-458-1989] *(C.L.S.)*

BASIL D. STAPLETON, Q.C., Director of Law Reform, Department of Justice, P.O. Box 6000, Fredericton E3B 5H1 [506-453-2668] *(U.L.S.)*

Newfoundland:

CHRISTOPHER CURRAN, Executive Director, Newfoundland Law Reform Commission, 21 Church Hill, St. John's A1C 3Z8 [709-739-9686-6617] *(U.L.S.)*

WAYNE GORMAN, Senior Crown Attorney, Crown Attorney's Office, Grand Falls A2A 1W9 [709-292-4238] *(C.L.S.)*

DEREK GREEN, Q.C., Chairman, Newfoundland Law Reform Commission, 21 Church Hill, St. John's A1C 3Z8 [709-739-9686-6617] *(U.L.S.)*

A. JOHN NOEL, Senior Legislative Counsel and Law Clerk of the House of Assembly, Office of the Legislative Counsel, P.O. Box 8700, St. John's A1B 4J6 [709-576-2877-2881] *(L.D.S.)*

Northwest Territories:

MARK AITKEN, Legislative Counsel, Department of Justice, Box 1320, Yellowknife X1A 2L9 *(L.D.S.)*

RALPH ARMSTRONG, Research Counsel, Committee on Law Reform, Box 1320, Yellowknife X1A 2L9 *(U.L.S.)*

GIUSEPPA BENTIVEGNA, Director, Legislation Division, Department of Justice, Box 1320, Yellowknife X1A 2L9 *(L.D.S. & U.L.S.)*

GEOFFREY M. BICKERT, Deputy Minister, Department of Justice, Box 1320, Yellowknife X1A 2L9 *(C.L.S.)*

JANET DRYSDALE, Legislative Counsel, Department of Justice, 1108-11th St. East, Saskatoon S7H 0G2 *(L.D.S.)*

DIANA GINN, Legislative Counsel, Department of Justice, Box 1320, Yellowknife X1A 2L9 *(L.D.S.)*

MARCEL LA FLAMME, French Legislative Counsel, Department of Justice, 37 Lewes Blvd., Apt. 101A, Whitehorse Y1A 4S5 *(L.D.S.)*

ALAN REGEL, Partner, Cooper Hardy & Regel, Box 818, Yellowknife X1A 2M7 *(C.L.S.)*

LISE-RACHELLE ROBICHAUD, French Legislative Counsel, Department of Justice, Box 1320, Yellowknife X1A 2L9 *(L.D.S.)*

NORA SAUNDERS, Director, Policy and Planning, Department of Justice, Box 1320, Yellowknife X1A 2L9 *(C.L.S.)*

LINDA TARRAS, Legislative Counsel, Department of Justice, Box 1320, Yellowknife X1A 2L9 *(L.D.S.)*

Nova Scotia:

ARTHUR G. H. FORDHAM, Q.C., Legislative Counsel, Office of the Legislative Counsel, 9th Floor, Joseph Howe Building, 1690 Hollis Street, P.O. Box 1116, Halifax B3J 2X1 [902-424-8941] *(L.D.S. & U.L.S.)*

ANNA J. FRIED, Registrar of Regulations, Department of the Solicitor General, P.O. Box 7, Halifax B3J 2L6 [902-424-6723] *(L.D.S. & U.L.S.)*

GORDON C. JOHNSON, Legislative Counsel, Office of the Legislative Counsel, 9th Floor, Joseph Howe Building, 1690 Hollis Street, P.O. Box 1116, Halifax B3J 2X1 [902-424-8941] *(U.L.S.)*

GRAHAM D. WALKER, Q.C., Chief Legislative Counsel, P.O. Box 1116, Halifax B3J 2X1 [902-424-8941] *(L.D.S. & U.L.S.)*

Ontario:

ELIZABETH BALDWIN, Legislative Counsel, Ministry of the Attorney General, 1st Floor - 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.)*

JEFF CASEY, Senior Crown Counsel, Policy Crown Law Office Criminal, Ministry of the Attorney General, 720 Bay Street, 10th Floor, Toronto M5G 2K1 [416-326-2303] *(C.L.S.)*

MICHAEL COCHRANE, Counsel, Ministry of the Attorney General, Policy Development Division, 18 King Street East, 15th Floor, Toronto M5C 1C5 [416-326-2506] *(U.L.S.)*

TARA DIER, Crown Attorney, York Region, Ministry of the Attorney General, 50 Eagle Street West, Newmarket L3Y 6B1 [416-853-4800] *(C.L.S.)*

EARL FRUCHTMAN, Counsel, Criminal Law Policy, Ministry of the Attorney General, 720 Bay Street, 10th Floor, Toronto M5G 2K1 [416-326-4658] *(C.L.S.)*

DIANA FULLER, Regional Director of Crown Attorneys, Northeast Region, Ministry of the Attorney General, 128 Pine Street, Sudbury P3C 1X3 [705-675-4166] *(C.L.S.)*

BRIAN H. GREENSPAN, Barrister & Solicitor, 3300 - 130 Adelaide Street West, Toronto M5H 3P5 [416-868-1755] *(C.L.S.)*

JOHN GREGORY, Acting Deputy Director, Ministry of the Attorney General, Policy Development Division, 720 Bay Street, 7th Floor, Toronto M5G 1N5 [416-326-2503] *(U.L.S.)*

LUCINDA MIFSUD, Legislative Counsel, Ministry of the Attorney General, 1st Floor - 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.)*

HOWARD F. MORTON, Q.C., Senior Crown Counsel, Criminal Law Policy, Ministry of the Attorney General, 720 Bay Street, 10th Floor, Toronto M5G 2K1 [416-326-4661] *(C.L.S.)*

DONALD L. REVELL, Senior Legislative Counsel, Ministry of the Attorney General, 1st Floor - 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.)*

JOHN M. RITCHIE, Q.C., Senior Crown Counsel, Criminal Law Division, Ministry of the Attorney General, 720 Bay Street, 10th Floor, Toronto M5G 2K1 [416-326-4662] *(C.L.S.)*

CORNELIA SCHUH, Deputy Senior Legislative Counsel, Ministry of the Attorney General, 1st Floor - 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.)*

ARTHUR N. STONE, Q.C., 8 St. Hilda's Avenue, Toronto M4N 2P4 [416-481-3971] *(U.L.S.)*

SIDNEY TUCKER, Deputy Senior Legislative Counsel, Ministry of the Attorney General, 1st Floor - 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.)*

MICHAEL WOOD, Acting Deputy Senior Legislative Counsel, Ministry of the Attorney General, 1st Floor - 1401 Whitney Block, 99 Wellesley Street West, Toronto M7A 1A2 [416-965-2841] *(L.D.S.)*

Prince Edward Island:

RICHARD B. HUBLEY, Q.C., Director of Prosecutions and Chief Crown Prosecutor, Department of the Attorney General, Law Courts Buildings, Box 2200, Charlottetown C1A 8B9 *(C.L.S.)*

ROGER B. LANGILLE, Department Solicitor, Department of Justice, Box 2000, Charlottetown C1A 7N8 *(U.L.S.)*

RAYMOND MOORE, Legislative Counsel, P.O. Box 1628, Charlottetown C1A 7N3 *(L.D.S.)*

Quebec:

JEAN ALLAIRE, Directeur, Bureau des lois, Affaires législatives, Ministère de la Justice, 1200 Rte de l'Eglise, Sainte-Foy G1V 4M1 [418-643-7222] *(L.D.S. & U.L.S.)*

MICHEL BOUCHARD, Sous-ministre associé, Affaires criminelles et pénales, Ministère de la Justice, 1200 Rte de l'Eglise, Sainte-Foy G1V 4M1 [418-643-4085] *(C.L.S.)*

ANDRÉ COSSETTE, Coordonnateur du droit civil, Affaires législatives, Ministère de la Justice, 1200 Rte de l'Eglise, Sainte-Foy G1V 4M1 [418-643-8782] *(U.L.S.)*

JEAN-FRANÇOIS DIONNE, Substitut en chef du Procureur général, Directeur des affaires criminelles, Ministère de la Justice, 1200 Rte de l'Eglise, Sainte-Foy G1V 4M1 [418-643-9059] *(C.L.S.)*

ALDÉ FRENETTE, Direction des Etudes et orientations, Affaires législatives, Ministère de la Justice, 1200 Rte de l'Eglise, Sainte-Foy G1V 4M1 [418-643-8782] *(U.L.S.)*

DENISE GERVAIS, Coordonnatrice du droit international, Affaires législatives, Ministère de la Justice, 1200 Rte de l'Eglise, Sainte-Foy G1V 4M1 [418-643-5379] *(U.L.S.)*

DANIEL GRÉGOIRE, Conseiller juridique, Direction des affaires criminelles, Ministère de la Justice, 1200 Rte de l'Eglise, Sainte-Foy G1V 4M1 [418-643-9059] *(C.L.S.)*

PAUL MONTY, Président du Comité d'implantation du code de procédures pénales, Direction des affaires pénales, Ministère de la Justice, 1200 Rte de l'Eglise, Sainte-Foy G1V 4M1 [418-643-2330] *(C.L.S.)*

LISE MORENCY, Sous-ministre associée, Affaires législatives, Ministère de la Justice, 1200 Rte de l'Eglise, Sainte-Foy G1V 4M1 [418-643-9632] *(L.D.S. & U.L.S.)*

Saskatchewan:

SUSAN C. AMRUD, Crown Solicitor, Legislative Services, Department of Justice, 1874 Scarth Street, Regina S4P 3V7 [306-787-8990] *(U.L.S.)*

IAN R. BROWN, Chief Legislative Crown Counsel, Legislative Drafting, Department of Justice, 1874 Scarth Street, Regina S4P 3V7 [306-787-9346] *(L.D.S.)*

AARON FOX, Shumiatcher-Fox, 2100 Scarth Street, Regina S4P 2H6 [306-352-2651] *(C.L.S.)*

ELLEN GUNN, Q.C., Executive Director, Public Prosecutions, Department of Justice, 1874 Scarth Street, Regina S4P 3V7 [306-787-5490] *(C.L.S.)*

KENNETH HODGES, Q.C., Director of Research, Law Reform Commission of Saskatchewan, 122 - 3rd Avenue North, Saskatoon S7K 2H6 [306-933-6127] *(U.L.S.)*

GEORGINA R. JACKSON, MacPherson, Leslie & Tyerman, Barristers and Solicitors, 15th Floor, 1874 Scarth Street, Regina S4P 4E9 [306-347-8430] *(U.L.S.)*

DOUGLAS E. MOEN, Co-ordinator, Legislative Services, Department of Justice, 1874 Scarth Street, Regina S4P 3V7 [306-787-5360] *(U.L.S.)*

CAROL SNELL, Crown Solicitor, Policy Planning and Evaluation, Department of Justice, 1874 Scarth Street, Regina S4P 3V7 [306-787-3684] *(C.L.S.)*

ROBERT THORNTON, Priel, Stevenson, Hood and Thornton, 902 Spadina Crescent E., Saskatoon S7K 3H5 [306-244-0132] *(U.L.S.)*

Yukon:

STEVEN A. HORN, Legislative Counsel, Department of Justice, Box 2703, Whitehorse Y1A 2C6 [403-667-5811] *(L.D.S. & U.L.S.)*

DELEGATES EX OFFICIO

1989 Annual Meeting

Attorney General for Alberta: HON. KEN ROSTAD, Q.C.

Attorney General of British Columbia: HON. BUD SMITH, Q.C.

Minister of Justice and Attorney General of Canada:
HON DOUG LEWIS, P.C., M.P.

Minister of Justice and Attorney General of Manitoba:
HON. JAMES C. MCCRAE

Attorney General and Minister of Justice of New Brunswick:
HON JAMES LOCKYEAR, Q.C.

Minister of Justice and Attorney General of Newfoundland:
HON. PAUL D. DICKS

Minister of Justice of the Northwest Territories:
HON. MICHAEL A. BALLANTYNE

Attorney General of Nova Scotia: HON THOMAS MCINNES, Q.C.

Attorney General of Ontario: HON. IAN G. SCOTT, Q.C.

Minister of Justice and Attorney General of Prince Edward Island:
HON. JOSEPH A. GHIZ, Q.C.

Minister of Justice and Attorney General of Quebec:
HON. GIL RÉMILLARD

Minister of Justice and Attorney General for Saskatchewan:
HON. GARY LANE

Minister of Justice of the Yukon: HON. MARGARET JOE

HISTORICAL NOTE

Seventy 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, with a few exceptions, during the week preceding the annual meeting of the Canadian Bar Association 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.
1988 Aug 6-12, Toronto
1989. Aug 12-18, Yellowknife

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 Secretary, 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

Introduction of Delegates

Each delegate gave his last name, first name, title and functions.

Opening

The meeting opened with the Vice-Chairman, Peter Pagano, presiding in the absence of the Chairman, Merrilee Rasmussen. Jean Allaire was elected to act as Secretary. It was agreed that the Section would sit from 9:30 a.m. to 12:30 p.m. and from 2:00 p.m. to 5:00 p.m. on Saturday and Sunday, August 12th and 13th, and an agenda was adopted.

Recording of Deliberations

It was agreed that the Conference Secretariat would record the deliberations of the meeting for internal use of the Conference only.

Adoption of Minutes

The minutes of the 1988 meeting of the Section, held in Toronto, were adopted.

Nominating Committee

Bruno Lalonde was appointed Chairman of the Nominating Committee and Gérard Bertrand agreed to sit with him on the Committee.

Procedure

As a follow up to the resolution adopted by the members of the Section in Toronto in August 1988, Cliff Watt tabled a proposal concerning the new mandate of the Legislative Drafting Section. After discussion, it was resolved that another Committee be constituted and that it consist of Jean Allaire, Peter Pagano and Cliff Watt, who would act as Chairman. The Committee will have the responsibility of examining whether the members of the Legislative Drafting Section and the Association of Legislative Counsel should sit together.

Report of the Committee appointed to prepare bilingual legislative drafting conventions for the Uniform Law Conference of Canada

Donald Revell, of Ontario, tabled the majority report of the above-mentioned Committee.

Bruno Lalonde, of New Brunswick, tabled a minority report.

When the delegates were each in turn given the opportunity of making general comments on the majority report, they congratulated the authors of the report and expressed their appreciation for all the work that the authors had put into it.

Amendments to several sections of the conventions were proposed. Some were accepted while others, for various reasons, were not.

The report, as amended during the deliberations of the Section, was adopted unanimously.

Report of the Nominating Committee

The Nominating Committee presented its report and informed the delegates that for 1989-1990 the Executive Committee of the Section would consist of the following persons:

Merrillee Rasmussen - Chairman
Peter Pagano - Vice-Chairman
Jean Allaire - Secretary

Close

There being no further business, on motion duly made, the Section adjourned to meet again during the next Uniform Law Conference or earlier at the call of the Chair.

SECTION DE RÉDACTION LÉGISLATIVE

PROCES-VERBAL

Présentation des délégués

Chacun à son tour, les délégués déclinent leurs nom, prénom, titres et qualités.

Ouverture

La séance s'est ouverte sous la présidence de Peter Pagano, vice-président, en l'absence de la présidente, Merrillee Rasmussen. Jean Allaire avait été élu pour agir comme secrétaire. Il fut convenu que la section siégerait de 9h30 à 12h30 et de 2 heures à 5 heures samedi et dimanche, les 12 et 13 août et un ordre du jour fut adopté.

Enregistrement des débats

Il fut convenu que le Secrétariat des conférences enregistrerait les débats de la séance pour des fins de régie interne seulement.

Adoption du procès-verbal

Le procès-verbal de la séance de la Section, tenue en 1988 à Toronto, a été adopté.

Comité des nominations

Bruno Lalonde a été désigné président du comité des nominations et Gérard Bertrand s'est joint à lui.

Buts et moyens

Afin de donner suite à la résolution adoptée par les membres de la Section, à Toronto, en août 1988, Cliff Watt dépose une proposition relativement au nouveau mandat que devrait assumer la Section de rédaction législative. Après quelques commentaires et précisions, il est résolu qu'un autre comité soit nommé, formé de Jean Allaire, Peter Pagano et Cliff Watt, qui en assumerait la présidence. Ce comité sera chargé d'examiner l'opportunité que les membres de la Section de rédaction législative et ceux de l'Association des conseillers parlementaires siègent ensemble.

Rapport du comité chargé d'élaborer un protocole canadien de rédaction législative bilingue

Donald Revell, de l'Ontario, dépose le rapport majoritaire du comité mentionné ci-dessus.

Bruno Lalonde, du Nouveau-Brunswick, dépose un rapport minoritaire.

À l'occasion d'un tour de table visant à permettre aux délégués de faire des commentaires généraux sur le rapport majoritaire, tous félicitent les responsables de sa rédaction et reconnaissent la tâche importante que constitue la réalisation d'un tel travail.

Des propositions de modification sont faites à l'égard de plusieurs articles du protocole. Certaines sont retenues, d'autres non, pour divers motifs.

Le rapport est adopté à l'unanimité, tel que modifié au cours des travaux de la Section.

Rapport du comité des nominations

Le comité des nominations fait rapport et informe les délégués que, pour l'année 1989-90, le Comité exécutif de la Section sera formé des personnes suivantes:

Merrillee Rasmussen – Présidente
Peter Pagano – Vice-président
Jean Allaire – Secrétaire

Clôture de la séance

Les sujets à l'ordre du jour étant épuisés, sur proposition, la séance est close et les participants conviennent de se réunir de nouveau à l'occasion de la tenue de la prochaine conférence sur l'uniformisation des lois, ou plus tôt, sur convocation de la présidente.

REPORT OF THE COMMITTEE APPOINTED TO PREPARE BILINGUAL LEGISLATIVE DRAFTING CONVENTIONS FOR THE UNIFORM LAW CONFERENCE OF CANADA

(Majority Report)

INTRODUCTION

The history of the Canadian Legislative Drafting Conventions and the history of the Uniform Law Conference are so intertwined as to be virtually inseparable. At its first annual meeting in 1918, the Conference of Commissioners on Uniformity of Laws throughout Canada (as the Uniform Law Conference was then known) appointed a committee to prepare a set of rules for legislative drafting for the Conference. The committee's report was adopted at the second annual meeting in 1919.

In 1941, a committee consisting of Eric H. Silk of Ontario and J. P. Runciman of Saskatchewan was appointed to revise the 1919 rules. This committee's report was received and adopted in 1942. In 1947, the Saskatchewan Commissioners were asked to revise the rules once again. The report of E. C. Leslie and J. P. Runciman was adopted in 1948. The revised rules were included in a pamphlet that was published by the Conference in 1949 under the title *Uniformity of Legislation in Canada - An Outline*.

The current conventions and commentaries grew out of the work of the Legislative Drafting Workshop (the forerunner of the Legislative Drafting Section), which first met in 1969. After several years of intensive work, particularly on the part of Glen Acorn of Alberta, the present drafting conventions were adopted in 1976. Arthur Norman Stone of Ontario and James Ryan of Newfoundland were appointed to prepare the commentaries. Their report was adopted in 1978. (The 1976 Conventions have been amended twice, in 1981 and 1986.)

The current conventions, like all their predecessors, were adopted in English only and applied only to English drafting. When the Conference began to adopt its uniform legislation in both French and English, official drafting conventions applicable to both languages became necessary. Among others, Gérard Bertrand, Claude Bisaillon, Alain-François Bisson, Alexandre Covacs, Bruno Lalonde, Bernard Méchin and Louis-Philippe Pigeon devoted time to the issue. A draft French document was presented to the annual meeting in 1984, but was not adopted.

By 1987 it was clear that it was neither practical nor realistic to have separate drafting conventions for French drafting and English drafting, each devoting no attention to the rules applicable to the other official language. Consequently, the annual meeting in Winnipeg appointed a committee to prepare bilingual drafting conventions. This committee was to report in 1988, but soon realized that such a major task could not be completed in one year.

The proposed drafting conventions and commentaries set out in this report are based both on the draft French document mentioned above and on the Conference's existing English drafting conventions and commentaries. The members of the committee are grateful for the invaluable work of their predecessors.

The conventions set out in this report were prepared primarily by Cornelia Schuh, Donald Revell and Michel Moisan, all of the Office of the Legislative Counsel in Ontario with significant input from Peter Pagano of Alberta, Michel Nantel of Manitoba, Gérard Bertrand and Lionel Levert of Ottawa, Jean Allaire of Quebec and Elaine Doleman and Bruno Lalonde of New Brunswick. Mr. Lalonde's minority report, which is published separately in the 1989 proceedings of the Conference, remind us that there is more than one approach to the complex subject of legislative drafting.

The Drafting Section of the Conference is a useful forum for the discussion of issues of interest to people who draft in English; it should now perform the same function for those who work in French-speaking and bilingual settings. It is the hope of the authors of this document that the Conference's work in the area of bilingual drafting will eventually contribute to the development of the unified "Canadian style" predicted by Elmer Driedger.

These drafting conventions are expressed as rules, but the reader must bear in mind that they are intended primarily as a guide. It will often be necessary to make exceptions or to adapt the spirit of the conventions to particular circumstances.

It is perhaps inevitable that drafting conventions deal primarily with matters of form. However, as drafters of legislation we are concerned as much with the substantive adequacy and the logical organization of our tests as with their form.

DRAFTING CONVENTIONS OF THE UNIFORM LAW CONFERENCE OF CANADA

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I. GENERAL

Logical organization

1. The organization of an Act should be logical.

A logically organized text usually proceeds from the general to the particular and follows the chronological sequence of events. If it deals with matters that occur in a particular order, such as court proceedings or administrative applications, that order should normally be followed See also Part III on logical arrangement.

Style

2. An Act should be written simply, clearly and concisely, with the required degree of precision, and as much as possible in ordinary language.

Simplicity and conciseness of language can be made to coexist with precision in a well-organized text. It is important not to exaggerate the degree of precision that is required.

Sex-specific references

3. Sex-specific references should be avoided.

In the English version of an Act, pronouns such as "he", "his" and "him" should not be used if the message is intended to refer to persons of either sex. Instead, the drafter can use "he or she", repeat the noun referred to or use a combination of these methods. Typographical devices such as brackets, virgules and hyphens are unseemly and distracting and should not be used. It is usually possible to restructure sentences so as to avoid the problem altogether.

Nouns that have the appearance of referring to men only should be replaced by terms that can refer to both sexes (for example, use "firefighter" instead of "fireman").

Because French nouns have grammatical rather than natural gender, and because in that language adjectives and past participles must agree with the nouns to which they relate, French solutions to the problems of sex-specific references are necessarily different from those used in the English version. See the French commentary on this point.

II. DIVISIONS OF AN ACT

Required elements

4.-(1) An Act always has a title and one or more sections (numbered 1, 2, 3...).

The statutes (and ordinances) of all Canadian jurisdictions always contain an enacting clause - an element that is not found in Uniform Acts.

Optional elements

(2) An Act may also contain the following elements:

(a) a preamble;

(b) parts (designated Part I, Part II ......);

(c) schedules (designated Schedule I, Schedule II ......);

(d) forms (designated Form 1, Form 2 ......).

On the subject of preambles, see section 18.

If there is only one schedule or form, it is not necessary to number it.

Subdivisions of sections

(3) A section may be subdivided into subsections (numbered (1), (2), (3)...).

(4) A section that is not subdivided into subsections and a subsection may be subdivided into clauses (lettered (a), (b), (c)...).

(5) A clause may be subdivided into subclauses (numbered (i), (ii), (iii)...).

(6) A subclause may be subdivided into paragraphs (lettered (A), (B), (C)...).

Excessive subdivision into clauses, subclauses and paragraphs should be avoided, as it makes the text harder to understand. See subsection 23(1).

Definitions

5. Definitions form part of a section or subsection and are separated by semicolons. They begin with a lower-case letter and are not lettered or numbered. Subdivisions, if any, within an individual definition take the form of clauses and are indented, separated by commas, and identified as (a), (b), and so forth.

In bilingual Acts, because definitions are arranged alphabetically in each language, a system of cross-references is necessary. It is recommended that the corresponding term in the other language be shown in brackets at the end of each definition.

There are conventional differences between French and English usage in the form of definitions.

The following example shows the recommended form of a provision containing a series of definitions:

1. In this Act,

"Minister" means the Minister of Agriculture. ("Ministre")

"weed" means dandelion, ragweed or thistle. ("mauvaise herbe")

Form of sections and their subdivisions

6. Sections and subsections begin with a capital letter and end with a period. Clauses are indented, begin with a lower-case letter and are separated by semicolons. Subclauses are further indented, begin with a lower-case letter and are separated by commas. Paragraphs are still further indented, begin with a lower case letter and are separated by commas.

The "paragraph" used by some jurisdictions requires introductory words like "the following" followed by a colon. The paragraphs are indented and numbered with Arabic numerals. They begin with an upper-case letter and are separated by periods. Like clauses, they must be grammatically parallel, but they may consist of complete sentences or of fragments. The "paragraph" is more autonomous than the clause, which must be an integral part of a single sentence.

III. ARRANGEMENT

Preamble

7. If a preamble is to be included, it follows the title.

Definitions

8. Definitions should be set out in the first section of the Act, unless they apply only to a particular Part, section or group of sections. In that case they should be placed at the beginning of the passage in question.

Interpretation or application provisions

9. Provisions that deal with the interpretation or application of the Act should follow the definitions.

Regulation-making powers

10. Provisions conferring regulation-making power should come at the end of the Act, preceding only the transitional or temporary provisions, those repealing or amending other Acts and the commencement provision.

If an Act is divided into Parts, it may be more practical to group the provisions conferring regulation-making power at the end of the individual Parts to which they relate.

Transitional or temporary provisions

11. Transitional or temporary provisions should follow the subject-matter to which they relate.

If they relate to the Act as a whole, they should follow the regulation-making powers.

Repealing and amending provisions

12. Provisions repealing or amending other Acts should precede the commencement provision.

Commencement provisions

13. The provision dealing with the coming into force of the Act should be its last section.

Schedules

14. Schedules, if they are necessary, should follow the last section of the Act.

It may be helpful to mention, in the heading of the schedule, the section to which it refers. The same is true in the case of forms (see section 15).

Forms

15. Forms, if it is necessary to include them in the Act, should be placed at the end of the Act, following the schedules, if any.

Normally, it is preferable to leave forms to be prescribed by regulation or by administrative procedures.

Marginal notes and table of contents

16.-(1) Each section should have a succinct marginal note.

(2) A table of contents setting out the marginal note for each section may be inserted between the title and the first section of the Act.

A table of contents is useful for the drafter as well as for the reader, since its preparation requires a further review of the Act's basic structure and exposes any flaws in its logical organization.

However, if the Act is very short, a table of contents is not necessary.

IV. DRAFTING PRINCIPLES

Title

17. The title should succinctly indicate the Act's subject-matter.

Preamble

18. The use of preambles is not recommended.

Statement of purpose

19. If a statement of purpose is required, it should be structured as a section rather than as a preamble.

Explicit statements of purpose are rarely necessary, since the object of a well-drafted Act should become clear to the person who reads it as a whole. In general, legislation should not contain statements of a non-legislative nature. However, a specific statement of purpose is occasionally required (for example, to give guidance to the courts).

Parts

20. An Act should be divided into Parts only if the subject-matter of each Part is clearly distinct.

The insertion of succinct headings before groups of related sections may be a useful alternative or supplement to division into Parts.

Definitions

21.-(1) Definitions should be used sparingly and only for the following purposes:

(a) to establish that a term is not being used in a usual meaning, or is being used in only one of several usual meanings;

(b) to avoid excessive repetition;

(c) to allow the use of an abbreviation;

(d) to signal the use of an unusual or novel term.

The drafter should not prepare the definitions until the main substantive provisions of the Act have been settled.

See also section 32

No substantive content

(2) A definition should not have any substantive content.

Statements of the application of the Act should be made in substantive provisions rather than definitions

Artificiality

(3) A definition should not give an artificial or unnatural sense to the term defined.

"Means" and "includes"

(4) "Means" and "includes" have different uses.

Note that the French version of this subsection is different.

"Means" is appropriate for exhaustive definitions (where French uses *s'entend de*, or no linking word at all) "Includes" is appropriate for two kinds of definitions: those that extend the defined term's usual meaning (here, French uses techniques such as *assimiler à*), and those that merely give examples of the defined term's meaning without being exhaustive (here, French generally uses *s'entend notamment de*). When a bilingual Act is being prepared the two drafters must consider these issues together

The drafter should exercise caution when using "includes". It should not be used in exhaustive definitions, and the contradictory "means and includes" should never be used

Consistency

(5) A defined term should never be used in the same Act in a different sense.

See also subsection 34(2)

Content of section

22.–(1) A section should deal with a single idea or with a group of closely related ideas.

Single sentence

(2) A section (or, if it is divided into subsections, each subsection) should consist of a single sentence.

Short sentence

(3) Sentences should be as short as clarity and precision will allow.

Note that the French version of subsection 22(2) is different.

The tradition of one-sentence sections and subsections is not generally followed in French drafting, where a series of short sentences are often preferred to a single long one.

In both languages, it is desirable to keep sentences terse and simple. (In traditional English drafting, the one-sentence rule has often led to excessively long sentences.) If a sentence becomes long and convoluted, the drafter should first consider whether it contains redundant material and can be simplified or (if there is no redundancy) whether it would be more appropriate to break it into two or more subsections. The French drafter may also resort to the technique of creating two or more sentences within the original provision.

In a bilingual Act, although the French version of a section or subsection may contain two or more sentences and the English only one, the formal structure of both versions must remain the same (for example, it would not be acceptable to have two subsections in one version and three in the other).

Use of clauses and further subdivisions

23.-(1) Clauses should be used only if they improve communication of the message to the reader. Subclauses and paragraphs should be used even more sparingly.

"Clause sandwiches"

(2) "Clause sandwiches" should be avoided.

Arrangements of a flush passage followed by a series of clauses and a closing flush are undesirable. Even more undesirable are similar arrangements containing two series of clauses, interrupted by a flush passage They are apt to lead the drafter into errors of grammar and logic, and are difficult to read in either language In bilingual drafting, "clause sandwiches" make it difficult - sometimes impossible - to ensure close correspondence of form between the two versions.

Parallelism

(3) Clauses and further subdivisions should be grammatically and logically parallel to one another.

Connecting words

(4) A series of clauses or further subdivisions should usually be linked by one "and" or "or", placed at the end of the second-last item in the series.

No conjunction should be used if the subdivisions follow a complete sentence (e.g. "The court may give directions with respect to the following matters: .. "). It is best to omit "and" and "or" if their use could cause confusion.

Note that the French version of this subsection is different.

In French drafting, the fact that a series is conjunctive or disjunctive is indicated by appropriate introductory words, not by literal equivalents of "and" and "or"

Verbs in present indicative

24.-(1) Verbs should appear in the present tense and indicative mood unless the context requires an exception.

The use of "shall" as an imperative is the major exception to this rule.

Passive undesirable

(2) Restraint should be exercised in the use of the passive voice.

Duties and prohibitions

(3) "Shall" is used to impose a duty or (with "not" or "no") a prohibition.

Powers, rights and choices

(4) "May" is used to confer or indicate a power, right or choice.

Note that the French versions of subsections (3) and (4) are different.

In French drafting, an obligation is usually imposed by the present indicative form of the verb, occasionally by auxiliaries such as *doit* or *est tenu de* A prohibition is indicated by the use of the auxiliary *ne peut*, by *il est interdit de* or sometimes by the auxiliary *ne doit*. A power, right or choice is indicated by the auxiliary *peut* or occasionally by other phrases.

Internal references

25. Internal references should be used sparingly.

A logical arrangement makes frequent internal references unnecessary.

Internal references should clearly identify the provisions referred to by their number or letter. It is not necessary to describe the provision referred to as "of this Act", unless there is a danger of confusion with another Act that has been mentioned.

Derogations and restrictions

26.-(1) Derogations and restrictions ("notwithstanding", "despite" and "subject to") should be used sparingly and only if there is an inconsistency, to make it clear which provision is meant to prevail.

Inconsistencies can often be eliminated by redrafting the passage.

(2) If provision 1 is meant to prevail over provision 2, it is sufficient to say that 1 applies notwithstanding (or despite) 2, or that 2 is subject to 1. The two devices should not be used simultaneously.

Placement of new provisions

27.-(1) A new provision should be inserted in the most logical place.

Designation of new provisions

(2) The numbers or letters assigned to new provisions are determined in accordance with the decimal system adopted by the Conference (1968 Proceedings, pages 76-89).

Changes to original structure

(3) Amendments to existing Acts should not detract from the readability of the original structure.

Rather than attaching new provisions to an existing structure, perhaps repeatedly, it may be desirable to rework the original structure.

Tables and mathematical formulas

28. Tables and mathematical formulas should be used if they make the text clearer and more concise.

Regulation-making powers

29. Regulation-making powers should be clearly expressed and should be no broader than is necessary.

V. LANGUAGE

Ordinary language

30.-(1) An Act should be written as much as possible in ordinary language, using technical terminology only if precision requires it.

Intended audience

(2) The terminology of an Act should be suitable for its intended audience.

Redundancies and archaisms

31. Redundant or archaic words and phrases should be avoided.

It is desirable to examine stock phrases that take the form of pairs or triplets (especially common in English – for example, "give, devise and bequeath", "terms and conditions") in order to determine whether fewer words could convey the desired meaning. Legislation should be written in a style that is correct and up to date without being either faddish or excessively conservative. Many words and phrases that are often seen in legal documents belong to an earlier age and are no longer well understood. They should be replaced by a contemporary equivalent. If they add nothing to the message, as is often the case, they should be eliminated.

Neologisms

32. Neologisms should be used with caution.

In principle, terms that are not found in standard reference works should be avoided in legislation. Sometimes it is necessary to invent a term or to use a recently coined term; in that case it is prudent to define it. The use of neologisms causes special problems in bilingual drafting.

Note that in bilingual common law jurisdictions, often the use of neologisms is the only way to express in French with precision legal concepts that are derived from English law and lack any satisfactory French "functional equivalent".

Other languages

33. Terms from languages other than English should be used only if they are generally understood and if there is no equally clear and concise way of expressing the concept in English.

Latin and other foreign terms are used even less often in French than in English.

Consistency

34.-(1) Different terms should not be used to express the same meaning within a single Act.

(2) The same term should not be used with different meanings within a single Act, unless, in a given context, the particular meaning that is intended is perfectly clear and no other term is suitable.

The exception does not apply to defined terms, which should never be used in a different sense than that of the definition. See subsection 21(5).

VI. BILINGUAL DRAFTING

Bilingual legislation should be prepared by two drafters, one responsible for each version, who co-operate on a basis of equality.

Ideally, *both* drafters should be bilingual. The participation of linguists and translators is often helpful.

Although it is usually faster and may seem easier to conduct the drafting process in only one language and to prepare a translation once the unilingual draft is settled, the quality of *both* versions is significantly improved by co-drafting.

Substance

35. The English and French versions of a bilingual Act must be identical in substance.

Linguistic quality

36. Each version should be written in correct and idiomatic language, and neither version should be forcibly adjusted to fit the peculiarities of the other language.

In bilingual drafting, both drafters must be ready to make necessary compromises in order to reconcile the need for linguistic quality with the need for identity of substance and close correspondence of structure.

Structure

37.-(1) The structure of the Act should be the same in both versions.

Parallelism at the structural level promotes identity of substance. It is likewise a valuable tool for the increasing number of bilingual users and interpreters of the law who compare the two versions.

Acceptable differences

(2) It is not necessary that corresponding English and French provisions use the same syntax.

(3) One version of a subsection (or of a section that contains no subsections) may contain a different number of sentences than the other.

(4) Occasionally, a definition present in one version may not be necessary in the other.

RAPPORT DU COMITÉ CHARGÉ D'ÉLABORER UN PROTOCOLE DE RÉDACTION LÉGISLATIVE BILINGUE À L'INTENTION DE LA CONFÉRENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

(Rapport Majoritaire)

INTRODUCTION

Faire l'historique du Protocole canadien de rédaction législative, c'est remonter aux origines de la Conférence sur l'uniformisation des lois, et c'est en suivre étroitement l'histoire. Dès sa première assemblée annuelle en 1918, la Conférence, qui portait alors le nom de *Conference of Commissioners on Uniformity of Laws throughout Canada*, forma un comité chargé d'élaborer à son intention des règles de rédaction législative. Le comité présenta un rapport, qui fut adopté au cours de la deuxième assemblée annuelle, en 1919.

En 1941, la Conférence demanda à un nouveau comité, qui se composait d'Eric H. Silk, de l'Ontario, et de J. P. Runciman, de la Saskatchewan, de réviser les règles adoptées en 1919. Le rapport de ce deuxième comité fut reçu et adopté en 1942. À la requête de la Conférence, les commissaires représentant la Saskatchewan entreprirent, en 1947, une nouvelle révision des règles de rédaction. La conférence adopta en 1948 le rapport d'E. C. Leslie et de J. P. Runciman, et les règles ainsi révisées figurèrent dans une brochure intitulée *Uniformity of Legislation in Canada – An Outline*, que publia la Conférence en 1949.

Les *Canadian Drafting Conventions* ainsi que les *Commentaries* présentement en vigueur résultèrent du travail effectué par l'atelier de rédaction législative (l'ancêtre de la Section de rédaction législative), dont les membres se réunirent pour la première fois en 1969. Grâce au travail acharné de quelques-uns de ses membres, et particulièrement de Glen Acorn, de l'Alberta, la Conférence put adopter, en 1976, la plus récente version des *Drafting Conventions.* Les *Commentaries to the Conventions*, oeuvre d'Arthur Norman Stone, de l'Ontario et de James Ryan, de Terre-Neuve, furent adoptés en 1978. (Les *Conventions* de 1976 furent modifiées deux fois, en 1981 et 1986.)

Les *Conventions* présentement en vigueur, à l'instar des protocoles antérieurs, furent adoptées en anglais uniquement et ne s'appliquaient qu'à la rédaction anglaise. Lorsque la Conférence décida d'adopter ses

lois uniformes en anglais et en français, il parut opportun qu'elle se dote d'un protocole officiel de rédaction valable pour les deux langues. Parmi ceux qui ont consacré des efforts à l'étude de la question il faut mentionner Gérard Bertrand, Claude Bisaillon, Alain-François Bisson, Alexandre Covacs, Bruno Lalonde, Bernard Méchin et Louis-Philippe Pigeon. Un avant-projet français fut déposé, sans toutefois être adopté, lors de l'assemblée générale de 1984.

En 1987, il fallut toutefois se rendre à l'évidence qu'il n'était ni pratique ni réaliste d'avoir, pour la rédaction française et la rédaction anglaise, des protocoles distincts ne tenant aucun compte des règles applicables dans l'autre langue officielle. L'assemblée annuelle de Winnipeg établit par conséquent un comité des règles de rédaction bilingues. Le comité devait présenter son rapport en 1988, mais il s'aperçut rapidement qu'il lui faudrait plus d'un an pour mener à bon terme une tâche d'une telle ampleur.

Le protocole de rédaction et les commentaires proposés dans le présent rapport se fondent en grande partie sur l'avant-projet français mentionné ci-dessus ainsi que sur les *Conventions* et les *Commentaries* présentement en vigueur. Les membres du comité tiennent à rendre publiquement hommage à tous leurs prédécesseurs qui ont grandement facilité leur tâche et justement mérité la reconnaissance de tous les rédacteurs législatifs du Canada.

Le protocole qui fait l'objet du présent rapport a été rédigé principalement par Cornelia Schuh, Donald Revell et Michel Moisan, du Bureau des conseillers législatifs de l'Ontario, qui ont bénéficié des commentaires précieux des personnes suivantes: Peter Pagano (de l'Alberta), Michel Nantel (du Manitoba), Gérard Bertrand et Lionel Levert (d'Ottawa), Jean Allaire (du Québec), Élaine Doleman et Bruno Lalonde (du Nouveau-Brunswick). Le rapport minoritaire de Mᵉ Lalonde, publié séparément dans les actes des assises de 1989, nous rappelle utilement qu'il existe plus d'une façon d'aborder un sujet aussi complexe que la rédaction législative.

La section de rédaction législative de la Conférence rend de grands services en stimulant la discussion sur des questions intéressant les rédacteurs anglophones; il est maintenant temps qu'elle rende le même service à leurs collègues qui travaillent dans des milieux francophones et bilingues. Les auteurs du présent document osent espérer que le travail de la Conférence dans le domaine de la rédaction bilingue pourra à la longue contribuer à l'évolution du «style canadien» unifié que prédisait Elmer Driedger.

Le présent protocole se présente sous forme de règles impératives. Le lecteur ne doit cependant pas oublier qu'il ne s'agit que de lignes directrices. Les contextes particuliers exigeront souvent des exceptions et des modifications.

Les protocoles de rédaction, par leur nature même, mettent l'accent sur les questions de forme.Le rédacteur doit cependant veiller tant au fond du texte et à la logique de son organisation qu'à son aspect purement formel.

PROTOCOLE DE RÉDACTION DE LA CONFÉRENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

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I. GÉNÉRALITÉS

Composition logique

1 Le texte de loi est organisé de façon logique.

Le respect de la progression normale des idées fait partie de la composition logique. Il convient de procéder du général au particulier et de présenter par exemple dans leur ordre chronologique les étapes d'une procédure judiciaire ou d'une demande adressée à une administration ou en émanant. Au sujet de la présentation logique, voir aussi la partie III.

Style

2 Le texte de loi est d'un style simple, clair et concis et comporte le degré de précision nécessaire. Il convient d'employer, autant que possible, le langage courant.

Si le texte est bien organisé, la simplicité et la concision cadreront bien avec la précision. Il ne faut d'ailleurs pas exagérer le degré de précision nécessaire.

Caractérisation sexuelle

3 Il convient d'éviter toute caractérisation sexuelle.

Se rappeler que le texte s'adresse aux femmes autant qu'aux hommes.

Les artifices typographiques (parenthèses ou tirets par exemple) déparent le texte et entravent sa lecture; leur emploi est donc déconseillé.

Il convient d'éviter les termes qui semblent ne viser que les hommes, et privilégier l'emploi de termes «neutres» comme «quiconque» ou «la personne qui». Pour éviter l'alourdissement du discours, on peut toutefois utiliser le masculin générique («le président», «l'auteur de la demande») et le masculin pluriel («les employés», «les fonctionnaires»)

Les solutions aux problèmes de la caractérisation sexuelle se présentent d'une toute autre façon en anglais, en raison du fait que les substantifs anglais n'ont pas de genre grammatical, et également parce que les mots anglais s'accordent en nombre mais non pas en genre. Voir le commentaire anglais à ce sujet.

II. ÉLÉMENTS DU TEXTE DE LOI

Éléments obligatoires

4 (1) Les éléments obligatoires d'un texte de loi sont le titre et les articles (numérotés de la façon suivante: 1, 2, 3 ...).

Les lois (et ordonnances) de toutes les autorités législatives du Canada comportent toujours une formule d'édiction, élément qui ne figure pas dans les lois uniformes.

Éléments facultatifs

(2) Le texte de loi peut en outre comporter les éléments suivants:

a) un préambule;

b) des parties (ainsi désignées: Partie I, Partie II ...);

c) des annexes (ainsi désignées: Annexe I, Annexe II ...);

d) des formules (ainsi désignées: Formule 1, Formule 2 ...).

Sur les préambules, voir l'article 18.

Il est inutile de numéroter l'annexe ou la formule unique.

Sous-unités de l'article

(3) L'article peut comporter plusieurs paragraphes (ainsi numérotés: (1), (2), (3) ...).

(4) L'article qui est d'un seul tenant et le paragraphe peuvent comporter plusieurs alinéas (ainsi désignés: a), b), c) ...).

(5) L'alinéa peut comporter plusieurs sous-alinéas (ainsi numérotés: (i), (ii), (iii) ...).

(6) Le sous-alinéa peut comporter plusieurs dispositions (ainsi désignées: (A), (B), (C) ...).

Il importe d'éviter le fractionnement excessif, qui réduit la clarté du texte. Voir le paragraphe 23(1).

Définitions

5 La définition fait partie d'un article ou d'un paragraphe. Elle commence par une majuscule, se termine par un point et ne porte ni numéro ni lettre. Les sous-unités éventuelles à l'intérieur d'une définition sont des alinéas, qui se présentent en retrait double, divisés par des points-virgules et désignés par a), b) et ainsi de suite.

Dans les lois bilingues, la présentation des définitions par ordre alphabétique dans les deux langues nécessite un système de renvois internes. Il est recommandé de faire suivre chaque définition dans une langue du terme défini dans l'autre langue (entre parenthèses).

Les conventions anglaises et françaises quant à la forme des définitions ne sont pas les mêmes.

L'exemple qui suit donne la forme recommandée de la disposition contenant des définitions en série:

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

«mauvaise herbe» Pissenlit, herbe à poux ou chardon. («weed»)

«ministre» Le ministre de l'Agriculture. («Minister»)

Forme des articles et de leurs sous-unités

6 Les articles et les paragraphes commencent par une majuscule et se terminent par un point. Les alinéas se présentent en retrait double, commencent par une minuscule et sont séparés par des points-virgules. Les sous-alinéas se présentent en retrait quadruple, commencent par une minuscule et sont séparés par des virgules. Les dispositions se présentent en retrait sextuple, commencent par une minuscule et sont séparées par des virgules.

Les «dispositions» qu'on trouve dans les textes de certaines autorités législatives se présentent en retrait double, numérotées en chiffres arabes. Elles commencent par des majuscules et se terminent par des points Comme les alinéas, elles sont assujetties à la règle du parallélisme grammatical, mais elles peuvent comporter des phrases entières ou des morceaux de phrase. Elles sont plus autonomes que les alinéas, qui font toujours partie intégrante d'une seule phrase.

III. PRÉSENTATION

Préambule

7 S'il faut ajouter un préambule au texte, on le place à la suite du titre.

Définitions

8 Les définitions constituent le premier article de la loi, sauf si elles ne portent que sur une partie ou sur un article ou groupe d'articles. Dans ce cas, elles se placent au début du passage dont il s'agit.

Interprétation et champ d'application

9 Les dispositions relatives à l'interprétation ou au champ d'application de la loi suivent les définitions.

Dispositions habilitantes

10 Les dispositions habilitantes se placent à la fin du texte de loi et ne sont suivies que par les dispositions transitoires ou temporaires, les dispositions portant abrogation ou modification d'autres lois et les dispositions d'entrée en vigueur.

Dans le cas d'une loi divisée en parties, il peut s'avérer préférable de grouper les dispositions habilitantes à la fin des parties visées.

Dispositions transitoires ou temporaires

11 Les dispositions transitoires ou temporaires suivent le passage auquel elles se rapportent.

Si elles se rapportent à la loi dans son ensemble, elles suivent les dispositions habilitantes.

Dispositions abrogatives ou modificatives

12 Les dispositions portant abrogation ou modification d'autres lois précèdent la disposition d'entrée en vigueur.

Disposition d'entrée en vigueur

13 La disposition d'entrée en vigueur de la loi constitue son dernier article.

Annexes

14 Les annexes, si elles sont nécessaires, se placent à la suite du dernier article de la loi.

Il peut s'avérer utile de mentionner, en tête de l'annexe, l'article auquel elle renvoie. Il en est de même pour les formules (voir l'article 15).

Formules

15 Les formules, s'il est nécessaire de les inclure dans le texte de loi, se placent à la fin, à la suite des annexes, le cas échéant.

Il vaut normalement mieux créer les formules par voie réglementaire ou administrative.

Notes marginales et sommaire

16 (1) Chaque article est assorti d'une note marginale succincte.

(2) Un sommaire qui énonce la note marginale de chaque article peut s'insérer entre le titre et le premier article de la loi.

Le sommaire rend service non seulement au lecteur, mais encore au rédacteur, car sa préparation amène celui-ci à réexaminer le plan de la loi et à remédier éventuellement à des défauts de logique dans la structuration du texte.

Toutefois, un texte de loi qui est très bref n'a pas besoin d'un sommaire.

IV. PRINCIPES DE RÉDACTION

Titre

17 Le titre de la loi indique brièvement la teneur de celle-ci.

Préambule

18 Il est conseillé de ne pas faire usage de préambules.

Énoncé de l'objet de la loi

19 Le cas échéant, il vaut mieux énoncer l'objet de la loi en article qu'en préambule.

Les énoncés de principes ne sont que rarement utiles, puisque la personne qui lit l'ensemble d'un texte de loi bien rédigé devrait facilement en comprendre l'objet. En règle générale, les textes législatifs ne doivent comporter que des dispositions de fond. Cependant, il est quelquefois souhaitable d'énoncer en termes précis le but d'une disposition (à l'intention des tribunaux par exemple).

Parties

20 La division en parties ne se justifie que si l'objet de chacune d'elles est distinct.

Des intertitres succincts, placés au début de chaque groupe d'articles, peuvent utilement se substituer, ou même s'ajouter, aux parties.

Emploi des définitions

21 (1) Il convient de faire un usage parcimonieux des définitions et de limiter leur emploi aux cas suivants:

a) utilisation d'un terme dans une acception peu courante, ou dans une seule de ses acceptions;

b) souci d'éviter la répétition;

c) souci d'employer une forme abrégée;

d) utilisation d'un terme nouveau ou inusité.

Le rédacteur ne doit procéder à la rédaction des définitions qu'après avoir réglé les principales dispositions de fond de la loi.

Voir aussi l'article 32.

Teneur de la définition

(2) La définition ne doit pas comporter d'élément de fond.

S'il faut énoncer le champ d'application de la loi, il convient de le faire dans les dispositions de fond et non pas dans les définitions.

Sens naturels

(3) La définition ne doit pas donner aux termes définis des sens artificiels.

Charnières

(4) L'emploi éventuel de charnières pour articuler la définition doit tenir compte de la nuance de sens recherchée.

N B. La version anglaise du présent paragraphe est différente.

L'équivalence absolue entre terme défini et définition peut se faire au moyen d'une phrase nominale sans l'emploi d'une charnière, ou au moyen d'une phrase verbale avec l'emploi de la charnière «s'entend de» (en anglais, le rédacteur utilise généralement *means*). La définition qui élargit la portée de l'acception courante du terme peut recourir à une technique telle que l'assimilation (le rédacteur anglais emploie ici *includes*) La définition non exhaustive, qui sert surtout à illustrer le sens ou la portée du terme défini, peut recourir à une charnière telle que «s'entend notamment de» (le rédacteur anglais emploie, ici aussi, *includes*).

En situation de bilinguisme législatif, lorsque le mot *includes* figure au texte anglais, les deux rédacteurs doivent s'assurer qu'ils veulent bien exprimer la même nuance de sens, chacun selon les ressources de sa langue de travail. Il importe d'éviter l'emploi abusif du mot *includes* (c'est-à-dire son emploi dans un contexte auquel *means* conviendrait mieux) et surtout la tournure contradictoire *means and includes*.

Uniformité

(5) Le terme défini ne s'emploie pas, dans le même texte de loi, dans une autre acception.

Voir aussi le paragraphe 34(2).

Contenu de l'article

22 (1) L'article traite d'une seule idée ou d'un groupe d'idées étroitement liées.

Phrases

(2) L'article (ou le paragraphe, si l'article se divise en paragraphes) comporte une ou plusieurs phrases.

Brièveté de la phrase

(3) La phrase doit être aussi brève que le permettent la clarté et la précision de l'énoncé.

N.B. La version anglaise du paragraphe 22(2) est différente

La rédaction anglaise traditionnelle voulait que l'article ou le paragraphe, selon le cas, se compose d'une seule phrase.

Dans les deux langues il convient de composer des phrases brèves et simples. (La règle traditionnelle anglaise de la phrase unique a souvent mené le rédacteur à créer des phrases interminables.) Si la phrase devient excessivement longue, le rédacteur doit d'abord repérer et supprimer les redondances éventuelles. En l'absence de redondance, la division en plusieurs paragraphes est une solution opportune. Enfin, le rédacteur français peut, à l'intérieur de la disposition même, créer plusieurs phrases.

Dans le cas d'une loi bilingue, la version française d'un article ou d'un paragraphe contiendra peut-être plusieurs phrases, la version anglaise une seule phrase, mais les deux versions doivent adopter la même structure formelle (par exemple, il est contre-indiqué de faire coexister deux paragraphes dans une version avec trois dans l'autre).

Emploi d'alinéas et d'autres sous-unités de l'article

23 (1) Il convient de limiter l'emploi des alinéas aux contextes où ils aident vraiment à communiquer le message au lecteur. Les sous-alinéas et les dispositions doivent être employés encore plus parcimonieusement.

Enjambement et énumération interrompue

(2) Il convient d'éviter l'enjambement et l'énumération interrompue.

Il est préférable d'éviter l'enjambement, c'est-à-dire la structure résultant de l'intercalation d'une énumération verticale (généralement une série d'alinéas) dans une phrase qui se poursuit au-delà de cette énumération. Une forme aggravée de l'enjambement est l'énumération interrompue, qui se compose de deux ou plusieurs séries d'alinéas précédées et suivies des tronçons d'une phrase unique. L'enjambement et l'énumération interrompue, qui mènent souvent aux fautes de grammaire et de logique, compliquent inutilement la lecture du texte législatif, en français comme en anglais. En situation de bilinguisme législatif, ces structures rendent très difficile et parfois impossible l'étroite correspondance entre les deux versions au niveau de la forme.

Parallélisme

(3) Les alinéas et les autres sous-unités de l'article doivent être parallèles sur le plan grammatical et sur le plan logique.

Charnières

(4) Il est contre-indiqué d'insérer une charnière entre les éléments d'une énumération verticale.

N.B. La version anglaise du présent paragraphe est différente.

Le rédacteur du texte anglais place «and» ou «or» à la fin de l'avant-dernier élément d'une énumération verticale pour exprimer la conjonction ou la disjonction, tandis que le rédacteur du texte français le fait, au besoin, au moyen des mots qui précèdent l'énumération.

Verbes: indicatif présent

24 (1) Le verbe porteur du sens principal s'emploie au présent de l'indicatif, à moins que le contexte n'exige un temps ou un mode différent.

Voix

(2) Il convient de privilégier la voix active.

Obligations et interdictions

(3) L'obligation s'exprime par l'indicatif présent du verbe porteur du sens principal ou, occasionnellement, par l'emploi de mots à sens impératif tels «doit» ou «est tenu de» suivis d'un infinitif. L'interdiction s'exprime par «ne peut», l'impersonnel «il est interdit de» ou, occasionnellement, par «ne doit».

Pouvoirs, droits et facultés

(4) L'octroi ou l'existence de pouvoirs, de droits ou de facultés s'exprime par «peut» ou, quelquefois, par le verbe assorti d'autres formules telles «a le pouvoir (le droit) (la faculté) de» ou «facultativement».

N B. La version anglaise des paragraphes (3) et (4) est différente.

Le rédacteur anglais emploie *shall* pour exprimer l'obligation, *shall not* pour exprimer l'interdiction et *may* pour exprimer l'octroi ou l'existence de pouvoirs, de droits ou de facultés.

Renvois internes

25 Il convient de faire un usage parcimonieux des renvois internes.

Les renvois internes multiples sont inutiles dans un texte de composition logique.

La clarté exige que le renvoi interne vise la désignation exacte de la disposition à laquelle il renvoie. Il est inutile d'y ajouter la précision «de la présente loi», à moins qu'il n'y ait danger de confusion à cause de la mention d'une autre loi.

Dérogations et réserves

26 (1) Il convient de faire un usage parcimonieux des dérogations et réserves («malgré», «nonobstant», «par dérogation à» et «sous réserve de»). Elles ne s'emploient qu'en cas d'incompatibilité, afin de préciser laquelle des dispositions l'emporte.

La reformulation du passage permet d'ailleurs souvent d'éliminer l'incompatibilité.

(2) Si la disposition 1 doit l'emporter sur la disposition 2, il suffit de préciser soit que la première s'applique malgré (nonobstant, par dérogation à) la deuxième, soit que la deuxième s'applique sous réserve de la première. L'emploi simultané des deux techniques est à proscrire.

Insertion de nouvelles dispositions

27 (1) La nouvelle disposition s'insère à l'endroit qui semble le plus logique.

Désignation des nouvelles dispositions

(2) La nouvelle disposition porte un numéro ou une lettre choisis selon le système décimal adopté par la Conférence (Actes des assises de 1968, pages 76 à 89).

Modifications touchant la structure originale

(3) Il convient d'éviter d'apporter aux textes de loi existants des modifications qui risquent de porter atteinte à la clarté de la structure originale.

Il vaut quelquefois mieux refaire complètement la structure originale que d'y rattacher de nouvelles dispositions, surtout si on le fait à plusieurs reprises.

Tableaux et formules mathématiques

28 Il convient d'employer des tableaux et des formules mathématiques s'ils permettent de rendre le texte plus clair et plus concis.

Dispositions habilitantes

29 Il convient d'exprimer clairement les dispositions habilitantes et de limiter leur portée à ce qui s'impose vraiment.

V. NIVEAU DE LANGUE

Langage courant

30 (1) En règle générale, la rédaction du texte de loi se fait en langage courant, tant sur le plan lexical que sur le plan syntaxique. L'emploi de termes techniques se limite aux cas où la précision l'exige.

Destinataires

(2) La terminologie du texte de loi doit être adapté au public visé.

Redondances et archaïsmes

31 Il convient d'éviter les redondances et les archaïsmes.

Lorsqu'il rencontre des séries synonymiques ou quasi synonymiques, particulièrement stéréotypées dans la rédaction traditionnelle anglaise (par exemple: «give, devise and bequeath», «terms and conditions»), le rédacteur doit s'assurer que chaque mot est vraiment nécessaire et supprimer les redondances.

Le style législatif doit utiliser une langue moderne et correcte qui évite à la fois les modes éphémères et le conservatisme outrancier. Dans les textes juridiques, on trouve souvent des expressions archaïques dont le sens échappe aux lecteurs modernes. Il faut les remplacer par un équivalent moderne ou, si elles n'ajoutent rien au message, comme c'est souvent le cas, les supprimer.

Néologismes

32 Il convient de faire un usage prudent des néologismes.

Dans les textes de loi, il faut en principe éviter l'emploi de termes qui ne figurent pas dans les ouvrages usuels de référence. Quelquefois la néologie ou l'emploi d'un néologisme non encore passé dans le langage s'imposent; dans ce cas il est prudent de recourir à une définition précise. L'emploi de néologismes crée des difficultés particulières en rédaction bilingue.

Il est à noter que dans les territoires bilingues de common law, l'utilisation de néologismes s'avérera souvent la seule façon d'exprimer avec précision en français des notions juridiques héritées du droit anglais, pour lesquelles il n'existe aucun «équivalent fonctionnel» satisfaisant

Xénismes

33 Les latinismes, anglicismes et autres xénismes sont à éviter.

L'expression d'origine étrangère qui a été intégrée au vocabulaire français courant ou spécialisé, donc francisée, ne constitue plus un xénisme.

Traditionnellement, la langue anglaise a favorisé l'emploi de xénismes (surtout de latinismes) plus que la langue française La rédaction législative moderne en anglais les réserve cependant de plus en plus aux contextes rares où ils sont nettement plus clairs et plus concis que ne le serait leur équivalent anglais.

Uniformité

34 (1) Il convient de ne pas exprimer la même notion, dans un texte de loi, par des termes différents.

(2) Il convient également de ne pas employer, à l'intérieur d'un texte de loi, le même terme dans des acceptions différentes. Une exception à cette règle se justifie cependant si le sens différent, dans un contexte particulier, est parfaitement clair et qu'aucun autre terme ne convient à ce contexte.

Cette exception ne s'applique toutefois pas aux termes définis, qui ne doivent jamais s'employer dans une acception différente de celle de la définition. Voir le paragraphe 21(5).

VI. RÉDACTION BILINGUE

Il convient que deux rédacteurs, chacun responsable de l'une des deux versions, collaborent sur un pied d'égalité à la rédaction d'un texte législatif bilingue.

L'idéal serait que les rédacteurs soient tous les deux bilingues. La collaboration de linguistes et de traducteurs s'avère souvent précieuse.

Bien que le processus de rédaction unilingue, suivie d'une traduction réalisée après coup, soit généralement plus rapide et puisse sembler plus facile, la corédaction permet une amélioration sensible de la qualité des *deux* textes

Identité du fond

35 Les versions française et anglaise d'une loi bilingue doivent être identiques quant au fond.

Qualité linguistique

36 Chaque version doit être rédigée dans une langue correcte et idiomatique. Ni l'une ni l'autre ne doit subir de rajustements forcés visant à l'adapter aux caractéristiques particulières de l'autre langue.

En situation de bilinguisme législatif, il importe que les rédacteurs français et anglais soient prêts à faire les compromis nécessaires pour concilier le souci de la qualité linguistique avec les principes d'identité du fond et de correspondance étroite au niveau de la structure.

Structure

37 (1) La structure des deux versions du texte de loi devrait être la même.

Le parallélisme de la structure favorise l'identité du fond. Il constitue également un outil précieux pour le nombre croissant d'usagers et d'interprètes de la loi qui font une lecture comparée des deux versions.

Différences acceptables

(2) Il convient d'employer dans chaque version de dispositions correspondantes la syntaxe la plus adaptée à la langue de rédaction.

(3) Les deux versions d'un paragraphe (ou d'un article sans paragraphes) peuvent se composer d'un nombre différent de phrases.

(4) à l'occasion, une définition peut ne figurer que dans une version.

DRAFTING CONVENTIONS OF THE UNIFORM LAW CONFERENCE OF CANADA

(Minority Report)

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I. GENERAL

Logical organization

1. The organization of an Act should be logical.

Style

2. An Act should be written simply and concisely, with the required degree of precision, and as much as possible in ordinary language.

Sex-specific references

3. Sex-specific references should be avoided.

II. ELEMENTS OF AN ACT

Required elements

4.-(1) An Act always *should have* a title and one or more sections (numbered 1, 2, 3...).

Possible elements

(2) An Act may also contain:

(a) a preamble;

(b) parts (designated Part I, Part II...);

(c) schedules (designated Schedule I, Schedule II...);

(d) forms (designated Form 1, Form 2...).

Subdivisions of sections

(3) A section may be subdivided into subsections (numbered (1), (2), (3)...).

(4) A section that is not subdivided into subsections and a subsection may be subdivided into clauses (lettered (a), (b), (c)...).

(5) A clause may be subdivided into subclauses (numbered (i), (ii), (iii)...).

(6) A subclause may be subdivided into paragraphs (lettered (A), (B), (C)...).

Definitions

5. Definitions form part of a section or subsection and are separated by semicolons. They begin with a lower-case letter and are not lettered or numbered. Subdivisions, if any, within an individual definition take the form of clauses and are indented, separated by commas, and identified as (a), (b), and so forth.

Form of sections and their subdivisions

6. Sections and subsections begin with a capital letter and end with a period. Clauses are indented, begin with a lower-case letter and are separated by semicolons. Subclauses are further indented, begin with a lower-case letter and are separated by commas. Paragraphs are still further indented, begin with a lower case letter and are separated by commas.

III. ARRANGEMENT

Title

7. An Act has one title, which should be placed at the beginning.

Definitions

8. Definitions should be set out in the first section of the Act, unless they apply only to a particular Part, section or group of sections. In that case they should be placed at the beginning of the passage in question.

Interpretation or application provisions

9. Provisions that deal with the interpretation or application of the Act should follow the definitions.

Regulation-making powers

10. Provisions conferring regulation-making power should come at the end of the Act, preceding only the transitional or temporary provisions, those repealing or amending other Acts and the commencement provision.

Transitional or temporary provisions

11. Transitional or temporary provisions should follow the subject matter to which they relate.

Repealing and amending provisions

12. Provisions repealing or amending other Acts should precede the commencement provision.

Commencement provisions

13. The provision dealing with the coming into force of the Act should be its last section.

Schedules

14. Schedules, if they are necessary, should follow the last section of the Act.

Forms

15. Forms, if it is neccessary to include them in the Act, should be placed at the end of the Act, following the schedules (if any).

Marginal notes and table of contents

16. (1) Each section and subsection should have marginal note.

(2) A table of contents setting out the principle marginal note for each section may be placed *before* the title.

IV. DRAFTING PRINCIPLES

Title

17. The title should be succinctly indicate the Act's subject matter.

Preamble

18. Preambles should be used sparingly.

Statement of purpose

19. If a statement of purpose is required, it should be structured as a section rather than as a preamble.

Parts

20. An Act should be divided into Parts only if the subject-matter of each Part is clearly different.

Definitions to be used sparingly

21.-(1) Definitions should be used sparingly and only for the following purposes:

a) to establish that a term is not being used in its unusual meaning, or is being used in only one of several usual meanings;

b) to avoid excessive repetition;

c) to allow the use of an abbreviation;

d) to signal the use of an unusual or novel term.

No substantive content

(2) A definition should not have any substantive content.

Artificiality

(3) A definition should not give an artificial or unnatural sense to the term defined.

"Means" and "includes"

(4) "Means" and "includes" have different uses.

Consistency

(5) A defined term should never be used in the same Act in a different sense.

Content of section

22.-(1) A section should deal with a single idea or with a group of closely related ideas.

Single sentence

(2) A section (or, if it is divided into subsections, each subsection) should consist of a single sentence.

Short sentence

(3) Sentences should be as short as possible.

Use of clauses and further subdivisions

23.-(1) Clauses should be used only if they improve communication of the message to the reader. Subclauses and paragraphs should be used even more sparingly.

"Clause sandwiches"

(2) "Clause sandwiches" should be avoided.

Parallelism

(3) Clauses and further subdivisions should be grammatically and logically parallel to one another.

Connecting words

(4) A series of clauses or further subdivisions should usually be linked by one "and" or "or", placed at the end of the second-last item in the series.

Verbs in present indicative

24.-(1) Verbs should appear in the present tense and indicative mood unless the context requires an exception.

Passive undesirable

(2) Restraint should be exercised in the use of the passive voice.

Duties and prohibitions

(3) "Shall" is used to impose a duty or (with "not" or "no") a prohibition.

Powers, rights and choices

(4) "May" is used to confer or indicate a power, right or choice.

Internal references to be used sparingly

25. Internal references should be used sparingly.

Derogations and restrictions

26.-1(1) Derogations and restrictions ("notwithstanding", "despite" and "subject to" should be used sparingly and only if there is an inconsistency, to make it clear which provision is meant to prevail.

(2) If provision 1 is meant to prevail over provision 2, it is sufficient to say that 1 applies notwithstanding (or despite) 2, or that 2 is subject to 1.

Placement of new provisions

27.-(1) A new provision should be inserted in the most logical place.

Designation of new provisions

(2) The numbers or letters assigned to new provisions are determined in accordance with the decimal system adopted by the Conference (1968 Proceedings, pages 76-89).

Changes to original structure

(3) Amendments to existing Acts should not detract from the readability of the original structure.

Tables and mathematical formules

28. Tables and mathematical formules should be used if they make the text clearer and more concise.

Regulation-making powers

29. Regulation-making powers should be clearly expressed and should be no broader than is necessary.

V. LANGUAGE

Ordinary language

30.-(1) An Act should be written as ordinarily as possible, using technical terminology only if precision requires it.

Intended audience

(2) The terminology of an Act should be suitable for its intended audience.

Redundant words and phrases; archaisms

31. Redundant or archaic words and phrases should be avoided.

Neologisms

32. Neologisms should be used with caution.

Other languages

33. Terms from languages other than English should be used only if they are generally understood and if there is no equally clear and concise way of expressing the concept in English.

Consistency

34.-(1) Different terms should not be used to express the same meaning within a single Act.

(2) The same term should not be used with different meanings within a single Act, unless, in a given context, the particular meaning that is intended is perfectly clear and no other term is suitable.

VI. BILINGUAL DRAFTING

Substance

35. The English and French versions of a bilingual Act must be identical in substance.

Linguisic quality

36. Each version should be written in correct and idiomatic language, and neither version should be forcibly adjusted to fit the peculiarities of the other language.

Structure

37(1) The structure of the Act must be the same in both versions.

Acceptable differences

(2) It is not necessary that corresponding English and French provisions use the same syntax.

(3) The French version of a subsection (or of a section that contains no subsections) *should not contain* more sentences than the English version.

(4) Occasionally, a definition present in one version may not be necessary in the other.

Co-drafting

38 Bilingual legislation should be prepared by two drafters, one responsible for each version, *who co-operate on the basis of one of them being the lead drafter in charge of the file.*

Frederiction, N.B. August 3rd, 1989

PROTOCOLE DE RÉDACTION DE LA CONFÉRENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

(Rapport Minoritaire)

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I. GÉNÉRALITÉS

Composition logique

1. Le texte de loi *devrait être* organisé de façon logique.

Style

2. Le texte de loi *devrait être rédigé* de façon simple et concise comportant le degré de précision nécessaire. *Il devrait aussi autant que possible être rédigé de façon ordinaire.*

Caractérisation sexuelle

3. *Toute caractérisation sexuelle devrait être évitée.*

II. ÉLÉMENTS DU TEXTE DE LOI

Éléments obligatoires

4(1) *Un texte de loi devrait comporter un titre et un ou plusieurs articles* (ainsi numérotés: 1, 2, 3 ...).

Éléments possibles

(2) Le texte de loi peut en outre comporter

a) un préambule;

b) des parties (ainsi désignées Partie I, Partie II...);

c) des annexes (ainsi désignées Annexe I, Annexe II...);

d) des formules (désignées Formule I, Formule 2...).

Sous-divisions des articles

(3) L'article peut comporter plusieurs paragraphes (ainsi numérotés: (1), (2), (3)...).

(4) L'article non composé de paragraphes et le paragraphe peuvent comporter plusieurs alinéas (ainsi désignés: a), b), c) ...).

(5) L'alinéa peut comporter plusieurs sous-alinéas (ainsi numérotés: (i), (ii), (iii)...).

(6) Le sous-alinéa peut comporter plusieurs *clauses* (ainsi désignées: (A), (B), (C)...).

**Définitions*

5. La définition fait partie d'un article ou d'un paragraphe. Elle commence par une *minuscule sauf si dans la loi le mot doit être écrit avec une majuscule*. Les sous-unités éventuelles à l'intérieur d'une définition sont des alinéas, qui se présentement en retrait double, divisés par des points-virgules et désignés par a), b) et ainsi de suite. *Les définitions sont ni numérotées ni indiquées par une lettre.*

Forme des articles et de leurs sous-unités

6. Les articles et les paragraphes commencent par une majuscule et se terminent par un point. Les alinéas se présentent en retrait double,

commencent par une minuscule et sont séparés par des points-virgules. Les sous-alinéas se présentent en retrait quadruple, commencent par une minuscule et sont séparée par des virgules. Les *clauses* se présentent en retrait sextuple, commencent par une minuscule et sont séparées par des virgules.

III. PRÉSENTATION

Titre

7. Le texte de loi n'a qu'un seul titre *qui devrait être placé* en tête.

Définitions

8. Les définitions *devraient constituer* le premier article de la loi, sauf si elles ne portent que sur une partie ou sur un article ou groupe d'articles. Dans ces derniers cas, elles devraient être placées au début du passage dont il s'agit.

Interprétation et champ d'application

9. Les dispositions relatives à l'interprétation ou au champ d'application de la loi *devraient suivre* les définitions.

**Dispositions habilitantes*

10. Les *dispositions habilitantes devraient être placées* à la fin du texte de loi et *ne devraient être suivies* que des dispositions transitoires ou temporaires, des dispositions portant abrogation ou modification d'autres lois et des dispositions d'entrée en vigueur.

Dispositions transitoires ou temporaires

11. Les dispositions transitoires ou temporaires *devraient suivre* le passage auquel elles se rapportent.

Dispositions abrogatives ou modificatives

12. Les dispositions portant abrogation ou modification de d'autres lois *devraient précéder* la disposition d'entrée en vigueur.

Disposition d'entrée en vigueur

13. La disposition d'entrée en vigueur de la loi *devrait être* son dernier article.

Annexes

14. Les annexes, si elles sont nécessaires, *devraient être placées* à la suite du dernier article de la loi.

Formules

15. Les formules, s'il est nécessaire de les inclure dans le texte de loi, *devraient être placées* à la fin, à la suite des annexes (le cas échéant).

Notes marginales et sommaire

16. (1) Chaque article et chaque paragraphe *devrait être assorti* d'une note marginale succinte.

* (2) Un sommaire qui énonce la principale note marginale de chaque article *peut être placé avant le titre.*

IV. PRINCIPES DE RÉDACTION

Titre

17. Le titre de la loi *devrait indiquer* brièvement le teneur de celle-ci.

Préambule

18. *Les préambules devraient être utilisés avec modération.*

19. *Si un énoncé de l'objet de la Loi est requis, il devrait être rédigé sous forme d'article plutôt que sous forme de préambule.*

20. *Une loi ne devrait être divisée en partie que si l'objet de chaque partie est clairement différent.*

Emploi des définitions

21(1) *Les définitions devraient être utilisées avec modération et être limitées aux cas suivants:*

a) utilisation d'un terme dans une acception peu courante ou dans une seule de ses acceptions;

b) souci d'éviter la répétition;

c) souci d'employer une forme abrégée;

d) utilisation d'un terme nouveau ou inusité.

Teneur de la définition

(2) La définition *ne devraient pas comporter* des éléments de fond.

Sens naturels

(3) La définition *ne devraient pas donner* aux termes définis des sens artificiels.

"Désigne" "signifie" "s'entend également de"

(4) *Les charnières "désigne" et "signifie" "s'entend également de" devraient être utilisées correctement.*

Uniformité

(5) Le terme défini *ne devrait pas être utilisé* dans le même texte de loi dans une autre acception.

Contenu de l'article

22(1) Un article *devrait traiter* d'une seule idée ou d'un groupe d'idées étroitement liées.

Phrases

(2) L'article (ou le paragraphe, si l'article se divise en paragraphes) *devrait comporter* une seule phrase.

Brièveté de la phrase

(3) La phrase *devrait être* aussi brève que possible.

Emploi d'alinéas et d'autres sous-unités de l'article

23(1) L'emploi des alinéas *devraient être limité* aux contextes où ils aident vraiment à communiquer le message au lecteur. Les sous-alinéas et clauses *ne devraient être employés que* parcimonieusement.

Enjambement et émunération interrompue

(2) *L'enjambement et l'émunération interrompue devraient être évitées.*

Parallélisme

(3) Les alinéas et les autres clauses de l'article *devraient être* parallèles sur le plan grammatical et sur le plan logique.

* (4) *Le mot "et" ou "ou" devraient lier les deux dernières clauses.*

Verbes: indicatif présent

24(1) *Le temps du verbe devrait être le présent de l'indicatif*, à moins que le contexte n'exige un temps ou un mode différent.

Voix

(2) *Le recours à la voix passive devrait être limité.*

**Obligations et inderdictions*

(3) *L'obligation s'exprime par l'indicatif présent du verbe* ou, occasionnellement, par "doit" suivi d'un infinitif. L'interdiction s'exprime par "ne doit".

**Pouvoirs, droits et facultés*

(4) L'octroi ou l'existence de pouvoirs, de droits ou de facultés s'exprime par "peut".

Renvois internes

25. *Les renvois internes devraient être utilisés avec modération.*

Dérogations et réserves

26(1) *Les dérogations et les réserves devraient être utilisées avec modération* ("malgré", "nonobstant", et "sous réserve de"). Elles ne *devraient être employées* qu'en cas d'incompatibilité, afin de préciser laquelle des dispositions l'emporte.

(2) Si la disposition 1 doit l'emporter sur la disposition 2, il suffit de préciser soit qu'elle s'applique nonobstant à la disposition 2, soit que la disposition 2 s'applique sous réserve de la disposition 1.

Insertion de nouvelles dispositions

27(1) Une nouvelle disposition *devrait être insérée* à l'endroit qui semble le plus logique.

Désignation des nouvelles dispositions

(2) La nouvelle disposition *devrait porter* un numéro ou une lettre choisis selon le système décimal adopté par la Conférence (Actes des assises de 1968, pages 76 à 89).

Modifications touchant la structure originale

(3) *Des modifications à des textes de loi existants ne devraient pas porter* atteinte à la clarté de la structure originale.

Tableaux et formules mathématiques

28. *Des tableaux et des formules mathématiques devraient être utilisés* s'ils permettent de rendre le texte plus clair et plus concis.

**Dispositions habilitantes*

29. *Les dispositions habilitantes devraient être exprimées clairement* et leur portée *devrait être limitée* à ce qui est nécessaire.

V. LANGUE

**Écriture ordinaire*

30(1) *Un texte de loi devrait être écrit d'une façon ordinaire.* L'usage des termes techniques *devrait être limité* aux cas où la précision l'exige.

Destinataires

(2) La terminologie du texte de loi *devrait être adaptée* au public visé.

Redonances et archaismes

31. *Les redondances et les archaïsmes devraient être évités.*

Néologismes

32. Les néologismes *devraient être utilisés avec précaution.*

Autres langues

33. Les mots autres que français *ne devraient être utilisés que si leur équivalent en français n'est pas aussi clair et (concis)* et que si ils sont généralement compris.

Uniformité

34(1) *Différents termes ne devraient pas exprimer* la même notion dans un texte de loi.

(2) *Un même terme ne devrait pas être employé à* l'intérieur d'un texte de loi, dans des acceptations différentes. Une exception à cette règle se justifie cependant si le sens différent, dans un contexte particulier, est parfaitement clair et qu'aucun autre terme ne convient à ce contexte.

VI. RÉDACTION BILINGUE

Fond

35. Les versions française et anglaise d'une loi bilingue doivent être identiques quant au fond.

Qualité linguistique

36. Chaque version *devrait être rédigée* dans une langue correcte et idiomatique. Ni l'une ni l'autre ne *devrait subir* de rajustements forcés visant à l'adapter aux caractéristiques particulières de l'autre langue.

Structure

37(1) La structure des deux versions du texte de la loi doit être la même.

Différences acceptables

(2) Il n'est pas nécessaire d'employer dans chaque version la même syntaxe.

***(3) La version française d'un paragraphe (ou d'un article sans paragraphe) *ne devrait pas se composer* d'un plus grand nombre de phrases que la version anglaise.

**(4) A l'occasion, une définition peut ne figurer que dans une version.

Corédaction

***38. La législation bilingue *devrait être préparée* par deux rédacteurs, chacun responsable de l'une des deux versions, *un des deux rédacteurs étant le rédacteur responsable du dossier à titre de premier légiste*.

Fredericton, N.-B.
le 3 août 1989

OPENING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting opened at 8:00 p.m. on Sunday, August 13, 1989 at the Explorer Hotel in Yellowknife with Georgina Jackson in the chair and Mel Hoyt as secretary.

Address of Welcome

The President extended a warm welcome to all those delegates in attendance. The Deputy Minister of Justice for the Northwest Territories also welcomed all the delegates to Yellowknife and hoped an enjoyable time would be had by all.

Introduction of the Executive

The President identified each officer of the Conference and named the office each one fulfills.

Introduction of Delegates

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

National Conference of Commissioners on Uniform State Laws

The President of the National Conference of Commissioners on Uniform State Laws, Mr. Lawrence J. Bugge, and his wife Elaine, were introduced to the Conference.

Mr. Bugge pointed out that our Conferences share a number of common concerns and contemporaneous projects.

President's Report

Maintenant pour le travail du comité exécutif pendant l'an dernier : Le comité exécutif s'est réuni à Toronto au début de novembre de l'an dernier en vue d'examiner les plans à longue terme pour la Conférence. Inclue alors aux deux jours étaient les divers rapports préparés au cours

des dernières années portant sur la conférence et sur la nécessité de alle-ci. Le comité a étudié notamment les *Recommandations de la Commission McDonald sur l'économie* et les études et l'appui de ces recommandations. Le comité a conclu à la nécessité de la Conférence; de même qu'au besoin d'en revoir la mission, les structures et les procédures afin de déterminer si elles sont adéquates pour la réalisation de ces objectifs.

Un sous-comité a été crée à cette fin composé de la présidente de la conférence, et du premier vice-président Basil Stapleton. L'objectif était d'examiner les divers rapports portants sur l'harmonisation des lois au Canada, aux Etas-Unis, et en Australie; et de recommander de cas échéants les changements.

Basil and I produced a first draft and we then met with all of the members of the Executive in person on one occasion and then met by conference calls on several occasions. The report that the Executive approved for release at this meeting was distributed in the last couple of weeks and you will find copies in your binder and there are also additional copies at the front ... the front desk.

