UNIFORM LAW CONFERENCE OF CANADA

CONFERENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

PROCEEDINGS

OF THE

SEVENTY-FIFTH ANNUAL MEETING

HELD AT

EDMONTON, ALBERTA

August, 1993

CONTENTS

PAST PRESIDENTS

† - deceased

SIR JAMES AITKINS, 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
LACHAN 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

PAST PRESIDENTS

D.S. THORSON, Q.C., Ottawa † 1973-1974
ROBERT NORMAND, Q.C., Quebec 1974-1975
GLEN ACORN, Q.C., Edmonton 1975-1976
WENDALL MACKAY, Charlottetown 1976-1977
H. ALLAN LEAL, Q.C. LL.D., Toronto 1977-1978
ROBERT G. SMETHURST, Q.C., Winnipeg 1978-1979
GORDON F. COLES, Q.C., Halifax 1979-1980
PADRAIG O'DONOGHUE, Q.C., Whitehorse 1980-1981
GEORGE B. MACAULAY, Q.C., Victoria 1981-1982
ARTHUR N. STONE, Q.C., Toronto 1982-1983
SERGE KUJAWA, Q.C., Regina 1983-1984
GÉRARD BERTRAND, c.r., Ottawa 1984-1985
GRAHAM D. WALKER, Q.C., Halifax 1985-1987
M. REMI BOUCHARD, Sainte-Foy 1987-1988
GEORGINA R. JACKSON, Q.C., Regina 1988-1990
BASIL D. STAPLETON, Q.C., Fredericton 1990-1991
DANIEL C. PRÉFONTAINE, c.r., Ottawa 1991-1992
HOWARD F. MORTON, Q.C., Toronto 1992-1993

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DELEGATES

1993 Annual Meeting
The following persons attended one or
more sections of the Seventy-fifth Meeting of
the Conference

Legend

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

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HISTORICAL NOTE

Seventy-three 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 and 1990, 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. 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. 31, 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
1990. Aug. 11-17, Saint John
1991. Aug. 9-14, Regina.
1992 Aug 9-14, Corner Brook.

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 one of its executives annually

to represent the Conference on the Council of the Bar Association. And third, the past president of the Conference each year files a written report on its current activities with the Bar Association.

Since 1935 the Government of Canada has sent representatives annually to the meetings of the Conference and although the Province of Quebec was represented at the organization meeting in 1918, representation from that province was spasmodic until 1942. Since then, however, representatives of the Bar of Quebec have attended each year, with the addition from 1946 to 1990 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*, the *Uniform International Commercial Arbitration Act* and the *Uniform Human Tissue Donation 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 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 and subsequent 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 Drafting Section of the Conference. It meets the same time as the annual meeting of the Conference and at the same place. It is attended by legislative draftsmen who 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.

In 1989 a report entitled "Renewing Consensus for Harmonization of Laws in Canada" was prepared by the Executive of the Uniform Law Conference and distributed to the jurisdictions at the annual meeting of the Conference in Yellowknife. The jurisdictions and other interested bodies and persons were invited to study the report and to provide the Executive with their assessments and recommendations.

Representations were received and studied by the Executive during the winter and in the spring of 1990 the report was revised and distributed to the jurisdictions as a discussion document to be considered and debated at the annual meeting in Saint John. In the course of that meeting certain proposed amendments were brought forward, several of which were adopted. The report was then approved as amended.

HISTORIQUE

Soixante-treize années se sont écoulées depuis la recommandation de l'Association du barreau canadien que chaque gouvernement provincial prévoit la nomination de commissaires qui seraient présents aux conférences organisées dans le but de promouvoir une législation uniforme dans les provinces.

La recommandation de l'Association du barreau canadien fut basée, en premier lieu, sur la conception nette qu'elle n'est pas organisée de façon à pouvoir préparer des propositions de format législatif qui seraient attrayantes pour les gouvernements provinciaux et, en second lieu, sur leurs observations du National Conference of Commissioners on Uniform State Laws, qui s'étaient réunis annuellement aux État-Unis depuis 1892 (et qui se réunissent encore) pour préparer des statuts modèles et uniformes. L'adoption subséquente par l'assemblée législative de plusieurs États de ces Lois a produit un niveau important d'uniformité de législation à travers les États, surtout dans le domaine du droit commercial.

L'idée de l'Association du barreau canadien fut bientôt mise en oeuvre par la plupart des gouvernements provinciaux et plus tard par les autres. La première réunion des commissaires nommés sous le mandat de statuts provinciaux, ou par action exécutive dans les provinces où aucune disposition ne fut faite par statut, eut lieu à Montréal le 2 septembre 1918 et alors fut organisée la Conference of Commissioners on Uniformity of Laws a travers le Canada. Durant les années suivantes la Conférence a changé son nom a Conference of Commissioners on Uniformity of Legislation in Canada et en 1974 a adopté son nom actuel.

Bien que du travail ait été fait en vue de préparer une constitution pour la Conférence de 1918-19 et de 1944 et fut discutée en 1960-61 et à nouveau en 1974 et 1990, la décision à chaque occasion fut de continuer sans la rigidité et les limites qui auraient été le résultat inévitable de l'adoption d'une constitution écrite formelle.

Depuis la réunion de mise sur pied en 1918 la Conférence s'est réunie, sauf quelques exceptions, durant la semaine précédent la réunion annuelle de l'Association du barreau canadien. Ci'suit est une liste des dates et lieux des réunions de la Conférence :

1918. 2-4 sept., Montréal
1919. 26-29 août, Winnipeg
1920. 30 et 31 août, 1-3 sept., Ottawa
1921. 2, 3, 5-8 sept., Ottawa
1922. 11, 12 et 14-16 août, Vancouver
1923 30 et 31 août, 1 et 3-5 sept., Montréal
1924. 2-5 juillet, Québec
1925. 21, 22, 24 et 25 août, Winnipeg.
1926. 27, 28, 30 et 31 août, Saint-Jean.
1927. 19, 20, 22 et 23 août, Toronto.
1928. 23-25, 27 et 28 août, Régina.
1929. 30, 31 août, 2-4 sept , Québec
1930. 11-14 août, Toronto.
1931. 27-29 et 31 août, 1 sept., Murray Bay
1932 25-27 et 29 août, Calgary.
1933. 24-26, 28 et 29 août, Ottawa
1934. 30 et 31 août, 1-4 sept , Montréal.
1935 22-24, 26 et 27 août, Winnipeg
1936. 13-15, 17 et 18 août, Halifax.
1937. 12-14, 16 et 17 août, Toronto.
1938. 11-13, 15 et 16 août, Vancouver.
1939. 10-12, 14 et 15 août, Québec.
1941. 5, 6, 8-10 sept. Toronto.
1942. 18-22 août, Windsor.
1943 19-21, 23 et 24 août, Winnipeg
1944 24-26, 28 et 29 août, Chutes du Niagara
1945. 23-25, 27 et 28 août, Montréal
1946 22-24, 26 et 27 août, Winnipeg

1947. 28-30 août et 1 et 2 sept. Ottawa.
1948. 24-28 août, Montréal.
1949. 23-27 août, Calgary.
1950. 12-16 sept. Washington, D.C.
1951. 4-8 sept. Toronto.
1952. 26-30 août, Victoria.
1953. 1-5 sept., Québec.
1954. 24-28 août, Winnipeg.
1955. 23-27 août, Ottawa.
1956. 28 août-1 sept., Montréal.
1957. 27-31 août, Calgary.
1958. 2-6 sept., Chutes du Niagara.
1959. 25-29 août, Victoria.
1960. 30 août-3 sept., Québec.
1961. 21-25 août, Régina.
1962. 20-24 août, Saint-Jean.
1963. 26-29 août, Edmonton.
1964. 24-28 août, Montréal.
1965. 23-27 août, Chutes du Niagara.
1966. 22-26 août, Minaki.
1967. 28 août-1 sept., St. John's
1968. 26-30 août, Vancouver.
1969 25-29 août, Ottawa.
1970. 24-28 août, Charlottetown.
1971. 23-27 août, Jasper.
1972. 21-25 août, Lac Beauport.
1973. 20-24 août, Victoria.
1974. 19-23 août, Minaki.
1975. 18-22 août, Halifax.
1976. 19-27 août, Yellowknife.
1977. 18-27 août, St. Andrews.
1978. 17-26 août, St. John's.
1979. 16-25 août, Saskatoon.
1980. 14-23 août, Charlottetown.
1981. 20-29 août, Whitehorse.
1982. 19-28 août, Montebello.
1983. 18-27 août, Québec.
1984. 18-24 août, Calgary
1985. 9-16 août, Halifax.
1986. 8-15 août, Winnipeg.
1987. 8-14 août, Victoria.
1988. 6-12 août, Toronto.
1989. 12-18 août, Yellowknife.
1990. 11-17 août, Saint John.
1991. 9-14 août, Régina
1992. 9-14 août, Corner Brook

'cause des restrictions hôtelières et de voyage due à la guerre, la réunion annuelle de l'Association du barreau canadien prévue à Ottawa en 1940 fut annulée et pour les mêmes raisons aucune réunion de la Conférence n'eut lieu cette année. En 1941 l'Association du barreau canadien et la Conférence tinrent des réunions mais en 1942 l'Association du barreau canadien annula sa réunion prévue à Windsor. La Conférence cependant tint sa réunion. Cette réunion fut significative puisque la National Conference of Commissioners on Uniform State Laws aux États tenait sa réunion annuelle en même temps à Détroit ce qui permit plusieurs réunions communes que tinrent les membres des deux Conférences.

Bien qu'il soit vrai que la Conférence soit une organisation complètement indépendante qui ne répond d'aucun gouvernement ou autre autorité, elle reconnait et en fait nourrit une relation avec l'Association du barreau canadien. Par exemple, une façon de faire inclure un sujet à l'ordre du jour de la Conférence est à la requête de l'Association. Deuxièmement, la Conférence nomme annuellement un membre de son exécutif comme représentant au Conseil e l'Association du barreau. Et troisièmement, le président sortant de la Conférence dépose à chaque année, auprès de l'Association du barreau, un rapport écrit des activités.

Depuis 1935 le Gouvernement du Canada a envoyé des représentants aux réunions de la Conférence et, bien que la province du Québec fut représentée à la réunion d'organisation en 1918, la présence de cette province fut irrégulière jusqu'en 1942. Depuis lors des représentants du Barreau du Québec furent présents chaque

année avec en plus, de 1946 à 1990, un ou plusieurs délégués nommés par le Gouvernement du Québec.

En 1950 la nouvelle province de Terre-Neuve se joignit à la Conférence et nomma des délégués qui prirent part au travail de la Conférence.

Depuis la réunion de 1963 la représentation s'est élargie par la venue de représentants des Territoires du Nord-Ouest et du Yukon.

Dans la plupart des provinces, des statuts offrent des provisions pour des octrois envers les dépenses générales de la Conférence et les dépenses des délégués. Dans le cas des juridictions où aucune action législative fut entreprise, les représentants sont nommés, et les dépenses remboursées, par ordre de l'Exécutif. Les membres de la Conférence ne sont pas rémunérés, par ordre de l'Exécutif. Les membres de la Conférence ne sont pas rémunérés pour leurs services. En général, les personnes nommées pour la Conférence sont des représentants de la Cour, des Ministères de la justice des gouvernements, des écoles de droit, des praticiens de la profession et, depuis quelques années, des commissions de réforme du droit et autres agences semblables.

La nomination de délégués par un gouvernement ne grève bien sûr pas les gouvernements, qui pourront, selon leur bon vouloir, agir ou non selon les recommandations de la Conférence.

L'objectif principal de la Conférence est de promouvoir une uniformité législative à travers le Canada et les provinces dans lesquelles l'uniformité peut être vue comme possible et avantageuse. Aux réunions annuelles de la Conférence considération est donnée aux sections du droit dans lesquelles il semble désirable et praticable d'assurer une uniformité. Entre les réunions, le travail de la Conférence se fait par correspondance entre les membres de l'exécutif, les secrétaires locaux et le secrétaire exécutif et entre les membres des comités *ad hoc*. Des sujets à être considéré par la Conférence peuvent être suggérés par les délégués de n'importe quelle juridiction ou par l'Association du barreau canadien.

Bien que le travail principal de la Conférence soit d'essayer d'atteindre une uniformité sur la matière couverte par la législation déjà en existence, la Conférence a cependant été plus loin à divers occasion et a traité de sujets qui ne sont pas encore couverts par la législation au Canada et qui, après préparation, sont recommandés à être promulgués. Des exemples de cette pratique sont la *Uniform Survivorship Act* (loi uniforme portant sur la survie), l'article 39 de la *Uniform Evidence Act* (loi uniforme portant sur la preuve) qui traite des archives photographiques et l'article 5 de la même Loi qui, en effet, abroge l'ordonnance du juge dans *Russell c. Russell*, la *Uniform Regulations Act* (loi uniforme portant sur les règlements), la *Uniform Frustrated Contract Act* (loi uniforme portant sur l'annulation d'un contrat), la *Uniform Proceeding's Against the Crown Act* (loi uniforme portant sur les poursuites contre la Couronne), la *Uniform International Commercial Arbitration*

Act (loi uniforme portant sur l'arbitrage commercial international) et la *Loi uniforme sur le don de tissue humain.* Dans ces cas, la Conférence préférait établir et recommander des lois uniformes avant qu'aucune législature ne s'occupe du sujet et passe des lois et ensuite devoir entreprendre la tâche plus difficile de recommander des changements afin d'établir une uniformité.

Une autre innovation dans le travail de la Conférence fut la mise sur pied d'une section sur le droit criminel et procédures suite à une recommandation de la Section du droit criminel de l'Association du barreau canadien en 1943. Il fut signalé qu'aucune association existait au Canada avec le personnel approprié pour étudier et préparer sous format législatif des recommandations pour modifier le *Code criminel* et autres lois pertinentes pour le Ministère de la justice du Canada. Ceci mena à une résolution de l'Association du barreau canadien qui pressait la Conférence à élargir son champ d'action afin d'inclure ce service. A la réunion de la Conférence en 1944 une Section du droit criminel fut constituée, à laquelle toutes les provinces du Canada nommèrent des représentants.

En 1950 l'Association du barreau canadien a tenue une réunion annuelle commune avec la American Bar Assocation à Washington, D.C. La Conférence s'est aussi réunie à Washington ce qui donna aux membres une deuxième occasion d'observer les procédés de la National Conference of Commissioners on Uniform State Laws qui tenait sa réunion à Washington en même temps. Ceci donna aussi aux Américains l'occasion de participer aux sessions de la Conférence canadienne, ce qu'ils firent de temps à autre.

L'intérêt des Canadiens pour le travail des Américains et *vice versa* c'est depuis manifesté à plusieurs occasions, entre autre en 1965 lorsque le président de la Conférence canadienne assista à la réunion annuelle de la Conférence aux États, en 1975 lorsque les Américains tinrent leur réunion annuelle au Québec et durant les années suivantes lorsque les présidents des deux Conférences ont échangé des visites aux réunions annuelles de l'une et de l'autre.

L'exemple le plus concret de la collaboration continue entre les Conférences américaine et canadienne est la Transboundary Pollution Reciprocal Access Act (loi réciproque portant sur l'entrée de la pollution outre-frontière). Le projet de loi fut rédigé par un comité conjoint Américains-Canadiens et recommandé par les deux Conférences en 1982. C'était la première fois qu'on s'unissait pour ce genre de législation bilatérale.

Un événement d'importance singulière dans la vie de la Conférence eut lieu en 1968. Durant cette année le Canada devint membre de la Hague Conference on Private International Law dont le but est de travailler envers l'unification du droit privé international, surtout dans les secteurs du droit commercial et du droit familial.

En bref, la Hague Conference a les même objectifs généraux au niveau international que ceux de cette Conférence à l'intérieur du Canada.

Le Gouvernement du Canada, en nommant dix délégués pour assister à la réunion en 1968 de la Hague Conference, a grandement honoré notre Conférence en nous demandant de nommer un de nos membres comme membre de la délégation canadienne. Cette façon de faire fut encore suivie lorsqu'on demanda à la Conférence de nommer un de ses membres pour assister à la réunion de la Hague Conference de 1972 et les suivantes comme membre de la délégation canadienne.

Une caractéristique relativement nouvelle de la Conférence est le Legislative Drafting Workshop qui fut mis sur pied en 1968 et qui est maintenant connu comme la Section des révision de la Conférence. Cette Section se réunie en même temps que la réunion annuelle de la Conférence et au même endroit. Les rédacteurs des projets de loi qui assistent à la réunion annuelle de la Conférence assistent aussi à cette réunion. La Section se préoccupe de sujets d'intérêt général dans le secteur de la rédaction parlementaire. La Section s'occupe aussi de la rédaction de documents qui lui sont fourni par la Section de droit uniforme ou par la Section du droit criminel.

Un des handicape avec lequel la Conférence a dû travailler depuis sa conception est le manque de fonds pour la recherche légale, les délégués étant trop occupés avec leur travail régulier pour pouvoir entreprendre des recherches approfondies. Cependant, ce besoin a été heureusement comblé par des octrois bienvenus en 1974 et durant les années suivant du Gouvernement du Canada.

Une nouvelle expérience dans la vie de la Conférence - et une de grande importance eut lieu à la réunion annuelle de 1978 lorsque le Secrétariat des conférences intergouvernementales du Canada a amener d'Ottawa sa première équipe d'interprètes, traducteurs et autres spécialistes et fournirent une ligne complète de services, y inclus une interprétation simultanée du français à l'anglais et de l'anglais au français à chaque session plénière ou sectorielle durant les dix jours que siégeât la Conférence.

En 1989 un rapport intitulé "Renouvellement du consensus sur l'harmonisation des lois au Canada" fut préparé par l'exécutif de la Conférence sur l'uniformisation des lois au Canada et distribué aux juridictions lors de la réunion annuelle de la Conférence à Yellowknife. Les juridictions et autres partis et personnes intéressées furent invités à étudier le rapport et à présenter à l'exécutif leurs évaluations et recommandations.

Des présentations furent reçues et étudiées par l'exécutif durant l'hiver, et au printemps 1990 le rapport fût révisé et distribué aux juridictions comme document à discussion à être examiné et débattu lors de la réunion annuelle à Saint Jean. Au cours de la réunion certaines modifications furent proposées et mises sur table dont plusieurs furent adoptées. Le rapport fut alors accepté tel que modifié.

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OPENING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting opened at 8:15 p.m. on Sunday, August 15, 1993 in the William Tomison Room at the Hilton Hotel in Edmonton. Howard F. Morton, presided as Chairman, and Claudette N. Racette acted as Secretary.

Introduction of the Executive

The Officers of the Conference were introduced: Daniel Prefontaine, Immediate Past President, Peter Lown, Vice President, John Gregory, Chairman of the Uniform Law Section, Robert Murray, Chairman of the Criminal Law Section, Peter Pagano, Chairman of the Drafting Section, and Claudette N. Racette, the new Executive Director.

Address of Welcome

On behalf of the Government of Alberta, the Department of Justice and the City of Edmonton, Peter Pagano welcomed the delegates to the 75th Annual Meeting of the ULC.

He had hoped to welcome the Delegates in Jasper, however the cost of hosting a conference there in the summer was simply prohibitive. He wished the Delegates a successful meeting and an enjoyable stay in Edmonton.

Introduction of Delegates from the NCCUSL

Peter Lown welcomed the two representatives from the NCCUSL: The immediate Past President, Mr. Dwight A. Hamilton and Mr. Jeremiah Marsh, Chairman of the Liaison Committee between the U.S. and Canadian Conferences. Mr. Hite, the current President, had planned to attend but was unable to do so due to the sudden death of his wife. Mr. Marsh was asked to convey the Conference's condolences on this very sad event.

Introduction of Delegates

The senior delegate from each jurisdiction introduced the Commissioners attending with them

Auditor's Report

The Executive Director presented the Auditor's Report for the fiscal period ending March 31, 1993. Four items in the report were highlighted:

- A slight increase in the Executive Director's Honorarium which represented an overlap of a few months to allow Mr. Hoyt sufficient time to close the New Brunswick office and for the new Executive Director to establish the Ottawa office.

The remaining three items demonstrated the Conference's resolve to reduce expenses wherever possible:

- A savings of over $20,000 in the production costs for the Proceedings as a result of the elimination of the costly typesetting process previously used by the Conference and the fact the Peter Lown and his staff had done most of the production work.

- A substantial reduction in stationery costs, from $2,000 to $463.

- Professional Fees (auditors) will be substantially reduced this year. The Executive Director has obtained three quotations: One from Ernst and Young, the firm that the Conference has used for years, for $2,600, one from BDO Dunwoody Ward Mallette, a medium size firm, for $1,200 to $1,400 and one from a one man firm, M.W. Vance, for $690. The Executive Director recommended the appointment of Mr. M.W. Vance.

Doug Moen congratulated the Executive Director and Peter Lown and his staff on their cost cutting efforts and hopes that this approach will continue.

The audited financial statements were approved as submitted. Motion by Daniel Préfontaine, seconded by Raymond Moore. The motion was carried unanimously.

Appointment of Auditors

Moved by Daniel Préfontaine, seconded by Arthur Close that M.W. Vance be appointed as auditor of the ULC for the 1993/94 fiscal period. The motion was carried unanimously.

The Chairman commented that one of the efforts of the current Executive had been not only to use its funds wisely, but also in areas where quality would not suffer to save money. The Proceedings is a good example of this approach.

Banking Resolution

Moved by the Chairman that any two members of the Executive or one member and the Executive Director, as determined by the incoming Executive, be given signing authority as signing officers for all banking matters for the Conference. The motion was seconded by Graham Walker and unanimously carried.

1993-94 Budget

The 1993-94 budget was presented to the Delegates. The Chairman stated this was a balanced and cautious budget that is intended to provide an accurate reflection of what we expect the revenues and expenses will be. The Executive wishes to ensure that the Conference demonstrates the same sort of fiscal constraints that all of our jurisdictions are undergoing at the present time. He then welcomed questions from the Delegates.

Questions were raised with respect to the lack of financial support from New Brunswick and Manitoba and the reduction in the Justice Canada contribution.

In response, the Chairman stated that these were very difficult times for all jurisdictions. Some have stopped all grants and contributions while others, like the Federal Government have reduced their level of support. The Executive has discussed these issues with a number of jurisdictions and is exploring different approaches to ensure continued support. For this reason, the Executive has held the first of two meetings this morning with Jurisdictional Representatives. Each jurisdiction was asked to send no more than two people (one civil law and one uniform law) to attend an informal meeting with the Executive to discussion the future of the Conference in terms of finances, workload and projects. The second meeting will take place on Tuesday.

Appointment of Committees

RESOLUTIONS COMMITTEE

Peter Lown reported that he had been given the task of forming a Resolutions Committee. He has already asked Anne-Marie Trahan, Raymond Moore and Clark Dalton to assist him. Others will be contacted shortly. The Committee will meet during the course of the meeting. Their report will be presented at the Plenary Session.

NOMINATING COMMITTEE

The Chairman of the Nominating Committee, Daniel Préfontaine informed the delegates that he would be approaching at least four to assist him prepare the nominating roster for the closing Plenary Session.

NCCUSL Conference

The Chairman reported that he and John Gregory had attended the NCCUSL Conference. He stated that he had always had the feeling the American Conference was strictly a uniform law conference. He had discovered this was not the case and had been totally fascinated by what turned out to be a 6 to 7 hour discussion on civil forfeiture. There are many areas worked on by the American Conference that have a direct bearing on the criminal law in Canada. There is an opportunity to benefit from the experience of the NCCUSL in areas which touch on the criminal law. He came back from the Conference with a willingness and a desire on the part of the Criminal Law Section to get more involved.

John Gregory reported that he had also been most impressed with the Conference. There were 237 registered delegates, most in private practice, some judges, and others.

One of the selling points among the governments that were the sponsors was the amount of free private legal advice that they receive from their commissioners and certainly the commissioners work hard. The preparation of uniform texts is a long and complex process involving several mid-year meetings. The second job of the American commissioners is lobbying for the passage of uniform acts in their jurisdictions and their States.

He then gave a brief summary of the topics that were dealt with during the Conference, highlighting those topics that are also on ULC's own Agenda. He concluded by confirming the need for co-operation with the Americans.

Business of the Week - Criminal Law and Uniform Law Sections

Robert Murray, Chairman of the Criminal Law Section, and John Gregory, Chairman of the Uniform Law Section presented brief summaries of the business activities of their respective sections.

Speaking on behalf of the Organizing Committee, Peter Lown reported that at last year's Conference, the organizers of this year's Conference were given some clear instructions:

1. Distil the time taken into a shorter time period

2. Concentrate on the business sessions

He then gave a brief summary of the social events for the Conference and advised delegates that since this was the 75th anniversary of the Conference, a group photograph would be taken to record the event.

Adjournment

There being no further business, the meeting adjourned at 9:15 p.m. to meet again in the Closing Plenary Session on Friday, August 19. Motion by Anne Marie Trahan, seconded by John Gregory. Motion carried unanimously.

UNIFORM LAW SECTION

MINUTES 1993

Attendance

24 delegates attended the meeting of the Uniform Law Section. For details see the list of delegates on page 5.

Sessions

The section held seven sessions from Sunday through Wednesday as well as two joint sessions with the Criminal Law Section.

Distinguished Visitors

The Section was honoured by the participation of:

(a) Mr. Dwight A. Hamilton, Immediate Past President of the National Conference of Commissioners on Uniform State Laws;

(b) Mr. Jeremiah Marsh, Chairman of the Committee on Liaison with Canada and International Organizations, and Co-chairman of the Joint Committee on Cooperation with the Uniform Law Conference of Canada and the National Conference of Commissioners on Uniform State Laws.

Arrangement of Minutes

A few of the matters discussed were opened one day, adjourned and concluded on another day. For convenience, the minutes are put together as though no adjournments occurred and the subjects arranged alphabetically.

Opening

The session opened with John D. Gregory in the chair and Clark W. Dalton acting as secretary.

Melbourne Hoyt, Q.C.

The Section noted with much appreciation the valuable contribution Mel Hoyt had made to it over many years as Commissioner and as Executive Secretary.

Children's Evidence

The Section received from Ontario a report and draft amendments to the Uniform Evidence Act dealing with the evidence of children, based on the principles adopted in 1992.

RESOLVED

1. That uniform legislation be adopted in a form independent of the Uniform Evidence Act.

2. That the Section adopt and recommend for enactment as a uniform act the Uniform Child Evidence Act as presented to the meeting and that the Act be published in the proceedings. (See Appendix F, page 187.)

Cost of Credit

The Section received from the Alberta Commissioners with Mr. Richard Bowes as principal researcher, a Draft Uniform Cost of Credit Disclosure Act, a Proposed Interest Act, with commentaries on both draft statutes, and supporting documents. These documents set out the result of consultation and further consideration of the principles adopted in 1992.

RESOLVED

1. That the section create a review group to assist in the completion of the uniform and proposed federal statutes, for submission to the 1994 meeting of the Conference.

2. That the documents discussing the principles be published in the proceedings. (See Appendix J, page 270.)

Electronic Data and the Law

The Section received from Ontario a report and supporting materials on legal issues raised for government and the private sector by electronic data interchange (EDI) and electronic records and communications generally.

In this context it was noted that uniform laws should not create express or implied requirements that information or communications be carried on paper, except where after careful consideration the Section has determined that paper-based records are necessary to the purpose of the legislation.

RESOLVED

1. That the report on the legal implications of EDI, without the supporting materials, be published in the proceedings. (See Appendix G, page 198.)

2. That a working group be constituted to prepare uniform legislation on the foundations of the admissibility of evidence of electronic records, with particular reference to business records. The working group was instructed to consider the effect of its deliberations on standards for electronic filing of documents in Canadian courts.

Intercountry Adoption (Hague Convention)

The Section received from the Nova Scotia and Prince Edward Island Commissioners a report and draft Uniform Intercountry Adoption (Hague Convention) Act, to assist member jurisdictions to implement The Hague Convention on the subject approved by The Hague Conference in May, 1993.

RESOLVED

That the Section adopt and recommend for enactment as a uniform act the Uniform Intercountry Adoption (Hague Convention) Act and that the Act be published in the Proceedings. (See Appendix E, p. 141.)

Investment Securities

The Section received from the Alberta Commissioners, for whom Mr. Eric Spink was principal researcher, a report on the transfer of investment securities, touching principally on the need for uniform legislation and the possibility of creating a unique property interest in securities transferred without delivery of a certificate. The Alberta Commissioners had been working closely with the National Conference on Uniform State Laws, whose project on Article 8 of the Uniform Commercial Code was directly relevant.

RESOLVED

1. That the report on investment securities be published in the Proceedings. (See Appendix D, p. 126.)

2. That a review committee be established to assist Mr. Spink as he prepares draft uniform legislation for the 1994 meeting.

Jurisdiction and Transfer

The Section received from the British Columbia Commissioners, with Professor Joost Blom as principal researcher, a report and draft Uniform Court Jurisdiction and Proceedings Transfer Act, based substantially on the principles approved in 1992.

RESOLVED

1. That the Uniform Court Jurisdiction and Proceedings Transfer Act as approved by the meeting be published with commentaries in the Proceedings. (See Appendix B, p. 98.)

2. That the Act and commentaries be presented by the Conference to the Ministers Responsible for Justice Issues, offering to participate in consultation with the Bench and Bar in anticipation of preparing a final uniform statute in 1994 that would take into account the results of the consultation and the views of the Ministers.

Jury Selection and Composition

The Section received from the Nova Scotia Commissioners a report on principles for the selection and composition of juries applicable both to criminal and to civil juries.

RESOLVED

1. That the report on juries be published in the Proceedings. (See Appendix H, p. 218.)

2. That a working group be consitituted together with the Criminal Law Section to present to the 1994 meeting annotated principles or approaches to jury selection and composition.

Private International Law

The Section received from the Government of Canada a report on the activities of the Department of Justice in private international law matters. It also considered the status of work on several international conventions.

RESOLVED

That the report on the activities of the Department of Justice be published in the Proceedings. (See Appendix I, p. 243.)

Uniform Enforcement of Canadian Judgements Act

The Section received a report from British Columbia on recent academic commentaries on the Uniform Enforcement of Canadian Judgements Act.

RESOLVED

That the report on commentaries on the Uniform Enforcement of Canadian Judgements Act be published in the Proceedings. (See Appendix C, p. 121.)

Other Reports

The Section received from Saskatchewan the report of the Committee on Commercial Liens, updating the work approved in 1992, and from Ontario reports on the conflicts of laws provisions in the Uniform Limitation Act, the legal rights of beneficiaries of retirement savings plans, and the privacy implications of DNA testing.

Steering Committee's Report

The Steering Committee noted that in addition to the continuing projects from 1993, proposals for uniform legislation on negotiable documents of title and on the Unidroit Conventions on Factoring and Leasing would be back on the agenda for 1994.

In addition, the Committee presented a number of new topics for the views of the Section. In particular the Committee proposed new projects on the law of evidence and DNA, the status of beneficiaries of certain retirement plans, and the Uniform Reciprocal Enforcement of Judgements Act. It foresaw possible work during the year on the conflict of laws provision of the Uniform Limitations Act and on the International Convention on the Setttlement of Investment Disputes (ICSID).

The draft uniform statutes on the protection of privacy and on defamation had been circulated in 1991 but had not been approved. It was anticipated that new drafts would be brought back in 1994 for final disposition.

The Steering Committee also suggested approval of a request by the Criminal Law Section to review the constitutionality of the Uniform Mental Health Act's provisions for commital of mentally disordered people on the ground that they are dangerous to others. The request was made in the context of the forthcoming proclamation of Criminal Code amendments "capping" the amount of time people could be held on Lieutenant Governor's warrants for most criminal offences. If the Uniform Act's provisions were thought to be constitutional under current law, the Steering Committee would consult with representatives of the Criminal Law Section before deciding whether and how to proceed further.

Finally, the Steering Committee noted the recommendations of the federal/provincial/territorial working group on gender equality. Two of the recommendations had referred to work to be done by the Uniform Law Conference. The Committee suggested that these be referred to the Drafting Section.

Canada - U.S. Liaison Committee's Report

The Liaison Committee had met both at the NCCUSL conference in Caharleston, S.C., and in Edmonton. It agreed to pursue the 1992 decision to further regularize contacts, including the routine exchange of working documents through the Executive Director of the Canadian Conference and the Executive Secretary of the American Conference. In addition, the groups would seek to define or find a project for a joint working committee. The two subjects first suggested were revisions to evidence law to support the introduction of DNA evidence, and revisions to enforcement of support laws so that current practical problems could be reduced. Particularly useful contacts of a more or less formal nature had been made in the field of investment security transfers and the laws affecting electronic commerce.

SECTION D'UNIFORMISATION DES LOIS

PROCÈS-VERBAL - 1993

Participants

24 délégués ont participé à la réunion de la Section d'uniformisation des lois. Pour plus de détails, voir la liste des délégués à la page 5.

Sessions

La Section a tenu sept sessions de dimanche à mercredi, et deux sessions conjointes avec la Section du droit pénal.

Invités de marque

La Section était honorée par la présence de:

(a) M[e] Dwight A. Hamilton, président sortant de la National Conference of Commissioners on Uniform State Laws; et

(b) M[e] Jeremiah Marsh, président du Comité de liaison avec le Canada et les organisations internationales, et co-président du comité conjoint sur la coopération entre la Conférence sur l'uniformisation des lois du Canada et la National Conference of Commissioners on Uniform State Laws.

Présentation du procès-verbal

La discussion de certaines des questions abordées a commencé un jour pour reprendre plus tard pendant la semaine. Afin de faciliter la lecture du procès-verbal, ce dernier regroupe la discussion comme si elle fut ininterrompue et présente les sujets par ordre alphabétique.

Ouverture

La session s'est ouverte sous la présidence de John D. Gregory avec Clark W. Dalton comme secrétaire.

Melbourne Hoyt, c.r.

La Section a noté avec beaucoup de reconnaissance la grande contribution de Mel Hoyt pendant des années, tant comme commissaire que comme secrétaire général.

Adoption internationale (Convention de la Haye)

La Section a reçu de la Nouvelle-Écosse et de l'île du Prince-Édouard un rapport ainsi qu'un projet de Loi uniforme sur l'adoption internationale (Convention de la Haye), pour aider les gouvernements commanditaires à mettre en vigueur la

Convention de la Haye sur ce sujet telle qu'approuvée par la Conférence de la Haye en mai 1993.

RÉSOLUTION

Que la Section adopte et recommande que les gouvernements commanditaires promulguent la Loi uniforme sur l'adoption internationale (Convention de la Haye) comme loi uniforme, et que cette loi soit publiée dans le compte-rendu. (Voir annexe E, à la page 162.)

Compétence des tribunaux et transfert de la cause

La Section a reçu des délégués de la Colombie britannique, plus précisément du professeur Joost Blom, chercheur principal, un rapport et un projet de loi uniforme sur la compétence sur les actions civiles et sur leur transfert, le tout fondé en substance sur les principes approuvés en 1992.

RÉSOLUTIONS

1. Que la Loi uniforme sur la compétence des tribunaux et le transfert des actions telle qu'approuvée lors de la réunion soit publiée avec des commentaires dans le compte-rendu. (Voir annexe B, a la page 98.)

2. Que la Conférence présente la Loi et les commentaires aux Ministres responsables des questions relatives à la justice et en même temps offre de participer à une consultation avec les juges et le barreau, anticipant qu'une version finale de la Loi uniforme soit préparée en 1994 qui prenne compte les résultats de la consultation et les vues des ministres.

Coût du crédit

La Section a reçu des délégués albertains, plus précisément de M[e] Richard Bowes, un projet de loi uniforme sur la divulgation du coût du crédit et un projet de loi fédérale sur les intérêts, ainsi que des commentaires sur les deux projets de loi et de la documentation à l'appui. Ces documents ont établi le bilan de la consultation aussi bien qu'une suite à l'élaboration des principes adoptés en 1992.

RÉSOLUTIONS

1. Que la Section établisse un groupe de révision pour aider à compléter la rédaction de la loi uniforme et du projet de loi fédérale, les deux devant être présentés à la réunion de la Conférence en 1994.

2. Que les documents donnant suite à l'élaboration des principes soient publiées dans le compte-rendu. (Voir annexe J, à la page 270.)

Données électroniques et le droit

La Section a reçu de l'Ontario un rapport avec documentation à l'appui sur des questions juridiques soulevées pour les gouvernements et pour le secteur privé par l'échange de données informatisées (l'EDI) et par l'usage de fichiers électroniques et de la télématique.

Dans ce contexte, l'on a noté que les lois uniformes ne devraient pas rendre nécesaire, ni par langage exprès ni par obligation implicite, de support papier, à moins que la Section ne se rende compte après considération en détail que la réalisation des buts d'une loi exige une documentation sur papier.

RÉSOLUTIONS

1. Que le rapport sur les effets juridiques de l'EDI soit publié dans le compte-rendu sans les documents subsidiaires. (Voir annexe G, à la page 207.)

2. Qu'un groupe de travail soit constitué pour préparer une loi uniforme sur le fondement de la recevabilité de la preuve des documents électroniques, surtout des documents commerciaux. Le groupe de travail fut chargé de peser les conséquences de ses discussions sur des normes éventuelles qui s'appliquent au dépôt des documents au greffe par voie électronique.

Droit international privé

La Section a reçu du gouvernement du Canada un rapport sur les activités du ministère de la Justice dans le droit international privé. Elle a également pris en considération le statut du travail sur plusieurs conventions internationales.

RÉSOLUTION

Que le rapport sur les activités du ministère de la Justice soit publié dans le compte-rendu. (Voir annexe I, à la page 256.)

Loi uniforme sur la mise en vigueur des jugements canadiens

La Section a reçu un rapport de la Colombie-britannique sur de récents commentaires académiques sur la Loi uniforme sur la mise en vigueur des jugements canadiens.

RÉSOLUTION

Que le rapport sur les commentaires sur la Loi uniforme sur la mise en vigueur des jugements canadiens dans le compte-rendu. (Voir annexe C, à la page 121.)

Sélection et composition du jury

La Section a reçu des délégués de la Nouvelle-Écosse un rapport sur les principes de la sélection et la composition du jury qui s'appliquent au jury dans les causes pénales et civiles.

RÉSOLUTIONS

1. Que le rapport soit publié dans le compte-rendu. (Voir annexe H à la page 218.)

2. Qu'un groupe de travail soit constitué en collaboration avec la Section de droit pénal pour présenter à la réunion de 1994 des principes ou approches avec annotations traitant de la sélection et de la composition du jury.

Témoignage des enfants

La Section a reçu de l'Ontario un rapport et des modifications proposées à la Loi uniforme sur la preuve concernant le témoignage des enfants, formulées selon les principes adoptés en 1992.

RÉSOLUTIONS

1. Qu'une loi uniforme soit adoptée sous une forme indépendante de la Loi uniforme sur la preuve.

2. Que la Section adopte et recommande que les gouvernements commanditaires promulguent la Loi uniforme sur le témoignage des enfants comme loi uniforme, telle que présentée à la réunion de la Section, et que la Loi soit publiée dans le compte-rendu. (Voir annexe F, à la page 192.)

Valeurs mobilières

La Section a reçu des délégués albertains, plus précisément de M^{e} Eric Spink, chercheur principal, un rapport sur le transfert des valeurs mobilières qui traita principalement du besoin d'une loi uniforme et de la possibilité de créer un titre unique des valeurs mobilières qui sont transférées sans livraison d'un certificat.

RÉSOLUTIONS

1. Que le rapport sur les valeurs mobilières soit publié dans le compte-rendu. (Voir annexe D, à la page 126.)

2. Qu'un comité de révision soit établi pour aider M^e^ Spink à préparer un projet de loi uniforme pour la réunion de 1994.

Autres rapports

La Section a reçu de la Saskatchewan un rapport du Comité sur les privilèges commerciaux qui met à jour le projet approuvé en 1992, et de l'Ontario des rapports sur les dispositions de droit international privé à la Loi uniforme sur les prescriptions, et sur les droits des bénéficiaires des plans d'épargne-retraite, et sur les implications des tests basés sur l'ADN sur la vie privée.

Rapport du comité directeur

Le comité directeur a noté qu'en plus des projets continus de 1993, l'ordre du jour de 1994 comprendrait également des projets sur une loi uniforme sur les documents de titres négociables et sur les Conventions de l'Unidroit sur l'affacturage et le crédit-bail.

Le comité a présenté également à la section un certain nombre de nouveaux projets. Plus particulièrement, le comité a proposé de nouveaux projets sur la loi de la preuve et l'ADN, le statut des bénéficiaires de certains plans d'épargne-retraite, et la Loi uniforme sur l'exécution réciproque des jugements. Le comité a prévu des travaux éventuels pendant l'année à venir sur les dispositions de droit international privé de la Loi uniforme sur les prescriptions et sur la Convention internationale sur la résolution des différends sur l'investissement (ICSID).

Les projets de loi uniformes sur la protection de la privée et sur la diffamation furent circulés en 1991 sans être approuvés. On a anticipé que de nouveaux projets seraient présentés en 1994 en vue de disposition finale.

Le comité directeur a également suggéré l'approbation d'une demande par la Section de droit pénal de revoir la constitutionnalité des dispositions de la Loi uniforme sur la santé mentale sur l'incarcération des gens qui souffrent de troubles mentaux parce qu'ils sont un danger aux autres. La requête fut faite dans le contexte de la future mise en vigueur des modifications du Code criminel qui limitent la période d'incarcération sous les ordonnances du Lieutenant-gouverneur pour la plupart des infractions. Si les dispositions de la Loi uniforme ont été considérées constitutionnelles en vertu de la loi courante, le comité directeur consulterait les représentants de la Section du droit pénal avant de décider si et comment aller plus loin.

Enfin, le comité a pris note des recommandations du groupe de travail fédéral,provincial et territorial sur l'égalité des sexes. Deux de ses recommandations renvoient aux travaux à réaliser par la Conférence sur l'uniformisation des lois. Le comité a suggéré que ces recommandations soient portées à l'attention de la Section de rédaction.

Rapport du comité de liaison entre le Canada et les États-Unis

Le comité de liaison s'est réuni et à la conférence de la NCCUSL à Charleston, C.du S., et à Edmonton. Il a convenu de poursuivre sa décision de 1992 de pousser plus loin des contacts réguliers, y compris l'échange routinier de documents de travail par le truchement de la Directrice générale de la Conférence canadienne et de la Secrétaire générale de la Conférence américaine. De plus, les groupes chercheraient à définir ou à trouver un projet pour un comité de travail mixte. Les deux premiers sujets suggérés ont été la modification de la loi sur la preuve pour appuyer la réception de la preuve fondée sur l'ADN, et la modification des lois sur l'exécution des ordonnances des pensions alimentaires afin de réduire des problèmes pratiques courants. Des contacts officieux d'une utilité particulière avaient surgi à l'étude du transfert des valeurs mobilières et des lois qui touchent au commerce électronique.

CRIMINAL LAW SECTION

MINUTES

Attendance

A total of 27 delegates attended the meetings of the Criminal Law Section of the Uniform Law Conference held in Edmonton, Alberta.

Opening

Robert Murray presided as Chair and Fred Bobiasz acted as Secretary for the Meetings of the Criminal Law Section (CLS) of the Uniform Law Conference. The Section convened to order on Sunday, August 15, 1992. The heads of each delegation introduced the commissioners attending with them.

After approval of the Agenda and the Minutes of the 1992 Conference, the Chair reported on the following three items arising out of the 1992 Conference.

The Uniform Law Section (ULS) wanted further information before agreeing to the suggestion of a joint project on DNA.

The ULS, having considered a "Discussion Document Regarding Reforms to the Jury System in Canada: The Case for Uniformity", decided to pursue work on the jury and it anticipated that the project would consider criminal law issues.

The ULS was reluctant to pursue the 1992 Resolution of the Criminal Law Section which referred: "...the Uniform Mental Health Act to the Uniform Law Section for reconsideration of this legislation in light of Criminal Code amendments enacted by Statutes of Canada, 1991, c.32 and Charter implications". However, after further representation by the Chair, his counterpart agreed that the matter of reviewing the Uniform Mental Health Act would be reconsidered by the ULS.

Report of the Chair

The Section considered 42 resolutions. Forty one had been submitted in advance and one was proposed from the floor. Of the 42 resolutions considered, 34 were adopted as proposed or as amended, 2 were defeated and 6 were withdrawn.

Two papers submitted by the Department of Justice were discussed. One dealt with options for reform of the preliminary inquiry. The other dealt with proposals to amend the Criminal Code (general principles).

When introducing the consideration of the resolutions the Chair noted that they fell within the following categories:

- those which enhance public confidence in our criminal justice system;
- those intended to make Criminal Code provisions more effective or more efficient;
- those intended to implement or achieve compliance with court decisions;
- those intended to fill in perceived gaps in the Criminal Code;
- those aimed at taking advantage of new forensic techniques;
- those aimed at taking advantage of advances in computer, communications and video technology;
- those directed at improving court procedures; and,
- those proposed to ensure greater fairness to the participants in the procedural process.

Report of the Senior Federal Delegate

The senior federal delegate reported on resolutions adopted in prior years. He noted that although 1992/93 was a particularly productive year for criminal law legislation (C-109 - electronic surveillance; C-123 - proceeds of crime; C-126 - stalking; and, C-128 - child pornography), the omnibus bill which will be based in large measure on ULC resolutions is still under development. There, nevertheless, has been progress on a number of resolutions in the past year.

A 1992 Saskatchewan resolution calling for changes to section 423 to better combat harassment has been substantially implemented by the new offence of criminal harassment, section 264 of the Criminal Code, enacted by C-126 which came into force the first of August.

A number of resolutions from earlier conferences have been implemented by C-109 which also came into force on August 1.

Section 185 of the Criminal Code has been amended to permit an intercept authorization to be obtained on behalf of a provincial Attorney General for an offence committed in another province. This was recommended in an Alberta resolution adopted in 1991 and a Quebec resolution adopted in 1988.

The definition of "offence" in section 183 has been amended to include the arson offences as was proposed in an Ontario resolution adopted in 1991.

New section 184.2 has been added to provide for authorizations based on consent. This was proposed in an Ontario resolution adopted in 1990.

There has also been a change to section 196 to permit further postponement of notification of authorized interceptions which implements a 1990 resolution put forward by Canada.

New section 487.01 would permit a warrant to obtain "information concerning an offence" and thus should be available to obtain information about the whereabouts of a person reasonably suspected of committing an offence. This was proposed by a British Columbia resolution adopted in 1989.

New section 487.01 also provides for authorizations to conduct video surveillance and implements a 1987 British Columbia resolution.

Rules of Procedure

Certain matters relating to the Rules of Procedure were discussed. It was agreed that the Rule 7 which requires that the Senior Federal Delegate "report on the status of the resolutions passed the previous year" be changed to read "report on the status of the resolutions passed in prior years".

The Secretary observed that not all jurisdictions had submitted agenda materials by May 31 as provided for in Rule 3.2. Delegates were also reminded that Rule 8 requires that delegations "summarize the debate" on adopted resolutions and forward "the summary to the secretary within 60 days of the close of the conference".

Closing

The nominating committee recommended that Michael Allen of Alberta be elected Chair for the 1994 meetings. Mr. Allen upon being elected, thanked the Chair on behalf of all the delegates for his efforts in making this an interesting and productive conference. It was observed that the conference will be held in Prince Edward Island next year.

RESOLUTIONS

I - ALBERTA

Item 1

Consecutive Sentences

That the Corrections and Conditional Release Act be amended to ensure that consecutive sentences are in fact served consecutively and not merged as is the case with concurrent sentences. One way of accomplishing this would be to amend the Act to remove from the National Parole Board the power to revoke parole in this situation with respect to the older sentence. In this way the older sentence will always be "interrupted" rather than merged. Once the consecutive term of

imprisonment has been fully served the National Parole Board can consider the availability of parole on the older sentence.

(Withdrawn)

Item 2

Application for the Mercy of the Crown

That section 690 of the Criminal Code be amended to replace the term Minister of Justice with Attorney General. This would permit the provincial Attorney General to exercise the same powers granted to the federal Minister of Justice in cases falling under the provincial Minister's jurisdiction.

(Defeated: 3-18-0)

That section 690 of the Criminal Code be amended to grant the provincial Attorney General a concurrent right to exercise the same powers granted to the federal Minister of Justice in cases falling under the provincial Minister's jurisdiction.

(Defeated: 5-17-0)

That section 690 of the Criminal Code be amended to permit the provincial Attorney General to apply on behalf of a person convicted of an indictable offence under the Criminal Code or who has been sentenced to preventative detention under Part XXIV (Dangerous Offenders) for the mercy of the Crown.

(Carried: 20-0-1)

Item 2

Costs

That the Criminal Code be amended to require notice to the Crown when costs will be applied for and that costs only be awarded after a hearing on the issue of costs.

(Carried: 6-5-8)

That the Criminal Code be further amended to provide for a right of appeal from an order awarding costs, both as to quantum and the order itself.

(Carried: 19-0-1)

That the Criminal Code be further amended to provide criteria for the awarding of costs.

(Defeated: 5-9-6)

Item 4

Judicial Certification of Transcripts

That the requirement that the judge certify the evidence in section 682(3) and section 715(1) be repealed.

(Carried: 20-0-0)

Item 5

Disclosure

That the Criminal Code be amended to prohibit the publication of materials or documents given to accused or counsel as part of the disclosure process except by order of a Court.

That Federal Justice undertake in expeditious fashion a study of implications of full disclosure, so that recommendations could be made for legislation.

(Carried: 18-0-4)

Item 6

Earned Remission/Provincial Inmates

That the Corrections and Conditional Release Act and Prisons and Reformatories Act be amended to:

(1) provide that offenders who are serving their sentences in provincial institutions pursuant to section 731(1) of the Criminal Code be entitled to earn remission based on an aggregate merged term, sentence length notwithstanding; and,

(2) provide that where the parole of a provincial offender is revoked, the offender may lose any earned remission that stood to the offender's credit prior to the release on parole.

(Carried: 17-0-3)

II - BRITISH COLUMBIA

Item 1

Engaging in Sexual Intercourse while infected with AIDS or while HIV Positive

That Federal Justice undertake in expeditious fashion a study of the need for an AIDS-related offence and for testing in regard to AIDS so that recommendations could be made for legislation.

(Carried: 21-0-0)

Items 2

Preventative Peace Bonds

That section 810 be amended

(1) to provide that a person who fears that another will
   (a) cause personal injury to that person or their spouse or child
   (b) cause significant and unreasonable interference with their enjoyment of life
   (c) damage their property; or
   (d) commit a criminal offence in relation to that person, their spouse or any member of their family

   may lay an information before a justice.

(2) to provide that the recognizance that may be ordered be for a term that does not exceed three years

(3) to provide specifically that section 507 of the Criminal Code applies to section 810 proceedings

(4) to permit either the applicant or a peace officer on their behalf to swear an information

(5) to permit a justice
(a) to cause the parties to appear for the hearing of the application or
(b) to issue a provisional ex parte peace bond which takes effect upon notice to the defendant, and may be set aside upon hearing of both parties if determined reasonable grounds for the fears do not exist.

(Defeated: 4-15-1)

As above, but without paragraph (1)(b):

(Carried: 21-0-2)

Item 3

Items Seized - Definition of "Prosecutor"

That section 490(1) and (5) be amended to state that either a prosecutor or peace officer may act as required by those provisions.

(Carried: 18-0-0)

Item 4

Prohibition Provisions - Explosive Substances

That section 100(2) be amended to read:

a) Where an offender is convicted or discharged under section 736 of an offence involving the use, carriage, possession, handling or storage of any firearm or ammunition or explosive substance.

(Carried: 21-0-1)

Item 5

Ban on Publishing Information Identifying Complainant in any Document

That section 486(3) be amended by adding an addition similar to that set out in section 38(1.1) of the Young Offenders Act, i.e. an order made pursuant to section 486(3) does not apply in respect of the disclosure of information in the course of the administration of justice where it is not the purpose of the disclosure to make the information known in the community.

(Carried: 21-0-1)

Item 6

The Use of Warrants for Obtaining DNA Samples

That the 1991 Resolution regarding **Seizure of Bodily Substances for DNA Analysis**, be acted upon.

(Carried: 20-1-0)

Item 7

The Use of Closed Circuit Television for Routine Remand Appearances

That section 537(1) and 803(1) be amended to provide that interim appearances for accused persons in custody may be performed through the use of closed circuit television in correctional facilities, with or without the consent of the accused person, but with the provision for the justice to order the personal attendance of the accused if it is considered necessary or just and with provision for private communications between the accused and counsel.

(Carried: 20-0-1)

III - MANITOBA

Item 1

Majority Verdict

That the sub-committee of the Uniform Law Conference examining issues relating to juries also consider the question of majority verdicts.

(Carried: 17-4-0)

Item 2

Appellate Courts - Power to Order Re-Trials

It is recommended that the power to order re-trials be removed as a general power and, instead, a power to order a new trial where fresh evidence is introduced at the Appellate level (and accepted as such) but where the possible effect of that evidence upon a jury is uncertain, be substituted.

(Withdrawn)

Item 3

Intimidation of Victims and Witnesses

It is recommended that a justice, or judge, when ordering the detention of an accused until he or she is dealt with according to law, be empowered to make an order that the accused abstain from communicating with any witness or other person named in the order.

(Carried: 20-0-2)

IV - NEW BRUNSWICK

Item 1

Footprints, Foot Impressions and Teeth Impressions

That the Criminal Code be amended to permit the seizure of footprints, foot impressions or teeth impressions pursuant to a judicially authorized warrant.

(Carried: 17-1-4)

Item 2

Videotaped Sworn Statements

That a new offence be created of giving contradictory statements where the first statement is a sworn videotaped statement and the second statement is sworn testimony in court.

(Withdrawn)

IV - ONTARIO

Item 1

Eight Day Remands

That sections 537(1)(a) and 803(1) be amended to permit adjournments for greater than eight days when the accused is serving a sentence the expiry of which occurs subsequent to the adjournment date.

(Carried: 19-0-0)

Item 2

Judicial Interim Release and the Secondary Ground for Detention

That section 515(10)(b) be amended to add as a ground of detention the fact that releasing the accused, in light of the gravity of the offence and the strength of the Crown's case, would tend to bring the administration of justice into disrepute.

(Withdrawn and replaced)

That Federal Justice study expeditiously the secondary ground as applied to bail decisions in light of the decisions in Pearson and Morales so that recommendations could be made for legislation.

(Carried: 16-0-0)

Item 3

Indecent Acts

That section 173 be amended to make it a dual procedure offence with a maximum penalty of five years.

(Defeated: 5-10-7)

Item 4

Publication Ban for Sexual Offences

That section 486(3) be amended to apply to sexual offences committed prior to the enactment of the current list of offences contained in the section.

