UNIFORM LAW CONFERENCE OF CANADA

CONFERENCE SUR L'UNIFORMISATION DES LOIS AU CANADA

PROCEEDINGS

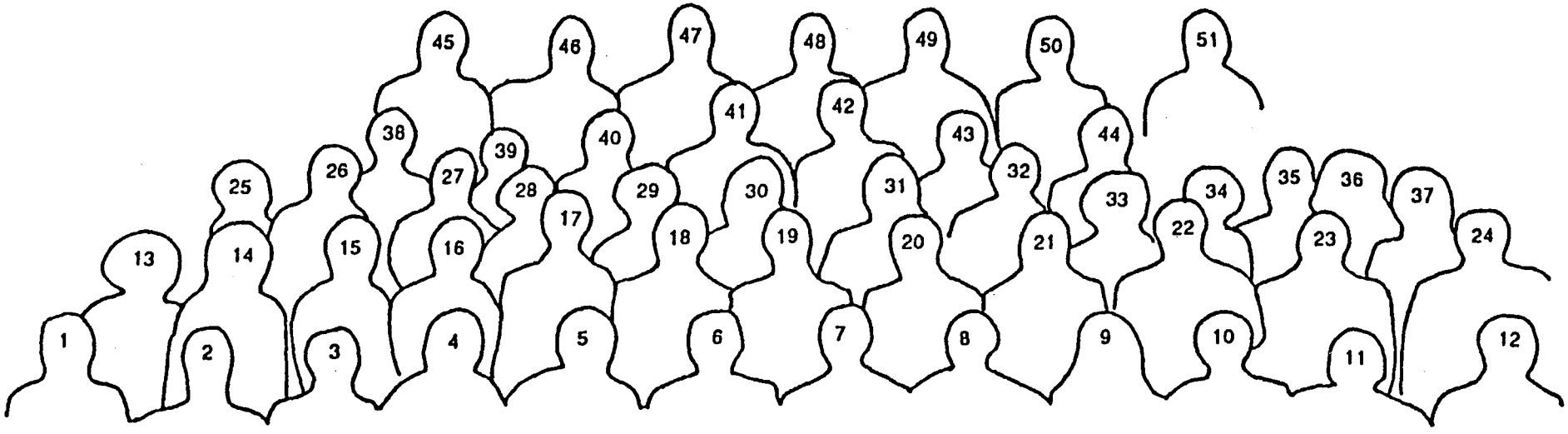
OF THE

SEVENTY-THIRD ANNUAL MEETING

HELD AT

REGINA, SASKATCHEWAN

August, 1991



1. Tegart, Sask.
2. Amrud, Sask.
3. Pagano, Alta.
4. Lown, Alta.
5. Marsh, NCCUSL
6. Hubley, P.E.I.
7. Hamilton, NCCUSL
8. Stapleton, N.B.
9. Jackson, Sask.
10. Hoyt, Ex. Dir.
11. Préfontaine, Can.
12. Moen, Sask.
13. Fried, N.S.
14. Cohl, Ont.
15. Mills, Nfld.
16. Morton, Ont.
17. Rattenbury, N.B.
18. Bobiasz, Can.
19. Dambrot, Can.
20. Walker, N.S.
21. Létourneau, Can.
22. Allen, Alta.
23. Lovgren, Can.
24. Close, B.C.
25. Holman, Ont.
26. Mosley, Can.
27. Piragoff, Can
28. Welsh, Nfld.
29. Reilly, B.C.
30. Moulton, Nfld.
31. Trahan, Can.
32. Dalton, Alta.
33. Gunn, Sask.
34. Not identified
35. Getz, B.C.
36. Snell, Sask.
37. Parker, Sask.
38. Zigayer, Can.
39. Geller, Can.
40. Lortie, Can.
41. Hodges, Sask.
42. Whitley, Man.
43. Horton, Yukon
44. Parker, Sask.
45. Richard, N.B.
46. Curran, Nfld.
47. Gregory, Ont.
48. Wade, Can.
49. Langille, P.E.I.
50. Perozzo, Man.
51. Hunter, Alta.

Absent: *Alta.* Pringle; *B.C.* Quantz; *Can.* Berlin, Freeman, Goetz, Peck, Tollefson, Tremblay, Wakefield, Zazulak; *Man.* Schnoor; *N.W.T.* Sanders, Whitehouse; *N.S.* Chisholm, Johnson; *Ont.* Ewart, Humphrey, Revell; *Sask.* Barrington-Foote, Brown, Cosman, Gallet, McIntyre, Pottruff.

CONTENTS

PAST PRESIDENTS

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

PAST PRESIDENTS

GÉRARD BERTRAND, c.r., Ottawa 1984-1985
GRAHAM D. WALKER, Q.C., Halifax 1985-1987
M. REMI BOUCHARD, Sainte-Foy 1987-1988
GEORGINA R. JACKSON, Q.C. Regina 1988-1990
BASIL D. STAPLETON, Q.C. Fredericton 1990-1991

OFFICERS: 1991-92

Immediate Past President ... Basil D. Stapleton, Q.C. Fredericton
President ..... Daniel C. Préfontaine, c.r., Ottawa
Vice-President ..... Howard F. Morton, Q.C., Toronto
Chairperson, Drafting Section ..... Peter Pagano, Q.C., Edmonton
Chairperson, Criminal Law Section .... Carol Snell, Regina
Chairperson, Uniform Law Section ..... Peter J. M. Lown, Edmonton

UNIFORM LAW SECTION

Chairperson ..... Peter J.M. Lown, Edmonton
Secretary ..... Melbourne M. Hoyt, Q.C., Fredericton

CRIMINAL LAW SECTION

Chairperson ..... Carol Snell, Regina
Secretary ..... Michael E. N. Zigayer, Ottawa

DRAFTING SECTION

Chairperson ..... Peter Pagano, Q.C., Edmonton
Vice-Chairperson ..... Lionel Levert, Ottawa
Secretary ..... Donald L. Revell, Toronto

JURISDICTIONAL REPRESENTATIVES

Alberta ..... Peter Pagano, Q.C.
British Columbia ..... Clifford S. Watt, Q.C.
Canada ..... Serge Lortie
Manitoba ..... Shirley Strutt
New Brunswick ..... Basil D. Stapleton, Q.C.
..... Robert A. Murray
Newfoundland ..... John Cummings
Northwest Territories ..... Miles H. Pepper, Q.C.
Nova Scotia ..... Gordon C. Johnson
Ontario ..... Donald L. Revell
Prince Edward Island ..... M. Raymond Moore
Quebec ..... Marie-José Longtin
Saskatchewan ..... Douglas E. Moen
..... Carol Snell
Yukon Territory ..... Sydney B. Horton

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

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P.O. Box 6000
Fredericton, N.B. E3B 5H1
Tel. (506) 458-1247
Fax. (506) 457-7342

DELEGATES

1991 Annual Meeting

The following persons (71) attended one or more sections of the Seventy-third 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.

Alberta:

MICHAEL ALLEN, Q.C., Assistant Deputy Minister (Criminal Justice), Department of the Attorney General, 2nd Floor, Bowker Building, 9833-109th Street, Edmonton T5K 2E8 [TEL: 403-427-5046] [FAX: 403-422-9639] *(C.L.S.)*

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PROFESSOR P. J. M. LOWN, Director, Alberta Law Reform Institute, 402 Law Centre, The University of Alberta, 89th Avenue and 114th Street, Edmonton T6G 2H5 [TEL: 403-492-5291] [FAX: 403-492-1790] *(U.L.S.)*

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British Columbia:

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RUSSELL GETZ, Policy and Program Analyst, Management Services and Justice Support Programs Branch, Ministry of Attorney General, 5th Floor, 910 Government Street, Victoria V8V 1X4 [TEL: 604-387-5006] [FAX: 604-356-9037] *(U.L.S.)*

CLAIRE REILLY, Legislative Counsel, Ministry of Attorney General, 5th Floor, 1070 Douglas Street, Victoria V8V 1X4 [TEL: 604-356-5757] [FAX: 604-356-5758] *(U.L.S.)*

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FRED BOBIASZ, Council, Policy, Programs and Research Sector, Department of Justice of Canada, 239 Wellington Street - Room 718, Ottawa K1A 0H8 [613-957-4733] *(C.L.S.)*

MICHAEL DAMBROT, Senior General Counsel, Nationsl Strategy for Drug Prosecutions Section, Department of Justice of Canada, 239 Wellington Street - Room 434, Ottawa K1A 0H8 [TEL: 613-952-7553] *(C.L.S.)*

MARTIN FREEMAN, General Counsel, Advisory and Administrative Law Section, Department of Justice of Canada, 293 Wellington Street - Room 657, Ottawa K1A 0H8 [TEL: 613-957-4910] *(U.L.S.)*

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Northwest Territories:

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

CAROL WHITEHOUSE, Legislative Counsel, Dept. NWT, Court House, Yellowknife X1A 2L9 [TEL: 403-873-7462] [FAX: 403-873-0234] *(U.L.S.)*

Nova Scotia:

MARC CHISHOLM, Assistant Chief Crown Attorney (Trial), Department of the Attorney General, P.O. Box 7, Halifax B3J 2L6 [TEL: 902-424-7789] [FAX: 902-424-4556] *(C.L.S.)*

ANNA J. FRIED, Registrar of Regulations, Department of Attorney General, P.O. Box 7, Halifax B3J 2L6 [TEL: 902-424-5476] [FAX: 902-424-0599] *(U.L.S.)*

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GRAHAM D. WALKER, Q.C., Chief Legislative Counsel, Office of the Legislative Counsel, 9th Floor, Joseph Howe Building, 1690 Hollis Street, P.O. Box 1116, Halifax B3J 2X1 [TEL: 902-424-8941] [FAX: 902-424-0547] *(U.L.S.)*

Ontario:

KAREN COHL, Director, Program Development Branch, Ministry of the Attorney General, 720 Bay Street, 2nd Floor, Toronto M5G 2K1 [TEL: 416-326-4264] [FAX: 416-326-4289] *(U.L.S.)*

DOUGLAS J. EWART, Director, Policy Development Division, Ministry of the Attorney General, 720 Bay Street, 11th Floor, Toronto M5G 2K1 [TEL: 416-326-2620] [FAX: 416-326-2699] *(U.L.S.)*

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Prince Edward Island:

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Saskatchewan:

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BRIAN BARRINGTON-FOOT, Q.C., Deputy Ministster and Deputy Attorney General, Department of Justice, 1874 Scarth Street, Regina S4P 3V7 [TEL: 306-787-5351] [FAX: 306-787-3874] *(C.L.S. & U.L.S.)*

IVAN R. BROWN, Chief Legislative Crown Counsel, Legislative Drafting, Department of Justice, 1874 Scarth Street, Regina S4P 3V7 [TEL: 306-787-9346] [FAX: 306-787-9111] *(D.S.)*

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ALAN MCINTYRE, Robertson Stromberg, 700-1867 Hamilton Street, Regina S4P 2C2 [TEL: 306-569-9000] [FAX: 306-575-6443] *(C.L.S.)*

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DELEGATES EX OFFICIO

1991 Annual Meeting

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

Attorney General of British Columbia: HON. RUSSELL G. FRASER

Minister of Justice and Attorney General of Canada:
HON. KIM CAMPBELL, P.C., Q.C.

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

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

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

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

Attorney General of Nova Scotia: HON. JOEL R. MATHESON, Q.C.

Attorney General of Ontario: HON. HOWARD HAMPTON

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

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

Minister of Justice and Attorney General for Saskatchewan:
HON. J. GARY LANE, Q.C.

Minister of Justice of the Yukon: HON. MARGARET JOE

LIVING PAST PRESIDENTS

GLEN ACORN, Q.C., EDMONTON

GÉRARD BERTRAND, C.R., OTTAWA

M. RÉMI BOUCHARD, SAINTE-FOY

W. F. BOWKER, Q.C., LL.D., EDMONTON

EMILE COLAS, K.M., C.R., LL.D., MONTREAL

GORDON F. COLES, Q.C., HALIFAX

A. R. DICK, Q.C., TORONTO

M. M. HOYT, Q.C., FREDERICTON

GEORGINA R. JACKSON, Q.C., REGINA

GILBERT D. KENNEDY, Q.C., S.J.D., VICTORIA

SERGE KUJAWA, Q.C., REGINA

H. ALLAN LEAL, Q.C. LL.D., TORONTO

GEORGE B. MACAULAY, Q.C., VICTORIA

WENDALL MACKAY, Q.C., CHARLOTTETOWN

ROBERT NORMAND, Q.C., QUEBEC

PADRAIG O'DONOGHUE, Q.C., WHITEHORSE

ROBERT G. SMETHURST, Q.C., WINNIPEG

BASIL D. STAPLETON, Q.C., FREDERICTON

ARTHUR N. STONE, Q.C., TORONTO

R. H. TALLIN, WINNIPEG

GRAHAM D. WALKER, Q.C., HALIFAX

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

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, representa-

tion from that province was spasmodic until 1942. Since then, however, representatives of the Bar of Quebec have attended each year, with the addition 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 same time. It also gave the Americans an opportunity to attend sessions of the Canadian Conference which they did from time to time.

The interest of the Canadians in the work of the Americans and *vice versa* has since been manifested on several occasions, notably in 1965 when the president of the Canadian Conference attended the annual meeting of the United States Conference, in 1975 when the Americans held their annual meeting in Quebec, and in subsequent years when the presidents of the two Conferences have exchanged visits to their respective annual meetings.

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

An event of singular importance in the life of this Conference occurred in 1968. In that year Canada became a member of The Hague Conference on Private International Law whose purpose is to work for the unification of private international law, particularly in the fields of commercial law and family law.

In short, The Hague Conference has the same general objectives at the international level as this Conference has within Canada.

The Government of Canada in appointing six delegates to attend the 1968 meeting of The Hague Conference greatly honoured this Conference by requesting the latter to nominate one of its members as a member of the Canadian delegation. This pattern was again followed when this Conference was asked to nominate one of its members to attend the 1972 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.

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OPENING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting opened at 8:00 p.m. on Sunday, August 11, 1991 at the Regina Inn In Regina with Basil Stapleton, Q.C. in the chair and Mel Hoyt, Q.C. as secretary.

Address of Welcome

The President extended a warm welcome to all those delegates in attendance. Mr. Douglas E. Moen, on behalf of the Minister of Justice for the Province of Saskatchewan welcomed all the delegates to the Province of Saskatchewan, and Mr. Randy Langgard, city councillor, also welcomed all the delegates to Regina and hoped an enjoyable time would be had by all.

Introduction of the Executive

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

National Conference of Commissioners on Uniform State Laws

The President of the National Conference of Commissioners on Uniform State Laws, Mr. Dwight A. Hamilton, and his wife, Elizabeth, were introduced to the Conference.

The 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, Mr. Jeremiah Marsh, and his wife, Marietta, were also introduced to the Conference.

Introduction of Delegates

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

Auditor's Report

The Chairperson of the Budget and Finance Committee presented the Auditor's Report regarding the Financial Statements of the Conference as at March 31, 1991. It is set out in Appendix B, page 101.

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. 30, 31, Sept. 1-4, Montreal.
1935. Aug. 22-24, 26, 27, Winnipeg.
1936. Aug. 13-15, 17, 18, Halifax.
1937. Aug. 12-14, 16, 17, Toronto.

RESOLVED

1. that the Auditor's Report be approved;
2. that the same auditors, Ernst & Young, be appointed for the coming year; and
3. that a banking resolution be approved authorizing any two members of the Executive, or one member and the Executive Secretary, as signing officers for banking matters.

Appointment of Resolutions Committee

RESOLVED that a Resoluting Committee be constituted, composed of Nora Sanders as Chairperson, Christopher Curran and Anne-Marie Trahan, Q.C. whose report will be presented at the Closing Plenary Session.

Appointment of Nominating Committee

The most immediate Past-President of the Conference, Georgina Jackson, Q.C., shall act as Chairperson of the Nominating Committee, and shall select at least four members of the Conference to constitute the Committee. She shall report to the Conference the names of the members of the committee as soon as conveniently possible after the committee is established.

President's Report

The President reported that this year has been a very busy year primarily because of the directives for action contained in the Renewal Report. The various directives were reviewed and a progress statement was made with regard to many of them.

He also reported that the Executive Committee implemented a policy regarding the preparation, presentation and printing of research reports which will save costs and also expedite the publication of the Proceedings.

The President further reported on his meeting with the NCCUSL and concluded that this Conference should liaise more closely on a continuing basis with the National Conference in relation to matters in the commercial field, family matters, in estate administration and so on. There is a lot of very good work that could be done to serve the citizens of both countries.

Events of the Week

Mr. Douglas E. Moen gave an outline of events for the week.

Adjournment

There being no further business, the meeting adjourned at 9:00 p.m. to meet again in the Closing Plenary Session on Friday, August 16.

L'OUVERTURE DE LA SESSION PLÉNIÈRE

PROCÈS-VERBAL

L'Ouverture de la réunion

Le réunion a été ouverte à 8h le dimanche 11 août 1991 au Regina Inn à Regina avec Basil Stapleton, c.r., présidente et Mel Hoyt, c.r., secrétaire.

Bienvenue

Le présidente a fait un accueil, chaleureux à tous. M. Douglas E. Moen, pour le Ministre de la Justice pour la province du Saskatchewan a souhaité la bienvenue aux délégués de le part de la province. M. Randy Langgard, représentatif de la ville de Regina a aussi souhaité la bienvenue aux délégués, et a espéré que visite fera plaisir à tout le monde.

Présentation du Comité Exécutif

Le Présidente a identifié chaque officier de la conférence et ses postes.

National Conference of Commissioners on Uniform State Laws

Le président du National Conference of Commissioners on Uniform State Laws, M. Dwight A. Hamilton, et sa femme, Elizabeth, ont été présenté aux membres de la Conférence.

Le président du comité sur Liaison with Canada and International Organizations, et le président-adjoint du Joint Committee on Cooperation with the Uniform Law Conference of Canada et la National Conference of Commissioners on Uniform State Laws, M. Jeremiah Marsh, et sa femme, Marietta, ont aussi été présenté aux membres de la conférence.

Présentation des délégués

Le présidente a demandé aux délégués supérieurs de chaque juridictions de se présenter et ensuite, de présenter les membres de leurs délégations.

Rapport du trésorier

Le président du comité sur le budget et les finance a présenté le rapport du expert-comptable qui traitait des relevés de compte de la conférence du 31 mars 1991. Ce rapport se trouve à l'Appendice B, page 101.

RÉSOLU

1. que le rapport du expert-comptable soit approuvé;
2. que les mêmes expert-comptables, Ernest et Young, soient désignés pour l'année prochaine; et
3. qu'une résolution bancaire soit approuvé qui donnera le pouvoir a n'importe deux membres du comité-exécutif ou un membre et le secrétaire-exécutif ou un membre et le secrétaire-exécutif d'agir comme officiers ayant droit de signer des affaires bancaires.

Nomination du comité sur résolutions

RÉSOLU qu'un comité sur résolutions sera constitué, compris de Nora Sanders, présidente, Chistopher Gurran et Anne-Marie Trahan, c.r. Le rapport de ces derniers sera présent à la séance plénière finale.

Nomination des membres du Comité sur nominations

La présidente sortante, Georgina Jackson, c.r., jouera le rôle de la présidente pour le comité sur nominations, et va désigner au moin quatre membres du conférence pour que le comité comptera cinq. Elle va rapporter au conférence les noms du membres du comité le plus tôt possible, aprés que le comité est établi.

Rapport du président

Le président a rapporter que cette année a été très occupée, principalement à cause des directives pour l'action du rapport sur renouvellement. Les différentes directives ont été revues et un rapport de progrès a été écrit.

Il a aussi rapporté que le comité-exécutif a exécuté une ligne de conduite concernant les préparations, présentements et l'impression des rapports de recherche qui vont sauver de l'argent, et puis expédier la publication des procédés.

Le président a aussi rapporté sur ses réunions avec le NCCUSL, et a conclure que ce conférence devrait liaiser continuellement avec le National Conference concernant les affaires de commerce, famille, l'administration d'états, etc. Il y a beaucoup de bon travail qui pourrait être fait pour les citoyens des deux pays.

L'Événement de la semaine

M. Douglas E. Moen, nous a donné un aperçu des événements de la semaine.

Ajournement

À 21h on a levé la séance. On a ajourné à la séance pléinère finale du vendredi 16 août.

JOINT SESSION OF THE UNIFORM LAW AND CRIMINAL LAW SECTIONS

MINUTES

Civil Contempt

An issues paper with draft Act on Civil Contempt was presented by Professor G. L. Bladon.

RESOLVED

1. that the paper and draft Act on Civil Contempt be received and printed in the Proceedings (see Appendix E, page 109); and
2. that the Executive Committee establish a working committee to pursue the matter further and to that end to prepare a further report and draft Uniform Act with commentaries for 1992.

Registration Fee

The President gave a verbal report on the levying of a registration fee.

> It was moved that the Uniform Law Conference of Canada adopt a policy in favor of charging a registration fee to be payable by all delegates attending its annual general meeting. The amount of the registration fee is to be determined each year by the Executive and is not to exceed $100.

The motion was defeated.

Regulatory Offences Procedure Act

A draft Act on Regulatory Offences Procedure were presented by Arthur N. Stone, Q.C. and Howard F. Morton, Q.C.

RESOLVED

1. that the draft Act on Regulatory Offences Procedure be received and printed in the Proceedings (see Appendix M, page 474);
2. that the provinces and territories undertake a commitment to participate more fully in the finalization of the Uniform Regulatory Offences Procedure Act;
3. that the Federal government be urged to participate in the working committee in an attempt to coordinate its work in this area with that of the provinces and territories with a view to achieving a substantial degree of harmonization in respect of regulatory offences procedure across Canada; and
4. that the working committee continue its task referred to in the 1990 resolution and to that end to prepare a further report and draft Uniform Act with commentaries for 1992.

Trafficking in Children

A report on Trafficking in Children was presented by the Saskatchewan and Federal Commissioners.

RESOLVED

1. that the report on Trafficking in Children be received;
2. that the situation be monitored on the advice of the Federal-Provincial-Territorial Committee; and
3. that no further action on the subject be taken at this time.

Close of Meeting

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

SESSION RÉUNIE DE LA SECTION DU DROIT UNIFORME ET LA SECTION DU DROIT CRIMINEL

Procès-Verbal

Outrage a la cour

Un mémoire et une Loi Uniforme proposée sur l'outrage a la cour dans le contexte du droit civil a été présenté par professeur G.L. Bladon.

RESOLU

1. que le mémoire et la Loi Uniforme proposée sur l'outrage a la cour soient reçus et imprimés dans le procès-verbal (voir Appendice E, page 109) et
2. que le Comité-Exécutif établi un groupe de travail pour continuer la tâche, et afin, de préparer une Loi Uniforme proposée avec commentaires pour 1992.

Frais d'inscription

Le président a rapporté sur l'impôt des frais d'inscription.

> Il a été proposé que la Conférence sur l'informisation des lois au Canada impose des frais d'inscription à tous les délégués à l'assemblée annuelle. Le montant de ces frais sera décidé chaque année par le comité exécutif mais ne devrait pas surpasser 100 $.

La motion a été défaite.

Loi sur la procédure des infractions régulatoires

Un rapport et Loi proposée sur la procédure des infraction régulatoires ont été présentés par Arthur N. Stone, c.r. et Howard F. Morton, c.r.

RÉSOLU

1. que le Loi proposée sur la procédure des infractions régulatoires soient reçus et imprimés dans le procès-verbal (voir Appendice M, page 474);
2. que les provinces et territoires s'engagent á une participation plus pleine dans l'achèvement de la *Loi sur la procédure des infractions régulatoires;*
3. que le gouvernement fédéral soit exhorté à participer au niveau du comité de travail dans un effort de coordonner ses efforts dans ce domaine avec ceux des provinces et territoires d'afin d'atteindre un degré substantiel d'harmonisation en ce qui conerne la procédure des infractions régulatoires à travers le Canada; et
4. que le comitè de travail continue avec son tâche a laquelle on a fait référence dans la résolution de 1990 et a ce but, de préparer un rapport et la Loi Uniforme proposée avec commentaires pour 1992.

Trafic d'enfants

Un rapport sur le trafic d'enfants a été présenté par les commissaires du fédéral et du Saskatchewan.

RÉSOLU

1. que le rapport sur le trafic d'enfants soit reçu;
2. que la situation soit surveillée sur le conseil du comité fédéral-provincial-territorial; et
3. que rien de plus à ce sujet soit fait à ce moment.

Levée de la séance

On a déclaré la séance levée.

UNIFORM LAW SECTION

MINUTES

Attendance

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

Sessions

The section held seven sessions, two each day from Tuesday to Thursday and one on Friday, August 13-16, 1991.

Distinguished Visitors

The Section was honoured by the participation of:

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

(b) Mr. Jeremiah Marsh, Chairman of the Committee on Liaison with Canda 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.

Arrangements of Minutes

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

Opening

The session opened with Peter J. M. Lown as Chairman and Mel Hoyt as Secretary.

Hours of Sitting

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

Agenda

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

Administrative Procedure

A report on Administrative Procedure together with a model Act and comments were presented by Professor Yves Ouellette.

RESOLVED

1. that the Model Code of Administrative Procedure, involving statements of principle, sources and commentaries be received and printed in the Proceedings for use by lawyers, tribunal members and tribunal participants (see Appendix A, page 75); and
2. that the Executive be authorized to publish the paper to the community in the most effective way it could within its discretionary arrangement.

Child Status Act

The Saskatchewan Commissioners presented a report on the Child Status Act and recommended that certain amendments to that Act be made.

RESOLVED that an Act to amend the Uniform Child Status Act be adopted and printed in the Proceedings (see Appendix D, page 106).

Note: The Federal Commissioners asked that their comments on this matter be tabled. These comments will be reviewed by the Saskatchewan Commissioners and if they raise sufficient concern, the matter will be brought back.

Class Actions

The matter was deferred to 1992.

Cost of Credit Disclosure

An issues paper on Cost of Credit Disclosure was presented by Richard Bowes.

RESOLVED

1. that the issues paper be received and printed in the Proceedings (see Appendix F, page 124); and
2. that the Steering Committee establish a study group and prescribe a series of 17 working hypotheses to be used as guidance by this group.

Defamation

The Chairperson of the Drafting Section asked for an extension of time for the circulation of the draft Act with commentaries (see Appendix G, page 257).

RESOLVED that the draft Act with commentaries be circulated, and if the Act with commentaries is not disapproved by two or more jurisdictions on or before January 31, 1992, by notice to the Executive Director, the Act be adopted by the Conference as a Uniform Act and recommended for enactment.

Note: Disapprovals from two jursidictions were received.

Disadvantaged Witness

An issues paper on the Disadvantaged Witness was presented by Professor James Robb.

RESOLVED

1. that the issues paper on the Disadvantaged Witness be received and printed in the Proceedings (see Appendix H, Page 281);
2. that the Steering Committee create a broad study group to study the rules of evidence relating to the disadvantaged witness, in particular the requirements of the oath and rules of corroboration, and report back for the 1992 meeting;
3. that the areas of hearsay and forms of evidence be studied also with a view to formulating proposals for review by the Conference when appropriate; and
4. the the study group coordinate the activities with the Criminal Law Section members of the practicing bar and the appropriate Canadian Bar Association Sections to study these issues.

Documents of Title

An issues paper on Documents of Title was presented by Professor Roderick J. Wood.

RESOLVED

1. that the issues paper on Documents of Title be received and printed in the Proceedings (see Appendix I, page 366);
2. that the section Chairperson establish a working group to continue work on this topic; and
3. that the working group consider the propositions set out in the report as a guide and pay particular attention to the application of these propositions to the law of Quebec, the effect of international conventions on the propositions and the existence of P.P.S.A. and non-P.P.S.A. jurisdictions.

Enforcement of Canadian Judgments

The British Columbia Commissioners presented a report and draft Act with commentaries on the Enforcement of Canadian Judgments.

RESOLVED

1. that the draft Act with revised commentaries on the Enforcement of Canadian Judgments be received and printed in the Proceedings (see Appendix J, page 425); and
2. that the draft Act with revised commentaries be circulated and if the Act with commentaries is not disapproved by two or more jurisdictions on or before February 28, 1992, by notice to the Executive Director, the Act be adopted by the Conference as a Uniform Act and recommended for enactment.

Jurisdiction: Assumption and Transfer

Professor Peter J. M. Lown presented a draft outline for further work on the assumption and transfer of jurisdiction.

RESOLVED that an outline plan for a study group on jurisdiction and transfer of jurisdiction be approved, the results of which are to be reviewed at the 1992 meeting.

Nominating Committee's Report

Professor Peter J. M. Lown is to remain Chairperson of the Uniform Law Section for the year 1991-92 in accordance with Section 5 of the Plan of Renewal adopted last year.

Plain Language

The Alberta Commissioners presented a report on Plain Language.

RESOLVED that the report be received.

Private International Law

The Federal Commissioners presented a report on the Department of Justice's Activities in Private International Law.

RESOLVED that the report be received and printed in the Proceedings (see Appendix K, page 437).

The Chairperson of the Special Committee on Private International Law presented his report.

RESOLVED that the report be received and printed in the Proceedings (see Appendix K, page 459).

Protection of Privacy: Tort

The Chairperson of the Drafting Section asked for an extension of time for the circulation of the draft Act with commentaries (see Appendix L, page 463).

RESOLVED that the draft Act with commentaries be circulated, and if the Act with commentaries is not disapproved by two or more jurisdictions on or before January 31, 1992, by notice to the Executive Director, the Act be adopted by the Conference as a Uniform Act and recommended for enactment.

Note: Disapprovals from two jurisdictions were received.

Sale of Goods

The Sale of Goods Act was brought back to the Conference this year for a few drafting corrections in the 1990 draft Act.

RESOLVED

1. that the amendments be referred to the Saskatchewan Commissioners for correction; and

2. that the corrected amendments be printed in the Proceedings and consolidated in the loose-leaf consolidation.

Note: The corrected amendments were not available at press time.

Steering Committee's Report

Professor Peter J. M. Lown gave a report on the activities of the Steering Committee for the year 1990-91.

Items suggested for consideration by the Steering Committee include the following:

1. Health records;
2. Conflicts Aspects of Powers of Attorney;
3. Conflicts Aspects of Limitation Periods; and
4. Shareholder Notices and Information.

Substitute Decision Making

The Ontario and Manitoba Commissioners presented reports on Substitute Decision Making.

RESOLVED that the Steering Committee establish a working group to examine the desirable attributes of a conflicts package in respect of:

1. Jurisdiction to govern capacity and appointment; and

2. Recognition and enforcement.

Unclaimed Intangible Property

The Ontario Commissioners presented a report on Unclaimed Intangible Property.

RESOLVED that the Uniform Law Section monitor the development of laws relating to unclaimed intangible property with a view to responding to a request that uniform law be developed at some future date.

Close of Meeting

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

SECTION DE LOI UNIFORME

PROCÈS-VERBAL

La présence

Quarante-quatre délégués furent présent. Pour les détails, voir la liste des délégués à la page 5.

Sessions

La section a tenu sept sessions, deux chaque jour du mardi au jeudi et une le vendredi, du 13 au 16 août 1990.

Visiteurs distingués

La section fut honorée par la participation de:

(a) M. Dwight A. Hamilton, le président du comité du National Conference of Commissioners on Uniform State Laws.

(b) M. Jeremiah Marsh, le président du comité de Liaison with Canada and International Organizations, et vice-président du Joint Committee on Cooperation with the Uniform Law Conference of Commissioneers on Uniform State Laws.

L'ordre du procès-verbal

Quelques sujets discutés furent considérés un jour, ajournés et conclus un autre jour. Pour la convenance, les procès-verbaux sont mis ensemble comme s'il n'y avait eu aucuns ajournements et les sujets sont présentés en ordre alphabétique.

L'ouverture

La session fut ouverte par Peter J. M. Lown en tant que président et Mel Hoyt en tant que secrétaire.

Horaire des séances

Il fut résolu que la section siègerait de 9h00 à 12h30 et de 14h00 à 17h00 chaque jour avec des changements possibles selon les circonstances.

L'ordre du jour

L'ordre du jour proposé fut considéré et l'ordre de travail pour la semaine fut approuvé.

Procédure administrative

Un rapport sur la procédure administrative ainsi qu'une loi modèle accompagnée de commentaires furent présentés par le professeur Yves Ouellette.

RÉSOLU

1. que le modèle du code de procédure administrative, contenant des déclarations de principe, des sources et des commentaires soit reçu et imprimé dans le compte rendu des séances pour usage par les avocats, les membres du tribunal et les participants aux tribunaux (voir annexe A, page 75); et

2. que l'exécutif soit autorisé a publier l'exposé pour la communauté de la façon la plus efficace selon son pouvoir discrétionnaire.

Loi sur le statut de l'enfant

Les commissaires de la Saskatchewan ont présenté un rapport sur la Loi sur le statut de l'enfant et ont recommendé que certaines modifications y soient apportées.

RÉSOLU qu'une loi modifiant la Loi sur le statut de l'enfant soit adoptée et imprimée dans le procès-verbal (voir annexe D, page 106).

Notez: Les commissaires fédéraux ont demandé que leurs commentaires sur ce sujet soient déposés. Ces commentaires seront revus par les commissaires de la Saskatchewan et s'ils soulèvent un intérêt suffisant, cette affaire sera à nouveau discutée.

Recours collectifs

Ce sujet fut différé jusqu'en 1992.

Divulgation du coût du crédit

Une étude de questions sur la divulgation du coût du crédit fut présentée par Richard Bowes.

RÉSOLU

1. que l'étude de questions soit reçue et imprimée dans le procès-verbal (voir annexe F, page 124); et

2. que le Comité de direction établisse un groupe d'étude et prescrive une série de 17 hypothèses de travail qui seront utilisées comme lignes guides par ce groupe.

Diffamation

Le président du Comité de révision a demandé une prolongation de délai pour la circulation de la loi proposée avec commentaires (voir annexe G, page 257).

RÉSOLU que la loi proposée avec commentaires soit circulée et que si la loi avec commentaires n'est pas désaprouvée par deux juridictions ou plus le 31 janvier 1992 ou avant par demande au directeur exécutif que la loi soit adoptée par la Conférence comme une Loi uniforme et recommandée à être statuée.

Note: Désapprobations de deux juridictions ont été reçues.

Témoins défavorisés

Une étude de questions sur les témoins défavorisés fut présentée par le professeur James Robb.

RÉSOLU

1. que l'étude de questions sur les témoins défavorisés soit reçu, et imprimé dans le procès-verbal (voir annexe H, page 281);
2. que le Comité de direction établisse un groupe d'étude afin d'examiner les procédures de témoignage reliées aux témoins défavorisés en particulier les exigences reliées au serment et les procédures de corroboration, et que ce comité fasse rapport lors de la réunion de 1992;
3. que les sujets de l'ouï-dire et du type de preuve soient aussi étudiés et qu'une proposition soit formulée afin d'être évaluée par la Conférence au momemt approprié; et
4. que le groupe d'étude coordonne ses activités avec les membres de la Section de droit criminel qui font parti des barreaux participants ainsi qu'avec les sections de l'Association du barreau canadien appropriés afin examiner ces questions.

Documents de titre

Une étude de questions sur les documents de titre fut présentée par le professeur Roderick J. Wood.

RÉSOLU

1. que l'étude de questions sur les documents de titre soit reçue et imprimée dans le procès-verbal (voir annexe I, page 366);
2. que le président de section établisse un groupe de travail afin de continuer le travail sur ce sujet; et
3. que le groupe de travail considère les propositions émises dans le rapport comme étant un guide et de porter une attention particulière à application de ces propositions selon les lois du Québec, aux effets des conventions internationales sur ces propositions et à l'existince des juridictions P.P.S.A. et non-P.P.S.A.

Mise in vigueur des jugements canadiens

Les commissaires de la Colombie-Britannique ont présenté un rapport et une loi proposée avec commentaires sur la mise en vigueur des jugements canadiens.

RÉSOLU

1. que la loi proposée et les commentaires modifiés sur la mise en vigueur des jugements canadiens soient reçus et imprimés dans le procès-verbal (voir annexe J, page 425);

2. que la loi proposée et les commentaires modifiés soient circulés et que si la loi et les commentaires ne sont pas désaprouvés par deux juridictions ou plus le 28 février 1992 ou avant par avis au directeur exécutif, que la loi soit adoptée par la conférence comme Loi uniforme et recommandée à être statuée.

Juridiction: entrée en possession et transfert

Le professeur Peter J. M. Lown a présenté une ébauche de travail en vue d'études sur l'entrée en possession et le transfert des juridictions.

RÉSOLU qu'un plan de travail pour un groupe d'étude sur la juridiction et le transfert de juridiction soit adopté, les résultats devant être examinés à la réunion de 1992.

Rapport du Comité de nomination

Le professeur Peter J. M. Lown demeurera à la présidence de la Section de Loi uniforme pour l'année 1991-92 selon l'article 5 du plan de renouvellement adopté l'an dernier.

Language ordinaire

Les comissaires de l'Alberta ont présenté un rapport sur le language ordinaire.

RÉSOLU que le rapport soit reçu.

Droit privé international

Les commissaires fédéraux ont présenté un rapport sur les activités du Ministère de la justice dans le domaine du droit privé international.

RÉSOLU que le rapport soit reçu et imprimé dans le procès-verbal (voir annexe K, page 437).

Le président du Comité special sur le droit privé international a présenté son rapport.

RÉSOLU que le rapport soit reçu et imprimé dans le procès-verbal (voir annexe K, page 459).

Protection de la vie privée: délit

Le président de la Section de révision a demandé une prolongation de délai pour la circulation de l'ébauche de la loi avec commentaires (voir annexe L, page 463).

RÉSOLU que l'ébauche de la loi avec commentaires soit circulée et que si la loi avec commentaires n'est pas désaprouvée par deux juridiction ou plus le 31 janvier 1992 ou avant, par avis au directeur-exécutif, la loi soit adoptée par la Conférence comme étant une Loi uniforme recommandée á être statuée.

Note: Désapprobations de deux juridictions ont été reçues.

Vente de biens

La Loi sur la vente de biens fut retablée cette année lors de la conférence afin d'apporter quelques corrections à la loi proposée de 1990.

RÉSOLU

1. que les modifications soient remises aux commissaires de la Saskatchewan pour corrections; et
2. que les modifications corrigées soient imprimées dans le procès-verbal et insérées dans la consolidation a feuilles-mobiles.

Rapport du Comité de direction

Le professeur Peter J. M. Lown a présenté le rapport des activités du Comité de direction pour l'année 1990-91.

Items suggérés à fin de considération par le comité de direction :

1. Dossiers dans le domaine de la santé;
2. Actions par procuration;
3. Périodes de limitation; et
4. Information et avis aux actionnaires.

Prise de décision par substitut

Les commissaires de l'Ontario et du Manitoba ont présenté des rapports sur la prise de décision par substitut.

RÉSOLU que le Comité de direction établisse un groupe de travail afin d'examiner les attributs désirables d'une unité de conflits sur les sujets suivants :

1. La compétence de régir la capacité et les nominations; et
2. Reconnaissance et mise en vigueur.

Propriété intangible non réclamée

Les commissaires de l'Ontario ont présenté un rapport sur la propriété intangible non réclamée.

RÉSOLU que la Section de Loi uniforme observe et vérifie le développement des lois sur la propriété intangible non reclamée afin de répondre à une requête demandant qu'une Loi uniforme soit développée dans un certain avenir.

Levée de la séance

Entendu qu'il n'y avait plus de matière à considérer, la séance fut levée.

CRIMINAL LAW SECTION

MINUTES

Attendance

A total of 27 delegates attended the meeting of the Criminal Law Section of the Uniform Law Conference held in Regina, Saskatchewan.

Opening

Richard B. Hubley, Q.C., presided as Chairman and Michael E.N. Zigayer acted as Secretary for the Meetings of the Criminal Law Section of the Uniform Law Conference. The Section convened to order on Tuesday, August 13, 1991. The heads of delegation introduced the commissioners attending with them.

Report of the Chairman

The Section discussed a paper entitled *Proposals to amend the Criminal Code concerning mental disorder* submitted by the Federal Department of Justice in advance of the introduction of legislation in Parliament in the Fall of 1991. Next, there was discussion on the topic of electronic surveillance and the consequences of a number of recent judgements by the Supreme Court of Canada on this area of criminal law.

Before commencing the consideration of the 39 resolutions submitted for its consideration, the Section amended its Rules of Procedure to:

1) stipulate that each delegation shall submit a list of its delegates in writing to the Secretary on or before August 1, each year (Rule 1(1.2)); and,

2) require that delegations which present a resolution which is adopted by the Section to summarize the debate on that resolution and to forward that summary to the Secretary within 60 days of the close of the conference.

Of the 39 resolutions submitted 30 were adopted, 2 were defeated and 7 were withdrawn. In addition to discussion of the resolutions there was also discussion of the proposed changes to the federal extradition legislation and the use of pre-trial conferences under section 645 of the *Criminal Code.*

As well, the federal delegation sought the views of the delegates with respect to a number of amendments to the *Criminal Code* proposed by the Law Reform Commission of Canada. It also reported on those resolutions adopted by the ULC in the past which might be pursued in a forthcoming criminal law omnibus bill.

The Section adopted two Special Motions. The first congratulated a former member of the Section from Quebec, Judge Jean-François Dionne, on his appointment to the bench. The second echoed a motion adopted by the Section in 1990 noting the absence of the Quebec delegation in their deliberations and looking forward to its participation in the work of the ULC in the future.

In closing the nominating committee recommended that Ms. Carol Snell of Saskatchewan be elected Chairperson of the meetings of the Section to take place in Newfoundland in 1992. As well, the delegates thanked the present Chairman, Richard Hubley of Prince Edward Island for his effective management of the Section's deliberations and the Secretary, Michael Zigayer, of the federal Department of Justice, for his work in ensuring a successful conference.

RESOLUTIONS

I - ALBERTA

Item 1

DIVERSION OF ADULT OFFENDERS

That the Department of Justice in consultation with the provincial and territorial ministers responsible for justice prepare legislation to amend the *Criminal Code* that will allow a program of adult diversion as authorized by the minister responsible for justice of each province.

(CARRIED 19-0-0)

Item 2

30 AND 90 DAY REVIEW OF PRE-TRIAL DETENTION

That s.525(9) be made permissive rather than mandatory.

(CARRIED 18-0-0)

Item 3

APPLICATION FOR AN AUTHORIZATION UNDER S. 185(1) OF THE *CRIMINAL CODE*

That section 185(1) be amended to permit an agent specially designated by the Attorney General to apply for an authorization concerning an offence committed in another province.

(CARRIED 22-0-0)

Item 4

CONDITIONAL DISCHARGES FOR YOUNG OFFENDERS

That conditional discharges be added to paragraph 20(1)(a) as a possible youth court disposition by adding the words "or on conditions prescribed in a probation order" after the word "absolutely".

(CARRIED 18-0-0)

Item 5

MAKING ASSAULT CAUSING BODILY HARM A HYBRID OFFENCE

That the offence of assault causing bodily harm be returned to a hybrid offence providing the Crown with an election to proceed by way of summary conviction or indictment depending on the nature and seriousness of the assault.

(CARRIED 12-2-6)

Item 6

APPLICATION FOR THE MERCY OF THE CROWN

That section 690 of the *Criminal Code* be amended to permit the provincial Minister responsible for the administration of justice to exercise the powers granted under the section as well as the federal Minister of Justice.

(WITHDRAWN)

II – BRITISH COLUMBIA

Item 1

AUTHORIZING PSYCHIATRIC ASSESSMENT REPORTS FOR JUDICIAL INTERIM RELEASE AND SENTENCING PURPOSES

Amend the judicial interim release and sentencing provisions of the *Criminal Code* to authorize psychiatric assessments.

(WITHDRAWN REPLACED WITH THE FOLLOWING)

That the *Criminal Code* be amended to authorize court ordered psychiatric assessments for sentencing, with legislative protections to ensure that assessments may only be ordered by the court where the serious nature of the offence and the apparent mental or emotional condition of the accused cause the court to believe that a psychiatric report would assist in determining the appropriate sentence.

(CARRIED 9-3-3)

Item 2

DEMAND FOR BLOOD SAMPLE FROM PERSON SUSPECTED OF IMPAIRMENT BY A DRUG OTHER THAN ALCOHOL

That the *Criminal Code* be amended to allow a peace officer to demand a blood sample from a person believed to have committed an offence under s.253 by reason of the consumption of drugs other than alcohol, and that failure or refusal to provide the blood sample upon demand be an offence.

(WITHDRAWN REPLACED WITH THE FOLLOWING)

That the Federal Department of Justice consider an amendment to the *Criminal Code* which would authorize the demand for blood samples from persons believed to have committed an offence under s.253 by reason of the consumption of drugs other than alcohol, with legislative protections to ensure that these demands will only be authorized where existing means of enforcement would be ineffective, and where adequate protection is offered to those subject to these demands.

(CARRIED 11-1-0)

Item 3

PROCEEDS OF CRIME: DEFINITION OF "ENTERPRISE CRIME OFFENCE"

Amend the *Criminal Code* to either expand the definition of "enterprise crime offence" to include a wider list of offences likely to be committed as part of organized crime or eliminate the list altogether so that the proceeds of crime legislation applies to all *Criminal Code* offences.

(WITHDRAWN REPLACED WITH THE FOLLOWING)

That the Federal Department of Justice consider an amendment to the definition of "enterprise crime offence" in the *Criminal Code* to include the offence of criminal interest rate in s.347 of the Code.

(CARRIED 17-0-0)

Item 4

PROCEEDS OF CRIME: FORFEITURE OF ASSETS IN ANOTHER CANADA

Amend the *Criminal Code* to allow the courts to make forfeiture orders for proceeds which are in other provinces.

(WITHDRAWN REPLACED WITH THE FOLLOWING)

Amend the *Criminal Code* to authorize a procedure whereby a Court in the Province where the proceeds of crime are located may order forfeiture based upon a conviction for an "enterprise crime offence" in another province.

(CARRIED 18-0-1)

Item 5

PROCEEDS OF CRIME: IN REM FORFEITURE OF PROPERTY BELONGING TO PERSONS WHO HAVE NEVER BEEN IN THE PROVINCE

Amend the *Criminal Code* to provide for the *in rem* forfeiture of all proceeds of crime found in Canada which were obtained by the commission of an "enterprise crime" where the accused remains outside the country.

(CARRIED 17-0-0)

Item 6

PROCEEDS OF CRIME: RELEASE OF RESTRAINED ASSETS TO PAY LEGAL FEES

Repeal the provision of the *Criminal Code* allowing the court to release funds for the purposes of covering legal expenses.

(WITHDRAWN)

Item 7

RIGHT TO ELECT MODE OF TRIAL AFTER CODE FOR NEW TRIAL BY COURT OF APPEAL

That s.686(5) of the *Criminal Code* be amended to place the accused and the Crown in the same position with regard to selecting the mode of trial as they were at the completion of the preliminary inquiry.

(CARRIED 19-0-0)

Item 8

TRIAL COURT JURISDICTION FOR S.253/254 IMPAIRED DRIVING/OVER .08/REFUSAL OFFENCES

That s.253/254 offences be included in the absolute jurisdiction offences listed in s.553 of the *Criminal Code.*

(WITHDRAWN)

Item 9

VARIATION OF SECTION 810 - RECOGNIZANCE/PEACE BOND

That s.810 of the *Criminal Code* be amended to enable variations to be made to a s.810 recognizance where warranted by a change in circumstances.

(CARRIED 17-0-0)

III – NEW BRUNSWICK

Item 1

FAILURE TO COMPLY WITH PROBATION ORDER, S.740.(1) *CRIMINAL CODE*

That s.740 CC be amended to contain a provision similar to s.667(2.1) of the *Criminal Code* to allow that similarity of name is, in the absence of evidence to the contrary, evidence that the name of the offender in the Probation Order is the accused charged with the Breach of Probation offence.

(DEFEATED 1-17-2)

Item 2

NON-PUBLICATION ORDERS – JURY TRIALS

That s.648 of the *Criminal Code* be amended to broaden the scope of its application to pre-trial proceedings, particularly evidentiary voir dire hearings conducted under s.645 of the *Criminal Code*.

(CARRIED 19-0-0)

Item 3

PROCEDURE FOR SWEARING OF INFORMATIONS UNDER S.508(1) OF THE *CRIMINAL CODE*

That s.508(1) CC be amended to eliminate the mandatory aspect in the case of provincial court judges and to give them a discretion to hear the allegations of the informant and the evidence of the witnesses.

(WITHDRAWN)

IV – ONTARIO

Item 1

JUDICIAL INTERIM RELEASE HEARINGS FOR ACCUSED CHARGED WITH ESCAPE FROM LAWFUL CUSTODY

Amend s.515(6) of the *Criminal Code* to include s.145(1).

(DEFEATED 3-9-3)

Item 2

DUAL OFFENCE PROCEDURE

The federal government commence a review of all indictable offences in the *Criminal Code* and determine whether any should be re-designated as dual offences.

(CARRIED AS AMEMDED 14-1-3)

Item 3

WIRETAP PROVISIONS APPLIED TO ARSON OFFENCES

Amend s.183 of the *Criminal Code* to include reference to ss.434, 434.1 and 435.

(CARRIED 19-0-0)

Item 4

DISPOSITIONS UNDER THE YOUNG OFFENDERS ACT

Amend paragraph 20(1)(a) of the *Young Offenders Act* to allow a Youth Court Judge to impose a conditional discharge.

(WITHDRAWN)

Item 5

TAKING EVIDENCE UNDER OATH BY A JUSTICE HOLDING A PRELIMINARY INQUIRY

Amend the *Criminal Code* to clarify that reference to 'oath' in s.540(1)(a) includes a solemn affirmation, promise to tell the truth, or other procedure permitted by the *Canada Evidence Act*.

(CARRIED 19-0-1)

Item 6

CERTIFICATES OF EXAMINERS OF COUNTERFEIT - CROSS-EXAMINATION AND NOTICE PROVISIONS

Amend s.461(3) to refer to ss.258(6) and (7).

(CARRIED 19-0-0)

Item 7

ABDUCTION OF CHILD BY PARENT, GUARDIAN OR PERSON HAVING LAWFUL CARE OR CHARGE

Amend ss.282 and 283 to create one offence along the following lines:

(1) Every one who, being a parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years, or

(b) an offence punishable on summary conviction.

(2) No proceeding may be commenced under subsection (1) where there is no custody order in effect in relation to the person under fourteen years without the consent of the Attorney General or counsel instructed by him for that purpose.

(WITHDRAWN - TO BE REFERRED TO FEDERAL-PROVINCIAL FAMILY LAW COMMITTEE)

Item 8

THE COMPETENCY AND COMPELLABILITY OF SPOUSES

A working group of officials be created to review the provisions of s.4 of the *Canada Evidence Act,* as interpreted by the cases and in comparison with the law in other jurisdictions. The working group should issue a report with recommendations.

(REPLACED AS FOLLOWS)

That both the common law and S.4 of the *Canada Evidence Act* referrable to the competency and compellability of spouses be reviewed and that a report with recommendations for reform in the area be prepared.

(CARRIED 18-0-0)

V - CANADA

Item 1

THE LAWFUL AUTHORITY TO READ THE "RIOT ACT" PROCLAMATION

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

(CARRIED 14-6-0)

Item 2

CONSECUTIVE AND CONCURRENT SENTENCES

Form 21 (warrant of committal on conviction) should be amended so that, when a sentence is shown as consecutive or concurrent, it is necessary to specify *to what* any new sentence is to be consecutive or concurrent.

(CARRIED 20-0-0)

Item 3

SEIZURE OF BODILY SUBSTANCES FOR DNA ANALYSIS

That in light of Report 33 of the Law Reform Commission of Canada that consideration be given to amending the *Criminal Code* to permit, subject to appropriate safeguards, the issuing of search warrants for the seizure of bodily substances, including blood samples, for the purpose of forensic testing (including DNA profiling) where there are reasonable grounds to believe an offence has been committed and it is likely the samples will provide probative evidence of the person's involvement in the offence.

(CARRIED AS AMENDED 22-0-1)

Item 4

PROOF OF PREVIOUS CONVICTION

That subsection 570(1) of the *Criminal Code,* and other relevant provisions, be amended to provide that a certificate of conviction may be requested and obtained by any person, in addition to any peace officer, prosecutor or accused.