The report is entitled: *Renewing Consensus for Harmonisation of Laws in Canada*. I've been involved in the Conference for thirteen years and I've had the opportunity of watching the Conference grow and also watching myself grow in my understanding and perception of how important the Conference is. During my time on the Executive we have had occasion to examine the *MacDonald Commission Reports*, as I've indicated. We also have had the opportunity of reviewing the reports of the *Sixteenth Symposium on Commercial Law* which took place in Toronto a few years ago. The substance of that symposium was harmonisation of laws and the papers that were produced at that Conference were subsequently published in the *Canadian Business Law Journal*. Mr. Bill Hurlburt and Mr. Arthur Close participated in that Conference and their papers have shed further light on the question of harmonisation of laws. The Executive felt that it was a good opportunity to examine those reports and look at those reports in the light of our experience with the Conference. We feel that those reports provided a good opportunity for self-analysis by the Conference; not merely "navel-gazing" but an opportunity to look at our mandate, structures and also to look at this idea that the *MacDonald Commission* first raised: that was the question of harmonisation of laws which according to the particular reports is 'a striving for similarity in principle among the member jurisdictions'. The thrust of our report is to provide a first draft

for you to examine. We think that the factors of the universe move together such that it is an important time for us to lay this before you. You will notice from the front page of the report that it is intended to be released here but the substantive discussion will take place next year in New Brunswick. We, Basil and I, have taken the opportunity in the last two days to speak to the *Legislative Drafting Section* and to the *Law Reform Conference of Canada* and to put in place mechanisms in those two organisations to respond to the terms and recommendations of the Report; and we would like this evening to also lay the Report before you in Opening Plenary of this Conference and to indicate that we will be trying to get the widest possible exposure to our Report. We will be meeting with local secretaries later this week and we hope that through the local secretaries, the Deputies Attorneys-General, the other law ministers, and deputy ministers that we will have an opportunity for debate about this report. The whole question, the thrust of the Report, is to examine the existing Conference, to summarise the reports mentioned and then to give some very tentative recommendations for possible areas where the Conference could be strengthened. With that ... Basil would you or anyone else on the Executive like to add something?

[Basil]: I really won't add very much now because I think the main purpose is just to introduce the report and certainly to encourage you to respond. It is a little difficult for me to say what I want to say without appearing immodest; however, it never stopped me before so I'll proceed.

I think we're fortunate in having an Executive, of which I happen to be a part ... that is irrelevant almost but ... an Executive that not only had the foresight but the courage to undertake this project because it does take some courage to open oneself up to public scrutiny, and public assessment. On the other hand, we did think it was important enough to take the chance of coming away with a possible negative result. We're confident that we won't, but in order to avoid a negative result I think we really do need feedback from the jurisdictions. We're hoping, of course, that you will find considerable merit in the recommendations that we have made; but even if you don't, if you come back with a positive reaction and recommendations of your own, then that's great; that we'll really have, I think, justified the exercise in any event. I might tell you that Georgina and I and Dan Préfontaine had the opportunity to appear before the Deputies Attorneys-General in Halifax in January and give then some indication of what we were about. And if the reaction of that group was indicative, then I think we can then be encouraged. I think we

can expect quite positive results from this. I think it was quite an 'eye-opener' for the deputies and I think that you will find, as a result, that when you discuss the report in your jurisdictions, you may find a more positive and understanding reaction than you might have anticipated. I really don't need to say much more I think, except to encourage again everybody to take this seriously. It is the first time it's happened in seventy-one years. It may be the last time it will happen in our lifetimes so this may be your only chance to make an 'everlasting contribution' that you will be recognised for in the work of the *Uniform Law Conference* so I do encourage you to run with it now that the ball has been thrown to you.

So the process will be that we are inviting your response to the report.

RESOLVED that the report be received and comments to the Report be invited and provided before December 31, 1989.

Auditor's Report

The Treasurer presented the Auditor's Report regarding the Financial Statements of the Conference as at June 30, 1989. It is set out in Appendix A, page 110.

RESOLVED

1. that the Auditor's Report be approved;
2. that the same auditors, Clarkson Gordon, be appointed for the coming year; and
3. that the usual banking motion be passed authorizing the Treasurer to draw upon the Conference accounts.

Appointment of Resolutions Committee

RESOLVED that a Resolutions Committee be constituted, composed of Jean-François Dionne as Chairman, Elaine Doleman and Carol Snell whose report will be presented at the Closing Plenary Session.

Future Meetings

The meeting next year will be in Saint John, New Brunswick, from August 11 to 17.

We have also received invitations from Saskatchewan and Newfoundland to host the annual meetings for the two years following.

Events of the Week

Ms. Giuseppa Bentivegna gave us an outline of events for the week.

Adjournment

There being no further business, the meeting adjourned at 9:00 p.m. to meet again in the Closing Plenary Session on Friday, August 18.

UNIFORM LAW SECTION

MINUTES

Attendance

Forty-five delegates were in attendance. For details see list of delegates, page 5.

Sessions

The Section held eight sessions, two each day from Monday to Thursday, August 14-17, 1989.

Distinguished Visitor

The Section was honoured by the participation of Mr. Lawrence J. Bugge, President of the National Conference of Commissioners on Uniform State Laws.

Arrangements 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 Basil D. Stapleton as Chairman and Mel Hoyt as Secretary.

Hours of Sitting

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

Agenda

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

Class Actions

The Ontario Commissioners presented a Report on Class Actions. The matter was referred back to the Ontario Commissioners for a report, draft Act and commentaries in 1990.

Consent to Medical Treatment

The Nova Scotia Commissioners presented a Report on Consent to Medical Treatment.

RESOLVED

1. that the matter be referred back to the Nova Scotia Commissioners and any other jurisdiction that indicates a willingness to participate for a report in 1990; and
2. that an approach be made to the Criminal Law Section to see whether there is interest in having a joint project undertaken.

Custody and Access Jurisdiction and Enforcement Act (Interprovincial Child Abduction Act)

The Ontario Commissioners presented a report on Custody and Access Jurisdiction and Enforcement Act (Interprovincial Child Abduction Act). The matter was referred back to the Ontario Commissioners for a further report, draft Act and commentaries in 1990.

Defamation

The Saskatchewan Commissioners presented a report on the Defamation Act. The matter was referred back to the Saskatchewan Commissioners for completion of a draft Act and commentaries to be presented in 1990.

Domestic Arbitrations

The Alberta Commissioners presented a report on Domestic Arbitrations.

RESOLVED

1. that the report from the Alberta Commissioners on Domestic Arbitrations be received and printed in the Proceedings;
2. that the matter be referred to the Ontario Commissioners for a draft Act and commentaries in consultation with the Alberta and British Columbia Commissioners and any other jurisdiction that indicates a willingness to participate; and

3. that the report, draft Act and commentaries as set out in Appendix B, page 114, be circulated and if the Act and commentaries are not disapproved by two or more jurisdictions on or before December 31, 1989, subject to an extension of that period by the Steering Committee, by notice to the Executive Secretary, the Act be adopted by the Conference as a Uniform Act and recommended for enactment.

Note: The draft Act and commentaries were not available at press time.

Financial Exploitation of Crime

The Nova Scotia Commissioners presented a report on Financial Exploitation of Crime.

RESOLVED that the matter be referred back to the Nova Scotia Commissioners for a further report in 1990.

Foreign Money Claims

The British Columbia Commissioners presented a report on Foreign Money Claims.

RESOLVED

1. that the report from the British Columbia Commissioners be received and printed in the Proceedings;
2. that Section 11 of the Currency and Exchange Act (Can.) be amended so that it no longer applies to judgments for money;
3. that the matter be referred back to the British Columbia Commissioners for a draft Act and commentaries; and
4. that the report, draft Act and commentaries as set out in Appendix C, page 178, be circulated and if the Act and commentaries are not disapproved by two or more jurisdictions on or before November 30, 1989, by notice to the Executive Secretary, the Act be adopted by the Conference as a Uniform Act and recommended for enactment.

Note: No disapprovals were received.

French Version of the Consolidation of Uniform Acts

The New Brunswick Commissioners presented a report on the Permanent Editing Committee for the French Version of the Consolidation of Uniform Acts.

RESOLVED that the New Brunswick Commissioners be asked to coordinate the editing of the French Consolidation of Uniform Acts for presentation in 1990

Human Tissue Donation Act

A Report of the Committee on Human Tissue Donation was presented by the Chairman, Elaine M. Callas, and the draft Uniform Human Tissue Donation Act was discussed clause by clause.

RESOLVED

1 that the Report of the Committee on Human Tissue Donation and the revised draft Act and commentaries be received and printed in the Proceedings; and

2. that the report, revised draft Act and commentaries, as set out in Appendix D, page 219, be circulated and if the Act and commentaries are not disapproved by two or more jurisdictions on or before November 30, 1989, by notice to the Executive Secretary, the Act be adopted by the Conference as a Uniform Act and recommended for enactment.

Note: No disapprovals were received.

Inter-Jurisdictional Child Welfare Orders Act

(See Extra-Provincial Child Welfare, Guardianship and Adoption Orders)

The Saskatchewan Commissioners raised an objection to the Inter-Jurisdictional Child Welfare Orders Act that was approved by the Conference in 1988.

RESOLVED that the matter be referred to the Saskatchewan and Alberta Commissioners for a report in 1990, after consultation with the Directors of Child Welfare and the Federal-Provincial Family Law Committee.

Law of Contempt (Civil)

The British Columbia Commissioners presented a report on Law of Contempt (Civil).

RESOLVED

1 that the matter remain on the agenda;

2. that the Executive, after consultation with the Criminal Law Section, determine the appropriate scope of a study, both criminal and civil; and

3. that the Executive set in motion the appropriate mechanism for having a report with recommendations brought back to the Conference in 1990 at which time we probably would have a joint session to attempt to put together a package on both sides.

Law Reform Conference of Canada

The Law Reform Conference of Canada presented a report on its Fifth Annual Meeting, as set out in Appendix E, page 239.

RESOLVED that the report on the Fifth Annual Meeting of the Law Reform Conference of Canada be received and printed in the Proceedings.

Matrimonial Property - Conflict of Laws Rules in Relation to

The Quebec Commissioners presented a report on Matrimonial Property Regimes. The matter was referred back to the Quebec Commissioners for a further report, draft Act and commentaries in 1990.

New Agenda Items

Some of the items suggested for consideration by the Steering Committee include the following:

1. Expropriation
2. Evidence
3. Paralegals
4. Sterilization
5. Creditor's Remedies
6. Scrutiny of Uniform Acts Superseded by Other Acts.

New Reproductive Technologies

The Saskatchewan Commissioners presented a report on New Reproductive Technologies. The matter was referred back to the Saskatchewan Commissioners for a further report, draft Act and commentaries in 1990.

Private International Law

The Federal Commissioners presented a report on the Department of Justice's Activities in Private International Law. That report is set out in Appendix F, page 240. The Special Committee on Private International Law also presented its report. It is set out in the same Appendix.

RESOLVED that the Federal Commissioner's Report on the Department of Justice's Activities in Private International Law be received and printed in the Proceedings; and

RESOLVED that the Special Committee's report on Private International Law also be received and printed in the Proceedings.

Probate Code

The Nova Scotia Commissioners presented a report on a Probate Code.

RESOLVED

1 that the matter be referred to the Steering Committee for assignment; and

2. that the project be limited to a study with respect to probate procedures as distinguished from the broader aspects of the topic.

Protection of Privacy: Tort

The Saskatchewan Commissioners presented a report on Protection of Privacy: Tort.

RESOLVED

1 that the Saskatchewan Commissioners' report on Protection of Privacy: Tort be received and printed in the Proceedings as set out in Appendix G, page 288; and

2. that the Saskatchewan Commissioners prepare a draft Act and commentaries to be referred to the Legislative Drafting Section for adoption in 1990

Provincial Offences Procedures Act

A report on Provincial Offences Procedures Act was presented by Arthur N. Stone, Q.C.

RESOLVED

1. that the report be received and printed in the Proceedings as set out in Appendix H, page 381; and

2 that the Executive constitute a working committee to undertake the task of trying to achieve maximum uniformity among the provinces and the Federal Government, and to that end if time permits in the course of the ensuing year, the preparation of a further report, draft uniform Act and commentaries

Reciprocal Enforcement of Judgments Act Amendment

The British Columbia Commissioners presented a report and draft amendment to the Reciprocal Enforcement of Judgments Act.

RESOLVED that the British Columbia Commissioner's draft amendment to the Reciprocal Enforcement of Judgments Act be printed in the Proceedings as set out in Appendix I, page 412; and that the amendment be adopted by the Conference as an amendment to the Uniform Act and recommended for enactment

Sale of Goods Act

The Saskatchewan Commissioners presented a report on amendments to the Sale of Goods Act.

RESOLVED

1 that the matter be referred back to the Saskatchewan Commissioners for a revised report, draft Act and commentaries; and

2. that the revised report, draft Act and commentaries be circulated and if the draft Act and commentaries are not disapproved by two or more jurisdictions on or before December 31, 1989, by notice to the Executive Secretary, the Act be adopted by the Conference as a uniform Act and recommended for enactment.

Note: The revised report, draft Act and commentaries were not available at press time.

Transboundary Pollution Reciprocal Access Act

The Ontario Commissioners inquired as to what jurisdictions have enacted or are at the point of enacting the Transboundary Pollution Reciprocal Access Act. Any updated information on this Act should be forwarded to the Executive Secretary, or to John D. Gregory, Deputy Director, Policy Development Division, Ministry of the Attorney General, 7th Floor, 720 Bay Street, Toronto, Ontario, M5G 2K1.

Nominating Committee's Report

Basil D. Stapleton, Q.C. was elected Chairman of the Uniform Law Section for the year 1989-90.

Close of Meeting

Special tributes were paid to the Chairman, Basil D. Stapleton, Q.C., for his outstanding contribution to the work of the Section.

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

CRIMINAL LAW SECTION

MINUTES

Attendance

Forty-two (42) delegates attended in Yellowknife to participate in the work of the Criminal Law Section of the Uniform Law Conference. There were representatives from nine provinces and one territory as well as the Federal Government.

Opening

Jean-François Dionne presided as chairman and Michael E. N. Zigayer acted as secretary for the meetings of the Criminal Law Section in 1989.

A special resolution expressing congratulations to five former members of the Criminal Law Section of the ULC on the occasion of their appointment to the bench was carried unanimously. The chairman will address a letter conveying these sentiments to: Mr. Justice Michel Proulx of the Quebec Court of Appeal; Mr. Justice Julius Isaac of the Supreme Court of Ontario; Judge Michael Martin of the Provincial Court of Ontario; Judge John Guy of the Provincial Court of Manitoba; and Judge Robert Hyslop of the Provincial Court of Newfoundland.

Report of the Chairman

Again this year the Criminal Law Section was called upon to deliberate a considerable amount of material. There were forty-eight (48) Resolutions submitted by the various jurisdictions proposing either specific amendments to the *Criminal Code* or a review of some of its provisions by the Federal government. Of these resolutions, twenty-eight (28) were adopted while eleven (11) were defeated and the remainder withdrawn. In addition, there were six formal Discussion Papers addressing the following topics: the possession of knives in public places; arson; a legislated statement of the purpose and principles of sentencing; the collection of fines imposed pursuant to the *Criminal Code*; a Uniform provincial offences procedure Act; and, criminal contempt of court.

Georgina Jackson, President of the ULC, addressed the Criminal Law Section on Wednesday, August 16, 1989, for the purpose of providing a brief background with respect to the document entitled *RENEWING CONSENSUS FOR HARMONIZATION OF LAWS IN CANADA* which is to be discussed during the course of the 1990 conference in Saint John, New Brunswick. This document contains proposals for improving the structure and operation of the ULC.

Closing

Richard G. Mosley of the Federal Department of Justice was unanimously elected as Chairman of the Criminal Law Section for the 1990 conference to be held in Saint John, New Brunswick. Michael E. N. Zigayer will again serve as secretary.

RESOLUTIONS

I - ALBERTA

Item 1

That sections 691, 692 and 693 of the *Criminal Code* be amended such that all appeals to the Supreme Court of Canada require leave to appeal except if it involves an offence punishable by life imprisonment and there was a dissent on a question of law in the court of appeal.

(CARRIED AS AMENDED: 6-12-8)

Item 2

Amendment to sub-section 29(4) of the *Canada Evidence Act* to facilitate the production of bank documents by affidavit to a peace officer or the Attorney General who is investigating an alleged criminal offence in order to avoid the requirement of first obtaining a search warrant.

(WITHDRAWN AND REPLACED WITH THE FOLLOWING)

That subsection 29(7) of the *Canada Evidence Act* be amended to exempt the seizure of *copies* of books and records of Financial Institutions from the effect of section 490 of the *Criminal Code* by adding the following:

> ", and in the case of the seizure of copies of those books or records pursuant to such search warrant section 490 does not apply."

(CARRIED ON PRINCIPLE: 31-0-3)

Item 3

Amendment to section 10 of the *Criminal Code* to permit a trade union the right to appeal a conviction for criminal contempt.

(CARRIED: 28-0-1)

Item 4

That a formal procedure be incorporated into the *Criminal Code* to govern what enquiries should be made by a judge or justice after receiving a guilty plea.

(WITHDRAWN)

Item 5

Repeal of section 718(2) of the *Criminal Code*.

(CARRIED: 28-0-0)

Item 6

Amendment to section 259 of the *Criminal Code* to specify that the driving prohibition imposed under section 259 will commence only after the term of imprisonment imposed pursuant to subsections (1) and (2) has expired.

(WITHDRAWN)

Item 7

Amendment to sub-sections 676(1) and 693(1) of the *Criminal Code*.

(WITHDRAWN)

II - BRITISH COLUMBIA

Item 1

That Part 19 of the *Criminal Code* be amended to grant an accused the right to trial in provincial court after a preliminary hearing.

(CARRIED ON A JURISDICTIONAL VOTE: 18-10-5)

Item 2

That the *Criminal Code* be amended to proscribe inviting a child to expose or touch his/her own body for a sexual purpose of another person.

(CARRIED: 27-0-1)

Item 3

That there be statutory authority for fingerprinting in all criminal prosecutions.

(DEFEATED AS ORIGINALLY DRAFTED: 8-13-4)

Amended Proposal:

That there be statutory authority for fingerprinting for the following summary conviction offences: indecent act (section 173(1)), exposure to a child for a sexual purpose (section 173(2)), prowling at night (section 177), playground loitering by sex offender (section 179(1)), offences related to prostitution (section 213), and breach of probation (section 740).

(CARRIED: 21-7-1).

Item 4

That there be statutory authority for:

a) a peace officer to arrest, with or without warrant, for the purpose of forthwith obtaining fingerprints where there are reasonable grounds to believe that a fingerprint reporting condition has not been complied with; and

b) a judge to remand the accused in custody for the purpose of forthwith obtaining fingerprints where the court is satisfied that they have not otherwise been obtained.

(DEFEATED AS DRAFTED: 8-22-3)

Amended Proposal:

That there be statutory authority for paragraph (b) alone.

(CARRIED: 29-3-1)

Item 5

That section 487 of the *Criminal Code* be amended to provide for warrants to search for information that may reveal the whereabouts of a person who is reasonably suspected of having committed an offence.

(CARRIED: 16-9-1)

Item 6

That the *Criminal Code* be amended to include a rebuttable presumption that a blood/alcohol content over .08 causes impairment of ability to operate a motor vehicle.

(DEFEATED: 3-30-3)

Item 7

That section 258 of the *Criminal Code* be amended to apply to charges under sections 220 and 249.

(CARRIED: 26-4-4)

Item 8

That the eight-day remand rule be removed from paragraph 537(1) (a) and subsection 803(1) of the *Criminal Code*.

(CARRIED AS DRAFTED: 21-4-10)

Amended Proposal:

That the eight-day remand rule in paragraph 537(1) (a) and subsection 803(1) of the *Criminal Code* be reviewed.

(CARRIED AS AMENDED: 19-5-8)

III - NEW BRUNSWICK

Item 1

That subsection 257(1) be amended to add the phrase "for medical reasons" after the word "refusal" where it appears in the subsection.

(DEFEATED: 1-27-6)

Item 2

That section 529 of the *Criminal Code* be repealed.

(CARRIED: UNANIMOUS)

Item 3

That subsection 718(10) of the *Criminal Code* be reviewed.

(CARRIED AS AMENDED: 28-0-3)

Item 4

That an offence be created in the *Criminal Code* providing for an absolute prohibition against post trial contact with jurors by or on behalf of the accused.

(DEFEATED: 1-29-5)

Item 5

That certain provisions in the *Criminal Code* be amended so as to have a uniform method of describing offences.

(DEFEATED: 2-7-23)

Item 6

That the *Criminal Code* be amended to provide a time limitation for prosecutions of indictable offences except those offences carrying a life penalty equivalent to twice the maximum term of imprisonment which can be imposed.

(WITHDRAWN)

Item 7

That the *Criminal Code* be amended to limit the length of probation orders in the case of summary conviction offences, to a term of 18 months and, in the case of indictable offences, to a term of three years.

(WITHDRAWN)

IV - NEWFOUNDLAND

Item 1

That paragraph 737(1) (c) of the *Criminal Code* be amended to clearly indicate that a court that imposes an intermittent sentence can also impose a period of probation that extends beyond the period of time required to serve the period of imprisonment imposed.

(CARRIED: 32-0-0)

Item 2

That section 430 of the *Criminal Code* be amended to clearly indicate whether "value of which" refers to the damage or to the property damaged.

(CARRIED: 30-0-0)

Item 3

That section 737 of the *Criminal Code* be amended to clearly indicate that the probation order commences as soon as an accused is released from prison.

(CARRIED: 14-4-7)

Item 4

(In the alternative) That section 737 of the *Criminal Code* be amended to indicate exactly when "expiration of sentence" occurs.

(WITHDRAWN)

V - ONTARIO

Item 1

Amend section 101 of the *Criminal Code* to make it clear that there is a requirement that the officer have reasonable grounds to believe that the sought for items are concealed upon the person or located within the place desired to be searched.

(CARRIED: 30-0-0)

Item 2

That section 715 of the *Criminal Code* be amended to permit the reading into evidence of the prior sworn evidence of an absconding witness who, with due diligence, cannot be located.

(CARRIED IN JURISDICTIONAL VOTE: 17-13-3)

Item 3

That sections 442(2.1) and 643.1 of the *Criminal Code* be amended to add to the list of offences contained therein an offence committed under section 348 where the indictable offence committed or intended to be committed in consequence of the break and enter is one of the offences currently listed in the sections.

(DEFEATED: 11-20-4)

Item 4

That the term "internal waters" be defined to include inland waters or that paragraph 249(1) (b) of the *Criminal Code* be amended to include events which take place on "inland waters".

(WITHDRAWN AND REPLACED WITH THE FOLLOWING)

That the phrase "on or over any of the internal waters of Canada or the territorial sea of Canada" be deleted from paragraph 249(1) (b) of the *Criminal Code*.

(CARRIED: 30-0-0)

Item 5

(1) That section 4 of the *Narcotic Control Act* and section 39 of the *Food and Drugs Act* be amended to provide that, when the offence of trafficking involves a youth under 16 years of age, either by selling, giving, administering, sending, delivering or distributing the drug to such youth, or by using the youth as an aider and abetter to the offence, that a person guilty of this offence under these conditions be subject to a minimum term of imprisonment for one year, and that such term be served consecutive to any other sentence to which he is subject at the time this sentence is imposed.

(WITHDRAWN AND REPLACED WITH THE FOLLOWING)

That the Federal Government conduct a study concerning the adequacy of sentences currently being imposed on adults for trafficking in *certain* restricted drugs where the offence includes involving youths under the age of 18 years either in the trafficking of drugs or the ingestion of drugs.

And further, should such sentences be found to inadequately reflect the involvement of youths, to develop alternative sentencing or offence mechanisms to adequately address the problem.

(CARRIED AS AMENDED: 32-0-2)

(2) That the *Narcotic Control Act* and *Food and Drugs Act* be amended to provide that, when a person encourages, counsels or otherwise prompts a youth under 16 years of age to commit an offence under these Acts, that such person be guilty of an offence and liable to a minimum term of imprisonment for one year, and a maximum of five years, such term to be served consecutive to any other sentence to which that person is subject at the time sentence is imposed.

(DEFEATED: 10-23-1)

Item 6

That subsection 25(4) of the *Criminal Code* be repealed and replaced by a new provision which restricts the use of deadly force by a peace officer who is proceeding lawfully to arrest, with or without warrant, to as much force as is necessary to prevent an individual from fleeing from a lawful arrest (including force that is likely or intended to cause death), and only where the use of such force is necessary for the protection of the public from suffering serious bodily harm if the fleeing individual escapes arrest.

(CARRIED: 13-6-13)

Item 7

That section 67 of the *Criminal Code* be amended to allow wardens and deputy wardens of federal and provincial correctional institutions to read the riot proclamation.

(DEFEATED ON JURISDICTIONAL VOTE: 12-13-5)

Item 8

That the jury provisions contained in the *Criminal Code* be examined in an endeavour to reform these provisions in light of current problems with the process.

(CARRIED: 33-0-0)

Item 9

That section 102 of the *Criminal Code* be amended to provide for an appeal from the decision of a judge under subsection 102(3).

(CARRIED: 33-0-0)

VI - QUEBEC

Item 1

That subsection 172(1) of the *Criminal Code* be amended to:

1. make the section applicable to a situation in which the offence is committed in the presence of a child in whatever place the child is located;
2. increase the maximum imprisonment to 10 years;
3. provide that the proceedings may be taken either by way of indictment or by summary conviction.

(WITHDRAWN AND REPLACED WITH THE FOLLOWING)

That the Federal Government review the provisions of subsection 172(1) of the *Criminal Code* dealing with the corruption of children in order to identify behaviour capable of endangering the child's morals and this wherever the child may be found.

(CARRIED: 24-0-5)

Item 2

That section 464 of the *Criminal Code* be amended:

1. to provide that the offence of counselling is complete by the act of counselling the public or any person, whether ascertained or not, to commit an offence;

(CARRIED: 27-0-2)

2. to give extra-territorial effect to this provision modelled on the regime applicable with respect to conspiracy in section 465 of the *Code.*

(DEFEATED: 9-15-7)

Item 3

That the *Criminal Code* be amended to provide that a person for whom a warrant has been issued may appear at the place where he was arrested to be released on his undertaking to appear before the court having jurisdiction, or to be held and remanded to that court.

(CARRIED: 21-2-6)

Item 4

That paragraph 737(1) (c) of the *Criminal Code* be amended so that a probation order to which a person sentenced to serve an intermittent term of imprisonment is subject may continue in force upon the expiration of that sentence for a period fixed by the court but not exceeding three years from the date on which the order is made.

(WITHDRAWN*)

*The Quebec delegation withdrew this resolution because a Newfoundland resolution to the same effect was carried.

Item 5

That paragraph 738(4) (d) of the *Criminal Code* be amended to give a court that revokes a suspended sentence the power to order that the sentence be served consecutive to any other sentence.

(CARRIED: 28-0-2)

VII - CANADA

Item 1

That the *Criminal Code* be amended to so as to create an offence of trafficking in children.

(WITHDRAWN AND REPLACED WITH THE FOLLOWING)

That the adequacy of existing Canadian legislation, either federal or provincial, to deal with the sale of children be examined by a working group with the Criminal Law and Uniform Law Sections for reports and further consideration at the 1990 conference.

(CARRIED: 33-0-0)

SECTION DU DROIT PÉNAL

PROCES-VERBAL

Présence

Quarante-deux (42) délégués étaient présents à Yellowknife pour participer aux travaux de la Section du droit pénal de la Conférence sur l'uniformisation des lois. Des représentants de neuf provinces et d'un territoire, ainsi que des représentants du gouvernement fédéral assistent à la Conférence.

Ouverture

Jean-François Dionne agit à titre de président et Michael E. N. Zigayer, à titre de secrétaire des réunions de la Section du droit pénal pour l'année 1989.

Une résolution spéciale adressant des félicitations à cinq anciens membres de la Section du droit pénal de la Conférence pour leur nomination à la magistrature a été adoptée à l'unanimité. Le président enverra une lettre à cet effet aux juges Michel Proulx de la Cour d'appel du Québec, Julius Isaac de la Cour suprême de l'Ontario, Michael Martin de la Cour provinciale de l'Ontario, John Guy de la Cour provinciale du Manitoba et Robert Hyslop de la Cour provinciale de Terre-Neuve.

Rapport du président

Encore cette année, la Section du droit pénal a été invitée à se pencher sur un grand nombre de documents. Quarante-huit (48) résolutions ont été soumises par les participants. Elles proposaient des modifications précises au *Code criminel* ou suggéraient que le gouvernement fédéral revoit certaines des dispositions qu'il renferme. De ces résolutions, vingt-huit (28) ont été adoptées, onze (11) ont été rejetées et les autres ont été retirées. De plus, six documents de travail ont été rédigés. Ils portaient sur les sujets suivants: la possession des couteaux dans les endroits publics, le crime d'incendie, un énoncé législatif des objectifs et principes de la détermination de la peine, la perception des amendes infligées en vertu du *Code criminel*, une loi uniforme relative à la procédure applicable aux infractions provinciales et l'outrage au tribunal.

Le 16 août dernier, Georgina Jackson, présidente de la Conférence sur l'uniformisation des lois, a donné à la Section du droit pénal un bref aperçu du document intitulé *RENEWING CONSENSUS FOR HARMONISATION OF LAWS IN CANADA* qui sera examiné lors de la conférence de 1990 qui se tiendra à St-John, au Nouveau-Brunswick. Ce document renferme des propositions visant l'amélioration de la structure et du fonctionnement de la Conférence sur l'uniformisation des lois.

Clôture

Richard G. Mosley, du ministère fédéral de la Justice, a été élu à l'unanimité président de la Section du droit pénal pour la Conférence de 1990 qui se tiendra à St-John, au Nouveau-Brunswick. Michael E. N. Zigayer agira encore une fois à titre de secrétaire.

RÉSOLUTIONS

I - ALBERTA

Point 1

Que les articles 691, 692 and 693 du *Code criminel* soient modifiés de manière à ce que tout appel interjeté à la Cour suprême nécessite l'autorisation d'appel sauf s'il concerne une infraction punissable par un emprisonnement à perpétuité et qu'il y a eu dissidence sur un point de droit en Cour d'appel.

(MODIFIÉE ET REJETÉE : 6-12-18)

Point 2

Que le paragraphe 29(4) de la *Loi sur la preuve au Canada* soit modifié de manière à faciliter la production de documents bancaires sous forme d'affidavit, à un agent de la paix ou au procureur général, aux fins d'une enquête relative à une infraction criminelle présumée afin d'éviter la nécessité d'obtenir d'abord un mandat de perquisition.

(RETIRÉE ET REMPLACÉE PAR CE QUI SUIT)

Que le paragraphe 29(7) de la *Loi sur la preuve au Canada* soit modifié de manière à soustraire la saisie de *copies* des livres et registres des institutions financières à l'application de l'article 490 du *Code criminel*, en ajoutant ce qui suit :

", et dans le cas de saisie de copies de ces livres et registres en vertu du mandat de perquisition, l'article 490 ne s'applique pas."

(ADOPTÉE EN PRINCIPE : 31-0-3)

Point 3

Que l'article 10 du *Code criminel*, soit modifié de manière à permettre à un syndicat ouvrier d'interjeter appel d'une condamnation pour outrage au tribunal.

(ADOPTÉE : 28-0-1)

Point 4

Que des règles formelles relatives aux enquêtes auxquelles devrait procéder le juge ou le juge de paix après avoir entendu un plaidoyer de culpabilité soient incorporées dans le *Code criminel*.

(RETIRÉE)

Point 5

Que le paragraphe 718(2) du *Code criminel* soit abrogé.

(ADOPTÉE : 28-0-0)

Point 6

Que l'article 259 du *Code criminel* soit modifié de manière à prévoir que l'interdiction de conduire prononcée en vertu de l'article 259 entre en vigueur seulement au moment où prend fin la peine d'emprisonnement infligée en vertu des paragraphes (1) et (2).

(RETIRÉE)

Point 7

Que les paragraphes 676(1) et 693(1) du *Code criminel* soient modifiés.

(RETIRÉE)

II - COLOMBIE-BRITANNIQUE

Point 1

Que la partie XIX du *Code criminel* soit modifiée de manière à donner au prévenu le droit à un procès devant une cour provinciale après la tenue d'une enquête préliminaire.

(ADOPTÉE PAR LES JURIDICTIONS : 18-10-5)

Point 2

Que le *Code criminel* soit modifié de manière à interdire d'inviter un enfant à exhiber ou à toucher son propre corps pour les fins d'ordre sexuel d'une autre personne.

(ADOPTÉE : 27-0-1)

Point 3

Que la loi autorise la prise l'empreintes digitales dans toutes les poursuites criminelles.

(REJETÉE DANS SA FORME ORIGINALE : 8-13-4)

Proposition modifiée :

Que la loi autorise la prise d'empreintes digitales dans le cas des infractions punissables sur déclaration sommaire de culpabilité suivantes : actions indécentes (paragraphe 173(1)), exhibitionnisme devant un enfant à des fins sexuelles (paragraphe 173(2)), intrusion de nuit (article 177), le vagabondage par un contrevenant ayant été déclaré coupable d'une infraction d'ordre sexuel sur un terrain de jeu (paragraphe 179(1)), sollicitation à des fins de prostitution (article 213) et violation des conditions d'une ordonnance de probation (article 740).

(ADOPTÉE : 21-7-1)

Point 4

Que la loi permette expressément :

a) à un agent de la paix de procéder à une arrestation, avec ou sans mandat, dans le but d'obtenir sans délai les empreintes digitales d'une personne quand il existe des motifs raisonnables de croire qu'une condition prévoyant la prise de ces empreintes n'a pas été respectée; et

b) a un juge de renvoyer un prévenue sous garde dans le but de prélever sans délai ses empreintes digitales lorsque le tribunal a acquis la conviction qu'elles n'ont pas été prélevées auparavant.

(REJETÉE DANS CETTE FORME: 8-22-3)

Proposition modifiée:

Que la loi confère le pouvoir mentionné au paragraphe (b) seulement.

(ADOPTÉE:29-3-1)

Point 5

Que l'article 487 du *Code criminel* soit modifié de façon à permettre la délivrance d'un mandat de perquisition susceptible de révéler le lieu où se trouve toute personne que l'on a des motifs raisonnables de soupçonner d'avoir commis une infraction.

(ADOPTÉE: 16-9-1)

Point 6

Que le *Code criminel* soit modifié de façon à inclure une présomption réfutable voulant qu'un taux d'alcoolémie supérieur à 80 mg entraîne un affaiblissement de la faculté de conduire un véhicule à moteur.

(REJETÉE: 3-30-3)

Point 7

Que l'article 258 du *Code criminel* soit modifié de façon à s'appliquer aux accusations fondées sur les articles 220 et 249.

(ADOPTÉE: 26-4-4)

Point 8

Que la règle du renvoi dans les huit jours soit supprimée de l'alinéa 537(1) (a) et du paragraphe 803(1) du *Code criminel.*

(ADOPTÉE DANS CETTE FORME: 21-4-10)

Proposition modifiée:

Que la règle du renvoi dans les huit jours de l'alinéa 537(1) (a) et du paragraphe 803(1) du *Code criminel* soit réexaminée.

(MODIFIÉE ET ADOPTÉE: 19-5-8)

III - NOUVEAU-BRUNSWICK

Point 1

Que le paragraphe 257(1) soit modifié pour y ajouter les termes «pour des motifs d'ordre médical» après le mot «refus» partout où il figure dans le paragraphe.

(REJETÉE: 1-27-6)

Point 2

Que l'article 529 du *Code criminel* soit abrogé.

(ADOPTÉE A L'UNANIMITÉ)

Point 3

Que le paragraphe 718(10) du *Code criminel* soit réexaminé.

(MODIFIÉE ET ADOPTÉE: 28-0-3)

Point 4

Qu'une infraction interdisant de façon absolue les communications par un accusé, ou en son nom, avec les jurés après la tenue d'un procès soit incluse au *Code criminel.*

(REJETÉE: 1-29-5)

Point 5

Que certaines dispositions du *Code criminel* soient modifiées afin que les infractions soient décrites de façon uniforme.

(REJETÉE: 2-7-23)

Point 6

Que le *Code criminel* soit modifié de façon à prévoir une prescription égale au double de la durée de la peine maximum d'emprisonnement qui peut être infligée, dans le cas des actes criminels, à l'exception de ceux qui entraînent une peine d'emprisonnement à perpétuité.

(RETIRÉE)

Point 7

Que le *Code criminel* soit modifié de façon à ce que la durée des ordonnances de probation soit limitée à 18 mois dans le cas des infractions punissables sur déclaration de culpabilité par procédure sommaire, et à trois ans dans le cas des actes criminels.

(RETIRÉE)

IV – TERRE-NEUVE

Point 1

Que l'alinéa 737(1) (c) du *Code criminel* soit modifié de manière à prévoir clairement que le tribunal infligeant une peine discontinue peur également infliger une période de probation allant au-delà de la période qu'il faut pour purger cette peine.

(ADOPTÉE : 32-0-0)

Point 2

Que l'article 430 du *Code criminel* soit modifié de manière à préciser si l'expression «dont la valeur» se rapporte au dommage ou au bien.

(ADOPTÉE : 30-0-0)

Point 3

Que l'article 737 du *Code criminel* soit modifié de manière à préciser que l'ordonnance de probation entre en vigueur au moment même de la libération de l'accusé.

(ADOPTÉE : 14-4-7)

Point 4

Ou encore, que l'article 737 du *Code criminel* soit modifié de manière à préciser le moment exact de «l'expiration de la sentence».

(RETIRÉE)

V – ONTARIO

Point 1

Que l'article 101 du *Code criminel* soit modifié de manière à préciser que l'agent doit avoir des motifs raisonnables de croire que les objets recherchés sont dissimulés sur la personne qu'il souhaite fouiller ou dans les lieux qu'il souhaite perquisitionner.

(ADOPTÉE : 30-0-0)

Point 2

Que l'article 715 du *Code criminel* soit modifié de façon à permettre, à titre de preuve, la lecture du témoignage, recueilli antérieurement sous serment, de tout témoin qui s'est enfui et que l'on ne peut retrouver, même en faisant preuve d'une diligence raisonnable.

(ADOPTÉE PAR LES JURIDICTIONS : 17-13-3)

Point 3

Que le paragraphe 442(2.1) et article 643.1 du *Code criminel* soient modifiés en ajoutant à la liste des infractions qui s'y trouve, l'infraction perpétrée aux termes de l'article 348, lorsque l'acte criminel que le contrevenant a commis ou avait l'intention de commettre, par suite de l'introduction par effraction, fait partie des infractions actuellement énumérées dans les dispositions.

(REJETÉE : 11-20-4)

Point 4

Que l'expression «eaux intérieures» soit définie de manière à ce qu'elle s'applique aux eaux internes, ou que l'alinéa 249(1) (b) du *Code criminel* soit modifié de manière à ce qu'il s'applique aux incidents survenus sur les «eaux internes».

(RETIRÉE ET REMPLACÉE PAR CE QUI SUIT)

Que les mots «sur les eaux intérieures ou la mer territoriale du Canada ou au-dessus de ces eaux ou de cette mer» soient supprimés de l'alinéa 249(1) (b) du *Code criminel*.

(ADOPTÉE : 30-0-0)

Point 5

(1) Que l'article 4 de la *Loi sur les stupéfiants* et l'article 39 de la *Loi sur les aliments et drogues* soient modifiés de manière à prévoir que quiconque commet une infraction de trafic comportant la participation d'un adolescent âgé de moins de 16 ans, soit en lui vendant, en lui donnant, en lui administrant, en lui envoyant, en lui livrant ou en lui distribuant de la drogue, soit en faisant appel à cet adolescent afin qu'il collabore à cette infraction ou en encourage la perpétration, est passible d'une peine d'emprisonnement d'au moins un an et que cette peine est consécutive à toute autre peine dont il fait l'objet au moment où celle-ci lui est infligée.

(RETIRÉE ET REMPLACÉE PAR CE QUI SUIT)

Que le gouvernement fédéral mène une étude sur l'opportunité des peines infligées actuellement aux adultes qui sont reconnus coupables de trafic de *certaines* drogues à usage restreint dans les cas où l'infraction comporte la participation d'adolescents de moins de 18 ans, soit en ce qui a trait au trafic ou à la consommation des drogues.

Et, de plus, si ces peines sont jugées inadéquates quant à la participation des adolescents, que le gouvernement fédéral élabore des solutions de rechange à la peine ou des mécanismes relatifs aux infractions qui permettront de régler le problème de façon appropriée.

(MODIFIÉE ET ADOPTÉE : 32-0-2)

(2) Que la *Loi sur les stupéfiants* et *Loi sur les aliments et drogues* soient modifiées de manière à prévoir que quiconque encourage un adolescent âgé de moins de 16 ans à perpétrer une infraction sous le régime de ces lois, le lui conseille ou le pousse à le faire, est coupable d'une infraction et passible d'une peine d'emprisonnement d'au moins un an et d'au plus cinq ans, et que cette peine est consécutive à toute autre peine dont il fait l'objet au moment où celle)ci lui est infligée.

(REJETÉE : 10-23-1)

Point 6

Que le paragraphe 25(4) du *Code criminel* soit abrogé et remplacé par une nouvelle disposition limitant l'emploi de la force par un agent de la paix qui procède légalement à une arrestation, avec ou sans mandat, au degré de force nécessaire pour empêcher une personne de s'enfuir pour échapper à une arrestation légale (y compris l'emploi de la force de nature à causer ou avec l'intention de causer la mort). L'emploi de la force serait limité aux cas où il est nécessaire pour protéger la population contre les préjudices graves qu'elle a risque de subir si la personne en fuite réussissait à échapper à l'arrestation.

(ADOPTÉE : 13-6-13)

Point 7

Que l'article 67 du *Code criminel* soit modifié de manière à autoriser les directeurs et directeurs adjoints des établissements correctionnels fédéraux et provinciaux à lire la proclamation de la loi sur l'émeute.

(REJETÉE PAR LES JURIDICTIONS : 12-13-5)

Point 8

Que l'on modifie les dispositions du *Code criminel* relatives au jury en tenant compte des problèmes liés au système actuel de sélection.

(ADOPTÉE : 33-0-0)

Point 9

Que l'article 102 du *Code criminel* soit modifié de façon à prévoir la possibilité d'interjeter appel de la décision rendue par un juge sous le régime du paragraphe 102(3).

(ADOPTÉE : 33-0-0)

VI – QUÉBEC

Point 1

Que le paragraphe 172(1) du *Code criminel* soit modifié de façon :

1. a ce que la disposition s'applique lorsque l'acte est commis en présence d'un enfant, peu importe l'endroit où celui-ci se trouve;

2. a ce que la peine maximale soit un emprisonnement de 10 ans;
3. à prévoir que les procédures peuvent être entreprises par voie de mise en accusation ou sur déclaration sommaire de culpabilité.

(RETIRÉE ET REMPLACÉE PAR CE QUI SUIT)

Que le gouvernement fédéral revoit le paragraphe 172(1) du *Code criminel* relatif à la corruption d'enfants afin de déterminer les conduites qui mettent en danger les moeurs de l'enfant, peu importe l'endroit où celui-ci se trouve.

(ADOPTÉE: 24-0-5)

Point 2

Que l'article 464 du *Code criminel* soit modifié de façon:

1. a prévoir que l'infraction de conseiller à une personne, identifiée ou non, de commettre une infraction est complète par ce simple fait de conseiller;

(ADOPTÉE: 27-0-2)

2. a prévoir que cette disposition similaire au régime applicable au complot visé par l'article 465 du *Code criminel*, a des répercussions extra-territoriales.

(REJETÉE: 9-15-7)

Point 3

Que le *Code criminel* soit modifié de manière à prévoir qu'une personne à l'égard de laquelle un mandat a été délivré, peur comparaître à l'endroit où elle a été arrêtée en vue d'être libérée suite à sa promesse de comparaître devant le tribunal compétent, ou d'être détenue et renvoyée devant ce tribunal.

(ADOPTÉE: 21-2-6)

Point 4

Que l'alinéa 737(1) (c) du *Code criminel* soit modifié de façon à prévoir qu ordonnance de probation à laquelle doit se conformer une personne qui s'est vu infliger une peine d'emprisonnement discontinue reste en vigueur à l'expiration de cette peine pour la période fixée par le tribunal qui ne doit pas dépasser trois ans suivant la date à laquelle a été rendue l'ordonnance de probation.

(RETIRÉE*)

*Le délégation du Québec a retirée cette proposition après l'adoption d'une proposition similaire présentée par Terre-Neuve.

Point 5

Que l'alinéa 738(4) (d) du *Code criminel* soit modifié de façon à donner au tribunal qui a révoqué une sentence avec sursis le pouvoir d'ordonner que la peine soit purgée de façon consécutive à une autre peine.

(ADOPTÉE : 28-0-2)

VII - CANADA

Point 1

Que le *Code criminel* soit modifié de façon à ce qu'il renferme une infraction visant le trafic des enfants.

(RETIRÉE ET REMPLACÉE PAR CE QUI SUIT)

Que la législation fédérale et provinciale relative à la vente d'enfants soit examinée par un groupe de travail de la Section du droit pénal et de la Section de l'uniformisation des lois, en vue de déterminer si elle est adéquate, et que le rapport de ce groupe de travail soit déposé et examiné lors de la Conférence de 1990.

(ADOPTÉE : 33-0-0)

CLOSING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting opened at 11:00 a.m. on Friday, August 18 with Georgina Jackson in the chair and Mel Hoyt as secretary.

Legislative Drafting Section

Clifford Watt, in the absence of the chairman, reported on the work of the Section. The minutes of the Section are set out at page 21.

Uniform Law Section

The Chairman, Basil Stapleton, reported on the work of the Section. The minutes of that Section are set out at page 76.

Criminal Law Section

The Chairman, Jean-François Dionne, reported on the work of the Section. The minutes of the Section are set out at page 83.

The Chairman also moved that the Steering Committee in assessing the problem of what should be done on Contempt of Court join some members of the Civil Side with some members of the Criminal Side to form a full working committee on this matter by members of the Civil and Criminal Sides and that they have a report next year either by way of a draft proposition or by a working paper.

The motion was carried.

Resolutions Committee's Report

The Chairman, Jean-François Dionne, 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 the Northwest Territories, for its generous hospitality in hosting the seventy-first meeting of the Uniform Law Conference of Canada and in particular:

   a) for the tour of Yellowknife;

   b) for the tours of the Legislative Assembly;

   c) for the dinners in Yellowknife homes;

d) for the tour of the Prince of Wales Heritage Museum;

e) for the trip to Long Lake and Picnic Lunch;

f) for the annual East-West Baseball game and B-B-Q;

g) for the walking tour of Old Town;

h) for the films of the Northwest Territories;

i) for the cruise of Great Slave Lake;

j) for the banquet on Thursday evening.

2. The Organizing Committee consisting of Geoff Bickert, Nora Sanders, Giuseppa Bentivegna, Beth Stewart, Ralph Armstrong, Laurie Balsan, Bernie Funston, Ruth Schwab, Diana Ginn, Susan Johnson and Renee Fournier for their enormous contributions which resulted in a successful and enjoyable conference

3 The Department of Justice of the Northwest Territories foı hosting the lunch for the Legislative Drafting Section

4. The Government of the Northwest Territories for hosting the reception following the Plenary Session.

5. The Government of the Northwest Territories for providing the secretarial services for the Conference.

6 Lawrence Bugge, the President of the National Conference of Commissioners on Uniform State Laws, for the hospitality extended to our President at the recent meeting in Hawaii, and for contributing to the enhancement of relations between our Conferences by honouring our Conference with the attendance of himself and his wife Elaine.

7. The Government of Canada for hosting the reception on Thursday evening.

8. Jean-François Dionne, Chairman of the Criminal Law Section, Basil D. Stapleton, Q.C., Chairman of the Uniform Law Section and Peter Pagano, who acted as Chairman of the Legislative Drafting Section in the absence of Merrilee Rasmussen.

9. Louise Mercier, François Gofeil, Sylvie Lee, Claude Groenendaald, Janet Fulton, and Louise Meunier-Cyr, for the excellent interpretation services provided to the Conference.

10. Alan and Maureen Regel, Geoff Bickert and Susan Johnson, Giuseppa Bentivegna and Brian Bergman, Doug and Mary Carol Miller, David Gates, Nora Sanders, Beth Stewart, Carol Roberts, Mark Aitken, Carol Whitehouse, Linda Tarras, Janet Drysdale, Diana Ginn and Heather Gibbs for their generous hospitality in hosting the dinners at their homes Monday evening.

11. Brian Bergman, for his enormous contribution to the success of the Conference.

Future Meetings

The President announced that our meeting in 1990 will be in Saint John, New Brunswick at the International Hilton. The dates of that meeting will be as follows:

Legislative Drafting Section, Saturday, August 11.

Opening Plenary Session, Sunday, August 12 at 8:00 p.m.

In 1991 the meeting will be in Saskatchewan.

The Executive Committee is talking with Newfoundland about hosting the meeting in 1992.

Nominating Committee's Report

The Executive Secretary reported on the membership of the Nominating Committee and the factors taken into account in their deliberations.

RESOLVED that the following officers of the Conference be elected for the year 1989-90.

Honorary President	Graham D Walker, Q.C., Halifax
President	Georgina R. Jackson, Regina
1st President	Basil D. Stapleton, Q C., Fredericton
2nd President	Daniel C. Préfontaine, c.r., Ottawa
Treasurer	Peter Pagano, Edmonton
Secretary	Howard F. Morton, Q C., Toronto
Ex Officio	Merrilee Rasmussen, Regina
Ex Officio	Richard G. Mosley, Ottawa

Report on Renewing Consensus for Harmonization of Laws in Canada

The President announced that the Executive Committee will be reviewing reports in the next quarter on Renewing Consensus for Harmonization of Laws in Canada and will be meeting at the end of February to consider the reports, a draft constitution and by-laws to enable all of the above to be presented for consideration in a Plenary Session in Saint John next year.

Annonce – Anne-Marie Trahan

Je voudrais porter à l'attention de nos collègues, un outil qui pourra probablement leur être extrêmement utile dans la tâche, à laquelle nous travaillons tous très fort, à savoir celle d'uniformiser et d'harmoniser les lois. Pour ce faire je mets mon chapeau de présidente du *Programme de l'administration de la Justice dans les Langues Officielles (le PAJLO)*. C'est un programme conjoint du Ministère de la Justice et du Secrétariat d'État. Jusqu'à présent le PAJLO a travaillé extrêmement fort à la normalisation de la common law en français. Certains d'entre vous ont peur- être déjà vu les volumes bleus ... les vocabulaires juridiques de la common law normalisée.

Nous lancerons lundi prochain lors du congrès du Barreau canadien, le tome 3 du *Droit des biens* et aujourd'hui ... je voudrais vous présenter *Le Lexique juridique des lois fédérales*. Comme vous le savez l'évolution de la rédaction législative a connu des modifications importantes depuis un certain nombre d'années au niveau du style et de la terminologie. Nous avons jugé opportun de consigner dans ce lexique les équivalents français et anglais des divers termes utilisés. Je soulignerais la présence à ma droite de Lionel Levert qui a été pendant plusieurs années (sept je crois) le secrétaire de la *Commission de Révision des lois du Canada*. C'est la Commission qui a mené à bien entre autres la révision d'une bonne partie de la version française des lois. Le résultat en est, je pense, que la version française des lois correspond maintenant au génie de la langue. Pour ceux d'entre vous qui êtes intéressés à la question, j'ai un exemplaire du volume. En français on parle de 'lancement de livre', je n'oserais pas le "lancer" parmi nous; mais je l'offrirai, tout à l'heure, à la présidente pour qu'elle perfectionne le français qu'elle a manié si bien tout au cours de cette réunion. Merci Madame la présidente.

Close of Meeting

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

APPENDIX A

(See page 74)

AUDITORS' REPORT

To the Members of the
Uniform Law Conference of Canada:

We have examined the General Fund and Research Fund balance sheets of the Uniform Law Conference of Canada as at June 30, 1989 and the statement of revenues, expenses and equity for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests and other procedures as we considered necessary in the circumstances.

In our opinion, these financial statements present fairly the financial position of the organization as at June 30, 1989 and the results of its operations for the year then ended in accordance with generally accepted accounting principles applied, after giving retroactive effect to the change in accounting policy explained in note 2 to the financial statements, on a consistent basis.

Saint John, Canada
July 24, 1989

Clarkson Gordon
Chartered Accountants

UNIFORM LAW CONFERENCE OF CANADA

Balance Sheet
June 30, 1989

GENERAL FUND

Assets

	1989	1988
Cash	$16,310	$ 5,548
Accounts receivable	3,000	3,000
	$19,310	$ 8,548

Liabilities and Equity

Accounts Payable	$ 4,785	$ 6,141
Equity	14,525	2,407
	$19,310	$ 8,548

RESEARCH FUND

Assets

Cash	$ 1,774	$ 1,345
Term Deposits	52,000	72,000
Accounts receivable	21,226	1,655
	$75,000	$75,000

Equity

Equity	$75,000	$75,000

(See accompanying notes)

UNIFORM LAW CONFERENCE OF CANADA

Statement of Revenues, Expenses and Equity
Year Ended June 30, 1989

	General Fund	Research Fund	Total 1989	Total 1988
Revenues:				
Annual contributions	$69,000		$69,000	$69,000
Government of Canada	3,460	$21,226	24,686	1,655
Interest	5,146		5,146	4,049
	77,606	21,226	98,832	74,704
Expenses:				
Printing	17,408	12,309	29,717	20,957
Executive Director honorarium	21,352		21,352	18,859
Secretarial services	3,112		3,112	3,070
Executive travel	8,071		8,071	4,742
Annual meeting	10,836		10,836	5,979
Professional fees	800		800	785
Postage	1,291		1,291	644
Stationery	1,319		1,319	113
Miscellaneous	41	7	48	20
Telephone	1,258		1,258	1,465
Human Tissue Project		4,010	4,010	1,639
Uniform Provincial Offences Procedures Act		4,900	4,900	
	65,488	21,226	86,714	58,273
Excess of revenues over expenses	12,118		12,118	16,431
Equity, beginning of year	2,407	75,000	77,407	60,976
Equity, end of year	$14,525	$75,000	$89,525	$77,407

(See accompanying notes)

UNIFORM LAW CONFERENCE OF CANADA

Notes to Financial Statements
June 30, 1989

1. *Accounting policies*

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. *Change in accounting policy*

During the year, the organization adopted the accrual basis of accounting. This change had been applied retroactively and the comparative financial statements presented for 1988 have been restated. The effect of the change is to increase (decrease) the following amounts:

	1989	1988
Revenues	$19,611	$ 2,709
Expenses	(1,356)	(14,461)
Excess of revenues over expenses	$20,967	$17,170

3. *Statement of cash flows*

A statement of cash flows has not been presented as it is not considered to provide additional information.

4. *Tax status*

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

APPENDIX B

(See page 78)

DOMESTIC ARBITRATIONS

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THE UNIFORM LAW CONFERENCE
REPORT OF THE ALBERTA COMMISSIONERS

DOMESTIC ARBITRATIONS

Purposes of report

The purposes of this report are

(a) to put forward the recommendations of the Alberta Commissioners which are set forth below,

(b) to give reasons for the recommendations,

(c) to provide materials upon which the Uniform Law Section can make the policy decisions necessary for the implementation of the recommendations.

Recommendations of the Alberta Commissioners

1. The Alberta Commissioners recommend that the Uniform Law Section undertake the preparation and adoption of a Uniform Arbitration Act governing domestic arbitrations within each province.

2. The Alberta Commissioners further recommend that the Section make the policy decisions necessary for the preparation of a Uniform Act and refer the preparation of the Uniform Act to the Drafting Section with the hope that a draft Uniform Act might be put before the Uniform Law Section for adoption at its 1990 annual meeting.

Reasons for recommendations (Conference Rules of Procedure 4(2)(a))

The reasons of the Alberta Commissioners for recommending the preparation and adoption of a Uniform Arbitration Act are as follows:

(a) until 1986, arbitration legislation in the common law provinces was remarkably uniform (Quebec having a statute in different form), because those provinces had copied the Arbitration Act 1889 (UK) and left it largely untouched. Since 1986, however, uniformity among the common law provinces has been largely destroyed by the following developments:

(i) the adoption of one reformed domestic arbitration statute by British Columbia and the adoption of another one by Parliament,

(ii) the adoption of a reformed international commercial arbitration statute by Parliament and all the common law provinces, which has left the law of international commercial arbitrations quite uniform in those jurisdictions, but has created divergence between international commercial arbitration law and domestic arbitration law.

(b) domestic arbitration statutes based on the Arbitration Act 1889 (UK) are in need of reform, and it may be expected that there will be further erosion of uniformity unless the erosion process can be reversed by the adoption of a new Uniform Arbitration Act. It has been found necessary to enact reformed legislation in the UK itself, in several Australian jurisdictions, and in British Columbia. Recommendations for reform have been made in Alberta, and reform is under consideration in other provinces.

(c) it is likely that provinces will enact idiosyncratic reforming domestic arbitration statutes, and that the inertia resulting from a reluctance to revisit a subject dealt with comparatively recently will make it virtually impossible to regain a situation of uniformity or harmonization of domestic arbitration law.

Past consideration by the Commissioners on Uniformity

In 1930, a committee of the Canadian Chamber of Commerce suggested that the Commissioners on Uniformity consider and report on a draft arbitration act prepared by the Committee. In 1931, the Commissioners, acting upon a report prepared by the British Columbia Commissioners, decided not to take any action in the drafting of a Uniform Act based on the proposed act.

Essentially, the Commissioners' reasons were as follows:

(a) all the provinces except Quebec and Prince Edward Island had enacted statutes based on the Imperial Arbitration Act of 1889, so that there was substantial uniformity of legislation in the provinces.

As noted above, uniformity has now been eroded and is threatened with further erosion, so this reason is no longer applicable.

(b) there was no reason why commercial arbitration could not develop in Canada under the provincial acts as it had done in the UK under the Imperial Act, which it had done very effectively.

As noted above, statutes based on the Arbitration Act 1889 (UK), however adequate they may have been in 1931, are no longer meeting the needs of the times, so this reason is no longer applicable.

(c) the proposed act did not add anything significant, and some of its provisions were unsuited to Canada.

As will be seen, there are models available for consideration which would be more suitable for domestic arbitration in the provinces than are the statutes based upon the Arbitration Act 1889 (UK).

Desirability of uniformity (Conference Rules of Procedure 5(2)(a))

Uniformity, in the submission of the Alberta Commissioners is desirable for the following reasons:

(a) business transcends provincial boundaries, and the legal system should provide similar laws and procedures across the country to accommodate it.

(b) jurisprudence can better be developed by the courts of a number of provinces.

(c) requiring practitioners to master widely different provincial arbitration laws and systems in order to appear in different provinces is inefficient.

(d) requiring practitioners to master widely different arbitration laws and systems in order to appear on both international and domestic arbitrations, and as to appear on both federal and provincial domestic arbitrations, within the same province, is inefficient.

Demand for uniformity (Conference Rules of Procedure 5(2)(b))

It is only since 1986 that uniformity of arbitration law in the common law provinces has been eroded. There has therefore been little time for dissatisfaction with diversity to come to the surface.

As we have noted above, however, there is a demand for reform. This is evidenced by the fact that British Columbia, having weighed the desirability of reform against the desirability of uniformity, concluded, in the words of the Law Reform Commission of British Columbia, that "the benefits flowing from the recommendations [i.e., the Commission's recommendations for reform, which were largely adopted] outweigh the benefit of maintaining uniformity with the other common law provinces of Canada". Other provinces are likely to come to similar

conclusions, and, as we have suggested above, to enact divergent reforming legislation which, once enacted, will be difficult to dislodge in the name of uniformity. We think that a reformed Uniform Act should be provided at an early stage of the process, so that, as provinces enact new legislation, they will do so in a uniform, or at least harmonious, way.

In 1986/87, the Uniform Law Section found sufficient demand for uniformity to adopt, with almost unprecedented expedition, a Uniform Act covering international commercial arbitrations. While the Section's motivation no doubt had much to do with creating a hospitable legal climate for such arbitrations, it should be noted that creation of a hospitable legal environment across the country is desirable in general and will be advanced by the adoption of uniform reformed domestic arbitration statutes.

Likelihood of adoption (Rules of Procedure 5(2)(c))

There is no specific evidence as to whether or not a uniform act would be adopted. British Columbia, having recently adopted domestic arbitration legislation, might not want to revisit it soon. However, the great amount of reform activity which has gone on suggests that there is a widespread desire for a modern act, and, if a Uniform Act is adopted which will meet that desire, there should be a good likelihood that it will be accepted. There is activity going on in Alberta and Ontario at the moment (and probably in other provinces), and the Abitrators' Institute of Canada and at least the Alberta Arbitration and Mediation Society have been pushing for reformed legislation.

The questions of policy that the Section should determine (Conference Rules of Procedure 4(2)(b) and 5(2)(d))

The policy questions which the Section should consider are outlined in the attached materials.

INTRODUCTION TO ARBITRATION MATERIALS

In 1982, the Law Reform Commission of British Columbia issued its Report 55, Report on Arbitration. In 1986, British Columbia enacted the Commercial Arbitration Act, which was largely based on the Commission's proposals.

In 1988, the Alberta Institute of Law Research and Reform (which is now the Alberta Law Reform Institute and will be referred to as ALRI),

issued its Report 51, Proposals for a New Arbitration Act. The report included draft legislation which would give effect to the proposals made in it.

ALRI's approach differed somewhat from the LRC BC approach. This was not because of any perceived deficiency in the LRC BC's proposals: on the contrary, ALRI recognized its heavy – and not always specifically acknowledged – indebtedness to the storehouse of research and ideas contained in the LRC BC report. Rather, the difference arose because, in ALRI's view, the situation had been significantly changed, after the LRC BC report was issued, by the adoption across much of Canada, of international commercial arbitration statutes which incorporated, or were based upon, the UNCITRAL Model Law of 1985.

The Alberta Commissioners think that it will be efficient for the Uniform Law Section (if it decides to proceed with a Uniform Arbitration Act) to have regard to either or both of the LRC BC and ALRI models, the latter being modelled upon the Model Law. No doubt, other models are possible, but we think that the Section should take the benefit of the work done in British Columbia and Alberta.

The principal materials attached are intended to raise the policy issues for the Uniform Law Section. They include propositions which are based upon the summary of proposals which appears in the ALRI report at pages 43 to 64. Each proposition is followed by a summary of the arguments which bear on the proposition, and, where appropriate, a rough indication of the way in which a number of legislative models have dealt with the issue raised by the proposition. (It will be noted, also, that a Comparative Chart at pages 153 to 166 of the ALRI report compares the present Alberta Arbitration Act – which is, of course, similar to the legislation of most of the common law provinces – with the UNCITRAL Model Law as varied by the Alberta International Commerical Arbitration Act – which is the ICC Uniform Act. Unfortunately, it does not include the BC Commercial Arbitration Act.)

As background material, the enclosed materials include the ALRI report. The discussion of the law in the ALRI report is in summary form, from pages 1 to 41. The discussion materials refer the reader to the draft Act included in the ALRI report, where some further commentary can be found if it is desired. The propositions contained in the materials include the corresponding section reference in the ALRI draft Act.

In addition, under the heading "Legislation" under most of the propositions, references are made to the UK and BC legislation, and

also to the "Principles for the enactment of arbitration legislation "adopted by the Arbitrators' Institute of Canada". References to the AIC principles are included because of the endorsement of the Principles by practical people in the field. The Principles are strongly influenced by the Model Law.

The Alberta Commissioners tend to favour the ALRI approach, but it is, of course, for the Uniform Law Section to decide what approach it thinks best. If the materials give an indication of bias in that direction, it is because they can be most efficiently prepared from the ALRI materials. We have tried to set out the arguments on all sides of the issues.

The propositions, in most cases, read as if they are statements of law. This is for convenience of expression. They are, of course, mere proposals.

TABLE OF REFERENCES

We refer in this report to the following:

Arbitration Act 1889 (UK)	"UK 1889 Act"
Alberta Arbitration Act	"AA"
British Columbia Commercial Arbitration Act (as an example of an act based upon UK 1889 Act)	"BC CAA"
UNCITRAL Model Law on International Commercial Arbitration, 1985	"Model Law"
Uniform International Commercial Arbitration Act (to which the Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, are schedules)	"UICCA"
Principles for the enactment of arbitration legislation, a draft by David Elliott and adopted by the Board of Directors of the Arbitrators' Institute of Canada, 1987	"AIC principles"
Report LRC 55, Report on Arbitration, Law Reform Commission of British Columbia, 1982	"LRC BC report"

Report 51, *Proposals for a New Alberta Arbitration Act*, 1988 by the Alberta Law Reform Institute (formerly the Institute of Law Research and Reform). "ALRI report"

["ALRI s. .." refers to a section in the draft Act included in the ALRI Report]

UNIFORM DOMESTIC ARBITRATION ACT

REQUIRED POLICY DECISIONS

[The propositions contained in these materials, in most cases, read as if they were statements of law. This is for convenience of exposition. They are, of course, merely proposals.]

1. BASIC PRINCIPLES

Party control, fairness and efficiency

Proposition 1(1)

The Uniform Arbitration Act is based upon the following principles:

(a) fairness, or equality of treatment,

(b) control by the parties (except as required by equality of treatment), and

(c) efficiency, or satisfaction of the interests of the parties (except as required by equality of treatment, and except as agreed by the parties).

Arguments

1. Generally speaking, it is impracticable for arbitration agreements to lay out a whole code of law and procedure. The law should therefore provide a scheme which will supply the deficiencies.
2. Generally speaking, the only interests involved in an arbitration are those of the parties. While it may be argued that a whole mandatory scheme should be imposed on them for their own good, we see no justification for doing so. Party control is one fundamental principle upon which arbitration law should be based.

3. However, a legally sanctioned procedure for adjudicating disputes should give parties a legal assurance of equal and fair treatment. This is necessary to give business efficacy to their agreement. There is a public interest in seeing that the arbitration system works fairly, as well as a danger of overreaching, and the requirement of equal treatment and fairness should override any agreement of the parties to the contrary. Equal and fair treatment is the second fundamental principle.

Comments

1. The conflict between the party control principle and the equality and fairness principle is worked out later in these materials.
2. Before becoming fixed with these or other principles, the Conference may want to see how they are worked out in the following proposals, but at least tentative approval would be useful as a working guide for the discussion.

Court assistance

Proposition 1(2)

The Court should have the following powers to assist in the conduct of an arbitration (all of which are mentioned above): interim measures (ALRI s. 9); appointment of arbitrators (ALRI s. 11, 15); determination of preliminary question of law (ALRI s. 9(3), (4)); consolidation of arbitrations (ALRI s. 9(5), (6)); enforcement of arbitral tribunal's directions (ALRI s. 23(4)); orders for taking evidence (ALRI s. 27(5)); extension of time for award (ALRI s. 31(3)); and enforcement of award (ALRI s. 35).

Argument

The law should supply deficiencies in machinery and procedure, both by conferring powers on arbitrators and by conferring powers of assistance on the courts.

Comment

The Conference need not approve this list at this point. The list is supplied in order to help the Conference get an overview. The specifics will come up as we go along.

Court supervision

Proposition 1(3)

Court supervision is necessary to ensure justice and fairness. However, instead of the broad discretions conferred by domestic arbitration law, the Uniform Arbitration Act should (a) identify specific kinds of circumstances in which court intervention is necessary, and (b) confer upon the Court the powers necessary for effective intervention in those circumstances.

In particular, the Uniform Arbitration Act should provide that the court has the following power to exercise in supervising an arbitration: the power to grant or refuse a stay of an action in the court (ALRI s. 8); the power to decide upon a challenge to arbitrator's impartiality and independence (ALRI s. 13); the power to remove an arbitrator (ALRI s. 14); the power to determine whether an arbitral tribunal has jurisdiction (ALRI s. 16); the power to order an arbitral tribunal to give reasons (ALRI s. 31); the power to set aside or remit an award; the power to allow an appeal on a question of law (ALRI s. 34); the power to make a declaration of a fundamental flaw in an arbitration agreement or in a reference to arbitration or appointment of an arbitral tribunal (ALRI s. 34(11)).

Arguments

1. The proposition states the argument for court intervention. The argument against it is that one reason people choose arbitration is to escape the judicial system, and that the judicial system should not be imposed upon them. However, there is no one who suggests that court intervention is never necessary, and the argument comes down to its nature and extent.
2. The problem with the present domestic arbitration law is that the courts have broad discretions to intervene, and that these discretions leave undue latitude for intervention. That is why the proposals try to identify specific circumstances in which intervention is necessary in the interests of the parties, and to confer power to intervene only if those circumstances exist, and only to the extent called for by those circumstances.

Comment

The Conference need not approve this list at this point. It is supplied in order to help the Conference get an overview. The specifics will come up as we go along.

Court with jurisdiction under Uniform Act

Proposition 1(4)

With one exception, the court of unlimited trial jurisdiction in a jurisdiction should have exclusive jurisdiction under the Uniform Arbitration Act (the exception being that the power to grant or refuse a stay of an action in a court would be exercised by the court in which the action is brought, whether or not that court is the court of unlimited trial jurisdiction).

Argument

The superior courts have traditionally exercised the supervisory powers over arbitrations, and the functions to be exercised are best exercised by superior courts.

Comment

This question should be decided at this point.

2. THE UNCITRAL MODEL LAW AS A MODEL

Proposition 2

The Uniform Act should use as a model the UNCITRAL Model Law, as modified by the Uniform International Commercial Arbitration Act, departing from it only when

(a) different considerations apply to domestic arbitrations,

(b) changes are needed to fit the law or practice of arbitration into common law and Canadian procedures, or

(c) terminology should be changed for the convenience of Canadian users.

Arguments

1. The Model Law is, on the whole, a good model, as evidenced by its substantial adoption by the ULC for international commercial arbitrations, its substantial adoption by the common law provinces and Parliament for the same, and its substantial adoption by Parliament for domestic arbitrations as well.

2. This might lead to the conclusion that the Model Law, or the Uniform International Commmercial Arbitration Act, ought to be adopted for domestic arbitration purposes without alteration. However, the Model Law does have aspects, arising from its international

nature and from the diverse inputs into it, which make it unsuitable for literal adoption for domestic arbitrations in common law jurisdictions. Using it as a model, but not following it slavishly, appears to us to be the best way to go.

3. Using the Model Law as a model will tend to keep domestic arbitration law in harmony (though not uniformity) with international commercial arbitration law in this country, and, probably, elsewhere, when the Model Law is widely adopted. This will make for efficiency.

4. It can be argued that a better approach would be to start with existing domestic arbitration law, and to reform it, particularly bearing in mind the availability of the recent BC reform. It is our view, however, that the advantages of harmonization are the factor which should prevail, though we should try to get the advantages of the existing reform as well.

Comment

This proposition is raised at the beginning of the discussion so that it will be in participants' minds during the discussion. Probably, a decision should be deferred until the end of the discussion, when the shape of the policy decisions about specific issues will be known.

3. SCOPE OF UNIFORM ARBITRATION ACT

Proposition 3

The Uniform Arbitration Act applies to every arbitration to which the law of the enacting jurisdiction applies, unless an agreement of the parties or a statute of the enacting jurisdiction excludes it (ALRI s. 1(1)(a)).

Legislation

(1) AA s. 16, BC CAA s. 2(1)(b), include arbitrations under other statutes if the other statute directs that there be an arbitration under the Act (AA), or except to the extent that the Act is inconsistent with the Act regulated the arbitration or rules under it (BC).

(2) Neither AA nor BC CAA makes specific provision about contracting out of the whole Act.

Arguments

1. This proposition would apply the Arbitration Act to an arbitration under another statute unless the statute said otherwise. The alternative is to provide that the Arbitration Act applies if the other statute says that the Arbitration Act applies.

2. We think that the proposal is better. It does not seem that it would require all statutes to be combed to see whether they should opt out of the Arbitration Act, and, if it did, searching for "arbitration" is not much of a task nowadays in most jurisdictions. We think that the new Act will be beneficial and should apply unless it is excluded, which it will be by labour and international commercial arbitration statutes.

3. The proposition would allow parties to contract out of the Arbitration Act altogether. This should be their right, though it is hard to see where they will find their law if the decision is to be binding.

4. THE CROWN

Proposition 4

The Uniform Arbitration Act binds the Crown in right of the enacting jurisdiction (ALRI s. 36).

Legislation

The Crown is bound under the UICAA, UK 1950 s. 30, Federal Commercial Arbitration Act, and AIC Draft 32. The BC CAA Act is silent and therefore binds the Crown under BC interpretation legislation. The AA is silent, and, at least before recent judicial decisions, would have been thought not to bind the Crown.

Argument

There is simply no argument which would suggest that the Crown, having freely and voluntarily entered into an agreement to arbitrate, should be able to back out of it.

Comment

It would be possible to go further and to provide that the Crown in right of another jurisdiction is bound to the extent that the enacting jurisdiction has power to bind the Crown in that other right. The proposal does not go that far.

5. UNWRITTEN AGREEMENT TO ARBITRATE

Proposition 5

The Uniform Arbitration Act applies to an agreement to arbitrate, whether or not the agreement is in writing (ALRI s. 7(1)(b)).

Legislation

Writing is required by: AA, UK, Model Law.

Writing is not required by: BC CAA, AIC Principle 3(2).

Arguments

1. It may be argued that an unwritten agreement to arbitrate will cause confusion and will be difficult to prove, and that if the parties did not think it important enough to commit to writing, the law should not pay any attention to it.
2. However, if the law will not enforce such an agreement, it will not carry out the intention of the parties, and access to arbitration will, to that extent be more difficult. One particular problem will be a case in which the parties, during the course of an arbitration, have agreed to extend it to a new but related issue, and no one has bothered to write the agreement down (Mustill & Boyd on Commercial Arbitration consider this a problem.)
3. Difficulties of proof are common to many other agreements, which may be more important than an agreement to arbitrate. Issues can be put in writing during the arbitration proceedings.
4. Note that there is no evidence that there is any great incidence of unwritten agreements, except for the reference in Mustill & Boyd mentioned above, to informal extensions of arbitrations during hearings.
5. If it is decided that the Uniform Act should not cover unwritten agreements, such agreements should be declared void. Merely to leave them out of the Act, as many existing statutes do, is to leave them enforceable but with no current law to look to, so that the common law would have to be sought.

6. *SCOTT v. AVERY CLAUSES* (arbitration a condition precedent to action)

Proposition 6

The Uniform Act treats a *Scott* v. *Avery* clause as if it were merely an agreement to arbitrate (ALRI s. 8).

Legislation

BC CAA s. 19 and AIC Principle 34 treat *Scott* v. *Avery* clauses as agreements to arbitrate. UK 1950, s. 25(4) allows the Court to overrule a *Scott* v. *Avery* clause when the Court replaces an arbitrator or when fraud is imputed to a party.

Argument

The *Scott* v. *Avery* clause was devised to avoid the very broad discretion of the courts to refuse a stay of an action, with the result that the action would preempt the arbitration. Later in these proposals, it will be proposed that the Court grant a stay except in certain circumstances in which it is desirable that the action preempt the arbitration. These proposals, in our view, achieve a better balance than a rigid requirement that in every case an arbitration be completed before action can be brought, and we think that in this case the agreement of the parties should be overriden and the Scott v. Avery clause treated as a simple agrement to arbitrate.

7. WAIVER

Proposition 7

A party who proceeds with an arbitration without objecting to non-compliance with the arbitration agreement or the arbitration statute is taken to have waived the objection, even if it goes to jurisdiction, and an award may not be set aside on the basis of an objection which has been waived (see ALRI s. 4(3) (presumed waiver), s. 16(6) (jurisdiction), and s. 34(2) (setting aside)). However, the protection of section 18 (equality of treatment and fair opportunity to make case) cannot be waived (ALRI s. 4(2)).

Legislation

Model Law Article 4, 16(2): must be timely objection.

Arguments

1. Under this proposition, a party could lose a right to object to something if he did not object promptly. However, the requirement to object promptly will curb game-playing and the holding back of objections for tactical reasons.
2. Equality of treatment and fair opportunity to make and meet a case should be guaranteed despite agreement to the contrary.

Comment

The subject of waiver is not addressed in the same comprehensive way by the prototype legislation, and it is not always easy to determine whether or not a provision can be waived. It is hoped that the proposals will make this easier.

8. TIME FOR COMMENCEMENT OF ARBITRATION AND ENFORCEMENT PROCEEDINGS

Application of limitations law

Proposition 8(1)

Limitations law applies to the bringing of an arbitration in the same way as the bringing of an action in court (see ALRI draft, Report p. 112).

Legislation

Limitation Act 1980 (UK) s. 34. Judicial decisions generally apply limitations law under other arbitration statutes.

Argument

We can see no reason why the repose and evidentiary considerations which lead to the requirement of a limitation period for the bringing of an action do not apply equally and similarly to the bringing of an arbitration.

Exclusion of time taken by abortive arbitration

Proposition 8(2)

If the Court sets aside an award or makes any order which terminates an arbitration proceeding, or declares the arbitration to be ineffective, the Court has power to order that the period between the commencement of the arbitration and the date of the order shall be excluded in computing a limitation period for the bringing of an action or proceeding (see ALRI draft, Report p. 112).

Legislation

Limitation Act 1980 (UK) s. 34(5) to similar effect, but does not apply to all cases in which arbitration is aborted.

Arguments

1. If a lawsuit aborts and a limitation period has run, the plaintiff is probably barred from bringing another action. This would suggest that the same result should follow if an arbitration aborts.
2. In this respect, however, we think that an arbitration is different. Generally speaking, an action will abort against the plaintiff's wishes only if he has chosen the wrong court (which is rare) or if he allows the action to be dismissed for want of prosecution (which is his own fault). An arbitration may, however, abort for many different reasons, some of which are not within the claimant's control, and others of which can come about despite reasonable care and attention.
3. An arbitration claimant has alerted the respondent by bringing his claim to arbitration. If the arbitration aborts, we think that it should be possible for the Court to order that the time taken up by the abortive arbitration is not to be counted towards the limitation period, so that if there was time left when the arbitration was commenced, the same time would be available for the bringing of a new arbitration or an action. This would be discretionary, so that the respondent would have a chance to persuade the Court that it would be unfair to allow the extra time.

Time for enforcement of award

Proposition 8(3)

A limitation period of two years should apply to the bringing of an award to the Court for enforcement. (ALRI draft, Report p. 112)

Legislation

This proposal is new.

Arguments

1. An award crystallizes rights under an arbitration agreement. It should have to be brought to the court for enforcement within a reasonable time.
2. One choice of time would be a new limitation period based upon the limitation period applicable to the original cause of arbitration. However, when the award is made, there is no need for time to discover the cause of action, and there is nothing to prevent the successful party from proceeding promptly to enforce his award. We think that 2 years is enough.

9. COMMENCEMENT OF ARBITRATION AND APPOINTMENT OF ARBITRAL TRIBUNAL

Commencement of arbitration

Proposition 9(1)

An arbitration may be commenced by a notice to appoint an arbitrator or a notice demanding arbitration (ALRI s. 21(1)). If a third party is empowered to appoint an arbitrator, the notice must be given to the third party and served on the other parties to the arbitration. Every matter referred to in the notice is referred to the arbitration. If the notice does not specify the matters being referred, every matter which the party giving the notice is entitled to have arbitrated under the arbitration agreement is referred (ALRI s. 21(2)).

Legislation

Generally speaking, the prototype legislation does not contain similar provisions, though Article 21 of the Model Law says that, unless otherwise agreed, the arbitral proceedings commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.

Arguments

1. The proposals seem unexceptionable. They will give a clear direction to a claimant as to how to get his arbitration going, and they will make it difficult for a respondent to deny that an arbitration has been started or to delay matters by saying that it has not been started about some particular item of dispute.
2. It may be said that these provisions should be in rules. However, we think that they are fundamental to the bringing of an arbitration and that it is suitable for them to be in the statute.

Number of arbitrators

Proposition 9(2)

The parties may agree on the number of arbitrators. Failing agreement, there shall be 1 arbitrator (ALRI s. 10). If there are more arbitrators than 1, the arbitrators may elect one of themselves as chairman (ALRI s. 11(2)).

Legislation

The UICAA/Model Law provides for 3 arbitrators in default of agreement on number. All the other legislative models call for 1, which is better for cost and efficiency. Presumably the UICAA/Model Law calls for three (a) because parties like to have one of their own nationality on the tribunal, (b) the arbitrations are large enough to stand the cost, and (c) custom.

(UK 1950 s. 8 provides that in the absence of a contrary intention, a reference to 2 arbitrators is deemed to include a provision that the 2 may appoint an umpire. It goes on to say, as does the AA schedule, that when the 2 cannot agree the umpire enters on the reference in lieu of the arbitrators. This is because of the English practice which the section describes. This has been dropped, as ALRI was not aware that this procedure is used in Alberta, and we are not aware that it is used elsewhere in Canada.)