(Carried: 21-0-0)

Item 5

Suspension Pending Appeal of Orders to Pay Restitution as a Condition of Probation

That section 683(5) be amended to permit the suspension of any term of probation pending appeal, including an order to pay restitution.

(Carried: 22-0-0)

Item 6

Enforcement of Fines

That section 724 be amended: (1) to enable the conviction to be entered as a judgment in the civil courts and the fine to be enforced as a civil judgment, (2) to clarify that the two year limitation period runs from the date at which the fine goes into default, and (3) to stipulate (in this section or in section 718) that a fine is in default when it becomes due and remains unpaid.

(Carried: 21-1-0)

Item 7

Search Warrants to Obtain Bodily Fluids and Substances

(1) That the Criminal Code be amended to provide for the granting of an ex parte warrant or order authorizing the non-surgical seizure of:

a) bodily fluids and substances
b) residues left on the body, e.g., fingernail scrapings, hand washing's
c) impressions of body parts, e.g., teeth or jaw impressions, x-rays

Such warrant or order to be granted by a provincial court judge and to be subject to appropriate safeguards and limitations.

Such warrants be available by telewarrant process in appropriate cases.

(2) That the current Federal Justice review as to the forensic testing, admissibility and reliability of evidence obtained by part (1) continue.

(Carried: 19-1-3)

Item 8

Conditional Discharges and the Young Offenders Act

That section 20(1) of the Young Offenders Act be amended to allow the imposition of a conditional discharge.

(Carried: 17-1-4)

Item 9

Criteria for Release and Onus of Proof in Bail Pending New Trial Ordered by Court of Appeal or Supreme Court of Canada

That section 679(7) be amended so that an application for bail pending a new trial is governed by the same release criteria and onus as contained in the pre-trial judicial interim release provisions.

(Carried: 21-0-0)

V - QUEBEC

Item 1

Causing Injury or Death with a Level Exceeding .08

That subsections (2) and (3) of section 255 of the Criminal Code be amended to include paragraph 253(b) of the Criminal Code.

(Defeated: 5-9-3)

Item 2

Power to Stay a Driving Prohibition Order Pending Appeal

That section 261 of the Criminal Code be amended so that not only the court, but also one of its members, has jurisdiction to dispose of an application to stay a prohibition order.

(Carried: 20-0-0)

Item 3

Use of the "would bring the administration of justice into disrepute" test in respect of an interim release

That the expression "in the public interest" be replaced with the expression "would bring the administration of justice into disrepute" in sections 497(1)(f), 498(1)(i), 515(10)(b), and 679(3)(c) and (4)(*c*) of the Criminal Code

That the criteria of "protection" and "safety" of the public used in section 515(10)(b) of the Criminal Code be repeated in sections 497(1)(f), 498(1)(i), and 679(3)(c) and (4)(c) of the Criminal Code.

(Withdrawn in favour of Ontario Resolution, Item 2)

Item 4

Transcript of Evidence Taken at a Preliminary Inquiry

That subsections 540(5) and (6) of the Criminal Code be amended so that the evidence will be transcribed, in whole or in part, only when requested by either the judge or either of the parties.

(Carried: 20-0-0)

Item 5

Proof by Affidavit in Respect of the Unauthorized Use of Credit Cards and Computers

That section 342 of the Criminal Code be added to subsection (1) of section 657.1 of the Criminal Code so that it will be possible to prove the unauthorized use of credit cards by affidavit or solemn declaration.

That subsection 657.1(2) of the Criminal Code be amended to add those matters that are relevant to proving the offence under section 342 of the Criminal Code to those that may be proven by affidavit or solemn declaration.

(Carried: 21-0-0)

That section 342.1 of the Criminal Code be added to subsection (1) of section 657.1 of the Criminal Code so that it will be possible to prove the unauthorized use of computers by affidavit or solemn declaration.

That subsection 657.1(2) of the Criminal Code be amended to add those matters that are relevant to proving the offence under section 342.1 of the Criminal Code to those that may be proven by affidavit or solemn declaration.

(Carried: 9-8-3)

Item 6

Subpoenas

That the Criminal Code provisions on subpoenas be reviewed taking into consideration possible amendments:

(1) to permit counsel themselves to subpoena witnesses (without the production of documents)

(2) to require prior judicial authorization to subpoena a witness by a party not represented by counsel, together with a requirement that the party in question prove that the evidence is relevant;

(3) to require, on a showing that the evidence will be not only relevant but useful, judicial authorization before the following persons are subpoenaed:

(a) a judge or member of the Bar;
(b) a provincial or federal government minister or deputy minister;
(c) a person who is in custody; or,
(d) a person who resides outside the province

(4) to provide for several clear days of notice before appearance to the persons mentioned in paragraph (c) when served with a subpoena and to give a judge the power to reduce this time limit in an emergency;

(5) to permit a person whose evidence is irrelevant or will not be useful to make a motion to quash the subpoena; and,

(6) to give a judge of the Court before which the witness is to appear jurisdiction to rule prior to appearance on a motion to quash the subpoena, together with the power to award costs against the party who subpoenaed the witness without valid reason.

(Carried: 20-0-2)

Item 7

Costs in Criminal Matters

That section 840 of the Criminal Code be amended to give the Lieutenant Governor in Council the power to provide for fees and allowances other than those established by the schedule to Part XXVII of the Criminal Code.

That the federal Department of Justice task a federal-provincial working group to consider recommendations as to the appropriateness of maintaining or ending the principle of cost-free criminal proceedings.

(Carried: 16-0-2)

Item 8

Power to Dispose of Perishables

That anyone who, under the Criminal Code or other federal statute, seizes goods that are either perishable or likely to depreciate rapidly be able to obtain judicial authorization, notice having been given where possible, to immediately dispose of those goods by returning them to their lawful owners, by selling them on behalf of their lawful owners or by destroying them if necessary.

(Carried: 18-0-0)

Item 9

Trafficking in Children

That the Criminal Code be amended to include a provision prohibiting trafficking in children.

(Carried: 12-0-7)

VI - SASKATCHEWAN

Item 1

Bail Pending Appeal

That section 679(3) and (4) be amended to state grounds for detention based on a need for protection of society and public confidence in and respect for the administration of justice.

That section 816 be amended to reflect the same grounds for detention as are contained in section 679(3) and (4).

(Withdrawn in favour of Ontario Resolution, Item 2)

Item 2

Anal Intercourse

That section 159 be repealed.

(Carried: 9-3-8)

Item 3

Recognizances under section 810 of the Criminal Code (Peace Bonds)

That the maximum period for the recognizance be extended to three years. No amendment is sought to increase the prison term permitted if the defendant refuses to enter into the recognizance.

(Withdrawn in favour of British Columbia Resolution, Item 2)

Item 4

Parties to Sexual Assault

That section 272(d) of the Criminal Code be repealed and its content inserted in section 273 of the Criminal Code.

(Carried: 8-6-7)

VII - CANADA

Firearms Control: Registration Procedures for Restricted Weapons

That sections 91, 109, and 110 be amended to permit a local registrar of firearms to issue a permit which would allow the applicant to temporarily possess a restricted weapon and where necessary, to take it to and from an approved shooting club while the issuance of a Registration Certificate is still pending.

That this temporary possession provision be left to the discretion of the registrar, but limited to cases where the registrar has recommended that the RCMP issue a registration certificate to the applicant and where the applicant already has at least one similar restricted weapon registered.

(Withdrawn)

Item 2

Sealing of Search Warrant Informations

That the Department of Justice develop a new provision which would prevent premature public disclosure of the contents of search warrant informations, but in a manner which properly respects the interests protected by the guarantee of freedom of expression in section 2(b) of the Charter, the accused and the subject of the search.

(Carried: 19-0-0)

SECTION DU DROIT CRIMINEL

COMPTE RENDU

Présence

Vingt-sept délégués assistent à la réunion de la Section du droit criminel de la Conférence sur l'uniformisation des lois, qui a lieu à Edmonton (Alberta).

Mot D'ouverture

M. Robert Murray agit comme président de la réunion et M. Fred Bobiasz, comme secrétaire. La Section entreprend ses travaux dimanche, le 15 août 1993. Le chef de chacune des délégations présente les personnes qui l'accompagnent.

Après approbation de l'ordre du jour et du compte rendu de la réunion de 1992, le président fait le point sur les trois questions suivantes soulevées lors de la réunion de 1992.

La Section du droit uniforme a rejeté la proposition d'un projet conjoint sur l'ADN.

La Section du droit uniforme a décidé, après avoir examiné un document de discussion sur les modifications qui pourraient être apportées à la procédure relative au jury, de poursuivre ses travaux sur cette question. On prévoit que des questions de droit pénal seront étudiées dans le cadre de ces travaux.

La Section du droit uniforme ne voit pas la nécessité de donner suite à la résolution suivante, adoptée par la Section du droit criminel en 1992 : «Que la Section du droit criminel renvoie la Loi uniforme sur la santé mentale à la Section du droit uniforme pour réexamen à la lumière de la Charte et des dispositions du Code criminel, tel que modifié par les Lois du Canada de 1991, ch. 32». Toutefois, après avoir entendu les commentaires du président de la Section du droit criminel, le président de la Section du droit uniforme a convenu de soumettre à nouveau à celle-ci la question du réexamen de la Loi uniforme sur la santé mentale.

Rapport du Président

La Section se penche sur 42 résolutions. Quarante et une de celles-ci ont été soumises avant la réunion et l'autre est présentée au cours de celle-ci. Trente-quatre résolutions sont adoptées dans leur forme originale ou dans une forme modifiée, deux sont rejetées et six sont retirées.

Deux documents présentés par le ministère de la Justice -- l'un sur les options en vue d'une réforme du droit applicable aux enquêtes préliminaires, et l'autre, sur les propositions de modification au Code criminel (principes généraux) -- sont examinés.

En présentant les résolutions qui doivent être étudiées, le président souligne que ces différentes résolutions peuvent être placées dans les catégories suivantes :

- celles qui visent à accroître la confiance du public dans notre système de justice pénale;
- celles qui visent à rendre plus efficaces les dispositions du Code criminel;
- celles qui font suite à des décisions judiciaires;
- celles qui visent à combler les lacunes que semble contenir le Code criminel;
- celles qui tiennent compte des nouvelles techniques médico-légales;
- celles qui tiennent compte de la toute nouvelle technologie informatique et des nouveautés dans le domaine des communications et de la vidéo;
- celles qui visent à améliorer les procédures judiciaires;
- celles qui visent à assurer une plus grande équité aux personnes qui ont affaire au système de justice pénale.

Rapport du Délégué Fédéral en Chef

Le délégué en chef du gouvernement fédéral fait le point sur les résolutions adoptées au cours des années passées. Il mentionne que de nombreux textes de loi en matière pénale ont été adoptés durant l'exercice 1992-1993 (C-109 - surveillance électronique; C-123 - produits de la criminalité; C-126 - harcèlement avec menaces; C-128 - pornographie juvénile), mais que le projet de loi omnibus, fondé en grande partie sur les résolutions de la Conférence, est toujours en cours de préparation. Il y a toutefois eu des progrès au cours de la dernière année en ce qui concerne plusieurs résolutions.

La nouvelle infraction de harcèlement criminel reprend, pour l'essentiel, une résolution présentée par la Saskatchewan en 1992 sur des modifications à l'article 423 visant à mieux lutter contre le harcèlement. Cette infraction est prévue à l'article 264 du Code criminel, qui est entré en vigueur le 1er août 1993.

Le projet de loi C-109, qui est aussi entré en vigueur le 1er août dernier, reprend plusieurs résolutions présentées dans le passé au cours de réunions de la Conférence.

L'article 185 du Code criminel a été modifié de façon qu'une autorisation d'intercepter des communications puisse être demandée au nom du procureur général d'une province relativement à une infraction commise dans une autre province. Une résolution présentée par le Québec et une autre par l'Alberta recommandant une telle modification avaient été adoptées par la Conférence en 1988 et 1991 respectivement.

La définition d'«infraction» à l'article 183 a été modifiée de façon à inclure l'incendie criminel, comme le proposait l'Ontario dans une résolution adoptée en 1991.

Une nouvelle disposition ajoutée au Code criminel, l'article 184.2, vise les interceptions avec consentement. Une telle disposition avait été proposée par l'Ontario en 1990.

L'article 196 a été modifié de façon à permettre la prolongation du délai pour aviser la personne qui a fait l'objet d'une interception. Cette modification fait suite à une résolution présentée par le Canada en 1990.

Aux termes du nouvel article 487.01, un juge peut décerner un mandat s'il est convaincu que des «renseignements relatifs à l'infraction» pourront être obtenus. Cette disposition pourra être utilisée aux fins de retracer une personne dont on a des motifs raisonnables de croire qu'elle a commis une infraction. La Colombie-Britannique avait proposé l'adoption d'une disposition semblable par une résolution adoptée en 1989.

Le nouvel article 487.01 vise également les autorisations relatives à la surveillance vidéo et met en oeuvre une résolution présentée par la Colombie-Britannique en 1987.

Regles de Procédure

La Section discute de certaines questions touchant les règles de procédure et décide que la règle 7, qui exige que le délégué fédéral en chef fasse rapport sur la situation des résolutions adoptées l'année précédente, doit être modifiée de façon à prévoir qu'il doit faire rapport sur la situation des résolutions adoptées au cours des années précédentes.

Le secrétaire souligne que certaines administrations n'ont pas soumis, avant le 31 mai, les points qu'elles souhaitaient voir inscrits à l'ordre du jour, comme l'exige la règle 3.2. Par ailleurs, on rappelle aux délégués que la règle 8 exige que les délégations résument les délibérations portant sur les résolutions adoptées et qu'elles transmettent ce résumé au secrétaire dans les 60 jours suivant la clôture de la réunion.

Conclusion

Le comité de mise en candidature recommande que M. Michael Allen, de l'Alberta, soit élu président de la réunion de la Section qui aura lieu en 1994. M. Allen remercie le président au nom de tous les délégués pour ses efforts en vue de faire de cette réunion une rencontre agréable et utile. On mentionne que la réunion aura lieu à l'Île-du-Prince-Édouard l'an prochain.

RÉSOLUTIONS

I - ALBERTA

Point 1

Peines consécutives

Modifier la Loi sur le système correctionnel et la mise en liberté sous condition de façon à garantir que les peines consécutives sont, de fait, purgées consécutivement et qu'il n'y a pas fusion des peines comme dans le cas des peines concurrentes. Pour atteindre ce but, il faudrait modifier la Loi de façon à supprimer le pouvoir de la Commission de révoquer la libération conditionnelle à l'égard de la peine qui est purgée. Ainsi, la peine qui est purgée sera toujours «interrompue» plutôt que fusionnée. Une fois que la nouvelle peine d'emprisonnement a été purgée, la Commission nationale des libérations conditionnelles peut examiner la possibilité d'accorder la libération conditionnelle en ce qui concerne la peine qui est purgée.

(Retirée)

Point 2

Demande de clémence de la Couronne

Modifier l'article 690 du Code criminel de façon à remplacer le terme «ministre de la Justice» par «procureur général». Cela permettrait au procureur général de la province d'exercer les pouvoirs qui sont attribués au ministre fédéral de la Justice dans les cas qui relèvent de la compétence du ministre de la province concernée.

(Rejetée : 3-18-0)

Modifier l'article 690 du Code criminel de façon à conférer au procureur général de la province un droit concurrent d'exercer les pouvoirs qui sont attribués au ministre fédéral de la Justice dans les cas qui relèvent de la compétence du ministre de la province concernée.

(Rejetée : 5-17-0)

Modifier l'article 690 du Code criminel de façon à autoriser le procureur général de la province à présenter une demande de clémence de la Couronne au nom d'une personne qui a été condamnée pour un acte criminel en vertu du Code criminel ou qui a été condamnée à la détention préventive en vertu de la partie XXIV (délinquants dangereux).

(Adoptée : 20-0-1)

Point 3

Coûts

Modifier le Code criminel de façon à prévoir l'obligation de donner un avis à la Couronne quand une demande relative aux frais est présentée et à prévoir la tenue d'une audience visant à trancher l'adjudication des frais.

(Adoptée : 6-5-8)

Modifier le Code criminel de façon à prévoir un droit d'appel de l'ordonnance qui adjuge des frais et un droit d'appel quant au montant des frais.

(Adoptée : 19-0-1)

Modifier le Code criminel de façon à prévoir les critères pour l'adjudication des frais.

(Rejetée : 5-9-6)

Point 4

Attestation de la transcription par le juge

Abroger les dispositions prévues aux paragraphes 682(3) et 715(1) qui obligent le juge à attester la preuve recueillie.

(Adoptée : 20-0-0)

Pont 5

Communication de la preuve

Modifier le Code criminel de façon à interdire la publication de documents remis à l'accusé ou à son avocat dans le cadre de la communication de la preuve, sauf si le tribunal ordonne cette publication.

Demander au ministère fédéral de la Justice d'entreprendre rapidement une étude des répercussions de la communication intégrale de la preuve de sorte que des modifications législatives puissent être recommandées.

(Adoptée : 18-0-4)

Point 6

Remise de peine méritée par les détenus provinciaux

Modifier la Loi sur le système correctionnel et la mise en liberté sous condition et la Loi sur les prisons et les maisons de correction de façon à :

(1) prévoir que les contrevenants qui purgent leurs peines dans des établissements provinciaux en vertu du paragraphe 731(1) du Code criminel ont droit à une remise de peine établie suivant la durée totale d'emprisonnement, peu importe la durée des peines;

(2) prévoir qu'un contrevenant détenu dans un établissement provincial dont la libération conditionnelle est révoquée peut perdre son droit à une remise de peine qui lui avait été accordée avant la libération conditionnelle.

(Adoptée : 17-0-3)

II - COLOMBIE-BRITANNIQUE

Point 1

Avoir des rapports sexuels alors que l'on se sait atteint du SIDA ou séropositif

Demander au ministère fédéral de la Justice d'entreprendre rapidement une étude dans le but de déterminer s'il y a lieu de créer une infraction relative au SIDA de sorte que des modifications législatives puissent être recommandées.

(Adoptée : 21-0-0)

Point 2

Engagement préventif de ne pas troubler l'ordre public

Modifier l'article 810 de façon à prévoir ce qui suit :

(1) peut déposer une dénonciation devant un juge de paix quiconque craint qu'autrui :
   a) ne lui cause, ou cause à son conjoint ou à ses enfants, des lésions corporelles;
   b) ne trouble gravement et abusivement leur jouissance de la vie;
   c) n'endommage leurs biens;

d) ne commette une infraction criminelle à son égard, à l'égard de son conjoint ou de tout autre membre de sa famille;

(2) l'engagement peut être imposé pour une durée n'excédant pas trois ans;

(3) l'article 507 du Code criminel s'applique aux procédures prévues par l'article 810;

(4) le requérant, ou un agent de la paix en son nom, est autorisé à déposer une dénonciation sous serment;

(5) un juge de paix est autorisé :

a) soit à faire comparaître les parties lors de l'audition de la requête,

b) soit à prononcer *ex parte* une ordonnance provisoire enjoignant au défendeur de ne pas troubler l'ordre public, laquelle prend effet sur notification à ce dernier et peut être annulée après audition de toutes les parties, si l'on juge que les motifs raisonnables sur lesquels la crainte est fondée n'existent pas.

(Rejetée : 4-15-1)

Comme ci-dessus, sans l'alinéa (1)b).

(Adoptée : 21-0-2)

Point 3

Choses saisies - Définition du terme «poursuivant»

Modifier les paragraphes 490(1) et (5) de façon à prévoir qu'un poursuivant ou un agent de la paix peut agir dans le cadre de ces dispositions.

(Adoptée : 18-0-0)

Point 4

Ordonnances d'interdiction - Substances explosives

Modifier le paragraphe 100(2) de façon à prévoir :

a) le tribunal qui déclare un contrevenant coupable ou l'absout en vertu de l'article 736 soit dans le cas d'une infraction impliquant usage, port, possession, maniement ou entreposage d'une arme à feu, de munitions ou d'une substance explosive [...].

(Adoptée : 21-0-1)

Point 5

Ordonnance limitant la publication de renseignements sur l'identité du plaignant

Modifier le paragraphe 486(3) par un ajout semblable à celui du paragraphe 38(1.1) de la Loi sur les jeunes contrevenants, soit qu'une ordonnance rendue aux termes du paragraphe 486(3) ne s'applique pas à la divulgation de renseignements dans le cours de l'administration de la justice lorsque le but de cette divulgation n'est pas de faire connaître le renseignement au grand public.

(Adoptée : 21-0-1)

Point 6

Obtention d'échantillons d'ADN par mandats

Donner suite à la résolution de 1991 concernant le **prélèvement de substances corporelles aux fins d'analyse de l'ADN.**

(Adoptée : 20-1-0)

Point 7

Utilisation de la télévision en circuit fermé pour les comparutions de routine en cas de renvoi

Modifier les paragraphes 537(1) et 803(1) de façon à permettre des comparutions intérimaires des prévenus par le recours à la télévision en circuit fermé dans les établissements correctionnels, avec ou sans le consentement du prévenu, à prévoir

que le juge de paix peut ordonner la comparution en personne du prévenu s'il le juge nécessaire ou si l'intérêt de la justice l'exige, et à permettre les communications privées entre le prévenu et son avocat.

(Adoptée : 20-0-1)

III - MANITOBA

Point 1

Verdicts rendus à la majorité

Demander au sous-comité de la Conférence sur l'uniformisation des lois chargé de l'examen des questions relatives au jury de se pencher sur la question des verdicts rendus à la majorité.

(Adoptée : 17-4-0)

Point 2

Cours d'appel - Pouvoir d'ordonner de nouveaux procès

Supprimer le pouvoir général et absolu d'ordonner de nouveaux procès et le remplacer par un pouvoir d'ordonner un nouveau procès lorsqu'un nouvel élément de preuve est présenté à la cour d'appel (et accepté comme tel), mais que l'effet que pourrait avoir ce nouvel élément sur le jury est incertain.

(Retirée)

Point 3

Intimidation des victimes et des témoins

Habiliter un juge de paix ou un juge qui ordonne la détention d'un prévenu jusqu'à ce qu'il soit traité conformément à la loi à rendre une ordonnance interdisant au prévenu de communiquer avec un témoin ou toute autre personne nommée dans l'ordonnance.

(Adoptée : 20-0-2)

IV - NOUVEAU-BRUNSWICK

Point 1

Empreintes et clichés de pied et de dents

Modifier le Code criminel de façon à permettre expressément la prise d'empreintes ou de clichés de pied ou de dents en vertu d'un mandat judiciaire.

(Adoptée : 17-1-4)

Point 2

Déclarations sous serment enregistrées sur vidéocassette

Créer une nouvelle infraction visant les témoignages contradictoires où la première déposition est une déclaration sous serment enregistrée sur vidéocassette et la deuxième, un témoignage sous serment devant le tribunal.

(Retirée)

IV - ONTARIO

Point 1

Renvoi de huit jours

Modifier l'alinéa 537(1)a) et le paragraphe 803(1) de façon à permettre des ajournements de plus de huit jours quand le prévenu purge déjà une peine qui expirera après la date de convocation.

(Adoptée : 19-0-0)

Point 2

Mise en liberté provisoire par voie judiciaire et motif secondaire justifiant la détention

Modifier l'alinéa 515(10)b) de façon à ajouter comme motif de détention le fait que la mise en liberté du prévenu, vu la gravité de l'infraction et la valeur des éléments de preuve dont dispose la Couronne, tendrait à nuire à l'administration de la justice.

(Retirée et remplacée)

Demander au ministère fédéral de la Justice de se pencher rapidement sur la question du motif secondaire dans le cas des décisions relatives à la mise en liberté sous caution, compte tenu des arrêts Pearson et Morales, de sorte que des modifications législatives puissent être recommandées.

(Adoptée : 16-0-0)

Point 3

Actions indécentes

Modifier l'article 173 de façon à prévoir une infraction mixte, punissable par un emprisonnement maximal de cinq ans.

(Rejetée : 5-10-7)

Point 4

Ordonnance limitant la publication en ce qui concerne les infractions d'ordre sexuel

Modifier le paragraphe 486(3) de façon qu'il s'applique aux infractions d'ordre sexuel commises avant l'adoption de la liste d'infractions qu'il contient.

(Adoptée : 21-0-0)

Point 5

Suspension, jusqu'à décision définitive sur l'appel, du paiement du dédommagement constituant une condition à une ordonnance de probation

Modifier le paragraphe 683(5) de façon à prévoir la suspension, jusqu'à ce que l'appel soit tranché, de toute condition, notamment le paiement du dédommagement, dont est assortie l'ordonnance de probation.

(Adoptée : 22-0-0)

Point 6

Exécution forcée de l'amende

Modifier l'article 724 de façon à : (1) permettre que, par l'inscription de la déclaration de culpabilité comme un jugement rendu par un tribunal civil, le montant de l'amende devienne exécutoire comme s'il s'agissait d'un jugement rendu par un tribunal civil; (2) préciser que la prescription de deux ans commence à courir au moment du défaut de paiement de l'amende; et (3) prévoir (à cet article ou à l'article 718) qu'il y a défaut dès l'expiration du délai de paiement.

(Adoptée : 21-1-0)

Point 7

Mandats de perquisition pour obtenir des liquides et des substances corporels

(1) Modifier le Code criminel de façon à prévoir que peut être obtenu *ex parte* un mandat ou une ordonnance autorisant le prélèvement non chirurgical :

a) de liquides et de substances corporels;
b) de résidus trouvés sur le corps (p. ex. le curage des ongles);
c) d'empreintes et de clichés de certaines parties du corps (p. ex. les dents, au moyen de rayons X).

Ce mandat ou cette ordonnance pourrait être décerné ou rendue par un juge de la cour provinciale et être assujetti aux mesures de protection et aux restrictions appropriées.

Ce mandat pourrait également être obtenu conformément à la procédure des télémandats, s'il y a lieu.

(2) Demander au ministère fédéral de la Justice de poursuivre l'examen qu'il mène actuellement sur les questions d'analyses médico-légales, de recevabilité et de fiabilité des éléments de preuve obtenus par application du paragraphe (1).

(Adoptée : 19-1-3)

Point 8

Mise en liberté sous condition et Loi sur les jeunes contrevenants

Modifier le paragraphe 20(1) de la Loi sur les jeunes contrevenants de façon à autoriser un juge à rendre une ordonnance de mise en liberté sous condition.

(Adoptée : 17-1-4)

Point 9

Critères applicables à la mise en liberté sous caution et fardeau de la preuve en attendant le nouveau procès ordonné par la cour d'appel ou la Cour suprême du Canada

Modifier le paragraphe 679(7) de façon que la demande de mise en liberté sous caution en attendant un nouveau procès soit régie par les critères et les règles applicables au fardeau de la preuve prévus par les dispositions relatives à la mise en liberté provisoire par voie judiciaire avant le procès.

(Adoptée : 21-0-0)

V - QUÉBEC

Point 1

Causer des blessures ou la mort en ayant plus de .08

Modifier les paragraphes (2) et (3) de l'article 255 du Code criminel pour y inclure l'alinéa 253b) du Code criminel.

(Rejetée : 5-9-3)

Point 2

Pouvoir de suspendre une ordonnance d'interdiction de conduire pendant l'appel

Modifier l'article 261 du Code criminel afin que non seulement le tribunal mais aussi l'un de ses membres ait juridiction pour disposer d'une demande de suspension d'interdiction de conduire.

(Adoptée : 20-0-0)

Point 3

Utilisation du critère «susceptible de déconsidérer l'administration de la justice» en matière de remise en liberté provisoire

Remplacer l'expression «dans l'intérêt public» par l'expression «susceptible de déconsidérer l'administration de la justice» aux alinéas 497(1)f), 498(1)i), 515(10)b) ainsi que 679(3)c) et (4)c) du Code criminel.

Reprendre, aux alinéas 497(1)f), 498(1)i) ainsi que 679(3)c) et (4)c) du Code criminel, les critères de la «protection» et de la «sécurité» du public utilisés à l'alinéa 515(10)b) du Code criminel.

(Retirée en faveur de la résolution de l'Ontario figurant au point 2)

Point 4

Transcription des témoignages recueillis à l'enquête préliminaire

Modifier les paragraphes (5) et (6) de l'article 540 du Code criminel de façon à ce que la transcription totale ou partielle des témoignages ne soit faite que sur demande du juge ou des parties.

(Adoptée : 20-0-0)

Point 5

Preuve par affidavit en matière d'utilisation non autorisée de cartes de crédit et d'ordinateurs

Ajouter l'article 342 du Code criminel au paragraphe (1) de l'article 657.1 du Code criminel afin qu'il soit possible de faire la preuve par affidavit ou déclaration solennelle de l'utilisation non autorisée de cartes de crédit ou d'ordinateurs.

Modifier le paragraphe (2) de l'article 657.1 du Code criminel afin que soient ajoutés aux éléments pouvant être inclus dans l'affidavit ou déclaration solennelle ceux pouvant permettre de prouver les infractions prévues à l'article 342 du Code criminel.

(Adoptée : 21-0-0)

Ajouter l'article 342.1 du Code criminel au paragraphe (1) de l'article 657.1 du Code criminel afin qu'il soit possible de faire la preuve par affidavit ou déclaration solennelle de l'utilisation non autorisée de cartes de crédit ou d'ordinateurs.

Modifier le paragraphe (2) de l'article 657.1 du Code criminel afin que soient ajoutés aux éléments pouvant être inclus dans l'affidavit ou déclaration solennelle ceux pouvant permettre de prouver les infractions prévues à l'article 342.1 du Code criminel.

(Adoptée : 9-8-3)

Point 6

Assignation des témoins

Revoir les dispositions du Code criminel sur les assignations des témoins en prenant en considération les modifications possibles suivantes visant à :

(1) permettre aux procureurs des parties d'assigner eux-mêmes les témoins (sans production de documents);

(2) exiger une autorisation judiciaire préalable à l'assignation d'un témoin par une partie non représentée par procureur, avec l'obligation pour celle-ci de démontrer la pertinence du témoignage;

(3) exiger, sur preuve que non seulement le témoignage sera pertinent mais aussi utile, une autorisation judiciaire préalable à l'assignation des personnes suivantes :

a) un juge ou un membre du Barreau;
b) un ministre ou un sous-ministre du gouvernement provincial ou fédéral;
c) une personne détenue;
d) une personne résidant à l'extérieur de la province;

(4) prévoir que le subpoena destiné aux personnes mentionnées à l'alinéa c) doit être signifié un certain nombre minimum de jours francs avant la comparution de celles-ci et donner à un juge le pouvoir de réduire ce délai en cas d'urgence;

(5) permettre à la personne dont le témoignage n'est pas pertinent ou ne sera pas utile de présenter une requête en annulation de subpoena;

(6) donner à un juge de la Cour devant laquelle le témoin est assigné à comparaître compétence pour statuer, avant cette comparution, sur une requête en annulation de subpoena, avec pouvoir de condamner aux frais la partie qui a assigné le témoin sans raison valable.

(Adoptée : 20-0-2)

Point 7

Frais en matière criminelle

Modifier l'article 840 du Code criminel pour donner au lieutenant-gouverneur en conseil le pouvoir d'adopter un tarif d'honoraires et allocations autre que celui figurant à l'annexe de la partie XXVII du Code criminel.

Demander au ministère fédéral de la Justice de donner à un groupe de travail fédéral-provincial mandat de faire des recommandations relativement à l'opportunité de maintenir ou non le principe de la gratuité des procédures en matière criminelle.

(Adoptée : 16-0-2)

Point 8

Pouvoir de disposer de biens périssables

Prévoir que les personnes qui procèdent, en vertu du Code criminel ou d'une autre loi fédérale, à la saisie de biens périssables ou de nature à se déprécier rapidement peuvent obtenir une autorisation judiciaire, dont avis est donné lorsqu'il est possible de le faire, leur permettant de disposer dans les meilleurs délais de ces biens en les remettant à leurs propriétaires légitimes, en les vendant pour le compte de ceux-ci ou en les détruisant si nécessaire.

(Adoptée : 18-0-0)

Point 9

Trafic d'enfants

Modifier le Code criminel afin d'y inclure une disposition prohibant le trafic d'enfants.

(Adoptée : 12-0-7)

VI - SASKATCHEWAN

Point 1

Mise en liberté en attendant la décision de l'appel

Modifier les paragraphes 679(3) et (4) de façon à énoncer des motifs de détention fondés sur la nécessité de protéger la société et la confiance du public dans l'administration de la justice.

Modifier l'article 816 de façon à y prévoir les mêmes motifs de détention que ceux prévus aux paragraphes 679(3) et (4).

(Retirée en faveur de la résolution de l'Ontario figurant au point 2)

Point 2

Relations sexuelles anales

Abroger l'article 159.

(Adoptée : 9-3-8)

Point 3

Engagements aux termes de l'article 810 du Code criminel (engagement de ne pas troubler l'ordre public)

Étendre la période maximale de l'engagement jusqu'à trois ans. Aucune modification n'est recherchée en ce qui a trait à la durée de la peine d'emprisonnement pouvant être infligée si le défendeur refuse de souscrire l'engagement.

(Retirée en faveur de la résolution de la Colombie-Britannique figurant au point 2)

Point 4

Parties à une agression sexuelle

Abroger l'alinéa 272d) du Code criminel et incorporer les éléments qu'il renferme à l'article 273 du Code criminel.

(Adoptée : 8-6-7)

VII - CANADA

Point 1

Contrôle des armes à feu : procédure d'enregistrement des armes à autorisation restreinte

Modifier les articles 91, 109 et 110 de façon à permettre à un registraire local des armes à feu de délivrer un permis qui donnerait au requérant l'opportunité de posséder temporairement une arme à autorisation restreinte et, si nécessaire, de la transporter à l'intérieur et à l'extérieur d'un club de tir approuvé pendant que la délivrance du certificat d'enregistrement a lieu.

Laisser cette disposition sur la possession temporaire à la discrétion du registraire, mais la restreindre aux cas où le registraire a recommandé que la GRC délivre un certificat d'enregistrement au requérant et où le requérant possède déjà au moins une arme à autorisation restreinte analogue déjà enregistrée.

(Retirée)

Point 2

Scellé des dénonciations pour mandat de perquisition

Demander au ministère de la Justice d'élaborer une nouvelle disposition qui interdirait la divulgation prématurée du contenu des dénonciations pour mandat de perquisition, d'une façon qui respecte les intérêts de l'accusé et de la personne visée par la perquisition, de même que la liberté d'expression garantie par l'alinéa 2b) de la Charte.

(Adoptée : 19-0-0)

CLOSING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting opened at 11:15 a.m., on Thursday, October 19. Howard F. Morton, Q.C. presided as Chairman, Claudette N. Racette acted as Secretary.

President's Report (Howard F. Morton, Q.C.)

At the outset, I would like to thank you for the privilege of having served as your President over the past year. I enjoyed coming to this Conference for a number of years as a working delegate and I have certainly enjoyed the discussions.

I would like to thank our Executive for their support during the year. The work of the President is really the work of the Executive and the Executive Director. Particularly, I would like to thank Claudette Racette for her invaluable assistance and continuing efforts to ensure that I was not too late in doing all of the things that I was supposed to do.

The Executive had two very productive meetings with Jurisdictional Representatives during the course of the meetings. Each jurisdiction was asked to send no more than two representatives (one criminal law and one uniform law) to meet with members of the Executive for an informal discussion as to how we can improve the workings of the Conference.

I would like to thank those who attended the meetings and provided us with their input as to how the Conference might be improved. I will have more to say on this subject in a moment.

The first two editions of the COMMUNIQUÉ contained a column entitled The President's Message. In these columns I attempted to set out some of my views with respect to several issues surrounding the Conference. I will attempt not to be repetitive, as I am often accused of doing in Court.

I would like to deal with four broad issues that I see as critical to the continued functioning of the Uniform Law Conference of Canada. When I say that they are four broad issues, they are my views and I believe are shared by members of the Executive. They are certainly my views and they are simply views that I am asking you to consider. I do not see it as the role of the President to impose his or her personal views without bringing a formal resolution before the Conference as a whole.

The first category that I feel is important to the continuing work of the Conference is improved communication and Accountability to the membership as a whole. The first step we took in attempting to improve that communication was the

COMMUNIQUÉ. Its purpose was to keep the membership informed of the workings of the Executive so that you just don't learn on your arrival in Prince Edward Island next August what the Executive has been doing all year.

We have decided, with the help of the Jurisdictional Representatives, that the COMMUNIQUÉ will be published on a quarterly basis. Therefore, there will be four issues between now and the meeting in P.E.I. In these issues you will be kept up-to-date not only of decisions made by the Executive, but of things which the Executive a re considering. We invite your input through the COMMUNIQUÉ or through letters to the new President with respect to your views on any of those issues.

I am pleased to announce that the COMMUNIQUÉ will be translated into French. The Province of New Brunswick has very kindly offered to provide that service. The COMMUNIQUÉ will be reflective of this country, it will be bilingual.

Secondly, under the heading of Communication and Accountability, I would like to speak briefly to the formalization of meetings with Jurisdictional Representatives from each jurisdiction. My own personal view is that at every Annual Meeting, there ought to be at least one, and perhaps two, informal discussions with the Jurisdictional Representatives. In addition, at our meetings with Jurisdictional Representatives this year, we decided that at a minimum, there would be one conference call during the year between members of the Executive and the Jurisdictional Representatives.

In taking the position which we have with the Jurisdictional Representatives, we have, I suppose in legal terms, attempted to entrench the role of the Jurisdictional Representatives in the decision making process of the Executive, and therefore the Conference. Of course, the day to day decisions must be made by the Executive, subject of course always to formal resolutions by the Conference as a whole. It is my strong view that in the course of the year, ideas for improvement of the Conference must come from the membership at large. Ideas must filter up as opposed to filtering down.

The second heading I would like to deal with is the Financial Health of the Conference. This year, your Executive has, primarily through the efforts of Peter Lown and the Alberta Law Reform Institute, saved the Conference approximately $20,000 in the production of the Annual Proceedings. Our view was that we simply could not afford the luxury of the expenditure we were making. In my opinion, and I know it is shared by most of you that I have spoken to, the quality of the text and the paper of the 1992 Proceedings was better than it has been in previous years.

In addition, we have saved the Conference close to $1,800 in audit fees by asking your approval to accept the lowest bid. This is a relatively easy audit to do, and it simply did not seem to us that we needed the prestige of a large auditing firm to do our audit.

The third effort we made in cost savings for the Executive was that in previous years we would have four Executive meetings in different parts of Canada. This year, our meetings were by way of conference calls. That also represents a saving for the Conference.

While we have made some efforts in terms of saving the Conference money and living within our means, it is my very strong view that we must consider other innovative and alternative ways of financing the work of the Conference.

The entire country is in a period of financial constraint. We too must be in keeping with the mood of the country that strongly feels that governments, organizations, particularly those involving lawyers, which are expending public funds by way of expense accounts or grants, must attempt to do so in the most fiscally responsible method possible.

Some of the things I would ask you to consider, and it is my hope that the new Executive will consider, are innovative ways of coming up with alternatives to, in some cases, the yearly grant. If there is a province or a territorial jurisdiction where cabinet or board simply refuse a grant, then it is my personal view that accommodation can be made for that one jurisdiction or those jurisdictions to ensure that either by way of services in kind, or registration fees, or other innovative ways, an amount equal to what the grant would have been, is payable to the Conference. I know that the question of registration fees will ramble some of you. Again these are my personal views, and they are only views which I am asking both you and the new Executive to consider.

In addition to being innovative in the way we collect our grants, it is my personal view that we must come up with an alternative vehicle to raise contributions to the Conference which would result in an income tax receipt. As you are aware, we have an opinion from Revenue Canada that the endowment fund approach would not result in a mechanism by which we could give income tax receipts to donors. The new Executive, looking to you, the membership, for ideas, must find some legal vehicle which will result in contributions being tax deductible.

We must also, in my respectful view, look to the legal profession and legal organizations for financial assistance. We must examine the concept of specific project funding. That is, when we have a particular project that various agencies, governments or even private sector groups might be interested in, that we seek funding from them.

The third area I would ask you to consider is a broader sale of the Annual Proceedings. As you are aware, apart from the Delegates and members of the Conference, we started this year to sell the Proceedings at a cost recovery basis. We will continue to do this, or at least it is my hope that the new Executive will continue this for the coming year by charging $20.00 or $25.00 to all agencies and

organizations who desire a copy of our Proceedings. The members of this Conference will continue to receive the Proceedings free of charge.

I want to add a caveat to some of the ways that I think we can raise more money, and I look to you to find other innovative ways. The caveat is this. In looking to other places to find money, we are not selling shares in the Uniform Law Conference of Canada. The Conference can in no way sacrifice its autonomy and independence. I am in no way suggesting that by looking to alternative methods of financing, we in any way sacrifice either our autonomy or our independence.

The third area I would like to touch on is the Renewal Report. As you are aware, by way of Resolution, this Conference is committed to the Renewal Report. There is a reality however, that we must examine.

Several of the recommendations of the Renewal Report are simply not economically feasible at this time. They are too costly. They were perhaps too costly when we passed them, but as our economy has spiralled downward since that time, they are clearly too expensive now. I am thinking in particular of things like a full time staff with paid researchers, lawyers and elaborate offices.

The second point I would like to make with respect to the Renewal Report, and I say this with great respect to the authors of the Report, is that like all reports, some of the recommendations are already outdated. It is my personal view that some of the concepts in that report must be rethought by the membership at large.

Finally I would like to speak to the work and scope of the Conference. I can't take credit for these ideas. Most of them were generated by our two meetings with the Jurisdictional Representatives. Again, I emphasize that these are only matters I ask you to consider, although they are my personal views.

First, we must enhance the profile of the Conference and its valuable contributions to all Canadians. There must be a wider distribution of the Proceedings for example. I am not suggesting that we become Fuller Brush salesmen going out rapping on doors to make ourselves known. However, there are subtle but effective ways in which we can enhance the knowledge of this Conference and the valuable contributions which it makes.

We must look beyond, in my view, to lawyers, law professors, members of the judiciary. It has often been said that the law was far too important to be left to lawyers alone. I have to keep reminding myself that the law is not some idle stand-alone to be worshipped. It is simply a social tool by which society improves the quality of life of its members and makes it easier for all of us to get along. That is what the law is, and that is what the law should be.

Another suggestion that I would ask you to consider is that the Conference perhaps broaden the size of its delegates. I would ask you to consider closer links with the

Canadian Bar Association, members of the judiciary, non-legal groups, criminal lawyers' associations, Deputy Ministers, law reform bodies and in particular, organizations concerned with what has been commonly referred to as social justice. Surely the law is but a minor component of social justice.

I would also ask you to evaluate the need to balance the law reform component of our Conference and our major objective which is the harmonization of laws in the various jurisdictions. I would ask you to reconsider the number and scope of projects. My personal view, and again, I benefit from this personal view having listened to the Jurisdictional Representatives, is that we must consider what I call more bite size projects that can be turned around in a quick period of time in order to show that this Conference is capable of accomplishing needed changes to the law and ensuring that these changes are harmonized across the country. In that vein, again I would ask that we consider entering into joint ventures with government agencies and the private sector. Again, at no sacrifice or risk to the independence or autonomy of this body.

I would ask you to consider filling the gap left by the termination of several Federal, territorial and provincial agencies. For example, the Law Reform Commission of Canada. In my view, a tremendous gap has been left and there is an opportunity for the Conference to provide the very worthwhile work that those agencies were doing.

Finally, in light of my view with respect to social justice as opposed to merely legal justice, I would ask you to consider the involvement of Ministries other than Justice Ministries at this Conference. I know on the uniform law side, that has been done from time to time. I think on the criminal side, my own personal view is that we have to broaden the scope of the input that we receive with respect to criminal law.

I apologize for being so long. That is the President's report. If there is any need for clarification, I would be glad to listen. In terms of debate however, that is my report. I preface it by saying that these are my views and in order to keep this meeting as short as possible, I would be glad for questions of clarrification, but my own view is that it is not appropriate to debate my personal views.

He then moved that his report be adopted as presented. Seconded by Daniel Préfontaine, carried unanimously.

Report from the Criminal Law Section

Robert Murray, Chairman of the Criminal Law Section, presented the following report:

I would like to thank Howard Morton as President of this year's Conference and Claudette Racette for their assistance to me as Chair of the Criminal Law Section. I would certainly like to thank Fred Bobiasz, Secretary of the Criminal Law Section.

I can assure the new Chair that he/she will be in good hands and well served by Fred in preparation for the Criminal Law Section's Agenda.

The Criminal Law Section had 27 delegates this year, including 6 defence counsels. They considered 42 resolutions, 34 were adopted either in whole or in part, 6 were withdrawn and 2 were defeated. The discussion took place over a total of 2 full days. The debate and discussion were very well received by everyone. It was very productive. I think the participation of the 6 defence counsels made it even more so. Without their presence, there would have be a great abyss, certainly at our meetings. Whatever can be done to encourage the participation of the defence bar in the Criminal Law Section would be well worth the effort.

One full day was set aside for discussion of the two Federal papers submitted by the Federal Department of Justice. The first dealt with the Preliminary Hearing and Proposals for Reform. The second dealt with Part I of the Criminal Code, which now contains close to 40 sections and really is the blueprint for the remainder of the Criminal Code. There were two very important items that generated a lot of discussion and I think that there was a remarkable degree of consensus among the participants, particularly in the area of preliminary hearing reform.

The Senior Federal Delegate, as is the tradition and requirement of our Section, reported on the status of earlier recommendations in past years. Seven Bills passed by Parliament within the last few months and just proclaimed contained many of the resolutions of the Criminal Law Section. For example, Bill C109 on Electronic Surveyance, Bill C123 on Proceeds of Crime, Bill C126 on Family Violence, Child Abuse and Violence Against Women which included the anti-stalking provision, Bill C128 on Child Pornography. All of these Bills had certain elements which were based on resolutions passed in prior years.

In addition, there is a Criminal Omnibus Bill which has been prepared and ready for consideration by Parliament. We are advised that most of the provisions in that Bill have been considered and passed in prior year meetings of the Criminal Law Section.

We noted the absence of Delegates from 3 jurisdictions: Newfoundland, Nova Scotia and the Northwest Territories. I am assured that at least 2 of those jurisdictions, if not all three, will be back at next year's Conference. There were various reasons why they could not send Delegates this year, but next year, they will be back with us.

The Chair for next year's meeting has been elected and I am pleased to pass over the gavel to Michael Allen from Alberta. Michael has a task ahead of him, but I know he can meet the challenge and that next year's meeting will be even better than this year.

The Section acknowledges the tremendous job done by our Alberta hosts and I would like to acknowledge Peter Pagano, Peter Lown, Michael Allen, Alex Pringle, Paul Bourque and Clark Dalton. I know there are others, but in terms of our Section and

our operation, I want to specfically thank those individuals. They certainly put us in an environment where we could have productive meetings and we had a very pleasant and most enjoyable visit to Alberta. We thank you all for making the effort to make us welcome.

Robert Murray moved the adoption of his report, seconded by Richard Mosley. Motion carried unanimously.

Report of the Uniform Law Section

John Gregory, Chairman of the Uniform Law Section presented the following report:

The Uniform Law Section had a very productive meeting. Two uniform acts were adopted: One dealing with Evidence of Children and one with the implementing of the Hague Convention on Intercountry Adoption, three months after the Hague Conference adopted its own Convention. We had an early start and managed to come in fairly quickly. This will allow jurisdictions that wish to implement that Convention to do so pretty well immediately, which would help Canada to ratify that Convention, assuming that there is the will in the jurisdictions to do it. Certainly, there is no barrier of having to deal with the basics. Each jurisdiction will have some supplementary work to do to deal with some of the requirements of the Convention at home.

The Section also took a very significant step towards the adoption of a uniform act on the taking of civil jurisdiction and the transfer of civil cases from one jurisdiction to the next. This is a project that grew out of a reference from the Ministers of Justice to the Uniform Law Conference in 1990. The first step in our response was the adoption of the Uniform Enforcement of Canadian Judgments Act a couple of years ago. This is the logical next step. The Conference agreed on the wording of the Act to be submitted to the Ministers of Justice with a recommendation that a consultation be conducted with members of the Bar, members of the judiciary and other interested parties, a consultation in which the Uniform Law Section of the Conference would like to be involved. We anticipate that we will deal with this again next year and adopt the Uniform Act that will reflect the consultations.

We also advanced work significantly on uniform legislation on Cost of Credit Disclosure. We also continued uniform work on Commercial Liens and began work on the Transfer Investment Securities, a very technical area that was extremely clearly laid out to us by Eric Spink of the Alberta Law Reform Institute.

In addition, we have undertaken work on two aspects of the work of evidence. One is the effect on the law of evidence of electronic commerce, essentially providing probably something like a business records rule for electronic records. The other aspect of evidence that we are dealing with will be an attempt to establish the foundation for admissibility of DNA evidence. In both of those projects, we will be

soliciting assistance from the Criminal Law Section, since in both cases, the rules will apply to a very large extent in both civil and criminal litigation.

We have also began work on a project on juries where the principles are the same, be it criminal or civil procedures. We do not anticipate a uniform act on this topic although this could change. Rather than a uniform act, we are projecting the adoption of principles or guidelines for the selection of juries. We are also looking at working closely with the Criminal Law Section. We anticipate that our project will be headed by Moira McConnell of the Law Reform Commission of Nova Scotia, with the assistance of William Hurlburt of the Alberta Law Reform Institute and Stewart Whitley of Manitoba. We will profit from the work that has already been done in this area in several provinces as well as at the Federal level.

Two other projects worth noting. One is a possible project with the National Conference of Commissioners on Uniform State Laws dealing with the enforcement of maintenance and support orders across the boarder. It is the view of a number of people involved in that area in Canada that the American law is unsatisfactory in enforcing Canadian orders in the United States, both the new and old versions of American law. We will be making representations to the National Conference to suggest curing that problem. If they find they are having problems coming this way, then we may end up looking at the Reciprocal Enforcement of Maintenance Orders Act which is uniform legislation here as well.

There was a great deal of enthusiasm from members of the Liaison Committee between the National Conference and ourselves on the DNA Evidence project as well. That is one where the Americans do not have something under way, but they are launching a review of the law of evidence. That is clearly an area where they will have to take some action. We may be able to do a joint project with them as well.

The final project I want to mention is a response of the Uniform Law Conference, through the Uniform Law Section in the first instance, but not in the final instance, to the Federal/Provincial/Territorial Working Group on Gender Equality. The Ministers responsible for Justice issues in Québec city in May approved in principle, the most urgent of the recommendations of the Working Group. Two of them referred specifically to the Uniform Law Conference. Both of them deal with drafting. One of them deals with clear language drafting, and the other deals with non-sexist drafting guidelines. I believe the Conference has already dealt with the latter, but plain language drafting guidelines is something that the Conference has not dealt with expressly. The Conference, of course, has drafting guidelines that it feels leads to plain language.

The Uniform Law Section proposes to refer this matter to the Drafting Section since it really is not within our immediate competence. But I believe the Uniform Law Conference as a whole has to be in a position to respond to the Ministers of Justice on this issue at some point in time.

There are a number of other projects that the Steering Committee will be dealing with over the course of the coming year.

I would echo Bob Murray's thanks to the organizers of this year's Conference. It certainly ran smoothly from my point of view, and this is basically because everything we needed had already been taken care of. I think I can reflect the views of members of the Section in thanking them for a very agreeable time.

John Gregory moved the adoption of his report, seconded by Raymond Moore. Motion carried unanimously.

Report of the Drafting Section

Peter Pagano, Chairman of the Drafting Section, presented the following report:

The Drafting Section met twice during the meetings. Although the meetings were not very long, the issue at hand was quite significant. The Section was trying to determine whether the Section was still necessary as part of the Uniform Law Conference of Canada.

In the end, the Drafting Section felt that they should continue as part of the Conference. In addition, further discussion on the future of the Drafting Section will be brought up at the meeting of Legislative and Parliamentary Counsels in September. It was resolved that a better tie, particularly with the Steering Committee would ensure the health of the Drafting Section.

The Nominating Committee of the Drafting Section nominated Gordon Johnson as the new Chair of the Drafting Section. The nomination was approved by the Section. There will be no official Vice-Chair, however, in the event the Chair cannot act, the most senior Legislative Counsel at the particular meeting will act as Chair.

Peter Pagano moved the adoption of his report. Motion seconded by John Gregory. The motion was carried unanimously.

Report from the Resolution's Committee

Chris Curran, Anne-Marie Trahan, Raymond Moore, Clark Dalton and Peter Lown, presented the following resolution:

RESOLVED that the Conference express its appreciation by way of a letter from the Executive Director to:

1. The City of Edmonton and Mayor Jan Reimer who welcomed delegates to the City.

2. The province of Alberta and the Ministry of Justice which hosted the 75th Meeting of the Conference:

   - at which we again welcomed our colleagues from Québec
   - which provided fruitful and stimulating intellectual discussions
   - during which we enjoyed lively camaraderie and conviviality.

3. To the Organizing Committee of:

   Rob Remmer, Barb Lupul, Peter Pagano, Q.C., Clark Dalton, Paul Bourque and Peter Lown, ably assisted by Norma Smith and Kelley Matheson.

4. To the following volunteers:

   Jocelyn Rodgers, Ida Smith, Lori Johnson, James Thorlakson and Janet Brzezicki.

5. To our umpire, Ron Jacobs, for his extreme impartiality and patience.

6. To our colleagues from the National Conference in the United States, the Immediate Past President, Dwight Hamilton and Tiz Hamilton and the Chairman of the U.S. Liaison Committee, Jeremiah Marsh and Marietta Marsh.

7. To our able and patient interpreters:

   Louise Perry, Helene Rochon, Dorothy Charbonneau, Jennifer Dykstra, Carole Levesque and Huguette Lemieux.

8. To our ever helpful Secretariat:

   Rick Millette, Carol Bourgeois, Pat Fagan and Nicole Henrie.

9. To the Section Chairpersons whose leadership contributed to the success of the discussions.

The Resolution requires that a letter from the Executive Director go to all of these persons thanking them for their assistance.

And because of appropriate drafting, there is a final part to the Resolution which does not require the Executive Director to write a letter to herself that says "by this Resolution, the Conference expresses its appreciation to the Executive Director, Claudette Racette, who attended her first Annual Conference, the first in a long and profitable association, we hope."

Peter Lown moved that the Report of the Resolutions Committee be adopted as presented, seconded by Dan Préfontaine. The motion was carried unanimously.

Future Meetings

Raymond Moore stated that Prince Edward Island will be delighted to welcome the Delegates to its beautiful Island in August 1994. There are a number of exciting things that happen on the Island in August. He was not in a position to announce specifics at the moment. The meeting will take place the 2nd or 3rd week in August, 1994.

Thanking Mr. Moore, the Chairman stated that the Conference was looking forward to meeting in Prince Edward Island next year.

Before inviting Paul Monty to speak on behalf of the Province of Québec, the Chairman expressed the Conference's joy at the return of the Québec Delegation to the Conference this year.