(CARRIED: 15-4-2)

Item 5

ENABLING THE FEDERAL GOVERNMENT TO PROSECUTE *CRIMINAL CODE* OFFENCES ARISING OUT OF ITS OWN PROCEEDINGS

Amend clause (b) (ii) of the definition of "Attorney General" in section 2 of the *Criminal Code* so that it reads:

"(ii) proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of

(A) a contravention of or conpsiracy to contravene any Act of Parliament other than this Act or any regulation made thereunder, or

(B) a contravention of or conspiracy to contravene sections 132, 136, 137, 138, 139, subsections 145(2) to (5), or section 740 of this Act in relation to or arising from a prosecution referred to in (A) above."

(WITHDRAWN)

Item 6

COMMISSION APPLICATIONS - APPEAL FROM REFUSAL

Amend the *Criminal Code* to provide that the decisions of a judge on applications pursuant to section 709 shall be deemed to have been given at any trial held in relation to the proceedings mentioned in section 709.

(CARRIED 17-0-0)

Item 7

FOREIGN BUSINESS DOCUMENTS

The *Canada Evidence Act* and the *Mutual Legal Assistance in Criminal Matters Act* should be amended to permit the introduction and assessment of foreign records or other documents under section 30 of the *Canada Evidence Act* or section 36(2) of the *Mutual Legal Assistance in Criminal Matters Act,* if the documents are accompanied by a certificate, or a statement taken or received in conformity with the law of the foreign state, by an appropriate foreign law of the foreign official. At the least, an affidavit should be admissible in Canada where it is received before an appropriate official in a foreign jurisdiction.

(CARRIED 11-4-1)

Item 8

PRIVATE PROSECUTIONS

To amend the *Criminal Code* to permit the Attorney General of Canda to intervene in a private prosecution of an offence contrary to a federal enactment other than the *Criminal Code* where the provincial Attorney General has not intervened, and to stay such proceedings.

(CARRIED 17-0-0)

Item 9

PROCEDURE FOR PASSING RULES OF COURT

That subsection 482(1) of the *Criminal Code* be amended to provide for proxy voting or for rule making authority to be given to a committee of the court.

(CARRIED 17-1-0)

Item 10

TESTIMONY RELEVANT TO AN APPLICATION FOR MERCY

Amend section 690 of the *Criminal Code* to include a mechanism for obtaining subpoenas to compel persons in possession of information relevant to an application for the Mercy of the Crown to testify under oath with respect to that information.

(CARRIED 14-0-4)

Item 11

CONSEQUENCES OF AN ESCAPE

Add a provision in the *Crminal Code* which specifies that a sentence does not continue to run while an offender is unlawfully at large.

(CARRIED 20-0-0)

Item 12

POSSESSION OF AUTOMOBILE MASTER KEYS BY POLICE OFFICERS

The addition of an exemption clause for police officers in s.353 of the *Criminal Code* respecting possession "while in the course of their duties". Analogous clauses exist in s.92 (Firearms) and s.191 (Equipment for the interception of private communications).

(CARRIED 10-1-7)

Item 13

PALMPRINTS

Amend Order-in-Council P.C. 1954-1109 or obtain a new order-in-council to specifically include palmprinting as a sanctioned measurement, process or operation pursuant to paragraph 2(1)(b) of the *Identification of Criminals Act*.

(CARRIED 20-0-0)

SECTION DU DROIT PÉNAL

PROCÉS-VERBAL

Présences

Au total, il y avait vingt-sept délégués à la réunion de la section de droit pénal de la Conférence sur l'uniformisation des lois tenue à Regina, Saskatchewan.

Ouverture

Richard B. Hubley, c.r., a présidé les réunions de la section du droit pénal de la Conférence sur l'uniformisation des lois et Michael E. N. Zigayer a assuré les fonctions de secrétaire. La Section s'est réunie le mardi 13 août 1991. Les chefs de délégation ont présentés les commissaires qui participent avec eux à la réunion.

Rapport du président

La section a discuté un document qui s'intitule *Proposition de modification du Code criminel en matière de troubles mentaux* qui a été soumis par le ministère fédéral de la Justice à l'avance de la présentation d'un projet de loi au Parlement au cours de l'automne 1991. Ensuite une discussion a eu lieu sur la surveillance électronique et les conséquences de plusieurs décisions récentes de la Cour suprême se rapportant à ce domaine du droit pénal.

Avant de procéder à l'analyse des 39 résolutions qui lui ont été soumises, la Section a modifié ses règles de procédures de façon à :

1) prévoir que chaque délégation soumet une liste de ses délégués au secrétaire le 1er août ou avant (paragraphe 1(1.2) des règles);

2) exiger que chaque délégation qui présente une résolution qui est adoptée par la Section résume le débat portant sur cette résolution et fasse parvenir ce résumé au Secrétaire dans les 60 jours qui suivant la clôture de la conférence.

Des 39 résolutions soumises, 30 furent adoptées, 2 rejetées et 7 retirées. En plus de l'examen des résolutions, les participants ont discuté des modifications proposées à la législation fédérale en matière d'extradition et du recours aux conférences préparatoires au procès que prévoit l'article 645 du *Code criminel*.

De même, la délégation du fédéral a demandé l'avis des délégués sur un certain nombre de modification au *Code criminel* qui ont été proposées par la Commission de réforme du droit du Canada. Elle a fait aussi un exposé sur les résolutions adoptées dans le passé par la Conférence sur l'uniformisaiton des lois qui pourraient figurer dans un prochain projet de loi d'ensemble en maitère de droit pénal.

La Section a adopté deux motions spéciales. Par la première, elle félicite un ancien membre de la Section de Québec, le juge Jean-François Dionne à l'occasion de sa nomination comme juge. La deuxième reprend une motion adoptée par la Section en 1990 signalant l'absence de la délégation du Québec lor des délibérations et espérant qu'elle participera aux travaux de la Conférence sur l'uniformisation des lois à l'avenir.

En conclusion, le comité de mise en candidature recommande que M[me] Carol Snell de Saskatchewan soit élue présidente des réunions de la Section qui auront lieu à Terre-Neuve en 1992. En outre, les délélgués remercient le président actuel, Richard Hubley de Île-du-Prince-Edouard pour sa gestion efficace des délibérations de la Section, ainsi que le secrétaire, Michael Zigayer, du ministère fédéral de la Justice pour ses efforts en vue de la réussite de cette conférence.

RÉSOLUTIONS

I - ALBERTA

Item 1

PROGRAMME DE DÉJUDICIARISATION VISANT LES CONTREVENANTS ADULTES

Que le ministère de la Justice, en consultation avec les ministres provinciaux et territoriaux responsables de la justice élabore un projet de loi modifiant le *Code criminel* de façon à prévoir l'application d'un programme de déjudiciarisation visant les contrevenants adultes tel qu' autorisé par le ministre responsable de la justice de chaque province.

(ADOPTÈE 19-0-0)

Item 2

EXAMEN DE LA DÉTENTION DANS LES QUATRE-VINGT DIX OU TRENTE JOURS

Rendre le par. 525(9) facultatif plutôt qu'impératif.

(ADOPTÉE 18-0-0)

Item 3

DEMANDE D'AUTORISATION EN VERTU DE L'ART. 185(1) DU *CODE CRIMINEL*

Que l'alinéa 185(1) soit modifié de façon à permettre à mandataire spécialement désigné par le procureur général de demander un autorisation d'interception relativement à une infraction commise dans une autre province.

(ADOPTÈE 22-0-0)

Item 4

LIBÉRATIONS SOUS CONDITIONS DES JEUNES CONTREVENANTS

Que l'alinéa 20(1)a) soit modifié a fin rende possible pour le tribunal pour adolescents de prononcer une décision portant libération sous condition, par l'insertion des mots : "ou sous les conditions prévues par une ordonnance de probation", après le mot "inconditionnelle".

(ADOPTÉE 18-0-0)

Item 5

RENDRE AGRESSION ARMÉE OU INFLICTION DE LÉSIONS CORPORELLES UNE INFRACTION MIXTE

Que infliction de lésions corporelles redevienne une infraction mixte, permettant à la Couronne de choisir soit la voie de la procédure sommaire de déclaration de culpabilité, soit celle de l'acte d'accusation, selon la nature et la gravité des voies de fait.

(ADOPTÉE 12-2-6)

Item 6

DEMANDE DE CLÉMENCE DE LA COURONNE

Que l'article 690 du *Code criminel* soit modifié afin de permettre au ministre provincial responsable de l'administration de la justice d'exercer les mêmes pouvoirs que ceux qui sont conférés par cet article au ministre de la Justice fédéral.

(RETIRÉE)

II – COLOMBIE-BRITANNIQUE

Item 1

RAPPORTS D'ÉVALUATION PSYCHIATRIQUE POUR FINS DE MISE EN LIBERTÉ PROVISIOIRE PAR VOIE JUDICIAIRE ET DE DÉTERMINATION DE LA PEINE

Modifier les dispositions du *Code criminel* touchant la mise en liberté provisioire par voie judiciaire et la détermination de la peine afin d'autoriser la tenue d'évaluations psychiatriques.

(RETIRÉE ET REMPLACÉE PAR LA SUIVANTE)

Que le *Code criminel* soit modifié en vue d'autoriser, pour les fins de la détermination de la peine, des évaluations psychiatriques ordonnées par les tribunaux. Le *Code* devrait prévoir des mesures de protection assurant que les évaluations ne peuvent être ordonnées par la Cour que lorsque la gravité de l'infraction et l'etat mental et affectif de l'accusé permettent à la Cour de croire qu'un rapport psychiatrique l'aiderait à déterminer la peine qui convient.

(ADOPTÉE 9-3-3)

Item 2

ORDRE DE FOURNIR UN ÉCHANTILLON SANGUIN À UNE PERSONNE SOUPÇONNÉE D'AVOIR LES FACULTÉES AFFAIBLIES PAR UNE DROGUE AUTRE QUE L'ALCOOL

Modifier le *Code criminel* afin, d'une part, d'habiliter l'agent de la paix qui a des motifs raisonnables qu'une personne a commis l'infraction prévue à l'article 253, par suite d'absorption de drogues autres que l'alcool, d'ordonner à cette personne de fournir un échantillon de sang, et, d'autre part, d'indiquer que le défaut ou le refus d'obtempérer à cet ordre constitue une infraction.

(RETIRÉE ET REMPLACÉE PAR LA SUIVANTE)

Que le ministère fédéral de la Justice examine une modificaiton au *Code criminel* qui autoriserait les autorités compétentes à ordonner à une personne de fournir un échantillon de sang s'il y a lieu de croire que cette personne a commis une infraction prévue à l'article 253 du *Code criminel* et a consommé une drogue autre que l'alcool. Le *Code* devrait prévoir des mesures de protection assurant que ces ordres ne seront autorisés que lorsque les moyens de contrôle existants sont inefficaces, et lorsque une protection suffisante est offerte aux personnes qui doivent se soumettre à un tel ordre.

(ADOPTÈE 11-1-0)

Item 3

PRODUITS DE LA CRIMINALITÉ: DÉFINITION D''''INFRACTION DE CRIMINALITÉ ORGANISÉE''

Modifier le *Code criminel* soit pour élargir la définition de l'expression ''infraction de criminalité organisée'' de manière à allonger la liste des infractions susceptibles d'être commises par le crime organisé, soit pour éliminer complètement cette liste et faire en sorte que les dispositions concernant les produits de la criminalité s'appliquent à toutes les infractions prévues par le *Code criminel.*

(RETIRÉE ET REMPLACÉE PAR LA SUIVANTE)

Que le ministère fédéral de la Justice étudie une modification à la définition de «infraction de criminalité organisée» dans le *Code criminel* de façon à inclure l'infraction de taux d'intérêt criminel dans l'article 347 du Code.

(ADOPTÉE 17-0-0)

Item 4

PRODUITS DE LA CRIMINALITÉ: CONFISCATION DE BIENS SE TROUVANT DANS UNE AUTRE PROVINCE

Modifier le *Code criminel* de manière à permettre aux tribunaux d'ordonner la confiscation des produits de la criminalité se trouvant dans une autre province que celle où a été perpétrée l'infraction.

(RETIRÉE ET REMPLACÉE LA SUIVANTE)

Modifier le *Code criminel* en vue d'autoriser une procédure qui habiliterait un tribunal de la province où se trouvent les produits de la criminalité à ordonner la confiscation en se fondant sur la déclaration de culpabilité prononcée à l'égard d'une «infraction de criminalité organisée» dans une autre province.

(ADOPTÉE 18-0-1)

Item 5

PRODUITS DE LA CRIMINALITÉ: CONFISCATION IN REM DES BIENS APPARTENANT À DES PERSONNES QUI N'ONT JAMAIS MIS LE PIED AU CANADA

Modifier le *Code criminel* afin de permettre la confiscation *in rem* de tous les produits de la criminalité découverts au Canada qui ont été obtenus par suite de la perpétration d'une ''infraction de criminalité organisée'' dans les cas où l'accusé reste à l'extérieur du pays.

(ADOPTÉE 17-0-0)

Item 6

PRODUITS DE LA CRIMINALITÉ: DÉBLOCAGE DE BIENS BLOQUÉS AFIN DE PERMETTRE LE PAIEMENT DES FRAIS JURIDIQUES

Abroger la disposition du *Code criminel* habilitant le tribunal à débloquer des fonds afin de permettre à l'accusé de payer ses frais juridiques.

(RETIRÉE)

Item 7

DROIT DE CHOISIR LE MODE DE PROCÈS APRÈS UNE ORDONNANCE DE LA COUR D'APPEL INTIMANT L'ORDRE DE TENIR UN NOUVEAU PROCÈS

Modifier le paragraphe 686(5) du *Code criminel* de manière à ce que l'accusé et la Couronne se trouvent, en ce qui concerne le choix du mode de procès, dans la même situation qu'au terme de l'enquête préliminaire.

(ADOPTÉE 19-0-0)

Item 8

COMPÉTENCE DES TRIBUNAUX QUANT AUX INFRACTIONS DE CONDUITE AVEC FACULTÉS AFFAIBLIES PRÉVUES AUX ART. 253 ET 254/ALCOOLÉMIE DÉPASSANT 0,08/REFUS

Que les infractions visées aux art. 253 et 254 soient incluses dans la liste des infractions mentionnées à l'art. 553 pour lesquelles il y a compétence absolue.

(RETIRÉE)

Item 9

MODIFICATION DE L'ARTICLE 810 - ENGAGEMENT/ ENGAGEMENT DE NE PAS TROUBLER LA PAIX PUBLIQUE

Que l'art. 810 du *Code criminel* soit modifié de façon à permettre à la cour de modifier les conditions des engagements visés à l'art. 810 lorsqu'un changement dans les circonstances de l'affaire le justifie.

(ADOPTÉE 17-0-0)

III - NOUVEAU-BRUNSWICK

Item 1

DÉFAUT DE SE CONFORMER À UNE ORDONNANCE DE PROBATION, PAR 740(1) DU *CODE CRIMINEL*

Que l'art. 740 du *Code criminel* soit modifié de façon à renfermer une disposition similaire au par. 667 (2.1) du *Code criminel*, pour permettre que la ressemblance d'un nom fasse foi, en l'absence de preuve contraire, du fait que le nom du contrevenant mentionné dans l'ordonnance de probation est la personne accusée du défaut de s'être conformée à l'ordonnance de probation.

(REJETTÉE 1-17-2)

Item 2

ORDONNANCES DE NON-PUBLICATION - PROCÈS DEVANT JURY

Que l'art. 648 du *Code criminel* soit modifié de façon à s'appliquer également aux procédures préalables au procès, particulièrement dans le cas des voire-dire prévus par l'art. 645 du *Code criminel.*

(ADOPTÉE 19-0-0)

Item 3

PROCÉDURE À SUIVRE POUR LA PRÉSENTATION D'UNE DÉNONCIATION EN VERTU DU PAR. 508(1) DU *CODE CRIMINEL*

Que le par. 508(1) du *Code criminel* soit modifié de façon à en éliminer l'aspect obligatoire dans le cas des juges de la cour provinciale, et à leur conférer un pouvoir discrétionnaire d'entendre les allégations du dénonciateur et les dépositions des témoins.

(RETIRÉE)

IV - ONTARIO

Item 1

AUDITIONS RELATIVES À LA MISE EN LIBERTÉ PROVISOIRE PAR VOIE JUDICIAIRE POUR LES PRÉVENUS ACCUSÉS DE SÊTRE ÉVADÉS D'UNE GARDE LÉGALE

Que soit modifié le par. 515(6) du *Code criminel* de façon à inclure le par. 145(1).

(RETIRÉE)

Item 2

PROCÉDURE RELATIVE AUX INFRACTIONS MIXTES

Qu'un groupe de travail fédéral-provincial soit formé aux fins d'examiner toutes les dispositions du *Code criminel* prévoyant des actes criminels et de déterminer s'il y aurait lieu de placer certains de ces derniers dans law catégorie des infractions mixtes.

(ADOPTÉE TEL QUE MODIFIÉ 14-1-3)

Item 3

APPLICATION DES DISPOSITIONS RELATIVES À L'ÉCOUTE ÉLECTRONIQUE DANS LES CAS D'INCENDIE CRIMINEL

Que l'art. 183 du *Code criminel* soit modifié de façon à faire mention de art. 434,434 1 et 435.

(ADOPTÉE 19-0-0)

Item 4

DÉCISIONS RENDUES EN VERTU DE LA *LOI SUR LES JEUNES CONTREVENANTS*

Que l'alinéa 20(1)a) de la *Loi sur les jeunes contrevenants* soit modifié de façon à permetre à un juge d'un tribunal pour adolescents de prononcer la libération conditionnelle d'un jeune contrevenant.

(RETIRÉE)

Item 5

PRISE DES DÉPOSITIONS SOUS SERMENT PAR UN JUGE DANS LE CADRE D'UNE ENQUÊTE PRÉLIMINAIRE

Que le *Code criminel* soit modifié de façon à établir clairement que le «serment» mentionné à l'al. 540(1)a) vise l'affirmation solennelle, la promesse de dire la vérité et d'autres mécanismes prévus par la *Loi sur la preuve au Canada.*

(ADOPTÈE 19-0-1)

Item 6

CERTIFICAT DE L'INSPECTEUR DE LA CONTREFAÇON - DISPOSITIONS RELATIVES AU CONTRE-INTERROGATOIRE ET À L'AVIS

Que le par. 461(3) soit modifié de manière à comporter un renvoi aux par. 258(6) et (7).

(ADOPTÉE 19-0-0)

Item 7

ENLÈVEMENT D'UN ENFANT PAR LE PÈRE, LA MÈRE, LE TUTEUR OU UNE PERSONNE EN AYANT LA GARDE OU LA CHARGE LÉGALE

Que les art. 282 et 283 soient modifiés de façon à prévoir une nouvelle infraction semblable à celle-ci :

1. Quiconque étant le père, la mère, le tuteur ou une personne ayant la garde ou la charge légale d'une personne âgée de moins de quatorze ans, enlève, entraîne, retient, reçoit, cache ou héberge cette personne, avec l'intention de priver de la possession de celle-ci le père, la mère, le tuteur ou toute autre personne ayant la garde ou la charge légale de cette personne est coupable

   a) soit d'un acte criminel et passible d'un emprisonnenment maximal de dix ans;

   b) soit d'une infraction punissable par procédure sommaire.

2. Aucune poursuite ne peut être engagée en vertu du paragraphe (1) sanas le consentement du procureur général ou d'un avocat qu'il mandate à cette fin lorsqu'aucune ordonnance de garde n'est applicable à l'égard de la personne âgée de moins de quatorze ans.

(RETIRÉE – REFERÉE AU COMITÉ FÉDÉRAL – PROVINCIAL SUR LA DROIT FAMILIAL)

Item 8

DISPOSITIONS RELATIVE À L'HABILITÉ Á TÉMOIGNER ET À LA CONTRAIGNABILITÉ DES CONJOINTS

Qu'un groupe de travail composé de fonctionnaires soit chargé d'examiner les dispositions de l'art. 4 de la *Loi sur la preuve au Canada* en tenant compte de l'interprétation que les tribunaux en ont donnée et en les comparant avec les dispositions portant sur la même question en vigueur dans d'autres pays. Le groupe de travail devrait publier un rapport et y inclure ses recommandations.

(REMPLACÉE PAR LA SUIVANTE ET ADOPTÉE)

Qu'aussie bien la common law que l'article 4 de la *Loi sur la preuve au Canada* concernant l'habileté et la contraignabilité des époux soient examinés et qu'un rapport prévoyant des recommandations de réforme dans le domaine soit établi.

(ADOPTÉE 18-0-0)

V - CANADA

Item 1

AUTORISATION LÉGALE DE LIRE LA PROCLAMATION EN CAS D'ÉMEUTE

Il est recommandé que l'article 67 du *Code criminel* soit modifié de manière à autoriser les directeurs et les sos-directeurs d'établissements pénitentiaires fédéraux et provinciaux à lire la proclamation ern cas d'émeute dans leur établissement.

(ADOPTÉE 14-6-0)

Item 2

PEINE CONSÉCUTIVE ET PEIN CONCOMITANTE

Modifier la formule 21 (mandat d'incarcération à la suite d'une condamnation) afin que, lorsqu'une peine doit être purgée de façon consécutive ou concomitante, il soit nécessaire de préciser *à quelle autre peine* elle s'ajoute.

(ADOPTÉE 20-0-0)

Item 3

PRÉLÈVEMENT DE SUBSTANCES CORPORELLES AUX FINS D'ANALYSE DE L'ACIDE DÉSOXYRIBONUCLÉIQUE (ADN)

Attendu le Rapport 33 du Commission de réforme du droit du Canada, qu'on examine une modification au *Code criminel* afin de permettre, moyennant le respect de certaines garanties appropriéeys, la délivrance de mandats de perquisitions autorisant le prévlèvement de substances corporelles, y compris des échantillons de sang, à des fins d'analyses medico-légales (notamment l'analyse de la structure de l'ADN) s'il existe des motifs raisonnables de croire qu'une infraction a été commise et qui'il est vraisemblable que les échantillons prélevés etabliront de façon probante la preuve de la participation du suspect à l'infraction.

(ADOPTÉE TEL QUE MODIFIÉ 22-0-1)

Item 4

PREUVE DE CONDAMNATION ANTÉERIEURE

Modifier le paragraphe 570(1) du *Code criminel* et les autres dispositions pertinentes de manière à permettre que toute personne, et non plus seulement un agent de la paix, le pursuivant ou l'accusé, puisse demander et obtenier en certificat de déclaration de culpabilité.

(ADOPTÉE 15-4-2)

Item 5

HABILITER LE GOUVERNEMENT FÉDÉRAL À INTENTER DES POURSUITES À L'ÉGARD DES INFRACTIONS AU *CODE CRIMINEL* QUI SURVIENNENT DANS LE COURS DE POURSUITES DONT IL A LA CHARGE.

Reformuler de la manière indiquée ci-après le sous-alinéa b) (ii) de la définition du terme «procureur général» figurant à l'article 2 du *Code criminel*:

«A) soit d'une contravention ou d'un complot en vue de contrevenir à une autre loi fédérale ou à ses règlements d'application;

B) soit d'une contravention ou d'un complot en vue de contrevenir aux articles 132, 136, 137, 138, 139, aux paragraphes 145(2) à (5), ou à l'article 740 de la présente loi, dans le cadre des poursuites viéses à l'alinéa A).»

(RETIRÉE)

Item 6

DEMANDE DE COMMISSION ROGATOIRE - APPEL EN CAS DE REFUS

Modifier le *Code criminel* pour que la décision du juge à l'égard d'une demande fondée sur l'article 709 soit présumée avoir été rendue dans le cadre d'un procès tenu relativement aux procédures mentionées à l'article 709.

(ADOPTÉE 17-0-0)

Item 7

DOCUMENTS COMMERCIAUX ÉTRANGERS

Modifier la *Loi sur la preuve au Canada* et la *Loi sur l'entraide juridique en matière criminelle* afin de permettre la production en preuve et l'examen de documents étrangers et autres pièces, conformément à l'article 30 de la *Loi sur la preuve au Canada* et au paragraphe 36(2) de la *Loi sur l'entraide juridique en matière criminelle,* si les documents en question sont accompagnés d'un certificat, our d'une déclaration recueillie ou reçue en conformité avec le droit de l'État étranger, par un fonctionnaire autorisé de cet État. À tout le moins, les affidavits devraient être admissibles en preuve au Canada lorsqu'ils ont été reçus par un fonctionnaire autorisé dans un pays étranger.

(ADOPTÉE 11-4-1)

Item 8

POURSUITES PRIVÉES

Modifier le *Code criminel* afin d'autoriser le procureur général du Canada à intervenir dans le cadre de poursuites privées visant une infraction à une autre loi fédérale que le *Code criminel,* dans les cas où le procureur général de la province n'intervient pas, et à ordonner l'arrêt de ces poursuites.

(ADOPTÉE 17-0-0)

Item 9

PROCÉDURE RELATIVE À L'ÉTABLISSEMENT DES RÈGLES DE PRATIQUE

Modifier le paragraphe 482(1) du *Code criminel* de manière à permettre le vote par procuration ou à accorder à un comité du tribunal le pourvoir d'etablir des règles.

(ADOPTÈE 17-1-0)

Item 10

TÉMOIGNANGE PERTINENT DANS LE CADRE D'UNE DEMANDE DE CLÉMENCE

Modifier l'article 690 du *Code criminel* afin d'y établir un mécanisme permettant d'obtenir la délivrance d'assignations à comparaître visant à contraindre des personnes qui sont en possession de données pertinents dans le cadre d'une demande de clémence à la Couronne à venir témoigner sous serment à cet égard.

(ADOPTÈE 14-0-4)

Item 11

CONSÉQUENCES D'UNE ÉVASION

Ajouter au *Code criminel* une disposition précisant que la peine ne continue pas de s'écouler pendant que le détenu est illégalement en liberté.

(ADOPTÈE 20-0-0)

Item 12

POSSESSION DE PASSE-PARTOUT D'AUTOMOBILE PAR DES AGENTS DE LA PAIX

L'insertion, à l'article 353, d'une clause d'exemption permettant aux agents de la paix, dans le cadre de leurs fonctions, de posséder des passe-partout. Des clauses similaires se retrouvent en ce moment aux articles 92 (armes à feu) et 191 (dispositifs servant à l'interception de communications privées).

(ADOPTÉE 10-1-7)

Item 13

EMPREINTES PALMAIRES

Modifier le décret C.P. 1954-1109 ou obtenir un nouveau décret incluant expressément les empreintes palmaires dans les catégories de mesuration ou opération anthropométrique approuvée en vertu du paragraphe 2(1)(b) de la *Loi sur l'identification des criminels.*

(ADOPTÈE 20-0-0)

CLOSING PLENARY SESSION

MINUTES

Opening of Meeting

The meeting opened at 9.00 a.m. on Friday, August 16, with Basil Stapleton, Q.C. in the chair and Mel Hoyt, Q.C. as secretary.

Drafting Section

The Chairperson, Peter Pagano, Q.C., reported on the work of the Section.

It was resolved that the Drafting Section review the printing format of Uniform Acts with a view to improving their presentation and report to the Conference with its recommendations, if any.

The officers of the Section for 1991-92 are:

Chairperson: Peter J. Pagano, Q.C.
Vice-Chairperson: Lionel Levert
Secretary: Donald Revell

Criminal Law Section

The Chairperson, Richard Hubley, Q.C., reported on the work of the Section. The minutes of the Section are set out at page 41.

The Section expressed (a) its pleasure at the appointment of Jean-François Dionne as a judge and (b) its regret at the absence of the Quebec delegation, but hope to work with them in the context of the Conference again in the future. The Executive is asked to seek Quebec's continued support and participation in the work of the Conference.

Carol Snell was elected Chairperson of the Section for 1991-92.

The Section thanked Saskatchewan for the great effort put into giving us a most successful and enjoyable week.

Uniform Law Section

The Chairperson, Peter J. M. Lown, reported on the work of the Section. The minutes of that Section are set out at page 31.

The Section was assisted by exceptionally well prepared and comprehensive presentations by Arthur Close, Jeff Schnoor, John Gregory, Barbara Holman, Rod Wood, Yves Ouellette, Richard Bowes, James Robb and Peter Pagano.

The Budget

The Chairperson of the Budget and Finance Committee presented the Estimated 1991-92 Budget. It is set out in Appendix C , page 105.

Resolutions Committee's Report

Nora Sanders and Anne-Marie Trahan, Q.C. presented the Resolutions Committee's Report.

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

1. The Attorney General and Minister of Justice for Saskatchewan, Honourable J. Gary Lane, Q.C., who spoke at the banquet on Thursday evening.
2. The people of Regina, represented by Alderman Randy Langgard, who welcomed us at the opening session.
3. The Department of Justice, Province of Saskatchewan which hosted the Conference and:
   (a) provided the refreshments available during the meeting;
   (b) co-sponsored the sports evening and fowl supper at the Bluenose Country Vacation Farm on Wednesday evening;
   (c) hosted the banquet Thursday evening;
   (d) provided a van to transport companions to events of their choice on Monday, Wednesday and Thursday;
   (e) provided clerical, secretarial and support services.
4. The organizing committee and their many assistants including Doug Moen, Ian Brown, Georgina Jackson, Q.C., Gerald Tegart, Ellen Gunn, Q.C., Susan Amrud, Carol Snell, Aaron Fox, Phillip Gallet, Kevin Lang, Leanne Lang, Kathy Hillman-Weir, Ken Chutskoff, Daryl Brown, Darcy McGovern, Tom Irvine, Dwayne Anderson, Daryl Rayner, Jerry Kelly, Brent Prenovost and Ken Ring.
5. Elaine Fox who organized events for the companions of delegates to attend, including a visit to the Science Centre and the Hutterite colony tour.
6. The Royal Canadian Mounted Police for welcoming us to their training centre where we enjoyed the sunset ceremony and a lovely dinner.
7. Without naming them, those who provided musical leadership and inspiration throughout the week.
8. SaskEnergy which co-sponsored the fowl supper at the Bluenose Country Vacation Farm on Wednesday evening.
9. The Law Society of Saskatchewan which hosted the reception following the Opening Plenary Session.

10. SaskTel and SaskPower which sponsored the barbecue at the RCM Police Training Academy on Tuesday evening.

11. The Canadian Bar Association, Saskatchewan Branch which sponsored the reception on Thursday evening.

12. The Regina Bar Association which sponsored the wine for the banquet on Thursday evening.

13. The law firm of McPherson, Leslie & Tyerman which sponsored the reception following the banquet on Thursday evening, and Gerogina Jackson and Gerald Tegart who very kindly made their beautiful home available for the reception, which was held in honour of Basil Stapleton.

14. Dwight Hamilton, the Chairman of the Executive Committee of the National Conference of Commissioners of Uniform State Laws (NCCUSL), who attended the conference for the first time with his wife, Elizabeth.

15. Jeremiah Marsh, Chairman of the Committee on Liasion with Canada and International Organizations and Co-Chairman of the Joint Committee on Co-operation with Uniform Law Conference of Canada and the NCCUSL who attended the Conference for the second time with his wife, Marietta.

16. Those who provided excellent interpretation services throughout the week, including Daniel Pliquin, Rene Plante, Gila Sperer, Huguette Lemieux, Helene Regimbald, and Don Gilmour.

17. Those who provided excellent leadership during the Conference, namely Richard B. Hubley, Q.C., Chairperson of the Criminal Law Section, Professor Peter J. M. Lownn, Chairperson of the Uniform Law Section, Peter J. Pagano. Q.C., Chairperson of the Drafting Secton, Basil Stapleton, President, and Georgina Jackson, Past President.

Future Meetings

The President announced that our meeting in 1992 will be held in Cornerbrook, Newfoundland from August 9 to August 14 and the Opening Plenary Session will be in the evening of the 9th at 8.00 p.m.

The President also announced that we have received an invitation from Prince Edward Island for the following year, 1993. The Executive Committee will be asked to follow up on that invitation.

Quebec's Future Participation in the Conference

It was moved that the Uniform Law Conference express its appreciation of the valuable contribution historically made to the Conference by the Province of Quebec. All members have missed the professional association and congeniality shared with colleagues from Quebec. We look forward to Quebec's participation in future years. This motion is to be duly recorded and transmitted appropriately to our friends in Quebec.

Nominating Committee's Report

The Nominating Committee presented its report recommending Daniel C. Préfontaine, Q.C. as President and Howard F. Morton, Q.C. as Vice-President for 1991-92.

The New President

The gavel was handed over by Basil Stapleton, Q.C. to Daniel C. Préfontaine, Q.C.

The new President said he would make a very determined effort to visit the various deputies with a view of ensuring that they attend, or at least they provide, strong representation at the Conference.

Close of Meeting

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

LA SESSION PLÉNIÈRE FINALE

PROCÈS-VERBAL

L'ouverture de la réunion

La réunion fut ouverte à 9h00 le vendredi 16 août avec Basil Stapleton, c.r. à la présidence et Mel Hoyt, c.r. comme secrétaire.

Section des révisions

Le président, Peter Pagano, c.r., a présenté un rapport sur le travail de la section.

Il fut résolu que la Section des révisions révise le format d'impression des Lois uniformes, ayant l'objectif d'améliorer leur présentation et de faire ensuite un rapport des recommendations, s'il y a lieu, à la Conférence.

Les dirigeants de la section pour l'exercise 1991-92 sont:

Président: Peter J. Pagano, c.r.
Vice-président: Lionel Levert
Secrétaire: Donald Revell

La Section du droit criminel

Le Président, Richard Hubley, c.r., a présenté un rapport sur le travail de la section. Le compte rendu se trouve à la page 41.

La section a exprimé (a) son plaisir devant la nomination de Jean-François Dionne au poste de juge et (b) son regret devant l'absence de la délégation du Québec tout en espérant pouvoir travailler avec celle-ci lors de conférences futures. Il fut demandé à l'exécutif de chercher l'appui et la participation continue du Québec au travail de la Conférence.

Carol Snell fut élue présidente de la section pour l'exercice 1991-92.

La section a remercié la Saskatchewan pour tous les efforts qui furent déployés afin que cette semaine soit couronnée de succès et très agréable pour tous.

La Section de Loi uniforme

Le président, Peter J. M. Lown, a présenté un rapport sur les travail de la section. Le compte rendu de la section se trouve à la page 31.

La section fut aidée par des présentations exceptionellement bien préparées et de grande portée données par Arthur Close, Jeff Schoor, John Gregory, Barbara Holman, Rod Wood, Yves Ouellette, Richard Bowes, James Robb et Peter Pagano.

Le budget

Le président du Comité du budget et des finances a présenté un estimé du budget pour l'exercice 1991-92. Cet estimé se trouve à l'annexe C, page 105.

Rapport du Comité des résolutions

Nora Sanders et Anne-Marie Trahan, c.r., ont présenté le rapport du Comité des résolutions.

RÉSOLU que la Conférence exprime sa reconnaissance, par voie de lettre du secrétaire, aux personnes et organismes suivants :

1. le procurer général et Ministre de la justice de la Saskatchewan, l'honorable J. Gary Lane, c.r., pour l'allocution qu'il a prononcé au banquet jeudi soir.

2. les citoyens de Régina, représentés par le conseiller municipal Randy Langgard, qui nous ont souhaité la bienvenue lors de la séance plénière initiale.

3. le Ministère de la justice de la Saskatchewan pour son hospitalité à l'occasion de la conférence et :

   (a) les rafraîchissements qu'il a fourni au cours de la conférence;

   (b) la soirée d'activité sportive et le dîner de volaille au Bluenose Country Vacation Farm le mercredi soir;

   (c) le banquet qu'il a donné jeudi soir;

   (d) la camionnette qu'il a fourni pour le transport des compagnes et compagnons aux activités de leur choix le lundi, mercredi et jeudi;

   (e) les services de bureau, de secrétariat et de soutient qu'il a fourni.

4. le Comité organisateur et leurs nombreux aides dont Doug Moen, Ian Brown, Georgina Jackson, c.r., Gerald Tegart, Ellen Gunn, c.r., Susan Amrud, Carol Snell, Phillip Gallet, Kevin Lang, Leanne Lang, Kathy Hillman-Weir, Ken Chutskoff, Daryl Brown, Darcy McGovern, Tom Irvine, Dwayne Anderson, Daryl Rayner, Jerry Kelly, Brent Prenovost et Ken Ring.

5. Elaine Fox qui a organisé les activités pour les compagnes et compagnons des délégué(e)s, dont une visite au Science Centre et une tournée de la colonie Hutterite.

6. la Gendarmerie royale du Canada pour nous avoir invité à leur centre de perfectionnement où nous avons pu jouir de la cérémonie du coucher du soleil et d'un délicieux dîner.

7. sans tous les nommer, ceux qui ont founi une direction musicale et de l'inspiration tout au long de la semaine.

8. SaskEnergy qui fut aussi hôte du dîner de volaille au Bluenose Country Vacation Farm le mercredi soir.

9. la Law Society of Saskatchewan pour la réception qui eut lieu suite à l'ouverture de la session plénière.

10. SaskTel et SaskPower pour le barbecue qui eut lieu à l'académie de la G.R.C. le jeudi soir.

11. l'Association du barreau canadien, division de la Saskatchewan pour la réception du jeudi soir.

12. l'Association du barreau de Régina pour le vin qui fut servi au banquet de jeudi soir.

13. la firme d'avocats McPherson, Leslie & Tyerman pour la réception qui suivit le banquet jeudi soir et Georgina Jackson et Gerald Tegart qui ont si gentillement prêté leur jolie demeure pour la réception qui fut tenue en l'honeur de Basil Stapleton.

14. Dwight Hamilton, président du Executive Committee of the National Conference of Commissioners on Uniform State Laws (NCCUSL) qui fut présent à la conférence pour la première fois et qui était accompagné de son épouse Elizabeth.

15. Jeremiah Marsh, président du Committee on Liaison with Canada and International Organizations et vice-président du Joint Committee on Co-operation with Uniform Law Conference of Canada and the NCCUSL qui assista à la Conférence pour la seconde fois et qui était accompagné de son épouse Marietta.

16. ceux qui ont fourni d'excellents services d'interprétation tout au long de la semaine, dont Daniel Pliquin, René Plante, Gila Sperer, Huguette Lemieux, Hélène Regimbald et Don Gilmour.

17. ceux qui ont agi en qualité de chef durant la conférence, à savoir, Richard B. Hubley, c.r., président de la Section du droit criminel, le professeur Peter J. M. Lown, président de la Section de Loi uniforme, Peter J. Pagano, c.r., président de la section des révisions, Basil Stapleton, président et Georgina Jackson ancienne présidente.

Réunions futures

Le président a annoncé que la réunion de 1992 aura lieu à Cornerbrook, Terre-Neuve du 9 août jusqu'au 14 août et que la première session plénière aura lieu le soir du 9 août à 20h00.

Le président a aussi annoncé que nous avons reçu une invitation de l'Ile-du-Prince-Edouard pour l'année suivante, soit 1993. Le Comité exécutif sera chargé de faire le suivi de cette invitation.

La participation du Québec à la Conférence dans l'avenir

Il fut proposé que la Conférence de Loi uniforme exprime son appréciation devant la précieuse contribution historique faite à la Conférence par la province du Québec. Tous les membres regrettèrent vivement de ne pouvoir jouir de l'apport professionel et de l'agréable compagnie de nos collègues du Québec. Nous espérons sincèrement que le Québec

participera lors des conférences futures. Cette proposition sera dûment enregistrée et transmise de façon appropriée à nos amis du Québec.

Rapport du Comité sur les nominations

Le Comité sur les nominations a présenté son rapport et a recommandé Daniel C. Préfontaine, c.r., à la présidence et Howard F. Morton, c.r., à la vice-présidence pour l'exercice 1991-92.

Le nouveau président

Le marteau de président de réunion fut remis á Daniel C. Préfontaine, c.r., par Basil D. Stapleton, c.r.

Le nouveau président a déclaré vouloir faire de grands efforts afin de visiter les députés et de s'assurer qu'ils assistent, ou au moins qu'une bonne délégation soit présente, aux conférences.

Levée de la séance

Entendu qu'il n'y avait plus de matière à considérer, la séance fut levée.

APPENDIX A

(see page 32)

A MODEL ADMINISTRATIVE PROCEDURE CODE

MONTREAL

MAY 1991

NOVEMBER 1991

Introduction

In recent years the courts have developed an important body of procedural and evidentiary rules which reflect values that are appropriate for the style of administrative tribunals — simplicity of procedure and accessibility, and the right to a fair but expeditious hearing. These rules are scattered throughout the reported cases; they are not conveniently accessible to most lawyers, members of administrative bodies and individuals who want to exercise their own rights. Moreover, these rules, which are enerally presented as methods of applying the principles of fairness or natural justice, are the same throughout Canada, and so it would be valuable to present an overall view. On the invitation of the Fondation du Barreau du Québec, an unofficial codification of these rules was prepared in 1985. This codification has been used as a reference document by a number of administrative tribunals in Quebec, such as the Bureau de révision de l'évaluation foncière, the Commission de la fonction publique du Québec, and so on, and by a number of lawyers.

The "Model Administrative Procedure Code" attached hereto is an update and adaptation of the "Règles de procédure des tribunaux administratifs" published in 1985, at the same time as the specific regulations for each of the administrative tribunals in Quebec.

The update takes into account the decisions of the Supreme Court of Canada, the Federal Court and other superior courts in Canada as of April 1, 1991.

Ontario and Alberta administrative procedure legislation has also been taken into consideration, as has the American statute of 1946, the Revised Model State Administrative procedure Act, Appendix A, and recent Canadian documents.

Because of the great variety of powers exercised by a myriad of administrative bodies in Canada, the challenge in writing this working paper was to present rules that are general enough to be used by a large number of such bodies, but also precise enough to serve as rules of conduct by members of administrative tribunals, guides for lawyers and agents, and guarantees for individuals.

In terms of codifying what might be called "minimum" rules, a difficult choice had to be made, particularly in respect of the rules of evidence. Only those rules which are specific to the work of administrative tribunals were included. For example, no specific rules

concerning the admissibility of children's testimony were required for administrative tribunals, and so the draft model Act is silent on this particular question.

Similarly, the standard of "substantial" evidence, which is so important in Amercian administrative law as a test and as a guarantee of the reasonableness of decisions, has not been adopted into Canadian administrative law, although judges may review erroneous findings of fact.

In other words, the working paper, which will of course be put to the test of criticism and comment, is an attempt to be general enough to be broadly applicable, but at the same time clear and precise enough to permit both decision-makers and individuals to be certain as to the scope of their rights and duties.

One criticism that may be made of Canadian administrative law is that it is not communicable, or not accessible, because its sources lie essentially in the case law and not in legislation. A model administrative procedure code could undoubtedly contribute to making Canadian administrative law more accessible to the people it claims to protect, and could be the next step in improving relations between government and the governed.

Yves Ouellette
Professor of Law
Université de Montréal

May 1991

MODEL ADMINISTRATIVE PROCEDURE CODE

Table of Contents

CHAPTER I

Definition and objectives

Sec 1 — In this Act, "authority" means a person, an agency, a commission or a tribunal, acting under a statute or other provision of law, not incuding a court and a coroner, that, after an oral hearing, decides matters affecting right, interests or privileges.

Comments:

A — This is a mode code designed to cover a great variety of independent bodies, both federal and provincial, including both regulatory agencies and adjudicative bodies, that is, "tribunals" and "commissions", to use the terminology in the Ratushney report; accordingly, the word used is "authority", which is also used in the *Alberta Administrative Procedure Act*.

B — The text covers proceedings by authorities which make decisions after holding hearings; this is the standard used in the American *Revised Model State Administrative Procedure Act*.

C — The text proposes only general and minimum rules which have already been formulated in the case law. It does not operate to change the common law, but simply to codify it in order to facilitate the work of lawyers, unrepresented parties and decision-makers.

Sec 2 — The purpose of this code is to provide for fair, expeditious and simple proceedings and to ensure that decisions are of good quality.

Comments:

A — It is wise to set out the objectives of the text in order to facilitate interpretation.

B — The source of this provisions is the 1987 Ouellette report.

Sec 3 — An authority shall make rules of specific regulations procedure and evidence, which shall set out standards governing the following matters:

(a) the method of serving documents, notices of hearing and decisions;

(b) the holding of pre-hearing conference by telephone or otherwise;

(c) the procedure for preparing hearing lists;

(d) the preparation of the minutes of the hearing;

(e) the procedure which applies when a request is made by an intervenor for funding and the criteria to be considered in deciding whether to grant such a request and determining the amount granted;

(f) the format of and procedure for entering decisions;

(g) the procedure for reviewing decisions.

CHAPTER II

Procedure

Part 1 — **General Principle**

Sec 5 — In the event that the Act and the regulations are silent, an authority is master of its own procedure, subject to the right of the parties to a fair hearing.

Source:

Hoffman-Laroche Limited v *Delmar Chemicals Limited,* [1985] 1 SCR 575;

Kane v *Board of Governors of the University of British Columbia,* [1980] 1 SCR 1105;

American Airlines v *Competition Tribunal* (1989), 89 NR 241 (FCA), affirmed by [1989] SCR 290.

Part 2 — **Representation**

Sec 6 — Anyone who is a party to a proceeding before an authority may choose to be represented or assisted by counsel or agent if, in the circumstances, failure to be so represented would amount to a denial of justice.

Comments:

A — At common law, there is no general and absolute right to be represented by counsel before an administrative tribunal. Everything depends on the circumstances, such as the complexity of the issues and the proceedings, time considerations and costs.

R v *Laroch* (1982), 131 DLR, 152 CFR;

Hone v *Maze Prison Board of Visitors*, [1988] All ER 321 (H of L);

Sheik v *Canada*, [1990] 3 FC 231 (FCA);

Gochanour v *Solicitor General of Alberta*, [1990] 5 WWR 178 (QB).

B — Section 7 of the Canadian *Charter of Rights and Freedoms*, where it applies (as in prison discipline cases), may, depending on the circumstances, confer the right to be represented by counsel.

Howard v *Stoney Mountain Institution*, [1984] 2 FC 642;

Re Kaur and Minister of Employment and Immigration, [1990] 2 FC 299.

C — Some provincial legislation or Law Society regulations impose more general and absolute rules respecting representation by counsel before a body which exercises quasi-judicial powers.

D — A study submitted to the Lord Chancellor in the United Kingdom in July 1989 indicated that representation significantly increases an applicant's chances of success before an administrative tribunal. The study also showed that before certain bodies, such as social benefits appeal boards, representation by non-lawyer experts had the most impact.

Hazel Genn and Yvette Genn, "The Effectiveness of Representation at Tribunals", Report to the Lord Chancellor, July 89.

Sec 7 — Where a party is not represented by counsel or agent, an authority shall:

(a) inform the person of his or her right to choose to be represented;

(b) assist the person in bringing out the facts.

Comments:

The source of the rule set out in paragraph (b) is:

Hummel v *Heckler*, 736 F (2d) 91, 95 (1985);

Ouellette Report, 1987, p 276.

Part 3 — **Public interest intervention**

Sec 8 — On oral or written request, an authority may grant status as an intervenor to any person, corporation or group of persons associated for the pursuit of a common interest, who have shown sufficient interest and are in a position to inform the authority or assist it in making a decision which will be in accordance witht he objective of the Act or in the public interest.

Source:

A — *Canada* v *Newfoundland Telephone*, [1987] 2 SCR 462;

B — The public law, and not the private law, standard of locus standi should apply. *Stanford* v *Harris* (1990), 38 Admin LR 141 (Ont Div Ct).

Sec 9 — An intervenor's procedural rights, including the right to apply for funding, shall be determined by the specific regulations of each authority, or by an order of the authority.

Comments:

The wide variety among the bodies in question would make it dangerous to set out a complete list of intervenors' procedural rights.

Some decisions have held that the scope of such rights will vary, depending on whether the Act provides that an oral hearing is mandatory or merely optional.

Seafarers International Union of Canada v *CN*, [1976] 2 FC 369.

It is probably preferable that matters such as the right to call witnesses, to cross-examine and to obtain disclosure of expert reports and financial documents be left to the discretion of the authority or set out in a specific regulation.

Re Manitoba League of Physically Handicapped Inc. and Taxicab Board (1988), 48 DLR (4th) 245 (Man QB);

Re BC Pollution Control Board (1967), 61 DLR 221 (BA);

Consumers Association of Canada v *Canadian Transport Commission*, [1979] 2 FC 415;

Re CRTC and London Cable TV Ltd., [1976] 2 FC 621 (FCA);

Re Attorney-General for Manitoba and National Energy Board (1975), 48 CLR (3d) 73;

American Airlines v *Competition Tribunal* (1989), 89 NR 241 (FCA);

Sec 10 — person who has been granted status as an intervenor may, at any time before the hearing commences, request intervenor funding, where the regulation so provides.

Sec 11 — An authority has the power:

(a) to decide the amount of funding to be granted;

(b) to decide which applicants will provide the funding for intervenors;

(c) to decide the conditions on which funding may be granted;

(d) to decide any question of law or fact relating to an application for funding;

(e) to grant additional funding, at the end of the hearing, if it believes, considering all the circumstances, the amount initially granted was inadequate.

Comments:

This text was inspired by Bill 174, Ontario, First Session, 34th Legislature, 1988: *An Act for the establishment and conduct of a Project to provide Funding to Intervenors in proceedings before a Joint Board under the Consolidated Hearings Act, 1981 and before the Ontario Energy Board and to provide for certain matters in relation to costs before those Boards.*

Part 4 — **Pre-hearing conference**

Sec 12 — An authority or one of its members may order the parties, orally, or in writing, to appear before a member, the secretary or counsel, at a specified time, date and place for the purpose of holding a pre-hearing conference.

Sec 13 — The purpose of the pre-hearing conference is:

(a) to define the issues to be argued at the hearing;

(b) to assess the advisability of amending the pleadings for greater clarity or precision;

(c) to encourage the parties to exchange documents before they are produced at the hearing;

(d) to plan the manner in which the hearing will proceed and evidence will be produced;

(e) to examine the possibility of admitting certain facts or accepting proof by affidavit;

(f) to consider any other matter that may promote a simple and expeditious hearing;

(g) to consider the possibility of reaching a settlement.

Sec 14 — Facts admitted at a pre-hearing conference shall be set out in a statement signed by the parties of their counsel or agent and countersigned by the person who presided at the pre-hearing conference.

The statement shall be entered on the record and shall be considered as evidence of the facts admitted, for all legal purposes.

Source:

Re Emerson and Law Society of Upper Canada (1984), 5 DLR (4th) 294;

Re Kuun and University of New Brunswick (1985), 13 DLR (4th) 745 (NBCA).

Part 5 — **Hearing**

Sec 15 — The parties and any person who is directly affected shall be given reasonable notice of the hearing.

Comments:

A — A person may be directly affected by a proceeding although he or she is not already a party to it.

Examples: *Canadian Transit Co* v *Public Service Staff Relations Board* (1990), 39 Admin LR 142 (FCA);

Canadian Union of Public Employees v *Canadian Broadcasting Corporation* (1990), 38 OAC 231 (CA);

Jantran v *Régie des permis d'alcool du Québec*, [1987] RJQ 2467 (SC).

B — Generally speaking, it is not necessary for a regulatory agency to notify mere potential competitors.

Okanagan Helicopter and Erickson Air Crane Co (1975), 55 DLR (3d) 98 (FC).

Sec 16 (1) The notice shall include:

(a) a statement of the date, time and place of the hearing;

(b) a statement of the purpose of the hearing and, in a reasonably precise manner, of the issues involved.

(2) The notice may include a statement that if a party does not attend at the hearing, the authority may proceed in his or her absence.

Comments:

Section 15 and 16 are inspired by section 6 of the Ontario *Statutory Powers Procedure Act*.

Sec 17 — The hearing shall be open to the public; however an authority may, of its own motion or at the request of a party, order that the hearing be held in camera, where the authority is of the opinion that

(a) it is so required in the interest of public security;

(b) a person's personal or financial privacy outweighs the benefits of a public hearing.

Source:

Section 9, Ontario *Statutory Powers Procedure Act*.

Pilzmaker v *Law Society of Upper Canada* (1990), 36 OAR 244 (Div Ct).

Comments:

1 — This provision does not follow the common law rule that in the event that the Act is silent, an administrative tribunal may proceed in camera or in public. *St-Louis* v *Treasury Board*, [1983] FC 332. Under the common law, an authority has discretion to proceed in camera or in public.