Arguments

1. The principle of party control requires that the parties be able to agree on the number of arbitrators. There is no earthly reason why they shouldn't have that power.
2. Under the Model Law, the default number is 3. Under domestic arbitration statutes it is usually one. The proposal opts for one. International commercial arbitrations usually involve large sums of money and complex issues, and each party is likely to want one arbitrator of his own nationality. These considerations do not apply to domestic arbitrations, and it seems best to opt for the cheapest and quickest arbitration, leaving those with complex and economically important issues to agree on a larger number.

Choice of arbitrator

Proposition 9(3)

The parties may agree on an arbitrator or chairman or on a procedure for appointing an arbitrator or chairman. If there is no agreement on the appointment of an arbitrator, or if a person empowered to appoint an arbitrator does not do so after 7 days' notice, the Court of Queen's Bench may appoint the arbitrator, with no appeal from the appointment (ALRI s. 11(3), (4)). The same provisions apply to the appointment of a substitute arbitrator, unless the arbitration agreement makes the reference to arbitration conditional upon the arbitration

being conducted by an arbitrator who is specifically named in the agreement, in which case no substitute can be appointed and no arbitration can be held (ALRI s. 15(4)).

Legislation

It is not usually stated that the parties can agree on the appointment of an arbitrator or on the procedure to be followed. It is clearly implied. AIC Principle 6 would make it explicit.

The prototype legislation provides for appointment of arbitrators by the courts. Some give a power only in certain cases. The proposition would extend the power to all cases in which the machinery for appointment of an arbitrator does not operate effectively.

Arguments

1. The party control principle dictates that the parties be free to agree on an arbitrator, a chairman, or a procedure.
2. The lack, or failure, of machinery to appoint an arbitrator should not be allowed to stultify an arbitration to which the parties have agreed. That one of them may not like the arbitrator appointed is no reason not to proceed: to arbitration they have appealed, and to arbitration they should go. Therefore, there should be an independent appointing authority who can appoint whenever the arbitration would otherwise be stultified.
3. The court seems to be the best appointing authority. It might be possible to leave it to an organization of arbitrators, on the grounds that they are likely to know better whom to appoint, but this is a kind of question courts are used to dealing with, and parties will normally make suggestions and try to justify them, so the Court will have choices put before it.
4. If an arbitrator must be replaced, it is appropriate that the same machinery be used, and that the Court have the same default power of appointment.
5. There is one exception to this last statement. If a party's agreement to arbitrate is conditional upon the arbitration being conducted by a named arbitrator, it would be wrong to impose another arbitrator upon him, and the arbitration will have to abort if the arbitrator agreed upon cannot or will not act. It should be noted that under the proposal, it is not enough that the arbitrator be named by the parties: the agreement must make it clear that the arbitration is conditional

upon the arbitrator conducting it. We think that anything less would leave it open to parties to escape from arbitrations when they should not be allowed to do so.

Commencement of powers

Proposition 9(4)

An arbitral tribunal may exercise its powers after every member has accepted appointment (ALRI s. 21(3)).

Legislation

ML 21(2), AIC Principle 11.

Argument

We cannot conceive of an argument against the proposition. It may be that the proposition is so trite that it need not be stated, but we think it useful to spell it out.

10. CHALLENGES TO JURISDICTION

Required ruling by tribunal

Proposition 10(1)

In the first instance an arbitral tribunal may rule on its own jurisdiction, whether as a preliminary question or in its award (ALRI s. 16(1), (7)). It may even rule on the existence or validity of the arbitration agreement (ALRI s. 16(1)(a)), which must be treated as independent of a larger contract in which it appears (ALRI s. 16(1)(b)), and which is not necessarily invalidated by a decision that the larger contract is invalid (ALRI s. 16(1)(c)).

Legislation

Model Law Article 16 and AIC Principle 17 are similar. Other prototypes are silent. Under the present law, an arbitrator can probably rule on his own jurisdiction, though it is doubtful that he can rule on the validity of the arbitration agreement.

Arguments

1. This and the following proposals are intended to set out an orderly procedure for dealing with challenges to jurisdiction, commencing with a challenge before the tribunal itself, and then going on to the Court, which will have the ultimate power to decide.

2. Requiring the tribunal to rule on the question in the first instance tends to add legitimacy and credibility to the arbitration system. It will also give the Court an expression of the tribunal's views, and these will often be of value.

3. It may be thought that, if the matter is to go to court anyway, a challenge before the tribunal is a wasted step. We do not think so. First, as indicated, it will make the tribunal's views available. Second, it will crystallize the issues for the court. Third, it may be expected that the parties will sometimes be satisfied with the tribunal's ruling (or the resignation of an arbitrator), or, at least, one party may sometimes see that there is no advantage to be gained by recalcitrance on the issue.

Comment

Elsewhere in these proposals, it will be proposed that where the objection to jurisdiction is based upon a fatal flaw in the arbitration agreement, the reference or the composition of the tribunal, a party will be able to ignore the arbitration proceedings and either apply to the Court for a declaration that the fatal flaw exists or wait until the award is made and either apply to set it aside on the grounds of the fatal flaw, or resist enforcement, probably by an action for a declaration. As noted elsewhere, this would require a very strong-minded approach to the arbitration, and it may be expected that the proposed procedure, if included in a statute, will be followed.

Timely objection

Proposition 10(2)

A party must raise an objection to an arbitral tribunal's jurisdiction to enter upon or conduct an arbitration as soon as possible and no later than the opening of the hearing or the first representations from the objecting party (ALRI s. 16(3)). A party must raise an objection that an arbitral tribunal is exceeding its authority as soon as the matter alleged to be beyond its authority is raised in the arbitral proceedings (ALRI s. 16(5)). Failure to raise an objection in time is a waiver (ALRI s. 16(6)) unless the arbitral tribunal allows it to be made later (ALRI s. 16(7)).

Legislation

Model Law Article 16 and AIC Principle 17 are similar.

Arguments

1. It may be objected that a party should not be compelled to disclose his hand until he wants to. The answer is that the law should discourage game-playing. There is no reason why a party should be able to lie back and produce a jurisdictional challenge or not depending upon the way the wind is blowing and the desirability or otherwise of obfuscation and delay.

2. It may also be objected that a party may lose his right to challenge jurisdiction through a mere failure to act quickly enough. This is true. However, in our view, the advantage of reducing obfuscation and delay outweighs the possible disadvantage. All that a party would have to do is to object when he sees an objection, and not some time later.

Court ruling on jurisdiction

Proposition 10(3)

If a tribunal makes a ruling on jurisdiction, a party may apply to the Court of Queen's Bench within 30 days for a decision about jurisdiction (ALRI s. 16(9)) and there is no appeal from the Court's decision (ALRI s. 16(10)). Unless the court otherwise directs, the arbitration may continue and an award may be made while the application is pending (ALRI s. 16(11)).

Legislation

Model Law Article 16.

Arguments

1. The proposition preserves a party's right to have jurisdiction of an arbitral tribunal determined by the court. The boundaries of the arbitration agreement and the reference, and the proper constitution of the tribunal, are matters which require outside supervision.

2. Together with the requirement that a party raise a jurisdictional objection before the arbitral tribunal as soon as possible, the proposition minimizes the delay which a party can impose by bringing court proceedings to challenge jurisdiction. The downside of the whole procedure is that freedom to manoeuver is limited by the requirement to move quickly, and a party who does not move quickly may lose his right to object, but this does not outweigh the advantages.

3. The provision that the arbitration may continue could lead to incurring wasted cost if the challenge to jurisdiction is later upheld, However, it also helps to minimize delay. Unless the court (or the arbitrator) decides that the arbitration should not go ahead in the meantime, the proceedings can continue (although if the challenge to jurisdiction is serious, the parties may not wish to enter upon a costly stage of the proceedings until the challenge is disposed of.)

4. It is always arguable that a right of appeal should be given. However, the provision against appeal is also intended to minimize the delays which jurisdictional challenges can impose. It is thought that, since the decision does not affect rights, but only the question whether those rights should be arbitrated or litigated, there is no need for the protection which an appeal is to the parties.

Comment

Note, again, that under other proposals, a party would be able to bring an action for a declaration that a tribunal is without jurisdiction (see ALRI draft s. 34(11)), and there is nothing to stop a party from refusing to recognize arbitration proceedings at all, and then either bringing an application to set aside the award under s. 34 on grounds of lack of jurisdiction.

11. PREEMPTION OF ARBITRATION BY ACTION IN COURT

Proposition 11

If a party to an arbitration agreement brings an action in a court about a matter which is agreed to be submitted to arbitration, the court in which the action is brought must stay the action, except in specific listed circumstances which render the arbitration void, unless the application for a stay is unduly delayed or the case is one in which the Court would grant a summary or default judgment (ALRI s. 8(1), (2)). The arbitration may be carried on while the application to the Court is pending (ALRI s. 8(3)). There is no appeal from the order of the Court staying an action or refusing a stay (ALRI s. 8(4)).

Legislation

(1) AA 3 and 4 provide that if a party to an arbitration agreement sues, the other may apply for a stay of the action. He must do so before taking any step in the action. The court may make the order upon being satisfied that there is no sufficient reason why the arbitration should not go ahead and that the applicant is and has since the

commencement of the action realy and willing to do all things necessary for the arbitration. UK 1950 s. 4 is much the same.

(2) BC CAA s. 15(3) reverses the onus. The Court is to grant the stay unless the party opposing the stay shows good reason for the action to continue. The subsection then goes on to list 11 factors which the Court should consider. The taking of a step in the action is a factor, not a bar. Whether the arbitration agreement was freely made is a factor. So are complexity of the facts, whether fraud is alleged, the qualifications and impartiality of the proposed arbitrator, comparative expense and delay, and the readiness and willingness of the applicant. There is also a catch-all. A stay should be more easily obtained under the BC CAA than under the AA.

(3) UICAA/Model Law 8 is more restrictive of court intervention. A court in which an action is brought must refer a party to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. S. 10 of the UICAA itself says that upon a referral to arbitration under article 8, actions are stayed. Model Law article 10 requires the applicant to apply "not later than when submitting his first statement on the substance of the dispute" (which, in this jurisdiction would presumably mean the statement of defence, but might include an affidavit filed about the merits). It permits the arbitration to continue despite the existence of the lawsuit.

(4) AIC 33 is somewhat different. It is narrow. Basically, it would allow a stay if the arbitration agreement is invalid or made by a party under incapacity, if the dispute is not arbitrable or was not referred, or if there is corrupt or fraudulent practice. It would not allow an appeal from the order.

(5) It should be noted that Mustill & Boyd point out (p. 9) that a stay can be lifted, though normally it will not be. Later circumstances could render the lawsuit appropriate.

Arguments

1. This proposition raises the relationship between the court system and the arbitration system.

2. It can be argued (a) that a party who has in any way recognized the action in court should not be able to resile from that recognition and insist upon arbitration, and (b) that, even if the applicant has not recognized the action, it is better that the Court have a broad general

discretion to grant or to refuse a stay of the action, so that it can balance all the circumstances and do what the justice of the case requires. This is the situation under the UK 1889 Arbitration Act.

3. At the other extreme, it can be argued that the Court should be precluded entirely from refusing a stay unless there is a fatal defect in the arbitration. This is the Model Law approach, which gives the maximum importance to keeping the parties to their agreement to arbitrate.

4. A third argument can be made for the BC provision, which puts the burden on the party who brings the action, and which provides the Court with a list of factors to consider when deciding whether or not to grant a stay. The discretion is not as untrammeled as it is under the 1889 Act.

5: Our reasons for making the proposal are as follows:

(a) our leaning is in favour of minimizing court interference, which seems to be the leaning of those who commented. Our general reason is that the contract to arbitrate should be honoured.

(b) accordingly, it seems to us that the statute should make it clear that keeping the matter in arbitration is the norm and that good grounds have to be shown to take it into court. It seems to us that the BC provision is the minimum recognition of this consideration.

(c) then, we do not really see why the complexity of the issues, the existence of questions of law, or allegations of fraud should have anything to do with what tribunal deals with a matter. There may be all sorts of reasons why a court would think that the parties were ill-advised to make a contract to arbitrate, but the fact remains that the parties have chosen arbitration and there is no reason to hack away at that agreement.

(d) next, while a party should be required to make up his mind reasonably soon whether he wants to arbitrate or to litigate, the requirement that he must not have taken the slightest step in the action is overly rigorous. (A case has been mentioned to us in which a stay was refused because a solicitor had examined on an affidavit in what the lawyer who mentioned it referred to as "non-adversarial" proceedings).

(e) we think that there is still too much discretion to refuse a stay in the BC provision.

(f) however, the UICAA/Model Law seems to us to go somewhat too far in forbidding litigation. While we don't think a court would allow it to go this far, it seems to say that the court would even have to stay an action where the dispute was not properly referred.

(g) our inclination is to go generally with the AIC Principles. They permit a stay where there is a defective or non-existent agreement. They also cover a case in which the arbitration itself has been infected with fraud or corrupt practice. In so saying, we interpret them as including conducting the arbitration without giving proper notice or a proper opportunity to make a party's case.

6. In the interests of expedition, it seems to us in order to provide, as UICAA/Model Law 8(2) does, that the arbitration may be commenced or continued while the issue of the stay is pending before the court. This would help to prevent an application for a stay being a device for holding off the arbitration, and would not, we think, prevent a court from granting an interim injunction against the arbitration in a proper case.

7. A provision that there should be no appeal for a court order on an application for a stay would help to avoid delay and obstruction. The disposition of the application for a stay would not affect a party's rights, but only the choice of dispute resolution machinery, so we think that it would be all right to deny the appeal.

12. PROCEDURE IN AN ARBITRATION

Proposition 12(1)

The statute should make detailed provision for the effective delivery of communications, including notices, with provision for substituted service in case of need. (The reader is referred to s. 3 of the ALRI draft Act, p. 51, for the content of the proposed rules.)

Legislation

Model Law Article 3, though this has been varied.

Argument

Service of the initial document is fundamental to getting an arbitration going, and we think it appropriate that the statute lay down rules which a party can follow. While this could be done in rules made under the arbitration statute, we think that, in order to assist both lawyers and

non-lawyers, the statute should say what the document is which will start the proceedings and how it should be served. If that is to be done, there is no reason to restrict the provision to the initiating document.

Fairness and equality of treatment

Proposition 12(2)

The parties to an arbitration must be treated with equality, and each must be given a fair opportunity of presenting his own case and of responding to the case of the other parties (ALRI s. 18). As mentioned above, this provision applies despite any agreement to the contrary.

Legislation

Model Law Article 18. BC provides for setting aside for "arbitral error", which includes failure of natural justice. Judicial decisions under the other prototype legislation have treated failure to observe the rules of natural justice as "misconduct" which may justify removing the arbitrator or setting aside the award.

Arguments

1. Fairness and an opportunity to put and meet a case are so fundamental to adjudication that it should not be possible for the parties, by ill-considered arbitration agreements, to waive them. This provision, and the provisions for court supervision, are as far as these proposals go in paternalism.
2. There may be difficulty in drawing the line between protections which can be contracted out of or waived, under other proposals and non-waivable equality and opportunity. For example, under another proposal, a hearing may be waived, but if a fair opportunity to put and meet a case can only be given through a hearing, the fairness provision would override the waiver provision. We think, however, that it will not usually be difficult to decide what fairness requires.
3. The party control principle suggests that parties should be able to make their own agreements, even if those involve accepting inequality of treatment or unfairness. We think, however, that there is a public interest in mandating equality of treatment and fairness which must override agreements to this extent, and that to this extent parties should be protected, even against themselves.

Comments

1. Common lawyers might be more comfortable with "natural justice" than with "equality" and "fair opportunity". The latter concepts may, however, be more readily understandable, particularly by non-lawyers.

2. The proposition does not say that there must be a hearing, nor does it say that a hearing must be conducted in any particular way. Only if there is no way, other than a hearing, to provide equal treatment and opportunity would this proposition require a hearing. The parties will be able to waive most procedural protections, so long as what remains is equal treatment and fair opportunity.

Notice and communication of information

Proposition 12(3)

The parties must be given sufficient notice of proceedings (ALRI s. 24(4)); and all statements, documents and information supplied by one party must be communicated to the others, and expert reports relied on by the arbitral tribunal must be communicated to the parties (ALRI s. 24(5)).

Legislation

Model Law Article 24. To the extent that these provisions are included in "natural justice", they are included in the existing law by judicial decision under all the prototype legislation.

Arguments

1. It may be thought that what is in the proposition should go into rules or regulations, and not into the statute. However, we think that it is important enough to go into the statute.

2. It is possible to argue that the requirements of the proposition are fundamental to natural justice, and therefore should not be waivable. However, there may be circumstances in which the parties do not need notice or information, and in which they should be allowed to waive if they wish. If the protection being waived is essential to equality of treatment and a fair opportunity to put and meet a case, it could not be waived.

Procedure generally

Proposition 12(4)

Except as mentioned above (proposition 3, contracting out of draft Arbitration Act and waiver), the parties are free to agree on the procedure to be followed (ALRI s. 19(1)). Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate (ALRI s. 19(2)).

Legislation

Model Law Article 19. This is probably the effect of the judge-made law under the current arbitration legislation.

Arguments

1. This proposition recognizes the primacy of party control. It then recognizes that, subject to such control, the arbitral tribunal should be able to decide how the arbitration should be conducted.
2. This proposition is subject to the overriding principle of equality and fairness.

Interlocutory powers

Proposition 12(5)

An arbitral tribunal may make orders for the detention, preservation or inspection of property which is the subject-matter of, or involved in, the dispute, and it may require a party to provide security in connection with any such measure (ALRI s. 17). The Court of Queen's Bench has the same powers, and in addition, it has the same powers with respect to interim injunctions and the appointment of receivers as it has in an action in the Court (ALRI s. 9).

Legislation

See Model Law Article 17 for the first part of the proposition and Article 9 for the second.

Arguments

1. Interim preservation of property may be necessary if a party is to be able to get the fruits of an award, and it is not clear that either arbitrators or the court have such powers in all cases under the present law, though the court can probably grant a Mareva injunction to protect an arbitration.

2. The court's concurrent jurisdiction will allow it to make court remedies available which would not be available at the behest of arbitrators. It should not lead to unwarranted court intervention.

Statements of claim and defence

Proposition 12(6)

An arbitral tribunal may direct that within a specified time a claimant must state the facts supporting his claim, the points at issue, and the relief claimed. It may also direct a respondent to state his defence within a specified time. A claimant or a respondent may amend a statement later unless the tribunal considers an amendment inappropriate because of delay. Oral statements may be permitted. (ALRI s. 23(1) and(2).)

If a claimant does not make his statement within the specified time, the arbitral tribunal may dismiss his claim (ALRI s. 25(1)(a)). If a respondent does not state his defence, or if a party does not appear or fails to produce documentary evidence, the tribunal may continue the proceedings and make an award (ALRI s. 25(1)(b),(c)). An arbitral tribunal may dismiss a claim for want of prosecution (ALRI s. 25(2)).

Legislation

Cf. Model Law arts. 23, 25 (though these differ in that statements of claim and defence are mandatory, and there is no power to dismiss for want of prosecution). Power to dismiss for want of prosecution is new.

Arguments

1. While statements of claim and defence might be relegated to rules or left to arbitrators, we think them sufficiently important to be included in the statute. We do not think, however, that they should be mandatory, as an arbitrator might dispense with them and merely write out the issues, particularly if a small consumer dispute is involved. We think that the provisions are flexible and workable.

2. The proposition gives the arbitrators some power to see that the parties get on with the arbitration. Lack of a power to dismiss for want of prosecution under English law was lamented by the House of Lords in 1987 (and Lord Goff proposes to introduce a bill to confer such a power), and we think such a power to be desirable.

Comment

Note that all this may be waived, unless some protection is necessary for equality of treatment and a fair opportunity.

Mediation

Proposition 12(7)

With the agreement of the parties, an arbitral tribunal may try mediation, conciliation or other procedures and is not thereby disqualified from continuing the arbitration (ALRI s. 30(1)).

Legislation

Uniform International Commercial Arbitration Act, s. 6.

Arguments

1. This proposition has drawn some fire, on the grounds that the roles of mediator and adjudicator are in conflict with each other and that attempts to have the same persons perform them both should be discouraged. It can also be said that such a provision is otiose, as it merely says that the parties can agree upon something that they can agree upon without the provision.

2. On the other hand, there is no reason why, if the parties think that an arbitral chameleon would help them, they should be discouraged from having one: the provision would not foist anything upon them, as it depends on agreement. There is an argument for the encouragement of mediation generally.

3. This Conference, in its wisdom, inserted a provision like this proposition in the Uniform International Commercial Arbitration Act.

Consolidation

Proposition 12(8)

On the application of the parties, the Court of Queen's Bench may order consolidation of arbitrations or provide for the order in which arbitrations will be held, and may appoint an arbitral tribunal for the consolidated proceeding (ALRI s. 22(3),(4)).

Legislation

Uniform International Commercial Arbitration Act s. 9.

Arguments

1. Consolidation of a related string of arbitrations is likely to be efficient. The only real argument against including the section is that it is otiose, on the grounds that all the parties to a string of arbitrations can agree to consolidate without any need for a court order, and the provision, on analysis, depends upon such agreement.

2. This Conference, in its wisdom, inserted a provision to this effect in the Uniform International Commercial Arbitration Act.

13. PRELIMINARY QUESTIONS OF LAW

Proposition 13

Subject to an appeal to the Court of Appeal with leave of that court, the Court of Queen's Bench may determine any question of law that arises during the course of an arbitration. It may do so only with the consent of all parties or on the application of one party with the consent of the arbitral tribunal. (ALRI s. 9(3).)

Legislation

Existing Arbitration Acts require an arbitrator to state a special case for the consideration of the court, upon order of the court. Section 9(3) is patterned on the BC and UK statutes, though those statutes require the court to be satisfied that time and costs are likely to be saved.

Arguments

1. Under the statutes based on the UK 1889 Act, an arbitrator may, and if so ordered by the court shall, state a special case for the consideration of the court. The new proposal would deprive a party of the opportunity of having the arbitrator ordered to state a case: the party would have to get the consent of either the other party or the arbitrator, and the proposal is therefore a derogation from an existing right.

2. On the other hand, the special case procedure (a) has been used elsewhere as a device for obstruction and delay, and (b) does not result in a binding disposition of the question.

3. There are circumstances in which time and cost will be wasted by carrying on an arbitration on a false premise, which could be avoided by having the court decide a question of law. This proposal, which takes up a BC idea, is intended to get the benefit of such a determination, without allowing the procedure to impose undue delays. It does so by requiring the consent of the other party or of the guardian of the arbitration. We do not think that, given that requirement, it is necessary to have the court consider whether it would save time and cost to decide the question, as the BC statute does.

14. HEARINGS

Whether hearings are to be held

Proposition 14(1)

The parties to an arbitration may agree whether oral hearings should be held (ALRI s. 24(1)). If there is no agreement, any party may require a hearing to be held (ALRI s. 24(2)). Otherwise, it is for the tribunal to decide whether a hearing or hearings should be held (ALRI s. 24(3)).

Legislation

Model Law Article 24. AIC Principle 15 says that hearings should not be mandatory and that by agreement an arbitration should be able to proceed on the basis of written evidence.

Arguments

1. An oral hearing will often be the best way, and it may be the only way, to give equality of treatment and a fair opportunity to make and meet a case. This suggests that a hearing should be mandatory.
2. On the other hand, the parties may agree simply to send their respective files and arguments to the arbitrator and to have him make up his mind on that basis, and this may be quite appropriate. Or, they may be content to let him use his expertise to decide whether a product is as described. For this reason, we do not think that a hearing should be mandatory.
3. However, unless the parties agree that there should be no hearing, we think that any party should be able to demand one. Only if no one cares enough to do that should the arbitrators have a discretion. That discretion would have to be exercised subject to the overriding equality and fairness principles.

Time and place of arbitration

Proposition 14(2)

The parties may agree on the time and place of arbitration (ALRI s. 20(1)). If they do not, the tribunal may determine the time and place, having regard to the circumstances, including the convenience of the parties (ALRI s. 20(2),(3)).

Legislation

Model Law Article 20.

Argument

This proposition seems self-evident. We think it worth including in the statute, though it could be argued that it should go in rules or regulations.

Tribunal's powers over the party

Proposition 14(3)

The parties to an arbitration must submit to being examined before the arbitral tribunal under oath or affirmation, must produce documents, and must do all other things which the tribunal may require (section 23(3)). The Court of Queen's Bench has the same power to enforce a tribunal's orders as it has to enforce a similar order of its own in a court action (section 23(4)).

Legislation

There is no counterpart to this in the Model Law. The powers of the arbitrator come from the Acts based on UK 1889. The court's power to enforce a tribunal's orders is new.

Argument

The powers of the arbitrator appear unexceptionable and necessary, and have long existed in common law jurisdictions. The powers of the court are intended to be helpful and promote efficiency.

Compelling testimony

Proposition 14(4)

A party to an arbitration may compel the attendance of witnesses to give evidence under oath or affirmation, together with documents which witnesses could be compelled to produce at the trial of an action, by serving notices to attend (ALRI s. 27(1),(2),(4)). The Court of Queen's Bench may give the same orders and directions for the taking of evidence for an arbitration as for an action in the Court (ALRI s. 27(5)).

Legislation

The Model Law has a counterpart of the court's power to give orders and directions for the taking of evidence. The domestic Acts confer powers to compel attendance, etc.

Argument

These provisions drag bystanders into arbitrations, which are a private function. However, arbitration is essentially the same as adjudication, that is, it is a form of dispute resolution, and there is a public interest in allowing the parties to use machinery for production of evidence similar to that available in litigation. The force of the state cannot be applied to a recalcitrant witness without court intervention.

Expert appointed by a tribunal

Proposition 14(5)

An arbitral tribunal may appoint an expert to report to it and, if requested, to attend at a hearing for cross-examination and rebuttal (ALRI s. 26)), subject to protection of privilege to the same extent as in litigation.

Legislation

The principal power is similar to that conferred by the Model Law.

Argument

This has been found to be a useful power in litigation, and it is difficult to conceive of any reason why it should not be available in an arbitration.

Rules of Evidence

Proposition 14(6)

An arbitral tribunal is not bound by rules of evidence and has power to determine the admissibility, relevance, materiality and weight of any evidence (ALRI s. 19(3)).

Legislation

The Model Law has a similar provision. The proposition would change the domestic law of arbitration.

Arguments

1. The rules of evidence have been designed to ensure that only evidence which should be considered is admitted. It can be argued that they were particularly designed with non-lawyers - juries - in mind, and that that makes them appropriate for arbitrations, which are often conducted by arbitrators who are not lawyers. This proposition would deprive parties of the protection of those rules.

2. However, one of the principal reasons why parties want to get away from litigation is to avoid the trappings of litigation generally, and of technical rules of evidence in particular. So long as there is equal treatment and a fair opportunity to make and meet a case, there is no reason to think that loosening the rules of evidence will result in unfair treatment.

15. INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

Proposition 15

An arbitrator must be independent and impartial. This proposition applies even to a party-nominated arbitrator.

Legislation

The legislation does not say specifically that an arbitrator must be independent and impartial. However, the common law does. See also the legislation referred to in the discussions of proposition 16(1) and 16(2).

Arguments

1. Independent and impartial adjudication is fundamental to arbitrations and is required by the principle of equality of treatment.

2. The practice in labour arbitrations is not to require the same degree of impartiality from party-nominated arbitrators as is required from other arbitrators. There are advantages to this. A party can be assured that his case will not be overlooked or misunderstood by the tribunal. If it is impractical to insist upon the same degree of impartiality, as some argue, there is a danger that a legal requirement requiring impartiality will be observed by one party and not by another, thus giving an unfair advantage to that other.

   We think that independence and impartiality should be required. There are special considerations in labour arbitrations, flowing from the nature of industrial relations and the desire of the parties to have arbitrations conducted by a comparatively small pool of highly qualified persons, which do not apply to the same extent to ordinary arbitrations. We think that impartiality is essential, and that the long-standing policy of the law should continue to apply.

3. We do not propose that a specific provision be put into the Uniform Act requiring independence and impartiality. We propose to leave it to a provision such as ALRI s. 12 which requires disclosure of

circumstances likely to give rise to a reasonable apprehension of bias and which provides for a challenge to an arbitrator if such circumstances exist.

16. TERMINATION OF MANDATE AND REMOVAL OF ARBITRATORS

Challenging an arbitrator

Proposition 16(1)

An arbitrator, before accepting appointment and during the proceedings, must disclose to all parties circumstances likely to give rise to a reasonable apprehension of bias (ALRI s. 12(1),(2)). A party may challenge an arbitrator only if such circumstances exist or if the arbitrator does not have qualifications agreed to by the parties (ALRI s. 12(3)). A party who has appointed or joined in the appointment of an arbitrator may challenge that arbitrator only for reasons of which he becomes aware later (ALRI s. 12(4)).

Legislation

Model Law Article 12. UK 1950 s. 24 says that it is not a ground for refusing to remove an arbitrator that the applicant party knew or ought to have known at the time of the agreement, by reason of his relation towards any other party of the agreement or of his connection with the subject, might not be capable of impartiality.

Arguments

1. An arbitrator may have some difficulty in taking the hypothetical emotional temperature of a hypothetical reasonable person to determine whether there is a likelihood that given facts will produce a reasonable apprehension of bias. However, the prevailing consideration is that he should be under an obligation to disclose anything that might detract from his independence or impartiality. He should have little difficulty in deciding whether or not he has the qualifications called for by the arbitration agreement.

2. The last part of the proposition, that a party should not be able to raise an objection of which he was aware when he joined in an arbitrator's appointment, may be controversial. It suggests that a party should not be able to blow hot and cold. However, it will be noted that the UK legislation goes the other way. An example of a case in which the provision might apply is a case in which the contractor and owner agree that the owner's architect will be

the arbitrator in the event of a dispute. Under this proposition, the contractor could not challenge the architect merely on the grounds that the architect was the owner's architect, though he would be able to object if there were additional grounds of bias of which the party did not know at the time of the agreement or if the architect conducts himself in a manner which might give rise to a reasonable apprehension of bias.

Procedure on challenge

Proposition 16(2)

A party who wants to challenge an arbitrator must within 15 days after becoming aware of the circumstances which give rise to the challenge send a written statement of reasons to the arbitral tribunal. Unless the arbitrator resigns or the parties agree to the challenge (ALRI s. 13(1),(2),(3)), the tribunal must decide on the challenge. A party may within 30 days of the tribunal's decision apply to the Court of Queen's Bench to decide on the challenge and, if the challenge is successful, to remove the arbitrator (ALRI s. 13(3)). The arbitration may continue and an award be made while the application is pending, unless the Court otherwise directs (ALRI s. 13(5)). There is no appeal from the Court's decision on the challenge (ALRI s. 13(7)).

Legislation

The Model Law has similar provisions. Domestic arbitration legislation merely confers power on the court to remove an arbitrator who has misconducted himself.

Arguments

1. Under a later proposal, the court would have ultimate authority to decide on the challenge. That suggests that going to the tribunal first may be a wasted step. However, it tends to support the credibility of the arbitration system, and a party may not carry the objection on to the court, which would result in a net saving of time and cost.

2. The rigid time-frame may restrict a party's ability to maneouver, and it may cause a dilatory party to lose his right to challenge an arbitrator. On the other hand, it will minimize game-playing and the use of challenges to obstruct and delay.

3. Allowing the arbitration to continue could result in wasted cost if the challenge is upheld. However, it would leave it open to the arbitrators to do what seems best under the circumstances.

4. There are obvious arguments against the denial of an appeal. However, we think that (a) the decision to remove or not to remove is one which is particularly appropriate for a trial or chambers judge rather than a court of appeal, and (b) that an appeal may well be used to obstruct and delay.

Termination of mandate by resignation or party agreement

Proposition 16(3)

An arbitrator may resign, or the parties may agree to terminate his mandate (ALRI s. 14(1)). A party may not unilaterally revoke the appointment of an arbitrator (ALRI s. 14(4)).

Legislation

The resignation and agreed termination provision is similar to Model Law Article 14. The provision against unilateral revocation of an appointment is contrary to the common law and may be contrary to the domestic Arbitration Acts. The BC CAA provides for revocation of authority with leave of the court.

Arguments

1. An arbitrator who has commenced an arbitration ought not to resign and leave the parties in the lurch. However, it seems better that the law should allow him to resign and leave the parties to their contractual remedies against him rather than to require the arbitration to go ahead under an unwilling arbitrator.
2. The arbitration belongs to the parties, and the principle of party control requires that they be able to remove an arbitrator (who may, however, have remedies in breach of contract or *quantum meruit*).
3. It is difficult to raise sensibly the issues behind the power of a party to revoke the authority of an arbitrator appointed by that party.

   The domestic arbitration acts provide that a party cannot revoke a *submission* without leave of the court, a provision which, according to authority, means, instead, that a party cannot revoke *the appointment of an arbitrator* without leave of the court. The BC CAA provides that a party cannot revoke an appointment without leave, which is to be granted on grounds similar to those on which a stay of an action will be refused.

   The proposals contained in these materials are based on the proposition that all the court's powers to abort an arbitration (other than a

declaration of fundamental defect) should be spelled out in the stay provision, and that all its powers to remove an arbitrator should be in the removal of arbitrator provisions which follow under the next proposition. The provision in this proposal against unilateral revocation is merely intended to get rid of the common law power to revoke an appointment.

Court removal of an arbitrator

Proposition 16(4)

The Court of Queen's Bench may remove an arbitrator who (i) is successfully challenged under sections 12 and 13, (ii) becomes unable to perform his functions, (iii) fails to carry on the arbitration without undue delay, or (iv) fails to take proper steps to ensure that the arbitral proceedings are carried on in accordance with the Act (ALRI s. 14(2)). Upon removing an arbitrator, the Court can give directions about the future conduct of the arbitration. There is no appeal from a decision of the Court on the question of removal (ALRI s. 14(3)).

Legislation

Under domestic arbitration legislation, the court can remove an arbitrator for "misconduct", which includes a broad range of activities from fraud and corruption, through bias, to denial of natural justice, or even making an error of law. Under Model Law Articles 12 and 13, the court can decide a challenge based on justifiable doubts as to impartiality or independence, or failure to possess qualifications agreed to by the parties. Under Article 14, if an arbitrator becomes unable to act or for other reasons fails to act without undue delay, "his mandate terminates if he withdraws from office or if the parties agree on the termination", and a party may request the court to decide on the termination.

Arguments

1. Once it is accepted that there is to be any court supervision of arbitrations, the proposition that the court may remove an arbitrator for reasonable apprehension of bias or failure to have the agreed qualifications, which is (i) above, is unlikely to meet with any disagreement. It also seems unlikely to be controversial to allow the court to remove an arbitrator who becomes unable to perform his functions.

2. A power to remove for undue delay is more likely to be controversial. It is suggested, however, that it is in the interest of those parties who

want to get on with arbitrations. The fact that the power exists is likely to cause an arbitrator to see that there is no undue delay. It is unlikely that a court would remove an arbitrator except for aggravated delay, but an application or threat of an application is likely to get the arbitrator to do something.

3. Failure to ensure that the proceedings are carried on in accordance with the Act, if serious enough, seems also to be an appropriate grounds for removal of an arbitrator. No doubt there are failures which should not justify removal, but the court would presumably exercise its discretion with discretion. Since the Act requires equal treatment and fair opportunity to make and meet cases, a substantial failure to provide these respects would justify removal, though probably only in a case where serious damage had occurred or the arbitrator proved contumacious.

4. The provision enabling the court to give directions about the future conduct of the arbitration is intended to leave some flexibility as to whether or not hearings which have been held would have to be repeated. In most cases, they probably would. However, if an adequate transcript exists and credibility is not too important, it might be better to save the costs. The power, as framed, is broader than that, but it does not seem likely that a court would exercise it except to correct some problem with the proceedings to date or some problem arising from the removal.

17. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Proposition 17(1)

An arbitral tribunal must decide a dispute in accordance with the rules of law chosen by the parties, or, failing such designation, in accordance with the rules of law which the tribunal considers appropriate (section 28(1),(3)). It must make its decision in accordance with the terms of the arbitration agreement and the contract under which the dispute arose, and it must take into account applicable usages of trade (section 28(1)(b),(c)). The tribunal may apply doctrines and rules of equity and may make orders in the nature of specific performance and injunctions (ALRI s. 28(4)).

Legislation

The last sentence is new. The rest comes from the Model Law as varied by the Uniform International Commercial Arbitration Act. (The

Model Law itself would require arbitrators to follow conflicts rules, but the Conference seems to have thought the wording given above is more appropriate.)

Arguments

1. Parties usually want their legal rights, so that the arbitrator should apply law. There is no reason why a party to an arbitration should not have the same rights and remedies as a party to litigation, so that the proposition would allow the arbitrator to apply equity and give equitable remedies (though court intervention will be necessary for the latter). Since this proposition is not part of the non-waivable part of the proposals, the parties would be able to dispense with law if they wish. (The BC LRC would have allowed parties to contract out of the application of law only after the commencement of the arbitration, when the bargaining power of the parties would be likely to be equal.)

2. It may be argued, on the one hand, that requiring non-lawyer arbitrators to apply law is being too legalistic. It may be argued that equitable remedies should not be granted by anything but a judicial tribunal. We suggest however that the general principle should be that a party is entitled to his legal rights until he agrees to the contrary, and that he should be able to get all remedies.

Non-unanimous decisions

Proposition 17(2)

A majority decision of an arbitral tribunal is sufficient, and, if there is no majority, the chairman's decision is sufficient (ALRI s. 29(a),(b)). The parties or the tribunal may delegate to the chairman the power to decide questions of procedure (ALRI s. 29(c)).

Legislation

Model Law Article 29, except for provision for chairman's award being sufficient where there is no majority, for which cf. AIC Principle 23.

Arguments

1. It may safely be said that parties who agree to arbitrate do not intend to have the proceeding aborted by a hung tribunal. There is some doubt under present law whether a majority can act. The proposition ensures that there will be a decision.

2. Recognizing the chairman's decision in the absence of a majority is somewhat debatable. However the value of getting a decision is considered to outweigh the disadvantage of having a decision by less than a majority.

3. The power to delegate procedural matters to the chairman seems to be unacceptionable.

Multiple awards

Proposition 17(3)

An arbitral tribunal may make an interim award (ALRI s. 17(3)), and it may make more than one final award dealing with different questions (ALRI s. 31(2)).

Legislation

BC CAA s. 9 provides for an interim award. Otherwise this proposition is new, and it is uncertain whether the present law permits an interim award.

Arguments

1. There seems to us to be no reason for the law to say that an arbitrator cannot, for example, decide liability before deciding damages, or that he cannot make an order that the respondent re-paint the car with liberty to the claimant to come back if the respondent does not conform. These would be "interim awards".

2. It may also be convenient, in a particular case, to make a final award on one claim without disposing of all the others at the same time. It does not seem that this is a power which an arbitrator is likely to abuse more than many other powers which are unhesitatingly conferred.

Effect of award

Proposition 17(4)

An award is final and binding except for the powers of the Court of Queen's Bench to set aside or remit it to the arbitral tribunal or to allow an appeal on a question of law (ALRI s. 6).

Legislation

The schedules attached to acts based on the 1889 UK Act say that an award is final and binding, subject to agreement to the contrary. The Model Law does not put the proposition in this form, but Article 34 says that recourse may be had only on certain rather narrow grounds.

Arguments

1. By agreeing to arbitrate, the parties have agreed to be bound by the award. This proposition therefore merely states a fundamental proposition of arbitration law.
2. The parties have not, however, agreed to accept an award which comes from an improperly conducted arbitration or which is contrary to law, so there must be court supervision and a court power to set aside awards. There may be argument as to the extent of the powers which a court should have. So far as we know, no one has ever said that there should be no power at all.
3. There is some authority which suggests that an arbitral award cannot be set it aside unless it is "patently unreasonable" or attracts some similar epithet. The drafting is intended to avoid such a result.

Settlement

Proposition 17(5)

If the parties to an arbitration settle the dispute, the arbitral tribunal must terminate the arbitration, and, if it does not object to doing so, may be requested to make a consent award which has the same effect and status as any other award (ALRI s. 30(2),(3),(4)).

Legislation

Model Law Article 30.

Argument

This proposition should be uncontroversial, unless it is thought that the arbitrators should be obliged to make whatever award is put before them without any power to decline.

Formalities of award

Proposition 17(6)

An award must be made in writing, signed by at least a majority of the arbitral tribunal, dated, and a copy delivered to each party (ALRI s. 31(1)).

Legislation

Model Law art 31, though it would also require the place to be shown.

Arguments

1. Requirements of writing, signature and delivery will ensure that (a) an award tells the parties what their rights are, (b) the time for an application to set an award aside can be determined, and (c) the award can be taken to the Court of Queen's Bench for enforcement.
2. These requirements seem to be a minimum. The Model Law also requires the place of the award to be shown, but that is not as important when domestic arbitrations are concerned.

Reasons

Proposition 17(7)

An award, other than a consent award, must give reasons, and if it does not give sufficient reasons, the Court may order the arbitral tribunal to deliver sufficient reasons (ALRI s. 31(1)(c),(d)).

Legislation

BC CAA s. 32 allows an application for more detailed reasons, and the court may order reasons in detail sufficient to enable the court to consider any question of law, but this applies only if written notice is given to the arbitrator before the award that a reasoned award would be required. This is similar to the UK provision.

Arguments

1. It can be argued that there are cases in which reasons should not be given. Occasionally, although a bare decision will end a dispute, the giving of the reasons behind it is likely to inflame things further. Further, reasons take time and cost money, and the parties may not need more than the decision. Some mass users of arbitration simply want a decision.
2. However, most people will want reasons, and in many cases reasons can easily be given. Reasons help the sense of fairness.
3. Reasons may be necessary for an appeal on a question of law.
4. On the whole, we think that the general rule should be that reasons must be given, because of the importance to the parties of knowing why a decision was made. However, the parties would be able to agree otherwise, as this provision would not be unwaivable.

Extension of time for award

Proposition 17(8)

The Court may extend an agreed time limit for the delivery of an award (ALRI s. 31(3)).

Legislation

BC s. 13.

Arguments

1. It may seem rather strange that the court should have an overriding power in this one instance, and it may seem that allowing the court to extend an agreed time is to do violence to the principle of party control.
2. The reason for putting in the provision and making it overriding is that it could avoid stultifying a long and complex arbitration merely because an arbitrator has missed a time by a few days.

Death of a party

Proposition 17(9)

The death of a party does not terminate an arbitration or the authority of an arbitral tribunal (ALRI s. 32). This provision does not affect any rule of law under which death extinguishes a cause of action (ALRI s. 32(5)).

Legislation

BC CAA s. 3

Argument

There is no reason why the death of a party should bring an arbitration to an end, so long as, under the general law, the claim is not extinguished by death. The proposition will clarify this point, as recommended by the BC LRC.

Termination by agreement, mootness and impossibility

Proposition 17(10)

An arbitral tribunal must terminate an arbitration if the claimant withdraws his claim. An exception is made for a case in which another party objects to the termination and has a legitimate interest in having

the dispute settled. A tribunal must also terminate an arbitration if the parties so agree or if it finds that the continuation of the arbitration has become unnecessary or impossible (ALRI s. 32(2)).

Legislation

Model Law Article 32

Argument

We think that the reasons for these proposals are self-evident.

Termination by award or order

Proposition 17(11)

An arbitral proceeding is terminated by a final award or awards which dispose of all questions referred to arbitration or by an order of the arbitral tribunal terminating the arbitration or dismissing the claim (ALRI s. 32(1)).

Argument

We think that the reasons for this proposal are self-evident.

Correction and interpretation of awards

Proposition 17(12)

However, an arbitral tribunal may make certain changes in its award. It may (i) within 30 days, or on application made within 30 days, correct mathematical, clerical, typographical or similar errors; (ii) make an additional award covering an omitted question; (iii) if so requested by the parties, give an interpretation of part of the award; and (iv) on application made within 30 days, change the award to correct injustice caused by an oversight of the tribunal.

Legislation

The proposal for correction for oversight is new. The rest, with some variation, comes from Model Law Article 33.

Arguments

1. Item (i), the power to make mathematical, clerical, etc., corrections seems unexceptionable, has precedents, and will relieve against injustice.

2. Item (ii), the power to make an additional award, merely recognizes that a tribunal may have failed to perform the whole of its duty and should have power to complete the job. This also seems unexceptionable.

3. Item (iii), the power to give an interpretation seems to us to be useful, and the fact that the parties must request the interpretations means that there is no downside. The only question is whether it need be said at all, as a request by the parties would, in the absence of a specific power, be enough to let the tribunal give the interpretation. We think that an express statement is useful enough to include.

4. Item (iv) may generate more controversy. It would allow a party to come back and ask for a change in an award on the grounds that the tribunal had overlooked something. This raises the spectre of interminable proceedings, whereas arbitration is supposed to be fast and definitive. That is the downside.

5. On the other hand, people overlook things, and arbitrators are people. The reasons may disclose that the tribunal thought that a witness said A, and made its award accordingly, whereas the witness said contra-A, or that the tribunal overlooked some compelling argument about fact. In the absence of a power of this kind, there would be no way of curing the oversight, and injustice would result, because the court would have no power to set aside an award for error of fact. Everyone might know that the award is based upon a mistake, but a party who is not frightfully gentlemanly might take advantage of it.

6. Under present domestic arbitration law, the courts will set aside an award if the arbitrator says that he made such a mistake. That is judge-made law. It would be possible to give the court a similar power under the new Uniform Act, but (a) that would make things more interminable than item (iv) would do, and (b) would result in more cost.

7. A judge has a *locus poenitentiae*: until his order is entered, he can vary it, so that he can correct an oversight if the parties bring it to his attention. If the order is entered, there is at least, in most cases, an appeal which can deal with errors of fact, unlike the arbitration situation. Powers to re-hear are held by higher courts, and often by administrative tribunals.

8. The indeterminacy which a power of correction for oversight will produce should be weighed against the possibility of injustice which

may occur in the absence of such a power. The proposal minimizes the indeterminacy by requiring an application for correction for oversight to be made within 30 days. The ALRI section, 33(4), further minimizes it by allowing the tribunal to reject an application without a meeting or a hearing (which is fair enough: the tribunal should know whether it made an oversight or not, and doesn't need a hearing to find out.)

Interest and costs

Proposition 17(13)

An arbitral tribunal may award interest. It may award costs, which it may fix or which may be taxed by the clerk of the Court of Queen's Bench, and which may take into account any offer made by one of the parties before the award. Failing an order for costs, each party must bear his own costs and pay half of the costs of the arbitral tribunal, clerks, secretaries and reporters, which can be taxed by the clerk of the Court on the basis of fair value of services and reasonable expenses (see ALRI s. 37,38).

Legislation

Much of the costs and interest provision comes from BC. The provisions about payment in and the making of offers are adapted from Alberta Rules of Court.

Arguments

1. This proposal may look as if it is trying to turn an arbitrator into a judge, by giving him powers which are usually exercised by courts, including prejudgment interest powers, and including the application to awards of the same interest provisions as apply to judgments.
2. The intention of the proposal is to give a party much the same costs and interest remedies in an arbitration as he will have in litigation. It is our view that, so far as possible, the choice of forum should not affect the remedies available.
3. We do not think it worth discussing all the detail of the proposal, as it is fairly straightforward. It is open for comment.

18. ARBITRATOR'S COMPENSATION AND EXPENSES

Proposition 18

Compensation and expenses of arbitrators and others who assist in an arbitration may not exceed the fair value of the services performed

together with necessary and reasonable expenses incurred. Accounts are subject to taxation by a taxing officer, with provision for review by the court. A taxed account may be filed with the court and enforced as a judgment of the court against the parties, jointly and severally. (See ALRI s. 37)

Legislation

BC CAA s. 26.

Arguments

1. Legislation in some provinces provides for regulation of arbitrators' compensation. The tariff is usually so low that prudent arbitrators invariably have it waived by the parties, so that the tariff is merely a trap for the unwary. It is customary to make a distinction between "professional" and arbitrators, which is a source of irritation.
2. We agree with the BC LRC that a provision for a reasonable compensation supplemented by a taxation power would be an adequate system.
3. We should point out that the right to taxation under the BC LRC recommendation and under the BC provision is non-waivable. We are not apprehensive of any disparity of bargaining power as between arbitrators and parties when compensation is determined and are content to leave the taxation provision subject to the agreement of the parties. However, we note the point for consideration.
4. The BC LRC recommended that the arbitrator's lien on the award for his costs be abolished. The BC Act did not include this particular provision, and we have not thought that there is a sufficient problem to require legislation. Again, however, we note the point for consideration.

19. RECOURSE AGAINST THE ARBITRATION OR THE AWARD

Overriding effect of recourse provisions

Proposition 19(1)

The recourse proposals contained in the following propositions cannot be overridden by the parties.

Legislation

This is not stated in the prototype legislation.

Arguments

1. It may be objected that the principle of party control says parties should be able to contract out of recourse to the courts if they want to do so, and that there is no reason to override their agreement.

2. One answer is that the principle of equal treatment and fairness requires that the courts, as the traditional guardians of justice, have a supervisory power. A party who contracts into arbitration does not contract into procedural or substantive unfairness.

3. A second answer is that the arbitration statute is meaningless as a statement of law if the arbitrator can do what he wishes without any reference to the legal system. A third is that it must be law which determines the boundaries of what is entrusted to arbitrators, and that the only objective determiner of law is the courts.

4. The proposals would leave parties free to contract out of the arbitration statute entirely. If they did so, and contracted for some form of arbitration, the courts would still be in the picture if the agreement creates legal obligations. If it does not - if, for example, the agreement is for non-binding arbitration - there may be no function for the courts.

Declarations of fatal defects

Proposition 19(2)

The Court of Queen's Bench may at any time grant a declaration (i) that the arbitration agreement is invalid or entered into by a party under a legal incapacity; (ii) that the dispute was not contemplated by the agreement or was not referred to arbitration; (iii) that the composition of the tribunal was not in accordance with the agreement of the parties or the Act; or (iv) that the subject matter was not capable of being the subject of arbitration under Alberta law (ALRI s. 34(11)). Such a declaration would have the effect of invalidating an arbitration. It may be complemented by an injunction.

Legislation

The prototype legislation is silent, which leaves the courts with their common law jurisdiction. Article 5 of the Model Law says that, except as provided, the courts are not to intervene. This may preclude some declarations, but it applies only to "matters governed by this law", which may leave the courts free to declare that a fatally defective arbitration is not "governed by" the Model Law.

Arguments

1. It may be argued that the common law jurisdiction to make declarations is a discretionary power of the kind which should be avoided in connection with arbitrations, as it leaves the court free to intervene at any time and does not precisely define the circumstances. The Model Law prohibits court intervention, except as specifically provided, and does not provide for such declarations.

2. On the other hand, an arbitration agreement is an agreement between the parties which is subject to all the usual incidents of agreements, including the powers of courts to declare what the rights of the parties under the agreement are. Even the Model Law cannot stop the court from making a declaration that an "arbitration" is really a nothing, and is therefore not "governed by this law", which governs only somethings. Arbitrators simply cannot be given the power to decide where the boundary is between an arbitration which has been agreed to and a nothing. Ultimate court intervention is necessary to keep arbitrations within arbitration agreements.

Setting aside an award

Proposition 19(3)

The Court of Queen's Bench may set aside an award on any of the grounds mentioned in Proposition 17(2) above, with two exceptions. First, if the parties have agreed that the arbitral tribunal has power to decide what disputes have been referred to it, the Court may not set aside the award on the grounds that the dispute was not referred. Second, the Court may not set aside an award because of an objection which the objecting party is deemed to have waived (ALRI s. 34(2)).

The Court of Queen's Bench may also set aside an award if (i) the procedure was not in accordance with the Act, including the provisions requiring equal treatment, notice, and an opportunity to present a case and respond to the cases presented by others; (ii) an arbitrator has engaged in corrupt or fraudulent practice or there is reasonable apprehension of bias; or (iii) the award was obtained by fraud (section 34(1)(f) to (i)).

Legislation

Under domestic arbitration legislation, awards may be set aside if "the arbitrator has misconducted himself". This has been held to cover everything from error of law on the face of the award through procedural error to fraud and corruption. Model Law Article 34 gives a

restrictive list of grounds for setting aside (ALRI Report 149), but includes as a grounds that the award is in conflict with the public policy of the State, which seems to be intended to include procedural fairness.

BC CAA s. 30 confers power to set aside where an award has been improperly procured or there has been arbitral error. "Arbitral error" is defined to mean an error by the arbitrator in the course of an arbitration that constitutes misconduct, and to include corrupt or fraudulent conduct, bias, exceeding his powers, and failure to observe the rules of natural justice.

Arguments

1. This proposal, and ALRI s.34, constitute an attempt to define the grounds for setting aside an award. This attempt should be contrasted with the power to set aside for misconduct which is in present domestic arbitration law, and, in effect, carried forward with some inclusive definition by the BC CAA. (Note that setting aside upon an appeal on law is in the next proposition.)
2. Discretions are flexible, allow for taking the circumstances of the individual case into account, and allow the taking into account of circumstances not foreseen by the legislator. On the other hand, the flexibility of a discretion allows a court to set up its own standards, in general or for a specific case, and discretions lead to uncertainty.
3. Our choice is to describe the grounds, with a view to restricting court intervention to cases in which it should intervene to protect legality and fairness, and with a view to giving those involved in arbitrations advance notice of the things to be avoided, rather than require them to read cases or get lawyers to read cases for them, in order to find out what they should do. It will be seen that the grounds may be summarized by saying that they include (a) a fundamental flaw in the arbitration or in the composition of the tribunal, and (b) a fundamental departure from equal treatment or a fair opportunity to put or meet a case. (Note the two exceptions stated in the proposition.)

Appeal against an award

Proposition 19(4)

A party may appeal an award to the Court of Queen's Bench on a question of law arising out of the award, but only if either (i) all parties agree or, (ii) the Court is satisfied that the importance of the arbitration to the parties justifies the intervention of the Court and that the determination of the point of law is likely to substantially affect the rights of

one or all of the parties. If it allows an appeal, the Court may confirm, vary or set aside the award or remit it to the arbitral tribunal with the Court's opinion on the question of law and directions about the future conduct of the arbitration (ALRI s. 34(6),(7),(8)).

Legislation

Under domestic arbitration legislation, awards can be set aside for "misconduct", which includes error of law, though it may be that the error must be apparent on the face of the award before the courts will intervene. Under Model Law Article 34, an award may be set aside on the grounds that the subject-matter was not arbitrable or on the grounds that the award was in conflict with the public policy of the State, which seems likely to cover at least some errors of law. BC CAA 31, which takes a UK provision as a model, allows an appeal on law only with leave, and the court is not to grant leave, except by consent, unless the importance of the result justifies intervention and the determination of the point of law may prevent a miscarriage of justice; the point of law is of importance to a class of which the applicant is a member; or the point of law is of general public importance. Under the BC provision, the parties can waive the right to appeal, but only after the arbitration is commenced.

Arguments

1. The first question is whether there should be an appeal on law at all. It may be said that the parties chose arbitration to escape from the judicial system, and that one of them should not be able to drag the other back into it: they have made their forum and should have to lie in it. As against that, it is not by any means clear that parties to an arbitration want anything other than their legal rights - or, rather, it is likely that they want legal rights to be the basis of the decision, and a right to be treated according to law is nothing if there is no way of restricting arbitrators to law, which only the courts can do. (It would be open to parties under our proposals to agree that arbitrators are not bound by law, and, if they do, presumably the court could allow an appeal on law only if the arbitrator erred in construing the arbitration agreement.) We think that there should be an appeal.

2. The next question is whether the error should have to be apparent on the face of the award. In most cases, it is likely that the error will be apparent on the face of the award, if arbitrators are obliged to give reasons, and it may be difficult for a party to show from what went on that an error in law was made if it doesn't appear in the reasons.

However, there may be cases in which it is clear that an error in law was made but does not appear in the award, and, if the applicant can show that that happened, we do not see why he should not have his appeal.

3. The BC CAA requires leave. Our proposal does not. The requirement of leave is to screen out appeals which should not be entertained. We think that the court can do the screening at the beginning of the appeal itself and save a step for which most of the work must be done anyway, to say nothing of the possibility that courts will hear the leave and the appeal as one application anyway. This is an open policy question.

4. Our proposals are narrower than the BC CAA in one respect: they do not recognize as grounds for entertaining an appeal that the question is of importance to a class of which the applicant is a member or to the public. Our reason is that we do not think that the respondent should be put to the cost of an appeal which, as between the parties, should not be heard: parties should not have to incur cost in order to confer a jurisprudential benefit on a class or on the public. We would therefore restrict the threshold tests to tests having to do with the parties, namely, the importance to them and the likelihood that the determination of the question will substantially affect their interests.

Powers of court

Proposition 19(5)

On setting aside an award for a fundamental flaw or fairness grounds, the court should have power (a) to remove an arbitrator; (b) remit the award to the tribunal for further consideration, and (c) give directions for the future conduct of the arbitration.

On allowing an appeal on law, the court should have power (a) to confirm, vary or set aside the award, and (b) to remit the award to the tribunal with the court's opinion on the question of law, and (c) give directions for the future conduct of the arbitration.

Legislation

These proposals are fairly well in accordance with existing domestic arbitration legislation and with the BC CAA. The power to give directions about the future conduct of the arbitration does not appear in these prototypes. The Model Law does not work out the consequences of setting aside.

Arguments

1. No argument against the power to remove an arbitrator on a setting aside (as it may be his true misconduct which is the grounds), or against the power to set aside or remit, occurs to us.

2. The power to give directions about the future conduct of the arbitration may be more controversial, as it may seem to allow the court to meddle in what should be the exclusive province of the arbitrators. However, in some circumstances, the arbitration may be in disarray, and it may be necessary for the court to do something to see that it goes on properly and expeditiously. For example, if an arbitrator is replaced, there may be a question whether or not the hearings should be repeated, and, if that question is dealt with on the setting aside application, much time and cost may be avoided. Or the court may be able to direct the arbitrator to deal with only one point.

20. ENFORCEMENT OF AWARD

Proposition 20

An award may, by leave of the Court of Queen's Bench, be enforced in the same manner as a judgment or order of the Court to the same effect (ALRI s. 35(1)). The Court may direct that judgment may be entered, or may make orders, in terms of the award, and may make such orders as are necessary to give effect to the award (ALRI s. 35(2),(3)).

The Court retains its jurisdiction to allow an action to be brought on the award (ALRI s. 35(4)).

Legislation

Article 35 of the Model Law makes an arbitral award "binding" and requires the competent court to enforce it. Existing domestic arbitration legislation, and the BC CAA, require an application to the court to enforce an award, and it is only if an order is made that the award is to be enforced in the same manner as a court judgment and that judgment may be entered in terms of the award. The BC CAA goes on to confer some useful incidental powers, which are included in the proposal.

In addition, common law courts have jurisdiction to entertain an action on an award, though this is infrequently done, because of the advantages of a summary procedure.

Arguments

1. The argument which supports the Model Law position is that the parties have agreed to arbitration, that they should submit to the

result of the arbitration, and that the award should be automatically enforceable without having to get involved with any part of the judicial system other than that necessary for enforcement.

2. We sympathize with the proposition that a claimant should get the fruits of his award with the least practicable amount of procedural requirements. However, we have the following objections to the Model Law proposal:

   (a) we do not think that an unauthenticated piece of paper should set the court machinery in motion. The Model Law calls for authentication, but it does not say that it has to be court authentication. This is not a fundamental objection and could be met by requiring some sort of proof of the award.

   (b) we do not think that the force of the state should be applied to the citizen without some prior consideration by a judicial mind, or, at least, without an opportunity to have it considered by a judicial mind. Arbitrators are not the traditional guardians of citizens' rights. The courts are. If all remedies are to be available, they would include power to break in to seize, to examine in aid of execution and to commit for contempt for failure to appear, and so on.

   (c) some kind of judicial intervention will often be needed in the working out of enforcement remedies. Garnished money has to be dealt with. Notices of objection to seizure have to be dealt with. Conflicting claims to seized assets have to be dealt with. It is better to recognize this at the beginning.

   (d) since arbitrators may not be legally trained – or even if they are – they may not cast their awards and their remedies in legal molds. To say that any piece of paper which can be called an award is to be enforced in accordance with its terms is to take unjustified risks.

   (e) provincial legislation cannot make section 96 judges out of arbitrators.

3. A suggestion has been made to us that fairly firm guidelines could be provided for the court. This would be a possible middle course.

21. SUBJECTS ABOUT WHICH NO ACTION IS RECOMMENDED

Qualifications and regulation of arbitrators

Proposition 21

The law does not prescribe any qualifications for arbitrators other than independence and impartiality. The parties can prescribe qualifications if they wish, and anyone who appoints an arbitrator can look for such qualifications as he thinks desirable. We think that this is the way it should be.

If arbitration is an alternative form of dispute resolution, it may be argued that the qualifications of arbitrators, whether or not they are important as the qualifications of judicial officers, are important enough to be established by legislation. However, in arbitration, unlike litigation, the parties can choose their adjudicator, or prescribe such qualifications for their adjudicator, as they choose, and we do not think that the law should circumscribe their choice. Nor do we think that a set of qualifications should be prescribed for cases in which parties do not deal with the question, (a) because we do not think it necessary to do so, and (b) because we do not see how satisfactory general standards can be devised for the multifarious circumstances which surround the multifarious arbitrations which will be covered by the Uniform Act.

Nor does the law provide for the regulation of arbitrators. Again, we do not think that the law should limit parties' choice by requiring arbitrators to be members of a professional body, nor do we see that the public interest would be served by setting up a public body to enforce conformity with standards of ethics and conduct.

The Arbitrators' Institute of Canada and its provincial affiliates provide for training and are developing codes of ethics, and institutions which administer arbitrations have their own standards of appointment. These systems do not apply to all arbitrators and arbitrations, but we think that it is better to let them develop in response to the needs of arbitrating parties than to establish a public system of regulation.

Protection of arbitrators

The present law seems to be

(a) that an arbitrator who does not act in good faith is liable in damages,

(b) that an arbitrator is not liable for negligence, or for lack of diligence, or for bias falling short of bad faith, and

(c) that, while an arbitrator may possibly have an absolute privilege in defamation, it is more likely that he has a qualified privilege.

While these statements cannot be made with the bedrock certainty which once might have been attached to the *ratio decidendi* of a Supreme Court of Canada decision or to a legislative statement, they appear reasonably firm.

This protection is not as comprehensive and impermeable as that which the law gives to judges, and it may be thought that, if arbitration is an alternative form of dispute resolution, the considerations which militate in favour of absolute protection for judges militate in favour of absolute protection for the alternative adjudicators. We think, however, that the protection outlined above is quite extensive. No doubt, it is uncomfortable for an arbitrator to be sued, but it is no more uncomfortable for an arbitrator than for other purveyors of professional services, and the protection given is significantly greater. If an arbitrator acts in bad faith or maliciously defames someone, there is no good reason to protect him.

An argument may come from the opposite direction, namely, that the law is too protective, and that a negligent arbitrator should be answerable for the damage he causes. The protection may be somewhat anomalous in an age in which liability for negligence has been greatly expanded. However, the dangers of actions being brought for revenge, for terrifying an arbitrator into giving a favourable award, or for indirectly upsetting an award, are probably too great to justify opening the gates, whether or not they turn out to be floodgates.

In the result, we think that the substantive law is reasonably satisfactory, and should be left to judicial development unless further problems develop.

The ALRI did not consider the question whether an arbitrator should be protected against being made a party to proceedings for judicial review of his award. No personal remedy is available in such proceedings against an arbitrator, and there seems to be no reason why he should be a party. Our inclination is to the view that it should be possible without special mention for an arbitrator to be removed from such proceedings, and that costs should be a sufficient remedy, but if there is an existing evil; consideration could be given to the point.

Model Rules

It would be possible to prepare a set of rules for arbitrations for attachment to the draft statute. It would be possible to make them absolutely binding, binding on arbitrators unless the parties agree to the contrary, or merely a guide from which arbitrators could depart as they see fit.

The ALRI gave consideration to recommending the adoption of rules. Their consultation showed a division of opinion. Some thought rules would be helpful. Others thought they would be confusing.

If the Conference agrees that the Uniform Arbitration Act should be modelled on the Model Law, and if the policy decisions follow the pattern of the propositions advanced above, it is our opinion that it will be quite possible to run an arbitration with what is in the Act itself.

As pointed out in the ALRI report, page 18, their proposed draft statute includes the following procedural provisions: service of documents (s. 3); preservation orders (ss. 9(1) and 17); challenge procedure (s. 13); commencement of proceedings (s. 21); consolidation of arbitrations (s. 9(6)); statements of the parties' positions (s. 23); holding of hearings (s. 24); dismissal for want of prosecution and other provisions about default of a party (s. 25); appointment of experts (s. 26); obtaining evidence (s. 27); form, contents and time of award (s. 31); termination of proceedings (s. 32); correction and interpretation of award (s. 33); application for setting aside an award (s. 34); enforcement of awards (s. 35); and taxation of costs (s. 37 and 38).

We do not think that it would be particularly helpful to arbitrators and arbitration litigants to repeat these provisions in rules. No doubt, some interstitial rules could be laid down, and forms provided. The difficulty with this is that the rules would have to be suitable to cover everything from the defective toaster, where a simple appearance with virtually no interlocutory proceedings is likely to be desirable, to the collapsing office tower, in which a pre-hearing conference is likely to be essential and substantial preliminaries are likely to be desirable, and from interpreting a simple contract standing alone to disentangling the contractual results of years of dealings and interchanges under a gas supply contract or a farm-in providing for the earning of royalties, supplemented by voluminous documentation. We think it better to leave those with complex disputes – who will probably be advised by counsel familiar with the arbitration scene – to agree on their own rules, or, more likely, to agree to adopt the rules promulgated by an institution which administers arbitrations.

We do not recommend the promulgation of model rules with the Uniform Arbitration Act.

Over-reaching and standard form contracts

Our proposals are not specifically designed to protect parties from arbitration agreements which favour the party with the stronger bargaining position. No doubt many agreements with arbitration clauses in them are signed without much consideration, by one party at least, of the possible consequences of one-sided arbitration clauses. Our general view is that the place for such protection, if there is a place, is in contract law, or (at the consumer level) in consumer protection law, and that arbitration law should accept contract law as it finds it.

Mandating equality of treatment and fair opportunity to make and rebut a case, and preventing contracting out, as our proposals provide, would do something to protect the weaker party. No doubt, in determining what is equality of treatment, an arbitrator, and later the court, must take note of what a complaining party agreed to, but, in proper hands, these provisions may well be useful. Further than that, we do not recommend that the Conference go.

APPENDIX C

(See page 78)

UNIFORM LAW CONFERENCE OF CANADA
REPORT OF THE BRITISH COLUMBIA COMMISSIONERS
ON
UNIFORM LEGISLATION IN RELATION TO FOREIGN MONEY CLAIMS

Yellowknife, Northwest Territories
August 14 - 18, 1989

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CHAPTER I

INTRODUCTION

A. *The Miliangos Revolution*

In 1975, in what has been described as "a remarkable piece of judicial lawmaking" the English House of Lords radically altered the law concerning foreign money liabilities. They held that a litigant, suing for a sum properly expressed in a foreign currency, should be entitled to enter judgment in that currency. The former rule required that the judgment be entered in sterling, converted from the foreign currency at the exchange rate prevailing at the date the money became payable. This change in the law had been advocated for many years by knowledgeable commentators.

The case in which this was decided, *Miliangos* v. *George Frank (Textiles) Ltd*[1] revolutionized the common law on this issue. For a variety of reasons, however, the Canadian judges, while sympathetic to this development, have not felt themselves able to adopt it fully. The Canadian jurisprudence since *Miliangos* can only be described as inconsistent and confusing. Assuming that a change in the law which adopts, in whole or in part, the *Miliangos* position would be desirable, legislation as a means of achieving that end calls for consideration.

The question of a legislated solution has arisen twice in Canada. In 1983 The Law Reform Commission of British Columbia submitted its *Report on Foreign Money Liabilities*[2] The BCLRC Report recommended a statutory restatement of the *Miliangos* rule.

A year later, legislation was enacted in Ontario which did precisely that.[3]

These developments suggest that the next ten years may see most Canadian jurisdictions move to enact legislation in relation to currency conversion. Since many currency conversion issues arise in international trading transactions, this area of law has a strong commercial flavour and uniformity across Canada may be of particular importance. The Uniform Law Conference may play an important role in attaining this goal. This seems to be the view in the United States where the National Conference of Commissioners on Uniform State Laws (NCCUSL) is in the process of developing uniform legislation.

The purpose of this paper is to examine the legal and economic issues which must be confronted in developing uniform legislation in this area. For convenience, we refer to such legislation as the *Uniform Foreign Money Claims Act* or, UFMCA in abbreviated form. The exposition and analysis in this paper draws heavily from the BCLRC Report and in many instances this is done without attribution. The consent and cooperation of the British Columbia Law Reform Commission is gratefully acknowledged.

B. *The Significance of the Conversion Date – Some Examples*

Where the currency in which a person's claim is asserted differs from the currency of the forum in which the claim is litigated, why should it make a difference what date is selected for conversion from the currency of the claim to the currency of the forum? The answer to this question is most easily explored through a few examples:

Example No. 1

D, a Canadian businessman, contracts with P, a Utopian manufacturer, to buy certain goods, made to D's specification. D is to take delivery of the goods in Utopia and pay the purchase price of 20,000 rallods (the currency of Utopia) within 60 days of delivery. The contract stipulates that it is governed by Utopian law. D takes delivery of the goods but fails to pay the purchase price.

Example No. 2

D and P enter into the contract described in Example No. 1 but D refuses to take delivery of the goods. P mitigates his losses by reselling the goods for 10,000 rallods to another purchaser.

Example No. 3

D, a Canadian resident, while on a motoring holiday in Utopia negligently damages an automobile belonging to P, a Utopian resident. P must spend 1000 Utopian rallods for repairs.

If, in these examples, P pursues his claim against D in a Canadian court, what technique should be adopted to measure that claim and give P the relief he seeks?

The existence of the Canadian dollar cannot be entirely ignored. P may be forced, ultimately, to rely on execution measures, such as the seizure and sale of D's property, and the reality is that such procedures are designed to yield Canadian dollars. At some point, therefore, it is necessary to identify the amount of Canadian dollars that are sufficient to satisfy P's claim.

The conversion of P's claim in Utopian rallods into Canadian dollars will not be a contentious issue if the exchange rate is stable. If, however, between the time P's claim arose and the time it was satisfied the exchange rate has fluctuated, the effective time of conversion may be of critical importance. If the rallod has increased in value relative to the dollar over this time it will be in P's interest to seek conversion as late as possible so as to recover the largest number of dollars. D, however, would seek to minimize that recovery and advocate an effective date of conversion that is early as possible. If the rallod has declined in value relative to the dollar the positions are reversed. P's recovery would be maximized by selecting an early conversion date while D would advocate conversion at a late time.

There are four dates that have significance in claims of this kind, each of which might be selected as defining the exchange rate that should govern P's recovery.

(a) The date on which P should have been paid or on which P incurred his loss (date of breach)

(b) The date on which P commences proceedings against D to enforce his claim (date of writ)

(c) The date on which P recovers judgment against D in a Canadian court (date of judgment)

(d) The date on which P's judgment is satisfied (date of payment). This choice would necessarily call for a power in the Canadian court to award a judgment framed, at least in part, in terms of a foreign currency.

The Canadian courts have generally adopted the date of breach as defining the appropriate rate of exchange. This preference rests on the adoption of the reasoning in certain older English cases, and on the effect of Canadian statutes that touch on currency matters. Until about ten years ago the English courts also followed the date of breach rule. A recent series of cases, however, has radically changed the position. The

English courts will now permit a judgment to be entered directly in a foreign currency whether the claim is based on tort, damages for breach of contract or an unpaid debt. They have, in effect, adopted a date of payment rule. The Canadian position and the English developments are discussed in greater detail in subsequent chapters.

Depending on the conversion date adopted, a secondary issue may also arise. In which of two or more foreign currencies should the plaintiff's loss be measured? A further example will illustrate the point:

Example No. 4

D, a Canadian resident, while on a motoring holiday in Utopia negligently damages an automobile belonging to P, a resident of Ruritania who is on a similar holiday in Utopia. Repairs are effected in Utopia at a cost of 1000 Utopian rallods. P purchases the rallods to pay for his repairs with 2000 talers (the currency of Ruritania). Some time later P sues D in a Canadian court but in the meantime the rallod and the taler have fluctuated with respect to the Canadian dollar and with respect to each other.

If the Canadian court follows the date of breach rule this example poses no difficulty. The same amount of Canadian currency would normally have been sufficient to buy 1000 rallods or 2000 talers at the time the damage was incurred. This will not necessarily be true at the date of writ, judgment or payment. If the court adopts one of these dates as appropriate for conversion it will be forced to choose between the rallods and talers as the currency in which P's loss was sustained.

CHAPTER II
LEGAL BACKGROUND

A. *Up to 1970*

1. *England*

Until the beginning of the last decade the Anglo-Canadian law concerning foreign currency claims seemed firmly settled. Two propositions were cited as fundamental. The first was that the courts have no authority to enter money judgments in terms of a "foreign" currency, that is a currency other than that of the forum. The second is that in converting from a foreign currency to the currency of the forum the court should have regard to the exchange rate that prevailed on the date of breach, the date the loss was suffered by the plaintiff or when the obligation to him became payable. These rules were applied in a variety of circumstances in which a money judgment was claimed, including claims based on tort, breach of contract and simple contract debt.

These questions received their first principled consideration late in the 19th century and the "classic" position was developed and refined during the first thirty years of this century. Its most recent authoritative restatement by the House of Lords occurred as late as 1961 in *Re United Railways of Havana and Regla Warehouses Ltd.*[4]

2. *Canada*

a. *Common Law*

The English authorities concerning foreign currency claims have always been treated with respect in the Canadian courts. Once the basic principles had been "settled," the Canadian cases tended to adhere to them.[5] In particular, the date of breach rule was applied twice by the Supreme Court of Canada and the English authorities cited in support.[6]

b. *Statute*

The rule that a judgment can only be given in the currency of the forum is a creature of common law. In Canada, however, that rule is also said to rest on statute. Section 11 of the *Currency and Exchange Act* (Can.)[7] provides:

> All public accounts throughout Canada shall be kept in the currency of Canada; and any statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada.

It has been said that this provision prohibits the entry of a judgment expressed in a foreign currency.[8]

While no general rule concerning currency conversion has been given the force of law by legislation, there are some particular circumstances in which the conversion date is defined by an enactment. A number of provisions adopt the date of breach rule. These include section 163 of the *Bills of Exchange Act*[9] and provincial statutes which have adopted section 4 of the *Uniform Reciprocal Enforcement of Judgments Act* or section 13 of the *Uniform Reciprocal Enforcement of Maintenance Orders Act*. A date of judgment rule is provided in two federal acts which adopt international conventions relating to aircraft.[10]

B. *Judicial Reform in England*

The decision of the House of Lords in *Miliangos* did not come as a bolt from the blue. It was in fact the culmination of a process which began 6 years earlier.[11] Characteristically, a catalyst for this process was Lord Denning. When the issue reached the House of Lords, Denning's

failure to adhere to previous authority was lamented but the court was unwilling to reverse the tide of events he had put in motion. The Law Lords thought it a proper case in which to apply the 1966 practice statement[12] under which the House might "depart from a previous decision when it appears right to do so."

A number of factors weighed heavily in reaching this conclusion. First, earlier authority was examined in detail. What emerged was that the "sue for sterling" "date of breach" rules were recognized earlier as having unsatisfactory aspects, but the practical and procedural difficulties that were thought to flow from any alternative rule militated against change. On a fresh consideration it was concluded that those difficulties were not as formidable as they had once appeared. The courts had in fact evolved procedures for dealing with foreign currency claims that seemed to be working satisfactorily.

Second, the rules evolved and were affirmed at a time when the pound and many other currencies were "fixed" and stable in value and changes in value between the date of breach and the date of judgment or payment were comparatively rare. By 1976 most currencies were "floating" and relative values often changed from day to day. The number of cases in which the choice of a conversion rule would significantly affect the result had greatly increased.

Third, commercial practice had adapted to the realities of currency fluctuations. In particular, arbitrators were now prepared to make foreign currency awards. Lord Wilberforce stated:[13]

> It would be an intolerable situation if a different rule were to prevail as regards arbitrations upon debts expressed in foreign currency on the one hand and actions upon similar debts on the other ... If I am faced with the alternative of forcing commercial circles to fall in with a legal doctrine which has nothing but precedent to commend it or altering the doctrine so as to conform with what commercial experience has worked out, I know where my choice lies. The law should be responsive as well as, at times, enunciatory, and good doctrine can seldom be divorced from sound practice.

In the result the court adopted a rule which permits judgment to be entered in a foreign currency and calls for conversion into sterling at the rate prevailing at the date of payment.

The specific claim in issue in Miliangos was a debt sounding in a foreign currency and the judgment was limited to such claims. Its application to claims based on tort and breach of contract came before the House of Lords a short time later in two cases heard consecutively by the same court.[14] The *Miliangos* rule was held to apply in such cases and

guidance was provided on choosing among two or more foreign currencies which might be used to compensate the plaintiff. The House of Lords appealed to the principle of restitutio in integrum and held that "the plaintiff should be compensated for the expense or loss in the currency which most truly expresses his loss." This was referred to as the "plaintiff's currency." In The *Despina R* Lord Wilberforce explained:[15]

> A plaintiff, who normally conducts his business through a particular currency, and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains is to be measured not by the immediate currencies in which the loss first emerges but by the amount of his own currency, which in the normal course of operation, he uses to obtain those currencies. This is the currency in which his loss is felt, and is the currency which it is reasonably foreseeable he will have to spend.

The *Folias* illustrates the way in which a multiplicity of competing currencies may figure in a single case:[16]

> This case arises out of a charterparty under which the appellants chartered the Folias to the respondents for a round voyage from the Mediterranean to the East Coast, South America. The hire was expressed to be payable in U.S. dollars, but there was a provision that in any general average adjustment disbursements in foreign currencies were to be exchanged in a European convertible currency or in sterling or in dollars (U.S.). The appellants are Swedish shipowners, the respondents are a French company which operates shipping services. The proper law of the contract was English law.
>
> In July 1971 the respondents shipped a cargo of onions at Valencia (Spain) for carriage to Brazilian ports. They issued bills of lading in their own name. There was a failure of the vessel's refrigeration as a result of which the cargo was found to be damaged on discharge. The cargo receivers claimed against the respondents and, with the concurrence of the appellants as to quantum, this claim was settled in August 1972 by a payment in Brazilian currency of cruzeiros 456,250. In addition, the respondents incurred legal and other expenses.
>
> The respondents discharged the receivers' claim by purchasing the necessary amount of cruzeiros with French francs.

The respondent charterers' claim related to the payment made to the cargo receivers and was framed as one for damages on the basis that the charterers had incurred a personal liability under the bills of lading that they were compelled to discharge. The competing currencies included:

sterling – the currency of the proper law of the contract and of the forum, and an alternate currency for general average adjustments;

cruzeiros – the currency used by the charterers to discharge the cargo receivers' claim;

French francs – the currency used to purchase the cruzeiros, and the "national" currency of the claimants;

U.S. dollars – the currency of account and payment under the charterparty, and an alternative currency for general average adjustments.

The House of Lords held that the plaintiff's currency, that which most truly expressed his loss, was French francs.

In summary, *Miliangos*, *The Despina R* and *The Folias* form a trilogy that swept away most of the preceding law on foreign currency claims and overruled a number of cases that had been faithfully followed in the Canadian courts.

C. *Reaction of the Canadian Courts*

The English decisions awakened the interest of litigants in Canada and a number of them have tested the Canadian law in the light of these developments. Little is to be gained, however, from a comprehensive review of the Canadian post-Miliangos jurisprudence. The BCLRC Report contains a survey of the case law up to 1983 which concludes with the following observation:[17]

> In summary, the recent Canadian cases seem to demonstrate considerable dissatisfaction among the judiciary with the date of breach rule and, in some cases, they have been willing to depart from it. The results, however, have been confusing and contradictory and have ranged from a reluctant adherence to the date of breach rule, through the endorsement of conversion as of the date of the writ or statement of claim, to taking the date of judgment as appropriate for currency conversion.

Cases since 1983 have done little to clarify matters.[18]

CHAPTER III
LEGISLATIVE REFORM

A. *Report of the British Columbia Law Reform Commission*

The 1983 BCLRC Report, after reviewing the legal background,

proceeded to an analysis of the breach date rule for currency conversion and the arguments for and against its abandonment. The arguments in favour of its abandonment included the substantial academic comment and criticism which had been directed at the rule; that the rule is based on an inappropriate analogy with commodity contracts; that it yields unfair results; and that it is inconsistently applied.