Paul Monty stated that Québec would be very pleased to receive the Delegates to the Conference in 1995, probably in Québec City. He commented that the only preoccupation he has at the moment, is to maintain the quality of the welcome that we had received in Edmonton this year. He hopes that the weather will be as good in Québec City as it was in Edmonton this year.

Report from the Nominating Committee

The Nominating Committee consisted of Daniel Préfontaine, Chairman, Graham Walker, Richard Hubley, Gérald Temblay and Michael Allen. The report was presented by the Chairman who presented the following Motion:

MOVE that Peter Lown be appointed as President for the coming year and Anne-Marie Trahan be appointed as Vice President.

The motion was seconded by Graham Walker and carried unanimously.

Any Other Business

- Graham Walker moved a formal motion of thanks to the President, Howard Morton, for his year and the efforts he had put into it. The motion was seconded by Raymond Moore and unanimously carried.

- As Chairman of the Organizing Committee, Peter Pagano stated that as his last function, he wanted to say how happy he was that everyone enjoyed themselves

in Alberta. The Organizing Committee worked very hard and someone was smiling upon us with beautiful weather. He thank everyone for the thanks that had been expressed throughout the week and was delighted that Alberta was good to all the Delegates.

Adjournment

There being no further business, the meeting adjourned at 12:15. Motion by Peter Pagano, seconded by Peter Lown and carried unanimously.

APPENDIX A

AUDITORS' REPORT

To the Members of
Uniform Law Conference of Canada

We have audited the balance sheet of **Uniform Law Conference of Canada** as at March 31, 1993 and the statements of revenue, expenses and equity and cash flows for the year then ended. These financial statements are the responsibility of the organization's management. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with generally accepted auditing standards. Those standards require that we plan and perform an audit to obtain reasonable assurance whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation.

In our opinion, these financial statements present fairly, in all material respects, the financial position of the Conference as at March 31, 1993 and the results of its operations and the changes in its financial position for the year then ended in accordance with generally accepted accounting principles.

Ernst & Young
Chartered Accountants

Ottawa, Canada,
June 2, 1993.

BALANCE SHEET

As at March 31

GENERAL FUND

	1993 $	1992 $
ASSETS		
Cash	1,703	8,633
Term deposits, at cost	29,138	25,000
Accounts receivable	18,628	18,463
	49,469	52,096
LIABILITIES AND EQUITY		
Accounts payable	1,620	1,025
Equity	47,849	51,071
	49,469	52,096

RESEARCH FUND

ASSETS		
Cash	488	4,630
Term deposits, at cost	32,050	20,000
Accounts receivable	625	22,233
	33,163	46,863
EQUITY	33,163	46,863

CONFERENCE FUND

ASSETS		
Term deposits	15,000	—
LIABILITIES AND EQUITY		
Deferred revenue - grants	15,000	—

See accompanying notes

STATEMENT OF REVENUE, EXPENSES AND EQUITY

Year ended March 31

	General Fund $	Research Fund $$	Total 1993 $	Total 1992 $
REVENUE				
Annual contributions	62,843	—	**62,843**	63,000
Government of Canada	—	18,050	**18,050**	21,550
Interest	1,091	187	**1,278**	2,318
	63,934	18,237	**82,171**	86,868
EXPENSES				
Executive director honorarium	28,000	—	**28,000**	23,834
Printing	8,898	16,736	**25,634**	25,345
Executive travel	11,830	—	**11,830**	7,094
Annual meeting	10,566	—	**10,566**	10,918
Jurisdiction and transfer of litigation	—	6,950	**6,950**	—
Regulatory Offenses Procedures	—	6,311	**6,311**	10,780
Secretarial services	2,484	—	**2,484**	2,611
Professional fees	1,920	—	**1,920**	1,945
Miscellaneous	1,052	635	**1,687**	1,160
Disclosure of Cost of Credit	—	1,305	**1,305**	627
Postage	1,144	—	**1,144**	583
Telephone	799	—	**799**	1,118
Stationery	463	—	**463**	2,000
Administrative Procedures	—	—	—	6,193
Civil Contempt	—	—	—	5,706
Documents of Title	—	—	—	3,913
Vulnerable Witness	—	—	—	589
	67,156	31,937	**99,093**	104,426
Excess of expenses over revenues	(3,222)	(13,700)	**(16,922)**	(17,558)
Equity, beginning of year	51,071	46,863	**97,934**	115,492
Equity, end of year	47,849	33,163	**81,012**	97,934

See accompanying notes

STATEMENT OF CASH FLOWS

Year ended March 31

	General Fund $	Research Fund $	Conference 1993 $	Total 1992 $
OPERATING ACTIVITIES				
Excess of expenses over revenues	(3,222)	(13,700)	**(16,922)**	(17,558)
Net change in non-cash working capital balances related to operations				
Accounts receivable	(165)	21,608	**21,443**	(747)
Accounts payable	(595)	—	**(595)**	125
Cash provided by (used in) operating activities	(2,792)	7,908	**5,116**	(18,180)
INVESTING ACTIVITIES				
Redemption (purchase) of term deposits	(4,138)	(12,050)	**(16,188)**	5,000
Decrease in cash	(6,930)	(4,142)	**(11,072)**	(13,180)
Cash, beginning of year	8,633	4,630	**13,263**	26,443
Cash, end of year	1,703	488	**2,191**	13,263

See accompanying notes

APPENDIX A

NOTES TO FINANCIAL STATEMENTS

March 31, 1993

1. ACCOUNTING POLICIES

The financial statements have been prepared in accordance with generally accepted accounting principles.

The Research Fund includes the revenues and expenses for specific research projects. The General Fund includes the revenues and expenses for all other activities of the organization. The Conference Fund is to be used solely to fund expenses for the upcoming 1993 Conference to be held in fiscal 1994.

2. TAX STATUS

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

APPENDIX B

(See page 35)

UNIFORM LAW CONFERENCE OF CANADA

COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT

Contents

APPENDIX B

INTRODUCTORY COMMENTS.

0.1. This proposed uniform Act has four main purposes:

(1) to replace the widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction;

(2) to bring Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077, and *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897;

(3) by providing uniform jurisdictional standards, to provide an essential complement to the rule of nation-wide enforceability of judgments in the uniform *Enforcement of Canadian Judgments Act*; and

(4) to provide, for the first time, a mechanism by which the superior courts of Canada can transfer litigation to a more appropriate forum in or outside Canada, if the receiving court accepts such a transfer.

0.2. To achieve the first three purposes, this Act would, for the first time in common law Canada, give the substantive rules of jurisdiction an express statutory form instead of leaving them implicit in each province's rules for service of process. In the vast majority of cases this Act would give the same result as existing law, but the principles are expressed in different terms Jurisdiction is not established by the availability of service of process, but by the existence of defined connections between the territory or legal system of the enacting jurisdiction, and a party to the proceeding or the facts on which the proceeding is based. The term "territorial competence" has been chosen to refer to this aspect of jurisdiction (section 1, "territorial competence") and distinguish it from other jurisdictional rules relating to subject-matter or other factors (section 1, "subject matter competence").

0.3. By including the transfer provisions in the same statute as the provisions on territorial competence, the Act would make the power to transfer, along with the power to stay proceedings, an integral part of the means by which a Canadian court can deal with proceedings that more appropriately should be heard elsewhere. The provisions on transfer owe a great debt to the uniform *Transfer of Litigation Act* ("UTLA") promulgated in 1991 by the United States National Conference of Commissioners on Uniform State Laws

PART I

INTERPRETATION

Definitions

1. In this Act

"**plaintiff**" means a person who commences a proceeding, and includes a plaintiff by way of counterclaim;

"**proceeding**" includes an action, suit, cause, matter or originating application;

"**state**" means

(a) Canada or a province or territory of Canada, and

(b) a foreign country or a subdivision of a foreign country;

"**subject matter competence**" means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence;

"**territorial competence**" means the aspects of a court's jurisdiction that depend on a connection between

(a) the territory or legal system of the state in which the court is established, and

(b) a party to a proceeding in the court or the facts on which the proceeding is based.

COMMENTS TO SECTION 1

1.1. "State" is defined for two purposes. One is to complement the definition of "territorial competence", which refers to connections with the territory or legal system of the "state" in which the court is established. The other is to make it clear that the power of transfer under Part 3 extends to transfers to and from countries outside Canada, or subdivisions of those countries. There was extensive debate at the Conference about whether the transfer provisions should extend to courts outside Canada This debate is summarized in the comments to section 11.

1.2. The rationale for adopting the term "territorial competence" is noted in comment 0.2 The definition is the key to the legal effect of the rules in Part 2, defining Canadian courts' territorial competence

1.3. "Subject matter competence" is defined to include all aspects of a court's jurisdiction other than those relating to territorial competence. It will thus include restrictions on a court's authority relating to the nature of the dispute, the amount in issue, and other criteria that are unrelated to the territorial reach of the court's authority. The distinction between "territorial competence" and "subject matter competence" is important in certain of the transfer provisions in Part 3.

PART 2

TERRITORIAL COMPETENCE OF COURTS OF [*enacting province or territory*]

Application of this Part

2. (1) In this Part, "**court**" means a court of [*enacting province or territory*].

(2) The territorial competence of a court is to be determined solely by reference to this Part.

COMMENTS TO SECTION 2.

2.1. Part 2 is drafted so as to define the territorial competence of any court of the enacting jurisdiction. This is subject to rules in any other statute that give a particular court a wider or narrower territorial competence than the rules in this Act (see section 10). The transfer provisions in Part 3 are drafted so as to apply only to the superior court of unlimited jurisdiction (see the note after the heading of Part 3).

2.2. Subsection 2(2) is intended to make it clear that a court's territorial competence is to be determined according to the rules in the Act and not according to any "common law" jurisdictional rules that the Act replaces.

2.3. The Act defines a court's territorial competence "in a proceeding" (section 3). It does not define the territorial aspects of any particular remedy. Thus the Act does not supersede common law rules about the territorial limits on a remedy, such as the rule that a Canadian court generally will not issue an injunction to restrain conduct outside the court's own province or territory.

2 4 The Act only defines territorial competence; it does not define subject matter competence. It is not intended to affect any rules limiting a Canadian court's jurisdiction by reference to the amount of a claim, the subject matter of a claim, or any other factor besides territorial connections

Proceedings in personam

3. A court has territorial competence in a proceeding that is brought against a person only if

(a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,

(b) during the course of the proceeding that person submits to the court's jurisdiction,

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,

(d) that person is ordinarily resident in [*enacting province or territory*] at the time of the commencement of the proceeding, or

(e) there is a real and substantial connection between [*enacting province or territory*] and the facts on which the proceeding against that person is based.

COMMENTS TO SECTION 3

3.1. Section 3 defines the five grounds on which a court has territorial competence in a proceeding *in personam*. Paragraphs (a), (b) and (c) include the three ways in which the defendant may consent to the court's jurisdiction: by invoking the court's jurisdiction as plaintiff, by submitting to the court's jurisdiction during the proceedings, or by having agreed that the court shall have jurisdiction. These reflect long-standing law. Paragraphs (d) and (e) change current law, by replacing the criterion of *service of process* with the criterion of substantive *connection* with the enacting jurisdiction

3.2. Paragraph (d) is effectively the replacement for the existing rule that a court has jurisdiction over any person that is served with process in the forum province or territory. Replacing *service* in the territory of the forum court with *ordinary residence* in that territory means that a person who is only temporarily in the jurisdiction will not automatically be subject to the court's jurisdiction. For a court to take jurisdiction over a person who is not ordinarily resident in its territory and does not consent to the court's jurisdiction, a real and substantial connection must exist within paragraph (e) The current rule, which (subject to arguments of *forum non conveniens*) permits a court to take jurisdiction on the basis of the defendant's presence alone, without any other connection between the forum and the litigation, will therefore no longer apply. This change in the existing rule is proposed not only on the ground of fairness, but also because the existing rule is of doubtful constitutional validity, since a defendant's mere presence in a province is probably not enough to support the constitutional authority of a province to assert judicial jurisdiction over the defendant.

3.3. Paragraph (e) replaces the existing rules, in the common law provinces, relating to service *ex juris*. Territorial competence will depend, not on whether a defendant can be served *ex juris* under rules of court, but on whether there is, substantively, a real and substantial connection between the enacting jurisdiction and the facts on which the proceeding in question is based This provision would bring the law on jurisdiction into line with the concept of "properly restrained jurisdiction" that the Supreme Court of Canada, in *Morguard Investments Ltd.* v. *De Savoye* (1990), held was a precondition for the recognition and enforcement of a default judgment throughout Canada. The "real and substantial connection" criterion is therefore an essential complement to the uniform *Enforcement of Canadian Judgments Act*, which requires all Canadian judgments to be enforced without recourse to any jurisdictional test The present Act,

if adopted, will ensure that all judgments will satisfy the Supreme Court's criterion of "properly restrained" jurisdiction, which the court laid down as the indispensable requirement for a judgment to be entitled to recognition at common law throughout Canada.

3.4. If the present Act is adopted, rules of court will still include rules as to service of process, but these will no longer be the source and definition of the court's territorial competence. Their role will be restricted to ensuring that defendants, whether ordinarily resident in or outside the jurisdiction, receive proper notice of proceedings and a proper opportunity to be heard.

Proceedings in rem

4. A court has territorial competence in a proceeding that is brought against a vessel if the vessel is in [*enacting province or territory*].

COMMENTS TO SECTION 4.

4.1 Section 4 codifies the existing rule that jurisdiction in an action *in rem*, which can be brought only against a vessel, depends upon the presence of the vessel within the jurisdiction. Actions *in rem* are primarily brought in the Federal Court under its admiralty jurisdiction, but concurrent jurisdiction over maritime matters exists in the courts of the provinces.

Ordinary residence - corporations

5. A corporation is ordinarily resident in [*enacting province or territory*], for the purposes of this Part, only if

(a) the corporation has or is required by law to have a registered office in [*enacting province of territory*],

(b) pursuant to law, it

(i) has registered an address in [*enacting province or territory*] at which process may be served generally, or

(ii) has nominated an agent in [*enacting province or territory*] upon whom process may be served generally,

(c) it has a place of business in [*enacting province or territory*], or

(d) its central management is exercised in [*enacting province or territory*].

COMMENTS TO SECTION 5.

5.1. Sections 5, 6 and 7 define ordinary residence for corporations, partnerships and unincorporated associations. They reflect, with only minor modifications, the approach that is generally taken under existing law to decide whether these defendants are present in the jurisdiction for the purposes of service.

5.2. This Act contains no definition of ordinary residence for natural persons. This connecting factor is widely used in Canada (for example, as the jurisdictional criterion in the *Divorce Act* (Can.)), and has been judicially defined in numerous cases. It was felt that an express statutory definition would probably fail to match the existing concept and would therefore provide difficulty rather than certainty.

Ordinary residence - partnerships

6. A partnership is ordinarily resident in [*enacting province or territory*], for the purposes of this Part, only if

(a) a partner is ordinarily resident in [*enacting province or territory*], or

(b) the partnership has a place of business in [*enacting province or territory*].

COMMENT TO SECTION 6

6.1. See comment 5.1.

Ordinary residence - unincorporated associations

7. An unincorporated association is ordinarily resident in [*enacting province or territory*] for the purposes of this Part, only if

(a) an officer of the association is ordinarily resident in [*enacting province or territory*], or

(b) the association has a location in [*enacting province or territory*] for the purpose of conducting its activities.

COMMENT TO SECTION 7.

7.1. See comment 5.1.

Real and substantial connection

8. Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [*enacting province or territory*] and the facts on which a proceeding is based, a real and substantial connection between [*enacting province or territory*] and those facts is presumed to exist if the proceeding

(a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in [*enacting province or territory*],

(b) concerns the administration of the estate of a deceased person in relation to

(i) immovable property of the deceased person in [*enacting province or territory*], or

(ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in [*enacting province or territory*],

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to

(i) immovable property in [*enacting province or territory*], or

(ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in [*enacting province or territory*],

(d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:

(i) the trust assets include immovable or movable property in [*enacting province or territory*] and the relief claimed is only as to that property;

(ii) that trustee is ordinarily resident in [*enacting province or territory*];

(iii) the administration of the trust is principally carried on in [*enacting province or territory*];

(iv) by the express terms of a trust document, the trust is governed by the law of [*enacting province or territory*],

(e) concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in [*enacting province or territory*],

(ii) the contract was made in [*enacting province or territory*],

(iii) by its express terms, the contract is governed by the law of [*enacting province or territory*], or

(iv) the contract

(A) is for the purchase or property, services or both, for use other than in the course of the purchaser's trade or profession, and

(B) resulted from a solicitation of business in [*enacting province or territory*] by or on behalf of the seller,

(f) concerns restitutionary obligations that, to a substantial extent, arose in [*enacting province or territory*],

(g) is brought for a tort committed in [*enacting province or territory*],

(h) concerns a business carried on in [*enacting province or territory*],

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in [enacting province or territory], or

(ii) in relation to immovable or movable property in [enacting province or territory],

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in [*enacting province of territory*],

(k) is for enforcement of a judgment of a court made in or outside [*enacting province or territory*] or an arbitral award made in or outside [*enacting province or territory*], or

(l) is for the recovery of taxes or other indebtedness and is brought by the Crown [*of the enacting province or territory*] or by a local authority [*of the enacting province or territory*].

COMMENT TO SECTION 8.

8.1. The purpose of section 8 is to provide guidance to the meaning of "real and substantial connection" in paragraph 3(e). Instead of having to show in each case that a real and substantial connection exists, plaintiffs will be able, in the great majority of cases, to rely on one of the presumptions in section 8. These are based on the grounds for service *ex juris* in the rules of court of many provinces. If the defined connection with the enacting jurisdiction exists, it is presumed to be sufficient to establish territorial competence under paragraph 3(e).

8.2 A defendant will still have the right to rebut the presumption by showing that, in the facts of the particular case, the defined connection is not real and substantial. For example, if the action concerned a contract that had no connection with the province other than the fact that it was made in a hotel there by two travelling business executives, the fact that the contract was made in the province (subparagraph 8(e)(ii)) could be argued not to be a real and substantial connection with the province within paragraph 3(e) Conversely, a plaintiff whose claim does not fall within any of the paragraphs of section 8 will have the right to argue that the facts of the particular case do have a real and substantial connection with the enacting jurisdiction so as to give its courts territorial competence under paragraph 3(e)

8.3. One common ground for service *ex juris* is not found among the presumed real and substantial connections in section 8, namely, that the defendant is a necessary or proper party to an action brought against a person served in the jurisdiction. The reason is that such a rule would be out of place in provisions that are based, not on service, but on substantive connections between the proceeding and the enacting jurisdiction. If a plaintiff wishes to bring proceedings against two defendants, one of whom is ordinarily resident in the enacting jurisdiction and the other of whom is not, territorial competence over the first defendant will be present under paragraph 3(d). Territorial competence over the second defendant will not be presumed merely on the ground that that person is a necessary or proper party to the proceeding against the first person The proceeding against the second person will have to meet the real and substantial connection test in paragraph 3(e).

8 4 Section 8 does not include any presumptions relating to proceedings concerned with family law Since territorial competence in these proceedings is usually governed by special statutes, it was felt that express rules in section 8 would lead to confusion and uncertainty because they would often be at variance with the rules in those statutes, which have priority by virtue of section 10 For this reason it was felt better to leave the matter of territorial competence for the special family law statutes. If the question of territorial competence in a particular family matter was not dealt with in a special statute, the general rules in section 3 of this Act, including ordinary residence and real and substantial connection, would govern.

Discretion as to the exercise of territorial competence

9. (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to try the proceeding.

(2) A court, in deciding the question of whether it or a court outside [*enacting province or territory*] is the more appropriate forum in which to try a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,

(b) the law to be applied to issues in the proceeding,

(c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

COMMENTS TO SECTION 9

9 1 Section 9 is meant to codify the doctrine of *forum non conveniens*, which was most recently confirmed by the Supreme Court of Canada in *Amchem Products Inc* v. *British Columbia* (1993). The language of subsection 9(1) is taken from *Amchem* and the earlier cases on which it was based. The factors listed in subsection 9(2) as relevant to the court's discretion are all factors that have been expressly or implicitly considered by courts in the past

9 2. The discretion in section 9 to decline the exercise of territorial competence is defined without reference to whether a defendant was served in the enacting jurisdiction or *ex juris*. This is consistent with the approach in Part 2 as a whole, which renders the place of service irrelevant to the substantive rules of jurisdiction It is also consistent with the Supreme Court's statement in the *Amchem* case that there was no reason in principle to differentiate between declining jurisdiction where service was in the jurisdiction and where it was *ex juris*.

Conflicts or inconsistencies with other Acts

10. If there is a conflict or inconsistency between this Part and another Act of [*enacting province or territory*] or of Canada that expressly or implicitly

(a) confers jurisdiction or territorial competence on a court, or

(b) denies jurisdiction or territorial competence to a court, that other Act prevails.

COMMENT TO SECTION 10.

10 1. As noted above (comment 2.1), section 10 preserves any limitation or extension of the territorial competence of a particular court that is provided, either expressly by implication, in another statute

PART 3

TRANSFER OF A PROCEEDING

[Note: For "[superior court]" throughout this Part, each [enacting province or territory] will substitute the name of its court of unlimited trial jurisdiction]

General provisions applicable to transfers

11. (1) The [*superior court*], in accordance with this Part, may

(a) transfer a proceeding to a court outside [*enacting province or territory*], or

(b) accept a transfer of a proceeding from a court outside [*enacting province or territory*].

(2) A power given under this part to the [*superior court*] to transfer a proceeding to a court outside [*enacting province or territory*] includes the power to transfer part of the proceeding to that court.

(3) A power given under this Part to the [*superior court*] to accept a proceeding from a court outside [*enacting province or territory*] includes the power to accept part of the proceeding from that court.

(4) If anything relating to a transfer of a proceeding is or ought to be done in the [*superior court*] or in another court of [*enacting province or territory*] on appeal from the [*superior court*], the transfer is governed by the provisions of this Part.

(5) If anything relating to a transfer of a proceeding is or ought to be done in a court outside [*enacting province or territory*], the [*superior court*], despite any differences between this Part and the rules applicable in the court outside [*enacting province or territory*], may transfer or accept a transfer of the proceeding if the [*superior court*] considers that the differences do not

(a) impair the effectiveness of the transfer, or

(b) inhibit the fair and proper conduct of the proceeding

COMMENTS TO SECTION 11

11.1. Part 3 sets up a mechanism through which the superior court of general jurisdiction in the enacting province or territory can - acting in cooperation with a court of another province, territory or state - move a proceeding out of a court that is not an appropriate forum into a court that is a more appropriate forum Under current law, if a court thinks the proceeding would be more appropriately heard in a different court, its only option is to decline jurisdiction and force the plaintiff to recommence the proceeding in the other court if the plaintiff wishes and is able to do so The transfer mechanism would accomplish the same purpose more directly, by preserving whatever has already been done in the old forum and simply continuing the proceeding in the new forum. It is therefore designed to avoid waste, duplication, and delay.

11.2. The present draft Act, like the Uniform Transfer of Litigation Act (UTLA) promulgated by the Uniformity Commissioners in the United States, allows for transfers not only to and from courts within Canada but also to and from courts in foreign nations There was extensive debate at the Conference on whether this was appropriate Two principal arguments were made against it. First, Canadian courts should not, it was argued, be given the power to relegate litigants to foreign legal systems that might be very different from our own, where the standards of justice might not be comparable, and which could not be openly evaluated by a Canadian court without the risk of embarassment to Canada. Secondly, cooperation between a Canadian court and a foreign court should not be possible in the absence of authorization, in a treaty, by the two nations involved

The primary response made to the first argument was that the transfer mechanism could not force a litigant into a foreign legal system any more than the present law does It will nearly always be a plaintiff who is forced to accept a transfer There is no practical difference between

a plaintiff being "forced" into a foreign court by means of a stay of Canadian proceedings, as the current law allows, and being "forced" there by a transfer. Arguments about the suitability of the foreign court, and the likelihood of justice being done there, can arise under the present system just as they could under the transfer mechanism. And, of course, plaintiffs can never be "forced" to pursue the proceeding in another court if they do not wish to do so. In a small minority of cases it may be, not the plaintiff, but the defendant (or a third party) who is "forced" into a foreign court by a transfer (for example, at the behest of a co-defendant). Even in those cases there is no practical difference, in terms of the effect on the defendant's rights, between being transferred into the foreign court and being sued there in the first place.

As for the second argument, the main response was that the proposed transfer mechanism did not by-pass the proper route of a treaty any more than do the present uniform statutes on the reciprocal enforcement of judgments and of maintenance orders. These result in the enforcement of foreign court orders in Canada, and vice-versa, through the combined operation of foreign and Canadian court systems, each operating by authority of the legislature in its jurisdiction.

It was also argued, in support of the present scope of the draft, that a transfer mechanism would be much more valuable if it allowed a Canadian court to request transfers to, and accept transfers from, courts in the United States and elsewhere. In each case the Canadian court would have a completely free discretion to decide whether the ends of justice would be served by requesting the outbound transfer or accepting the inbound transfer

The Conference, by a majority, decided not to restrict the present draft Act to transfers within Canada.

11.3 Section 11 provides the framework for all the other provisions of Part 3. Whether the transfer is from the domestic court to the extraprovincial court (paragraph 11(1)(a)) or from an extraprovincial court to the domestic court (paragraph 11(1)(b)), the Act only purports to regulate those aspects of the transfer that relate to the domestic court (or a court on appeal from the domestic court, referred to in subsection 11(4)). The provisions of Part 3 are drafted so that they do not purport to lay down any rules for the courts of the other jurisdiction that is involved in the transfer It may be that the other jurisdiction's rules for accepting or initiating transfers differ from those in the present Act. In that event, subsection 11(5) provides that the domestic court can transfer (i.e. initiate the transfer) to, or accept a transfer from, the other jurisdiction if the differences do not impair the effectiveness of the transfer or the fairness of the proceeding

Grounds for an order transferring a proceeding

12. (1) The [*superior court*] by order may request a court outside [*enacting province or territory*] to accept a transfer of a proceeding in which the [*superior court*] has both territorial and subject matter competence if [*superior court*] is satisfied that

(a) the receiving court has subject matter competence in the proceeding, and

(b) under section 9, the receiving court is a more appropriate forum for the proceeding than the [*superior court*].

(2) The [*superior court*] by order may request a court outside [*enacting province or territory*] to accept a transfer of a proceeding, in which the [*superior court*] lacks territorial or subject matter competence if the [*superior court*] is satisfied that the receiving court has both territorial and subject matter competence in the proceeding.

(3) In deciding whether a court outside [*enacting province or territory*] has territorial or subject matter competence in a proceeding, the [*superior court*] must apply the laws of the state in which the court outside [*enacting province or territory*] is established.

COMMENTS TO SECTION 12.

12.1 A key feature of the transfer provisions, which is taken from UTLA, is a transfer may be made so long as *either* the transferring or the receiving court has territorial competence over the proceeding The receiving court must always have subject matter competence; in other words it cannot, by virtue of a transfer, acquire jurisdiction to hear a type of case that it usually has no jurisdiction to entertain But it can, by virtue of a transfer, hear a case over which it would not otherwise have territorial competence, so long as the court that initiated the transfer did have territorial competence It should be noted in this connection that all that Part 3 does is to make a transfer to the receiving court possible. It does not guarantee that the receiving court's eventual judgment will be recognized in the transferring court - or anywhere else - as binding on a party who refuses to take part in the continued proceeding in the receiving court. As a practical matter, a transferring court would be most unlikely to grant the application for a transfer in the first place, if it appeared that the outcome might be a judgment that was unenforceable against a party opposing the transfer.

12.2. Subsection 12(1) deals with an outbound transfer where the domestic court has territorial as well as subject matter competence The receiving court need only have subject matter competence, and be a more appropriate forum under the principles in section 9

12.3. Subsection 12(2) authorizes an outbound transfer where the domestic court lacks territorial or subject matter competence, but the receiving court is possessed of both.

12.4. In relation to subsection 12(2), it may seem curious that a court that *lacks* competence to hear the case can nevertheless "bind" the parties by requesting a transfer In reality, however, the transferring court's request does not "bind" anyone. It only sets in motion a process whereby the receiving court can agree to take the proceeding. It is the receiving court's acceptance of the transfer that "binds" the parties - which, since it has full competence (under its own rules - subsection 12(3)), is no more than that court could have done if the proceeding had originally started there

Provisions relating to the transfer order

13. (1) In an order requesting a court outside [*enacting province or territory*] to accept a transfer of a proceeding, the [*superior court*] must state the reasons for the request.

(2) The order may

(a) be made on application of a party to the proceeding,

(b) impose conditions precedent to the transfer,

(c) contain terms concerning the further conduct of the proceeding, and

(d) provide for the return of the proceeding to the [*superior court*] on the occurrence of specified events.

(3) On its own motion, or if asked by the receiving court, the [*superior court*], on or after making an order requesting a court outside [*enacting province or territory*] to accept a transfer of a proceeding, may

(a) send to the receiving court relevant portions of the record to aid that court in deciding whether to accept the transfer or to supplement material previously sent by the [*superior court*] to the receiving court in support of the order, or

(b) by order, rescind or modify one or more terms of the order requesting acceptance of the transfer.

COMMENTS TO SECTION 13

13.1. Section 13 deals with the order of the superior court of the enacting jurisdiction, requesting another court to accept a transfer. Rules of court will provide the procedure for a party to apply for a transfer, as referred to by paragraph 13(2)(a) The rules of court will also deal with matters such as notice to the other parties and the opportuny to be heard.

13.2. The superior court is free to attach whatever conditions it thinks fit to the request for a transfer. These may be conditions precedent to the transfer's taking place (paragraph 13(2)(b)) or terms as to the further conduct of the proceeding (paragraph 13(2)(c)). The superior court may also stipulate that the proceeding is to return to it on the occurrence of certain events (paragraph 13(2)(c)) The receiving court is free to accept

or refuse the transfer on those conditions. Subsection 13(3) contemplates that the receiving court may ask the superior court if it will modify a term of the transfer as requested, and gives the superior court the power to do so.

[Superior court's] discretion to accept or refuse a transfer

14. (1) After the filing of a request made by a court outside [*enacting province or territory*] to transfer to the [*superior court*] a proceeding brought against a person in the transferring court, the [*superior court*] by order may

(a) accept the transfer, subject to subsection (4), if both of the following requirements are fulfilled:

(i) either the [*superior court*] or the transferring court has territorial competence in the proceeding; and

(ii) the [*superior court*] has subject matter competence in the proceeding, or

(b) refuse to accept the transfer for any reason that the [*superior court*] considers just, regardless of the fulfilment of the requirements of paragraph (a).

(2) The [*superior court*] must give reasons for an order under subsection (1) (b) refusing to accept the transfer of a proceeding.

(3) Any party to the proceeding brought in the transferring court may apply to the [*superior court*] for an order accepting or refusing the transfer to the [*superior court*] of the proceeding.

(4) The [*superior court*] may not make an order accepting the transfer of a proceeding if a condition precedent to the transfer imposed by the transferring court has not been fulfilled.

COMMENTS TO SECTION 14

14.1 Section 14 provides for the superior court's response to a request to accept a transfer from another court It may accept the inbound transfer, provided that it is satisfied that the requirements of territorial and subject matter competence are satisfied. Those requirements, contained in paragraph 14(1)(a), parallel those in section 12 dealing with the superior court's requesting an outbound transfer Either the transferring court or the (receiving) superior court must have territorial competence, and the superior court must have subject matter competence

14.2. The superior court is completely free to refuse the transfer even if the requirements of territorial and subject matter competence are met (paragraph 14(1)(b)), but must give reasons for doing so (subsection 14(2)).

14.3. Rules of court will supplement the provision in subsection 14(3) under which a party may apply to the superior court to have it accept or refuse a transfer.

14.4. If a condition precedent to the transfer, as set by the transferring court, is not fulfilled the superior court may not accept the transfer (subsection 14(4)). It would need to ask the transferring court to modify or remove the condition precedent, as contemplated (for outbound transfers) in paragraph 13(3)(b).

Effect of transfers to or from [superior court]

15. A transfer of a proceeding to or from the [*superior court*] takes effect for all purposes of the law of [*enacting province or territory*] when an order made by the receiving court accepting the transfer is filed in the transferring court.

COMMENT TO SECTION 15.

15.1. The time when a transfer - whether inbound or outbound - takes effect is critical to the operation of sections 16 to 21.

Transfers to courts outside [enacting province or territory]

16. (1) On a transfer of a proceeding from the [*superior court*] taking effect,

(a) the [*superior court*] must send relevant portions of the record, if not sent previously, to the receiving court, and

(b) subject to section 16(2) and (3), the proceeding continues in the receiving court.

(2) After the transfer of a proceeding from the [*superior court*] takes effect, the [*superior court*] may make an order with respect to a procedure that was pending in the proceeding at the time of the transfer only if

(a) it is unreasonable or impractical for a party to apply to the receiving court for the order, and

(b) the order is necessary for the fair and proper conduct of the proceeding in the receiving court.

(3) After the transfer of a proceeding from the [*superior court*] takes effect, the [*superior court*] may discharge or amend an order made in the proceeding before the transfer took effect only if the receiving court lacks territorial competence to discharge or amend the order.

COMMENTS TO SECTION 16.

See the comments to section 17.

Transfers to [superior court]

17. (1) On a transfer of a proceeding to the [*superior court*] taking effect, the proceeding continues in the [*superior court*].

(2) A procedure completed in a proceeding in the transferring court before transfer of the proceeding to the [*superior court*] has the same effect in the [*superior court*] as in the transferring court, unless the [*superior court*] otherwise orders.

(3) If a procedure is pending in a proceeding at the time of the transfer of the proceeding to the [*superior court*] takes effect, the procedure must be completed in the [*superior court*] in accordance with the rules of the transferring court, measuring applicable time limits as if the procedure had been initiated 10 days after the transfer took effect, unless the [*superior court*] otherwise orders.

(4) After the transfer of a proceeding to the [*superior court*] takes effect, the [*superior court*] may discharge or amend an order made in the proceeding by the transferring court.

(5) An order of the transferring court that is in force at the time the transfer of a proceeding to the [*superior court*] takes effect remains in force after the transfer until discharged or amended by

(a) the transferring court, if the [*superior court*] lacks territorial competence to discharge or amend the order, or

(b) the [*superior court*], in any other case.

COMMENTS TO SECTION 17.

17.1. An instantaneous transfer, in all respects, of a legal proceeding from one court to another would be ideal but obviously cannot be fully realized in practice. Sections 16 and 17 deal with the procedures that are completed before the transfer, procedures that are pending at the time of transfer, and orders that have been made before the transfer takes effect.

17.2. Paragraph 16(1)(b) and subsection 17(1) define the effect of a transfer for, respectively, outbound and inbound transfers: the proceeding continues in the receiving court.

17.3. A procedure that is completed before the transfer takes effect is simply given the same effect in the receiving court as it had in the transferring court, subject to the receiving court's right to change that effect (subsection 17(2)). (There is no need for an equivalent for outbound transfers.)

17.4. If a procedure is pending at the time a transfer takes effect, the transferring court retains power to make an order in respect of that procedure only in the limited circumstances defined in subsection 16(2) (for outbound transfers). The general rule is that the procedure must be completed in the receiving court. Subsection 17(3) provides (for inbound transfers) that it must be completed according to the rules of the transferring court and that relevant time limits run from 10 days after the transfer takes effect unless the court orders otherwise.

17.5. An order made before the transfer takes effect continues in effect until the receiving court discharges or amends it (subsections 17(4) and (5) for inbound transfers). The transferring court has no power to discharge or amend such an order unless the receiving court lacks the territorial competence to do so (subsection 16(3), for outbound transfers, and paragraph 17(5)(a) for inbound transfers). The latter situation might arise, for example, with respect to injunctions relating to things to be done or not done in the territory of the transferring court.

Return of a proceeding after transfer

18. (1) After the transfer of a proceeding to the [*superior court*] takes effect, the [*superior court*] must order the return of the proceeding to the court from which the proceeding was received if

(a) the terms of the transfer provide for the return,

(b) both the [*superior court*] and the court from which the proceeding was received lack territorial competence in the proceeding, or

(c) the [*superior court*] lacks subject matter competence in the proceeding.

(2) If a court to which the [*superior court*] has transferred a proceeding orders that the proceeding be returned to the [*superior court*] in any of the circumstances referred to in subsection (1) (a), (b) or (c), or in similar circumstances, the [*superior court*] must accept the return.

(3) When a return order is filed in the [*superior court*], the returned proceeding continues in the [*superior court*].

COMMENTS ON SECTION 18.

18.1. A return of a transfer may be necessary for two reasons. The terms of the original order requesting the transfer may require the return if certain events occur (paragraph 18(1)(a), dealing with the return of inbound transfers; compare paragraph 13(2)(c), giving power to impose such terms in outbound transfers). Or it may appear, after the receiving court has accepted the transfer, that the transfer was in fact unauthorized because a requirement of territorial or subject matter competence was not satisfied (paragraphs 18(1)(b) and (c), dealing with the return of inbound transfers).

18.2. A return may not be refused by the court to which the proceeding is returned (subsection 18(2), dealing with the return of outbound transfers), because the receiving court cannot retain the proceeding and the only place the proceeding can therefore be located is the transferring court. If that court lacks territorial or subject matter competence over the proceeding, the return of the proceeding may be simply for the purposes of dismissal.

Appeals

19. (1) After the transfer of a proceeding to the [*superior court*] takes effect, an order of the transferring court, except the order requesting the transfer, may be appealed in [*enacting province or territory*] as if the order had been made by the [*superior court*].

(2) A decision of a court outside [*enacting province or territory*] to accept the transfer of a proceeding from the [*superior court*] may not be appealed in [*enacting province or territory*].

(3) If, at the time that the transfer of a proceeding from the [*superior court*] takes effect, an appeal is pending in [*enacting province or territory*] from an order of the [*superior court*], the court in which the appeal is pending may conclude the appeal only if

(a) it is unreasonable or impractical for the appeal to be recommenced in the state of the receiving court, and

(b) a resolution of the appeal is necessary for the fair and proper conduct of the continued proceeding in the receiving court.

COMMENTS TO SECTION 19.

19.1. Section 19, like sections 16 and 17, deals with a practical difficulty when a transfer takes effect. In principle, consistently with the policy of a complete continuance of the proceeding in the receiving court, appeals from any order made in the proceeding must be taken there (subsection 19(1), dealing with inbound transfers). The order requesting the transfer, however, can be appealed only in the transferring court, not the receiving court (the exception in subsection 19(1)). Likewise, the order accepting the transfer can be appealed only in the receiving court, not the transferring court (subsection 19(2), dealing with outbound transfers)

19.2. Pending appeals raise the same kind of difficulty as the pending procedures dealt with by subsections 16(2) and 17(3). The solution adopted in subsection 19(3) (dealing with outbound transfers) is the same as that adopted in those sections for pending procedures, namely, that the appeal court in the transferring jurisdiction should be able to complete an appeal if, and only if, that is a practical necessity.

Departure from a term of transfer

20. After the transfer of a proceeding to the [*superior court*] takes effect, the [*superior court*] may depart from terms specified by the transferring court in the transfer order, if it is just and reasonable to do so.

COMMENT TO SECTION 20

20.1 One a transfer has taken effect, it is appropriate to give the receiving court a discretion to depart from terms specified in the transfer order by the transferring court. Circumstances may arise that the transferring court had not anticipated, or the terms in its transfer order may turn out to be impractical, or the parties may agree on the alteration of a term of the transfer.

Limitations and time periods

21. (1) In a proceeding transferred to the [*superior court*] from a court outside [*enacting province or territory*], and despite any enactment imposing a limitation period, the [*superior court*] must not hold a claim barred because of a limitation period if

(a) the claim would not be barred under the limitation rule that would be applied by the transferring court, and

(b) at the time the transfer took effect, the transferring court had both territorial and subject matter competence in the proceeding.

(2) After a transfer of a proceeding to the [*superior court*] takes effect, the [*superior court*] must treat a procedure commenced on a certain date in a proceeding in the transferring court as if the procedure had been commenced in the [*superior court*] on the same date.

COMMENTS TO SECTION 21

21.1. Subsection 21(1), dealing with inbound transfers, ensures that a limitation defence that would have been unavailable in the transferring court cannot be invoked in the receiving court after the transfer takes effect. The rule is limited to cases where the transferring court could itself have heard the case; in other words, where it had both territorial and subject matter competence.

21.2. Subsection 21(2), also dealing with inbound transfers, is needed so that the sequence of dates on which procedures were commenced in the transferring court is preserved intact after the transfer takes effect. If, however, a procedure is pending at the time of transfer, the special rule of subsection 17(3) applies to determine the time when the procedure must be completed.

APPENDIX C

(see page 36)

Criticism of the Uniform Enforcement of Canadian Judgments Act

Introduction

When it was first promulgated in 1991 the *Uniform Enforcement of Canadian Judgments Act* (UECJA) seemed to attract little interest among legal scholars specializing in conflict of laws questions and related issues. Interest seems to have quickened with British Columbia's adoption of the Uniform Act. The Annual Workshop on Commercial and Consumer Law held in October 1992 devoted one session to the *Morguard* case and several presenters made passing reference to the UECJA.[1] While none of these references constituted a rave review of the UECJA, neither were any so critical that any comment or rebuttal at the Workshop seemed called for.

Since the Workshop two commentaries have appeared in print which adopt a decidedly more hostile tone. The first, a commentary by Vaughan Black, was published late in 1992.[2] The second, by John Swan has just emerged.[3] One can only speculate about the reason for the hostility that has emerged. The real question is whether any issues have been raised that justify or require the Conference to reconsider any aspects of the UECJA or which ought to discourage a government, properly advised, from embracing the Act.

The UECJA and the *Morguard* Decision

Central to the criticisms is the relationship of the UECJA to the *Morguard*[4] decision. At the highest level of generality, the critics suggest that the UECJA is deficient because it was insufficiently deferential to many aspects of the *Morguard* decision. The Swan article, in particular, purports to identify a number of

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1. Revised versions of the papers presented at the Workshop are to be found in (1993) 22 Can. Bus. L.J. Part 1.

2. (1992) 71 Can. B. Rev. 721.

3. (1993) 22 Can Bus. L.J. 87. Although published with the Workshop papers, the Swan commentary was not presented at the Workshop.

4. Morguard Investments Ltd. v. DeSavoye, [1990] 3 S.C.R. 1077.

differences between *Morguard* and the UECJA[5] and laments the failure of the latter to follow the former.[6]

In focusing on ways in which the UECJA departs from *Morguard*, the critics reveal an imperfect understanding of what the Uniform Law Conference was doing, and why it was doing it, in developing the UECJA. Throughout, the critic suggest that the UECJA was somehow "driven" by *Morguard* or was a "response" to *Morguard*.[7] Swan goes so far as to state that "the UECJA purports to enact *Morguard*."[8]

All of these suggestions are incorrect. The task of the Conference was set out in the terms of the reference from the Attorneys General and Ministers of Justice. This occurred in 1990, well before the Supreme Court's decision in *Morguard*. The Conference was requested to develop legislation to provide a modern legal framework for the enforcement of judgments between provinces and Canada. That new legal framework was intended to replace an unsatisfactory body of common law.

Undeniably, during the course of the Conference's work, the common law changed and became somewhat less unsatisfactory. That, however, did not alter the fundamental nature of the Conference's task. The Supreme Court deserves our respect for moving the law in this area forward in the *Morguard* case. But judges have limited tools at their disposal. For the most part all they can do is make the old machinery work a bit better. The Uniform Law Conference has both the tools and the mandate to create wholly new machinery. Whatever other criticism the Conference may deserve in relation to the UECJA, a refusal to

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5. Swan's list of these differences is not entirely accurate. For example, he identifies as an "indisputable feature" of *Morguard* its rejection of reciprocity as a basis for enforcement and states that this proposition is "denied" by the UECJA (Swan Commentary at 98, 99). In fact rejection of reciprocity is a significant policy of the UECJA (*see* 2nd. paragraph of the official commentary to the UECJA).

6. An extreme example of this is the fact that the UECJA contains a transition provision which limits its retrospective operation. Swan suggests that the Act ought to have followed *Morguard* which, as a judicial decision, has full retrospective operation. But only a few lines earlier he pointed out the hardships that flow from a retrospective operation. The UECJA, it appears, is being criticized for failing to adopt what the commentator seems to concede is a bad rule.

7. *See* Black commentary at 723.

8. At 97.

follow *Morguard* obsequiously is not one of them. That was not the nature of the exercise.

Section 6(2)

A more particular criticism directed at the UECJA also rises out of *Morguard*. This criticism is directed at the policy embodied in section 6(2) which limits the right of the enforcing court to enquire into or review whether the court which originally gave the judgment had the jurisdiction to entertain the proceeding. This, admittedly significant, departure from current practice is one the critics have a great deal of difficulty accepting.

Policy

One line of criticism is, simply, that it is not good policy. The argument boils down to a proposition that is unfair to deprive a defendant of the opportunity to resist enforcement of a judgment when the court that rendered it took jurisdiction on an inappropriate basis.[9] The rationale for the opposing view is set out in the official comment to section 6 of the UECJA and will not be repeated here.

The competing considerations were debated fully by the Conference in the course of developing the UECJA and it was concluded that section 6, as a whole, achieved the best balance of the various interests at stake, including the efficient administration of justice and the needs of commerce. As with any closely debated decision, it is unrealistic to expect that it will be universally applauded. The critics are entitled to their views, but nothing they have raised in relation to the balancing of interests achieved in section 6, as a policy matter, is new.

The concern over the issue of courts taking jurisdiction where they should not do so may well be attenuated when the UECJA is joined by a set of uniform jurisdictional rules and machinery for the transfer of litigation.

Emerging Constitutional Principles

One issue raised by the critics in relation to section 6 is new. It is being suggested that a close reading of *Morguard* raises the possibility that a new constitutional principle has emerged which requires that Canadian courts accept jurisdiction over a proceeding only in accordance with "principles of order and fairness." A suggested corollary is that where a court takes jurisdiction in

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9. Fairness to the plaintiff should also enter into the picture. The common law approach allows the defendant to "lie in the weeds" and allow the original proceeding to go forward, only raising the jurisdictional issue when matters have reached the enforcement stage.

accordance with these principles, there is a duty on courts of other provinces to enforce the judgment of the first court.[10]

The implication is that a provision similar to section 6(2) of the UECJA which limits the right of a defendant, in a province where enforcement is sought, to test whether the assumption of jurisdiction by the original court met that criteria of "order and fairness" somehow violates these newly discovered constitutional principles.

The extent to which the *Morguard* decision embodies constitutional principles and, if so, whether they are in any way inconsistent with the UECJA is a question whose answer lies in decisions not yet delivered. For the moment, that possibility must remain highly speculative since it is based on a very selective reading of the *Morguard* decision. The critics have examined the entrails of *Morguard* and seen what they want to see.

Public Policy Exception

One aspect of the UECJA that has been the subject of persistent negative comment is the power of the enforcing court to grant a stay of enforcement where the judgment in question is contrary to the public policy of the place where enforcement is sought. This power is contained in section 6(1)(d). The critics suggest that this power is offensive in principle and unnecessary in practice since the test to establish that something is contrary to public policy is quite onerous.

It might be helpful to recall the background of this provision. The draft which the conference used as its point of departure in developing the UECJA carried with it a lot of historical "baggage" which reflected common law limitations on the enforcement of judgments between provinces. Under that early draft, judgments contrary to the public policy of the province where enforcement was sought were excluded from the scheme, but that simply restated a common law rule respecting the enforcement of extraprovincial judgments.

When this matter came up for discussion the diminished importance of the public policy exception in the common law provinces was recognized, but it was thought important to retain it in the light of the importance of "public order" as an overriding concept under Quebec law. A UECJA that contained the public policy exception was seen as one which did not have too much effect in the common law provinces but did bring the Act into harmony with Quebec law. [This account of the deliberations is based on recollections of events which occurred three years ago and I am subject to correction on them.]

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10. Black commentary at 724.

This aspect of the Act is one in which we may, in part at least, defer to our critics. While it is not suggested that the UECJA be reopened on this point, it may do no harm to indicate publicly that the inclusion of section 6(1)(d) can, in practice, be regarded as optional and can safely be deleted, without doing violence to the basic concepts of the Act, in those common law provinces that wish to do so.

Summary

Criticism of the UECJA based on its lack of congruence with *Morguard* is not well-founded. What the Conference set out to do was something quite different. Arguments based on emerging constitutional principles are highly speculative at this stage. None of the policy objections raised in relation to subsection 6(2) are new. All were fully debated in 1990 and 1991.

Arthur L. Close
July 23, 1993

APPENDIX D

(see page 35)

TRANSFERS OF INVESTMENT SECURITIES

Notes for Presentation to Uniform Law Section of Uniform Law Conference

Eric Spink - Counsel, Alberta Law Reform Institute

August 18, 1993

Introduction

The Alberta Law Reform Institute has been working for quite some time on a project in relation to Alberta law governing transfers of investment securities. We have prepared a draft report, which is in something close to final form. The materials you have at tab 12 of the Conference binder are the summary and table of contents for the current draft. We expect to publish our final report fairly soon.

The report is long and detailed, dealing as it does with a complex and specialized area of the law, involving many rather esoteric issues. This paper will focus upon some of the fundamental issues that create the need for reform in this area, starting with some background historical information on the law of securities transfers, which is necessary to an understanding of the present situation. After that, I will deal with various reasons why the general subject of securities transfers should be addressed by the Uniform Law Section.

Investment Securities

The term "investment securities" includes a wide range of investment products, but for our present purposes we can think in terms of stocks and bonds.

I will tend to limit my remarks to shares or stock, because the law of securities transfers has mainly evolved around share transfers. When we get to deal with the current legal situation, you will see how the same principles apply to bonds and other types of investment securities.

Some History

The law of securities transfers has historically been shaped by the demands and the circumstances of the securities markets. This is not to say that the law has kept pace with changes in the securities markets. It has not. Law reform in this area has been almost wholly reactive.

APPENDIX D

The Canadian statute and common law relating to securities transactions have been patterned closely after U.S. law. Canadian statutes in this area have always been some years behind U.S. law. In turn, the U.S. law has generally trailed behind events and practices within their securities industry. The history of U.S. law in this area thus provides the basic foundation of current Canadian law.

Negotiability of Stock Certificates

Towards the latter part of the 19th century, the U.S. securities markets, and particularly the New York Stock Exchange were very active. At that time, securities transactions were generally settled face to face, by the transfer of a suitably endorsed security certificate in exchange for the purchase price. If the security in question happened to be a negotiable instrument, such as a bearer bond, then the transaction presented no particular legal problem because the instrument itself was the physical embodiment of the debt, and the purchaser acquired special status as a holder in due course upon delivery of the instrument.

What if the security was a stock certificate? At that time, the common law was abundantly clear that stock certificates were not negotiable instruments, and the only way to legally transfer shares was by registration on the books of the issuer. The certificate was a vital part of this process because it had to be surrendered to the issuer in order to register a transfer, but the registration process took time, and until the transfer was finally registered, purchasers could not be sure that their claim to the shares would not be defeated by an adverse claimant. Obviously, under these circumstances a purchaser would be reluctant to make payment until registration occurred, while the vendor would not likely surrender the certificate until the purchase price was paid. This presented a definite legal problem and a major impediment to the free trading of certificates in the stock market.

The solution was for those active in the market to treat stock certificates, endorsed in blank, exactly as if they were negotiable instruments, delivering them from hand to hand without bothering with registration. This practice relied heavily upon the equitable doctrine of estoppel to preclude any adverse claim the registered owner might assert.

The law finally caught up with commercial practice in 1909 when the National Conference of Commissioners on Uniform State Laws approved the Uniform Stock Transfer Act, which was subsequently adopted, more or less promptly, by all 50 states. Section 1 of the Uniform Stock Transfer Act provided that title to a certificate and to the shares represented thereby could be transferred **only by delivery of the certificate**, even where the issuer or the certificate itself provided that the shares were transferable only on the books of the corporation or by its registrar or transfer agent.

With the advent of the Uniform Stock Transfer Act, therefore, the stock certificate acquired certain essential attributes of negotiability, if not full-fledged status as a negotiable instrument. This distinction, and any possible debate over its implications, came to an end with the introduction of the Uniform Commercial Code ("UCC") in 1952 and its subsequent adoption by all 50 states. Section 8-105 of the UCC has always specifically provided that stock certificates are negotiable instruments, and Article 8 generally sets out mechanisms for the transfer and pledge of stock certificates (and other securities) that differ in a number of ways from the law applicable to other types of negotiable instruments, but still share the same basic concept of negotiability. As such, they rely upon delivery concepts to effect transfers.

Transfers of investment securities in accordance with Article 8 of the UCC worked satisfactorily for a time, but as trading volumes increased, problems arose with the requirement of physical delivery of security certificates. The problems were not legal, but technological.

The Paperwork Crisis

Let's look at a typical, if somewhat simplified, securities transaction in 1965. Investor A decides to sell some shares. She retrieves the share certificate, registered in her name, from her safe deposit box, endorses it and hands it over to her broker. The broker offers to sell the shares on the Toronto Stock Exchange, and at the same time registers a transfer of the shares into the name of the broker. Investor B has instructed his broker to buy these shares, and the transaction is made through the TSE. In order to settle the transaction, B's broker must pay the purchase price to A's broker, and A's broker will endorse and deliver the share certificate to B's broker. B's broker would then register a transfer of the shares to B, and deliver the registered certificate to B so that he could put the certificate in his safe deposit box. Sometimes, both A and B would permit their respective brokers to hold certificates on their behalf. This simplified things considerably, but most trades still had to be settled by the delivery of certificates between brokers.

By the late 1960's, there was a startling contrast between the way trades were executed and the way they were settled. Typically, orders were transmitted verbally or electronically, often with the aid of computers. The clearing process might succeed in eliminating settlement of just over half of the total trades on any given day, leaving almost half to be settled by the physical movement of certificates. Each settlement would involve the certificate undergoing approximately 14 separate, distinct manual processes plus as many as 6 separate journeys between various locations. In the case of one large brokerage firm, it was noted that 210 pieces of paper had to be prepared and moved from point to point in order to consummate a single transaction from the time when the customer entered an order until final disposition of the stock certificate.

APPENDIX D

In 1967 the average daily trading volume on the NYSE was 10.1 million shares, more than double that of 1964. The settlement system could not cope with this volume. The result has become known as "The Paperwork Crisis". Delivery of certificates in settlement of trades was supposed to take 5 days. Instead, it took up to 6 months. Enormous backlogs of unsettled trades built up, and normal settlement was not restored for several years. A substantial number of large and small broker-dealer firms became insolvent. Congress felt compelled to introduce legislation creating a fund to compensate investors for losses sustained as a result of broker-dealer insolvencies (The *Securities Investor Protection Act of 1970*).