2 — This provision could not apply in this form in Quebec, because of section 23 of the *Charter of Human Rights and Freedoms* which sets out a slightly different rule.

3 — Each authority should make guide-lines or rules regarding trade secrets or proprietary information.

Sec 18 — An authority shall deal with all proceedings before it as informally and expeditiously as is justified by the circumstances and the right to a fair hearing.

Source:

Sec 68 (2), *Immigration Act*, c I-2, enacted by c 28, 4th Supp.

Heckler v *Day*, 104 S Ct 2249 (1984).

Re Misra (1989), 52 DLR (4th) 477 (Sask CA).

Sec 19 — An authority may adjourn a hearing, of its own motion or on request, on such terms as it may determine,

(a) in order to prevent a denial of justice;

(b) if it is satisfied that an adjournment would not unreasonably impede the proceedings.

Source:

Sec 69(6), *Immigration Act*

Han v *MEI* (1984), 52 NR 274 (FCA);

Green v *MEI*, [1984] 1 FC 441 (FCA);

Pruneau v *Chartier*, [1973] CS 736.

Sec 20 — An authority shall grant to any party

(a) a reasonable opportunity to be heard, to submit evidence and to make representations;

(b) a reasonable opportunity to cross-examine witnesses, to the extent necessary to ensure a fair hearing.

Source:

Sec 4, Alberta *Administrative Procedures Act*

Sec 10, Ontario *Statutory Powers Procedure Act*

Lipkovits v *CRTC*, [1983] 2 FC 321;

Cashin v *CBC*, [1984] 2 FC 209 (FCA);

Re Forstar Management Inc and BC Securities Commission (1990), 71 DLR (4th) 317 (BCCA).

Comments:

Is it desirable to require that, where a party is unrepresented, the authority inform him or her of the right to cross-examine?

See *Swindle* v *Sullivan*, 914 F (2d) 222 (1990).

Sec 21A (1) The right to a fair hearing includes the right of a natural person who is a party to a proceeding to understand the language used at the hearing.

(2) An authority shall, taking into account all the circumstances, grant the assistance of a competent interpreter free of charge to a party or witness who does not understand or speak the language used at the hearing or who is deaf.

Source:

Sec 14 of the Canadian *Charter* and sec 36 of the Quebec *Charter*.

Section 14 of the Canadian *Charter* has been interpreted as not conferring an absolute right to interpreter in arbitration proceedings under the *Canada Labour Code*.

Roy v *Hackett* (1988), 45 DLR (4th) 415 (Ont CA).

See also: *Brar* v *Canada* (1989), 43 Admin LR (FC);

Ming v *MEI*, [1990] 2 FC 336 (CA);

Restaurant Diana v *Régie des permis d'alcool*, JE 89-344 (SC).

CHAPTER III

Evidence

Sec 22 — Decisions made by an authority shall be based on the evidence and according to the principle of transparency.

Source:

R v *Deputy Industrial Injuries Commissioner*, [1965] 1 QB 456;

Re Dale Corporation and Rent Review Commission (1983), 149 DLR (3d) 113 (NSCA);

Mahon v *Air New Zealand*, [1984] AC 808.

Sec 23 — In the event that the Act and the regulations are silent, an authority

(a) is master of its own evidence, subject to the right of the parties to a fair hearing;

(b) is not bound by technical rules of evidence;

(c) may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

Source:

Miller v *Minister of Housing*, [1968] 1 WLR 992 (CA);

Canada v *Mills* (1985), 60 NR 4 (BCA);

Richardson v *Perales*, 91 S Ct 1420 (1971);

Immigration Act, s 68(3).

Sec 24 — An authority may not receive evidence outside a hearing or without the knowledge of the parties.

Source:

R v *City of Westminster Assessment Committee*, [1941] 1 KB 53;

R v *Schiff* (1971), 13 DLR (2d) 304 (Ont CA);

Sarco Canada v *Anti-Dumping Tribunal* (1978), 22 NR 225 (FCA);

Re Brunswick International and Anti-Dumping Tribunal (1980), 108 DLR 216 (FCA);

La Guilde des employés de Super Carnaval v *Tribunal du travail*, [1986] RJQ 1556 (Que CA);

CP Ltd v *BC Forest Products* (1981), 34 NR 209 (FCA);

Re BC Government Employees Union and Public Service Commission (1979), 96 DLR (3d) 86 (SCBC);

Kane v *Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105;

Spence v *Prince Albert Police Commission* (1987), 25 Admin LR 90 (Sask CA).

Sec 25 — An authority may take judicial notice

(a) of facts that are publicly known and that may be judicially noticed by a Court of Law;

(b) of generally recognized facts and any information and opinion that is within its specialized knowledge, subject to section 26.

Source:

Sec 68(4), *Immigration Act*

Cité de Ste-Foy v *Société immobilière Enic Inc*, [1967] SCR 121;

Dome Petroleum v *Grekul* (1984), 5 DLR (4th) 262 (Alta QB);

Air Canada v *Mirabel*, [1989] RJQ 1164 (Que CA).

Sec 26 — Before an authority takes notice of any fact, information, opinion, policy or unwritten rule other than what may be judicially noticed, it shall notify the parties of its intention and afford them a reasonable opportunity to make representations with respect thereto.

Source:

Sec 68(5) of the *Immigration Act*

Gonzalez v *MEI*, [1981] 2 FC 781 (FCA);

Kalair v *MEI* (1985), 10 Admin LR 107 (FCA);

CUM v *Properties Gunter-Kaussen*, [1987] RJQ 2641.

Sec 27 — Hearsay may be admitted in evidence if there are reasonable guarantees of the credibility of the evidence, upon such terms as ensure that the parties are afforded a fair hearing.

Source:

T A Miller v *Minister of Housing*, [1986] 1 WLR 992;

Restaurants et Motels Inter-cité Inc v *Vassart*, [198?] CS 1052;

Canada v *Mills* (1985), 60 NR 4 (FCA).

Sec 28 — A certified copy of the report of a commission or board of inquiry established by the government under the provision of any Act is admissible in evidence.

Source:

Re City of Toronto and Canadian Union of Public Employees, local 79 (1982), 133 DLR (3d) 94 (Ont CA).

CHAPTER IV

Deliberation and reasons for decisions

Sec 29 — An authority shall act fairly at all stages of the proceedings, including its deliberations.

Source:

Re Emerson and Law Society of Upper Canada (1984), 5 DLR (4th) 294 (Ont HCJ);

Tremblay v *Commission des affaires sociales*, [1989] RJQ 2053 (Que CA, on appeal);

IWA v *Consolidated Bathurst Packaging*, [1990] 1 SCR 282.

Sec 30 — Where an authority is required by law to give reasons for its decision, the decision shall include

(a) a statement of the findings of fact made from the evidence adduced;

(b) a statement of the rules of law and the interpretation thereof, or of the policy used.

Comments:

A — An authority may be required by the Act and, in some cases, by virtue of the principles of procedural fairness or of section 7 of the Canadian *Charter*, to give reasons for its decisions.

B — Unlike American law, Canadian common law does seem to require that authorities make express findings as to witnesses' lack of credibility, where credibility is an issue.

Re NSP Investment Ltd and Joint Board under Consolidated Hearings Act (1990), 67 DLR (4th) (Ont Div Ct);

Cf *Herr* v *Sullivan*, 912 F (2d) 178 (1990).

C — The standard or quality of the reasons may not be the same for all decision-making processes, and may differ according to the nature of the decision and the terms of the relevant legislation.

Re Poyser and Mills Arbitration (1964), 2 QB 467

Save Britain's Heritage v *Secretary of State for the Environment* (1991), 2 All ER 10 (H of L).

CHAPTER V

Independence and Impartiality

Sec 31 **(1)** An authority or its members shall perform its functions personally, and shall do so in a wholly impartial manner and with an independent mind.

(2) Unless otherwise expressly provided by the Act, an authority is not bound by any government policy or ministerial directive.

Source:

Innisfill Township v *Vespra Township*, [1981] 2 SCR 145;

Alkali Lake Indians and West Coast Transmission (1984), 8 DLR 611 (B*A);*

Minott v *Stoney Mountain Penitentiary*, [1982] 1 FC 322;

Re Dale Corporation and Rent Review Commission (1983), 149 DLR (3d) 11?;

Matthews v *Board of Directors of Physiotherapy* (1991), 44 Admin LR 147 (Ont Div Ct).

Comments:

A — This provision sets out the distinction between independence in decision-making and institutional independence or structural impartiality.

B — The courts have held that the mere fact that a manual of directives is used is not necessarily improper, if the directives do not operate to pre-determine the case.

Re Green (1979), 94 DLR (3d) 641 (Ont CA);

Heckler v *Campbell*, 103 S Ct 1952 (1983).

C — The Act may of course require the authority to comply with guidelines.

See section 6 of the *Department of the Environment Act*, RSC 1985, c E-12.

CHAPTER VI

Review of the decision

Sec 32 — Unless the Act expressly so authorizes, an authority may not review, reconsider or set aside a decision or an order except as provided by sections 33 and 34.

Canada v *Nabiye*, [1989] 3 FC 424 (CA);

Chandler v *Alberta Association of Architects*, [1989] 2 SCR 643; (1990), 62 DLR (4th) 577.

Sec 33 — An authority may, within a reasonable time, on its own motion or on request, review its decision in order to correct any clerical error or in expressing the clear intention of the authority.

Grillas v *Minister of Manpower and Immigration*, [1972];

Chandler, supra.

Sec 34 — An authority may, within a reasonable time, on its own motion or on request, review or set aside its decision or order where

(a) the decision or order was obtained as a result of fraud or misrepresentation;

(b) it appears to the authority that its decision or order was made without regard to the right of the parties to a fair hearing;

(c) the authority has a continuing jurisdiction in the matter.

Source:

R v *Home Secretary*, [1978] WLR 700;

Gill v *Canada*, [1987] 2 FC 425 (FCA);

R v. *Kensington and Chelsea Rent Tribunal*, [1974] 1 WLR 1486 (QBD);

Grillas, supra

Toth v *MEI*, [1989] 1 FC 535 (CA);

Scott v *National Parole Board*, [1988] 1 FC 473;

Longia v *Canada*, [1990] 3 FC 288 (CA), 44 Admin LR 264.

Comments:

A — In-house review is a faster, simpler and more economical procedure than appeal or judicial review. It should be encouraged.

B — The courts have held that in-house review may co-exist with the right of appeal.

Re Alberta Power and Alberta Public Utilities Board (1990), 66 DLR (4th) 286 (CA).

C — Clearly, reconsideration should be exercised in a reasonable manner.

LRB of Saskatchewan c. *The Queen* (1956), SCR 82, 87.

Repeated applications for review or unreasonable delay would create turmoil, not orderly regulation.

Sec 35 — An authority that reviews its own decision shall ensure that all parties are afforded a fair hearing.

CHAPTER VII

Final provisions

Sec 36 — Nothing in this Code relieves an authority from complying with any requirements imposed upon it by any other rule of law.

Source:

Sec 8, Alberta *Administrative Procedures Act*.

APPENDIX B

(See page 23)

AUDITORS' REPORT

To the Members of
Uniform Law Conference of Canada:

We have audited the General Fund and Research Fund balance sheets of the **Uniform Law Conference of Canada** as at March 31, 1991 and the statement of revenue, expenses and equity for the nine months 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, 1991 and the results of its operations for the nine months then ended in accordance with generally accepted accounting principles.

Fredericton, Canada
June 27, 1991.

Ernst & Young
Chartered Accountants

UNIFORM LAW CONFERENCE OF CANADA

BALANCE SHEET

As at March 31, 1991
(with comparative figures for June 30, 1990)

GENERAL FUND

	1991 $	1990 $
ASSETS		
Cash	**21,872**	8,371
Accounts receivable	**24,011**	—
	45,883	8,371
LIABILITIES AND EQUITY		
Accounts Payable	**900**	4,737
Equity	**44,983**	3,634
	45,883	8,371

RESEARCH FUND

ASSETS		
Cash	**4,571**	938
Term Deposits	**50,000**	65,000
Accounts receivable	**15,938**	9,062
	70,509	75,000
EQUITY		
Equity	**70,509**	75,000

(See accompanying notes)

UNIFORM LAW CONFERENCE OF CANADA

STATEMENT OF REVENUE, EXPENSES AND EQUITY
For the nine months ended March 31, 1991
(with comparative figures for the 12 months ended June 30, 1990)

	General Fund $	Research Fund $	**Total 1991 $**	Total 1990 $
Revenues:				
Annual contributions	69,000	—	**69,000**	69,000
Interest	3,876	—	**3,876**	6,036
Government of Canada	—	15,938	**15,938**	9,062
	72,876	15,938	**88,814**	84,098
Expenses:				
Printing	1,595	—	**1,595**	21,790
Executive Director honorarium	17,550	—	**17,550**	22,493
Annual meeting	14,365	—	**14,365**	19,947
Secretarial services	3,149	—	**3,149**	4,289
Executive travel	5,749	—	**5,749**	9,964
Professional fees	1,013	—	**1,013**	1,233
Postage	989	—	**989**	1,889
Stationery	926	—	**926**	1,776
Telephone	831	—	**831**	2,042
Bad Debts	—	—	—	3,000
Miscellaneous	22	—	**22**	35
Human Tissue Project	—	—	—	2,775
Uniform Provincial Offences Procedures Act	—	698	**698**	3,756
Civil Contempt	—	5,069	**5,069**	—
Reimbursements of Costs by the Research Fund to the General Fund (Note 2)	(14,662)	14,662		
	31,527	20,429	**51,956**	94,989
Excess of revenues (expenses)	41,349	(4,491)	**36,858**	(10,891)
Equity, beginning of period	3,634	75,000	**78,634**	89,525
Equity, end of period	44,983	70,509	**115,492**	78,634

(See accompanying notes)

UNIFORM LAW CONFERENCE OF CANADA

NOTES TO FINANCIAL STATEMENTS
March 31, 1991

1. *ACCOUNTING POLICIES*

The Research Fund includes the receipts and disbursements for specific projects. The General Fund includes the receipts and disbursements for all other activities of the organization.

2. *REIMBURSEMENT OF COSTS BY THE RESEARCH FUND TO THE GENERAL FUND*

During the period, the Government of Canada, which funds the activities of the Research fund, changed its policy on the costs it would reimburse. As such, certain costs incurred by the General Fund in the prior fiscal year have been reimbursed by the Research Fund in the current period.

3. *STATEMENT OF CASH FLOWS*

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

4. *TAX STATUS*

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

5. *COMPARATIVE FIGURES*

During the period, the organization changed its year end from June 30 to March 31. As a result, the current year's figures represent nine months of operations and the comparative figures represent twelve months operations.

APPENDIX C

(See page ??)

ESTIMATED 1991-92 BUDGET

REVENUES

Annual Contributions	$44,000
Interest	3,000
Total Revenues	**$47,000**

EXPENSES

Printing	$23,000[1,2]
Executive Director honorarium	24,000
Annual Meeting	15,000
Secretarial Service	4,000
Executive Travel	9,000
Professional Fees	1,200
Postage	1,900
Supplies	1,700
Telephone	1,500
Total Expenses	**$80,300**
Surplus / (Deficit)	**(33,300)**
Equity, beginning period	$45,883
Net	**$12,583**

1 Costs for printing 1990 proceeding only
2 Based on assumption the Research Fund will not re-imburse

APPENDIX D

(See page 32)

AN ACT TO AMEND THE UNIFORM CHILD STATUS ACT

1. The *Uniform Child Status Act* is amended in the manner set forth in this Act.

Section 1 amended

2. Section 1(3) is amended by striking out "11" and substituting "11 to 11.6".

Section 2 amended

3. Section 2 is amended by striking out "11" wherever it occurs
   (a) in subsection (1),
   (b) in subsection (3), and
   (c) in subsection (4),
   and in each case substituting "11 to 11.6".

Section 3 amended

4. Section 3 is amended by striking out "11" and substituting "11 to 11.6".

New sections 11 to 11.6

5. Section 11 is repealed and the following substituted:

Interpretation, "Assisted conception"

"11. In sections 11.1 to 11.6, "assisted conception" means a conception resulting
   (a) by means other than sexual intercourse, or
   (b) by removal and implantation of an embryo after sexual intercourse

Limitation on procedure

11.1. No person other than a duly qualified medical practitioner shall carry out a procedure on a woman that results in or is intended to result in an assisted conception.

Rebuttal of presumption

11.2. Notwithstanding section 6(3), for a child born before or after this section comes into force as a result of an assisted conception, a presumption of paternity pursuant to section 9 may be rebutted only by proof that
   (a) the presumed father
      (i) is not the genetic father of the child, and
      (ii) did not consent, or before conception withdrew his consent, to be the father

of any child born as a result of the assisted conception; or

(b) where the sperm of the presumed father was used in the assisted conception,

(i) he did not consent, or before conception withdrew his consent, to be the father of any child born as a result of the assisted conception, and

(ii) the child was not conceived as a result of sexual intercourse between the mother and him.

Maternity

11.3 A woman who gives birth to a child before or after the coming into force of this section is deemed to be the mother of the child whether the woman is or is not the genetic mother of the child.

Non-parental status

11.4 (1) A woman whose egg is used in an assisted conception and who does not give birth to the child conceived using her egg is deemed not to be the mother of the child.

(2) A man whose sperm is used in an assisted conception and who is not presumed to be the father of a child pursuant to section 9 is deemed not to be the father of the child.

Prohibition re dealing in eggs, sperm or embryos

11.5 (1) No person shall, directly or indirectly, buy, sell or otherwise deal in human eggs, sperm or embryos.

(2) A person who contravenes this section is guilty of an offence and liable on summary conviction to a fine of not more than $100,000, to imprisonment for not more than one year or to both.

(3) This section does not prohibit a person from giving or receiving reimbursement for reasonable expense necessarily incurred in donating her own eggs or his own sperm.

Prescribed records

11.6 (1) Every duly qualified medical practitioner who carries out procedures that are intended to result

in an assisted conception shall maintain, in the form and manner prescribed in the regulations, records indicating the donor and recipient of every egg or sperm used in the assisted conception procedures.

(2) Every duly qualified medical practitioner who carries out procedures that are intended to result in assisted conceptions shall submit information within the knowledge of the practitioner with respect to

(a) assisted conceptions that result from procedures carried out by the practitioner,

(b) births resulting from assisted conceptions that result from procedures carried out by the practitioner, and

(c) procedures carried out by the practitioner that are intended to result in assisted conception, where the practitioner does not know whether conception was or was not achieved.

(3) Every duly qualified medical practitioner shall submit information within the knowledge of the practitioner with respect to births of children delivered by the practitioner that result from assisted conceptions.

(4) The information mentioned in subsection (2) or (3) is to be submitted to the agency designated in the regulations in the form and manner and at the times prescribed in the regulations.

(5) The agency that receives information pursuant to subsection (4)

(a) shall maintain a permanent registry of the information, and

(b) shall not disclose or communicate the information except in accordance with the terms and conditions prescribed in the regulations.

(6) The Lieutenant Governor in Council [or other regulation making authority in the jurisdiction] may make regulations prescribing any matter or thing that is required or authorized by this section to be prescribed in the regulations.

APPENDIX E

(See page 27)

CIVIL CONTEMPT – THE FAILURE TO COMPLY WITH COURT ORDERS

The Proposed Statute Annotated

by Professor G. L. Bladon
University of New Brunswick
May 1991

CIVIL CONTEMPT – THE FAILURE TO COMPLY WITH COURT ORDERS

1. Introduction

The law of contempt is confusing and complex. Its two fundamental components – civil contempt and criminal contempt – overlap in their practical application. The contempt power has a number of sources – common law, criminal code, rules of practice and specific statutory provisions. The common law contempt power is theoretically unlimited. The purpose of the proposed legislation is to simplify that area of contempt which addresses non-compliance or 'mere' disobedience of non-monetary court orders.

2. Interpretation and Application

> *1. In this act, "compliance order" means an order made by the court in proceedings instituted under section 4;*
>
> *"order" means an order, judgment, decree or other determination made by any court in a civil proceeding, and includes an order, judgment, decree or other determination of a non-judicial body that by law may be [filed, entered and recorded in the (appropriate court in the enacting judisdiction) and enforced as a judgment of that court], if the order, judgment, decree or other determination has been [filed, entered and recorded];*
>
> *"party" means a party to a civil proceeding in which an order is made.*
>
> *2. This Act applies to an order that requires a party to do, or to refrain from doing, a particular act.*

Note: (i) Civil contempt is the 'mere' disobedience of a court order which occurs out of court. It is not flagrant disobedience, i.e. wilful defiance which lowers the repute of the administration of justice. This conduct is criminal contempt and subject to prosecution

under section 127(1)(4)[1] of the Criminal Code.[2] The focus of the suggested legislation is the enforcement of private rights resulting from the litigaton process. It leaves to the criminal law true contempt of court, i.e. conduct which threatens the integrity of the administration of justice.

Much of the confusion surrounding civil as opposed to criminal, contempt stems from the use of terminology traditionally associated with criminal proceedings. No distinction in syntax is made when the issue is a failure to comply with a court order made for the benefit of a litigant in a civil context. With the exception of section 3, the expression 'contempt' is not found in the Act. 'Non-compliance with court orders' is the better description of the behaviour with which the statute is concerned.

(ii) The comparable Australian legislation addresses the witness who refuses to be sworn in a civil proceeding. This type of conduct occurs in court and constitutes a public defiance of the court's authority. Accordingly, it is properly classified as criminal contempt – governed, for example, by section 545[3] of the Criminal Code, or through the exercise of the court's inherent criminal contempt power.

---

1 127 (1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

2 The difference is illustrated by comparing the conduct in *Poje* with the conduct in *Canada Metal* – see *Civil Contempt: Preliminary Issues paper* (CCPIP) – Bladon – p. 4,9.

3 545.(1) Where a person, being present at a preliminary inquiry and being required by the justice to give evidence,

(a) refuses to be sworn,
(b) having been sworn, refuses to answer the questions that are put to him,
(c) fails to produce any writings that he is required to produce, or
(d) refuses to sign his deposition,

without offering a reasonable excuse for his failure or refusal, the justice may adjourn the inquiry and may, by warrant in Form 20, commit the person to prison for a period not exceeding eight clear days or for the period during which the inquiry is adjourned, whichever is the lesser period.

(2) Where a person to whom subsection (2) applies is brought before the justice upon the resumption of the adjourned inquiry and again refuses to do what is required of him, the justice may again adjourn the inquiry for a period not exceeding eight clear days and commit him to prison for the period of adjournment or any part thereof, and may adjourn the inquiry and commit the person to prison from time to time until the person consents to do what is required of him.

(iii) The order in issue is a Court Order. It is not an Order made by an administrative tribunal - the disobedience or breach of which is better addressed by the statute establishing the tribunal.[4] However, enforcement of administrative tribunal decisions does create difficulty in the sense that most provincial legislation allows for the filing or registering of the tribunal's disposition with the Superior Court of the Province to be enforced as an order of that court. For example, most provincial legislation contains provisions similar to s.142 of the Alberta *Labour Relations Act:*

> 142. (5) When the Board is satisfied after an inquiry that an employer, employers' organization, employee, trade union or any other person has failed to comply with any provision of this Act ... the Board may issue a directive to rectify the act in respect of which the complaint is made ...
>
> (7) If any directive made by the Board pursuant to subsection (5) or (6) is not complied with, the Board may, ... file a copy of the directive with the clerk of the Court in the judicial district in which the complaint arose and thereupon the directive is enforceable as a judgment or order of the Court.

Such a provision was recently reviewed by the Alberta Court of Appeal in *General Hospital (Gray Nuns) of Edmonton v. U.N.A., Local 79,* [1990] A.J. No. 165 and found constitutionally valid. Stevenson J.A. (as he then was) said:

> "If the failure to obey a directive of the board is contempt, is the board given the trappings of a Superior Court - something the province cannot do because of the exclusive authority over the employment of Superior Court judges given the Federal government under s.96 of the *Constitution Act,* 1867?

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4 For eg. see the Alberta *Labour Relations Act:* S. 156 Subject to ss.154 or 155 [penalties for prohibited lockouts, strikes] any person, employee, employer, employer's organization or trade union who contravenes or fails to comply with any provision of this Act or of any decision, order, directive, declaration or ruling by the board under this Act, is guilty of an offence and liable
(a) in the case of a corporation, employer's organization or trade union, to a fine not exceeding $10,000; or
(b) in the case of an individual, to a fine not exceeding $5,000.

> This very interesting question was addressed by the British Columbia Court of Appeal in *Citation Industries Ltd. v. United Brotherhood of Carpenters and Jointers of America,* Local 1928, 1988, 53 D.L.R. (4d) 360. I agree with the conclusion that giving the court authority to address a directive of another tribunal does not invest that other tribunal with powers exceeding those permitted by the *Constitution Act*. The tribunal was not, itself, given the power to find and impose sanctions on contemners."

The proposed legislation provides an enforcement alternative by defining court orders sufficiently broadly to include those orders of administrative tribunals filed with the Superior Court.

Reference: (a) Contempt: Report No. 35; The Law Reform Commission (Australia) paragraph 494 page 292;

(a) (b) CCPIP; p. 13.

3. Abolition of the Common Law Civil Contempt Power

> *3. The common law of contempt of court, including the procedure at common law for dealing with such contempt, is abolished in respect of a party's failure or refusal to comply with an order.*

Note: (i) The jurisdiction of a "Superior Court of Record" is unlimited, unrestricted and unsupervised except on appeal and thereby includes the exercise of an inherent jurisdiction, i.e. a jurisdiction necessary to enable the court to maintain its authority and prevent its process from obstruction and abuse. In a more specific sense it must be able to compel observance of its orders – otherwise the litigation process becomes meaningless. The purpose of the civil contempt power is enforcement of private rights between subjects. The "insult" to the court flowing from the disobedience is secondary to the resolution of the dispute between litigants.

There is something to be said for particularity of consequence in the event of non-compliance from the standpoint of both parties. As has been observed:

> "The inherent jurisdiction of the court may be invested in an apparently inexhaustible variety of circumstances and may be exercised in different ways. This peculiar concept is indeed so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits."[5]

By abolishing the inherent common law civil contempt power and replacing it with a statutory scheme which delineates the extent of the power, the court is in no way a lesser creature. It still has the essential power to compel compliance with its orders – the difference being that the power is no longer "amorphous, ubiquitous or pervasive".

(ii) The constitutional issue in the Canadian context is the validity of provincial legislation limiting the inherent jurisdiction of federally appointed judges. That inherent jurisdiction, it is argued, is necessary and incidental to the functioning of a court:

> "[The inherent power] is intrinsic in a Superior Court; it is its very life blood, its very essence, its immanent attribute. The jurisdiction which is inherent in a Superior Court of Law is that which enables it to fulfil itself as a Court of Law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner."[6]

With respect to the issue of *criminal* contempt, MacEachern C.J. commented:

> "I doubt if [even] the legislature has the capacity to deprive a Superior Court of its jurisdiction to protect itself and the public against *criminal contempt*. I also question whether such an unthinkable purpose could be accomplished without a constitutional amendment. As long as there are Superior

5 Jacobs 1970, 23 Current Legal Problems, p. 23.

6 Jacobs 1970, 23 Current Legal Problems, pp. 23, 27-28.

> Court Judges, then, it seems arguable that they must, by definition, have and continue to enjoy the inherent power to protect their authority against *criminal* contempt [emphasis added].'"[7]

However, civil contempt does not directly address a public affront to the court's authority but rather the court is attempting to fulfil its role as final arbitrator of disputes. To take away its inherent power to punish for civil contempt and replace it with a legislated scheme to better and more clearly achieve the same result in no way saps the court of its 'life blood' or threatens its constitutional status.

While the federal government appoints Superior Court Judges in Canada, it is the province in discharging its responsibility under s.92 of the *BNA Act* which clothes the court with jurisdiction. For example, s.9(1) of the Ontario Courts of Justice Act, 1984 establishes the Ontario Court (General Division) as the Superior Court of Record and s.10(2) provides the General Division with "all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario."

In New Brunswick s.9(1) of the *Judicature Act* reads:

> "Notwithstanding anything in the provisions of this or any other Act or the Rules of the Court, the Trial Division [of the Court of Queens Bench] shall have and exercise general and original jurisdiction in all causes and matters including jurisdiction in the following matters, namely:
>
> (a) all causes and matters, civil and criminal, are within the exclusive cognizance of the Supreme Court in the exercise of its original common law jurisdiction, before the commencement of the *Judicature Act,* 1909;
>
> (b) all causes and matters prior to July 1st, 1966 were assigned to or cognizable by the Chancery Division;

---

7 [1984] 1 W.W.R. 399, 415 (B.C S C.).

> (c) all causes and matters prior to September 4, 1979 were within the jurisdiction of the County Court of New Brunswick; and
>
> (d) all causes and matters prior to September 4, 1979 were within the jurisdiction of the Court of Queens Bench Division of the Supreme Court."

If the Provincial Legislature can create the court's jurisdiction, then so long as it does so in clear and unequivocal terms, it can restrict that jurisdiction. The point is made in *Re Michie Estate in the City of Toronto et al.*[8] where Stark J., in addressing the exercise of a right of appeal in the context of the court's inherent jurisdiction, says at p. 215:

> "It appears that the Supreme Court of Ontario has broad universal jurisdiction of all matters of substantive law unless the legislature divests from this universal jurisdiction by legislation in unequivocal terms. The rule of law relating to the jurisdiction of Superior Courts was laid down at least as early as 1667 in the case of *Peacock v. Bell & Kendall* (1667), 1 Wms. Saund. 73 at p. 74, 84 E.R. 84: ... And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged."

(iii) Strangers – Aiders & Abettors: The proposed Australian legislation abolishing the inherent civil contempt power provides sanction against aiders and abettors of the parties engaged in disobedience. Where the stranger to the proceeding is acting with knowledge of the order and of the fact that the conduct constitutes disobedience, then such behaviour is properly the subject of a prosecution for criminal contempt for it is certainly a deliberate attempt to flout the court's authority.

---

8 (1967), 66 D L.R. (2d) 213.

4. Application for Compliance Order

4.(1) A proceeding for the determination of a party's failure or refusal to comply with an order shall be instituted by a party for whose benefit the order was made.

(2) A proceeding described in subsection (1) shall be instituted by a notice of motion.

(3) A motion shall be supported by an affidavit setting out

(a) the name, address and description of the applicant;

(b) the name, address and description of the person against whom a compliance order is sought; and

(c) the facts supporting the grounds on which the compliance order is sought.

(4) A motion shall be supported by affidavit evidence of persons having personal knowledge of the facts in support of the motion.

(5) A motion and supporting affidavits shall be served personally on the party against whom a compliance order is sought unless the court orders otherwise.

(6) A respondent is entitled to provide evidence by affidavit and to offer evidence otherwise at the hearing.

(7) Except as otherwise provided in this Act [the statutes and rules of court of the enacting jurisdiction] in relation to interlocutory motions apply to motions under this section.

(8) An applicant may discontinue a motion at any time prior to the court's determination in relation to it.

(9) A motion under this section shall not be heard by the judge who made the order in relation to which a compliance order is sought.

Note: (i) The Draconian procedure of classic contempt citations must be replaced with a procedure expressly providing the protections for the respondent which have evolved both at common law and under the Charter. Furthermore, the proper applicant can only be the person for whose benefit the Order was made for it is that individual's private rights which the disobedience frustrates. It is true that the non-compliance strikes at the integrity of the judicial process and is thereby a matter of public concern; however the thrust of the remedy is directed at the enforcement of private rights in the civil context. To be consistent with the private rights concept, the applicant must have the right to discontinue the application despite the respondent's continuing disobedience.

Reference: (a) CCPIP; p. 18, 30 & 32 et seq.

5. Compliance Orders

5.(1) An order imposing a sanction shall particularize the disobedience found and the purpose for which the sanction is imposed.

(2) Unless the court orders otherwise, a copy of a compliance order and any order suspending it shall be served forthwith by the applicant on the respondent and any person affected by it.

Reference: (a) CCPIP; p. 14-16.

6. Imposition of Sanctions

6.(1) Subject to this Act, where, on a motion under section 4, the court determines that the respondent has failed or refused to comply with an order, the court may impose a sanction on the respondent either to secure compliance with the order or to punish for the failure or refusal, or both.

(2) The court shall not impose a sanction under subsection (1),

(a) unless it is satisfied beyond a reasonable doubt that the respondent had knowledge of the order and failed or refused to comply with it; or

(b) if it is satisfied on a balance of probabilities that (i) the respondent acted with reasonable care and due diligence in attempting to comply with the order, or (ii) the respondent was not reasonably capable of complying with the order.

(3) The court shall not impose a sanction to secure compliance with an order,

(a) unless it is satisfied beyond a reasonable doubt that other methods used to secure compliance have been ineffective and that any other method available to the applicant for securing compliance is likely to be ineffective; and

(b) if it is satisfied on a balance of probabilities that the imposition of a particular sanction will be ineffective to secure compliance with the order.

(4) The court shall not impose a sanction to punish the respondent if it is satisfied on a balance of probabilities that the failure or refusal to comply with the order was attributable to an honest and reasonable failure by the respondent to understand at the relevant time the obligation imposed by the order.

7.(1) Where the respondent to a motion under section 4 is a body corporate, the court may impose a sanction on a person who is a director or officer of the respondent either to secure compliance by the respondent with the order or to punish the person, or both.

(2) The court shall not impose a sanction under subsection (1) unless it is satisfied beyond a reasonable doubt that the order has not been complied with, the person is a director or officer of the respondent and the person knowingly prevented compliance with the order or directed, authorized or assented to the respondent's failure to comply with the order.

8.(1) When imposing a sanction to secure compliance with an order the court may suspend its application on such terms as it considers just.

(2) Where a sanction has been imposed to secure compliance with an order the court, on application by the respondent, may suspend or revoke the sanction if it is satisfied that the respondent is willing to comply with the order, or that there is other just cause for doing so.

Note: (i) Re s.6(2),(4): The severity of sanctions available to the court and cases interpreting the impact of the Charter on civil contempt prosecutions require that the criminal standard of proof be met. The onus is upon the applicant to establish knowledge of the Order and the non-compliance as a matter of fact. The intent of the respondent would then be inferred in the first instance subject to a shift in the onus to the respondent to prove - on a balance of probabilities, that the conduct should be excused. Such a provision would not offend the Presumption of Innocence provision of the *Charter - see R. v. LeClerc* (1982), 1 C.C.C. (3d) 422 (Que. S.C.) and *R. v. Shelby* (1981), 59 C.C.C. (2d) 292 (S.C.C).

Reference: (a) CCPIP; p.16

(ii) Re s.6(3) - Recourse to a remedy under this legislation is, like a contempt order, a remedy of last resort. All other means of enforcement must be exhausted or shown to be ineffective before a compliance order will be made.

Reference: (a) *Danchevsky v. Danchevsky* [1974] 3 ALL E.R. 934 (C.A.)

(b) CCPIP; p. 13

(iii) Re s.8 - The hearing must address the purpose of the contempt sanction which results - to coerce compliance or to punish or both. In the event of a coercive sanction, the legislation must provide for a termination of the sanction where the respondent becomes willing to comply or compliane becomes impossible.

7. Types of Sanctions

9.(1) For the purpose of punishment, the court may impose a term of imprisonment not exceeding six months or a fine not exceeding $50,000, or both.

(2) For the purpose of securing compliance with an order, the court may impose one or more of the following sanctions:

(a) imprisonment for a fixed term, or for a term expressed to last until the order is complied with, not exceeding six months;

(b) a fine in a fixed amount, or in an amount expressed to accrue on a daily basis until the order is complied with, not exceeding $50,000 in total;

(c) an order for sequestration of assets of the respondent expressed to last until the order is complied with;

(d) an order that the respondent provide the court with security to secure compliance with the order; and

(e) an order that the act which the respondent fails or refuses to do be done at the respondent's expense by the applicant or by any other person appointed by the court.

(3) In addition to the sanctions described in subsections (1) and (2), the court may, for the purpose of punishment or to secure compliance with an order,

(a) order the respondent to pay compensation for the loss, injury or damage suffered by the applicant as a result of the respondent's failure or refusal to comply with the order, and

(b) make such order as to costs as it considers just.

10. In determining whether a sanction should be imposed for the purpose of punishment and, if so, the extent of the sanction, the court shall consider, among other things, evidence as to the nature and extent of any physical, mental or emotional damage sustained by any person as a result of the respondent's failure or refusal to comply with the order.

Note: (i) The court should have a broad range of identified sanctions. However punitive and coercive sanctions, being different in terms of the conduct addressed, should be distinguished in the legislation. Punitive sanctions should be limited. Coercive sanctions should be subject to early termination in the event of compliance or a change in circumstances.

Reference: (a) CCPIP pp. 39-42.

8. Referral to Attorney General

11.(1) Where, in a proceeding under section 4, it appears to the court that the respondent has failed or refused to comply with an order in a manner constituting a public depreciation of the authority of the court tending to bring the administration of justice into disrepute, it may refer that matter to the Attorney General for investigation.

(2) A referral under subsection (1) does not prevent the court from continuing the civil proceeding and imposing a sanction for the purpose of securing compliance with an order.

(3) The court shall not impose a punitive sanction for failure or refusal to comply with an order if a referral under subsection (1) is outstanding, or if the person has been prosecuted in respect of that failure or refusal.

Note: (i) When the disobedient conduct takes on the character "of public depreciation of authority of the court tending to bring the administration of justice into scorn" which comes to light in the context of a civil contempt motion, (eg: public defiance of a labour injunction) then the court, of its own motion, should have the power to adjourn or stay the civil proceeding and refer the potential "criminal contempt" to the Attorney General for investigation; and, where appropriate, prosecution under s.127 of the *Criminal Code*. This will avoid the court acting of its own motion in the prosecution of a contempt allegation as occurred for example in *Poje* and the attendant and obvious difficulty of the court being prosecutor, judge and jury.

In the event a criminal prosecution is undertaken by the Attorney General, then the Civil Court should be prevented from

imposing a punitive sanction on the basis of double jeopardy. It should not however be estopped from imposing a coercive sanction where the disobedience continues.

Reference: (a) CCPIP; p. 32.

9. Absence of Respondent

12. When a person against whom a compliance order has been issued cannot be found the court may, on motion without notice, issue a compliance order against the assets of the person which may be executed in the absence of the person.

Note: (i) This section simply further reflects the civil nature of the compliance order in that it affords the beneficiary of the original order of remedy against an absent respondent.

10. Appeal

13. A person on whom a sanction is imposed under this Act may appeal to [the appropriate court in the enacting jurisdiction in accordance with the rules of court or procedures governing criminal appeals].

Note: (i) The potential severity of the sanctions and the criminal standard of proof make the criminal appeal route preferable.

11. Continuation of Proceeding

14. A court may allow a proceeding before it to continue notwithstanding that a party to the proceeding has failed or refused to comply with an order of the court.

Note: (i) The abolition of common law procedure will do away with the notion that a person in contempt can take no further step in the action until the contempt is purged. This area should be covered off affording the court a clear discretion to permit a disobedient respondent to continue.

APPENDIX F

(SEE PAGE 32)

ISSUE PAPER

ON COST OF CREDIT DISCLOSURE

Prepared for the

UNIFORM LAW CONFERENCE OF CANADA

by

Richard H. Bowes

of

THE ALBERTA LAW REFORM INSTITUTE

August 1991

PREFACE

At the 1990 annual meeting of the Uniform Law Conference, the Alberta Commissioners submitted a report entitled "Disclosure of Cost of Consumer Credit" ["1990 Report"]. After consideration of the 1990 Report, the conference adopted a resolution that, subject to a caveat appearing on page 2 of the report:

1. the Uniform Law Section undertake the preparation and adoption of uniform statutory provisions regarding the disclosure of the cost of credit in consumer credit transactions,

2. the uniform statutory provisions be compatible with different (ie. non-uniform) legislative approaches to related issues in the consumer credit field,

3. the uniform statutory provisions be suitable for incorporation into relevant federal and provincial legislation,

4. the Uniform Law Section direct one or more jurisdictions to prepare for consideration at the Section's 1991 annual meeting a report setting out the policy issues to be addressed by the Section before the uniform statutory provision can be prepared, and

5. the uniform statutory provisions be prepared by the Drafting Section in accordance with the policy decisions of the Uniform Law Section made at its 1991 annual meeting.

The task of preparing the report contemplated by Item 4 of the resolution was tentatively assigned to the Alberta Commissioners.

The caveat mentioned in the resolution referred to an anticipated meeting of the Federal-Provincial-Territorial Conference of Ministers of Consumer and Corporate Affairs ["Conference of Ministers"] in September, 1990. A working group on cost of credit disclosure ["Working Group"] was operating under the auspices of the Conference of Ministers. The 1990 Report indicated that the Uniform Law Conference should be sure that any project it might undertake would not be redundant to the activities of the Working Group. On the other hand, there might be scope for co-operation and division of labour

between the two bodies. The 1990 Report suggested that any decision to undertake a project should be "conditional on the proposed project not being redundant to the activities of the Working Group, as determined at the September meeting of the Conference of Ministers".

September came and went, and there was no meeting of the Conference of Ministers. The meeting was rescheduled for later in 1990, and was then rescheduled for early in 1991, but has not been held. When it became apparent that the anticipated meeting of the Conference of Ministers was not going to be held any time soon, the Alberta Commissioners decided to proceed. However, partly in view of the unusual circumstances regarding the non-meeting of the Conference of Ministers, and partly because of the complexity of the subject matter, it was decided to present an issues paper rather than a formal report of the Alberta Commissioners.

The issues paper raises and discusses a number of issues that arise in connection with cost of credit disclosure legislation. Recommendations are made concerning these issues. As befits a document of this type, most of the recommendations are tentative, and are couched in phrases such as "Consideration should be given to . . .". It is not suggested that the Uniform Law Section take a firm decision on any of the issues. It is suggested that the Section consider the recommendations and decide whether they would serve as suitable "working hypotheses" for the next stage of the project, which would be the preparation of detailed proposals for uniform cost of credit disclosure legislation.

TABLE OF CONTENTS

READING GUIDE

This paper is divided into three parts. Part 1 briefly describes the scope of the paper and provides some general background information. Part 2 examines the goals of and the assumptions underlying cost of credit disclosure legislation, and describes the inherent limitations of such legislation. Part 3 describes some of the major weaknesses in Canadian cost of credit disclosure legislation, and makes tentative recommendations for improvement.

APPENDIX F

ABBREVIATIONS

REFERENCE	STANDS FOR
	General
ADB	average daily balance
APR	annual percentage rate
CCDL	cost of credit disclosure legislation [a generic reference to such legislation]
MPB	modified previous balance
RLCF	rebate or low cost financing
	Acts and subordinate legislation
Bank Act	*Bank Act,* R.S.C. 1985, c. B-1
CBDR	Cost of Borrowing Disclosure Regulations, SOR/83-103.
CCA	*Consumer Credit Act 1974,* 1974, c. 39 (U.K.)
CCDA	*Cost of Credit Disclosure Act,* R.S.N.B. 1973, c. C-28. *Cost of Credit Disclosure Act,* R.S.S. 1980. c. C-41.
CCTA	*Consumer Credit Transactions Act,* R.S.A., c. C-22.5.
CPA	*Consumer Protection Act,* R.S.B.C. 1979, c. 65. *The Consumer Protection Act,* R.S.M. 1987, c. C200. *Consumer Protection Act,* R.S.N.S. 1987, c. C-92. *Consumer Protection Act,* R.S.O. 1980, c. 87. *Consumer Protection Act,* R.S.P.E.I. 1988, c. C-19. *Consumer Protection Act,* S.Q. 1978, c. 9.
Interest Act	*Interest Act,* R.S.C. 1985, c. I-15
NCPA	*Newfoundland Consumer Protection Act,* R.S.N. 1970, c. 256
TILAT	*Truth in Lending Act* 15 U.S.C. 1601 et seq.

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ROHNER	R. Rohner, "Truth in Lending "Simplified": Simplified?" (1981), 56 NYU Law Review 999
SENATE, H.C. JOINT COMMITTEE	*Report on Consumer Credit of the Special Joint Committee of the Senate and the House of Commons on Consumer Credit and Cost of Living* (Ottawa: Queen's Printer, 1967) (Chairs: D. Croll, R. Basford)
WHITFORD	W. Whitford, "The Functions of Disclosure Regulation in Consumer Transactions", 1973 University of Wisconsin Law Review 400

GLOSSARY

Some of the terms defined below are common terms (e.g. "lender"). They are included here because they are given a meaning that is either broader or narrower than the meaning that they might be given in other contexts.

TERM	DEFINITION
advance	Includes any transaction in which a lender provides a sum of money to a borrower, provides goods or services to a borrower, or assumes an obligation to a third person from whom the borrower obtains goods or services, in each case on the basis that the borrower will repay the amount advanced, with or without credit charges.
annual percentage rate	Cost of borrowing expressed as the percentage charge for the use of a certain sum of money for one year.
borrower	Someone who obtains any form of credit. Not limited to someone who obtains a cash loan.
closed credit	A type of credit arrangement in which a specific sum is advanced to a borrower for a specific term, to be repaid in accordance with a predetermined schedule of payments. Other names: "closed-ended credit"; "fixed credit".
consumer credit	Unless otherwise indicated, includes mortgage credit. In some writing, mortgage credit is distinguished from consumer credit.
credit card	Includes any card that can be used to obtain goods or services or cash advances, whether it is a two-party card or a three-party card, and whether or not the card user is permitted to carry balances from one billing period to the next or is required to pay the amount outstanding in full at the end of each billing period.

TERM	DEFINITION
lender	Someone who extends credit, whether in the form of a cash loan or not. Includes a merchant who supplies goods on credit.
loan	Any extension of credit, including the supply of goods or services on credit.
mortgage	A loan obtained on the security of a security interest in land or immoveables.
open credit	A type of credit arrangement between a lender and a borrower in which the latter may obtain advances at any time and for any amount, so long as the "credit limit" is not exceeded. There is no fixed schedule of payments, and the arrangement may go on indefinitely. Other names: "variable credit"; "revolving credit"; "open-ended credit".
supplier credit	A form of credit in which someone provides goods or services to a customer without receiving payment in full, and where the customer agrees to pay the balance at some time in the future.
supplier-connected credit	A form of credit in which credit for the purchase of goods or services (usually goods) is provided by an entity that is connected with the person who supplies the goods or services (e.g. where consumer buys car from dealer and obtains credit from financial subsidiary of car manufacturer).
term	Except where otherwise indicated, term and amortization period of loans are assumed to be equivalent.

PART 1

OVERVIEW

A. Scope of paper

This paper is concerned with cost of credit disclosure. It is not concerned with substantive limitations on the provisions of credit contracts, except to the extent that the issues of cost of credit disclosure and substantive limitations on credit terms are so closely connected that the disclosure issues cannot be discussed without reference to the substantive issue. There are two areas where this close connection exists:

1. in calculating credit charges for the purposes of disclosure and for the purpose of determining the amount outstanding on a loan that a consumer wishes to prepay;

2. in prescribing cost of credit disclosure requirements for credit cards, where it may be necessary to impose a uniform method of calculating interest bearing balances if the disclosures are to be of any use to consumers.

Except for these two areas, the paper steers a wide berth around issues of substantive regulation of consumer credit transactions. The subject is narrower even than disclosure of credit terms. It is concerned only with disclosure of a certain type of information about prospective or actual credit transactions: the monetary cost of such transactions. It does not consider, for example, requirements for standardized disclosures of lenders' remedies on default[1].

That we do not deal here with consumer credit issues other than cost of credit disclosure should in no sense be taken as an indication that they are regarded as being unimportant, or that cost of credit disclosure legislation ("CCDL") is regarded as a panacea for all problems of consumer credit. It clearly is no such thing. Keeping with this point for a moment, it might be useful to briefly enumerate some problems (or potential problems) associated with consumer credit that consumer credit legislation definitely will not solve.

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1 Part of the reason for this bashfulness about going beyond cost of credit disclosure is to keep the enquiry within reasonable bounds. Another reason is that it would be difficult to say very much about disclosure of lenders' remedies on default without getting into the substance of different provinces' creditors' remedies laws.

APPENDIX F

Some Problems CCDL will NOT Solve

Excessive credit use: societal level. It is sometimes suggested that consumers as a whole (not to mention government and business) are inclined to obtain more credit than is good for the economy, and that consumers might be persuaded to moderate their demand for credit if they were made more aware of its true cost. Wrong. Suppose that consumers as a whole are using too much credit at some point in time. The evidence is that lack of knowledge about the cost of credit is not the cause of this overindulgence[2].

Excessive credit use: personal level. Perhaps legislated disclosure of the cost of credit will help consumers avoid getting into debt over their heads. Perhaps, but probably not. Mortgage credit aside, the basic problem of most consumers who get overextended is not that the cost of credit is too high, but that they have too much credit.

Consumers who cannot take advantage of disclosure. There are many consumers who cannot take advantage of cost of credit disclosure. In the first place, disclosure of the cost of credit is of no great utility to someone who has no choice as to whether to use credit and no real choice as to where to get credit. It will be of little use or comfort to someone in a high risk class to know that low cost credit is offered to low risk customers by low risk lenders. Secondly, some consumers—because of lack of education, a language barrier, inexperience—will be unable to understand even the plainest disclosure statements regulators can devise.

Inappropriate contract provisions. It is well known that most consumer credit contracts are adhesion contracts: they are offered to consumers on a "take it or leave it" basis. Generally, it is left up to consumers to decide whether to enter into such contracts. However, it may be thought that certain terms or legal doctrines are so onerous that, even if plainly disclosed and "accepted" by consumers, they will not be allowed to stand. Such terms or doctrines could include "cut-off"

2 See e g, NCCF REPORT at 183-84. The reality is that, except for very large loans (usually, home mortgages), fairly large increases in interest rates have little observable impact on most consumers' household budgets.

clauses in favour of assignees, the doctrine of negotiability as applied to consumer notes, waiver of exemptions, and so forth.

The foregoing are by no means all of the problems associated with consumer credit that CCDL is incapable of resolving. In Part 2, we explore further some of the limitations of CCDL.

B. Some observations about the consumer credit market

Readers of this paper will be familiar with the general structure of the Canadian consumer credit market, the uses of consumer credit, and the sources and legal forms of such credit. The purpose of this section is simply to mention a few facts and figures that will provide a context for the discussion that follows in Parts 2 and 3.

1. Overall level of consumer and residential mortgage credit

According to data compiled by the Bank of Canada, as of September, 1990, the outstanding balances of major holders of consumer and residential mortgage credit were approximately:

Consumer credit:	$97.5 Billion
Mortgage credit:	$229.7 Billion[3]

Of the total of $97.5 billion in outstanding consumer credit, the approximate percentages held by different types of institutions were as follows:

Chartered banks:	66%
Sales finance and consumer loan companies:	8%
Life insurance companies:	3%
Department stores:	3%

3 Bank of Canada Review, May, 1991, Table E2 "Consumer credit: Outstanding balances of selected holders", Table E3 "Residential Mortgage credit: Outstanding balances of major private institutional lenders". The actual totals would be somewhat higher than those given because, as the headings of the tables suggest, they do not include all lenders. For example, consumer credit held by retailers such as furniture and appliance stores and credit card accounts of oil companies are not included.

Trust and mortgage loan companies:	8%
Credit unions and caisses populaires	12%

If we assume that in September of 1990 there was about $100 billion in outstanding consumer credit and that the population of Canada was about 25 million, there was about $4000 in outstanding consumer credit per Canadian. Assuming an average annual interest rate on consumer credit of 15% (1.25% per month), we can guestimate that the average Canadian (man, woman or child) was paying about $50 per month in credit charges on consumer credit as of September, 1990.

2. Bank personal loan versus credit card lending

Some provinces' CCDL barely acknowledges the existence of credit cards. Yet, it is well known that the relative importance of credit cards in the consumer credit market increases every year. A glance at the ratio between chartered banks' outstanding balances on personal loans (fixed term instalment payment loans) and credit cards gives some idea in the shift towards the latter form of consumer credit. The relevant data for the end of 1981 and 1990 is set out below.[4] Balances shown are in millions of dollars.

Year	Personal Loan Balances	Credit Card Balalnces	Ratio: PLB : CCB
1981	18,090	3,549	5.10 :1
1990	31,864	10,608	3.00 : 1

It can be seen that the balances on the traditional form of consumer credit, the fixed term instalment loan, still exceed credit card balances by a wide margin. However, the gap has narrowed, and will likely continue to narrow in the years to come.