The Report then examined some of the arguments against abandonment of the breach date rule. These included suggestions that the advantages of the date of payment rule had been greatly overstated; that the date of payment rule creates uncertainty; that the date of payment rule creates procedural difficulties; and that a date of payment rule will lead to serious injustice to the plaintiff whose currency has undergone a relative decline in value after the date of breach.

The Report then turned to the question of provincial competence to legislate on this matter. This involved a consideration of two issues: the jurisdiction to legislate with respect to currency conversion generally, and whether section 11 of the *Currency and Exchange Act* precludes adoption of a payment date rule. The Commission summarized its views:[19]

> It is our conclusion that there are no basic constitutional barriers to the enactment, by the Province, of legislation on the conversion date with respect to foreign money claims. Whether or not such legislation could take the form of a date of payment conversion rule is a slightly more difficult issue. It would conflict with the accepted view of section 11 but a number of arguments can be raised in support of such a provision. They may be summarized as follows:
>
> 1. A provincial enactment drafted similarly to the English practice direction [the foreign currency or its equivalent in $ at the payment date] would not conflict with section 11 as it would contain a statement as to money value in Canadian currency.
>
> 2. Judicial authority for the accepted view of section 11 is not strong and if there is a conflict, the provincial enactment would prevail because:
>
> (a) the language of section 11 is ambiguous and does not necessarily apply to judgments,
>
> (b) Parliament did not intend that section 11 should extend to "foreign" causes of action litigated in Canadian courts; it was meant to suppress references to pre-Confederation currencies in domestic litigation,

(c) section 11 is ultra vires the Parliament of Canada as it purports to regulate procedure in civil matters, which is within the exclusive legislative jurisdiction of the provinces.

Obviously in uncharted constitutional waters such as these, no guarantee can be offered that such arguments would ultimately succeed, but a strong case can be made that unilateral provincial action to give force to a date of payment conversion rule would be upheld in the courts.

The Law Reform Commission's recommendations were prefaced by the following observations:[20]

> We believe the mood of law reform in this area is clear: a move away from the rigid application of the breach-date rule for currency conversion is widely regarded as a desirable development. In England, *Miliangos* has been warmly received and the payment date rule which it embodies appears to be working well in practice. In Canada, there appears to be a similar enthusiasm for change ...
>
> In summary, our view ... is that the law should no longer adhere rigidly to the breach-date rule for currency conversion. Our final conclusion, therefore, is that legislation should be enacted which will permit the British Columbia courts to adopt a date for currency conversion other than the date of breach with respect to foreign money liabilities.

The Commission went on to endorse the payment date rule and to recommend the adoption of legislation which, in essence, constitutes a restatement of the position achieved in England through judge-made law. More specifically, it recommended:[21]

1. Legislation be enacted which reflects the following principles:

   (a) In circumstances where a currency other than the currency of Canada will most truly express a person's loss or claim and will most fully and exactly compensate him then a court shall order that judgment be entered in a form which states the defendant's liability in the other currency or the equivalent, at the time of payment, in Canadian currency.

   (b) Paragraph (a) should apply mutatis mutandis to arbitration proceedings.

2. (a) Ancillary rules of practice concerning the assertion and enforcement of foreign money claims should be promulgated under the Court Rules Act.

(b) The form of judgment provided by the rules should be comparable to the following: THIS COURT ORDERS that the defendant(s) pay to the plaintiff(s)

(i) (state the sum in foreign currency in which judgment has been ordered to be entered), and

(ii) (interest as claimed or, interest pursuant to the Court Order Interest Act)

or the equivalent, at the time of payment, in Canadian currency, and costs to be taxed.

These recommendations have not yet been implemented.

B. *Ontario Legislation*

In 1984, as part of the larger *Courts of Justice Act*,[22] Ontario legislated with respect to foreign money claims. Section 131 of that Act provides:

Foreign money obligations

131. (1) Subject to subsections (3) and (4), where a person obtains an order to enforce an obligation in a foreign currency, the order shall require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a chartered bank in Ontario at the close of business on the first day on which the bank quotes a Canadian dollar rate for purchase of the foreign currency before the day payment of the obligation is received by the creditor.

Multiple payments

(2) Where more than one payment is made under an order referred to in subsection (1), the rate of conversion shall be the rate determined as provided in subsection (1) for each payment.

Discretion of court

(3) Subject to subsection (4), where, in a proceeding to enforce an obligation in a foreign currency, the court is satisfied that conversion of the amount of the obligation to Canadian currency as provided in subsection (1) would be inequitable to any party, the order may require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a chartered bank in Ontario on such other day as the court considers equitable in the circumstances.

Other obligations that include conversion

(4) Where an obligation enforceable in Ontario provides for a manner of conversion to Canadian currency of an amount in a foreign currency, the court shall give effect to the manner of conversion in the obligation.

Enforcement by seizure or garnishment

(5) Where a writ of seizure and sale or notice of garnishment is issued under an order to enforce an obligation in a foreign currency, the day the sheriff, bailiff or clerk of the court receives money under the writ or notice shall be deemed, for the purposes of this section and any obligation referred to in subsection (4), to be the day payment is received by the creditor.

Some features of section 131 call for special comment

The most significant feature of this provision is that it expressly adopts the rate of exchange prevailing at the time of payment as the appropriate one to apply in converting to Canadian currency. Subsection (1) provides explicit guidance on the exact moment in time which is deemed to be the time of payment, what sources may be taken as authoritative as to the magnitude of the rate itself, and which of the two rates which are potentially applicable (buying or selling of the foreign currency) should be adopted. The section provides further guidance in subsection (5) as to what constitutes the time of payment when execution measures have been taken. Subsection (2) indicates how the payment date rule applies when multiple payment are involved.

Subsections (3) and (4) permit exceptions to the time of payment conversion rule. Subsection (3) gives the court a discretion to select some other date for conversion where the date of payment "would be inequitable to any party." Subsection (4) expressly preserves the freedom of parties to contract in respect of currency conversion. Thus, the parties might stipulate for conversion at a particular rate or at the rate prevailing at a time other than the time of payment.[23] Such a contract will override the judicial discretion provided in subsection (3).

A major question left unanswered by section 131 is its scope. It applies to "an obligation" in a foreign currency, but "obligation" is left undefined. To what claims, or range of claims does it apply? While in some contexts, "obligation" may include a wide range of inchoate claims which may ultimately be satisfied by a payment of money, a narrower reading would equate the term with debt.[24] The question is an

important one because its answer will determine whether the time of payment rule applies to unliquidated claims for damages arising either in tort or for a breach of contract.

C. *National Conference of Commissioners on Uniform State Laws*

In the United States, the National Conference of Commissioners on Uniform State Laws (NCCUSL) added the topic of foreign money claims to their program in 1987. A Report and draft act were brought before the Conference at its 1988 meeting.[25] The NCCUSL draft follows the lead of the English and Canadian developments[26] in adopting a payment-date conversion rule. The core provision of the draft act is section 6:

> 6. (a) Except as provided in subsection (c) [costs], in a successful foreign-money claim, judgment must be awarded in the money of the claim.
>
> (b) The judgment is payable in money of the claim and, at the option of the judgment debtor, in the amount of United States dollars which on the conversion date will purchase the awarded money of the claim.
>
> (d) Each payment in United States dollars must be accepted and credited on the judgment in the amount of the foreign money that could be purchased by the dollars at a bank-offered spot rate of exchange at or near the close of business on the conversion date.
>
> (e) The conversion date for money received under a garnishment or at an execution sale is the day before the money is received by [the sheriff].

Where the NCCUSL draft differs from the Ontario legislation and the BCLRC recommendations is in the level of detail with which it deals with a variety of peripheral issues. Some flavour of this can be obtained from the table of contents to the draft act:

Section 1. Definitions
- (1) Action
- (2) Conversion Date
- (3) Distribution Proceeding
- (4) Foreign Money
- (5) Foreign-Money Claim
- (6) Money
- (7) Money of the Claim
- (8) Party
- (9) Rate of Exchange
- (10) Spot Rate

Section 2. Scope, Arbitration, Exceptions, and Exclusions
Section 3. Variation by Agreement and Trade Usage
Section 4. Determining Money of the Claim
Section 5. Asserting and Defending a Foreign Money Claim
Section 6. Judgments on Foreign-Money Claims; Times of Money Conversion After Judgment; Form of Judgment
Section 7. Conversions of Foreign Money in Distribution Proceeding
Section 8. Incidental and Consequential Damages
Section 9. Prejudgment and Judgment Interest
Section 10. Enforcement of Foreign Judgments
Section 11. Temporary Conversions Before Payment for Collection Purposes
Section 12. Effect of Currency Revalorizations
Section 13. Effect of Certain Indexing Agreements
Section 14. Supplementary General Principles of Law
Section 15. Uniformity of Application and Construction
Section 16. Short Title
Section 17. Severability Clause
Section 18. Effective Date
Section 19. Repeals

The contents of the draft act are subject to change as the work of the NCCUSL continues.

CHAPTER IV
UNIFORM LEGISLATION

A. *Introduction*

This Chapter outlines a series of decisions which are, or may be relevant to the development of a *Uniform Foreign Money Claims Act*. In most cases an attempt is made to set out the competing positions which might be taken and the arguments for and against those positions.

B. *Is This an Appropriate Topic for Legislation?*

The potential involvement of a uniform law body in a particular area raises two preliminary questions. First, is the topic one in which legislative intervention of any kind (uniform or not) is desirable? Second, if legislation is desirable, need it be uniform?

So far is the first question is concerned, legislative intervention may be opposed on two bases. One is that the present state of the law is satisfactory and no change is called for. It is possible to defend the breach-date conversion rule, but to do so is very clearly to stand in opposition to the events of the last two decades.

If it is concluded that change is desirable, it may still be argued that this is best achieved through the development of case law in the courts. In support one might point to the example of England where reform has been achieved almost entirely through case-law developments and legislation has been minimal.

The prospects for following the English path to reform, however, are not optimistic. The Canadian courts have had 13 years since *Miliangos* was decided to bring Canadian law to the same stage that English judges have reached, and the results have been a patchwork of timid advances. In part this reflects the existence of section 11 of the *Currency and Exchange Act* which has no English counterpart. In 1983 the Supreme Court of Canada had an opportunity to deal definitively with this issue and it expressly declined to do so.[27] It is suggested that the prospects for judicial reform in Canada (at least at an early date) are not good.

C. *Is Uniform Legislation Desirable?*

This question was before the NCCUSL at its 1988 meeting. The reasons why it is desirable to develop uniform legislation dealing with foreign money claims were described, in materials presented to the NCCUSL, in the following terms:

> These claims have increased greatly as a result of the growth in foreign trade and the parallel expansion of foreign exchange and international banking transactions.
>
> Values of foreign monies as compared to the United States dollar fluctuate much more over shorter periods of time than was formerly the case.
>
> United States jurisdictions treat recoveries on foreign money claims differently than our trading partners.
>
> A lack of uniformity among the states stimulates forum shopping and creates a lack of certainty in the law.
>
> A failure to focus on how best to place an aggrieved party in the position it would have been in had the other party performed as it should.
>
> A general erroneous perception that ones own currency is fixed (in domestic law, of course, it is) and it is the other currency that rises or falls, creating windfalls or under-compensations.

The Conference should consider the applicability of those reasons in a Canadian context.

If the Conference concludes that this topic is one which calls for uniform legislation, additional questions arise.

D. *Which Currency Conversion Rule Should be Adopted in a UFMCA: Judgment-date or Payment-date?*

If a UFMCA is to retreat from the breach-date rule for currency conversion, what alternative rule should be adopted in its place? There are two obvious candidates. These are the date of judgment and the date of payment.[28]

The payment-date rule has been the most widely adopted. It represents the English position, the rule in Ontario, the BCLRC recommendations, and the likely direction the NCCUSL act will take. To adopt a payment-date rule as the basic principle of a uniform act will enhance the prospects for harmony among Canadian jurisdictions and ensure that Canada is in harmony with its trading partners.

The main disadvantage of the payment-date rule is also the strength of the judgment-date rule. The question whether, as a matter of constitutional law, a province is competent to legislate for a payment-date rule, given the potential conflict with the *Currency and Exchange Act*, remains untested. The validity of legislation which provided for a judgment-date rule would not be open to constitutional challenge.[29]

This issue was considered in the BCLRC report:[30]

> In the Working Paper [which preceded the Report] we identified the date of payment rule as the one which, in principle, should be applied by the courts. We expressed some hesitation, on constitutional grounds, as to the Provincial competence to legislate in the light of section 11 of the *Currency and Exchange Act* (Can.). The alternative, constitutionally unimpeachable, course would be to provide for a date of judgment conversion rule.
>
> Our final conclusion is that, while the adoption of a date of payment rule is not totally free of doubt on constitutional grounds, this doubt does not justify a retreat to a second best legal position. There are strong arguments in favour of provincial competence and we believe they form a sufficient and credible basis for legislation by the Province.
>
> We have therefore concluded that reforming legislation should permit a British Columbia court, in appropriate cases, to make an order in terms which refer to a foreign currency or its equivalent, at the time of payment, in Canadian currency.

A similar conclusion is urged on the Conference. The remaining discussion is relevant whichever conclusion the Conference reaches, although for convenience it has been framed as though the UFMCA will embody a payment-date rule.

E. *Some Subsidiary Issues*

1. *Scope of the New Rule*

It was pointed out above that the reference to "obligation" in the Ontario legislation is somewhat ambiguous and raises the question whether the payment-date conversion rule was intended to apply to claims other than debt. The position taken elsewhere is clear. Both the BCLRC and the NCCUSL favour a rule that extends to all claims including those based on tort and breach of contract. This is also the position in England.

The uncertainty respecting the Ontario provision does raise the question whether the Conference would prefer a rule which is narrower in scope than that which prevails in England and has been recommended elsewhere. Whatever position is adopted, its expression should be free of ambiguity.

2. *How Much Detail?*

The preparation of legislation of currency conversion can be approached at different levels of generality. These are illustrated by a comparison of the Ontario legislation and the BCLRC recommendations. The Ontario legislation focuses on the mechanics of currency conversion and stresses certainty in ascertaining relevant exchange rates at particular times. The guidance which the Ontario legislation provides is undoubtedly helpful to those who must use it.

The BCLRC recommendations contemplate a relatively short provision in a statute of general application. Such a provision would state the general principle but leave it to the courts and/or subordinate legislation to guide its application in particular cases.[31] It would provide the courts with a *Miliangos*-type restatement of the law to use as a fresh point of departure in this area. The detail provided in s. 131(1) of the Ontario legislation would, under the BCLRC approach, be picked up (if at all) in regulations or rules of court.

The NCCUSL draft act goes further than the Ontario legislation and addresses a range of issues in detail.

The Conference may wish to consider the way in which the mechanics of currency conversion should be dealt with.

3. *Interest*

a. *The Significance of Interest*

An argument sometimes raised in defence of the breach date rule is that it achieves a just result where the "plaintiff's currency" declines in value, relative to that of the forum, after the date of breach:

Example

> D, a resident of Ruritania, owes P 100 Utopian rallods, payable on January 1, 1988. On this date the rallod and the Ruritanian taler are at par. D fails to pay and is sued by P in the Ruritania court. P obtains judgment for 100 Utopian rallods and initiates execution proceedings that ultimately yield 50 Ruritanian talers that are available to P. On that date, however, the currency exchange rate has shifted so that one taler may be exchanged for two rallods; hence the amount realized on the execution is sufficient to purchase enough rallods to satisfy the judgment.

On its face it would appear that P has been severely prejudiced by D's delay. If he were paid 100 rallods on July 1, 1989 he would receive only half the purchasing power he would have received had D fulfilled his part of the bargain promptly. Given a fact pattern such as this, it is tempting to assert that using the date of breach rule achieves a fairer result.

There are two answers to this assertion. First, the fact that P's currency has declined relative to the currency of the forum does not per se lead to a conclusion that P is prejudiced by being compensated in his own currency. Much depends on what changes, if any, have occurred with respect to the real purchasing power of P's currency. Whether P has been prejudiced in this example is not a question that can be answered in the abstract. Second, the assertion overlooks the role of interest in seeing that P is properly compensated.

An analysis of the role of interest begins with two propositions. The first is that a claim asserted in a foreign currency is entitled to interest on that claim running from the date of breach. The second is that the court has some discretion or flexibility with respect to the interest rates it orders. The *Uniform Judgment Interest Act* has both these characteristics.[32]

How should a court approach an award of prejudgment interest with respect to a foreign money claim? Currency exchange rates and interest rates are related. They do not fluctuate independently of each other. In a submission made to the BCLRC it was noted:[33]

> It is observed that an inverse relationship may normally be expected to prevail between exchange rate changes and interest rate differentials. Countries with currencies that are expected to be weak over future months or years have to offer higher interest rates than other countries if they are to attract international funds. Thus it is that countries whose currencies prove in the event to be losing value will generally be characterized by high interest rates and vice versa.

> The important implication of the existence of an inverse relation between exchange rate changes and the level of interest rates prevailing in the relevant countries is that the higher interest rates may be expected to offset to some extent adverse movements in exchange rates. Indeed this must be so, for international speculators and investors will place their funds in the most lucrative location, and competition to attract such funds will force central banks to offer interest rates that reflect any pessimism that international investors feel about the likely course of future exchange rates. Investors may of course make incorrect guesses about future exchange rates, but such errors simply mean that interest rate differentials may not fully reflect the changes that actually occur in exchange rates.

Another approach is to view interest as containing two elements. The first is true compensation to the plaintiff for the loss of use of his money and the corresponding benefit to the defendant. It is analogous to rent. If the economy were free of inflation the "rent" element of interest would likely amount to only a 3% to 5% rate of return. The balance of the nominal interest, whether in the marketplace or awarded under court order interest legislation, may be identified as preserving the purchasing power of the money loaned or withheld. Whether, owing to the absence of compounding, this is wholly effective is debatable.

Bearing in mind the relationship between interest rates and exchange rates, it is useful to consider the way in which the courts might react if they had the power to order payment in a foreign currency or to convert to Canadian funds as of the date of judgment. There is no reason why a court should not explicitly recognize this relationship as relevant to the appropriate rate of prejudgment interest. When exercising its discretion in respect of a foreign currency claim, the court would be free to consider the performance of that currency and interest rates payable in the jurisdiction in which that currency is used as legal tender and to award prejudgment interest accordingly.

> Example
>
> P sues D in Canada for 1000 Utopian rallods that were payable January 1, 1987. He obtains judgment on January 1, 1989. The evidence establishes that during 1987 and 1988 Utopia suffered a period of inflation during which the purchasing power of the rallod dramatically declined. During that period the average rate of interest paid by Utopian banks on money on deposit was 45%.

How should a Canadian court, applying a payment-date conversion rule, react to such a fact pattern? The interest rate that is appropriate in the circumstances is not that which would be paid if the facts arose

wholly in Canada and the obligation were payable in Canadian funds. Rather, the circumstances suggest that a higher rate is called for and prejudgment interest in the 40% to 50% range would be justified. In the result the court could enter a judgment for 1800 to 2000 rallods (or the Canadian equivalent at the date of payment).

The example above illustrates how a case involving a declining plaintiff's currency might be dealt with. On other facts, a minimal rate of prejudgment interest may be appropriate.

Example

P sues D in British Columbia for 1000 Ruritanian talers that were payable on January 1, 1987. He obtains judgment on January 1, 1989. The evidence establishes that the purchasing power of the taler was stable during 1987 and 1988 and that money on deposit with Ruritanian banks yielded an average rate of 4%.

In this kind of case it would be appropriate to suppress the inflation compensation aspect of prejudgment and compensate only on a "rent" basis. A minimal award of interest would be justified. To award more would, arguably, overcompensate the plaintiff.

Support for this view is found in the Miliangos litigation. Following the decision of the House of Lords on the currency conversion issue, the case was remitted to the trial Judge, Bristow J., for final disposition. An issue arose as to the basis on which prejudgment interest should be awarded under applicable English legislation. The plaintiff urged that interest be awarded at the prevailing English rates. This would have resulted in a significantly higher award as the English interest rates had been more than twice those payable in Switzerland during the relevant period.

Bristow J. adopted Swiss rates as appropriate, with the exact rate to be determined on a reference. He stated:[34]

> In my judgment the approach in English law should be: if you opt for a judgment in foreign currency, for better or for worse you commit yourself to whatever rate of interest obtains in the context of that currency.

In England, the process of working out the relationship of prejudgment interest to foreign money liabilities has not been without its pitfalls. In at least one case the courts appear to have approached the selection of an interest rate on an erroneous basis.[35] Nonetheless, judgment interest provides a fair and flexible means of achieving restitutio in integrum within a framework of familiar principles.

The price to be paid for using judgment interest as a vehicle for adjusting rights in foreign currency cases is an additional evidentiary burden. The party seeking a departure from the rate of judgment interest usually awarded in domestic cases would be obliged to lead evidence on the "performance" of the foreign currency during the relevant period.

b. *Implications for the Uniform Foreign Money Claims Act*

This discussion raises the question whether interest on foreign money claims should be directly addressed in uniform legislation and, if so, where. It was noted above that the discretion the court has under the *Uniform Judgment Interest Act*, in its current form, will allow the court to reach the correct result when the need arises. It would be possible to do no more than point that out vigorously in a note or comment to accompany the UFMCA, with a further note suggesting that any jurisdiction wishing to adopt it should also review its judgment interest legislation to ensure that the court has sufficient flexibility to deal properly with foreign money claims.

It would be equally possible to remove this issue from the discretion of the court and mandate the correct result. This approach was the one adopted by the BCLRC in its Report. It made the following recommendation:

> 3. The *Court Order Interest Act* should be amended by adding a provision to the effect that the court, in the exercise of its discretion as to the rate of interest, should, when awarding interest on a judgment stated in a foreign currency, have regard to the foreign interest rates which prevail with respect to that currency.

The NCCUSL draft act adopts a different approach. It treats judgment interest as a choice of law issue:[36]

> 9. (a) With respect to a foreign-money claim, recovery of pre-judgment interest and judgment interest and the rate of interest to be applied in the case are matters of the substantive law governing the right to recovery under the conflict of laws rules of this state.

What are the views of the Conference on the issues raised above:

1. Should judgment interest on a foreign money claim
    a. be mandated by uniform legislation to be at a rate which is identified with the foreign currency, or
    b. be left to whatever discretion the court may have under the applicable judgment interest legislation?

2. If the answer to 1. is a., should legislation provide any guidance to specific rates such as was provided by former s. 8(c) of the NCCUSL draft, or, perhaps, a rate linked to that paid by Canadian banks on deposit accounts maintained in the foreign currency?

3. If the answers to 1 or 2 call for legislation should it take the form of amendments to the *Uniform Judgment Interest Act* or a provision of the UFMCA.

4. *Judicial Discretion*

A recurring question in relation to this topic is whether the court should retain some residual discretion to depart from the currency conversion rule adopted in legislation. The Ontario legislation provides for such a discretion:

> *Discretion of court*
>
> (3) Subject to subsection (4), where, in a proceeding to enforce an obligation in a foreign currency, the court is satisfied that conversion of the amount of the obligation to Canadian currency as provided in subsection (1) would be inequitable to any party, the order may require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a chartered bank in Ontario on such other day as the court considers equitable in the circumstances.[37]

The question of a residual discretion was also considered by the BCLRC. In the Working Paper which was circulated for consultation purposes such a discretion was proposed. The final Report offered these observations:[38]

> In the Working Paper we discussed the possibility of giving the court a limited discretion with respect to the choice of conversion date to deal with any unusual cases which might arise. We described this as a possible "safety valve" for exceptional cases in which the ordinary rules might lead to an injustice. Accordingly, in the Working Paper, for the purposes of discussion, we made the following proposal:
>
> 1.(b) Notwithstanding (a) a court should have a discretion to order conversion to Canadian currency at the exchange rate prevailing on any other date between the date of breach and the date of payment, such discretion to be exercised only in exceptional circumstances to do justice between the parties.

In the Working Paper we stated that we had not been able to identify any exceptional cases in which the discretion conferred might be exercised, but comment was invited both on its utility and the kind of cases in which it might be used to achieve a fair result that would otherwise be unattainable. We indicated that if no such cases emerged, the proposal might not form part of our final recommendations.

The comment which we received on the proposal was mainly negative. No one identified a situation where it might be usefully invoked. Those who commented on it were in general agreement that such a discretion should not be included as part of our final recommendations.

This issue is one which has given us considerable difficulty. On one hand, because the proposal calls for "exceptional circumstances" before the discretion may be exercised, it is relatively narrow and, arguably, would do no harm. On the other hand, such a discretion does detract from the certainty which would flow from a firmer rule and, given the fact that a satisfactory example of its use has still not emerged, it is difficult to justify its adoption.

We have fully reconsidered this issue and a degree of uncertainty remains. It is the final conclusion of the Commission as a whole that a provision such as that described above should not be included in reforming legislation, although among the individual members of the Commission there are varying degrees of unease concerning the possible effects of its exclusion.

Does the Conference favour a judicial discretion in this context?

5. *Amendments to Other Uniform Acts*

It was noted above that two uniform acts have provisions which deal with currency conversion. These are section 4 of the *Uniform Reciprocal Enforcement of Judgments Act* and section 13 of the *Uniform Reciprocal Enforcement of Maintenance Orders Act*. Both provisions require that where a foreign judgment or order is not in Canadian currency, conversion shall take place at the rate prevailing at the time the judgment or order was made (or last varied) in the foreign jurisdiction. This is merely a restatement of the former common law breach-date rule as it applied to foreign judgments.[39]

If a different conversion rule is to be adopted in new uniform legislation, the Conference may wish to consider whether amendments to either or both of these uniform acts is called for.

F. *Summary of Issues for Discussion*

1. Is currency conversion a matter on which legislative intervention is desirable?
2. If legislation is desirable, is this a matter on which uniform legislation is desirable?
3. Should a UFMCA adopt a judgment-date or a payment-date rule for currency conversion?
4. Should a UFMCA apply to all claims which may result in a money judgment or should it be restricted to debt claims?
5. Should the mechanics of currency conversion be dealt with in the kind of detail found in the Ontario legislation. Are such details more appropriately dealt with in subordinate legislation?
6. Should judgment interest on a foreign money claim
   (a) be mandated by uniform legislation to be at a rate which is identified with the foreign currency, or
   (b) be left to whatever discretion the court may have under the applicable judgment interest legislation?
7. If the answer is (a), should legislation provide any guidance to specific rates?
8. If the answers to 6 or 7 call for legislation, should it take the form of amendments to the *Uniform Judgment Interest Act* or the UFMCA?
9. Should the UFMCA provide for a residual judicial discretion?
10. Should other uniform acts which provide for currency conversion be modified?

ANNEX A

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

UNIFORM FOREIGN-MONEY CLAIMS ACT DISCUSSION DRAFT: FEBRUARY 10,1989

This Annex contains only the text of the draft Act. It has not been passed upon by the NCCUSL and its provisions do not necessarily reflect the views of the Committee, Reporters or Commissioners.

UNIFORM FOREIGN-MONEY CLAIMS ACT

[*DEFINITIONS*]

1. In this [Act]:

(1) "Action" means a judicial proceeding in which payment in money may be awarded or enforced.

(2) "Conversion date" means the banking day next before the date on which money or an award is, in accordance with this [Act],

(i) paid to a judgment creditor;

(ii) paid to the designated official enforcing a judgment on behalf of the judgment creditor;

(iii) used to effect a set-off of claims in different moneys in an action;

(iv) converted to United States dollars on the date of the initiation of a distribution proceeding;

(v) stated to be converted temporarily for collection proceedings under a judgment.

(3) "Distribution proceeding" means a judicial or non-judicial proceeding for an accounting, a foreclosure, or for the distribution, liquidation, or rehabilitation of a corporation, an estate, trust, or other fund in or against which the share of a foreign-money claim is to be determined.

(4) "Foreign money" means money other than money of the United States of America.

(5) "Foreign-money claim" means an obligation to pay or a claim for recovery of a loss expressed in or measured by a foreign money.

(6) "Money" means a medium of exchange authorized or adopted as a part of its currency by a domestic or foreign government, or adopted by inter-governmental agreement, for the payment of debts or other obligations or as a store of value. The term includes European Currency Units, Special Drawing Rights, and other composite stores of value now existing or hereafter created.

(7) "Money of the claim" means the money in which an obligation is contractually payable or, if the money is not contractually

specified, the money in which a loss for which recovery is sought is ultimately felt by a party or by which a loss is to be measured at the time of recovery.

(8) "Party" means an individual, a corporation, government or governmental subdivision or agency, business trust, partnership or association of two or more persons having a joint or common interest or any other legal or commercial entity asserting or defending against a foreign-money claim.

(9) "Rate of exchange" means the rate at which the money of one country may be converted into another money in a financial market convenient to or usable by the party to pay or to state a conversion. Whenever multiple exchange rates exist, the term means the rate applicable to the particular transaction or event giving rise to the foreign-money claim in question.

(10) "Spot rate" means the rate of exchange at which foreign money is sold by a bank or foreign-currency trader, for settlement by immediate payment, by charge to an account, or by an agreed delayed settlement not exceeding two days. "Bank-offered spot rate" means the rate at which a bank will issue its draft in the foreign currency drawn on a foreign correspondent or by wire transfer will create credit available in the foreign currency in a foreign bank.

[*SCOPE, ARBITRATION, EXCEPTIONS, AND EXCLUSIONS*]

2. (a) Except as provided in Section 12 and subsection (b) of this section, this [Act] applies only to a foreign-money claim in an action or distribution proceeding.

(b) This [Act] may be used in arbitration or other alternative dispute resolution proceedings as if the dispute being settled were an action or a distribution proceeding. Failure to follow all or any part of this [Act] does not preclude enforcement of the award.

(c) This [Act] applies to the moneys of payment and account notwithstanding the law applicable under the conflict of laws rules of this State to other aspects of the action or distribution proceeding in which the foreign-money claim is pending. This [Act] does not determine the law applicable to other issues in a case.

[*VARIATION BY AGREEMENT*]

3. (a) The effect of provisions of this [Act] may be varied by agreement of the parties made at any time before or after commencement of an action, distribution proceeding, or the entry of judgment.

(b) The parties may agree upon the money to be used in a transaction giving rise to a foreign-money claim and may use different moneys for different aspects of the transaction stating the price in a foreign money or for a particular transaction does not require that money for all or any other losses.

[DETERMINING THE MONEY OF THE CLAIM]

4. (a) The proper money of the claim is the money selected by the parties as the money of payment.

(b) Whenever a different money of account controls the amount of the money payment, it is presumed that the quantity of the money of payment is to be determined by the bank-offered spot rate between the two moneys at or near the close of the banking day next before the day payment is in fact made, but it is presumed that any agreed rate of exchange applies only to payments made at or a reasonable time after the due date not to exceed 14 days.

(c) Except as provided by subsections (a) and (b), the proper money of the claim is, as the case may be, the money:

(1) in which the loss was ultimately felt or will be incurred by a party; or

(2) regularly used by the parties as a matter of usage or course of dealing; or

(3) used at the time of a transaction in international trade by trade usage or common practice for valuing or settling transactions in the particular commodity or service involved.

[ASSERTING AND DEFENDING A FOREIGN-MONEY CLAIM]

5. (a) A claimant not specifying that its claim is for a judgment, or for any portion thereof, in a specified foreign money, makes a claim for a judgment in United States dollars.

(b) A party defending against a claim may allege and prove that the claim is a claim for a different money than that claimed by the opponent for all or any part of the claim.

(c) A party defendant may assert a set-off, recoupment, or counterclaim in any money without regard to the money of the opponent's claim.

(d) The determination of the proper money of the claim is a question of law for the court if the relevant facts are determined or not disputed.

[JUDGMENTS ON FOREIGN-MONEY CLAIMS; TIMES OF MONEY CONVERSION AFTER JUDGMENT; FORM OF JUDGMENT]

6. (a) Except as provided in subsection (c), in a successful foreign-money claim, judgment must be awarded in the money of the claim.

(b) The judgment is payable in money of the claim and, at the option of the judgment debtor, in the amount of United States dollars which on the conversion date will purchase the awarded money of the claim.

(c) Assessed costs must be entered in U.S. dollars.

(d) Each payment in United States dollars must be accepted and credited on the judgment in the amount of the foreign money that could be purchased by the dollars at a bank-offered spot rate of exchange at or near the close of business on the conversion date.

(e) The conversion date for money received under a garnishment or at an execution sale is the day before the money is received by [the Sheriff].

(f) If a prevailing party is entitled to recover attorney's fees, any part of the fees previously paid or to be paid by that party in a foreign money, or with United States dollars purchased by a foreign money, must be awarded in that foreign money and any balance of attorney's fees awarded for attorney's fees to be paid in United States dollars must be awarded in United States dollars.

(g) If an award is made on both

(i) a defense, set-off, or counterclaim and

(ii) the adverse party's claim,

the court shall net the amounts by converting the moneys of the smaller award into the money of the larger and by subtracting the smaller from the larger, as if a payment had occurred on the date of the most recent award, and shall provide in the judgment the rates of exchange used.

(h) A judgment substantially in the following form complies with subsection (a).

IT IS ADJUDGED AND ORDERED, that Defendant _______ [insert name] pay to Plaintiff _______ [insert name] the sum of _____ [insert amount in the foreign money] plus interest on that sum at the rate of _____ [insert rate - see Section 9] percent a year compounded annually or, at the option of the judgment debtor, such number of United States dollars as will purchase the

_______ [insert name of foreign money] with interest due at a bank-offered spot rate at or near the close of business on the banking day next before the day of payment, together with assessed costs of _______ [insert amount] United States dollars.

[*CONVERSIONS OF FOREIGN MONEY IN A DISTRIBUTION PROCEEDING*]

7. (a) A foreign-money claim in a distribution proceeding must show its amount in the named foreign money and the amount of United States dollars resulting from a conversion as of the date the proceeding was initiated.

(b) A foreign-money claim having a priority over claims of a lower class and which, due to currency depreciation in the United States dollar will not receive the same percentage of its claim as a claimant in United States dollars, may be given a supplementary equalizing distribution out of remaining moneys in the fund before a distribution is made to claimants of the lower priority.

[*INCIDENTAL AND CONSEQUENTIAL DAMAGES*]

8. (a) If the money of the claim is not the money in which the aggrieved party keeps its funds, recoverable incidental damages include

(i) costs reasonably incurred by the aggrieved party after default of the other party for any forward currency contract or option, or

(ii) interest paid on loans not exceeding the equivalent of the amount due from the date of default to the date of payment.

Prejudgment interest under Section 10 may not be awarded to the extent loan interest is recovered as incidental damages.

(b) In the absence of a contrary agreement, if the party asserting a foreign-money claim shows that

(i) it has suffered a loss with regard to another money from depreciation in the money of the claim by delay in payment, and

(ii) that the other party in the circumstances of the case should have known of the need for the other money, or

(iii) that receipts were to the knowledge of the other party regularly converted into the other money on receipt,

the party asserting the claim may recover, as consequential damages, an amount equivalent to the difference between the amount of the other money obtainable at the rate of exchange prevailing on the date payment was due and the amount obtainable at the rate of exchange prevailing on the judgment date in an action or arbitration or on the date of the initiation of a distribution proceeding.

(c) This section does not preclude an aggrieved party from recovering other damages available under the substantive law of the case pursuant to the conflict of laws rules of this State.

[*PRE-JUDGMENT AND JUDGMENT INTEREST*]

9. (a) With respect to a foreign-money claim, recovery of pre-judgment interest and judgment interest and the rate of interest to be applied in the case are matters of the substantive law governing the right to recovery under the conflict of laws rules of this State.

(b) Notwithstanding subsection (a), an increase or decrease in calculated pre-judgment interest may be made in a foreign-money claim to the extent required by the rules of this State applicable in an action or distribution proceeding for United States dollars, if there is a failure to make or accept an offer of settlement or an offer of judgment or conduct by a party or its attorney causing undue delay or expense.

[*ENFORCEMENT OF FOREIGN JUDGMENTS*]

10. (a) If an action is brought to enforce a judgment of another jurisdiction expressed in a foreign money and the judgment is recognized in this State as enforceable, the enforcing judgment must be entered as provided in Section 6(b), whether or not the foreign judgment confers an option to pay in an equivalent amount of United States dollars. A satisfaction or partial payment made in the foreign money upon the foreign judgment, on proof thereof, must be credited against the amount of foreign money specified in the judgment, notwithstanding the entry of judgment in this State.

(b) A judgment entered only in United States dollars in another state of the United States must be enforced in this State by a judgment in United States dollars even though the foreign judgment was entered on a foreign-money claim.

[TEMPORARY CONVERSIONS BEFORE PAYMENT FOR COLLECTION PURPOSES]

11. (a) for the purpose of determining

    (i) the value of the assets to be seized or restrained by a writ of execution, garnishment or other legal process, or

    (ii) the amount involved for the purpose of obtaining a court-required bond after entry of or in seeking a judgment in foreign money,

affected [court officials] incur no liability for acting as if the writ, garnishment or bond were issued under a judgment stated in United States dollars in the amount necessary to purchase the amount of foreign money stated in the judgment with interest thereon, at a bank-offered spot rate of the day preceding the issuance of the writ, garnishment, other legal process, or the making of the application for the bond, as that amount is stated in an affidavit or certificate either of counsel to the judgment creditor stating the source of the information or of a bank officer stating knowledge of foreign exchange [trading] rates involved.

(b) United States dollars received at a judgment sale or other orders for collection of amounts due under a judgment entered pursuant to Section 6 must be converted to the foreign currency at the conversion date specified in Section 1(2)(ii) for the purpose crediting the judgment.

(c) A docketed judgment in foreign money shall constitute a lien in the foreign money convertible into United States dollars on the date the lien is discharged by payment.

(d) Conversions under this section are for the limited purposes of the section and, except as provided in subsection (b), do not affect the money of the judgment for payment purposes.

[EFFECT OF CURRENCY REVALORIZATIONS]

12. (a) If, after an obligation is expressed or a loss is incurred in a foreign money, the country issuing or adopting that money substitutes a new money for that money, the obligation or the loss is treated as if expressed or incurred at the rate of conversion the issuing country establishes for the payment of like obligations or losses denominated in the former money.

(b) If substitution under subsection (a) occurs after judgment is entered on a foreign-money claim, the court, on motion, shall amend the judgment by a like conversion of the former money.

[*EFFECT OF CERTAIN INDEXING AGREEMENTS*]

13. (a) A monetary claim is neither usurious nor unconscionable because an agreement relating to it computes the amount of the debtor's obligation to be paid in a specified amount of the foreign money of the country of the recipient of the payment.

(b) The agreement is not merged in any judgment that does not yield the agreed amount of the foreign money.

[*SUPPLEMENTARY GENERAL PRINCIPLES OF LAW*]

14. Unless displaced by particular provisions of this [Act], the principles of law and equity, including the law merchant, and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating causes supplement its provisions.

[*UNIFORMITY OF APPLICATION AND CONSTRUCTION*]

15. This [Act] shall be applied and construed to effectuate its special purpose to eliminate over compensation or under compensation to foreign money claimants and its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

[*SHORT TITLE*]

16. This [Act] may be cited as the "Uniform Foreign-Money Claims Act."

[*SEVERABILITY CLAUSE*]

17. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

[*EFFECTIVE DATE*

18. This [Act] becomes effective on January 1st following its enactment. It applies to actions and distribution proceedings commenced after that date.]

[*REPEALS*

19. The following acts and parts of acts are repealed:

(1) [any statute requiring judgments to be entered in United States Dollars.]

(2)

(3)]

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1) *Miliangos* v. *George Frank (Textiles) Ltd.*, [1976] A C. 443, 466.

2) LRC 65. Hereafter referred to as the BCLRC Report

3) *Courts of Justice Act*, S O. 1984, c. 11, s. 131.

4) [1961] A C. 1007 A full description of the development of the breach date rule may be found in the BCLRC Report at 9.

5) A useful review of the Canadian jurisprudence was published in the early 1930's: J. S. Dension, "Fluctuations in Exchange in the Courts", [1932] 10 Can. B. Rev. 134

6) *Custodian* v. *Blucher*, *[1927] S C.R. 420, 427* (unpaid dividends); *Gatineau Power Co.* v *Crown Life Insurance Co.* [1945] S.C.R. 655, 658 (debt claim)

7) R S.C. 1970, c. C-39 The BCLRC Report suggested that this provision might be ultra vires the Parliament of Canada as it purports to regulate civil procedure -- a matter reserved to the provinces.

8) *Baumgartner* v. *Carsley Silk Co* , (1971) 23 D L R. (3d) 255 (Que C.A).

9) R.S C. 1970, c B-5.

10) *Carriage by Air Act* (Can.), R.S.C. 1970, c. C-14., s. 2(6): *Foreign Aircraft Third Party Damage Act*, R S.C. 1970, c. F-28, Schedule, art. 11(4).

11) The relevant cases are reviewed in the BCLRC Report at 13 *et seq.*

12) [1966] 1 W.L.R. 1234

13) *Supra*, n 1 at 464

14) *Owners of M V Eleftherotria v Owners of M.V Despina R* [*The Despina R*] and *Services Europe Atlantique Sud (SEAS) of Paris* v. *Stockholms Rederiaktiebolag Svea of Stockholm* [*The Folias*], [1979] A.C. 685

15) *Ibid* at 697

16) *Ibid* at 699

17) BCLRC Report at 24 The cases referred to in the BCLRC Report are: *Batavia Times Publishing Co* v. *Davis*, (1978) 7 C P C 105, 20 O R 437; *Schacht* v *Schacht*, (1981) 8 A.C.W.S (2d) 426 (No. 0826); *rev'd* on other grounds, (1982) 37 B C.L.R 344 (B.C C.A); *Am-Pac Forest Products Inc* v. *Phoenix Doors Ltd* , (1979) 14 B.C.L.R 63 (B.C S.C.); *C.I B.C* v. *Singh*, Unreported, Supreme Court of British Columbia, Vancouver Registry No. C775814, supplementary reasons for judgment June 3, 1980; *Sedam* v *Whitehead*, [1981] B C.D. Civ. 2058-01; *Williams & Glyn's Bank Ltd.* v *Belkin Packaging Ltd.*, (1980) 18 B C L R. 279, 15 C.P.C. 209 (B C.S.C), (1981) 28 B C.L R. 96 (B.C.C.A.); *Clinton* v. *Ford*, (1982) 37 O R. 448; *Airtemp Corp* v. *Chrysler Airtemp Canada Ltd* , (1980) 11 Bus L R. 47 (Ont S C.); *Minister of State of the Principality of Monaco* v. *Project Planning Associates*, (1980) 32 O.R. 438 (Div. Ct.), 9 A.C W S 245 (Ont. C.A.). *Gross* v. *Marvel Office Furniture Mfg Ltd* , (1979) 9 C P C. 103 (Ont S.C); *National Westminster Bank* v. *Burston*, (1980) 16 C P.C. 27, 28 O.R 701 (Ont S.C) *Bedford* v. *Shaw*, (1981) 33 O.R 766

18) The overall volume of litigation on this issue seems to have declined since the enactment of the Ontario legislation

19) BCLRC Report at 50

20) BCLRC Report at 55

21) BCLRC Report at 60 Consequential changes to other enactments were also recommended

22) S.O 1984, c. 11.

23) In Watson and McGowan, *Ontario Supreme and District Court Practice, 1988* at 91 the authors take a much narrower view of subsection (4) They suggest it was meant to apply only where a foreign judgment which provides for conversion to Canadian currency is sought to be enforced in Ontario.

24) The courts have not assigned a uniform meaning to "obligation" when it appears in an enactment. *Compare Stokes* v. *Leavens*, (1918) 40 D.L.R 23 (Man C.A) and *Smith* v. *C B.C* , [1953] 1 D.L.R. 510 (Ont H.C).

25) The comments set out in this paper regarding the work of the NCCUSL, unless otherwise noted, are based on a draft act dated February 10, 1989 which is being circulated for discussion purposes This draft reflects some of the discussion which took place at the 1988 meeting of the NCCUSL The draft has no particular status at this stage and was made available by the Reporter to the NCCUSL Committee which is developing it. The draft act is set out as ANNEX A to this paper.

26) The work done in Ontario and British Columbia is fully acknowledged in the draft.

27) *Williams & Glyn's Bank* v *Belkin Packaging Ltd.*, (1983) 21 Bus L.R. 282.

28) A potential third alternative, conversion as of the date originating process issued, has not been widely adopted or discussed

29) The right of a province to legislate with respect to currency conversion *per se* was upheld by the Supreme Court of Canada in *A.G. Ont* v. *Scott*, [1956] S C R. 137.

30) At 56.

31) The BCLRC Report described its approach:
"The language of the [Working Paper] proposal drew on the English jurisprudence This was a reflection of our aim to attempt to reproduce the English legal position (post-Miliangos) through legislation.
We believe that our initial goal, to assimilate British Columbia law to that of England, is a sound one The English developments have provided a model of law reform which has been favourably received and appears to have worked well To adopt any other approach to reform is to run a risk of achieving results less satisfactory than those which have been achieved in England."
See also Waddams, "Commentary on Foreign Money Liabilities," (1981-82) 6 Can Bus. L.J. 364.

32) *See also, Court Order Interest Act*, R S.B.C 1979, c 76; *Courts of Justice Act, 1984, supra* n. 20, s. 140.

33) BCLRC Report at 40

34) *Miliangos* v *Frank (No. 2)*, [1976] 3 W.L.R 477, 479

35) *Helmsing Schiffahrts GmbH. & Co.* v *Malta Drydocks Corp.*, [1977] 2 Lloyd's Rep 444

36) A previous NCCUSL draft took a slightly different approach. As to prejudgment interest:
8 (a) Prejudgment interest must be awarded at the rates, on the elements of damages, and for the periods of time that such interest would have been awarded under the law of the country of the money of the claim
Postjudgment interest was dealt with differently:
8. (c) The rate of postjudgment interest must be the one year treasury obligation rate existing in the country of the money of the claim

37) A discretion of the kind embodied in subsection (3) was endorsed by a Committee of the Ontario Branch of the Canadian Bar Association

38) BCLRC Report at 57.

39) The two reciprocal enforcement provisions should be read with caution It must be borne in mind that the date of "judgment" or "order" refers to the proceeding in the foreign jurisdiction which, for Canadian purposes, creates an obligation akin to a specialty debt payable when it is entered. This is characterized as an application of the date of breach rule, as "breach" in this context is the failure to pay the foreign order. It is based on *Scott* v *Bevan*, (1831) 2 B. & Ad. 78, 109 E R 1073.

UNIFORM FOREIGN MONEY CLAIMS ACT

Payment in foreign money equivalent

1. (1) Where, before making an order for the payment of money arising out of a claim or loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court shall order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in [enacting jurisdiction] at the close of business on the conversion date.

(2) The conversion date is the last day, before the day on which a payment under the order is made by the judgement debtor to the judgement creditor, that the bank referred to in subsection (1) quotes a Canadian Dollar equivalent to the other currency.

Section 1:

Section 1 embodies the policy that where a claim is properly measured in a foreign currency, the conversion to Canadian dollars shall take place at the rates prevailing at the time of payment. It applies to actions which may result in a judgment for money including those for debt or damages based on tort or breach of contract. The opening words of subsection (1) state when the conversion rule applies, and its drafting echoes the English jurisprudence (see *The Despina R* and *The Folias* [1979] A.C. 685). The balance of subsection (1), and subsection (2), stipulate the form of the order which will achieve payment date conversion. An order framed in conformity with section 1 should not conflict with section 12 of the *Currency Act*, Canada, R.S.C. 1985, c. 52.

Interest

2. (1) Interest payable under [applicable court order interest legislation] shall be paid at a rate determined

(a) under the regulations made under section 3(a), or

(b) in the manner provided for in subsection (2).

(2) Where

(a) due to a change in circumstances, the court considers it is not possible to determine a rate of interest under the regulations,

(b) the court considers it would be unjust to any of the parties that the rate so determined be utilized, or

(c) no regulation has been made under section 3 (a) with respect to the other currency,

the court may fix a rate that is payable, having regard to rates that are being paid on the other currency in a country where that currency circulates as legal tender.

3. The Lieutenant Governor in Council may make regulations that are considered necessary or advisable respecting *Regulations*

(a) the manner of determining interest rates that are payable on particular currencies, for purposes of section 2 (1), and

(b) fixing conversion dates in respect of all processes to obtain money under [applicable court order enforcement legislation] to satisfy an order for the payment of money that is made under section 1.

Sections 2 and 3 (a):

Sections 2 and 3 (a) deal with interest payable on an order made under section 1. The basic principle is that the interest rate, both before and after judgment, should be fixed having regard to the interest rates which prevail with respect to the foreign currency. The interest rates payable on Canadian currency are irrelevant. The Act provides two methods by which a "foreign" interest rate may be determined.

First, section 3 (a) contemplates that regulations may be made respecting the determination of interest rates payable on particular currencies. Thus, for example, the enacting jurisdiction might, by regulation, provide that the applicable interest rate is the one-year treasury obligation rate existing in the country which issued the currency. Where such a regulation has been made it will normally prevail (section 2 (1) (a)) unless the facts bring the case into one of the two exceptions described in section 2 (2) (a) or (b).

Exception (a) might be invoked where the regulation is obsolete and refers to an interest rate no longer in use. Exception (b) might be applied where some distortion has occurred and the interest rate determined under the regulation is artificially high or low in relation to the "market" rates which prevail for the foreign currency. When either of those two exceptions apply, or where no regulation has been made, the court will fix an interest rate based on evidence presented as to rates which prevail with respect to the foreign currency.

Since judgment interest legislation varies somewhat between provinces, each enacting jurisdiction should carefully examine both section 2 and its own court order interest legislation, making whatever changes that are necessary to ensure that they work harmoniously and, so far as possible, give effect to the policy which underlies section 2.

Section 3 (b):

Under section 3 (b) regulations may also be made to provide an appropriate interface between judgments made under the Act and the usual remedies available to a judgment creditor.

APPENDICE C

LOI UNIFORME SUR LES INDEMNISATIONS EN DEVISES

Paiement en équivalent-devises

1. (1) Le tribunal saisi d'une demande en réparation pécuniaire est tenu, s'il estime plus équitable pour l'intéressé une indemnisation totale ou partielle calculée en devises, d'ordonner le versement en monnaie canadienne du montant nécessaire à l'achat dans une banque d ... [province ou territoire], au cours de clôture, de l'équivalent en devises de l'indemnité adjugée.

(2) Le cours de clôture à prendre en compte est celui de la veille du jour du versement.

Article 1:

Légalisation du principe selon lequel le montant en équivalent-devises d'une indemnisation est à fixer au taux de change en vigueur lors du versement. Sont visées les actions en réparation pécuniaire telles que les demandes en recouvrement de créances ou en dommages-intérêts pour cause d'acte délictuel ou d'inexécution de contrat. L'article s'inspire de la jurisprudence anglaise (voir *The Despina R* et *The Folias* [1979] A.C. 685). Les ordonnances rendues sous son régime doivent être compatibles avec l'article 12 de la *Loi sur la monnaie*, L.R.C. (1985), ch. 52.

Intérêt

2. (1) Le taux de l'intérêt payable sous le régime de [la loi applicable en matière d'intérêts aux ordonnances judiciaires] est calculé:

(a) soit conformément aux règlements d'application de l'alinéa 3a);

(b) soit selon les modalités prévues au paragraphe (2).

(2) Le tribunal peur fixer le taux dans les cas suivants:

(a) il estime impossible en l'occurrence de faire application des règlements;

(b) il estime cette application injuste pour l'une ou l'autre partie;

(c) il n'y a pas de règlement applicable à la devise en cause.

A cette fin, il tient compte des taux exigibles sur cette devise dans un pays où elle a cours légal.

Règlements

3. Le lieutenant-gouverneur en conseil peut, par règlement, prendre les mesures jugées utiles concernant:

(a) le mode de calcul des taux d'intérêt exigibles sur des devises déterminées;

(b) les cours de clôture à prendre en compte dans les recours exercés, sous le régime de [la loi applicable en matière d'exécution des ordonnances judiciaires], en exécution de l'ordonnance visée à l'article 1.

Article 2 et alinéa 3a):

Ces dispositions portent sur l'intérêt exigible dans le cas des ordonnances rendues sous le régime de l'article 1. Elles posent en principe que son taux, avant comme après jugement, est à fixer compte tenu de celui en vigueur sur la devise en cause, et non sur la monnaie canadienne. A cet effet, deux méthodes sont envisagées.

Il s'agit, en premier lieu, de la voie réglementaire, prévue par l'alinéa 3a): application, par exemple, du taux des bons du Trésor en vigueur dans le pays d'émission de la devise. C'est la méthode normale.

Il s'agit, en second lieu, de la voie judiciaire, laissée à l'appréciation du tribunal dans les situations visées au paragraphe 2(2). Exemples: cas d'un règlement désuet donnant un taux périmé; cas de distorsion où le calcul selon le règlement aboutirait à un résultat artificiellement bas ou élevé par rapport au taux du marché; absence de règlement. Le tribunal se détermine alors au vu des justificatifs qui lui sont présentés touchant le taux effectivement en vigueur.

Comme les lois applicables en matière d'intérêts aux ordonnances judiciaires varient quelque peu d'une province ou d'un territoire à l'autre, il importe que chacun d'eux procède aux adaptations nécessaires pour assurer la compatibilité entre l'article 2 et sa propre loi et pour réaliser, dans toute la mesure du possible, l'objet de cet article.

Alinéa 3b):

Pouvoir de prendre des règlements pour faire le lien entre les ordonnances rendues sous le régime de la présente loi et les recours habituellement ouverts au créancier bénéficiaire d'une jugement.

APPENDIX D

(See page 79)

REPORT OF THE COMMITTEE STUDYING THE UNIFORM HUMAN TISSUE GIFT ACT TO THE UNIFORM LAW SECTION OF THE UNIFORM LAW CONFERENCE OF CANADA

(Presented at Yellowknife, N.W.T. on August 14, 1989)

At the 1986 annual meeting of the Uniform Law Conference, the matter of the Uniform Human Tissue Gift Act was raised by Alberta to determine whether any other jurisdictions felt that reform was needed in this area of the law. The Conference directed that a report be prepared by Alberta and presented at the 1987 annual meeting analyzing the papers that had recently been prepared in Canada on the topic.

At the 1987 annual meeting of the Uniform Law Conference, Alberta presented a paper setting out the legal and administrative issues that had been raised in four reports that had recently been prepared in Canada by Alberta, Ontario, Manitoba and the Federal Government. As the topic generated a high level of interest at that annual meeting, the Conference directed that a Committee be set up to study possible reform of the Uniform Human Tissue Gift Act, with Alberta providing the Chairman.

The jurisdictions were canvassed and six indicated their desire to participate on the Committee. They are:

Alberta

Ontario

Quebec

Newfoundland

Nova Scotia

Department of Justice (Canada)

A number of other jurisdictions, though they did not wish to actively participate on the Committee, asked to be kept informed of and copied with the materials that came out of the Committee's meetings. They are:

British Columbia

Saskatchewan

Manitoba

Prince Edward Island

Northwest Territories

Manitoba enacted a new Human Tissue Act on July 17, 1987 and this new Act has been taken into consideration by the Committee in the preparation of this Report.

The Committee consisted of lawyers from each participating jurisdiction, one policy coordinator from the Ontario Ministry of Health who served on a variety of federal-provincial working groups on organ transplantation and the Chief Coroner of Ontario. The lawyer from the Department of Justice is the Chief, Medical Law, Protection of Life Project, who has also been a member of a number of federal-provincial working groups on organ transplantation and the Red Cross working group on bone marrow registries.

The members of the Committee are as follows:

Elaine Callas, Legislative Counsel, Edmonton

Gilbert Sharpe, Director, Legal Services Branch, Ministry of Health, Toronto

Jane Speakman, Special Projects Coordinator, Ministry of Health, Toronto

Dr. Marcia Farquhar, Policy Coordinator, Ministry of Health, Toronto

Dr. Ross Bennett, Chief Coroner, Toronto

Alde Frenette, Legislative Counsel, Sainte-Foy

Wendy Kipnis, Legislative Counsel, St. John's

Gordon Johnson, Legislative Counsel, Halifax

Graham Walker, Chief Legislative Counsel, Halifax

Bernard Starkman, Chief, Medical Law, Protection of Life Project, Ottawa

The Committee adopted the following terms of reference:

1. to recommend uniform provisions for a new Act dealing with the transplantation of tissue, with emphasis on the need to make more organs available for transplant and the provision of protection for donors and recipients and their families;

2. to review relevant legislation and developments in other jurisdictions;

3. to consult and receive representations from selected interest groups;

4. to report progress and conclusions to the Uniform Law Section of the Conference.

As a result of the direction from the Uniform Law Conference, the Committee did not deal with the following subjects in the proposed Act:

1. spermatozoa and ova;
2. an embryo or fetus;
3. blood and blood constituents.

However, these matters were discussed at length and comments relating to them appear in this Report.

At the 1988 annual meeting of the Uniform Law Conference, an early draft of a proposed Uniform Human Tissue Donation Act, which would replace the current Act, was tabled and a short progress report was presented. It was noted that the intent of the Committee was to present a full report and a proposed Act at the 1989 annual meeting of the Conference.

The Committee was not in a position to initiate consultation with interest groups until the fall of 1988. As a result, a decision was made by the Committee to conduct a limited consultation with certain national or provincial associations whose interests are related to this project. The Committee selected the following groups to consult:

Multiple Organ Retrieval and Exchange Program of Ontario, Toronto

Human Organ Procurement and Exchange Program, Calgary

Canadian Medical Association, Ottawa

Commission des droits de la personne, Montreal (Quebec Human Rights Commission)

Canadian Mental Health Association, Toronto

Canadian Association for Community Living, Toronto

The Committee made these choices based on the need to target certain groups in order to assess whether the recommendations (particularly those relating to donation by young children and the mentally disabled) were in accord with the wishes of the public and the desire to target national groups to avoid having regional disparities appear in the draft Act.

The Committee prepared a list of the recommendations it was proposing for changes to the current Uniform Act and the above groups were invited to respond. As directed by the Uniform Law Section, no drafts of the proposed Act were forwarded to the interest groups. The Committee received and considered written responses to its recommendations from four of the six interest groups.

In addition, the Committee received unsolicited comments from the Eye Bank of Canada and the Canadian Bar Association and some personal observations from one of the lawyers with the Law Reform Commission of Canada who is involved in a similar study.

The Committee from time to time also consulted a physician who is active in the area of organ transplantation in Toronto and other lawyers from Toronto who provided information on concerns relating to the Free Trade Agreement and Constitutional Law.

The Committee held five meetings in Toronto and one meeting in Quebec City, each of two or three days' duration.

The Committee is cognizant that some of its recommendations may not be easily addressed in the Civil Code of Quebec. However, it has attempted to make recommendations that would achieve substantial uniformity across Canada.

Alberta provided the English drafting services. Quebec provided the French drafting services.

The Committee recommends the adoption by the Uniform Law Conference of Canada of the attached draft Uniform Human Tissue Donation Act.

Elaine M. Callas
Chairman,
Committee Studying the Uniform Human Tissue Gift Act

APPENDIX D

(See page 79)

UNIFORM HUMAN TISSUE DONATION ACT

(This draft Act includes changes made by the Uniform Law Conference at Yellowknife, N.W.T. on August 14, 1989.)

1. In this Act, *Definitions*

"common law spouse" means [insert provincial definition]; ("conjoint de fait") *"common law spouse"*

"death" includes brain death as determined by generally accepted medical criteria; ("mort") *"death"*

"non-regenerative tissue" means tissue other than regenerative tissue; ("tissu non susceptible de regeneration") *"non-regenerative tissue"*

"regenerative tissue", in a living human body, means tissue that, on injury or removal, replaces itself; ("tissue susceptible de regeneration") *"regenerative tissue"*

"spouse" includes a common law spouse; ("epoux; ex-pouse") *"spouse"*

"tissue" means a part of a living or dead human body, but does not include *"tissue"*

(a) spermatozoa or ova,

(b) an embryo or fetus, or

(c) blood or blood constituents; ("tissu")

"transplant" means the removal of tissue from a human body and the implantation of the tissue in the living human body of another. ("transplantation") *"transplant"*

2. A consent to the removal of tissue may be given in accordance with this Act, but not otherwise. *Compliance with Act*

3.(1) A person who is [16] years of age or over and understands the nature and consequences of transplanting tissue from his or her body after death may consent to the removal of the tissue specified in the consent from his or her body after death for the purpose of implanting the tissue in a living human body. *Consent to transplant after death*

(2) Not withstanding subsection (1), a consent given by a person who did not understand the nature and conse-

quences of transplanting tissue from his or her body after death is valid for the purposes of this section if the person who acts on it has no reason to believe that the person who gave it did not understand the nature and consequences of transplanting tissue from his or her body after death.

Substituted consent

4.(1) After the death of a person who has not given a consent under section 3, who is under [16] years of age or who did not understand the nature and consequences of transplanting tissue from his or her body after death, a person referred to in subsection (2) may consent to the removal of the tissue specified in the consent from the body of the deceased

(a) for the purpose of implanting the tissue in a living human body, or

(b) for the purposes referred to in section 12(1).

(2) A consent referred to in subsection (1) may be given by any one of the following:

(a) a guardian of the person of the deceased before death;

(b) the spouse of the deceased;

(c) a child of the deceased;

(d) a parent of the deceased;

(e) a brother or sister of the deceased;

(f) any other relative of the deceased;

(g) a person, other than a spouse, who shared a residence with the deceased immediately before the deceased died and has knowledge of the wishes of the deceased.

(3) In the event of a dispute between persons in 2 or more of the classes of persons referred to in subsection (2), the dispute shall be decided in accordance with the order in which those classes are listed in subsection (2).

(4) If no consent is provided under subsection (1) and the [Coroner], after making reasonable efforts, is unable to locate any of the persons listed in subsection (2), the [Coroner] may be given a consent referred to in subsection (1).

(5) No consent may be given under this section by a person who

(a) is under [16] years of age,

(b) does not understand the nature and consequences of transplanting tissue from the body of the deceased after death, or

(c) has reason to believe that the deceased would have objected to the consent.

Consent to transplant during life

5.(1) A person who is [16] years of age or over and understands the nature and consequences of transplanting tissue from his or her body during his or her life may consent to the removal of the tissue specified in the consent from his or her body during his or her life for the purpose of implanting the tissue in another living human body.

(2) If there is reason to believe that a person who gives a consent under this section may not understand the nature and consequences of transplanting tissue from his or her body during his or her life, no transplant may be carried out pursuant to that consent unless the results of an independent assessment conducted in accordance with section 7 indicate that the transplant should be carried out.

(3) No transplant of non-regenerative tissue may be carried out pursuant to this section unless the results of an independent assessment conducted in accordance with section 7 indicate that the transplant should be carried out.

Transplant during life re person under 16

6.(1) A person who is under [16] years of age and understands the nature and consequences of transplanting tissue from his or her body during his or her life may consent to the removal of the regenerative tissue specified in the consent from his or her body during his or her life for the purpose of implanting the tissue in another living human body.

(2) Notwithstanding subsection (1), bone marrow may be removed from a person who is under [16] years of age and does not understand the nature and consequences of transplanting tissue from his or her body during his or her life for the purpose of implanting the bone marrow in a biological brother or biological sister of the donor.

(3) No transplant may be carried out

(a) pursuant to subsection (1), unless a parent or guardian of the donor also consents to the transplant, or

(b) pursuant to subsection (2), unless a parent or guardian of the donor consents to the transplant on behalf of the donor.

(4) No transplant may be carried out pursuant to subsection (1) or (2) unless the results of an independent assessment conducted in accordance with section 7 indicate that the transplant should be carried out.

Independent assessment

7.(1) If an independent assessment is required pursuant to this Act, it shall be conducted in accordance with this section and the regulations.

(2) An independent assessment shall be conducted by not fewer than 3 persons, of whom one shall be a physician.

(3) No person who has or has ever had an association with the donor of tissue in respect of whom an independent assessment is conducted or with the proposed recipient of the tissue shall conduct the independent assessment.

(4) The persons conducting an independent assessment shall provide notice of the date, time and place of the independent assessment to

(a) the donor of the tissue,

(b) if the donor is under [16] years of age, the parent or guardian of the donor and the [Official Guardian], and

(c) if the donor is (16) years of age or over and there is reason to believe that the donor may not understand the nature and consequences of transplanting tissue from his or her body during his or her life, the parent or guardian of the person of the donor and the [Official Guardian].

(5) On receiving a notice under subsection (4), the [Official Guardian] shall represent the donor at the independent assessment unless the [Official Guardian] is satisfied that another person in addition to the parent or guardian of the person of the donor will represent the donor.

(6) The persons conducting an independent assessment shall consider the following:

(a) whether the transplant is the medical treatment of choice;

(b) with respect to a transplant under section 6, whether all other members of the immediate family of the donor have been eliminated, for medical or other reasons, as potential donors;

(c) whether coercion has been exerted on the donor for the purpose of obtaining his or her consent to the transplant;

(d) whether the removal of the tissue from the body of the donor will create a substantial health or other risk to the donor;

(e) whether this Act and the regulations, as they relate to that transplant, have been complied with.

(7) The persons conducting an independent assessment shall, in the manner and within the time period prescribed in the regulations,

(a) make a decision as to whether a transplant that has been proposed pursuant to section 5 or 6 should be carried out,

(b) provide written reasons for the decision, and

(c) provide notice of that decision and the reasons for the decision to the persons who received notice of the independent assessment under subsection (4).

Appeal

8.(1) A person may, within [3 days] after a decision has been made under section 7(7), appeal to the [Supreme Court] the decision of the persons who conducted an independent assessment.

(2) On Hearing an appeal, the Court may

(a) quash, vary or confirm the decision of the persons who conducted the independent assessment, or

(b) refer the matter back to the persons who conducted the independent assessment for further action in accordance with the directions of the Court.

(3) On hearing an appeal to which section 6(2) applies, the Court may make an order authorizing a parent or guardian of the donor to consent to the transplant on behalf of the donor.

(4) No transplant in respect of which an appeal has been commenced under subsection (1) shall be carried out until the appeal has been concluded.

Effect of Consent

9.(1) A consent that complies with this Act is binding and is authority for a physician

(a) to make an examination necessary to assure medical acceptability of the tissue specified in the consent, and

(b) to remove the tissue specified in the consent in accordance with the consent.

(2) Notwithstanding subsection (1), no person shall act on a consent if the person has reason to believe that

(a) in the case of a consent under section 3, 5, 6 or 12, the person who gave the consent subsequently withdrew or would have objected to the consent, or

(b) in the case of a consent under section 4, the person on whose behalf the consent was given would have objected to the consent.

Coroner's direction

10. If, in the opinion of a physician, the death of a person is imminent by reason of injury or disease and the physician has reason to believe that section ... of the [Coroners Act] may apply when death does occur and a consent under section 3 has been obtained for a transplant of tissue from the body after death, a [Coroner] having jurisdiction, notwithstanding that death has not yet occurred, may give directions he or she thinks proper respecting the removal of the tissue after the death of the person, and that direction has the same force and effect as if it had been made after death under section ... of the [Coroners Act].

Determination of death

11.(1) The fact of death of a donor of tissue shall be determined by at least 2 physicians in accordance with accepted medical practice.

(2) No physician who has had an association with the proposed recipient of tissue shall take any part in the determination of the fact of death of the donor of that tissue.

(3) No physician who took any part in the determination of the fact of death of the donor of tissue shall participate in any way in the transplant of that tissue.

(4) Subsections (2) and (3) do not apply to a physician in the removal of eyes for cornea transplants.

12.(1) Notwithstanding anything in this Act, a person who is [16] years of age or over may consent to the use after death of his or her body or the parts of his or her body specified in the consent for therapeutic purposes, medical education or scientific research.

Consent for other purposes

(2) If tissue that has been removed pursuant to a consent given under section 3, 4, 5, or 6 cannot for any reason be implanted in a living human body, the tissue shall be disposed of as if no consent relating to the tissue had been given, unless the donor has consented to the use of the tissue for therapeutic purposes, medical education or scientific research.

13.(1) Except where required by law, no person shall disclose or give to another person any information or document whereby the public may learn the identify of a person

Disclosure of information

(a) who has given or refused to give a consent to the removal of tissue,

(b) with respect to whom a consent to the removal of tissue has been given or refused, or

(c) into whose body tissue has been, is being or may be implanted.

(2) Notwithstanding subsection (1),

(a) a donor of tissue may disclose or authorize another person to disclose information relating only to the donor that the donor has authorized for disclosure,

(b) a recipient of tissue may disclose or authorize another person to disclose information relating only to the recipient that the recipient has authorized for disclosure, and

(c) a person who gave a consent under section 4 on behalf of a deceased may disclose or authorize another person to disclose information relating only to the deceased that the person who gave the consent has authorized for disclosure.

Protection from liability

14. No person is liable for anything done or omitted to be done in good faith and without negligence in the exercise or intended exercise of an authority under this Act.

Commerce prohibited

15.(1) No person shall buy, sell or otherwise deal in, directly or indirectly, any tissue, body or body part for the purpose of a transplant or for a therapeutic purpose, medical education or scientific research.

(2) Any dealing in any tissue, body or body part that was lawful before this Act came into force shall continue to be lawful, provided this Act is complied with.

(3) A person who contravenes this section is guilty of an offence and liable on summary conviction to a fine of not more than $100,000 or to imprisonment for not more than 1 year, or to both.

General offence

[16. A person who contravenes this Act, except section 15, is guilty of an offence and liable on summary conviction to a fine of not more the $10,000 or to imprisonment for not more than 6 months, or to both.]

Regulations

17. The Lieutenant Governor in Council may make regulations

(a) respecting the establishment and operation of independent assessments;

(b) prescribing the manner and time period in which a decision under section 7(7), reasons for the decision and notice of the decision shall be given.

Repeal

18. The Uniform Human Tissue Gift Act is repealed.

APPENDICE D

(voir page 79)

LOI UNIFORME SUR LE DON DE TISSUS HUMAINS

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

"conjoint" comprend un conjoint de fait; ("spouse") *"conjoint"*

"conjoint de fait" signifie [insérer ici la définition prévue à la loi de la province intéressée]; ("common law spouse") *"conjoint de fait"*

"mort" comprend la mort cérébrale telle que déterminée conformément aux pratiques médicales actuelles; ("death") *"mort"*

"tissu" signifie toute partie du corps humain, vivant ou mort, à l'exception : *"tissu"*

(a) des spermatozoïdes et des ovules,

(b) des embryons et des foetus, ou

(c) du sang et de ses dérivés; ("tissue")

"tissu non susceptible de régénération" signifie un tissu autre que les tissus susceptibles de régénération; ("non-regenerative tissue") *"tissu non susceptible de régénération"*

"tissu susceptible de régénération", chez une personne vivante, signifie un tissu qui, à la suite d'une blessure ou d'un prélèvement, peut se reconstituer; ("regenerative tissue") *"tissu susceptible de régénération"*

"transplantation" signifie l'opération qui consiste à prélever un tissu sur le corps d'une personne et à l'implanter dans le corps d'une autre personne vivante; ("transplant") *"transplantation"*

2. Le consentement au prélèvement d'un tissu, le cas échéant, doit être donné conformément à la présente loi. *Respect de la loi*

3.(1) Une personne âgée de [16] ans et plus et capable de comprendre la nature et les effets de la transplantation peut consentir à ce qu'un tissu déterminé soit prélevé sur son corps après sa mort pour être implanté dans le corps d'une autre personne vivante. *Consentement à une transplantation après la mort*

(2) Toutefois, le consentement accordé par une personne qui ne comprend pas la nature et les effets de la transplantation est valide aux fins du présent article si la personne qui y a donné suite l'ignorait.

Consentement substitué

4.(1) Après la mort d'une personne qui n'a pas donné son consentent tel qui prévu à l'article 3, que était âgée de moins de [16] ans ou qui ne comprenait pas la nature et les effets du prélèvement de tissu sur son corps, une des personnes énumérées au paragraphe 2 peur consentir à ce qu'un tissu déterminé soit prélevé sur le corps du défunt

(a) pour être implanté dans le corps d'une autre personne vivante, ou

(b) pour les fins précisées à l'article 12(1).

(2) L'une ou l'autre des personnes suivantes peut donner le consentement visé au paragraphe 1 :

(a) le curateur, le tuteur ou le mandataire du défunt;

(b) le conjoint du défunt;

(c) un enfant du défunt;

(d) le père ou la mère du défunt;

(e) un frère ou une soeur du défunt;

(f) tout autre parent du défunt;

(g) toute personne, autre que le conjoint, qui vivait avec le défunt au moment de sa mort et qui avait connaissance de ses volontés.

(3) En cas de désaccord entre des personnes appartenant à au moins deux catégories visées au paragraphe 2, le conflit sera tranché en fonction de l'ordre selon lequel ces catégories de personnes sont énumérées.

(4) Si aucun consentement n'a été accordé aux termes du paragraphe 1 et que le [coroner], après avoir déployé des efforts raisonnables, n'a réussi à localiser aucune des personnes énumérées au paragraphe 2, celui-ci peut donner lui-même le consentement.

(5) Aucun consentement ne peut être accordé aux termes du présent article par une personne qui

(a) est âgée de [16] ans,

(b) ne comprend pas la nature et les effets du prélèvement de tissu, ou

(c) a des raisons de croire que le défunt s'y serait opposé.

Consentement à une transplantation entre vifs

5.(1) Une personne âgée de [16] ans et plus et capable de comprendre la nature et les effets de la transplantation peut consentir à ce qu'un tissu déterminé soit prélevé sur son corps de son vivant pour être implanté dans le corps d'une autre personne vivante.

(2) S'il y a des raisons de croire qu'une personne qui donne un consentement en vertu du présent article ne comprend pas la nature et les conséquences d'un prélèvement de tissu sur son corps de son vivant, aucune transplantation ne peut être effectuée aux termes du présent article, à moins que les résultats d'une étude indépendante menée conformément à l'article 7 n'indiquent qu'il y a lieu d'y procéder.

(3) Aucune transplantation de tissu non susceptible de régénération ne peut être effectuée aux termes du présent article sauf si les résultats d'une étude indépendante menée conformément à l'article 7 indiquent qu'il y a lieu d'y procéder.

Transplantation entre vifs – Personnes de moins de [16] ans

6.(1) Une personne âgée de [16] ans et capable de comprendre la nature et les effets de la transplantation peut consentir à ce qu'un tissu susceptible de régénération déterminé soit prélevé sur son corps de son vivant pour être implanté dans le corps d'une autre personne vivante.

(2) Toutefois, de la moelle peut être prélevée sur une personne âgée de [16] ans qui n'est pas en mesure de comprendre la nature et les effets de la transplantation aux fins de l'implanter dans le corps de la mère, du père, du frère, de la soeur, du demi-frère ou de la demi-soeur naturels du donneur.

(3) Nulle transplantation ne peut être effectuée.

(a) aux termes du paragraphe 1, sauf si le père, la mère ou le tuteur du donneur consent également à la transplantation, ou

(b) aux termes du paragraphe 2, sauf si le père, la mère ou le tuteur du donneur consent à la transplantation en son nom.

(4) Nulle transplantation ne peut être effectuée aux termes du paragraphe 1 ou 2, sauf si les résultats d'une étude indépendante menée conformément à l'article 7 indiquent qu'il y a lieu d'y procéder.

Étude indépendante

7.(1) Si une étude indépendante est requise en vertu de la présente loi, elle doit être effectuée conformément au présent article et aux règlements.

(2) Une étude indépendante doit être effectuée par au moins trois personnes, dont un médecin.

(3) Aucune personne, qui a ou a eu un lien avec le donneur ou avec le récipiendaire proposé, ne peut participer à l'étude indépendante.

(4) Les membres du comité doivent indiquer la date, l'heure et le lieu où le comité se réunira pour procéder à l'étude indépendante

(a) au donneur du tissu,

(b) si le donneur est âgée de [16] ans, au père, à la mère ou au tuteur du donneur et au [Curateur public], et

(c) si le donneur est âgée de [16] ans ou plus et qu'il y a des raisons de croire qu'il ne comprend pas la nature et les conséquences d'un prélèvement de tissus sur son corps de son vivant, à son père, à sa mère, à son tuteur et au [Curateur public].

(5) Lorsqu'il reçoit un avis en vertu du paragraphe (4), le [Curateur public] doit représenter le donneur devant le comité à moins qu'une personne autre que le père, la mère ou le tuteur n'assure déjà cette représentation.

(6) Les membres du comité doivent tenir compte des éléments suivants :

(a) la transplantation est le traitement médical opportun;

(b) tous les autres membres de la famille immédiate, du donneur ont été éliminés comme donneurs potentiels, que ce soit pour des raisons médicales ou autres;

(c) aucune pression n'a été exercée auprès du donneur dans le but d'obtenir qu'il consente à la transplantation;

(d) le prélèvement du tissu en question ne présente aucun risque important pour la santé du donneur;

(e) on s'est conformé à la présente loi et aux règlements relatifs à la transplantation.

(7) Les membres du comité doivent, de la manière et dans le délai prévus aux règlements :

(a) décider s'il y a lieu ou non de procéder à la transplantation qu'on se propose de faire conformément à l'article 5 ou à l'article 6,

(b) justifier leur décision par écrit, et

(c) aviser de la décision et des motifs les personnes mentionnées au paragraphe (4).

Appel

8.(1) Une personne peut en appeler de la décision rendue par le comité chargé de l'étude indépendante auprès de la [cour Supérieure] dans les trois jours de cette décision.

(2) Après avoir été saisi de l'appel, la [cour Supérieure] peut :

(a) annuler, modifier ou confirmer la décision du comité chargé de l'étude indépendante, ou

(b) renvoyer la question devant le comité pour étude plus approfondie conformément à toute directive qu'elle lui donne.

(3) Après avoir été saisi d'un appel relativement à une transplantation visée par l'article 6(2), la [cour Supérieure] peut rendre une décision autorisant le père, la mère ou le tuteur du donneur à consentir à la transplantation au nom du donneur.

(4) Aucune transplantation faisant l'objet d'un appel aux termes du paragraphe 1 ne peut être effectuée tant que la procédure l'appel n'est pas terminée.

Effet du consentement

9.(1) Une consentement accordé conformément à la présente loi lie les parties et autorise un médecin à

(a) procéder à un examen pour déterminer si le tissu désigné dans le consentement est médicalement acceptable, et

(b) à prélever ce tissu conformément au consentement.

(2) Toutefois, nul ne donnera suite à un consentement s'il a des raisons de croire que

(a) dans le cas d'un consentement visé par l'article 3, 5, 6 ou 12, la personne a ultérieurement retiré son consentement ou s'y serait opposée, ou

(b) dans le cas d'un consentement visé par l'article 4, la personne au nom de qui le consentement a été accordé s'y serait opposée.

Directives du coroner

10. Si, de l'avis d'un médecin, la mort d'une personne est imminente en raison d'une blessure ou d'une maladie, qu'il a des raisons de croire que l'article ... de la [loi des coroners] peut s'appliquer lorsque la mort surviendra et qu'un consentement à la transplantation d'un tissu a été accordé en application de l'article 3, le [*coroner*] habilité, en dépit du fait que la mort n'est pas encore survenue, peut donner toute directive qu'il juge appropriée relativement au prélèvement du tissu sur le cadavre de la personne, et cette directive a le même effet que si elle avait été donnée après la mort en application de l'article ... de la [*loi des coroners*].

Détermination du décès

11.(1) La détermination du moment de la mort du donneur d'un tissu doit être faite par au moins deux médecins conformément aux pratiques médicales reconnues.

(2) Le médecin qui a eu un lien quelconque avec le bénéficiaire éventuel d'un tissu transplanté ne peut participer à la détermination du moment de la mort du donneur de ce tissu.

(3) Le médecin qui a participé à la détermination du moment de la mort du donneur d'un tissu ne peut participer à la transplantation de ce tissu.

(4) Les paragraphes 2 et 3 ne s'appliquent pas au médecin qui effectue un prélèvement des yeux pour fins de transplantation de la cornée.

Consentement au don de tissu pour d'autres fins

12.(1) Malgré toute disposition contraire de la présente loi, une personne âgée de [16] ans et plus peut consentir à ce qu'on utilise son cadavre ou les parties de celui-ci désignées dans son consentement à des fins thérapeutiques ou à des fins d'enseignement médical ou de recherche scientifique.

(2) Si un tissu prélevé par suite d'un consentement accordé aux termes de l'article 3, 4, 5 ou 6 ne peut pour une

raison quelconque être implanté dans le corps d'une personne vivante, le tissu sera traité comme si aucun consentement n'avait été accordé, à moins que le donneur n'ait consenti à ce qu'on utilise le tissu à des fins thérapeutiques ou à des fins d'enseignement médical ou de recherche scientifique.