The paperwork crisis led to a great deal of analysis and commentary. By 1971, the security certificate had been identified as one of the major causes of the paperwork crisis, and there was a broad consensus that the certificate was obsolete and should be eliminated. Committees were established and in 1977 comprehensive revisions to Article 8 of the UCC were adopted dealing with the transfer and pledge of uncertificated investment securities. At the same time, the Model Business Corporation Act was amended to authorize the issuance of uncertificated stock.

It is significant to note that, by the time the 1977 revisions were adopted, additional technological changes had occurred within the securities industry that altered the situation drastically.

One significant technological advance was the Continuous Net Settlement system. It dramatically reduced the proportion of trades that required settlement. More significant was the centralized securities depository. The centralized securities depository offered a practical solution to the problem of delivering security certificates.

How A Depository Works

A securities depository can only be used by designated "participants", usually brokers, banks, and trust companies, who meet certain standards of financial strength, operational capability, and integrity. These participants each hold large quantities of securities, either on their own behalf or for their customers. The participants transfer securities to the depository by delivering the certificates, suitably endorsed. The depository registers the securities in the name of its nominee, stores the new certificates, and credits each participant's account with the securities so deposited. When one participant buys securities from another participant, the trade can be settled by the depository debiting the selling participant's account and crediting the purchasing participant's account. This is called "book-entry delivery" even though there is no book involved. The depository uses sophisticated computer records to keep track of its accounts.

The advantages offered by modern depositories are enormous. Although not all transactions can be settled through book-entry delivery, a large proportion of transactions are settled in this way. Recall that in 1967, 10 million share daily average trading volumes brought the industry to its knees. Now, daily trading volumes regularly exceed 100 million shares, and in October of 1987 the NYSE experienced consecutive 600 million share trading sessions without any serious settlement or delivery problems. Another advantage is the elimination of the risk attendant upon the physical movement of negotiable certificates.

Remarkably, the UCC did not have to introduce any amendments to deal with the operation of depositories. This was governed by §8-320, which had been added to the UCC in 1962, at a time when U.S. depositories were in their infancy. Today, the largest U.S. depository, the Depository Trust Company, holds securities valued at over $4 trillion and makes annual book-entry deliveries of securities valued at about $9 trillion.

The result has been a mass movement of securities into depositories. Few investors take actual custody of security certificates anymore. Large scale or active securities traders almost always hold securities through intermediaries, which intermediaries, in turn, often hold them in depositories. **This "immobilization" of certificates is one of the most important aspects of modern securities markets and a critical factor in the need for law reform in this area.**

Fungible Bulks

The use of fungible bulks is a key element of depository operations, and securities holding by any other intermediary.

Security certificates are fungible in that every certificate evidencing a share is no more or less valuable than any other certificate evidencing a similar share. In this regard, certificates are like dollar bills, or wheat. It has therefore been long established in securities transactions that any certificate of a given issue may be delivered in satisfaction of an obligation - there is no right to demand a particular certificate.

So, where a depository holds millions of certificates on behalf of its participants, or even where a brokerage firm holds a few hundred or thousand certificates for its customers, there is no segregation of certificates allocated to or identified with individual participants or customers. The certificates are held in a fungible bulk, or more precisely, a number of fungible bulks - one for each particular issue of securities.

It is important to note that, although the largest fungible bulks are those held by depositories, other intermediaries such as brokers also hold securities in fungible bulks.

The Canadian Depository For Securities, Limited ("CDS")

CDS was incorporated as a federal corporation in June of 1970. The original CDS objective was to put the holdings of all market participants into depository accounts so that transactions among participants would result merely in debit and credit entries. This fundamental objective evolved to encompass more specific aspects of the clearing and settlement of securities transfers, and other related issues, but the basic goal of CDS has remained unchanged.

CDS is owned by a number of Canadian Banks, Trust Companies, and members of the Investment Dealers Association, who are also its participants.

In 1976 CDS became the clearing agency for the Montreal Stock Exchange, and in the following year for the Toronto Stock Exchange. CDS did not actually operate as a securities depository until December of 1981. There is a distinction between the depository and clearing agency functions, but it is not important for purposes of this discussion.

Consistent with the history of depositories in the U.S., CDS' depository operations have grown rapidly. In December of 1988, the value of deposited securities was $93 billion. The current value of deposited securities exceeds $500 billion.

Canadian Legislation

Until relatively recently, in Canada, shares remained transferable only on the books of the issuing company, according to traditional Anglo-Canadian company law.

In 1965, Ontario appointed a Select Committee (known as the Lawrence Committee) to review its Corporations Act, signalling the first in a series of Canadian reform initiatives in this area. The Select Committee found that the transfer of shares under Ontario law was occurring very much in the same manner as in the U.S. in the late 1800's. Based upon the Committee's recommendations, Ontario introduced *The Business Corporations Act, 1970* (hereinafter "OBCA"), which came into force on January 1, 1971. It included provisions governing the transfer of securities that were modelled upon Article 8 of the UCC. Although the Act adopted the UCC concept of negotiability, it stopped short of specifying that securities are negotiable instruments, and it made a number of modifications to the UCC model.

At this same time, the federal government was re-examining the *Canada Corporations Act*. In 1967, a task force was appointed, headed by Robert Dickerson. In 1971, the Dickerson Report was produced. It criticized the modifications of the UCC model made by the OBCA, and advocated the

advantages of uniformity with the UCC. The Dickerson Report formed the basis for *The Canada Business Corporations Act*, which came into force in 1976.

Part VII of the CBCA, entitled "Security Certificates, Registers and Transfers", is patterned closely upon Article 8 of the UCC - much more closely than the OBCA had been. Section 48(3) of the CBCA specifically provides that security certificates are negotiable instruments, and CBCA Part VII establishes virtually the same negotiability framework as that found in Article 8 of the UCC.

In light of the aftermath of the paperwork crisis, it is remarkable that the only significant difference between Part VII of the CBCA and Article 8 of the UCC is that the CBCA did not include any of the 1962 revisions to Article 8 dealing with the operations of securities depositories, even though such provisions were recommended by the Dickerson Report. One might have hoped or expected that parliament would demonstrate more awareness of current developments in the securities markets.

The CBCA was used as a model by a number of provinces in revising their corporate statutes. Alberta, Saskatchewan, Manitoba and Newfoundland subsequently adopted statutes containing provisions virtually identical to Part VII of the CBCA. Ontario revised the OBCA in 1982 to conform more closely to the CBCA provisions. The other Canadian provinces have corporate statutes that differ from the CBCA in varying degrees, but which could generally be categorized as having registration type Companies Acts. All those provinces with a Business Corporations Act have securities transfer provisions based upon some version of the American Uniform Commercial Code - Article 8. This is: Ontario, Alberta, Saskatchewan, Manitoba and Newfoundland. All these provinces except Ontario have provisions basically identical to the pre-1962 version of UCC Article 8. Amongst most provinces with registration type Companies Acts, such as B.C., there are no statutory provisions governing securities transfers - these are left to the common law and the articles of each company.

At present, only Ontario and Quebec have any statutory provisions dealing with transfers of securities held in depositories. B.C. has provisions in its PPSA allowing for book-entry pledges, but no statutory provisions for book-entry transfers. The Quebec provisions are contained in their *Securities Act*, and operate within a legislative framework significantly different from that which exists in Alberta. Because our work has been in response to a proposal for Alberta to enact amendments to the ABCA to make it similar to the Ontario statute, we have focussed on the operation of the provisions of those two Acts, and particularly the current OBCA. We will see later that our conclusions are relevant to all Canadian jurisdictions, regardless of what type of corporate statute they use.

APPENDIX D

The 1970 OBCA included section 91, which was practically identical to then UCC §8-320. Both provisions operated by deeming transfers and pledges recorded on the books of a clearing corporation to have the effect of delivery of a suitably endorsed security certificate. Thus, book entries became compatible with other provisions of the OBCA and UCC which made delivery of a security certificate the key element of a transfer.

In 1982, the OBCA was substantially revised, bringing its securities transfer provisions much closer to the CBCA (and UCC Article 8) model of negotiability. Part VI of the OBCA, entitled "INVESTMENT SECURITIES", adopted the CBCA's definition of "security" and "bona fide purchaser", as well as the provision that a security is a negotiable instrument.

In 1986 the OBCA was further amended. Significant changes were made to Part VI. A definition of "uncertificated security" was introduced, similar to that used in the 1977 revisions to the UCC. The definitions of "security" and "bona fide purchaser" were amended. Section 85, dealing with book-entry transfers and pledges, was expanded considerably. There were also some consequential amendments to other definitions and sections.

There have been no substantive amendments to Part VI of the OBCA since 1986, although some wording changes were made as part of the 1990 revision and consolidation of all Ontario statutes. The OBCA provisions prior to the 1990 revision and consolidation are the model for amendments proposed by CDS for the ABCA in 1989.

Still, the current OBCA handles book-entry transfers by deeming them to have the effect of delivery of a security certificate, and deeming the transferee to be in possession of a certificate. This is essentially the same method as used by UCC §8-320 since 1962.

THE PROBLEM

The fundamental problem with the current law of securities transfers under the Business Corporations Acts (**Note: not just Ontario, but under ALL BCAs**) is with the nature of the property interest acquired by a purchaser when securities are held in a fungible bulk. To demonstrate this problem, we need to compare two different situations.

1. Investor A purchases 100 shares of X. Co. and allows Broker A to hold the certificate in an envelope with Investor A's name and the certificate number on it. The key element here is that a specific share certificate is "earmarked" and identifiable as the property of Investor A.

2. Investor A purchases 100 shares of Y. Co., but allows Broker A to hold them in a fungible bulk. Broker A may either keep a fungible bulk of non-earmarked certificates, or may keep them in the broker's account with CDS. In this case, according to all the BCAs, Investor A has acquired a **proportionate property interest ("PPI") in the fungible bulk.**

The property interest of a purchaser in a fungible bulk of securities is fundamentally different from the property interest of someone who acquires actual delivery or possession of a security certificate. This is so whether or not the purchaser is deemed to have acquired possession, or is a "good faith purchaser". The difference is that delivery and possession (by the broker, in this case) transfers tangible property: the earmarked certificate. The PPI in a fungible bulk is intangible property: a claim against another party.

The existing law in both Ontario and Alberta attempts to treat the PPI as an ownership interest in the securities that underlie the fungible bulk. This only works as long as the fungible bulk is always sufficient to meet the claims of everyone holding a PPI in it. If the fungible bulk is adequate, then the intangible claim against Broker A is every bit as valuable as ownership of a certificate, but if there is a shortfall in the fungible bulk, say in the event of Broker A's insolvency, and claimants are forced to rely upon their legal rights ("resort to law"), then the difference in the property interests becomes evident:

- With respect to the earmarked certificate, Investor A is the owner of the certificate. If the certificate is found amongst the property of the insolvent broker, it will be returned to Investor A. If it has been disposed of, then Investor A has a claim against the broker for 100 shares of X Co., which claim would entitle Investor A to a proportion of any X Co. shares held in fungible bulk by the broker.

- With respect to the PPI, Investor A's claim depends upon the status of the fungible bulk. Assume that Broker A had 5 clients, including Investor A, each of whom had a PPI supposedly valued at 100 shares of Y Co. Upon insolvency, Broker A only holds 250 shares of Y Co., having fraudulently disposed of some shares. The apparent result is that each client's PPI is worth 50 shares. But actually, the situation is much more complex than this. Assume that at the time Investor A supposedly purchased 100 shares, Broker A actually held no shares of Y Co., but later acquired some at the request of other clients. What property interest did Investor A acquire? Arguably, it was a PPI in nothing, so that Investor A may not be entitled to any portion of the Y Co. shares held by the broker upon insolvency.

In our report, we deal with some detailed examples (about 5 pages) of situations that could arise in a resort to law situation. It is difficult or impossible to determine priorities among competing claimants. To the extent that such priorities can be determined, they are random and fortuitous. And despite the

lack of certainty in such proportionate property interests, investors have no practical means of verifying their interests. There is a law review article from the U.S. that performs a similar analysis of a more complex fact situation, and takes 120 pages to reach essentially the same conclusion.[1]

A useful analogy is to compare the existing legal regime with a system that treats bank depositors as having a property interest in the money deposited with the bank. Such a system can work as long as there is no need to sort through property interests, such as if the bank becomes insolvent. In that situation, the system cannot deal rationally with competing claimants.

Pledges

Essentially the same considerations apply in respect of pledges. The OBCA uses deemed possession to perfect a pledge of a PPI in a fungible bulk. Again, this works only as long as there is never any shortfall in the fungible bulk. If there is, and claimants are required to resort to law, exactly the same problems arise.

Why The System Has Worked For So Long

Despite the problems we have described, there is no escaping the fact that the existing system works very well, and that, in Canada at least, there have been no significant manifestations of these problems. This is because nobody ever has to "resort to law". There has never been a depository insolvency in Canada or the U.S., and although there have been a number of broker insolvencies, the customers of such brokers have been compensated by investor protection funds. The Canadian Investor Protection Fund has been in operation since 1969. Not coincidentally, there have been no court decisions dealing with client claims in broker bankruptcy situations since then. It was apparent back in 1969 that the law had a great deal of difficulty coping with competing customer's claims in situations where insolvent brokers held securities in fungible bulks.

The Need For Reform

The current lack of symptoms does not detract from the need to reform the law in this area. The flaws in the existing law create an unacceptable degree of uncertainty. In the U.S., this uncertainty has produced some alarming symptoms. It caused lenders to restrict credit in critical situations (October 1987 and with Drexel, Burnham, Lambert). The situation is sufficiently serious that Congress

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[1]See C.W. Mooney Jr., "Beyond Negotiability: A New Model For Transfer and Pledge of Interests in Securities Controlled By Intermediaries" (1990) 12 Cardozo L.R. 307.

has authorized the Securities and Exchange Commission, under certain conditions, to adopt rules overriding state law concerning transfers and security interests in investment securities.

This has caused the National Conference of Commissioners on Uniform State Laws to form a drafting committee to revise UCC Article 8. They are moving very quickly, and I have just learned that they expect to adopt comprehensive revisions to Article 8 at their meeting next summer.

We should emphasize that the flaws that we have identified in the Canadian system, and which have been recognized in the U.S. system, are not cause for alarm, nor should they be seen as a threat to investor confidence. **The essential point is that the system can be significantly improved through reform, and that is what we propose.**

The Key Element of Reform

The key element of reform being considered for the revised UCC Article 8, and which we have recommended, is the replacement of the PPI in a fungible bulk with a **Securities Entitlement**, which is a unique property interest of someone who holds securities through an intermediary. As we have said, the problem with the existing system is that it tries, and fails, to treat these transfers as transfers of interests in the underlying fungible bulk of securities. That is unrealistic. It is realistic to recognize that the true property interest is a **special claim against the intermediary**.

The SE would be subject to comprehensive provisions defining the obligations of intermediaries to their account holders, and the rights of such account holders in the event of default by the intermediary.

The law regarding transfers effected by actual delivery of certificates would remain virtually unchanged.

The use of the SE has the potential to solve a number of long-standing problems, common to both Canada and the U.S.:

- it allows for predictable and equitable treatment of claims upon insolvency (this includes claims of secured creditors)

- it provides some flexibility to encompass trading in derivatives and other property which may or may not meet the strict definition of investment securities

The use of the SE also provides an opportunity to eliminate some other problems in this are that are peculiar to Canada, which I will review briefly.

SITUS

Securities depositories raise some interesting problems with situs. These problems actually existed on a smaller scale before the advent of depositories, but the use of depositories has amplified them.

First, consider the location of property for purposes of taxation. This was once a hot topic because of provincial succession duties, but it is still relevant to the constitutional limits of provincial taxation. If you live in Edmonton and are holding shares through an Edmonton broker, who in turn holds them with CDS, where is your property? The short answer: nobody knows.

It is not at all certain that your property is the shares. It may be only a beneficial interest in a trust, or even a simple debt. If we assume that your property is the shares, then what? Formerly, the test for determining situs of shares involved examining where they would most likely be dealt with as against the issuer, which meant determining where all the various transfer agents were located, and where the certificates were located, and then trying to predict which transfer agent might be used. That test did not contemplate modern securities holding practices or the existence of depositories. If it were to be used today, you may be startled to find that your shares are in Toronto, or Montreal, or New York, or Chicago.

A more concrete example of problems with situs arises with the pledge of securities held in a depository. According to s.5(1) of the Alberta PPSA, the law applicable to certain important aspects of a pledge is that of the jurisdiction where the collateral is located at the time the security interest attaches. This means the location of the security certificate. But with a security held by a depository, there is no identifiable certificate, and most depositories store certificates in several different jurisdictions. Which jurisdiction's laws apply to the pledge? There is no clear answer. B.C. recently added a provision to their PPSA (s.5(2)) stating that "...a security with a clearing agency is situated where the records of the clearing agency are kept." This is an improvement but it still seems unclear, because most depositories maintain offices and computer records in several jurisdictions.

These problems would be eliminated by use of the SE, because the property would be located at the place where the SE is enforceable against the intermediary. For a retail investor, this would be the local office of the broker, which would also be where the broker is subject to government regulation. This is sensible and easily determined.

Constitutional Jurisdiction

Use of the SE can also eliminate constitutional issues relating to jurisdiction over transfers of certain securities. This is particularly important with respect to debt securities such as government bonds and other instruments which may be subject to the *Bills of Exchange Act*. It also applies to securities issued by CBCA corporations. It is unclear whether provincial legislation can govern the transfer of such securities. I notice that the Uniform Law Section has been considering some work on the subject of negotiable instruments. At the present time, many negotiable instruments that originate as payment instruments are the subject of very active secondary trading in the money market, where the mechanics of transfer tend to be those used for conventional investment securities. There are potential problems with this, although no one is anxious to raise these problems.

The SE offers an opportunity to resolve them by, in effect, eliminating secondary trading in such securities. Instead of trading in government bonds or promissory notes, these instruments would be immobilized in a depository and thereafter, all trading would be in SEs. With respect to securities issues by CBCA corporations, the CBCA would still appear to govern the initial transfer to the depository, but this situation could be ameliorated by uniform transfer provisions.

Other Elements of Reform

We have recommended revisions to the PPSA to accord with the pending revisions to UCC Article 9, and that other Canadian jurisdictions consider uniform provisions. The existing PPSA provisions are patterned after UCC Article 9, and they also rely upon the concept of delivery and possession for perfection of a security interest. Under a reformed system, "control" would perfect a security interest in a SE. In this area we must recognize that the parties with the greatest interest in effective methods of attaching security interests to investment property are 1) clearing agencies, such as CDS, who daily carry enormous financial obligations to settle trades which must be secured by the securities being traded; and 2) the major banks who provide financing secured against the inventory of brokers. I am not going to get into a detailed review of the proposed revisions to UCC Article 9, but I would point out that a representative of CDS has indicated that the proposed revisions would be very beneficial to CDS. As I mentioned earlier, it was concern by U.S. lenders over secured financing that started the U.S. reform initiative.

The Need for Uniformity

As with any other area of commercial law, the advantages of uniformity are obvious. The proposals by CDS for amendments to the ABCA recognize the need for uniform securities transfer legislation across Canada, **and** the need for that legislation to be compatible (i.e. as uniform as possible) with U.S. legislation in this area.

The advantages of uniformity with the U.S. have been recognized ever since the first comprehensive statutory provisions governing securities transfers were enacted in Canada in the OBCA 1970. Our securities industry has always been patterned after its U.S. counterpart. The U.S. market is certainly the largest and probably the most efficient in the world, and it is right next door. Why would we now change our views on uniformity and pursue a different course, especially when there is a clear need for reform, and a number of obvious advantages available from that reform?

I think it is fair to say that everyone who has ever addressed the subject agrees that Canada should have uniform provisions governing the transfer of investment securities. The modern securities marketplace is global, and there is virtually no difference to an Edmonton investor trading in securities on Toronto, New York, London or Tokyo. In fact, all the major securities markets now compete with one another on a global level. For a number of years now, organizations like the Group of Thirty have been working towards harmonizing systems for international clearance and settlement of securities transactions. No jurisdiction can afford to be the odd one out.

The profound changes in the securities markets are apparent if we look at the current structure of Canadian legislation governing such transfers. This legislation is found in the Business Corporations Acts, reflecting the fact that, until fairly recently, corporate equity securities were the major component of the markets. That has changed. Debt securities, particularly government debt securities, are now by far the largest component, and derivatives are currently one of the fastest growing sectors of the markets. For this reason we have recommended that provisions regarding transfers of investment securities be removed from the ABCA and placed in a separate statute. For those provinces with BCAs, this is merely sensible, but for all provinces it is an opportunity for uniformity. For example, B.C., Ontario and Quebec could all have uniform statutes governing this particular subject, notwithstanding their differing corporate statutes.

Shareholder Communications

I should briefly mention this subject. Any close examination of the law of securities transfers raises issues with respect to shareholder communications. The massive shift of certificates into the hands of intermediaries has resulted in the securities registers of issuers not accurately reflecting the beneficial ownership of securities.

A general examination of the ABCA and other comparable corporations statutes, with particular attention to those provisions relating to the maintenance of a securities register and access to corporate records, reveals a clear intention that issuers should be able to communicate with their shareholders and that shareholders should be able to communicate with one another in respect of matters relating to the affairs of the issuer corporation.

A number of procedures have developed which attempt to overcome the problems inherent in communicating through intermediaries. The Canadian Securities Administrators adopted *National Policy Statement No. 41 - Shareholder Communication*, effective March 1, 1988. This Policy sets out a certain procedure for the conveyance to non-registered shareholders of proxy-related materials delivered on behalf of issuers.

The Policy does not cover other proxy-related materials, take-over bid materials, issuer bids, rights offerings or other matters. For example, a shareholder wishing to solicit proxies from those whose securities are deposited with a depository has no formal means of communicating with such "beneficial shareholders". This seems to frustrate the intention of the legislation.

Section 79 of the *Securities Act* and s.147 of the ABCA obligate registrants or custodians to convey certain material to the beneficial owners of securities under certain circumstances, but these sections does not appear to be applicable to depositories.

CDS is under a contractual obligation to transmit proxy information, dividends, and other material received from issuers to its participants, and it must be said that CDS diligently complies with such obligation as well as with its duties under National Policy No. 41 - something that cannot be said about all intermediaries. There is an obvious need, however, to address the overall issue of shareholder communications and to significantly change either the method of communication or the relevant legislation so that the two are compatible.

Under the BCAs, it is not even clear who a "shareholder" is.

Our report acknowledges that dealing with problems of shareholder communication is a major undertaking, and will require reassessment of the role of shareholders in corporate governance.

Conclusion

It is evident that, especially with the pending reform of UCC Article 8, there is a need to address the Canadian law governing transfers of investment securities. This affords a double opportunity: 1) to significantly improve the law, and 2) to achieve uniformity in this area. For these reasons, we recommend the adoption of this subject by the Uniform Law Section.

APPENDIX E

(see page 35)

UNIFORM INTERCOUNTRY ADOPTION (HAGUE CONVENTION) ACT

This Act lays the groundwork for an enacting jurisdiction to implement the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. It includes the basic requirements of the Convention. It also points to matters that should be considered by an enacting jurisdiction, without setting out in detail what decisions should be made on those matters. For example, the accreditation and role of private adoption agencies may be treated differently by different provinces or territories within the limits of the Convention. Each jurisdiction will have to fit these terms into its existing legislation on the topics covered. The Uniform Law Conference did not consider itself competent to make judgements for each province and territory in Canada about how this should be done.

Definitions

s.1 (1) In this Act, "Convention" means the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption set out in the Schedule.

(2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention.

Comment: These are normal provisions for uniform statutes to implement conventions.

Request for extension of Convention

s.2 The (*Minister of or*) shall request the Government of Canada to declare in accordance with Article 45 of the Convention that the Convention extends to (*enacting jurisdiction*).

Comment: An enacting jurisdiction will name the minister responsible for the administration of the Act. In the normal course, the Act would take effect in an enacting jurisdiction when Canada's ratification of the Convention came into force (the first of the month following the expiry of three months after it deposits the instruments of ratification). Jurisdictions that enact the Act after Canada is a party will have the Convention apply to them a similar period after Canada notifies the depositary of the Convention (the Ministry of Foreign Affairs of the Netherlands) of their action.

An enacting jurisdiction will have to indicate to the Department of Justice of Canada whether to make for that jurisdiction any of the declarations allowed by the Convention. Articles 22(2) and (4), 23, 25 and 45 should be reviewed for this purpose. While the Convention does not allow any reservations, Canada or an enacting jurisdiction may wish to consider an "interpretive declaration" on provisions of particular interest, such as customary adoptions among aboriginal peoples. A common position on such a declaration could be developed after consultation with all affected parties, including aboriginal organizations.

As noted later, the Convention also requires Contracting States to provide certain specific information to the depositary or to the Permanent Bureau of the Hague Conference, and this information must be provided by the enacting jurisdictions to the federal government for transmission abroad. See Articles 13 and 22(3).

Convention is law

s.3 (1) Starting on the date the Convention enters into force in respect of (*enacting jurisdiction*) as determined by the Convention, the Convention is in force in (*enacting jurisdiction*) and its provisions are law in (*enacting jurisdiction*).

Application where conflict

(2) The law of (*enacting jurisdiction*) applies, subject to the regulations, to an adoption to which the Convention applies but, where there is a conflict between the law of (*enacting jurisdiction*) and the Convention, the Convention prevails.

Comment: Under subsection (1), the Convention's rules will apply only to adoptions between the enacting jurisdiction and other countries that are parties to the Convention, as it comes into force between them (Article 41). These adoptions will involve a child habitually resident in a contracting state and adoptive parents habitually resident in another contracting state (one of these contracting states being the enacting jurisdiction). Other adoptions will continue to be governed by the existing law of the enacting jurisdiction. See Article 2 of the Convention.

Subsection (2) underlines the importance of verifying how the Convention's rules will affect existing local rules. The latter rules will continue to apply except to the extent that they are incompatible with the Convention.

Central Authority

s.4 The (*Minister of or*) is the Central Authority for (*enacting jurisdiction*) for the purpose of the Convention.

Comment: The role of the Central Authority to be designated under the Convention by each province or territory is the key to much of the practical operation of the Convention. Its duties are not described in detail in this uniform Act, because they are set out in the Convention itself, especially in Chapters III and IV. This Act deals only with the options for allocating the functions of the Central Authority where the Convention allows those functions to be delegated.

Delegation to accredited bodies

s.5 (1) Where the (*Minister of or*) so authorizes, the functions of a Central Authority under Chapter IV of the Convention may, to the extent determined by the (*Minister of or*), be performed by public authorities or by bodies accredited under Chapter III of the Convention.

Other bodies or persons

(2) Where the (*Minister of or*) so authorizes, the functions of a Central Authority under Articles 15 to 21 of the Convention may, to the extent determined by the (*Minister of or*), be performed by a person or body who meets the requirements of subparagraphs (a) and (b) of paragraph 2 of Article 22 of the Convention.

Comment: This section spells out the limits of the role of public and private agencies in intercountry adoptions under the Convention. Public bodies and regulated not-for-profit agencies accredited under Chapter III of the Convention, notably Articles 10 and 11, may carry out all the functions of Central Authorities under Chapter III and under Chapter IV, which contains the main duties of the Central Authorities.

It will be noted that neither the Convention nor this Act gives the enacting jurisdiction legal authority to create or accredit public or private agencies, or sets procedures for their accreditation. Such matters need to be dealt with by local law. Many jurisdictions will already have such rules for this purpose.

Other bodies, notably for-profit agencies, and individuals may carry out the functions of Central Authorities under Chapter IV if they meet the

standards of clauses 22(2)(a) and (b). They must also be "subject to the supervision of the competent authorities of that State", Art. 22(2).

An enacting jurisdiction that wishes to authorize for-profit bodies or individuals to act must inform the federal Department of Justice of this wish, and provide a list of the names and addresses of these bodies and persons. The Department will then make the appropriate declaration under Article 22(2) to the depositary, namely the Ministry of Foreign Affairs of the Netherlands, and submit the list of names and addresses to the Permanent Bureau of the Hague Conference. The list must be kept up to date. Provincial and territorial officials will have keep in close touch with the federal government to avoid undue delay in submitting the updated lists to the Hague.

Some countries of origin may refuse to allow children from those countries to be adopted by processes involving for-profit agencies or individuals (Article 22(4)). Enacting jurisdictions should ensure that the authorized agencies and prospective adoptive parents are aware of this.

One of the basic functions of a Central Authority under the Convention is the preparation of reports on the prospective adoptive parents and on the child to be adopted. These reports must be done by the Central Authority itself or public or not-for-profit agencies (Article 22(5)).

Authorization of foreign accredited bodies

s.6. Where the (*Minster of or*) so authorizes, a body accredited in a Contracting State may act in (*enacting jurisdiction*).

Comment: This gives the responsible minister the authority to approve foreign not-for-profit [but not profit-making] bodies, other than the foreign Central Authority, to work in the enacting jurisdiction on intercountry adoptions. Article 12 of the Convention requires that for such bodies to act, they must be approved by the authorities in both countries.

Accredited bodies acting abroad

s.7. The (*Minister of or*) may authorize a body accredited in (*enacting jurisdiction*) to act in a Contracting State.

Comment: This is the converse of the previous section. It allows the responsible minister to authorize local accredited bodies to operate abroad, if the foreign country has so authorized them as well.

Access to information

[s.8. A child adopted pursuant to the Convention has, to the extent permitted by the law of (*enacting jurisdiction*), a right of access to information concerning the child's origin that is held in (*enacting jurisdiction*).]

Comment: This right to information is set out in Article 30 of the Convention. That article requires Contracting States to preserve information about the child, his or her family and their medical history. The accessibility of this information is subject to limits prescribed by local law (Article 30(2)) and its use subject to rules set out in Article 31.

This section is in square brackets because it is not strictly necessary for the implementation of the Convention, as it repeats what would be the law in any event once the Convention comes into force in the enacting jurisdiction. It was added because some enacting jurisdictions might wish to put this often sensitive issue directly in the public eye rather than having the rule simply remain among the other provisions of the Convention.

Publication of date

s.9 The (*Minister of or*) shall publish in the Gazette the date the Convention comes into force in (*enacting jurisdiction*).

Comment: This is the usual provision for uniform statutes to implement conventions.

Regulations

s.10. The (*Lieutenant Governor in Council*) may make regulations necessary to carry out the intent and purpose of this Act and, without limiting the generality of the foregoing, may

(a) limit or vary the application of the law of (*enacting jurisdiction*) to an adoption in (*enacting jurisdiction*) to which the Convention applies; and

(b) designate the competent authority for any provision of the Convention.

Comment: Regulations may be thought desirable, or may be necessary under existing law of the enacting jurisdiction, to designate public bodies or to accredit private bodies to act under the Convention, or to do other matters to carry it out.

Clause (a) allows the enacting jurisdiction to tailor by regulation its existing adoption laws for intercountry adoptions under the Convention, to the extent that making the Convention part of the law does not do so already. Jurisdictions that would prefer to amend these laws by legislation rather than by regulation may do so by adding provisions starting at s. 11 of this Act.

Clause (b) allows for the designation of competent authorities. Enacting jurisdictions will have to decide under Article 36(c) which bodies should be designated to carry out the functions that the Convention assigns to "competent authorities". See for example Articles 4, 5, 11(a), 22(2), 23, 30, 33, 34 and 35.

For example, Article 23(1) of the Convention speaks of adoptions being certified by competent authorities. Article 23(2) obliges a contracting state to inform the depositary of the "identity and functions" of these authorities. As a result, an enacting jurisdiction will have to give this information to the federal Department of Justice, and notify it of any changes to the list.

Another example: the for-profit bodies or persons that may be allowed to carry out some of the functions of the Central Authority are to be supervised by "competent authorities" under Article 22(2).

Amending existing laws

s.11. (*Some jurisdictions may prefer to amend existing laws instead of exercising the authority in clause 10 (a).*)

Comment: If local laws are not expressly changed by the Convention but the enacting jurisdiction thinks they should be modified to suit Convention adoptions, this section is available. Clause 10(a) authorizes this to be done by regulation, if the enacting jurisdiction prefers to proceed in that way.

It will be noted that the Convention provides minimum rules to govern intercountry adoption. Jurisdictions that implement the Convention are free to enact stricter rules on the subject if they are consistent with the Convention.

Proclamation

s.12. (*Proclamation section*)

Comment: Some jurisdictions have legislation implementing a convention come into force on Royal Assent, with the understanding that

the law has no effect until the convention comes into force for that jurisdiction. Other jurisdictions prefer to wait and proclaim the legislation in force on the day the convention comes into force, once that day is known. In either event the public has notice under s. 9 of the date that the convention becomes the law of the enacting jurisdiction.

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FINAL EDITION

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DE DROIT INTERNATIONAL PRIVÉ

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DIX-SEPTIÈME SESSION

SEVENTEENTH SESSION

ACTE FINAL

FINAL ACT

LA HAYE, LE 29 MAI 1993
THE HAGUE, 29th MAY 1993

APPENDIX E

CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

The States signatory to the present Convention,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,

Recognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin,

Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.

Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the *United Nations Convention on the Rights of the Child*, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986),

Have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;

b to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;

c to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

Article 2

1 The Convention shall apply where a child habitually resident in one Contracting State ('the State of origin') has been, is being, or is to be moved to another Contracting State ('the receiving State') either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

2 The Convention covers only adoptions which create a permanent parent-child relationship.

Article 3

The Convention ceases to apply if the agreements mentioned in Article 17, sub-paragraph *c*, have not been given before the child attains the age of eighteen years.

CHAPTER II – REQUIREMENTS FOR INTERCOUNTRY ADOPTIONS

Article 4

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –

a have established that the child is adoptable;

b have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;

c have ensured that

(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,

(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,

(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and

(4) the consent of the mother, where required, has been given only after the birth of the child; and

d have ensured, having regard to the age and degree of maturity of the child, that

(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,

(2) consideration has been given to the child's wishes and opinions,

(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and

(4) such consent has not been induced by payment or compensation of any kind.

Article 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State –

a have determined that the prospective adoptive parents are eligible and suited to adopt;

b have ensured that the prospective adoptive parents have been counselled as may be necessary; and

c have determined that the child is or will be authorized to enter and reside permanently in that State.

CHAPTER III – CENTRAL AUTHORITIES AND ACCREDITED BODIES

Article 6

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

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

Article 7

1 Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.

2 They shall take directly all appropriate measures to –

a provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;

b keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

Article 8

Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

Article 9

Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to –

a collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;

b facilitate, follow and expedite proceedings with a view to obtaining the adoption;

c promote the development of adoption counselling and post-adoption services in their States;

d provide each other with general evaluation reports about experience with intercountry adoption;

e reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

Article 10

Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.

Article 11

An accredited body shall –

a pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;

b be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and

c be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.

Article 12

A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorized it to do so.

Article 13

The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law.

CHAPTER IV – PROCEDURAL REQUIREMENTS IN INTERCOUNTRY ADOPTION

Article 14

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

Article 15

1 If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.

2 It shall transmit the report to the Central Authority of the State of origin.

Article 16

1 If the Central Aut ority of the State of origin is satisfied that the child is adoptable, it shall –

a prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;

b give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;

c ensure that consents have been obtained in accordance with Article 4; and

d determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.

2 It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.

Article 17

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if –

a the Central Authority of that State has ensured that the prospective adoptive parents agree;

b the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;

c the Central Authorities of both States have agreed that the adoption may proceed; and

d it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorized to enter and reside permanently in the receiving State.

Article 18

The Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.

Article 19

1 The transfer of the child to the receiving State may only be carried out if the requirements of Article 17 have been satisfied.

2 The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents.

3 If the transfer of the child does not take place, the reports referred to in Articles 15 and 16 are to be sent back to the authorities who forwarded them.

Article 20

The Central Authorities shall keep each other informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

Article 21

1 Where the adoption is to take place after the transfer of the child to the receiving State and it appears to the Central Authority of that State that the continued placement of the child with the prospective adoptive parents is not in the child's best interests, such Central Authority shall take the measures necessary to protect the child, in particular –

a to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care;

b in consultation with the Central Authority of the State of origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; an adoption shall not take place until the Central Authority of the State of origin has been duly informed concerning the new prospective adoptive parents;

c as a last resort, to arrange the return of the child, if his or her interests so require.

2 Having regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken under this Article.

Article 22

1 The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.

2 Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who –

a meet the requirements of integrity, professional competence, experience and accountability of that State; and

b are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.

3 A Contracting State which makes the declaration provided for in paragraph 2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.

4 Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with paragraph 1.

5 Notwithstanding any declaration made under paragraph 2, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1.

CHAPTER V – RECOGNITION AND EFFECTS OF THE ADOPTION

Article 23

1 An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph *c*, were given.

2 Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.

Article 24

The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

Article 25

Any Contracting State may declare to the depositary of the Convention that it will not be bound under this Convention to recognize adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2.

Article 26

1 The recognition of an adoption includes recognition of

a the legal parent-child relationship between the child and his or her adoptive parents;

b parental responsibility of the adoptive parents for the child;

c the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.

2 In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognized, rights equivalent to those resulting from adoptions having this effect in each such State.

3 The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognizes the adoption.

Article 27

1 Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognizes the adoption under the Convention, be converted into an adoption having such an effect –

a if the law of the receiving State so permits; and

b if the consents referred to in Article 4, subparagraphs *c* and *d*, have been or are given for the purpose of such an adoption.

2 Article 23 applies to the decision converting the adoption.

CHAPTER VI – GENERAL PROVISIONS

Article 28

The Convention does not affect any law of a State of origin which requires that the adoption of a child habitually resident within that State take place in that State or which prohibits the child's placement in, or transfer to, the receiving State prior to adoption.

Article 29

There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs *a* to *c*, and Article 5, sub-paragraph *a*, have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.

Article 30

1 The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.

2 They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

Article 31

Without prejudice to Article 30, personal data gathered or transmitted under the Convention, especially data referred to in Articles 15 and 16, shall be used only for the purposes for which they were gathered or transmitted.

Article 32

1 No one shall derive improper financial or other gain from an activity related to an intercountry adoption.

2 Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.

3 The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

Article 33

A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.

Article 34

If the competent authority of the State of destination of a document so requests, a translation certified as being in conformity with the original must be furnished. Unless otherwise provided, the costs of such translation are to be borne by the prospective adoptive parents.

Article 35

The competent authorities of the Contracting States shall act expeditiously in the process of adoption.

Article 36

In relation to a State which has two or more systems of law with regard to adoption applicable in different territorial units –

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b any reference to the law of that State shall be construed as referring to the law in force in the relevant territorial unit;

c any reference to the competent authorities or to the public authorities of that State shall be construed as referring to those authorized to act in the relevant territorial unit;

d any reference to the accredited bodies of that State shall be construed as referring to bodies accredited in the relevant territorial unit.

Article 37

In relation to a State which with regard to adoption has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 38

A State within which different territorial units have their own rules of law in respect of adoption shall not be bound to apply the Convention where a State with a unified system of law would not be bound to do so.

Article 39

1 The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

2 Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the ..... day of ..... 19.., in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Seventeenth Session and to each of the other States which participated in that Session.

C The following Decision –

The Seventeenth Session of the Hague Conference on private international law;

Considering that the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* will apply to children habitually resident in the Contracting States under the circumstances described in Article 2 of the Convention;

Concerned that refugee children and other internationally displaced children be afforded the special consideration within the framework of this Convention that their particularly vulnerable situation may require;

Considering the consequent need for further study and possibly the elaboration of a special instrument supplementary to this Convention;

Requests the Secretary General of the Hague Conference, in consultation with the United Nations High Commissioner for Refugees, to convoke in the near future a working group to examine this issue and make specific proposals which might be submitted to a Special Commission of the Hague Conference to ensure appropriate protection of these categories of children.

E The following Wish –

The Seventeenth Session,

Considering that the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* provides –

a in Article 4, sub-paragraph *c*, that adoptions under the Convention shall take place only if the competent authorities of the State of origin of the child have ensured that the required consents have been given in conformity with certain safeguards,

b in Article 23, paragraph 1, that the recognition of an adoption made under the Convention requires a document certifying that the adoption has been made in accordance with the Convention,

Convinced that the use of forms based on a uniform model by the competent authorities of the Contracting States may promote the proper and uniform application of those provisions,

Expresses the Wish that the Experts participating in the first meeting of the Special Commission convened in accordance with Article 42 establish recommended forms to that effect.

APPENDICE E

(see page 39)

LOI UNIFORME SUR L'ADOPTION INTERNATIONALE (CONVENTION DE LA HAYE SUR LA PROTECTION DES ENFANTS ET LA COOPÉRATION EN MATIÈRE D'ADOPTION INTERNATIONALE)

Le but de cette loi uniforme est de fournir à la province ou au territoire intéressé le moyen de mettre en oeuvre la Convention de La Haye de 1993 sur la protection des enfants et la coopération en matière d'adoption internationale. La loi uniforme se réfère aux conditions de base contenues dans la Convention. Le texte renvoit de plus aux questions de mise en oeuvre qui devront être examinées par chaque juridiction en vue de la mise en oeuvre, sans décrire en détails les décisions qui devront être prises sur chacune de ces questions. À titre d'exemple, l'agrément et le rôle des organismes privés aux fins de l'adoption pourront faire l'objet de décisions différentes d'une province à l'autre dans les limites du cadre fixé par la Convention. Chaque province ou territoire verra à adapter les éléments de la Convention de manière à les intégrer aux lois existantes dans sa juridiction. La Conférence sur l'uniformisation des lois ne s'estime pas autorisée à faire les choix aux lieu et place de chaque province ou territoire.

Définitions

1. (1) Dans la présente loi, le mot «Convention» s'entend de la Convention sur la protection des enfants et la coopération en matière d'adoption internationale dont le texte figure à l'Annexe.

(2) Les termes de la présente loi s'entendent au sens de la Convention.

Commentaires: Il s'agit là de dispositions usuelles dans toute loi uniforme relative à la mise en oeuvre de Conventions de droit international privé.

Requête en vue de l'application de la Convention

2. Le (Ministre de ou) demande au Gouvernement du Canada de déclarer, conformément à l'Article 45 de la Convention, que la Convention s'applique à (province ou territoire).

Commentaires: Chaque province ou territoire devra désigner le nom du Ministre responsable de l'application de la loi. Suivant le processus normalement suivi pour l'introduction d'une Convention, la loi de mise en oeuvre prendra effet lorsque la Convention entrera en vigueur pour le Canada, soit le premier jour du mois suivant l'expiration d'un délai de trois mois après le dépôt de l'instrument de ratification du Canada. Dans le cas des provinces ou territoires qui adopteront des lois de mise en

oeuvre après la ratification par le Canada, la Convention sera applicable à ces ressorts selon le même calcul relatif à l'entrée en vigueur de la Convention dès que le Canada aura notifié le dépositaire de la Convention (le ministère des Affaires étrangères des Pays-Bas) de ces mesures.

La province ou le territoire qui procède à la mise en oeuvre devra faire savoir au ministère fédéral de la Justice quelles seront les déclarations que le Canada devra produire au nom de la province ou du territoire, tel que le permet la Convention aux articles 22(4), 23, 25 et 45. En conséquence, chaque ressort devrait examiner ces articles afin de déterminer les déclarations qu'il souhaite adopter aux fins de l'application de la Convention sur son territoire. Même si la Convention ne permet pas la formulation de réserves à son application, le Canada ou une province ou un territoire pourrait souhaiter formuler une «déclaration interprétative» relative à l'application de la Convention à certaines catégories d'adoption, telles que les formes coutumières de garde au sein des peuples autochtones. Une position commune pourrait être articulée après consultation de toutes les parties intéressées, incluant les organisations autochtones.

Tel qu'il est mentionné plus loin, la Convention requiert des États contractants (Canada) que soient transmises certaines informations spécifiques au Bureau permanent de la Conférence de La Haye : voir les articles 13 et 22(3). En conséquence, les provinces et les territoires qui procéderont à la mise en oeuvre de la Convention devront faire parvenir ces informations au ministère fédéral de la Justice.

Force de loi de la Convention

3. (1) À compter de la date d'entrée en vigueur de la Convention dans (province ou territoire) en conformité avec la Convention, la Convention est en vigueur dans (province ou territoire) et ses dispositions y ont force de loi.

Conflit entre la loi et la Convention

(2) La loi de (province ou territoire) s'applique, sous réserve des règlements, à toute adoption à laquelle la Convention s'applique. En cas de conflit entre la loi de (juridiction de mise en oeuvre) et la Convention, celle-ci l'emporte.

Commentaires : Selon l'alinéa (1), les règles établies par la Convention vont s'appliquer aux seules adoptions qui vont impliquer la province

ou le territoire de mise en oeuvre et les autres pays parties à la Convention dès son entrée en vigueur entre ceux-ci: voir article 41 de la Convention. Ces adoptions concerneront un enfant habituellement résident dans un État contractant et des parents adoptifs habituellement résidents dans un autre État contractant (l'un des États contractants étant la province ou territoire de mise en oeuvre): voir article 2. Les autres cas d'adoption resteront soumises à la loi de la province ou du territoire de mise en oeuvre.

L'alinéa 2 de l'article 3 de la loi uniforme souligne l'importance de vérifier de quelle manière les règles de la Convention vont affecter les règles existantes dans la province ou le territoire. Celles-ci vont continuer de s'appliquer dans la mesure où elles ne seront pas incompatibles avec celles de la Convention.

Désignation de l'Autorité centrale

4. Le (Ministre de ou) est l'Autorité centrale dans (province ou territoire) pour l'application de la Convention.

Commentaires : Le rôle dévolu à l'Autorité centrale qui devra être désignée en vertu de la Convention dans chaque province ou territoire est crucial pour l'application pratique de la Convention. Les fonctions de l'Autorité centrale ne sont pas décrites en détails dans la loi uniforme puisque la Convention elle-même en fait mention aux Chapitres III et IV. La loi uniforme vise à prévoir les alternatives possibles aux fins de la détermination des fonctions de l'Autorité centrale dont la Convention prévoit la délégation.

Délégation aux organismes agréés

5. (1) Lorsque le (Ministre de ou) l'autorise, les fonctions de l'Autorité centrale en vertu du Chapitre IV de la Convention peuvent dans la mesure déterminée par (Ministre de ou) être exercées par des autorités publiques ou par des organismes agréés en vertu du Chapitre III de la Convention.

Autres organismes ou personnes

(2) Lorsque le (Ministre de ou) l'autorise, les fonctions de l'Autorité centrale en vertu des Articles 15 à 21 de la Convention peuvent dans la mesure déterminée par (Ministre de ou) être exercées par une personne ou un organisme qui remplissent les conditions des alinéas (a) et (b) du paragraphe 2 de l'Article 22 de la Convention.

Commentaires : Cet article renvoie aux délimitations des rôles entre les organismes publics et privés dans le processus de l'adoption prévu par la Convention. Les autorités publiques et les organismes privés (agences) à but non lucratif agréés en vertu du Chapitre III de la Convention, notamment les articles 10 et 11, peuvent remplir toutes les fonctions dévolues aux Autorités centrales prévues au Chapitre III ainsi que celles prévues au Chapitre IV qui contient les principales fonctions reliées à la procédure de l'adoption.

Il est à noter que rien dans la Convention ni la loi uniforme ne confère à la province ou au territoire de mise en oeuvre le pouvoir nécessaire pour créer ou agréer les organismes publics ou privés; rien dans la Convention ni la loi uniforme n'établit la procédure d'agrément. Ces questions devront être réglées par la loi interne. La plupart des ressorts ont déjà prévu des règles à ces fins.

D'autres organismes, telles des organisations à but lucratif, et certaines personnes pourront exercer les fonctions des Autorités centrales mentionnées au Chapitre IV si elles rencontrent les exigences prévues aux paragraphes (a) et (b) de l'article 22 de la Convention. Elles doivent cependant faire l'objet d'une supervision comme le précise le paragraphe introductif de l'article 22 (2) en ces termes : «sous le contrôle des autorités compétentes de l'État».

La province ou le territoire de mise en oeuvre qui souhaite autoriser des organismes à but lucratif ou des personnes à s'impliquer dans le processus de l'adoption devra informer le ministère fédéral de la Justice de cette décision et lui fournir la liste des organismes et personnes ainsi autorisés. Le ministère fédéral de la Justice prendra alors les dispositions aux fins de formuler la déclaration conformément à l'article 22 (2) de la Convention et d'en faire part au dépositaire de la Convention (le ministère desAffaires étrangères des Pays-Bas). Il devra également transmettre la liste des noms et des adresses des organismes et personnes ainsi autorisés au Bureau permanent de la Conférence de La Haye. Cette liste devra être mise à jour. Les autorités fédérales, provinciales et territoriales veilleront à collaborer afin d'éviter des délais inutiles dans la transmission de la liste mise à jour.

Les pays d'origine pourront refuser que leurs enfants soient adoptés dans le cadre d'un processus impliquant des organismes à but lucratif ou des personnes privées en adoptant une

déclaration à cette fin (article 22(4)). Les provinces et les territoires devront s'assurer que les organismes autorisés et les futurs parents adoptifs soient mis au courant de ce fait.

L'une des fonctions principales d'une Autorité centrale concerne l'établissement des rapports sur les futurs parents adoptifs ou encore sur les enfants à être adoptés. Ces rapports devront être établis sous la responsabilité de l'Autorité centrale elle-même ou de ses délégués, les organismes publics et les organismes agréés (article 22(5)).

Autorisation d'organismes agréés à l'étranger

6. Lorsque le (Ministre de ou) l'autorise, un organisme agréé dans un autre État contractant peut agir dans (province ou territoire).

Commentaires : Cet article confère au Ministre le pouvoir d'autoriser les organismes agréés dans un autre État contractant (mais non les organismes à but lucratif), et spécialement autorisés à opérer sur le territoire d'un autre État, à opérer dans le territoire du ressort de mise en oeuvre, comme le prévoit l'article 12 de la Convention.

Organismes agréés désirant opérer à l'étranger

7. Le (Ministre de ou) peut autoriser un organisme agréé dans (province ou territoire) pour agir dans un autre État contractant.

Commentaires : Cet article est l'inverse de l'article précédent. Il confère au Ministre le pouvoir d'autoriser les organismes agréés dans sa province ou son territoire à opérer à l'étranger dans les pays où ces organismes auront également reçu l'autorisation.

Accès à l'information

[8. L'enfant adopté conformément à la Convention a droit, sous réserve du droit en vigueur dans (province ou territoire), d'accès aux renseignements qui concernent ses origines et qui sont détenues dans (province ou territoire).]

Commentaires : L'article 30 de la Convention prévoit le droit à l'information de l'enfant adopté. Cet article requiert des États contractants qu'ils veillent à préserver les informations relatives à l'enfant, sa famille ainsi que les données sur leur passé médical. L'accès à ces informations est possible dans la mesure permise par la loi du ressort (article 30(2)) alors que l'utilisation de ces

informations est sujette aux conditions prévues à l'article 31 de la Convention.

Cette disposition de la loi uniforme se trouve entre crochets puisqu'il n'est pas absolument nécessaire que la Convention soit mise en oeuvre sur ce point étant donné qu'elle a force de loi dès son entrée en vigueur dans la province ou le territoire. Toutefois, un tel article pourrait être ajouté dans la mesure où il s'agit là d'une question délicate aux yeux du public et qu'elle gagnerait ainsi une certaine visibilité par rapport aux autres dispositions de la Convention.

Publication de la date d'entrée en vigueur

9. Le (Ministre de ou) publie dans la Gazette la date d'entrée en vigueur de la Convention dans (province ou territoire).

Commentaires : Il s'agit là d'une disposition usuelle dans les lois uniformes de mise en oeuvre.

Règlements

10. Le Lieutenant-gouverneur en conseil peut prendre des règlements d'application de la présente loi, notamment pour :

(a) restreindre ou adapter l'application du droit en vigueur dans (province ou territoire) à une adoption dans (province ou territoire) à laquelle la Convention s'applique;

(b) désigner l'autorité compétente pour l'application de toute disposition de la Convention.

Commentaires : L'adoption de règlements peut paraître souhaitable ou encore peut être nécessaire en vertu de la loi existante dans le ressort de mise en oeuvre pour désigner des organismes publics ou agréer des organismes privés à remplir des fonctions prévues dans la Convention, ou pour toute matière aux fins d'appliquer la Convention.

Le paragraphe (a) permet à la province ou au territoire d'adapter par règlement la loi existante sur l'adoption pour régir les adoptions internationales visées par la Convention dans la mesure où le fait de donner force de loi à la Convention ne permet pas d'arriver à ce résultat.

Les ressorts qui préfèreraient modifier leurs lois existantes par une autre loi plutôt que par règlement peuvent le faire en ajoutant les dispositions modificatrices après l'article 11 de la loi uniforme.

Le paragraphe (b) prévoit la désignation d'autorités compétentes. Les provinces ou les territoires qui mettront en oeuvre la Convention auront à décider suivant l'article 36(c) quelles autorités seront désignées aux fins de remplir les fonctions dévolues aux autorités compétentes par la Convention : voir, entre autres, les articles 4, 5, 11(a), 23, 30, 33, 34 et 35.

À titre d'exemple, l'article 23(1) de la Convention mentionne les adoptions certifiées par les autorités compétentes de l'État contractant. L'article 23(2) prévoit la notification de l'identité et des fonctions de l'autorité compétente par l'État contractant au dépositaire de la Convention. En conséquence, la province ou le territoire devra fournir ces informations au ministère fédéral de la Justice et lui faire part des changements le cas échéant.

Un autre exemple est celui des organismes à but lucratif autorisés en vertu de l'article 22(2) qui seront soumis au contrôle des autorités compétentes de l'État contractant.

Modifications aux lois existantes

11. (Certaines provinces ou certains territoires pourront préférer modifier les lois existantes plutôt que d'exercer la faculté prévue à l'article 10(a)).

Commentaires : La mention de cet article paraît utile dans la mesure où les lois existantes ne seraient pas automatiquement modifiées par la Convention et que la province ou le territoire pense que des modifications seraient nécessaires pour régir les adoptions internationales conformément à la Convention. Rappelons que l'article 10(a) de la loi uniforme indique déjà que ces modifications pourraient être opérées par règlement.

Il doit être noté que la Convention prévoit des règles minimales aux fins de régir les adoptions internationales. Les provinces et les territoires peuvent dès lors choisir d'élaborer des règles plus strictes pourvu qu'elles demeurent compatibles avec celles de la Convention.

Proclamation

12. (Article relatif à la proclamation).

Commentaires : Certaines juridictions prévoient que les lois de mise en oeuvre de conventions entrent en vigueur au moment de la sanction royale, étant entendu que la loi ne produira d'effet qu'au moment de l'entrée en vigueur de la Convention pour la province ou le territoire concerné. D'autres juridictions préfèrent attendre et procéder par proclamation pour établir le jour de l'entrée en vigueur de la loi de mise en oeuvre une fois que la date d'entrée en vigueur de la Convention sera connue. Dans les deux cas, le public sera informé en vertu de l'article 9 de la loi uniforme de la date à partir de laquelle la Convention aura force de loi dans la juridiction.