3. Interest rate dispersion between different lenders

In June of 1990, a student spent a couple of hours one morning phoning branches of various financial institutions in Edmonton,

4 Source: Bank of Canada Review, June, 1991, Table C8.

asking for information about the rates available on a $10,000 car loan that would be repaid over 3 years. The purpose of this informal survey was twofold. First, we wanted to get a rough idea of how easy it would be for a consumer searching for the best available credit terms to get rate information over the telephone. Second, we wanted to get some idea of how much of a spread there is in interest rates for a typical consumer loan transaction. Both of these bear on the possibility of cost-effective credit price search by consumers.

The student telephoned 20 branches representing 14 different financial institutions. With the exception of one chartered bank, she found that the institutions contacted were quite willing to disclose their rates over the phone. Among the traditional low-risk lenders (Province of Alberta Treasury Branch, chartered banks, trust companies and credit unions), the rates quoted varied from a low of 10.5% (a special rate for persons prepared to open a new account with the institution) to a high of 14%. The one finance company that offered this sort of financing indicated that its rate would be in the low to high 20s, depending on the applicant.

Insofar as our survey can be said to have had a "design", it was designed to approximate one method that cost conscious consumers might use to try to find the best rate on a loan. What it seems to indicate is that a consumer could get a fair amount of comparative rate information without going out of the house. Moreover, there seems to be a significant enough spread in interest rates to make telephone search cost-effective.[5] More details of the responses are provided in Appendix A.

C. A brief history of CCDL

Before the 1960s, legislatures that wanted to do something about the cost of consumer credit usually did so directly through limits on interest rates. American state legislators were particularly fond of direct rate regulation, but Canada had its own examples of this approach.[6] However, by the early 1960s, there was a widespread belief that

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5 But if we take the lowest and highest rates among the low-risk lenders—10.5% and 14%—the difference in monthly payments would not be overwhelming. Taking the information provided at face value, monthly payments on the 10.5% loan would be $325 02 and on the 14% loan would be $341.78.

6 The *Small Loans Act*, R.S C. 1970, c. S-11 as rep. S C 1980-81-82-83, c. 43 provided a graduated scale of rates for small consumer loans. S. 91(1) of the *Bank Act*, R S.C. (continued...)

direct rate control was not the best way to protect consumers from excessive credit costs.[7] There was a feeling that legislation should pay more attention to helping consumers make their own *informed* credit use decisions than to directly controlling the cost of credit.

In the United States, after many hearings and much controversy extending over several years, Congress enacted the TILA in 1968. It was substantially amended in 1980. More recently, the TILA has been amended to strengthen its disclosure provisions relating to home equity lines of credit and credit cards. In the U.K., a committee chaired by Lord Crowther presented a very thorough report on all aspects of consumer credit in 1971.[8] This led directly to the enactment in 1974 of the U.K. CCA, a very detailed statute accompanied by very detailed regulations. More recently, the European Community has enacted legislation that sets out standards for consumer credit disclosure that must be met by member states.[9] New Zealand and some (if not all) Australian states have also enacted CCDL.

In Canada, several major investigations of consumer credit issues were undertaken in the 1960s. Nova Scotia created a Royal Commission on the subject of cost of borrowing which reported in 1963.[10] This was followed by legislation requiring, among other things, the disclosure of the cost of credit both as a dollar charge and as a rate per annum.[11] This

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6 (...continued)
1952 limited banks to annual interest or discount of 6%. This limitation was removed (in stages) in the *Bank Act*, S.C. 1966-67, c. 87. S. 347 of the *Criminal Code* is now the only outright cap on interest rates: it makes in an offense to exact a rate of interest exceeding 60% per annum.

7 There is a large body of literature on the subject of interest rate controls and whether they do more good than harm In a nutshell the main argument against rate controls is that if the statutory rate is above the "natural" market rate, it is pointless. If it is below the natural market rate, it will deprive high risk consumers of credit, or force them to get credit from illegal loan sharks, or from retailers who can get around the usury law by burying the credit charge in the cash price of goods

8 CROWTHER COMMITTEE

9 Council Directive 87/102/EEC, as am. 90/88/EEC

10 N.S. ROYAL COMMISSION

11 *Consumer Protection Act, 1966*, S.N.S. 1966, c. 5, s. 16.

pattern was repeated in Ontario: a select committee report[12] was followed in due course by cost of credit disclosure legislation.[13] By the 1970s, all provinces had some form of CCDL in place.

On the federal side, a joint committee of the Senate and House of Commons submitted its report on consumer credit in February of 1967.[14] So far as actual legislation is concerned, two acts need to be mentioned. First, there is the *Interest Act*. Sections 4 and 6 of that act are essentially cost of credit disclosure legislation. They require statement of interest on an annual basis in certain circumstances. Second, the *Bank Act* and the CBDR impose disclosure requirements on banks with respect to consumer credit loans.

By the early 1980s, it was recognized that Canadian CCDL, although broadly similar in concept, varied in execution from one jurisdiction to the next. As a result, responsible ministers met and agreed informally to try to standardize their respective CCDL around a single model: the *Bank Act*'s CBDR. To date, however, only two provinces—Alberta and Prince Edward Island—have thoroughly revised their CCDL to bring it into line with the CBDR. Part of the reason for this hesitation might be a well-justified feeling that, as a model for uniform CCDL, the CBDR leaves something to be desired.

More recently, attention has been focussed on credit cards. Much of the attention has been on the allegedly excessive interest rates charged by card issuers, and there has been considerable discussion of interest rate caps. Of more direct relevance to this paper is the the dissatisfaction that has been expressed regarding the cost of credit information given to credit card holders. In 1987 the House of Commons Finance and Economic Affairs Committee looked into this matter (as well as the matter of interest rate levels) and issued a report with recommendations that are noted in Part 3.[15] Close on the heels of this report was a 1989 report of the House Committee on Consumer and Corporate Affairs and Government Operations.[16] At the intergovernmental level,

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12 ONTARIO SELECT COMMITTEE

13 *Consumer Protection Act, 1966,* S.O. 1966, c. 23

14 SENATE, H.C. JOINT COMMITTEE

15 H C FINANCE COMMITTEE.

16 H.C. CONSUMER AFFAIRS COMMITEE.

the Federal-Provincial-Territorial Conference of Ministers of Consumer and Corporate Affairs has established a working group on cost of credit disclosure. In 1988 the working group published a discussion paper on credit card interest.[17] Despite all this activity, Quebec is the only jurisdiction that has modified its CCDL to take of the concerns assressed by these bodies.[18]

17 F-P-T WORKING GROUP.

18 At least two private member's bills on this subject (credit card disclosure, as opposed to credit card rate caps) have been introduced in the House of Commons over the last couple of years. CONSUMER AFFAIRS COMMITTEE at 22-24 comments on a bill presented by Mr. Don Blenkarn, M.P. on May 8, 1989: Bill C-238. The latest of Mr. Blenkarn's bills on credit card interst calculations—Bill C-237—received first reading on June 18, 1991.

PART 2

COST OF CREDIT LEGISLATION: STATED GOALS, LIMITATIONS, AND REASONABLE EXPECTATIONS

Section A describes the potential benefits of CCDL, as articulated by its proponents. Section B discusses certain assumptions underlying the claims about CCDL's potential benefits. Section C discusses research that has been done to determine the actual effect of CCDL. Section D examines some of the factors that affect consumers' willingness and ability to use the information that CCDL requires lenders to give them. Section E states some tentative conclusions about the benefits we can reasonably expect to get from CCDL.

A. Stated goals of CCDL

1. Increasing consumers' knowledge of the cost of credit

An obvious goal of CCDL is to increase consumer knowledge of the cost of credit, or the cost of things bought on credit.[19] All the presumed benefits of CCDL flow from increased consumer knowledge of credit costs. Of particular importance is consumer knowledge of the annual percentage rate ("APR") and, to a lesser extent, the dollar finance charges. Increasing consumer knowledge about credit costs is actually a means to an end. It is assumed that consumers will put their increased knowledge to use in making credit purchasing decisions. This knowledge can be employed for two purposes: deciding whether to obtain credit, and deciding on a source of credit.

2. The decision to obtain credit

When CCDL was being pushed in the sixties, some proponents argued that consumers who were given better information about the true cost of credit might be less inclined to obtain credit than they were in the unregulated market. There are two means by which a consumer might avoid obtaining credit for a contemplated purchase. The first means is by not making, or at least deferring, a purchase. The second is to pay for a product with cash from savings instead of buying on credit.

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19 This section is based on the discussions of CCDL's goals in NCCF REPORT at 171-84; JORDAN & WARREN, passim; LANDERS & ROHNER at 711-21; WHITFORD at 403-07.

(a) Deferring purchase of desired consumer product

A consumer who is considering the purchase of a consumer product and who does not have sufficient liquid savings to pay cash must either go without the product, at least for the time being, or obtain credit. Often, the consumer may consider the immediate acquisition of the product a necessity, in which case the consumer's only real option is to get credit. In other cases, the consumer may desire the product, without considering its immediate acquisition a necessity. In this latter situation, the consumer has a real choice between getting the product on credit and not making, or deferring, the contemplated purchase.

Some proponents of CCDL argued that it would help consumers make informed decisions on whether to use credit to obtain products for which they could not presently afford to pay cash. It was argued that many consumers made discretionary credit purchases without being fully aware of the true cost of buying on credit. Indeed, there was evidence that consumers were generally unaware of, and significantly underestimated, the finance rates for consumer credit. If they could be made more aware of the true cost of credit, they might give more consideration to doing without non-essential products until they were in a position to pay for them with cash. This would make it less likely that consumers would overextend themselves by taking on too much costly debt.

(b) Whether to use liquid assets

Consumers sometimes use credit to obtain consumer products for which they could have paid cash out of liquid savings. There may be good reasons for doing so, even though the cost of credit is sure to exceed the return on non-speculative liquid investments open to consumers. Many consumers want to maintain a cash reserve in case of some financial emergency. Purchasing on credit allows them to retain this reserve and still obtain desired consumer products.

Proponents of CCDL did not question the logic of consumers who chose to purchase on credit products for which in theory they could pay cash. It was argued, however, that full and standardized disclosure of the cost of credit would give consumers a more realistic appreciation of the cost of using credit instead of paying cash. Support for this contention came from the studies indicating that consumers tended to seriously underestimate the finance rate on consumer credit. This

underestimation of finance rates would narrow the perceived gap between the cost of borrowing and the return on the sort of investments (e.g. savings accounts) in which consumers' cash reserves were likely to be held. If consumers had better information about the real cost of credit, they would be able to make a more informed choice between obtaining credit and paying cash.

3. Facilitating credit shopping

The most emphasized benefit of CCDL was its potential effect on consumers' "credit shopping" activities. What is credit shopping? The term appears often in the literature but does not have a precise meaning. For the purposes of this paper, consumers are credit shopping if they meet the following conditions.

(a) They have decided (at least tentatively) to purchase a consumer product.

(b) They expect to purchase the product "on credit", in that they do not plan to pay for the product in full out of their savings at the time they acquire it.

(c) They want to get as much value for their money as possible, and realize that the cost of credit affects how much value they will get for their money.

(d) They are aware that there are different possible sources of credit, and that the price of credit may vary from one source to the next.

(e) They are not already committed (psychologically or legally) to obtaining credit from a particular source.

These requirements for credit shopping are not very stringent. They do not posit a consumer who is meticulously searching for the cheapest possible source of credit.

In order to credit shop, consumers need a means of comparing the cost of credit from different potential credit sources. In the days before CCDL, this is where consumers were likely to run into trouble. The problem was twofold: lack of information, and lack of a uniform measure of credit costs. In some cases certain information, such as the finance rate or the total finance charge, might simply be unavailable

from potential lenders. Even where the relevant information was provided, however, it might be presented in different formats by different lenders. This was especially true in the case of the finance rate, which could be and was calculated and quoted in entirely different fashions by different lenders. What was worse, it might not be apparent to the consumer that the rates quoted by different lenders were not directly comparable.

CCDL was to facilitate credit shopping by requiring all lenders to disclose all relevant information in a standardized format. Lenders would be required to disclose the true finance rate: the annual percentage rate on the declining balance. Thus, consumers would be able to easily compare the cost of credit from different sources.

Some authors have identified two somewhat different roles that disclosure might play in the context of consumer credit shopping. The first and grander role is to assist the consumer who is actively searching for low cost credit. The second, more modest role, is to alert consumers to particularly high cost sources of credit. We will refer to these two roles as "price search" and "alert", respectively.[20]

(a) Price search function

Consumers who are actively searching for favourable credit terms are the paradigm upon which the most optimistic case for CCDL is based. These value-conscious consumers will expend some effort in order to find favourable credit terms, just as they would expend some effort to find the best deal on the car or other consumer product for whose purchase credit is required. To shop for a source of credit, however, these consumers must have a standardized measure of the price of credit from different possible sources. The cost of credit information that CCDL requires lenders to disclose—particularly, APR—provides consumers with this measure.

(b) Alert function

The price search function of CCDL requires consumers who engage in a certain amount of active searching. After CCDL was enacted, it was suggested that such legislation could also play a more

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20 BLANDERS & ROHNER at 737-38. In fact, the authors do not regard the alert function as real credit shopping. They would use the term "credit shopping" to describe only what this paper refers to as "active" credit shopping.

limited, but still valuable role: alerting consumers to particularly high cost sources of credit.[21] CCDL can play this role even for consumers who do not actively search for favourable credit terms. All it requires is a consumer with the minimum amount of "credit shopping" consciousness described earlier.

The alert function of CCDL depends on the premise that some consumers who are relatively complacent about the cost of credit nevertheless have some knowledge of the prevailing cost of credit, and are not totally indifferent to how much they pay for credit. Such consumers do not actively search for favourable credit terms, but might be shocked into looking for an alternative source of credit if informed, say, that the APR on a proposed credit transaction with X Finance Co. is 45%. By requiring the APR to be stated in virtually all consumer credit transactions, CCDL can make even passive credit shoppers more aware of prevailing rates, and thus make them more likely to recognize exceptionally high priced credit sources.

4. Increase competition and lower cost of credit

The potential benefits of CCDL described above involve direct effects on consumer behaviour. Consumers will have better information about the cost of credit. This will allow them to shop more effectively for favourable credit terms. Even consumers who do not actively shop for favourable credit terms may be alerted to particularly expensive sources of credit. Well informed consumers will also be in a better position to decide whether to use credit at all. If informed of the true cost of credit, they may decide to defer proposed purchases or use cash from savings instead of obtaining credit.

These effects of CCDL on the behaviour of consumers should affect the behaviour of lenders. If consumers are better informed about the cost of credit as a result of CCDL, and if even a minority of them use this information in making credit purchasing decisions, lenders will have greater incentive to compete on the basis of price. Increased price competition between lenders should lower the cost of credit for all consumers, even those who are not credit shoppers.[22]

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21 *Ibid*; see also WHITFORD at 419

22 WHITFORD at 431; BRANDT & DAY at 327.

B. Underlying assumptions

CCDL is touted as being entirely consistent with "free market theory".[23] That is, unlike many possible forms of regulation, it does not seek to impose substantive limitations on the terms of credit transactions between consumers and lenders. Instead, it seeks to facilitate the workings of normal market mechanisms—in particular, price competition—by ensuring that consumers are provided with the information they need to make well-informed credit purchasing decisions.

Enacting disclosure requirements as a means of aiding normal market mechanisms involves several assumptions about the workings, indeed, the existence, of the consumer credit market. We will list the main assumptions here and then briefly describe them below.

1. The consumer credit market is truly a market in the sense that there is price competition, or the potential for price competition, between lenders.

2. In the unregulated consumer credit market consumers do not receive all the information that they need in order to make optimal credit purchasing decisions.

3. The problem of non-optimal information disclosure can be effectively addressed by legislated disclosure requirements.

1. A competitive consumer credit market

One of the advertised benefits of CCDL is that it will promote price competition between lenders. It will do so by making consumers more aware of and sensitive to the cost of credit. This assumes that the conditions for competition exist on the supply side of the market. The conditions for price competition would not exist if the supply of credit were monopolistic or highly oligopolistic. Questions have sometimes been raised about whether the Canadian consumer credit market is competitive or not, but that subject is beyond the scope of this paper.

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23 E g. SENATE, H C. JOINT COMMITTEE at 11

2. Non-optimal information in unregulated market

At its simplest, the argument for legislated disclosure requirements for a certain product goes something like this.

A Consumers who are considering purchasing the product should have certain information.

B In the unregulated market for the product, this information is not generally available to consumers.

C Therefore, sellers should be required by legislation to disclose the relevant information to consumers.

Of course, acceptance of propositions A and B does not lead inexorably to conclusion C. One might argue, for example that the best way of making the information available to consumers is through a public education campaign, rather than through seller disclosure.

Further study of the "simple" argument for disclosure legislation raises other questions. For instance, on what basis is it concluded that consumers should have the information in question? Does this reflect a conclusion that consumers do in fact want this information (but cannot get it)? Or does it represent a judgment that, whether consumers currently want this information or not, they ought to have and consider it in making decisions about purchasing the product? It has been suggested that the best explanation of CCDL—particularly, its requirements regarding disclosure of APR—is that it is based on a judgment of the latter sort.[23]

Another question that arises from propositions A and B is how widespread knowledge of the relevant information needs to be amongst consumers. Presumably, not every relevant consumer can be acquainted with the information, but is it crucial that as many consumers as possible be acquainted with it? Or will the anticipated benefits of the information be obtained if a reasonable number of consumers, perhaps only a minority, have and use the information. It should be easier (and less costly) to make some consumers aware of the information than to make most consumers aware of it.

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24 WHITFORD at 423-25 (but see 425-27).

3. Possibility of correcting information deficiency through legislated disclosure requirements

Suppose it is concluded that consumers would be able to make better informed decisions about purchasing a certain product if they considered certain information that is not generally available to them in an unregulated market. The conclusion that sellers should be required to disclose this information to consumers involves several intermediate conclusions: namely, that

- sellers have or can get the information;
- the information can be conveyed to consumers;
- significant numbers of consumers will automatically make use of the information or can be educated to do so;
- the benefits of consumers having and using the information will exceed the cost of generating and disseminating it, and, if necessary, persuading consumers to use it.

If any of these intermediate conclusions are wrong, disclosure of the information to consumers will be either impracticable, unhelpful, or more trouble than it is worth. As will be seen shortly, there has always been considerable debate as to whether CCDL falls down on any or all of these counts.

C. Actual effects of CCDL

Much of the original debate over CCDL centred around the question of whether it would produce any real benefits for consumers. Critics suggested that CCDL would likely have almost no positive effect whatsoever. Moreover, it was suggested that whatever benefits it might have would fall on middle-class consumers, not on the poor and uneducated consumers who most needed relief. Most supporters of CCDL did not hold it out as a panacea for all the problems of the consumer credit market, but they did argue that it would produce significant benefits for consumers.

The enactment of TILA in the United States provided an opportunity to test the competing claims about what, if any, effect CCDL would have on the consumer credit market. TILA came into effect in the United States in 1969. Over the next few years several empirical studies of consumers' knowledge and use of credit cost information were conducted. Their results are briefly described below. After describing the results, we mention some limitations of these studies as indicators of conditions in today's Canadian consumer credit market.

1. Effect on consumers' knowledge of credit cost

(a) Knowledge of rates (APR)

To have an effect on consumers' credit purchasing decisions, CCDL must make them more informed about the cost of credit. The main objective of CCDL was to introduce a standardized method of measuring the cost of credit: APR.[25] Thus, when researchers set out to measure the effect of CCDL, they naturally concentrated on consumers' before and after knowledge of APR information.

There are greater and lesser degrees of knowledge that a consumer might have about APR. The list that follows identifies kinds or degrees of knowledge that a consumer might have about APR. It begins with more general facts, and moves towards more specific ones. A consumer who was aware of any one of these facts would be somewhat knowledgeable about APR; a consumer who was aware of all or most of them would be exceptionally knowledgable about APR.

1. APR is a measure of the cost of credit.

2. All else being equal, a lower APR is better (for the borrower) than a higher APR.

3. The APR on credit from certain sources (e.g. banks) is generally lower than the APR on loans from other sources (e.g. furniture or appliance stores).

4. The APR on certain types of credit (e.g. closed-ended, secured loans) is generally lower than the APR on other types of credit (e.g. credit cards).

5. The APR on a potential credit transaction (e.g. a car loan) would be approximately R or (to put it somewhat differently) would be somewhere between R_{min} and R_{max}.

6. The APR on credit from the chosen source of credit for an actual credit transaction is exactly R.

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25 Of course, the idea of the APR was not new in the sixties. What was new was the requirement that all lenders state the cost of credit in terms of APR, and that APR be calculated in accordance with a standard formula

7. The APR on credit available from alternative sources of credit for the same transaction is (or was) R_1, R_2, . . . R_n.

8. APR measures the cost of credit in terms of the percentage cost per year of each borrowed dollar, on the assumption that the borrower has the use of that dollar for the whole year.

This list is by no means exhaustive of the sorts of information or degree of understanding that a consumer might have about APR. It does serve to demonstrate, however, that a statement that a consumer is or is not "knowledgeable" about the cost of credit requires further elaboration. The American empirical studies did not directly test consumer knowledge about all eight types of information mentioned above. They provide more or less direct evidence of consumer knowledge of four of the eight types of information just described: types 3, 4, 5, and 6.

(1) Relative cost of different sources or types of credit

When the empirical studies were conducted, there was a fairly well-defined stratification of credit costs, as between different types of lenders. Credit unions and banks were relatively low-cost sources, and retail stores and consumer finance companies were relatively high-cost sources. As well, certain types of credit, such as fixed term instalment loans, tended to be less expensive than other types, such as credit cards. Several studies attempted to establish how aware consumers were of these general differences.

It was discovered that consumers had a pretty good idea of which types of credit source cost more.[26] Whether or not consumers knew the actual rates charged by, for instance, banks and finance companies, they were likely to know that banks generally have lower rates than finance companies. However, this "institutional knowledge" predated the TILA and could not be attributed to legislated disclosure requirements.[27] CCDL is intended to allow consumers to make more subtle comparisons than this.

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26 BRANDT & DAY at 325,26.

27 BLANDERS & ROHNER at 736.

(2) Prevailing rates and actual rates

"Model consumers", for CCDL, are consumers who shop around for credit, determine the APR available from different credit sources and then, all else being equal, select the available source with the lowest APR. At the conclusion of the credit shopping experience, such consumers should have a fairly good idea of *prevailing rates* (a range, from R_{min} to R_{max}) and of the *actual rate* for their loan. Of course, that consumers know the prevailing rates or the actual rate paid does not guarantee that they actually shop for credit. However, it seems reasonable to assume that consumers who are unaware of prevailing rates or of the actual rate paid did not shop for credit by comparing the APR offered by different potential credit sources. Thus, researchers tried to find out how knowledgeable consumers were about prevailing rates and actual rates.

Although there was some variation in the results of different studies, they seem to support the following conclusions:[28]

1. Both before and after the enactment of TILA, most consumers could *not* give a reasonably accurate estimate of either prevailing rates or actual rates on recent credit transactions.

2. Consumers tended to *underestimate* rates.

3. The proportion of consumers who could estimate (or recall) prevailing or actual rates *did* improve somewhat after the enactment of TILA.

4. Both the absolute level of awareness of APR and the degree of post-improvement in awareness were positively correlated to income level and education.

As already mentioned, the surveys were conducted shortly after TILA came into effect. However, it was suggested that consumer awareness of prevailing or actual rates was not likely to rise beyond about 50% of all consumers:[29]

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28 A summary and evaluation of the studies can be found in WHITFORD at 407-17

29 *Ibid.* at 416.

Thus, so far as consumer knowledge of credit costs—particularly APR—is concerned, the studies indicated that consumers were pretty good at ranking lenders on a scale from most to least expensive. This knowledge, however, was not a product of TILA. So far as awareness of prevailing or actual rates is concerned, TILA did bring some improvement. However, most consumers were still unable to estimate or recall prevailing or actual rates. Such awareness as existed was concentrated amongst the wealthier and better educated part of the population. Finally, it appeared that consumers were unlikely to become significantly more knowledgeable about rates with increased exposure to the required disclosures.[30]

(b) Knowledge of the dollar credit charge

Another kind of information that it was thought important for consumers to be given is the dollar credit charge. Basically, this is the total amount paid by the consumer to the lender, less the amount originally advanced to the consumer. Consumers' knowledge of the amount of credit charges did not get as much attention as their knowledge of APR. However, one study indicated that, if anything, consumer awareness of this information was even lower than consumer awareness of APR.[31]

(c) Knowledge of monthly payments

From what has been said so far, it would seem that consumers as a group had little specific knowledge about the cost of credit. However, there is one type of credit cost information about which consumers have a high degree of awareness: the amount of the periodic (usually monthly) payments.[32] CCDL requires the disclosure of the amount of periodic payments, but lenders have always disclosed this information anyway. After all, it would be hard for consumers to make

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30 Such predictions may have been overly pessimistic. A more recent survey—although not specifically concerned with the effect of TILA—suggests that by the late seventies American consumers had become considerably more knowledgeable about rates than they were in the early seventies: see DUNKELBERG, Table IV-9 at 187

32 BRANDT & DAY at 304, 307. However, a smaller study of very high rate, small loan borrowers in Texas indicated that among such borrowers, although there was almost no awareness of the finance rate, there was a high level of awareness of the dollar credit charge: DURKIN at 60-61.

32 BKOFELE-KALE at 145.

their monthly payments if they did not know what they were. As will be discussed later, consumers' knowledge of monthly payment amounts indicates the importance they attach to this figure.

2. Effect on credit shopping

Before the enactment of the TILA, very few American consumers actively shopped for favourable credit terms.[33] After the enactment of the TILA, very few American consumers actively shopped for favourable credit terms. In short, the TILA appeared to have very little effect on consumers' credit shopping behaviour. At least, that was the conclusion pointed to by the handful of studies that actually investigated this point.[34]

3. Effect on decision whether to use credit

Commentators could suggest that the TILA might have had some modest effect on consumers' credit shopping activities. However, when it came to the question of the TILA's effect on consumers' decisions whether to obtain credit at all, commentators could not muster even so guarded an assertion as that. The authors of one study flatly stated that "[i]n the decision to postpone purchases or to use cash instead of credit, knowledge of credit terms played no role whatsoever."[35]

4. Effect on competition

It would be difficult to measure directly the effect of CCDL on competition in the credit market. But CCDL is supposed to promote competition indirectly, by making consumers more aware of and responsive to credit cost information. If the studies of the effects of the TILA on American consumers are a reliable guide, CCDL has helped make consumers somewhat more aware of credit costs, particularly of

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33 To the extent they were searching for something, it was more likely to be for a source of credit than for the cheapest source of credit

34 Actually, of the immediate post-TILA studies, only one focused on this particular question: BRANDT & DAY Other studies looked at consumers' knowledge of credit terms, without trying to get direct evidence of the effect of this knowledge (or lack of knowledge) on their credit purchasing behaviour.

35 *Ibid* at 327

rates, than they were previously. However, the TILA has not made consumers a great deal more responsive to credit cost information when choosing a source of credit. The research suggests that most consumers place little emphasis on the cost of credit (as measured by APR) when choosing a source of credit. This seems to argue against CCDL having made the consumer credit market significantly more competitive. This is not the end of the story, however, even if we assume that most consumers are not active credit shoppers.

It has been suggested that CCDL might promote competition even if it does not appreciably alter the behaviour of most consumers. This could occur through a process that we will call "piggybacking".[36] Piggybacking might occur if some consumers are active credit shoppers, and the disclosures required by CCDL allow them to shop more effectively. These few consumers could have an effect on the credit market that belies their small numbers. The theory is that even if active credit shoppers are few, lenders will have an incentive to compete for their business by lowering the cost of credit.[37] Since it is difficult for lenders to lower the cost of credit selectively (that is, only for active credit shoppers), even non-shoppers will benefit from the competition for the credit shoppers' business. That this sort of competition has been produced by the TILA is by no means established.[38] However, the piggyback theory does suggest one way in which CCDL might benefit many more consumers than those who actively shop for credit.

5. Limitations of the available data

The data about the effect of CCDL that we have been discussing have significant limitations as a guide to the knowledge and behaviour of Canadian consumers in the 1990s. It comes from studies conducted in the United States in the first few years after the TILA was enacted. Commentators have criticized some of the conclusions reached

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36 The possibility of this phenomenon occurring in the consumer credit market is discussed by WHITFORD at 432,433; BRANDT & DAY at 327; KOFELE-KALE at 139-46

37 This assumes, of course, that the conditions for increased rate competition exist. Lenders must previously have been making what an economist would regard as excess profits, and this must have been due to the information deficiency rather than to, say, the existence of a monopoly

38 The piggybacking theory has its uses for CCDL opponents. They could argue that even without CCDL, there are enough credit shoppers to keep the market competitive. KOFELE-KALE offers a critique of this objection to CCDL at 139-46

by these studies on account of perceived weaknesses in their methodology.[39] While there is some force in these criticisms, they do not seem to throw serious doubt on the studies' basic conclusion that after a couple of years of operation, the TILA had had a decidedly modest affect on American consumer credit purchasing behaviour.

Of more significant concern to us than methodological weaknesses of the studies is their applicability to Canadian consumers of the nineties. To be sure, the behaviour of Canadian consumers today is probably not fundamentally different than the behaviour of American consumers in the early seventies. But various differences between "them and us" and "then and now" suggest that the results of the early post-TILA studies should be used with caution. Some of the significant points of difference are described below.

1. The American studies were conducted shortly after the enactment of the TILA. Some 20 years of extra exposure to CCDL disclosures might have made Canadian consumers more knowledgeable about and sensitive to credit costs than were American consumers of the early 1970s.

2. Interest rates were much more highly regulated in the United States at the time the studies were conducted than they presently are (or ever have been) in Canada. It is possible that such regulation suppressed rate competition and, therefore, made credit shopping pointless for consumers.[40]

3. Trends and changes in the consumer financial services industry may have made Canadian consumers more aware of and sensitive to the cost of credit than were American consumers of 20 years ago. It may have become more worthwhile for consumers to shop for credit. These trends and changes include:

   (a) higher interest rates for all types of credit may have made the cost of credit more significant for consumers;[41]

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39 KOFELE-KALE at 136, WHITFORD at 413

40 JOHNSON at 1364. There is some empirical evidence to support the proposition that consumers in a jurisdiction with a low interest rate ceiling are less likely to engage in active credit shopping: PETERSON & BLACK at 533-34.

41 JOHNSON at 1364

(b) heated competition between financial institutions for consumers' *savings* may have helped to make consumers more sensitive to their cost of *borrowing*;[42]

(c) deregulation and decompartmentalization of the financial industry may have led to increased competition between lenders, making it more worthwhile for consumers to shop for credit.

4. It is possible that consumer education programs have made more consumers sensitive to credit costs.

It is not asserted here that the developments noted above have in fact made Canadian consumers more sensitive to cost of credit information than were the American consumers studied in the early seventies. Today's Canadian consumers might be no more sensitive to the cost of credit—particularly, to annual percentage rates—than were American consumers in the early seventies. All that can be said at this point is that there are plausible grounds for suggesting that Canadian consumers might be more sensitive to cost of credit information than a simple extrapolation of the early post-TILA studies would suggest. Any firmer conclusions must await further research on the actual behaviour of Canadian consumers.

D. Inherent limitations on usefulness of cost of credit disclosure

1. What does APR tell the consumer

Unquestionably, the most cherished piece of information in CCDL is APR. Disclosure of this information to consumers was to be the outstanding benefit of CCDL. Although other information about credit terms might be useful to consumers, it was only with information about APR that consumers would be empowered to get the best value for their credit dollar. Since APR is the centre-piece of CCDL, it will be useful to consider exactly what APR was supposed to do for consumers. Having considered what it was supposed to do, we can ask ourselves what it *realistically* can be expected to do. By answering this latter question we will better equip ourselves for considering some specific questions about the costs and benefits of various approaches to disclosure requirements.

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42 *Ibid.*

What is APR? If we look at the Alberta CCTA's definition of "annual percentage rate", we are informed that APR is this:

> in relation to a credit transaction, the percentage rate for each period of time that, when multiplied by the principal amount owing under the credit transaction that is outstanding at the end of each period, will produce an amount or amounts the total of which is equal to the credit charges in relation to the credit transaction, expressed as a rate per annum[43]

Indeed!

In fact, it is much easier to express the concept of APR as a mathematical formula than to explain it in everyday language. For present purposes, it suffices to describe APR as the cost of borrowing expressed as the percentage charge for the use of one dollar for one year. In most cases, consumers do not have the use of every dollar borrowed for exactly one year. In a typical instalment loan, they are likely to have the use of some of the borrowed funds for less than a year, some for exactly one year, and some for more than a year. So the charges paid by the borrower are actually charges for the use of some money for less than a year, some money for exactly a year, and some money for more than a year. The supposed beauty of APR is that it expresses all these charges as a percentage charge per year for each dollar of which the consumer has the use.

In principle, so long as one knows the amount advanced to the borrower and the amount and timing of each payment, one can calculate the APR for the transaction. The task of calculating the APR is easier if the transaction consists of a single advance followed by series of regular equal payments until the loan is paid off (or, better yet, a single advance, and a single payment of interest and principal at the end of one year). However, someone with a computer (or a lot of time) can calculate the APR for a credit transaction consisting of multiple advances and payments at irregular intervals. No matter how complicated the transaction, the APR formula can convert the charges into a percentage charge per year.

So far as comparative credit shopping is concerned, APR's chief virtue is as a means of comparing credit arrangements involving

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43 CCTA, s 1(c)

dissimilarities in either the amount advanced or the number or timing of payments. APR is unnecessary for comparing the cost of alternative sources for a simple instalment loan of $X where the number of payments and interval between each payment are the same for each source. In those circumstances, a consumer can find the cheapest source of finance by comparing the dollar finance charges. Indeed, it is not even necessary to compare the dollar amount of the finance charges; the cheapest source of credit will be the one with the lowest regular payments. The lower the payments, the lower the APR.

But a credit shopping consumer is likely to have many different alternatives on such matters as the length of the amortization period, and the frequency of payments. Not only may different lenders offer different payment plans, each lender will probably offer a range of payment plans. If Plan A calls for 12 monthly payments, Plan B calls for 26 weekly payments, and Plan C calls for 24 monthly payments, comparing the amount of the payments will not reveal the relative cost of each plan. Of course, comparing dollar finance charges tells the consumer their relative cost in dollars, but this does not take account of the fact that the consumer will have the use of the loan proceeds for different periods of time under each plan. APR can supply the missing information, giving the consumer a better picture of the relative cost—per dollar in use per unit of time—of each plan.

As well as being useful in credit shopping, disclosure of APR should be valuable to consumers in deciding whether to obtain credit (the "credit use decision"). The dollar amount of finance charges serves a similar purpose, but it again fails to take the time factor into account. Consumers who were thinking of borrowing $1000 might not pause if told that the cost of the loan, if paid in 12 monthly instalments of $95 each, would be $140. These same consumers might well reconsider their decision if they were also told that the APR for such a loan is about 25%.

2. What APR might not tell the consumer

Such evidence as there is suggests that most consumers do not generally pay much attention to the APR when making credit purchasing decisions. They do not seem to expend much effort to find the credit source that offers the lowest APR, nor does information about APR seem to make much difference in the decision whether to obtain credit or

not. This apparent inattention to such a crucial thing as APR is sometimes regarded as pathological. The reasoning goes something like this.

1. It is in consumers' best interest to consider the cost of credit in deciding whether to obtain credit and in selecting a source of credit.

2. The best indicator of the cost of credit is APR.

3. But most consumers appear to pay little attention to the cost of credit as measured by APR in deciding whether and where to obtain credit.

4. Therefore, there is a defect in the market that prevents most consumers from making proper use of cost of credit information.

The analysis then proceeds to a discussion of the various factors that may be responsible for this malady: impulsive buying habits, deficient consumer education, incomprehensible disclosure statements, and so forth.

Undoubtedly, consumers' use of cost of credit information—APR information in particular—is not optimal. However, there are intrinsic limits on the usefulness of APR disclosure, even to value-conscious consumers who have a reasonable understanding of credit cost concepts. Even for such consumers, there comes a point where searching for the best credit terms, as measured by APR, can lose its cost-effectiveness. Indeed, in certain circumstances, overreliance on APR could lead the consumer farther astray than would ignoring it completely.

The hypothetical situations described below are intended to illustrate some of the limitations of APR as a guide to consumer credit purchasing decisions. In none of the situations is APR an irrelevant consideration. In each situation, however, considerations other than that of finding the lowest APR come into play.

The examples all focus on credit purchasing decisions faced by the Smiths, a value-conscious couple with a reasonable degree of financial sophistication. They are aware of the importance of considering the cost of credit and of the role of APR as a standard measure of the cost of credit.

EXAMPLE 1

Point: For the purchase of a consumer product on instalment credit that is to be paid off over a short period of time, relatively large changes in APR produce relatively small changes in the total cost of the product. An increase in APR will have a more significant effect on the perceived cost of the loan as the duration of the loan increases.

Facts: The Smiths intend to finance the $5,000 purchase price of a used car. They intend to pay off the loan in 12 monthly instalments. An alternative assumption is that they intend to pay it off in 36 monthly instalments.

Issue: How do changes in APR affect the cost of the car, as measured by 1) the increase in the monthly payments and 2) the present value of the incremental payments?

Tables: Tables 1A and 1B provide the relevant information for amortization periods of 12 months and 36 months, respectively. Each table shows the effect of changes in APR from a low of 8% to a high of 24%. APR is shown in increments of 2%, except between 12% and 14%, where the increments are 0.25% Increments of 0.25% are shown because some CCDL requires APR to be stated with that degree of precision.

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44 The present value calculation assumes that the Smiths have a "personal discount rate" of 10% per annum.

TABLE 1A

EFFECT OF APR ON MONTHLY PAYMENTS AND PRESENT VALUE OF PAYMENTS

PRINCIPAL: $5,000.00		TERM: 12 MONTHS			
		MONTHLY PAYMENT INCREMENT		PRESENT VALUE INCREMENT	
APR	MONTHLY PAYMENTS	($)	(%)	($)	(%)
8.0 %	$434.94				
10.0 %	$439.58	$4.64	1.1%	$52.75	1.1%
12.0 %	$444.24	$4.66	1.1%	$53.06	1.1%
12.25%	$444.83	$ .58	0.1%	$ 6.65	0.1%
12.50%	$445.41	$ .59	0.1%	$ 6.66	0.1%
12.75%	$446.00	$ .59	0.1%	$ 6.66	0.1%
13.00%	$446.59	$ .59	0.1%	$ 6.67	0.1%
13.25%	$447.17	$ .59	0.1%	$ 6.67	0.1%
13.50%	$447.76	$ .59	0.1%	$ 6.68	0.1%
13.75%	$448.35	$ .59	0.1%	$ 6.68	0.1%
14.00%	$448.94	$ .59	0.1%	$ 6.69	0.1%
16.0%	$453.65	$4.72	1.0%	$53.67	1.0%
18.0%	$458.40	$4.75	1.0%	$53.98	1.0%
20.0%	$463.17	$4.77	1.0%	$54.29	1.0%
22.0%	$467.97	$4.80	1.0%	$54.59	1.0%
24.0%	$472.80	$4.83	1.0%	$54.89	1.0%
LOW >HIGH APR TOTAL INCREASE		$37.86	8.7%	$430.59	8.7%

Analysis: For short-term instalment loans, a substantial increase in APR produces a fairly modest increase in the perceived cost of the product for which the loan is required. To budget-conscious consumers, the most relevant piece of information about a credit transaction may well be the amount of the monthly payments. From Table 1A, it can be seen that tripling the APR from 8% to 24% increases the monthly payments from $434.94 to $472.80, an increase of only $37.85 (8.7%). Within that range, any 2% increase in APR increases the monthly payments by a little under $5, or about 1%.

TABLE 1B

EFFECT OF APR ON MONTHLY PAYMENTS AND PRESENT VALUE OF PAYMENTS

PRINCIPAL: $5,000.00		TERM: 36 MONTHS			
		MONTHLY PAYMENT INCREMENT		PRESENT VALUE INCREMENT	
APR	MONTHLY PAYMENTS	($)	(%)	($)	(%)
8.0 %	$156.68				
10.0 %	$161.34	$4.65	3.0%	$144.24	3.0%
12.0 %	$166.07	$4.74	3.0%	$146.76	3.0%
12.25%	$166.67	$ .60	0.4%	$ 18.52	0.4%
12.50%	$167.27	$ .60	0.4%	$ 18.56	0.4%
12.75%	$167.87	$ .60	0.4%	$ 18.60	0.4%
13.00%	$168.47	$ .60	0.4%	$ 18.64	0.4%
13.25%	$169.07	$ .60	0.4%	$ 18.68	0.4%
13.50%	$169.68	$ .60	0.4%	$ 18.72	0.4%
13.75%	$170.28	$ .61	0.4%	$ 18.76	0.4%
14.00%	$170.89	$ .61	0.4%	$ 18.80	0.4%
16.0%	$175.79	$4.90	2.9%	$151.76	2.9%
18.0%	$180.76	$4.98	2.8%	$154.24	2.8%
20.0%	$185.82	$5.06	2.8%	$156.69	2.8%
22.0%	$190.95	$5.13	2.8%	$159.12	2.8%
24.0%	$196.16	$5.21	2.7%	$161.53	2.7%
LOW >HIGH APR TOTAL INCREASE		$39.48	25.2%	$1,223.61	25.2%

Table 1A also shows that a ¼% APR increase causes the monthly payments to increase by about 60 cents, or slightly more than one tenth of one percent. The average consumer is unlikely to get very excited over that.

Table 1B shows that moving to a 36 month term reduces the monthly payments by more than 50% for each APR level. However, the monthly payment increment for each 2% increment in the APR remains about the same as before: around $5. Thus, the percentage increase in the monthly payments is much higher. Thus, as the term increases from

12 months to 36 months, a given increase in the APR will have a more noticeable effect on the amount of the monthly payments.

The present value of the incremental monthly payments produced by an increase in APR provides another measure of the cost of the increase. This is shown in the right two columns of Tables 1A and 1B. Looking at the first two lines of Table 1A, it will be seen that increasing the APR from 8% to 10% increases the monthly payments by $4.64. The present value of this increment is $52.75.[45] This means, in effect, that the 2% increase in APR increases the cost of the car by a little over $50. Such an increase is not to be sneezed at, but it still represents an increase of barely over 1% in the cost of the car. Tripling the interest rate from 8% to 24% still increases the cost of the car, in present value terms, by only 8.7%.

Table 1B shows that lengthening the term to 36 months has even more effect on the present value of the incremental payments than it does on the amount of the monthly payments. For the 36 month term, increasing the APR from 8% to 10% increases the present value of the incremental payments by close to $150, the equivalent of adding $150 to the price of the car.

The preceding example illustrates why consumers cannot be blamed for not getting too excited about "significant" changes in interest rates. When credit is obtained to purchase a consumer product, a consumer who considers the cost of credit at all is likely to consider it not on its own, but as a component of the total cost of the product. This is so even if the product and the credit come from different sources, such as a car dealer and a bank. If an increase in interest rates increases the cost of borrowing $1000 from $50 to $100, the cost of borrowing has doubled! But if the money has been used to purchase a consumer product whose cash price is $1000, the total cost of the product has gone from $1050 to $1100, an increase of less than 5%. The increase in the total cost of the product is probably a better indicator of the consumer's probable reaction to the rate increase than is the fact that the cost of credit has doubled.

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45 At a personal discount rate of 10% per year and a one year term, the present value of the incremental payments is only slightly less than the figure obtained by simply multiplying the increment ($4 64) by the number of payments (12). The discount rate becomes more significant over longer terms

Table 2 is another method of representing the effect of different APRs and terms on the perceived cost of a product. It shows the portion of the total payments on a loan that goes to the payment of credit charges. This provides a rough measure of the relative increase in the cost of a product attributable to credit charges. As one would expect, the portion of the total payments devoted to the payment of credit charges increases as the APR and the length of the term increase.

TABLE 2

CREDIT CHARGES AS PERCENTAGE OF TOTAL PAYMENTS FOR VARIOUS APRs AND TERMS

TERMS (MONTHS)	APR 6%	9%	12%	18%	24%	36%
6	1.7%	2.6%	3.4%	5.0%	6.6%	9.7%
12	3.2%	4.7%	6.2%	9.1%	11.9%	17.0%
24	6.0%	8.8%	11.5%	16.5%	21.2%	29.4%
36	8.7%	12.6%	16.4%	23.2%	29.2%	39.4%
48	11.3%	16.3%	20.9%	29.1%	36.1%	47.4%
60	13.8%	19.7%	25.1%	34.4%	42.1%	53.9%
120	24.9%	34.2%	41.9%	53.8%	62.2%	73.0%
240	41.8%	53.7%	62.2%	73.0%	79.3%	86.1%

EXAMPLE 2

Point: Shopping for credit is not cost free: the consumer must spend time and quite possibly money to search for the lowest-priced credit. In some cases, search costs could exceed any saving likely to be realized by an exhaustive search for the lowest-priced source of credit.

Facts: The Smiths intend to borrow $2000, which they will pay off in 12 monthly instalments. They know that they can get a loan of this amount from their usual source of credit at 21%. But they are considering shopping around to see if they can get a better rate from someone else. Assume a "search cost" of $50, consisting mainly of the cost of the time it will take them to search for alternative sources of credit. An alternative assumption is that the known rate is 14%.

Issue: How low a rate will the Smiths have to find in order to compensate themselves for their search cost?

Tables: Table 3A shows the lower ("threshold") APR that would have to be obtained on a loan from another source in order for the

saving in monthly payments to compensate the Smiths for their $50 search costs. The threshold APR for any given combination of principal and term is found at the intersection of the appropriate column and row. If the APR from the alternate source is above this rate, the savings in monthly payments will not compensate the Smiths for their search costs.

Table 3B presents the same information as Table 3A for a known APR of 14%.

TABLE 3A

APR REDUCTION NECESSARY TO RECOVER SEARCH COSTS

SEARCH COST: $50.00	KNOWN APR: 21%					
TERM	PRINCIPAL					
(MONTHS)	$1000	$2000	$4000	$8000	$16,000	$32,000
6	3.1%	12.1%	16.6%	18.8%	19.9%	20.4%
12	11.2%	16.1%	18.6%	19.8%	20.4%	20.7%
24	15.7%	18.4%	19.7%	20.3%	20.7%	20.8%
36	17.3%	19.2%	20.1%	20.5%	20.8%	20.9%
48	18.1%	19.6%	20.3%	20.6%	20.8%	20.9%
60	18.6%	19.8%	20.4%	20.7%	20.8%	20.9%

TABLE 3B

APR REDUCTION NECESSARY TO RECOVER SEARCH COSTS

SEARCH COST: $50.00	KNOWN APR: 14%					
TERM	PRINCIPAL					
(MONTHS)	$1000	$2000	$4000	$8000	$16,000	$32,000
6	.0%	5.2%	9.6%	11.8%	12.9%	13.5%
12	4.3%	9.2%	11.6%	12.8%	13.4%	13.7%
24	8.8%	11.4%	12.7%	13.4%	13.7%	13.8%
36	10.4%	12.2%	13.1%	13.6%	13.8%	13.9%
48	11.2%	12.6%	13.3%	13.7%	13.8%	13.9%
60	11.7%	12.9%	13.4%	13.7%	13.9%	13.9%

Analysis: The threshold APR for the contemplated $2000, 12 month loan is 16.1%. This means that the Smiths will recover their search costs if they are able to find a lender who will give them a loan at 16.1% or less. Whether they will be able to do

so depends on the level of prevailing rates, their own credit rating, the thoroughness of their search, luck, and various other factors.

Table 3B shows the threshold rate where the known APR is 14%. To break even on their $50 search costs, the Smiths would have to find a lender prepared to give them a loan at less than 9.2%.

By examining Tables 3A and 3B, one can readily see that, for given search costs and a known APR, the threshold APR increases as the loan amount or the length of the term increases. In other words, the bigger the loan and the longer the term, the smaller need be the drop in APR from the known rate for credit shopping to be cost-effective.

The tables do not show the effect of changes in search costs. However, it should be apparent that lower search costs translate into higher threshold APRs. It takes a smaller drop in APR to compensate for search costs of $25 than it does to compensate for search costs of $50.

EXAMPLE 3

Point: APR is often touted as the only, or at least the best, way to make comparisons between loans that are for different terms. However, choosing the loan with the lowest APR does not necessarily represent the best financial decision, when given a choice between loans of different lengths.

Facts: The Smiths want to borrow $2000 to buy a used car, because their old one just died. They expect to receive $2050 on a bond that comes due in a month. They have two options. Lender A will lend them $2000 for a month for a credit charge of $50, payable at the end of the month: a 30% APR (Plan A). Lender B will lend them $2000, repayable in 12 monthly instalments of $181.46: a 16% APR (Plan B). If they choose Plan A, they will use the proceeds of the bond to pay off the loan at the end of the month. If they go with Plan B, they will put the proceeds of the bond in a savings account that pays 10% interest, and make the monthly payments out of that account. Assume they would pay no tax on the interest they would earn.

Issue: Will the Smiths be financially better off under Plan A (30% APR) or Plan B (16% APR)? The test is whether they can put the proceeds of the bond in the savings account, pay the monthly payments out of that account, and end up with a

positive balance in the savings account at the end of the year. In that event, they would be better off under Plan B. If they would end up with a negative balance (i.e. they have to dip into other income or savings to make the payments), they will be financially better off under Plan A.

Table: Table 4 shows what happens to the Smiths' savings account if they follow Plan B. The proceeds of the bond ($2050) are deposited in the account at the end of Month 1. The right-hand column shows what happens to the balance in the account as interest is credited and payments are debited at the end of each month.

TABLE 4

PLAN B LOAN APR: 16%
SAVINGS ACCOUNT INTEREST RATE: 10%

MONTH	OPENING ACCOUNT BALANCE	ACCOUNT INTEREST	LOAN PAYMENT	CLOSING ACCOUNT BALANCE
1	$ .00	$ .00	$181.46	$1,868.54
2	$1,868.54	$15.57	$181.46	$1,702.65
3	$1,702.65	$14.19	$181.46	$1,535.37
4	$1,535.37	$12.79	$181.46	$1,366.71
5	$1,366.71	$11.39	$181.46	$1,196.64
6	$1,196.64	$ 9.97	$181.46	$1,025.15
7	$1,025.15	$ 8.54	$181.46	$ 852.23
8	$ 852.23	$ 7.10	$181.46	$ 677.87
9	$ 677.87	$ 5.65	$181.46	$ 502.05
10	$ 502.05	$ 4.18	$181.46	$ 324.78
11	$ 324.78	$ 2.71	$181.46	$ 146.02
12	$ 146.02	$ 1.22	$181.46	($ 34.22)

Analysis: Although the APR under Plan B is lower than under Plan A, it is higher than the interest rate on the savings account. Consequently, when it is time to make the last loan payment, there is not enough left in the account to make the payment. The Smiths will have to dip into other savings or income to make this last payment. They would have been better off if they had gone with Plan A, even though it has a higher APR.

The preceding analysis assumes that the Smiths would actually adhere to Plan B if they selected it. Legislation generally allows consumers to pay out consumer loans in advance

without bonus or penalty. Hard feelings aside, the Smiths' optimal course of action would be to sign up for Plan B but pay out the loan at the end of the first month. They would get the advantage of Plan B's lower APR without the disadvantage of the longer term. But many consumers might not be aware of this legal option.

In various ways, the preceding examples all illustrate a simple point. Consumers do not spend or save percentage points; they spend or save dollars. Disclosure of APR is valuable because it can help consumers get a better understanding of how many dollars they will spend or save by making one credit purchasing decision rather than another. There are, however, practical limits on how helpful APR can be to a consumer. This is especially so in the case of relatively small, short-term loans, where

1. substantial movements in APR are required to effect a fairly modest change in the perceived cost of a product purchased on credit, and

2. perceptions aside, it will not be cost-effective for consumers to spend a lot of time looking for the cheapest source of credit, unless this search can be expected to reveal a lender who will give them a loan at a much lower rate than the known APR.

We have pointed out several situations in which APR information might not, indeed, should not, be the determining factor in credit shopping decisions. What about credit use decisions? It is not difficult to see why many budget-conscious consumers will not pay too much attention to the APR in deciding whether they can afford to purchase, say, a car on credit.