Divulgation de l'information

13.(1) Sauf lorsque la loi le requiert, nul ne doit divulguer ou communiquer à une autre personne une information ou un document permettant de rendre publique l'identité d'une personne

(a) qui a accordé ou refusé d'accorder son consentement à une transplantation de tissu,

(b) à l'égard de qui un consentement a été accordé ou refusé, ou

(c) dans le corps de qui un tissu a été, est ou pourra être implanté.

(2) Toutefois,

(a) un donneur de tissus peut divulguer ou autoriser une personne à divulguer certains renseignements qui ne concernent qui lui-même;

(b) un récipiendaire de tissus peut divulguer ou autoriser une personne à divulguer certains renseignements déterminés qui ne concernent que lui-même, et

(c) une personne qui a donné un consentement en vertu de l'article 4 au nom d'une personne décédée peut divulguer ou autoriser une autre personne à divulguer certaines informations relatives uniquement au donneur.

Immunité

14. Nul n'est passible de poursuites en raison d'un acte qu'il a accompli ou omis d'accomplir de bonne foi et sans négligence de sa part dans l'exercice des pouvoirs conférés par la présente loi.

Interdiction relative au commerce

15.(1) Nul ne peut acheter ou vendre, directement ou indirectement, un tissu, un corps ou une partie de corps humain, ou en faire le commerce à des fins de transplantation, d'enseignement médical, de recherche scientifique ou à des fins thérapeutiques.

(2) Tout commerce de corps ou de partie de corps humain autorisé par la loi avant que la présente loi n'entré en vigueur continuera de l'être, sauf disposition contraire contenue dans la présente loi.

(3) La personne qui contrevient aux dispositions du présent article commet une infraction et se rend passible, sur déclaration sommaire de culpabilité, d'une amende d'au plus 100 000 $ ou d'un emprisonnement d'au plus un an, ou de ces deux peines concurremment.

Infraction ordinaire

[16. La personne qui contrevient aux dispositions de la présente loi, sauf l'article 15, commet une infraction et se rend passible, sur déclaration sommaire de culpabilité, d'une amende d'au plus 10 000 $ ou d'un emprisonnement d'au plus six mois, ou de ces deux peines concurremment.]

Règlements

17. Le gouvernement peut, par règlement :

(a) déterminer les règles relatives aux études indépendantes :

(b) déterminer les délais et la forme des décisions rendues en vertu de l'article 7(7), de même que les règles relatives aux motifs et aux avis à donner.

Abrogation

18. Loi uniforme sur le don de tissus humains est abrogée.

APPENDIX E

(See page 80)

REPORT FROM THE LAW REFORM CONFERENCE TO THE UNIFORM LAW CONFERENCE

The meeting of the Law Reform Conference was convened under the Chairmanship of Mr. Justice David Marshall at 1:30 p.m. on August 13th at the Explorer Hotel in Yellowknife. Representatives were in attendance from British Columbia, Alberta, Saskatchewan, Manitoba, Canada, Nova Scotia, Newfoundland, New Brunswick, Northwest Territories and Yukon.

A presentation was made to the Conference by the President of the Uniform Law Conference, Ms. Georgina Jackson. As a result of this presentation, it was agreed that comments and views of the various Law Reform Commissions would be supplied to the Uniform Law Conference through the office of Mr. Peter Lown, the Director of the Alberta Law Reform Institute.

Two specific law reform initiatives were discussed. Mr. Arthur Close, Chairman of the British Columbia Law Reform Commission, presented a working model of the law reform database, describing both the design and operation of the program, and making it available to the various Law Reform Commissions for their use. Also, at the initiative of the B.C. Commission, it was agreed that a Staff Development Workshop should be held, tentatively planned for the spring of 1990, and to be hosted in Vancouver.

Finally it was determined that a Committee should be formed to examine the structure and strength of the Law Reform Conference. It was agreed that this Committee would be chaired by Professor Lown and its members would be Mr. Arthur Close (B.C.), Ms. Rosalie Abella (Ontario) and Mr. Justice Al Linden (Canada).

This is the report of the Law Reform Conference to the final plenary session of the Uniform Law Conference.

APPENDIX F

(See page 80)

DEPARTMENT OF JUSTICE REPORT TO THE UNIFORM LAW CONFERENCE

Yellowknife, August 14-18, 1989

It has been an eventful year for Canada in the field of private international law. In particular, Canada participated in the activities of The Hague Conference on Private International Law UNCITRAL and UNIDROIT and of the Organization of American States. In addition, the Department of Justice took concrete measures to improve the communication of information on our activities in private international law.

INTRODUCTION - COMMUNICATION AND CONSULTATION

Status Chart of Canadian Activities in Private International Law

(This Chart was distributed at the meeting)

In an effort to better inform provinces and interested groups on developments in private international law in Canada, last Spring the Department of Justice of Canada has prepared and distributed a Status Chart of Canadian Activities in Private International Law. This Chart will be distributed twice a year to give updated information on all conventions in private international law to which Canada is a party or is considering.

The Chart mentions the various organizations under the auspices of which the conventions are negotiated or were adopted, the status of Canada's participation, special clauses, the legislation required for implementation, the contribution of the Uniform Law Conference, whether in drafting a uniform act or in making recommendations or carrying out studies, the adopted implementing legislation and the action that remains to be taken.

This Chart will be sent to all provinces and territories as well as to bar associations and universities and will be updated once in October and once in April.

Advisory Group on Private International Law

The Advisory Group on Private International Law was first established by the Department of Justice in 1973 to provide it with close and continuing guidance in matters of provincial interest that are under consideration by certain international organizations. It is composed of

four regional representatives, one each from the western provinces, the Maritimes, Ontario and Quebec and, in addition, one private practitioner. We ensure that at least one member of the Group is also a member of the Uniform Law Conference.

Uniform Law Conference

The Uniform Law Conference is valuable to our work in private international law: the drafting of uniform acts ensures and facilitates the process of adoption of provincial legislation implementing international conventions. As well the liaison through the Conference, between the Department of Justice and the provinces, helps to resolve issues and to provide a forum for the exchange opinions and information.

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Hague Conference on Private International Law has now thirty-six member States including China, Hungary, some South American States and most European States.

Canada's activities with The Hague Conference on Private International Law this year were numerous and important: we acceded on September 26, 1988 to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters and we signed on October 11, 1988 the Convention on the Law Applicable to Trusts and on their Recognition. We participated in the Sixteenth Session of the Conference and in the Special Commission on the operation of the Convention on Service Abroad and the Convention on the Taking of Evidence Abroad.

The Convention on Service Abroad

Canada is now party to this Convention which has come into force in Canada, in all jurisdictions, on May 1, 1989. Implementation of this Convention requires amendments to the rules of court in each jurisdiction where they are not compatible with the Convention. As soon as we have received all copies of these amendments they will be compiled and distributed to each province and territory.

Convention on the Law Applicable to Trusts and on Their Recognition

Canada has signed this Convention and three provinces have adopted implementing legislation, namely New Brunswick, Prince Edward Island and British Columbia following the Uniform act adopted by the Uniform Law Conference in 1987. Other provinces have

initiated the process of adopting implementing legislation and we hope to be able to ratify the Convention before the end of the year.

The Sixteenth Session of The Hague Conference on Private International Law October 3-21, 1988

The Hague Conference on Private International Law holds a session every four years. In October 1988, Canada sent a delegation of six people to the Sixteenth Session of the Conference, including the "rapporteur spécial" for the Convention on the Law Applicable to the Succession to the Estates of Deceased Persons. The members of the delegation were:

Christiane Verdon, Justice

Chantal Bernier, Justice

André Cassette, Québec

John Gregory, Ontario

Jeffrey Talpis, Expert

Donovan Waters, "Rapporteur spécial"

The role of the "Rapporteur spécial" is to prepare a report on the discussions that surrounded each provision of the adopted convention with a view to clarify their meaning or orient their interpretation. The Sixteenth Session adopted the Convention on Successions and the agenda for future work of the Conference.

The Convention determines the law applicable to the succession to an estate where there are properties in two or more contracting States. It has received its first signature on August 1, 1989 by Switzerland. As soon as the report of the "rapporteur spécial" is ready, we will submit it, with the Convention, to the Advisory Group on Private International Law to examine Canada's interest in becoming a party to the Convention. The various jurisdictions will then be consulted and if it is decided that Canada should become a party to this Convention we hope to be able to count on the Uniform Law Conference in the context of its implementation for drafting a uniform act.

The agenda for the future work of the Conference gives priority to the elaboration of a convention on inter-country adoption. It will be submitted to the Seventeenth Session in 1993, coinciding with the centennial of the Conference.

Special Commission on the Operation of the Convention on Service Abroad and of the Convention on the Taking of Evidence Abroad

In April 1989, Canada attended the Special Commission on the operation of the Convention on Service Abroad and of the Convention on the Taking of Evidence Abroad.

The Special Commission addressed a number of technical issues where States compared practices and informed each other of the application of the Conventions in their territory.

The fundamental issues raised concerned the exclusivity, i.e. whether the process established by the Conventions excluded the use, between the Contracting States, of other processes under internal law, and the scope of both conventions. The consensus was that neither convention is exclusive, but should be given priority and that the conventions which apply to "civil or commercial matters" should apply to all matters relating to private disputes, including certain aspects of labour law and bankruptcy law, but should not include tax matters or administrative law. It was also the general opinion of the delegates that both conventions are very efficient and useful.

The Convention on the Taking of Evidence Abroad

On the recommendation of the Advisory Group on Private International Law, we have submitted the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters to all jurisdictions in order to establish Canada's interest in becoming party to it. So far the response has been very favourable. The Uniform Law Conference had recommended, in 1978, that the Convention be submitted to the provinces to seriously consider Canada's accession. At the request of the Uniform Law Conference, Rae Tallin had produced at that point a comprehensive report on the compatibility of the Convention with provincial rules of evidence. This report was sent to all jurisdictions in our consultation on Canada's accession to the Convention. I understand that Mr. Basil Stapleton has asked the Legislative Counsels in all jurisdictions to review and update the Tallin Report. Considering the interest in Canada for the Convention and the practical advantages it offers in civil and commercial litigation it would be appropriate for each jurisdiction to initiate the process of implementation.

UNCITRAL

The United Nations Commission on International Trade Law is the "core legal body within the United Nations system in the field of

international trade law" and has the mandate to further the progressive harmonization and unification of the law of international trade.

The membership of UNCITRAL is limited at present to thirty-six States, structured so as to be representative of the various geographic regions and the principal economic and legal systems of the world. Observers from States and international governmental and non-governmental organizations are welcome to participate at meetings of UNCITRAL and of its working groups. On October 17, 1988 Canada was elected by the General Assembly to a six year term on the Commission commencing with the opening of its 22nd session on May 16, 1989. Prior to that time, Canada participated very actively and strongly as an observer at meetings of the Commission and of its working groups.

The Commission now has three working groups: the Working Group on the New International Economic Order, the Working Group on International Payments and the Working Group on International Contract Practices.

UNCITRAL WORK OF CURRENT INTEREST

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

Legislation to implement the Vienna Convention on Contracts for the International Sale of Goods (1980) has now been enacted in five jurisdictions, namely, Nova Scotia, Prince Edward Island, Ontario, New Brunswick and the Northwest Territories. Canada hopes to ratify the Convention in the near future.

Draft Convention on International Bills of Exchange and International Promissory Notes

The UNCITRAL draft Convention on International Bills of Exchange and International Promissory Notes was adopted by the General Assembly of the United Nations on December 9, 1988 and opened for signature by States. The Department of Justice consulted for several years with the Canadian Bankers Association and the Canadian Payments Association with regard to the Convention and Canada has participated actively in its preparation. The Convention will provide a new international regime based on a viable compromise between the common law and the civil law systems. The Government is now giving consideration to Canadian signature to and ratification of the Convention. In order to implement it in Canada, federal legislation would be required.

Model Rules on Electronic Funds Transfers

The UNCITRAL Working Group on International Payments, of which Canada is a member, is continuing the preparation of model rules on electronic funds transfers based on the Legal Guide on EFT that was prepared by UNCITRAL. The model rules could provide a basis for domestic regulation and Canada is participating actively in their preparation. To that end, the Department of Justice is consulting very widely within the federal government, the provincial governments, with private industry and with academics. The Working Group has already had four meetings and will meet again from 27 November to 8 December, 1989 in Vienna and from 10 to 21 July, 1990 in New York. It may take another year beyond then to complete the work.

Stand-by Letters of Credit and Guarantees

The Working group on International Contract Practices met in Vienna from November 21 to December 2, 1988 to review the draft Uniform Rules for Guarantees produced by a working party of the International Chamber of Commerce on January 8, 1988 and to consider their acceptability on a world-wide basis. It has recommended to the Commission that it should undertake the drafting of a model uniform law on stand-by letters of credit and guarantees which could be adopted by States. The Working Group will begin this work at its next session in New York from 5-16 February 1990.

Draft Convention on Liability of Operators of Transport Terminals in International Trade

At its 22nd session at Vienna during May 1989, UNCITRAL adopted a draft Convention on Liability of Operators of Transport Terminals in International Trade and recommended to the General Assembly that a diplomatic conference be held with a view to its adoption by the United Nations.

The purpose of the Convention is to establish uniform limits of liability for the operators of transport terminals engaged in international trade. The Convention does not apply to the carriage of goods, but rather to their transfer by, for example, stevedores or air or land terminal operators. The liability regime is similar to that established under the Montreal Protocols of the Warsaw Convention. In addition to establishing the limits of liability, the draft Convention provides the operators with a security interest in the goods for non-payment of charges.

The Department of Justice is consulting industry representatives and the provinces on the draft Convention, with the cooperation of the

Department of Transport. Federal and provincial legislation would be required to securely implement the Convention in Canada and if the consensus that we proceed, the Conference might wish to undertake the development of implementing legislation.

Government Procurement

Work on government procurement has been commenced by the Working Group on the New International Economic Order. It is expected that the Working Group will agree upon a model procurement code which could be adopted by States. The project will probably take about three years to complete. This subject is considered important by developing States who often perceive their access to markets in developed States as being unnecessarily limited by governmental procurement practices, in particular. The Department of Justice will participate very actively in the work on international procurement. The Department will consult with federal and provincial government departments and with industry as the work progresses. Some consultation has already taken place within the Government and with the Advisory Group on Private International Law.

Countertrade

During its next session in New York from 18 June to 16 July, 1990, the Commission will consider a report from the Secretariat on countertrade and other barter-like transactions and decide what further work it should do on this subject, such as a legal guide, model law or a convention.

UNIDROIT

The International Institute for the Unification of Private Law, known as Unidroit, is a 52-member governmental organization based in Rome, of which Canada has been a member since 1969. Current members include States from eastern and western Europe, Africa, China, North and South America and Australia. The purpose of the organization is to harmonize and coordinate the private law of States by preparing draft laws and conventions to establish uniform law and improve international relations in the field of private law. Canada has participated actively in the organization. Last November, Anne-Marie Trahan, Associate Deputy Minister, Civil Law of the Department of Justice, was elected to the Governing Council of Unidroit, one of the organizations' principal organs.

Diplomatic Conference

In May 1988 the Government of Canada hosted a Diplomatic Conference, organized by the Justice Department, for the purpose of adopting 2 conventions prepared under the auspices of Unidroit, namely the Convention on International Financial Leasing and the Convention on International Factoring. Both Conventions were adopted and 6 States have thus far signed them, being Ghana, Guinea, Nigeria, Morocco, the Philippines and Tanzania. Canada has not yet signed the Conventions, although the Department of Justice has requested the Uniform Law Conference to prepare draft implementing legislation to be adopted by the provinces should it eventually be decided that Canada should become a party to the Conventions.

Leasing and Factoring Conventions

Some of you may be familiar with the Conventions. The Leasing Convention was designed essentially to respond to the need to develop an internationally uniform approach to regulating international financial leasing. The type of arrangement with which the Convention is concerned is a tri-partite arrangement involving a lessee, a lessor and a supplier. The lessee arranges with a financier (lessor) to purchase equipment from a named supplier and to make it available through a contractual arrangement that is essentially a financing device. The lessor is technically the purchaser (owner) of the equipment, but the lessee will use and retain possession of it.

The purpose of the Factoring Convention is to provide uniformity among States with respect to their domestic laws dealing with international factoring. The concept of factoring governed by the Convention concerns an arrangement whereby a finance company (factor) purchases the trade debts of an exporter and in most cases undertakes to recover the debts from the latter's foreign customers for a fee.

The Department has not yet proceeded with its plans to consult the provinces, territories and interested private sector groups and experts on the desirability of Canada becoming a party to the Conventions, preferring to examine first the impact of the new rules on equipment leasing that were announced in the Federal Budget.

UNIDROIT'S WORK PROGRAM

Unidroit has a number of projects on its current Work Program, listed in the headings that follow.

Security Interests in Mobile Equipment

The subject of security interests in mobile equipment is of particular interest to Canada. Following on the momentum established at the 1988 Diplomatic Conference on Leasing and Factoring, Canada proposed that Unidroit look into the desirability and feasibility of developing uniform laws on security interests in mobile equipment. Unidroit agreed and requested Professor Ronald Cuming of the University of Saskatchewan to prepare a report on the subject.

In his report, Professor Cuming stated that the conflict of laws rules of western European and North American jurisdictions are inadequate to meet the needs of those who engage in modern financing transactions involving collateral in the form of mobile equipment (such as trucks and construction equipment). He concluded that there is a need to establish a legal framework within which the financing of high-value mobile equipment can function effectively, although it would not be necessary to develop a complete code on international secured transactions law.

Professor Cuming noted that there is considerable support among experts from a number of countries that Unidroit pursue the preparation of a focussed international instrument on certain aspects of security interests in mobile equipment.

Unidroit intends to circulate Professor Cuming's report to member Governments to seek their views on the desirability of the organization pursuing the development of a convention in this area.

Principles for International Commercial Contracts

The Department has also followed the progress of the Unidroit Working Group that was established to develop an international instrument on principles for international commercial contracts. The Group is not attempting to develop a convention or any instrument that would place obligations on States. Rather, they are drafting rules in non-technical language that incorporate concepts of the various legal systems around the world with a view to developing a document that could assist negotiators or arbitrators who deal with international commercial contracts. It is anticipated a document will be ready for circulation in 1991.

The Working Group is a non-governmental body composed of 13 experts representing various legal systems. The Department is kept informed of the Group's progress by Professor Paul-André Crépeau, a member of the Group.

Forwarding Agency

Unidroit has recently requested member Governments to comment on a proposal to develop uniform rules on forwarding agency. A forwarding agent is in the business of receiving and transmitting goods through various means of transport. A draft convention on international forwarding agency was initially prepared under the auspices of Unidroit in 1959. Following several revisions the draft was circulated to Governments in 1966 with a view to the possible convening of a diplomatic conference. Activity was suspended once it became apparent there was considerable hostility in the forwarding profession to the adoption of the draft convention.

In recent years a renewed interest in the subject has developed, primarily due to the very good prospects for the conclusion of a convention concerning the activities of another category of non-carrying intermediaries, namely operators of transport terminals. Moreover, there is a growing awareness that forwarding agency is now one of the principal areas of transport law in respect of which no agreed international rules exist.

The Department intends to conduct consultations in the coming weeks so that it can inform Unidroit of its views as to the suitability of forwarding agency as a topic for unification. I would be pleased to receive any comments you may have on this issue. Please feel free to forward them to me in Ottawa.

Other Unidroit Projects

The following is a brief summary of where we are with respect to some of the other Unidroit projects I mentioned earlier.

The Hotelkeeper's Contract

Copies of the Unidroit draft convention and commentary thereon have been provided for comment to the Advisory Group on Private International Law and Unification of Law. The Department intends to circulate these documents for comment to the provinces, territories and interest groups in the coming months.

Copies of these documents will be made available to those interested upon request.

International Protection of Cultural Property

Two studies and a draft convention have been prepared within Unidroit on this subject, with particular emphasis on the principles of civil

law affecting the transfer of ownership of cultural property. The Federal-Provincial Advisory Group on Private International Law and Unification of Law has reviewed these documents. Unidroit has created a non-governmental Study Group to pursue the work in this area.

The Franchising Contract

The Department conducted consultations across Canada with a view to determining whether Unidroit should proceed with the development of an international instrument on franchising. Although there was some support for further work on franchising, there was considerable doubt as to the merits of attempting to develop an international instrument to unify the law in this area. Canada recommended to Unidroit that it redirect its work in this area by pursuing the preparation of a legal guide on the franchising contract. This proposal is being considered. Unidroit has decided to retain this subject on its Work Program without according it any priority.

Relations Between Principal and Agent in the International Sale of Goods

Unidroit commissioned a study on this subject from Professor Dietrich Maskow of the Institute of Potsdam-Babelsberg. Professor Maskow concluded in his study that work should be undertaken with a view to concluding a "Convention on Contracts of Commercial Agency in the International Sale of Goods." The Convention would complement the Unidroit Convention on Agency in the International Sale of Goods, which was adopted in 1983 although it is not yet in force. The Department deferred consideration of the 1983 Convention, pending its consideration of the Vienna Convention on Contracts for the International Sale of Goods.

THE FOURTH INTERAMERICAN CONFERENCE ON PRIVATE INTERNATIONAL LAW

As a Permanent Observer to the Organization of American States, Canada sent a delegate, Chantal Bernier, from the Department of Justice, to the Fourth Interamerican Conference on Private International Law, in Montevideo from July 9 to 15, 1989.

The Conference adopted two conventions which may be of great interest to Canada: the Convention on the return of minors (which is similar to The Hague Convention on the Civil Aspects of International Child Abduction) and the Convention on the Recovery of Maintenance. Both conventions were adopted with a federal State clause. They will be closely examined to consider whether Canada should become party to them.

OTHER CONVENTIONS

New developments have also occurred in Canada with respect to important bilateral and multilateral conventions.

The Convention between Canada and the United Kingdom on the Reciprocal Recognition and Enforcement of Judgments has now been extended to eight jurisdictions, namely, British Columbia, Manitoba, Nova Scotia, New Brunswick, Ontario, Prince Edward Island, Saskatchewan and the Yukon Territory and is about to be extended to the Northwest Territories and Newfoundland. We are still hoping that Alberta and Quebec will adopt implementing legislation soon.

Finally, the Department of Justice is examining three conventions on the recovery of maintenance abroad: The Hague Convention on the Law Applicable to Maintenance Obligations (1973), The Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973) and the United Nations Convention on the Recovery of Maintenance Abroad. There is increasing pressure both from inside Canada and outside for becoming party to one or all of these conventions and we are examining this possibility.

CONCLUSION

1. Activities in the field of private international law require, by their nature, very close coordination between the provinces and the federal government. The Uniform Law Conference plays a key role in harmonizing Canadian activities in this field.

2. We are fully aware of the importance of the Conference's work in drafting uniform laws. We value the contribution of the Conference and we hope it will continue to have a strong influence.

3. It is important to Canada, the provinces and States dealing with Canada that provinces consult on amendments to uniforms acts implementing international conventions. The Uniform Law Conference is particularly well placed to assume an important role in monitoring and coordinating such amendments.

APPENDICE F

(voir page 80)

RAPPORT DU MINISTERE DE LA JUSTICE A LA CONFÉRENCE SUR L'UNIFORMISATION DES LOIS

Yellowknife, du 14 au 18 août 1989

Le Canada a été très actif cette année dans le domaine du droit international privé. Plus particulièrement, le Canada a participé aux activités de la Conférence de La Haye de droit international privé, de la CNUDCI, d'UNIDROIT et de l'Organisation des États américains. De plus, le ministère de la Justice a pris des mesures concrètes pour améliorer la communication de renseignements sur ses activités dans le domaine du droit international privé.

INTRODUCTION – COMMUNICATION ET CONSULTATION

Tableau d'étapes des activités canadiennes en droit international privé

(Ce tableau a été distribué lors de la réunion)

Afin de mieux informer les provinces et les groupes intéressés des faits nouveaux en matière de droit international privé au Canada, le ministère fédéral de la Justice a rédigé et diffusé un Tableau d'étapes des activités canadiennes en droit international privé. Ce document paraîtra deux fois l'an, et mettra à jour les renseignements sur toutes les conventions en droit international privé auxquelles le Canada est partie ou envisage de la devenir.

Le Tableau d'étapes fait état des divers organismes sous l'égide desquels des conventions sont négociées ou adoptées, de la participation canadienne, des clauses spéciales, de la législation nécessaire à la mise en oeuvre, de l'apport de la Conférence sur l'uniformisation des lois (qu'il s'agisse de la rédaction d'une loi uniforme, de recommandations ou d'études), de l'adoption de lois de mise en oeuvre et des mesures qui s'imposent pour y donner suite.

Les provinces, les territoires, les associations de barreau et les universités recevront ce Tableau d'étapes qui sera mis à jour aux six mois, soit en octobre et en avril.

Groupe consultatif sur le droit international privé

Le Groupe consultatif sur le droit international privé a été créé en 1973 par le ministère de la Justice afin de fournir à ce dernier des conseils judicieux et soutenus concernant les affaires d'intérêt provincial sur lesquelles des organismes internationaux se penchent. Il se compose de quatre représentants régionaux (l'Ouest canadien, les Maritimes, l'Ontario et le Québec) et d'un juriste du secteur privé. Au moins un membre du Groupe est aussi membre de la Conférence sur l'uniformisation des lois.

Conférence sur l'uniformisation des lois

La Conférence sur l'uniformisation des lois est d'une grande utilité en ce qui a trait à notre travail en droit international privé: la rédaction de lois uniformes permet et facilite l'adoption de lois provinciales de mise en oeuvre des conventions internationales et la communication, par l'entremise de la Conférence, entre le ministère de la Justice et les provinces facilite la résolution de questions ainsi que l'échange de points de vue et de renseignements.

CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

A l'heure actuelle, la Conférence de La Haye de droit international privé est composée de trente-six États membres notamment, la Chine, la Hongrie, quelques États sud-américains et la majorité des États européens.

Cette année, le Canada a participé à de nombreuses et importantes activités au sein de la Conférence de La Haye de droit international privé: le 26 septembre 1988, nous avons adhéré à la Convention relative à la signification et à la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale; le 11 octobre 1988, nous avons signé la Convention relative à la loi applicable au trust et à sa reconnaissance. Nous avons aussi pris part à la seizième session de la Conférence et à la Commission spéciale relative au fonctionnement de la Convention relative à la signification à l'étranger et de la Convention sur l'obtention des preuves à l'étranger.

Convention sur la signification à l'étranger

Le Canada est maintenant partie à cette Convention, qui est en vigueur dans toutes les administrations canadiennes depuis le 1 mai 1989. La mise en oeuvre de cette Convention nécessite la modification des règles de cour dans les administrations où celles-ci sont

incompatibles avec les dispositions de la Convention. Sur réception des modifications, et après compilation, elles seront distribuées à tous les territoires et provinces.

Convention relative à la loi applicable au trust et à sa reconnaissance

La Canada ayant signé cette Convention, trois provinces, soit le Nouveau-Brunswick, l'Ile-du-Prince-Édouard et la Colombie-Britannique, ont déjà adopté une loi de mise en oeuvre suite à la loi uniforme adoptée par la Conférence sur l'uniformisation des lois en 1987. D'autres provinces ont aussi mis en branle le processus d'adoption d'une loi de mise en oeuvre. Nous espérons pouvoir ratifier cette Convention avant la fin de l'année.

Seizième session de la Conférence de La Haye de droit international privé du 3 au 21 octobre 1988

La Conférence de La Haye de droit international privé tient une session à tous les quatre ans. En octobre 1988, le Canada a envoyé une délégation de six personnes à la seizième session de la Conférence dont un rapporteur spécial aux fins de la Convention relative à la loi applicable aux successions à cause de mort. Les personnes suivantes faisaient partie de la délégation canadienne.

Christiane Verdon, représentante du ministère de la Justice

Chantal Bernier, représentante du ministère de la Justice

André Cassette, représentant du Québec

John Gregory, représentant de l'Ontario

Jeffrey Talpis, expert

Donovan Waters, rapporteur spécial

Le rôle du rapporteur spécial consiste à rédiger un rapport sur les points soulevés à l'égard de chacune des dispositions de la Convention adoptée de façon à les expliquer et à paver la voie à leur interprétation. Au cours de la seizième session, on a adopté la Convention sur les successions et le calendrier de travail de la Conférence pour les prochaines années.

La Convention prévoit le droit applicable aux successions à cause de mort lorsque la personne décédée avait des biens dans deux États contractants ou plus. La Suisse a été le premier État à signer cette Convention, le 1 août 1989. Dès que le document du rapporteur spécial sera terminé, nous allons le présenter, conjointement avec la Convention, au Groupe consultatif sur le droit international privé qui

déterminera si le Canada a intérêt à devenir partie à cette Convention. Nous consulterons alors les différentes administrations sur l'opportunité pour le Canada de devenir partie à cette Convention. Si-celles-ci estiment que le Canada devrait y adhérer, nous espérons pouvoir compter sur la rédaction d'une loi uniforme par la Conférence sur l'uniformisation des lois en vue de la mise en oeuvre de la Convention.

Le calendrier de travail de la Conférence de La Haye pour les prochaines années accorde la priorité à élaboration d'une convention sur l'adoption internationale. Elle sera présentée à l'occasion du centenaire de la Conférence, dans le cadre de la dix-septième session qui aura lieu en 1993.

Commission spéciale sur le fonctionnement de la Convention relative à la signification à l'étranger et de la Convention sur l'obtention des preuves à l'étranger

En avril 1989, le Canada a assisté à une séance de la Commission relative au fonctionnement de la Convention sur la signification à l'étranger et de la Convention sur l'obtention des preuves à l'étranger.

La Commission spéciale a abordé un certain nombre de questions de forme, et les États présents ont comparé leurs pratiques et échangée des renseignements sur l'application de la Convention sur leur territoire.

Les questions fondamentales soulevées portaient sur l'exclusivité, c.-à-d. sur la question de savoir si la procédure établie par les Conventions excluait le recours, entre les États contractants, de la procédure prévue aux termes de leur droit national, ainsi que sur la portée des deux Conventions. Il a été entendu qu'aucune des deux conventions n'était exclusive, quoiqu'on doive quand même leur accorder la priorité, et que les conventions, applicables en matière civile ou commerciale, devraient régir toutes les questions d'intérêt privé, y compris certains aspects du droit du travail et de la faillite, mais non celles relevant du droit fiscal ou administratif. En règle générale, les délégués sont d'avis que les deux Conventions sont très utiles et efficaces.

Convention sur l'obtention des preuves à l'étranger

Sur recommandation du Groupe consultatif sur le droit international privé, nous avons présenté la Convention sur l'obtention des preuves à l'étranger en matière civile ou commerciale à toutes les administrations afin de déterminer s'il serait opportun que le Canada y devienne partie. Jusqu'à présent, les réactions ont été très favorables et, en fait, la Conférence sur l'uniformisation des lois, a recommandé, en 1978, que la Convention soit présentée aux provinces dans le but

d'envisager l'adhésion du Canada. A la demande de la Conférence sur l'uniformisation des lois, Rae Tallin avait, à ce moment, rédigé un rapport complet sur la compatibilité des dispositions de la Convention avec les règles provinciales en matière de preuve. Ce rapport avait été transmis à toutes les administrations dans le cadre des consultations sur l'opportunité pour le Canada d'adhérer à la Convention. Je crois savoir que M. Basil Stapleton a demandé aux conseillers législatifs de toutes les administrations de réviser et de mettre à jour le rapport Tallin. Ce travail s'avérera très utile pour la mise en oeuvre de la Convention. Compte tenu de l'intérêt qu'a le Canada à adhérer à la Convention et des avantages concrets que cette dernière offre en matière civile et commerciale, on estime que les administrations devraient entamer le processus de mise en oeuvre.

CNUDCI

La Commission des Nations Unies pour le droit commercial international privé, «principal organe juridique du système des Nations Unies dans le domaine du droit commercial international», a pour mandat de promouvoir l'harmonisation et l'unification progressives du droit commercial international.

Actuellement, ne peuvent être membres de la CNUDCI que trente-six États, représentatifs des diverses régions géographiques et des principaux systèmes économiques et juridiques du monde. Les États et les organismes gouvernementaux et non gouvernementaux internationaux peuvent participer aux séances de la CNUDCI et de ses groupes de travail à titre d'observateurs. Le 17 octobre 1988, l'Assemblée générale a élu le Canada membre de la Commission pour une période de six ans à compter de l'ouverture de la 22e séance de cette dernière, débutant le 16 mai 1989. Avant son élection, le Canada a participé activement et vigoureusement, à titre d'observateur, aux débats de la Commission et de ses groupes de travail.

Il existe à l'heure actuelle trois groupes de travail institués par la Commission : le Groupe de travail du nouvel ordre économique international, le Groupe de travail des paiements internationaux et le Groupe de travail des pratiques en matière de contrats internationaux.

TRAVAUX ACTUELS DE LA CNUDCI INTÉRESSANT LE CANADA

Convention des Nations Unies sur la loi applicable aux contrats de vente internationale de marchandises (Vienne, 1980)

Cinq administrations, soit la Nouvelle-Écosse, l'Ile-du- Prince-Édouard, l'Ontario, le Nouveau-Brunswick et les Territoires du

Nord-Ouest ont déjà adopté une loi pour assurer la mise en oeuvre de la Convention de Vienne sur les contrats de vente internationale de marchandises (1980). Le Canada espère pouvoir ratifier cette Convention dans un proche avenir.

Projet de convention sur les lettres de change internationales et les billets à ordre internationaux

Le 9 décembre 1988, l'Assemblé générale des Nations Unies a adopté le Projet de convention de la CNUDCI sur les lettres de change internationales et les billets à ordre internationaux. Depuis lors, les États intéressés peuvent y adhérer. Le ministère de la Justice a mené de vastes consultations auprès de l'Association des banquiers canadiens et de l'Association canadienne des paiements au sujet de cette Convention. Le Canada a participé activement à la rédaction de la Convention, qui instituera un nouveau régime international fondé sur un compromis viable entre la common law et le droit civil. Le gouvernement canadien considère actuellement l'opportunité de signer et de ratifier cette Convention. Il faudra adopter une loi fédérale pour assurer sa mise en oeuvre au Canada.

Règles types relatives aux transferts électroniques de fonds

Le Group de travail de la CNUDCI sur les paiements internationaux, dont le Canada est membre, poursuit l'élaboration de règles types sur les transferts électroniques de fonds en s'inspirant du Guide juridique sur les TEF rédigé par la CNUDCI. Le Canada participe activement à l'élaboration de ces règles types qui pourraient servir de base à une réglementation nationale. A cette fin, le ministère de la Justice procède que des gouvernements provinciaux, ainsi que de l'industrie privée et des universités. Les membres du Groupe de travail se sont déjà réunis à quatre reprises et prévoient se réunir de nouveau à Vienne du 27 novembre au 8 décembre 1989 et à New York, du 10 au 21 juillet 1990. Il est possible que le travail ne soit pas terminé avant l'année suivante.

Lettres de crédit stand-by et garanties

Les membres du Groupe de travail des pratiques en matière de contrats internationaux se sont réunis à Vienne du 21 novembre au 2 décembre 1988 pour examiner le Projet de règles uniformes sur les garanties présenté par un groupe de la Chambre de commerce internationale le 8 janvier 1988 et pour déterminer si ces règles sont acceptables à l'échelle mondiale. Le Groupe de travail a recommandé à la Commission d'entreprendre la rédaction d'une loi uniforme sur les lettres de

crédits stand-by et les garanties qui pourrait être adoptée par les États. Il entreprendra ces travaux à la prochaine séance qui aura lieu du 5 au 16 février 1990, à New York.

Projet de convention sur la responsabilité des exploitants de terminaux de transport dans le commerce international

A sa 22ième session, tenue à Vienne en mai dernier, la CNUDCI a adopté un Projet de convention sur la responsabilité des exploitants de terminaux de transport dans le commerce international et a recommandé à l'Assemblée générale de tenir une conférence diplomatique en vue de son adoption par les Nations Unies.

Cette Convention vise à uniformiser les limites à la responsabilité des exploitants de terminaux de transport dans le commerce international. Elle ne s'applique pas au transport de marchandises, mais plutôt à leur transbordement par des dockers ou des exploitants de terminaux aériens ou routiers par exemple. Le régime de responsabilité est similaire à celui établi aux termes des Protocoles de Montréal de la Convention de Varsovie. En plus d'établir les limites à la responsabilité, le Projet de convention prévoit, pour les exploitants, une sûreté sur les biens en cas de non-paiement des frais.

Le ministère de la Justice, en collaboration avec la ministère des Transports, mène actuellement des consultations auprès des représentants de l'industrie et des provinces au sujet de ce Projet de convention. S'il est décidé d'adhérer à la Convention, il faudra adopter des lois fédérales et provinciales de mise en oeuvre. A cette fin, la Conférence jugera peut-être à propos d'élaborer une telle loi.

Marchés publics

Le Groupe de travail du nouvel ordre économique international a commencé ses travaux sur l'adjudication des marchés publics. On s'attend à ce que les membres du Groupe de travail s'entendent sur un code type d'adjudication des marchés publics, qui pourrait être adopté par les États. Il faudra compter trois ans environ avant que ce projet ne soit terminé. Cette questions importe particulièrement aux États en développement, qui considèrent souvent que leurs débouchés sur les marchés internationaux sont injustement limités en raison des pratiques en matière d'adjudication des marchés publics. Le ministère de la Justice participera très activement aux travaux sur les marchés publics. Il consultera les ministères fédéraux et provinciaux ainsi que les industries au fur et à mesure que les travaux progresseront. Des consultations ont déjà été entamées au sein du gouvernement et avec le Groupe consultatif sur le droit international privé.

Échanges compensés

Au cours de sa prochaine session qui aura lieu du 18 juin au 16 juillet 1990, à New York, la Commission examinera le rapport du Secrétariat sur les échanges compensés et autres transactions similaires, et déterminera le travail qu'elle devra entreprendre à ce sujet, par exemple un guide juridique, une loi type ou une convention.

UNIDROIT

Le Canada est membre d'Unidroit, ou Institut international pour l'unification du droit privé, depuis 1969. Unidroit est un organisme intergouvernemental composé de 52 États, qui a son siège à Rome. On compte parmi ses membres actuels la Chine, l'Australie ainsi que des États de l'Europe de l'Est et de l'Ouest, de l'Amérique du Nord et du Sud et de l'Afrique. Unidroit a pour mandat d'harmoniser et de coordonner le droit privé, en rédigeant des projets de loi et de convention qui visent à établir des règles uniformes de droit privé et à améliorer les relations internationales en matière de droit privé. Le Canada participe activement aux travaux de cet organisme; en novembre dernier, Anne-Marie Trahan, sous-ministre déléguée, Droit civil, au ministère de la Justice, a été élue au Conseil de direction, un des principaux organes d'Unidroit.

Conférence diplomatique

En mai 1988, le Canada a accueilli une Conférence diplomatique organisée par le ministère de la Justice en vue d'adopter deux conventions, rédigées sous l'égide d'Unidroit, soit la Convention sur le crédit-bail international et la Convention sur l'affacturage international. Ces deux Conventions ont été adoptées et, depuis, ont été signées par six États, soit le Ghana, la Guinée, le Nigeria, le Maroc, les Phillipines et la Tanzanie. Le Canada n'a pas encore signé ces Conventions bien que le ministère de la Justice ait demandé à la Conférence sur l'uniformisation des lois de rédiger un projet de loi de mise en oeuvre pour adoption par les provinces, advenant que le Canada décide de devenir partie aux Conventions.

Conventions sur le crédit-bail et l'affacturage

Certains d'entre vous connaissent déjà ces Conventions. La Convention sur le crédit-bail a été conçue spécialement dans le but de régir uniformément le crédit-bail à l'échelle internationale. Elle s'applique aux contrats tripartites où les co-contractants sont le crédit-preneur, le crédit-bailleur et le fournisseur. Le crédit-preneur s'oblige envers un financier (le crédit-bailleur) à acheter du matériel d'un fournisseur

désigné et à en faire l'objet d'un contrat qui n'est ni plus ni moins un instrument de financement. Le crédit-bailleur est, à toutes fins utiles, l'acheteur (propriétaire) du matériel, mais le crédit-preneur en a la jouissance et la possession.

La Convention sur l'affacturage vise à uniformiser le droit national des États relativement à l'affacturage international. La notion de l'affacturage à laquelle la Convention s'applique est la contrat par lequel une société de financement (cessionnaire) achète les créances commerciales d'un exportateur et, la plupart du temps, entreprend de recouvrer les créances, moyennant des frais, des clients étrangers ce dernier.

Le ministère de la Justice n'a pas encore entamé les consultations prévues avec les provinces, les territoires, les experts et les groupes du secteur privé sur l'opportunité pour le Canada d'adhérer à ces Conventions. Il estime nécessaire d'étudier auparavant les répercussions du nouveau régime sur les contrats de crédit-bail de matériel annoncé dans le budget fédéral.

PROGRAMME DE TRAVAIL D'UNIDROIT

Sur le programme de travail d'Unidroit figurent les projets qui suivent:

Sûretés sur le matériel pouvant être déplacé

Les sûretés sur le matériel pouvant être déplacé intéressent particulièrement le Canada. Emporté par l'élan de la Conférence diplomatique de 1988 sur le crédit-bail et l'affacturage, le Canada a proposé qu'Unidroit fasse une étude sur l'opportunité et la faisabilité d'élaborer des lois uniformes sur les sûretés sur le matériel mobile. Unidroit a accepté la proposition et a chargé le Professeur Ronald Cuming de l'Université de la Saskatchewan de rédiger un rapport sur ce sujet.

Dans son rapport, le Professeur déclare que les règles sur le conflit des lois des pays de l'Europe de l'Ouest et de l'Amérique du Nord ne répondent pas aux besoins de ceux qui s'engagent dans des opérations financières modernes assorties de charges sur du matériel mobile (tel que les camions et l'équipement de construction). Il a conclu que la création d'un cadre juridique pour le financement de matériel mobile de grande valeur comblerait une lacune bien qu'il ne soit pas nécessaire d'élaborer un code complet sur les transactions internationales garanties.

Le Professeur Cuming a signalé que les experts de divers États appuient fortement la proposition voulant qu'Unidroit poursuive la rédaction d'un instrument international touchant certains aspects des sûretés sur le matériel pouvant être déplacé.

Désirant obtenir les points de vue des gouvernements membres sur l'opportunité de poursuivre l'élaboration d'une convention sur ce sujet, Unidroit entend leur remettre le rapport du Professeur Cuming.

Principe relatifs aux contrats commerciaux internationaux

Le Ministère a également suivi le progrès du Groupe de travail d'Unidroit chargé d'élaborer un instrument international sur les principes relatifs aux contrats commerciaux internationaux. Le Groupe de travail ne vise pas à élaborer une convention ni aucun autre instrument international qui créerait des obligations pour les États; il rédige plutôt des règles en langue non spécialisée qui incorporeraient des notions de divers régimes juridiques du monde dans le but d'élaborer un document qui aiderait éventuellement aux négociations ou à l'arbitrage en matière de contrats commerciaux internationaux. On prévoit que ce document sera prêt pour publication en 1991.

Le Groupe de travail est un organisme non gouvernemental composé de 13 experts représentant divers régimes juridiques. Le Professeur Paul-André Crépeau, membre du Groupe de travail, tient le Ministère au courant des travaux du Groupe.

Agence d'expédition

Unidroit a demandé récemment à ses États membres de lui faire part de leurs observations relativement à la proposition d'élaborer des règles uniformes sur les agences d'expédition. Les agences d'expédition sont des entreprises qui reçoivent et transmettent des marchandises par divers moyens de transport. Déjà en 1959, un projet de convention sur les agences internationales d'expédition avait été rédigé sous l'égide d'Unidroit. Après plusieurs révisions, le projet avait été remis aux États membres en 1966 en vue d'une conférence diplomatique éventuelle. Néanmoins, les travaux ont été suspendus en raison de la vive opposition que suscitait l'adoption du projet de convention chez les gens d'affaires oeuvrant dans le domaine de l'expédition.

Au cours des dernières années, on a recommencé à s'intéresser à cette question principalement en raison de la conclusion éventuelle d'une convention relative aux activités d'une autre catégorie d'intermédiaires non transporteurs, c'est-à-dire les exploitants de terminaux de transport. Par ailleurs, on est de plus en plus conscient que les agences d'expédition restent un des principaux domaines du droit relatif au transport pour lequel aucun cadre juridique international n'est prévu.

Le ministère de la Justice entend mener des consultations dans les prochaines semaines afin de soumettre à Unidroit ses points de vue sur

la nécessité d'uniformiser les règles relatives aux agences d'expédition. J'aimerais beaucoup connaître votre point de vue à ce sujet. N'hésitez pas à m'écrire à Ottawa.

Autres projets d'Unidroit

Le sommaire suivant donne un aperçu des travaux du Ministère relativement aux autres projets d'Unidroit que j'ai mentionnés plus tôt.

Contrats d'hôtellerie

Des exemplaires du projet de convention d'Unidroit accompagné de notes explicatives ont été soumis à l'attention du Groupe consultatif sur le droit international privé et l'uniformisation des lois. Le ministère de la Justice entend distribuer ces documents au cours des prochains mois aux provinces et territoires ainsi qu'aux groupes intéressés. Les intéressés peuvent se procurer ces documents sur demande.

Protection internationale des biens culturels

Unidroit a réalisé deux études et un projet de convention sur ce sujet, en mettant l'accent sur les principes de droit civil régissant le transfert de propriété de biens culturels. Le Groupe consultatif fédéral-provincial sur le droit international privé et l'uniformisation des lois a étudié ces documents. Unidroit a créé un Groupe d'étude non gouvernemental pour poursuivre les travaux dans ce domaine.

Franchisage

Le Ministère a mené des consultations à l'échelle du pays afin de déterminer si Unidroit devrait ou non poursuivre l'élaboration d'un instrument international sur le franchisage. Bien que certains soient favorables à la poursuite des travaux sur le franchisage, on doute beaucoup du bien-fondé de l'élaboration éventuelle d'un instrument international visant à uniformiser ce domaine du droit. Le Canada a recommandé à Unidroit de réorienter ses travaux dans ce domaine et de rédiger un guide juridique sur le franchisage. Unidroit étudie actuellement cette recommandation. Il a décidé de garder ce projet à son programme de travail, mais ne le considère plus comme prioritaire.

Liens entre représentant et représenté dans la vente internationale de marchandise

Unidroit a chargé le Professeur Dietrich Maskow de l'Institut de Potsdam-Babelsberg de mener une étude sur ce sujet. Dans son étude, le Professeur Maskow a conclu que des travaux devraient être entrepris en

vue de conclure une "Convention sur la représentation commerciale dans la vente internationale de marchandises". Cette Convention serait le complément de la Convention d'Unidroit sur la représentation en matière de vente internationale de marchandises, qui a été adoptée en 1983 mais qui n'est pas encore en vigueur. Le Ministère se penchera plus tard sur la Convention de 1983 et se concentre actuellement sur l'étude de la Convention de Vienne sur les contrats de vente internationale de marchandises.

LA QUATRIEME CONFÉRENCE INTERAMÉRICAINE DE DROIT INTERNATIONAL PRIVÉ

En sa qualité d'observateur permanent à l'Organisation des États américains, le Canada a envoyé une déléguée, Chantal Bernier du ministère de la Justice, à la quatrième Conférence interaméricaine de droit international privé, qui a eu lieu à Montevideo du 9 au 15 juillet 1989.

La Conférence a adopté deux conventions qui peuvent s'avérer d'un grand intérêt pour le Canada: la Convention sur le retour international des mineurs (semblable à la Convention de La Haye sur les aspects civils de l'enlèvement international d'enfants) et la Convention sur les obligations alimentaires. Ces deux Conventions, qui renferment une clause fédérale, ont été adoptées. Elles seront attentivement étudiées afin de déterminer l'opportunité pour le Canada d'y devenir partie.

AUTRES CONVENTIONS

Des progrès ont également été accomplis au Canada relativement à d'importantes conventions bilatérales ou plurilatérales.

La Convention entre le Canada et le Royaume-Uni pour assurer la reconnaissance et l'exécution réciproques des jugements s'applique maintenant à huit administrations: la Colombia-Britannique, le Manitoba, la Nouvelle-Écosse, le Nouveau-Brunswick, l'Ontario, l'Ile-du-Prince-Edouard, la Saskatchewan et le territoire du Yukon. Les Territoires du Nord-Ouest et Terre-Neuve s'apprêtent à adopter des lois de mise en oeuvre, et nous espérons que l'Alberta et le Québec le feront aussi dans un avenir rapproché.

Enfin, le ministère de la Justice examine actuellement trois conventions relatives au recouvrement des aliments à l'étranger: la Convention de La Haye sur la loi applicable aux obligations alimentaires (1973), la Convention de La Haye concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires et la Convention des Nations Unies sur le recouvrement des aliments à l'étranger. On exerce

actuellement de plus en plus de pressions sur le Canada, tant au pays qu'à l'étranger, pour qu'il devienne partie à l'une ou à toutes ces conventions, et nous étudions cette possibilité.

CONCLUSION

1. La nature de ce domaine requiert une coordination étroite entre les provinces et le gouvernement fédéral afin de répondre aux besoins des provinces et de prendre les mesures appropriées sur le plan international. La Conférence sur l'uniformisation des lois joue un rôle de premier plan en ce qui a trait à l'harmonisation des activités canadiennes en droit international privé.

2. Nous sommes parfaitement conscients de l'importance des travaux de rédaction de lois uniformes de la Conférence. Nous apprécions beaucoup la participation de la Conférence à cet égard et nous espérons qu'elle sera sans cesse grandissante.

3. Il est dans l'intérêt du Canada, de toutes les provinces et de tous les États qui font affaire avec le Canada que les provinces se consultent sur les modifications qu'elles apportent aux lois uniformes de mise en oeuvre de conventions internationales afin d'assurer la conformité de ces lois avec les instruments qu'elles mettent en oeuvre et la plus grande uniformité possible.

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEED
THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW	Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961)	Under Study	No federal State clause No reservations	Implementation in all provinces and territories	— —	— —	Consultation with provinces and territories as to possible accession
	Convention on the Service Abroad of Judical and Extrajudicial Documents in Civil or Commercial Matters (1965)	Accession 26.09.88 Inforce 1.5.89	No federal State clause Declarations against certain forms of service, regarding translation requirements and delays	Amendment to rules of court in all jurisdictions	Discussed: Report 1979	Amendments to rules of court in most jurisdictions	Amendments to rules of court where needed immediately

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEED
	Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970)	Consultation with provinces and territories upon recommendation from Advisory Group on Private International Law Letter: 17.2'89	No federal State Clause Reservations regarding language requirements, delays and pretrial discovery	Implementing legislation in all jurisdictions	Recommended consultation with provinces and territories	— —	Reply from all provinces and territories to letter of 17.2'89 as to implementation in view of accession
	Convention on the Law Applicable to Maintenance Obligations (1973)	Disfavourable examination by the Federal - Provincial - Territorial Committee on Family Law	Federal State clause Reservation regarding admissible claims under the Convention	— —	— —	— —	— —

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEED
	Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973)	Disfavourable examination by the Federal - Provincial - Territorial Committee on Family Law	Federal State clause Reservation regarding admissible claims under the Convention	— —	— —	— —	— —
	Convention on the Civil Aspects of International Child Abduction (1980)	In force throughout Canada 1.4.'88 Special Commission of The Hague Conference on Private International Law on the Operation of the Convention 23.10.'89 - 26.10.'89	Federal State clause Reservation on legal aid	Implementing legislation in all provinces and territories	Uniform Act 1982	All provinces and territories with reservations; no reservation in Man. (1983-1988)	Distribution of report of Canadian delegation to provinces and territories

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEED
	Convention on the Law Applicable to Trusts and on Their Recognition (1984)	Signed 11.10.88	Federal State clause Declaration to include trusts created judicially Reservations: to allow mandatory rules; to exclude trusts governed by the law of a non-contracting State; to exclude retroactive effect	Implementing legislation in all provinces and territories	Uniform Act 1988	P.E.I. with declaration only (1988) N.B. with declaration and qualified reservation on retroactive effect (1988) B.C. with declaration only (1989)	Implementing legislation in N.S., Nfld, Qc., Ont., Man., Sask., Alta., Y.T. and N.W.T.
	Draft Convention on the Law Applicable to Succession to the Estates of Deceased Persons (1988)	Under Study	Federal State clause Reservations regarding succession agreements, applicable law of non-contracting States, choice of law	Implementing legislation in all provinces and territories	— —	— —	Consideration by Advisory Group on Private International Law; Consultation with provinces and territories as to possible signature

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEED
INTERNATIONAL CIVIL AVIATION ORGANISATION	Convention on the International Recognition of Rights in Aircrarft (1948)	Support from all provinces and territories except Qc., and Nfld. Federal; provincial and territorial draft bills finalized	No federal State clause	Implementing legislation in all jurisdictions	— —	N.S. (1988) P.E.I. (1988)	Indication of support from Qc., and Nfld.
INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)	Convention Providing a Uniform Law on the Form of an International Will (1973)	Accession 1978 for Man. and Nfld. extended to Ont., Alta. (1978) and to Sask. (1982)	Federal State clause	Provincial and territorial implementing legislation	— —	Alta. (1976) Man. (1975) Nfld. (1975-1976) Ont. (1977) Sask. (1980-1981)	Consultation with remaining provinces and territories on extension of Convention

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEED
	Convention on Agency in the International Sale of Goods (1983)	Not yet in force Canada has not signed nor acceded	Federal State clause Declarations: regarding States with similar rules, written authorities, applicable law, scope of the Convention and organisations not considered agents	Implementing legislation in all jurisdictions	— —	— —	Consultation with Advisory Group on Private International Law and provinces, territories and business groups on desirability of Canada becoming party after accession to Vienna Sales Convention
	Convention on International Factoring (1988)	Not in force Canada has not signed nor acceded	Federal State clause Declaration: non-applicability of Convention between States with similar rules, certain assignments ineffective against debtor	Implementing legislation in all jurisdictions	Was requested to draft uniform act	— —	Consultation with provinces, territories and business groups on desirability of Canada becoming party

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEED
	Convention on International Financial Leasing (1988)	Not in force. Canada has not signed nor acceded	Federal State clause Declaration: non-applicability of Convention between States with similar rules; substitution of domestic law in certain cases	Implementing legislation in all jurisdictions	Was requested to draft uniform act	— —	Consultation with provinces, territories and business groups on desirability of Canada becoming party
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)	In force throughout Canada 10.8.1986	No federal State clause	Implementing legislation in all jurisdictions	Uniform Act 1985	All jurisdictions 1986	— —

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEED
	Convention on Contracts for the International Sale of Goods (Vienna Sales Convention 1980)	Support from all jurisdictions and Advisory Group on Private International Law	Federal State clause Reservations: to exclude Part II or Part III, to exclude application between States with similar rules, to exclude 1.1.b), to allow only written contracts	Implementing legislation in all jurisdictions	Uniform Act 1986	N.S. (1988) P.E.I. (1988) Ont. (1988) N.W.T. (1988) N.B. (1989)	Implementing legislation in Nfld, Qc., Man., Sask., Alta, B.C., Y.T. Federal implementing legislation
	Model Law on International Commercial Arbitration (1985)	Adopted by UNCITRAL	— —	Implementing legislation in all jurisdictions	Uniform Act 1986	All jurisdictions 1986-1988	— —

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEED
	Draft Convention on Liability of Operators of Transport Terminals in International Trade	Draft adopted at Spring 1989 Session of UNCITRAL, referred to General Assembly; diplomatic conference recommended for 1991	Federal State clause desirable	Implementing legislation in all jurisdictions	— —	— —	Further consultation with provinces, industry and Advisory Group on Private International Law for development of Canadian position
	Convention on international bills of exchange and international promissory notes	Adopted by the U.N. General Assembly December 9, 1988	Federal State clause	Federal legislation only	— —	— —	Signature of Convention and federal implementing legislation

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEED
UNITED NATIONS ORGANISATION	Convention on the Recovery of Maintenance Abroad (1956)	Disfavourable examination by Federal - Provincial - Territorial Committee on Family Law	No adequate federal state clause	— —	— —	— —	— —
BILATERAL CONVENTIONS	Canada-UK Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (1984)	In force in N.B., N.S., P.E.I., Ont., Man.,Sask., B.C., Y.T.	Federal State clause	Implementing legislation in all jurisdictions	Uniform Act 1983	B.C. (1984) Man. (1984) N.S. (1984) N.B. (1984) Ont. (1984) Y.T. (1984) P.E.I. (1987) N.W.T. (1988) Sask. (1988) Nfld (1986-1989) Can. (1989)	Implementing legislation in Alta and Qc. Extension to N.W.T. and Nfld

OTTAWA CONTACT FOR CANADIAN ACTIVITIES IN PRIVATE INTERNATIONAL LAW

ORGANISATION:	OTTAWA CONTACT:	TELEPHONE NUMBER:
The Hague Conference on Private International Law	Chantal Bernier	957-4963
International Civil Aviation Organisation	Gilles Lauzon	957-4961
International Institute for the Unification of Private Law (Undroit)	Chantal Bernier Robert Desjardins	957-4963 957-4977
United Nations Commission on International Law Trade	Lewis Levy Ross Hornby	957-4958 957-4967
United Nations Organisation (Convention on the Recovery of Maintenance Abroad)	Chantal Bernier	957-4963
Bilateral Conventions (Canada-Uk Convention on Reciprocal Recognition and Enforcement of Judgments)	Chantal Bernier	957-4963

ORGANISATION	ACTIVITÉ	ÉTAPE	CLAUSES PARTICULIÈRES	LÉGISLATION REQUISE	CONÉRENCE D'UNIFORMISATION DES LOIS	LEGISLATION ADOPTÉE	MESURES À PRENDRE
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ	Convention supprimant l'exigence de légalisation des actes publics étrangers (1961)	A l'etude	Aucune clause fédérale Aucune réserve	Mise en oeuvre dans les provinces et les territoires	— —	— —	Consultation avec les provinces et territoires quant à la possibilité d'adherer
	Convention relative a la signification et la notification à l'etranger des documents judiciares et extrajudiciares en matière civile ou commerciale (1965)	Adhésion 26.09.88 En vigueur 1.5.89	Aucune clause fédérale Déclaration contre certaines formes de signification et concernant traductions et délais	Amendements aux regles de cour	Discute: Rapport 1979	Amendements aux reégles de pratique dans la plupart des provinces	Amendements regles de pratique là où necessaire immediatement

ORGANISATION	ACTIVITÉ	ÉTAPE	CLAUSES PARTICULIÈRES	LÉGISLATION REQUISE	CONÉRENCE D'UNIFORMISATION DES LOIS	LÉGISLATION ADOPTÉE	MESURES À PRENDRE
	Convention sur l'obtention de la preuve a l'étranger en matière civile ou commercial (1970)	Consultation avec provinces et territoires selon recommandation du Groupe consultatif sur le droit international privé Lettre: 17.2.89	Aucune clause fédérale Réserves concernant traduction, délais et "pre-trial discovery"	Lois provinciales et territoriales de mise en oeuvre	Recommandation: consultation avec provinces et territoires	— —	Réponse à lettre du 17.2.89 concernant la mise en oeuvre en vue de l'adhésion
	Convention sur la loi applicable aux obligations alimentaires (1973)	Examen défavorable par le Comité fédéral – provincial – territorial sur le droit de la famille	Clause fédérale Réserve concernant les demandes admissibles aux termes de la Convention	— —	— —	— —	— —

ORGANISATION	ACTIVITÉ	ÉTAPE	CLAUSES PARTICULIÈRES	LÉGISLATION REQUISE	CONÉRENCE D'UNIFORMISATION DES LOIS	LÉGISLATION ADOPTÉE	MESURES À PRENDRE
	Convention concernant la reconnaissance et l'execution de décisions relatives aux obligations alimentaires (1973)	Examen défavorable par le Comité fédéral - provincial - territorial sur le droit de la famille	Réserve concernant les demandes admissible aux termes de la Convention Clause fédérale	— —	— —	— —	— —
	Convention sur les aspects civils de l'enlèvement *international d'enfants* (1980)	En vigueur dans tout le Canada 1.4.88 Commission speciale de la Conférence de la Haye de droit international privé sur le fonctionnement de la Convention 23.10.89 26.10.89	Clause fédérale Réverse concernant l'aide juridique	Lois de mise en oeuvre dans toutes les provinces et territoires	Lois uniforme (1982)	Toutes les provinces et territoires avec reserve; aucune reserve Man. (1983-1988)	Distribution du rapport de la délégation canadienne *a toutes les provinces et* les territoires

ORGANISATION	ACTIVITÉ	ÉTAPE	CLAUSES PARTICULIÈRES	LÉGISLATION REQUISE	CONÉRENCE D'UNIFORMISATION DES LOIS	LÉGISLATION ADOPTÉE	MESURES À PRENDRE
	Convention relative a la loi applicable aux trusts et à sa reconnaissance (1984)	Signee 11.10.'88	Clause fédérale Déclaration pour inclure trusts créés par décision en justice Réserves: permettant lois impreratives; excluant trusts régis par loi d'un Etat non-contractant; excluant effet rétroactif;	Lois de mise en oeuvre dans provinces et territoires	Loi uniforme (1988)	I.P.E. avec déclaration (1988) N.-B. avec déclaration et reserve partielle excluant effet rétroactif (1988) C.B. avec déclaration (1989)	Lois de mise en oeuvre N.E., T.-N., Qc., Ont., Man., Sask., Alta, T.Y., et T.-N.O.
	Project de Convention sur la loi applicable aux succession à cause de mort (1988)	A l'étude	Clause fédérale Réserves concernant les pactes successoraux, la loi applicable d'un Etat non contractant, choix de loi	Lois de mise en oeuvre dans provinces et territoires	— —	— —	Considérations par le Groupe consultatif sur le droit international privé. Consultation avec provinces et territoires concernant signature possible

ORGANISATION	ACTIVITÉ	ÉTAPE	CLAUSES PARTICULIÈRES	LÉGISLATION REQUISE	CONÉRENCE D'UNIFORMISATION DES LOIS	LÉGISLATION ADOPTÉE	MESURES A PRENDRE
ORGANISATION DE L'AVIATION CIVILE INTERNATIONALE	Convention relative à la reconnaissance internationale des droits sur aeronef (1948)	Appui de provinces et territoires sauf Qc., T.-N. Avant-projets de lois fédérale, provinciales et territoriales finalisees	Aucune clause fédérale	Lois de mise en oeuvre par tous gouvernements	— —	N.E. (1988) I.P.E. (1988)	Indication d'appui de Qc., T.-N.
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVÉ (UNIDROIT)	Convention portant loi uniforme sur la forme d'un testament international (1973)	Adhesion 1978 pour Man., T.-N. Étendue a Ont., Alta (1978) et Sask. (1982)	Clause fédérale	Lois de mise en oeuvre dans provinces et territoires	— —	Alta (1976) Man. (1975) T.-N. (1975-1976) Ont. (1977) Sask. (1980-1987)	Consultation avec autres provinces et territoires concernant extension de la Convention

ORGANISATION	ACTIVITÉ	ÉTAPE	CLAUSES PARTICULIÈRES	LÉGISLATION REQUISE	CONÉRENCE D'UNIFORMISATION DES LOIS	LÉGISLATION ADOPTÉE	MESURES À PRENDRE
	Convention sur la représentation en matière de vente internationale de marchandises (1983)	Pas en vigueur Canada n'a pas signe m adhéré	Clause fédérale Déclarations: concernant États ayant règles similaires, procurations, loi applicable, portée de la Convention et organisations non-considérées intermedaires	Lois de mise en oeuvre par tous gouvernements	— —	— —	Consultation avec Groupe consultatif sur droit international privé, provinces, territoires et milieux d'affaires quant à opportunité de devenir partie après adhésion à Convention de Vienne sur la vente
	Convention sur l'affacturage international (1988)	Pas en vigueur Canada n'a pas signé ou adhére	Clause fédérale Déclarations: non-application de la Convention entre États ayant règles similaires, irrecevabilité de certaines cessions de créances à l'encontre du débiteur	Lois de mise en oeuvre par tous gouvernements	Priée de formuler loi uniforme	— —	Consultation avec provinces, territoires et milieux d'affaires quant à opportunité de devenir partie

ORGANISATION	ACTIVITÉ	ÉTAPE	CLAUSES PARTICULIÈRES	LÉGISLATION REQUISE	CONÉRENCE D'UNIFORMISATION DES LOIS	LÉGISLATION ADOPTÉE	MESURES À PRENDRE
	Convention sur le crédit-bail international (1988)	Pas en vigueur Canada n'a pas signé ou adhéré	Clause fédérale Déclaration: non-application de la Convention entre États ayant règles similaires, substitution du droit interne dans certains cas	Lois de mise en oeuvre par tous gouvernements	Priée de formuler loi uniforme	— —	Consultation avec provinces et territoires et milieux d'affaires quant à l'opportunité de devenir partie
COMMISSION DES NATIONS UNIES POUR LE DROIT COMMERCIAL INTERNATIONAL (CNUDCI)	Convention des Nations Unies sur la reconnaissance et l'exécution des sentences arbitrales étrangères (1958)	En vigueur dans tout le Canada 10.8.86	Aucune clause fédérale	Lois de mise en oeuvre par tous gouvernements	Loi uniforme (1986)	Tous gouvernements (1986)	— —

ORGANISATION	ACTIVITÉ	ÉTAPE	CLAUSES PARTICULIÈRES	LÉGISLATION REQUISE	CONÉRENCE D'UNIFORMISATION DES LOIS	LÉGISLATION ADOPTÉE	MESURES À PRENDRE
	Convention sur les contrats de vente internationale de marchandises (Convention de Vienne de 1980)	Appui de tous les gouvernements et du Groupe consultatif sur le droit international privé	Clause fédérale Réserves: excluant Partie II et III, excluant application entre États ayant règles similaires, excluant 1.1 b) et autorisant seuls contrats écrits	Lois de mise en oeuvre par tous gouvernements	Loi uniforme (1986)	N.E. (1988) I.P.E. (1988) Ont. (1988) T.N.-O. (1988) N.-B. (1989)	Lois de mise en oeuvre, T.-N., Qc., Man., Sask., Alta, C.-B., T.Y. Lois de mise en oeuvre fédérale
	Loi-type sur l'arbitrage commercial international (1985)	Adoptée par CNUDCI	— —	Lois de mise en oeuvre par tous gouvernements	Loi uniforme (1986)	Tous gouvernement (1986-1988)	— —

ORGANISATION	ACTIVITÉ	ÉTAPE	CLAUSES PARTICULIÈRES	LÉGISLATION REQUISE	CONÉRENCE D'UNIFORMISATION DES LOIS	LÉGISLATION ADOPTÉE	MESURES À PRENDRE
	Convention sur la responsabilité des exploitants de transport en commerce international	Projet adopté à session printemps 1989 de CNUDCI; référé à l'Assemblée Générale; conférence diplomatique recommandée pour 1991	Clause fédérale souhaitable	Lois de mise en oeuvre par tous gouvernements	— —	— —	Poursuite des consultations avec provinces, milieux d'affaires et Groupe consultatif sur le droit international privé pour développement de position canadienne
	Convention sur les lettres de change internationales et les billet à ordre internationaux	Adoptée par l'Assemblée Générale des Nations Unies le 9 décembre 1988	Clause fédérale	Loi fédérale de mise en oeuvre	— —	— —	Signature de la Convention et adoption d'une loi fédérale de mise en oeuvre

ORGANISATION	ACTIVITÉ	ÉTAPE	CLAUSES PARTICULIÈRES	LÉGISLATION REQUISE	CONÉRENCE D'UNIFORMISATION DES LOIS	LÉGISLATION ADOPTÉE	MESURES À PRENDRE
ORGANISATION DES NATIONS UNIES	Convention sur le recouvrement à l'étranger des obligations alimentaires	Examen défavorable par le Comité fédéral – provincial – territorial sur le doit de la famille	Pas de clause fédérale adéquate	— —	— —	— —	— —
CONVENTIONS BILATÉRALES	Convention Canada Royaume – Uni sur la reconnaissance et l'execution reciproque des jugements en matière civile et commerciale	En vigueur au N.-B., N.E., I.P.E., Ont., Man., Sask., C.-B., T.Y.	Clause fédérale	Lois de mise en oeuvre par tous gouvernements	Loi uniforme (1983)	C.-B. (1984) Man. (1984) N.E. (1984) N.-B. (1984) Ont. (1984) T.Y. (1984) I.P.E. (1987) T.N.-O. (1988) Sask. (1988) T.-N. (1986-1989) Can. (1984)	Lois de mise en oeuvre Qc., Alta Extension à T.N.-O. et T.-N.

CONTACT À OTTAWA CONCERNANT LES ACTIVITÉS CANADIENNES EN DROIT INTERNATIONAL PRIVÉ

ORGANISATION:	CONTACT À OTTAWA:	NUMÉRO DE TÉLÉPHONE:
Conférence de La Haye de droit international privé	Chantal Bernier	957-4963
Organisation de l'aviation civile internationale	Gilles Lauzon	957-4961
Institut international pour l'unification du droit privé (Unidroit)	Chantal Bernier Robert Desjardins	957-4962 957-4977
Commission des Nations Unies pour le droit commercial international (CNUDCI)	Lewis Levy Ross Hornby	957-4958 957-4967
Organisation des Nations Unies (Convention sur le recouvrement à l'étranger des obligations alimentaires)	Chantal Bernier	957-4963
Conventions bilatérales (Convention entre le Canada et le Royaume-Uni sur la reconnaissance et l'exécution réciproque des jugements)	Chantal Bernier	957-4963

APPENDIX F

(See page 80)

UNIFORM LAW CONFERENCE OF CANADA REPORT OF THE SPECIAL COMMITTEE ON PRIVATE INTERNATIONAL LAW

The Special Committee on Private International Law was formed by the Uniform Law Conference in 1973 to provide effective cooperation between the federal and provincial governments and to smooth the way of Canadian ratification and accession to international treaties and conventions. The purpose of the Conference can best be achieved by a close liaison between the Committee and the Advisory Group on Private International Law and Unification of Law established by the federal Department of Justice. A member of your Conference's Special Committee, Christiane Verdon, Q.C., is a Chairman of the Advisory Group of the federal Department of Justice. Two other members of the Special Committee, namely John Gregory and Peter Pagano are also members of the Advisory Group. Mr. Graham D. Walker, Q.C., the Special Committee Chairman, is a former member of the group. The members of the Special Committee are Emile Colas, Q.C., LL.D., John Gregory, Peter Pagano, Christiane Verdon, Q.C., and Graham D. Walker, Q.C.

The Special Committee has had referred to it, the Unidroit Convention on International Factoring and the Unidroit Convention on International Financial Leasing. When a determination has been made by the Department of Justice, in consultation with the provinces and territories, that there is sufficient interest to warrant Canada becoming a party to the conventions, draft uniform legislation for adoption by the jurisdictions will be presented to the Uniform Law Section. At the present time, this determination has not been made. Unless other more urgent matters are referred to the Special Committee by the Advisory Committee on Private International Law and Unification of Law, then draft uniform legislation in respect of the two mentioned Conventions will be prepared for consideration of the Uniform Law Section in August, 1990.

All of which is respectfully submitted on behalf of the Committee.

Graham D. Walker, Q.C.
Chairman

APPENDIX G

(See page 81)

REPORT ON UNIFORM PROTECTION OF PRIVACY: TORT BY THE SASKATCHEWAN COMMISSIONERS

Uniform Law Conference of Canada
Yellowknife, Northwest Territories
August, 1989

BACKGROUND

Protection of privacy has been considered by the Conference on a number of occasions and in several contexts since 1971. It has been recognized that legislative initiatives are required both in regard to specific problem areas where privacy is threatened, and to create a general tort remedy.

In 1985 a preliminary report presented to the Conference[1] by the Saskatchewan Commissioners recommended that the Conference consider as its main and immediate objective the adoption of a Uniform Privacy Act which recognizes a tort of invasion of privacy. In 1986 proposals were presented for discussion purposes in the form of a preliminary draft Protection of Privacy Act[2] which followed, in outline, the Saskatchewan, Manitoba, and British Columbia *Privacy Acts*. Although the general framework of the draft legislation was satisfactory to the Conference, the Saskatchewan Commissioners were asked to undertake further study with respect to certain provisions. In some instances further clarification was requested. In other instances alternative wording was proposed, or a complete reconsideration of a provision was suggested.

The purpose of this report is to consider recommendations for alteration to the 1986 draft. In what follows, relevant provisions from the 1986 draft are set out, followed by discussion and proposed changes.

DISCUSSION

Section 2

2. It is a tort actionable without proof of damage for a person to violate the privacy of an individual.

The 1986 draft, following the 1978 draft,[3] distinguishes between a person (an entity possessing legal personality, including a corporation) and an individual (a human being). This distinction is not made in the existing provincial Privacy Acts. The Conference agreed with this approach, recognizing that the concept of privacy is fundamentally an issue concerning human beings. We recommend no change in this regard.

Concern was expressed, however, that genuine violations of individual privacy not be overlooked simply because of a corporate connection. It was thought that by denying a corporation an independent right of action, individuals involved in the day to day running of a corporation would be precluded from pursuing a personal right of action if it could be said that the activity complained of was primarily directed at the corporation rather than the individual.

Various types of violations of privacy, although primarily associated with business or industry, may still have the effect of interfering with the individual privacy of a corporation's principals. In such cases the corporate shield would not prevent an individual from claiming relief pursuant to the legislation. It is the effect of the interference on an individual's solitude or anonymity rather than the motivation behind the impugned activity that determines whether a prima facie violation has occurred. Although it was not intended that this legislation directly address the mounting problems associated with corporate espionage, if individual privacy is threatened in this or any other context, protection is afforded by the legislation.

> BE IT RESOLVED: That the Uniform Privacy Act provide protection for individuals, as opposed to legal persons.

Section 3

3. Without limiting the generality of section 2, proof that there has been:

   (c) use of the name or likeness or voice of an individual for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, the individual is identified or identifiable and the user intended to exploit the name or likeness or voice of that individual;

   (e) dissemination of information concerning an individual where such dissemination is not authorized by law, or where such information is released in breach of confidence;

is prima facie proof of an invasion of privacy of an individual.

(i)) *Appropriation of Personality.*

Clause (c) of this section affords protection against the unauthorized commercial appropriation of an individual's name, likeness or voice. At the 1986 Conference the question was asked whether the inclusion of this provision was necessary. It was suggested that the common law provided sufficient protection in this area. Although we do not recommend altering our original proposal in this regard, the question did prompt us to review the emerging developments in this area of the law.

Until fairly recently, Canadian courts consistently refused to recognize any independent right of action for the appropriation, without consent, of another's personal attributes. Liability would only be imposed if the plaintiff could fit within one of the existing torts. The traditional categories of tort, such as defamation,[4] breach of confidence,[5] and passing off[6] have provided a remedy in some instances of unauthorized use of an individual's name or likeness. However, the remedies that have been afforded by these common law torts are limited.[7] For example, the unauthorized use of a person's name or likeness may be actionable in defamation but the critical element of such an action is damage to reputation. Unless the unauthorized appropriation causes the plaintiff to be lowered in the estimation of right-thinking people generally, or causes him to be shunned or avoided, no action will lie.

Similarly, the tort of passing off has provided a remedy in some cases. Traditionally, this tort existed to prevent unfair competition in the business world. Courts will intervene where a person has assumed a name or symbol of a competitor, misleading the public into identifying him with the competitor. The law of passing off is only attracted, however, where the plaintiff and defendant are competing in a common trade or are commercially associated in a common sector of the commercial world. This critical element is often referred to as the "common field of activity" requirement. In an unauthorized celebrity endorsement case, the prospects for redress are poor.

More recently, however, the Ontario courts have recognized a new tort of wrongful appropriation of personality. There is now authority for imposing liability for misappropriation of personality separate and apart from the traditional torts. The case of *Krouse v. Chrysler Canada Ltd.*[8] involved a professional football player whose photograph had been used in a promotional campaign by an auto manufacturer without his consent. Mr. Justice Estey, as he then was, speaking for the Ontario Court of Appeal, reviewed the categories of the law traditionally affording relief in such cases and concluded that:

> I, therefore, conclude from the foregoing examination of the authorities in the several fields of tort related to the allegations made herein that the common law does contemplate a concept in the law of torts which may be broadly classified as an appropriation of one's personality.[9]

And further:

> ...there may well be circumstances in which the courts would be justified in holding a defendant liable in damages for appropriation of a plaintiff's personality, amounting to an invasion of his right to exploit his personality by the use of his image, voice or otherwise with damage to the plaintiff, but after a careful review of the evidence in the present action, I have come to the conclusion that the respondent has not demonstrated any infringement by the appellants of any legal right of the respondent.[10]

In *Athans v. Canadian Adventure Camps Ltd.* et al,[11] the opening created by the *Krouse* case was exploited to give full judicial recognition to this new head of tort liability. This case held that the reproduction for commercial advantage of photographs of the plaintiff, a professional water skier, was an invasion of his exclusive right to market his personality.He was entitled to compensation in an amount equal to what his endorsement would have cost had his permission been obtained.

Although there is now authority for the proposition that a tort of misappropriation of personality exists in Canada, the exact parameters and elements of the tort remain uncertain. It should be pointed out that the right being protected in this new head of tort liability is legally distinct from a right of privacy. Mr. Justice Estey in the *Krouse* case reviewed the development of the equivalent type of action in the United States and noted that although the action was originally classified as a breach of privacy, it had recently been described by the American courts as a breach of the right to publicity.

Professor Dale Gibson of the University of Manitoba, in a comment on the *Athans* case, has pointed out that a claim to exclusive rights of publicity is really the very antithesis of a claim to privacy:

> The plaintiff is not asking to be protected from public scrutiny; he is asking for the right to profit commercially from such scrutiny. Unauthorized advertising certainly can involve breaches of privacy, such as in the *Tolley and Mazatti* cases where the plaintiffs presumably did not want any publicity, but the wrong done to such individuals is very different from that involved in situations like the present case, where the plaintiff seeks to profit from the advertising.[12]

It is not apparent how this recent development in the law of torts will interact with privacy law. Although some overlap in protection will undoubtedly occur, the two available remedies should be viewed as complementing each other rather than covering the same field. Well-known personalities can now look to the common law for a remedy against the wrongful appropriation of their personality, but it is unclear as to whether relief will be extended to cases in which no damages measured in terms of the commercial value of the plaintiff's personality can be identified.[13] Such a case involves invasion of privacy rather than violation of the right of publicity. A right of privacy is more appropriate to prevent intrusions into an individual's private life whereas a right of publicity provides protection against "publicity piracy".[14] In our view the two legally distinct interests involved justify the inclusion of the clause (c).

> BE IT RESOLVED: That the Unifoι m Privacy Act include appropriation of the name, likeness or voice of an individual for the purpose of advertising as a breach of privacy.

(ii) *Breach of Privacy by Data Banks.*

Clause (e) is addressed to invasions of privacy occurring as the result of the vast quantities of personal information being stored and processed today in data banks. Banks of a governmental and private nature, both those regulated by statute, and those unregulated at this time, were meant to be included within the parameters of this clause.

It was not intended that the equitable doctrine of breach of confidence[15] be incorporated as a prima facie case of invasion of privacy, despite the wording of the provision. It was suggested at the 1986 Conference that the wording could lead, however, to a different interpretation. We recommend deleting the reference to breach of confidence and propose a new clause which we see as significantly broadening the protection being afforded. If this approach is adopted, the more technical problems concerning the relationship between the statutory tort of privacy and the equitable doctrine of breach of confidence will not arise.

> BE IT RESOLVED: That the Uniform Privacy Act include as a breach of privacy:
>
> Dissemination of information concerning an individual that has been gathered for legitimate commercial or governmental purposes where:
>
> (i) the dissemination was contrary to statute; or

(ii) the dissemination was

A) not pursuant to the purposes for which the information was gathered; or

B) for profit.

Section 4

4.-(1) An act, conduct or publication is not violation of privacy where:

(a) it is consented to, either expressly or impliedly by some individual entitled to consent thereto, and the court is satisfied that the consent was freely given;...

(c) it was authorized or required by or under a law in force in the province or by a court or any process of a court;...

(e) it was reasonable having regard to any relationship, whether domestic or otherwise, between the parties to the action; or

(f) the defendant neither knew or reasonably should have known that the act, conduct, or publication constituting the violation would have violated the privacy of any individual.

(2) Notwithstanding any other Act, where an individual is required by law to divulge information of a private nature, or where the release of such information is consented to for a limited purpose, the dissemination of the information for purposes other than for which it is required or consented to is a violation of the individual's privacy...