ÉDITION DÉFINITIVE
FINAL EDITION

CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

HAGUE CONFERENCE
ON PRIVATE INTERNATIONAL LAW

DIX-SEPTIÈME SESSION

SEVENTEENTH SESSION

ACTE FINAL

FINAL ACT

LA HAYE, LE 29 MAI 1993
THE HAGUE, 29th MAY 1993

APPENDICE E

CONVENTION SUR LA PROTECTION DES ENFANTS ET LA COOPÉRATION EN MATIÈRE D'ADOPTION INTERNATIONALE

Les Etats signataires de la présente Convention,

Reconnaissant que, pour l'épanouissement harmonieux de sa personnalité, l'enfant doit grandir dans un milieu familial, dans un climat de bonheur, d'amour et de compréhension,

Rappelant que chaque Etat devrait prendre, par priorité, des mesures appropriées pour permettre le maintien de l'enfant dans sa famille d'origine,

Reconnaissant que l'adoption internationale peut présenter l'avantage de donner une famille permanente à l'enfant pour lequel une famille appropriée ne peut être trouvée dans son Etat d'origine,

Convaincus de la nécessité de prévoir des mesures pour garantir que les adoptions internationales aient lieu dans l'intérêt supérieur de l'enfant et le respect de ses droits fondamentaux, ainsi que pour prévenir l'enlèvement, la vente ou la traite d'enfants,

Désirant établir à cet effet des dispositions communes qui tiennent compte des principes reconnus par les instruments internationaux, notamment par la *Convention des Nations Unies sur les droits de l'enfant*, du 20 novembre 1989, et par la Déclaration des Nations Unies sur les principes sociaux et juridiques applicables à la protection et au bien-être des enfants, envisagés surtout sous l'angle des pratiques en matière d'adoption et de placement familial sur les plans national et international (Résolution de l'Assemblée générale 41 85, du 3 décembre 1986),

Sont convenus des dispositions suivantes:

CHAPITRE I – CHAMP D'APPLICATION DE LA CONVENTION

Article premier

La présente Convention a pour objet:

a d'établir des garanties pour que les adoptions internationales aient lieu dans l'intérêt supérieur de l'enfant et dans le respect des droits fondamentaux qui lui sont reconnus en droit international;

b d'instaurer un système de coopération entre les Etats contractants pour assurer le respect de ces garanties et prévenir ainsi l'enlèvement, la vente ou la traite d'enfants;

c d'assurer la reconnaissance dans les Etats contractants des adoptions réalisées selon la Convention.

Article 2

1 La Convention s'applique lorsqu'un enfant résidant habituellement dans un Etat contractant («l'Etat d'origine») a été, est ou doit être déplacé vers un autre Etat contractant («l'Etat d'accueil»), soit après son adoption dans l'Etat d'origine par des époux ou une personne résidant habituellement dans l'Etat d'accueil, soit en vue d'une telle adoption dans l'Etat d'accueil ou dans l'Etat d'origine.

2 La Convention ne vise que les adoptions établissant un lien de filiation.

Article 3

La Convention cesse de s'appliquer si les acceptations visées à l'article 17, lettre *c*, n'ont pas été données avant que l'enfant n'ait atteint l'âge de dix-huit ans.

CHAPITRE II – CONDITIONS DES ADOPTIONS INTERNATIONALES

Article 4

Les adoptions visées par la Convention ne peuvent avoir lieu que si les autorités compétentes de l'Etat d'origine:

a ont établi que l'enfant est adoptable;

b ont constaté, après avoir dûment examiné les possibilités de placement de l'enfant dans son Etat d'origine, qu'une adoption internationale répond à l'intérêt supérieur de l'enfant;

c se sont assurées

1) que les personnes, institutions et autorités dont le consentement est requis pour l'adoption ont été entourées des conseils nécessaires et dûment informées sur les conséquences de leur consentement, en particulier sur le maintien ou la rupture, en raison d'une adoption, des liens de droit entre l'enfant et sa famille d'origine,

2) que celles-ci ont donné librement leur consentement dans les formes légales requises, et que ce consentement a été donné ou constaté par écrit,

3) que les consentements n'ont pas été obtenus moyennant paiement ou contrepartie d'aucune sorte et qu'ils n'ont pas été retirés, et

4) que le consentement de la mère, s'il est requis, n'a été donné qu'après la naissance de l'enfant; et

d se sont assurées, eu égard à l'âge et à la maturité de l'enfant,

1) que celui-ci a été entouré de conseils et dûment informé sur les conséquences de l'adoption et de son consentement à l'adoption, si celui-ci est requis,

2) que les souhaits et avis de l'enfant ont été pris en considération,

3) que le consentement de l'enfant à l'adoption, lorsqu'il est requis, a été donné librement, dans les formes légales requises, et que son consentement a été donné ou constaté par écrit, et

4) que ce consentement n'a pas été obtenu moyennant paiement ou contrepartie d'aucune sorte.

Article 5

Les adoptions visées par la Convention ne peuvent avoir lieu que si les autorités compétentes de l'Etat d'accueil:

a ont constaté que les futurs parents adoptifs sont qualifiés et aptes à adopter;

b se sont assurées que les futurs parents adoptifs ont été entourés des conseils nécessaires; et

c ont constaté que l'enfant est ou sera autorisé à entrer et à séjourner de façon permanente dans cet Etat.

CHAPITRE III – AUTORITÉS CENTRALES ET ORGANISMES AGRÉÉS

Article 6

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

2 Un Etat fédéral, un Etat dans lequel plusieurs systèmes de droit sont en vigueur ou un Etat ayant des unités territoriales autonomes est libre de désigner plus d'une Autorité centrale et de spécifier l'étendue territoriale ou personnelle de leurs fonctions. L'Etat qui fait usage de cette faculté désigne l'Autorité centrale à laquelle toute communication peut être adressée en vue de sa transmission à l'Autorité centrale compétente au sein de cet Etat.

Article 7

1 Les Autorités centrales doivent coopérer entre elles et promouvoir une collaboration entre les autorités compétentes de leurs Etats pour assurer la protection des enfants et réaliser les autres objectifs de la Convention.

2 Elles prennent directement toutes mesures appropriées pour:

a fournir des informations sur la législation de leurs Etats en matière d'adoption et d'autres informations générales, telles que des statistiques et formules types;

b s'informer mutuellement sur le fonctionnement de la Convention et, dans la mesure du possible, lever les obstacles à son application.

Article 8

Les Autorités centrales prennent, soit directement, soit avec le concours d'autorités publiques, toutes mesures appropriées pour prévenir les gains matériels indus à l'occasion d'une adoption et empêcher toute pratique contraire aux objectifs de la Convention.

Article 9

Les Autorités centrales prennent, soit directement, soit avec le concours d'autorités publiques ou d'organismes dûment agréés dans leur Etat, toutes mesures appropriées, notamment pour:

a rassembler, conserver et échanger des informations relatives à la situation de l'enfant et des futurs parents adoptifs, dans la mesure nécessaire à la réalisation de l'adoption;

b faciliter, suivre et activer la procédure en vue de l'adoption;

c promouvoir dans leurs Etats le développement de services de conseils pour l'adoption et pour le suivi de l'adoption;

d échanger des rapports généraux d'évaluation sur les expériences en matière d'adoption internationale;

e répondre, dans la mesure permise par la loi de leur Etat, aux demandes motivées d'informations sur une situation particulière d'adoption formulées par d'autres Autorités centrales ou par des autorités publiques.

Article 10

Peuvent seuls bénéficier de l'agrément et le conserver les organismes qui démontrent leur aptitude à remplir correctement les missions qui pourraient leur être confiées.

Article 11

Un organisme agréé doit:

a poursuivre uniquement de buts non lucratifs dans les conditions et limites fixées par les autorités compétentes de l'Etat d'agrément;

b être dirigé et géré par des personnes qualifiées par leur intégrité morale et leur formation ou expérience pour agir dans le domaine de l'adoption internationale; et

c être soumis à la surveillance d'autorités compétentes de cet Etat pour sa composition, son fonctionnement et sa situation financière.

Article 12

Un organisme agréé dans un Etat contractant ne pourra agir dans un autre Etat contractant que si les autorités compétentes des deux Etats l'ont autorisé.

Article 13

La désignation des Autorités centrales et, le cas échéant, l'étendue de leurs fonctions, ainsi que le nom et l'adresse des organismes agréés, sont communiqués par chaque Etat contractant au Bureau Permanent de la Conférence de La Haye de droit international privé.

CHAPITRE IV – CONDITIONS PROCÉDURALES DE L'ADOPTION INTERNATIONALE

Article 14

Les personnes résidant habituellement dans un Etat contractant, qui désirent adopter un enfant dont la résidence habituelle est située dans un autre Etat contractant, doivent s'adresser à l'Autorité centrale de l'Etat de leur résidence habituelle.

Article 15

1 Si l'Autorité centrale de l'Etat d'accueil considère que les requérants sont qualifiés et aptes à adopter, elle établit un rapport contenant des renseignements sur leur identité, leur capacité légale et leur aptitude à adopter, leur situation personnelle, familiale et médicale, leur milieu social, les motifs qui les animent, leur aptitude à assumer une adoption internationale, ainsi que sur les enfants qu'ils seraient aptes à prendre en charge.

2 Elle transmet le rapport à l'Autorité centrale de l'Etat d'origine.

Article 16

1 Si l'Autorité centrale de l'Etat d'origine considère que l'enfant est adoptable,

a elle établit un rapport contenant des renseignements sur l'identité de l'enfant, son adoptabilité, son milieu social, son évolution personnelle et familiale, son passé médical et celui de sa famille, ainsi que sur ses besoins articuliers;

b elle tient dûment compte des conditions d'éducation de l'enfant, ainsi que de son origine ethnique, religieuse et culturelle;

c elle s'assure que les consentements visés à l'article 4 ont été obtenus; et

d elle constate, en se fondant notamment sur les rapports concernant l'enfant et les futurs parents adoptifs, que le placement envisagé est dans l'intérêt supérieur de l'enfant.

2 Elle transmet à l'Autorité centrale de l'Etat d'accueil son rapport sur l'enfant, la preuve des consentements requis et les motifs de son constat sur le placement, en veillant à ne pas révéler l'identité de la mère et du père, si, dans l'Etat d'origine, cette identité ne peut pas être divulguée.

Article 17

Toute décision de confier un enfant à des futurs parents adoptifs ne peut être prise dans l'Etat d'origine que

a si l'Autorité centrale de cet Etat s'est assurée de l'accord des futurs parents adoptifs;

b si l'Autorité centrale de l'Etat d'accueil a approuvé cette décision, lorsque la loi de cet Etat ou l'Autorité centrale de l'Etat d'origine le requiert;

c si les Autorités centrales des deux Etats ont accepté que la procédure en vue de l'adoption se poursuive; et

d s'il a été constaté conformément à l'article 5 que les futurs parents adoptifs sont qualifiés et aptes à adopter et que l'enfant est ou sera autorisé à entrer et à séjourner de façon permanente dans l'Et t d'accueil.

Article 18

Les Autorités centrales des deux Etats prennent toutes m sures utiles pour que l'enfant reçoive l'autorisation de sortie de l'Etat d'origine, ainsi que celle d'entrée et de séjour permanent dans l'Etat d'accueil.

APPENDICE E

Article 19

1 Le déplacement de l'enfant vers l'Etat d'accueil ne peut avoir lieu que si les conditions de l'article 17 ont été remplies.

2 Les Autorités centrales des deux Etats veillent à ce que ce déplacement s'effectue en toute sécurité, dans des conditions appropriées et, si possible, en compagnie des parents adoptifs ou des futurs parents adoptifs.

3 Si ce déplacement n'a pas lieu, les rapports visés aux articles 15 et 16 sont renvoyés aux autorités expéditrices.

Article 20

Les Autorités centrales se tiennent informées sur la procédure d'adoption et les mesures prises pour la mener à terme, ainsi que sur le déroulement de la période probatoire, lorsque celle-ci est requise.

Article 21

1 Lorsque l'adoption doit avoir lieu après le déplacement de l'enfant dans l'Etat d'accueil et que l'Autorité centrale de cet Etat considère que le maintien de l'enfant dans la famille d'accueil n'est plus de son intérêt supérieur, cette Autorité prend les mesures utiles à la protection de l'enfant, en vue notamment:

a de retirer l'enfant aux personnes qui désiraient l'adopter et d'en prendre soin provisoirement;

b en consultation avec l'Autorité centrale de l'Etat d'origine, d'assurer sans délai un nouveau placement de l'enfant en vue de son adoption ou, à défaut, une prise en charge alternative durable; une adoption ne peut avoir lieu que si l'Autorité centrale de l'Etat d'origine a été dûment informée sur les nouveaux parents adoptifs;

c en dernier ressort, d'assurer le retour de l'enfant, si son intérêt l'exige.

2 Eu égard notamment à l'âge et à la maturité de l'enfant, celui-ci sera consulté et, le cas échéant, son consentement obtenu sur les mesures à prendre conformément au présent article.

Article 22

1 Les fonctions conférées à l'Autorité centrale par le présent chapitre peuvent être exercées par des autorités publiques ou par des organismes agréés conformément au chapitre III, dans la mesure prévue par la loi de son Etat.

2 Un Etat contractant peut déclarer auprès du dépositaire de la Convention que les fonctions conférées à l'Autorité centrale par les articles 15 à 21 peuvent aussi être exercées dans cet Etat, dans la mesure prévue par la loi et sous le contrôle des autorités compétentes de cet Etat, par des organismes ou personnes qui:

a remplissent les conditions de moralité, de compétence professionnelle, d'expérience et de responsabilité requises par cet Etat; et

b sont qualifiées par leur intégrité morale et leur formation ou expérience pour agir dans le domaine de l'adoption internationale.

3 L'Etat contractant qui fait la déclaration visée au paragraphe 2 informe régulièrement le Bureau Permanent de la Conférence de La Haye de droit international privé des noms et adresses de ces organismes et personnes.

4 Un Etat contractant peut déclarer auprès du dépositaire de la Convention que les adoptions d'enfants dont la résidence habituelle est située sur son territoire ne peuvent avoir lieu que si les fonctions conférées aux Autorités centrales sont exercées conformément au paragraphe premier.

5 Nonobstant toute déclaration effectuée conformément au paragraphe 2, les rapports prévus aux articles 15 et 16 sont, dans tous les cas, établis sous la responsabilité de l'Autorité centrale ou d'autres autorités ou organismes, conformément au paragraphe premier.

CHAPITRE V – RECONNAISSANCE ET EFFETS DE L'ADOPTION

Article 23

1 Une adoption certifiée conforme à la Convention par l'autorité compétente de l'Etat contractant où elle a eu lieu est reconnue de plein droit dans les autres Etats contractants. Le certificat indique quand et par qui les acceptations visées à l'article 17, lettre *c*, ont été données.

2 Tout Etat contractant, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, notifiera au dépositaire de la Convention

l'identité et les fonctions de l'autorité ou des autorités qui, dans cet Etat, sont compétentes pour délivrer le certificat. Il lui notifiera aussi toute modification dans la désignation de ces autorités.

Article 24

La reconnaissance d'une adoption ne peut être refusée dans un Etat contractant que si l'adoption est manifestement contraire à son ordre public, compte tenu de l'intérêt supérieur de l'enfant.

Article 25

Tout Etat contractant peut déclarer au dépositaire de la Convention qu'il ne sera pas tenu de reconnaître en vertu de celle-ci les adoptions faites conformément à un accord conclu en application de l'article 39, paragraphe 2.

Article 26

1 La reconnaissance de l'adoption comporte celle

a du lien de filiation entre l'enfant et ses parents adoptifs;

b de la responsabilité parentale des parents adoptifs à l'égard de l'enfant;

c de la rupture du lien préexistant de filiation entre l'enfant et sa mère et son père, si l'adoption produit cet effet dans l'Etat contractant où elle a eu lieu.

2 Si l'adoption a pour effet de rompre le lien préexistant de filiation, l'enfant jouit, dans l'Etat d'accueil et dans tout autre Etat contractant où l'adoption est reconnue, des droits équivalents à ceux résultant d'une adoption produisant cet effet dans chacun de ces Etats.

3 Les paragraphes précédents ne portent pas atteinte à l'application de toute disposition plus favorable à l'enfant, en vigueur dans l'Etat contrac ant qui reconnaît l'adoption.

Article 27

1 Lorsqu'une adoption faite dans l'Etat d'origine n'a pas pour effet de rompre le lien préexistant de filiation, elle peut, dans l'Etat d'accueil qui reconnaît l'adoption conformément à la Convention, être convertie en une adoption produisant cet effet,

a si le droit de l'Etat d'accueil le permet; et

b si les consentements visés à l'article 4, lettres *c* et *d*, ont été ou sont donnés en vue d'une telle adoption.

2 L'article 23 s'applique à la décision de conversion.

CHAPITRE VI – DISPOSITIONS GÉNÉRALES

Article 28

La Convention ne déroge pas aux lois de l'Etat d'origine qui requièrent que l'adoption d'un enfant résidant habituellement dans cet Etat doive avoir lieu dans cet Etat ou qui interdisent le placement de l'enfant dans l'Etat d'accueil ou son déplacement vers cet Etat avant son adoption.

Article 29

Aucun contact entre les futurs parents adoptifs et les parents de l'enfant ou toute autre personne qui a la garde de celui-ci ne peut avoir lieu tant que les dispositions de l'article 4, lettres *a* à *c*, et de l'article 5, lettre *a*, n'ont pas été respectées, auf si l'adoption a lieu entre membres d'une même famille ou si les conditions fixées par l'autorité compétente de l'Etat d'origine sont remplies.

Article 30

1 Les autorités compétentes d'un Etat contractant veillent à conserver les informations qu'elles détiennent sur les origines de l'enfant, notamment celles relatives à l'identité de sa mère et de son père, ainsi que les données sur le passé médical de l'enfant et de sa famille.

2 Elles assurent l'accès de l'enfant ou de son représentant à ces informations, avec les conseils appropriés, dans la mesure permise par la loi de leur Etat.

Article 31

Sous réserve de l'article 30, les données personnelles rassemblées ou transmises conformément à la Convention, en particulier celles visées aux articles 15 et 16, ne peuvent être utilisées à d'autres fins que celles pour lesquelles elles ont été rassemblées ou transmises.

Article 32

1 Nul ne peut tirer un gain matériel indu en raison d'une intervention à l'occasion d'une adoption internationale.

2 Seuls peuvent être demandés et payés les frais et dépenses, y compris les honoraires raisonnables des personnes qui sont intervenues dans l'adoption.

3 Les dirigeants, administrateurs et employés d'organismes intervenant dans une adoption ne peuvent recevoir une rémunération disproportionnée par rapport aux services rendus.

Article 33

Toute autorité compétente qui constate qu'une des dispositions de la Convention a été méconnue ou risque manifestement de l'être en informe aussitôt l'Autorité centrale de l'Etat dont elle relève. Cette Autorité centrale a la responsabilité de veiller à ce que les mesures utiles soient prises.

Article 34

Si l'autorité compétente de l'Etat destinataire d'un document le requiert, une traduction certifiée conforme doit être produite. Sauf dispense, les frais de traduction sont à la charge des futurs parents adoptifs.

Article 35

Les autorités compétentes des Etats contractants agissent rapidement dans les procédures d'adoption.

Article 36

Au regard d'un Etat qui connaît, en matière d'adoption, deux ou plusieurs systèmes de droit applicables dans des unités territoriales différentes:

a toute référence à la résidence habituelle dans cet Etat vise la résidence habituelle dans une unité territoriale de cet Etat;

b toute référence à la loi de cet Etat vise la loi en vigueur dans l'unité territoriale concernée;

c toute référence aux autorités compétentes ou aux autorités publiques de cet Etat vise les autorités habilitées à agir dans l'unité territoriale concernée;

d toute référence aux organismes agréés de cet Etat vise les organismes agréés dans l'unité territoriale concernée.

Article 37

Au regard d'un Etat qui connaît, en matière d'adoption, deux ou plusieurs systèmes de droit applicables à des catégories différentes de personnes, toute référence à la loi de cet Etat vise le système de droit désigné par le droit de celui-ci.

Article 38

Un Etat dans lequel différentes unités territoriales ont leurs propres règles de droit en matière d'adoption ne sera pas tenu d'appliquer la Convention lorsqu'un Etat dont le système de droit est unifié ne serait pas tenu de l'appliquer.

Article 39

1 La Convention ne déroge pas aux instruments internationaux auxquels des Etats contractants sont Parties et qui contiennent des dispositions sur les matières réglées par la présente Convention, à moins qu'une déclaration contraire ne soit faite par les Etats liés par de tels instruments.

2 Tout Etat contractant pourra conclure avec un ou plusieurs autres Etats contractants des accords en vue de favoriser l'application de la Convention dans leurs rapports réciproques. Ces accords ne pourront déroger qu'aux dispositions des articles 14 à 16 et 18 à 21. Les Etats qui auront conclu de tels accords en transmettront une copie au dépositaire de la Convention.

Article 40

Aucune réserve à la Convention n'est admise.

Article 41

La Convention s'applique chaque fois qu'une demande visée à l'article 14 a été reçue après l'entrée en vigueur de la Convention dans l'Etat d'accueil et l'Etat d'origine.

Article 42

Le Secrétaire général de la Conférence de La Haye de droit international privé convoque périodiquement une Commission spéciale afin d'examiner le fonctionnement pratique de la Convention.

APPENDICE E

CHAPITRE VII – CLAUSES FINALES

Article 43

1 La Convention est ouverte à la signature des Etats qui étaient Membres de la Conférence de La Haye de droit international privé lors de sa Dix-septième session et des autres Etats qui ont pa ticipé à cette Session.

2 Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas, dépositaire de la Convention.

Article 44

1 Tout autre Etat pourra adhérer à la Convention après son entrée en vigueur en vertu de l'article 46, paragraphe 1.

2 L'instrument d'adhésion sera déposé auprès du dépositaire.

3 L'adhésion n'aura d'effet que dans les rapports entre l'Etat adhérant et les Etats contractants qui n'auront pas élevé d'objection à son encontre dans les six mois après la réception de la notification prévue à l'article 48, lettre *b*. Une telle objection pourra également être élevée par tout Etat au moment d'une ratification, acceptation ou approbation de la Convention, ultérieure à l'adhésion. Ces objections seront notifiées au dépositaire.

Article 45

1 Un Etat qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par cette Convention pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la présente Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.

2 Ces déclarations seront notifiées au dépositaire et indiqueront expressément les unités territoriales auxquelles la Convention s'applique.

3 Si un Etat ne fait pas de déclaration en vertu du présent article, la Convention s'appliquera à l'ensemble du territoire de cet Etat.

Article 46

1 La Convention entrera en vigueur le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt du troisième instrument de ratification, d'acceptation ou d'approbation prévu par l'article 43.

2 Par la suite, la Convention entrera en vigueur:

a pour chaque Etat ratifiant, acceptant ou approuvant postérieurement, ou adhérant, le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion;

b pour les unités territoriales auxquelles la Convention a été étendue conformément à l'article 45, le premier jour du mois suivant l'expiration d'une période de trois mois après la notification visée dans cet article.

Article 47

1 Tout Etat Partie à la Convention pourra dénoncer celle-ci par une notification adressée par écrit au dépositaire.

2 La dénonciation prendra effet le premier jour du mois suivant l'expiration d'une période de douze mois apr s la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est spécifiée dans la notification, la dénonciation prendra effet à l'expiration de la période en question après la date de réception de la notification.

Article 48

Le dépositaire notifiera aux Etats membres de la Conférence de La Haye de droit international privé, aux autres Etats qui ont participé à la Dix-septième session, ainsi qu'aux Etats qui auront adhéré conformément aux dispositions de l'article 44:

a les signatures, ratifications, acceptations et approbations visées à l'article 43;

b les adhésions et les objections aux adhésions visées à l'article 44;

c la date à laquelle la Convention entrera en vigueur conformément aux dispositions de l'article 46;

d les déclarations et les désignations mentionn s aux articles 22, 23, 25 et 45;

e les accords mentionnés à l'article 39;

f les dénonciations visées à l'article 47.

APPENDICE E

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le ..... 19.., en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Etats membres de la Conférence de La Haye de droit international privé lors de la Dix-septième session, ainsi qu'à chacun des autres Etats ayant participé à cette Session.

C La Décision suivante:

La Dix-septième session de la Conférence de La Haye de droit international privé;

Considérant que la *Convention sur la protection des enfants et la coopération en matière d'adoption internationale* sera applicable aux enfants qui ont leur résidence habituelle dans les Etats contractants dans les circonstances visées à son article 2;

Soucieuse de ce que les enfants réfugiés et autres enfants internationalement déplacés reçoivent l'attention spéciale dans le cadre de cette Convention que leur situation particulièrement vulnérable peut exiger;

Considérant la nécessité d'un examen poursuivi de ce sujet et éventuellement celle d'élaborer un instrument spécial supplémentaire à cette Convention;

Prie le Secrétaire général de la Conférence de La Haye, en consultation avec le Haut Commissariat des Nations Unies pour les Réfugiés, de convoquer dans un proche avenir un groupe de travail pour étudier cette question et faire des propositions spécifiques qui pourraient être soumises à une Commission spéciale de la Conférence de La Haye afin d'assurer la protection appropriée de ces catégories d'enfants.

E Le Voeu suivant:

La Dix-septième session.

Considérant que la *Convention sur la protection des enfants et la coopération en matière d'adoption internationale* prévoit,

a en son article 4, lettre *c*, que les adoptions visées par la Convention ne peuvent avoir lieu que si les autorités compétentes de l'Etat d'origine de l'enfant se sont assurées que les consentements requis ont été donnés dans le respect de certaines garanties,

b en son article 23, paragraphe 1, que la reconnaissance d'une adoption faite conformément à la Convention suppose la délivrance d'un certificat constatant cette conformité.

Convaincue que l'utilisation, par les autorités compétentes des Etats contractants, de formules inspirées d'un même modèle peut favoriser l'application correcte et uniforme de ces dispositions,

Emet le Voeu que les Experts participant à la première réunion de la Commission spéciale convoquée en vertu de l'article 42 de la Convention établissent des formules modèles à cet effet.

APPENDIX F

(See page 33)

CHILDREN'S EVIDENCE

At its 1991 meeting, the Uniform Law Section resolved to develop principles for taking the evidence of disadvantaged witnesses. The first priority was to formulate rules for child witnesses in respect of their ability to take an oath and the requirement that their evidence be corroborated.

In 1992 the Conference adopted a number of resolutions to amend the Uniform Evidence Act to improve the likelihood that child witnesses would be able to give effective testimony in proceedings governed by that Act. Attached to this report is an annotated version of amendments to implement those resolutions. The resolutions themselves are published at page 302 in the Proceedings of the 1992 meeting.

Two other developments are worth noting. First, as contemplated at the 1992 meeting, the federal government published reports on the operation of its 1988 amendments to the Canada Evidence Act dealing with child witnesses. It also presented detailed documents on the subject to the Standing Committee of the House of Commons on Justice and the Solicitor General. Some of the recommendations of those documents were followed in Bill C-126, which was then passed by Parliament in June of this year.

It is safe to say that the federal analysis did not require any re-examination of the recommendations made by the 1992 meeting. In fact the Conference's decision on corroboration was directly reflected in Bill C-126, which abolished the Kendall rule. While the federal government did not revisit its 1988 provisions about oaths and promises, neither did any of the analysis argue for retaining the oath when a promise has the same weight.

The second development is that in June, 1993, Ontario published a consultation paper on the evidence of children and vulnerable adults. The first part of the paper is similar to the document before the Uniform Law Conference in 1992.

The 1991 meeting resolved that the areas of hearsay evidence and "forms of evidence" be studied over the longer term, to bring forward proposals "when appropriate". By forms of evidence, the meeting referred to the circumstances of the evidence, such as the use of screens or closed-circuit television, the presence of support persons with the child, and the like.

The Section may wish to consider three such matters relating to children's evidence. The 1993 Ontario paper circulated to the Section's meeting contains a thorough analysis of the policy options on these points. The Section will have to

decide as well whether harmonization of Canadian laws on these points is desirable, though the 1991 resolutions suggest a positive response.

1. Presence of support person: Child witnesses may often be intimidated by the formality or just the size of a courtroom. The Ontario paper recommends that child witnesses be allowed to be accompanied in the stand by an adult support person of the child's choice, subject to a couple of qualifications. Bill C-126 gives a child the same right in selected criminal proceedings governed by the Canada Evidence Act.

   The issues are:

   i) Should the Uniform Evidence Act provide for support persons to accompany child witnesses?
   ii) Should the presence of support persons be limited to any particular kind of proceeding?
   iii) What safeguards if any should be provided against undue influence by the support person?
   iv) What age of witness should benefit?

   Bill C-126 provides, in s.8, for new subsections 486(1.2,3,4) of the Criminal Code:

   (1.2) In proceedings referred to in subsection 1.1 [sexual offences, offences under ss 271, 272 or 273, or offences involving violence or the threat of violence], the presiding judge ... may, on application of the prosecutor or a witness who, at the time of the trial or preliminary hearing, is under the age of fourteen years, order that a support person of the witness' choice be permitted to be present and to be close to the witness while testifying.

   (1.3) The presiding judge ... shall not permit a witness in proceedings referred to in subsection (1.1) to be a support person unless the presiding judge ... is of the opinion that the proper administration of justice so requires.

   (1.4) The presiding judge ... may order that the support person ann the witness not communicate with each other during the testimony of the witness.

   Ontario's draft amendment provides, in s.18.5:

   18.5(1) During a child's testimony, a support person chosen by the child may accompany him or her. ["Child" is elsewhere defined as being under fourteen.]

18.5(2) The court may determine that the support person chosen by the child is not appropriate because the person is a witness in the same proceeding, may attempt to influence the child's testimony or behaves in a disruptive manner, and in that case the child is entitled to choose another support person.

2. Screens or closed-circuit television: The Canada Evidence Act now allows for child witnesses to testify from behind screens, or outside the courtroom by closed-circuit TV, where the child is the victim and complainant in certain criminal proceedings. The Ontario paper recommends general availability of screens, and the ability to use TV where it is available. Saskatchewan, British Columbia and Quebec all have some rights to hear evidence using screens or television in civil proceedings.

The main issues to resolve in the use of screens and closed-circuit television are these:

i) Should these devices be made available at all?
ii) If so, should they be made available in all cases, or in some kinds of case (e.g. child protection proceedings, cases where abuse is alleged), or at the discretion of the court?
iii) What other standards or procedures are needed, if any?
iii) What age of witness should benefit?

3. Hearsay evidence: Federal law contains no provisions on hearsay. It does allow the use of videotape evidence of the early complaint of the child, if that tape is adopted by the child at trial. Quebec law allows hearsay evidence in some child protection proceedings, if the evidence is corroborated. The common law provinces have not provided generally for hearsay, though some particular statutes allow some flexibility from the usual rules of evidence.

In Ontario at least it is common in proceedings for child protection and some other proceedings for hearsay evidence to be admitted, whether or not with express legal authority. Providing formal rules for its admission may create greater certainty, but it may also reduce the amount of hearsay evidence now being admitted, forcing more children to give evidence in person.

On this subject the Section should note the recommendation of its 1991 meeting that the views of the Criminal Law Section and the practising Bar be sought. Some part of those views should be available through Ontario's consultation process. Views of the Section are welcome on how

else these matters can be properly canvassed before the 1994 meeting, if the Section wishes to pursue the topic at all.

UNIFORM CHILD EVIDENCE ACT

Definition

1. In this Act,

(a) "child" means a person under the age of fourteen years.
(b) "court" includes a tribunal.

Admissibility of child's evidence

2.(1) A child's evidence is admissible if,

(a) he or she promises to tell the truth; and

(b) the court is of the opinion that the child understands what it means to tell the truth and is able to communicate the evidence.

COMMENT: This gives effect to the first recommendation of 1992.

Determining competency

(2) When it is necessary to establish whether a child is competent to give evidence, the court may conduct an inquiry to determine whether, in its opinion, the child understands what it means to tell the truth and is able to communicate the evidence.

COMMENT: This gives effect to part of the second recomendation of 1992. The third recommendation, that the inquiry be directed by a judge, who may permit counsel to participate, was thought to go without saying.

Further admissibility of evidence

(3) If a child does not promise to tell the truth, or if the court is of the opinion that the child does not understand what it means to tell the truth, his or her evidence may still be admitted if the court is of the opinion that it is sufficiently reliable.

COMMENT: Part of the first recommendation of 1992.

Corroboration not required

3.(1) Evidence given by a child need not be corroborated.

COMMENT: This is the fourth recommendation of 1992.

Warning not needed

(2) The judge is not required to instruct the jury that it is dangerous to rely on the uncorroborated evidence of a child.

COMMENT: This gives effect to the fifth recommendation from 1992. This formulation has been preferred over the "any rule requiring a warning is abrogated", used in the 1993 federal amendments, because the latter formulation may not be clear to those who have never heard of such a rule. The discretion of the judge to comment on the evidence in any particular case is not affected by this rule; once again, this was thought to go without saying.

NOTE: The Section decided not to integrate these provisions with the Uniform Evidence Act, because few if any jurisdictions have adopted that Act. Creating a separate uniform statute was thought to improve its chances for adoption.

Creating a separate statute for children's evidence means that part of the second resolution of 1992, that all witnesses of whatever age are presumed to be competent, is not enacted as a Uniform Act. Such a provision added to a jurisdiction's general evidence statute would be consistent with the present Act.

APPENDICE F

(see page 42)

TÈMOIGNAGE D'ENFANTS

A sa réunion de 1991, la Section d'uniformisation des lois a résolu d'élaborer des principes touchant l'audition de la preuve des témoins défavorisés. Sa priorité était de formuler des règles concernant le témoignage des enfants, à savoir leur capacité de prêter serment et la nécessité que leur témoignage soit corroboré.

En 1992, la Conférence a adopté un certain nombre de résolutions visant à modifier la *Loi uniforme sur la Preuve* de façon à améliorer la probabilité de recueillir un témoignage utile de la part des enfants au cours des procédures visées par cette loi. Le texte des résolutions figure dans le procès-verbal de la réunion de 1992 à la page 302.

Il y a lieu de noter deux autres faits. D'abord, comme il avait été envisagé à la réunion de 1992, le gouvernement fédéral a publié des rapports sur l'application des modifications apportées en 1988 aux dispositions de la *Loi sur la preuve au Canada* concernant le témoignage des enfants. Il a aussi présenté des documents détaillés sur la question au Comité permanent de la Chambre des communes chargé de la justice et du solliciteur général. Le projet de loi C-126, que le Parlement a adopté en juin 1993, donnait effet à certaines de ces recommandations.

Il est juste de dire que l'analyse fédérale n'a pas nécessité de réexamination des recommandations formulées à la réunion de 1992. En fait, la décision de la Conférence concernant la corroboration se reflétait directement dans le projet de loi C-126, qui a aboli la règle Kendall. Même si le gouvernement
n'est pas revenu sur ses dispositions de 1988 concernant les serments et les promesses, il n'a pas non plus présenté d'arguments en faveur de la prestation de serment, lorsqu'une promesse a le même poids .

Le deuxième fait est que l'Ontario a publié un document de consultation portant sur le témoignage des enfants et des adultes vulnérables. La première partie de ce document est semblable à celui dont la Conférence sur l'uniformisation de la loi a été saisie en 1992.

Il a été résolu à la réunion de 1991 que les preuves par ouï-dire et les «formes de preuve~ seraient étudiées plus avant et que des propositions seraient présentées «en temps opportun~. L'expression «formes de preuve», telle qu'utilisée à la réunion, désignait les circonstances où le témoignage était recueilli, comme l'utilisation d'écrans ou de matériel de télévision en circuit fermé, la présence de personnes de confiance, et ainsi de suite.

APPENDICE F

La Section voudrait peut-être examiner trois questions liées au témoignage des enfants. Le document de 1933 de l'Ontario soumis à la réunion d'Edmonton analyse des options de politique concernant ces trois points. La Section devra décider aussi s'il convient d'harmoniser les lois canadiennes sur ces points, même si les résolutions de 1991 laissent entendre que ce devrait être le cas.

1. Présence d'une personne de confiance : Les enfants appelés à témoigner sont souvent intimidés par la solennité ou simplement par la taille de la salle d'audience. Le document de l'Ontairo recommande que les enfants puissent être accompagnés à la barre des témoins par une personne de confiance de leur choix, à quelques conditions. Le projet de loi C-126 donne aux enfants le même droit dans les procédures criminelles visées par la *Loi sur la Preuve au Canada.*

Les questions sont les suivantes :

i) La *Loi uniforme sur le témoignage des enfants* doit-elle permettre à des personnes de confiance d'accompagner les enfants appelés à temoigner?
ii) Faut-il limiter la présence des personnes de confiance à des types de procédures particuliers?
iii) Quelles sauvegardes, le cas échéant, faut-il prévoir pour empêcher les personnes de confiance d'exercer une influence indue sur l'enfant? iv) Quel devrait être l'âge des témoins pouvant se faire accompagner par une personne de confiance?

Le projet de loi C-126 prévoit, à l'art. 8, l'inclusion de nouveaux paragraphes 486 (1.2, 3, 4) dans le Code criminel :

(1.2) Dans les procédures visées au paragraphe (1.1) [infraction d'ordre sexuel, infraction visée aux articles 271, 272 ou 273, ou infraction dans laquelle est alléguée l'utilisation, la tentative ou la menace de violence], le juge ... qui préside peut, sur demande du poursuivant ou d'un témoin qui, au moment du procès ou de l'enquête préliminaire, est âgé de moins de quatorze ans, ordonner qu'une personne de confiance choisie par ce dernier soit présente à ses côtés pendant qu'il témoignage.

(1.3) Le juge ... qui préside ne peut permettre aux témoins d'agir comme personne de confiance dans les procédures visées au paragraphe (1.1) sauf si, à son avis, la bonne administration de la justice l'exige.

(1.4) Le cas échéant, il peut aussi interdire toute communication entre la personne de confiance et le témoin pendant que celui-ci témoigne.

La modification proposée par l'Ontario a l'article 18.5 se lit comme suit:

18.5(1) Au cours du témoignage d'un enfant, ce dernier peut être accompagné d'une personne de confiance. [«enfant~ > s'entend de toute personne âgée de moins de quatorze ans.]

18.5(2) Le tribunal peut décider que la personne de confiance choisie par l'enfant ne peut accompagner ce dernier parce qu'elle est un témoin du procès, elle est susceptible d'influer sur le témoignage de l'enfant ou elle se comporte de manière incorrecte et que dans ce cas l'enfant a le droit de choisir une autre personne de confiance. (traduction)

2. Écrans ou télévision en circuit fermé : La *Loi sur la preuve au Canada* permet actuellement aux enfants de témoigner derrière un écran ou à l'extérieur de la salle d'audience par l'entremise de matériel de télévision en circuit fermé si l'enfant est la victime et le plaignant dans certaines procédures criminelles. Le document de l'Ontario recommande que des écrans soient généralement accessibles et que le matériel de télévision puisse être utilisé si la salle d'audience en est pourvue. La Saskatchewan. la Colombie-Britannique et le Ouébec reconnaissent tous certains droits d'utiliser des écrans ou le matériel de télévision pour recueillir le témoignage pendant des procédures civiles.

Les principales questions soulevées par l'utilisation d'écrans et de la télévision en circuit fermé sont les suivantes :

i) Faut-il permettre l'utilisation de ce matériel?
ii) Si oui, faut-il la permettre dans tous les cas, ou seulement dans certains types de cas (par exemple, procédures visant à protéger l'enfant, où l'exploitation est alléguée), ou faut-il s'en remettre à la discrétion du tribunal?
iii) Quelles autres normes ou procédures faut-il prévoir, s'il y en a?
iv) Quel devrait être l'âge des témoins bénéficiant de telles dispositions?

3. Ouï-dire : La loi fédérale ne contient aucune disposition concernant la preuve par ouï-dire. Elle permet l'utilisation de bandes vidéo dans l'audition de la plainte de l'enfant, si l'enfant adopte cette bande au procès. La loi québécoise permet certaines preuves par oui-dire dans certaines procédures destinées à protéger l'enfant, si cette preuve est corroborée. Les provinces de common law ne permettent pas les preuves par ouï-dire en général, quoique certaines lois autorisent un certain assouplissement de la règle de la preuve habituelle.

APPENDICE F

En Ontario au moins, la preuve par ouï-dire est normalement admise dans les procédures destinées à protéger les enfants et dans d'autres procédures, que la loi permette clairement ou non son admission. Établir des règles officielles à cet égard accorderait une plus grande certitude, mais cela pourrait aussi réduire le nombre de preuves qui sont actuellement admises, et forcer plus d'enfants à témoigner en personne.

A cet égard, la Section devrait noter la recommandation qu'elle a faite à sa réunion de 1991, soit que les avis de la Section de droit pénal et du barreau pratiquant soient recherchés. Il devrait être possible d'obtenir une partie de ces avis par l'entremise du processus de consultation de l'Ontario. La Section est également invitée à faire valoir son opinion concernant la question de savoir comment d'autres vues à ce sujet peuvent être sollicitées, si elle désire en fait poursuivre cette question.

LOI UNIFORME SUR LE TÉMOIGNAGE DES ENFANTS

Définition

1. Dans la présente loi, «enfant» s'entend de toute personne âgée de moins de quatorze ans.

OBSERVATION: La loi uniforme existante reconnaît la règle du common law qui fixe à quatorze ans l'âge pour le traitement spécial des témoignages. Les dispositions ici sont conformes à cette règle.

Admissibilité du témoignage d'un enfant

2(1) Le témoignage d'un enfant est admissible si les conditions suivantes sont réunies :

a) l'enfant promet d dire la vérité;

b) le tribunal est d'avis que l'enfant comprend ce que dire la vérité signifie et qu'il est capable de communiquer les faits dans son témoignage.

OBSERVATION: Cette modification donne effet à la première résolution de 1992.

Enquête sur la compétence

2(2) Lors qu'il est nécessaire d'établir si un enfant est habile à témoigner, le tribunal peut mener une enquête pour déterminer si, à son avis, il comprend ce que dire la vérité signifie et s'il est capable de communiquer les faits dans son témoignage.

OBSERVATION: Cette modification donne effet à la deuxième résolution de 1992. La troisième résolution voulait que le juge mène l'enquête et peut permettre à l'avocat d'interroger l'enfant directement. Les rédacteurs de la présente loi croient que cela va sans dire.

Cas où le témoignage est quand même admissible

(3) Si un enfant ne promet pas de dire la vérité ou que le tribunal est d'avis que l'enfant ne comprend pas ce que dire la vérité signifie, son témoignage peut quand même être admis si le tribunal est d'avis qu'il est suffisamment faible.

OBSERVATION: Cette modification donne effet à la deuxième partie de la première résolution de 1992.

Corroboration non requise

3(1) Le témoignage d'un enfant n'a pas besoin d'être corroboré.

OBSERVATION: Cette modification donne effet à la quatrième résolution de 1992.

Mise en garde non nécessaire

(2) Le juge n'est pas obligé d'informer le jury qu'il n'est pas prudent de se fier au témoignage non corroboré d'un enfant.

OBSERVATION: Cette modification donne effet à la cinquième résolution de 1992. Son libellé est préféré au langage des modifications à la loi fédérale en 1993, ~est abolie toute obligation de mettre en garde", parce que ce dernier risque de ne pas être clair à ceux qui ne connaissent pas l'existence d'une telle obligation. Le juge garde toute sa discrétion de commenter la preuve dans les cas particuliers; encore ici cela allait sans dire.

A NOTER: La Section a décidé d'abandonner son effort de placer ces articles au sein de la *Loi uniforme sur la preuve*, puisque cette Loi est adoptée par très peu de juridictions, s'il y en a. La

préparation d'une loi spéciale paraissait améliorer la possibilité que les dispositions sur les enfants soient adoptées.

La préparation d'une loi spéciale sur le témoignage des enfants empêche que soit adoptée en loi uniforme la partie de la résolution de 1992 qui veut que tout témoin de n'importe quel âge soit présumé habile à témoigner. Une disposition éventuelle dans ce sens dans une loi générale sur la preuve s'accorderait parfaitement aux principes de la présente loi.

APPENDIX G

(see page 34)

Electronic Data Interchange (EDI)

Legal Issues for Governments
Uniform Law Conference of Canada 1993

Electronic Data Interchange (EDI) is the creation and maintenance of relationships among people or organizations by electronic communications. The term is used here loosely, to include a number of aspects of information technology beyond simple exchanges of computerized messages. In the past ten years, the use of EDI has exploded, thanks to increasingly powerful local computers and the development of links among them. This has widespread and serious implications for government, for business and for the relations between them.

This memorandum describes some of the legal issues raised by EDI. It recommends that the Uniform Law Conference should harmonize initiatives within Canada to develop a response to these issues.

In General

In general, EDI has its impact because electronic data replace paper, for keeping records and for carrying out transactions. A host of legal rules require records to be kept in physical form and transactions to be documented in writing. In addition, electronic data can be transferred, recombined or simply examined much more easily than paper data. As a result, problems of authentication and security take on new aspects. Extensive attacks on privacy are possible through EDI that could not be done on paper.

EDI has huge potential to increase efficiency and reduce costs both of government and of the private sector. It is essential that the legal barriers to its use should be reduced to a minimum. On the other hand, some regulation will be needed to ensure the integrity of the systems.

Government

Governments' data is increasingly being stored electronically. In Ontario, vital statistics are now being stored with no paper in the new centre in Thunder Bay. Personal property security registrations can be made electronically, and federal income tax returns can be filed without paper. Ontario's Ministry of Finance (Revenue) has started EDI with larger sales tax payers. Cross-ministry coordination is in its infancy. Ontario's Ministry of Consumer and Commercial Relations did develop the Electronic Registration Act, 1991 (S.O.1991 c.44), which

set up a framework for all that ministry's registrations; so far only the PPSA has been brought into this system.

The federal government developed an electronic filing system for customs documents, CADEX, now used by over 80% of customs brokers. In 1993 Revenue Canada received about two million personal income tax returns electronically. Ottawa also engages in procurement contracts electronically, with "trading partner agreements" to overcome some of the legal uncertainties about the form. Manitoba allows on-line searches of its land titles data base, but does not extend its guarantee of title to the results of searches performed in this way. Nova Scotia allows some filing of court documents electronically (and not just by fax, which is a system still based on paper originals of relevant documents.) Other governments could add their own examples to this very incomplete list.

Some forms of paperless transactions that are being used or considered by governments are accepting credit cards to pay government bills (probably not a new idea in itself); procurement cards for remote spending by ministries; benefit cards for recipients of government payments, notably welfare payments; audit standards for paperless trade; "smart cards" for health or other personal records, and the like.

Analysing and coordinating the legal impact of these policies is difficult. Different parts of the same government often are only vaguely aware of what other parts are doing in this field. The case for coordination across governments and across the country is an easy one in many areas. A good deal of high quality legal work has been done in various places in the country. The Conference should try to focus it and make it more broadly available. At the same time it should start securing the legal foundations for the use of EDI where those foundations appear insecure. The case for uniformity is very strong.

Private Sector

The main uses of EDI in the private sector are commercial (rather than, for example, personal). Most of the law supporting commercial relationships developed in the nineteenth century. Some parts, mainly those protecting consumers, have been added in this century. All parts of the law assume that commercial communications will be in writing. This assumption is no longer valid.

In many areas of commerce, no business can be done except by EDI. Auto parts makers must deal with auto manufacturers by EDI; suppliers must deal with large retailers by EDI; food producers must often deal with supermarkets by EDI. One national retailer reports that the number of her suppliers with which she deals electronically rose from 20 to 65 between the beginning of December, 1992 and the end of January, 1993 - two months!

Contracts for the sale of goods are required by law in many cases to be in writing. Are they valid if done by EDI? At least one business has had its financial statements qualified because a major law firm would not say yes. (The Uniform Sale of Goods Act does not contain such a provision, and there is no uniform Statute of Frauds.) Evidence in court proceedings is traditionally based on a paper original. Can litigation be conducted with little or no paper? The "business records" rules are difficult to apply to EDI. How do parties to commercial transactions, and to transactions with governments, ensure that their electronic communications are authentic and tamper-proof?

Legal Issues

Private and Public Issues

EDI presents a wide range of legal issues for government and the private sector. To some extent government must consider how to establish general rules that will apply equally to itself and to private users of EDI. At the same time government will want to devise rules for using EDI that will apply to itself as regulator or taxer of private enterprise, and different considerations may apply to such rules than to those governing voluntary relations.

If the Uniform Law Conference wishes to undertake work in this field, it will have to understand the basic issues in EDI and set priorities for dealing with them. To assist in these tasks, this paper contains a condensed list of some legal issues in EDI. It also refers to some background material on some of these issues. Increasing amounts of material are available on them; the current list does not pretend to be exhaustive or authoritative.

The Purposes of Writing and Other Issues

A useful text on this subject is the recent interim report by the Uncitral working group on EDI (United Nations document A/CN.9/373, March 9, 1993). It starts by examining the uses of legal rules that require texts in writing, then discusses which of these uses might be appropriately performed by electronically generated texts and under what conditions. The Uncitral working group seems to be moving away from simply defining "writing" to include electronic messages. The present text may help to show why.

Another revealing examination of the purposes of writing appears in Patricia Fry's paper, "X Marks the Spot: New Technologies Compel New Concepts for Commercial Law", in 26 Loyola of Los Angeles Law Review 607 (1993).

The Uncitral text also considers other issues before the working group. Uncitral has decided to exclude consumer issues and deal only with electronic commerce. It will also pass over some kinds of regulatory uses involving formalities of registration or authentication for public policy purposes. Neither decision need be

the choice of the Uniform Law Conference. Uncitral has also decided not to attempt to define EDI at this stage of its work (about the third year), to ensure sufficient flexibility to handle the range and the change of technology that may be affected. Further issues are raised but not discussed, notably the liability of third party carriers of electronic messages (sometimes in the form of "VANs", value added networks), and the creation of negotiable documents of title without paper.

The United Nations is a great generator of paper, and two or three substantial reports a year are produced by this working group or its secretariat. Most or all can be made available on request, and should be before any working group of the ULC on EDI. Not surprisingly, the discussions each year build on what went before, so reading the most recent text allows one to understand much of the topic without referring to the previous material.

Defining Writing to Include EDI

A submission to the federal/provincial/territorial Civil Justice Committee in 1992 recommended defining writing to include electronic messages, with safeguards for the technologically unsophisticated. Despite the Uncitral scepticism, which is relatively recent, some may wish to consider this for uniform action. It should be pointed out that such a redefinition would deal with only some of the express or implied writing requirements in Canadian statutes. Many writing requirements do not use the word "writing"; uniform statutes (and regulations in each jurisdiction) would have to be searched for equivalent rules, based for example on the creation or production of an "original" assumed to be on paper, or references to particular documents such as mortgages or deeds or contracts with the same assumption. Such a search has recently been done unofficially for the Uniform Commercial Code. A preliminary report on that search should be available in 1993. Some method would have to be found to protect people without the technical capacity to participate in EDI messages, as well.

The Law of Evidence

Substantial articles on evidence and electronic records have been published by Ken Chasse, a Toronto lawyer. A recent paper on the law of evidence and one form of electronic creation of documents, "imaging", was distributed at the meeting of the Conference in Edmonton. Many of the comments in this piece apply to other kinds of electronically-generated messages as well. A list of other articles by the same author may be found in a recent series in the Canadian Computer Law Reporter. His views may be contrasted with those of J.D. Ewart in his text Documentary Evidence in Canada. Mr. Ewart is more optimistic about the ready application of the business records rule to computer records.

The Conference may wish to consider the law of evidence as a priority for harmonization of Canadian rules for EDI. Two preliminary comments may be ventured. First, computer-generated records have tended to be admitted in

Canadian courts. The rules for getting them in are mentioned in Chasse's article. These results may not reduce the need for action. Statutory help would be justified in any event by the uncertainty in any particular case about whether the records will be admitted and about how to demonstrate that they should be. Clearer rules on admissibility may also help establish the reliability or weight of such evidence.

Second, new rules on evidence may best rely on accepted standards for record generation and storage. These standards exist for some kinds of records but not for all. As Mr. Chasse points out, the national standard for imaged documents remains a work in progress. Where these standards are not available, evidence reform will have to tread carefully.

Some statutes already deal with evidence questions for specific purposes. Ontario has tried to devise a common approach for its taxing statutes. Section 24 of Ontario's Act to amend s. 26 of the Employer Health Tax Act, Bill 27, gives an example. When government acts as regulator, admissibility of evidence is not completely separable from requirements to retain records for particular periods and in particular forms.

A more general approach to EDI and evidence was taken in the new Quebec Civil Code that comes into force in January 1994. Section VI of the chapter on evidence is the relevant provision. The articles seem to be an attempt to ensure that business records rules apply to computerized records, without going into detail about how those rules might be adapted or applied to EDI documents. (The new Code also defines "signature" broadly enough that it will apply to computer-generated authentication codes.)

Impact of Public Rules on Private Systems Design

Governments have to take care that prescribing how people or businesses should deal with them does not influence unduly the way people or businesses organize themselves electronically. Designing an information technology strategy for an enterprise involves a large number of considerations about how to carry on the business. This design is arguably distorted if the strategy is dictated by the government regulators alone.

On the other hand, the government systems have to be integrated into the business systems. Some people say that the EDI network created for Canadian customs has turned out to be irrelevant to the systems that the brokers and traders use to organize their businesses internally. As a result, the CADEX system operates parallel to rather than together with their internal systems. This is to some extent a risk of changing technology. CADEX itself was created after extensive consultation with the potential users.

A separate but possibly related concern is the impact of EDI systems on those who cannot afford to participate. For example, clients of customs brokers who are not part of CADEX face far greater delays in having shipments and documents cleared, because the government's system is set up for EDI. In some cases this is simply the "discipline of the marketplace"; in other cases public policy may demand that the technologically less sophisticated members of the public continue to receive good service.

Privacy - Public and Private Sector Rules

Two other legal aspects of EDI should be mentioned here. The first is the relationship of EDI and privacy laws. Since electronic records can be searched and sorted very quickly, having public information stored in electronic data bases makes it accessible in ways that it has not been before. For example, if the public records of corporations is available for electronic search, it would be possible for someone to find out all the companies of which an individual was director. This is theoretically but not practically possible with paper records. Since many governments are moving to arrange their data in accessible form, in order to sell it - a policy sometimes known as one on "tradable data" - these new assaults on privacy should be taken seriously.

The federal Privacy Commissioner mentioned EDI expressly as a potential threat to privacy in his recent annual report, published in July 1993. In addition, Ontario's Information and Privacy Commissioner has recently published a study on the privacy implications of smart cards, whose creation and use is often linked with EDI systems. It is possible that real privacy will depend on a legal rule to build the electronic systems with a higher capacity for security than paper systems.