In Example 1 we posited a situation in which the Smiths proposed to purchase a used car and pay for it over 12 months. Suppose that they have taken a fancy to a particular car, which costs $5000 cash. Being conscious of the limitations of their budget, they have decided that the maximum monthly payments they can afford is $450. They have also decided that they want to pay off the car in 1 year; they are not interested in reducing the monthly payments by extending the term. In these circumstances, the credit use decision resolves itself into whether they can find a lender who will lend them $5000 over 1 year with payments of $450 or less. If they can get a loan with monthly payments of $450 or less, they can (subjectively) afford the car; otherwise, they cannot. In order to decide whether they can afford to buy this particular car, it is not necessary to know what the APR is.

This is not to say that consumer's will never take rate information into account in making credit use decisions. One can speculate, however, that insofar as awareness of rates has any effect on consumers' credit use decisions, it is more likely to be general awareness of prevailing and historic rates, rather than specific knowledge of the APR on a particular credit source. The sort of rate awareness that convinces a consumer to put off a proposed purchase is more likely to be a perception that "rates are very high right now" than knowledge that "X Bank's rate is 18.5%".

3. Other inherent limitations on the usefulness of cost of credit information

(a) Burying credit charges

The phenomenon of buried credit charges straddles the line between inherent limitations on the usefulness of disclosure requirements and limitations that are related to particular approaches to disclosure. The opportunity for burying finance charges arises only in the context of supplier or supplier-connected credit. Supplier credit, it will be recalled, is any situation where the seller of a consumer product allows the purchaser to defer payment of all or part of the purchase price. Supplier-connected credit is credit that is arranged through an organization that has a close connection with the supplier, such as a finance company set up by a car manufacturer to finance the sale of its cars.

Suppose that Eric the Retailer believes that he will make a nice profit on the sale of widgets if he sells them on credit for $30 down and 12 monthly payments of $10 ($150 in total). What is the APR on the this credit transaction? It is whatever Eric decides it should be, although he would be wise to avoid setting it at a rate that exceeds the 60% "criminal rate of interest" established by section 347 of the *Criminal Code*. Apart from that, Eric is free to set the cash price at any figure at or below $150, and then treat the balance of the $150 as credit charges: the higher the cash price, the lower the credit charges and APR. Table 5 shows a few of the possible combinations.

TABLE 5

POSSIBLE COMBINATIONS OF CASH PRICE AND CREDIT CHARGES

CASH PRICE	DOWN PAYMENT	OPENING BALANCE	TOTAL MONTHLY PAYMENTS (12 x 10)	TOTAL PAYMENTS	CREDIT CHARGES	APR
$122.95	$30.00	$ 92.95	$120.00	$150.00	$27.05	50%
$129.54	$30.00	$ 99.54	$120.00	$150.00	$20.46	36%
$135.75	$30.00	$116.19	$120.00	$150.00	$14.25	24%
$146.19	$30.00	$120.00	$120.00	$150.00	$ 3.81	6%
$150.00	$30.00	$120.00	$120.00	$150.00	$ .00	0%

If Eric thought it would be to his advantage to emphasize his fantastic credit terms, he could set the cash price at $150, and advertise "No Credit Charges—0% APR". The downside of burying credit charges in this fashion is that if the prevailing cash price for widgets is, say $125, setting the cash price at $150 in order to drive down the advertised APR may well drive away potential cash customers. Thus, competition for cash customers will usually restrain any inclination amongst retailers to bury credit charges in the cash price. However, it has been pointed out that in some low-income districts, many retailers sell almost exclusively to credit customers who seldom shop outside of their neighbourhood.[46] For such retailers, attracting cash customers is not a major concern, so burying credit charges in the cash price may well be an attractive option.

(b) Disclosure will not prevent overcommitment

In the debate over CCDL in the 1960s, it was occasionally suggested that full disclosure of credit charges would help prevent consumers from becoming over-indebted to the extent of being unable to meet their obligations. If consumers had a better appreciation of the cost of credit, they would not be as likely to take on more debt than they could afford:

> The central purpose of the truth-in-lending bill is to prevent the excessive and untimely use of credit by consumers which arises out of ignorance of the cost of credit.[47]

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46 JORDAN & WARREN at 301-03; KRIPKE at 6-7, WHITFORD at 421, note 81 It is not clear how extensive this problem is in Canada.

47 Senator Paul Douglas, sponsor of an early TIL bill, quoted in NCCF REPORT at 172.

The trouble with this argument is that in the case of short-term instalment credit, for consumers who get into trouble the basic problem is not high rates, but too much credit.[48] Most of each monthly payment goes towards principal, even if rates are relatively high. High rates do not assist the overcommitted consumer, but are not likely to be the basic problem.

E. What benefits can realistically be expected of cost of credit disclosure?

Most of the preceding section was taken up with pointing out limitations on the usefulness of cost of credit disclosures to consumers. We were particularly concerned with limitations on the usefulness of APR disclosure. This section draws some conclusions about how cost of credit disclosure might realistically be expected to assist consumers in credit shopping and credit use decisions. It also examines a third potential function of disclosure, which we call "future reference".

1. Credit shopping

It will be recalled that we distinguished between two somewhat different functions that credit cost disclosure might serve in relation to credit shopping: "price search" and "alert". The former assumes that a consumer is actively shopping for low-priced credit, while the latter assumes only that the consumer is not totally insensitive to cost of credit information.

(a) Price search

We have noted that American research conducted shortly after TILA came into effect indicated that relatively few consumers engaged in credit price search, and that for those who did, APR was not a particularly important factor. There is reason to believe that the picture painted by this research may be overly bleak if applied to the Canadian consumer credit market in the 1990s.

Undoubtedly, there are consumers who would be almost totally unmoved by any credit cost information one might give them. At the other extreme are inveterate bargain hunters to whom finding the lowest possible APR would bring emotional satisfaction out of all proportion to the money actually saved. Somewhere in the middle lies the average consumer: price-conscious, but with a finite amount of time and patience to invest in searching for the best price. The discussion that follows concerns price search behaviour of the average consumer.

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48 JORDAN & WARREN at 1321.

The following propositions seem to be reasonable assessments of normal consumer shopping behaviour, **all else being equal.**

1. Consumers who have a choice of obtaining a product from two different sources will generally choose the source that offers the lowest price.

2. The easier it is to compare prices for a product, the more likely consumers are to do so.

3. The amount of effort consumers will invest in price shopping depends on the potential savings from the investment. This is a function of the value of the product.

These propositions would seem to have as much validity for credit shopping as for any other kind of shopping. However, credit differs from other products for which consumers might price shop in ways that make credit price shopping different from other kinds of price shopping.

One difference between credit and other products actually favours credit shopping. For many goods and services, price comparison is complicated by the fact that the product offered by one source is not identical to the other source. Consider, for example, a consumer who wants to buy a 27-inch colour television. The consumer will be faced with a choice of many different brand names and models ranging in price from a few hundred to a couple of thousand dollars or more. This makes "pure" price shopping difficult because the perceived differences in product quality must enter into the equation. Perceived differences in product quality play less of a role when the product is money. Consumers can be pretty confident that $10,000 from lender A is going to have exactly the same qualities as $10,000 from lender B.[49] This eliminates one obstacle to price search.

On the other hand, the subjective cost of credit price search is likely to be higher than the subjective cost of an equivalent amount of time spent shopping for the product for which the credit is needed. Many consumers would happily spend hours shopping for a television

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49 Of course, "non-product" considerations might affect the consumer's choice of credit source, just as they might affect the choice of where to buy a television set, once the consumer has decided on a brand and model. A consumer might buy a television from a dealer whose price is slightly higher than another dealer's price, because of a more favourable impression created by the former's sales staff. Similarly, consumers might be influenced by the perceived friendliness of one lender as compared to another, even though the former's loan rate is slightly higher.

or car. Indeed, they might "shop" for such items even though they have no immediate intention of buying one. But one does not generally encounter in a bank a consumer who is "just looking". Credit shopping does not provide the intrinsic pleasures that shopping for other products provides to many consumers. Thus, it seems reasonable to assume that time spent visiting lenders in search of the lowest price for credit is likely to involve a greater subjective cost than the same amount of time spent visiting television or car dealers.

The examples in Section D—Example 1 in particular—show that in certain circumstances, a pretty substantial change in APR will produce only a modest change in the amount of each periodic payment or the present value of all the payments. The two crucial factors are the term of the loan and its amount. For instance, Table 1A shows that for a $5000 loan that is to be paid off in 12 monthly payments, a drop in the APR from 16% to 14% would decrease a consumer's monthly payments by $4.72 (from $453.65 to $448.94) and the present value of all payments by $53.67.[50] In each case, the decrease is about 1%.

Now, if given a choice between a 16% and 14% loan and told what the difference was in dollars per month and in total, the average consumer would undoubtedly take the 14% loan (all else being equal). The saving would not be great, but a buck is a buck. On the other hand, consumers are unlikely to spend a great deal of time searching for the lowest rate on such a loan when the stakes are so modest. Extensive search would simply not be cost-effective. But for consumers looking for a $75,000 mortgage amortized over 20 years, it would be well worth their while to spend a good deal of time looking for the lowest possible rate.[51]

All of this seems to support the following conclusions about active credit shopping by consumers and how CCDL can facilitate this activity.

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50 This figure is based on the assumption that the consumers in question have a "personal discount rate" of 10% per year. Different assumptions about the discount rate would produce slightly different present value figures.

51 The difference in monthly payments between a 16% and a 14% mortgage would be $110.80 ($1043.44 versus $932.64). If the mortgage was for a one year term, the present value difference in the payments over that year would be $1260.30 (assuming our standard 10% discount rate).

CONCLUSIONS ABOUT CONSUMER CREDIT PRICE SEARCH AND CCDL

1. Consumers will search for low priced credit, to the extent that they think there is some significant benefit in doing so.

2. There are greater potential benefits from price search when the amount to be borrowed is greater and the amortization period is longer. For smaller loans with short amortization, the rewards of price search will be quite modest.

3. The easier it is for consumers to get clear and reliable information about the relative cost of different credit sources, the more likely they are to get and use that information.

(b) Alert

As stated earlier, APR information can function as an alert for consumers who might not be active credit shoppers, but who are not altogether insensitive to the cost of credit. We suspect that most consumers fall into this category when it comes to relatively small, short term loans. APR can alert such consumers to the fact that the cost of credit for a proposed credit transaction is extraordinarily high, and perhaps persuade the consumer that it would be worthwhile to look for an alternative source of credit. For APR to function as an "alert" signal, consumers whom it is intended to alert must have some knowledge of prevailing rates, and they must have a "shock threshold", a point at which an APR will strike them as being so outrageously high that they should reconsider a transaction. We suspect that many consumers do have the requisite knowledge of prevailing rates and shock threshold for APR to play a useful role as an "alert" signal.

2. Credit use decisions

Earlier, we noted that research indicates that knowledge of APR has almost little or no discernible effect on consumers' credit use decisions.[52] Of much more importance for this purpose is consumers' perception of whether they can afford the monthly payments (and any required downpayment). Of course, prevailing interest rates will affect the amount of the monthly payments required to pay off a loan of a given amount over a given period of time, and so will indirectly affect the amount borrowed by consumers.[53] Even here, however, the effect of a change in rates reveals itself to consumers as a change in the amount of the monthly payments.

Knowledge of prevailing rates probably will continue to have limited impact on consumers' demand for short term instalment credit. Consumers who think about rates at all when making short-term credit use decisions probably think in pretty broad terms: "Interest rates are sure high right now". This sort of rate awareness is more likely to come from the media than from the perusal of a CCDL disclosure statement. Thus, CCDL should not be viewed as having a significant role to play in moderating demand for consumer credit.

3. Future reference

What role, if any, can cost of credit disclosure play after the contract is signed and the funds are advanced? When the battles over CCDL were being fought, very little attention was paid to the possibility of such a role for CCDL. After CCDL was enacted, however, and especially when it appeared to be having a very limited effect on consumers' pre-contract behaviour, suggestions were made that CCDL could have beneficial effects on the post-contractual relations between consumers and lenders.[54] Most of the suggestions regarding the post-contractual benefits of disclosure relate to non-cost terms of the credit contract, such as default provisions, warranty claim procedures, and so forth. As such they are beyond the scope of this enquiry. However, there are a couple of potential post-contractual benefits of cost of credit disclosure.

Chances are that after entering into a closed credit contract, most consumers will have a good recollection of the amount of the periodic payments and of how many payments will be required in order to pay out the loan. It would be surprising, however, if many consumers could recall the precise APR or credit charge on the loan after a couple of months. What would be the point? Information about APR and the dollar credit charge—indeed, any credit cost information other than the amount and number of the periodic payments—does not really assist consumers in "managing" the loan. But many of these consumers who have less than perfect recollection of the APR will also have the loan

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52 Putting the term "almost" before "no discernible effect" is being charitable. It should be emphasized here that we are talking about consumer credit other than mortgage credit.

53 As was earlier, however, even a dramatic increase in interest rates will have a pretty modest effect on the monthly payments required on a short term instalment loan. In any event, many consumers would extend the amortization period on their loan rather than cut back on the amount of credit they obtain.

54 WHITFORD at 405, 463-70.

documents tucked in a drawer, so they can refer to them if the need arises. One thing that might cause them to do so is a nagging feeling that the rate they are paying is higher than the rates now being advertised by other lenders. Some of these consumers, who realize that they may pay out a consumer loan at any time without penalty, will consider the possibility of "transferring" the loan to another lender. At this point, the APR information in the loan documents in the drawer can serve a very useful purpose. It provides a quick indication of whether there is money to be saved by transferring the loan.

The other area in which cost of credit disclosure can have significant post-contractual benefits is in the field of open credit, particularly credit cards. This topic is dealt with in Part 3.

PART 3

CANADIAN CCDL: DISCUSSION AND TENTATIVE SUGGESTIONS FOR UNIFORM CCDL

This part of the paper points out some of the weaknesses of existing Canadian CCDL and makes some tentative suggestions as to how it might be improved in a uniform act. It is not a detailed analysis of existing CCDL. Instead, its purpose is to draw attention to areas in which there is room for significant improvements in existing CCDL. Sometimes, the suggested improvements would amount to the adoption (perhaps with some variations) of an approach already taken by at least one Canadian jurisdiction. In other cases, the suggested improvement would depart from the approach currently taken in any Canadian CCDL.

The preceding paragraph refers to the possibility of significant improvements in CCDL. What would count as such an improvement? To count as a significant improvement to CCDL, a suggested change should accomplish one of the following:

1. increase the utility of CCDL disclosure requirements to consumers and reduce the burden of such disclosure on lenders;

2. increase the utility of CCDL disclosure to consumers without imposing disproportionate burdens on lenders; or

3. decrease the burden imposed on lenders by CCDL without significantly reducing the utility of CCDL disclosures to consumers.

Obviously, the first type of improvement is the most prized, as well as the hardest to achieve.

A. A performance specification for CCDL

It will help to have a standard against which to measure existing Canadian CCDL and suggested improvements. For that purpose, we describe below a "performance specification" for CCDL. The specification first states the objectives CCDL should be designed to achieve. In this, it attempts to keep the objectives within the range of the

practicable. Second, the specification describes certain characteristics of the environment in which CCDL must operate.

CCDL OBJECTIVES

1. The first objective of CCDL is to provide consumers with clear, reliable and directly comparable information about the cost of credit from different sources, so they can use this information when deciding where to obtain credit. It is crucial that the information be given to consumers in a form and in circumstances that maximize their opportunity to use it.

2. A secondary objective is to provide consumers with information that will alert them to very high-cost sources of credit.

3. It is hoped that consumers will use information given to them as a result of CCDL requirements in deciding whether to use credit, but it is not anticipated that CCDL disclosures will have a major impact on such decisions, except, perhaps, for long-term credit transactions involving large principal amounts.

4. CCDL should impose no greater burdens on lenders than are necessary to achieve the preceding objectives. This applies to the requirements themselves, as well as to their expression in statutory form.

ASSUMPTIONS AND CONSTRAINTS

1. It should be assumed that the target of CCDL is the "average consumer", who has the following characteristics:

   (a) given a choice between buying a product from a lower-cost source and a higher-cost source, the consumer will choose the lower-cost source, all else being equal;

   (b) time spent shopping for credit (or anything else) will be proportionate to the consumer's perceptions of the potential savings from doing so;

(c) time spent credit shopping is relatively high-cost time, especially where it involves visits to lenders' premises.[55]

2. CCDL disclosures are not intended to provide consumers with the means of doing sophisticated analyses of potential credit transactions. Consumers who can undertake such analyses do not need CCDL.

3. In most consumer credit transactions, if the cost of credit is thought of at all, it will be thought of as a component of the cost of the product for which the credit is required.

4. The significance to consumers of a given shift in APR depends on the size and duration of the credit transaction. The significance of a shift in APR increases with the size and duration of the credit transaction.

This is a rather loose performance specification for CCDL. Nevertheless, it provides a framework for analyzing the main weaknesses of existing CCDL and proposing possible improvements.

B. The basic approach of CCDL

To a greater or lesser degree, all Canadian CCDL follows what can be described as a "detailed requirements" approach; the information that must be disclosed to consumers and the form in which it must be disclosed are specified in considerable detail. This is also the approach taken by U.S., U.K. and E.E.C. CCDL. Nevertheless, it has been suggested that this is the wrong approach, that CCDL should not attempt to specify in detail the credit cost information to be disclosed to consumers. Instead, it should simply require fair and full disclosure:

> I continue to be of the view that the basic approach contained in the CCTA is wrong. It is much more complicated than is needed. Surely all the legislation needs to say is that a lender will fairly and reasonably disclose the credit charges and go on to

55 Many consumers enjoy shopping for, say, a car or a television. Few consumers will find shopping for credit to be an intrinsically enjoyable experience. Thus an hour spent shopping for credit is likely to seem more burdensome than an hour spent shopping for a car or television.

> say that if he fails to do so a court may prevent recovery of some or all of the credit charges. That kind of broad approach can be applied to a wide variety of transactions and has much greater flexibility.[56]

The argument for a fair and full (or "fair and reasonable") disclosure approach really amounts to an argument for abandoning CCDL altogether. When CCDL was being advocated in the sixties, opponents argued that such legislation was unnecessary because consumers already received all the credit cost information they needed or wanted. Lenders argued that they were already fully and fairly disclosing the cost of credit. Why should they be required to do more?

An advocate of CCDL might concede that, in the absence of such legislation, the great majority of lenders would probably fully and fairly disclose the cost of credit to consumers. The problem, however, is that there is no guarantee that the cost of credit fully and fairly disclosed by lender A would be directly comparable with the cost of credit fully and fairly disclosed by lender B. It would be the old problem of the lack of a standard measure of the cost of credit: the credit market equivalent of a gasoline market in which some gas stations quote prices by volume and some by weight and, of those who quote by volume, some quote in litres and others in gallons. In short, CCDL that merely required lenders to make "full and fair" disclosure of credit charges would not meet the first objective of our specification. It would not provide consumers with a convenient method of directly comparing the cost of credit offered by different sources.

RECOMMENDATION 1:

Substitution of a "fair and full disclosure" approach for the existing "detailed requirements" approach of CCDL should NOT be considered.

C. Comprehensible statute

Objective 4 in our specification was that CCDL be no more burdensome to lenders than is necessary to achieve its purpose. One measure of the burden placed on lenders by CCDL is the ease or difficulty they will encounter in trying to figure out what the legislation

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56 MIRTH at 35

tells them to do. In this respect, CCDL leaves much to be desired. Admittedly, CCDL deals with some difficult technical and mathematical issues that are bound to lead to some complexity in the relevant statutes. But the complexity of the subject matter does not justify the tortuous complexity and obscurity of Canadian CCDL. This point can be illustrated by a general observation applicable to all Canadian CCDL, and a specific example drawn from Alberta's CCTA.

First, the general observation. It is necessary for CCDL to define concepts such as annual percentage rate and total credit charges. These concepts involve mathematical relationships of varying complexity. Over the ages mathematicians have developed a special notation for expressing mathematical relationships much more precisely and concisely than such relationships can be expressed in everyday language. For example, expressions 1 and 2 below describe the same relationship, but expression 2 does so more clearly and concisely.

1. W equals the amount by which X exceeds the product of Y multiplied by Z.

2. $W = X - (Y * Z)$

Unfortunately, the manifest advantages of mathematical notation for expressing mathematical relationships appear not to have impressed the drafters of Canadian CCDL. The drafters of American, British and European Economic Community CCDL all use mathematical notation to express mathematical relationships, but the drafters of Canadian CCDL do not. They attempt to express all mathematical relationships in ordinary English, rather than with mathematical notation. The result is usually not a happy one.

The general organization and structure of Canadian CCDL also leaves something to be desired. This can make finding the answer to a relatively simple question unnecessarily difficult and time consuming. Suppose, for example, that a lender wishes to know whether a cash loan of $25,000 to an individual for business purposes is covered by Alberta's CCTA. Since CCTA stands for ***Consumer Credit Transactions Act***, the lender might presume that the act would not cover a loan for business purposes. But finding out the answer is quite a complicated exercise. The CCTA does not have a general "application" section: its first substantive provision, section 2, starts out "This Act does not apply to the following: . . . ." Amongst other things, section 2 excludes

- "a sale or purchase of goods or services . . . for purposes other than for primarily personal, family, household or farming purposes";
- loans greater than $50,000;
- loans to corporations or partnerships.

No mention here, though, of *loans* of less than $50,000 to individuals for business purposes. In fact, a diligent search through the CCTA will turn up nothing to indicate that there is a blanket exclusion of loans to individuals for business purposes. But one must not forget the regulations, where section 3.1 (2) says that section 8 of the CCTA does not apply to mortgage loans or loans "for purposes other than for primarily personal, family, household or farming purposes." Flipping back to section 8 of the act, one finds that this is the section that gives borrowers a remedy in the event of non-compliance. The conclusion, after much hunting about: the CCTA applies to the loan, but compliance seems to be optional.[57]

In short, quite apart from any substantive improvements that can be effected in Canadian CCDL, there is a great deal that can be done to make it more comprehensible and easier to use. The benefits of doing so would fall mainly on lenders and their legal advisers since they have the task of designing forms and policies that meet the requirements of the legislation. The easier it is to determine what these requirements are, the easier it will be to design the forms and policies.

D. Section 4 of the *Interest Act*

Section 4 of the *Interest Act* says that, except for mortgages on real property, where a contract provides for interest at a monthly rate or any other periodic rate less than a year, the maximum interest that can be recovered is 5% per annum, unless the contract states the annual rate to which the other periodic rate is equivalent. Not too long ago, a judge of the Alberta Court of Queen's Bench created something of a sensation[57] by holding that this section requires the rate of interest to be stated

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57 There is, however, the matter of the CCTA's penal provision, which makes non-compliance with the act an offense.

58 When we say it created a sensation, we do not mean to suggest that it received as much attention as, say, the latest Madonna video (except, perhaps among bank (continueed .)

as an *effective* annual rate, rather than a *nominal* annual rate.[59] This case involved business, rather than consumer, credit. However, the reasoning in this case was soon applied in a case involving a consumer.[60] *Dunphy* has not been followed in other jurisdictions and has come under heavy criticism.[61] An appeal has been heard but has not yet been decided.

We comment on the effective versus nominal rate debate later in this paper. For the moment, the interesting thing about section 4 of the *Interest Act* is that it applies to consumer transactions as well as non-consumer transactions. If it does really require interest to be stated as an effective annual rate, it would contradict not only every province's CCDL, but also the *Bank Act*'s CBDR. If, on the contrary, it does not require an effective annual rate, it adds nothing to the provincial and federal CCDL. Accordingly, there is a good argument that section 4 of the *Interest Act* should either be repealed or limited to transactions that are not covered by provincial or federal CCDL.

RECOMMENDATION 2:

Consideration should be given to repealing section 4 of the *Interest Act* or limiting its application to transactions not covered by other CCDL.

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58 (continued)
lawyers). However, it did receive front page coverage in the Globe & Mail, extensive coverage in the Edmonton Journal and the Lawyers' Weekly, and a segment on the CBC television program Market Place. It also spurred two entrepreneurs to start a business which, for a small fee, would assist consumers to recover the excess interest they had supposedly been paying to banks and other lenders.

59 Bank of Nova Scotia v *Dunphy Leasing Enterprises Ltd.* (1990) 105 A.R. 161 [hereinafter *Dunphy*]. The difference between nominal and effective annual rates are discussed below, in section F2(b). Actually, it is not beyond argument that the judge in *Dunphy* held that s. 4 **required** interest to be stated as an effective annual rate. It is possible that he decided that the contract in question was ambiguous as to whether the annual rate that it set out was the effective or the nominal rate. Resolving the ambiguity in favour of the party who did not draft the contract, the judge assumed that it stated an effective rate.

60 *T. Eaton Co. Ltd* v. *Madden* (1990) 74 Alta. L R. (2d) 9 (Q.B M.C).

61 *Dunphy* was not followed in *Upper Yonge Ltd.* v. *Canadian Imperial Bank of Commerce* (1990) 75 O R (2d) 98 at 110-13 (Ont. H.C.J.), and is criticized in E. Maynes et al "Calculating Periodic Interest" (1991) 17 Candian Business Law Journal 415.

E. Coverage of CCDL

To what sorts of transactions should CCDL apply? This is an area where there is considerable diversity in different Canadian jurisdictions' CCDL. To a certain extent, these differences reflect different political judgments about who requires the protection afforded by CCDL. In such cases, it could be difficult to achieve a consensus on the appropriate scope of protection. A case in point is the question of whether credit for agricultural purposes should be included within CCDL. Several provinces' CCDL treats credit for agricultural credit as consumer credit. In other provinces and in the *Bank Act*, credit for agricultural purposes is treated the same as other business credit.[62] It may be that such differences represent fundamental differences on questions of policy. There are, however, coverage issues where existing differences between jurisdictions could be bridged without requiring anyone to give up a fundamental point of political principle. The three sections that follow discuss some of the more important coverage issues that would come up in drafting uniform CCDL.

1. Credit secured by mortgages on land

Some provinces' CCDL and the CBDR (under the *Bank Act*) apply to mortgages. Other provinces' CCDL specifically excludes mortgages. This exclusion of mortgages seems odd at first glance. After all, mortgages constitute by far the largest portion of total household credit, and individual mortgages are likely to be much larger than other kinds of household debts. It seems especially important to ensure that consumers are fully informed about the cost of mortgage borrowing.

Actually, the exclusion of mortgages from some provinces' general CCDL does not reflect a decision to deny full cost of credit disclosure to mortgage borrowers. Rather, it reflects pre-existing, narrower legislation. In Ontario, for example, regulations under the *Mortgage Brokers Act*[63] require mortgage brokers[64] to provide borrowers with

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62 To be more precise, "agricultural purposes" are not expressly mentioned by the *Bank Act*. Section 202(4)(f) excludes from the act's disclosure requirements loans "to an individual for business purposes", which presumably would cover a loan to a farmer for agricultural operations.

63 R.S O 1980, c. 295

64 Contrary to what one might think, "mortgage brokers" includes persons who act as principals in mortgage loan transactions

a statement that contains the same sort of disclosures as is required under general CCDL. It seems more logical, however, to include such provisions in general CCDL than to leave it in legislation dealing with particular classes of lenders. Uniform CCDL should include mortgages: individual provinces could still deal separately with mortgages if they so chose.

One difficulty facing provincial CCDL that deals with mortgages is section 6 of the *Interest Act*. As mentioned above in connection with section 4 of the *Interest Act*, the APR required by provincial legislation and the CBDR is a nominal rate. As is well known, section 6 of the *Interest Act* requires interest on a blended mortgage to be disclosed as an annual rate of interest, calculated annually or semi-annually not in advance. Since most household mortgages are blended and are paid monthly or even more frequently, there is a flat-out contradiction between the nominal APR of CCDL and the "semi-annual compounding" APR required by section 6 of the *Interest Act*. There are two ways to address this. Either general CCDL legislation can modify its requirements where mortgages are concerned, or section 6 of the *Interest Act* could be repealed. There is much to be said for the latter option, but this requires further study and consultation.[65]

RECOMMENDATION 3:

(a) Uniform CCDL should be drafted on the assumption that it will apply to credit extended on the security of a mortgage against land.

(b) Consideration should be given to recommending repeal of section 6 of the *Interest Act*.

(c) If section 6 of the *Interest Act* is not repealed, the method of calculating credit charges for disclosure purposes should be consistent with that section.

65 The general issue of nominal versus effective APRs is discussed below

2. Transactions without credit charges

In some provinces' CCDL "credit" is defined so as not to include credit for which there is no cost of credit, or it is otherwise made clear that the legislation does not apply to credit where there is no cost of credit. The rationale for this exclusion is readily apparent. By definition, CCDL is concerned with *cost of credit disclosure*. If there is no cost, what is there to disclose?

This approach was initially taken by the TILA in the United States but was soon modified. Now any credit that is repayable in more than four instalments is covered by the TILA.[66] The reasoning for the change was that the exclusion simply encouraged merchants to bury credit charges in the cash price of merchandise sold mainly to credit customers. It was reasoned that even if there was no overt credit charge, there must be a cost of credit in there somewhere.

Whether it is really impossible for consumers to get credit without credit charges is a point that we do not need to resolve here. Even if there really are no credit charges attached to a particular credit transaction, there may be good reasons for imposing certain disclosure requirements. For example, a credit contract that does not impose any credit charges, provided the account is paid in full on schedule, might impose stiff "default charges" if the consumer misses a payment. Such a provision might properly be made the subject of disclosure requirements. Hence, rather than excluding such credit transactions altogether, the disclosure requirements applicable to such transactions should reflect the absence of credit charges.

RECOMMENDATION 4:

There should NOT be a blanket exclusion of transactions without credit charges. Instead, the applicable disclosure requirements should reflect the absence of credit charges.

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66 The Act requires lenders who do not quote a separate finance charge for credit to be repaid in more than four instalments to include the following statement in any advertisement: THE COST OF CREDIT IS INCLUDED IN THE PRICE QUOTED FOR THE GOODS AND SERVICES

3. Leases and lease-options

In this discussion, we will distinguish between three types of consumer leases of personal property: (1) short-term leases, (2) long-term leases, and (3) leases with an option to purchase.

Consumer leases of personal property have not traditionally been thought of as forms of credit, but it is fairly obvious that a long-term lease of a car serves a similar function to a sale of the car on credit terms. In both cases, the consumer gets the long-term use of the car without having to pay its full capital cost immediately. One difference between the two cases is that at the end of the term of the credit sale the buyer takes title to the car, whereas at the end of the lease the car is returned to the dealer. Even this difference disappears if, as is often the case, the lease is combined with an option to buy the car at the end of the lease term.

Some provinces' CCDL covers certain leases of personal property to consumers. Alberta's CCTA contains disclosure requirements for leases in excess of four months for goods with a value of $50,000 or less. Quebec recently passed amendments to its CPA that, when proclaimed, will bring "contracts of long-term lease" within the act's purview.[67] In view of the similar role played by long-term leases and conventional forms of consumer credit, there is a strong argument for including disclosure requirements regarding such leases in uniform CCDL. This issue should be considered further.

If there is a good argument for making CCDL applicable to long-term leases of consumer goods, there is an even better argument for doing so when the lessee is given an option to buy the leased goods. From an economic point of view, there is not a great difference between a lease-option arrangement and a time sale of goods. This is especially so where the option price is less than the expected market value of the goods at the option date. In effect, the lessee is building equity in the goods with each regular lease payment, just as in a standard time sale arrangement. Given the similarity of lease-option arrangements and ordinary time sales—and given that consumers will often have a choice between them—there is much to be said for making sure that consumers are given information about prospective lease-option arrangements that is comparable to information about time sale transactions.

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67 *An Act to Amend the Consumer Protection Act*, S.Q 1991, c. 24.

The similarity of lease-option arrangements and ordinary time sales has been recognized in Manitoba's CPA, which sets out disclosure requirements for "retail hire-purchases" (basically, leases with options). In addition to other "cost of credit" information, the agreement must disclose the cash price of the goods and the APR for the transaction.[68] These two pieces of information provide consumers with a superior means of comparing a proposed hire-purchase arrangement with other methods of financing a purchase.[69] The recent amendments to Quebec's CPA contain similar provisions, except the requirement to state an APR is triggered when the consumer guarantees that the leased goods will have a certain residual value at the end of the lease.[70] Requiring the disclosure of "implicit credit charges"[71] and the APR in lease-option or "guaranteed residual value" leases is an idea that merits consideration for uniform CCDL.

RECOMMENDATION 5:

(a) Consideration should be given to including disclosure provisions for consumer long-term leases of personal property.

(b) Consideration should be given to treating certain lease-option arrangements as credit sales for disclosure purposes, which would entail the disclosure of APR and other cost of credit information.

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68 Manitoba CPA, s. 5.B

69 One fly in the ointment is that this information is to be disclosed in the written contract As pointed out elsewhere in this paper, disclosures in the contract document will usually have little or no impact on the consumer's decision. By the time the consumer sees the contract, he or she is probably committed to the transaction

70 Quebec CPA, ss 150.18, 150.24-150 27, as added by S Q. 1991, c. 24, s. 3 (not yet proclaimed). The guaranteed residual value can be thought of as a sort of balloon payment. The consumer can either pay this amount in cash and keep the goods or return the goods for credit against the balance owing (the guaranteed residual value). If the goods are actually worth less than the guaranteed residual value, the consumer must make up the difference (although Quebec's amended CPA limits the consumer's liability to 20% of the residual value and provides other protections for the consumer).

71 This term is used in Quebec's CPA

F. APR as standard measure of credit cost: accuracy versus precision in closed credit transactions

It is possible that some Canadian CCDL requires too much precision and not enough accuracy in the calculation and disclosure of APR. What we mean by accuracy in this context is an APR that takes into account all cost factors that it needs to take into account in order to serve its intended purpose. Precision, on the other hand, is measured by the number of decimal places to which the calculation of APR must be carried. An APR of 12.784% might be very precise but still be an inaccurate measure of the cost of credit, if its calculation leaves out a relevant cost factor. On the other hand, in some contexts an APR of "about 12%" might provide consumers with all the information they need. We will deal first with the issue of accuracy.

1. Accuracy: the components of APR

APR is supposed to be a standard measure of the relative cost of different credit sources. However, as noted previously, consumers do not spend and save percentage points: they spend and save money. The real test of the utility of APR information is whether it can help consumers save money or get optimal value out of the money they do spend. APR information should help consumers find cheaper sources of credit by serving as a **signal** of the relative cost of different sources of credit. As with any signal, APR's value depends on the reliability or accuracy of the information it sends out. If consumers are invited to interpret APR as a significant measure of the cost of credit, then APR must be calculated in a way that reliably indicates the relative cost of different sources of credit.

It is not realistic to expect APR, or any other cost information that might be given by lenders to consumers, to take into account every component of the real cost to the consumer of obtaining credit. APR can tell the consumer nothing about such costs as the time spent applying for a loan, the gasoline used to get to the financial institution's office, or the cost of parking. These are real components of the cost of obtaining credit and for small loans may be as significant as the interest charges. Obviously, though, such "personal" costs vary from one consumer to the next, and lenders are unlikely to have the foggiest idea what these personal costs are for any given consumer. Lenders can be asked to disclose only those components of the total cost of credit that are within their knowledge. Thus, subsequent references in this section to consumers' costs of obtaining credit should be taken as references to costs other than personal costs.

What costs should be taken into account in the calculation of APR if it is to function as a reliable signal of the relative cost of credit? One possible answer is that APR should include all costs that the consumer incurs to obtain credit, whether they reflect periodic charges for the use of money (interest) or non-periodic, lump sum payments. A consumer deciding between two potential sources of credit should consider all the costs associated with each source in deciding which is cheaper. For APR to be a reliable signal of the relative cost of different credit sources, it should take all these costs into account. If APR ignores any costs that must be borne by consumers to obtain credit, it is liable to provide them with inaccurate and possibly misleading information.

It is, however, far from universally accepted that all costs incurred by consumers in order to obtain credit should be included in the calculation of APR. Controversy is most likely to arise in the treatment of various "non-interest" charges that consumers may have to pay. Generally, such charges are one-time payments imposed at the outset of a transaction and often come directly off the sum advanced to or on behalf of the consumer.

At the risk of some oversimplification, non-interest charges can be divided into three categories: (1) premiums, discounts and other "front-end" charges that do not fall into either of the next two categories, (2) incidental charges, and (3) flow-through expenses. The first category is comprised of charges that can be thought of as part of the lender's compensation for extending credit to the consumer. The second category consists of charges for incidental services that are provided by the lender but that are not charges for the extension of credit. An example of such an incidental charge is a premium for "credit life insurance", where the payment is for a product—insurance coverage—that is beyond the mere provision of credit.[72] Flow-through expenses are a special kind of front-end charge. They are expenses connected with the loan that are paid by a lender to a third party and then recovered by the lender from the consumer. The most common sort of flow-through expense is the "official fee": money paid by the lender to a government official for, say, registering a security interest.

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72 Such charges must be scrutinized carefully, however, to ensure that they really are not part of the cost of obtaining credit. A useful test is to ask whether the consumer is *required* to incur the expense in question in order to get credit from the lender. If so, it does not fall into the category of an incidental expense: it is a category 1 or 3 expense. Perhaps with this in mind, Quebec's CPA expressly includes all insurance premiums except automobile insurance premiums in the credit charge: s 70(b).

The first two kinds of non-interest charges are pretty uniformly dealt with in CCDL. Premiums, discounts, brokers' commissions, general service charges and so forth are treated as credit charges and must be included in the calculation of APR. This is fundamental to the efficacy of APR as an indicator of the cost of credit. On the other hand, incidental charges are not treated as credit charges: they must be disclosed, but they do not have to be included in the calculation of APR. This is a sensible approach, so long as the incidental charges are in fact for a distinct service that is separate from the extension of credit.

Some flow-through expenses are not treated as credit charges for the purposes of calculating the APR. There is some variation between jurisdictions in the flow-through expenses that can be passed on to the consumer without being treated as a credit charge. In most provinces, only official fees and premiums for insurance connected with the extension of credit[73] can be passed on to consumers without being included in the APR. Under the *Bank Act* CBDR and Alberta's CCTA, a wider range of expenses can be passed on in this fashion. These expenses include search costs, appraisal fees, lawyers' fees and surveyors' fees.[74]

Several different arguments (with many variations) can be made for *not* including flow-through expenses in the calculation of APRs for consumer credit transactions. These arguments are briefly described and evaluated below.

1. Flow-through expenses should not be treated as credit charges because they are not paid to the lender for its own benefit. The lender merely acts as a conduit for the payment of these charges to a third party. Including flow-through expenses in the calculation of APR misrepresents the nature of these payments by suggesting that they are income of the lender.

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73 As previously noted, some insurance premiums fall into the category of incidental charges: charges for a separate service provided by the lender. But CCDL other than Quebec's CPA appears to permit premiums for insurance that benefits the *lender* to be passed on to the consumer without being included in the APR.

74 Of course, the types of expenses mentioned here are routinely incurred only in mortgage loans, and most Canadian CCDL does not cover mortgage credit. Not surprisingly, then, most provinces' CCDL does not mention such expenses. Quebec's CPA requires appraisers' fees to be included in the credit charge: s. 70(d)

This argument forgets that the function of APR is to indicate the cost to the consumer of obtaining credit from a particular source; its function is not to tell the consumer how profitable the transaction will be for the lender. If official fees or other flow-through charges are a significant component of consumers' costs, an APR that does not take them into account will significantly understate the cost of credit.

2. Including flow-through expenses in the calculation of APR is more likely to confuse consumers than to assist them. Consumers are likely to think of APR as the periodic charge on outstanding principal (i.e. interest) and will assume that the credit charges for any payment period can be calculated by multiplying the outstanding principal by the appropriate fraction of the APR. This will not work if flow-through expenses are included in the calculation of APR.

Certainly, when flow-through expenses are included in APR, the relationship between the disclosed APR and the credit charges attributable to any given period becomes rather problematic. However, it is difficult to see how this will confuse many consumers. The primary purpose of providing APR information in closed credit transactions is not to allow consumers to check the lender's arithmetic. Calculating the portion of a periodic payment that is credit charge and the portion that reduces principal is not something that many consumers will have any inclination to attempt. The only practical reason for doing so would be to determine the outstanding balance for prepayment purposes. Doing such a calculation is not the simplest task in the world, whether flow-through charges are included in APR or not. Probably, a consumer who has the inclination and ability to perform this calculation will not be confused by the inclusion of flow-through expenses in the calculation of APR.

3. Flow-through expenses are not controlled by the lender, and all lenders in a particular segment of the consumer credit market (e.g. first mortgages or car loans) are likely to incur the same flow-through expenses. Hence, including such charges in the calculation of APR would not assist consumers in credit shopping. The stated APRs of all lenders would be higher, but the relative APR levels of different lenders would remain the same. Since flow-through expenses are the same for all lenders, the lender with the lowest APR when such

charges are not included in the calculation will have the lowest charges when they are included.

This represents a more substantial objection to including flow-through charges in APR. Its major premise is that all lenders in a particular segment of the credit market will incur and pass on to consumers essentially the same flow-through charges. Thus, including such charges in APR does not assist consumers in credit shopping, because its effect will be more or less the same on the APRs quoted by different lenders. This objection cannot be lightly dismissed, but there are points that can be made in reply.

In the first place, the premise that flow-through expenses of different lenders will be virtually identical is questionable, especially when applied to flow-through charges other than official fees. Even where official fees are concerned, there could be differences between lenders. For example, official fees are generally incurred in connection with secured rather than unsecured credit transactions. If lender A requires security for a loan but lender B does not, the latter will escape the official fees that the former will incur to register its security interest. Thus, excluding official fees from APR will understate the true cost of a loan from A relative to a loan for the same amount from B.[75] Another point is that even if two lenders incur identical official fees, there is nothing to stop one of them from absorbing these fees for competitive purposes.

Also, insofar as information about APR may be useful to consumers in making credit use decisions (i.e. whether to obtain credit, pay cash, or defer purchase), excluding flow-through costs from APR will distort the information it provides for this purpose. This could lead to a credit use decision based on a misappropriation of the total cost of credit. This argument can not be carried too far though. We have emphasized that APR information seems to have very little effect on consumers' credit use decisions, except where large, long term loans—generally mortgages—are concerned. But it is precisely in the case of large, long term loans that flow-through charges will have their smallest effect on APR. Nevertheless, APR's potential impact on the credit use decision should not be left entirely out of account.

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75 Admittedly, the exclusion or inclusion of official fees is unlikely to make a great deal of difference in the stated APR for any but the the smallest of loans, and the effect diminishes as the term of the loan increases.

4. Including flow-through expenses in the APR will cause practical difficulties. Such expenses do not vary directly with the amount of credit extended, so they are difficult to express as an APR (or as any sort of percentage). This is especially so where the APR is to be expressed for a range of possible transactions (as in an advertisement) that may have different principal amounts.

Actually, inclusion of flow-through expenses does not cause a significant problem in calculating the APR for a specific transaction once these expenses are known. Generally, they will be known by the time the disclosure documents are given to the consumer. The problem arises in connection with non-specific disclosures—such as in advertising—where APR is to be disclosed for a range of potential transactions that may involve different principal amounts, durations and, perhaps, flow-through expenses. These expenses are unlikely to vary in direct proportion to the amount of the loan, and even if they did, their effect on the APR would depend on the loan's duration. Thus, if flow-through expenses will be incurred and must be included in APR, it will be impossible to state a precise APR that will apply to the full range of possible loans.

Granted, if flow-through expenses must be included in APR, a lender who passes them on to its customers will not be able to advertise an APR that will be precisely correct for all combinations of principal, duration and flow-through expenses. That, however, does not mean that we are faced with the alternatives of not including flow-through charges in APRs or not permitting lenders who pass on flow-through expenses to consumers to advertise their APR. It would be feasible, for example, to allow lenders to advertise their APR for credit transactions of a specified amount and duration, based on an estimate of the flow-through charges that will be passed on to the consumer. Such an APR will probably be somewhat imprecise, but we have several times pointed out that precision may be an over-rated virtue when it comes to APR calculations.

5. Treating flow-through expenses as credit charges could cause complications when it comes to the calculation of the balance outstanding on loans that consumers wish to prepay. Since they are direct and irrecoverable costs of setting up the loan, it does not seem appropriate for the lender to be required to refund any portion of them to a consumer who prepays the loan. However, if flow-through expenses are treated as credit charges, that is exactly what the prepayment formulas in CCDL require.

This point is valid but does not raise an insuperable obstacle to including flow-through expenses in APR. If it is assumed that flow-through expenses should not be refunded to consumers who prepay their loans, then including such expenses in APR does complicate the calculation of the outstanding balance when a loan is prepaid. However, it is not a huge complication and can be addressed without a great deal of difficulty. The important thing to keep in mind is that treating flow-through expenses as credit charges for the purposes of calculating APR does not entail that they be treated just like other credit charges for prepayment purposes.[76]

In principle, it is desirable to include all flow-through charges in the calculation of APR. This will make APR a more effective signal of the relative cost of credit of different sources. This could cause some practical difficulties, particularly in the context of advertising or other situations where disclosure does not relate to a specific transaction. The seriousness of these difficulties must be weighed against the improved accuracy that comes with including them in APR. At the very least, the types of flow-through charges that are excluded from APR should be kept to a minimum. However, it is crucial to remember that including a particular flow-through expense in the calculation of APR does not entail that it must be treated like "ordinary" credit charges when it comes to calculating outstanding balances for prepayments.

RECOMMENDATION 6:

(a) Consideration should be given to including all flow-through expenses charged to consumers in the calculation of APR. At the very least, uniform CCDL should be slow to exclude any type of flow-through expense from the APR calculation.

(b) The issue of whether flow-through charges are included in the disclosed APR should be kept separate from the issue of how such charges are treated in the calculation of rebates.

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76 This distinction is acknowledged by the U.K.'s CCA, although here, as elsewhere, the CCA's approach seems exceedingly complex: see GOODE, vol 1 at 870-71.

2. Precision

(a) Tolerances

CCDL provides a tolerance for the disclosure of APR; lenders are permitted a certain margin of error in the disclosure of APR.[77] Canadian CCDL takes two distinct approaches to the specification of the tolerance: we refer to them as the "single test" and "alternative test" approaches.

The single test approach is characteristic of recent CCDL (ie. Alberta, B.C., P.E.I., Quebec, and the *Bank Act*'s CBDR). It requires the disclosed APR to be accurate to within a certain fraction of one percent. Typically, the fraction is 1/8 of 1%,[78] and this degree of precision must be achieved regardless of the size or duration of the loan. But it is questionable whether this degree of precision is useful to consumers in the case of small, short-term loans, where discrepancies of considerably more than 1/8 of one percent between the quoted and actual percentage rates are likely to be of little real significance.

For example, the actual annual rate on a $1000.00 loan that is to be repaid in 12 monthly instalments of $88.97 is 12.25%. Suppose that the lender rounds the disclosed rate to 12%, a figure that is 1/4 of one percent off the actual rate. If the rate were actually 12.0%, the monthly payments would be $88.85, a difference of 12 cents a month or $1.44 in total payments. Thus, for a loan of this amount and duration, the difference in the payments produced by rates of 12.0% and 12.25% is so slight that rounding the actual rate of 12.25% to 12% does not produce any real mischief, yet it results in a variance beyond the permitted tolerance of 1/8 of 1%.

The alternative test approach is typical of older CCDL, such as that of Ontario and Saskatchewan. Under this approach, the disclosed rate is sufficiently precise if it meets **either** of the following tests:

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77 We are here concerned with the standard tolerance provided by CCDL. In addition to this standard tolerance, CCDL often provides tolerances for certain special cases, such as where there are unequal intervals between payments These "special" tolerances are not addressed in this paper

78 The one exception is Quebec, which specifies that the stated percentage must not be *less* than the actual percentage by more than 1/4 of 1%

1. it does not vary by more than a certain percent per annum from the actual rate; or

2. when applied in the prescribed manner, it does not produce credit charges that vary from the the actual credit charges by more than a certain amount (in dollars).

The typical figures for the two tests are 1% for the first and $2.50 for the second, but there is some variation between provinces.[79] Comparing the two tests, the first provides the lender with more leeway for larger, longer-term loans, while the second is more generous for smaller, shorter-term loans. Thus, the first test will determine the tolerance for larger, longer loans, and the second will determine the tolerance for smaller, shorter loans.

To illustrate the relationship between the first and second tests, suppose that an act specifies 1/8 of 1% for the first test and $2.50 for the second. What is the tolerance for the $1000 loan described a couple of paragraphs ago? With 12 monthly payments of $88.97, the actual APR on the loan is 12.25%. The first test is satisfied only if the disclosed APR is between 12.125% and 12.375% (12.25% plus or minus .125%). However, the second test is satisfied by any stated APR between 11.8% and 12.7%. Since the disclosed APR need only satisfy one of the tests, the tolerance is here determined by the second one.

In deciding on the approach uniform CCDL should take to tolerances for APR disclosure, a distinction should be made between the possible and the practical. For any given closed credit transaction, a lender with the most basic computing equipment and software can calculate the APR with any degree of precision the legislature might require. A lender who knows the timing and amount of advances to and payments by a borrower can enter the data in a computer and easily obtain an APR that is accurate to more decimal places than legislators would ever dream of requiring. The question, then, is not how much precision is possible, but how much precision is actually useful to consumers.

Obviously, there comes a point where excessive precision in the quotation of APR becomes useless or worse than useless. If the quoted APR for a $5000 consumer loan is 16.321345%, not only do the last few

79 Of course, any combination of figures could be used. For example, the criteria might be might be 1/8 of 1% and $5.00

digits provide no useful information, but they are likely to confuse some consumers.[80] It has been suggested that even precision to the nearest decimal place (e.g. 16.3%) could confuse many consumers and cause them to rely too heavily on the APR, especially in smaller, short-term transactions:

> But quoting APRs to 0.1 per cent gives a spurious impression of accuracy which could mislead people about what is and what is not a noteworthy difference in the cost of credit. Moreover, decimals confuse some people. So we believe that it would be better to quote APRs to the nearest whole number, in advertisements and in agreements.[81]

Excessive precision in the statement of APR could be misleading if CCDL permits certain flow-through expenses to be excluded from in the calculation of APR. Suppose that the $1000 loan that we have been discussing in this section involves a front-end expense of $10. This amount is deducted from the amount advanced to the consumer, who thus receives only $990. If this $10 expense were taken into account in calculating the APR, the latter would go from 12.25% to 14.17%, a jump of nearly 2%. It seems incongruous to require the APR to be precise to within 1/8 of 1% while ignoring an expense that would increase the APR by nearly 2%. The precision required in the statement of the APR could give consumers an exaggerated impression of the APR's accuracy as a measure of the cost of credit.

As we have seen, the alternative test approach followed by some provinces' CCDL provides a rough and ready means of adapting the precision required in the statement of APR to the size and duration of the loan. Consideration should be given to taking this approach (or some modification of it) in uniform CCDL. However, further consideration and consultation is required before any firm conclusion is reached on this issue.

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80 Nothing in Canadian CCDL requires lenders to round off APRs. Thus, a lender could insert as many digits after the decimal place as it wishes, so long as the resulting number is within the permitted tolerance. There is something to be said for *requiring* lenders to round off APRs to, say, the first decimal place

81 NATIONAL CONSUMER COUNCIL [U K.] at 109.

RECOMMENDATION 7:

Consideration should be given to relaxing the precision required in APR disclosures for small, short duration loans, where great precision might not be justified by the inherent accuracy of APR as an indicator of the cost of credit.

(b) Effective versus nominal APR

It was mentioned earlier that a couple of recent Alberta cases have held that in situations where section 4 of the *Interest Act* applies, an annual rate must be stated as an **effective** annual rate, rather than a **nominal** rate. These decisions are before the Court of Appeal, and it may well be decided that their interpretation of section 4 of the *Interest Act* is incorrect, but that would still leave open the question of whether CCDL **ought** to require disclosure of effective, instead of nominal annual rates.[82]

What is the difference between effective and nominal annual rates? The difference lies in how one gets from the periodic rate to the annual rate, or vice versa. The periodic rate, in essence, is the rate at which credit charges accrue on outstanding principal between payment dates. If a borrower owes $100 throughout a given period and pays $1 in credit charges at the end of the period, the periodic rate is 1%. Suppose the period is one month. To find the nominal annual rate, one multiplies the periodic (monthly) rate by 12, giving an annual rate of 12%. To find the effective rate, however, one must do the more complicated calculation described by the effective rate formula

$$APR_{eff} = (1+i)^n - 1$$

where i is the periodic interest rate (.01) and n is the number of periods in a year (12). This works out to an effective annual rate of about 12.7%.