(4) In this section "court" means any person authorized by law to administer an oath for the taking of evidence acting for the purposes for which he is authorized to take evidence.

(i) *Section 4(2).*

Section 4(2) was meant to be read in conjunction with section 3(e), providing a qualification to the consent defence and legal authority defence in clauses 4(1)(a) and (c) respectively. Now that section 3(e) has been substantially amended, we recommend deletion of subsection (2).

In its place, we propose amendments to the clauses (a) and (c) to provide for the situation where there is consent or legal authorization for a limited purpose, but a wider dissemination has occurred. In such an instance, the consent or legal authorization would not be effective as a defence to the wider dissemination. The amendment to clause 4(1)(c) would also limit the defence of authorization in cases where the statute regulating the particular information source contains only a vague or wide open rule giving blanket authority for the release of information.

BE IT RESOLVED: That the Uniform Privacy Act provide that an act, conduct or publication is not a violation of privacy where:

(a) it is specifically consented to, either expressly or impliedly by some individual entitled to consent thereto and the court is satisfied that the consent was freely given;

(c) it was authorized or required by or under a law in force in the province or by a court or any process of a court, providing that no authorization pursuant to statute shall provide a defence unless the statute specifically authorizes the act, conduct or publication for the purpose for which it was undertaken

(ii) *Section 4(4).*

In response to a comment made at the 1986 Conference, we propose one minor amendment to section 4(4). The word "means" should be replaced with the word "includes". It was suggested that this would have the effect of clarifying the purpose behind this subsection.

BE IT RESOLVED: That the Uniform Privacy Act provide that an act, conduct, or publication is not a violation of privacy if authorized by a court, and in this context "court" should include any person authorized by law to administer an oath for the taking of evidence acting for the purposes for which he is authorized to take evidence

(iii) *Malice and Breach of Privacy*

Concern was also expressed about American jurisprudence which gives significance to malice, either as a requirement of the tort or as a factor negating a defence. The consensus of the Conference was that malice should not be relevant to a privacy action. It was suggested that American jurisprudence might affect future judicial decisions under privacy legislation and that perhaps there should be included a clear pronouncement that malice is not a requirement of an action and that it does not negate any of the statutory defences.

We are not convinced that such an amendment is necessary or desirable. It is in the context of constitutional protection of free speech and the press that the American jurisprudence has arisen. Specific reference to malice in privacy legislation is unlikely to either encourage

or discourage a parallel development in Canadian law under the Charter of Rights and Freedoms.

> BE IT RESOLVED: That the Uniform Privacy Act should not make malice on element of the tort of invasion of privacy, or a factor negating a defence in an action for breach of privacy.

Section 6

6.–(2) In an action for violation of privacy, the court may award punitive damages.

The explicit reference to the availability of punitive damages is intended to complement the principle that privacy is actionable without proof of damage by ensuring that the court can award damages of a substantial nature without proof of actual monetary loss. However, punitive damages are not justified in every case where tangible loss cannot be proven. It was suggested at the 1986 Conference that some indication should be given as to when punitive damages are appropriate. It would be difficult to successfully codify all the types of situations that are capable of justifying an award of punitive damages. Rather than attempting to do this and thus run the risk of inadvertently restricting the scope of such awards, we propose creation of a more general discretion in regard to punitive damages.

> BE IT RESOLVED: That the Uniform Privacy Act provide that:
>
> In an action for violation of privacy, the court may award punitive damages as it considers appropriate, taking into account the flagrancy of the invasion of privacy and the conduct of the defendant

Section 7

7.–(1) The right of action for violation of privacy and the remedies under this Act are in addition to, and not in derogation of, any other right of action or other remedy available otherwise than under this Act.

(2) This section shall not be construed as requiring any damages awarded in an action for violation of privacy to be disregarded in assessing damages in any other proceedings arising out of the same act, conduct or publication constituting the violation of privacy.

There was some discussion at the 1986 Conference pertaining to subsection (2). The merit of retaining a subsection that apparently reiterates a general rule that would apply in any case was questioned. This provision has been adopted in substance from the existing Privacy

Acts. In light of the unequivocal statement in subsection (1) we still believe it advisable to retain subsection (2) to prevent misinterpretation of its scope.

BE IT RESOLVED: That the Uniform Privacy Act provide that:

The right of action for violation of privacy and the remedies under the Act be in addition to, and not in derogation of, any other right of action or other remedy available otherwise than under the Act.

This provision of the Act shall not be construed as requiring any damages awarded in an action for violation of privacy to be disregarded in assessing damages in any other proceedings arising out of the same act, conduct or publication constituting the violation of privacy.

Section 8

8. A plaintiff is entitled to costs in any case in which the court finds that the plaintiff's privacy has been violated.

At the 1986 Conference it was suggested that this provision be expanded in the manner set out in the resolution below. We agree with this suggestion. It further reinforces the general policy that plaintiffs who succeed should be entitled to all reasonable costs.

BE IT RESOLVED: That the Uniform Privacy Act provide that:

Where costs are awarded in an action for breach of privacy, the costs shall be fixed by the court having regard to the actual costs reasonably incurred by the plaintiff in bringing the action.

Section 9

9. An action for violation of privacy shall be commenced within two years from the discovery of the alleged violation of privacy by the individual who claims his privacy has been violated.

The consensus reached at the 1986 Conference was that the use of special limitation periods in particular Acts should be avoided. This has been a consistent philosophy of the Conference since adoption of the *Uniform Limitation of Actions Act* in 1982. The "scattering throughout the statute books of limitation periods" was considered to be a "trap for the unwary and to be likely to lead to undesirable complexity and to inconsistent treatment of similar cases".[16]

To achieve simplicity and conformity in the law of limitations we recommend adhering to the approach of the *Uniform Limitation of Actions Act*. There is no need, in our view, to duplicate its provisions in the Privacy Act.

BE IT RESOLVED: That the Uniform Privacy Act contain no limitation period, leaving the appropriate period to be governed by the Uniform Limitation of Actions Act.

Section 10

10. A right of action for violation of privacy is extinguished by the death of the individual whose privacy has been violated.

This provision was included in the original draft Privacy Act which was considered by the Conference in 1972. At that time, the Manitoba Commissioners expressed doubt as to the merits of such a provision. They were of the view that:

> Certainly in respect of claims for damages relating to economic loss to the person whose privacy was violated or any claim for an accounting or return of articles or documents, the right should remain alive after the death of the person whose privacy was violated.[17]

This "survivability" issue surfaced again at the 1986 Conference. In addition, a similar issue was discussed in the *Uniform Defamation Act*. In a report dealing with the *Uniform Defamation Act* prepared for last year's Conference, the Saskatchewan Commissioners recommended that defamation actions survive the death of either party. Under the *Uniform Survival of Actions Act*, when an action survives for the benefit of the estate of the deceased person, the right to claim damages is restricted to actual pecuniary loss.

If it were not for section 10 of the draft Privacy Act, the *UniformSurvival of Actions Act* would apply to privacy actions. It is desirable, in our view to treat defamation and privacy actions in the same way. No rationale exists for singling out privacy actions for different treatment.

BE IT RESOLVED: That the Uniform Privacy Act contain no provision regarding survival of actions, leaving that question to be governed by the Uniform Survival of Actions Act.

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1) See *Proceedings of the Uniform Law Conference of Canada*, 1985 at p 375.

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2) See Annex A to this Report

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3) See *Proceedings of the Uniform Law Conference of Canada*, 1978 at p. 263.

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4) See: *Tolley v. J. S. Fry & Sons Ltd.* [1903] 1 K.B 467; *Clark v. Freeman* (1848), 50 E R 759; *Mazatti v. Acme Products Ltd.* [1930] 4 D.L.R. 601; *Dunlop Rubber Co Ltd v. Dunlop*, [1921] 1 A C. 367

5) See: *Pollard v. Photographic Co.* (1889), 40 Ch. D 345; *Prince Albert v. Strange* 41 E.R. 1171.

6) See: *McCulloch v. Lewis A. May (Produce Distributors) Ltd* , [1947] 2 All E.R. 845; *King Features Syndicate, Inc. et al v. Lechter* (1940), 12 C.P.R. 60.

7) For other suggested bases of liability see: Pannam, "Unauthorized use of Names or Photographs in Advertisements" (1966), 40 Aust. L.J. 4.

8) (1974), 1 O.R. (2d) 225 C A.

9) *Ibid.*, at 238

10) *Ibid* , at p 241

11) (1978), 80 D.L R (2d) 583 (Ont)

12) Comment on *Athans*, 1977 4 C.C.L.T. 37 at p. 42.

13) *Krouse* case, *supra* footnote 6, per Mr. Justice Estey at P. 237, where it is stated that proof of damages is an essential ingredient of liability for misappropriation of personality attributes.

14) This phrase was used by Professor Dale Gibson, *supra* footnote 12.

15) See Annex B to this Report.

16) See *Proceedings of the Uniform Law Conference of Canada*, 1979 at p. 158.

17) See *Proceedings of the Uniform Law Conference of Canada*, 1972 at p. 209.

ANNEX A
(1986 Report)

UNIFORM PROTECTION OF PRIVACY: TORT
UNIFORM PRIVACY ACT: DRAFT AND COMMENTARY

INTRODUCTION

Five provinces have enacted legislation creating a remedy for violation of privacy. Under the British Columbia, Manitoba, Saskatchewan and Newfoundland Privacy Acts, violation of privacy is a tort.[1] In Quebec, privacy rights are recognized and protected by the provincial *Charter of Human Rights and Freedoms*.[2] The federal Parliament and Quebec have enacted legislation to regulate access to governmental data banks.[3] This legislation responds to a growing public concern, also reflected in the proceedings of the Uniform Law Conference[4] and the reports of the law reform agencies,[5] about protection of privacy. During the 1960's, the "technological breakthrough in techniques of physical surveillance"[6] was recognized as a new threat to privacy that could not adequately be met by traditional common law remedies.[7] More recently, attention has shifted to the potential abuse of increasingly sophisticated public and private computerized data banks.[8]

The provincial Privacy Acts were designed to provide generalized protection of privacy rights. The concept of privacy was framed in intentionally broad terms, and made subject to equally broad qualifications. They recognized that privacy can be infringed in almost innumerable and unpredictable ways, and that the concept of privacy itself does not admit to a simple, concise definition.[9] It was apparently expected that the statutes would provide a foundation upon which the new tort could develop through judicial decisions. Unfortunately, that development has not occurred. There are only a handful of reported decisions under the Provincial Acts, and those decisions have done little to establish workable parameters for the new tort.[10]

As Edward Ryan noted in an analysis of the British Columbia *Privacy Act* in the Ontario Law Reform Commission's *Report on Protection of Privacy* in 1968:

> This legislation is fine as far as it goes, but, absent what would amount to a comprehensive code of privacy, setting definitive norms for information trafficking, control of the means and physical implements for invading privacy, control of psychological in-depth testing, input and disclosure standards for school, medical, and governmental records, and all the rest ... then this statute standing alone could easily become a well-intentioned dead letter.[11]

The "broad brush" approach adopted by the Privacy Acts is both a strength and a weakness. The legislation is flexible enough to address the various ways in which privacy may be violated at present, and to meet new challenges to privacy in the future. On the other hand, uncertainty and unpredictability in applying the generalized, and therefore inevitably vague, concept of privacy contained in the legislation may leave a plaintiff unsure as to whether or not privacy rights have been violated in a particular instance. Even if the plaintiff is confident that a violation of privacy can be demonstrated, the legislation provides no assurance that sufficient damages will be awarded to justify an action.

The apparent failure of the Privacy Acts in their present form suggests that creation of a broadly-conceived statutory tort may not be the most effective way to provide protection for privacy rights. The first line of defence against invasions of privacy must be specific legislation relating to particular invasions of privacy. Growing concern about possible misuse of computerized data banks containing personal information can only be adequately addressed by a re-examination of legislation governing particular data banks.[12] Credit reporting legislation is in need of revision to adequately cope with the problems created by the micro-chip; controls of public data banks such as Medicare records must be reviewed and tightened.

Nevertheless, the provincial Privacy Acts represent, as Professor Ryan suggests, "a desirable step forward in the field of protection of privacy."[13] Even if legislation is enacted to regulate specific data banks and other major sources of the contemporary threat to privacy, there will be a place for the broader approach exemplified by the Privacy Acts. In the context of a comprehensive legislative policy for the protection of privacy, general Privacy Acts can fulfil several functions:

1. Specific enactments relating to control of data banks and electronic surveillance cannot, as a practical matter, reach all collections of personal information that may be abused, or anticipate new modes and contexts of surveillance.

2. Specific enactments cannot address the almost innumerable ways in which privacy may be invaded, or cope with the cumulative effect in individual cases of what Ryan calls the "totality" of "individually reasonable small assaults upon privacy", which he regards as the most significant aspect of the contemporary problem of privacy.[14]

3. The Privacy Acts could serve as an adjunct to more specific legislation by providing an avenue for a claim for damages when a

specific prohibition against dissemination of information or unauthorized surveillance has been breached.

Although the Privacy Acts have not often been interpreted by the courts, they have been subjected to considerable analysis and criticism.[15] It is possible to identify several ways in which the legislation might be improved in order to make it more effective. In general, the commentary on the legislation suggests three ways in which the legislation can be improved. First, the examples of *prima facie* violations of privacy contained in the legislation should be expanded. Second, the defences provided by the legislation should be tightened. Third, the courts should be given more direction in regard to remedies and costs. The proposed Uniform Act is based on a critical comparison of the existing provincial legislation, and on the analysis provided by commentators. It differs from earlier draft Uniform Acts in addressing directly the question of the effectiveness of the legislation. The 1972 and 1978 drafts were primarily attempts to reconcile the provincial models. The rationale for the proposed additions to the legislation, and for the choices made between the models provided by the provincial Acts, is set out in the commentary.

There is no reason, in principle, why general protection for privacy rights cannot be effectively incorporated into human rights codes, following the Quebec model. The Commentary and draft Act may be of assistance in considering ways to strengthen the protections provided by the *Charter of Human Rights and Freedoms*. However, it should be noted that human rights codes are usually drafted in general terms, requiring considerable interpretive effort to apply them in practice. Modification of general protections for privacy to make them more effective in practice will require more specificity of language and attention to detail than is usually regarded as appropriate in human rights codes.

COMMENTARY

Section 2

2. It is a tort actionable without proof of damage for a person to violate the privacy of an individual.

The Privacy Acts of British Columbia, Saskatchewan and Newfoundland provide that the tort of breach of privacy is an intentional tort. The Saskatchewan Act, for example, provides that "it is a tort, actionable without proof of damage, for a person, wilfully and without claim of right, to violate the privacy of another person" (section 2). Only the Manitoba Act is sufficiently wide to encompass a breach of privacy resulting from negligence:

2.(1) A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.

(2) An action for violation of privacy may be brought without proof of damage.

The U.L.C.C. 1972 draft rejected the Manitoba approach. As Burns notes[16], however, the Commentary to the draft Act focused on the status of unintentional invasions of privacy, but did not address negligent invasions of privacy. The Manitoba Act provides a defence where the defendant "neither knew or should reasonably have known that the act...would have violated the privacy of any person" (s. 5(b)). Thus an unintentional violation of privacy is not a tort in Manitoba unless it is negligent.

Proof that a violation of privacy is wilful may place a difficult burden on the plaintiff. In addition, as a matter of policy, it is appropriate to find an actionable violation of privacy where the defendant "ought to have known" that his acts constitute an invasion of privacy.

Then B.C. Commissioners Commentary on the 1972 draft took the position that: "We consider that any violation of privacy however slight or reasonable should constitute a tort, the seriousness and unreasonableness of the violation will be taken into account in assessing damages." All the provincial Privacy Acts and the 1972 draft Act (but not the 1978 draft), however, require proof that the Act complained of amounted to an unreasonable invasion of privacy.[17] The provincial acts apparently adopt this approach to avoid litigation over trivial matters. However, even without the specified requirement of unreasonableness, the courts will retain sufficient discretion in defining the scope of privacy protected in individual cases to reject claims based on trivialities. Inclusion of the specific requirement of unreasonableness serves only to weaken the concept of privacy. As Professor Ryan notes, "substantial justification can be mustered in support of almost every means by which privacy is invaded."[18]

The new draft, following the 1978 draft, distinguishes between a person (any entity possessing legal personality, including a corporation) and an individual (a human being). The distinction is not made in the existing Privacy Acts. Under the new draft Act, only an individual's privacy is protected, though a corporation or other body may be liable for a breach of an individual's privacy.

Section 3

3. Without limiting the generality of section 2, proof that there has been:

(a) auditory or visual surveillance of an individual, his residence or vehicle, by any means including eavesdropping, watching, spying, besetting or following and whether or not accomplished by trespass;

(b) listening to or recording of a conversation in which an individual participates, or listening to or recording of messages to or from that individual passing by means of telecommunications, otherwise than as a lawful party thereto;

(c) use of the name or likeness or voice of an individual for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, the individual is identified or identifiable and the user intended to exploit the name or likeness or voice of the individual;

(d) publication of letters, diaries or other personal documents of an individual; or

(e) dissemination of information concerning an individual where such dissemination is not authorized by law, or where such information is released in breach of confidence;

is prima facie proof of an invasion of privacy of an individual.

Section 3 identifies certain behaviour that is *prima facie* an invasion of an individual's privacy. This approach is followed by all the draft Acts and by the Saskatchewan and Newfoundland provincial Acts. The B.C. Act establishes commercial use of a name or likeness without consent as a separate tort, but provides no other *prima facie* example of violations of privacy. The Manitoba Act provides that privacy "may be violated" by acts similar to those made *prima facie* violations by the draft.

It is to be expected that most actions for invasion of privacy will involve circumstances falling within section 3. For that reason, the list should encompass as many clear cases of invasion of privacy as possible. Paragraphs (a) through (d) reproduce in substance the *prima facie* cases of invasion of privacy contained in the existing legislation. Notable by its absence from the existing legislation, however, is dissemination of information from data banks and other information sources that is contrary to law or in breach of confidence. Clause (e) of the draft Act remedies that deficiency.

Clause (e) is intended to be of application in a wide variety of circumstances. First, a release of information by a government data bank under circumstances that are not permitted by the legislation

governing the data bank will amount to an invasion of privacy. Second, privacy may be invaded by release of information from non-governmental data banks that are regulated by law. For example, release of information by a credit reporting agency that is not permitted by provincial legislation regulating credit reporting because of the nature of the information, or the use to which the information is put, will amount to an invasion of privacy. Finally, the clause is broad enough to cover release of information where there is no statutory regulation of the information source, but a confidential relationship exists between the data-gatherer and the individual whose privacy has been invaded. Thus, for example, release of medical information by a physician without the patient's consent would amount to an invasion of privacy.

Clause (e) should be read in conjunction with subsection 2 of section 4, discussed below.

Clause (a), like the Manitoba Act, but unlike the other provincial Acts and other U.L.C.C. drafts, expressly extends to surveillance of an individual's residence and vehicle.

Clause (b) is identical to the clause criticized by the Manitoba Commissioners in comments on the 1972 draft. It was noted that some telecommunications companies record every message sent. This practice may be appropriate for some forms of telecommunications. Telegrams, for example, are recorded for verification and billing purposes. It would be inappropriate, however, to permit telephone companies to record calls. For that reason, any recording by the transmitting company should be consented to if it is not to be regarded as a violation of privacy. It is likely that when the text of a communication is delivered to the transmitting company for transmission, there is an implied consent for the company to retain or record the message. In any event, disclosure of the practice would absolve the company from liability.

Clause (d) differs from the provincial Acts and earlier drafts in that it refers to "publication" rather than "use" of letters, etc. Comments by the Manitoba commissioners in 1972 suggested that "publication" is "a better description of what is being attempted."

Section 4

4.(1) An act, conduct or publication is not a violation of privacy where:

(a) it is consented to, either expressly or impliedly by some individual entitled to consent thereto, and the court is satisfied that the consent was freely given;

(b) it was reasonably incidental to the exercise of a lawful right of defence of person or property;

(c) it was authorized or required by or under a law in force in the province or by a court or any process of a court;

(d) it was that of:

(i) a peace officer acting in the course and within the scope of his duty; or

(ii) a public officer engaged in an investigation in the course and within the scope of his duty;

and was neither disproportionate to the gravity of the matter subject to investigation nor committed in the course of trespass, or other unlawful act;

(e) it was reasonable have regard to any relationship, whether domestic or otherwise, between the parties to the action; or

(f) the defendant neither knew or reasonably should have known that the act, conduct, or publication constituting the violation would have violated the privacy of any individual.

(2) Notwithstanding any other Act, where an individual is required by law to divulge information of a private nature, or where the release of such information is consented to for a limited purpose, the dissemination of the information for purposes other than for which it is required or consented to is a violation of the individual's privacy.

(3) A publication of any matter is not a violation of privacy where:

(a) there were reasonable grounds for belief that the publication was in the public interest; or

(b) the publication was privileged in accordance with the rules of law relating to defamation;

but this subsection does not extend to any other act or conduct whereby the matter published was obtained if such other act or conduct was itself a violation of privacy.

(4) In this section "court" means any person authorized by law to administer an oath for the taking of evidence acting for the purposes for which he is authorized to take evidence.

A number of defences to an action for breach of privacy are set out in section 4. The provincial Privacy Acts and earlier U.L.C.C. drafts contain similar lists of defences.

The Saskatchewan Privacy Act contains an additional defence not included in the legislation of other jurisdictions, or in the draft Acts. Section 4(1)(e) of the Saskatchewan Act provides that an act, conduct, or publication is not a violation of privacy where:

> (e) It was that of a person engaged in news gathering:
>
> (1) for any newspaper or other paper containing public news; or
>
> (2) for a broadcaster licensed by the Canadian Radio-Television Commission to carry on a broadcasting transmitting undertaking;
>
> and such act, conduct or publication was reasonable in the circumstances and was necessary for or incidental to ordinary news gathering activities.

The "fair comment" defence in section 4(3) of the draft Act (contained in substance in all the provincial Acts) is sufficient to protect freedom of the press. It will protect the media when it publicizes information. However, in respect to the actual gathering of news, members of the media should not enjoy a special privilege that allows the news-gatherer to breach the privacy of an individual.

Although the defences set out in the draft Act are similar in substance to those in the provincial Acts and the 1972 draft, some modifications have been introduced in order to more clearly delineate the scope of the defences.

Clause (a) of subsection 1 establishes a defence of consent. The new draft Act modifies the formula used in the provincial Acts and the 1972 draft by adding the requirement that the court must be "satisfied that the consent was freely given" in order to establish the defence. This requirement is included to permit the courts to reject the defence in cases in which it appears that the plaintiff was coerced into consenting. For example, if an employee is required to consent to the dissemination of information, or to undergo a lie detector test, on pain of dismissal if the consent is not given, the defence should not be available to the employer. The concept of "consent" at common law includes, of course, some notion of voluntariness. The draft Act attempts to provide greater guidance to the court by stressing that requirement.

Clause (b), permitting what would otherwise be an invasion of privacy in defence of person or property, adopts the substance of the Manitoba formula for the defence. The Saskatchewan Act, for example, (section 4(1)(b)) makes the defence available if the conduct complained of "was incidental to the exercise of a lawful right of defence of person or property." Manitoba (section 5(c)), on the other hand, provides a defence only if the conduct "was reasonable, necessary for, and incidental to, the exercise or protection of a lawful right of defence of person, property, or other interest of the defendant...".

Clause (c), providing a defence of authorization by law, is adopted without change from the provincial Acts. Although, as the Manitoba commissioners noted in the Commentary to the 1972 draft, it is probable that no tort can ever be said to be committed when the Act complained of is authorized by law, clause (c) is useful as a codification of that principle in this context.

Clause (d), providing a defence to peace officers and other public officers engaged in investigations, has been modified. Under the provincial Acts and the 1972 draft, where a police officer has committed an act which may be an invasion of privacy, but is not otherwise illegal, the defence is available if the invasion of the privacy was not "disproportionate to the gravity of the matter subject to investigation." If the invasion of privacy involves a trespass, however, the defence is not available. But it would appear that the defence may be available when the violation of privacy is an illegal act other than trespass. It is likely that trespass was singled out for special treatment because at the time Privacy Acts were originally enacted, illegal surveillance, often involving trespass, was the species of invasions of privacy that had attracted most public comment. The legislation makes it reasonably clear that a trespass committed in the course of a surveillance that has not been properly authorized under the *Criminal Code* will amount to an invasion of privacy.

The legislation may have been intentionally vague in regard to other acts by law enforcement officers that are *prima facie* illegal because of uncertainty about the scope of police authority to infringe criminal and quasi-criminal law of an essentially regulatory nature during the course of investigations. However, the formulation adopted in the provincial Privacy Acts and the 1972 draft may make the defence available even when the Act complained of is *prima facie* illegal, and not one which a police officer may be entitled to do in the course of an investigation. In the result, even acts clearly outside the scope of police authority may be protected by the Privacy Acts.

The question of the scope of police authority to commit acts which would otherwise be illegal is outside the subject matter of the Privacy Acts. It should be left to the courts to determine, according to the general law applicable to police investigations, whether the act complained of is illegal when committed in the course of a police investigation. If the act is found to be illegal, no defence should be available to the police officer under the Privacy Acts. For that reason, the new draft deprives a police officer of the defence if the act is any unlawful act, not just if the act is a trespass.

Clause (e) is new. It replaces, however, a provision found elsewhere in the existing Privacy Acts. See the Commentary to section 6 below.

Clause (f) is discussed above (see Commentary to section 2).

Subsection (3), as noted above, provides a "fair comment" defence. It is a modification of the parallel provisions in the existing legislation, which provides the defence if the information is "of public interest". The modification makes it clear that it is not enough that the information is of interest to the public, (for the scandal sheets show that a segment of the public is interested in gossip). Instead, the new draft requires that the publication be "in the public interest", a phrase more clearly suggesting legitimate public concern. The express reference to "fair comment on a matter of pubic interest" contained in the existing legislation is deleted, since it is encompassed by incorporation of the defences available in defamation actions.

Subsection (2) is new. It constitutes a qualification to the consent defence and legal authority defence in sections 4(1)(a) and (c) respectively. It recognizes that the consent or legal authorization may be for a limited purpose, and that a wider dissemination may result in a breach of privacy. Subsection (2) operates to limit the defence of authorization even in cases where the statute regulating the particular information source in question contains only a vague or wide open rule relating to disclosure of information. For example, the Saskatchewan Social Services Act provides that no information obtained by the Department from clients shall be released to any person, other than the Deputy Minister or the Minister, without the authorization of the Minister. If that authorization is obtained, it would appear that at present the information can be disseminated for any purpose. Under the draft Act, release of information by the Department to a credit reporting agency, for example, might constitute an invasion of privacy. Without such a provision, the Privacy Acts create, as Professor Ryan notes, "an almost blanket exception in favour of what may be termed duly constituted authority". Professor Ryan suggests that effective limits can be placed

on invasions of privacy by governmental data banks only be review and revision of "the statutory bases of these authorities"[19]. The provision recommended in the draft should be regarded as a supplement to revision of specific statutes regulating data banks, not a substitute for it.

It would appear that the Manitoba Act may have intended a similar result to that achieved by section 4(2) of the draft Act. Section 8 of the Manitoba Act provides that the Privacy Act applies "notwithstanding any other Act of the Legislature". However, the authorization defence undermines the effect of section 8 in the Manitoba Act.

Section 5

5.(1) In an action for violation of privacy, the court may as it considers just:

(a) award damages;

(b) grant an injunction;

(c) order the defendant to account to the plaintiff, for any profits that have accrued or that may subsequently accrue to the defendant by reason or in consequence of the violation;

(d) order the defendant to deliver up to the plaintiff all articles or documents that have come into his possession by reason or in consequence of the violation; or

(e) grant any other relief to the plaintiff that appears necessary under the circumstances.

Section 5 is the remedies section. In general terms, the remedies made available by the existing legislation are adequate.

Section 6

6.(1) In awarding damages in an action for violation of privacy, the court shall have regard to all the circumstances of the case, including:

(a) the nature, incidence and occasion of the act, conduct or publication;

(b) the effect of the act, conduct or publication on the health and welfare, or social, business or financial position, of the individual or his family or relatives; and

(c) the conduction of the individual and of the defendant both before and after the act, conduct or publication, including any apology or offer or amends made by the defendant.

(2) In an action for violation of privacy, the court may award punitive damages.

Because the concept of privacy introduced in section 2 is necessarily broad in scope, and thus inevitably somewhat nebulous, the provincial Privacy Acts provide additional guidance to the courts. In the British Columbia, Saskatchewan and Newfoundland Acts, the factors contained in section 6(1) of the draft Act are "considerations in determining whether there is a violation of privacy". In the Manitoba Act and the draft Act, on the other hand, the factors are made relevant to assessment of damages. The approach adopted by the other provinces places a heavy burden on the plaintiff to establish an actionable violation of privacy. As the B.C. Commissioners noted during discussion of the 1972 draft, which rejected the Manitoba approach:

> Although the first seven lines of this draft are a copy of s. 2(2) of the B.C. Act, we now acknowledge that a consideration of the degree of privacy to which a person is entitled to base on these factors makes it very difficult for a court to determine that a tort has "in fact" been committed; witness the *Davis v MacArthur* case.

In fact, the factors do not relate primarily to the question of whether a violation of privacy has occurred, but to the extent of the invasion of privacy, and the damage occasioned by it. Where a *prima facie* violation has occurred, and no defence is available, the plaintiff should be entitled at least to a finding that his privacy has been infringed, and to his costs. Only one of the clauses in the existing Privacy Acts analogous to section 6(1) of the new draft Act requires modification if this approach is adopted. The existing Privacy Acts all contain a clause similar to clause (c) of section 6(2) of the Saskatchewan Act. That clause permits the courts to take into consideration "any relationship whether domestic or otherwise between the parties to the action". This clause, unlike the others in the subsection, appears to be primarily relevant to the question of whether or not a violation of privacy has occurred. Whether a statement by one spouse about the other, at least so long as they are cohabiting, can be properly regarded as a violation of privacy should depend upon a careful examination of all the surrounding circumstances. Therefore, clause (e) of section 4(1) of the new draft establishes the existence of a domestic or similar relationship as a qualified defence in an action for violation of privacy.

Subsection (2) makes it clear that the court may award punitive damage. One factor discouraging plaintiffs from asserting their rights under the Privacy Acts is the difficulty in establishing substantial damage in some cases, which must be weighed against the cost and time involved in legal proceedings. It should be clear that the court can award damage of a substantial nature without proof of equally substantial monetary loss. The provincial Privacy Acts all provide that an invasion of privacy is actionable without proof of damage; explicit reference to the availability of punitive damages is intended to strengthen the policy of the existing legislation.

Section 7

7.(1) The right of action for violation of privacy and the remedies under this Act are in addition to, and not in derogation of, any other right of action or other remedy available otherwise than under this Act.

(2) This section shall not be construed as requiring any damages awarded in an action for violation of privacy to be disregarded in assessing damages in any other proceedings arising out of the same act, conduct or publication constituting the violation of privacy.

This provision is adopted in substance from the existing provincial Acts and the 1972 draft.

Section 8

8. A plaintiff is entitled to costs in any case in which the court finds that the plaintiff's privacy has been violated.

For the same reasons that punitive damages should be available, the successful plaintiff in an action for violation of privacy should be ensured of his costs. At present, some defendants may be deterred from bringing an action because of fear that unless substantial damages can be proved, no order as to costs will be made.

Section 9

9. An action for violation of privacy shall be commenced within two years from the discovery of the alleged violation of privacy by the individual who claims his privacy has been violated.

This provision is adopted in substance from the provincial Acts and the 1972 draft. Some jurisdictions may prefer to place the limitation period in general limitations legislation.

Section 10

10. A right of action for violation of privacy is extinguished by the death of the individual whose privacy has been violated.

This provision is adopted in substance from the provincial Acts and the 1972 draft.

Section 11

11. The Crown is bound by this Act.

This provision is adopted in substance from the provincial Acts and the 1972 draft.

Note on Jurisdiction

The draft Act makes no reference to the court of competent jurisdiction to entertain actions for violation of privacy. Some jurisdictions may be satisfied that the small claims courts within their jurisdictions are appropriate to entertain actions for invasions of privacy if the damages claimed are small. If Small Claims Courts are given jurisdiction in actions for violation of privacy, the remedies available to those courts should be limited to exclude injunctive relief.

Note on Illegally Obtained Evidence

Section 7 of the Manitoba Act creates a rule excluding evidence obtained in consequence of a violation of privacy. The provision amounts to a partial adoption of a rule excluding illegally obtained evidence. An exclusionary rule is now contained in section 24(2) of *The Canadian Charter of Rights and Freedoms.*

DRAFT UNIFORM PRIVACY ACT

1. This Act may be cited as *The Privacy Act.*
2. It is a tort actionable without proof of damage for a person to violate the privacy of an individual.
3. Without limiting the generality of section 2, proof that there has been:
   (a) auditory or visual surveillance of an individual, his residence or vehicle, by any means including eavesdropping, watching, spying, besetting or following and whether or not accomplished by trespass;
   (b) listening to or recording of a conversation in which an individual participates, or listening to or recording of messages to or

from that individual passing by means of telecommunications, otherwise than as a lawful party thereto;

(c) use of the name or likeness or voice of an individual for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, the individual is identified or identifiable and the user intended to exploit the name or likeness or voice of that individual;

(d) publication of letters, diaries or other personal documents of an individual; or

(e) dissemination of information concerning an individual where such dissemination is not authorized by law, or where such information is released in breach of confidence;

is prima facie proof of an invasion of privacy of an individual.

4.(1) An act, conduct or publication is not a violation of privacy where:

(a) it is consented to, either expressly or impliedly by some individual entitled to consent thereto, and the court is satisfied that the consent was freely given;

(b) it was reasonably incidental to the exercise of a lawful right of defence of person or property;

(c) it was authorized or required by or under a law in force in the province or by a court or any process of a court;

(d) it was that of:

(i) a peace officer acting in the course and within the scope of his duty; or

(ii) a public officer engaged in an investigation in the course and within the scope of his duty;

and was neither disproportionate to the gravity of the matter subject to investigation nor committed in the course of trespass, or other unlawful act;

(e) it was reasonable having regard to any relationship, whether domestic or otherwise, between the parties to the action; or

(f) the defendant neither knew or reasonably should have known that the act, conduct or publication constituting the violation would have violated the privacy of any individual.

(2) Notwithstanding any other Act, where an individual is required by law to divulge information of a private nature, or where the release of such information is consented to for a limited purpose, the dissemination of the information for purposes other than for which it is required or consented to is a violation of the individual's privacy.

(3) A publication of any matter is not a violation of privacy where:

(a) there were reasonable grounds for belief that the publication was in the public interest; or

(b) the publication was privileged in accordance with the rules of law relating to defamation;

but this subsection does not extend to any other act or conduct whereby the matter published was obtained if such other act or conduct was itself a violation of privacy.

(4) In this section "court" means any person authorized by law to administer an oath for the taking of evidence acting for the purposes for which he is authorized to take evidence.

5. In an action for violation of privacy, the court may as it considers just:

(a) award damages;

(b) grant an injunction;

(c) order the defendant to account to the plaintiff, for any profits that have accrued or that may subsequently accrue to the defendant by reason or in consequence of the violation;

(d) order the defendant to deliver up to the plaintiff all articles or documents that have come into his possession by reason or in consequence of the violation; or

(e) grant any other relief to the plaintiff that appears necessary under the circumstances.

6.-(1) In awarding damages in an action for violation of privacy, the court shall have regard to all the circumstances of the case, including:

(a) the nature, incidence and occasion of the act, conduct or publication;

(b) the effect of the act, conduct or publication on the health and welfare, or the social, business or financial position, of the individual or his family or relatives; and

(c) the conduct of the individual and of the defendant both before and after the act, conduct or publication, including any apology or offer or amends made by the defendant.

(2) In an action for violation of privacy, the court may award punitive damages.

7.-(1) The right of action for violation of privacy and the remedies under this Act are in addition to, and not in derogation of, any other right of action or other remedy available otherwise than under this Act.

(2) This section shall not be construed as requiring any damages awarded in an action for violation of privacy to be disregarded in assessing damages in any other proceedings arising out of the same act, conduct or publication constituting the violation of privacy.

8. A plaintiff is entitled to costs in any case in which the court finds that the plaintiff's privacy has been violated.

9. An action for violation of privacy shall be commenced within two years from the discovery of the alleged violation of privacy by the individual who claims his privacy has been violated.

10. A right of action for violation of privacy is extinguished by the death of the individual whose privacy has been violated.

11. The Crown is bound by this Act.

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1) *Privacy Act*, R.S.B.C. 1979, c. 336; *Privacy Act*, S.M. 1970, c. 74, *Privacy Act*, S.N. 1981, c. 6; *The Privacy Act*, R.S.S. 1978, c. P-24.

2) *Charter of Human Rights and Freedoms*, Statutes of Quebec, 1975, c. 6, s 405. Article 1053 of the *Civil Code* has also been used in some instances by the courts to protect privacy. See *Note on the Saskatchewan Report Concerning the Uniform Privacy Act*, U.L C.C., proceedings, 1985

3) *Privacy Act*, S.C. 1980-81-82, c. 111 (Schedule II). *An Act respecting Access to documents held by public bodies and the Protection of Personal Information*, Statutes of Quebec, 1982, c. 30

4) U.L.C.C. proceedings, 1972, Appendix O *(The Protection of Privacy Act)* and Appendix P *(Report on the Tort of Invasion of Privacy)*; U.L.C.C. proceedings, 1977, Appendix P *(Protections of Privacy: Collection and Storage of Personalized Data Bank Information)*, Appendix Q *(Protection of Privacy: Credit and Personal Data Reporting)*, Appendix R *(Protection of Privacy: Illegally Obtained Evidence in Civil Cases)*, and Appendix S *(Protection of Privacy: Tort)*; U.L.C.C., proceedings, 1978, Appendix Q *(Protection of Privacy: Tort)*.

5) See, e.g. Ontario Law Reform Commission, *Report on Protection of Privacy*, 1968, and the research publications prepared for the Ontario Commission on Freedom of Information and Individual Privacy (1978-79).

6) Alan Westin, *Privacy of Freedom*, 1967, p. 365.

7) See the discussion of "privacy and traditional legal responses" in Petei Burns, "The Law and Privacy: The Canadian Experience" C.B.R., vol. 54, 1976, pp. 12-28.

8) See Timothy G. Brown, *Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontaiio Law*, Commission on Freedom of Information and Individual Privacy (Ontario), 1979.

9) Westin, *supra*, note 6, p. 1020, views privacy as inclusive of several psychological relations between an individual and others:
(a) Solitude. This is the state where an individual is separated from the group and freed from the observations of others. It is the most complete state of privacy attainable although even here the subject's peace of mind may be intruded by physical stimuli, supernatural belief or primordial psychological condition.
(b) Intimacy. This is the state where the individual is acting as part of a small group – the family, society, etc. Here corporate seclusion may be attained.
(c) Anonymity. This occurs where the individual, although doing public things in public places, finds freedom from identification and surveillance. Another form is the anonymous expression of views whereby the individual may publicly air his views but have his identity remain unknown.
(d) Reserve. Which expresses the individual's need to withhold information, to create mental distance to protect his personality.

10) The British Columbia statute was enacted in 1968. There have been four cases under the Act since that time: *Davis v MacArthur*, 72 W W.R. 69, reversed [1971] 2 W.W.R 142; *Belzberg v B.C.T.V. Broadcasting System Ltd.*, [1986] 2 W.W.R. 609. The plaintiff was unsuccessful in all four cases. The Manitoba Act was adopted in 1970, and the Saskatchewan Act in 1973-74. There are no reported decisions under either Act Burns, *supra*, note 7, p. 33, describes the Privacy Acts to be a "non-development".

11) *Supra*, note 5, p. 69.

12) The federal *Privacy Act* and the Quebec Protection of Personal Information Statue are significant contributions to this goal.

13) *Supra*, note 5, p. 68.

14) *Ibid.*

15) P. H. Osborne, "The Privacy Acts of British Columbia, Manitoba and Saskatchewan", in *Aspects of Privacy Law*, ed., Dale Gibson, Toronto: Butterworth's, 1981. Burns, *supra*, note 7; Ryan, *supra*, note 5; U.L.C.C., *supra*, note 4.

16) *Supra*, note 7, p. 37.

17) B.C., s. 1(2); Man., s. 2(1); Sask., s. 6(1); Nfld., s. 3(2); 1972 draft, s. 5.

18) *Supra*, note 5, p. 68. In *Davis v McArthur, supra*, note 10, the B.C.C.A., reversing the decision of the court below, found electronic surveillance by a private detective to be "reasonable" because, *inter alia*, his surveillance did not attract public attention, and that it was not "unduly close or continuous"

19) *Supra*, note 5, p. 69.

ANNEX B

BREACH OF CONFIDENCE AND THE STATUTORY TORT OF PRIVACY

By Michael Finley
Legal Research Officer,
The Law Reform Commission of Saskatchewan

1. INTRODUCTION

Breach of confidence is now recognized in Commonwealth jurisdictions as an independent cause of action arising in equity. The basic concepts underlying the action were succinctly stated by Lord Denning in *Seager v Copydex Ltd.*:

> The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent.[1]

Denning asserted that "the principle is clear", but in truth the action for breach of confidence remains a vague and misunderstood thing. It has attracted considerable academic and judicial comment, but there is little authority on some of the key conceptual issues surrounding it. Chief Justice McEachern observed in a recent British Columbia case that the precise ancestry (of the action) is surprisingly vague and there are very few decided cases, although there is much writing on the subject."[2] Some doubt still remains, for example, about the relationship between the action for breach of confidence and the remedies available for breach of fiduciary duty.[3] That question is not unrelated to the principal problem addressed by this paper: the extent to which the action for breach of confidence can provide a remedy for an invasion of privacy occasioned by disclosure of confidential information concerning an individual's affairs.

Certainly, the action for breach of confidence has been pressed into service in cases in which protection of privacy would appear to be the principal goal. McEachern's comments on the action were made in a case in which a solicitor divulged information to licensing authorities that a private investigator had become romantically involved with his client, the plaintiff in the action. Despite doubts about the scope of the action, McEachern concluded that:

> I have no doubt that if there is a right to confidentiality there must be an appropriate sanction either by injunction to prevent a breach or damages where a breach has already occurred.[4]

R. G. Hammond notes that

> ...The English cases on which Warren & Brandeis relied to suggest a right to privacy, in a seminal article "The Right to Privacy" (1890) 4 Harv. L. Rev. 193, are the identical cases which are usually claimed in the older authorities as giving rise to an equitable duty of confidence in English law...

He then asks

> Does (that)...suggest that English judges have found the concept of confidence wide enough to gather in at least some situations which in the United States would have clearly been thought of as privacy issues?[5]

There are enough breach of confidence cases involving matters of "privacy" to make an affirmative answer to Hammond's question almost inescapable. Nevertheless as the action for breach of confidence has developed to date, it is conceptually quite distinguishable from an action founded on invasion of privacy per se. Breach of confidence first took shape as a remedy for theft of "trade secrets"; it still bears the imprint of its origin. It will be argued below that it is only with considerable difficulty that breach of confidence can be extended to cover the full range of invasion of privacy cases in which relief is appropriate. While some overlap between breach of confidence and breach of privacy may be inevitable, that is not a reason for refusing to recognize a breach of privacy involving disclosure of confidential information as an action independent of the action for breach of confidence.

2. ORIGIN AND BASIS OF THE ACTION FOR BREACH OF CONFIDENCE

One reason for the conceptual uncertainty still surrounding the action for breach of confidence is its relatively recent origin. Some early cases are referred to in the authorities as the historical basis for the action,[6] but those cases are primarily of interest in retrospect. As Hammond notes, the equitable obligation to maintain confidentiality "was largely overlooked" by nineteenth century English judges.[7] The first clear authority for the existence of the action appears to be *Saltman Engineering Co. Ltd. v Campbell Engineering Co. Ltd.*, decided in 1946. Even that case did not have much impact until the 1960's. It was initially reported only in the patent cases series,[8] which probably insured

that it would not gain wide recognition. It was applied in another "patent" case in 1960: *Terripin Ltd. v Building Supply Co. Ltd.*[9] Then, in 1963 it was applied in a more widely reported decision: *Peter Pan Corp. v Corsets Silhouette Ltd.*,[10] and reprinted as an appendix to that case.[11] Since that time, the action for breach of confidence has been routinely entertained by the British courts.

In Canada, the action did not receive much attention until the decision of the Supreme Court in *Slavutych v Baker*[12] in 1976.[13] Although that was not an action for breach of confidence (the case turned upon a point of evidence: the admissibility of evidence tendered in breach of confidence), Mr. Justice Spence relied upon the English authorities recognizing the existence of the action. Since *Slavutych v Baker*, several successful claims for breach of confidence have been made in Canadian courts, and Hammond suggests that "it seems that the Chambers list in most cities is no longer complete without an application for an interlocutory injunction with respect to such an occurrence".[14] Most of those cases, however, will involve misuse of confidential business information.

The action for breach of confidence is obviously an example of equity's concern to prevent fraud in all its forms, but its origin is uncertain. It is likely an outgrowth of another equitable principle. At least since *Keech v Sandford* in 1726,[15] equity has prevented trustees and fiduciaries from taking a profit from information obtained in their fiduciary capacity because of the apparent conflict of interest that inevitably arises in such cases. The most commonly litigated circumstance involving something akin to breach of confidence (though breach of fiduciary duty and breach of confidence may both be pleaded) still involves appropriation of a corporate opportunity for personal profit by an officer or director of a company (who stands in a fiduciary capacity to the company).[16] Whether the action for breach of confidence arose simply by analogy to breach of fiduciary duty or was originally an outgrowth of it is less certain.

In any event, it is only very recently that it could be stated with conviction that the umbilical cord connecting breach of confidence with breach of fiduciary duty has been severed. As late as 1979, Hammond could write that "Recently the notion that the equitable obligation of confidence is doctrinally dependent upon the spectrum of fiduciary obligations seems to have gained some acceptance."[17] A fiduciary relationship "is one in which there is a duty on the fiduciary to act solely for the benefit of another or others in respect to any property that is the subject matter of the relationship."[18] Thus the extension of breach of

fiduciary duty to include breach of confidence initially involved some notion that confidential information has a proprietary or at least quasi-proprietary character. Such a doctrine is obviously better suited to protection of commercial interests in trade secrets than to protection of individual privacy.

The action for breach of confidence has now clearly been extended to cover situations in which no fiduciary relationship exists, and to protect interests other than commercial ones. In *Ott v Fleishman*,[19] the action lay as a remedy for divulging confidential information about a love affair; in *Argyll v Argyll*, communication between spouses was protected;[20] in *A.G. v Jonathon Cape Ltd.* cabinet secrets were protected;[21] and in Foster v Mountford and Rigby Ltd., Australian aboriginal tribal secrets founded the action.[22] Meagher, Gummow and Lehane, authors of an Australian text on equity, do no more than state the emerging consensus when they suggest that "obligations of confidence arise other than between fiduciaries as traditionally understood and there seems little served by burdening that already difficult area of equity with an additional and disparate category".[23] Nevertheless, the cases that do not involve commercial interests remain exceptional, and are not the cases in which the concepts underlying the action for breach of confidence have been most clearly articulated.

The *Saltman* case itself was primarily concerned, as the court in the *Terripin and Peter Pan* cases noted, with the "use of confidential information for purposes of trade by way of competition".[24] Whatever the actual limits of the action for breach of confidence may be, at its core is provision of a remedy for the kind of misuse of confidential business information identified by Mr. Justice Megarry in *Coco v A. N. Clark (Engineers) Ltd.*:

> In particular, when information of commercial or industrial value is given on a business-like basis and with some avowed object in mind, such as a joint venture or manufacture of articles by one party for another, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention then he was bound by an obligation of confidence.[25]

While it may not be possible to do more than speculate about the precise doctrinal origin of the action for breach of confidence, it is possible to reconstruct the logic that lead from breach of fiduciary duty to breach of confidence. The four stages in the development of the action for breach of confidence outlined below constitute a logical, not a temporal sequence. This hypothetical reconstruction is useful in the

present context to the extent that it elucidates the conceptual underpinnings of the action, and thus throws some light on its practical limits.

Stage 1 – Not every contract gives rise to a fiduciary relationship. Nevertheless, where information is provided confidentially under the terms of a contract, misuse of the information to the detriment of the party providing it is analogous to misuse of such information by a fiduciary. In the Nineteenth Century, confidential information imparted to an employee was protected by finding an implied term of secrecy in the contract of employment.[26] In the *Saltman* case, it was suggested that

> if two parties make a contract, under which one of them obtains for the purpose of the contract or in connection with it some confidential matter, then, even though the contract is silent on the matter of confidence, the law will imply an obligation to treat that confidential matter in a confidential way as one of the implied terms of the contract.

Stage 2 – Even in cases in which the contractual relationship of the parties does not relate directly to the confidential information exchanged, it would permit an injustice if the courts did not prevent misuse of confidential information obtained as an indirect result of a subsisting contractual relationship between the parties. Thus, in the Peter Pan case, the defendant manufactured brassieres under licence from the plaintiff. In the course of discussions between the parties, the plaintiff showed designs for a new model to the defendant. There was never any agreement between the parties in regard to the new design, but the defendant used the design to "evolve" a new model of its own. The court used the language of the Terripin case, which purported to be a restatement of the principles laid down in Saltman, to conclude

> that if information be given by one trader to another in circumstances which make that information confidential, then the second trader is disentitled to make use of the confidential information for purposes of trade by way of competition with the first trader.

It is at this point that some appeal to equitable principles is required, since it is at least difficult to rely upon strict contract law to achieve the desired results. The independence of the action for breach of confidence from contract is of primary importance in this context because it permits the court to extend the protection of confidentiality beyond circumstances in which business dealings have actually culminated in a contractual relationship relating specifically to the confidential information.

Stage 3 – The principle can be extended, once it is clear that a contractual relationship is not necessary to support it, to circumstances in which there was no contract at all between the parties, but some sort of business dealing had occurred between them. Thus, for example, in a recent Canadian case, *International Corona Resources Ltd. v Lac Minerals Ltd.*,[27] two mining companies had entered into negotiations with a view to forming a joint venture. The negotiations fell through, but information provided by the plaintiff during the course of the negotiations was subsequently used by the defendant to exploit certain mineral claims. The court held that the giving of valuable confidential information in the course of "serious negotiations" imposes an obligation not to act on the information to the detriment of the party providing the information. It will be noted, however, that it would still be possible to provide a remedy in such cases by characterizing the appropriation of information as breach of a fiduciary duty. In fact, breach of fiduciary duty was also successfully pleaded in the *International Corona* case. Perhaps some of the appeal in pleading of breach of confidence in the alternative to breach of fiduciary duty lies in the fact that fiduciary relationships can be notoriously difficult to define.[28] By simply characterizing a transaction as one in which there are "circumstances which make that information confidential" rather than insisting upon a fiduciary relationship, some tactical problems may be avoided by the plaintiff. It is likely that the court had such considerations in mind in a New Zealand case, A. B. *Consolidated Limited v Europe Strength Food Co.*,[29] when it suggested that

> the issue is not whether some special kind of relationship can be recognized and given a label but whether the circumstances give rise to a situation where the obligation of confidence fairly rests upon the party receiving the information.

Stage 4 – Once it is clear that neither a fiduciary relationship nor contract is required to establish a right of action for breach of confidence, the principle can be extended, at least in theory, to a broad range of cases where information was provided and subsequently misused, so long as a sufficient quality of confidence attached to it. It is at this point that the action becomes available as a remedy for invasion of privacy.

3. LIMITS ON THE ACTION FOR BREACH OF CONFIDENCE AS A PROTECTION OF PRIVACY

Aristotle wrote that it is a mistake to confuse origin with essence; despite the commercial origin of the action for breach of confidence, there is no absolute reason why it can not become a broad protection for individual privacy. Nevertheless, if origin is not equivalent with essence,

the utility of a concept is often limited by its history. Before accepting breach of confidence as an adequate substitute for an independent action for invasion of privacy, a closer examination of some of those limits is in order.

In the *International Corona* case, Mr. Justice Holland identified three "ingredients for liability" to found a successful action for breach of confidence:

(1) the information must be confidential;

(2) the communication must have occurred in circumstances where an obligation of confidence arose; and

(3) unauthorized use of the information was made.

There is authority touching upon each of these three ingredients, some of which was examined in detail by Holland. For present purposes, the important thing to note is that the way in which the courts have handled each ingredient limits the utility of the action outside a commercial setting.

(a) *What is confidential information?*

In the International Corona case, Holland adopted a statement from the Saltman case:

> I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by someone who goes through the same process.[30]

The identification of "confidential information" with information that is not "public property" almost certainly achieved prominence in breach of confidence cases because the existence of a fiduciary relationship was jettisoned as a threshold requirement. In the fiduciary cases, the question is whether the information came to the fiduciary as a result of his capacity, not whether the information could otherwise have been obtained. Where there is no fiduciary or contractual relationship, the test must of necessity be somewhat different. It is one thing to say that a

fiduciary is bound by a duty of loyalty that precludes personal use of information whether he is aware that the information is otherwise obtainable or not, and quite another to make dissemination of information imparted "in confidence" in the colloquial sense of the term the basis of an action when the information is common currency.

Not surprisingly, a considerable amount of ingenuity has been expended upon the distinction between public and confidential information. Thus for example, Lord Denning in *Seager v Copydex Ltd.*[31] found it necessary to refine the distinction:

> when the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to a public source and get it; or, at any rate, not be in a better position than if he had gone to a public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it.

But much of this ingenuity is not easily transferred to cases which do not involve valuable commercial information. Note Denning's concern that the defendant should not have had "a start over others...without paying for it." In the *Saltman* case, the attention was focused on formulas, plans, and sketches or "something of that kind, which is the result of work done by the maker."

An even more serious objection to the distinction when the action for breach of confidence is applied to protect privacy rights should be obvious. Privacy can be infringed even by the dissemination of public domain information. For example, credit reporting legislation places limits on the kind of public domain information that can be collected and included in credit reports. An action for invasion of privacy under the provincial Privacy Acts might lie when such public domain information is reported if the disclosure compromised the reputation or some other privacy interest of the individual concerned.

In at least some of the cases in which breach of confidence has been successfully pleaded in a non-commercial context, success was probably dependent on the court ignoring the distinction between public domain and confidential information. In *Ott v Fleishman*, for example, the court was satisfied that a breach of confidence had occurred simply because the defendant's solicitor had forwarded privileged information to public authorities. The court apparently demanded no evidence on the question of whether or not the affair between the client and the private investigator was known to others. The decision does, however, incidentally record the fact that both the solicitor's secretary and law partner knew of the affair before the defendant.

(b) Confidential Communication

Not all private communications can be regarded as confidential for the purposes of founding an action. While a contractual or fiduciary relationship does not appear to be necessary, it is difficult to find cases in which there was not some special relationship between the parties that imposed a clear obligation to maintain confidentiality. The New Zealand Court of Appeal accurately reflected the general tendency of commonwealth authorities when it held that "the issue is not whether some kind of relationship can be recognized and given a label...". But all that is clearly implied by that statement is that it is unnecessary to categorize "confidential relationships" into a finite number of recognized types. The New Zealand court still required that "the circumstances give rise to a situation where the obligation of confidence fairly rests upon the party receiving the information."

In a commercial context it is perhaps not too difficult to identify examples of "confidential relationships". Fiduciary relationships obviously fall within that category, as do many contractual relationships. The action for breach of confidence extends beyond such relationships in part simply because the courts were prepared to recognize other instances in which it could be said that a confidential relationship had been intended, or was recognized in practice. In the *International Corona* case, for example,[32] the court heard the evidence of experts "on the custom of the industry in respect to obligations of confidentiality" during negotiations or other dealings between mining companies. While not insisting upon a contractual or fiduciary relationship, the court did require evidence of a relationship that would generally be recognized as involving confidentiality by the industry.

It is more difficult, however, to guess how far the courts may be prepared to go in finding the necessary indica of confidentiality where the relationship between the parties is not a commercial one. Does the bartender to whom I unburdened myself owe me a duty of confidentiality? If I tell my family or friends about my marital difficulties can I reasonably expect them to be under a legal obligation not to gossip?

The reported decisions involving private, non-commercial communications have almost always involved some special circumstance, and thus may not be typical of invasions of privacy. In *Ott v Fleishman*,[33] the defendant solicitor breached solicitor-client privilege. In *Slavutych v Baker*,[34] Mr. Justice Spence began his analysis by finding that a qualified evidentiary privilege attached to the communication in question.[35] Though Spence made it clear that he was not satisfied to dispose of the case simply on the basis of the qualified privilege, there can be little

doubt that the existence of the privilege made it easier for him to characterize the relationship between the parties as confidential for other purposes. Even *Argyll v Argyll*,[36] a case that is often taken as an example of the broadest application of breach of confidence to date, involved a communication between spouses, another circumstance giving rise to an evidentiary privilege.

It is possible that the courts will take a very broad view of what constitutes confidential communication. It may even be enough that the parties understood at the time the communication occurred that it was to be confidential. In *Slavutych v Baker*, Spence appears to have believed that it was enough "that the document came into being and the confidence was attached thereto by the proper officers of the University of Alberta (the defendant)".Nevertheless, it simply cannot be said with assurance that an action for breach of confidence would lie in a case involving a private communication where there is no obligation of confidentiality otherwise recognized by law.

(c) Use of the Information

The third ingredient of liability referred to by Mr. Justice Holland is unauthorized use of the information. On one level, this is a trite requirement. Obviously, as Lord Denning stated in *Seager v Copydex Ltd.*, absence of consent to use the information is an essential element of the action. However, there is another aspect of this ingredient of the action that is more troublesome. For the information to be used in an "unauthorized fashion", the authorities seem to suggest that a detriment-benefit test of some sort must be met.

Conceptually, difficulty arises with the third element of liability because it may sometimes be difficult to determine what amounts to unauthorized use of confidential information. In a strictly private context, information may well be imparted without any intention that it be acted upon in any way. The sympathetic ear of a bartender is a paradigm example. In the commercial setting in which the law relating to breach of confidence developed, however, it is usually intended that confidential information will be put to some use by the person who receives it. Therefore, mere use of the information can not be regarded as misuse. The uses to which the information was put must be examined to determine whether or not misuse has occurred. Obviously, the examination must look at all the dealings between the parties, and the consequences of the use which was made of the information. That is the reason for the detriment-benefit approach. Thus in the *Saltman* case, at least as interpreted in *Terripin*,[37] reference was made to "use of confidential information for purpose of trade by way of competition." The

benefit-detriment test was even more clearly stated in a passage from the judgment at trial in the Terripin case, cited with approval in the appeal decision, and adopted in several later decisions:

> As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication...it is, in my view, inherent in the principle upon which the *Saltman* case rests that the possessor of such information must be placed under a special disability in the field of competition to ensure that he does not get an unfair start.

The benefit-detriment analysis does not appear to have been advanced by the courts as an exhaustive test. But it is the only test that has been developed in a reasonably satisfactory fashion. Just how a court would go about determining there has been a misuse of confidential information in a case that does not involve profit and loss is simply unclear.

In practice, the problem has usually been solved in non- commercial cases simply by ignoring it. The benefit-detriment style of analysis does not appear explicitly in either the *Ott or Slavutych* cases, though the *Slavutych* case can be forced into the benefit-detriment mould. In that case the confidential information was used as a basis for dismissing the plaintiff from employment. It can be said there was a "benefit" to the defendant who sought to rid himself of an unwanted employee, and a corresponding "detriment" to the employee against whom it was used. The Ott case, on the other hand, cannot be fitted into the mould. In truth, it is forcing the logic of the benefit-detriment test to expect it to be useful at all outside a commercial setting.

4. BREACH OF CONFIDENCE AS AN INVASION OF PRIVACY

The Saskatchewan Privacy Act[38] provides that "it is a tort actionable without proof of damage, for a person, wilfully and without claim of right, to violate the privacy of another person." Although there is no comprehensive definition of privacy in the Act, it would seem on its face that section 2 is broad enough to encompass dissemination of confidential information. The question for the court in such a case would be whether or not the disclosure of the information seriously compromised the privacy of an individual.

The Draft Uniform Privacy Act prepared by the Saskatchewan Commissioners for the 1986 Uniform Law Conference is more explicit. Section 3(e) of the Draft Act provides that:

> dissemination of information concerning an individual where such dissemination is not authorized by law, or where such information is released in breach of confidence...is *prima faci* proof of an invasion of privacy of the individual.

The commentary to the Draft Act noted that dissemination of information in breach of confidence is "notable by its absence from the existing legislation." In discussion of the draft at the Conference, however, it was questioned whether it is appropriate to include breach of confidence as a species of invasion of privacy, since breach of confidence is actionable in its own right.

No doubt, there is considerable overlap between the action for breach of confidence and the action for invasion of privacy. But the existence of an overlap is not a sufficient reason for limiting the scope of either action. It is hardly unusual for actions and remedies to overlap. The action for breach of confidence overlaps with other actions apart from invasion of privacy – with patent and trademark protections, with breach of fiduciary duty, and even with breach of contract. The real question should be whether or not the action for breach of confidence provides adequate protection for privacy rights. The way in which the action has developed to date would suggest that it does not. On one level, it is probably sufficient simply to note that the origin of the action for breach of confidence in "trade secrets" cases makes it difficult to extend it to all species of private communication that deserve legal protection.

On a second level of analysis it may be argued that the action for breach of confidence is not primarily concerned with protection of privacy at all. The gist of the action is not violation of privacy; it is the taking of unfair advantage of confidential information to make a profit at the expense of the person providing the information. Privacy can be invaded in some cases even if the information disseminated is known by others, or even if the information is available in the public domain. Privacy of an individual may be compromised by dissemination of confidential information even if the party who breached the confidence obtained no benefit from the breach. While the action for breach of confidence may not strictly depend upon characterization of confidential information as property, it still regards information as a commodity that can be used or misused for profit.[39]

By recognizing breaches of confidence as potential invasions of privacy, the focus can be shifted to private, non-commercial communications. It is that aspect of clause 3(e) of the Draft *Privacy Act* that justifies its retention despite overlap with the action for breach of confidence.

However, it may be that the language of section 3(e) is not entirely satisfactory. The use of the term "breach of confidence" can be questioned because it may imply an unintended identity with the species of breach of confidence that will ground an action for breach of confidence. It would be unfortunate if 3(e) were interpreted as providing for an action for invasion of privacy only in those circumstances in which an action for breach of confidence would also lie. 3(e) could be redrafted to avoid this problem by replacing the reference to information "released in breach of confidence" with the phrase "where the information was provided in confidence".

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1) [1967] 2 All E.R , 415 at 417.

2) *Ott v Fleishman*, [1983] 5 W.R.R. 721

3) See R G. Hammond, "Is Breach of Confidence Properly Analyzed in Fiduciary Terms?", (1979) 25 McGill L.J. No. 2 244.

4) *Ott v Fleishman*, supra, note 2.

5) Hammond, "Is Breach of Confidence Properly Analyzed in Fiduciary Terms?", supra, note 3, at 252

6) See *Moore v Perrell* (1883), 4 D. Av. 870, 110 E R 683, and *Taylor v Blackow* (1836), 3 Bing. N.C. 235, 132 E.R. 401.

7) Hammond, "Is Breach of Confidence Properly Analyzed in Fiduciary Terms?", supra, note 3, at 246.

8) 65 R.P.C. 203

9) [1960] R.P.C. 128

10) [1963] 3 All E R. 402.

11) [1963] 3 All E.R. 413.

12) [1976] 1 S.C.R. 254

13) The action may, however, have something of a pre-history in Canada In *Canadian Aero Services Ltd. v O'Malley*, [1974] S C.R. 592, it was suggested that "breach of confidence . may in itself afford a ground for relief". But that case appears to have hinged on a breach of fiduciary duty, and may have served only to confuse the relationship between the two equitable doctrines – see Roberts, "Corporate Opportunity and Confidential Information: Birds of a Feather that Flock Together or can Arrows of a Different Colour?" (1977) 28 C P.R (2nd) 68.

14) R. G Hammond, "Breach of Confidence: Assignability of Rights", (1986) Intellectual Property Journal, 248.

15) (1726), Sel. Cas. Ch. 61.

16) See for example *Canada Aero Service Ltd. v O'Malley*, supra, note 13.

17) Hammond, "Is Breach of Confidence Properly Analyzed in Fiduciary Terms?", supra, note 3 at 248. Particularly in the early phases of academic commentary on the emerging action, the tendency was to attempt to assimilate breach of confidence to other protections of property rights. See for example North, "Breach of Confidence: Is There a New Tort?" (1972) 12 J S.P T.L 149 and Ricketson, Confidential Information - A New Proprietary Interest? (1977) 11 Melbourne U.L. Rev. 223

18) A. H Oosterhoff, Cases and Material on Law of Trusts, (2nd), 1983, 35.

19) Supra, note 2.

20) [1977] Ch. 302.

21) [1975] 3 All E.R. 484.

22) (1977), 14 A.L.R 71.

23) *Equity, Doctrines and Remedies* (1975), 722.

24) *Terripin v Building Supply*, supra, note 9, and quoted in *Peter Pan v Corsets Silhouette Ltd.*, supra, note 10.

25) [1969] R P.C. 41.

26) See Hammond, "Is Breach of Confidence Properly Analyzed in Fiduciary Terms?" supra, note 3, at 246.

27) (1986), 32 B.L.R. 15 (Ont. H.C).

28) See, for example, the elaborate, though not entirely successful, attempt to categorize and classify recognized forms of fiduciary relationships into four categories in Sealy, "Fiduciary Relationships", [1962] C.L.J. 69.

29) [1978] 2 N.Z.L R. 515.

30) *Saltman v Campbell*, supra, note 11.

31) Supra, note 1.

32) Supra, note 27

33) Supra, note 2.

34) Supra, note 12.

35) The communication was a "confidential" tenure assessment form that the plaintiff had been asked to fill out in regard to a colleague in a university department Spence adopted the criteria necessary to establish a qualified privilete set out in *Wigmore on Evidence*, (3rd), para. 2285: (1) the communications must originate in a confidence that they will not be disclosed; (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously

fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. Obviously, the qualified privilege will not exist in regard to many private communications that the parties initially intended to be "confidential".

36) Supra, note 20.

37) Supra, note 9.

38) R.S.S. 1978, C. P-24, s. 2.

39) It is appropriate at this point to briefly consider the measure of damages for breach of confidence. In a commercial context, damages can be assessed by placing a value on the information in question. In *Seager v Copydex Ltd.*, supra, note 1, the court looked to the market value of the confidential information on a sale between a willing seller and a willing buyer. In the *International Corona* case, several approaches to assessment of damages were considered, but all boiled down to the proposition that a value could be placed on the mineral leases obtained by the defendant as a result of the acquisition of the confidential information Assessment of damages in non-commercial cases is obviously more difficult. In *Ott v Fleishman*, supra, note 2, the court found no alternative but to award nominal damages.

APPENDICE G

(voir page 81)

RAPPORT SUR L'UNIFORMISATION DE LA VIE PRIVÉE: LES DÉLITS PAR LES COMMISSAIRES DE LA SASKATCHEWAN

Conférence sur l'uniformisation des lois du Canada
Yellowknife, Territoires du Nord-Ouest
Août 1989

LE CONTEXTE

Depuis 1971, la protection de la vie privée a été examinée par la Conférence à plusieurs occasions et dans différents contextes. Il a été reconnu que des initiatives législatives sont requises à la fois pour régir les situations types dans lesquelles la vie privée est menacée et pour créer un recours général qui serait applicable aux délits commis à cet égard.

En 1985, un rapport préliminaire présenté à la Conférence[1] par les Commissaires de la Saskatchewan a recommandé que la Conférence se fixe comme objectif immédiat et principal l'adoption d'une loi uniforme sur la vie privée reconnaissant l'atteinte à la vie privée comme un délit. En 1986, ont été présentées aux fins d'être discutées des propositions qui prenaient la forme d'un projet de loi préliminaire sur la protection de la vie privée[2] suivant, dans leurs lignes générales, les lois sur la vie privée de la Saskatchewan, du Manitoba et de la Colombie-Britannique. Bien que satisfaite de l'économie générale du projet de loi, la Conférence a demandé aux commissaires de la Saskatchewan de reprendre l'étude de certaines de ses dispositions. Dans certains cas, des éclaircissements supplémentaires leur ont été demandés; dans d'autres, une formulation différente de celle du projet de loi a été proposée ou le réexamen complet d'une disposition a été suggéré.

Le présent rapport a pour objet d'examiner les recommandations visant la modification du projet de 1986. Dans les lignes qui suivent, les dispositions pertinentes du projet de 1986 sont citées puis analysées, après quoi les modifications proposées à leur égard se trouvent énoncées.

ANALYSE

Article 2

2. Quiconque porte atteinte à la vie privée d'autrui commet un délit

et peut être poursuivi sans qu'il soit nécessaire d'établir que des dommages ont été causés.

Le projet de 1986, qui fait suite à celui de 1978[3], établit dans sa version anglaise* une distinction entre une personne [*"a person"*] (une entité possédant une personnalité juridique, c'est-à-dire, notamment, une société) et un particulier [*"an individual"*] (un être humain). Cette distinction ne figure pas dans les lois provinciales sur la vie privée qui existent actuellement. La Conférence a souscrit à une telle approche, et elle a reconnu que le concept de la vie privée concerne fondamentalement des êtres humains. Nous ne recommandons aucune modification à cet égard.

On s'est toutefois montré soucieux que des atteintes réelles à la vie privée de particuliers ne soient pas négligées pour le seul motif qu'elles se présentaient dans un contexte corporatif. On a considéré que la négation d'un droit d'action indépendant à une société priverait les particuliers assurant son fonctionnement quotidien de leur droit d'action personnel si l'activité reprochée pouvait être considérée comme visant principalement cette société plutôt que ces particuliers.

Certains types de violations de la vie privée, tout en étant principalement reliés à une entreprise ou à une industrie, peuvent porter atteinte à l'intimité personnelle de ses cadres. Dans de tels cas, la personnalité morale n'empêcherait pas le particulier concerné de réclamer un redressement en vertu de la Loi. La question de savoir si, à première vue, il y a violation dépend des conséquences de l'acte reproché sur la solitude ou l'anonymat du particulier plutôt que des mobiles de cet acte. Bien que la Loi qui nous intéresse ne soit pas censée s'appliquer aux problèmes croissants reliés à l'espionnage industriel, elle offre une protection contre les menaces visant la vie privée individuelle dans un tel contexte ou dans tout autre contexte.

QU'IL SOIT RÉSOLU : que Loi uniforme sur la protection de la vie privée offre une protection aux particuliers par opposition aux personnes morales

Article 3

3. Sans préjudice de la portée générale de l'article 2, une preuve qu'il y a eu

   (c) utilisation du nom ou de la voix d'un particulier ou d'une ressemblance avec celui-ci à des fins publicitaires, de promotion de la vente de biens ou de services, ou de toute autre opération relative à des biens ou services ou à toute autre fin qui procure un avantage pour l'utilisateur si, au cours de

l'utilisation, le particulier est identifié ou identifiable et l'utilisateur avait l'intention d'exploiter le nom ou la voix de cette personne ou la ressemblance avec celle-ci;

(e) communication de renseignements concernant un particulier quand cette communication n'est pas autorisée par la loi, ou si la divulgation de ces renseignements constitue un abus de confiance;

établit, en l'absence d'une preuve contraire, une atteinte à la vie privée d'un particulier.

(i) *Appropriation de la personnalité*

L'alinéa (c) de cet article accorde une protection contre l'utilisation non autorisée, à des fins commerciales, du nom ou de la voix d'un particulier ou d'une ressemblance avec celui-ci. Lors de la Conférence de 1986, la nécessité d'inclure cette disposition dans la Loi a été mise en doute. On a suggéré que la protection offerte par la *common law* dans ce domaine était suffisante. Bien que nous ne recommandions pas la modification de notre proposition originale à cet égard, la question posée nous a incités à examiner les nouveaux développements dans ce domaine du droit.

Jusqu'à une date assez récente, les cours canadiennes ont uniformément refusé de reconnaître un droit d'action district en ce qui concerne l'appropriation des attributs personnels d'autrui sans son consentement. La responsabilité ne pouvait être imputée à un défendeur que si le demandeur était en mesure d'invoquer un des délits dont l'existence était reconnue. Les catégories traditionnelles de délits, telles le libelle diffamatoire[4] l'abus de confiance[5] et la supposition [*passing off*][6] ont prévu un recours dans certaines affaires où le nom d'une personne ou une ressemblance avec une personne avaient été utilisés sans autorisation. Toutefois, les recours auxquels donnent lieu ces délits prévus par la *common law* sont limités.[7] Par exemple, l'usage non autorisé du nom d'une personne ou d'une ressemblance avec celle-ci est susceptible de donner lieu à une action en diffamation, mais l'élément déterminant dans une telle action est le préjudice à la réputation. À moins que l'appropriation non autorisée n'ait pour conséquence de diminuer l'estime dont jouit le demandeur auprès des gens bien pensants en général, ou de placer le demandeur dans une situation où il sera fui ou évité, aucune action ne pourra être intentée.

De la même façon, le délit de supposition a donné lieu à un recours dans certains cas. Traditionnellement, ce délit avait été créé pour empêcher la concurrence déloyale dans le monde des affaires. Les tribunaux

peuvent intervenir lorsqu'une personne s'est approprié le nom ou le symbole d'un concurrent, pour amener le public à identifier cette personne à ce concurrent. Les règles de la supposition ne sont toutefois applicables que dans le contexte où le demandeur et le défendeur se font concurrence dans un même commerce ou sont liés par des rapports commerciaux dans un même secteur du monde commercial. Cet élément déterminant est souvent désigné comme l'exigence du [TRADUCTION] "champ d'activités commun". Les perspectives de redressement sont pauvres dans les affaires où une célébrité est utilisée sans son autorisation dans la promotion d'un produit.

Un nouveau délit, l'appropriation illégale de la personnalité, a toutefois été reconnu plus récemment par les tribunaux de l'Ontario. Il existe à présent une jurisprudence permettant aux tribunaux d'imputer, sans avoir recours aux délits traditionnels, une responsabilité à l'égard de l'appropriation sans droit de la personnalité. Dans l'affaire *Krouse v. Chrysler Canada Ltd.*[8] la photographie d'un joueur de football professionnel avait été utilisée sans son consentement dans la campagne de développement des ventes d'un fabricant d'automobiles. M. le juge Estey – dans l'exercice des fonctions qui lui étaient alors assignées, – exprimant l'opinion de la Cour d'appel de l'Ontario, a passé en revue les catégories du droit traditionnellement invoquées pour accorder un redressement dans de tels cas, et il a tiré la conclusion suivante :

> [TRADUCTION] L'examen qui précède de la jurisprudence relative aux différentes catégories de délits qui se rapportent aux allégations en l'espèce m'amène donc à conclure que la *common law* envisage effectivement, dans ses règles applicables aux délits, un concept classifiable de façon générale sous la catégorie de l'appropriation de la personnalité.[9]

Et il ajoute :

> [TRADUCTION] ...il pourrait bien exister des circonstances dans lesquelles les tribunaux seraient justifiés de tenir un défendeur responsable du préjudice imputable à l'appropriation de la personnalité d'un demandeur portant atteinte au droit de ce dernier d'exploiter sa personnalité par l'utilisation de son image ou de sa voix, ou par d'autres moyens; cependant, après avoir examiné attentivement les éléments de preuve présentés dans le cadre de la présente action, je suis venu à la conclusion que l'intimé n'a pas établi que les appelants aient violé un droit reconnu par la loi à l'intimé.[10]

L'arrêt *Athans v. Canadian Adventure Camps Ltd. et al.*[11] a utilisé la brèche créée par l'arrêt *Krouse* pour conférer une reconnaissance judiciaire complète à cette nouvelle catégorie de la responsabilité délictuelle.

Cette décision a conclu que la reproduction à des fins commerciales de photographies du demandeur, un professionnel du ski nautique, portait atteinte à son droit exclusif de commercialiser sa personnalité. Il a eu droit à une indemnité équivalente au montant qu'il aurait reçu en échange de son autorisation.

Bien que l'on puisse maintenant dire qu'une jurisprudence canadienne reconnaît l'existence d'un délit d'appropriation sans droit de la personnalité, les paramètres et les éléments précis d'un tel délit demeurent incertains. Il vaut d'être souligné que le droit protégé sous ce nouveau chef de la responsabilité délictuelle est juridiquement distinct du droit à la vie privée. Dans l'affaire *Krouse*, après avoir examiné l'évolution d'un type d'action équivalant à celui-ci aux États-Unis, M. le juge Estey a noté que cette action avait été originalement classifiée comme une atteinte à la vie privée mais avait récemment été qualifiée de violation du droit à la publicité par les tribunaux américains.

Dans un commentaire sur l'arrêt *Athans*, le professeur Dale Gibson, de l'université du Manitoba, a indiqué que la revendication de l'exclusivité des droits de publicité constitue en fait l'antithèse même de la revendication du droit à la protection de la vie privée :

> [TRADUCTION] Le demandeur ne sollicite pas la protection contre une intrusion du public : il demande que lui soit reconnu le droit de tirer commercialement profit de son exposition à la vue du public. La publicité non autorisée peut certainement porter atteinte à la vie privée, comme ce fut le cas dans les affaires *Tolley* et *Mazatti*, où les demandeurs ne voulaient censément aucune publicité, mais le préjudice causé à de telles personnes était très différent du préjudice subi dans des circonstances comme celles de la présente affaire, où un demandeur veut tirer profit de la publicité.[12]

La manière dont ce développement récent de la reponsabilité délictuelle influencera les principes touchant la vie privée n'est pas évidente. Bien qu'il y aura sans nul doute un certain chevauchement des protections offertes, les deux recours disponibles devraient être considérés comme complémentaires plutôt que comme applicables au même champ. Des célébrités peuvent à présent solliciter en vertu de la *common law* un redressement contre les personnes qui se sont fautivement approprié leur personnalité, mais la question se pose toujours de savoir si un redressement sera également accordé dans les cas où aucun préjudice mesurable selon la valeur commerciale de la personnalité du demandeur ne peut être décelé.[13] Cette question met en jeu une atteinte à la vie privée plutôt qu'une violation du droit à la publicité. Le droit à la vie privée est plus pertinent que le droit à la publicité lorsqu'il s'agit de prévenir les intrusions dans la vie personnelle d'un particulier, tandis

que le droit à la publicité accorde une protection contre la [TRADUCTION] "piraterie publicitaire".[14] À notre avis, l'existence de ces deux droits juridiquement distincts justifie l'inclusion de l'alinéa (c) dans le projet de loi.

QU'IL SOIT RÉSOLU : que la Loi uniforme sur la vie privée prévoit que l'appropriation du nom ou de la voix d'un particulier ou d'une ressemblance avec celui-ci à des fins publicitaires constitue une atteinte à la vie privée.

(ii) *L'atteinte à la vie privée et les banques de données*

L'alinéa (e) vise les atteintes à la vie privée résultant du stockage et du traitement de grandes quantités de renseignements personnels qui ont lieu de nos jours dans les banques de données. Les paramètres de cette clause veulent comprendre les banques gouvernementales et les banques privées, à la fois celles qui sont régies par une loi et celles qui ne font l'objet d'aucune réglementation à ce point-ci.

Malgré le libellé de l'alinéa (e), ses rédacteurs n'ont pas voulu que la doctrine de l'abus de confiance[15] prévue en *equity* serve à établir, en l'absence de preuve contraire, une atteinte à la vie privée. Lors de la conférence de 1986, il a été suggéré que les termes utilisés pouvaient se prêter à une interprétation différente de celle qui avait été entendue. Nous recommandons la suppression de la mention de l'abus de confiance, et nous proposons une nouvelle clause qui, selon nous, élargira de façon importante la protection accordée. L'adoption de cette façon d'aborder la question éliminerait les problèmes plus techniques inhérents au rapport entre le délit d'atteinte à la vie privée prévu à la Loi et la doctrine de l'abus de confiance issue de l'equity.

QU'IL SOIT RÉSOLU : que la Loi uniforme sur la vie privée mette au rang des violations de la vie privée :

la communication de renseignements recueillis au sujet d'un particulier pour des fins commerciales ou gouvernementales légitimes :

(i) lorsque cette communication s'est faite contrairement à la loi; ou

(ii) lorsque cette communication s'est faite

A) dans un but autre que celui pour lequel les renseignements visés ont été recueillis; ou

B) dans un but de profit

Article 4

4.(1) Un acte, un comportement ou une publication ne porte pas atteinte à la vie privée :

(a) s'il a été expressément ou implicitement autorisé par un particulier compétent à donner une telle autorisation, lorsque le tribunal est convaincu que cette autorisation a été accordée librement; ...