The Uniform Law Conference does not have a uniform statute on the protection of privacy within government. EDI may give us the incentive to create one.

This is different of course from a generally applicable private law right to privacy. The most recent attempt of the Conference to adopt a uniform privacy statute faltered at the drafting stage in early 1992. Perhaps the Conference's consideration of EDI could give new impetus to that project.

Administration of Justice

The final impact of EDI on the legal system that will be mentioned is the prospect of making our courts operate electronically. One leading expert on EDI in the private sector have said that the single most important legal issue in EDI is to create a harmonized system for filing court documents electronically, rather than ten or twelve or thirteen "islands of EDI". Even with the commercial benefits of uniformity, business often finds itself facing incompatible systems. Governments should not make the same mistakes. It is tempting for public

administrators to satisfy their own needs without considering the broader impact (as it is tempting for businesses to do the same.)
Standards for "legal messages" (or at least court messages) would be extremely helpful, though as noted earlier in the discussion of evidence, other technical standards for use of EDI are not always readily available either. The need for "open systems" is great. The risk is that if such systems are not developed now, we will all spend great amounts of time and money in a decade trying to open the closed systems we may build tomorrow.

The Conference might choose to refer this question to the Canadian Court Administrators, with an offer to contribute whatever expertise in the area that the Conference may otherwise develop. Just as the Conference must work with all the players in the legal system, so too the Court Administrators should do so in developing their own standards. They will have to face problems of unequal resources and priorities, and different styles and demands of practice across the country, but the desirability of harmonization remains high.

Some Other Initiatives

The National Conference of Commissioners for Uniform State Laws, has been integrating EDI questions into its current work on the Uniform Commercial Code, particularly Chapter II on the sale of goods. As noted earlier, the United Nations Commission on International Trade Law (Uncitral) is working on international legal standards for EDI. A large number of international organizations are also pursuing some aspects of the topic. The Uncitral work is being carefully designed not to duplicate what is happening elsewhere. Private as well as public sector developments should be taken into account in developing a Canadian response.

Recommendation

> The Uniform Law Conference should take the initiative in responding to the legal challenges of EDI both within government and outside. This is an opportunity to provide active "customer service" to all parts of sponsoring governments in an area that will cut costs. It is also a chance to promote competitive business practices in both regulated and unregulated fields.
>
> The 1993 meeting should choose one or two priority items for manageable work and practical results within one or two years. It is probably that the top priority should be the law of evidence, as much business and government use of EDI is made risky by the uncertainty of its reception in court. This is a project in which the Criminal Law Section should be invited to participate.

APPENDIX G

Legal Issues in EDI

This list has been compiled using material from the Electronic Data Interchange Council of Canada and the United Nations Commission on International Trade Law.

Contract Law

1. Do EDI messages satisfy the legal requirement that some contracts must be in "writing"?

2. Do EDI messages satisfy the legal requirement that some information must be contained in a "document"?

3. Do EDI messages satisfy the legal requirement that some documents must contain a "signature"?

4. When and where is a contract made by EDI messages? This affects the choice of law and the timing of obligations.

5. Can general conditions be imposed through EDI? How is the "battle of forms" to be resolved in EDI transactions?

6. Can the equivalent of a negotiable bill of lading or other documents of title be created through EDI messages?

7. What are the liabilities of the sender and the recipient where the communication is defective? Does it matter if a third party communicator is involved?

Evidence Law

8. Can admissible evidence be generated by EDI - through the business records rules or otherwise?

Records Retention and Use Rules

9. Do EDI messages stored electronically satisfy the requirements of public authorities about keeping records?

10. Are EDI messages acceptable means of submitting information to public authorities? Acceptable means for public authorities to communicate with all or parts of the public?

Banking Law

11. How can orders be countermanded and errors corrected when EDI instructions are effected immediately with no independent original documentation for verification?

Contracting Out

12. Can the parties by contract avoid some of the legal requirements of writing on paper?

Regulatory Issues

13. Should providers of EDI network services, or the practice of EDI generally, be publicly regulated?

14. Are current criminal laws adequate to protect the security of EDI messages and systems?

15. Should privacy laws be amended in light of EDI?

16. Should access to information laws be amended in light of EDI?

17. Should laws regulating the export of data be amended in light of EDI?

18. Who owns the intellectual property rights in EDI message systems?

APPENDICE G

(see page 41)

Document: 840-693/010

(ATTENTION: On a présenté cette version à la Conférence sur L'uniformisation des Lois au Canada. Elle ne reflète pas les changements que ont été faits dans la version anglaise après la conclusion de la Conférence.)

CONFÉRENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

L'échange de données informatisées (EDI)

EDMONTON (Alberta)
Du 15 au 19 août 1993

L'échange de données informatisées (EDI)

Défis juridiques pour les gouvernements
Conférence de 1993 sur l'uniformisation des lois du Canada

L'échange de données informatisées (EDI) consiste en la création et au maintien de relations entre les personnes et les organismes par voie de communications électroniques. L'expression est utilisée dans son sens large ici, afin d'inclure plusieurs aspects de la technologie informatique dépassant les simples échanges de messages informatisés. Au cours des dix dernières années, l'utilisation de l'EDI s'est répandu rapidement, grâce à l'utilisation de terminaux informatiques de plus en plus puissants et l'élaboration de liens entre eux. Cette situation présente des incidences généralisées et graves pour le gouvernement, pour les entreprises et pour leurs relations entre eux.

Le présent mémoire décrit quelques points juridiques que soulève l'EDI. Il recommande que la Conférence sur l'uniformisation des lois du Canada harmonise les initiatives au Canada afin d'apporter des solutions à ces points litigieux.

Généralités

En général, l'incidence de l'EDI vient du fait que les données électroniques remplacent le papier, pour conserver des documents et pour exécuter des transactions. Une série de règles juridiques exigent de conserver les docu ents sur papier et de documenter les transactions par écrit. En outre, les données électroniques peuvent être transférées, refusionnées ou simplement être consultées plus facilement que les données sur papier. Par conséquent, les problèmes d'authentification et de sécurité prennent d'autres formes. Il est possible de porter largement atteinte à la vie privée par le truchement de l'EDI de façons qui seraient impossibles sur papier.

L'EDI offre des possibilités énormes d'augmenter l'efficacité et de réduire les coûts, autant pour le gouvernement que pour le secteur privé. Il est essentiel de réduire au minimum les obstacles juridiques. Par ailleurs, certains règlements seront nécessaires pour assurer l'intégrité des systèmes.

Gouvernement

Les données des gouvernements sont de plus en plus emmagasinées électroniquement. En Ontario, des statistiques vitales sont actuellement emmagasinées sans papier dans le nouveau centre de Thunder Bay. Il est possible d'enregistrer les sûretés mobilières de façon électronique et de déposer les déclarations d'impôt sur le revenu fédérales sans papier. Le Ministère ontarien des Finances (Revenu) a commencé à utiliser l'EDI auprès de ses plus gros contribuables commerciaux. La coordination entre les ministères en est à ses premiers balbutiements. Le ministère ontarien de la Consommation et du Commerce a adopté la Loi de 1991 sur

l'enregistrement électronique (L.O. 1991 c.44), qui dresse le cadre de travail de tous les enregistrements du ministère; jusqu'à présent, seul la PPSA utilise ce système.

Le gouvernement fédéral a mis au point un système de transmission électronique des déclarations pour les documents de douanes, SAED, qu'utilisent actuellement 80 p. 100 des courtiers en douane. En 1993, Revenu Canada a reçu deux millions de déclarations d'impôt sur le revenu électroniquement. De plus, Ottawa passe des contrats d'achat électroniquement dans le cadre des «accords entre partenaires commerciaux», afin de surmonter certains doutes relatifs au formulaire. Le Manitoba permet des recherches en ligne dans sa base de données des titres de bien-fonds, mais ne garantit pas le titre à la suite d'une telle recherche. La Nouvelle-Écosse permet de déposer en cour certains documents électroniquement (et pas seulement par télécopieur, un système encore basé sur des documents pertinents originaux sur papier). D'autres gouvernements pourraient ajouter leurs propres exemples à cette liste très incomplète.

Certaines formes de transactions passées sans papier que les gouvernements utilisent ou envisagent d'utiliser acceptent des cartes de crédit pour le paiement de comptes gouvernementaux (une idée qui n'est probablement pas nouvelle en elle-même); des cartes de débit pour les dépenses à distance des ministères; des cartes de prestation pour les récipiendaires de paiements gouvernementaux, particulièrement pour le paiement de l'assistance sociale; des formes de vérification pour le commerce sans papier; des «cartes intelligentes» pour les dossiers de santé ou d'autres dossiers personnels, etc.

Il est difficile d'analyser et de coordonner l'incidence juridique de ces politiques. Des entités distinctes du même gouvernement ne sont souvent que vaguement au courant de ce que les autres entités font dans ce domaine. La coordination à l'échelle gouvernementale et nationale se justifie facilement à de nombreux égards. Beaucoup de travail juridique de haute qualité a été fait à divers endroits du pays. La Conférence devrait tenter d'en faire la synthèse et de le rendre plus accessible. Du même souffle, la Conférence devrait commencer à assurer les fondements juridiques de l'utilisation de l'EDI, lorsque ces fondements semblent risqués. L'uniformité est très justifiée.

Secteur privé

Le secteur privé utilise surtout l'EDI à des fins commerciales (plutôt que personnelles, par exemple). La plupart des lois régissant les relations commerciales ont été adoptées au XIX^e^ siècle. Des clauses, visant surtout la protection du consommateur, y sont ajoutées au cours du siècle actuel. En toutes parts, les

lois présument que les communications commerciales seront écrites. Cette présomption n'est plus valide aujourd'hui.

Dans de nombreux secteurs commerciaux, il est impossible de faire des affaires si ce n'est par le truchement de l'EDI; les fournisseurs doivent traiter avec les grands détaillants par EDI. Un détaillant national indique que le nombre de ses fournisseurs avec lesquels il traite électroniquement est passé de 20 à 65 entre le début de décembre 1992 et la fin de janvier 1993 - deux mois!

Dans de nombreux cas, les contrats de vente doivent légalement être rédigés par écrit. Sont-ils valides s'ils sont rédigés par EDI? Au moins une entreprise n'a pas obtenu l'autorisation de ses états financiers parce qu'une grande étude d'avocats n'a pas répondu oui à cette question. La *Uniform Sale of Goods Act* ne prévoit pas une telle disposition et il n'existe pas un Statute of Frauds uniforme.) Les preuves sont traditionnellement présentées dans les tribunaux sur original de papier. Peut-on débattre une question litigieuse avec peu ou pas de papier? Les règlements sur les «documents commerciaux» s'appliquent difficilement à l'EDI. Comment les parties d'une transaction commerciale et d'une transaction avec le gouvernement s'assurent-elles que leurs communications électroniques sont authentiques et inviolables?

Questions juridiques

questions publiques et privées

L'EDI soulève une vaste gamme de questions juridiques pour le gouvernement et pour le secteur privé. Le gouvernement doit envisager, dans une certaine mesure, des façons d'établir des règles générales qui s'appliqueront également à lui-même et aux utilisateurs privés de l'EDI. Le gouvernement voudra aussi concevoir des règles d'utilisation de l'EDI qui s'appliqueront à lui-même à titre d'organisme de réglementation et de taxateur de l'entreprise privée et des éléments autres que ceux qui gouvernent les relations volontaires pourraient s'appliquer à ces règles.

Si la Conférence sur l'uniformisation des lois désire se pencher sur cette question, elle devra comprendre les enjeux fondamentaux de l'EDI et établir des priorités pour trancher. À cette fin, le présent document contient une liste succincte de questions juridiques soulevées par l'EDI et de la documentation de référence sur certaines de ces questions.

Objet de la rédaction par écrit et autres questions

Le texte le plus long reproduit ici est celui du groupe de travail de la CNUDCI sur l'EDI (document des Nations Unies A/CN.9/373, 9 mars 1993). Il commence par l'examen des utilisations des règles juridiques qui exigent des textes écrits, puis examine les utilisations qui pourraient convenablement être réalisées à l'aide

section de l'uniformisation des lois, juillet 1993

de textes produits électroniquement, et dans quelles conditions. Le groupe de travail de la CNUDCI semble s'éloigner de la simple définition de «texte écrit» pour y inclure les messages électroniques. Le présent document pourrait aider à en comprendre les motifs.

Le même texte présente d'autres questions sur lesquelles le groupe de travail s'est penché. La CNUDCI a décidé d'exclure les questions de consommation pour ne traiter que le commerce électronique. En outre, elle passera outre certains types d'utilisations réglementaires concernant les formalités d'enregistrement ou d'authentification aux fins de politique officielle. La Conférence sur l'uniformisation des lois n'est tenue d'adopter aucune de ces décisions. La CNUDCI a aussi décidé de ne pas aborder la définition de l'EDI à cette étape de son travail (à peu près la troisième année), afin de se réserver suffisamment de souplesse pour traiter la gamme de technologies et les changements technologiques qui pourrait être en cause. Vous remarquerez que d'autres questions sont soulevées sans être discutées, notamment la responsabilité des tierces parties qui transmettent des messages électroniques (parfois sous la forme de RVA, les réseaux à valeur ajoutée), et la création de documents de titre négociables sans support sur papier.

Les Nations Unies produisent beaucoup de papier et ce groupe de travail ou son secrétariat produit deux ou trois rapports d'envergure annuellement. La plupart ou l'ensemble de ces documents doivent être disponibles sur demande et tous les groupes de travail de la Conférence sur l'EDI devraient en avoir un exemplaire. Il n'est pas étonnant de constater que chaque année, les discussions portent sur ce qui s'est passé auparavant; la lecture du texte le plus récent permet donc de comprendre en grande partie le sujet sans qu'il soit nécessaire de consulter la documentation précédente.

Inclure l'EDI dans la définition de texte écrit

Un autre texte d'ordre général, quoique bref, a été déposé au Comité de la justice civile en 1992; il recommande d'inclure dans la définition de texte écrit les messages électroniques et de prévoir des protections pour les personnes qui ne sont pas à la fine pointe de la technologie. Malgré le scepticisme relativement récent de la CNUDCI, l'on pourrait considérer cette démarche comme une mesure uniforme. Il convient de souligner qu'une telle modification de la définition ne viserait que quelques-unes des exigences explicites ou implicites des lois canadiennes sur les textes écrits. De nombreuses exigences relatives aux textes écrits n'utilisent pas l'expression «texte écrit»; il faudrait chercher dans les lois uniformes (et dans les règlements de chaque domaine de compétence) des règles équivalentes, basées par exemple sur la création ou sur la production d'un «original» que l'on présume être sur support papier, ou des mentions de documents en particulier

comme les hypothèques, les actes ou les contrats, qui reposent sur la même présomption. Une telle recherche a été effectuée récemment de façon informelle pour le code commercial uniforme. Un rapport préliminaire sur une telle recherche devrait être présenté à la réunion d'août. Il faut aussi trouver une façon de protéger les personnes qui ne disposent pas de la capacité technique nécessaire pour recevoir et envoyer des messages électroniques.

Droit de la preuve

L'autre texte d'envergure annexé au présent document est un extrait d'un article de Ken Chasse, un avocat de Toronto, sur le droit de la preuve et sur un type de création électronique de documents, la «prise d'images». Bon nombre des commentaires dans ce document s'appliquent aussi à d'autres types de messages électroniques. Une liste des autres articles du même auteur est tirée série parue récemment dans le Canadian Computer Law Reporter.

La Conférence pourrait considérer le droit de la preuve comme prioritaire pour l'harmonisation des règles canadiennes relatives à l'EDI. On peut avancer deux commentaires préliminaires. Premièrement, les tribunaux canadiens ont tendance à admettre les documents informatiques. L'article de Chasse mentionne les règles sur la façon de les présenter. Cette situation ne réduit en rien la nécessité de prendre des mesures. Une mesure législative serait justifiée en cas d'incertitude dans une cause en particulier, à savoir si les documents seront admis et sur la façon de démontrer qu'ils devraient l'être. En outre, des règles plus précises sur l'admissibilité pourraient contribuer à établir la fiabilité ou le poids d'une telle preuve.

Deuxièmement, il serait préférable que de nouvelles règles quant à la preuve reposent sur des normes acceptées de production et de conservation de documents. De telles normes existent pour certains types de documents, mais par pour tous. Comme le fait remarquer M. Chasse, la norme nationale pour les documents en image n'est pas encore établie. La réforme de la preuve devra rester prudente tant que de telles normes ne seront pas disponibles.

Quelques lois traitent déjà des questions de preuve à des fins précises. L'Ontario a tenté de mettre au point une approche commune dans ses lois sur la taxation. Un extrait d'un nouveau projet de loi visant à modifier la *Loi sur l'impôt prélevé sur les employeurs relatif aux services de santé* sert d'exemple. Lorsque le gouvernement passe des règlements, l'admissibilité de la preuve n'est pas tout à fait séparable des exigences relatives à la conservation des documents pendant des périodes données et dans des formes données.

Le nouveau Code civil du Québec, qui entre en vigueur en janvier 1994, adopte une approche plus générale quant à l'EDI et à la preuve. Veuillez trouver ci-joint l'article VI du chapitre sur la

section de l'uniformisation des lois, juillet 1993

preuve. Les articles semblent tenter d'inclure les documents informatisés dans les règles régissant les documents commerciaux, sans donner de précisions sur la façon dont ces règles peuvent s'adapter ou s'appliquer aux documents informatisés.

Incidence des règles publiques sur la conception des systèmes privés

Les gouvernements doivent faire attention que leurs exigences sur la façon dont les personnes ou les entreprises traitent avec eux n'influencent pas indûment la façon dont les personnes ou les entreprises s'organisent sur le plan informatique. La conception d'une stratégie sur la technologie de l'information d'une entreprise met en jeu un grand nombre de points à examiner sur la façon de faire des affaires. On peut faire valoir qu'une telle conception est biaisée si la stratégie n'est dictée que par réglementation gouvernementale.

Par ailleurs, les systèmes gouvernementaux doivent être intégrés aux systèmes privés. Certains prétendent que le réseau d'EDI créé pour les douanes canadiennes n'est pas compatible avec les systèmes qu'utilisent les courtiers ou les négociants dans l'organisation de leurs affaires à l'interne. Par conséquent, le système SAED fonctionne parallèlement à leurs systèmes internes plutôt que conjointement avec eux. Dans une certaine mesure, il s'agit là d'un risque associé à l'évolution technologique. Le SAED a été conçu après bien des consultations avec les utilisateurs éventuels.

Une autre préoccupation distincte, mais qui pourrait être reliée, est l'incidence des systèmes d'EDI sur les personnes qui ne peuvent pas se permettre d'y participer. À titre d'exemple, les clients des courtiers en douanes qui ne font pas partie du SAED encourent de bien plus longs délais pour faire dédouaner leur marchandise et accepter leurs documents, parce que le système du gouvernement est conçu pour l'EDI. Dans certains cas, ce n'est simplement que la «règle du marché»; dans d'autres cas, la politique publique peut exiger que les membres du public moins avancés sur le plan technologique reçoivent un bon service.

Vie privée - règles des secteurs public et privé

Il convient de mentionner deux autres aspects juridiques de l'EDI. D'abord la relation de l'EDI avec les lois sur la vie privée. Puisque les documents électroniques peuvent être consultés et triés très rapidement, les renseignements sur le public stockés dans des bases de données électroniques sont accessibles comme jamais auparavant. Par exemple, si des documents publics sur les sociétés peuvent être consultés électroniquement, il serait possible de faire ressortir toutes les entreprises dont une personne donnée a été le directeur. Cette démarche est possible théoriquement, mais pas concrètement, avec des documents sur papier. Puisque bon nombre de gouvernements organisent de plus en plus leurs données de

façon accessible, afin de les vendre - une politique appelée parfois «de données négociables» - il faut prendre au sérieux ces nouvelles ingérences dans la vie privée.

Le commissaire fédéral à la protection de la vie privée a indiqué expressément que l'EDI constituait une menace éventuelle à la vie privé dans son dernier rapport annuel paru en juillet 1993. En outre, le commissaire à l'information et à la protection de la vie privée de l'Ontario a publié récemment une étude sur les incidences sur la vie privée des cartes intelligentes dont la création et l'utilisation sont souvent reliées à des systèmes d'EDI. Il est possible qu'une disposition légale exigeant la construction de systèmes électroniques de sécurité plus puissants que les systèmes régissant le papier soit nécessaire afin d'assurer une véritable protection de la vie privée.

La Conférence sur l'uniformisation des lois ne dispose pas d'une loi uniforme sur la protection de la vie privée au sein du gouvernement. Peut-être l'EDI nous incitera-t-elle à en créer une.

Ce serait différent bien sûr d'une loi privée d'application générale sur la vie privée. La dernière tentative de la Conférence visant à adopter une loi uniforme sur la vie privée a échoué lorsqu'au moins deux instances ont rejeté la version préliminaire de la loi au début de 1992. Peut-être l'étude de l'EDI par la Conférence pourrait donner un second souffle à ce projet.

Administration de la justice

La dernière incidence de l'EDI sur le système judiciaire que nous aborderons est la perspective de faire fonctionner les cours de façon électronique. Un des grands spécialistes de l'EDI du secteur privé a indiqué que la question la plus importante dans le domaine judiciaire était de créer un système harmonisé pour le dépôt électronique de documents en cour plutôt que dix, douze ou treize «îlots d'EDI». Même si l'uniformité présente des avantages commerciaux, les entreprises se retrouvent souvent face à ses systèmes incompatibles. Les gouvernements ne doivent pas faire les mêmes erreurs. Il est tentant pour les administrateurs publics de satisfaire à leurs propres besoins sans tenir compte des incidences dans un cadre plus grand (il en est de même pour les entreprises).

Il serait extrêmement utile d'établir des normes pour les «messages juridiques» (ou du moins des messages s'adressant à la cour), bien que, comme il est mentionné ci-avant dans la partie traitant de la preuve, d'autres normes techniques d'utilisation de l'EDI ne soient pas toujours plus facilement disponibles. Des «systèmes ouverts» s'imposent. Si de tels systèmes ne sont pas mis sur pied dès maintenant, nous risquons tous de consacrer beaucoup de temps et d'argent dans une décennie à tenter d'ouvrir les systèmes fermés que nous construirons plus tard.

Section de l'uniformisation des lois, juillet 1993

La Conférence peut choisir de renvoyer cette question aux administrateurs des tribunaux canadiens et de leur offrir toute expertise dans le domaine que la Conférence pourrait acquérir autrement. À l'instar de la Conférence, qui doit travailler de concert avec tous les intervenants du système judiciaire, les administrateurs des tribunaux doivent en faire autant lorsqu'ils élaborent leurs propres normes. Ils devront s'attaquer aux problèmes de l'inégalité des ressources et des priorités, de la différence des styles et des exigences de la pratique à l'échelle du pays, mais l'harmonisation demeure hautement souhaitable.

Quelques autres initiatives

La National Conference of Commissioners for Uniform State Laws a intégré les questions relatives à l'EDI à ses travaux actuels sur le code commercial uniforme, particulièrement au chapitre II sur la vente de produits. Comme il est indiqué ci-avant, la Commission des Nations Unies pour le droit commercial international (CNUDCI) cherche à établir des normes judiciaires internationales sur l'utilisation de l'EDI. En outre, un grand nombre d'organismes internationaux se penchent sur certaines facettes de cette question. La CNUDCI organise ses travaux de façon à éviter de dédoubler ce qui se passe ailleurs. Il faut tenir compte des développements qui surviennent dans les secteurs public et privé avant d'élaborer la réponse canadienne.

Recommandation

La Conférence sur l'uniformisation des lois devrait prendre l'initiative d'aplanir les difficultés que présente l'EDI en matière judiciaire, au sein du gouvernement et à l'extérieur. Voici une occasion d'offrir un «service à la clientèle» actif à toutes les parties des gouvernements intéressés dans un domaine qui réduira les coûts. Voici aussi une occasion de promouvoir des pratiques commerciales concurrentielles autant dans les domaines réglementés que non réglementés.

Il faudrait choisir à la réunion de 1993 un ou deux points prioritaires pour organiser des travaux réalisables et arriver à des résultats pratiques dans une ou deux années. Le droit de la preuve devrait probablement être au premier rang des priorités, puisque l'utilisation de l'EDI par les entreprises et par le gouvernement présente beaucoup de risques à cause de l'incertitude de son admissibilité en cour. La Section du droit pénal devrait être invitée à participer à ce projet.

Section de l'uniformisation des lois, juillet 1993

Questions légales soulevées par l'EDI

Nous avons dressé la présente liste en nous servant des documents du Conseil canadien de l'échange électronique de données et de la Commission des Nations Unies pour le droit commercial international. [Elle est jointe à une note documentaire sur l'EDI distribuée à la réunion des sous-ministres F/P/T d'avril 1993.]

Droit des contrats

1. Les messages EDI répondent-ils aux exigences légales voulant que certains contrats doivent être rédigés «par écrit»?

2. Les messages EDI répondent-ils aux exigences légales voulant que certaines informations doivent être consignées dans un «document»?

3. Les messages EDI répondent-ils aux exigences légales voulant que certains documents doivent contenir une «signature»?

4. Quand et dans quelles circonstances un contrat est-il préparé par des messages EDI? Ces questions influent sur le droit applicable et l'entrée en vigueur des obligations.

5. Peut-on imposer des conditions générales par l'intermédiaire de l'EDI? Comment réglera-t-on le «conflit des formules» dans les transactions EDI?

6. Peut-on, par le biais des messages EDI, créer un équivalent d'un connaissement négociable ou d'un autre document de titre?

7. Quelles sont les responsabilités de l'expéditeur et du destinataire en cas de défaillance des communications? La participation d'une tierce partie communicatrice a-t-elle une importance quelconque?

Droit de la preuve

8. Peut-on générer des éléments de preuve recevables par voie d'EDI - conformément aux règles régissant les documents commerciaux ou autrement?

Conservation des dossiers et règles d'usage

9. Les messages EDI qui sont stockés électroniquement répondent-ils aux exigences des autorités publiques en ce qui concerne la conservation des données?

10. Les messages EDI constituent-ils un moyen acceptable de présenter l'information aux autorités publiques? Ces mêmes messages constituent-ils un moyen acceptable pour les

autorités publiques de communiquer avec une partie ou l'ensemble de la population?

Droit bancaire

11. Comment les commandes peuvent-elles être annulées et les erreurs corrigées lorsque les instructions de l'EDI entrent en vigueur immédiatement, sans original permettant de vérifier?

Exonération contractuelle

12. Les parties peuvent-elles, par contrat, se soustraire à certaines exigences légales prévoyant la documentation par écrit des données?

Questions réglementaires

13. Faut-il réglementer publiquement les fournisseurs de services de réseaux EDI, voire la pratique de l'EDI en général?

14. La législation pénale actuelle est-elle adéquate pour protéger la sécurité des messages et systèmes EDI?

15. Faut-il modifier la législation relative à la protection de la vie privée compte tenu de l'EDI?

16. Faut-il modifier la législation relative à l'accès à l'information compte tenu de l'EDI?

17. Faut-il modifier la législation relative au transfert des données compte tenu de l'EDI?

18. Qui détient les droits de propriété intellectuelle dans les systèmes de messages EDI?

APPENDIX H

(see page 36)

BRIEF TO THE UNIFORM LAW CONFERENCE OF CANADA DISCUSSION DOCUMENT REGARDING REFORMS TO THE JURY SYSTEM IN CANADA: The Case for Uniformity[1]

A. OVERVIEW

1. Introduction

The following has been prepared for the purposes of facilitating discussion at the Uniform Law Conference regarding a possible project on uniform reforms to the jury system. It is designed to outline the substantive issues which might be involved and also to identify possible areas in which uniformity might be a benefit.[2] Since the jury system operates within both federal and provincial spheres there are already aspects of the jury system which are uniform in Canada as they are regulated by the *Criminal Code* and also by the provisions of the *Charter of Rights and Freedoms.* This Brief deals areas of the jury system within provincial control.

The main issue to be considered is the implementation of ideas of representation and inclusion ("judgement by one's peers") in a society which increasingly recognizes diversity in gender, race, religion, culture, language and sexual orientation. Most of the issues dealt with in this Brief are simply sub-issues of this central concern. Specifically this includes analysis of the sources of juries (the jury lists), and an evaluation of systemic biases in the operation of the qualifications, exemptions and exclusion processes in jury selection (eg. jury fees and economic screening, language requirements).

The Brief concludes by suggesting that the issues which might benefit from uniformity include:

1. A uniform approach to implementation of "a jury of one's peers". Specifically should it be quota system or should it be a random selection system. If the latter then this would require discussion about uniform approaches to source lists and residency or location of the community of jurors.

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1 Presented by Dr. Moira L. McConnell, Executive Director, Law Reform Commission of Nova Scotia. Much of the substantive text of this Brief is taken from the Discussion Paper, *Juries in Nova Scotia* prepared by Dr. Steve Coughlan, Research Consultant on the Juries Project, LRC of NS.

2 Commissioners will recall that there was some work on uniformity done in the 1970s with respect to uniform exclusions and qualifications for jury service: *Jurors Qualification Act 1976*

2. A uniform approach the requirement of citizenship.

3. A uniform approach to the principles underlying juror fees .

4. A uniform approach regarding UIC payments

5. A uniform position regarding the discriminatory effect of peremptory challenges

6. A uniform approach to the availability of civil trial juries and on what basis.

7. A uniform approach to the question of understanding the proceedings and language requirements.

In the event that there is a decision to work towards uniformity on some or all these issues then further specific research would be required. It should be noted that the following Brief is intended to suggest areas for research and that comparative research in all jurisdictions is required.

2. The Jury

In Canada, the right of a person charged with a serious criminal offence to have their guilt decided by other people in the community is regarded as so fundamental to our system of justice that it is guaranteed in the Canadian *Constitution*. Most juries are used for criminal cases, but the right to have a case decided by a jury is also available in civil cases. This Brief is concerned primarily with the use of juries in criminal matters, since they are far more common, but will also deal with civil juries.

The right to a jury and many aspects of the jury system are controlled under the *Constitution* by the federal government, as part of its power over criminal law. However, the provinces and territories of Canada have responsibility for the administration of justice, which means that they also have responsibility for regulating the jury system. Most jurisdictions have legislation entitled the *Juries Act*[3] or some variation thereof which covers matters within the provincial responsibility such as creation of the jury list, (a list of names of people who can be required to serve on a jury), juror fees, qualifications for jurors, and exemptions. In effect then the province controls the implementation of the right to have a jury and, while less established as a right, the right to participate on a jury.

As the courts have become busier and as people have had less time to play a role in the justice system by acting as jurors, the jury system has become time consuming for the courts and expensive for government and taxpayers. More importantly, it appears that many people no longer regard jury duty as a privilege, but regard it as an

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[3] R S N.S 1989, c 242

obligation which is costly, inconvenient, and to be avoided. (This attitude is particularly unfortunate, because surveys have regularly shown that jurors found the experience interesting and worthwhile, and were pleased to have been involved.)[4] In addition, many people feel that the juries are not representative of the entire community but rather reflect only a small segment of the community. This has given rise to a concern that the values, morals and attitudes of a small group of people are shaping the way in which justice is provided. It can also create the impression that some people, particularly people from ethnic communities, have no role in setting the standards for what is just and fair in society by serving as jurors. Costs and delays in the jury system as well as the belief that the jury system may not be completely fair all undermine the credibility of the legal system.

3. The History of the Jury

The idea of giving a significant role to the community in settling disputes is common to many cultures. Historically, Aboriginal people in Canada looked to community members to help decide disagreements. Similarly, France makes use of juries in its judicial system. Since Canadian criminal law and, except for Quebec, civil law was inherited from England, the jury system in Canada reflects developments over the past several hundred years of English legal history.

Juries were first used in England to decide criminal cases in 1215, when a person's guilt was tested by an "ordeal" and survival testified to their innocence. When this was no longer used as a method for deciding guilt or innocence, some other method of decision-making was needed and local citizens were given this task. Although it is now generally assumed that people on juries must decide on the basis of facts given to them and not on some private knowledge, originally juries were expected to decide using their own knowledge of the case: for that reason jury members had to be drawn from the community in which the offence occurred. This view is not uniformly held, however, and some feel that "self-informing juries" may have been the theory, but not the practice. Whatever the original theory might have been, as early as the fifteenth century juries were being described as "a body of impartial men who came into court with an open mind".[5]

From a very early stage, an accused person had the right to challenge the choice of some jurors. In the fourteenth century, an accused could "peremptorily challenge"

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[4] See Law Reform Commission of Canada, *Studies on the Jury*, (Ottawa: L.R C C., 1979); New South Wales Law Reform Commission, *The Jury in a Criminal Trial: Empirical Studies*, (New South Wales: The Commission, 1986); Ministry of Attorney General, Province of British Columbia, *Jury Selection: A Right, A Duty, & A Privilege*, (Vancouver: Ministry of the Attorney General, 1992)

[5] J.B Post, "Jury Lists and Juries in the Late Fourteenth Century", in J.S Cockburn and Thomas A Green (ed.) *Twelve Good Men and True-The Criminal Jury Trial in England, 1200-1800* (Princeton: Princeton University Press, 1988), quoting J Fortescue, *De Laudibus Legum Anglie*, ed S.B. Chimes (Cambridge, 1949), chap.25

the 35 people. It appears that the accused also had the right to challenge potential jurors "for cause" from an early stage.

In late sixteenth century England, jury members were upper class, white male members of society. Changes to this situation were a long time coming. Women were not permitted to serve on juries in England until 1919. Until recently, ownership of property was also a requirement for serving on a jury, which also limited the number of people eligible to serve. All of these requirements and "qualifications", many of which were related to financial matters, had the effect of excluding large numbers of people from participating in shaping the values enshrined in the legal system. The people most excluded were people who were economically disadvantaged, the majority of whom were people of colour and women.

It can be seen from this brief outline that "the jury" can take a number of forms. It has been suggested that "its invention by a lawgiver is inconceivable. We are used to it and know that it works; if we were not, we should say that it embodies a ridiculous and impractical idea".[6] From a body that was intended to have special knowledge of the facts, it has evolved to one where special knowledge is a disqualification. Initially of quite restricted membership, it now tries to include virtually everyone. What should matter in any assessment of the jury system, therefore, is the question of what role is most useful today. The key idea is that individuals in a community should take an active role in applying the law to others in their community.

4. Creating the Jury: Federal and Provincial Roles

There are three steps involved in selecting a jury:

1) assembling the pool (the large list from which panels will be chosen);

2) choosing a panel (which involves selecting names from the pool and exempting or disqualifying those who should not serve), and;

3) choosing a jury in court (from the panel which has attended the session).

Issues arise at each stage of the process, but only the first two are within the jurisdiction of the province, and so only those two will be considered.

The dividing line between federal and provincial responsibility is the point at which the jury panel is in the court at the start of a criminal term. The process by which

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[6] Lord Devlin, *Trial By Jury* (London: Sweet & Maxwell, Limited, 1988), p 4.

the jury panel is assembled is set out in the *Juries Act* of each province. For example, in Nova Scotia the *Act* specifies that the list of people to be considered for jury duty will be selected from federal, provincial, and municipal electoral lists, and determines the size of the jury list in each judicial district. Grounds for disqualification and exclusion - that is, people who should be left off or removed from the jury list - are set out in the *Juries Act*.[7] The *Juries Act* also sets out the compensation to be paid to those who appear for jury duty and creates a $200.00 fine for persons who fail to appear.

The jury selection process involves a number of steps. For example, in Nova Scotia, every jury district - that is, county - conducts its own separate jury selection process. First, the jury pool or "jury list" is assembled - from electoral rolls, a large list of people qualified to serve on juries is drawn up.[8] From that jury list, "jury panels" are selected at the start of each Supreme Court criminal term: notices are sent to a random collection of people on the jury list, who must appear in court for jury

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7 The *Criminal Code*, also attaches some restrictions to the grounds for jury service, although these are used to challenge a juror in court. These grounds are not qualifications, because the juror could still serve if not challenged. Although the process by which the panel is assembled is governed by provincial law, the *Code* provides that the panel can be challenged on the ground of "partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned" (*Code*, s 6)

8 The jury list for each district must be quite large to accommodate "drop-off" percentages at every stage. The number of potential jurors in court at the start of a term must be sufficiently large that, after all challenges by the Crown attorney and the defence, a jury of twelve can still be created in a criminal case. To have that number of people present at the start of a session, enough notices must have been sent to allow for the people who will successfully seek exemptions, those whose notices cannot be delivered because they have moved, those who will simply fail to appear, and those who will be challenged in court. Further, the initial list must provide panels for every term where juries are required All of this means that a large list of potential jurors is required. For example, according to the *Juries Act* of Nova Scotia, a jury list of 1200 names is to be drawn up in Halifax, but because of all the factors listed above, longer lists are routinely necessary The most extreme case is Halifax, which currently draws up a list of 14,000 names annually One of the major factors affecting the size of the list is the number of terms held: in some districts, only two or three criminal terms are held each year, while in Halifax an average of two per month are held A variety of other factors affect how many names need to be on the jury list, primarily relating to the percentage of those summoned who will actually appear in court. One relevant factor is the return rate on jury notices which are undeliverable, due to out-of-date addresses This return rate varies depending on how recently an election has been held, and therefore, how accurate the electoral list is. Further, some people called for a jury panel will seek exemptions in advance: in some districts between one-third and one-half of jurors ask to be excused A few people simply fail to appear in court, and somewhere between 10% and 25% of those appearing will seek exemptions from the judge Depending on the district, it can be necessary to send notices to more than twice as many people as are actually needed in court to be sure that enough people are present for the jury selection process to take place

selection. Those called for a panel can apply to be excused, in some cases in advance, in others to the judge upon appearance in court. In court, the court clerk selects names randomly from the panel, and each of those potential jurors is either accepted or challenged by the parties, until a jury of twelve is assembled. A challenge can be made at that stage either peremptorily or for cause under the *Criminal Code*. It is at this stage there is further potential for exclusions based on biases and stereotypes. However this aspect of the selection process is regulated by the federal government and must be addressed at that level.

Civil juries are matters within provincial jurisdiction, although the initial selection process is not substantially different. In civil cases in Nova Scotia a jury need only consist of seven jurors. Also, although a criminal jury must be unanimous, a civil jury need not be and after four hours, five members can give a decision. The *Juries Act* gives parties only three peremptory challenges in civil matters.

In general then the "jury system" involves an attempt to involve all of the community as potential jurors with the actual selection being governed by a notion of fairness through random selection. The issue of concern here is identifying places where biases can infiltrate the system by determination of the initial pool or group from which jurors are selected. If that group is circumscribed or narrowed by cultural assumptions then the same assumptions will taint the process of random selection within this group. For example, at present, the jury list in many provinces is assembled from federal, provincial, and municipal electoral rolls. This source is unsatisfactory, because as it becomes dated it becomes inaccurate, resulting in a high return rate of jury notices. Further, these inaccuracies are not random, and will tend to mean that home-owners and others less likely to move frequently - that is, middle and upper income groups - will dominate jury panels. When in court there are still additional areas in which unintentional or systemic factors which create further narrowing of the range of people available to be called, considered, rejected or selected to be the jury.

B. ISSUES RAISED REGARDING JURIES

Although most of the issues regarding jury reform arise more clearly in the case of criminal matters the need for juries and concerns about the make-up of the juries in civil cases must also be considered. The issues are set out below as discrete issues but they are essentially dealing with one central question and the various sub issues that flow from this - that is, what does the right to be tried by a "jury of one's peers" mean in a society which increasingly recognizes diversity in gender, race, culture, religion, language and sexual orientation.

1. How Should the Concern That Juries are not Fully Representative of the Community be Dealt With?

The central issue in any discussion of the jury system involves the question of how to interpret in practice the idea that the person is to be tried by a jury of his or her "peers" in the community and that the jury is representative of the community as a whole. Both views involve very old notions. In the homogenous society in which they arose, there was very little difference between the two, but society today is more multicultural. Juries should be representative, but who should they represent - the accused or the community which is to judge the behaviour?

This concern relates especially to members of cultural, racial and ethnic groups.[9] It is felt by some that a jury none of whose members share the racial or ethnic background of an accused, may be less able to fairly judge that person's behaviour: a notion consistent with the idea that a person should be tried by his or her peers. It may be difficult, for example, for a jury to decide how provoked a defendant in a criminal trial could have been by a racial slur, if none of those jury members share the race or ethnic background of the accused and have never been subject to this form of hatred. The concept of "how a reasonable person would behave in the circumstances", which matters in many criminal and civil cases, is at least in part culturally-based. Unless juries are somehow able to take other viewpoints into account, members of certain ethnic and racial groups may be at a disadvantage.

It is far from obvious how to make sure that other viewpoints are represented and that all members of society are equally likely to be treated fairly. For example, do we mean by "a representative jury" that an Aboriginal defendant should be entitled to a jury exclusively of Aboriginal persons?[10] Or do we mean that the participation of some Aboriginal persons on the jury should be guaranteed? Should every jury reflect, on a percentage basis, the population of the province, so that the presence of jurors from minority communities is guaranteed on every jury and not just on those where a member of a minority is on trial?

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[9] The ***Marshall Inquiry*** found that no Aboriginal person had, as of that time, ever served on a jury in Nova Scotia No studies appear to have been done but responses indicate that some court officials believe that black Nova Scotians are also under-represented on jury panels. It is also thought by some people involved in the system that relatively few lower-income people are called for juries. The reasons that some groups are under-represented are not known, although it seems likely that it is related in large part to the list, from which juries are selected See: S Clark, *The Mi'kmaq and Criminal Justice in Nova Scotia (Halifax The Royal Commission of Inquiry into the Donald Marshall, Jr , Prosecution 1989) p 48*

[10] An example of this issue was recently reported in the *Lawyers Weekly* (July 16, 1993, p 17). The case reported involved selection of the 52 jurors from the native community in Alberta to hear the trial of another native person (*R v Born With a Tooth*) The sheriff did so in accordance with a direction from a trial judge in the case that at least 50% of the jury must be from the native community

The problem becomes more difficult if the role of the jury is considered. It is understandable that people are concerned when no members of the jury share the race or ethnic origin of the accused. At the same time, however, people can be equally concerned if the jury members are all of the same race as the accused: where a white police officer is on trial for having shot a black youth, for example, and all the jurors are white. In either case there is a problem because it is not clear whether the jury is supposed to satisfy the accused or to satisfy the community. Similarly, in a case of a sexual assault by a man on a woman, where the issue of consent arises, it could be argued that a jury should be divided on gender lines. The jury is supposed to do both, but sometimes it does not seem to be possible to achieve these goals at the same time.

There seems to be two major approaches to trying to satisfy both goals in a multicultural society where the same legal system applies to all people. Either there could be some type of "quota" system, guaranteeing the presence of members of specified groups on every jury, or perhaps on every jury where a member of that particular group is on trial. Alternatively, the province could attempt to remove any systemic discrimination from the jury selection process, by ensuring that juries are chosen from a cross-section of the community, and that the process is random (up to the point where the right to challenge arises).

These two approaches, although they differ, are not inconsistent with each other. For example, if a "quota" or an affirmative action approach to increasing members of ethnic groups in the jury system was adopted it would be preferable to target the jury panels rather than juries themselves. If persons are placed on a jury because they share the ethnic background of the accused or the victim there is a very real danger that those jurors will be perceived, both by themselves and by the community at large, as the representative of one side or the other. There is the difficult question of what groups should be entitled to benefit from any quota system. (eg. should it be only racial and ethnic members of the communities? (eg.should it even be all racial or ethnic groups? Should other characteristics such as income level, age, or gender or sexual orientation be taken into account?).[11] Clearly these are difficult questions and while answers could be given, it is likely that any decision would in some way be arbitrary, or seen to be unfair in some circumstances.

These concerns, especially that of jury members being impartial, could be met to some extent if, instead of ensuring that members of under-represented groups were present on juries, it were made more certain that members of all groups were present on the jury panels from which the people who make up the jury are taken. In that event, using random selection techniques, it should be as possible for members of a variety of groups to be chosen for the jury as anyone else.

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[11] The Ontario Court of Appeal has found that a jury selection procedure which intentionally excluded members of one sex from the jury was a violation of the *Charter*: see *R.* v. *Pizzacalla* (1991), 7 C R (4th) 294 (Ont C A).

2. If Random Selection is an Appropriate Method of Ensuring Juries are as Inclusive As Possible, What Sources Should be Used for Assembling the Jury List?

It is clear that some rules can have the unintended effect of excluding particular groups of people. Until 1985, for example, Nova Scotia juries were selected from the property assessment roll - that is, from the list of home-owners. That rule meant that about 85% of jurors were men,[12] since most home-owners were men. Now that the voters' list has been substituted for the assessment roll, juries are approximately equally composed of men and women. This same change should also have increased the number of jurors from diverse groups, who were less likely to own homes: the use of the assessment roll would have excluded a very high percentage of Aboriginal persons, for example. Even so, the use of the electoral list can still have similar discriminatory effects. Other possible source lists are as likely to be inaccurate. An appropriate response might be that no single source list be used, and that community groups and others should be able to propose source lists to be included among those from which the jury list is drawn up.

3. What About Express Exclusions/Exemptions From Jury Duty?

Although the jury list should be as inclusive as possible, some people will still need to be excluded from jury duty. However, no exclusion should be made unless there is a strong argument in favour of it. Further, exclusions which might have a greater impact on members of one group should be especially closely examined. Basically exclusions occur with respect to "qualifications", express exclusions of some groups of people from jury service, and, in some cases, exemptions granted on a case by case basis. It is commonly accepted that some people should be excluded from jury service, for the following reasons:

1. Some people should be disqualified because they may be biased, might be too involved in the administration of justice, may not have sufficient connection to the community, or for some other reason should not be allowed to serve on a jury;

2. Other people should be excused because they have a good reason for not being on a jury–usually that they must do something else which is more important either to society or to them. Excuses are of two types: some people should be excused if they apply and can show why they should not have to serve on that particular jury; while other people should be excused automatically excluded from any jury and so should not have to make an application.

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[12] See Law Reform Commission of Canada, *The Jury (Criminal Law Series Study Paper)* (Ottawa: L R C C, 1979) at pp 80-81

(i) Qualifications

Most *Juries Acts* require that a juror must be a Canadian citizen, at least eighteen years old, and in the case of Nova Scotia, have resided in the jury district for 12 months. People who have a criminal record (in NS-"who has been convicted of any criminal offence for which the punishment included death or for which he was sentenced to a term of imprisonment of two years or more") are also disqualified from service. Finally there may be a requirement that the person be able to understand the proceedings.

While specific requirements for residency may be rare in most jurisdiction there may in fact be a de facto residency requirement depending on the administration of the lists and the budgetary sources for payment of jurors fees. The substantive issue involved here is what is the relevant community of one's peers. Is it the entire province? the country? or the local area?

Where courts are being centralized and jurors are drawn from the area around the court this may mean that certain people are excluded from participating in the process. On the other hand to draw the jury from the location of the crime may mean that the person will not get a fair trial.

Jurors are required to be Canadian citizens. Presumably this qualification is intended to ensure that jurors have a real connection with the community - that they feel committed to the community, or are familiar with local standards. However, it is not clear that the citizenship requirement actually achieves these goals. People who have chosen to come to Canada, even if they have not become a citizen (or perhaps have not yet been present long enough to be a citizen) might in some cases feel a greater commitment to this country than people who are citizens because they happened to be born here. Similarly, a non-citizen might have lived in a community for many years and be far more familiar with local customs than someone who, though a citizen of Canada, has recently moved from another province. Connection to the community might be a valuable goal, but requiring that jurors be Canadian citizens is not an effective way to achieve it.[13] The issue is how one should define that connection. Almost every jurisdiction restricts jury service to Canadian citizens.[14]

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[13] In a similar context (allowing a person to practice law in a province) the Supreme Court of Canada has specifically rejected a citizenship requirement - see *Law Society of British Columbia* v *Andrews*, [1989] 1 S C.R 14 Accordingly, this restriction in *Juries Act* might be subject to challenge under the *Charter*

[14] The Northwest Territories (Jury Act, R.S N W T 1988, c J-2) permits permanent residents of Canada to serve, while the Yukon (Jury Act, R.S.Y. 1986, c 97) allows British subjects to serve. Manitoba (The Jury Act, R S.M 1987, c J30) deleted the citizenship requirement in its Charter Compliance Statute Amendment, S M 1987-88, c 44, s 15(1)

The need to do so is not clear. The arguments in favour of this disqualification seem to be that "Jurors must be familiar with the experiences and standards of conduct of the average member of the community and they must feel a commitment to the community. Citizenship is a logical requirement for qualifying for jury duty...while it provides only a rough indication of the above characteristics, it at least draws a line capable of objective application".[15]

Essentially these same arguments were considered and rejected by the Supreme Court of Canada in Law Society of British Columbia v. Andrews.[16] On the first point, familiarity with Canadian standards of behaviour, the majority held:

> Only citizens who are not natural-born Canadians are required to have resided in Canada for a period of time. Natural-born Canadians may reside in whatever country they wish and still retain their citizenship. In short, citizenship offers no assurance that a person is conscious of the fundamental traditions and rights of our society.[17]

Regarding commitment to Canadian society, the court held:

> Only those citizens who are not natural-born Canadians can be said to have made a conscious decision to establish themselves here and to opt for full participation in the Canadian social process, including the right to vote and run for public office While no doubt most citizens, natural-born or otherwise, are committed to Canadian society, citizenship does not ensure that is the case Conversely, non-citizens may be deeply committed to our country.[18]

Based on this decision, it is arguable that the citizenship requirement is a violation of s. 15 of the Charter. Even if it is not, it is unnecessary and undesirable.

Further reasons not to exclude non-citizens can be found. In part, the justification for the exclusion rests on the assumption that people who do not share a culture cannot adequately judge one another's behaviour. But if that is so, excluding non-citizens from juries will virtually guarantee that non-citizens who are tried by juries cannot have jurors who might understand their behaviour. This disqualification will

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15 Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27) (Ottawa: Supply and Services Canada, 1980), p. 40

16 The Court was considering a citizenship requirement for admission to a provincial Bar society, rather than as a requirement for jury service

17 p.35, adopting the view of the British Columbia Court of Appeal.

18 p. 36, again adopting the view of the British Columbia Court of Appeal

At the other extreme, one could argue that because jury service is, broadly speaking, compulsory and because it is an imposition, one should not suffer any disadvantage as a result. In this event, it could be argued that full compensation of whatever financial loss the juror suffers is appropriate.

In this regard, a recent survey in British Columbia provides a useful insight into public attitudes. Former jurors were asked a number of questions concerning their experience. Ninety-seven per cent felt that it was a citizen's civic duty to serve as a juror. At the same time, 96% felt that jurors ought to be compensated for their service.[23]

Nova Scotia (like every other province) has opted for a compromise between these two extreme positions. People called to court to sit on a jury panel or on a jury are paid $15.00 per day, and a travel allowance of 20¢ per mile.[24]

This approach might be described as compensating every juror equally but inadequately. The amount given is enough to amount to a token recognition of the juror's service, but not enough to provide any real compensation. Accordingly, it would be necessary to increase the jury fee considerably in order to compensate most jurors, but losing the token fee now paid would make little difference to most people.[25] The method currently used in Nova Scotia does not distinguish between jurors in any way. Someone who appears for only an hour as part of the jury panel will receive the same fee as a person who is selected for the jury and serves the rest of that day. In addition, any actual loss suffered by the juror is not taken into account. Whether one is self-employed and loses a day's earnings, or will receive full pay from one's employer while serving on a jury, the fee is the same. A particularly unfortunate example of the way jury service can have an impact on a juror's income relates to unemployment insurance. According to the policies of the Department of Employment and Immigration, a person who serves more than two days on a jury is not available for work.[26] Accordingly, that person will not be eligible for unemployment insurance benefits during that time.

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23 Juror Needs Assessment - Jury Selection: A Right, A Duty, & A Privilege (Province of British Columbia, Ministry of Attorney General, April 1992), p 18.

24 This fee is set out in s 17(1) of the Juries Act though s 17(2) also allows the Governor in Council to set a different fee by regulation In some municipalities, a fee of $25.00 is paid.

25 Note as well that although the fee is only a token amount to each juror, it can be significant to the municipality that pays it - juror fees and expenses amounted to $70,000 in Halifax in 1991.

26 This rule does not apply to those who merely are part of a jury panel, or who take part in a trial that is over within two days.

A number of alternative approaches to compensation are possible. First, one might decide only to pay jury fees to those actually serving on a jury, not to those who attend as part of a jury panel (whether travel expenses would still be compensated equally is a separate question). The duty imposed on these two groups of people are quite different, and it would not be unreasonable to distinguish between them in compensation.[27] This approach is similar to that in British Columbia, where the fee for jurors is set at $20.00 per day, but those appearing only on a jury panel receive only $10.00.[28] In accordance with this approach, one could vary the jury fee according to the length of time a juror is required. In British Columbia, the jury fee increases from $20.00 to $30.00 for every day over ten days. In Ontario, jurors receive no fee (though they are compensated for expenses) for service of less than ten days: after that, they are compensated $40.00 per day for up to 49 days, and $100.00 per day for 50 days or more.[29] Several state in the United States have also adopted a similar approach. In Massachusetts, for example, a juror receives no compensation for the first three days of service, but $50.00 a day thereafter. If the juror is unemployed, he or she can receive $50.00 for the first three days as well.[30]

A more flexible approach to increasing compensation is also possible. In Manitoba, for example, the standard jury fee is set by regulation.[31] However, the trial judge can recommend that a juror be paid additional fees where payment of only the normal fee would result in unusual hardship to the juror, or where the trial is of unusual length.[32]

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27 This step alone would save approximately $16,500 - $33,000 in fees in Halifax Figures from the Prothonotary's Office show that approximately 1600 people appeared on the opening day of a term in 1991 Halifax held 42 trials that year, which means that 500 people actually served on juries The remaining 1100, therefore, appeared on a panel but not on a jury (this is slightly oversimplified, since a person could have appeared on more than one jury in the term). Those 1100 people would have been paid jury fees totalling $16,500.00. If there were on average two trials each term, and everyone available on the opening day also attended for jury selection at the second trial, then the amount paid to persons appearing on a panel but not on a jury would be $33,000 00

28 Jury Act,R S.B.C. 1979, c.210, s. 22 (as amended 1986)

29 R.R O 1980, Reg 4, as am by O Reg 178/89, pursuant to the Administration of Justice Act, R S.O. 1990, c. A.6, s. 5

30 Janice T. Munsterman et al , The Relationship of Juror Fees and Terms of Service to Jury System Performance (Arlington, Virginia: National Center for State Courts, 1991), p. 2 In Massachusetts, the employer is required to pay a juror's regular wage for the first three days. Similar approaches have been adopted in Colorado, Connecticut, North Carolina, Pennsylvania, and some courts in Arizona and Alaska

31 The Jury Act,R S.M 1987, c J30, s. 42(1)

32 Ibid., s. 42(2)

Similarly, a recent study in British Columbia suggests the possibility of making juror fees available on application. Anyone who has received their ordinary wage while serving on the jury would not be eligible. Those who did not receive any wage or other compensation during that time could apply for the fee: since fewer people would be compensated, the compensation paid each could be greater.[33]

Rather than adjusting the amount paid in fees, it would be possible to deal with compensation by other means. In Newfoundland, for example, the *Jury Act* provides that "a person may not be compensated for jury duty".[34] However, the *Act* also provides that a juror's employer is required to pay the juror normal wages and benefits during his or her absence.[35] Similarly, Ontario is considering a proposal that would require employers to compensate jurors for service of up to three days, and to give the employers some type of tax credit in return.[36] This approach of requiring employers to continue to pay jurors is also adopted in Massachusetts.