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82 In the CCDL literature there is inconsistency in the use of the term "effective rate" The chances are that a reference in North American CCDL literature to "effective annual percentage rate" means what British and some North American literature means by "nominal annual percentage rate". This different use of terminology should be kept in mind when reading the literature. This paper uses "nominal rate" and "effective rate" in the same sense as they are used in the British literature and in the recent cases on s 4 of the *Interest Act*

The point of the more complicated effective rate approach is to make the annual rate equivalent to the annual rate for a loan on which interest is paid annually, rather than monthly. In other words, a loan on which interest is paid monthly at a rate of 1% is equivalent to a loan on which interest is paid annually at a rate of 12.7%. From the lender's perspective, this equivalence depends on the assumption that as each monthly interest payment is received by the lender, it is reinvested at the same 1% per month rate. On this assumption, by the time a year expires, the lender who receives monthly interest payments of 1% will be in the same position as a lender who receives one interest payment at the end of the year of 12.7%. This applies to the borrower as well. A borrower who pays $1 in interest at the end of each month is in the same position as one who pays $12.70 interest at the end of the year, if it is assumed that the first borrower could otherwise have invested each dollar paid to the lender at 1% per month.[83]

As mentioned earlier, all North American CCDL requires a nominal APR.[84] On the other hand, U.K. and E.C. CCDL requires disclosure of an effective APR. So who has it right? Actually, each method has its advantages and disadvantages. There are reasonable arguments in favour of each method, and there is no fundamental principle of mathematics or finance that favours one or the other. What follows is a brief discussion of the arguments for and against requiring APR to be stated as an effective rate.

Argument for effective rate method

The effective rate method of expressing APR reflects a simple fact: if you have to pay someone a dollar, you are financially better off to do so later rather than sooner. The longer you have the dollar, the longer you can keep it invested and earn interest on it. Therefore, if you have to pay $12 in interest, you are better off paying it all at once at the end of the year than paying $1 at the end of each month. By making the

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83 At this point we can elaborate on the preceding footnote a bit. In most North American literature, the term "effective rate method" refers to a method of calculating the *periodic* rate that takes into account the timing and amount of all advances and payments. How this effective periodic rate is converted to an annual rate is a separate issue. Whichever method of conversion is chosen, the resulting number is regarded as the effective annual rate.

84 It should be pointed out that s 6 of the *Interest Act* requires what might be described as a semi-effective annual rate. It allows the annual rate to be based on semi-annual calculation (compounding)

APR reflect the frequency of interest payments, the effective rate method captures this truth.

Arguments against effective rate method

1. The effective rate method rests on inappropriate assumptions about lenders' ability to reinvest interest payments. It assumes that each dollar paid by the borrower to the lender can immediately be reinvested at the same rate as the borrower is paying, and that there will be no administrative costs incurred in doing so. These assumptions, especially the latter, are unlikely to reflect reality. The lender might not be able to reinvest the interest immediately or at the same rate, and is unlikely to escape with no administrative cost of reinvestment. Hence, the true effective rate where interest is paid monthly is likely to be lower than the effective rate formula would suggest.

This argument is perfectly valid, except that it misses the point. The argument for disclosing effective annual rates need make no assumptions at all about what the lender does with the interest payments. To reiterate, what CCDL is concerned with is the cost of credit to the consumer, not the profitability of the transaction to the lender. The argument for the effective rate method is based on the greater cost to the consumer of paying a dollar of interest sooner rather than later.[85]

2. Calculating an effective rate from, say, a monthly periodic rate, is more complicated than calculating a nominal rate from the periodic rate. Thus, requiring lenders to disclose effective annual rates will increase the burden that disclosure requirements place on lenders.

It is true that the effective rate formula is relatively complicated (in that it has an exponent), but it does not follow that the burden of

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85 The argument does reveal one limitation of the effective rate method: its assumption that a borrower who does not have to pay a dollar of interest to the lender until the end of the year will be able to invest it at the same periodic rate as the lender is charging on the loan. In reality, any non-speculative investment available to the consumer would almost certainly pay interest at a substantially lower rate than the consumer must pay on the loan. This means that the consumer's real loss from having to pay interest monthly rather than at the end of the year is probably less than what is suggested by the effective rate formula.

disclosure for lenders would be significantly greater in closed credit transactions. The effective rate calculation would be tedious to perform with a pencil and paper (but would be far less tedious than the task of trying to determine the periodic rate or the amount of the monthly payments on an instalment contract). But anyone who can use a hand-held calculator can easily calculate an effective rate for a given periodic rate. For a computer, the difference between the two methods is insignificant.

3. Even if converting periodic rates to effective annual rates were feasible for closed credit transactions, it is impossible to calculate effective annual rates in advance for open credit. It does not make sense to convert periodic rates for closed credit to effective annual rates if the same cannot be done for open credit.

This is a valid point, since the timing of interest payments in relation to the timing of advances is crucial in determining an effective annual rate. In an open credit arrangement the lender has no antecedent knowledge of the timing of advances and interest payments. It would be possible to make certain assumptions about the timing of advances and interest payments, but such assumptions are not very helpful if what we are after is precision. On the other hand, contrary to the suggestion of the argument, it might make considerable sense to distinguish between closed and open credit, and only require the disclosure of effective annual rates in relation to the former.

4. The effective rate method sets up the annual payment of interest (i.e. annual compounding) as the standard against which all credit transactions are to be measured. But there is no magic in this standard. There is no legal or moral principle nor any custom or general expectation that holds that interest should only be paid annually. If a standard is wanted, why not use monthly payment of interest as the standard? Indeed, this would be more realistic, since consumers are far more likely to pay interest monthly than to pay it annually. An "effective" annual rate of 12% would then be understood as 12% per annum, payable monthly, rather than 12% per annum, payable annually.

Carrying this last point a little further, if one assumes monthly payment of interest as the standard, there is little to be gained by doing fancy calculations to

convert periodic rates for payment periods less than a month to equivalent annual rates payable monthly. Using monthly compounding as the standard, a rate of 1% a month is 12% a year. Suppose it were feasible for a consumer to make daily payments of interest at a daily rate of 12/365 × 1%. That would work out to the equivalent of 12.06% per annum *payable monthly*. If the disclosed APR must be accurate to within 1/8 of 1%, the lender would still be able to state this rate as 12%.

This is a strong argument. There is, in truth, no magic in a standard that assumes that interest is paid annually. Indeed, it is an assumption that flies in the face of the actual practice in consumer credit transactions. It is rare for a consumer to pay interest less frequently than monthly. One thing that can be said for assuming annual compounding is that a certain symmetry results from using a common time frame (a year) as the base for both the rate and the compounding period. This is not, however, a compelling reply to Argument 4.

5. In certain circumstances, the effective rate method could give unsophisticated consumers misleading signals as to where their financial interests lie. On the effective rate method, a loan at 12% per annum that is payable in full (including interest) at the end of one year (Plan A) would have a disclosed APR of 12%. The same loan payable in monthly instalments and bearing interest at 1% a month (Plan B) would have a disclosed APR of 12.7%. So consumers relying on APR as a guide to the cheapest source of credit might assume that they will be further ahead to go with Plan A, since the rate is lower than the rate on Plan B. The money that would have to be applied to the instalments on Plan B could instead be invested, and this money, together with the interest earned on it, could be used to pay off the loan at the end of the year.

   The trouble with this is that the return on non-speculative liquid investments available to consumers will be less than the rate paid on the loan (even if we make the unrealistic assumption that no tax is payable on the investment income). Suppose that the loan is for $5000, and that a consumer could invest the amount

that would have been payable monthly on Plan B at 9.5% per annum, compounded monthly. Consumers following this route would find at the end of the year that they would be about $30 short of the $5,600 necessary to pay off the loan. In other words, they would have been better off financially to choose Plan B over Plan A, notwithstanding the latter's lower effective rate.

This argument does not call into question the basic premise that it is better to pay a dollar of interest later rather than sooner. What it shows, however, is that consumers pay **more** dollars in interest, the longer the principal is outstanding. By paying a loan in monthly instalments, a consumer steadily reduces the principal that is outstanding, and this saves interest. Given the probable spread between consumer borrowing rates and the rates available on non-speculative liquid investments, this saving is likely to outweigh the higher effective rate of the instalment payment plan. This illustrates once again that excessive precision in APR calculations can be as misleading as too little precision.

Conclusion

On balance, we think that the arguments favour the status quo. The effective rate method reflects the undeniable fact that a dollar of interest paid now is worth more to the consumer than a dollar of interest paid later. However, the chosen standard—annual payment of interest—is somewhat arbitrary and unrealistic because consumer credit contracts almost always call for the payment of interest on a monthly or more frequent basis. But if monthly payment of interest is chosen as the standard, the difference in effective rates between monthly payment of interest and, say, daily payment of interest, is too small to matter. Moreover, as Argument 5 points out, the effective rate method has its own potential for misleading unsophisticated consumers. This convinces us that the benefits of the effective rate method are not significant enough to warrant a change in the present Canadian CCDL approach.

RECOMMENDATION 8:

No further consideration should be given to requiring APR to be expressed as an effective rate.

G. Determining the cost of credit: Rebate or Low Cost Financing (RLCF) programs

We referred in Part 2 to the possible difficulty of separating credit charges from principal where credit is provided by the supplier of goods or services. However, whether one is emphasizing disclosure for the purpose of credit shopping or for the purpose of the credit use decision, the nature of the information that should be provided is reasonably clear. The disclosed credit charges should tell consumers how much more it will cost them to purchase the product using the supplier's credit plan instead of using cash: cash which might come from either a consumer's savings or another lender. The "principal" advanced to the consumer by the supplier is the amount that a cash customer would have to lay out to purchase the product, less any downpayment given by the consumer at the time of purchase. This seems pretty straightforward, but this illusion disappears when one comes up against a particular type of "incentive" program offered by car dealers and manufacturers. Such programs offer consumers two alternatives: a cash rebate or low cost financing ("RLCF").

Suppose that a car dealer (D) sells Panther X29s for $14,000 cash. D is prepared to finance the purchase of an X29 on the following terms: $1400 down and 20 monthly payments of $700 each. The monthly payments total $14,000, so the total amount paid by the credit purchaser is $15,400. The credit purchaser pays $1,400 more than the cash purchaser, so the credit charges are $1,400. The APR is 12.25% (rounding to the nearest quarter percent). So far, so good.

Now suppose that D adjusts its pricing and credit policies somewhat. The X29 now sells for $15,400 cash, but D offers X29 buyers a choice of two special incentive plans: Plan A and Plan B. Under Plan A, consumers who pay cash receive a rebate from D of $1400. Under Plan B, consumers do not get the rebate, but they receive interest-free credit. All they have to do is put $1400 down, and make 20 monthly payments of $700, for a total, including the downpayment, of $15,400. No credit charges! 0% APR! This is the ultimate RLCF program.

Something smells fishy though, and the fish is not hard to find. It is the rebate given to cash customers. When the rebate is taken into account, D's cash customers are in the same position as they were before the change in pricing policies; they still end up paying $14,000. The credit customers are also still in the same position, paying $15,400. Credit purchasers still pay $1,400 more than cash purchasers. In short, everything is the same as before, except that the credit purchaser is suddenly paying no credit charges and 0% APR.

It is worthwhile to pause to consider what the problems with this scheme are from a policy point of view. The first problem is obvious. Undoubtedly, few consumers will fail to appreciate that they give up something in not paying cash: the $1,400 rebate. Probably, many of them will realize that this translates into an implicit finance charge. However, few of them will easily be able to discover what the true APR (12.25%) is. Thus, whatever credit shopping information could be provided by an accurately disclosed APR (not to mention accurately disclosed dollar credit charges) is lost.

There is also a less obvious but even more serious problem that would be created if D could maintain that there are no credit charges and that the whole $14,000 in instalment payments represents principal. The problem relates to consumers' statutory right to prepay the amount outstanding on any credit transaction (other than a mortgage) without, in the words of Alberta's CCTA "any charge or penalty". In calculating the amount outstanding on a loan, the lender is entitled only to credit charges that have been earned at the time of the prepayment. The legislation prescribes a formula for determining what portion of the total credit charges have been earned at any given point in the contract. The real problem with D's scheme, if it were to succeed, is that the $1,400 previously regarded as credit charges would now be regarded as part of the principal, and would therefore be payable in full even if a consumer wanted to prepay the loan a month after driving the car off the lot. This would mean that, contrary to the policy of the statutory prepayment provisions, the consumer had been locked in for the full duration of the credit contract.

Legislators know a fish when they smell one. Obviously, so transparent an attempt to avoid disclosure requirements cannot be allowed to succeed. Alberta's CCTA deals with the problem by defining "cash price" as "the price at which any goods or services are offered for sale less any reduction, if any, [sic] given by the seller" to cash purchasers. The rebate offered by D to cash buyers would undoubtedly count as a reduction. The same result is implicit in other provinces' CCDL.

Human ingenuity should never be underestimated, especially when it comes to devising means of getting around inconvenient legislation. What if neither the financing nor the rebates were provided by D, but were instead provided by Panther Credit Co., the financial subsidiary of the manufacturer of the X29. That is, D would sell X29s for $15,400 cash. Panther Credit Co. would then pay a rebate of $1400 to cash customers, and would provide "no credit charge" credit to other consumers.

From a policy point of view, there is no discernible difference between this situation and the situation where D provides the rebate or credit directly. However, this situation is not as easy for the legislative drafter to deal with. For example, the CCTA's definition of "cash price" quoted two paragraphs ago refers to a "reduction . . . given by **the seller**". Here, it might be argued that since D is the seller and the rebate is given not by D but by Panther Credit Co., there is no reduction within the meaning of the definition.[86] This argument was made in one of the very few Canadian cases interpreting CCDL.

In *Re Motor Vehicle Manufacturers' Association and Wrye*,[87] car makers challenged the position of Ontario's Registrar of the Consumer Protection Bureau that a RLCF program would violate the CPA.[88] The wording of the Ontario act is different from the CCTA's wording on this point, but seems to leave similar scope for an argument that the rebate need not be deducted from the cash price in order to determine the credit charges. Nevertheless, by giving the relevant provisions an expansive reading, the court was able to find that the proposed program would violate the act. This is a decision of a trial court based on the wording of one province's CCDL, but courts in other provinces would undoubtedly strive to reach a similar result.

The picture painted here of RLCF programs is not flattering. From the point of view of the purpose of CCDL, it is difficult to find redeeming features in such programs. Yet automobile dealers and manufacturers reject the suggestion that their RLCF programs are improper. Before reaching a final judgment on this matter, it will be necessary to consider the arguments of these groups in support of such programs. In the meantime, the working hypothesis should be that uniform CCDL should make it clear that any rebate or other allowance given exclusively to cash customers must be taken into account in determining the cash price of a product, whether it comes directly from the supplier of the product or not.

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86 The wording of Quebec's CPA avoids this difficulty It defines as a credit charge "the value of the rebate or of the discount to which the consumer is entitled if he pays cash". It does not matter who the rebate comes from

87 (1988), 49 D.L.R. (4th) 592 (Ont H C) [hereinafter "*Motor Vehicle*"].

88 The only real difference between the hypothetical scheme involving Panther Finance Co and the actual programs before the court was that the former offered no cost financing, while the latter offered low cost financing.

RECOMMENDATION 9:

Unless cogent arguments for not doing so are put forward, CCDL should make it clear that any rebate or allowance given to cash customers but not to credit customers must be deducted from the cash price for the purpose of determining the credit charges on supplier or supplier-connected credit. This applies whether the rebate or allowance is provided directly by the supplier or not.

Despite the *Motor Vehicle* decision, automobile manufacturers and dealers continue their RLCF promotions with but a derisory bow to the statutory disclosure requirements. Set out on the following page is a portion of a full-page advertisement from *The Edmonton Journal*[89] The figure of "10.9%" has been reduced in size to make it fit on the page; the rest is shown in its actual size. The first part is the familiar offer of a very low finance rate or, alternatively, a cash rebate.[90] The second part is a disclosure statement that reveals—to anyone who reads it—that the APR is actually considerably higher than the number proudly displayed at the top of the page would have one believe.

89 *The Edmonton Journal* (8 November 1990) C22

90 A variation is to offer the special finance rate with, say, a $500 rebate as one alternative, and a larger rebate as the other alternative. This does not change the fundamental fact that cash customers receive an allowance that credit customers do not

10.9%

GM Gets The Ball Rolling With 10.9%* Financing For 4-Full Years

• • •

OR

$500-$3000* Cash Backs.

*These offers may not be combined or used in combination with any other offer Example: For $15,000 financed over 48 months at 10 9% A P R , the monthly payment is $386 95, the cost of borrowing is $3,573 60 and the total amount to be repaid is $18,573 60 Assuming a rebate of $1,000 as the alternative, should you choose the reduced financing rate, legislation requires that the amount of the rebate must be included in the cost of borrowing in order to arrive at an effective interest rate In the example given, the effective interest rate would be $13 72% A P R , and the total cost of borrowing, including the rebate not taken, would be $4,573 60

Of course, the advertisement is intended to focus consumers' attention on the low rate. Undoubtedly, most consumers who look at the advertisement would not even read the tiny disclosure statement. Of those who did, many would either be confused by the two different percentages or persuaded by the statement's implication that the APR is an irrelevant number required by silly government regulations. In short, any purpose that is intended to be served by disclosing the APR is probably not served by this disclosure statement. Unlike some Canadian CCDL, Alberta's CCTA contains a provision that would seem clearly to prohibit advertisements such as this:

> Any information disclosed by a lender that is in addition to the information required to be disclosed under this Act shall be of such a nature that it does not contradict, obscure or detract from that information required to be disclosed under this Act.[91]

If the whole design of this advertisement—in particular, the bold-type offer of **10.9%** financing—is not calculated to contradict, obscure and detract from the statutory disclosures, it is hard to imagine what would.

Advertisements such as the one described above continue to proliferate in Alberta, so section 19 of the CCTA does not seem to have had much effect. However, this sort of provision should be incorporated in any uniform CCDL.

RECOMMENDATION 10:

Uniform CCDL should prohibit lenders from including in a document or advertisement containing required disclosures statements or information that contradict, obscure or detract from the required disclosures.

H. Pretransaction disclosures

We finished off the last section with a discussion of advertisements that appear to depart from the spirit, and probably the letter, of CCDL. Advertising is a good example of pretransaction disclosures. It is disclosure that occurs prior to the point at which consumers must be given specific disclosures relating to a specific credit transaction into which they have just entered or are about to enter. These pretransaction

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91 CCTA, s. 19.

disclosures can be contrasted with what we will refer to as "contractual disclosures": written disclosures given to a consumer around the time a specific credit transaction is consummated, usually in the contract itself or in an accompanying disclosure statement. So far as consumers' credit shopping activities are concerned, pretransaction disclosures are, or at least have the potential to be, far more useful to consumers than are contractual disclosures. Yet the centrepiece of CCDL has always been contractual disclosures: pretransaction disclosure requirements always leave the impression of having been tacked on to the basic CCDL structure as something of an afterthought.

In Part 2 we referred to studies indicating that the enactment of the TILA in the United States had little apparent affect on consumers' credit purchasing decisions. The authors of these studies pointed out some of the inherent limitations of CCDL as a credit shopping aid. However, many of them also pointed out that contractual disclosures are virtually useless as a credit shopping tool. At the point these disclosures are made, it is most unlikely that the consumer is going to engage in any credit shopping. Even if not legally bound to enter the credit contract at the time contractual disclosures are made, the consumer is probably psychologically committed to it.[92] Thus, it has been pointed out that if CCDL is to be of any significant assistance to consumers' credit shopping activities, it must concentrate on pretransaction disclosures.[93]

The reasons why pretransaction disclosures are likely to be more effective credit shopping tools than contractual disclosures are not hard to find. We have mentioned several times that except for large loans with long durations—usually mortgages—it takes a pretty big change in APR to produce a noticeable change in the things that matter to most consumers: particularly, monthly payments and the total cost of the product for which credit is required. Moreover, consumers are likely to put a premium on time spent credit shopping. It does not take very much time before the cost of credit shopping overwhelms any likely benefit. Therefore, the best way to facilitate credit shopping is by measures that will make it as easy as possible for consumers to get comparable cost

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92 LANDERS & ROHNER at 715-16.

93 WHITFORD at 439-40, 442; LANDERS & ROHNER at 734-37. The latter were not optimistic that the benefits of effective pre-transaction disclosure requirements would be worth their cost

information for different lenders as quickly and conveniently as possible. Obviously, for this purpose, pretransaction disclosures are going to be much more useful than contractual disclosures.

A point that follows from all this is that CCDL should be designed with an eye to encouraging as much pretransaction disclosure as possible. It should not be designed on the assumption that advertising of credit terms is an evil that can be tolerated only so long as it is closely controlled. Rather, advertising, along with other forms of pretransaction disclosure, should be considered as the best available means of achieving the primary goal of CCDL. Of course, information contained in advertising or other pretransaction disclosures must be consistent with the purpose of such disclosures. It must provide consumers with a reasonably accurate picture of the cost of credit from different sources. This is what pretransaction disclosure requirements should be designed to ensure. We will keep this in mind as we consider three different types of pretransaction disclosures: (1) advertising, (2) oral disclosures, and (3) third party disclosures.

1. Disclosure in advertising

In designing disclosure requirements for advertising, one must recognize that the contractual disclosure model must be loosened somewhat. A lender providing contractual disclosures for a closed credit transaction can disclose the principal amount of the loan, the APR, the periodic payments, the total credit charges and any other information that must be disclosed. A lender making a pretransaction disclosure faces the difficulty that all of these things will vary from one transaction to the next. APR is the information most likely to remain constant, but there is no guarantee that it will. The APR is bound to vary from one transaction to the next if there are front-end charges that must be included in APR.

CCDL has not been indifferent to the realities of advertising. Generally, it takes a multitiered approach to advertising requirements. This approach allows advertisers to choose the level of detail advertisements will provide but assumes that certain types of information are misleading if not presented in their proper context. For example, information about the amount of the monthly payments could be misleading unless accompanied by disclosure of the number of payments required to pay out the loan, total credit charges, APR and so forth. On the other hand, certain types of information, notably APR, are considered to be better able to stand on their own or with little additional information.

Set out below is an outline of a multitiered advertising disclosure structure.

Tier 1 No credit cost information

The advertisement states that credit is available without making any suggestion at all about what it might cost.

Tier 2 Minimum credit cost information

An advertiser who wants to provide some credit cost information but who does not want to (or cannot) provide all the details can disclose the APR and (perhaps) a certain amount of additional information, such as the maximum duration of the loan, the maximum or minimum loan amount, and the nature of any additional charges not included in the APR.

Tier 3 Maximum credit cost information

A lender who wishes to provide more information, such as the amount of the monthly payments, must make full disclosure. This would typically include the amount of the principal to be advanced, the number of payments, the total credit charges, and the grand total of all payments.

Tier 4 Special cases

This tier is for cases, such as where there are no credit charges.

The multitiered approach to advertising requirements makes considerable sense, but its implementation in existing CCDL leaves something to be desired. Much of the difficulty is simply a matter of organization and reflects what was said earlier about pretransaction disclosure requirements having the appearance of being stuck in at the last moment. The advertising provisions run together different types of credit transactions or do not make it clear what kind of credit transaction they are talking about. For example, Alberta's CCTA makes special provision for

> a credit transaction that includes credit charges under which . . . the annual percentage rate being charged for a portion of the amount financed under the credit transaction is different from that being

> charged for another portion of the amount financed under the credit transaction.[94]

It is difficult to decide what the drafter had in mind here. The whole purpose of the APR is to disclose a rate for the transaction as a whole. The idea of a closed credit transaction having different APRs for different parts of the amount financed is contrary to the basic purpose of APR disclosure. One can speculate that what the drafter had in mind here is some sort of open credit plan that employs a graduated rate structure, but it should not be necessary for someone looking at CCDL to engage in such speculation. Much confusion would be avoided if the advertising requirements for different types of credit transactions (e.g closed cash loans, closed supplier credit, open credit) were stated separately.

RECOMMENDATION 11:

Uniform CCDL should deal separately with advertising for different types of credit transactions.

Some other problems are not simply matters of drafting. Consider, for example, the matter of front-end charges and APRs. In all provinces front-end charges other than certain flow-through charges must be included in the calculation of APR. That is good. However, the effect of a given front-end charge on APR will depend on the amount of the loan and its duration.[95] So if a lender anticipates any front-end charges (whose exact amount might not yet be known) that will be included in APR, it will be impossible to state the APR with the required degree of precision without making certain assumptions about the amount and duration of the loan and the amount of the front-end charges. Whether it is permissible to make such assumptions under existing CCDL is unclear.

The cause of credit shopping will be served if lenders are permitted to make reasonable assumptions and estimates in calculating the credit charge and APR for the purpose of pretransaction disclosures. In particular, where front-end charges must be included as part of the credit charge, lenders should be expressly permitted to make reasonable assumptions about the amount and duration of a loan and the

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94 CCTA, s 15(3)(c)(i).

95 The effect of the front-end charge on APR also depends to a certain extent on the level of the APR (considered apart from the effect of the front-end charge) But this is a minor variable compared to the variables of amount and duration

amount of any front-end charges that will be included in APR. Such assumptions and estimates should be disclosed in the advertisement. Since APRs calculated and disclosed on this basis will necessarily be somewhat imprecise, consideration should be given to requiring that they be disclosed only to the closest whole percentage point, or within a certain range (e.g. 14%-18%).

RECOMMENDATION 12:

(a) Uniform CCDL should expressly permit lenders to make reasonable assumptions and estimates in credit charge and APR calculations for advertising disclosures. The assumptions and estimates should be disclosed in the advertisement.

(b) Where such assumptions are made, consideration should be given to requiring that the APR be disclosed only to the closest whole percentage point, or within a certain range of percentages.

2. Oral disclosures

Canadian CCDL makes no attempt to regulate oral disclosure of cost of credit information. There would be obvious practical difficulties in enforcing such requirements. However, the U.S. TILA does regulate the manner in which creditors orally disclose rate information:

> In responding orally to any inquiry about the cost of credit, a creditor . . . . shall state rates only in terms of the annual percentage rate, except that in the case of an open end credit plan, the periodic rate also may be stated . . . . The Board may, by regulation, modify the requirements of this section or provide any exception from this section for a transaction or class of transactions for which the creditor cannot determine in advance the applicable annual percentage rate.[96]

Whether they would be easily enforceable or not, there is something to be said for imposing certain basic standards on oral disclosures of the cost of credit.

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96 15 USCS § 1665a

RECOMMENDATION 13:

Consideration should be given to imposing minimal standards for oral disclosure of cost of credit information.

3. Third party disclosure

Suggestions are occasionally made that government agencies should collect and disseminate information about comparative credit costs. Indeed, the federal Department of Consumer and Corporate Affairs collects and make available such data in relation to credit cards.[97] The main problem with this method of disclosing credit costs lies in the dissemination of the information once it is collected. The responsible government agencies do not have the resources to disseminate this information to large numbers of consumers on their own. Without broad dissemination, the collection of this information is of very limited utility to consumers.

Notwithstanding the problems of dissemination, the idea of government collection and dissemination of cost of credit information is worth considering. One of the problems with relying on lender advertising for pretransaction disclosures is that some lenders may simply choose not to advertise their cost of credit. This makes comparison shopping on the basis of advertised credit cost information difficult. Even if many lenders advertise their rates, the advertisements are likely to be scattered in various sources and will for that reason be difficult for consumers to gather and compare. One advantage of government collected data is that the information needed to compare the cost of different credit sources would be in one place. One possibility for alleviating the problem of disseminating government collected information is to distribute this information through newspapers and other media. This sort of information lends itself to presentation in tabular or graphical format, and is the sort of information that newspapers and other media might well consider worth publicizing as a service to their customers.

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97 This was one of the H.C. FINANCE COMMITTEE recommendations: Recommendation 3 at 5.

RECOMMENDATION 14:

Consideration should be given to broadening existing efforts by government agencies to collect and disseminate comparative cost of credit data. Uniform CCDL would give the appropriate government agencies the power to require lenders to provide the necessary data.

I. Variable rates and balloon payments

On a variable rate loan the interest rate can change during the term[98] of the loan. In a balloon payment transaction, the term of the loan is shorter than the amortization period, so that when the term expires there will be a balance outstanding on the loan. More often than not, although the contract calls for the outstanding balance to be paid in full when the term expires, it is contemplated that the loan will be "renewed" at whatever interest rate is prevailing at that time. Such balloon transactions are regarded as renewable loans, although the lender is under no legal obligation to grant a renewal. Most Canadian residential mortgages are renewable balloon transactions of this sort.

A renewable balloon loan is a lot like a variable rate loan. The difference is that the frequency of variations in the rate is limited by the length of the term. For this reason, it is futile for legislators to attempt to prohibit variable rate loans without doing the same for balloon payment loans. This point is illustrated by Alberta's CCTA, which attempts to prohibit variable rate time sale agreements:

> Where a lender makes a disclosure under subsection (1)(k) [i.e. states the APR] in a time sale agreement, he shall not, in respect of that time sale agreement, vary the annual percentage rate as set forth in that disclosure.[99]

A time-seller who is unhappy with this restriction might set up the agreement as a balloon transaction: say, a three year amortization

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98 In this section we use "term" in its more specific sense, as the period of time until the loan is to be repaid in full, according to the strict wording of the agreement

99 CCTA, s. 21(5). As a matter of policy, it is difficult to see how such a restriction on time sales can be justified when variable rate cash loans are permitted.

period with a one-year term. At the conclusion of the term, the time seller could offer to enter into a new loan agreement whose principal balance is the amount outstanding on the time sale agreement. Of course, the new agreement might bear a higher interest rate than the original time sale agreement.

It is not difficult to see that both variable rates and balloon payments affect the utility of credit cost disclosure. If the interest rate on a credit transaction is not fixed throughout the amortization period, many of the benefits of disclosure are diluted or simply disappear. Shopping for the cheapest source of credit becomes more difficult, since there is no guarantee that the lender whose rates are lowest at the moment will have the lowest rates through the life of the contemplated loan. Budgeting becomes problematic, especially for larger loans with fairly long amortization periods; a sustained rise in prevailing rates can turn a manageable debt into a budget-destroying burden:

> To understand a variable rate mortgage a consumer would need to take four people to the loan closing—a lawyer to explain the terminology; an accountant to calculate the closing costs; a soothsayer to predict the future; and a holy man to pray that the interest rates do not escalate rapidly.[100]

This uncertainty is alleviated somewhat by a balloon transaction with a reasonably long term or a variable rate loan that is subject to variation only at decent intervals.

This is not to say that disclosure serves no purpose in variable rate or balloon payment loans. Indeed, it is extremely important that it be made clear to the consumer that the rate is variable or that it is a balloon transaction. It is also important that the period for which the rate is fixed be made clear. Moreover, disclosure of the existing rate can serve an important credit shopping purpose, even if the existing rate may be transitory. Consumers will often have a choice between fixed

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100 J Boyle, Consumer Federation of America, quoted in Washington Credit Letter, June 29, 1981, quoted in ROHNER at 1028. We have seen, though, that it takes a sizeable hike in interest rates to produce a modest hike in the monthly payments on a short term loan. If one has $10,000 outstanding on a loan that has 3 years left on its amortization period, an increase in the annual rate from 12% to 18% will increase the monthly payments from $332 14 to $361 52, an increase of $29.38. That represents a significant increase in the amount of the payments, but is unlikely to be a budget breaker.

and variable rates or will be able to choose between a balloon or fully amortized loan.[101] The consumer will have to choose between a rate that is initially lower but volatile and a rate that is higher but more stable.[102]

Existing CCDL generally seems to deal adequately with the substance of variable rate and balloon payment disclosures. However, uniform CCDL should pay particular attention to the form of such disclosures, ensuring that this information is prominently displayed in any disclosure statements. This is especially so in the case of advertisements. Indeed, consideration should be given to prohibiting the advertisement of any rate that will not be fixed for a certain minimum period, such as six months. It may well be that advertising of rates that might vary at a moment's notice will hinder rather than promote informed credit shopping.

RECOMMENDATION 15:

(a) Uniform CCDL should require that the existence of variable rates or balloon payments be clearly and prominently stated in disclosure documents and advertisements, and that the period, if any, for which the rate is fixed be disclosed.

(b) Consideration should be given to prohibiting the advertisement of any rate that would not be fixed for at least six months.

J. Open credit, especially credit cards

Open credit raises two types of problem for CCDL. One type of problem is more or less technical. The problem is that the nature of open credit, and the idiosyncrasies of various open-credit plans, can make it virtually impossible to disclose an accurate APR in advance. One issue in the design of CCDL legislation is how to cope with, and perhaps reduce,

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101 In the mortgage context, consumers will almost always be looking at balloon payment transactions, but they will have a choice in the length of the term.

102 In some credit contexts, the fixed rate might be lower than the variable rate. But for consumer, non-mortgage credit, it is difficult to imagine a lender offering fixed rates below prevailing variable rates. From a lender's perspective, consumers' statutory right to pay off non-mortgage consumer loans at any time without penalty means there is no up side to a fixed rate consumer loan at a rate below the prevailing variable rate

this problem. We will return to this issue in a few moments. First, though, we should mention some problems that are created by open credit that would exist even if lenders could disclose precise cost of credit information at the drop of a hat. The problems concern what consumers would do with this information once they got it.

1. Inherent limitations on the utility of open-credit disclosures

Nowadays, the paradigm for open credit is the credit card, in its various manifestations. Therefore, this discussion of the problems of open credit will focus on credit cards. There are different sorts of credit cards—indeed, some issuers insist that they do not issue "credit cards"; they issue "charge cards"—but they all have these points in common.

1. Obtaining credit with a credit card is a two-step process. The first step is to obtain the card. At that point, considerable information about the card will be given to consumers: some of it in CCDL disclosures. In one sense, the issuing of the card to the consumer is an extension of credit; however, the real extension of credit comes when the consumer uses the card to obtain an "advance", possibly of money, but more likely of goods or services. At this point, the consumer is quite likely to have long since forgotten the initial CCDL disclosures.

2. Consumers receive periodic—usually monthly—statements detailing the activity on the account during the month. These statements will show all amounts charged and all payments credited to the account. The statement will also show the amount of the credit charges and the APR.

The two-step process for obtaining credit with a credit card has several implications for the potential utility of cost of credit disclosures. Consumers have not one but many credit purchasing decisions. The first decision comes when they apply for the credit card. Even if consumers are given all relevant information about the cost of the card at the time they apply for a card, this information will have a limited impact on most consumers. In particular, rate disclosure at this stage is likely to have a decidedly limited effect, since the consumer does not incur any debts to which this rate will apply simply by getting the card. If

anything, a high APR is likely to have more of an impact on consumers' **use** of a card once they get it than on their decision whether to get it in the first place. Another reason why consumers are likely to be apathetic about the APR disclosed in a credit card application is that the monthly credit charges are relatively small because balances are relatively small.[103] On a $2000 balance, the difference in the monthly credit charge between a 12% and a 24% annual rate is $20 ($20 versus $40).

On the other hand, it is reasonable to suppose that advance disclosure of information about annual fees or other fees that are independent of a consumer's use of a card will have more influence on consumers. Such fees, if imposed, will likely seem to be of more immediate relevance than the prospect of paying interest on as yet non-existent balances.

After the consumer gets the credit card, the real fun begins. For consumers who have an all-purpose card, almost every purchase of goods or services entails a credit use decision (whether it is a conscious decision is another matter), because chances are the card can be used to purchase the product. But here the well known convenience of credit card shopping can work against the consumer giving any thought at all to the cost of credit. To make a purchase using closed credit, consumers have to apply for credit, and this at least gives them a natural opportunity to think about the cost of credit. Armed with a credit card, consumers who spy a product that they really must have are spared both the pain of applying for credit and the more wholesome pain of thinking about the cost of credit.

Credit cards are not all to the bad so far as the potential utility of disclosure is concerned. It has been pointed out that the need for periodic statements and the multiple transaction aspect of credit cards can give cost of credit disclosures an opportunity to sink in and affect future behaviour.[104] A closed credit transaction is generally a one-shot affair, so far as credit use and credit-shopping decisions are concerned. The consumer must make use of the cost of credit disclosures right away or not at all. With a credit card, consumers engage in multiple transactions and receive regular statements containing required cost of credit

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103 H.C. FINANCE COMMITTEE at 11 The report refers to evidence that credit card issuers who dropped their rates by substantial amounts saw almost no change in the payment patterns of their customers.

104 LANDERS & ROHNER at 746-47

disclosures. Thus, consumers can learn about the cost of using their credit card as they go. This gives them the opportunity to adjust their use of the credit card and their payment patterns so as to reduce or even eliminate credit charges.

2. Issues for the design of CCDL pertaining to credit cards

As pointed out earlier, the proportion of consumer credit that is open credit, specifically, credit card credit, has been steadily increasing, and is likely to continue increasing. Perhaps because credit cards play such a visible and ever-increasing role in the consumer credit field, they have received a great deal of attention from consumers' groups, the media, and legislators. Much of this attention has focused on the high rates that are charged on credit card balances. There have been many calls for caps on credit card rates, but that issue is beyond the scope of this paper. So far as disclosure is concerned, there are two main groups of issues. The first is concerned with the contents of disclosure, the second, with the timing of disclosure. In the former group, issues of "pure" disclosure are inextricably mixed with issues regarding substantive restrictions on the methods by which card issuers calculate credit charges.

(a) Calculation and disclosure of credit charges

Four aspects of credit card billing practices complicate the calculation of APRs and make the direct comparison of credit charges of different card issuers difficult:[105]

1. annual fees and other non-interest charges;
2. grace periods;
3. the method used to calculate the interest bearing balance;
4. residual interest.

The fourth item, residual interest, is more a source of aggravation for consumers than a source of difficulty in the calculation of APR.

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105 See generally, H C. CONSUMER AFFAIRS COMMITTEE at 5-7; F-P-T WORKING GROUP at 4-8.

Annual fees and other non-interest charges cannot be taken into account in calculating the APR for an open-credit account (except retrospectively, which is not very helpful). The problem is that the effect of such fees and charges depends on the amount and timing of advances to and payments by the consumer.[106] Generally, the more use consumers make of their cards, the smaller the effect of a given annual fee on the true APR. As a result, credit card issuers are required by CCDL to disclose the amount of such fees and charges but are not required to do the impossible by including them in the calculation of APR.[107]

Grace periods are periods during which no interest is charged on purchases[108] made with a credit card so long as the consumer's account is paid in full by the end of the grace period: typically, 21 (most bank cards) or 30 (most retail cards) days after the date of the statement upon which the transaction first appears. Of course, consumers who habitually pay off their credit card accounts in full before the end of the grace period benefit from the grace period. If they play their cards right, they can get close to 50 days of free credit. However, for obvious reasons, the grace period does make cost of credit disclosure more problematic. Disclosing a "true" APR in the closed credit sense is impossible because it will not be known to what extent any given consumer will take advantage of the grace period. Depending on a consumer's payment patterns, the true APR on all the credit extended over, say, a year, could range from 0% all the way up to the nominal annual rate (the amount obtained by multiplying the monthly rate by 12). Like annual fees, grace periods are disclosed, but are not included in the calculation of the APR.

The method used by some card issuers to calculate the interest bearing balance aggravates the problem of calculating an APR. Leaving aside the problems of annual fees, other non-interest charges and grace periods, lenders could calculate and disclose APR with as much accuracy as in closed-credit transactions by using the average daily balance

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106 Graduated rate structures create a similar problem for advance disclosure of APRs.

107 Actually, it is a bit bold to state that CCDL requires card issuers to calculate the APR on credit card accounts in any particular fashion. This is an area where some Canadian CCDL can be very ambiguous.

108 For obvious reasons, interest is always charged on cash advances from the moment they are made until they are paid off.

("ADB") method.[109] On this method, purchases are added to the interest bearing balance as soon as they are posted, and payments are deducted from that balance as soon as they are made. The monthly credit charges are determined by multiplying the ADB by the monthly finance rate.

With few exceptions, the ADB method is used by issuers of all so-called bank cards (VISA, Mastercard). However, issuers of other types of cards (retail cards, oil company cards, "Travel & Entertainment" cards) use other methods. In Canada, the main alternative method (especially for retail cards)[110] is what we will call the modified previous balance ("MPB") method, which works like this. New purchases are not added to the interest bearing balance until the date of the statement on which the transaction appears.[111] However, payments made by the consumer during a billing cycle (the period between statement dates) are not taken into account either, unless they exceed 50% of the balance shown on the previous statement. The point in the billing cycle at which the payment is made is irrelevant. Set out below are two calculations that show how the MPB method can work to the advantage or the disadvantage of the consumer, depending on his or her payment pattern. Both calculations assume a monthly interest rate of 2%.

Calculation 1

The balance shown on the June 30 statement is $500. Goods worth $100 are purchased with the card on July 10. A payment of $300 is made on July 25. The purchase is added and the payment is subtracted from the previous balance in order to arrive at the balance for the July 31 statement. However, in calculating the credit charges that will be added to the July 31 statement, the purchase is not added to the previous balance.

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109 A word of caution about terminology Labels such as "average daily balance method" may be assigned somewhat different meanings by different authors. It should not be assumed that two different authors who use the same label mean precisely the same thing.

110 H.C. CONSUMER AFFAIRS COMMITTEE at 6-7.

111 This is different than a grace period. On a bank card with a grace period, interest accrues from the date of posting but will be "forgiven" if the account is paid in full before the grace period expires. On the method under consideration here, interest does not accrue at all until the purchase appears on the statement.

The payment, being greater than 50% of the previous balance, is deducted in order to arrive at the interest bearing balance. Thus, the interest bearing balance is $200 ($500 – $300), and the credit charge is $4.00. The credit charge using the same rate and the ADB method would be $10.06.

Calculation 2

Everything is the same as in Calculation 1, except that instead of making a $300 payment on July 25, the consumer makes a $200 payment on July 5. Because the payment is less than 50% of the previous balance, it is not deducted in determining the interest bearing balance. Thus, the interest bearing balance is $500 and the credit charge is $10.00. The credit charge on the ADB method would be $7.92.

It can be seen that the MPB method makes calculation of a true APR (in advance) impossible, and also makes difficult direct comparisons between cards using this method and cards using the ADB method. The main reason given for using the MPB method is that it simplifies the calculation of credit charges. That would certainly have been true a few years ago, but it is difficult to believe that card issuers and their computer programmers would nowadays experience great difficulty in adopting the ADB method.

This brings us to residual interest, which is best explained by an example. Suppose that you have been carrying balances on your VISA account from one statement to the next, and you receive a statement for $1000 dated July 31. You decide the time has come to pay off the account and put the card in a drawer for a while. You pay the account through an automated banking machine on August 10. When you receive your August 31 statement, which you expected to show a nil balance, there is a credit charge for $4.84, being the interest for the period from August 1 to August 10. This is residual interest, and there is nothing inherently evil about it. It is entirely consistent with the ADB method of calculating interest bearing balances. Nor is the amount of a residual interest charge likely to be a matter of great concern. However, it annoys many consumers who thought they had paid off their credit card account in full, only to find a credit charge on their next monthly statement.

At the moment Canadian CCDL takes a variety of approaches to the method of calculating interest bearing balances. The *Bank Act*'s CBDR and some provinces' CCDL take a flexible approach. Section 11(1)(e),(h) of the CBDR requires a bank to disclose:

(e) the cost of borrowing, expressed as an annual percentage rate;

(h) the manner in which the cost of borrowing is calculated.

One assumes that the purpose of clause (h) is to allow the card issuer to choose the method of calculating interest bearing balances and then describe the method in the disclosure statement. As noted above, banks generally use the ADB method, but a card issuer governed by similar provincial legislation might use the MPB or some other method.

Several provinces' CCDL takes a different approach. Credit cards are lumped in with other forms of "variable" credit, and credit charges must be calculated by multiplying the previous balance by the appropriate fraction of the annual percentage rate.[112] This is an unmodified previous balance method which takes account of neither payments or purchases during the billing cycle.

As already noted, the calculation and disclosure of credit charges has been examined recently by two House of Commons standing committees. The Finance Committee made the following recommendation:

> 4. That the Minister of Finance work with the relevant provincial ministers to put into force legislation requiring all credit card issuers to calculate interest bearing balances by a common method. The method should be uniform, allow a grace period for new purchases (to ensure that payments are credited first to any interest-bearing balances), recognize the timing of payments (so being late a day on a payment does not lead to interest charges for an entire month) and allow that any partial payment lower the interest-bearing balance.[113]

The Consumer and Corporate Affairs Committee's recommendations on this issue are as follows:

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112 See e.g. R R.O. 1980, Reg. 181, s.21(1).

113 H.C. FINANCE COMMITTEE at 6

> 2. That credit card issuers provide full disclosure with applications and any promotional material of the specific costs of using their cards before cards are issued.
>
> The information shall include, but shall not be limited to, the annual interest rate, any relevant component of this rate (such as daily or monthly rate), the length of the grace period, any fees, the point at which interest charges begin (purchase date, statement date or other), any specific treatment of partial payments and any special treatment of certain transactions (for example, cash advances). This material shall be put in a standardized table . . . .
>
> 3. That all card issuers be required to provide to all card holders a copy of this table annually.
>
> 4. That the card issuer be required to provide to any consumer who applies for a credit card the standardized table set out in recommendation 2 no later than with the issuance of the card.
>
> 6. That credit card issuers be compelled to calculate interest charges in a manner which fully credits any partial payment by the credit card holder.[114]

Both committees recommended that there should be a standard notice period of 30 days before rate increases could take effect.

This brings us to Quebec's CPA. The regulations under this act prescribe what might be referred to as a modified ADB method. The highlights of the prescribed method are as follows:

> 1. except for cash advances, transactions during a billing period do not increase the interest bearing balance until the next statement date;[115]

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114 H.C. CONSUMER AFFAIRS COMMITTEE at 29.

115 R.R.Q , c. P40.1, r. 1, s. 56

2. payments must be credited as they are made;[116]

3. except for advances of money, no credit charges are payable on a previous account balance by a consumer who pays the amount of that balance within 21 days of the mailing of the statement.[117]

Item 3 serves a dual purpose. It provides a statutory grace period of 21 days, and also prevents card issuers from charging residual interest.

The idea of standardizing the method of calculating interest bearing balances merits careful consideration. However, before reaching any final conclusion on this point or deciding on a particular method of standardizing the calculation, further thought and consultation is needed.[118] In this regard, Quebec's experience with its standardized requirements should provide valuable information.

RECOMMENDATION 16:

Consideration should be given to including in uniform CCDL a standard method of calculating interest bearing balances. This would include consideration of standardized grace periods and restrictions on residual interest (other than on cash advances).

(b) **Early disclosure**

In 1988 the U.S. Congress passed the *Fair Credit and Charge Card Disclosure Act of 1988*. Its main purpose is to ensure that consumers receive **early** disclosure of cost of credit information pertaining to credit cards. Thus, the Act (rather, the regulations by which it is implemented) provides detailed requirements for disclosures to be made in solicitations and applications for credit cards. As is typical of the

116 *Ibid.* s. 55(a).

117 *Ibid.* s 61.

118 Even if one accepts the desirability of a uniform method for calculating interest bearing balances, one might question whether regulation of grace periods and residual interest is necessary or desirable.

TILA, extensive use is made of model forms. Uniform CCDL should establish standards for early disclosure of cost of credit information to consumers in connection with credit card applications or solicitations. It remains to be considered, however, how extensive and detailed such disclosures should be.

RECOMMENDATION 17:

Uniform CCDL should describe cost of credit information to be given to consumers in credit card applications and solicitations.

APPENDIX A

PERSONAL LOAN RATE SURVEY

The following data is from a telephone survey of Edmonton financial institutions inquiring about the rates available on new car loans for $10,000 amortized over 3 years.

INSTITUTION	RATE	COMMENTS
Treasury Branch – main branch	11.75% 10.75%	– fixed rate – minimum rate, varies with personal financial situation – "absolute minimum rate" for preferred customers with previous dealings
Treasury Branch – suburban branch	11.75%	– minimum rate
Toronto Dominion – main branch	12.5%	– "normal rate", varies with application
Toronto Dominion – suburban branch	13.25%	– rate for 100% financing – could be as low as 12.5% for less than 100% financing
Bank of Montreal – main branch	11.75%	– base rate, fixed for 1 year
Bank of Montreal – suburban branch	11.75%	– base rate, varies depending on collateral
CIBC – main branch	12.5%	– "hard to quote over the phone" – rate varies up and down
CIBC – suburban branch		– would not disclose the rate over the phone
Bank of Nova Scotia – main branch	12.25%	– 1 year renewal – "will bend a little to compete"
Bank of Nova Scotia – suburban branch	12.25%	– as above, but no acknowledgement of flexibility in rate
Royal Bank – main branch	12%	– fixed for 1 year – "standard rate for everyone"
Royal Bank – suburban branch	11.25%	– floating rate, fixed rate at 11.5% – "very negotiable"
National Trust	11.5%	– fixed rate for 1 year term
Canada Trust	11.25%	– "discount rate", fixed for 6 months – rate drops to 10.5% if you open an account (no minimum deposit required)

INSTITUTION	RATE	COMMENTS
Royal Trust	14%h	- "absolutely fixed, no negotiation"
Montreal Trust		- does not deal in personal loans
Wildrose Credit Union	11.25 - 12%	- "special rate" - varies according to personal circumstances at discretion of loan officer
Capital City Savings and Credit	10.75%	- "special rate" - rate fixed for 3 years - no negotiation on rate
Avco Finance	low to high 20's	- fixed rate - varies upon circumstances of applicant
Household Finance	21.9%	- current variable rate for lines of credit - no personal loans as such

APPENDIX B*

CANADIAN CONSUMER CREDIT LEGISLATION

COVERAGE:

z = "in the course of business"
a = applicable
n/a = not applicable
n/m = not mentioned
b = $50
c = not applicable where the cost of borrowing does not exceed $10
d = time sales of $100
e = $50,000 except mortgages
f = up to $150,000

COVERAGE	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
definition of lender or seller	z	z	z	n/m	n/m	z	z	n/m	n/m	n/m	n/m
purchases for resale	n/a	n/a	n/a	n/a	n/a	n/m	n/a	n/a	n/a	n/a	n/m
minimum credit amount	d	n/m	b	c	b	b	n/m	c	n/m	b	c
maximum transaction	e	n/m	n/m	e	n/m	n/m	n/m	n/m	n/m	e[1]	e
mortgages	f	n/a	n/a	f	n/a	n/a	n/a	n/a	n/a	f	f
leases	a[2]	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m
sale or lease of farm implements	n/a	n/m	n/m	n/m	n/m	n/m	n/m	n/a	n/m	n/m	n/m

* These tables were prepared by Kerry Rittich, student research assistant with the Alberta Law Reform Institute.

1 Note however that the Act (s.7) excludes mortgages while the Regulations (s.12) purports to cover mortgages up to $150,000.

2 applies to leases of personal property up to $50,000 for 4 months or longer for personal, family, household and farming purposes; does not apply to leases of real property

COVERAGE	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
sales, leases, loans to corporations and partnerships	n/a[1]	n/m	n/a[2]	a[3]	n/m	n/a[4]	n/a	n/a[5]	n/m	n/a[6]	n/m
sales to municipal corps.	n/a	n/m	n/m	n/m	n/m	n/m	n/m	n/a[7]	n/m	n/m	n/m
sales by public utilities	n/a	n/m	n/m	n/m	n/m	n/a	n/a	n/a	n/a	n/m	n/m
life insurance loans	n/a	n/a	n/m	n/m	n/m	n/a	n/m	n/a	n/a	n/m	n/m
to student loans	n/a	n/m	n/m	n/m	n/m	n/a	n/m	n/m	n/m	n/m	n/m
municipal taxes	n/a	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m
credit union loans	n/m	n/a	n/m	a	n/m	n/m	n/a	n/m	n/m	n/m	n/m
professions	n/a	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m
overdraft protection	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/a	n/m
provincial mortgage and housing /agricultural credit	n/a	n/m	n/m	n/m	n/m	a	n/m	n/a	n/a[8]	n/m	n/m

1 except farming

2 "borrower" and "buyer" defined as "a natural person who receives/purchases goods or services on credit"

3 "borrower" means a person who receives credit; "person" means an individual, an association ..., a partnership or a corporation

4 "consumer" is defined as "a natural person, except a merchant who obtains goods or services for the purposes of his business"

5 Act refers to corporations only

6 restricted to individuals defined as natural persons not in the course of carrying on a business

7 nor to sales to provincial or federal governments or agencies

8 loans under the *Agricultural Incentives Act* and the *Livestock Loans Guarantee Act* are exempt

COVERAGE	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
federal credit corps.	n/m	n/m	n/m	n/m	n/m	a	n/m	n/a	n/a[1]	n/m	n/m
credit for business and industrial purposes	n/a[2]	n/a[3]	n/a	n/a[4]	n/a	n/a[5]	n/a	n/a	n/a[6]	n/a	n/m
sale of corporate bonds or debentures	n/m	n/m	n/m	n/m	n/m	n/a[7]	n/m	n/m	n/a	n/m	n/m
demand loans	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/a	n/m	n/m	n/m

1 loans under the federal *Farm Improvement Act* are exempt

2 restricted to primarily personal, family, household or farming purposes

3 There appears to be a contradiction between the Act and the Regulations. The Act excludes from the definition of credit that which is extended for business or industrial purposes; the Regulations exclude from disclosure requirements loans for business purposes in excess of $25,000.