(c) s'il était autorisé ou exigé par la loi en vigueur dans la province ou par un tribunal; ...

(e) s'il était raisonnable étant donné les liens, familiaux ou autres, existant entre les parties intéressées; ou

(f) si le défendeur ne savait pas ou ne pouvait raisonnablement savoir que l'acte, le comportement ou la publication pouvait porter atteinte à la vie privée d'un particulier.

(2) Par dérogation à toute autre loi, lorsqu'un particulier est tenu en vertu de la loi de divulguer des renseignements d'une nature personnelle ou que la divulgation de tels renseignements est autorisée à des fins limitées, la communication de ces renseignements à des fins autres que celles nécessaires ou permises constitue une violation de la vie privée du particulier...

(4) Au présent article, le terme "tribunal" s'entend de toute personne autorisée par la loi à faire prêter serment dans le but de recevoir un témoignage et qui agit aux fins pour lesquelles elle a été autorisée à recevoir ce témoignage.

(i) *le paragraphe 4(2)*

Le paragraphe 4(2), qui devait s'interpréter en conjonction avec le paragraphe 3(e), assortissait d'une réserve la défense fondée sur le consentement et celle qui s'appuie sur l'autorisation légale que prévoyaient respectivement les alinéas 4(1)(a) et 4(1)(c). L'alinéa 3(e) a subi des modifications importantes, et nous recommandons la suppression du paragraphe (2), que nous remplacerions en modifiant les clauses (a) et (c) pour leur faire régir les circonstances dans lesquelles un consentement ou une autorisation légale ont été donnés à des fins restreintes, qui n'ont pas été respectées par la communication effectuée. Dans une telle situation, le consentement ou l'autorisation légale ne pourraient être efficacement opposés en défense à une poursuite reprochant cette communication excessive. La modification qui serait apportée à l'alinéa 4(1)(c) restreindrait également la défense fondée sur l'autorisation dans les cas où la loi régissant la source de renseignements visée ne prévoit qu'une règle vague ou une règle très souple conférant un pouvoir général de communication de renseignements.

QU'IL SOIT RÉSOLU : que la Loi uniforme sur la vie privée prévoit qu'un acte, un comportement ou une publication ne porte pas atteinte à la vie privée :

(a) s'il est précisément autorisé, de façon expresse ou implicite, par un particulier compétent à donner une telle autorisation, lorsque le tribunal est convaincu que cette autorisation a été donnée librement;

(c) s'il a été autorisé ou exigé par une loi en vigueur dans la province ou par un tribunal, sous la réserve qu'une autorisation fondée sur une loi ne pourra constituer un moyen de défense que si la loi en question autorise précisément cet acte, ce comportement ou cette publication en regard des fins ainsi visées.

(ii) *Le paragraphe 4(4)*

Suite à une observation faite lors de la conférence de 1986, nous proposons l'adoption d'une modification mineure en ce qui concerne le paragraphe 4(4). L'expression "s'entend de" a été remplacée par le mot "comprend". L'on a suggéré que cette modification clarifierait l'objet ayant présidé à l'adoption de ce paragraphe.

QU'IL SOIT RÉSOLU : que la Loi uniforme sur la vie privée prévoit qu'un acte, un comportement ou une publication ne porte pas atteinte à la vie privée s'il a été autorisé par un tribunal, et que, dans un tel contexte, le mot "tribunal" devrait comprendre toute personne autorisée par la loi à faire prêter serment dans le but de recevoir un témoignage et qui agit aux fins pour lesquelles elle a été autorisée à recevoir ce témoignage.

(iii) *L'intention de nuire et l'atteinte à la vie privée*

Des inquiétudes ont également été exprimées au sujet de la jurisprudence américaine, qui accorde de l'importance à l'intention de nuire, pour en faire soit un élément constitutif du délit soit un facteur annulant une défense. La conférence a convenu que l'intention de nuire ne devait pas être pertinente à une action fondée sur le droit à la vie privée. Certains craignaient que la jurisprudence américaine n'influence les décisions judiciaires appliquant la législation sur la vie privée. Il a été suggéré de prévoir une stipulation déclarant clairement que l'intention de nuire n'est pas nécessaire dans le cadre d'une action et n'annule aucune des défenses statutaires.

Nous ne sommes pas convaincus qu'une telle modification soit nécessaire ou même souhaitable. Le contexte dans lequel la jurisprudence américaine a été élaborée est celui de la protection constitutionnelle de la liberté de parole et de la liberté de presse. Il est peu vraisemblable que la mention expresse de l'intention de nuire dans les dispositions législatives sur la vie privée encourage ou décourage une évolution parallèle du droit canadien sous le régime de la *Charte des droits et libertés*.

QU'IL SOIT RÉSOLU : que la Loi uniforme sur la vie privée ne fasse pas de l'intention de nuire un élément du délit d'atteinte à la vie privée ou un facteur annulant une défense dans une action alléguant une atteinte à la vie privée.

L'article 6

6(2) Le tribunal peut en vertu du présent article accorder des dommages-intérêts punitifs.

La mention explicite de l'adjudication de dommages-intérêts punitifs apporte un complément au principe que la vie privée donne ouverture à une action sans nécessité d'établir un préjudice en établissant clairement qu'un tribunal peut adjuger des dommages-intérêts substantiels sans que ne soit faite la preuve d'une perte pécuniaire réelle. Les dommages-intérêts punitifs ne sont toutefois pas justifiés à chaque fois qu'une perte tangible ne peut être établie. Lors de la conférence de l'an dernier, il a été dit que l'on devrait donner certaines précisions sur les circonstances dans lesquelles des dommages-intérêts seraient appropriés. Il serait difficile de codifier tous les types de situations pouvant justifier l'adjudication de dommages-intérêts punitifs. Plutôt que de tenter de le faire, en risquant de limiter par mégarde la portée de tels redressements, nous proposons qu'un pouvoir discrétionnaire plus général soit conféré à l'égard des dommages-intérêts punitifs.

QU'IL SOIT RÉSOLU : que la Loi uniforme sur la vie privée porte que :

Dans le cadre d'un recours fondé sur une atteinte à la vie privée, le tribunal peut accorder les dommages-intérêts punitifs qu'il considère appropriés, en tenant compte de la flagrance de l'atteinte à la vie privée ainsi que de la conduite du défendeur

Article 7

7.(1) L'exercice des recours prévus à la présente loi n'a pas pour effet d'interdire l'exercice de tout autre recours.

(2) Il peut être tenu compte des dommages-intérêts accordés en vertu de la présente loi aux fins de l'évaluation des dommages accordés dans tout autre recours exercé pour les mêmes motifs et fondé sur les mêmes faits.

Le paragraphe (2) a fait l'objet de certaines discussions lors de la conférence de 1986. L'opportunité de conserver un paragraphe réitérant apparemment une règle générale qui serait applicable de toute façon a été mise en doute. Cette disposition reproduit en substance des stipula-

tions figurant dans les lois existantes sur la vie privée. Considérant la déclaration non équivoque du paragraphe (1), nous continuons de croire qu'il est opportun de conserver le paragraphe (2) afin d'empêcher que la portée de l'article 7 ne soit mal interprétée.

QU'IL SOIT RÉSOLU : que la Loi uniforme sur la vie privée porte que :

Le droit d'action pour atteindre à la vie privée et l'exercice des recours prévus à la présente loi n'ont pas pour effet d'interdire l'exercice de tout autre recours.

Il peut être tenu compte des dommages-intérêts accordés en vertu de la présente loi aux fins de l'évaluation des dommages accordés dans tout autre recours exercé pour les mêmes motifs et fondé sur les mêmes faits

Article 8

8. Le demandeur a droit aux dépens de l'action dès lors que le tribunal constate une violation de sa vie privée.

Lors de la Conférence de 1986, il a été suggéré que cette disposition soit étendue ainsi que le prévoit la résolution qui suit le présent paragraphe. Nous sommes d'accord avec cette proposition, qui renforce la politique générale voulant que les demandeurs victorieux aient droit à tous les frais et dépens raisonnables.

QU'IL SOIT RÉSOLU : que la Loi uniforme sur la vie privée porte que :

Le tribunal qui adjuge des dépens dans le cadre d'un recours fondé sur une atteinte à la vie privée tient compte des frais réels qui ont été raisonnablement engagés par le demandeur pour intenter ce recours.

Article 9

9. Les recours permis en vertu de la présente loi doivent être exercés dans les deux ans qui suivent la découverte, par la victime, de la violation de sa vie privée.

La Conférence de 1986 a convenu que la création de périodes de prescription particulières dans différentes lois devait être évitée. Elle se conformait en cela à la philosophie suivie de façon constante par la Conférence depuis l'adoption de la *Loi uniforme sur la prescription des actions en justice* en 1982. L'on considérait que l'éparpillement de périodes de prescription à travers les recueils de lois constituait un piège pour les personnes non averties et rendrait vraisemblablement la législation trop complexe, si bien que des affaires semblables seraient réglées de façon différente.[16]

Afin d'atteindre à la simplicité et à la constance dans le droit des prescriptions, nous recommandons l'application à la vie privée des dispositions de la *Loi uniforme sur la prescription des actions en justice*. À notre avis, les dispositions de cette loi n'ont pas à être reproduites dans la Loi sur la vie privée.

> QU'IL SOIT RÉSOLU : que la Loi uniforme sur la vie privée ne prévoit aucune prescription, et que la période applicable à cet égard soit déterminée selon la Loi uniforme sur la prescription des actions en justice.

Article 10

10. Le décès de la victime entraîne l'extinction des recours prévus à la présente loi.

Cette disposition figurait dans le projet de loi original sur la protection de la vie privée qui a été examiné par la Conférence en 1972. À l'époque, les commissaires du Manitoba avaient exprimé des doutes quant à la valeur d'une telle disposition. Leur opinion était la suivante :

> [TRADUCTION] Il est certain que, en ce qui concerne les demandes de dommages-intérêts faisant état d'une perte pécuniaire subie par la personne dont la vie privée aurait été violée, comme en ce qui regarde toute demande sollicitant une reddition de compte ou la remise de certains articles ou documents, le droit invoqué devrait subsister après le décès de la personne dont la vie privée a été violée.[17]

La question de la transmissibilité des droits a refait surface lors de la Conférence de 1986. De plus, une question semblable a été discutée en regard de la *Loi uniforme sur le libelle diffamatoire*. Dans un rapport sur la *Loi uniforme sur le libelle diffamatoire* qui avait été préparé pour la conférence de l'an dernier, les commissaires de la Saskatchewan ont recommandé que les actions en diffamation survivent à l'une et à l'autre partie. Sous le régime de la *Loi uniforme sur la transmission des droits d'action*, lorsqu'une action survit au profit de la succession du défunt, le droit de réclamer des dommages-intérêts est limité à la perte pécuniaire réellement subie.

Si ce n'était de l'article 10 du projet de loi sur la vie privée, la *Loi uniforme sur la transmission des droits d'action* serait applicable aux actions relatives à la vie privée. Nous sommes d'avis que les actions en diffamation et les actions relatives à la vie privée devraient être mises sur le même pied. Rien ne nous justifie de mettre à part le recours fondé sur le droit à la vie privée en lui appliquant des règles distinctes.

> QU'IL SOIT RÉSOLU : que la Loi uniforme sur la vie privée ne prévoit aucune disposition concernant la transmission des actions, et qu'elle abandonne cette question à la Loi uniforme sur la transmission des droits d'action.

1) *Voir Proceedings of the Uniform Law Conference of Canada, 1985*, à la page 375.

2) Voir l'annexe A du présent rapport

3) Voir *Proceedings of the Uniform Law Conference of Canada, 1978*, à la page 263
* It is a tort actionable without proof of damage for a person to voilate the privacy of an individual.

4) Voir les arrêts: *Tolley* v *J. S. Fry & Sons Ltd.*, [1903] 1 K.B 467; *Clark* v. *Freeman* (1948), 50 E.R. 759; *Mazatti* v. *Acme Products Ltd.* [1930] 4 D.L R 601; *Dunlop Rubber Co. Ltd.* v. *Dunlop*, [1921] 1 A C. 367.

5) Voir les arrêts: *Pollard* v *Photographic Co.* (1889), 40 Ch D 345; *Prince Albert* v. *Strange* 41 E R. 1171.

6) Voir les arrêts: *McCulloch* v *Lewis A. May (Produce Distributors) Ltd.*, [1947] 2 All E R. 845; *King Features Syndicate, Inc.* et al v. *Lechter* (1940), 12 C.P.R. 60.

7) D'autres fondements de responsabilité se trouvent suggérés danas: Panam, "Unauthorized use of Names or Photographs in Advertisement" (1966), 40 Aust. L.J. 4.

8) (1974), 1 O.R. (2d) 225 C.A.

9) *idem* à la page 238.

10) *idem*. à la page 241.

11) (1978), 80 D.L.R. (2d) 583 (Ont.).

12) Commentaire sur l'arrêt *Athans*, 1977 4 C.C.L T. 37, à la page 42

13) L'arrêt *Krouse, supra* à la note de bas de page 6, dans lequel le juge Estey, à la page 237, déclare que la preuve d'un préjudice constitue un élément essentiel de la responsabilité relative à l'appropriation sans droit des attributs de la personnalité.

14) Cette expression a été utilisée par le professeur Dale Gibson, *supra*, à la note 12.

15) Voir l'annexe B de ce rapport.

16) Voir *Proceedings of the Uniform Law Conference of Canada, 1979*, à la page 158.

17) Voir *Proceedings of the Uniform Law Conference of Canada, 1972*, à la page 209

ANNEXE A

(Rapport de 1986)

UNIFORMISATION DE LA PROTECTION DE LA VIE PRIVÉE: LES DÉLITS UNIFORMISATION DE LA LOI SUR LA VIE PRIVÉE: PROJET DE LOI ET COMMENTAIRE

INTRODUCTION

Cinq provinces ont adopté des lois pour porter remède aux atteintes à la vie privée. En vertu des lois sur la protection de la vie privée adoptées en Colombie-Britannique, au Manitoba, en Saskatchewan et à Terre-Neuve, l'atteinte à la vie privée est un délit[1]. Au Québec, le droit à la vie privée est reconnu et protégé par la *Charte provinciale des droits et libertés de la personne*[2]. Le Parlement fédéral et l'Assemblée nationale du Québec ont adopté des lois régissant l'accès aux banques de données gouvernementales[3]. Ces lois répondent à une préoccupation croissante chez le public au sujet de la protection de la vie privée, préoccupation que l'on retrouve également dans les compte-rendus de la Conférence sur l'uniformisation des lois au Canada[4] et dans les rapports des organismes de réforme du droit[5]. Au cours des années 60, il est devenu clair que les percées technologiques dans le domaine des techniques de surveillance[6] constituaient une nouvelle menace pour la vie privée contre laquelle les recours traditionnels de la *common law* étaient insuffisants[7]. Depuis peu, on s'attarde tout particulièrement à la mauvaise utilisation possible des banques de données informatisées publiques et privées qui sont toujours plus perfectionnées[8].

Les lois provinciales sur la protection de la vie privée ont été conçues pour assurer une protection générale du droit à la vie privée. Le concept de la vie privée est décrit à dessein en termes généraux et assujetti à des réserves également très vagues. Ces lois tiennent compte du fait que la vie privée peut être violée par des moyens presque innombrables et imprévisibles et que le concept de la vie privée lui-même n'appelle pas une définition simple et concise[9]. On s'attendait apparemment à ce que les lois fournissent un fondement sur lequel s'élèverait la définition d'un nouveau délit dans le cadre de décisions judiciaires. Malheureusement, cette évolution n'a pas eu lieu. Il n'existe qu'une poignée de décisions prises en vertu des lois provinciales et ces décisions ont très peu contribué à établir les paramètres pratiques du nouveau délit[10].

Dans le *Report on Protection of Privacy* de la Commission de réforme du droit de l'Ontario de 1968, M. Edward Ryan a signalé dans son analyse de la Loi sur la protection de la vie privée de la Colombie-Britannique:

> Il s'agit d'une bonne loi, mais elle souffre de certaines lacunes: une code complet de protection de la vie privée, des normes définitives sur le trafic d'information, une surveillance des moyens et des appareils servant à violer la vie privée, la limitation des tests psychologiques approfondis, des normes visant l'entrée et la communication de renseignements dans les dossiers scolaires, médicaux et gouvernementaux, et tout le reste ... Prise isolément, cette loi pourrait facilement devenir une lettre morte bien intentionnée![11]

La démarche "globale" adoptée par les lois sur la protection de la vie privée est à la fois leur force et leur faiblesse. La loi est assez souple pour traiter des différentes façons dont la vie privée peut être violée à l'heure actuelle et pour répondre aux nouveaux défis qui apparaîtront dans ce domaine. Par contre, l'incertitude et l'imprévisibilité qui marquent l'application du concept généralisé, et par conséquent inévitablement vague, de la vie privée contenue dans la loi laissent un plaignant éventuel perplexe, celui-ci ne sachant pas au juste s'il y a eu atteinte à son droit dans une situation particulière. Même si le plaignant croit pouvoir démontrer qu'il a été victime d'une atteinte à sa vie privée, la loi ne garantit pas que les dommages-intérêts accordés seront suffisants pour justifier les poursuites en justice.

L'échec apparent des lois sur la protection de la vie privée sous leur forme actuelle laisse croire que la création d'un délit statutaire conçu de façon globale ne constitue peut-être pas la méthode la plus efficace pour assurer la protection du droit à la vie privée. La première ligne de défense contre les atteintes à la vie privée doit être des lois précises portant sur des formes particulières de violations de la vie privée. Face à l'inquiétude croissante concernant une mauvaise utilisation possible des banques de données informatisées contenant des renseignements personnels, il nous faut procéder à un nouvel examen des textes législatifs régissant des banques de données précises![12] Il faut réviser la loi sur les rapports de solvabilité pour répondre adéquatement aux problèmes créés par la microplaquette; il faut également revoir et resserrer la surveillance des banques de données publiques comme les dossiers d'assurance-maladie.

Néanmoins, les lois provinciales sur la protection de la vie privée représentent, comme le dit le professeur Ryan, un pas en avant dans le domaine de la protection de la vie privée![13] Même si des textes législatifs

sont adoptés pour réglementer certaines banques de données et d'autres sources importantes de la menace contemporaine pour la vie privée, la démarche globale qu'offrent les lois sur la protection de la vie privée aura encore sa place. Dans le contexte d'une politique législative exhaustive visant la protection de la vie privée, des lois générales sur la protection de la vie privée peuvent remplir plusieurs fonctions :

1. Les textes de loi précis portant sur la surveillance de banques de données et sur la surveillance électronique ne peuvent pas, d'un point de vue purement pratique, atteindre toutes les collections de renseignements personnels qui peuvent être mal utilisées, ni prévoir les nouveaux modes et les nouveaux contextes de surveillance.

2. Des textes législatifs précis ne peuvent pas porter sur les innombrables façons de porter atteinte à la vie privée, ni faire face à l'effet cumulatif des cas individuels de ce que Ryan appelle la totalité des atteintes à la vie privée relativement légères pratiquées individuellement, qu'il considère comme étant l'aspect le plus important du problème contemporain de la protection de la vie privée.[14]

3. Les lois sur la protection de la vie privée peuvent servir de complément à des textes de loi plus précis en permettant un recours en dommages-intérêts s'il y a infraction à une interdiction précise de divulguer de l'information ou d'exercer une surveillance autorisée.

Les lois sur la protection de la vie privée n'ont pas souvent été interprétées par les tribunaux, mais elles ont fait l'objet d'analyses et de critiques considérables.[15] Il y a plusieurs façons d'améliorer les textes législatifs et de les rendre plus efficaces. En général, les observations portant sur ces textes de loi suggèrent trois façons de les améliorer. En premier lieu, les exemples de violation présumée de la vie privée qu'offrent les textes de loi devraient être élargis. Deuxièmement, les moyens de défense permis devraient être resserrés. En troisième lieu, il faut mieux orienter les tribunaux en matière de redressements et de dépens. La loi uniformisée proposée est fondée sur une comparaison critique des lois provinciales existantes et sur les analyses des glossateurs. Elle diffère des versions antérieures de la loi uniformisée en ce qu'elle traite directement de la question de l'efficacité du texte législatif. Les versions de 1972 et 1978 visaient d'abord à concilier les modèles provinciaux. Le commentaire expose le fondement des dispositions que l'on propose d'ajouter à la loi et des choix entre les modèles fournis par les lois provinciales.

En principe, rien n'empêche d'incorporer la protection générale du droit à la vie privée dans un code des droits de la personne, suivant le modèle du Québec. Le commentaire et le projet de loi peuvent aider à trouver des façons de renforcer la protection qu'offre la *Charte des droits et libertés de la personne*. Il faut toutefois souligner que les codes des droits de la personne sont généralement rédigés en termes assez généraux et que leur mise en application exige parfois un effort d'interprétation considérable. La modification des mesures générales de protection de la vie privée afin de les rendre plus efficaces dans la pratique nécessitera un langage plus précis et un soin du détail plus grand que ce que l'on considère généralement approprié dans les codes des droits de la personne.

COMMENTAIRE

Article 2

> 2. Quiconque porte atteinte à la vie privée d'autrui commet un délit et peut être poursuivi sans qu'il soit nécessaire d'établir que des dommages ont été causés.

Selon les textes de lois de la Colombie-Britannique, de la Saskatchewan et de Terre-Neuve, le délit de violation de la vie privée doit être volontaire. Ainsi, la loi de la Saskatchewan prévoit que quiconque, de propos délibéré et sans revendication de droits, porte atteinte au droit à la vie privée d'autrui commet un délit et est passible de poursuite sans qu'il soit nécessaire d'établir que des dommages ont été causés (article 2). Seule la loi du Manitoba a un sens assez élargi pour comprendre une atteinte à la vie privée découlant de la négligence:

> [TRADUCTION]
>
> 2.(1) Une personne qui porte atteinte sérieusement, déraisonnablement et sans revendication de droits à la vie privée d'autrui, commet un délit contre cette autre personne.
>
> (2) Une action en justice pour atteinte à la vie privée peut être intentée sans qu'il soit nécessaire d'établir que des dommages ont été causés.

Le projet de 1972 de la CULC rejetait la démarche du Manitoba. Toutefois, comme le souligne Burns,[16] le commentaire relatif au projet de loi portait surtout sur l'atteinte non intentionnelle à la vie privée et faisant abstraction de la négligence. La loi du Manitoba offre un moyen de défense lorsque le défendeur ne savait ni ne pouvait raisonnablement savoir que l'acte violerait la vie privée d'autrui (par. 5(b)). Par consé-

quent, une violation non intentionnelle de la vie privée n'est pas un délit au Manitoba à moins qu'elle ne résulte de la négligence.

Le plaignant peut avoir de la difficulté à établir que la violation de la vie privée résulte d'un acte volontaire. En outre, il convient en principe de conclure qu'une violation de la vie privée est passible de poursuites si le défendeur aurait dû savoir que son acte constituait une atteinte à la vie privée.

Dans le commentaire sur le projet de 1972, les commissaires de la C.-B. étaient d'avis que toute atteinte à la vie privée, aussi minime ou raisonnable soit-elle, devrait constituer un délit et qu'il faudrait tenir compte de la gravité et du caractère déraisonnable du délit au moment d'évaluer les dommages-intérêts. Toutes les lois provinciales sur la protection de la vie privée et le projet de 1972 (mais pas celui de 1978) exigent toutefois une preuve que l'acte reproché constitue une atteinte déraisonnable à la vie privée![17] Les lois provinciales adoptent apparemment cette démarche afin d'éviter des litiges pour des questions insignifiantes. Cependant, même si l'on n'exige pas que l'acte soit de nature déraisonnable, les tribunaux auront assez de latitude pour définir la portée de la protection offerte dans chaque cas et rejeter les réclamations fondées sur des peccadilles. Le fait d'exiger que l'acte soit de nature déraisonnable ne sert qu'à affaiblir le concept de la vie privée. Comme le souligne le professeur Ryan, il est possible de trouver une justification valable pour presque tous les moyens qui permettent de porter atteinte à la vie privée![18]

Le nouveau projet, suivant celui de 1978, établit une distinction entre une personne (toute entité possédant une personnalité juridique, y compris une société) et un particulier (un être humain). Cette distinction n'existe pas dans les lois actuelles sur la protection de la vie privée. En vertu du nouveau projet de loi, seule la vie privée d'un particulier est protégée, mais une société ou un autre corps constitué peuvent être tenus responsables d'une atteinte à la vie privée d'un particulier.

Article 3

3. Sans préjudice de la portée générale de l'article 2, une preuve qu'il y a eu:

   (a) surveillance auditive ou visuelle d'un particulier, de sa résidence ou de son véhicule, par quelque moyen que ce soit, y compris l'écoute aux portes, la surveillance, l'espionnage, l'importunité ou la filature, qu'il y ait ou non introduction sans permission dans une propriété;

(b) écoute ou enregistrement d'une conversation à laquelle participe un particulier, ou écoute ou enregistrement de messages transmis ou reçus par cette personne par des moyens de télécommunication, autrement qu'en tant que partie légitime à ceux-ci;

(c) utilisation du nom ou de la voix d'un particulier ou d'une ressemblance avec celui-ci à des fins publicitaires, de promotion de la vente de biens ou de services, ou de toute autre opération relative à des biens ou services ou à toute autre fin qui procure un avantage pour l'utilisateur si, au cours de l'utilisation, le particulier est identifié ou identifiable et l'utilisateur avait l'intention d'exploiter le nom ou la voix de cette personne ou la ressemblance avec celle-ci;

(d) publication de lettres, de journaux internes ou d'autres documents personnels appartenant à un particulier; ou

(e) communication de renseignements concernant un particulier quand cette communication n'est pas autorisée par la loi, ou si la divulgation de ces renseignements constitue un abus de confiance;

établit, en l'absence d'une preuve contraire, une atteinte à la vie privée d'un particulier.

L'article 3 définit certains comportements qui sont réputés être une atteinte à la vie privée d'un particulier. Cette démarche se retrouve dans toutes les versions de la Loi et dans les textes de la Saskatchewan et de Terre-Neuve. La loi de la C.-B. (art. 3) érige en délit distinct l'utilisation commerciale d'un nom ou d'une ressemblance sans consentement mais elle ne donne pas d'autres exemples d'atteinte à la vie privée. La loi du Manitoba prévoit que des actes semblables à ceux qu'énonce la projet peuvent porter atteinte à la vie privée.

Il faut s'attendre à ce que la majorité des poursuites intentées pour atteinte à la vie privée touchent des circonstances prévues à l'article 3. C'est pourquoi la liste doit comprendre le plus grand nombre possible de cas clairs d'empiétement sur la vie privée. Les alinéas (a) à (d) reprennent essentiellement les cas de violation de la vie privée prévus dans les textes de loi existants. Il faut cependant remarquer que ces textes législatifs ne mentionnent pas la communication de renseignements contenus dans les banques de données et d'autres sources d'information, qui est contraire à la loi ou constitue un abus de confiance. L'alinéa (e) du projet de loi remédie à cette lacune.

L'alinéa (e) est censé s'appliquer dans des circonstances très diverses. Premièrement, une banque de données gouvernementale qui communique des renseignements dans des circonstances qui ne sont pas permises par la loi régissant la banque de données porte atteinte à la vie privée. Deuxièmement, il peut y avoir violation de la vie privée quand des banques de données non gouvernementales réglementées communiquent des renseignements. Par exemple, la communication de renseignements par un organisme de vérification de la solvabilité, si elle n'est pas permise par les textes de loi provinciaux régissant la vérification de la solvabilité à cause de la nature de l'information ou de l'utilisation que l'on veut en faire, équivaudra à une atteinte à la vie privée. Enfin, cet alinéa est assez général pour s'appliquer à la communication de renseignements provenant d'une source non réglementée lorsqu'il existe un lien de confidentialité entre la personne qui rassemble les données et celle dont la vie privée est violée. Ainsi, la communication par un médecin de renseignements médicaux sans le consentement du patient équivaudrait à une violation de la vie privée.

Il faut relier l'alinéa (e) au paragraphe 2 de l'article 4 examiné ci-après.

L'alinéa (a), à l'exemple du texte de loi du Manitoba mais contrairement aux autres lois provinciales et aux autres projets de la CULC, étend expressément son champ d'application à la surveillance de la résidence ou du véhicule d'un particulier.

L'alinéa (b) est identique à la disposition que les commissaires du Manitoba ont critiquée dans leurs commentaires sur le projet de 1972. On a fait remarquer que certaines sociétés de télécommunication enregistrent tous les messages envoyés. Cette pratique peut convenir à certaines formes de télécommunication. Par exemple, certains types de télégrammes sont enregistrés à des fins de vérification et de facturation. Il ne conviendrait pas cependant de permettre aux services de téléphone d'enregistrer des appels. Par conséquent, tout enregistrement effectué par la société effectuant la transmission devrait être autorisé par la personnel visée afin que ne considère pas qu'il y a eu atteinte à la vie privée. Il est probable que lorsqu'on délivre le texte d'une communication à la société pouvant en effectuer la transmission, on consente implicitement à ce que la société garde ou enregistre le message. Quoi qu'il en soit, la divulgation de cette pratique dégagerait la société de toute responsabilité.

L'alinéa (d) est différent de la disposition correspondante dans les lois provinciales et les projets précédents en ce qu'il traite de la "publication" plutôt que de l'utilisation de lettres, etc. Les commissaires du Manitoba ont signalé dans leurs commentaires de 1972 que le terme "publication" correspondait de plus près à ce que l'on voulait indiquer.

Article 4

4.(1) Un acte, un comportement ou une publication ne porte pas atteinte à la vie privée:

(a) s'il a été expressément ou implicitement autorisé par un particulier compétent à donner une telle autorisation, lorsque le tribunal est convaincu que cette autorisation a été accordée librement;

(b) s'il était raisonnablement accessoire à la défense d'une personne ou d'un bien;

(c) s'il était autorisé ou exigé par la loi en vigueur dans la province ou par un tribunal;

(d) s'il était celui:

(i) d'un agent de la paix agissant dans l'exercice de ses fonctions et dans les limites de ses pouvoirs; ou

(ii) d'un fonctionnaire agissant dans le cadre d'une enquête dans l'exercice de ses fonctions et dans les limites de ses pouvoirs;

et n'était pas disproportionné à la gravité de l'affaire faisant l'objet de l'enquête ou n'a pas été commis en violation d'un droit de propriété ou à l'occasion d'un autre acte illégal;

(e) s'il était raisonnable étant donné les liens, familiaux ou autres, existant entre les parties intéressées; ou

(f) si le défendeur ne savait pas ou ne pouvait raisonnablement savoir que l'acte, le comportement ou la publication pouvait porter atteinte à la vie privée d'un particulier.

(2) Par dérogation à toute autre loi, lorsqu'un particulier est tenu en vertu de la loi de divulguer des renseignements d'une nature personnelle ou que la divulgation de tels renseignements est autorisée à des fins limitées, la communication de ces renseignements à des fins autres que celles nécessaires ou permises constitue une violation de la vie privée du particulier.

(3) La publication de toute affaire, quelle qu'elle soit, ne porte pas atteinte à la vie privée:

(a) s'il existe des motifs raisonnables de croire que la publication est faite pour des raisons d'intérêt public; ou

(b) que la publication était protégée en vertu des règles de droit applicables à la publication de matériel diffamatoire;

mais ce paragraphe n'offre aucune protection lorsque l'acte ou le comportement par lequel on s'est emparé de l'affaire publiée portait lui-même atteinte à la vie privée.

(4) Au présent article, le terme "tribunal" s'entend de toute personne autorisée par la loi à faire prêter serment dans le but de recevoir un témoignage et qui agit aux fins pour lesquelles elle a été autorisée à recevoir ce témoignage.

L'article 4 présente nombre de moyens de défense contre une poursuite pour violation de la vie privée. Les lois provinciales sur la protection de la vie privée et les projets précédents de la CULC énoncent des moyens de défense semblables.

La *Loi sur la protection de la vie privée* de la Saskatchewan prévoit un moyen de défense supplémentaire que n'offre aucun autre texte législatif ou projet de loi. L'alinéa 4(1)(e) de la loi de la Saskatchewan prévoit qu'un acte, un comportement ou une publication ne constitue pas une atteinte à la vie privée s'il est le fait

(e) d'une personne s'occupant de la collecte d'informations:

(1) pour tout journal ou autre publication d'informations publiques; ou

(2) pour un radiodiffuseur titulaire d'un permis du Conseil de la radiodiffusion et des télécommunications canadiennes l'autorisant à poursuivre une entreprise de diffusion

et que l'acte, le comportement ou la publication était raisonnable dans les circonstances et nécessaire ou accessoire aux activités normales de collecte d'informations.

L'exception de "juste commentaire" permise au paragraphe 4(3) du projet de loi (et dans toutes les lois provinciales) suffit à protéger la liberté de presse. Elle protégera les médias lorsqu'ils publient de l'information. Cependant, en ce qui concerne la collecte d'informations comme telle, les membres des médias ne devraient pas jouir d'un privilège spécial permettant à celui qui rassemble des informations de porter atteinte à la vie privée d'un individu.

Les exceptions établies dans le projet de loi sont semblables, quant au fond, à celles qui se trouvent dans les lois provinciales et le projet de 1972, mais certaines modifications ont été apportées afin de cerner plus clairement la portée de ces moyens de défense.

L'alinéa (a) du paragraphe 1 établit l'exception de consentement. La nouvelle version du texte de loi modifie la formule utilisée dans les lois provinciales et le projet de 1972 en ajoutant la nécessité pour le tribunal d'être convaincu que le consentement a été donné librement afin de pouvoir établir ce moyen de défense. Par cet ajout, le tribunal peut rejeter le moyen de défense lorsqu'il apparaît que le plaignant a été contraint à donner son consentement. Par exemple, si un employé est obligé de consentir à la communication d'information ou de subir un test de détecteur de mensonges sous peine d'être congédié s'il refuse, l'employeur ne pourrait pas se prévaloir de ce moyen de défense. Le concept de "consentement", en *common law*, renferme bien sûr une certaine notion du caractère volontaire de l'acte. Le projet de loi cherche à orienter le tribunal en mettant l'accent sur cette exigence.

L'alinéa (b), qui permet la violation de la vie privée pour défendre une personne ou un bien, adopte l'essentiel de la formulation de ce moyen de défense dans la loi du Manitoba. La loi de la Saskatchewan par exemple (alinéa 4(1)(b)) permet le recours à cette exception si le comportement reproché était accessoire à l'exercice d'un droit légitime de défense de la personne ou d'un bien. Par contre, la loi du Manitoba (paragraphe 5(c)) n'accorde ce moyen de défense que si le comportement était raisonnable, nécessaire et accessoire à l'exercice ou à la protection du droit de défense de la personne, d'un bien ou d'un autre intérêt du défendeur.

L'alinéa (c), prévoyant une exception d'autorisation par un texte législatif, reproduit textuellement le texte des lois provinciales. Bien que les commissaires du Manitoba aient souligné dans le commentaire sur le projet de 1972 qu'on n'assimilera probablement jamais un acte de permis par la loi à un délit, l'alinéa (c) est utile puisqu'il codifie ce principe dans le présent contexte.

L'alinéa (d), qui offre un moyen de défense aux agents de la paix et autres fonctionnaires chargés d'enquêtes, a été modifié. En vertu des lois provinciales et du projet de 1972, si un agent de police a commis un acte qui pourrait être une violation de la vie privée mais qui n'est pas par ailleurs illégal, il peut se prévaloir de ce moyen de défense si l'atteinte à la vie privée "n'était pas disproportionnée à la gravité de l'affaire faisant l'objet de l'enquête". Si toutefois l'atteinte à la vie privée s'accompagne d'une entrée sans permission, ce moyen ne peut être invoqué. Mais il semble que ce moyen de défense soit possible si la violation de la vie privée survient à l'occasion d'un acte illégal autre que l'entrée sans permission. Il est probable que l'entrée sans permission a fait l'objet d'un traitement spécial parce qu'au moment de l'adoption des textes de loi sur la protection de la vie privée, la surveillance illégale, qui s'accom-

pagnait souvent d'une entrée sans permission, était la sorte d'atteinte à la vie privée qui avait nourri le plus de commentaires chez le public. Le texte de loi prévoit assez clairement qu'une entrée sans permission dans le cadre d'une surveillance qui n'a pas été dûment autorisée en vertu du *Code criminel* équivaut à une violation de la vie privée.

C'est peut-être à dessein que les textes législatifs sont vagues en ce qui concerne d'autres actes des agents de maintien de l'ordre qui, en l'absence de preuve au contraire, sont illégaux, puisqu'on ne sait pas toujours dans quelle mesure le policier peut, dans le cadre d'une enquête, déroger aux règles de nature pénale ou quasi-pénale. Cependant, le libellé adopté dans les lois provinciales sur la protection de la vie privée et le projet de 1972 permettraient d'invoquer cette exception même quand l'acte dont on se plaint semble illégal et n'est pas permis à un agent de police agissant en cours d'enquête. Par conséquent, même des actes clairement interdits à un policier pourraient être protégés par les lois sur la protection de la vie privée.

La possibilité pour des policiers d'accomplir des actes qui seraient par ailleurs illégaux est une question étrangère à l'objet des lois sur la protection de la vie privée. On devrait laisser aux tribunaux le soin de déterminer, conformément au droit applicable aux enquêtes policières, si l'acte dont on se plaint est illégal s'il est accompli au cours d'une enquête policière. Si l'acte est déclaré illégal, l'agent de police ne devrait pouvoir invoquer aucune exception en vertu des lois sur la protection de la vie privée. C'est pour cette raison que la nouvelle version nie ce moyen de défense à un agent de police si l'acte accompli et illégal et non seulement s'il s'agit d'une entrée sans permission.

L'alinéa (e) est nouveau. Il remplace cependant une disposition qui se trouve ailleurs dans les autres textes de loi semblables. Voir le commentaire sur l'article 6 ci-après.

L'alinéa (f) a été examiné ci-dessus (voir le commentaire sur l'article 2).

Le paragraphe (3), dont il a été fait mention ci-dessus, prévoit une exception de "juste commentaire". Il reprend en les modifiant des dispositions équivalentes des textes de loi existants qui prévoient un moyen de défense si les renseignements sont "d'intérêt public". La modification établit clairement qu'il ne suffit pas que les renseignements intéressent le public (les journaux à potins montrent qu'une partie de la population s'intéresse aux ragots). À la place, la nouvelle version exige qu'une publication soit dans l'intérêt public, une expression qui évoque plus clairement une préoccupation légitime de la part du public. La mention explicite d'un "commentaire juste dans l'intérêt

public" contenue dans les textes de loi existants est supprimée puisqu'elle est comprise et incorporée dans les moyens de défense qu'on peut invoquer dans les poursuites pour diffamation.

Le paragraphe (2) est nouveau. Il restreint le recours aux exceptions de consentement et d'autorisation légale prévues aux alinéas 4(1)(a) et (c) respectivement. Il pose le principe que le consentement ou l'autorisation légale peuvent avoir été accordés à des fins limitées et qu'une communication plus élargie peut entraîner une attente à la vie privée. Le paragraphe (2) vient restreindre l'exception d'autorisation même dans les cas où les textes de loi régissant la source d'information en question ne prévoit que des règles vagues ou non limitatives en ce qui concerne la divulgation d'information. Par exemple, le *Social Services Act* de la Saskatchewan prévoit qu'aucun renseignement recueilli par le Ministère auprès des clients ne sera communiqué à une personne autre que le Sous-ministre ou le Ministre sans l'autorisation préalable de ce dernier. Cependant, il semble à l'heure actuelle que ces renseignements puissent être communiqués pour quelque raison que ce soit une fois que l'autorisation a été obtenue. En vertu du projet de loi, la communication de renseignements par le Ministère à un organisme de vérification de la solvabilité par exemple, pourrait constituer une atteinte à la vie privée. En l'absence d'une telle disposition, les lois sur la protection de la vie privée créent, comme le souligne le professeur Ryan, une exception générale favorisant ce que l'on pourrait appeler "une autorisation en bonne et due forme". Selon le professeur Ryan, seuls un examen et une révision des fondements statutaires de ces autorisations permettraient de limiter effectivement la possibilité de violation de la vie privée par les banques de données gouvernementales.[19] La disposition recommandée dans le projet devrait être considérée comme étant accessoire à la révision de textes législatifs précis régissant les banques de données et non comme une mesure pour la remplacer.

Il semble que la loi du Manitoba ait cherché à atteindre un résultat semblable à celui visé par le paragraphe 4(2) du projet de loi. L'article 8 de la loi du Manitoba prévoit que la Loi sur la protection de la vie privée s'applique nonobstant toute autre disposition de la législature. Toutefois, l'exception d'autorisation mine l'effet de l'article 8 de la loi du Manitoba.

Article 5

5.(1) Dans toute recours fondé sur une violation de la vie privée, le tribunal peut, s'il l'estime approprié:

(a) accorder des dommages-intérêts;

(b) accorder une injonction;

(c) ordonner au défendeur de rendre compte au demander des avantages qu'il a retirés ou qu'il pourrait subséquemment retirer du fait ou en conséquence de la violation;

(d) ordonner au défendeur de remettre au plaignant tous les articles ou documents dont il a obtenu la possession du fait ou en conséquence de la violation; ou

(e) accorder au demandeur tout autre redressement jugé nécessaire dans les circonstances.

L'article 5 prévoit les mesures de redressement. En général, les mesures de redressement qu'offrent les lois existantes sont suffisantes.

Article 6

6.(1) Dans tout recours fondé sur une violation de la vie privée, le tribunal accorde des dommages-intérêts en tenant compte de toutes les circonstances de l'espèce, notamment:

(a) la nature, la fréquence et le contexte de l'acte, du comportement ou de la publication;

(b) les effets de l'acte, du comportement ou de la publication sur la santé, sur le bien-être, sur le statut social, professionnel ou financier du particulier, ou de sa famille ou de ses proches; et

(c) le comportement du particulier et du défendeur tant avant qu'après l'acte, le comportement ou la publication, y compris toute excuse ou offre de réparation de la part du défendeur.

(2) Le tribunal peut en vertu du présent article accorder des dommages-intérêts punitifs.

Puisque le concept de la vie privée introduit à l'article 2 a nécessairement une portée assez vaste, et inévitablement assez nébuleuse, les lois provinciales sur la protection de la vie privée fournissent aux tribunaux des lignes de conduite plus précises. Dans les lois de la Colombie-Britannique, de la Saskatchewan et de Terre-Neuve, les facteurs contenus dans le paragraphe 6(1) du projet de loi doivent être pris en considération aux fins de décider s'il y a eu violation de la vie privée. Par contre, dans la loi du Manitoba et le projet de loi, les facteurs sont liés à l'évaluation des dommages-intérêt. La démarche adoptée par les autres

provinces impose au demandeur le lourd fardeau d'établir qu'il y a eu atteinte à la vie privée donnant ouverture à un recours. Comme l'ont souligné les commissaires de la Colombie-Britannique au cours du débat sur le projet de loi de 1972 où l'on a rejeté la démarche du Manitoba:

> Bien que les sept premières lignes de ce projet reprennent textuellement le paragraphe 2(2) de la loi de la C.-B., nous reconnaissons que si l'on tient compte du degré de vie privée auquel une personne a droit d'après ces facteurs, il devient très difficile pour un tribunal de déterminer si un délit a en fait été commis; voir à cet effet l'affaire *Davis* c. *MacArthur*.

En fait, ces facteurs ne sont pas liés principalement à la question de savoir s'il y a eu ou non atteinte à la vie privée mais bien à l'importance de cette violation et aux dommages qui en découlent. Quand une violation paraît avoir été commise et qu'aucun moyen de défense ne peut être invoqué, le plaignant devrait au moins avoir droit à une déclaration concluant à l'atteinte à sa vie privée et au remboursement de ses dépens. Si cette démarche est adoptée, une seule des dispositions des lois existantes sur la protection de la vie privée et du projet de loi de 1972 semblables au paragraphe 6(1) de la loi uniformisée nécessiterait une modification. Les lois sur la protection de la vie privée contiennent toutes une disposition semblable à l'alinéa c) du paragraphe 6(2) de la loi de la Saskatchewan. Cette disposition permet aux tribunaux de tenir compte de tous liens, familiaux ou autres, entre les parties en cause. Cette disposition, contrairement aux autres de ce paragraphe, semble porter principalement sur la question de savoir s'il y a eu ou non atteinte à la vie privée. Pour déterminer si une déclaration faite par une personne au sujet de son conjoint, lorsque les deux vivent ensemble, peut effectivement être considérée comme une atteinte à la vie privée, il faut examiner soigneusement les circonstances. Par conséquent, l'alinéa (e) du paragraphe 4(1) de la nouvelle version dispose que l'existence d'un lien familial ou semblable peut constituer un moyen de défense restreint dans une poursuite pour violation de la vie privée.

Le paragraphe (2) indique clairement que le tribunal peut accorder des dommages-intérêts punitifs. Il existe un facteur qui peut décourager les demandeurs de faire valoir leurs droits en vertu des lois sur la protection de la vie privée: en effet, il peut être difficile dans certains cas d'établir que des dommages substantiels ont été causés et il faut d'ailleurs comparer ceux-ci aux coûts et à la durée des procédures judiciaires. Il devrait être évident que le tribunal peut accorder des dommages-intérêts substantiels sans preuve d'une perte monétaire équivalente. Les lois provinciales sur la protection de la vie privée prévoient

toutes qu'une atteinte à la vie privée peut donner lieu à des poursuites sans qu'il soit nécessaire de prouver que des dommages ont été causés; la mention explicite de la possibilité d'accorder des dommages-intérêts punitifs est censée renforcer la politique des textes de loi existants.

Article 7

7.(1) L'exercice des recours prévus à la présente loi n'a pas pour effet d'interdire l'exercice de tout autre recours.

(2) Il peut être tenu compte des dommages- intérêts accordés en vertu de la présente loi aux fins de l'évaluation des dommages accordés dans tout autre recours exercé pour les mêmes motifs et fondé sur les mêmes faits.

Cette disposition reprend l'essentiel des dispositions équivalentes des lois provinciales existantes et du projet de loi de 1972.

Article 8

8. Le demandeur a droit aux dépens de l'action dès lors que le tribunal constate une violation de sa vie privée.

Le demandeur qui a gain de cause devrait être assuré du remboursement de ses dépens et cela pour les mêmes raisons que celles justifiant qu'on lui accorde des dommages-intérêts punitifs. l'heure actuelle, certains demandeurs hésitent à intenter une poursuite parce qu'ils craignent qu'à moins de pouvoir prouver qu'il y a eu des dommages substantiels, aucune ordonnance ne sera rendue à l'égard des dépens.

Article 9

9. Les recours permis en vertu de la présente loi doivent être exercés dans les deux ans qui suivent la découverte, par la victime, de la violation de sa vie privée.

Cette disposition reprend en substance les dispositions analogues des lois provinciales et du projet de loi de 1972. Certaines provinces préféreront insérer cette disposition dans des textes de loi qui prévoient les délais de prescription.

Article 10

10. Le décès de la victime entraîne l'extinction des recours prévus à la présente loi.

Cette disposition est tirée en substance des lois provinciales et du projet de loi de 1972.

Article 11

11. L'État est assujetti à la présente loi.

Cette disposition est tirée en substance des lois provinciales et du projet de loi de 1972.

Note sur la compétence

Le projet de loi ne mentionne pas quel tribunal a la compétence pour entendre les poursuites pour violation de la vie privée. Certaines provinces estimeront que le tribunal des petites créances peut entendre ces poursuites si les montants réclamés sont peu importants. Si on accorde à ces tribunaux la compétence à l'égard de ces poursuites, l'injonction devra être exclue des mesures de redressement offertes.

Note sur les preuves obtenues illégalement

L'article 7 de la loi du Manitoba consacre l'inadmissibilité de toute preuve obtenue à la suite d'une violation de la vie privée. La disposition correspond à une adoption partielle d'une règle qui exclut les preuves obtenues illégalement. Une règle d'exclusion est maintenant prévue au paragraphe 24(2) de la *Charte canadienne des droits et libertés*.

PROJET DE LOI UNIFORMISÉ SUR LA PROTECTION DE LA VIE PRIVÉE

1. La présente loi peut être citée sous le titre: Loi sur la protection de la vie privée.

2. Quiconque porte atteinte à la vie privée d'autrui commet un délit et peut être poursuivi sans qu'il soit nécessaire d'établir que des dommages ont été causés.

3. Sans préjudice de la portée générale de l'article 2, une preuve qu'il y a eu:

   (a) surveillance auditive ou visuelle d'un particulier, de sa résidence ou de son véhicule, par quelque moyen que ce soit, y compris l'écoute aux portes, la surveillance, l'espionnage, l'importunité ou la filature, qu'il y ait ou non introduction sans permission dans une propriété;

   (b) écoute ou enregistrement d'une conversation à laquelle participe un particulier, ou écoute ou enregistrement de messages transmis ou reçus par cette personne par des moyens de télécommunication, autrement qu'en tant que partie légitime à ceux-ci;

(c) utilisation du nom ou de la voix d'un particulier ou d'une ressemblance avec celui-ci à des fins publicitaires, de promotion de la vente de biens ou de services, ou de toute autre opération relative à des biens ou services ou à toute autre fin qui procure un avantage pour l'utilisateur si, au cours de l'utilisation, le particulier est identifié ou identifiable et l'utilisateur avait l'intention d'exploiter le nom ou la voix de cette personne ou la ressemblance avec celle-ci;

(d) publication de lettres, de journaux internes ou d'autres documents personnels appartenant à un particulier; ou

(e) communication de renseignements concernant un particulier quand cette communication n'est pas autorisée par la loi, ou si la divulgation de ces renseignements constitue un abus de confiance;

établit, en l'absence d'une preuve contraire, une atteinte à la vie privée d'un particulier.

4.(1) Un acte, un comportement ou une publication ne porte pas atteinte à la vie privée:

(a) s'il a été expressément ou implicitement autorisé par un particulier compétent à donner une telle autorisation, lorsque le tribunal est convaincu que cette autorisation a été accordée librement;

(b) s'il était raisonnablement accessoire à la défense d'une personne ou d'un bien;

(c) s'il était autorisé ou exigé par la loi en vigueur dans la province ou par un tribunal;

(d) s'il était celui:

(i) d'un agent de la paix agissant dans l'exercice de ses fonctions et dans les limites de ses pouvoirs; ou

(ii) d'un fonctionnaire agissant dans le cadre d'une enquête dans l'exercice de ses fonctions et dans les limites de ses pouvoirs;

et n'était pas disproportionné à la gravité de l'affaire faisant l'objet de l'enquête ou n'a pas été commis en violation d'un droit de propriété ou à l'occasion d'un autre acte légal;

(e) s'il était raisonnable étant donné les liens, familiaux ou autres, existant entre les parties intéressées; ou

(f) si le défendeur ne savait pas ou ne pouvait raisonnablement savoir que l'acte, le comportement ou la publication pouvait porter atteinte à la vie privée d'un particulier.

(2) Par dérogation à toute autre loi, lorsqu'un particulier est tenu en vertu de la loi de divulguer des renseignements d'une nature personnelle ou que la divulgation de tels renseignements est autorisée à des fins limitées, la communication de ces renseignements à des fins autres que celles nécessaires ou permises constitue une violation de la vie privée d'un particulier.

(3) La publication de toute affaire, quelle qu'elle soit, ne porte pas atteinte à la vie privée:

(a) s'il existe des motifs raisonnables de croire que la publication est faite pour des raisons d'intérêt public; ou

(b) que la publication était protégée en vertu des règles de droit applicables à la publication de matériel diffamatoire;

mais ce paragraphe n'offre aucune protection lorsque l'acte ou le comportement par lequel on s'est emparé de l'affaire publiée portait lui-même atteinte à la vie privée.

(4) Au présent article, le terme "tribunal" s'entend de toute personne autorisée par la loi à faire prêter serment dans le but de recevoir un témoignage et qui agit aux fins pour lesquelles elle a été autorisée à recevoir ce témoignage.

5. Dans tout recours fondé sur une violation de la vie privée, le tribunal peut, s'il l'estime approprié:

(a) accorder des dommages-intérêts;

(b) accorder une injonction;

(c) ordonner au défendeur de rendre compte au demandeur des avantages qu'il a retirés ou qu'il pourrait subséquemment retirer du fait ou en conséquence de la violation;

(d) ordonner au défendeur de remettre au plaignant tous les articles ou documents dont il a obtenu la possession du fait ou en conséquence de la violation; ou

(e) accorder au demandeur tout autre redressement jugé nécessaire dans les circonstances.

6.(1) Dans tout recours fondé sur une violation de la vie privée, le tribunal accorde des dommages-intérêts en tenant compte de toutes les circonstances de l'espèce, notamment :

(a) la nature, la fréquence et le contexte de l'acte, du comportement ou de la publication;

(b) les effets de l'acte, du comportement ou de la publication sur la santé, sur le bien-être, sur le statut social, professionnel ou financier du particulier ou de sa famille ou de ses proches; et

(c) le comportement du particulier et du défendeur tant avant qu'après l'acte, le comportement ou la publication, y compris toute excuse ou offre de réparation de la part du défendeur.

(2) Le tribunal peut en vertu du présent article accorder des dommages-intérêt punitifs.

7.(1) L'exercice des recours prévus à la présente loi n'a pas pour effet d'interdire l'exercice de tout autre recours.

(2) Il peut être tenu compte des dommages-intérêts accordés en vertu de la présente loi aux fins de l'évaluation des dommages accordés dans tout autre recours exercé pour les mêmes motifs et fondé sur les mêmes faits.

8. Le demandeur a droit aux dépens de l'action dès lors que le tribunal constate une violation de sa vie privée.

9. Les recours permis en vertu de la présente loi doivent être exercés dans les deux ans qui suivent la découverte, par la victime, de la violation de sa vie privée.

10. Le décès de la victime entraîne l'extinction des recours prévus à la présente loi.

11. L'État est assujetti à la présente loi.

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1) *Privacy Act*, R S.B.C. 1979, c 336; *Privacy Act*, SM 1970, c 74, *Privacy Act*, S.N. 1981, c.6; *The Privacy Act*, R.S S. 1978, c P-24

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2) *Charte des droits et libertés de la personne*, Lois du Québec, 1975, c 6, art. 4-5. Les tribunaux ont éalement eu recours dans certains cas à l'article 1053 de *Code civil* pour protéger la vie privée. Voir *Note to the Saskatchewan Report Concerning the Uniform Privacy Act*, compte-rendu de la CULC, 1985.

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3) *Loi sur la protection de la vie privée*, S C. 1980-81-82, c 111 (Annexe II). *Une Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels*, Lois du Québec, 1982, c 30.

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4) Compte-rendu de la CULC, 1972, annexe O *(The Protection of Privacy Act)* et annexe P *(Report on the Tort of Invasion of Privacy)*; compte-rendu de la CULC, 1977, annexe P *(Protection of Privacy: Collection and Storage of Personalized Data Bank Information)*, annexe Q *(Protection of Privacy. Credit and Personal Data Reporting)*, annexe R *(Protection of Privacy: Illegally Obtained Evidence in Civil Cases)*, et annexe S *(Protection of Privacy: Tort)*; compte-rendu de la CULC, 1978, annexe Q *(Protection of Privacy Act: Tort)*

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5) Voir par exemple la Commission de réforme du droit de l'Ontario, *Report on Protection of Privacy*, 1968, et les travaux de recherche préparés pour la Ontario Commission on Freedom of Information and Individual Privacy (1978-79).

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6) Alan Westin, *Privacy and Freedom*, 1967, p. 365.

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7) Voir l'étude sur la vie privée et les réponses juridiques traditionnelles dans l'ouvrage de Peter Burns, *"The Law and Privacy. The Canadian Experience"*, *C.B.R.*, vol. 54, 1976, p. 12-28

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8) Voir Timothy G Brown, *Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law"*, Commission on Freedom of Information and Individual Privacy (Ontario), 1979

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9) Westin, précité, renvoi 6, p. 1020, considère que la vie privée comprend plusieurs rapports psychologiques entre un individu et les autres:
   (a) Solitude. Il s'agit de l'état d'une personne séparée du groupe et libre de toute surveillance, la vie privée sous sa forme la plus complète, bien que la paix d'esprit puisse être troublée par des stimulus physiques des croyances surnaturelles ou un état psychologique primordial.
   (b) Intimité. Il s'agit de l'état où la personne agit dans le cadre d'un petit groupe – la famille, la collectivé, etc. Il y a alors un certain isolement en groupe.
   (c) Anonymat Il s'agit de la situation d'une personne qui, bien qu'elle pose des gestes publics dans des lieux publics, n'est pas identifiée et est libre de toute surveillance. Cet état peut également predre la forme d'une expression anonyme des points de vue grâce à laquelle la personnel communique publiquement son opinion sans que son identité soit connue.
   (d) Réserve Il s'agit de l'attitude de la personne qui a besoin de taire des renseignements et de créer une distance mentale afin de protéger sa personnalité.

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10) Le texte de loi de la Colombie-Britannique a été adopté en 1968. Quatre décisions ont été rendues en vertu de cette loi: *Davis* c. *MacAuthur*, 72 W.W R 69, infirmant [1971] 2 W.W.R. 142; *Belzberg* c *B.C.T.V. Broadcasting System Ltd* , 1981 (inédite); *Wooding* c. *Little* (1982), 24 C.C.L.T. 37; *Silber* c *B.C.T.V. Broadcasting System Ltd.*, [1986] 2 W.W.R 609. Dans les quatre affaires, le plaignant a essuyé un échec. Le texte de loi du Manitoba a été adopté en 1970 et celui de la Saskatchewan en 1973-74. Aucune décision n'a été signalée en vertu de l'une ou l'autre de ces lois. Burns, précité renvoi 7, p 33, estime que les lois sur la protection de la vie privée créent un "droit statique".

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11) Précité, renvoi 5, p. 69.

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12) La *Loi sur la protection de la vie privée* du governement fédéral et la loi du Québec sur la protection des renseignements personnels contribuent grandement à atteindre cet objectif.

13) Précité, renvoi 5, p 68

14) *Ibid.*

15) P. H. Osborne, *"The Privacy Acts of British Columbia, Manitoba and Saskatchewan"*, tiré de *Aspects of Privacy Law*, éd.: Dale Gibson, Toronto: Butterworths, 1981. Burns, précité, renvoi 7; Ryan, précité, renvoi 5; CULC, précité, renvoi 4

16) Précité, renvoi 7, p. 37

17) C -B., par 1(2); Man., par 2(1); Sask , par 6(1); T -N., par 3(2); projet de 1972, art 5.

18) Précité, renvoi 5, p. 68. Dans l'affaire *Davis* c. *McArthur*, précité, renvoi 10, la C A C.-B., en infirmant la décision du tribunal inférieur, a jugé que la surveillance électronique effectuée par un détective privé était "raisonnable" parce que, notamment, sa surveillance n'attirait pas l'attention du public puisqu'elle n'était pas indûment étroite ou continue

19) Précité, renvoi 5, p. 69

ANNEXE B

L'ABUS DE CONFIANCE ET LE DÉLIT CIVIL QUE CONSTITUE L'ATTEINTE LA VIE PRIVÉE

Par Michael Finley
Recherchiste juridique
La Commission de réforme du droit de la Saskatchewan

1. INTRODUCTION

Les juridictions du Commonwealth reconnaissent désormais l'abus de confiance comme cause d'action distincte sous le régime de l'equity. Les principes fondamentaux de cette action ont été succinctement exposés par le juge Denning dans l'arrêt *Seager* v *Copydex Ltd.* :

> [TRADUCTION] Le droit applicable à ce sujet ne dépend pas d'un contrat implicite. Il repose sur le principe général d'equity selon lequel le dépositaire de renseignements ne doit pas en tirer un parti injuste. Il ne doit pas s'en servir au préjudice de celui de qui il les tient sans son consentement[1].

Le juge Denning a affirmé que [TRADUCTION] "le principe est clair", mais en réalité l'action pour abus de confiance demeure un recours vague et mal compris. Elle fait l'objet de nombreux commentaires théoriques et judiciaires, mais il existe peu d'ouvrages et de décisions sur certaines des principales questions conceptuelles qui s'y rapportent. Le juge en chef McEachern a observé dans un arrêt récent de la Colombie-Britannique que [TRADUCTION] "l'origine exacte [de l'action] est étonnamment vague et elle a donné lieu à peu d'arrêts, bien que beaucoup d'encre ait coulé à ce sujet."[2] Il subsiste encore des doutes, par exemple, sur le lien entre l'action pour abus de confiance et les redressements auxquels donne lieu la violation de l'obligation fondée sur un rapport de confiance[3]. Cette question n'est pas étrangère au principal problème dont traite le présent document: la mesure dans laquelle l'action pour abus de confiance peut constituer un recours à l'égard de l'atteinte à la vie privée que représente la divulgation de renseignements confidentiels sur les affaires d'un particulier.

Sans doute, a-t-on eu recours à l'action pour abus de confiance dans des affaires où la protection de la vie privée semblerait être la principale préoccupation. Le juge en chef McEachern a fait ses commentaires sur cette action dans une affaire dans laquelle un avocat avait révélé aux autorités responsables de l'octroi des permis qu'un détective privé s'était épris de sa cliente, la demanderesse dans l'action. Bien qu'il ait eu des doutes sur la portée de l'action, je juge en chef McEachern a conclu :

> [TRADUCTION] Il ne fait aucun doute que parallèlement à un droit à la non-divulgation, il devrait aussi exister une sanction appropriée, qu'il s'agisse d'une injonction pour prévenir la divulgation ou de dommages-intérêts si cette dernière a déjà eu lieu[4]

R.G. Hammond souligne ce qui suit:

> [TRADUCTION] ... [L]es arrêts anglais sur lesquels se sont appuyés Warren & Brandeis pour conclure à l'existence d'un droit à la protection de la vie privée dans leur article savant intitulé "The Right to Privacy" (1890) 4 Harv. L. Rev. 193, sont les mêmes arrêts dont les décisions et les auteurs antérieurs affirment qu'ils donnent naissance, en droit anglais, à l'obligation en *equity* de garder le secret ...

Il pose ensuite la question suivante:

> [TRADUCTION] Faut-il en déduire que les juges anglais ont trouvé que le concept du rapport de confiance était suffisamment large pour comprendre au moins certaines situations qui auraient clairement été considérées aux États-Unis comme étant des questions relatives à la protection de la vie privée?[5]

Il existe suffisamment d'affaires relatives à l'abus de confiance qui mettent en cause des questions de protection de la "vie privée" pour rendre inéluctable une réponse affirmative à la question posée par Hammond. Cependant, étant donné la façon dont a évolué jusqu'à maintenant l'action pour abus de confiance, elle se distingue tout à fait conceptuellement de l'action fondée sur une atteinte à la vie privée comme telle. L'action pour abus de confiance a d'abord pris naissance comme recours contre le vol des "secrets industriels"; elle porte encore l'empreinte de son origine. Nous soutiendrons plus loin que ce n'est que difficilement que l'action pour abus de confiance peut trouver une extension suffisante pour viser tout l'éventail des affaires relatives aux atteintes à la vie privée dans lesquelles il y a lieu à réparation. Bien qu'un certain double emploi des actions respectivement pour abus de confiance et pour atteinte à la vie privée soit inévitable, ce n'est pas une raison suffisante pour refuser de reconnaître que l'atteinte à la vie privée qui met en cause la divulgation de renseignements confidentiels donne lieu à une action distincte de l'action pour abus de confiance.

2. ORIGINE ET FONDEMENT DE L'ACTION POUR ABUS DE CONFIANCE

L'une des raisons pour lesquelles la notion de l'action pour abus de confiance reste incertaine tient à son origine relativement récente. Les

sources doctrinales et jurisprudentielles renvoient à certaines affaires anciennes à titre de fondement historique de l'action[6] mais ces affaires ont surtout un intérêt rétrospectif. Comme l'a noté Hammond, l'obligation en *equity* de garder le secret "a été largement négligée" par les juges anglais du dix-neuvième siècle[7] Le premier arrêt qui asseoit clairement l'existence de l'action pour abus de confiance semble être la décision *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.*, rendue en 1946. Même cet arrêt n'a pas eu une très grande incidence avant les années soixante. Il a été publié tout d'abord uniquement dans les recueils portant sur les brevets[8] ce qui lui assurait probablement l'obscurité. Il a été suivi dans une autre affaire de "brevet" en 1960: *Terripin Ltd.* v. *Building Supply Co. Ltd.*[9] Puis, en 1963, il a été suivi dans une décision qui a joui d'une plus grande publicité: *Peter Pan Corp.* v. *Corsets Silhouette Ltd.*,[10] et il a été publié en appendice à cet arrêt[11] Depuis lors, l'action pour abus de confiance a été décidée de façon régulière par les tribunaux anglais.

Au Canada, cette action n'a pas suscité grand intérêt jusqu'à ce que la Cour suprême rende sa décision dans l'affaire *Slavutych* v. *Baker*[12] en 1973[13] Bien qu'il ne se soit pas agi d'une action pour abus de confiance (l'affaire portait sur une question de preuve: la recevabilité de la preuve dans les actions pour abus de confiance), le juge Spence s'est appuyé sur la jurisprudence anglaise qui reconnaissait l'existence de l'action. Depuis l'affaire *Slavutych* v. *Baker*, plusieurs actions pour abus de confiance ont été accueillies par les tribunaux canadiens, et Hammond émet l'opinion qu'"il semble que le rôle, dans la plupart des villes, n'est plus complet sans qu'y figure une demande d'injonction interlocutoire relativement à une telle situation."[14] Toutefois, la plupart de ces affaires visent un emploi abusif de renseignements de nature commerciale.

L'action pour abus de confiance fournit évidemment un exemple du souci de *l'equity* de prévenir la fraude sous toutes ses formes, mais son origine est incertaine. Elle est probablement la conséquence d'un autre principe *d'equity*. Au moins depuis l'arrêt *Keech* v. *Sandford* en 1726[15] *l'equity* a interdit aux *trustees* et aux fiduciaires de tirer profit des renseignements qu'ils ont reçus en cette qualité en raison de l'évident conflit d'intérêts qui se présente inévitablement dans ces circonstances. Le fait le plus communément actionné ressemblant à un abus de confiance (bien qu'il soit possible de plaider la violation d'une obligation de fiduciaire aussi bien que l'abus de confiance) vise encore les avantages personnels illégalement tirés d'une occasion d'affaires par les dirigeants ou les administrateurs d'une compagnie (agissant à titre de fiduciaires de la compagnie)[16] Il reste cependant plus difficile à déter-

miner si l'action pour abus de confiance a pris naissance simplement par analogie avec la violation de l'obligation de fiduciaire ou si elle en a été à l'origine une conséquence.

En tout état de cause, ce n'est que depuis très peu de temps que l'on peut dire avec assurance que le cordon ombilical reliant l'abus de confiance et la violation de l'obligation de fiduciaire a été tranché. En fait, aussi récemment qu'en 1979, Hammond a pu écrire que "Récemment la notion voulant que l'obligation en *equity* fondée sur des rapports de confiance dépende, au plan doctrinal, de l'éventail des obligations de fiduciaire semble voir gagné quelque crédit".[17] Un rapport de fiduciaire [TRADUCTION] "est un rapport caractérisé par l'obligation faite au fiduciaire d'agir uniquement dans l'intérêt d'une autre personne relativement au bien qui fait l'objet du rapport les unissant".[18] Ainsi donc l'extension de l'acte que représente la violation de l'obligation de fiduciaire pour lui faire comprendre l'abus de confiance supposait à l'origine l'idée que les renseignements confidentiels donnent lieu à un droit de propriété ou au moins de quasi-propriété. Cette doctrine convient évidemment davantage à la protection des droits commerciaux sur les secrets industriels qu'à la protection de la vie privée.

L'action pour abus de confiance s'étend clairement désormais aux situations qui ne mettent en cause aucune obligation fondée sur des rapports de confiance, et elle protège des intérêts autres que commerciaux. Dans l'affaire *Ott* v. *Fleishman*,[19] l'action en cause avait été intentée à titre de recours contre la divulgation d'une affaire de coeur; dans *Argyll* v. *Argyll*, des communications entre époux se trouvaient protégées;[20] dans *A. G.* v. *Jonathon Cape Ltd.*, des secrets du cabinet étaient protégés;[21] et dans *Foster* v. *Mountford and Rigby Ltd.*, des secrets ancestraux des aborigènes de l'Australie avaient motivé l'action intentée.[22] Meagher, Gummow et Lehane, auteurs d'un ouvrage australien sur *l'equity*, se font simplement les interprètes du consensus naissant lorsqu'ils laissent entendre que [TRADUCTION] "des rapports de confiance ne créent pas des obligations uniquement aux fiduciaires selon l'acception commune du mot, et il ne semble pas utile d'imposer à ce domaine déjà compliqué de *l'equity* une catégorie supplémentaire et distincte".[23] Néanmoins, les affaires qui ne visent pas des intérêts commerciaux restent exceptionnelles, et elles ne sont pas celles où les concepts à la base de l'action pour abus de confiance ont été le plus clairement exposés.

L'affaire *Saltman* elle-même visait principalement, comme l'a noté la cour dans les affaires *Terripin* et *Peter Pan*, l'usage de renseignements confidentiels à des fins commerciales au moyen de la concurrence.[24] Quelles que puissent être les véritables limites de l'action pour abus de

confiance, elle constitue essentiellement un recours contre l'emploi abusif de renseignements commerciaux confidentiels dont a parlé le juge Megarry dans l'arrêt *Coco* v. *A. N. Clark (Engineers) Ltd.*:

> [TRADUCTION] En particulier, lorsque des renseignements ayant une valeur commerciale ou industrielle sont donnés sur une base d'affaires en vue d'un objet déclaré, comme une entreprise commune ou la fabrication d'articles par une partie pour une autre, je considérerais que celui à qui ces renseignements ont été confiés doit faire une preuve très solide s'il veut réfuter la prétention qu'il était tenu à une obligation fondée sur des rapports de confiance.[25]

Bien que nous puissions en être réduits à de simples hypothèses sur l'origine doctrinale précise de l'action pour abus de confiance, il est possible de retracer le lien logique qui a mené de l'action pour violation de l'obligation de fiduciaire à l'action pour abus de confiance. Les quatre étapes du développement de l'action pour abus de confiance exposées plus bas constituent une séquence logique et non temporelle. Cette reconstruction hypothétique est utile dans le présent contexte dans la mesure où elle fait la clarté sur les fondements conceptuels de l'action et, de ce fait, sur ses limites pratiques.

Étape 1 – Les contrats ne donnent pas tous lieu à des rapports de fiduciaire entre les parties. Néanmoins, lorsque des renseignements sont confiés sous le sceau du secret aux termes du contrat, leur emploi abusif au détriment de celui qui les donne est assimilable à leur emploi abusif par un fiduciaire. Au dix-neuvième siècle, les renseignements confidentiels transmis à un employé étaient protégés par la reconnaissance, dans le contrat de travail, d'une disposition implicite visant le respect du secret.[26] Dans l'arrêt Saltman, on a laissé entendre ce qui suit :

> [TRADUCTION] lorsque l'une des parties à un contrat obtient aux fins de ce dernier ou en rapport avec celui-ci quelque matière confidentielle, la loi reconnaît l'obligation d'observer le secret comme étant l'une des conditions implicites du contrat, même si celui-ci reste silencieux sur la question.

Étape 2 – Même dans les circonstances où les rapports contractuels entre les parties n'ont pas directement trait aux renseignements confidentiels échangés, il y aurait injustice si les tribunaux n'interdisaient pas l'emploi abusif de ces renseignements obtenus comme conséquence indirecte d'un lien contractuel subsistant entre les parties. Ainsi, dans l'affaire *Peter Pan*, le défendeur fabriquait des soutiens-gorge pour le demandeur en vertu d'un permis. Au cours de discussions entre les parties, le demandeur avait montré au défendeur les dessins d'un nouveau modèle. Celui-ci n'avait jamais fait l'objet d'une entente entre les

parties, mais le défendeur s'en était servi pour "élaborer" un nouveau modèle de son cru. La cour s'est servie des termes de l'arrêt *Terripin*, qui se voulait la répétition des principes déjà exposés dans l'arrêt *Saltman*, pour conclure ce qui suit :

> [TRADUCTION] Le commerçant qui reçoit d'un autre commerçant des renseignements confiés dans des circonstances qui les rendent confidentiels ne peut s'en servir à des fins commerciales en faisant concurrence à celui de qui il les tient.

C'est à ce point qu'un certain recours aux principes de *l'equity* s'impose puisqu'il est pour le moins difficile de compter sur le strict droit contractuel pour obtenir les résultants voulus. L'indépendance de l'action pour abus de confiance vis-à-vis du droit contractuel est d'une importance primordiale dans ce contexte, parce qu'elle permet aux tribunaux d'étendre la protection des renseignements confidentiels au-delà des circonstances dans lesquelles les relations d'affaires entre les parties se sont soldées par des rapports contractuels ayant trait expressément aux renseignements confidentiels en cause.

Étape 3 – Le principe peut s'étendre, une fois qu'il est clair que des liens contractuels ne sont pas nécessaires pour l'étayer, aux circonstances dans lesquelles les parties ne sont liées par aucun contrat, mais simplement par la conclusion d'une quelconque affaire. Ainsi par exemple, dans une récente affaire canadienne, *International Corona Resources Ltd.* v. *Lac Minerals Ltd.*,[27] deux compagnies minières avaient engagé des négociations dans le but de former une entreprise en coparticipation. Les négociations n'avaient pas abouti, mais des renseignements que le demandeur avait fournis pendant qu'elles se déroulaient avaient été utilisés ultérieurement par le défendeur pour exploiter certaines concessions minières. La cour a statué que les renseignements confidentiels précieux confiés dans le cadre de "négociations sérieuses" imposaient l'obligation de ne pas s'en servir au détriment de celui qui les a donnés. On notera toutefois qu'il serait encore possible d'obtenir un redressement dans de tels cas en assimilant le détournement des renseignements à la violation d'une obligation fondée sur des rapports de confiance. De fait, on a aussi plaidé avec succès la violation de l'obligation fondée sur des rapports de confiance dans l'affaire *International Corona*. Il se peut que l'avantage qu'il y a à plaider l'abus de confiance plutôt que la violation de l'obligation fondée sur des rapports de confiance tient à ce que les rapports de confiance peuvent être notoirement difficiles à définir.[28] En qualifiant simplement une transaction de transaction dans laquelle existent "des circonstances qui confèrent aux renseignements fournis un caractère confidentiel" plutôt qu'en insistant sur l'existence d'un rapport de confiance, le demandeur peut éviter

certains problèmes de tactique. Il est vraisemblable que le tribunal avait à l'esprit de telles considérations dans un arrêt de la Nouvelle-Zélande, *A. B. Consolidated Limited* v *Europe Strength Food Co.*[29] quand elle a laissé entendre que:

> [TRADUCTION] la question n'est pas de savoir si l'on peut déceler un rapport particulier et lui donner un nom, mais elle consiste plutôt à déterminer si les circonstances donnent lieu à une situation dans laquelle celui qui a reçu des renseignements est tenu de les traiter en toute confiance.

Étape 4 – Dès lors qu'il est clair que ni des rapports de confiance ni un contrat ne sont nécessaires pour établir un droit d'action pour abus de confiance, le principe peut être appliqué, tout au moins en théorie, à un vaste éventail de cas où des renseignements reçus ont été utilisés abusivement, pourvu qu'un caractère suffisamment confidentiel s'y rattache. C'est à ce stade-là qu'il peut être fait recours à l'action à titre de redressement pour violation de la vie privée.

3. LIMITES L'ACTION POUR ABUS DE CONFIANCE COMME GARANTIE DU DROIT AU RESPECT DE LA VIE PRIVÉE

Aristote a dit que c'était une erreur de confondre l'origine et l'essence des choses; malgré l'origine commerciale de l'action pour abus de confiance, il n'existe aucune raison absolue pour laquelle elle ne pourrait devenir une protection générale du droit au respect de la vie privée des particuliers. Néanmoins, si l'origine n'est pas l'équivalent de l'essence, l'utilité d'un concept est souvent limitée par ses antécédents. Avant de reconnaître l'action pour abus de confiance comme le substitut indiqué d'une action distincte pour violation de la vie privée, il y a lieu d'examiner de plus près les limites en question.

Dans l'arrêt *International Corona*, le juge Holland a considéré que trois "critères de responsabilité" étaient nécessaires au succès d'une action pour abus de confiance:

(1) les renseignements doivent être confidentiels;

(2) leur communication doit avoir eu lieu dans des circonstances ayant donné naissance à l'obligation de les traiter en toute confiance; et

(3) les renseignements doivent avoir reçu un emploi non autorisé. Il existe des décisions portant sur chacun de ces trois critères, dont certains ont été étudiés en détail par le juge Holland. Pour les fins présentes, il importe de noter que la façon dont les tribunaux ont traité de chacun des critères limite l'utilité de l'action en dehors d'un contexte commercial.

(a) *En quoi consistent des renseignements confidentiels?*

Dans l'arrêt *International Corona*, le juge Holland a fait siens des propos de l'arrêt *Saltman*:

> [TRADUCTION] Je ne crois pas énoncer incorrectement le principe en disant ce qui suit sur l'usage des renseignements confidentiels. Les renseignements, pour être confidentiels, doivent, me semble-t-il, indépendamment du contrat, posséder le caractère confidentiel nécessaire, c'est-à-dire qu'il ne doit pas s'agir de quelque chose qui appartient au domaine public et est de notoriété publique. D'autre part, il est parfaitement possible qu'un document confidentiel, qu'il s'agisse d'une formule, d'un plan, d'un dessin ou de quelque chose du genre, soit le résultat du travail de son auteur à l'aide de matériaux dont tous peuvent se servir; ce qui le rend confidentiel est le fait que l'auteur du document s'est servi de son intelligence et a de la sorte obtenu un résultat que seul ce processus mental peut donner.[30]

L'identification des "renseignements confidentiels" avec les renseignements qui ne sont pas du "domaine public" a presque certainement obtenu la notoriété dans les affaires d'abus de confiance parce que l'existence d'un rapport de confiance se trouvait mise de côté comme condition préliminaire. Dans les affaires fondées sur des rapports de confiance, la question est de savoir si le fiduciaire a obtenu les renseignements en raison de ses fonctions, et non de savoir s'ils auraient pu être obtenus par ailleurs. En l'absence de rapports contractuels ou de confiance, le critère applicable doit nécessairement différer quelque peu. C'est une chose de dire qu'un fiduciaire est tenu à la loyauté, laquelle lui interdit de tirer un avantage personnel des renseignements reçus, qu'il sache ou non qu'ils sont par ailleurs disponibles, et c'est une toute autre chose de fonder une action sur la divulgation de renseignements transmis "en toute confiance" au sens courant de l'expression lorsque ces renseignements sont monnaie courante.

Chose peu étonnante, on a fait preuve d'une grande ingéniosité pour établir une distinction entre les renseignements confidentiels et ceux qui relèvent du domaine public. Ainsi par exemple, Lord Denning a-t-il jugé nécessaire, dans l'arrêt *Seager* v. *Copydex Ltd.*,[31] de définir de nouveau cette distinction:

> [TRADUCTION] lorsque les renseignements confiés sont mixtes, ayant en partie un caractère public et en partie un caractère privé, celui qui les reçoit doit prendre bien soin de n'utiliser que ceux qui appartiennent au domaine public. Il devrait les obtenir d'une source publique, ou tout au moins ne pas être en meilleure posture que s'il les avait reçus d'une telle source. Il ne devrait prendre aucune avance

> sur les autres en se servant des renseignements reçus confidentiellement. Tout au moins, il ne devrait pas le faire sans payer cet avantage.

Mais il n'est pas facile d'appliquer l'ingéniosité susmentionnée aux affaires ne mettant pas en cause des renseignements de nature commerciale. Notez que Lord Denning souligne que le défendeur "ne devrait pendre aucune avance sur les autres ... sans payer cet avantage". Dans l'arrêt *Saltman*, il était question de formules, de plans, de dessins ou [TRADUCTION] "quelque chose du genre, qui soit le résultat du travail de son auteur."

Une objection encore plus sérieuse à la distinction dont on a parlé plus haut devrait être évidente lorsque l'action pour abus de confiance vise à protéger la vie privée. Celle-ci peut subir une atteinte même lorsque les renseignements communiqués sont du domaine public. Ainsi, les lois régissant l'établissement des rapports de solvabilité imposent des limites sur le genre de renseignements du domaine public pouvant figurer dans les rapports de solvabilité. Il pourrait y avoir lieu à une action pour atteinte à la vie privée en application des Lois provinciales sur la protection des renseignements personnels lorsque des renseignements du domaine public sont rapportés, si leur divulgation a compromis la réputation ou quelque droit à la protection de la vie privée de la personne concernée.