In 1979, the Law Reform Commission of Canada commissioned a number of research projects all relating to jury trials.[37] One of these studies, examining the views that jurors held about criminal jury trials, proceeded by way of questionnaires distributed to jurors in various places in Canada. One of the places included in the survey was Nova Scotia, where questionnaires were distributed to jurors in Halifax, Windsor, and Lunenburg. Based on responses in that study, jurors in Nova Scotia may have no strong objections to a fee system that removes compensation in many cases.

Only 4.7% of jurors found the process a great inconvenience - 72.7% rated the inconvenience as slight or none.[38] When asked what their major complaint about the process was, only 5% reported loss of wages. Waiting was the most commonly reported complaint, but loss of wages was the least common[39]. In part, this may be explained by the situation of jurors with regard to wages: 59% reported that they received their full pay while on a jury, and a further 21.7% had no regular source of

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33 Jury Selection: A Right, A Duty, & A Privilege, pp 33-34

34 Jury Act, R.S.N 1990, c. J-5, s. 38(1)

35 Ibid., s. 37 Section 38(2) of the Act allows anyone "who is not in receipt of income from wages, self-employment, unemployment insurance or social assistance" to be paid out of the Consolidated Revenue Fund

36 Juries Act Project, Juries Act Review - Issues Paper (January 13, 1992), p 11.

37 See Law Reform Commission of Canada, The Jury (Criminal Law Series Study Paper) (Ottawa, L R C C., 1979)

38 Ibid., p 48

39 Ibid., p. 54.

income, and so presumably lost no wages. That is, just over 80% of jurors were no worse off financially for serving on a jury, and a further 7.2% received some wages.[40]

Unfortunately, these figures cannot safely be relied on as representing the situation today. Since the statistics were gathered in 1979, the jurors sampled were all drawn from a jury list based on the assessment roll, not the electoral roll. As a result, the demographics of the jury sampled is quite different from that today. The sample, for example, was 85.6% male, whereas today the jury list should contain men and women in more or less equal numbers.[41] The statistics on age and sex of jurors in 1979 and today are not likely to be comparable. It is difficult to know what effect this change has on juror attitudes. For that reason, renewed investigation is called for.

In the long run, the major reason that this issue is important is its effect on the composition of juries. If large parts of the population are routinely excused by judges because of the financial impact of jury service, then juries are not drawn from as broad a cross-section as they should be.

The most straightforward way to cause judges not to grant exemptions based on financial impact is to remove that financial impact - to compensate all jurors fully. It seems clear that option is unrealistic. If, however, a system can be created that treats compensation in a more sophisticated manner - that sees to it that the burden generally imposed is a reasonable one, and that jurors with unusual circumstances can be adequately compensated, rather than excused - then in-court excusals should be reduced. This would be consistent with the goal of greater inclusiveness, and a desirable result.

5. What are Effects of Changing the Location of Courts and Jury

Many changes are being made in many provinces to the court structures to accommodate the workload and financial constraints. This means in some cases that the areas which constitute the community or "jury district" may have changed. For example, in Nova Scotia courts have held hearings in every jury district and jurors were drawn from the district where the trial took place. Now, the court will no longer sit in every jury district. This change will have an effect on the "community" by which an accused person is tried. If an offence occurs in a county where the court no longer sits, where should the jury members be drawn from - the county where the trial occurs, the county where the offence occurred, or from the several counties all served by the court? There will be additional expense and inconvenience in drawing jury members from counties other than that of the trial, but it might be unfair, both to jurors and to accused persons, to ask the members of one county to act as jurors for all trials in that and surrounding counties. While the specifics of this issue might

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[40] Ibid., p 51

[41] Ibid., pp. 80-81

C. ISSUES WHICH MIGHT BENEFIT FROM UNIFORMITY

In Canada the right to a jury in some criminal cases is guaranteed as a fundamental right. Further, although there is to date little written on the matter, it may be that the right to participate on a jury as a part of participation in the justice system could also be considered a right. Given the uniformity or universality of this right it would seem appropriate that some matters relating to implementation of this right also be uniform. These are:

1. A uniform approach to implementation of "a jury of one's peers".

Specifically should it be quota system or should it be a random selection system. If the latter then this would require discussion about uniform approaches to source lists and residency or location of the community of jurors.

2. A uniform approach the requirement of citizenship.

Since this has already been altered in at least two jurisdictions it would be seem an appropriate issue to consider. Concerns about comprehension of the proceedings could be met though a requirement along those lines. Some analysis of issues relating to voting rights might be relevant. Given the *Charter* implications this would appear to be a suitable area for uniformity.

3. A uniform approach to the principles underlying juror fees.

While standards of living and budgets may allow for differing amounts to be paid it would be useful if the same approach to this civic duty be adopted. Included in this would be issue relating to whether it is fair to require employers to absorb the cost to be paid by society as a whole through the tax system or whether each citizen should absorb this cost through service. The implications of undue hardship on lower income or wage dependent people should be considered, particularly as intersects with concerns about race and gender representation.

4. A uniform approach regarding UIC payments

While the availability of UIC payments is a federal matter the ULCC could adopt a position on this matter. This could be expressed to the federal government and could also be expressed through a uniform treatment of UIC recipients in requiring jury service.

5. **A uniform position regarding the discriminatory effect of preemptory challenges.**

Again this is a federal matter, however in view of the concerns about inclusiveness and representation it might be appropriate for the ULCC to develop a position on the effect of these challenges in restricting or narrowing the range of people on the jury.

6. **A uniform approach to the availability of civil trial juries and on what basis**

Civil juries are available to some degree in all jurisdictions. However the cost of these juries is a matter of concern. It would be useful to develop a uniform approach to the availability of these juries, particularly in the common law jurisdictions.

7. **A uniform approach to the question of understanding the proceedings and language requirements.**

Again the specifics of this issue might vary from jurisdiction to jurisdiction depending on the ethnic makeup of the place, however it would be useful to develop a common approach to question relating to comprehension of proceedings. This is of particular importance in cases involving Aboriginal peoples.

DISQUALIFICATIONS AND EXEMPTIONS FROM JURY SERVICE

	N.S.	Nfld.	N.B.	P.E.I.	Quebec	Ontario	Manitoba	Sask.	Alberta	B.C.	N.W.T.	Yuk.	U.L.C.
non-citizen	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓[1]	✓[2]	✓
under min.age	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
non-resident[3]	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓			✓
elected official[4]	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
house officer[5]	✓	✓	✓	✓	✓			✓	✓				
judge	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
court official	✓	✓	✓	✓	?[6]	✓	✓			✓	✓	✓	✓
sheriff		✓	✓	✓	?[6]	✓	✓			✓	✓	✓	✓
lawyer	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
police	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
coroner				✓	✓		✓	✓	✓				
justice employee[7]		✓	✓	✓	?[6]		✓	✓	✓	✓			✓
warden/correction		✓	✓	✓	?[6]	✓	✓				✓	✓	✓
probation officer					?[6]	?[6]	✓		✓			✓	
legal aid employee										✓			
jury committee	✓												
spouse[8]		✓	✓	✓	✓	✓		✓					✓
possible witness						✓							
criminal record[9]	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓
blind/deaf		✓	✓	✓						✓		✓	

	N.S.	Nfld.	N.B.	P.E.I.	Quebec	Ontario	Manitoba	Sask.	Alberta	B.C.	N.W.T.	Yuk.	U.L.C.
mental,physical affirmity		√	√	√	√	√	√	√	√	√	√	√	√
institutionalized								√	√				
language		√	√	√	√		√	√	√	√	√	√	√
incompetent								√					
over maximum age[10]		√	√		√			√	√	√			√
recent juror	√	√		√	√	√	√	√	√		√		√
second juror in family/fire	√					√							
pregnant[11]	√												
religion		√	√[12]			√	√	√	√	√			√
hardship		√	√	√	√	√	√	√	√	√		?[13]	√
distance		√			√				√				
illness					√	√		√					
financial loss			√										
"application"	√				√	√							
essential service									√				
armed forces	√		√		√		√					√	
doctor	√		√			√					√	√	
dentist	√		√							√	√	√	
venterinarian			√			√							

	N.S.	Nfld.	N.B.	P.E.I.	Quebec	Ontario	Manitoba	Sask.	Alberta	B.C.	N.W.T.	Yuk.	U.L.C.
mental,physical affirmity		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
institutionalized								✓	✓				
language		✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓
incompetent								✓					
over maximum age[10]		✓	✓		✓			✓	✓	✓			✓
recent juror	✓	✓		✓	✓	✓	✓	✓	✓		✓		✓
second juror in family/fire	✓					✓							
pregnant[11]	✓												
religion		✓	✓[12]			✓	✓	✓	✓	✓			✓
hardship		✓	✓	✓	✓	✓	✓	✓	✓	✓		?[13]	✓
distance		✓			✓				✓				
illness					✓	✓		✓					
financial loss			✓										
"application"	✓				✓	✓							
essential service									✓				
armed forces	✓		✓		✓		✓					✓	
doctor	✓		✓			✓					✓	✓	
dentist	✓		✓							✓	✓	✓	
venterinarian			✓			✓							

	N.S.	Nfld.	N.B.	P.E.I.	Quebec	Ontario	Manitoba	Sask.	Alberta	B.C.	N.W.T.	Yuk.	U.L.C.
clergy	✓	✓	✓		✓						✓	✓	
chiropractor										✓			
naturopath										✓			
tax collector										✓			
municipal council			✓					✓	✓				
school trustee								✓	✓				
firefighter			✓		✓						✓	✓	
telegraph,telephone phone operator												✓	
postmaster												✓	
druggist											✓	✓	
nurse											✓	✓	
train,steamship operator												✓	
electrical worker												✓	
water distributor												✓	
consul/consular agent			✓										
witness to house									✓				

ENDNOTES

1. Permanent residents are also included.

2. British subjects are also included.

3. Nova Scotia and Prince Edward Island require 12 months residence: the other provinces attach no time limit.

4. This category includes members of the House of Commons, the Senate, and provincial Legislatures and Executive Councils.

5. Nova Scotia only exempts House Officers while the Legislature is in session.

6. Section 5(6) of the Quebec Juror's Act excludes "functionaries engaged in the administration of Justice". Section 3(1) of the Ontario Juries Act excludes "every person engaged in the enforcement of law", specifying some persons but not referring to probation officers.

7. This category includes employees of the federal Departments of Justice and Solicitor General and the provincial equivalents.

8. Spouses of some of those excluded-typically on occupational grounds.

9. The exact limits of this disqualification vary.

10. Some jurisdictions disqualify those over a certain age, while others allow them to apply for an exemption.

11. Nova Scotia allows pregnant women to seek an exemption from service on a civil jury.

12. New Brunswick only exempts persons "vowed to live only in a convent, monastery or other-like religious community" on this ground.

13. Section 14(2) of the Yukon Jury Act requires the sheriff to attempt to ascertain whether a juror will be caused undue hardship, but does not explicity provide an exemption.

APPENDIX I

(see page 36)

REPORT OF THE DEPARTMENT OF JUSTICE TO THE UNIFORM LAW CONFERENCE

Edmonton, August 15-19, 1993

Since the last meeting of the Uniform Law Conference, Canada has continued to participate actively in the activities of The Hague Conference on Private International Law, UNCITRAL and UNIDROIT. It has also followed closely the work undertaken by the OAS in preparation for the Inter-American Conference on Private International Law. The Department of Justice has consulted regularly with the provinces and the territories, with other interested federal Departments as well as with the private sector on various conventions adopted by those organizations and on instruments being developed under their auspices.

Before referring to those activities, let me mention the assistance provided by the Advisory Group on Private International Law and remind you of the Status Chart of the Canadian Activities on Private International Law.

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 in private international law. The Group, which was reconstituted in 1990, is now composed of five regional representatives: one from Manitoba representing Manitoba, Alberta and Saskatchewan, one from Prince Edward Island representing the Atlantic provinces, one from British Columbia, Ontario and Quebec and, in addition, one private practitioner.

The Group has met on two occasions since last August: in November 1992 and April 1993. The agenda for these meetings was very full and gave rise to a very productive exchange of views on various conventions of The Hague Conference, UNIDROIT and UNCITRAL and the World Bank and other related matters in private international law. It is worth noting that the Group has taken the opportunity at its last meeting to review its mandate and has made useful suggestions to improve the consultation process regarding private international law activities.

STATUS CHART OF CANADIAN ACTIVITIES IN PRIVATE INTERNATIONAL LAW

In an effort to better inform provinces and interested groups on developments in private international law in Canada, the Department of Justice of Canada prepares a Status Chart of Canadian Activities in Private International Law. It is intended to give updated information on private international law conventions to which Canada is a party and on conventions or model laws currently under consideration for future implementation.

The latest edition of the Status Chart dated July 1993 has been sent to all provinces and territories as well as to bar associations, law societies, and universities.

LATEST DEVELOPMENTS IN PRIVATE INTERNATIONAL LAW

The main events of the last year are the finalization of the Hague Convention on Intercountry Adoption on May 29, 1993, under the auspices of the Hague Conference and the coming into force for Canada of the Trusts Convention on January 1, 1993.

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Hague Conference on Private International law has now forty member States and has celebrated its 100th anniversary this year. Canada, being a member since 1968, has been supportive of its activities.

In 1993, Canada has participated in the Special Commission on the review of the application of the Child Abduction Convention from January 18-21, 1993 as well as the 17th Session of the Hague Conference from May 10-29, 1993.

Convention on Inter-country Adoption

Under the chairmanship of Mr. T.B. Smith, a former Assistant Deputy Attorney General in the Department of Justice, the Special Commission on the elaboration of a convention on Intercountry Adoption has met three times since 1990 and at its last meeting in February 1992, drew up a Preliminary Draft Convention. This Draft was discussed and refined at the Diplomatic Conference held in The Hague in May 1993, Mr. T.B. Smith again acting as Chair of the debates. The Canadian delegation was composed of provincial (Manitoba and Quebec) and federal representatives as well as one representative from nongovernmental organizations. The Convention was finalized on May 29, 1993. The same day, four countries, namely, Brazil, Costa Rica, Mexico and Romania, signed the Convention.

The new Convention embodies a satisfactory compromise between 66 States representing countries of origin and receiving countries. Its main objects aim at establishing a system for administrative co-operation between Central Authorities, ensuring safeguards in the best interests of the child concerned, and ensuring also the legal recognition of adoptions made in accordance with the Convention.

Extensive consultation has taken place throughout the negotiation process with appropriate authorities in the provinces and the territories and at the federal level as well as with interested private groups and aboriginal associations. This Department has now undertaken a new stage of consultation with a view to seeking support for an early signature by Canada of the Convention.

At the request of this Department, the Uniform Law Conference has agreed to prepared draft uniform legislation. It is hoped that the proposed Uniform Act on Intercountry Adoption will be finalized this year.

1993-96 Work Programme

The future work programme of the Hague Conference has been adopted at the Diplomatic Conference in May 1993 and will consist of: 1- the review of the 1961 Convention on the Law Applicable to the Protection of Minors and its possible extension to incompetent adults; 2- the creation of a special commission to study further the development of a draft convention on the recognition and enforcement of judgments; 3- the continuation of preparatory work on the law applicable to civil liability for damages caused to the environment.

Consultation will take place with provinces and territories on these various topics with a view to preparing the Canadian contribution.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters

This Convention has been in force throughout Canada since May 1, 1989. The rules of practice in all jurisdictions have been amended to comply with it. New modifications to the Rules of the Federal Court in order to better harmonize them with the Service Convention have been adopted in December 1992.

Convention on the Law Applicable to Trusts and their Recognition

The Convention came into force for Canada on January 1, 1993, in those provinces which have adopted implementing legislation based on the Uniform Act adopted by the Uniform Law Conference in 1987. The Convention has been extended to Alberta, British Columbia, New Brunswick, Newfoundland and Prince Edward Island. A Bill, also based on the Uniform Act, has been introduced into

the Manitoba legislature. Consultations with the other jurisdictions on the implementation of the Convention have continued and will continue over the year.

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

So far, the implementation of this Convention has received the support of six jurisdictions while two other provinces are still reviewing the matter. Three jurisdictions have not yet responded to our consultation and one has received clarification on questions regarding the impact of the Convention on existing rules. It is hoped that consultation could be reactivated this year, allowing for possible consideration of Canada acceding to the Convention as soon as possible. This Department would like to seek assistance from the Uniform Law Conference in this matter. It is worth noting that the implementation of the Taking of Evidence Convention would supplement the application of the Service Convention already in force in Canada.

There is no federal State clause in the Convention; therefore the unanimous support of all the provinces and territories to its implementation must be obtained in order for Canada to become party to it.

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents

A report prepared by Ontario on the necessary implementing measures regarding this Convention was distributed to all jurisdictions in April 1992. Given the small number of positive replies received from the provinces and territories since then, the Advisory Group has recommended that the consultation process regarding Canada's accession be suspended until further notice.

Convention on the Law Applicable to the Succession to the Estates of Deceased Persons

In response to the Minister of Justice's letter of July 10, 1991, four jurisdictions have expressed their support for the implementation of the Convention; three others are still consulting with their local Bars. Alberta has raised questions on the "unity" principle that would indicate that it is not prepared to support the Convention. Quebec has also responded that it would not consider favourably for the time being the implementation of the Convention. In Ontario, the Canadian Bar Association - Ontario Section has recently expressed support for the Convention.

While the consultation is ongoing, we are continuing the study of the Convention.

Convention on the Civil Aspects of International Child Abduction

Thirty States are now party to this Convention. In 1993, the Convention has come into force between Canada and Ecuador and will soon be applicable between Canada and Burkina Faso. The provinces are being consulted respecting the accession of new States to the Convention in order for Canada to approve such accessions. Consultation is now taking place regarding the recent accessions of Monaco and Romania.

A Special Commission was convened in January 1993 to review the application of the Convention. The Canadian delegation was composed of two representatives from provincial Central Authorities (British Columbia and Quebec) and of one representative from the federal Central Authority. The cooperation of all Central Authorities was very helpful in preparing the Canadian participation to this meeting. A report will soon be distributed on the conclusions of the Special Commission with a view to fostering discussion on the application of the Convention in Canada.

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" whose mandate is 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. Canada has been a member of UNCITRAL since 1989.

The Commission currently has three working groups: the Working Group on International Contract Practices, the Working Group on the New International Economic Order and the Working Group on Electronic Data Interchange (formerly the Working Group on International Payments).

It is worth noting that at the time of UNCITRAL's 25th session in May 1992, a Conference on Uniform Commercial Law in the 21st Century was held and was very well attended. Participants, who included practising lawyers, government representatives, judges, academics and active as well as former members of the Commission, considered the work accomplished by UNCITRAL over the last 25 years and suggested directions for the Commission's future work. Some of those suggestions were dealt with by the Commission at its 26th session in July 1993.

Uncitral's Work of Current Interest

United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980)

The Convention came into force for Canada on May 1, 1992. At that time the Convention extended to all Canadian jurisdictions with exception of the Yukon, which adopted implementing legislation in June 1992. A declaration extending the Convention to the Yukon has been deposited and took effect on January 1, 1993. Since British Columbia has amended its implementing legislation to repeal the provision rendering Article 1(1)(b) of the Convention inapplicable there, a declaration withdrawing the declaration concerning Article 1(1)(b), made at the time of Canada's accession to the Convention, has been deposited and took effect on February 1, 1993. The Convention now applies uniformly across Canada.

Convention on International Bills of Exchange and International Promissory Notes

The UNCITRAL Convention on International Bills of Exchange and International Promissory Notes was adopted by the General Assembly of the United Nations on December 9, 1988. Canada participated in drafting the Convention, which will establish a new international regime based on a viable compromise between the common law and the civil law systems. Canada was the first country to sign this Convention; the United States and the U.S.S.R. (now succeeded by the Russian Federation) have also done so. Guinea and Mexico have acceded to it. The Convention will come into force after ten ratifications or accessions. In order to implement it is Canada, federal legislation would be required.

Model Law on International Credit Transfers

At the 25th session in New York in May 1992, the Commission completed its review of and adopted the Model Law on International Credit Transfers (formerly the Model Law on Electronic Funds Transfer) that had been prepared by the Working Group on International Payments. By resolution in October 1992, the U.N. General Assembly recommended that all States give consideration to enacting legislation based on the Model Law. The Model Law achieves an acceptable compromise on issues that arise because of the speedy nature of electronic funds transfers on the one hand and the need to give as much protection as possible to clients of financial institutions using EFT systems. An example is found in the provision relating to the consequences of failed, erroneous or delayed credit transfers. Implementation of the Model Law in Canada would fall under the responsibility of the Canadian Payments Association which under its legislation, is mandated to operate the national clearings and settlement system and to plan the evolution of the national payments system.

International Guaranty Letters

A first reading of the Draft Uniform Law on stand-by letters of credit and guarantees was completed at the 17th session of the Working Group on International Contract Practices. Work continued in Vienna in the late Fall of 1992 and in New York in the Spring of 1993. The next session of the Working Group will be held in Vienna from November 22 to December 3, 1993.

The Working Group has now reviewed draft provisions on inter alia, sphere of application, effectiveness of guaranty letter and rights, obligations and defences, including payment or rejection of demand. These are contained in 17 articles, which will be revised by the Secretariat. At its next session, the Working Group will consider another 18 articles and revised draft of these 17 articles. The draft Convention will then be sent to the Commission for consideration and adoption, following which a diplomatic conference would be called to finally consider and adopt the Convention.

Model Law on Procurement of Goods and Construction

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 has participated very actively in the work on procurement and has consulted with federal and provincial departments and with industry as the work progressed in the UNCITRAL Working Group on the New International Economic Order. The Model Law was submitted to the Commission at its 26th session in Vienna in July, 1993 when it was reviewed, amended and adopted. The next stage is that it will be sent to the U.N. General Assembly for a resolution urging States to adopt it.

The Model Law is intended to serve as a model law to countries for the evaluation and modernization of their procurements laws and practices and for the establishment of procurement legislation. Basically, it provides for all the essential procedures and principles for conducting procurement proceedings in a transparent and equitable manner.

From a practical point of view, the Model Law mandates the use of international tendering as a general rule although limited or domestic tendering can be used in some cases. In exceptional circumstances, it offers other methods. The procedures provided for in the Model Law are designed to maximize competition in accordance with faire treatment to suppliers and contractors bidding to do government work.

Procurement of Services

As indicated above, the Model Law is designed to apply to the procurement of goods and construction. Services are only dealt with as incidental to the procurement contract. The Commission decided at its 26th session that its Working Group on the NIEO should prepare model provisions on procurement of services. The Commission expects that the Working Group will complete this project at its next session in Vienna from December 6 to 17, 1993, or at a further session in the Spring of 1994 in New York. The Commission expects that it will be in a position to finalize and adopt it at its 27th session in New York from May 31 to June 17, 1994.

In the course of this work, it will be decided whether the new provisions should be a free standing new model law or an additional chapter to the Model Law on Procurement of Goods and Construction, in which case the title would be changed.

Legal Guide on International Countertrade Transactions

At its 25th session in May 1992, the Commission reviewed and adopted a draft Legal Guide on International Countertrade, the draft chapters of which had been examined and revised by the Commission at its 23rd session in 1990 and by the Working Group on International Payments in September 1992. It will be published by UNCITRAL during 1993.

Electronic Data Interchange

The Working Group on Electronic Data Interchange, formerly called the Working Group on International Payments, commenced work on the preparation of detailed legal norms and rules for the use of electronic data interchange in international trade at a session to be held in New York in January 1993. The next session of the Working Group will be held in Vienna, October 11-22, 1993.

So far, discussions have been based on the substantive scope of application of uniform rules, such as the notion of EDI, itself, definitions of parties to an EDI transaction, form requirements, obligations of parties, formation of contracts, liability and risk. The Working Group will next consider the liability of third party service providers, documents of title and securities. It is not expected that the Working Group will finish its work in the next two years.

Future Work Programme

At its last session, the Commission considered some of the proposals put forward at the Conference on Uniform Commercial Law in the 21st Century. The Commission decided that the Secretariat should prepare for consideration by the 27th session of the Commission in 1994, a draft of guidelines on pre-hearing

conferences in arbitral proceedings. Such guidelines would be useful because pre-hearing conferences between arbitrators and parties could make it easier for participants to prepare for the various stages of arbitral proceedings. After work on the guidelines is complete, the Commission will decide whether it should undertake any work on multi-party arbitration and the taking of evidence in arbitral proceedings.

The Commission also decided that the Secretariat should, in consultation with UNIDROIT, which will be preparing a study on the feasibility of a model law on security interests, prepare a feasibility study on work on the unification of law on the assignment of claims.

The Commission finally decided that the practical problems caused by the lack of harmony among national laws on cross-border insolvency warrant an in-depth study by the Secretariat notwithstanding the failure of other international organizations to achieve results. It will consider what aspects of cross-border insolvency law might lend themselves to harmonization and the most suitable vehicle therefor.

UNIDROIT

The International Institute for the Unification of Private Law, known as Unidroit, an inter-governmental organization based in Rome, of which Canada has been a member since 1969. There are more than fifty member States, including China, Australia, States from Eastern and Western Europe, North and South American and Africa. The mandate of Unidroit is to harmonize and coordinate the private law of States and groups of States. Canada is an active participant in Unidroit. Anne-Marie Trahan, Associate Deputy Minister, Civil Law, Department of Justice, is a member of the Governing Council of Unidroit, one of the Institute's principal organs.

Leasing and Factoring Conventions

In May 1988, Canada hosted a Diplomatic Conference, organized by the Department of Justice, for the purpose of adopting two conventions prepared under the auspices of Unidroit, namely, the Convention on International Financial Leasing and the Convention of International Factoring. Both Conventions were adopted. Thus far, France is the only State to have ratified both Conventions. Eleven other States have signed both Conventions: Belgium, Czechoslovakia, Finland, Ghana, Guinea, Italy, Nigeria, Morocco, the Philippines, Tanzania and the United States. Germany and the United Kingdom have signed the Convention on International Factoring, whereas Panama is a signatory to the Convention on International Financial Leasing.

The Department of Justice conducted consultations with the provinces, territories and interested private sector groups and experts on the desirability of Canada becoming a party to the Conventions. The responses received indicated that there is general support for Canada becoming party to both Conventions. At the request of the Department, the Uniform Law Conference has agreed to prepare draft uniform legislation regarding the implementation of the Conventions for adoption by interested jurisdictions.

Uniform Law on the Form of an International Will

The Convention Providing a Uniform Law on the Form of an International Will was acceded to by Canada in 1977 and it has been extended to five provinces: Manitoba, Newfoundland, Ontario, Alberta and Saskatchewan. Other States parties are Ecuador, Niger, Yugoslavia, Portugal, Libya, Belgium, Cyprus and Italy.

In April of this year, the Deputy Minister of Justice wrote to his provincial and territorial counterparts to inform them of recent activity with respect to the Wills Convention and to encourage those jurisdictions that have not yet done so to consider adopting implementing legislation. A response has been received from Prince Edward Island indicating that it will consider enacting implementing legislation.

Unidroit's Work Program

Unidroit has a number of interesting projects on its current Work Program, some of which include the following:

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.

A Unidroit questionnaire circulated in commercial and financial circles elicited numerous responses demonstrating widespread support for the drawing up of an international convention or set of uniform rules as a means of recognizing security interests in movables at the international level. Unidroit has convened a working group to draw up draft uniform rules.

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 an international instrument that would place obligations on States. Rather, it is 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. The work is expected to be completed in 1994.

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 of McGill University, a member of the Group.

International Protection of Cultural Property

The committee of governmental experts studying the preliminary draft Unidroit convention on stolen or illicitly exported cultural property continued its work, meeting in February of this year. The next and last meeting of the Group will be held in September/October 1993. Canada is represented on the Committee.

The preliminary draft seeks to establish uniform rules concerning the return of stolen or illegally exported cultural objects.

The general rule with respect to stolen property is that the party in possession of such property is required to return it to the requesting party, provided that the latter pays fair compensation at the time of return and that the party in possession proves that the necessary diligence was used when the property was acquired.

With respect to illegally exported property, the current draft provides that the courts or other competent government authorities of the requested State shall order the return the property to the requesting State, subject to certain conditions regarding the interest of the requesting State in the cultural object.

It is expected that the draft convention will be submitted to a diplomatic conference for adoption in 1994.

The Franchising Contract

Unidroit is continuing to examine the feasibility of drawing up uniform rules on certain aspects of international franchising. Unidroit has pursued its cooperation on this matter with the international franchising committee of the business law section of the International Bar Association. Unidroit has decided to set up a study group to prepare an international instrument on franchising, beginning with laying down rules relating to disclosure requirements and then considering the issues of choice of law and forum and the tri-partite relationship of master franchise agreements.

WORLD BANK

Convention on the Settlement of Investment Disputes Between States and Nationals of other States

Most provinces and territories have responded to the consultations undertaken by the Department of Justice and the Department of External Affairs and International Trade. Most of those jurisdictions favour, in principle, Canada's signature and ratification of the Convention. Some questions have been raised and further correspondence with the jurisdictions will take place. This additional information sent to the provinces and territories should assist them in finalizing their position, if they have not already done so, with respect to Canada's proposed signature and ratification of the Convention. If all jurisdictions are prepared to implement this convention, the Uniform Law Conference will be asked to draft a uniform act.

OTHER CONVENTIONS ON MUTUAL LEGAL ASSISTANCE

The Convention between Canada and the United Kingdom on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters has now been implemented in all the provinces and territories, except Quebec.

After consultation with the provinces and territories, this Department has prepared a draft convention which has been submitted to France in August 1992. Somewhat similar to the Canada-UK Convention, the proposed convention with France is intended also to encompass matters concerning recognition and enforcement of maintenance orders. An official reaction has yet to be obtained from French authorities. Provinces and territories will be kept informed and consulted on the development of the Convention.

ORGANIZATION OF AMERICAN STATES

At the request of the OAS, Canada replied to a questionnaire on economic integration in the Americas. It is expected that this matter will be reviewed by the next CIDIP (Inter-American Conference on Private International Law) to take place in Mexico in March 1994. The agenda of CIDIP will also include the finalization of a draft convention on international contractual arrangements. This draft convention aims at recognizing the choice made by the parties to an international contract regarding the law applicable to their contractual arrangement. Provinces and territories will be consulted on the Canadian position to be presented at this Conference.

CONCLUSION

As many private international law conventions deal with matters within provincial legislative jurisdiction, Canadian participation in those conventions and in their drafting requires very close coordination between the provinces and the federal government.

The Advisory Group in Private International Law, which was established by the Department of Justice to advise the Department on private international matters, as well as the Uniform Law Conference play a key role in the coordination process. They both make it possible for Canada to fully participate in the development of private international law on the international level. In particular, the Uniform Law Conference can play a key role in the harmonization of private law by drafting uniform acts facilitating the implementation in Canada of private international law conventions. We also foresee a role for the Conference in monitoring the uniform acts implementing international conventions in order to ensure that amendments to those uniform acts comply with the conventions they implement.

This year we wish that the Conference adopt the uniform legislation regarding the new Hague Convention on Intercountry Adoption. We would also appreciate the assistance of the Conference in the finalization of the consultation on the Hague Convention on the Taking of Evidence. We hope that the Conference complete its work relating to the Unidroit Leasing and Factoring Conventions. Finally, should the provinces support its implementation, we will ask the Conference to consider beginning work on the implementation legislation relating to the World Bank ICSID Convention.

APPENDICE I

(see page 41)

RAPPORT DU MINISTÈRE DE LA JUSTICE À LA CONFÉRENCE SUR L'UNIFORMISATION DES LOIS

Edmonton, 15 au 19 août 1993

Depuis la dernière rencontre de la Conférence sur l'uniformisation des lois le Canada a participé aux activités de la Conférence de La Haye de droit international privé, de la CNUDCI et d'UNIDROIT. Il a également suivi le travail entrepris par l'OEA en vue de préparer la Conférence inter-américaine sur le droit international privé. De plus, le ministère de la Justice a consulté les provinces, les territoires et le secteur privé concernant diverses conventions adoptées par ces organisations ainsi que sur les documents élaborés sous leur égide.

Avant de présenter ces activités, j'aimerais mentionner le soutien fourni par le Groupe consultatif sur le droit international privé et rappeler l'existence du Tableau d'étapes des activités canadiennes en droit international privé.

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 matières d'intérêt provincial sur lesquelles des organismes internationaux se penchent dans le domaine du droit international privé. Le Groupe, qui a été reconstitué en 1990, se compose de cinq représentants régionaux, un originaire du Manitoba représentant également la Saskatchewan et l'Alberta, un originaire de l'Ile-du-Prince-Édouard représentant les provinces de l'Atlantique, un de la Colombie-britannique, un de l'Ontario ainsi qu'un du Québec, en plus d'un juriste du secteur privé.

Le Groupe s'est réuni à deux reprises depuis août dernier, soit en novembre 1992 et en avril 1993. L'ordre du jour de ces réunions était très chargé et a donné lieu à un échange de vues très fructueux sur des Conventions de la Conférence de La Haye, d'Unidroit, de la CNUDCI et la Banque Mondiale ainsi que sur divers autres sujets de droit international privé. Il doit être souligné que le Groupe à sa dernière réunion a réexaminé son mandat et a fourni des suggestions utiles pour améliorer le processus de consultation relatif aux activités de droit international privé.

APPENDICE I

TABLEAU D'ÉTAPES DES ACTIVITÉS CANADIENNES EN DROIT INTERNATIONAL PRIVÉ

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 diffuse un Tableau d'étapes des activités canadiennes en droit international privé. Ce document met à jour les renseignements sur toutes les Conventions en droit international privé auxquelles le Canada est partie et sur les Conventions ou lois modèles auxquelles il envisage de le devenir.

Les provinces, les territoires, les Barreaux et les universités ont reçu le dernier Tableau d'étapes en date de juillet 1993.

DERNIERS DÉVELOPPEMENTS EN DROIT INTERNATIONAL PRIVÉ

Les principaux événements en 1993 en ce qui concerne le Canada ont été la conclusion en mai 1993 de la Convention de La Haye sur l'adoption internationale sous les auspices de la Conférence de La Haye, ainsi que l'entrée en vigueur le 1er janvier 1993 de la Convention sur les trusts.

CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

A l'heure actuelle, la Conférence de La Haye de droit international privé est composée de quarante États membres et elle célèbre son 100e anniversaire cette année. En tant que membre de la Conférence depuis 1968, le Canada appuie ses initiatives.

En 1993, le Canada a participé, du 18 au 21 janvier 1993, à la Commission spéciale sur l'application de la Convention sur l'enlèvement d'enfants de même que, du 10 au 29 mai, à la Dix-septième Session de la Conférence de La Haye.

Convention sur l'adoption internationale

Sous la présidence de Me T.B. Smith, anciennement Sous-procureur général adjoint de ce Ministère, la Commission spéciale chargée d'élaborer une convention sur l'adoption internationale s'est réunie trois fois depuis 1990; à sa dernière réunion en février 1992, la Commission a rédigé un Avant-projet de convention. Ce projet a été à nouveau discuté et finalisé lors de la Conférence diplomatique qui a été tenue à La Haye en mai 1993, Me Smith agissant toujours comme président des travaux. La délégation canadienne était également composée de représentants provinciaux (Manitoba et Québec) et fédéraux de même que d'un représentant des organisations non-gouvernementales. La Convention a été conclue le 29 mai 1993 et le même jour quatre pays l'ont signée; il s'agit du Brésil, du Costa Rica, du Mexique et de la Roumanie.

La Convention sur l'adoption internationale représente un compromis satisfaisant entre les 66 États comprenant tant des pays d'origine que d'accueil qui ont participé à son élaboration. Les objets de la Convention concernent l'établissement d'un système de coopération administrative, la promotion des garanties nécessaires à la protection du meilleur intérêt des enfants concernés, et l'assurance de la reconnaissance juridique des adoptions faites conformément à la Convention.

Nous avons consulté tout au long de cette négociation les autorités compétentes des provinces et des territoires, les autorités fédérales de même que les groupes privés intéressés et les associations autochtones. Le ministère de la Justice du Canada a maintenant entrepris une nouvelle ronde de consultation en vue de chercher l'appui nécessaire à la signature prochaine par le Canada de la Convention. A la demande du Ministère, la Conférence d'uniformisation des lois a accepté d'entreprendre la rédaction d'une loi uniforme sur l'adoption internationale. Il est souhaité que cette loi soit finalisée cette année.

Programme de travail 1993-96

Le programme de travail futur de la Conférence qui a été adopté à la Conférence diplomatique en mai 1993 comprend les sujets suivants : 1- la révision de la Convention de 1961 sur la protection de mineurs et son extension aux majeurs incapables; 2- la création d'une commission spéciale pour étudier le développement d'une convention sur la reconnaissance et l'exécution des jugements; 3- la poursuite des travaux sur la loi applicable à la responsabilité découlant des dommages causés à l'environnement.

Les provinces et les territoires seront consultés sur ces différents projets en vue de préparer la contribution canadienne.

Convention relative à la signification et la notification à l'étranger des documents judiciaires et extrajudiciaires en matière civile ou commerciale

Cette Convention est en vigueur au Canada depuis le 1er mai 1989. Les règles de pratique des tribunaux dans toutes les juridictions ainsi qu'au niveau fédéral ont depuis été modifiées pour s'y conformer. De nouvelles modifications aux Règles de la Cour fédérale pour les harmoniser davantage aux règles de la Convention ont été adoptées en décembre 1992.

Convention relative à la loi applicable au trust et à sa reconnaissance

La Convention est entrée en vigueur pour le Canada le 1er janvier 1993 dans les provinces ayant adopté des lois de mise en oeuvre de cette Convention selon la loi uniforme adoptée par la Conférence d'uniformisation des lois en 1987. La Convention a été étendue à l'Alberta, la Colombie-britannique, l'Île-du-Prince-Édouard, le Nouveau-Brunswick et Terre-Neuve. Un projet de loi,

également selon la loi uniforme, a été déposé par le Manitoba auprès de sa législature. Les consultations avec les autres juridictions se sont poursuivies et continueront à se poursuivre durant la prochaine année.

Convention sur l'obtention des preuves à l'étranger en matière civile ou commerciale

Jusqu'à présent, nous avons reçu l'appui de six administrations qui sont favorables à la mise en oeuvre de la Convention alors deux autres administrations en poursuivent l'étude. Trois juridictions n'ont pas encore répondu à notre consultation alors qu'une autre a reçu des explications supplémentaires concernant l'impact de la Convention sur les règles existantes.

Il est possible d'espérer que la consultation se termine cette année, permettant ainsi l'adhésion du Canada à cette Convention le plus tôt possible. Le Ministère souhaiterait l'appui de la Conférence d'uniformisation des lois à cette fin. Il convient de souligner que la mise en oeuvre de la Convention sur l'Obtention des preuves viendrait compléter l'application de la Convention sur la signification qui est déjà en vigueur au Canada.

La Convention ne contient pas de clause fédérale de sorte qu'il faut l'appui unanime des provinces et des territoires pour permettre au Canada d'y devenir partie.

Convention supprimant l'exigence de légalisation des actes public étrangers

Un rapport préparé par l'Ontario sur les mesures nécessaires à la mise en oeuvre de la Convention a été envoyée, en avril 1992, à toutes les administrations. Étant donné le peu de réponses des provinces et des territoires reçues depuis, le Groupe consultatif a recommandé que soit suspendue la considération de l'adhésion du Canada jusqu'à avis contraire.

Convention sur la loi applicable aux successions à cause de mort

En réponse à la lettre du 10 juillet 1991 de la Ministre de la Justice, quatre administrations ont exprimé leur appui à la mise en oeuvre de la Convention alors que trois autres ont indiqué qu'elles consultaient les Barreaux locaux. L'Alberta pour sa part a soulevé certaines questions relatives au principe de l'unité, ce qui semble démontrer son absence de support pour la Convention. Le Québec a répondu qu'il n'entendait pas pour le moment favoriser la mise en oeuvre de la Convention. En Ontario, la Section de l'Ontario de l'Association du Barreau canadien a récemment fait connaître son appui à la Convention.

Nous poursuivons l'étude de la Convention alors que la consultation se continue.

Convention sur les aspects civils de l'enlèvement international d'enfants

Trente États sont parties à cette Convention. En 1993, la Convention est entrée en vigueur entre le Canada et l'Équateur et elle sera bientôt en vigueur entre le Canada et le Burkina Faso. Les provinces sont consultées concernant l'adhésion de nouveaux États à cette Convention dans le but pour le Canada d'accepter ces adhésions. Une consultation est présentement en cours concernant les adhésions récentes de Monaco et de la Roumanie.

Une Commission spéciale a été tenue en janvier 1993 pour examiner le fonctionnement de la Convention. La délégation canadienne était composée de deux représentants des autorités centrales provinciales (Colombie-britannique et Québec) et d'un représentant de l'Autorité centrale fédérale. La collaboration de toutes les Autorités centrales a été très utile dans la préparation de la participation canadienne à cette rencontre. Un rapport sur les conclusions de la Commission spéciale sera transmis prochainement aux provinces et aux territoires en vue de susciter la discussion sur l'application de la Convention au Canada.

CNUDCI

La Commission des Nations Unies pour le droit commercial international, «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 ses groupes de travail à titre d'observateurs. Le Canada est membre de la CNUDCI depuis 1989.

Il existe à l'heure actuelle trois groupes de travail de la Commission : le Groupe de travail du nouvel ordre économique international, le Groupe de travail des échanges de données informatisées (anciennement le Groupe de travail des paiements internationaux) et le Groupe de travail des pratiques en matière de contrats internationaux.

Lors de la 25e réunion de la CNUDCI en mai 1992, un congrès a été organisé sur le thème du droit commercial international uniforme dans le 21e siècle et qui s'est avéré un succès. Parmi les participants au congrès, on retrouvait des avocats, des représentants gouvernementaux, des juges et des professeurs ainsi que des membres anciens ou actuels de la Commission qui ont examiné les réalisations de la CNUDCI au cours des 25 dernières années et apporté des suggestions au programme de travail futur de la Commission. La Commission a examiné ces suggestions lors de sa 26ième session en juillet 1993.

APPENDICE I

Travaux actuels de la CNUDCI

Convention des Nations Unies sur les contrats de vente internationale de marchandises (Vienne, 1980)

La Convention est entrée en vigueur pour le Canada le 1er mai 1992. À cette date, la Convention s'étendait à toutes les juridictions canadiennes, à l'exception du Yukon qui a adopté une loi de mise en oeuvre de la Convention en juin 1992. Une déclaration étendant la Convention au Yukon a été déposée par la suite et est entrée en vigueur le 1er janvier 1993. Étant donné que la Colombie-britannique a modifié sa loi de mise en oeuvre afin d'abroger la disposition qui écartait l'application de l'Article 1(1)(b) de la Convention, le Canada a donc procédé à retirer sa déclaration initiale à ce sujet, déposée au moment de l'adhésion. La nouvelle déclaration a pris effet le 1er février 1993. La Convention s'applique maintenant de façon uniforme à travers le Canada.

Convention sur les lettres de change internationales et les billets à ordre internationaux

Le 9 décembre 1988, l'Assemblée générale des Nations Unies a adopté la Convention sur les lettres de change internationales et les billets à ordre internationaux. 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 Canada a été le premier à signer cette Convention et les États-Unis de même que l'Union Soviétique (dont la Fédération russe est maintenant le successeur) l'ont également signée; la Guinée et le Mexique y ont adhéré. La Convention entrera en vigueur après le dépôt de dix ratifications ou adhésions. Il faudra adopter une loi fédérale pour assurer sa mise en oeuvre au Canada.

Loi type sur les virements internationaux

Lors de sa vingt-cinquième session en mai 1992, la Commission a complété son étude de la Loi type sur les virements internationaux (anciennement les transferts électroniques de fonds) et a adopté le texte qui avait été élaboré par le Groupe de travail des paiements internationaux. Dans une résolution votée en octobre 1992, l'Assemblée générale des Nations Unies a recommandé que tous les États accordent une attention à cette Loi type en adoptant une législation qui y soit conforme.

La loi type constitue une solution de compromis acceptable aux problèmes que soulève la rapidité de tels virements, vu la nécessité de protéger le mieux possible les clients des institutions financières qui utilisent des systèmes de virements électroniques de fonds. Il y a, par exemple, les dispositions concernant les conséquences des incidents, erreurs ou retards dans les virements. La mise en oeuvre de la Loi type au Canada relève de l'Association canadienne des

paiements qui en vertu de sa loi est chargée d'établir et de mettre en oeuvre un système national de compensation et de règlement et de planifier le développement du système national de paiement.

Loi uniforme concernant les garanties et lettres de crédit stand-by

Le Groupe de travail des pratiques en matière de contrats internationaux a complété une première étude d'une loi uniforme sur les garanties et lettres de crédit stand-by lors de sa 17ième session. Le travail s'est poursuivi à Vienne à l'automne 1992 ainsi qu'à New York au printemps 1993. La prochaine session du groupe du travail aura lieu à Vienne du 22 novembre au 3 décembre 1993.

Le Groupe de travail a maintenant terminé la révision des projets de dispositions portant notamment sur le champ d'application, les effets de la lettre de garantie, les droits, les obligations et les moyens de recours, y compris le paiement ou le rejet de la demande. Ces dispositions se trouvent dans 17 articles que le secrétariat doit réviser. Lors de sa prochaine session, le Groupe de travail va étudier 18 autres articles et réviser le projet de texte des 17 premiers. Le projet de Convention sera ensuite soumis à la Commission pour étude et adoption, à la suite de quoi une conférence diplomatique sera convoquée pour l'étudier une dernière fois et adopter définitivement la Convention.

Loi type sur la passation des marchés de biens et de construction

Cette question importe particulièrement aux États en voie de 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 a participé très activement aux travaux du Groupe de travail du nouvel ordre économique international et a consulté régulièrement les ministères fédéraux et provinciaux ainsi que l'industrie. La Commission a étudié la Loi type lors de sa 26ième session à Vienne en juillet 1993 lors de laquelle elle a été révisée, modifiée, puis adoptée. La prochaine étape consistera à son renvoi devant l'Assemblée générale des Nations Unies en vue de l'adoption d'une résolution pour inciter les États à l'incorporer.

La Loi type a pour but de servir de modèle aux pays qui auront à réviser et moderniser leurs lois et leurs pratiques de passation de marchés et qui auront à mettre en oeuvre une législation en la matière. La Loi type prévoit les règles et principes essentiels à la passation de marchés selon une formule assurant transparence et équité.

Par commodité, la Loi type impose comme règle générale l'appel d'offres international, mais celui-ci peut être national ou restreint dans certaines situations. D'autres méthodes sont proposées pour des circonstances

exceptionnelles. Les règles proposées dans la Loi type sont destinées à maximiser la concurrence tout en traitant équitablement les fournisseurs et les entrepreneurs qui soumissionnent pour obtenir des contrats gouvernementaux.

Marché de services

Tel qu'il vient d'être mentionné, la Loi type est conçue pour s'appliquer à la passation de marchés en matière de biens et de travaux. Les services sont visés uniquement dans la mesure où ils sont accessoires à ces marchés. La Commission a décidé lors de sa 26ième session que le Groupe de travail sur le NOEI devra préparer des dispositions types sur le marché de services. La Commission s'attend à ce que le Groupe de travail termine le projet à sa prochaine session à Vienne du 6 au 17 décembre 1993, ou à une session ultérieure à New York au printemps 1994. La Commission espère ainsi être en mesure de finaliser ce projet à sa 27ième session à New York du 31 mai au 17 juin 1994.

La question de savoir si les nouvelles dispositions formeront une nouvelle loi type ou seront ajoutées à la Loi type déjà existante sur les marchés de biens et de travaux sera décidée pendant ces travaux.

Échanges compensés

Au cours de sa dernière session en mai 1992, la Commission a examiné et adopté le projet de Guide juridique sur l'élaboration de contrats internationaux d'échanges compensés. Les projets de chapitre avaient déjà été étudiés et révisés par la Commission lors de sa 23ième session en 1990 et par le Groupe de travail sur les paiements internationaux en septembre 1992. Ce Guide sera publié par la CNUDCI dans les prochains mois de 1993.

Échanges de données informatisées

Lors d'une session à New York en janvier 1993, le Groupe de travail sur les échanges de données informatisées, anciennement le Groupe de travail sur les paiements internationaux, a entrepris la préparation de normes juridiques et de règles détaillées pour l'emploi des échanges de données informatisées dans le commerce international. La prochaine session du Groupe de travail aura lieu à Vienne du 11 au 22 octobre 1993.

Jusqu'à présent, les discussions ont porté sur le champ d'application des règles uniformes, notamment sur la notion de l'EED en soi, sur la définition des parties à une transaction électronique, les formes requise, les obligations des parties, la formation des contrats, la responsabilité et le risque. Le groupe de travail étudiera en octobre 1993 la responsabilité des tiers fournisseurs de services, les titres et les sûretés. Le groupe de travail ne devrait pas avoir terminé ses travaux avant au moins deux ans.

Futur programme de travail

A sa dernière session, la Commission a examiné certaines des suggestions faites à l'occasion de la Conférence sur le droit commercial uniforme au 21e siècle. La Commission a décidé qu'il serait utile que le Secrétariat prépare pour étude lors de sa 27ième session prévue en 1994, une ébauche de directives pour la tenue de conférences préliminaires dans le cadre des procédures d'arbitrage. Ces directives permettraient aux arbitres et parties de discuter, en conférence préliminaire, de la procédure et de planifier les diverses étapes de la procédure arbitrale. Une fois ce travail sur les directives complété, la Commission décidera si elle entreprendra des activités dans les domaines de l'arbitrage multipartite et de l'obtention de preuves dans le cadre de procédure arbitrales.

La Commission a également décidé que le Secrétariat devrait, en consultation avec UNIDROIT qui entreprendra une étude sur la faisabilité d'une loi type sur les sûretés, préparer une étude sur la faisabilité d'un projet d'uniformisation des lois en matière de cession de créances.

La Commission a finalement décidé que les problèmes pratiques causés par la trop grande divergence des lois nationales en matière d'insolvabilité transnationale nécessitent une étude approfondie par le Secrétariat, en dépit du fait que d'autres organisations internationales n'ont pu obtenir de résultats concluants sur la question. Le Secrétariat préparera une étude qui identifiera les aspects de l'insolvabilité transnationale pouvant se prêter à une harmonisation ainsi que le meilleur moyen d'y arriver.

UNIDROIT

Depuis 1969, le Canada est membre d'Unidroit, soit l'Institut international pour l'unification du droit privé, qui est un organisme intergouvernemental composé de 51 États et 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 lois 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 cette organisme; Anne-Marie Trahan, sous-ministre déléguée, Droit civil, au ministère de la Justice siège présentement au Conseil de direction, un des principaux, organes d'Unidroit.

Conventions sur le crédit-bail et l'affacturage

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. Jusqu'à présent, seule la France a ratifié les deux Conventions. Onze autres États les ont signées, soit la Belgique, la Tchécoslovaque, la Finlande, le Ghanan, la Guinée, l'Italie, le Nigéria, le Maroc, les Philippines, la Tanzanie, et les États-Unis. L'Allemagne et le Royaume-Uni ont signé la Convention sur l'affacturage international, alors que le Panama est signataire de la Convention sur le crédit-bail international.

Le ministère de la Justice a consulté les provinces, les territoires, les experts et les groupes du secteur privé sur l'opportunité pour le Canada d'adhérer à ces Conventions. Les réponses reçues jusqu'ici indiquent un appui généralisé à ce que le Canada y devienne partie. À la demande du Ministère, la Conférence d'uniformisation des lois a accepté de préparer des projets de loi uniforme en vue de leur adoption par les juridictions intéressées à mettre en oeuvre les Conventions.

Loi uniforme sur la forme d'un testament international

La Convention portant sur la loi uniforme sur la forme d'un testament international, à laquelle le Canada a adhéré en 1977, a été étendue à cinq provinces : Alberta, Ontario, Manitoba, Saskatchewan et Terre-Neuve. Les autres États parties à la Convention sont la Belgique, Chypre, l'Équateur, la Libye, le Niger, le Portugal et la Yougoslavie.

Au mois d'avril dernier, le sous-ministre de la Justice a consulté les sous-ministres des provinces et des territoires afin de les informer des activités récentes concernant la Convention. De même, il a encouragé les provinces et les territoires qui n'ont pas encore adopté une loi de mise en oeuvre, à envisager cette possibilité. Une réponse a été reçue de l'Île-du-Prince-Édouard indiquant qu'elle envisage d'adopter une loi de mise en oeuvre.

Programme de travail d'Unidroit

Unidroit possède à son programme de travail différents projets intéressants au nombre desquels se retrouvent les suivants :

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 Cuming indique 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.

Un questionnaire d'Unidroit distribué dans les milieux commerciaux et financiers à travers le monde a suscité un grand nombre de réponses démontrant un appui répandu en faveur de l'élaboration d'un projet de convention internationale ou de règles uniformes comme moyen d'assurer la reconnaissance des sûretés mobilières à l'échelle internationale. Unidroit a prévu d'organiser une rencontre d'un groupe international d'experts, incluant le Professeur Cumin, pour mener à terme ce projet.

Principes relatifs aux contrats commerciaux internationaux

Le Ministère suit les 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 un 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. Ce projet devrait être finalisé en 1994.

Le Groupe de travail est un organisme non gouvernemental composé de 13 experts représentant divers régimes juridiques. Le Professeur Paul-André Crépeau, de l'Université McGill, membre du Groupe de travail, tient le Ministère au courant des travaux du Groupe.

Protection internationale des biens culturels

Le comité d'experts gouvernementaux examinant l'avant-projet de Convention d'Unidroit sur les biens culturels volés ou illicitement exportés a continué ses travaux à sa rencontre de février 1993. Le Canada est représenté à ce comité qui se réunira une dernière fois en septembre-octobre prochain.