4 except for farming and fishing purposes

5 except farm and forestry loans

6 except for farm purposes

7 transactions governed by the *Securities Act*

Annual Percentage Rate Calculations:

a = monthly rate is deemed to be 1/12 of APR; other payment periods are the fraction of the APR that the payment period is of one year
b = 1/52 of a year for weekly payments, 1/26 of a year for payments every 2 weeks, 1/24 of a year for bimonthly payments, 1/13 of a year for payments every 4 weeks, 1/12 of a year for monthly payments
c = credit charge is equal to the portion of the APR that the period is of 1 year
d = 1/8 of 1%
e = 1% or not more than $2.50
f = $1/4 of 1%
nom = nominal rate
n/m = not mentioned

APR CALCULATION	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
Tolerance	d	e	e	d	e	f	1	f[1]	e[2]	d	d
nominal / effective	nom	nom	nom	nom	nom	nom	nom	nom	nom	nom	nom
assumptions re time periods	c	a	a	c	a	b	a	a	a	n/m	c

1 or a rate which does not vary from the actual cost of borrowing by more than $2.50

2 or higher, if the actural rate does not differ by more than $5.00 from the actual credit

ADVERTISING REQUIREMENTS:

In Newfoundland, New Brunswick and Nova Scotia, lenders who are not sellers may advertise the amounts, terms and size of monthly payments of loans without complying with the advertising requirements in their respective Acts. Lenders who are sellers may advertise the maximum payment required to retire the entire cost of the debt without detailing other terms.

In Alberta, the advertising requirements do not apply to leases, mortgages or if the credit information consists only of the APR, the amount or term of credit available or extra charges payable. Alberta is also unique in having separate advertising requirements for leases.

In Ontario and Saskatchewan, lenders who advertise on their business premises are exempt from the requirements as long as there is a statement on the advertisement saying that the information may be obtained on the lender's business premises.

The Alberta and P.E.I. statutes contain sections which prohibit the disclosure of information which contradicts, obsscures or detracts from information which is required to be disclosed under the acts.

yes = disclosure required
n/m = not mentioned
* = required where any term of credit other than the credit charge is advertised

ADVERTISING	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
cost of borrowing as APR	yes	yes	yes	yes	yes	n/m	yes	yes	yes	yes	yes[1]
cost of borrowing in $	yes	n/m	n/m	n/m	yes	yes*	yes	yes	n/m	n/m	n/m
cash price or principle	yes	yes*	yes*	yes*	yes*	yes*	yes*	yes	yes	yes	
down payment	yes	yes*	yes*	yes*	yes*	yes*	yes*		yes	yes	
number of installments	yes	yes*	yes*	yes*	yes*	yes[2]*	yes*	yes	yes	yes	
amount of installments	yes	yes*	yes*	yes*	yes*		yes*	yes	yes	yes	
total amount to be repaid	yes	n/m	n/m	n/m	n/m	yes*	n/m	yes	n/m	n/m	n/m
examples of rate and charge calculations	n/m	n/m	n/m	n/m	n/m	n/m	yes	n/m	yes	n/m	n/m
basis for interest calculation, if other than monthly	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	yes	n/m
table of credit charges	n/m	n/m	n/m	n/m	n/m	yes	n/m	n/m	n/m	n/m	n/m
amount of deferred payment	n/m	n/m	n/m	n/m	n/m	yes*	n/m	n/m	n/m	n/m	n/m
nature of charges not included in the cost of borrowing that must be paid	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	n/m	yes

1 or range of rates applicable to the class of loans advertised

2 including the duration of the payments

Note: Quebec has specific provisions for the advertisement of variable credit. They require advertising:

a) the duration of the statement period
b) membership or renewal fees
c) the period during which obligations may be discharged without incurring credit charges
d) the miminum payment for each period
e) a reference table of credit charges

CLOSED/OPEN ENDED CREDIT:

All provinces recognize the distinction between open and closed ended credit in their disclosure requirements.

MORTGAGES:

Only Alberta and P.E.I. distinguish between mortgages and other types of closed ended credit in their disclosure requirements.

CLOSED ENDED CREDIT DISCLOSURE REQUIREMENTS:

Alberta, Quebec and Manitoba distinguish between loans and other types of closed ended credit such as installment sales for the purposes of disclosure requirements.

The requirements for loans, hire purchase and retail sales of goods and services on credit in Manitoba and loans and accessory credit in Quebec are either repetitive or complementary and so have been amalgamated for the purposes of comparison with other provinces.

REQUIRED DISCLOSURE DETAILS	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
cash price or sum received	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes[1]	n/m
down payment or trade in	yes*	yes	yes	n/m	yes	yes	yes	yes	yes	yes	n/m
difference between down payment and cash price	n/m	yes	yes	n/m	yes	yes	yes	yes	yes	n/m	n/m
previous credit to be consolidated	n/m	yes	yes	n/m	n/m	n/m	n/m	yes	n/m	yes	n/m
official fees	yes*	yes	yes	n/m	yes	yes	yes	yes	yes	yes	n/m
insurance fees	yes*	yes	yes	n/m	yes	yes	yes	yes	yes	yes	n/m
aggregate amount[2]	yes*	yes	yes	yes	yes	yes[3]	yes	yes	yes	yes	n/m
additional service charges	yes*	n/m	n/m	n/m	n/m	yes	n/m	n/m	n/m	yes	n/m
basis of default charges	n/m	yes	yes	yes	yes	n/m	yes	yes	yes	yes	n/m
cost of borrowing as APR	yes	yes[4]	yes	yes[5]	yes	yes[6]	yes	yes	yes	yes	n/m
total obligation of the borrower	yes*	n/m	n/m	yes	n/m	yes	n/m	yes	n/m	n/m	n/m

1 including any sum paid to a third party
2 of official fees, insurance, consolidated credit and either sum received or the difference between the cash price and the down payment or trade in
3 which is the interest, the insurance and any other component of the credit charge
4 where the cost of borrowing exceeds $10
5 or the manner of determining the APR
6 "credit rate calculated in accordance with the regulations"

REQUIRED DISCLOSURE DETAILS	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
cost of borrowing in $	yes*	yes	yes	yes	yes	yes	yes	yes	yes	yes	n/m
manner of calculating the cost of borrowing	n/m	n/m	n/m	yes	n/m	n/m	n/m	n/m	n/m	yes	n/m
annual statement	n/m	n/m	n/m	yes[1]	n/m	n/m	n/m	n/m	n/m	n/m	n/m
disclosure required at or before agreement	yes[2]	yes	yes	yes	yes	yes[3]	yes[4]	yes	yes	yes[5]	n/m
initial disclosure in writing	yes	yes	yes	yes[6]	yes	yes	n/m	yes	yes	yes	yes[7]

1 detailing the number and amount of payments made, amount applied to the cost of borrowing, principal repaid and principal outstanding

2 at the time of the agreement for loans, before the loan is advanced if secured by a mortgage

3 the merchant must, except in the extension of variable credit, sign the written contract and give the consumer sufficient delay to become aware of its terms before signing

4 before giving credit

5 before

6 in a separate statement

7 in a separate statement

PREPAYMENT:

a = calculated according to the numerator and denominator method
b = calculated according to the rule of 78ths subject to a maximum $20 payment to the creditor
c = " $10 "
d = without penalty
e = with a $10 allowance to the credit grantor

PREPAYMENT CONDITIONS	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
prepayment with penalty							a		a		
prepayment permitted	d[1]	c	b	d[2]	b	d	e			d	d

DEFINITION OF "COST OF BORRROWING":

The Alberta and P.E.I. statutes and the Cost of Borrowing Regulations under the Bank Act define "credit charges" and "cost of borrowing charges" in a very similar manner except as they apply to overdraft charges. All other jurisdictions except Quebec define the "cost of borrowing" as that which exceeds the amount included in the "aggregate sum" under the "Required Disclosure Details" chart. In Quebec, "credit charges" are defined as the amount the consumer must pay in addition to the "net capital" (the amount actually received by the consumer) or the net capital and the down payment as the case may be. In computing the credit rate in variable rate credit contracts however, membership or renewal fees and the value of cash rebates or discounts are not included.

1 excluding mortgages

2 excluding mortgages

CALCULATION OF THE APR:

a = items explicitly included
b = items explicitly included
c = items implicitly excluded
d = items implicitly included
n/m = not mentioned
n/a = not applicable, as the statute does not cover mortgages

There is considerable room for dispute about which items characterized as "implicitly included" or "implicitly excluded" in the cost of borrowing properly belong there as opposed to in the "not mentioned" category.

Ontario is specific about defining the cost of borrowing as "the amount by which the total sum that the borrower is required to pay ... regardless of the purpose or reason for the payment or the time of the payment, exceeds ... (the listed exclusions)." B.C. defines the "cost of borrowing" as "the amount by which the total sum that a borrower is required to pay ... exceeds the principal sum". "Principal sum includes any sum paid to a third party on behalf of, and at the request of the borrower".

Less clear is the effect of the provision in the Nova Scotia, Saskatchewan and Newfoundland statutes which excludes from the cost of borrowing "the sum received in cash by the borrower and by any person on his behalf".

COMPONENTS OF THE APR	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
administrative including service, transaction or activity charges	a	d	d	a	d	a	d	d	d	d	a[1]
interest	a	d	d	d	d	a	d	d	d	d	d
loan, finder's, brokerage or similar fees	a	d	d	a	d	a	d	d	d	d	a
official fees	b	b	b	b	b	a[2]	b	b	b	b	b

1 except for overdraft protection

2 "duties payable"

COMPONENTS OF THE APR	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
amounts for maintenance of tax accounts	b	n/m	n/m	b	n/m	n/m	d	n/m	n/m	n/m	b
fees for certificates of search	n/m	n/a	n/a	b	n/a	a[1]	n/a	n/a	n/a	c	b
surveying fees	b	n/a	n/a	b	n/a	n/a	n/a	n/a	n/a	c	b
lawyers fees	b	n/a	n/a	b	n/a	n/a	n/a	n/a	n/a	c	b
appraisal or inspection fees	b	n/a	n/a	b	n/a	a	n/a	n/a	n/a	c	b
insurance charges	b	b	b	b	b	a	b	b	b	b	b
charges for NSF cheques	b	n/m	n/m	b	n/m	n/m	n/m	n/m	n/m	n/m	b
charges for prepayments	b	n/m	n/m	b	n/m	n/m	n/m	n/m	n/m	n/m	b
previous credit consolidated	c	b	b	b	c	c	b	c	c	b	c
down payments or trade-ins	c	b	b	b	b	c	b	b	b	b	c
delivery or installation charges	n/m	n/m	n/m	n/m	n/m	n/m	n/m	b	n/m	n/m	n/m
membership or renewal fees	n/m	n/m	n/m	n/m	n/m	a	n/m	n/m	n/m	n/m	n/m

1 costs incurred for obtaining a credit report

SPECIAL PROVISIONS REGARDING VARIABLE RATE CREDIT:

VARIABLE RATE REQUIREMENTS	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
no specific provisions		x			x		x		x	x	
notice of change within a reasonable time	x										x
notice of change of rate within 30 days			x	x[1]							
not permitted for time sales	x					x					
disclosure that rate is variable and the basis for change				x				x			
statement detailing amount of payment, principal outstanding and annual rate charged				x[2]				x[3]			

VARIABLE CREDIT DISCLOSURE REQUIREMENTS (CONTINUOUS DEFERRED PAYMENT PLANS):

Other than Alberta, all provinces have the same disclosure requirements for all types of variable (open-ended) credit. Alberta permits disclosure of overdraft loans by way of notice posted in the bank or by compliance with the varible credit disclosure requirements.

No province specifies the manner of calculating credit charges other than Quebec which requires that the computation be done on the "average daily balance method". Quebec also requires that a statement of account be mailed to the consumer for all contracts of variable credit 21 days before credit charges can be exacted except in the cash of cash advances, for which credit charges may accrue from the date of the advance.

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1 within 5 weeks

2 annually, including the amounts applied to the principal and the cost of borrowing

3 every 6 months

yes = disclosure required
a = 60 days
b = 30 days
c = 6 months
d = 3 months for goods and services only
f = at least every 5 weeks
g = every 6 months
h = at least every 3 months
j = not more than 35 days

VARIABLE CREDIT DISCLOSURE REQUIREMENTS	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
initial disclosure of cost of borrowing as APR or scale of APRs	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
initial disclosure of cost of borrowing in $ or schedule of amounts	yes	yes	yes		yes	yes	yes	yes	yes	yes	
statement period	n	f	f	f	f	j	f[1]	g	h	yes	
statement detailing cost of borrowing as APR and in $	yes	yes	yes	yes	yes	yes	yes		yes		
statement to include: 1) balance at the beginning of statement period		yes	yes	yes	yes	yes	yes		yes		
2) amount and date of each credit extension		yes	yes	yes	yes	yes	yes[2]		yes[3]	yes	

1 and not more often than every 4 weeks

2 and the identity of the goods

3 and the classification of the goods and services

VARIABLE CREDIT DISCLOSURE REQUIREMENTS	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
3) total credited to account		yes	yes	yes	yes	yes	yes		yes	yes	
4) cost of borrowing in $ for statement period	yes[1]	yes	yes	yes	yes	yes	yes		yes	yes[2]	
5) balance at end of period		yes	yes	yes	yes	yes	yes		yes	yes	
notice period re variations of terms	a		b	b		c		d	b	b	b
minimum charge	yes		yes			yes		yes	yes		yes
manner in which obligation may be discharged without credit charges	yes			yes		yes					yes
maximum liability for unauthorized purchases	yes			yes		yes		yes			yes
manner of calculating charges	yes			yes				yes			yes
maximum credit available	yes			yes		yes		yes			yes
time period of statement	yes			yes		yes		yes			yes
service or transaction charge, including the manner of calculation	yes			yes							yes
copy of agreement to consumer and anyone obligated to repay								yes			

1 and as APR

2 and as APR

VARIABLE CREDIT DISCLOSURE REQUIREMENTS	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
conditions under which the true annual rate may vary								yes			
creditor to "send" notice of change of terms			yes								yes
annual fee	yes					yes					

LEASES:

As noted above, the Alberta statute covers leases of personal property of specified times and amounts and for specified purposes.

The Manitoba statute defines "retail hire-purchase" as "any hiring of goods ... in which the hirer is given an option to purchase the goods". This appears to indicate that only leases in which parties have the option to purchase are covered by the Act. Hire-purchase agreements must conform to the same disclosure requirements as other closed-ended credit transactions.

Leases are not specifically referred to in the Saskatchewan, P.E.I., Nova Scotia, New Brunswick, Newfoundland, Ontario, Quebec or B.C. (except as follows) statutes although it seems that they could be included within the definitions "sale of goods or services" or "buyer" as one who "purchases goods or services". The B.C. statute (s.7) specifically excludes leases of real property, allowing the inference that other leases are intended to be included within the definition of "goods and services".

a = leases specifically mentioned
c = leases covered under "hire-purchase" agreements
d = leases not mentioned, but may be implicitly covered within "purchase" or "sale of goods and services"
n/m = not mentioned

LEASE COVERAGE	AB	NFLD	NS	PEI	NB	QUE	ONT	MAN	SASK	BC	FED
category	a	d	d	d	d	d	d	c	d	d	n/m

SUMMARY:

Here are a few of the most salient areas of inconsistency between the CCTA and other jurisdictions:

Coverage:

Most jurisdictions, excluding Alberta, P.E.I., possibly B.C. and federal, do not cover mortgages in their consumer credit legislation. In addition, Alberta has a significantly greater number of specific excluded transactions.

Calculation of the APR:

Alberta, P.E.I., B.C. and the federal CBDR allow a smaller tolerance in the APR than any of the other provinces.

Closed-Ended Credit:

As noted above, most jurisdictions other than Alberta, Manitoba and Quebec have a single set of disclosure requirements for closed ended credit. However when these requirements are amalgamated, there is not a great deal of significant variation.

Elements included in the calculation of the APR:

Alberta, P.E.I. and federal legislation is considerably more detailed and unambiguous about the elements that are to be included in the APR; how much actual inconsistency there is with other provinces remains unclear.

Variable Rate Credit:

Half the provinces have no special provisions for variable rates. Among the others, there is no general agreement about what they should entail.

Variable Credit:

The most important difference to note in this category is that no other province has found it necessary to distinguish between credit cards, lines of credit and other types of open-ended credit regarding disclosure requirements. It is also interesting that despite the presence of separate provisions for credit cards those provisions require less detail particularly with regard to the contents of periodic statements than other provinces.

Leases:

The Alberta and Manitoba statutes deal with leases separately; in all other jurisdsictions they may be implicitly covered under "goods and services".

LIST OF RECOMMENDATIONS

RECOMMENDATION 1:

Substitution of a "fair and full disclosure" approach for the existing "detailed requirements" approach of CCDL should NOT be considered.

RECOMMENDATION 2:

Consideration should be given to repealing section 4 of the *Interest Act* or limiting its application to transactions not covered by other CCDL.

RECOMMENDATION 3:

(a) Uniform CCDL should be drafted on the assumption that it will apply to credit extended on the security of a mortgage against land.

(b) Consideration should be given to recommending repeal of section 6 of the *Interest Act*.

(c) If section 6 of the *Interest Act* is not repealed, the method of calculating credit charges for disclosure purposes should be consistent with that section.

RECOMMENDATION 4:

There should NOT be a blanket exclusion of transactions without credit charges. Instead, the applicable disclosure requirements should reflect the absence of credit charges.

RECOMMENDATION 5:

(a) Consideration should be given to including disclosure provisions for consumer long-term leases of personal property.

(b) Consideration should be given to treating certain lease-option arrangements as credit sales for disclosure purposes, which would entail the disclosure of APR and other cost of credit information.

RECOMMENDATION 6:

(a) Consideration should be given to including all flow-through expenses charged to consumers in the calculation of APR. At the very least, uniform CCDL should be slow to exclude any type of flow-through expense from the APR calculation.

(b) The issue of whether flow-through charges are included in the disclosed APR should be kept separate from the issue of how such charges are treated in the calculation of rebates.

RECOMMENDATION 7:

Consideration should be given to relaxing the precision required in APR disclosures for small, short duration loans, where great precision might not be justified by the inherent accuracy of APR as an indicator of the cost of credit.

RECOMMENDATION 8:

No further consideration should be given to requiring APR to be expressed as an effective rate.

RECOMMENDATION 9:

Unless cogent arguments for not doing so are put forward, CCDL should make it clear that any rebate or allowance given to cash customers but not to credit customers must be deducted from the cash price for the purpose of determining the credit charges on supplier or supplier-connected credit. This applies whether the rebate or allowance is provided directly by the supplier or not.

RECOMMENDATION 10:

Uniform CCDL should prohibit lenders from including in a document or advertisement containing required disclosures statements or information that contradict, obscure or detract from the required disclosures.

RECOMMENDATION 11:

Uniform CCDL should deal separately with advertising for different types of credit transactions.

RECOMMENDATION 12:

(a) Uniform CCDL should expressly permit lenders to make reasonable assumptions and estimates in credit charge and APR calculations for advertising disclosures. The assumptions and estimates should be disclosed in the advertisement.

(b) Where such assumptions are made, consideration should be given to requiring that the APR be disclosed only to the closest whole percentage point, or within a certain range of percentages.

RECOMMENDATION 13:

Consideration should be given to imposing minimal standards for oral disclosure of cost of credit information.

RECOMMENDATION 14:

Consideration should be given to broadening existing efforts by government agencies to collect and disseminate comparative cost of credit data. Uniform CCDL would give the appropriate government agencies the power to require lenders to provide the necessary data.

RECOMMENDATION 15:

(a) Uniform CCDL should require that the existence of variable rates or balloon payments be clearly and prominently stated in disclosure documents and advertisements, and that the period, if any, for which the rate is fixed be disclosed.

(b) Consideration should be given to prohibiting the advertisement of any rate that would not be fixed for at least six months.

RECOMMENDATION 16:

Consideration should be given to including in uniform CCDL a standard method of calculating interest bearing balances. This would include consideration of standardized grace periods and restrictions on residual interest (other than on cash advances).

RECOMMENDATION 17:

Uniform CCDL should describe cost of credit information to be given to consumers in credit card applications and solicitations.

APPENDIX G

(See page 32)

UNIFORM DEFAMATION ACT

Draft Act and Commentaries

Saskatchewan

Saint John, New Brunswick
August 12-17, 1990

UNIFORM DEFAMATION ACT

Interpretation "broadcasting" 1. In this Act

"broadcasting" means the dissemination of words that are intended to be received by the public directly or through the medium of relay stations

(i) by means of any device that uses electromagnetic waves,

(ii) by means of cables, wires, fibre-optic linkages or laser beams,

(iii) through a community antenna television system operated by a person licensed under the *Broadcasting Act* (Canada) to carry on a broadcasting receiving undertaking, or

(iv) by means of an amplifier or loudspeaker of a tape recording or other recording;

"court" "court" means *(each jurisdiction can designate its appropriate court)*;

"defamation" "defamation" means libel or slander;

"newspaper" "newspaper" means a paper that

(i) contains news, intelligence, occurrences, pictures, or illustrations or remarks or observations on those things,

(ii) is printed for sale, and

(iii) is published periodically, or in parts or numbers, at intervals not exceeding 31 days between the publication of any two of those papers, parts or numbers;

"public meeting" "public meeting" means a meeting lawfully held in good faith for

(i) a lawful purpose, and

(ii) the furtherance or discussion of any matter of public concern,

whether admission to the meeting is general or restricted;

"words"

"words" includes gestures, pictures, signals, signs, visual images, writing and other methods of signifying meaning.

Commentary: The term "broadcasting" and its derivatives are used in sections 16, 17, 20, and 21 of the Act. The term "newspaper" appears in sections 20 and 21. It is essential that these terms be clearly defined, because the rights afforded broadcasters are somewhat different than those afforded to a print medium, and newspaper publishers are afforded certain rights not available to publishers who do not face the same "deadline" constraints. These definitions are similar to those contained in UDA, 1962, but the definition of broadcasting has been expanded to cover cable television as well as conventional broadcasting.

The Act, like its predecessor (UDA, 1962) is intended to abolish any distinction between "libel" and "slander". Thus the term "defamation" is defined to include both of the traditional torts.

Actions for defamation

2. (1) An action lies for defamation.

(2) Where defamation is proved, damage shall be presumed.

Commentary: Substantively, unification of the traditional torts of libel and slander into the single tort of defamation is achieved by this section, which is carried over from UDA, 1962. At common law, most species of slander were actionable only if "special damages" could be proved. Libel, on the other hand, was actionable without proof of actual damage in all cases. This section makes all defamations actionable without proof of damage.

Defamation of deceased

3. (1) Where a person publishes words in relation to a deceased person that would have constituted defamation had the deceased been alive, an interested person may bring an action for defamation against the publisher of the alleged defamation for

(a) a declaration that the defendant has published defamatory matter regarding the deceased person; and

(b) an injunction preventing further publication of the defamatory matter;

but not for damages.

(2) In this section, "interested person" means a person who, in the opinion of the court

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

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

(3) No action shall be brought pursuant to this section more than five years after the death of the person who was allegedly defamed.

Commentary: At common law, no action lay for defamation against a dead person; reputation was not regarded as a thing that survived death. In addition, survival of actions legislation in most jurisdictions expressly provided that actions for defamation do not survive.

The question of whether or not defamation actions should be excluded from survivalship legislation is distinct from the question of whether or not defamation of a deceased person should be actionable. Continuing an action on behalf of a deceased person's estate in regard to a defamation which occurred within the deceased's lifetime is a different matter than permitting an action for statements made about a person who has been long dead. The Uniform Survival of Actions Act, unlike some of its provincial counterparts, provides for the survival of all personal actions in tort, including actions for defamation.

Section 3 shanges the common law by permitting an action for defamation of a deceased person. This section is directed primarily at yellow-press attacks on the reputation of recently deceased celebrities. The section is not intended to invite defamation actions that might interfere with the work of legitimate historians. For that reason, extension of the action to cover defamation of the dead has been qualified in several ways. A family or business connection between the deceased and the plaintiff is required in order to discourage frivolous actions; relief is limited to injunction and declaration, but not damages. Perhaps most importantly, the defamation is actionable only within five years of the deceased's death. Thus the action will be available to discourage those who would capitalize on the fame of a recently deceased celebrity, but is unlikely to impede legitimate historical research.

Allegations of plaintiff

4. (1) In an action for defamation, the plaintiff may allege that the words complained of were used in a defamatory sense, specifying the defamatory sense without alleging how the words were used in that sense.

(2) The pleading is put in issue by the denial of the alleged defamation and, where the matters set forth, with or without the alleged meaning, show a cause of action, the pleading is sufficient.

Legal innuendo

5. A claim in defamation

(a) based on a single publication; and

(b) relying on

(i) the natural and ordinary meaning of words, and

(ii) a legal innuendo;

constitutes a single cause of action.

Defence to be pleaded

6 (1) In an action for defamation, the defendant shall expressly plead each defence relied on.

(2) The plea known as the rolled-up plea is abolished.

Commentary: At common law, a libel or slander action was subject to a number of special rules of pleading that were essentially archaisms that survived the general procedural reforms of the nineteenth century. Sections 4, 5, and 6 modernize these rules.

Section 4, unlike the other two sections under consideration, is carried over from UDA, 1962. At common law, it was sometimes necessary to plead the precise sense in which an innuendo derived from the defendant's statement affected the reputation of the plaintiff. The defendant would then be required to deny that the statement was defamatory in the sense pleaded. Section 4 conforms more closely to the modern rules of pleading in other types of action. The sense in which an innuendo may be defamatory is essentially a matter of fact for consideration at trial.

Section 5 is also intended to remove a technical rule relating to innuendo. At common law, an innuendo that was obvious (contained in the "natural and ordinary meaning of the words"), and an innuendo that could be demonstrated only by reference to additional facts (a legal innuendo) were distinct. The latter afforded a separate cause of action from the former, and if both types of innuendo were alleged, separate causes of action had to be set up.

Section 6 abolishes the so-called "rolled-up plea". The rolled-up plea incorporated both the defences of justification and of fair comment, and amounted to an allegation that insofar as the words complained of consist of allegations of fact, they are true, and insofar as they consist of expressions of opinion, they are fair comment. Although there may have been some tactical advantage to the defendant in use of the plea, its precise function and effect was unclear, and probably misunderstood. Most commentators on the law of defamation have suggested that it no longer serves any useful purpose.

Amends

7. (1) The defendant may pay into court with his or her defence monies by way of amends for the injury sustained by the publication of the defamatory words, with or without a denial of liability.

(2) The payment mentioned in subsection (1) has the same effect as payment into court in other cases.

Commentary: This section, carried over from UDA, 1962, permits payment of money into court as amends. The payment into court is

intended to function in much the same way as payment into court in other cases, and to act as an incentive to settlement.

General or special verdict

8. (1) On the trial of an action for defamation the jury

(a) may give a general verdict on the whole matter in issue in the action; and

(b) shall not be required or directed to find for the plaintiff merely on proof of publication by the defendant of the alleged defamation and of the sense ascribed to it in the action;

but the court, according to its discretion, shall give its opinion and directions to the jury on the matter in issue as in other cases, and the jury may find a special verdict on the issue, if the jury considers it appropriate to do so.

(2) The proceedings after the verdict, whether general or special, shall be the same as in other cases.

Commentary: This provision, carried over from UDA, 1962, codifies certain principles contained in the common law and earlier legislation. A "general verdict" in favour of the plaintiff is a finding that defamation has occurred, but that no damages are appropriate. This, and the provision stating that the court may "give its opinion and direction to the jury on the matter in issue as in other cases" is intended to clarify the function of judge and jury. At common law, judges formerly exercised more control over libel actions tried before a jury than in other types of action. The role of the jury was gradually enhanced at common law, however. The propositions contained in section 8 reflect that development.

Consolidation of actions

9. (1) On an application by two or more defendants in two or more actions brought by the same person for the same or substantially the same defamation, the court may make an order for the consolidation of those actions.

(2) After an order has been made pursuant to subsection (1) and before the trial of the action, the

defendants in any new action instituted with respect to the same or substantially the same defamation mentioned in subsection (1) are entitled to be joined in a common action on a joint application by

(a) the defendants in the new action; and

(b) the defendants in the action already consolidated.

Assessment of damages in consolidated action

10. (1) In the trial of a consolidated action pursuant to section 9, the court or jury shall

(a) assess the whole amount of the damages, if any, in one sum; and

(b) give a separate verdict for or against each defendant in the same way as if the consolidated actions had been tried separately.

(2) If the court or jury gives a verdict against the defendants in more than one of the consolidated actions

(a) the court or jury, as the case may be, shall apportion the amount of the damages between and against those defendants; and

(b) if the plaintiff is awarded the costs of the action, the judge shall make any order that the judge considers just for the apportionment of the costs between and against those defendants.

Commentary: Sections 9 and 10 relate to consolidation of actions against more than one defendant in respect of the same defamatory matter. Joinder of defendants and consolidation of actions in defamation cases was traditionally not permitted by the courts, since each publication of a defamation was regarded as a separate transaction. Even when joinder rules were generally relaxed by the courts, they still hesitated to extend the more liberal approach to defamation actions. Although the rules relating to joinder and consolidation in many jurisdictions now appear to be broad enough to encompass defamation, history suggests it may yet be unwise to dispense with the statutory

sanction for consolidation in sections 9 and 10. They are carried over from UDA, 1962, which is based on provisions found in provincial legislation.

Other damages, compensation

11. In an action for defamation, the defendant may plead or adduce evidence in mitigation of damages that the plaintiff has already

(a) recovered damages in an action; or

(b) received or agreed to receive compensation;

with respect to the same defamation or a substantially similar defamation.

Commentary: If separate actions are brought against several defendants, each of whom published the same defamation, the common law adopted a mitigation rule to prevent what amounted to double recovery by the plaintiff. Thus the damages awarded in the first action could be pleaded in mitigation by defendants in subsequent actions. Section 11 codifies this principle. It is a restatement of a provision in UDA, 1962.

Apology

12. (1) In an action for defamation, the defendant may plead or adduce evidence in mitigation of damages that the defendant made or offered to make an apology or retraction at an appropriate time and in an appropriate manner.

(2) In an action for defamation, the plaintiff may plead or adduce evidence in aggravation of damages that the defendant refused or failed to make an apology or retraction at an appropriate time and in an appropriate manner.

Commentary: At common law, an apology was regarded as a factor mitigating damages. Lord Campbell's libel Act, 1843 partially codified the apology rule, but applied it only to newspapers. Section 17(1) of the UDA, 1962, like similar provisions in provincial legislation, adopted the rule from the 1843 Act, extending it to "broadcasters". It has been suggested that the statutes cut down on the common law rule in regard to apology. Section 12 essentially restores the common law by providing generally that an apology or retraction can be pleaded in mitigation of damages. It is left to the trier of fact to determine whether the apology is "adequate or reasonaable" to serve as a basis for mitigation.

Unintentional defamation

13. (1) A publisher who claims that an alleged defamation was innocently published may make an offer of amends to the aggrieved person pursuant to this section.

(2) An offer of amends pursuant to this section shall

(a) be in writing;

(b) be expressed to be made for the purposes of this section;

(c) include a statement of explanation setting out the facts relied on to show that the words complained of were published innocently in relation to the aggrieved person;

(d) be made as soon as practicable after the publisher receives notice that the words are or might be defamatory of the aggrieved person; and

(e) include an offer to publish, or join in the publication of, a suitable correction of the alleged defamatory matter and a sufficient apology.

(3) If an offer of amends is accepted by the aggrieved person and is duly performed, the aggrieved person shall not take or continue any action for defamation against the publisher with respect to the publication of the alleged defamation.

(4) Subsection (3) does not prejudice any cause of action against any other person jointly responsible for the publication of that alleged defamation.

(5) If an offer of amends is not accepted by the aggrieved person, it is a defence, in any action for defamation by the aggrieved person against the publisher with respect to the publication, to allege and prove

(a) facts and circumstances which establish that the alleged defamation was published innocently in relation to the plaintiff;

(b) that the offer of amends fulfilled the requirements of subsection (2); and

(c) that the offer has not been withdrawn.

(6) For the purposes of a defence pursuant to subsection (5) and unless the court directs otherwise, no evidence, other than evidence of the facts set out in the statement of explanation mentioned in clause (2)(c), is admissible on behalf of the defendant to prove that the words were published innocently in relation to the plaintiff.

(7) If an offer of amends is not accepted by the aggrieved person

(a) that offer is not to be construed as an admission of liability on the part of the publisher; and

(b) without the consent of the publisher, the aggrieved person shall not refer to that offer in an action for defamation brought against the publisher with respect to the publication in question.

(8) For the purposes of this section, alleged defamatory words are to be treated as published innocently by the publisher is relation to the aggrieved person if

(a) the publisher exercised all reasonable care in relation to the publication; and

(b) one of the following circumstances has occurred

(i) the publisher did not intend to publish the alleged defamatory words of and concerning the aggrieved person, and did not know of circumstances by virtue of which those words might be understood to refer to the aggrieved person, or

(ii) the words were not defamatory on their face, and the publisher did not know of circumstances by virtue of which those words might be understood to be defamatory of the aggrieved person.

(9) Any reference in subsection (8) to the publisher is to be construed as including a reference to any of the publisher's employees or agents who were concerned with the contents of the publication.

(10) Where an offer of amends is accepted by the aggrieved person, a judge, in default of agreement between the parties and on application by one of them, may

(a) determine the form or manner of publication of the correction or apology, and the judge's decision is final;

(b) order the publisher to pay the costs of the aggrieved person on a solicitor-client basis and any expenses reasonably incurred by the aggrieved person as a result of the publication in question;

(c) where there are unsold copies of the publication in question, make any order that the judge considers appropriate, including an order

(i) permitting the continuation or resumption of the distribution of those copies unamended,

(ii) requiring the inclusion in those copies of a correction of the words complained of that is adequate or reasonable in the circumstances, or

(iii) prohibiting the continuation or resumption of the distribution of those copies; or

(d) do all or any combination of the matters described in clauses (a) to (c).

Commentary: Words capable of bearing a defamatory meaning are actionable, even if the publisher meant no slight to the reputation of the plaintiff. An "innocent" defamation is most likely to occur when the words complained of import an innuendo that affects the reputation of the plaintiff only by virtue of extrinsic facts and circumstances that may not have been known to the publisher. Section 13 provides some protection to the "innocent defamer" who has exercised "reasonable care" to avoid unintended meaning. The defendant may make an "offer of amends" in such a case, and publish an explanation in a manner agreed upon by the parties, or in the absence of such agreement, as the court may direct. If the offer is not accepted, the fact that the offer was made can be pleaded in defence. The defence will be successful if the court is satisfied that the defendant has established that the publication was innocent, and the offer of amends is adequate.

Defence of justification

14. Where an action for defamation is brought with respect to the whole or any part of alleged defamatory words

(a) the defendant may allege and prove the truth of any part of those words; and

(b) the defence of justification is held to be established if the alleged defamation, taken as a whole, does not materially injure the plaintiff's reputation having regard to any part that is proved to be true.

Commentary: The common law defence of justification rests on an assertion that the defamatory words are true. Section 14 is a partial codification and extension of the common law defence. Under the section, justification may be based on the whole of the publication in question, not (as at common law) just the portion alleged to be defamatory by the plaintiff. A misstatement that, considered in isolation, might appear to be damaging to the reputation of the plaintiff may, in the context of the entire publication, produce no material injury to the plaintiff's reputation.

Fair comment

15. (1) In an action for defamation, the defence of fair comment may be raised where the alleged defamation is a statement of opinion on a matter of public interest, and the statement of opinion is

(a) grounded on a substantial basis of fact;

(b) one that a normal, albeit biased, person might hold concerning those facts; and

(c) honestly held by the person making the statement.

(2) The defence of fair comment is defeated where the plaintiff establishes that the defendant published the defamatory matter for malicious purposes.

(3) Where a defendant published an alleged defamation that is an opinion expressed by another person on a matter of public interest, a defence of fair comment is not defeated by reason only that the defendant did not hold the opinion if a person could honestly hold the opinion.

(4) The defendant mentioned in subsection (3) is not under a duty to inquire into whether the person expressing the opinion does or does not hold the opinion.

(5) In an action for defamation with respect to words including or consisting of an expression of opinion, a defence of fair comment is not defeated by reason only that the defendant has failed to prove the truth of every relevant assertion of fact relied on by the defendant as a foundation for the opinion, if the assertions that are proved to be true are relevant and afford a foundation for the opinion.

Commentary: This section is a codification and clarification of the common law defence of fair comment. At common law, fair comment on a matter which is of public interest is not actionable even if it is defamatory. However, the common law defence suffered from some inadequacies. As the defence was originally conceived at common law, it failed unless every fact on which the comment was based was true. The courts, however, alleviated the strictness of this rule, holding that a substantial basis of fact is sufficient. Section 15 codifies that principle. The provincial Libel and Slander Acts also modified the strict common law rule. The legislation provides that the defence is available even if the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such facts as are proved. This principle is also contained in section 15.

Subsection 3 redraws the provision of UDA, 1962 that was adopted in response to the decision in *Cherneskey v. Armadale Publishers Limited.* It is intended to make the defence of fair comment available to newspapers which publish a "letter to the editor" without necessarily adopting the opinion expressed in the letter.

In othe respects, section 15 preserves the common law defence. In particular, the principle is retained that a comment will be "fair" if it is honest, made without malice, and one that a "normal person" might hold.

Broadcasts of Parliament, Assemblies

16. The absolute privilege that attaches to words spoken during proceedings of the Parliament of Canada or the Assembly of any province of Canada attaches to broadcasts of those proceedings if the broadcast is an unedited live or delayed broadcast of the whole or substantially the whole of the proccedings.

Commentary: Although section 17, like the UDA, 1962 and provincial legislation, provides some protection to publishers of reports of proceedings of Parliament and Provincial Legislatures, the advent of direct broadcast of proceedings of legislatures requires special treatment. Section 16 extends the absolute privilege attached to legislative proceedings to the broadcast of those proceedings. Because the broadcasts are not edited in any way, the broadcaster requires this broad protection; the qualifications on the defence provided by section 17 would be inappropriate in this context.

Reports of public proceedings

17. (1) A fair and accurate report of public proceedings of

(a) the Senate or House of Commons of Canada;

(b) the Assembly of any province of Canada;

(c) a committee of a body mentioned in clause (a) or (b);

(d) any commissioners of inquiry authorized to act by or pursuant to statute or other lawful authority;

(e) any tribunal, board, committee or body that

(i) is formed or constituted, and

(ii) exercising functions,

pursuant to any public Act of Parliament of Canada or of an Assembly of any province of Canada; or

(f) any municipal council, school board, board of education, board of health or any other board or local authority constituted pursuant to any Act of the Parliament of Canada or an Assembly of any province of Canada; or

(g) any committee of a municipal council, board or local authority mentioned in clause (f);

is privileged, unless it is proved that the publication was made maliciously.

(2) A fair and accurate report of the findings or decisions of

(a) an association; or

(b) any committee or governing body of an association;

relating to a person who is a member of or subject, by virtue of any contract, to the control of that association is privileged, unless it is proved that the publication was made maliciously.

(3) For the purposes of subsection (2), "association" means an association that is formed in Canada

(a) for the purposes of promoting or safeguarding the interests of any game, sport or pastime, to the playing or exercise of which members of the public are invited or admitted, and that is empowered by its constitution to exercise control over or adjudicate on the actions or

conduct of persons connected with or taking part in the game, sport or pastime; or

(b) for the purpose of

(i) promoting or encouraging the exercise of, or interest in, any art, science, religion or learning, or

(ii) promoting a charitable object or other objects beneficial to the community,

and that is empowered by its constitution to exercise control over or to adjudicate on matters of interest or concern to the association or on the actions or conduct of any persons subject to that control or adjudication.

(4) A fair and accurate report of the findings or decisions of

(a) a professional body that is empowered by its constitution to exercise control over or to adjudicate on

(i) matters of interest or concern to the professional body, or

(ii) the actions or conduct of any persons subject to that control or adjudication; or

(b) any committee or governing body of a professional body mentioned in clause (a) relating to a person who is a member of or subject, by virtue of any contract, to the control of that professional body;

is privileged unless it is proved that the publication was made maliciously.

(5) A fair and accurate report of

(a) any public meeting held in Canada;

(b) any press conference held in Canada that is convened to inform the press or other media of a matter of public concern; or

(c) any documents circulated at a public meeting or press conference described in clause (a) or (b) to persons lawfully admitted to that meeting or press conference;

is privileged, unless it is proved that the publication was made maliciously.

(6) A copy of a fair and accurate report or summary of any

(a) report;

(b) bulletin;

(c) notice; or

(d) other document;

that is issued for the information of the public by or on behalf of any department, bureau, office or public officer of the Government of Canada or of any province of Canada is privileged, unless it it proved that the publication was made maliciously.

(7) In an action for defamation with respect to the publication of a report of a matter in the circumstances described in this section, the provisions of this section are not a defence if it is proved that

(a) the plaintiff has asked the defendant to publish

(i) at the defendant's expense, and

(ii) in a manner that is adequate or reasonable in the circumstances,

a reasonable letter or statement of explanation or contradiction; and

(b) the defendant has

(i) refused or neglected to publish the letter or statement mentioned in clause (a), or

(ii) published the letter or statement in a manner that is not adequate or reasonable in the circumstances.

(8) This section does not limit or abridge any existing privilege.

(9) This section does not apply to the publication of

(a) any matter

(i) that is not a public concern, or

(ii) the publication of which is not for the public benefit; or

(b) seditious, blasphemous or indecent matter.

Commentary: Provincial legislation and the UDA, 1962 established a qualified privilege for newspapers and broadcasters in respect of "fair and accurate" reports of proceedings of public bodies. Statements subject to qualified privilege are not actionable unless made maliciously. Section 17 extends the traditional qualified privilege in two ways. First, the qualified privilege is available to all publishers, not just newspapers and broadcasters. Under the old formula, a report in a magazine published bi-monthly would not be subject to the qualified privilege. Second, the list of public bodies to which the privilege applies has been expanded and clarified. In addition to legislatures, municipal councils and other local authorities, the list now includes cultural, charitable, and sports associations. Press conferences and public meetings are also expressly included, and the language has been clarified to unequivocally encompass all proceedings of commissions of inquiry, tribunals and boards holding meetings and issuing reports under the authority of legislation. It should be noted that the qualified privilege applies only to public bodies within Canada.

Reports of proceedings in court privileged

18. (1) A fair and accurate report of proceedings publicly heard before any court is absolutely privileged if the report

(a) contains no comment;

(b) is published contemporaneously with the proceedings that are the subject-matter of the report, or within 30 days after those proceedings are completed; and

(c) contains nothing of a seditious, blasphemous or indecent nature.

(2) In an action for defamation with respect to publication of a report or other matter in circumstances mentioned in subsection (1), the provisions of this section are not a defence if it is proved that

(a) the plaintiff has asked the defendant to publish

(i) at the defendant's expense, and

(ii) in a manner that is adequate or reasonable in the circumstances,

a reasonable letter or statement of explanation or contradiction; and

(b) the defendant has

(i) refused or neglected to publish the letter or statement mentioned in clause (a), or

(ii) published the letter or statement in a manner that is not adequate or not reasonable in the circumstances.

Headlines and captions

19. Sections 17 and 18 apply to every headline or caption that relates to a report contained in a newspaper or other publication.

Commentary: Provincial legislation, and the UDA, 1962, presently attach an absolute privilege to "fair and accurate" reports of court proceedings. The absolute privilege is intended to insure that the public is fully informed about the workings of our justice system. Sections 18 and 19 differ from earlier formulations of the principle in extending the

privilege to all publishers, not just newspapers and broadcasters. However, the absolute privilege applies only to reports made within 30 days of the proceeding, and which contain no comment.

Where plaintiff to recover special damages only

20. (1) A plaintiff shall recover only special damages if it appears on the trial that

(a) the alleged defamation was published in good faith;

(b) there were reasonable grounds to believe that the publication of the alleged defamation was for public benefit;

(c) the alleged defamation did not impute to the plaintiff the commission of a criminal offence;

(d) the publication took place in mistake or misapprehension of the facts; and

(e) either

(i) where the alleged defamation was published in a newspaper, a full and fair retraction of and full apology for any statement in the defamatory matter alleged to be erroneous were published

(A) in the newspaper within a reasonable time, and

(B) in a place and type that is as conspicuous as was the alleged defamation, or

(ii) where the alleged defamation was broadcast, a retraction and apology were broadcast from broadcasting stations from which the alleged defamatory matter was broadcast

(A) within a reasonable time,

(B) on at least two occasions on different days, and

(C) at the same time of day as the alleged defamation was broadcast or as near as possible to that time.

(2) Subsection (1) does not apply in the case of defamation against any candidate for public office unless the retraction and apology are

(a) made editorially in the newspaper in a conspicuous manner; or

(b) broadcast;

as the case may require, at least five days before the election.

Application of section 20

21. (1) Section 20 applies only to actions for defamation against

(a) the proprietor or publisher of a newspaper;

(b) the owner or operator of a broadcasting station; or

(c) an officer, employee or agent of a person mentioned in clause (a) or (b);

with respect to defamatory matter published in the newspaper or from the broadcasting station.

(2) No defendant in an action for defamation published in a newspaper is entitled to the benefit of section 20 unless the name of the proprietor and publisher and address of publication are stated in a conspicuous place in the newspaper.

(3) Where a broadcasting station receives a registered letter from a person

(a) containing the person's return address;

(b) alleging that defamation against the person has been broadcast from the station; and

(c) requesting the name and address of the owner or operator of the station, or the names and addresses of the owner and the operator of the station;

the broadcasting station, within 10 days of the receipt by it of the registered letter, shall deliver or send by registered mail to that person the requested information.

(4) No defendant in an action for defamation published by broadcasting is entitled to the benefit of section 20 if the defendant fails to comply with subsection (3).

(5) The production of a printed copy of a newspaper is *prima facie* evidence of

(a) the publication of the printed copy; and

(b) the truth of the information mentioned in subsection (2).

Commentary: Ordinarily, general damages for loss of reputation may be awarded. Special damages, on the other hand, compensate for actual pecuniary loss which the plaintiff is able to prove to have resulted from the defamation. In practice, the general damages are often more substantial than the special damages awarded. Defamation legislation and the UDA, 1962 contain provisions limiting awards to special damages where a newspaper or broadcaster has published a retraction and apology at the request of the plaintiff. Sections 20 and 21 retain the substance of the older formulae. Although the new Act extends a number of protections formerly only available to newspapers and broadcasters to all publishers, the provision for retraction and apology is uniquely suited to situations where the defendant publishes on a regular and frequent basis. An apology in a newspaper, for example, is likely to come to the attention of readers of the newspaper who were subjected to the defamatory matter. Moreover, because of the frequency of publication of the newspaper, the correction will be brought to the attention of readers without any delay. The Act provides, in fact, that the retraction and apology must be published within 10 days of the request.

General Notes

1. The general limitation period for defamation actions is to be found in the *Uniform Limitation of Actions Act.*

2. The general provisions pertainiog to defamation survivability are to found in the *Uniform Survival of Actions Act.*

3. Place of trial of defamation actions should be determined by provincial judicature legislation.

APPENDIX H

(See page 33)

THE DISADVANTAGED WITNESS

DRAFT OF AN ISSUES PAPER

PREPARED FOR THE

ALBERTA LAW REFORM INSTITUTE

by

PROFESSOR J. C. ROBB

THE DISADVANTAGED WITNESS

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THE DISADVANTAGED WITNESS

Draft Discussion Document

CHAPTER 1 — INTRODUCTION

In 1987 the federal government enacted in Bill C-15[1] a series of reforms to both the *Criminal Code of Canada* and the *Canada Evidence Act*. The reforms were directed at removing perceived impediments to the successful prosecution of child sexual abuse cases. Rules with respect to competency tests, corroboration, videotaping statements, and the usage of screens and closed circuit television as alternative forms of giving evidence were enacted.

The reform at the federal level parallels developments in the United States and Commonwealth jurisdictions with similarly directed evidence reforms proposed or enacted. A common thread through the reform movement has been a concentration on child sexual abuse cases.

A. The Focus on Child Sexual Abuse

The concentration on child sexual abuse cases as the focus of reform stems from rising concern about the high incidence of sexual abuse. The *Report of the Committee on Sexual Offences (1986)*, commonly referred to as the *Badgley Report*, estimated that about one in two females, and one in three males have been victims of sexual abuse.[2] U.S. surveys have estimated that as many as 100,000 to 500,000 cases of child abuse will occur in any given year.[3]

A second source of pressure for reform has been a changed view as to the worth of a child's testimony. The rapidity of the change is almost breathtaking. In 1962 the Supreme Court held that a child's

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1 *An Act to Amend the Criminal Code and the Canada Evidence Act*, proclaimed Jan. 1, 1988

2 Vol 1, at 193.

3 DeFrancis, *Protecting the Child Victims of Sex Crimes Committed by Adults* (1979), Colorado American, at 216; Yun, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases* (1983), 83 Col. L. Rev 1745, n. 1.

evidence was fundamentally deficient.[4] By 1990 this view was thought to be based upon "false science"[5], and statements of young children with respect to sexual abuse are viewed as "inherently reliable".[6]

Reform, then, has been occurring at a rapid pace both in legislatures and the courts. Bolstering this movement has been current scientific evidence which has provided some confidence to the reform movement. Present trends in psychological research tend to indicate that children's testimony should be examined on a case by case basis rather than older theories of developmental stages[7]. Broadly speaking, the current literature indicates that children are no more prone to deliberate fabrication than adults; even young children have the ability of recall, albeit with some problems of free recall; suggestibility is not necessarily more of a problem with children than adults; and that adult testimony is not necessarily more accurate than that of children[8].

Yuille, *et al*, do state that suggestibility can be a problem, and the younger the child the more this is true. However, the degree of suggestibility depends upon the dynamics of the interview situation, the child's understanding of the interview, and the behavior of the interviewer; specific questions should be minimized and leading questions avoided.[9] Suggestibility can be more of a problem with mentally handicapped children, although it would appear that the problem does not arise as much when the child is describing an event he or she has directly experienced; i.e., memory is accurate and not susceptible to suggestion[10].

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4 *R.* v *Kendall*, [1962] S.C R. 469

5 *R.* v *Meddoui* (1990), (unreported, November 23, 1990) (Alta. C.A.)

6 *R* v. *Khan* (unreported, Sept. 13, 1990) (S.C C)

7 J. Yuille, M. King, D MacDougall, *Child Victims and Witnesses· The Social Science and Legal Literature*, Department of Justice (1988), at 18.

8 Sheehy & Chapman *Assessing the Veracity of Children's Testimony* (1989), 3 Med. Law 311; Nurcombe, *The Child as Witness· Competency and Credibility* (1986), 25 Jo. of the Amer Acad. of Child Psych. 4:478-80; Melton, *Children's Competency to Testify* (1981), 5 Law and Human Behavior, at 82; Loftus & Davies, *Distortions in the Memory of Children* (1984), 40 Jo of Social Issues, at 62; Ceci, Toglia, & Ross, *Children's Eyewitness Memory* (1987)

9 *Supra*, note 7 at 22-23.

10 *Ibid.* at 25.