Certaines actions pour abus de confiance dans un contexte non-commercial doivent probablement leur heureuse issue au fait que le tribunal n'a pas fait de cas de la distinction entre les renseignements du domaine public et les renseignements confidentiels. Dans l'arrêt *Ott* v. *Fleishman*, par exemple, la cour s'est montrée convaincue qu'il y avait eu abus de confiance simplement parce que l'avocat du défendeur avait communiqué des renseignements privilégiés aux autorités publiques. Le tribunal n'a apparemment demandé aucune preuve sur la question de savoir si l'aventure entre la cliente et le détective privé était connue d'autres personnes. Mais la décision mentionne incidemment le fait que la secrétaire de l'avocat et son associé étaient tous deux au courant de cette affaire de coeur.

(b) Communications confidentielles

Les communications de nature privée ne peuvent pas toutes être considérées comme confidentielles aux fins de motiver une action. Bien que des rapports contractuels ou de confiance ne semblent pas être nécessaires, il est difficile de trouver des cas où il n'existait pas des rapports particuliers entre les parties qui imposaient l'obligation évidente de garder le secret. La Cour d'appel de la Nouvelle-Zélande a

reflété avec exactitude la tendance générale des instances du commonwealth lorsqu'elle a conclu que [TRADUCTION] "la question n'est pas de savoir si on peut déceler un rapport particulier et lui donner un nom ... ". Mais cette phrase laisse tout simplement entendre qu'il est inutile de répartir les "rapports confidentiels" en un nombre déterminé de genres reconnus. Le tribunal de la Nouvelle-Zélande a néanmoins exigé que [TRADUCTION] "les circonstances donnent lieu à une situation dans laquelle celui qui a reçu des renseignements est tenu de les traiter en toute confiance."

Dans un contexte commercial, il n'est peut être pas très difficile de désigner des exemples de "rapports confidentiels". Les rapports de confiance entrent évidemment dans cette catégorie, de même que de nombreux rapports contractuels. L'action pour abus de confiance s'étend au-delà de ces rapports en partie tout simplement parce que les tribunaux se sont montrés disposés à reconnaître d'autres circonstances dans lesquelles on peut dire que des rapports confidentiels sont voulus, ou sont reconnus en pratique. Dans l'arrêt *International Corona*, par exemple,[32] le tribunal a entendu le témoignage d'experts [TRADUCTION] "sur la pratique courante dans ce domaine à l'égard de l'obligation de garder le secret" au cours de négociations et d'autres transactions entre des compagnies minières. Sans insister sur l'existence de rapports contractuels ou de confiance, le tribunal n'en a pas moins exigé la preuve de rapports auxquels le domaine concerné reconnaîtrait généralement un caractère confidentiel.

Il est toutefois plus difficile de deviner jusqu'où les tribunaux sont disposés à aller pour trouver les indices nécessaires du caractère confidentiel des renseignements lorsque les rapports entre les parties ne sont pas de nature commerciale. Ainsi, le barman auquel je confie mes ennuis doit-il garder le secret? Si je révèle à ma famille ou à mes amis mes problèmes maritaux, puis-je raisonnablement m'attendre à ce qu'ils soient légalement tenus de se taire?

Les arrêts publiés qui ont trait aux communications privées et non commerciales visent presque toujours quelques circonstances particulières et de la sorte, ils peuvent ne pas être typiques des atteintes à la vie privée. Dans l'affaire *Ott* v. *Fleishman*,[33] l'avocat défendeur avait violé le secret professionnel. Dans l'arrêt *Slavutych* c. *Baker*,[34] le juge Spence a commencé son analyse en concluant que la communication en question aurait clairement dû être considérée inadmissible en preuve.[35] Bien que le juge Spence ait dit clairement qu'il ne fallait pas envisager la question uniquement sous l'angle de l'application de la règle des communications privilégiées, il ne fait aucun doute que l'existence du privilège lui a permis plus aisément de qualifier de confidentiels les rapports entre les

parties, à d'autres fins. Même l'affaire *Argyll* v. *Argyll*[36] souvent citée comme exemple de l'application la plus large du concept de l'abus de confiance jusqu'à maintenant, mettait en cause une communication entre époux, une autre circonstance rendant celle-ci inadmissible.

Il est possible que les tribunaux interpréteront de façon très large ce qui constitue une communication confidentielle. Il suffit même peut-être que les parties aient compris au moment où a eu lieu la communication qu'elle devait être confidentielle. Dans l'arrêt *Slavutych* v *Baker*, le juge Spence semble avoir estimé suffisant "que ce [soient] les administrateurs mêmes de l'Université de l'Alberta [la défenderesse] qui sont à l'origine de l'existence du document et du caractère confidentiel qui lui a été donné." Toutefois, on ne saurait vraiment pas affirmer avec assurance qu'une communication privée à l'égard de laquelle la loi ne reconnaît par ailleurs aucune obligation de garder le secret peut ouvrir droit à une action pour abus de confiance.

(c) Emploi des renseignements

Le troisième critère de la responsabilité dont parle le juge Holland est l'usage non autorisé des renseignements. D'une certaine façon, c'est là une condition peu originale. Il est évident, comme l'a dit Lord Denning dans l'arrêt *Seager* v. *Copydex Ltd.*, que l'absence de consentement à l'usage des renseignements est un élément essentiel de l'action pour abus de confiance. Cet élément de l'action a toutefois un aspect plus gênant. En effet, la jurisprudence semble laisser entendre que "l'usage non autorisé" des renseignements repose sur des critères relatifs aux avantages et aux désavantages de la divulgation.

Conceptuellement, le troisième critère de la responsabilité pose des problèmes parce qu'il peut parfois être difficile de déterminer ce qui constitue un emploi non autorisé de renseignements confidentiels. Dans un contexte strictement privé, il est parfaitement possible de donner des renseignements sans la moindre intention que l'on s'en serve. L'oreille sympathique du barman en fournit l'exemple par excellence. Cependant, dans le contexte commercial dans lequel a évolué le droit applicable aux abus de confiance, on entend généralement que celui qui reçoit des renseignements confidentiels en fera un usage quelconque. Par conséquent, leur simple emploi ne peut être considéré comme étant un usage abusif. Pour établir si celui-ci existe, il faut examiner l'emploi des renseignements. Évidemment, cet examen doit porter sur tous les rapports entre les parties, ainsi que sur les conséquences de l'emploi des renseignements. C'est là la raison de l'approche fondée sur les avantages et les désavantages. Ainsi, dans l'arrêt Saltman, tout au moins comme l'interprète l'arrêt *Terripin*,[37] on a parlé des renseignements

confidentiels et du fait de [TRADUCTION] "s'en servir à des fins commerciales en faisant concurrence à celui de qui (on) les tient." Le critère fondé sur les avantages et les désavantages a été exposé encore plus clairement dans un passage du jugement de première instance dans l'affaire *Terripin*, avec lequel la décision en appel s'est montrée en accord, et qui a été adopté dans plusieurs jugements subséquents :

> [TRADUCTION] Comme je le comprends, le fondement de cette branche du droit, quelle que soit son origine, est qu'une personne qui a obtenu un renseignement à titre confidentiel ne peut s'en servir comme base d'agissements préjudiciables à la personne qui a fourni le renseignement confidentiel. Il découle à mon avis du principe à la base de l'arrêt *Saltman* que celui qui possède ces renseignements doit se voir imposer un handicap particulier relativement à la concurrence de sorte qu'il ne jouisse pas d'une avance injuste sur les autres.

L'analyse fondée sur les avantages et les désavantages ne semble pas avoir été proposée par les tribunaux en qualité de critère exhaustif. Mais c'est là le seule critère élaboré de façon raisonnablement satisfaisante. La façon dont s'y prendrait un tribunal pour déterminer qu'il y a eu emploi abusif de renseignements confidentiels dans des circonstances ne mettant pas en cause un profit et une perte n'est tout simplement pas claire.

En pratique, on a habituellement réglé le problème dans des affaires non commerciales en n'en faisant pas de cas. Le type d'analyse fondé sur les avantages et les désavantages ne se retrouve pas explicitement dans les arrêts *Ott* ou *Slavutych*, bien que l'on puisse l'appliquer à ce dernier, en y mettant la peine. Dans cette affaire, les renseignements confidentiels avaient servi au congédiement du demandeur. On peut dire qu'il y a eu "avantage" pour la défenderesse, qui cherchait à se débarrasser d'un employé dont elle ne voulait plus, et un "désavantage" correspondant pour l'employé contre lequel les renseignements étaient utilisés. D'autre part, l'affaire *Ott* ne peut entrer dans ce moule. En vérité, c'est forcer la logique du critère fondé sur les avantages et les désavantages que de s'attendre à ce qu'il soit utile dans un contexte autre que commercial.

4. L'ABUS DE CONFIANCE CONSIDÉRÉ COMME UNE ATTEINTE LA VIE PRIVÉE

La Saskatchewan *Privacy Act*[38] prévoit que [TRADUCTION] "quiconque porte atteinte à la vie privée d'autrui, de propos délibéré et sans revendication de droit, commet un délit et peut être poursuivi sans qu'il soit nécessaire d'établir un préjudice". Bien que la Loi ne comporte

aucune définition générale de ce que constitue la vie privée, l'article 2 à sa simple lecture semble avoir une portée suffisamment large pour comprendre la diffusion des renseignements personnels. La question qui se pose au tribunal dans de tels cas est de savoir si la divulgation des renseignements a porté gravement atteinte à la vie privée d'un particulier.

Le Projet de loi uniformisé sur la protection de la vie privée rédigé par les commissaires de la Saskatchewan en vue de la Conférence de 1986 sur l'uniformisation des lois au Canada est plus explicite. L'alinéa 3(e) du projet de loi uniformisé prévoit ce qui suit:

> la communication de renseignements concernant un particulier quand cette communication n'est pas autorisée par la loi, ou si la divulgation de ces renseignements constitue un abus de confiance;
>
> établit, en l'absence d'une preuve contraire, une atteinte à la vie privée d'un particulier.

Le commentaire accompagnant le projet de loi souligne que "les textes législatifs ne mentionnent pas" la communication de renseignements qui constitue un abus de confiance. Cependant, lorsqu'a été discuté du projet au cours de la Conférence, on s'est demandé s'il était indiqué de considérer l'abus de confiance comme un type d'atteinte à la vie privée, alors qu'il ouvre droit à une action de lui-même.

Il ne fait aucun doute que l'action pour abus de confiance et l'action pour atteinte à la vie privée font double emploi dans une mesure considérable. Mais l'existence du double emploi n'est pas un motif suffisant pour restreindre l'étendue de l'une ou l'autre action. Il n'est pas rare que les actions et les redressements fassent double emploi. L'action pour abus de confiance fait double emploi avec d'autres actions que l'action pour atteinte à la vie privée, notamment avec la protection accordée aux brevets d'invention et aux marques de commerce, avec l'action pour violation des rapports de confiance et même avec l'action pour rupture de contrat. La véritable question devait être de savoir si l'action pour abus de confiance garantit suffisamment les droits relatifs à la protection de la vie privée. L'évolution de l'action jusqu'à nos jours laisserait supposer que ce n'est pas le cas. Sur un certain plan, il suffit probablement de souligner que l'action pour abus de confiance ayant ses origines dans des affaires relatives aux "secrets industriels", il est difficile de l'étendre à toutes les espèces de communications privées qui ont droit à la protection de la loi.

D'autre part, on peut avancer que l'action pour abus de confiance ne vise pas du tout principalement la protection de la vie privée. Le fondement de l'action n'est pas la violation de la vie privée, mais plutôt

l'emploi abusif de renseignements confidentiels à des fins de profit personnel aux dépens de celui qui a donné ces renseignements. Il peut, dans certains cas, y avoir atteinte à la vie privée même si les renseignements divulgués sont connus d'autres personnes, ou même s'ils appartiennent au domaine public. La divulgation de renseignements confidentiels peut porter atteinte à la vie privée d'un particulier même si celui qui les a divulgués n'a retiré aucun avantage de cet abus de confiance. Bien que l'action pour abus de confiance puisse ne pas strictement exiger que les renseignements personnels soient considérés comme un bien, elle n'en considère pas moins les renseignements comme un produit dont on peut user ou abuser pour en tirer profit.[39]

Si l'on considère les abus de confiance comme de possibles atteintes à la vie privée, il est possible de mettre l'accent sur les communications privées et non commerciales. C'est cet aspect de l'alinéa 3(e) du projet de *Loi uniformisée sur la protection de la vie privée* qui justifie son maintien en dépit de son double emploi avec l'action pour abus de confiance.

Il se peut néanmoins que le libellé de l'alinéa 3(e) ne soit pas entièrement satisfaisant. L'emploi du terme "abus de confiance" peut être contesté, car il peut erronément laisser supposer qu'il vise la sorte d'abus de confiance qui est le fondement de l'action pour abus de confiance. Ce serait regrettable de croire que l'alinéa 3(e) ouvre droit à une action pour atteinte à la vie privée uniquement dans les circonstances où il y aurait aussi lieu à une action pour abus de confiance. Le libellé de l'alinéa 3(e) pourrait être rédigé de nouveau pour éviter ce problème en substituant la mention "ou si la divulgation de ces renseignements constitue un abus de confiance" par la mention "ou lorsque ces renseignements ont été donnés à titre confidentiel".

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1) [1967] 2 All E.R., 415 à la page 417.

2) *Ott* v. *Fleishman*, [1983] 5 W.R R. 721.

3) Voir l'ouvrage de R. G. Hammond intitulé "Is Breach of Confidence Properly Analyzed in Fiduciary Terms?", (1979), 25 McGill L.J. n° 2 244.

4) *Ott* v. *Fleishman*, précité, note 2.

5) Hammond, "Is Breach of Confidence Properly Analyzed in Fiduciary Terms?", précité, note 3, à la page 252.

6) Voir les arrêts *Moore* v. *Perrell* (1883), 4 D. Av. 870, 110 E.R. 683, et *Taylor* v. *Blackow* (1836), 3 Bing. N C 235, 132 E.R. 401

7) Voir Hammond "Is Breach of Confidence Properly Analyzed in Fiduciary Terms?", précité, note 3, à la page 246.

8) 65 R.P.C. 203.

9) [1960] R.P.C. 128.

10) [1963] 3 All E R. 402

11) [1963] 3 All E.R. 413.

12) [1976] 1 R.C.S. 254

13) Il se peut que l'action ait toutefois des antécédents au Canada. Dans l'arrêt *Canadian Aero Service Ltd.* c. *O'Malley*, [1974] R.C S. 592, on a laissé entendre que "l'abus de confiance...puisse(nt) donner lieu à une recours". Mais cette affaire semble avoir porté sur la violation d'une obligation de fiduciaire, et elle peut n'avoir servi qu'à embrouiller le lien entre les deux doctrines de l'equity - voir l'ouvrage de Roberts, "Corporate Opportunity and Confidential Information: Birds of a Feather that Flock Together or can Arrows of a Different Colour?" (1977) 28 C.P.R. (2nd) 68.

14) Voir l'article de R G. Hammond, "Breach of Confidence: Assignability of Rights," (1986) Intellectual Property Journal, 248.

15) (1726), Sel. Cas. Ch. 61.

16) Voir par exemple l'arrêt *Canada Aero Services* c. *O'Malley*, précité à la note 13 en bas de page.

17) Voir Hammond, "Is Breach of Confidence Properly Analyzed in Fiduciary Terms?", sus-mentionné, note 3 à la page 248. Particulièrement dans les phases initiales des commentaires sur l'action naissante, on avait tendance à essayer d'assimiler l'action pour abus de confiance aux auters garanties des droits de propriété. Voir par exemple l'article de North, "Breach of Confidence: Is There a New Tort?" (1972) 12 J.S.P.T.L 149 et celui de Ricketson, Confidential Information - A New Proprietary Interest? (1977) 11 Melbourne U.L Rev 223.

18) A. H. Oosterhoff, Cases and Material on the Law of Trusts, (2nd), 1983, 35

19) Voir plus haut, note 2 en bas de page.

20) [1977] Ch. 302.

21) [1975] 3 All E.R. 484.

22) (1977), 14 A.L.R. 71.

23) Equity, Doctrines and Remedies (1975), 722

24) *Terripin* v *Building Supply*, susmentionné, note 9 en bas de page, et cité dans l'arrêt *Peter Pan* v *Corsets Silhouette Ltd.*, précité, note 10 en bas de page.

25) [1969] R.P.C. 41.

26) Voir Hammond, "Is Breach of Confidence Properly Analyzed in Fiduciary Terms?", précité, note 3 en as de page, n° 2 246.

27) (1986), 32 B L R. 15 H.C de l'Ont.

28) Voir par exemple les efforts compliqués et non entièrement couronnés de succès en vue de classer et de classifier les formes reconnues de rapports de confiance en quatre catégories dans l'ouvrage de Sealy: "Fiduciary Relationships", [1962] C.L.J. 69.

29) [1978] 2 N Z.L.R. 515.

30) *Saltman* v. *Campbell*, précité, note 11 en bas de page.

31) Précité, note 1 en bas de page.

32) Précité, note 27 en bas de page.

33) Précitée, note 2 en bas de page.

34) Précité, note 12 en bas de page

35) La communication consistait en un formulaire relatif à la permanence marqué "confidentiel" que l'on avait demandé au demandeur de remplir à l'égard d'un collègue d'un département de l'université. Le juge Spence a adopté les critères nécessaires au caractère confidentiel des communication exposés dans *Wigmore on Evidence*, (3ᵉ éd), par. 2285: [TRADUCTION] (1) Les communications doivent soir été transmises confidentiellement avec l'assurance qu'elles ne seraient pas divulguées; (2) le caractère confidentiel doit être un élément essentiel au maintien complet et satisfaisant des relations entre les parties; (3) les relations doivent être de la nature de celles qui, selon l'opinion de la collectivité, doivent être entretenues assidûment; (4) le préjudice permanent que subiraient les relations par le divulgation des communications doit être plus considérable que l'avantage à retirer d'une juste décision Il est évident que le caractère confidentiel ne s'attachera pas à de nombreuses communications privées auxquelles les parties avaient voulu à l'origine donner un tel caractère.

36) Précité, note 20 en bas de page.

37) Précité, note 9 en bas de page.

38) S.R S. 1978, chap. P-24, art. 2.

39) Il convient à ce point de parler brièvement de l'apprécation des dommages-intérêts pour abus de confiance. Dans un contexte commercial, il est possible d'évaluer les dommage-intérêts, en attribuant une valeur aux renseignements en question. Dans l'arrêt *Seager* v. *Copydex Ltd.*, précité, note 1 en bas de page, la cour a considéré la valeur marchande des renseignement confidentiels dans l'hypothèse d'une vente entre un vendeur et un acheteur consentants. Dans l'arrêt *International Corona*, on a étudié plusieurs façon possibles d'évaluer les dommages-intérêts, qui se réduisaient toutes à la proposition selon laquelle il était possible d'attribuer une valeur aux concessions minières que le défendeur avait obtenues grâce aux renseignements confidentiels qui lui avaient été confiés. L'évaluation des dommages-intérêts dans des affaires non commerciales est évidemment plus difficile Dans l'arrêt *Ott* v. *Fleishman*, précité, note 2 en bas de page, la cour n'a trouvé d'autre solution que celle d'adjuger des dommages-intérêts symboliques.

APPENDIX H

(See page 81)

UNIFORM PROVINCIAL OFFENCES PROCEDURE ACT

Working Paper: Arthur N. Stone
May 2, 1989

The purpose of this working paper is to obtain enough direction from the Conference in principle for work to begin on drafting a uniform Act for procedures governing the prosecution of offences against provincial and territorial statutes and delegated legislation.

Objectives

The first question for general guidance is what is the objective and general policy that is to be followed to justify the proposed Act?

Historically the procedures for the criminal prosecution of summary conviction offences under the Criminal Code have served for provincial offences and in most jurisdictions still do. Motivation for reform comes from the realization that the criminal code procedures are steeped in centuries of assumptions about crimes and the persons who commit them. Neither of these assumptions nor the rigid technicalities that they have engendered are appropriate for the 90% of provincial offences that are intended to regulate activities that are not only legal but also useful to society. A structural problem is created by the attitude that every infraction, however minor, must be treated in the same way as a major criminal charge. Correspondingly, in the view of the public, most regulatory offences do not impute a criminal intent and are accepted as deserving a civil penalty without stigma.

The Ontario Law Reform Commission noted in its 1973 Report on Administration of Ontario Courts Part I p. 17 "The whole system of administration of provincial offences is collapsing not only in court but also with respect to the service of summonses, execution of warrants and the vast amount of related paperwork. Police resources are being used to enforce parking tags while subpoenas in serious criminal cases are being sent by ordinary mail. Some police officers do not bother to attend as witnesses. Defendants are acquitted apart from the merits. The latter result may be unobjectionable if some other desirable purpose is served, but if acquittal is simply the consequence of administrative incapacity it can only encourage disrespect for the system."

The objective of reform, therefore, is to strip out excess procedural baggage while preserving the procedural rights of accused persons.

The justification must come from recognizing that there is a difference between true crimes and regulatory offences or quasi-crimes. Almost all offences under provincial statutes fall in the latter category. An important distinction has been recognized by the Supreme Court of Canada in R v Sault Ste. Marie (1978) 3 C.R. (3d) 30 (SCC) in which it was confirmed that the element of mens rea necessary to prove in a criminal prosecution, was not necessary for a regulatory offence unless specifically required, but a distinction between strict and absolute liability applied, a difference that can have considerable consequence for the burden on the prosecutor and on the defendant's attitude toward the offence. In the same case Dickson J. said at p. 34 "In the present appeal the court is concerned with offences variously referred to as "statutory", "public welfare", "regulatory", "absolute liability", or "strict responsibility", which are not criminal in any real sense but are prohibited in the public interest. Although enforced as penal laws through the utilization of the machinery of criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which the traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sale of impure food, violations of liquor laws and the like."

Is it the general objective of a uniform Act to provide procedures for the prosecution of provincial offences that will recognize a distinction in nature between crimes and most regulatory offences and will eliminate those technicalities and procedural steps that are concerned with criminal behaviour and that will provide for bringing provincial offence proceedings to an expeditious conclusion on the merits as quickly as is consistent with fairness to the parties?

Codification

If the objectives of the project for the uniform Act are accepted, the entire procedure should be rewritten with the objectives in mind.

Although a large part of the procedure is similar to that in the Criminal Code, there are numerous opportunities to relax the severity of the Code in recognition of the fact that the offences are not crimes (e.g. seldom involve violence, physical danger or breach of the peace). Also a provincial codification would come under the provincial Interpretation Act and other statutory supplements and would be more likely to receive its own interpretation independently of criminal law precedent.

The changes that may be made by redrafting are too numerous to specifically deal with in this paper and would arise in the drafting process in which the policy objectives are implemented.

It is proposed in this paper to indicate only some of the more major or significant changes that are suggested for consideration.

The parts that would be a form of rewrite of the Criminal Code are Trial, Sentencing, Payment of fines, Search and Seizure and Arrest and Bail.

Court

1. Should there be a separate court created for provincial offences?

The argument in favour of a separate court is to encourage a more relaxed, less severe approach to provincial offences and provincial offenders in keeping with the objectives of the Act.

If the offences are dealt with in the same court in which the cases are mingled with criminal cases, any distinction would have to be identified and implemented on a case by case basis. If provincial offences only were all dealt with by a court sitting as a provincial offences court, a change of attitude would be more easily maintained.

If a separate court is adopted, the Uniform Act should so recommend and recognize it by reference to it, but the creation of the court would more properly belong in a separate provincial courts Act where appropriate supplementary and administrative provisions can be provided. That Act would also say who comprise the bench for the new court which could be trained justices of the peace or borrowed from the provincial court bench or both.

2. Should jurisdiction over a case be in the court of the justice?

A troublesome criminal procedure obstacle arises from the criminal code practice of conferring jurisdiction on the magistrate personally. This practice probably arose for no better reason than a drafting difficulty in identifying appropriate courts in provinces and territories that were in various stages of development. These difficulties can be eliminated by referring to the court throughout the Act and specifically referring to "the same justice" in any instance where this is intended.

Another criminal law obstacle that arises from jurisdiction is the principle that a magistrate possesses no inherent power, discretion or jurisdiction that is not specifically conferred by statute. The creation of a provincial offences court is an opportunity to confer on the court or a justice, in the absence of express provision for procedures, to exercise its jurisdiction in any manner consistent with the due administration of justice. This would permit a justice to improvise a procedure in unusual circumstances in order to achieve the intent that he or she dispense justice.

Provincial Offence Officers

If the ticket procedure is adopted, it is administratively necessary that only authorized officers issue them. This is because they need to be equipped with appropriate forms with carbons along the lines of the uniform traffic ticket and also they can be held responsible for certain decisions and powers given to the prosecutor by the Act; for example, making a charge without swearing to it and obtaining a conviction by default.

The provincial offences officers can be designated by ministries of government to enforce their own regulating Acts, possibly their inspectors. Police and traffic and parking auxiliaries may be designated but there is the opportunity to make it easier for administrators to enforce their own statutes for minor infractions without going through a specialized process.

Also see under the heading "Choice of Procedure" for the kind of judgment needed by the prosecuting officer in choosing the appropriate procedure as an instrument of enforcement policy.

Ticket Procedure

A fruitful method of permitting speedy charging and pre-trial processing and settlement is by a ticket procedure. Some characteristics of a ticket procedure are as follows:

1. Pre-set fines are fixed by the court for a range of minor offences.
2. Short form of wording designating a range of minor offences are prescribed by regulation and given constructive sufficiency by the statute. This makes it feasible for the officer to write out the ticket at the scene of the offence and make service on the spot.
3. An officer authorized by the Act certifies that he believes an offence has been committed (the charge and unsworn) using the prescribed short form of wording where available and entering the pre-set fine if any.
4. The officer serves a notice of the offence, preferably on the spot, where there is a pre-set fine. The officer serves a summons instead of an offence notice where there is no pre-set fine or where the officer wants the defendant to be compellable to attend the trial or to receive a penalty awarded by the court for any other reason.
5. The proceeding is commenced when the officer files his certificate of the offence in the court office.

6. Where the defendant is served with an offence notice, he may:

   (a) sign the plea of guilty and send it with the set fine to the court office;

   (b) sign the not guilty plea and send it to the court office with an indication of intent to attend the hearing;

   (c) attend at the hearing to plead guilty and make submissions as to penalty;

   (d) do nothing.

   Another possibility is where the accused is outside the province or the territorial jurisdiction of the court, to permit him to write in a not guilty plea and a written submission in defence or mitigation and have it considered by the court on its merits.

7. In a case referred to in 6 (a) or (d) the court may enter a conviction without a hearing.

8. A conviction in absentia may be reopened where, through no fault of the defendant, he has failed to get a hearing when he wanted one (fail-safe).

9. The ticket procedure may be accompanied by provision for a low maximum penalty to replace the maximum in the penalty section and no imprisonment, to allow the prosecuting officer to treat the offence as a minor offence by taking the more informal procedure. If so, the information procedure would be retained and taken to have the full maximum penalty available.

In the case of parking offences, certain special provisions have been included by most jurisdictions.

1. Service by affixing ticket to vehicle.

2. Service on owner by service on driver or by affixing to vehicle.

3. In most cases the collection of parking fines is not done by the court but by the municipal administration or its agency (parking authority). Because of the volume, the court office only gets the cases where there is a plea of not guilty and a hearing is required or there is no response or payment and a conviction is required to enforce payment. Therefore, if someone sends in the fine, no plea is taken and no conviction is sought and the matter is closed. Because of the importance of accurate communication between the parking authority and the court office, the "fail-safe" mechanism becomes more important in parking cases.

Information Procedure

The present information procedure may be retained to be taken in private prosecutions or where the prosecuting officer decides to treat the offence as a serious one invoking the full statutory penalties and sentencing alternatives. Suggested technical modifications are as follows:

1. To permit the officer to serve the summons at the scene of the offence and have it confirmed when the information is sworn.
2. To authorize the justice to issue the information without hearing the informant in his discretion.
3. To confirm the trend in criminal procedures by providing that an information shall not be quashed unless an amendment or the provision of particulars would fail to satisfy the ends of justice.

Choice of Procedure

The person laying the charge decides the following options:

1. To go for a pre-set fine - in which case he takes the ticket procedure with offence notice.
2. To have a fine other than the pre-set fine set by the court, but subject to the summary procedure maximum, or for any other reason to have the defendant compellable to attend a trial - in which case he uses the ticket procedure with summons instead of offence notice.
3. To have a fine up to the maximum provided for in the penalty section, or imprisonment, or to have certain sentencing devices available (e.g. conditions as to conduct in probation order) - in which case he takes the information procedure.

Should the decision be left entirely to the charging officer? There is something to be said for using the availability of the options as an instrument of policy available to those responsible for the administration of the Act. For that purpose it is most effective to appoint provincial offence officers from their own staff for their own Acts. If it is left to police, the only way to direct enforcement policy is to specify by regulation what can be proceeded with by information, thereby adding a layer of legal technicality in the prosecution of the offence.

For particular offences, the Legislature can, of course, specify the method of procedure in the offence section.

Arrest

There should be no general power of arrest for provincial offences because of their non-criminal nature. There is, as a rule, no threat to the

public. If arrest is appropriate it should be provided for in the particular statute that creates the offence. If an offender persists in offending or other form of non-cooperation in defiance of the police, his conduct would have to translate itself into a Criminal Code offence before an arrest could be made.

Arrest can, of course, be provided for in connection with particular offences in the statute creating the offence, and therefore there must be provision for bail.

Bail

The function of arrest under the Criminal Code includes controller behaviour that may be dangerous to the public peace.

Arrest for provincial offences is rare and when it occurs it is concerned only with identifying the defendant, securing or preserving evidence and possibly ensuring attendance at trial. These concerns can be satisfied in a short period of custody and simple conditions for bail.

One function for bail that is appropriate for provincial offences is a cash bail posted by an offender from outside the province, to be applied to the fine, if any, in case of non-appearance at the trial.

Trial (See heading Codification)

Provision for the trial of an issue and examination on the question of whether the defendant is, because of mental disorder, incapable of conducting his defence can be simplified in recognition of the fact that in provincial offences, this is the only issue. If dangerous conduct were involved the proceeding would be under the Criminal Code or the Mental Health Act for involuntary treatment and for continuing custody.

Limitations

A general limitation period of six months would be appropriate because of the minor nature of most provincial offences. It would be subject to a longer period provided for offences that are considered serious enough in the statute creating the offence. A provision permitting an extension with the consent of the defendant would enable the defendant to plead guilty to a lesser offence than the one with which he is charged.

Penalties

A statute must specify conduct to be an offence before a conviction or penalty can be imposed. The offences and penalties are best left to the

specific statutes that deal with the subject matter. However, the procedural Act is appropriate to provide general sentencing and enforcement policy to reflect the objectives of the uniform Act.

The policy appropriate to the nature of provincial offences is through fines and a flexible and adaptable approach to their collection while reducing imprisonment, including the instances of imprisonment on default of the payment of a fine.

Minimum fines or minimum imprisonment are often prescribed in an attempt to require the court to be tougher. On the other hand, a court has to deal with a wide range of fact situations and may be justified in feeling in a particular case that although the defendant is technically guilty, the minimum penalty would be unjust. Minimum penalties may force a court, in some instances, to reach a finding of not guilty to avoid imposing the minimum punishment, and to bend the interpretation for the purpose. Some alternatives that might be included in the uniform Act are:

(1) authorize the court to impose less than the prescribed minimum in special circumstances (e.g. when the minimum is considered unjust).

(2) authorize the court to impose a fine in lieu of a prescribed minimum imprisonment.

(3) authorize the court to suspend a sentence despite minimums.

Although the statute creating the offence ought to provide for the penalty, there are exceptions in old statutes. The choice is to carry these forward by providing a penalty where not otherwise provided, or say nothing and let those offences be unenforceable or be amended. The practice should not be revived. Such a general penalty should not include imprisonment.

Some suggestions for flexibility in the collection of fines are:

1. Fix days of grace for payment of a fine - e.g. 15 days.

2. Provide for extension of time for payment of a fine by the court on request of the defendant on sentencing or later in writing with authority for the court to inquire as to the circumstances of the defendant.

3. Authorize the court to order payment by instalments.

4. Authorize the court to order payment by means of credits for work performed in a program that is set up for the purpose.

5. Suspension of the fine on conditions with a maximum period for the suspension. This permits the Court to order a remedial training course or other rehabilitative measure in lieu of the fine.
6. Collection through civil courts on default.
7. Imprisonment on default only where all else fails and for a specific maximum period that is scaled to the amount owing.

It should be noted that the penalty of imprisonment, though authorized in the penalty section, would be reduced by the adoption of the suggestion under the heading "Ticket Procedure" that the more summary procedure would confine the penalty to a lower maximum fine. Therefore, the imprisonment penalty could only be imposed if the information procedure is taken.

Another suggestion for mitigating a sentence of imprisonment is to provide for a period of grace (up to 30 days) before the custody commences to permit a defendant to make arrangements for his absence from family and work.

Some modifications to the Criminal Code provision for probation orders in recognition of the non-criminal nature of provincial offences might include:

1. Providing that a probation order can only be made when the proceeding is commenced by information and the defendant is personally before the court and should be for a maximum period, subject to extensions.
2. Writing to replace the conditions referring to crime-related conduct with conditions that are relevant to the offence, such as performance of community service, attendance at educational programs or for alcohol or drug abuse treatment. These conditions possibly should be available only when the offence is punishable by imprisonment. In view of the fact that criminal offences require mens rea and provincial offences don't the use of conditions in probation orders for compensation or restitution requires more caution so that it is not freely available as a way of collecting damages for negligence. Possibly the conditions should be usable only where authorized by the statute that creates the offence where it can be provided in the light of particular circumstances.

Appeals

There would seem to be no reason to change the appeal rout from that provided by the Criminal Code for summary convictions in those

cases that are commenced by information, except possibly to eliminate stated case appeals to the Supreme Court.

The minor nature of the ticket cases, their volume and informal dispositions before trial may justify a quicker and more inexpensive and approachable review process. The penalty appealed will be a pre-set fine or a fine set by the Court within the maximum for summary procedure (the low maximum suggested under heading "Penalties"). What would serve the defendant best is a close look by another judge in review of the summary treatment with a flexible free wheeling approach to receiving and completing any information necessary to ensure fair treatment. The result would be to make reviews more accessible to the defendant at more proportional expense and speedier dispositions than a formal appeal to a county or district court or court of Queen's Bench.

Under the heading "Court" it was recommended that there be a provincial offences Court and that the bench could include justices appointed to sit only in provincial offence Court (possibly justices of the peace) and provincial Court judges. In that case the appeal could be to the provincial Court.

The appeal could be conducted as an inquiry by the court which would be authorized:

1. To review the recorded evidence or a transcript and receive the evidence of any witness whether or not the witness gave evidence at the trial;
2. To require the justice who made the decision that is appealed to report on any matter as to procedures and processes taken;
3. To review and act upon statements of agreed facts and submissions.

The review would be available whether the conviction was after a trial or in absentia or without a trial.

A major problem is the multiplication of appeals taken to gain time or postpone the payment of fines. For provincial offences, it would be salutary to require fines to be paid before an appeal can be filed, or a recognizance be entered into for the amount.

An appeal from either form of first appeal should be to the Court of Appeal with leave on questions of law of important public significance.

Young Offenders

The Federal Young Offenders Act creates serious adaptations to the procedure for the prosecution of young offenders for offences against

the Criminal Code and other Federal statutes. It also obliges the provinces to establish youth courts for the purpose.

The youth courts, usually emanations of the provincial family courts, will also need to deal with provincial offences by young offenders, so will need to be given jurisdiction as a provincial offences court for the purpose.

In addition, adaptation of the provincial offences procedure will be necessary, corresponding as closely as possible to the Federal Young Offenders Act.

Are these adaptations to be included in the Uniform Provincial Offences Act or left for separate treatment in a Young Offenders Act?

APPENDIX

Summary of Provincial and Territorial Legislation

Alberta:	Provincial Offences Procedure Act
Codification –	Adopts Criminal Code
Court –	Provincial Court
Procedures –	Information, ticket summons and ticket offence notice
Choice of Procedure –	Ticket procedure offences designated by regulation
Limitations –	6 months
Appeals –	Court of Queen's Bench and Court of Appeal with leave
Young Offenders –	Complete in separate Act

British Columbia:	Offence Act
Codification –	Self-contained provincial code
Court –	Provincial Court
Procedures –	Information or summons both by means of ticket or regular information
Choice of Procedure –	Ticket offences designated by statute
Limitation –	6 months
Appeals –	County Court and Court of Appeal with leave
Young Offenders –	Complete in separate Act

Manitoba:	Summary Convictions Act
Codification –	Adopts Criminal Code
Court –	Provincial Court
Procedures –	Information or offence notice
Choice of Procedure –	Peace officer
Limitations –	6 months
Appeals –	Court of Queen's Bench and Court of Appeal with leave
Young Offenders –	By regulation under Summary Convictions Act

New Brunswick:	Provincial Offences Procedure Act
Codification –	Complete provincial
Codification Court –	Provincial Court except the appeals
Procedures –	Information or ticket
Choice of Procedure –	Ticket offences prescribed by regulation
Limitations –	6 months
Appeals –	Adopts Criminal Code
Young Offenders –	Re-enacts Federal Act with modifications

Newfoundland:	Summary Proceedings Act
Codification –	Adopts Criminal Code
Court –	Provincial Court
Procedures –	Information and ticket
Choice of Procedure –	Ticket offences specified in Act
Limitations –	12 months
Appeals –	Under Criminal Code
Young Offenders –	

Northwest Territories:	Summary Conviction Procedures Act
Codification –	Adopts Criminal Code
Court –	Magistrate
Procedures –	Information with uniform ticket
Choice of Procedure –	Prescribed by regulation
Limitations –	6 months
Appeals –	Under Cr Code
Young Offenders –	Amendment to Summary Convictions Act

Nova Scotia:	Summary Proceedings Act
Codification –	Adopts Criminal Code
Court –	Justice under the Code
Procedures –	Information in all cases but ticket for summary procedure
Choice of Procedure –	Designated by regulation
Limitations –	6 months
Appeals –	Under Criminal Code
Young Offenders –	Complete in separate Act

Ontario:	Provincial Offences Act
Codification –	Complete provincial Code
Court –	Separate provincial offences Court
Procedures –	Information, ticket with warrant or offence notice, or traffic ticket with notice
Choice of Procedure –	Made by provincial offences officer
Limitations –	6 months
Appeals –	Information offences to District Court, ticket offences to Provincial Court all to Court of Appeal with leave
Young Offenders –	Included in Provincial Courts Act

Prince Edward Island:	Summary Proceedings Act
Codification –	Adopts Criminal Code
Court –	Justice under the Code
Procedures –	Information in all cases but ticket for summary procedure
Choice of Procedure –	Designated by regulation
Limitations –	6 months
Appeals –	Under Criminal Code
Young Offenders –	

Quebec:	Code of Penal Procedure
Codification –	Complete provincial Code
Court –	Provincial Court, Youth Court, Court of Sessions of the Peace, Labour Court, municipal courts
Procedures –	One procedure commenced with statement of offence
Choice of Procedure –	All cases the same
Limitations –	One year
Appeals –	Superior Court and Court of Appeal with leave
Young Offenders –	

Saskatchewan:	Summary Offences Procedure Act
Codification –	Adopts Criminal Code
Court –	Justice under the Code
Procedures –	Information in all cases but ticket for more summary procedure
Choice of Procedure –	Designated by regulation
Limitations –	6 months
Appeals –	Under Criminal Code
Young Offenders –	

Yukon Territory:	Summary Convictions Act
Codification –	Adopts Criminal Code
Court –	Justice under the Criminal Code
Procedures –	Information or ticket
Choice of Procedure –	Designated by regulation
Limitations –	6 months
Appeals –	Under Criminal Code
Young Offenders –	Complete in separate Act paralled to Federal Act

APPENDICE H

(voir page 88)

CONFERENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

Le 2 mai 1989
Loi uniforme sur les infractions aux lois provinciales
Document de travail Arthur N. Stone

Le présent document de travail a pour objet d'obtenir de la Conférence suffisamment de directives relativement aux principes pour entreprendre la rédaction d'une loi uniforme sur la procédure en matière de poursuite des infractions aux lois et règlements provinciaux et territoriaux.

Objectifs

Le premier sujet des directives générales est celui de ce en quoi doivent consister l'objet et le principe général qui justifieraient la Loi proposée.

Dans le passé, les administrations ont appliqué les procédures de poursuite sommaire prévues au Code criminel aux infractions aux lois provinciales et presque toutes les administrations qle font encore. Le désir de réforme vient de ce qu'on se rend compte que les procédures du Code criminel sont marquées par des siècles de jurisprudence au sujet des infractions et de leurs auteurs. Ni cette jurisprudence, ni les formalités strictes qu'elle a engendrées, ne conviennent dans 90 p. 100 des infractions aux lois provinciales qui ont été établies pour régir des activités non seulement permises, mais utiles à la société. En traitant chaque infraction, si peu grave soit-elle, de la même manière q'une inculpation criminelle grave on engendre une problème de structure. Éegalement, la plupart des infractions à la réglementation ne comportent pas d'intention criminelle, aussi devraient-elles, aux yeux du public, rendre passible d'une amende, mais ne pas entraîner de stigmatisation.

La Commission de réforme du droit de l'Ontario a signalé dans son rapport de 1973 sur l'administration des tribunaux en Ontario, Partie I,

p. 17 que [TRADUCTION] "L'ensemble de l'administration des infractions aux lois provinciales s'enlise non seulement devant les tribunaux, mais aussi à l'égard de la signification des sommations, de l'exécution des mandats et de la manipulation de toutes les écritures qui s'y rapportent. Les corps de police sont mis à contribution pour percevoir les contraventions de stationnement alors que les assignations dans les affaires criminelles graves sont transmises par courrier ordinaire. Certains policiers ne se donnent même pas la peine de se présenter pour déposer. Les accusés sont acquittés sans égard au fond. Cette situation ne présente probablement pas d'inconvénient, si elle a une utilité sous un autre rapport, mais si l'acquittement des prévenus découle uniquement de l'inefficacité de l'administration, cette situation ne peut que discréditer le système judiciaire".

La réforme a donc pour objet de délester le système de l'excès de procédure tout en garantissant les droits de la personne en matière de procédure.

La raison d'être de la Loi doit tenir à la consécration de la différence entre les actes criminels véritables d'une part et les infractions à la réglementation ou actes quasi-criminels d'autre part. Presque toutes les infractions définies aux lois provinciales appartiennent à cette dernière catégorie. Dans l'arrêt R. c. Sault Ste-Marie 1 R.C.S. 1299, 3 C.R. (3d) 30, la Cour suprême du Canada a établi une distinction importante en affirmant que la preuve de l'intention coupable nécessaire dans le cas d'un acte criminel n'est pas requise dans le cas d'une infraction à un règlement à moins qu'elle ne soit expressément prescrite. La Cour a aussi distingué entre les infractions de responsabilité absolue et celles de responsabilité stricte, la différence entre les deux ayant des conséquences importantes sur le fardeau de preuve imposé au poursuivant et sur la perception de la gravité de l'infraction par la personne poursuivie. Dans le même arrêt, le juge Dickson dit à la p. 34 : "Dans le présent pourvoi, la Cour doit examiner des infractions diversement appelées infractions "statutaires", "réglementaires", "contre le bien public", de "responsabilité absolue", ou de "responsabilité stricte". Ces infractions ne sont pas criminelles au plein sens du terme, mais sont prohibées dans l'intérêt public. Bien qu'appliquées comme lois pénales, par le truchement de la procédure criminelle, ces infractions sont essentiellement de nature civile et pourraient bien être considérées comme une branche du droit administratif à laquelle les principes traditionnels du droit criminel ne s'appliquent que de façon limitée. Elles se rapportent à des questions quotidiennes, telles les contraventions à la circulation, la vente de nourriture contaminée, les violations de lois sur les boissons alcooliques et autres infractions semblables."

La loi uniforme a-t-elle comme objet principal de fournir des procédures pour la poursuite des infractions aux lois provinciales qui tiendraient compte de la différence de nature entre les actes criminels et la plupart des infractions réglementaires, qui supprimeraient les formalités et les étapes qui se rattachent à un comportement criminel et qui permettraient d'accélérer le jugement au fond des poursuites relatives aux infractions aux lois provinciales autant que le permet l'équité envers les parties?

Rédaction

Si la Conférence accepte les objectifs d'une Loi uniforme, il est nécessaire de redéfinir l'ensemble de la procédure conformément à ces objectifs.

Bien que la procédure soit en grande partie semblable à celle du Code criminel, il se présente de nombreuses occasions de s'écarter de la sévérité du Code puisque ces infractions ne constituent pas des actes criminels, (c.-à-d. qu'ils comportent rarement de violence, de risque de blessures ou de trouble pour la paix). De plus, un texte provincial relèverait de la Loi d'interprétation de la province et des lois connexes qui le rendraient plus susceptible de recevoir une interprétation propre, différente de celle de la jurisprudence de droit criminel.

Les modifications à apporter à l'occasion d'une nouvelle rédaction sont probablement trop nombreuses pour toutes les mentionner expressément dans le présent document; certaines d'entre elles surgiront à l'occasion de la rédaction qui sera faite en fonction des principes à réaliser. Nous proposons de ne mentionner ici que les modifications les plus importantes à envisager.

Les parties qui équivaudraient à une nouvelle rédaction du Code criminel traiteraient du procès, de la détermination de la peine, du paiement des amendes, des fouilles, perquisitions et saisies, des arrestations et des cautionnements.

Les tribunaux

1. Doit-on établir un tribunal distinct pour juger les infractions aux lois provinciales?

Une raison d'établir un tribunal distinct tient à ce que cette création favoriserait une attitude plus détendue, moins sévère à l'égard des infractions aux lois provinciales et envers les contrevenants conformément aux objectifs de la loi.

Si les infractions sont jugées par un seul et même tribunal et les affaires entendues avec celles de droit pénal, il faudra faire la distinction affaire par affaire. Par contre, si les infractions aux lois provinciales sont toutes jugées par un tribunal réservé à ces infractions, il sera plus facile de favoriser un changement permanent d'attitude.

Si l'on opte pour un tribunal distinct, la loi uniforme devra recommander l'adoption de cette solution et déterminer le tribunal par renvoi, mais la création de ce dernier relèvera plutôt d'une loi provinciale distincte qui pourra pourvoir à d'autres dispositions administratives. Une telle loi définirait quels sont les juges de ce nouveau tribunal, qui pourraient être des juges de paix spécialement formés ou des juges de la cour provinciale ou les uns et les autres.

2. La compétence de juger une affaire devrait-elle appartenir au tribunal ou au juge?

La coutume suivie en vertu du Code criminel de conférer la compétence au juge personnellement constitue une obstacle en matière de procédure pénale. Cette coutume découle probablement de la difficulté de désigner le tribunal compétent dans les provinces et territoires qui n'étaient pas tous rendus à la même étape de leur évolution. Il serait possible d'éliminer cette difficulté en mentionnant le tribunal partout dans la loi et en précisant au besoin quand on voudra qu'il s'agisse "du même juge".

Un autre obstacle découle du principe de droit pénal voulant que le magistrat n'ait pas d'autre pouvoir discrétionnaire, d'autre compétence ou d'autre pouvoir intrinsèque que ceux que la législation lui confère. La création d'un tribunal réservé aux infractions aux lois provinciales fournirait l'occasion de conférer au tribunal ou au juge, en l'absence de disposition expresse relative aux procédures, le pouvoir d'exercer sa compétence librement pourvu que ce soit conformément aux principes d'administration régulière de la justice. Cette solution autoriserait le juge à adapter la procédure dans des circonstances exceptionnelles afin de lui permettre de remplir son devoir de rendre la justice.

Les agents d'application de la loi uniforme

Si l'on adopte une procédure de contravention, il devient nécessaire, du point de vue administratif, que seuls les agents autorisés à les délivrer le fassent. Il en est de même parce qu'ils doivent être munis des formules appropriées en duplicata semblables à celles qui servent à la loi uniforme sur les contraventions à la circulation et, de plus, parce qu'ils sont responsables à l'égard des décisions et pouvoirs que la loi attribuera au poursuivant, notamment celui de porter une accusation sans dénonciation assermentée et celui d'obtenir une condamnation sur défaut de comparaître.

Les ministères des gouvernements pourront désigner des agents d'application de la loi uniforme sur les infractions dans le but de faire respecter leurs propres lois et textes réglementaires; ce pourrait être leurs inspecteurs. Les agents spéciaux de police, de la circulation et du stationnement pourraient aussi être désignés, mais l'occasion se présente de faciliter aux administrateurs de faire appliquer leur propres lois par la poursuite des infractions mineures sans avoir recours à un processus spécialisé.

Voir aussi, sous la rubrique "Choix de la procédure" quant au genre de décision que doit prendre le poursuivant relativement au choix de la procédure appropriée comme forme de politique d'application.

Procédure de contravention

La procédure de contravention offre une méthode efficace d'inculpation, de préparation du jugement et de disposition. Voici quelques unes des caractéristiques de la procédure de contravention :

1. Le tribunal condamne à des amendes pré-établies à l'égard d'une gamme d'infractions mineures.
2. La réglementation définit des formules succinctes d'inculpation des infractions mineures et la loi déclare ces formules suffisantes. Cette méthode permet à l'agent d'application de dresser la convention sur place et de la signifier sur-le-champ.
3. Un agent habilité par la loi atteste qu'il croit qu'une infraction a été commise (sans dénonciation sous serment) en employant la formule succincte prescrite, s'il en est, et détermine l'amende.
4. L'agent signifie un avis d'infraction, de préférence sur place, quand l'amende est pré-établie. L'agent signifie une assignation plutôt qu'un avis d'infraction quand l'amende n'est pas pré-établie ou lorsque l'agent veut forcer le défendeur à se présenter au tribunal ou faire déterminer la peine par le tribunal pour quelqu'autre motif.
5. La procédure est engagée par le dépôt du certificat d'infraction par l'agent au greffe du tribunal.
6. Sur réception de la signification d'un avis d'infraction, le défendeur peut :
   a) endosser l'aveu de culpabilité et faire parvenir l'avis et le montant de l'amende pré-établie au greffe du tribunal;
   b) endosser le plaidoyer de non-culpabilité et faire parvenir l'avis au greffe du tribunal en indiquant qu'il demande une audition;

c) se présenter au tribunal, reconnaître sa culpabilité et faire les représentations relatives à la peine;

d) ne rien faire.

Il serait aussi possible, quand le défendeur se trouve hors de la province ou de la juridiction du tribunal, de lui permettre de soumettre un plaidoyer écrit de non culpabilité et une argumentation écrite sur les moyens de défense ou de réduction de la peine et au tribunal de juger le fond sur pièce.

7. Dans les cas visés aux al. 6a) ou 6d), le tribunal peut prononcer la culpabilité sans audition.

8. Une déclaration de culpabilité sans comparution est susceptible de révision si l'absence du défendeur de l'audience ne lui est pas imputable. (mesure de sauvegarde).

9. La procédure de contravention pourrait comporter une peine maximale peu élevée qui s'appliquerait au lieu de la peine maximale prescrite par l'article et ne comporterait pas d'emprisonnement, ce qui autoriserait le poursuivant à traiter l'infraction comme mineure et à adopter la procédure sommaire. Dans ce cas, la procédure de dénonciation pourrait servir dans les cas où l'on recherche la peine maximale plus élevée.

Pour les contraventions de stationnement, presque toutes les administrations souhaitent inclure des dispositions spéciales, notamment :

1. La signification par apposition de la contravention sur le véhicule.

2. La signification au propriétaire ou au conducteur d'un véhicule par apposition de la contravention sur le véhicule.

3. Dans la plupart des cas, ce n'est pas le tribunal, mais l'administration municipale ou sa mandataire qui s'occupe de la perception des amendes de stationnement. En raison du volume d'affaires, une affaire n'est transmise au tribunal que s'il y a plaidoyer de non culpabilité et demande d'audition, s'il y a défaut de répondre ou de payer et nécessité de faire prononcer la culpabilité pour percevoir l'amende. En conséquence, le paiement de l'amende ne comporte ni plaidoyer ni déclaration de culpabilité et clos l'affaire. A cause de la nécessité de communications fidèles entre l'administration du stationnement et le greffe du tribunal, la "mesure de sauvegarde" s'impose davantage dans les affaires de stationnement.

Procédure par dénonciation

Il est possible de garder le système actuel de procédure par dénonciation pour les poursuites privées ou lorsque le poursuivant choisit de considérer l'infraction grave et de demander la peine maximale prescrite par la loi et les peines de substitution. Les modifications de forme proposées sont les suivantes:

1. Permettre à l'agent d'application de signifier la sommation sur les lieux de l'infraction et de la faire approuver après le dépôt de la dénonciation sous serment.
2. Autoriser le juge de paix à délivrer la dénonciation sans entendre le dénonciateur.
3. S'en tenir à la tendance établie en procédure criminelle selon laquelle la dénonciation n'est annulée que dans les cas où sa modification ou la présentation de détails ne servirait pas les fins de la justice.

Choix de la procédure

La personne qui dépose l'accusation choisit parmi les possibilités suivantes :

1. Pour obtenir la condamnation à l'amende déterminée, elle choisit la procédure de contravention avec avis d'infraction.
2. Pour obtenir du tribunal la condamnation à une amende différente de l'amende déterminée, tout en utilisant la procédure sommaire, ou pour forcer le défendeur à comparaître à toute autre fin, le poursuivant choisit la procédure de contravention, mais il choisit aussi de délivrer une sommation plutôt qu'un avis d'infraction.
3. Pour obtenir la condamnation au paiement de l'amende maximale prescrite par l'article de la loi particulière, ou pour faire prononcer certaines disposition particulières de la peine (comme des conditions dans une ordonnance de probation), le poursuivant choisit la procédure par dénonciation.

Faut-il laisser la décision à la discrétion absolue du poursuivant? Il faut débattre de l'utilité pour ceux qui sont chargés d'administrer la loi de se prévaloir des différentes possibilités comme instruments de politique. Cet objet sera plus facilement réalisé si les provinces désignent les agents d'application de la loi à même le personnel chargé d'appliquer leurs autres lois. Si on confie l'application de la loi aux corps de police, le seul moyen de faire appliquer des directives consistera à établir par règlement ce qui pourra faire l'objet de poursuites par procédure de

contravention avec amende prédéterminée et ce qui pourra faire l'objet de poursuite par procédure de dénonciation, ce qui aura pour effet d'ajouter un niveau de formalités à la poursuite des infractions.

Pour des infractions précises, le législateur peut fort bien édicter le mode de poursuite dans la disposition créant l'infraction.

Arrestation

Il ne devrait pas exister de pouvoir général d'arrestation à l'égard des infractions aux lois provinciales en raison de l'absence de caractère criminel de celles-ci. En général, ces infractions ne comportent pas de risque pour le public. Si l'infraction justifie la possibilité d'arrestation, la loi particulière définissant l'infraction devrait déclarer expressément qu'elle rend passible d'arrestation. Dans le cas de récidive ou d'autre comportement de défi à la police, la conduite de l'auteur de l'infraction devra être assimilée à une infraction au Code criminel pour qu'il y ait possibilité d'arrestation.

Il pourrait arriver que la loi constitutive de certaines infractions prévoie la possibilité d'arrestation, d'où la nécessité prévoir des dispositions relatives à la mise en liberté sous cautionnement.

Mise en liberté sous cautionnement

En vertu du Code criminel, un des objets de l'arrestation est celui de prévenir les actes qui mettraient la paix publique en danger.

Dans le cas des infractions aux lois provinciales, l'arrestation devrait être exceptionnelle et viser uniquement à assurer l'identification du défendeur, la préservation des éléments de preuve et la comparution au tribunal. Une mise sous garde de courte durée et la remise en liberté sous de conditions simples rempliront ces objets.

Une forme de cautionnement qui conviendrait aux infractions aux lois provinciales est le dépôt en numéraire souscrit par un contrevenant qui réside hors de la province; le montant du cautionnement peut servir au paiement de l'amende dans le cas de défaut de comparaître.

Procès (Se reporter à la rubrique Codification)

Il pourrait y avoir lieu de simplifier les dispositions relatives au procès qui permettent de trancher une question de droit ou de déterminer si le défendeur est inapte, pour cause de maladie mentale, à subir son procès puisque, pour les infractions aux lois provinciales, ce sont les seules questions qui peuvent se poser. S'il y a conduite dangereuse, la procédure relève du Code criminel ou des dispositions de la Loi sur la santé mentale relatives à l'envoi en cure fermée.

Délais de prescription

Une prescription générale de six mois serait appropriée en raison du peu de gravité de la plupart des infractions aux lois provinciales. La loi définissant une infraction pourrait établir un délai de prescription plus long pour les infractions jugées plus graves. Le défendeur pourrait renoncer au délai de prescription afin de reconnaître sa culpabilité à une infraction moins grave que celle dont il est inculpé.

Peines

Une loi doit définir ce qui constitue une infraction pour qu'il puisse y avoir déclaration de culpabilité et imposition d'une peine. Il serait préférable que la définition des infractions et la détermination des peines relèvent des lois spécifiques au sujet réglementé. Cependant, les dispositions générales sur la détermination de la peine et les principes d'application relèvent plus particulièrement d'une loi sur la procédure qui favoriserait la réalisation des buts d'une loi uniforme.

La nature des infractions aux lois provinciales fait qu'il convient d'en assurer l'application par des amendes et un système souple de perception de ces amendes, sans recours à l'emprisonnement sauf au cas de non paiement de l'amende.

La loi prescrit souvent une amende minimale ou une peine d'emprisonnement minimal afin d'inciter les tribunaux à plus de sévérité. D'autre part, le tribunal doit réagir à une grande variété de situations qui l'amène à estimer que, dans des circonstances particulières, même si l'accusé est formellement coupable, il serait injuste de lui imposer la peine minimale. La prescription d'une peine minimale amène parfois le tribunal à prononcer l'acquittement pour ne pas imposer la peine minimale et à gauchir l'interprétation de la loi pour y arriver. La loi uniforme pourrait prévoir d'autres moyens d'arriver à ce résultat en :

(1) autorisant le tribunal a imposer une peine moins sévère que la peine minimale quand il estime que les circonstances l'exigent et qu'il serait injuste d'imposer la peine minimale;

(2) autorisant le tribunal à imposer une amende au lien de l'emprisonnement minimal prescrit;

(3) autorisant le tribunal à accorder un sursis d'application de la peine;

Bien que la loi qui définit une infraction doive aussi en déterminer la peine, les lois antérieures comportent des exceptions à cette règle. Il est possible de pourvoir à ces exceptions en établissant une peine générale à défaut de peine spécifique ou encore de ne rien faire ce qui rendrait ces

infractions inapplicables sans modification de leur définition. Il n'est pas souhaitable de perpétuer cette pratique. Une telle peine par défaut ne devrait pas inclure l'emprisonnement.

Voici quelques mesures qui assoupliraient la perception des amendes :

1. Un délai fixe de grâce (par exemple 15 jours);
2. La possibilité pour le tribunal d'accorder un délai de paiement lors du prononcé de la peine ou plus tard, sur demande soumise par écrit par le défendeur, avec possibilité pour le tribunal de se renseigner sur la situation financière du défendeur;
3. La possibilité pour le tribunal d'ordonner le paiement de l'amende à tempérament;
4. La possibilité pour le tribunal d'ordonner le paiement sous forme de travaux accomplis dans le cadre d'un programme établi à cette fin;
5. Le sursis de peine d'une durée déterminée. Cette mesure permettrait au défendeur de se soumettre à de la formation ou à toute autre mesure de réadaptation au lieu de payer l'amende.
6. La perception de l'amende par les tribunaux civils.
7. L'emprisonnement pour défaut de paiement de l'amende en dernier recours, la durée maximale de l'emprisonnement serait alors proportionnelle au montant impayé.

Il faut se rappeler que même si l'article de détermination de la peine autorise l'emprisonnement, la peine sera réduite, si l'on retient le système préconisé à la rubrique "Procédure de contravention" en vertu duquel le mode de poursuite sommaire n'autorisera que l'imposition d'une amende maximale moins élevée. Il ne pourrait y avoir de peine d'emprisonnement que dans le cas de poursuite selon la procédure de dénonciation.

Une autre façon d'adoucir la peine d'emprisonnement consisterait à accorder un sursis d'exécution (d'au plus 30 jours) pour permettre au défendeur de préparer son absence de son domicile et du travail.

Il y aurait lieu de substituer les dispositions suivantes aux dispositions du Code criminel relatives aux ordonnances de sursis pour tenir compte de la gravité moindre des infractions aux lois provinciales que celle des actes criminels :

1. N'autoriser la délivrance d'une ordonnance de probation que si la poursuite a lieu par procédure de dénonciation et si le défendeur

est présent au tribunal; limiter la durée de l'ordonnance, sauf à la renouveler;

2. Remplacer les conditions associées à un comportement criminel par des conditions qui conviennent à l'infraction comme l'accomplissement de services communautaires, la participation à un programme de formation ou de cure d'alcoolisme ou de toxicomanie. Ces conditions pourraient s'appliquer seulement si l'infraction rend passible d'emprisonnement. Puisque les actes criminels exigent la présence d'une intention coupable qui n'est pas requise dans le cas des infractions aux lois provinciales, il faudra prendre garde que les conditions de probation relatives à l'indemnisation des victimes ou à la restitution des biens ne deviennent un moyen facile de percevoir des dommages- intérêts pour négligence. Il serait possible de n'autoriser ces conditions que si la loi créant l'infraction le permet et si les circonstances le justifient.

Appels

Il ne semble pas y avoir de motif de modifier le cheminement des appels prévu au Code criminel pour les poursuites sommaires à l'égard des poursuites entamées par dénonciation, sauf pour l'exposé de cause à la cour suprême qu'il y aurait peut-être lieu d'éliminer.

La gravité réduite des affaires traitées comme contraventions, leur nombre et les décisions sans formalité avant procès pourraient justifier un régime de révision plus rapide, plus économique et plus accessible que celui des poursuites par dénonciation. La peine qui fait l'objet de l'appel est soit une amende pré-établie ou une amende déterminée par le tribunal dans la fourchette fixée pour les poursuites par procédure sommaire (le maximum moins élevé proposé à la rubrique "Peines". La forme d'appel la plus utile au défendeur consisterait en un régime de révision, par une autre juge, du jugement sommaire de l'affaire avec la pleine liberté pour lui de prendre connaissance de nouveau éléments de preuve afin de vérifier que justice a été bien rendue. L'objectif consiste à rendre la révision plus accessible au défendeur, moins dispendieuse et plus expéditive qu'un appel formel à la cour de comté ou de district ou à la cour du banc de la reine.

Sous la rubrique "Tribunal" on a proposé d'établir un tribunal distinct pour les infractions aux lois provinciales où les juges (ce pourrait être des juges de paix ou des juges de la cour provinciale) n'entendraient que les affaires présentées à ce tribunal. Dans ce cas, la cour d'appel pourrait être la cour provinciale.

L'appel pourrait prendre la forme d'un examen mené par la cour qui aurait le droit:

1. de prendre connaissance de tous les éléments de preuve et de la transcription des témoignages présentés au procès et de recevoir la déposition des mêmes témoins ou celle de nouveaux témoins;
2. d'exiger du juge qui a rendu la décision attaquée en appel qu'il fasse un rapport sur tout aspect de la procédure antérieure;
3. procéder à la révision en fonction d'un énoncé de faits convenus.

Il pourrait y avoir révision que la déclaration de culpabilité fasse suite à un procès ou qu'elle ait été prononcée sur défaut de comparaître ou sans procès.

Pour éviter la multiplication des appels engagés pour profiter des délais ou retarder le paiement de l'amende, il y aurait lieu, à l'égard des infractions aux lois provinciales, d'exiger le paiement de l'amende ou le dépôt d'un cautionnement équivalent à l'amende avant l'inscription de l'appel.

Il devrait y avoir possibilité de se pourvoir à la cour d'appel contre toute forme d'appel du premier niveau, sur autorisation de cette cour, sur toute question de droit de grande importance pour le public.

La Loi sur les jeunes contrevenants

La Loi sur les jeunes contrevenants, une loi fédérale, établit un régime spécial de procédure pour le jugement des jeunes contrevenants inculpés d'infractions au Code criminel et aux autres lois fédérales. La Loi oblige de plus les provinces a établir des tribunaux pour la jeunesse à cette fin.

Les tribunaux pour la jeunesse, qui relèvent ordinairement des tribunaux provinciaux de la famille, devront aussi juger les jeunes contrevenants coupables d'infractions aux lois provinciales; il sera donc nécessaire de leur attribuer la compétence à l'égard des infractions aux lois provinciales commises par de jeunes contrevenants.

Il sera aussi nécessaire de rendre la procédure relative aux infractions aux lois provinciales aussi semblable que possible à celle qu'établit la Loi sur les jeunes contrevenants.

Faut-il définir ces adaptations de procédure dans la Loi uniforme sur les infractions aux lois provinciales ou attendre de le faire dans une Loi sur les jeunes contrevenants?

ANNEXE

Tableau des lois provinciales et territoriales

Alberta :	Provincial Offences Procedure Act
Codification –	Renvoie au Code criminel
Tribunal –	Cour provinciale
Procédures –	Dénonciations, sommation d'infraction et avis de contravention
Choix de la procédure –	Le infractions poursuivables par la procédure de contravention sont déterminées par le règlement
Prescription –	6 mois
Appels –	Cour du Banc de la Reine et Cour d'appel sur autorisation
Jeunes contrevenants –	Dispositions législatives complète dans une loi distincte
Colombie-Britannique :	Offence Act
Codification –	Code provincial indépendant
Tribunal –	Cour provinciale
Procédures –	Dénonciations ou sommation d'infraction sous forme de contravention ou de dénonciation ordinaire
Choix de la procédure –	Le infractions poursuivables par la procédure de contravention sont déterminées par la Loi
Prescription –	6 mois
Appels –	Cour de comté et Cour d'appel sur autorisation
Jeunes contrevenants –	Dispositions législatives complète dans une loi distincte
Ile-du-Prince-Édouard :	Summary Proceedings Act
Codification –	Renvoie au Code criminel
Tribunal –	Le juge de paix habilité par le Code
Procédures –	Par contravention en matière sommaire et dénonciation dans tous les autres cas
Choix de la procédure –	Déterminé par le règlement
Prescription –	6 mois
Appels –	Selon le Code criminel
Jeunes contrevenants –	

Manitoba :	Loi sur les poursuites sommaires
Codification –	Renvoie au Code criminel
Tribunal –	Cour provinciale
Procédures –	Dénonciations, avis d'infraction
Choix de la procédure –	Laissé à l'agent de la paix
Prescription –	6 mois
Appels –	Cour du Banc de la Reine et Cour d'appel sur autorisation
Jeunes contrevenants –	Règlement d'application de la Loi sur les poursuites sommaires

Nouveau-Brunswick :	Loi sur la procédure applicable aux infractions provinciales
Codification –	Codification provinciale complète
Tribunal –	Cour provinciale, sauf pour les appels
Procédures –	Dénonciation ou contravention
Choix de la procédure –	Les infractions poursuivables par la procédure de contravention sont déterminées par le règlement
Prescription –	6 mois
Appels –	Selon le Code criminel
Jeunes contrevenants –	Loi provinciale semblable à la Loi fédérale

Nouvelle-Écosse :	Summary Proceedings Act
Codification –	Renvoie au Code criminel
Tribunal –	Le juge de paix compétent selon le Code criminel
Procédures –	Contravention en matière sommaire et dénonciation dans tous les autres cas
Choix de la procédure –	Déterminé par le règlement
Prescription –	6 mois
Appels –	Selon le Code criminel
Jeunes contrevenants –	Dispositions législatives complètes dans une loi distincte

Ontario :	Loi sur les infractions provinciales
Codification –	Code provincial complet
Tribunal –	Tribunal distinct pour les infractions provinciales
Procédures –	Dénonciation, contravention avec mandat ou avis d'infraction ou contravention de circulation avec avis
Choix de procédure –	Le choix appartient à l'agent d'application de la Loi
Prescription –	6 mois
Appels –	Infractions poursuivables sur dénonciation : cour de district; infractions poursuivables par contravention : cour provinciale et cour d'appel dans tous les cas, sur autorisation
Jeunes contrevenants –	Visés par la Loi sur les tribunaux provinciaux.
Québec :	Loi sur les poursuites sommaires
Codification –	Codification provinciale complète
Tribunal –	Cour provinciale, tribunaux de la jeunesse, Cour des sessions de la paix, tribunaux du travail, cours municipales
Procédures –	Procédure unique engagée par dénonciation
Choix de la procédure –	Procédure identique dans tous les cas
Prescription –	1 an
Appels –	Cour supérieure et Cour d'appel avec autorisation
Jeunes contrevenants –	

Saskatchewan :	Summary Offences Procedure Act
Codification –	Renvoie au Code criminel
Tribunal –	Juge de paix habilité par le Code
Procédures –	Contravention en matière sommaire et dénonciation dans tous les autres cas.
Choix de la procédure –	Le infractions poursuivables par la procédure de contravention sont déterminées par le règlement
Prescription –	6 mois
Appels –	Selon le Code criminel
Jeunes contrevenants –	

Terre-Neuve :	Summary Proceedings Act
Codification –	Renvoie au Code criminel
Tribunal –	Cour provinciale
Procédures –	Dénonciation et contravention
Choix de la procédure –	Le infractions poursuivables par la procédure de contravention sont déterminées par la Loi
Prescription –	12 mois
Appels –	Selon le Code criminel
Jeunes contrevenants –	

Territoire du Yukon :	Summary Convictions Act
Codification –	Renvoie au Code criminel
Tribunal –	Juge de paix habilité par le Code criminel
Procédures –	Dénonciations ou contravention
Choix de la procédure –	Procédure déterminée par le règlement
Prescription –	6 mois
Appels –	Selon le Code criminel
Jeunes contrevenants –	Dispositions législatives complètes dans une loi distincte semblable à la Loi fédérale

Territoires du Nord-Ouest : Summary Conviction Procedures Act

Codification -	Renvoie au Code criminel
Tribunal -	Magistrat
Procédures -	Dénonciations et contravention uniforme
Choix de la procédure -	Déterminé par le règlement
Prescription -	6 mois
Appels -	Selon le Code criminel
Jeunes contrevenants -	Modifications apportées à la Summary Convictions Act

APPENDIX I

(see page 81)

UNIFORM RECIPROCAL ENFORCEMENT OF JUDGMENTS ACT

1. Section 4 of the Uniform Reciprocal Enforcement of Judgments Act is repealed and the following substituted:

Application of Foreign Money Claims Act

4. Where a judgment sought to be registered under this Act makes payable a sum of money expressed in a currency other than the currency of Canada

(a) the Uniform Foreign Money Claims Act applies to ascertain the amount of Canadian currency payable under it,

(b) the registering court shall certify the amount payable under the judgment, in accordance with paragraph (a) on its registration, and

(c) upon its registration, the judgment shall be deemed to be a judgment for the amount so certified.

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	Am. '88
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.
Foreign Money Claims Act	1989	
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 Donation Act	1989	
Information Reporting Act	1977	
Inter-Jurisdictional Child Welfare Orders Act	1988	
International Child Abduction Act	1981	
International Commercial Arbitration Act	1986	
International Sale of Goods Act	1985	
International Trusts Act	1987	Am '88
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, '89.
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.
Trusts, Conflict of Laws	1987	Am. '88
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
Human Tissue Gift Act	1970	10	1989	Human Tissue Donation 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.

ˣindicates 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 Rules for Trusts Act

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 Yukon[x] ('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.

Foreign Money Claims Act.

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 Donation Act.

Inter-Jurisdictional Child Welfare Orders Act

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.

International Trusts Act

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.° ('81). Total: 5.

Legitimacy Act—Enacted by Alta. ('28, '60); B.C. ('22, '60); Man. ('28, '62); N.W.T.° ('49, '64); N.S.[x]; Ont. ('21, '62); P.E.I.* ('20) *sub nom.* Children's Act: Part I; Sask.° ('20, '61); Yukon* ('54). Total: 9.

Limitation of Actions Act—Enacted by Alta.° ('35); Man.° ('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.° ('51); N.W.T. ('52, '77); Yukon° ('54). Total: 4.

Medical Consent of Minors Act—Enacted by N.B.° ('76). Total: 1.

Mental Health Act

Occupiers' Liability Act—Enacted by B.C. ('74); P.E.I.° ('84). Total: 2.

Partnerships Registration Act—Enacted by N.B.° ('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.° ('79); Yukon° ('81). Total: 3.

Powers of Attorney Act—Enacted by B.C. ('79); Sask.° ('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.° ('83); Yukon ('81). Total: 6.

Proceedings Against the Crown Act—Enacted by Alta.° ('59); Man. ('51); N.B.° ('52); Nfld.° ('73); N.S. ('51); Ont.° ('63); P.E.I.* ('73); Sask.° ('52). Total: 8.

Reciprocal Enforcement of Judgments Act—Enacted by Alta. ('25, '58); B.C. ('25, '59); Man. ('50, '61); N.B.[x] ('25, '51); Nfld.° ('60); N.W.T.* ('55); N.S.° ('73); Ont. ('29); P.E.I.° ('74); Sask. ('40); Yukon ('56, '81). Total: 11.

Reciprocal Enforcement of Maintenance Orders Act—Enacted by Alta. ('47, '58); B.C.° ('72); Man. ('46, '61, '83); N.B.† ('52); Nfld.[x] ('51, '61); N.W.T.° ('51); N.S.* ('49, '83); Ont.° ('59); P.E.I.° ('51, '83); Que. ('52); Sask. ('68, '81, '83); Yukon ('81). Total: 12.

Regulations Act—Enacted by Alta.° ('57); B.C. ('83); Can.° ('50); Man.° ('45); N.B.° ('62); Nfld.° ('77); N.W.T.° ('73); Ont.° ('44); Sask.° ('63, '82); Yukon° ('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.

Trade Secrets 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*

ˣ *indicates that provisions similar in effect are in force*

† *indicates that the Act has since been revised by the Conference*

Alberta

Bills of Sale Act† ('29); Bulk Sales Act† ('22); Contributory Negligence Act† ('37); Criminal Injuries Compensation Act† ('69); Defamation Act† ('47); Devolution of Real Property Act ('28); Evidence Act—Affidavits before Officers ('58), Foreign Affidavits ('52, '58), Photographic Records ('47), *Russell v. Russell* ('47); Extra-Provincial Custody Orders Enforcement Act ('77); Frustrated Contracts Act† ('49); 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: 31.

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; 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: 34.

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° ('52); Bulk Sales Act† ('27); Canada U.K. Convention on the Recognition and Enforcement of Judgments° ('82); Child Status[x] ('80) *sub nom.* Family Services Act; Contributory Negligence Act ('25)° ('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° ('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° ('50); Highway Traffic Act[x]; Hotelkeepers Act[x] *sub nom.* Innkeepers Act; International Commercial Arbitration Act ('86); Interpretation Act[x]; Interprovincial Subpoenas Act° ('79); Intestate Succession Act° ('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° ('51); Medical Consent of Minors° ('76); Partnership Registration Act° ('51); Presumption of Death Act[x] ('60); Proceedings Against the Crown°('52); Reciprocal Enforcement of Judgments ('25),[x] ('51); Reciprocal Enforcement of Maintenance Orders† ('52); Reciprocal Recognition and Enforcement of Judgments° ('84); Regulations Act° ('62); Retirement Plan Beneficiaries° ('82); Sale of Goods[x]; Statutes Act° ('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° ('47); Wills Act° ('59). Total: 37.

Newfoundland

Bills of Sale Act° ('55); Bulk Sales Act° ('55); Contributory Negligence Act° ('51); Criminal Injuries Compensation Act[x] ('68); Custody Jurisdiction and Enforcement Act° ('83); Defamation Act ('83); Evidence – Affidavits before Officers ('54); Extra-Provincial Custody Orders Enforcement Act° ('76); Foreign Affidavits ('54) *sub nom.* Evidence Act; Frustrated Contracts Act ('56); International Child Abduction Act ('83); International Commercial Arbitration Act ('86); International Wills ('76) *sub nom.* Wills Act; Interpretation Act° ('51); Interprovincial Subpoena Act° ('76); Intestate Succession Act ('51); Judgment Interest Act° ('83); Jurors Act (Qualifications and Exemptions) ('81) *sub nom.* Jury Act; Legitimacy Act°[x]; 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^{x} ('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: 30.

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); 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: 32.

Nova Scotia

Bills of Sale Act ('30); Bulk Sales Act^{x}; Child Abduction (Hague Convention) Act ('82); Contributory Negligence Act ('26, '54); Defamation Act* ('60); Evidence—Foreign Affidavits ('52), Photographic Records ('45), *Russell v. Russell* ('46); International Commercial Arbitration Act ('86); Legitimacy Act^{x}; Pension Trusts and Plans — Appointment of Beneficiaries ('60); Perpetuities ('59); Presumption of Death Act° ('63); Proceedings Against the Crown Act ('51); Reciprocal Enforcement of Judgments Act° ('73); Reciprocal Enforcement of Maintenance Orders Act* ('49, '83); Survivorship Act ('41); Trustee Investments* ('57); Variation of Trusts Act ('62); Vital Statistics Act° ('52); Warehousemen's Lien Act ('51); Warehouse Receipts Act ('51). Total: 20.

Ontario

Accumulations Act ('66); Criminal Injuries Compensation Act ('71) *sub nom.* Compensation for Victims of Crime Act[o] ('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); International Commercial Arbitration Act ('86); Interprovincial Subpoenas Act ('79); Intestate Succession Act[o] ('77) *sub nom.* Succession Law Reform Act: Part II; Legitimacy Act ('21, '62), rep. '77; Perpetuities Act ('66); Proceedings Against the Crown Act[o] ('63); Reciprocal Enforcement of Judgments Act ('29); Reciprocal Enforcement of Maintenance Orders Act[o] ('59); Regulations Act[o] ('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[o] ('46); Wills—Conflict of Laws ('54). Total: 28.

Prince Edward Island

Bills of Sale Act*('47, '82); Child Abduction (Hague Convention) *sub nom.* Custody Jurisdiction and Enforcement Act[o] ('84); Child Status Act ('87); Contributory Negligence Act[x] ('78); Defamation Act[o] ('48); Dependants' Relief Act[o] ('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]; International Commercial Arbitration Act ('86); Interpretation Act[o] ('81); Interprovincial Subpoenas Act; Intestate Succession Act *sub nom.* Part IV Probate Act* ('39); Jurors Act (Qualifications and Exemptions)[o] ('81); Legitimacy Act* ('20) *sub nom.* Part I of Children's Act; Limitation of Actions Act* ('39); Occupiers' Liability Act[o] ('84); Partnerships Registration Act[x]; Proceedings Against the Crown Act* ('73); Reciprocal Enforcement of Judgments Act[o] ('74); Reciprocal Enforcement of Maintenance Orders Act[o] ('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[o] ('38). Total: 21.

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); 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: 27.

Yukon Territory

Bulk Sales Act ('56); Child Abduction (Hague Convention) Act ('81); Condominium Insurance Act ('81); Conflict of Laws (Traffic Accidents) Act ('72); Contributory Negligence Act° ('55); Criminal Injuries Compensation Act° ('72, '81) *sub nom.* Compensation for Victims of Crime Act; Defamation Act ('54, '81); Dependants Relief Act ('81); Devolution of Real Property Act ('54); Evidence Act° ('55), Foreign Affidavits ('55), Judicial Notice of Acts, etc. ('55), Photographic Records ('55), *Russell v. Russell* ('55); Family Support Act[x] ('81); *sub nom.* Matrimonial Property and Family Support Act; Frustrated Contracts Act ('81); Human Tissue Gift Act ('81); International Commercial Arbitration Act ('86); Interpretation Act* ('54); Interprovincial Subpoena Act ('81); Intestate Succession Act° ('54); Legitimacy Act* ('54); Limitation of Actions Act ('54); Married Women's Property Act° ('54); Perpetuities Act° ('81); Personal Property Security Act° ('81); Presumption of Death Act ('81); Reciprocal Enforcement of Judgments Act ('56, '81); Reciprocal Enforcement of Maintenance Orders Act ('81); Regulations Act° ('68); Retirement Plan Beneficiaries Act ('81); Survival of Actions Act ('81); Survivorship Act ('81); Testamentary Additions to Trusts ('69) see Wills Act, s. 29; Trustee (Investments) ('62, '81); Vital Statistics Act° ('54); Warehousemen's Lien Act ('54); Wills Act° ('54). Total: 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.

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