Cet avant-projet vise à établir des règles uniformes concernant les demandes de restitution de biens culturels volés ainsi que les demandes visant le retour de biens culturels exportés du territoire d'un État contractant en violation de sa législation en matière d'exportation.

En ce qui a trait aux biens culturels volés, la règle générale est que le possesseur d'un tel bien soit tenu de le restituer au demandeur à condition que ce dernier paie, au moment de la restitution, une indemnité équitable, sous réserve que le possesseur prouve qu'il a exercé la diligence requise lors de l'acquisition du bien. En ce qui concerne les biens exportés illégalement, le présent projet prévoit que les tribunaux ou toutes autres autorités compétentes de l'État requis ordonnent le retour de ces biens dans l'État demandeur, sous réserve du respect de certaines conditions relatives à l'un ou l'autre intérêt de l'État demandeur.

Il est prévu que le projet de convention sera présentée à une conférence diplomatique en vue de son adoption en 1994.

Franchisage

Unidroit poursuit son examen de la faisabilité et de l'opportunité de rédiger des règles uniformes sur certains aspects du franchisage international. Unidroit collabore avec le Comité sur le franchisage international de la Section de droit des affaires de l'International Bar Association. Unidroit a décidé de mettre sur pied un groupe d'étude chargé de préparer un instrument international sur le franchisage, en considérant d'abord les règles relatives aux conditions à la divulgation et ensuite les questions intéressant le choix de la loi applicable ainsi que la juridiction avant d'aborder la relation tri-partite des ententes maîtres sur le franchisage.

BANQUE MONDIALE

Convention pour le règlement des différends relatifs aux investissements entre États et ressortissant d'autres États

La plupart des provinces et territoires ont répondu aux consultations du ministère de la Justice et du ministère des Affaires extérieures et du Commerce extérieur. Il ressort de ces consultations que la plupart des juridictions appuient en principe la signature et la ratification de la Convention par le Canada. Certaines questions soulevées donneront lieu à un nouvel échange de correspondance. Ces informations additionnelles transmises aux provinces et territoires devraient leur permettre de finaliser leur position, si ce n'est pas déjà fait, au sujet de la signature et de la ratification de la Convention par le Canada. Si l'ensemble des juridictions paraissent prêtes à procéder à la mise en oeuvre de la Convention, le ministère demandera à la Conférence d'uniformisation des lois de préparer une loi uniforme.

AUTRES CONVENTIONS D'ENTRAIDE JUDICIAIRE

La Convention entre le Canada et le Royaume-Uni pour assurer la reconnaissance et l'exécution réciproques des jugements en matière civile et commerciale a maintenant été mise en oeuvre dans toutes les provinces et les territoires, sauf au Québec.

Après consultation avec les provinces et les territoires, le Ministère a préparé un projet de convention sur l'entraide judiciaire qui a été soumis à la France en août 1992. Bien que semblable à la Convention Canada-Royaume Uni, le projet de convention avec la France visera également le sujet de la reconnaissance et de l'exécution des ordonnances alimentaires. Les provinces et les territoires seront informés et consultés sur les développements du dossier dans les prochains mois.

ORGANISATION DES ÉTATS AMÉRICAINS

A la demande de l'O.E.A., le Canada a répondu à un questionnaire sur l'intégration économique dans les Amériques. Il est prévu que ce sujet figurera à l'ordre du jour de la prochaine réunion de CIDIP (Conférence inter-américaine sur le droit international privé) qui aura lieu en mars 1994 à Mexico. L'ordre du jour incluera la finalisation d'un projet de Convention sur les arrangements contractuels internationaux. Ce projet de convention vise à reconnaître la volonté des parties à un contrat international dans le choix de la loi applicable à leurs arrangements contractuels. Le Ministère consultera les provinces et les territoires en vue de préparer la contribution canadienne à cette Conférence.

CONCLUSION

Comme bon nombre de conventions de droit international privé élaborées au plan international touchent à des matières qui relèvent de la compétence législative des provinces, la participation du Canada au développement du droit international privé au niveau international requiert une coordination étroite entre les provinces et le gouvernement fédéral.

Le Groupe consultatif établi par le ministère de la Justice pour le conseiller en droit international privé ainsi que la Conférence sur l'uniformisation des lois jouent un rôle essentiel dans ce processus de coordination. Ils permettent au Canada de participer pleinement aux activités internationales de développement du droit international privé. En particulier, la Conférence sur l'uniformisation des lois peut jouer un rôle essentiel dans le domaine de l'harmonisation du droit privé en rédigeant des lois uniformes qui facilitent la mise en oeuvre à travers le Canada des conventions de droit international privé. Nous croyons aussi que la Conférence pourrait jouer un rôle de surveillance des

lois uniformes visant à mettre en oeuvre des conventions internationales afin de faire en sorte que les amendements qui pourraient être apportés à ces lois uniformes soient compatibles avec les conventions qu'ils mettent en oeuvre.

Cette année, nous souhaitons que la Conférence adopte la loi uniforme relative à la Convention de La Haye sur l'adoption internationale. Nous espérons également compter sur le soutien de la Conférence en vue de finaliser la consultation concernant la Convention de La Haye sur l'obtention des preuves. Nous comptons demander à la Conférence de commencer la préparation d'une loi uniforme de mise en oeuvre relative de la Convention CIRDI de la Banque mondiale dans la mesure où les provinces seront favorables à sa mise en oeuvre. Nous espérons de plus que la Conférence complète son travail concernant les lois uniformes relatives aux Conventions d'UNIDROIT sur le crédit-bail et l'affacturage.

APPENDIX J

(see page 34)

SECOND INTERIM REPORT

ON

COST OF CREDIT DISCLOSURE

Prepared for the

UNIFORM LAW CONFERENCE OF CANADA

by

RICHARD H. BOWES

of

THE ALBERTA LAW REFORM INSTITUTE

August 1993

APPENDIX J

NOTE TO READERS

This report refers frequently to three documents that, because of their length, are not printed in the ULCC Proceedings:

Cost of Credit Disclosure Act, Draft 2;
Proposed Interest Act, Draft 1;
Commentary on CCDA and PIA.

Readers may obtain a copy of these documents from:

Alberta Law Reform Institute
402 Law Centre, University of Alberta
Edmonton, Alberta
T6G 2H5

Telephone: 403-492-1797
Fax: 403-492-1790

TABLE OF CONTENTS

APPENDIX J

1

PROJECT HISTORY

1.1 BEFORE 1992 UNIFORM LAW CONFERENCE

This section briefly summarizes the history of this project prior to the 1992 Uniform Law Conference of Canada ("ULCC") meeting. A more detailed summary can be found in a paper entitled *Interim Report on Cost of Credit Disclosure* ("Interim Report"), which is reproduced as Appendix F to the *Proceedings* of the 1992 meeting.

The project on cost of credit disclosure legislation ("CCDL") was approved at the 1990 ULCC meeting. The goal of the project, which is being carried out in cooperation with the Alberta Law Reform Institute ("ALRI") and federal and provincial government departments responsible for consumer affairs, is the adoption of uniform statutory provisions regarding disclosure of the cost of credit in consumer credit transactions. These provisions are to be suitable for incorporation into relevant federal and provincial legislation.

At the 1991 ULCC meeting the Uniform Law Section considered a paper entitled *Issues Paper on Cost of Credit Disclosure* ("Issues Paper"), which discussed various issues concerning cost of credit disclosure and made a number of tentative recommendations. The Uniform Law Section adopted the recommendations as the starting point for further consultation and analysis. In the fall of 1991 the ALRI circulated the Issues Paper to consumer affairs departments and organizations representing participants in the consumer credit market. In the spring of 1992 I prepared a document called *Suggested Principles for Uniform Cost of Credit Disclosure Legislation* (hereinafter "Principles Paper"). The Principles Paper, which was circulated for comment in May of 1992, contained suggested principles for uniform disclosure legislation that took account of comments that had been received on the earlier Issues Paper. The suggested principles were somewhat more detailed than the tentative recommendations in the Issues Paper. The Interim Report, which was prepared for the ULCC meeting in August, 1992, suggested certain departures from the recommendations that had been tentatively adopted at the 1991 ULCC meeting. It also discussed principles from the Principles Paper that appeared to be controversial, based on comments that had been received up to that point.

1.2 SINCE 1992 UNIFORM LAW CONFERENCE

At the 1992 ULCC meeting the Uniform Law Section considered the Interim Report and approved the suggested departures from the tentative recommendations accepted in 1991. Although delegates were aware that some of

the principles in the Principles Paper were controversial, they accepted the Interim Report's recommendation that the principles be used as the starting point for drafting uniform cost of credit disclosure legislation. It was also proposed and accepted that the project's scope be extended to include the *Interest Act* (Canada), because the issues dealt with by that act are so closely intertwined with the issues dealt with by provincial and federal CCDL. It will be much easier to achieve a co-ordinated approach to cost of credit disclosure if the issues dealt with in the current *Interest Act* are dealt with by an act that is part of a package of mutually supporting federal, provincial and territorial legislation.

The timetable approved at the 1992 ULCC meeting called for the first draft of the proposed uniform legislation to be circulated before the end of 1992, with comments to be provided by February of 1993. A final draft of the uniform legislation was then to be prepared in time to be considered for adoption at the 1993 ULCC meeting. However, it took longer to complete the first draft of the uniform legislation and the commentary than was originally anticipated. Instead of being circulated by the end of 1992, the following three documents (collectively, "the February materials") were circulated at the end of February, 1993:[1]

Cost of Credit Disclosure Act ("CCDA"), Draft 2;[2]
Proposed Interest Act ("PIA"), Draft 1;
Commentary on CCDA and PIA ("Commentary").

As of the end of July, 1993, the ALRI has received written comments on the February materials from the organizations or individuals listed below:[3]

Association of Canadian Financial Corporations;
Alberta Municipal Affairs Consumer Services Division;
Province of British Columbia Ministry of Labour and Consumer Services;
Trust Companies Association of Canada;
Professor Mary Anne Waldron, Faculty of Law, University of Victoria;
Chrysler Canada;
Mortgage Loans Association of Alberta;
Saskatchewan Justice;
Newfoundland Department of Justice;

It is more accurate to say that circulation of the materials **commenced** at the end of February. The ALRI continues to send copies of the February materials to interested individuals and organizations as they are identified.

CCDA Draft 1 was actually an incomplete draft that was appended to the 1992 Principles Paper.

The list is arranged in the order in which the comments were received. Some commentators provided comprehensive comments on both acts, while others focused on particular issues dealt with by one or another of the acts.

Canadian Bankers Association;
Ontario Ministry of Consumer and Commercial Relations.

The delay in circulating the February materials was partly responsible for another departure from the timetable contemplated at the 1992 ULCC meeting. A final draft of CCDA and PIA has not been prepared for consideration and adoption at the 1993 ULCC meeting. It has become apparent that it would be premature to ask the Uniform Law Section to adopt uniform cost of credit legislation at the 1993 ULCC meeting. This is due partly to the delay in circulating the first draft of the legislation, but also reflects the fact that the comments received on the February materials suggest that further consultation and consideration is called for before the Uniform Law Section is asked to approve uniform legislation.

1.3 SUGGESTED FUTURE COURSE OF ACTION

As was the case last year, the Uniform Law Section will be invited to endorse tentative positions on various substantive issues. It will also be asked to approve a plan of action for the following year. The substantive issues are dealt with in Part 2; the rest of this section outlines a procedure that is intended to culminate in adoption of a uniform CCDA and PIA at the 1994 ULCC meeting.

1. At the 1993 meeting the Uniform Law Section should establish a review committee to assist and give direction to the drafter. Consumer affairs and other provincial and federal government departments with responsibilities in this area should be represented on the review committee.

2. The drafter, taking into account comments on the February materials, should prepare the second draft of CCDA and PIA, with commentary, for consideration by the review committee. This draft should be in the hands of the review committee by the end of December, 1993.

3. The review committee should resolve any outstanding policy issues by the end of February, 1994, and should give appropriate directions to the drafter.

4. The drafter should prepare a final draft of CCDA and PIA, in accordance with the review committee's directions, by the end of March, 1994. The final draft should be reviewed and approved by the review committee by the end of April, 1994, at which time it would be distributed in the normal fashion to ULCC delegates.

5. The final draft of CCDA and PIA would be considered and, hopefully, adopted at the 1994 ULCC meeting.

These proposals do not contemplate circulation of further drafts of CCDA and PIA beyond the review committee. However, further input on specific issues relating to the legislation will be sought from other interested persons and organizations.

2

ISSUES FOR DISCUSSION

2.1 DEPARTURES FROM PRINCIPLES

At the 1992 ULCC meeting it was decided that the drafter should take the recommendations from the Issues Paper[4] and principles in the Principles Paper[5] as the starting point for the draft legislation, but "should depart from or go beyond the recommendations and principles where this is considered advisable in the light of comments and further reflection." The departures were to be documented. Many of the provisions of CCDA and PIA do depart from or go beyond the aforementioned recommendations and principles. These departures are documented in the Commentary and summarized below. I emphasize that the following is a brief summary; a more extensive discussion is found in the Commentary.

2.1.1 DIVISION OF EFFORT BETWEEN CCDA AND PIA

The division of effort between CCDA and PIA does not in itself represent a departure from any of the principles previously adopted by the Uniform Law Section, but does change some of the assumptions upon which the Principles Paper was based. Responsibility would be divided between the two acts in the following manner.

- CCDA would still perform most of the functions that comprehensive CCDL (provincial and federal) has always fulfilled. However, as is explained in section 2.1.2, CCDA would not require disclosure of a calculated annual percentage rate ("APR") in most cases. Instead, it would require disclosure of the annual interest rate.

Except to the extent that it had been decided to depart from those recommendation at the 1992 meeting.

The following principles were accepted with the indicated modifications:

Principle 12: clause (b) deleted;
Principle 14: reference to first page deleted.

- The *Interest Act* (PIA) would be totally revamped to make it work with rather than at cross purposes with provincial and federal CCDL. PIA is divided into a general part and a consumer credit part. The general part applies to all loans (except where superseded by the consumer part) and would basically leave it to the parties to determine interest rates and the method of calculating interest. The consumer credit part (Part 2) applies to the same types of transactions to which the proposed CCDA applies. Where Part 2 of PIA applies it requires disclosure of the annual interest rate, sets out requirements for notice of changes in variable rates, and prescribes the method of calculating outstanding loan balances.

- CCDA and PIA are designed to work together, but either of them could live without the other. CCDA would, however, require some tweaking if PIA were not implemented.

2.1.2 ABANDONING CALCULATED APR

Principles Affected: 6,7,8
CCDA, PIA Sections: CCDA 11, 53
Commentary Discussion: II.B

As mentioned above, CCDA abandons the concept of a calculated APR for most consumer credit transactions. In theory, the decision to abandon the calculated APR represents a significant departure from the principles mentioned above. In reality, the approach to calculating APR adopted in Principle 6 takes away the whole point of having a calculated APR: accounting for non-interest charges in a time-rate measure of the cost of credit. Thus, the concept of the calculated APR was fatally wounded by Principle 6. The February materials administer the *coup de grâce*. Getting rid of the concept of calculated APR greatly simplifies CCDA. It should be noted, however, that the concept of calculated APR is retained for two situations: brokerage fees; and certain leases of goods.

2.1.3 CALCULATION OF OUTSTANDING BALANCES

Principle Affected: 8
CCDA, PIA Sections: PIA 10-15
Commentary Discussion: II.A, III.D.3-8

Principle 8 described a method of calculating the balance outstanding on a loan that left many commentators confused. This confusion arose partly because the method was not well explained in the Principles Paper, and partly because the method itself was unduly complex. The proposed method was also open to the objection that it invited lenders to use a method of calculating outstanding balances — choosing their own compounding period — that would make the APR (or interest rate) a less useful comparison tool than it otherwise would have been. The balance calculation method proposed in Principle 8 has been replaced by

alternative calculation methods described in PIA. One is the "nominal rate method"; the other is the "effective rate method".

2.1.4 MISLEADING CREDIT ADVERTISEMENTS

Principle Affected:	10
CCDA, PIA Sections:	None
Commentary Discussion:	III.F.1.a

Principle 10 would have prohibited misleading credit advertisements. Several commentators pointed out that it was ambiguous and redundant, given similar provisions in the *Competition Act*. Although there arguably is still a place in CCDL for the sort of provision contemplated by Principle 10, it has been eliminated from CCDA. In addition to the considerations just mentioned, the specific disclosure requirements for advertisements make the case for such a provision less than compelling.

2.1.5 METHOD OF RESTRICTING NON-INTEREST CHARGES

Principle Affected:	12
CCDA, PIA Sections:	CCDA 1(1)(a),(f),(l),(n),(t),(v), 1(2),(3), 2, 5-11
Commentary Discussion:	III.B.4, III.B.4-8, III.C

Principle 12 would have allowed credit grantors to "cover costs of setting up, documenting or securing a fixed credit agreement". In retrospect, the main problem with this principle is simply that it is too open-ended. It would create too many opportunities for unscrupulous lenders and too much uncertainty for scrupulous lenders, consumers and administrators. The approach that has been substituted for Principle 12 is more complicated in appearance, but in the end should provide greater certainty. Under the approach adopted in CCDA, permitted non-interest charges fall into four carefully defined categories:

- loan setup charges;
- flat charges;
- prepayment charges;
- default charges.

Although certain issues relating to these categories of charges are outstanding (see section 2.2.4), it should at least be easier to decide whether a particular charge comes within one of these categories than it would have been to decide whether the charge came within Principle 12.

2.1.6 REVISED APPROACH TO RLRF PROGRAMS

Principle Affected:	18
CCDA, PIA Sections:	CCDA 1(1)(f), 15

Commentary Discussion: III.F.2.c

The decision to abandon the calculated APR for most purposes made it necessary to make a decision with respect to rebate or low rate financing ("RLRF") programs.[6] One option would have been to make another exception to the decision to abandon the calculated APR, and to retain the concept in the case of RLRF programs. However, CCDA takes a different approach. It requires any rebate that is given to cash customers to be given to credit customers as well. When all is said and done, the effect of this would be to prevent car manufacturers (the main users of RLRF programs) from offering low rate financing or rebates as alternatives within the same program. As explained below (see section 2.2.4.4), this has proved to be controversial (but no more so than the existing approach and the approach proposed in Principle 18).

2.2 ISSUES RAISED BY COMMENTATORS

I turn now to issues that have been raised by commentators. This is not quite accurate, because in some cases the commentators were simply responding to issues that were raised in the draft legislation in the form of "alternative boxes". In any event, this section deals with points that were made by commentators. It must be emphasized that it does **not** deal with **every** point raised by the commentators. For the most part, I do not mention drafting points. I also omit some points that, although they raise policy issues, are at a level of detail that I think it would be more appropriate for the review committee to address.

To illustrate the sort of point that might not get mentioned if it were not being used for illustration, I refer to a comment on CCDA's definition of "borrower". The comment noted that the definition "does not seem to contemplate that there may be more than one borrower — if there is more than one borrower, the legislation should be clear as to whether or not delivery of a disclosure statement or renewal statement is sufficient if given to only one of the borrowers". This is an important point — indeed, it is both a drafting point and a policy point (Should both or all borrowers get the disclosure statements?). However, it is at a level of detail where it is probably best dealt with in a forum other than a plenary session of the Uniform Law Section.

2.2.1 ISSUES NOT ADDRESSED BY DRAFT ACTS, COMMENTARY

The commentators raised a few issues that the draft acts and commentary simply did not address, or addressed in a very cursory manner. The major issues in this category, and my suggested disposition, are described briefly below.

Previously, I referred to "rebate or low cost" (RLCF) programs. Substituting "rate" for "cost" seems to make the label a more accurate description of the programs.

2.2.1.1 Guarantors

A commentator pointed out that CCDA does not deal with disclosure to guarantors. This is an important issue, and something should perhaps be said about this in CCDA. On the other hand, some provinces — Alberta comes to mind — may have legislation dealing specifically with disclosure to guarantors. Care would have to be taken to ensure that the uniform legislation is not inconsistent with such special-purpose legislation.

Recommendation:

- Consideration should be given to including specific disclosure requirements in favour of guarantors in CCDA.

- The form, content and timing of such disclosure would be determined by the review committee after further consultation and discussion.

2.2.1.2 Timing of Advances

A commentator pointed out that PIA does not specify when advances — especially advances consisting of the supply of goods or services — are considered to occur. This is important in terms of when interest can begin to accrue. For example, the act could specify that an advance consisting of the supply is goods is considered to occur only when the goods are delivered to the buyer. In fact, when I was drafting CCDA I did consider including such a provision. But I abandoned the idea because I thought there would have to be too many exceptions to any proposed rule. However, I think this merits further consideration.

Recommendation:

The review committee should consider whether it is practical and desirable for PIA to specify when advances are considered to occur, and if so, what the rule should be.

2.2.1.3 Remedies and Penalties

Several commentators commented on the remedies and penalties provided, or not provided, by the two acts. The only remedial provisions are PIA sections 16 and 17 and CCDA section 13. PIA section 16 deals with the case where the annual rate is not expressly stated, and restricts the lender to the lesser of the "statutory rate" and a rate that can be inferred from the terms of the agreement. Section 17 deals with the situation where an annual rate is stated but there is a discrepancy between the stated rate and an "implicit rate" that can be calculated

from the terms of the agreement.[7] CCDA section 13 provides for the recovery of overpayments. The following points can be made about these remedies:

- The PIA remedies are much less harsh on lenders than are the corresponding provisions of the *Interest Act*, especially when interest rates are high.

- CCDA provides no administrative or penal sanctions, and the only civil remedy it provides is the right to recover overpayments. In contrast, existing CCDL typically deprives a lender who has failed to make the required disclosure of all credit charges. Usually, there is some sort of saving provision, such as an opportunity for the lender to recover credit charges if it can show that the borrower in question was not misled by the omission or error.

The basic problem is this. If one tries to structure civil remedies so that they emphasize fairness in the particular case, one runs the risk of having a toothless statute. More often than not, it will be difficult for borrowers to show that they have suffered significant damages as a result of non-disclosure or improper disclosure, and it would not be worth the effort for them to assert their rights if they had to prove actual damage. Thus, lenders would not have much to lose by ignoring the disclosure requirements. On the other hand, imposing very severe consequences, such as depriving the lender of all interest or limiting it to 5% interest (where prevailing rates are high) has the potential to cause unfair results in the particular case. It might be argued that this is the price that has to be paid to have a more or less self-enforcing (or borrower enforced) statute. However, the case law concerning section 6 of the *Interest Act* illustrates that one consequence of imposing unduly harsh remedies for breach of a disclosure requirement is that the courts will bend over backwards to find that the requirement has not been breached. This results in very strange interpretations of the provision in question, which ultimately defeat the whole purpose of the provision.

In their present form, PIA and CCDA probably go about as far as one could go to be fair to lenders in the particular case.[8] It should be noted, however, that it was recognized in the Commentary that the acts, particularly CCDA, were missing their teeth. It was contemplated that the teeth would be added later.

The procedure for calculating the implicit rate is essentially the same procedure that would be used to calculate the APR under existing CCDL.

Although one commentator did object to PIA section 16 on the basis that it still imposed arbitrary penalties on lenders, even if the penalty was not as harsh as under the existing *Interest Act*.

Recommendation:

The review committee should consider what combination of civil remedies and, perhaps, penal or administrative sanctions would best achieve the object of encouraging lenders to comply with the requirements of CCDA and PIA while minimizing the potential for unfair results in particular cases.

2.2.1.4 Verification Agreements

A commentator raised the issue of whether account verification agreements should be prohibited or restricted. This is the sort of agreement where borrowers are required to inform the lender within, say, 15 days of receiving their statement of account of any errors in the statement. The agreement then might go on to provide that if the borrower does not notify the lender within that period of time, the account is conclusively deemed to be accurate (except where the deeming rule would favour the borrower). For some types of errors it is possible to sympathize with the lender's point of view. It is probably not too much to ask that a borrower look at a statement of account within a short time after receiving it to confirm that the charges that appear on it were actually authorized. The borrower is usually in a better position to tell whether charges have been authorized than is the issuer. However, it seems patently unreasonable to expect a consumer borrower to pick up subtle mathematical errors that may have been made by the lender. There would seem to be a good case for imposing reasonable restrictions on how far lenders can protect themselves through account verification agreements. On the other hand, I am not sure that uniform CCDL is necessarily the best home for such restrictions.

Recommendation:

The review committee should consider whether it is desirable for uniform CCDL to contain any restrictions on the contents of account verification agreements.

2.2.2 APPLICATION OF ACTS: BUSINESS LOANS

CCDA, PIA sections: CCDA 3, PIA 4
Commentary Discussion: III.A

Some commentators expressed sympathy for including certain business loans within the ambit of CCDA and PIA Part 2. In particular, support was expressed for the "alternative box" in CCDA section 3. The alternative would make CCDA and PIA Part 2 applicable to business loans unless the parties agree that they should not apply. In principle, I think there is ample justification for including certain business loans within the ambit of these acts. However, the considerations discussed in the Commentary make me hesitant to suggest

extending CCDL into the business loans arena. The problem is one of distinguishing business loans that should be covered from those that should not. The approach suggested in the alternative box is intended to finesse this problem by letting the parties decide for themselves. But this approach is only a partial solution. For one thing, the borrower in a business loan could easily be more sophisticated and in a stronger bargaining position than the lender. Although the application of CCDL to such situations would be inappropriate, the lender might not be able to take advantage of the "contracting out" provision.

Recommendation:

CCDA and PIA Part 2 should not apply to any business loans unless a method can be found of limiting their application to business loans to which they clearly ought to apply.

2.2.3 BROKERAGE FEES

CCDA, PIA sections: CCDA 11
Commentary Discussion: III.C.5

The CCDA approach is to require brokerage fees to be disclosed in a calculated APR. In addition, no brokerage fee could be imposed or collected in respect of a loan in which the broker or an "associate" of the lender was the lender. One commentator thought that non-interest brokerage fees should not be permitted at all in respect of consumer mortgage lending. The argument would be that even where the broker is independent of the lender, the broker's fee can be built in to the interest rate charged on the loan. In effect, the lender would pay the brokerage fee, and would then recover it from the borrower by way of interest. That is certainly a plausible approach, although at the moment I am inclined to support the position taken in CCDA, which opts for disclosure over prohibition.

Recommendation:

The current approach of CCDA to brokerage fees should be maintained unless the review committee is convinced, after consultation, that brokerage fees (paid by the borrower) should be prohibited in consumer mortgage lending.

2.2.4 NON-INTEREST CHARGES

CCDA, PIA Sections: CCDA 1(1)(a),(f),(l),(n),(t),(v), 1(2),(3), 2, 5-11
Commentary Discussion: III.B.4, III.B.4-8, III.C

2.2.4.1 Loan Setup Charges

Loan setup charges are specific charges, such as appraisal fees or legal fees, imposed in connection with setting up a loan. CCDA section 7 would only permit such charges where the charge relates to an amount paid to an unrelated third party. It would not permit recovery of the salary of an in-house lawyer or appraiser. However, it also provides that this rule can be modified by regulation. The Commentary states that there is no reason in principle to distinguish between services performed in-house and "out-house". There is a practical problem, however, in monitoring charges for the former to ensure that they are realistic. That is why it was left to the regulations to determine circumstances in which in-house services could be charged back as loan set-up charges. A couple of commentators strongly supported the proposition that in-house services should be on the same footing as out-house services. On the other hand, one commentator thought that caps should be placed on loan set-up charges. However, I do not see a justification for that, at least in the case of services provided by an independent third party.

Recommendation:

No change at this time.

2.2.4.2 Flat Charges

A flat charge under CCDA is simply a charge that does not vary with the amount of the loan. A lender would not have to justify a flat charge or ascribe it to anything in particular. But the charge must be constant, or flat, for a given category of loans. And there could be only one flat charge per fixed loan, except that the lender could impose a flat charge upon renewal. Moreover, CCDA would place caps on the amount of flat charges. It proposes caps of $100 for mortgage loans and $25 for non-mortgage loans, subject to adjustment by regulation. There would be no caps on flat charges for open credit: reliance would instead be placed on consumer resistance to flat charges.

Opposing views were expressed on this subject. One commentator thought that caps should apply to open credit flat charges as well as to those for fixed loans. Others thought that there should be no caps on flat charges, because market mechanisms would keep these charges down for fixed credit and the monetary caps would quickly become out of date. Another commentator thought that if there were to be any caps, they should be in the regulations.

Another commentator raised a concern regarding flat charges in the context of renewal agreements. This commentator pointed out that this could provide an unscrupulous lender with a way around the cap on flat charges. It

could provide for a loan to be renewed every few months and slap on a $25 renewal fee each time. One solution would be to allow a flat charge in respect of a renewal fee only once in any given calendar year.

Recommendation:

No change for now, but the review committee should consult further regarding the need for monetary caps on flat charges, and on whether it is necessary to impose additional restrictions on flat charges for renewals.

2.2.4.3 Default Charges

Section 10 has an alternative box. Most commentators preferred the flexibility of the alternative, and thought that it would provide reasonable protection to borrowers. One commentator thought the alternative would give too much leeway to creditors.

Recommendation:

Adopt alternative section 10 for now.

2.2.4.4 Rebates

Section 15 requires that any rebate given to cash customers also be given to credit customers. One commentator thought this would discourage merchants from giving discounts to cash customers. What it will do, I think, is discourage merchants from selling goods at an inflated price and then offering cash buyers a discount and credit customers "interest free credit". Special problems are raised by RLRF programs, partly because of the number of parties involved. One commentator, insisted that consumers are not misled in the slightest by RLRF programs, and that such programs benefit both manufacturers and consumers.

Recommendation:

No change for now, but the review committee should consider this issue carefully to ensure that the suggested approach is appropriate.

2.2.5 BALANCE CALCULATION METHOD

CCDA, PIA Sections: PIA 10-15
Commentary Discussion: III.D.3-8

As already mentioned, PIA provides for alternative balance calculation methods: the nominal rate method and the effective rate method. There was not a great deal of adverse comment on PIA in general, or the balance calculation provisions in particular. However, one commentator suggested that there was no market or logical reason to have more than one balance calculation method. I think this commentator preferred the nominal rate method. Another commentator objected that going from a "quasi-effective rate method" (**Interest Act** section 6) to a true effective rate method would be very costly and disruptive, and would have little if any benefit.

Recommendation:

No change for now, but the review committee should consult further regarding the appropriate balance calculation method(s).

2.2.6 TIMING OF DISCLOSURE: "COOLING OFF PERIODS"

CCDA, PIA Sections: CCDA 11, 26, 29, 30
Commentary Discussion: III.C.5, III.F.2.d, III.F.3.a

Several sections or alternative sections in CCDA would provide a limited "cooling-off" period to consumer borrowers. The most important cooling-off period is the one provided in section 30 regarding mortgage loans. The main part of the section would give the borrower 48 hours after receiving the initial disclosure statement within which to decide not to proceed with the loan. The only charges for which the borrower would be liable in such a case would be accrued interest (if the funds had already been advanced), and loan setup charges relating to expenses already incurred by the lender. An alternative box would have relieved the borrower of liability for any expenses. Several commentators objected to the alternative box, on the basis that it would prevent lenders from recovering legitimate expenses incurred on the borrower's behalf. Several commentators thought that a provision for waiving this right in cases of special urgency should be incorporated into the section.

Recommendation:

- Section 30 should be retained without the alternative box.

- A provision should be included in section 30 that would allow borrowers who need funds without delay to waive the "cooling-off" period.

2.2.7 INDEXED RATES: DEFINITION

CCDA, PIA sections: PIA 1(1)(i), 7
Commentary Discussion: III.D.2.b, III.F.4

The most significant aspect of an indexed rate is that lenders would not be required to give advance notice of changes in such a rate. No commentators objected to that aspect of indexed rates. However, some commentators thought that the main definition of "indexed rate" was too narrow, as it would not apply to a lending institutions's own prime rate. That is, a financial institution could not use its own prime rate as an index. However the definition of "indexed rate" provides for the designation of approved indexes by regulation. It was intended that the regulations could designate financial institutions' prime rate as approved indexes.

Recommendation:

No change at this time.

2.2.8 BALLOON PAYMENT AGREEMENTS

CCDA, PIA Sections: No specific sections
Commentary Discussion: III.F.6

CCDA does not contain any special "balloon payment" provisions. It assumes that the requirement to disclose the amount and timing of all payments would reveal the existence of a balloon payment provision. The Commentary discusses certain perceived disadvantages of balloon payment provisions, so far as consumer understanding of the cost of credit is concerned. It points out that Quebec does not allow balloon payment loans, and that one commentator on the Principles Paper had expressed support for the Quebec approach. CCDA does not take that approach, but the Commentary suggested that, if necessary, balloon payment features could be given special prominence in a disclosure statement. One commentator on the February materials also expressed sympathy for the Quebec approach. This commentator and another commentator supported the prominent disclosure of balloon payment features.

Recommendation:

The disclosure requirements relating to fixed credit agreements should require that balloon payment features be given special prominence in a disclosure statement.

2.2.9 OPEN CREDIT ADVERTISING

CCDA, PIA sections: CCDA 39, 46
Commentary Discussion: III.G.3

One commentator supported the recommendations of the *Credit Cards in the Nineties* Report issued by the House of Commons Standing Committee on Consumer and Corporate Affairs. The Standing Committee called for disclosure of a variety of information about the cost of credit, including the APR, in credit card advertising. CCTA opted for an approach that would require the advertisement to provide a toll-free number where information about the agreement could be obtained. For credit card advertising, this information would only be required in the case of advertising by a particular issuer.[9] The theory behind requiring a toll-free number instead of the actual information was that in many cases the information on any type of printed advertisement or form would be out of date by the time a consumer saw it. I thought and still think that a toll-free number would be more useful.

Recommendation:

No change at this time.

2.2.10 LEASES OF GOODS

One commentator pointed out that the provisions regarding calculation and disclosure of the cash value and APR were too important to be dealt with by regulation. The same commentator and another commentator suggested that it the legislation should perhaps regulate the calculation of the option price, since this is akin to calculating the balance outstanding on a supplier loan that is being prepaid. Finally, this commentator suggested that it might be appropriate to deal with consumer leases in separate uniform legislation. This latter is certainly a point worth considering. Some of the issues that arise with respect to consumer leases are more closely related to sale of goods issues than consumer credit issues.

It would be impossible to provide cost of credit information in credit card "brand" advertising, since different issuers offer cards with different rates and charges under the same brand name.

However, in the absence of uniform legislation relating specifically to consumer leases, it is appropriate to deal with **disclosure** issues relating to consumer leases in uniform CCDL.

Recommendation:

- For the time being, CCDA should continue to deal with disclosure requirements for long-term consumer leases.
- The requirements for disclosure of APR and cash value should be incorporated into CCDA, rather than being left to regulation.
- The review committee should consider the feasibility of including provisions regulating the manner of calculating the option price for a consumer lease, although this is probably the sort of topic that is more appropriately dealt with in uniform legislation relating to consumer leasing.

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	
Arbitration Act	1990	
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 Evidence Act	1993	
Child Status Act	1980	Rev '82; Am. '91.
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.
Court Orders Compliance Act	1992	
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	
Enforcement of Canadian Judgments Act	1992	
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	

TABLE I

Title	Year First Adopted and Recommended	Subsequent Amendments and Revisions
Foreign Arbitral Awards Act	1985	
Foreign Judgments Act	1933	Rev. '64.
Foreign Money Claims Act	1989	
Formal Validation Recognition of Advance Health Care Directives	1992	
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	
Intercountry Adoption (Hague Convention) Act	1993	
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.
Interprovincial Subpoenas Act	1974	
Intestate Succession Act	1925	Am. '26, '50, '55; Rev. '58; Am '63; Rev '85.
Judgment Interest Act	1982	
Jurors' Qualification 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	

Title	Year First Adopted and Recommended	Subsequent Amendments and Revisions
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 Enforcement of Judgments (United Kingdom) Act	1982	
Recognition of Foreign Health Care Directives	1992	
Regulations Act	1943	Rev. '82
Regulatory Offences Procedure Act	1992	
Retirement Plan Beneficiaries Act	1975	
Sale of Goods Act	1981	Rev. '82; Am '90.
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	

TABLE I

Title	Year First Adopted and Recommended	Subsequent Amendments and Revisions
- 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
Extra-Provincial Custody Enforcement Act	1975	8	1981	Custody Jurisdiction and Enforcement Act
Fire Insurance Policy Act	1924	9	1933	*
Foreign Arbitral Awards Act	1985	1	1986	International Commercial Arbitration Act
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.*

ˣ *indicates that provisions similar in effect are in force.*

† *indicates that the Act has since been revised by the Conference.*

Accumulations Act - Enacted by N.B.ˣ *sub nom.* Property Act; Ont. ('66). Total: 2.

Arbitration Act - Enacted by Alta. ('91); Ont. ('91); Sask. ('92); N.B. ('92). Total: 4.

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 Man. ('51); N.B.† ('27); Nfld.° ('55); N.S.ˣ; Yukon ('56). Total: 5.

Change of Name Act - B.C.ˣ ('60) *sub nom.* Name Act; Man.('88), N.B.° ('87)

Child Abduction (Hague Convention) Act - Enacted by Alta. ('87); B.C. ('82); Man. ('82); N.B.ˣ ('82); Nfld. ('83); N.S. ('82); N.W.T.° ('87); Ont. ('82) *sub nom.* Children's Law Reform Act s. 46; P.E.I.° ('84) *sub nom.* Custody Jurisdiction and Enforcement Act; Que.ˣ ('84); Sask. ('86); Yukon ('81). Total: 12.

Child Status Act - Enacted by B.C.ˣ ('78) *sub nom* Family Relations Act; N.B. ('80) *sub nom.* Family Services Act; P.E.I. ('87). Total: 3.

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 - Enacted by N.B. ('88); B.C. ('90) Total 2

Conflict of Laws (Traffic Accidents) Act - Enacted by Yukon ('72). Total: 1.

Contributory Negligence Act - Enacted by Alta.† ('37); B.C.ˣ ('60) *sub nom.* Negligence Act; N.B.° ('25, '62); Nfld.° ('51); N.W.T.° ('50); N.S. ('26, '54); P.E.I.ˣ ('78); Sask. ('44); Yukon° ('55). Total: 9.

Court Orders Compliance Act

Criminal Injuries Compensation Act - Enacted by Alta.† ('69); B.C. ('72); N.B.ˣ ('71); Nfld.ˣ ('68); N.W.T.ˣ ('89); 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); Ont * ('80) *sub nom* Libel and Slander Act, s. 24; P.E.I. ('48, '87); Yukon ('54, '81). Total: 10.

Dependants' Relief Act - Enacted by Man. ('90); 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: 6.

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.

TABLE III

Effect of Adoption Act - Enacted by N.B.[x] ('80); N.W.T. ('69); P.E.I.[x]. Total: 3.

Enforcement of Canadian Judgements Act: Enacted B.C. ('92).

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 B.C.[x] ('78) *sub nom.* Family Relations Act; Yukon[x] ('81) Total: 2.

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 Arbitral Awards Act - Enacted by B.C.('85).[Other jurisdictions have enacted, in addition or instead, the International Commercial Arbitration Act that supersedes this Act.]

Foreign Judgments Act - Enacted by N.B.° ('50); Sask. ('34). Total: 2.

Foreign Money Claims Act - Enacted by B.C. ('90); Ont.[x] ('84) *sub nom.* Courts of Justice Act s.121.

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 - Enacted P.E.I. ('91); Ont.[x] *sub nom.* Human Tissue Gift Act; B C.[x] ('72) *sub nom.* Human Tissue Gift Act.

Information Reporting Act

Inter-Jurisdictional Child Welfare Orders Act

International Commercial Arbitration Act - Enacted by Alta. ('86); B.C.° ('86); Can ('86); Man. ('87); N.B. ('86); Nfld. ('86); N.W T. ('86); N S ('86); Ont ('86); P.E.I. ('86); Que.[x] ('86) *sub nom.* Civil Code, Code of Civil Procedure; Sask. ('88); Yukon ('86). Total: 13.

International Sale of Goods Act - Enacted by B.C. ('90,'92); Alta. ('90) *sub nom.* International Conventions Implementation Act; Sask. ('91); Man. ('89); Ont. ('88); Que.[x] ('91); N B. ('89); P.E.I. ('88); N.S. ('88); Nfld. ('89); Yukon ('92); N.W T. ('88); Canada ('91). Total 13.

International Trusts Act - Enacted by B.C. ('89); Alta ('90) *sub nom.* International Conventions Implementation Act; Nfld. ('89); P.E.I. ('89); N.B. ('88); Man. ('93). Total 6.

Interpretation Act - Enacted by Alta.° ('80); B.C. ('74); N.B.[x]; Nfld.° ('51); N.W.T.° ('88); 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); 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: 8.

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.

Maintenance and Custody Enforcement Act - Enacted by B.C.[x] ('88) *sub nom.* Family Maintenance and Enforcement Act.

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); Man. ('84); P.E.I.° ('84). Total: 3.

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 B.C.° ('89); Man. ('77); N.B.° ('93); P.E.I.° ('90); Sask.° ('79); Yukon° ('81). Total: 6

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 Judgements (United Kingdom) Act: Nfld.('86); P.E.I.('87); N.S.('84); Man.('84); Sask ('88) - all five *sub nom.* Canada-U.K. Recognition (and Enforcement) of Judgments Act; N.B.('84); Ont ('84); Alta.('90) *sub nom.* International Conventions Implementation Act; B.C.('85) *sub nom.* Court Order Enforcement Amendment Act; N.W.T.('88); Yukon ('84); Canada ('84) *sub nom.* Canada-U.K. Civil and Commercial Judgments Convention Act. Total: 12.

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

Recognition of Foreign Health Care Directives

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.

Regulatory Offences Procedures Act

Retirement Plan Beneficiaries Act - Enacted by Alta. ('77, '81); Man. ('76); N.B ° ('82); Ont. ('77) *sub nom.* Succession Law Reform Act: Part III; P.E.I.[x]; Yukon ('81) Total: 6.

Sale of Goods Act - Enacted by N.B.[x]. Total: 1

Service of Process by Mail Act - Enacted by Alta [x]; Man [x]; Sask.[x]. Total: 3.

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

TABLE III

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 Connecticut ('92); Colorado ('84); Man. ('85); Michigan° ('88); Minnesota*; Montana ('84); New Jersey ('84); Ont. ('86); Oregon ('91); 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); Wisconsin; Yukon ('62, '81). Total: 3 Cdn., 8 U.S.

Variation of Trusts Act - Enacted by Alta.° ('64); B.C. ('68); Man. ('64); N.W.T. ('63); N.S. ('62); Ont. ('59); P.E.I. ('63); Sask. ('69). Total: 8.

Vital Statistics Act - Enacted by Alta ° ('59); B.C.° ('62); Man.° ('51); N B * ('79); N W T.° ('52); N.S ° ('52); Ont. ('48); P.E.I.* ('50); Sask. ('50); Yukon° ('54). Total: 10.

Warehouse Receipts Act - Enacted by Alta. ('49); B C.* ('45); Man.° ('46); N.B ° ('47); Nfld. ('63); N S. ('51); Ont ° ('46). Total: 7

Warehousemen's Lien Act - Enacted by Alta ('22); B C. ('52); Man. ('23); N B.* ('23); Nfld. ('63); N.W.T.° ('48); N S ('51); Ont. ('24); P E.I.° ('38); Sask. ('21); Yukon ('54). Total: 11

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 3) International - Enacted by Alta ('76); Man ('75); Nfld ('76); Ont ('78) *sub nom.* Succession Law Reform Act s.42; Sask ('81) Total: 5
- 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

Arbitration Act ('91); Child Abduction (Hague Convention) Act ('87); 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); International Commercial Arbitration Act ('86); International Sale of Goods Act ('90); International Trusts Act ('90); Interpretation Act° ('80); Interprovincial Subpoena Act ('81); Interstate 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 Judgements (United Kingdom) Act ('90) *sub nom.* International Conventions Implementation Act; Reciprocal Enforcement of Maintenance Orders Act ('47, '58); Regulations Act° ('57); Retirement Plan Beneficiaries Act ('77, '81); Service of Process by Mail Actˣ; Survival of Actions Act° ('79); Survivorship Act† ('48, '64); Variation of Trusts Act° ('22); Vital Statistics Act° ('59); Warehouse Receipts Act ('49); Warehousemen's Lien Act ('22); Wills Act† ('60); International Wills ('76) Total: 37.

British Columbia

Change of Name Actˣ ('60) *sub nom.* Name Act; Child Abduction (Hague Convention) Act ('82); Child Status Actˣ ('78) *sub nom* Family Relations Act; Conflict of Laws Rules for Trusts Act ('90); Contributory Negligence Actˣ ('60) *sub nom.* Negligence Act; Criminal Injuries Compensation Act ('72); Condominium Insurance Act ('74) *sub nom.* Condominium Act*; Defamation Act* *sub nom* Libel and Slander Act; Enforcement of Canadian Judgements Act ('92); Evidence - Affidavits before Officers: Foreign Affidavits* ('53); Family Support Actˣ ('78) *sub nom.* Family Relations Act; Foreign Arbitral Awards Act ('85); Foreign Money Claims Act ('90); *Hollington v Hewthorne* ('77); Human Tissue Donationˣ ('72) *sub nom.* Human Tissue Gift Act; International Sale of Goods Act ('90,'92); International Trusts Act ('89); 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; Maintenance and Custody Enforcement Act× ('88) *sub nom.* Family Maintenance and Enforcement Act; Occupiers' Liability Act ('74) *sub nom.* Occupiers's Liability Act*; Perpetuities Act ('75) *sub nom.* Perpetuity Act*; Personal Property Security° ('89); 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 Judgements (United Kingdom) Act ('85) *sub nom.* Court Order Enforcement Admendment Act; Reciprocal Enforcement of Maintenance Orders Act° ('72) in Regulations under Sec. 7008 Family Relations Act; Regulations Act ('83); 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); Warehouse Receipts Act* ('45); Warehousemen's Lien Act ('52) *sub nom.* Warehouse Lien Act*; Wills Act† ('60); Wills - Conflict of Laws ('60), Sec 17† ('79). Total: 49.

Canada

Evidence - Foreign Affidavits ('43), Photographic Records ('42); International Commercial Arbitration Act ('86); International Sale of Goods Act ('91); Reciprocal Enforcement of Judgements (United Kingdom) Act ('84) *sub nom.* Canada-U.K Civil and Commercial Judgements Convention Act; Regulations Act° ('50), superseded by the Statutory Instruments Act, S.C. 1971, c. 38. Total: 6.

Manitoba

Assignment of Book Debts Act ('29, '51, '57); Bills of Sale Act ('29, '57); Bulk Sales Act ('51); Change of Name Act ('88); Child Abduction (Hague Convention) Act ('82); Condominium Insurance Act ('76); Custody Jurisdiction and Enforcement Act ('83); Defamation Act ('46); Dependants' Relief Act ('90); Extra Provincial Custody Orders Enforcement Act† ('82); Evidence Act* ('60); Affidavits before Officers ('57); International Commercial Arbitration Act ('87); International Sale of Goods Act ('89); International Trusts Act ('93); 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); Occupiers' Liability Act ('84); 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 Judgements (United Kingdom) Act ('84) *sub nom* Canada-U.K. Recognition (and Enforcement) of Judgments Act; 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); Warehouse Receipts Act° ('46); Warehousemen's Lien Act ('23); Wills Act† ('64); Wills - Conflict of Laws ('55); (Part 3) International - ('75) Total: 43.

New Brunswick

Accumulation Act[x] *sub nom.* Property Act; Arbitration Act ('92); Bills of Sales Act ('52); Bulk Sales Act† ('27); Canada U.K. Convention on the Recognition and Enforcement of Judgments° ('82); Change of Name Act° ('87) Child Status[x] ('80) *sub nom* Family Services Act; Conflict of Laws Rules for Trusts Act ('88); 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); International Sale of Goods Act ('89); International Trusts Act ('88); 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); Personal Property Security° ('93); Presumption of Death Act[x] ('60); Proceedings Against the Crown° ('52); Reciprocal Enforcement of Judgments ('25),[x] ('51); Reciprocal Enforcement of Judgements (United Kingdom) Act ('84); 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); Warehouse Receipts° ('47); Warehousemen's Lien Act[x] ('23); Wills Act† ('59). Total: 50

Newfoundland

Bills of Sale Act° ('55); Bulk Sales Act° ('55); Contributory Negligence Act° ('51); Criminal Injuries Compensation Act° ('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 Sale of Goods Act ('89); 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 Judgements (United Kingdom) Act ('86) *sub nom* Canada-U.K. Recognition (and Enforcement) of Judgements Act; 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); Warehouse Receipts Act ('63); Warehousemen's Lien Act ('63); Wills Act† ('76); Wills - Conflict of Laws Act ('76) *sub nom* Wills Act; Wills - (Part 3) International ('76) Total: 33

TABLE IV

Northwest Territories

Bills of Sale Act° ('48); Child Abduction (Hague Convention) Act° ('87); Contributory Negligence Act° ('50); Criminal Injuries Compensation Act[x] ('89); 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); International Sale of Goods Act ('88); Interpretation Act° ('88); 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* ('55); Reciprocal Enforcement of Judgements (United Kingdom) Act ('88); 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); Extra-Provincial Custody Orders Enforcement Act† ('76); International Commercial Arbitration Act ('86); International Sale of Goods Act ('88); 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° ('49, '83); Reciprocal Enforcement of Judgements (United Kingdom) Act ('84) *sub nom.* Canada-U.K. Recognition (and Enforcement) of Judgements Act; Survivorship Act ('41); Trustee Investments* ('57); Variation of Trusts Act ('62); Vital Statistics Act° ('52); Warehouse Receipts Act ('51); Warehousemen's Lien Act ('51); . Total: 24.

Ontario

Accumulations Act ('66); Arbitration Act ('91); Child Abduction (Hague Convention) Act ('82) *sub nom.* Children's Law Reform Act s 46; Criminal Injuries Compensation Act ('71) *sub nom.* Compensation for Victims of Crime Act° ('71); Defamation Act* ('80) *sub nom.* Libel and Slander Act, s 24; 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; Foreign Money Claims Act[x] ('84) *sub nom.* Courts of Justice Act s 121; Frustrated Contracts Act ('49); Human Tissue Donation[x] *sub nom* Human Tissue Gift Act; International Commercial Arbitration Act ('86); International Sale of Goods Act ('88); Interprovincial Subpoenas Act ('79) Intestate Succession Act° ('77) *sub nom* Succession Law Reform Act: Part II; Legitimacy Act ('21, '62), re '77; Perpetuities Act ('66); Proceedings Against the Crown Act° ('63); Reciprocal Enforcement of Judgments Act ('29); Reciprocal Enforcement of Judgements

(United Kingdom) Act ('84); Reciprocal Enforcement of Maintenance Orders Act° ('59); Regulations Act° ('44); Retirement Plan Beneficiaries Act ('77) *sub nom.* Succession Law Reform Act: Part III; Survivorship Act ('40); Transboundary Pollution Reciprocal Access Act ('86); Variation of Trusts Act ('59); Statistics Act ('48); Warehouse Receipts Act° ('46); Warehousemen's Lien Act ('24); Wills - Conflict of Laws ('54). Total: 33.

Prince Edward Island

Bills of Sale Act* ('47, '82); Child Abduction (Hague Convention) *sub nom.* Custody Jurisdiction and Enforcement Act° ('84); Child Status Act ('87); Contributory Negligence Act[x] ('78); Defamation Act ('48, 87); Dependants' Relief Act° ('74) *sub nom.* Dependants of a Deceased Person Relief Act; Devolution of Real Property Act* ('39) *sub nom.* Part V of Probate Act; Effect of Adoption Act[x]; Evidence Act* ('39); Fatal Accidents Act[x]; Human Tissue Donation ('91); International Commercial Arbitration Act ('86); International Sale of Goods Act ('88); International Trusts Act ('89); Interpretation Act° ('81); Interprovincial Subpoenas Act; Intestate Success Act *sub nom.* Part IV Probate Act* ('39); Jurors Act (Qualifications and Exemptions)° ('81); Legitimacy Act* ('20) *sub nom.* Part I of Children's Act; Limitation of Actions Act* ('39); Occupiers' Liability Act° ('84); Partnerships Registration Act[x]; Personal Property Security° ('90); Proceedings Against the Crown Act* ('73); Reciprocal Enforcement of Judgments Act° ('74); Reciprocal Enforcement of Judgements (United Kingdom) Act ('87) *sub nom.* Canada-U.K. Recognition (and Enforcement) of Judgements Act; Reciprocal Enforcement of Maintenance Orders Act° ('51, '83); Retirement Plan Beneficiaries Act[x]; Statutes Act[x]; Survival of Actions Act[x]; Transboundary Pollution (Reciprocal Access) Act ('85); Variation of Trusts Act ('63); Vital Statistics Act* ('50); Warehousemen's Lien Act° ('38). Total: 34.

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; Child Abduction (Hague Convention) Act[x] ('84); Criminal Injuries Compensation Act; see Loi sur l'indemnisation des victimes d'actes criminels, L R.Q. (1977) ch. 1-6 - quite similar; Evidence Act: Affirmation in lieu of oath: see a. 299 C.P C - similar; International Commercial Arbitration Act[x] ('86) *sub nom.* Civil Code, Code of Civil Procedure; International Sale of Goods Act[x] ('91); 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. 981 a 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. of s. 8(3) of the Uniform Act - which are similar

NOTE:

Many other provisions of the Quebec Civil Code or of other statutes bear resemblance to the Uniform Acts but are not sufficiently identical to justify a reference. Obviously, most of these subject matters are covered one way or another in the laws of Quebec.

Saskatchewan

Arbitration Act ('92); Child Abduction (Hague Convention) Act ('86); 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); Extra-Provincial Custody Orders Enforcement Act† ('77); Foreign Judgments Act ('34); International Commercial Arbitration Act ('88); International Sale of Goods Act ('91); 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 Judgements (United Kingdom) Act ('88) *sub nom* Canada-U.K Recognition (and Enforcement) of Judgements Act; 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: 33.

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); International Sale of Goods Act ('92); 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 Judgements (United Kingdom) Act ('84); 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: 40.

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 or she 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 or her 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 or her subject.

The cumulative index is arranged in parts:

Part I. Conference: General
Part II Drafting Section
Part III. Uniform Law Section
Part IV Criminal Law Section

An earlier compilation of the same sort is to be found in the 1939 *Proceedings* at pages 242 to 257. It is entitled: TABLE AND INDEX OF MODEL UNIFORM STATUTES SUGGESTED, PROPOSED, REPORTED ON, DRAFTED OR APPROVED, AS APPEARING IN THE PRINTED PROCEEDINGS OF THE CONFERENCE 1918-1939

PART I
CONFERENCE: GENERAL

PART II

DRAFTING SECTION

PART III

UNIFORM LAW SECTION

PART IV

CRIMINAL LAW SECTION

Subjects considered each year are listed in the minutes of the year and published in the Proceedings of that year