Ability to give accurate information can be variable dependent upon a number of factors: age influences free recall, cognitive complexity directly improves subsequent memory, recall strategies develop with age.[11] A key difference between children and adults is that adults can put order into their accounts; young children give disjointed versions lacking cohesion, but it is not necessarily less accurate.[12] As Yuille, *et al*, indicate, while children may generally recall less than adults, when tested on a topic about which they have specialized knowledge, they may actually recall more than an adult.[13]

While the research is far from complete (if that is ever possible) it is serving to remove some myths about children as witnesses. Similar research with respect to the elderly[14] is showing similar results.

The most common concern with respect to children's testimony has been with respect to false allegations of sexual abuse. Here, the current literature tends to indicate that false allegations *in general* are between 7 and 10%.[15] One problem that arises in the literature is the usage of the term "unfounded" which may be the label attached to as many of 50 to 70% of allegations of sexual abuse. The term is a reporting term commonly used (including by Statistics Canada) which may encompass false allegations, cases which cannot proceed to court because the child is too young or did not provide a disclosure to an interview, or cases in which there was no supporting evidence, and cases of good faith accusation.

The more serious problem arises with respect to allegations of child sexual abuse in disputed divorce/custody cases. The majority of the 7 to 10% deliberately false allegations are attributed to this category of case. Estimates of false allegations in such cases have ranged from a

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11 Yuille, *Assessment of Children's Testimony* (1988), 29 Can. Psych 247

12 Sheehy et al, *supra*, note 8

13 *Supra*, note 7 at 20-21.

14 Smith, *Representing the Elderly Client and Addressing the Question of Competence* (1988), 14 Jo. of Contemp Law 61.

15 Yuille, King, MacDougall, *Child Victims and Witnesses* (1988); Jones & McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children* (1987), 2 Jo. of Interpersonal Violence.

low of 3-7%;[16] to 36%;[17] to 55%;[18] and even as high as 65%![19] Most of these studies have been criticized on grounds of size of sample, bias and methodology, particularly that of Green[20] and Besharov.[21]

There is, however, a consensus that at least *some* allegations in these cases are false, and perhaps motivated by an adult, which raises the question of the need for a statement validation protocol.

The rapid change in attitudes toward children as witness has occurred despite the divorce/custody controversy. In part, this is not so much change as it is returning full circle, for long ago young children in particular were viewed as inherently trustworthy witnesses.[22] The change from trust, to deepening suspicion, to hardened suspicion, and back again to trust, can be traced to scientific theories with respect to women and children, particularly with respect to sexual allegations.

Myers[23] posits that there have been four periods of time during which the veil of secrecy surrounding child sexual abuse has been lifted, only to be drawn again under allegations of child (particularly female)

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16 See Toth, *False Prophets and Other Dangers· Current Issues in child Abuse Intervention*, paper presented to the National Center for Prosecution of Child Abuse, at 8-9; K. Quinn, *The Credibility of Children's Allegations of Sexual Abuse* (1988), 6 Behavioral Sciences & The Law 181, and studies cited therein.

17 A Green, *True and False Allegations of Sexual Abuse in Child Custody Disputes* (1986), 25 Jo. of the Amer Acad. of Child Psychiatry 449.

18 E. Benedek & D. Schetky, "Allegations of Sexual Abuse in Child Custody and Visitation Disputes, in *Emerging Issues in Child Psychiatry and the Law* (1985) V and even as high as 65%

19 Besharov, *Solomon's Choice*, in Ms. Magazine, June 1989.

20 Corwin, *Child Sexual Abuse and Custody Disputes, No Easy Answers* (1987), 2 Jo of Interpersonal Violence

21 Finkelhor, *Is Child Abuse Overreported* (1990), Public Welfare, at 23-29.

22 Blackstone, *Commentaries on the Laws of England*, Vol. 4, at 214.

23 *Protecting Children from Sexual Abuse: What Does the Future Hold?* (1989), 15 Jo. of Contemporary Law 31.

fabrication of sexual allegations. The first period, starting in 1857, occurred when Tardieu, a French physician, completed a study in which over 11,000 cases of sexual abuse were recited. While this gained some credence, by 1883 Tardieu's theories were under strong attack by those who alleged that respectable men were targets of blackmail by depraved children and that 60 to 80% of all allegations were fabricated.

The second period, starting in 1896, occurred when Freud presented a paper which linked hysteria in women with childhood sexual assault. Under heavy attack and scorn, Freud recanted and presented a new theory (the Oedipus Complex) which explained mental illness in terms of children's sexual fantasies.[24]

Freud's recantation did not simply bring about an end to the second period. He had an arguably profound influence upon the law.[25] His influence upon influential legal scholars such as Wigmore is undoubted:

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environments, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man . . .
>
> No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.

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24 See Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (1984).

25 Yuille, *The Systematic Assessment of Children's Testimony* (1988), 3 Can Psychology 247, at 249.

> It is time that the courts awakened to the sinister possibilities of injustice that lurk in believing such a witness without careful psychiatric scrutiny.[26]

Wigmore was equally mistrustful of children as well characterizing them as particularly prone to fantasy. While he argued that their testimony should be received, it was on the basis that it was worth very little.[27]

The combined Freud-Wigmore view cannot be underestimated. The philosophical basis of our current competency and corroboration rules find their roots in those views, despite critical analysis.[28] By 1911, noted Belgian psychologist, J. Varendonck, posed the rhetorical question: when are we going to give up, in all civilized nations, listening to children in Courts of law''.[29]

The third period cited by Meyer in which the issue of child sexual abuse came to the fore through the work of Sandor Ferenczi, who presented a paper which dealt with the connection between neurosis and child sexual abuse. Again, he was heavily criticized by, amongst others, Freud.

The fourth period described by Meyer begins with the work of Henry Kempe who described battered child syndrome. With the development of child abuse reporting laws, incident studies developed a theory of widespread child sexual abuse. These in turn, have given rise to the push for current reform.

B. A Broader Focus

The focus on law reform on child sexual abuse seeks to address an urgent problem. However, the focus is also a major weakness of law reform efforts to date. The weaknesses are three-fold:

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26 Wigmore, *Evidence in Trials at Common Law* (1970), at 736-37.

27 *Ibid* , Vol. 2 at 509ff.

28 See for example, Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in S. 924A of the Treatise on Evidence* (1983), 19 Cal W.L. Rev. 235 in which it is strongly argued that Wigmore ignored scientific evidence to the contrary at the time he wrote the text.

29 Cited in G. Goodman, *Children's Testimony in Historical Perspective* (1984), 40 Jo of Social Issues 9, at 10-11.

(a) It ignores the fact that children are involved as witnesses in other types of cases: tort, contract, protection proceedings (where the allegation might equally be drunkenness of parents rather than sexual abuse).[30] Legal impediments to the provision of testimony apply equally in those cases.

(b) By focusing on child sexual abuse, reform immediately becomes a "lightning rod" for reaction. Meyer, for example, is pessimistic in forecasting a backlash against the testimony of children. The veracity of child sexual abuse allegations has always been, and remains, a source of widely conflicting views within the scientific community. It would be preferable to examine what can be safely said about the testimony of Tchildren *generally,* and if possible, construct a general framework through amendments to legislation of *general* application, such as the *Alberta Evidence Act*.

(c) It ignores the plight of other potentially vulnerable witnesses such as the aged and the mentally disabled. For example, the Criminal Code now provides that a videotaped statement may be received in evidence for certain enumerated sexual offences, provided the witness was under the age of eighteen at the time of the offence. Yet, videotaped statements may be as essential for the 25 year old witness suffering from Down's Syndrome.

In approaching the subject of reform of evidence, one begins with the proposition that our system of justice (whether criminal, civil, or administrative) seeks to discover the truth. Yet, as the Australian Law Reform Commission has noted, that within the context of our adversarial system, what emerges is not the whole truth, but rather, "a new kind of truth".[31] In part this flows from characteristics of our adversary system, but in part it flows from our rules of evidence. Law reform on the subject of evidence must examine the policy reasons behind rules of evidence to assess the degree of continued validity in light of current knowledge. That holds true for the evidence of children and other vulnerable witnesses.

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30 One of the few reports to recognize this is that of the Scottish Law Reform Commission, *Evidence of Children and other Potentially Vulnerable Witnesses* (1989).

31 *Evidence*, Report No 26 (1988), Vol. 1 at 27

C. Purpose of the Report

This report examines four critical rules of evidence as they affect children and other vulnerable witnesses: (a) competency requirements, (b) corroboration rules, (c) hearsay, and (d) form of evidence. These are rules that have been commonly criticized as unwarranted impediments to the reception of evidence and the subject of reform at the federal level, and in other jurisdictions. While once Alberta legislation was relatively uniform with that of the federal government, it is now clearly out of step.

The desirability of uniformity may be evident for it does create neatness in the law. Additionally, both at the federal and provincial levels, there is a need to scrutinize rules of evidence as they affect children and others. In Alberta, children may, and are, witnesses in a wide variety of proceedings.

That is not to say that the federal rules should be adopted blindly. One difference already noted is this report's preference for rules of general application. As well, the reasoning behind the federal reforms must be examined carefully.

D. Scope of the Report

The focus of this report is on the four broad areas of evidence previously outlined. It does not purport to address the serious, and much larger issue, of different legal models for addressing problems such as child abuse. It may be that some day it may be appropriate to examine the very different Israeli, Swedish, Danish, and West German models, but the careful work required is beyond the time and breadth of this report.

CHAPTER 2 — REQUIREMENTS OF OATH OR AFFIRMATION

A. Historical Introduction

Requiring witnesses to give testimony upon oath has its roots in antiquity. Originally, it was thought to be a form of traditional self-curse at a time when persons were thought to be possessed of magic. Monotheistic religions viewed God as responding to the magic of the oath. Constantine, believing he was following Christian practice, required witness's statements to be sworn which eventually, through Canon law, extended into European Christian communities.[32]

At early common law there was initially a broad circle of potential witnesses whose testimony was excluded. The list included the parties to an action, spouses of the parties, persons convicted of certain felonies, and persons unwilling or unable to give their testimony under oath. Following an evolutionary pattern, the courts and legislatures gradually reduced the list of those legally incompetent to testify to those who were unwilling or unable to give their testimony under oath.[33]

The early common law had a strict requirement that every witness must be sworn as a precondition to giving testimony.[34] In its original form, the oath had to be taken on the Christian gospel. Those excluded from taking the oath were "heathens" (including Jews according to Lord Coke) and those incapable of appreciating the nature and consequences of the oath due to youth or intellectual disability.

The exclusionary category of "heathens" was substantially modified by the landmark decision in *Omychund* v. *Barker*[35] which held that Gentoos could give sworn testimony although plainly they were not Christians. The justices were of the view that oaths were not a Christian

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32 Law Reform Commission of Ireland, *Report on Oaths and Affirmations*, (1990) at 5-6.

33 These restrictions have been removed in large part by provisions of the *Alberta Evidence Act* and *Canada Evidence Act*

34 *Wright* v. *Tatham* (1837), 112 E.R 488.

35 (1744), 26 E.R 15.

invention but were a universal requirement based upon a universal belief in a governor or creator of the world. Willes, C.J. was of the view, however, that there must be a belief in a creator and punishment by the god in this world or the next, otherwise the oath would fail in its purpose of imposing an obligation. Provided this requisite belief was present, the *form* of the oath could be adapted to meet particular religious requirements.

The net result of the case was that those excluded from giving testimony were those who *in fact* did not believe in a god capable of imposing punishment, those whose religion *forbade the taking of an oath*, or those *incapable by reason of lack of intellect of comprehending the concept*.

The oath was intended as *one* guarantor of truth.[36] Absent the requisite belief in fact, or absent the capacity to form and understand the belief, there could be nothing to bind conscience. In part, this flowed from a theory of *mens rea*. One consequence of giving false testimony under oath was the secular punishment of the perjury charge. Those lacking the competence to understand the oath were equally incapable of attracting criminal liability.[37]

However, the requirement of an oath was not perceived by the early common law as necessarily requiring the exclusion of the testimony of young children. Blackstone summarized the law as follows:

> Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath; and, even if she hath not, it is thought by Sir Matthew Hale that she ought to be heard without oath, to give the court information; though that alone will not be sufficient to convict the offender. And he is of this opinion, first, because the nature of the offence being secret, there may be no other possible proof of the actual fact; though afterwards there may be concurrent circumstances to corroborate it, proved by other witnesses; and, secondly, because the law allows what the child told her mother, or other relations, to be given in evidence,

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36 The second guarantor is cross-examination.

37 W Holdsworth, *The History of the English Law*, (3d ed. 1944).

> since the nature of the case admits frequently of no better proof; and there is much more reason for the court to hear the narration of the child herself, than to receive it at second hand from those who swear they heard her say so. And indeed *it is now settled, that infants of any age are to be heard; and, if they have any idea of an oath, to be also sworn; it being found by experience that infants of very tender years often give the clearest and truest testimony* (emphasis added).[38]

Holdsworth was of a similar, albeit more cautious view:

> Infants below a certain age were, *like insane persons*, absolutely incapable because they "wanted discretion." It would seem that Coke *put this age at fourteen*. Probably it was fixed by analogy to other branches of the law; and the same analogy tended to produce the belief that a child below the age of seven was as incapable of being a witness as of incurring criminal liability. The impossibility of mens rea was thought to connote the impossibility of understanding the nature of an oath. But, when Hale wrote, the law was being modified. As early as the sixteenth century, the evidence of infants in *certain offences against the person of a sexual character*, had been allowed; and, though Hale repeats the rule that "regularly an infant under fourteen years is not be examined upon his oath as a witness," he adds that "the condition of his person, as if he be intelligent, or the nature of the fact, *may allow an examination of one under that age*"; and he cites cases where this had been allowed in cases of treason and witchcraft. Moreover, though he did not approve of a child under twelve being examined upon oath, *he approved of hearing their testimony without oath*, "which possibly being fortified with concurrent evidences may be of some weight, as in cases of rape, buggery, witchcraft, and such crimes which are practiced upon children." (emphasis added)[39]

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38 W Blackstone, *Commentaries On the Laws of England*, Vol. 4 at 214.

39 *Supra*, note 37.

Premised upon the assumptions that (1) the evidence of the child was preferable to hearsay and (2) the evidence of very young children could be trustworthy, the common law rules were as follows:

> (1) Witnesses over the age of 14 had to take the oath or otherwise their testimony was forbidden. Adults who were unable or unwilling to take the oath were forbidden to testify.
>
> (2) Witnesses under the age of 14 should be examined to determine whether they have any understanding of the nature of the oath and, if they did, could be sworn. There was no arbitrary age below which a child could not be sworn. Indeed, children as young as 5 years of age were sworn.[40] Nearly a century ago the United States Supreme Court remarked:
>
> > That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligation to tell the truth. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous. these rules have been settled by many decisions, and there seems to be no dissent among the recent authorities . . . [T]o exclude from the witness stand *one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice*.[41]

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40 *R. v. Brasier* (1779), 168 E.R 202.

41 159 U.S. 523 (1895), at 524-25

(3) If the under 14 witness did not understand the nature of the oath, their testimony could, and should (particularly in cases of a sexual nature), be received nonetheless. This amendment to a rigid rule of requiring an oath flowed from two premises: (a) the necessity of obtaining the best evidence available; (b) the perception held by some that young children, as a class of witness, were inherently trustworthy.

(4) If the testimony was unsworn, it must be corroborated. Absent one of the two primary guarantors of truth it would be unsafe to found a judgment on the unsworn testimony.

It was, for its time, a remarkably benevolent view with respect to children's testimony.

B. Statutory Requirements of Oath, Affirmation and Unsworn Evidence

By the twentieth century the rules respecting oath had been codified. The trend of such legislation has been two-fold: (b) to encapsulate the above common law rules with respect to children and the mentally disabled in statutory form; (b) to remove from the list of disabled witnesses those persons whose religion forbade an oath and those who were unwilling to take an oath.

Before discussing the two trends in detail, it is important to set the statutory framework, for the precise wording of the various statutory provisions are critical to the discussion. The following two tables set out the following: Table 1 sets out the various levels of court operating in Alberta and references the statutory provisions concerning oaths and affirmations and the type of action to which they apply. Table 2 then provides the detailed wording of the key statutory provisions relating to oaths.

TABLE 1

Level of Court	Federal Statutory Rules	Provincial Statutory Rules
1 Provincial Court: (a) Criminal Division	Applies provisions of *Canada Evidence Act* and to all federal offences	Applies provisions of *Alberta Evidence Act* to all provincial offences

APPENDIX H

Level of Court	Federal Statutory Rules	Provincial Statutory Rules
(b) Family & Youth Division	Applies provisions of *Canada Evidence Act* and federal *Young Offenders Act* to all federal offences in Youth Court	Applies provisions of *Alberta Evidence Act* and the provincial *Young Offenders Act* to all provincial offences in Youth Court *Alberta Evidence Act and* provisions of the *Child Welfare Act* apply to proceedings under the *Child Welfare Act* Provisions of the *Alberta Evidence Act* and *Maintenance and Recovery Act* apply to complaints under the latter Act The provisions of the *Alberta Evidence Act* and *Domestic Relations Act* apply to protection orders.
(c) Small Claims Division		Applies provisions of the *Alberta Evidence Act*
2 Court of Queen's Bench		
(a) Criminal Cases	Applies provisions of *Canada Evidence Act* to all federal offences	Sitting as a summary conviction appellate court, would be bound by provisions of *Alberta Evidence Act* with respect to provincial offences
(b) Matrimonial:		
(i) Divorce/Custody	Applies provisions of *Canada Evidence Act* as divorce is a matter within the jurisdiction of the federal parliament	Section 40 of the *Canada Evidence Act* would permit provincial rules of evidence to be applied Of particular note is section * of the *Judicature Act*
(ii) Judicial Separation		In absence of specific provisions under the *Domestic Relations Act* the provisions of the *Alberta Evidence Act* apply
(iii) Maintenance		The provisions of the *Alberta Evidence Act* apply but additionally there are specific provisions under the *Maintenance and Recovery Act* and the *Maintenance Enforcement Act* There are *no* specific provisions under the *Maintenance Orders Act*
(iv) Matrimonial Property		In the absence of specific provisions the *Alberta Evidence Act* applies to matters under the *Matrimonial Property Act*
(iv) Guardianship		Part 7 of the *Domestic Relations Act* (Guardianship and Custody of Minors) does not contain any specific provisions and so the *Alberta Evidence Act* would govern The *Minors Property Act* incorporates (s 14) the Alberta Rules of Court and accordingly the *Alberta Evidence Act* and Rules of Court apply
(vi) Mental Health		Absent specific provisions under the *Dependent Adults Act*, the provisions of the *Alberta Evidence Act* apply Review panels under the *Mental Health Act* have the power of commissioners under the *Public Inquiries Act*; judicial review in Queen's Bench is a rehearing and the same powers would be exercised

Level of Court	Federal Statutory Rules	Provincial Statutory Rules
(viii) Civil Actions	Sitting as a federal court judge (s *Federal Court Act*) the provisions of the *Canada Evidence Act* and Federal Court Rules apply	Civil actions would be governed by the provisions of the *Alberta Evidence Act* and Alberta Rules of Court

Statutory Rules

Federal	Alberta	Comment
Canada Evidence Act	*Alberta Evidence Act*	Key comparisons
S 14(1) Where a person called or desiring to give evidence objects, on grounds of conscientious scruples, to take an oath, or is objected to as incompetent to take an oath, that person may make the following solemn affirmation S 15(1) Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, refuses or is unwilling to be sworn, on grounds of conscientious scruples, the court or judge, or other officer shall permit that person, instead of being sworn, to make his solemn affirmation , and that solemn affirmation shall be of the same force and effect as if that person had taken an oath in the usual form S 16, pre-1987 S 16(1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of judges , understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if in the opinion of the judge, may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth (2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence	S 16(1) An oath may be administered in the form and manner following: The person taking the oath shall hold the Bible or New Testament or Old Testament in the case of an adherent of the Hewish religion, in his uplifted hand and the officer administering the oath shall say: "You swear that the evidence you give as touching matters in question in this action or matter shall be the truth, the whole truth and nothing but the truth So help you God", to which the person being sworn shall say "I do" or give his assent thereto in a manner satisfactory to the court (2) Without in any way limiting or restricting the manner in which an oath may be administered, the oath may be taken or sworn on any one of the 4 Gospels S 17 If a person to whom an oath is to be administered desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland he shall be permitted to do so, and the oath shall be administered to him in that form and manner without further question S 18(1) If, in an action or on an occasion when an oath is required or permitted, a person called as a witness, or required or desiring to give evidence , objects to taking an oath or is objected to as incompetent to take an oath, if the presiding judge is satisfied that the witness or deponent objects to being sworn	(a) Oath Under the CEA, a person who understands the nature of an oath and is able to communicate may give evidence on oath or affirmation Under the AEA, a person who understands the nature of an oath may give evidence on oath (b) Affirmation Under both the CEA and the AEA this arises if the person objects to the oath, or is challenged on grounds of incompetence A key question is whether this permits persons who are unable as a result of youth or mental disability to affirm? If so, do we need unsworn testimony? (c) Unsworn Evidence Under the CEA a child or person suffering from a mental disability may give unsworn evidence provided they can communicate their evidence Under the AEA a child may give unsworn evidence provided they are of sufficient intelligence to justify the reception of the evidence and understand the duty to tell the truth.

Statutory Rules		
Federal	**Alberta**	**Comment**
Canada Evidence Act	*Alberta Evidence Act*	Key comparisons
post-1987 S 16(1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine (a) whether the person understands the nature of an oath or a solemn affirmation and (b) whether the person is able to communicate the evidence (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify (5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or solemn affirmation.	(a) from conscientious scruples (b) on the ground of his religious belief, or (c) on the ground that the taking of an oath would have no binding effect on his conscience, the witness or deponent may make an affirmation and declaration instead of taking an oath S. 20(1) In a legal proceeding where a child of tender years is offered as a witness and the child does not, in the opinion of the judge understand the nature of an oath, the evidence of the child may be received though not given on oath if, in the opinion of the judge the child is possessed of sufficient intelligence to justify the receiption of the evidence and understands the duty of speaking the truth (2) No case shall be decided on such evidence unless the evidence is corroborated by other material evidence	
Young Offenders Act S 60 In any proceedings under this Act where the evidence of a child or a young person is taken, it shall be taken only after the youth court judge or the justice (a) in all cases, if the witness is a child, and (b) where he deems it necessary, if the witness is a young person instructed the child or young person as to the duty of the witness to speak the truth and the consequences of failing to do so	(Alberta) *Young Offenders Act* S 27 is in identical terms to the federal provision	This obligation would appear to be in addition to the oath inquiry

Statutory Rules		
Federal	**Alberta**	**Comment**
Interpretation Act S 28 "oath includes a solemn affirmation or declaration	*Alberta Interpretation Act* S 25 (n l) oath or affidavit includes a solemn affirmation or solemn declaration	This restrictive definition is important in light of provisions of some Alberta statutes
Federal Court Rules	Alberta Rules of Court Any party to an action may be orally examined *on oath* or affirmation before the trial of the action	Alberta Rule 200 requires that discovery be upon oath or affirmation There is not a similar restriction for evidence at trial
	Child Welfare Act S 74(1) In a proceeding before the Court under this Act, the Court may (a) compel the attendance of any person and require him to give evidence *on oath* (3) The evidence of each witness in a Court proceeding under this Act *shall be taken under oath and forms part of the record*	This provision is quite restrictive The question arises whether it could possibly encompass unsworn evidence in light of section 25 of the *Interpretation Act*
	Parentage and Maintenance Act (s 14(4)) s 15(6) *Maintenance and Recovery Act* each have the following provision: judge may (a) compel the attendance of any person and require him to give evidence upon oath	Is this too restrictive?
	Domestic Relations Act s 28(3) The applicant and all witnesses whom the Court thinks proper may be examined *on oath*	Again, the question arises as to whether this would exclude unsworn evidence

The *first trend of codifying common law rules* with respect to the oath and unsworn evidence is evident from the provisions of section 20 of the *Alberta Evidence Act* and the pre-1987 version of section 16 of the *Canada Evidence Act*. The key interpretive issues are:

(1) Are there cases in which an oath is a testimonial prerequisite?

The new provisions of section 16 of the *Canada Evidence Act* contemplate *three* possibilities: (a) a child, or person whose mental capacities are challenged, may give evidence upon oath, provided the witness understands the nature of an oath, and is able to communicate; (b) the witness may affirm; (c) a *child* may give evidence upon a *promise to tell the truth* if, while incapable of understanding the nature of an oath, is *of sufficient intelligence* to justify reception of the evidence.

The *Alberta Evidence Act* also admits of three possibilities: (a) oath, (b) affirmation, (c) *unsworn evidence of a child* if the child is of sufficient intelligence to justify reception of the evidence and understands the duty to tell the truth. There are two key differences between the federal and provincial formulations: (a) the federal act no longer requires that the child understand the duty to tell the truth to give unsworn evidence, while the Alberta statute retains the requirement; (b) under the CEA corroboration is not required for unsworn evidence; under the AEA unsworn testimony must be corroborated.

There are, however, several Alberta statutes which contain express terms which require that testimony be given upon oath. The *Interpretation Acts* define oath as including affirmation. Can the same be said of unsworn testimony?

The issue has arisen in Alberta in the context of the provisions of the Alberta *Rules of Court*. In *Strehlke et al* v. *Camezind et al*[42] a house had been destroyed by fire as a result of two young boys playing with matches. The children had been examined on discovery (giving unsworn answers). The claim against the adults was dismissed on an application for a non-suit. One of the issues at trial was whether the children's discovery testimony could be read in at trial by the plaintiff. Rule 200 requires that the discovery be upon oath or affirmation. This rule had replaced an earlier rule which had not contained a similar requirement. It was held that determinations as to competency must be made before the examination. Although the *Evidence Act* authorizes unsworn testimony, given the express requirement of oath or affirmation in Rule 200, unsworn discovery evidence cannot be read in.[43] In Ontario, the discovery rules have been amended to permit unsworn evidence.[44]

It would appear, therefore, that the statutory requirement of an oath may have considerable significance. The argument does not appear to have arisen in the context of child welfare proceedings.

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42 [1980] 4 W.W.R. 464 (Alta. Q B.)

43 See also *Klassen* v. *Saskosky* (1952), 60 Man. R. 105 (Q.B.) in which it was held that the requirement of an oath in the rules precluded the usage of unsworn read ins.

44 See *Nemeth* v. *Harvey* (1975), 7 O.R. 719 (M.C.).

Discussion Questions 1 & 2

1. **Is there an internal inconsistency between the *Alberta Evidence Act* and the several statutes referred to in Table 2?**

2. **If so, is there a need to resolve the inconsistency, i.e., are there any proceedings in which unsworn testimony should be precluded?**

(2) What are the requirements of an oath?

The CEA requires an ability to communicate which simply means an ability to understand and respond to simple questions.[45] Both the CEA and AEA require an understanding of the nature of an oath.

In its origin, the requirement of an oath was a religious one requiring belief in a Christian, anthropomorphic deity. It was expanded to permit persons of other religions to testify upon oath provided there was a belief in divine retribution.

The codification of the rule as found in section 16 CEA and section 20 AEA refers to understanding the *nature of the oath*, and makes no reference to understanding the consequences. This has been interpreted as precluding a requirement of belief in divine retribution.[46] Provided there was a belief in a supreme being the oath could be taken.[47]

In *Bannerman*,[48] it was held that what was important was understanding the moral obligation to tell the truth. This was repeated in *Reference Re Truscott*.[49]

The difficulty with the "moral obligation" test was that it eliminated the distinction between giving evidence upon oath and giving unsworn testimony for the latter test under the *Alberta Evidence Act*

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45 Delisle, *Evidence: Principles and Problems* (2d ed.) (1989).

46 *R.* v. *Bannerman* (1966), 55 W.W.R. 257, aff'd. 57 W.W.R 736.

47 *R.* v. *Budin* (1981), 20 C.R. (3d) 86 (Ont. C.A.).

48 *Supra*, note 46.

49 [1967] S C R. 309 at 368.

(and the old version of section 16 CEA) requires that the witness understand the duty to tell the truth.

The more recent trend has been to strip the oath of any religious connotation. In *R.* v. *Fletcher*, the Ontario Court of Appeal ruled that no inquiry need be made about belief in a supreme being. In a secular society it was doubtful that many adults could satisfy the requirement.[50] The secular reasoning was accepted by the Alberta Court of Appeal.[51] This development has been somewhat paralleled in the U.K.

In *R.* v. *Kemble*[52] the English Court of Appeal considered a situation in which a Muslim had given testimony for the Crown upon swearing the oath on the New Testament. On appeal, expert evidence was led that according to Muslim law, no oath that is made upon anything other than the Koran, written in Arabic, would be valid. The court dismissed the appeal stating that the validity of an oath does not depend upon what may be the considerable intricacies of the particular religion adhered to by the witness. Rather, the question is whether the oath binds the conscience.

The recent decision of the Supreme Court in *R.* v. *Khan*[53] has confirmed the concept of binding conscience. What is required is "an appreciation of the significance of testifying in court under oath".[54] The problem is how does one ascertain this?

More recently, the courts have endeavoured to sharpen the distinction by requiring that the witness understand the solemnity of the occasion, and that there is an added responsibility to tell the truth over and above the duty to tell the truth which is an ordinary duty of normal social conduct.[55]

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50 (1983), 1 C.C C (3d) 370 at 376-77.

51 *R.* v. *Connors* (1986), 71 A.R. 78 (C.A.)

52 [1990] 1 W.L.R. 1111 (C.A.).

53 Unreported, Sept. 13, 1990.

54 *Ibid.* at 8

55 *R* v. *Khan* (1988), 42 C.C.C. (3d) 197 (Ont. C.A)

Two problems arise. First, it is not as clear that the religious component is absent from the AEA given the provision for form of the oath in section 16. While a similar form of oath is administered in federal matters, that is a matter of practice and not a statutory requirement.

Second, it is still not clear whether the test of binding conscience will receive uniform application. In *R.* v. *D.*[56] a trial judge had permitted a six year old to give sworn testimony after being satisfied that the child understood the difference between a truth and a lie, and that "God would be mad if he lied". It was held that this was an insufficient indication that the child understood the requirement of telling the truth *flowing from the special nature of the oath*. In contrast, in *R.* v. *R.*[57] it was held that a child had been properly sworn where she stated that she understood that if she put her hand on the Bible she had to tell the truth although later she indicated that she did not know what would happen if she told a lie.

Under both the federal and provincial *Young Offenders Act* the duty is imposed upon the judge to instruct the child as to this added duty. In other proceedings, it is to emerge from the witness during the competency hearing. However, at common law a judge could give the necessary religious instruction to the child.[58] Similarly, it may be *possible* that instruction could be given on the added duty. It does, however, raise the question whether the new test is any more realistic than the old one.

Some form of oath or affirmation is virtually a universal requirement.[59] Equally, however, in most jurisdictions the religious component has substantially diminished. From a law reform perspective, the major question that has arisen is whether a form of oath should be retained at all. The Canadian Task Force on Uniform Rules of Evidence recommended that the oath be retained as an alternative to affirmation.[60] This recommendation was premised on several grounds: (1) that

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56 (1989), 47 C C C. (3d) 97 (Sask. C A.)

57 (1989), 71 C R. (3d) 113 (N.S.C A)

58 *R.* v. *Hawke* (1975), 22 C.C.C. (2d) 19 at 29 (Ont. C.A).

59 *Supra*, note 32 at 23.

60 *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982) at 234.

through case law the oath has become a flexible test capable of encompassing a wide variety of beliefs; (2) that affirmation based upon threat of perjury would not in fact deter perjury and; (3) young children would not be susceptible to perjury charges in any event. The recommendation was further predicated upon the understanding that the rules would be changed so that the choice of oath or affirmation would be one of choice for the witness, not requiring or permitting any inquiry into religious beliefs.[61] The retention of oaths has been favoured in the United States, Australia, the United Kingdom and Scotland.

The Law Reform Commission of Tasmania has taken a somewhat different approach, favouring both the retention of the oath and its religious significance. The majority of commissioners were of the view that the religious component remains important for a substantial number of people and should be retained.[62]

In Ireland the Law Reform Commission has recommended the abolition of the oath entirely.[63] In its view the scientific evidence does not support the proposition that an oath is a greater guarantor of the truth than affirmation. As well, jurors might attach unwarranted significance to the evidence of a person who gives evidence under oath as compared to affirmation. Finally, for many non-Christian religions, the alternative forms of oath are either non-binding or fictionalized accounts of other traditions. The Commission was of the view that Ireland should adopt a universal requirement of affirmation.

Discussion Questions 3, 4 & 5

3. Should the oath be retained at all, or should it be replaced by a simple requirement of affirmation, regardless of whether the witness is an adult or child.

4. Should the form of the oath, with its religious component, be continued in light of the above developments?

5. Should there be a continued requirement of understanding the nature of an oath?

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61 *Ibid* at 239-40.

62 Report No. 62, *Child Witnesses*.

63 *Supra*, note 32 at 35-40

(3) What triggers a competency hearing?

Under both the federal and provincial evidence acts, age and mental capacity are the triggering factors. First, with respect to age, a child of less than 14 years of age is the subject of automatic inquiry. The federal statute pins the age at 14 expressly; the provincial statute does so by case law which interprets the phrase "child of tender years" as meaning under 14.[64]

The age of 14 appears to stem from Lord Coke's formulation, which in turn, seems to stem from ancient notions of ages of competency.[65] It is not clear that age 14 is anything other than an arbitrary age.

Under the *Canada Evidence Act*, assuming that the witness is over 14, a witness may be subject to a competency inquiry if: (a) there is reason to believe that the witness has insufficient communication skills to give evidence at all;[66] or, if their ability to understand the nature of the oath is in doubt. Under the old section 16 CEA, and common law rules applicable to the AEA, this could arise as a result of challenge, or on the judge's own motion.[67] Age, manner of giving evidence, appearance, and evidence offered as to mental capacity were sufficient justification.[68]

Under the new section 16 CEA, this arises only by way of challenge by one of the parties (s. 16) who then bears the burden of establishing that there is an issue as to competency. It does not appear that there is a burden to establish incompetency, but only that there is an issue. It is not yet clear whether extrinsic evidence of lack of capacity must be led or what the threshold test for such evidence would be: is

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64 *R.* v. *Horsburgh*, [1966] 1 O.R. 739 at 746 (Ont. C A.); *R.* v. *Dyer* (1972), 5 C.C.C. (2d) 376 at 378 (B.C.C.A.)

65 Blackstone, *Commentaries On the Laws of England* (1876), Vol. 4 at 20-22.

66 See for example, *Udy* v *Stewart* (1885), 10 O.R. 591 (C A.) where it was held that a girl suffering from brain damage and unable to speak or write intelligibly was incompetent to testify. Similarly, in *R* v. *Harbuz* (1979), 45 C.C.C. (2d) 65 (Sask. Q.B) a child was held to be incompetent to testify by reason of a mental disease or retardation.

67 *R.* v. *Hawke* (1975), 22 C.C.C. (2d) 19 (Ont C A.).

68 *Ibid*

evidence of past lying sufficient, constant lying, treatment for mental disability?

Discussion Questions 6 & 7

6. **Should the age of 14 be retained as the threshold age? In a number of jurisdictions the age has been reduced to 12. There is some benefit to uniformity.**

7. **Should there be, as in some jurisdictions, a presumption of competency, subject to challenge with the burden upon the challenger to establish an issue as to competency?**

(4) Who may affirm?

The *second trend* of accommodating those whose religion forbade the taking of an oath was accomplished by statutorily establishing affirmation as the equivalent of an oath. Initially, this was intended to permit Quakers, Separatists and Moravian (for whom the taking of an oath is blasphemous) to give testimony.[69] The notion of "affirmation" is purely a creature of statute but continued the trend of reducing the list of disabled witnesses.

The broader terms of the Alberta statute would permit an atheist to affirm, but it is not as clear under the federal legislation.[70] Neither is clear as to whether a child or mentally disabled witness who is found incapable of being sworn may be affirmed instead.

In *R.* v. *Walsh*[71] a professed "satanist" was called as a Crown witness. An initial challenge to his competence, advanced upon grounds of incompetence due to a sociopathic personality, failed. A second voir dire was held when it was learned that the witness claimed to be a satanist. During the hearing the witness testified that if he felt he should tell the truth, he would; but, if not, he would not tell the truth. He further testified that he was aware of the meaning of perjury and that in

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69 *Supra*, note 32 at 10.

70 See R. Delisle, *Evidence Principles and Problems*, (2d ed. 1989) at 221; *R.* v. *Leach*, [1966] 1 O.R 106 (C.A); *R* v. *Sveinsson* (1950), 102 C C C 366 (B.C.C.A.)

71 (1979), 45 C.C.C. (2d) 199.

this particular case he would tell the truth. The trial judge ruled him incompetent. The Ontario Court of Appeal held that this was incorrect and that the witness should have been affirmed. Moral depravity, a disposition to lie, or moral defect goes to credibility and not competency. The term "is objected to as incompetent", according to the court, does not mean mental incompetency but rather refers to the fact that an oath *would not bind conscience*. The court distinguished the situation from that of the insane and children in the following terms:

> As Dean Wigmore has pointed out it is not entirely clear whether when the competence of the witness is in issue on account of insanity the capacity to take an oath requirement was based on the religious belief requirement of the common law, or whether it related to the moral qualification to testify *which is especially likely to be lacking in persons who are insane, and in children*. With the dispensation of the religious belief requirement, the latter element is forced into prominence . . .[72]

It would seem, therefore, that under either statute the list of persons who might be incapable of being sworn was reduced to the insane and child witness. Yet, even that proposition is unclear from other case law.

First, with respect to the mentally disabled witness, three decisions have held that such a witness who is found incapable of being sworn, can nevertheless be affirmed provided there is an indication that the witness understands that there is a duty to tell the truth.[73] The reasoning appears to be that the words "is objected to as incompetent" is a broad phrase capable of embracing mental incapacity.

Consistency of reasoning would lead to the result that children who understand the duty to tell the truth would also be capable of affirming. However, the case law is flatly contradictory. The Ontario Court of Appeal baldly stated in *R.* v. *Budin*[74] that the right to affirm

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72 *Ibid* at 205.

73 *R.* v *Dawson*, [1968] 4 C C.C 33 (B.C.C A.); *R.* v *Hawke* (1975), 22 C.C C. (2d) 19,30 (Ont C.A); *R.* v. *T.C.D* (1988), 61 C.R. (3d) 168 (Ont. C.A).

74 (1981), 58 C.C.C. (2d) 352, leave to appeal dismissed.

does not extend to children of tender years. The opposite result was arrived at by the Alberta Court of Appeal in *R.* v. *Connors*[75] which held that a child who understood the moral obligation to tell the truth could be affirmed.

(5) Who may give unsworn testimony?

Under section 16 of the CEA, a witness who is able to communicate may give evidence upon a promise to tell the truth. This is not restricted to children, but could include the elderly and mentally disabled. Section 16 seems to signal parliamentary intention that persons who cannot articulate the requirements of the oath, should nevertheless be heard.

The provisions of section 20 of the AEA are somewhat different. First, unsworn evidence is restricted to children. Second, the judge must be satisfied that the child understands the duty to tell the truth and is of sufficient intelligence to justify the reception of the evidence.

The "intelligence test" is imbedded in twentieth century common law which posits that there is a minimum threshold level of intelligence which makes evidence worth hearing or not. Of particular concern to the courts were children and the mentally disabled. McCormick summarized the American position in the following terms:

> There is no rule which excludes an insane person as such, or prohibits a child of any specified age from testifying, but in each case the test is whether the witness has intelligence enough to make it worthwhile to hear him at all and whether he feels a duty to tell the truth.[76]

Twentieth century policy reasoning stems from a general suspicion about the evidence of children as reflected in the four deficiencies of child testimony set out in *R.* **v.** *Kendall*: (a) capacity of observation, (b) capacity to recollect accurately, (c) capacity to understand questions and frame intelligent answers, (d) they lack moral responsibility.[77]

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75 (1986), 71 A.R 78

76 *Law of Evidence* (1954), at 140

77 (1962), 132 C C.C. 216 (S C C)

Indeed, it was suggested that young children ought not to be called at all. In *Sankey* v. *R.* it was stated:

> The term "child of tender years" is not defined. Of no ordinary child over seven years of age can it be sagely predicted, from his mere appearance, that he does not understand the nature of an oath.[78]

This is suggestive of an age of 7 at which children would be presumptively incapable of understanding the oath (bearing in mind the oath's religious connotation at that time). Between the ages of 7 and 14 some brief inquiry would be desirable. The English Court of Appeal was more emphatic in *R.* v. *Wallwork* holding that a child of 5 should never be called. In that case a 6 year old was called as a witness, the court cleared as far as possible, but the child would say little. It was stated that she should not have been called for: "the jury would not attach any value to the evidence of a child of five; it is ridiculous to suppose that they would".[79]

The *Wallwork* decision has been reviewed twice. In *R.* v. *Wright* a 6 year old witness was called. The court reviewed the Wallwork decision indicating that its rationale continued to be valid. Therefore, while a young child could be called it should occur only in exceptional circumstances.[80] Three years later the Wallwork case was reviewed again with a different result. In *R.* v. *Z* it was held that events had overtaken the Wallwork decision. The reasons were that the primary concern in Wallwork was concern for the child (which is not terribly accurate), and that the removal of the requirement of corroboration by Parliament signalled the "increasing belief that the testimony of young children, when all precautions have been taken, may be just as reliable as that of their elders."[81]

The change of view as to the reliability of children's testimony is beginning to be paralleled in Canada. In *R.* v. *Khan*, the Supreme Court adopted the following statement from the decision of Robins, J.A. (Ont. C.A.):

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78 [1927] S.C.R. 436 at 439.

79 (1958), 42 Cr App. R. 153 at 160-61.

80 (1987), 90 Cr App. R. 91 (C.A.)

81 [1990] 2 All E.R 971 at 973-74 (C A)

> Where the declarant is a child of tender years and the alleged event involves a sexual offence, special considerations come into play in determining the admissibility of the child's statement. This is so because young children of the age with which we are concerned here *are generally not adept at reasoned reflection or at fabricating tales of sexual perversion.* They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken.[82]

The importance of this is that the emerging policy is that children, including young children, should be heard, at least (as was held in *Khan*), on an unsworn basis.

The current section 20 AEA poses two problems: (a) it retains the old intelligence test which may not be rooted in sound knowledge; (b) it retains the requirement that the witness understand the duty to tell the truth. Yet, if the decision in *R.* v. *Connors*[83] is correct, and a witness who understands the moral obligation of telling the truth may be affirmed, do we need the provision for unsworn evidence at all? Its retention makes sense only upon the federal formulation which requires only that the witness be able to communicate.

Discussion Questions 8 & 9

8. Should the intelligence test for unsworn evidence be retained?

9. Should there be a continued requirement that the witness understand the duty to tell the truth.

C. Law Reform in Other Jurisdictions

United States

U.S. case law has generally required that a witness possess characteristics which include: capacity to observe, sufficient intelligence, adequate memory, the ability to communicate, an awareness of

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82 Unreported, at 7.

83 *Supra,* note 75

the difference between truth and falsehood and an appreciation of the obligation to tell the truth. This requires that a witness have a threshold level of intelligence which McCormick describes as having intelligence enough to make it worthwhile to hear from the witness.[84]

U.S. case law has not assumed an age at which a witness is disqualified. There are numerous cases in which children as young as three have been held to be competent.[85] Nor has mental disability proven to be a major impediment. Individuals with below average intelligence, or diagnosed as mentally retarded, are viewed as competent provided they possess the ability to observe, recollect and relate in a comprehensible fashion.[86]

It is not surprising, therefore, that the *Federal Rules of Evidence* (increasingly duplicated by state legislation) starts with a *presumption of competence for every witness.*[87] That has not, however, meant that inquiry is never conducted. Rather Rule 603, which requires every witness to declare that he/she will testify truthfully under oath or affirmation, is interpreted as providing a *judicial discretion* to inquire.[88]

At the state level, a number of states have duplicated the federal rules;[89] others maintain the requirement of an oath;[90] others, at least until recently, maintained a presumptive age of incapacity subject to inquiry as to the understanding of the duty to tell the truth;[91] and a growing trend is presumptive capacity in sexual abuse cases.[92] Typically these latter provisions state that victims of specified abuse crimes are competent to testify without prior qualification.

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84 McCormick, *On Evidence* (1984) at 156.

85 J. Myers, *The Testimonial Competence of Children* (1986)87), 25 Jo. of Fam. Law 287 at 288, n 2

86 See for example, *U.S* v. *Benn*, 476 F 2d 1127 (D.C. Cir 1973).

87 Rule 601

88 *Supra*, note 85 at 296-300

89 Florida, California, New York, Kentucky, Massachussets for example.

90 Georgia for example.

91 As in Idaho.

92 As in Alabama and Connecticut.

New South Wales

Sections 32-33 *Oaths Act 1900* provides that a child under *age 12* who is not competent to take the oath, may given unsworn evidence if of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. The child must promise to tell the truth.

Victoria

The Law Reform Commission has recommended that a child should be permitted to testify if he or she understands there is an obligation to tell the truth and can give rational replies to questions of fact. The Commission recommended abolishing the categorization of evidence as either unsworn or sworn.

Queensland

Section 9 of the *Evidence Act 1977-1986* has been amended to provide that a child could give sworn testimony if he/she understood the nature of the oath; if not, is permitted to testify *unless* the court is satisfied that the child is insufficiently intelligent to provide reliable evidence; if unsworn evidence is given, its probative value is not diminished by virtue of the fact that it is unsworn; and, expert evidence is admissible in the case of a child under 12 relating to the level of intelligence of the child.

South Australia

Section 12 of the *Evidence Act 1929* has been amended to provide that a child over 7 can give evidence on oath if they understand the nature of the oath; a child under 12 may give unsworn evidence provided the child has sufficient cognitive development enabling the child to give an intelligible account and promises to tell the truth.

Western Australia

A Child Sexual Abuse Task Force recommended that the test of competency should permit the reception of evidence of a child who has sufficient intelligence to justify reception of the evidence, and who understands the duty to tell the truth.

New Zealand

An Advisory Committee has recommended abolition of the competency test leaving a child's testimony solely as a question of weight for the trier of fact. Currently, a child under 12 may give evidence upon a promise to tell the truth provided they understand the duty to tell the truth and can give intelligible evidence.

Scotland

The Scottish Law Reform Commission has recommended that children should be presumed to be a competent witness unless there is good reason to reach a different conclusion.

Ireland

The Law Reform Commission has recommended that with respect to children, that children under 14 should be permitted to give evidence without oath or affirmation, *but* that the court should be satisfied as to the capacity of the child to give an intelligible account of events which he or she observed. In short, it is a test as to whether the child has the necessary verbal skills to give a proper account.[93] In a separate report the Commission recommended the same rules with respect to persons with severe mental handicap.[94]

The key trends in the reforms to date are:

1. The majority of reforms retain the distinction between sworn and unsworn evidence, the latter requiring an understanding of the duty to tell the truth, and possessing sufficient intelligence.

2. The majority of reforms retain the mandatory inquiry but cast the age at 12 rather than 14.

3. A minority of jurisdictions at present have legislated, or proposed, a rule of presumed competence.

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93 Law Reform Commission of Ireland, *Child Sexual Abuse* (1990), at 50ff.

94 Law Reform Commission of Ireland, *Sexual Offences Against the Mentally Handicapped* (1990), at 22-24.

CHAPTER 3 — CORROBORATION

A. Historical Introduction

One of the key differences between modern English common law (reflected in Canadian law and practice) and canon or civil law (as developed by Roman law) is that the former does not generally require a plurality of witnesses. This became most apparent with the development of the modern jury system in the seventeenth century. Pre-seventeenth century jurors were expected to fulfil a witness function as well as an adjudicative function and so, in a real sense, there was a plurality of witnesses. This largely disappeared with the modern development of restricting jurors to an adjudicative function. Canon law, in contrast, as practiced in the ancient ecclesiastic courts of England and the Star Chamber required oath helpers in order to found a judgment or conviction.

Although English common law did not require a plurality of witness, some ancient anomalies remained including requirements of more than one witness on charges of treason and perjury. The requirement of more than one witness for treason stems from a statute of 1547; the requirement of corroboration for perjury stems from the practice of the Court of Star Chamber. Both requirements are continued by the current Criminal Code.

Despite the absence of a *general* requirement of a plurality of witnesses, the English courts developed, as matters of practice, requirements of corroboration surrounding *suspect categories of witnesses or type of case*. A court *might act* upon the evidence of one witness *but was not required* to do so:

> The circumstances may be such that there is no check on the witness and no power to obtain any further evidence on the subject. Under these circumstances juries may, and often do, acquit. They may very reasonably say we do not attach such credit to the oath of a single person of whom we know nothing, as to be willing to destroy another person on the strength of it. This case arises where the fact deposed to is a passing occurrence—such as a verbal confession or a sexual crime—leaving no trace behind it, except in the memory of an eye or ear-witness . . . The justification of this is, that the

> power of lying is unlimited, the causes of lying and delusion are numerous, and many of them are unknown, and the means of detection are limited.[95]

The essential concept was that, even if a witness appeared to be credible and unshaken by cross-examination, there were certain *classes* of case and *classes* of witness who were inherently suspect. From this concept flowed the practice of warning jurors of the dangers of conviction (or founding a judgment) in the absence of corroborative evidence.

It bears emphasis that this arose only if the witness appeared credible.[96] If the witness proved not to be credible (such as where a witness had given a false statement) the case had to be proven *aliunde*, i.e., independent of that witness. In *D.P.P.* v. *Kilbourne* it was said:

> Corroboration is only required or afforded if the witness requiring corroboration or giving it is *otherwise credible*. If his evidence is not credible, a witness's testimony *should be rejected* and the accused acquitted, even if there could be found evidence capable of being corroborated in other testimony. Corroboration can only be afforded to or by a witness *who is otherwise to be believed*.[97]

The requirement for corroboration arises because the witness falls within the suspect categories. With respect to some classes of case and witness the concern was so deep that corroboration would be mandatory, i.e., a verdict *could not* be founded upon the uncorroborated evidence of one witness.[98] In both England and Canada, many of the requirements of warning to juries and the mandatory requirements of corroboration became ensconced in legislation.

The traditional suspect classes of case and witness has included:

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95 Sir J Stephen, *General View of the Criminal Law*, at 249.

96 Jackson, *Credibility, Morality and the Corroboration Warning* (1988), 47 Camb. Law Jo. 428.

97 [1973], A C. 729 at 746, per Lord Hailsham

98 *R.* v. *Baskerville*, [1916] 2 K.B. 658

(1) Perjury

The reason for the requirement stems from historical procedures of the Court of Star Chamber which was influenced by canon law.

(2) Treason

The requirement of at least two witness stems from a statute of 1547 as a reaction to Henry VIII. Wigmore commented:

> The object of the rule requiring two witnesses in treason is plain enough. It is, as Sir William Blackstone said, to "secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages".

Politicians were the first of a growing list of suspect witness.

(3) Accomplices

By the nineteenth century it had become a rule that jurors were to be warned of the dangers of convicting upon the evidence of an accomplice. By the twentieth century it had been accepted that the warning was mandatory and its absence was fatal to a conviction.

The concerns can be traced back to seventeenth century "Reward Statutes" by which witnesses who accused others of crime were paid a premium upon conviction. A class of professional accuser and witness developed, the members of which would falsely accuse for the reward. This was bolstered by the eighteenth century "Crown Witness" practice of offering felons immunity from prosecution in return for testimony. Since most felonies carried the death penalty it is not surprising that the offer would be readily accepted. The abuses of the system led to an almost permanent cloud of suspicion hanging over the head of anyone characterized as an accomplice/witness.[99]

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99 M. Bloos, *Alberta Crown Prosecutors Unfinished Hybrids* (L.L M Thesis, 1987, U of A) at 52-56.

However, the most dramatic developments of the twentieth century were the extension to the definition of an "accomplice", and the changing definition assigned to the term "corroboration".

The meaning to be attached to "corroboration" in criminal cases was shaped by the leading decision in *Rex* v. *Baskerville*[100] which held that evidence in corroboration must be independent testimony connecting the accused with the crime. It must confirm in some material particular not only that the crime was committed but that the accused committed it.

What followed was a bewildering array of decisions on what constituted, or did not constitute, corroboration.[101] The *Baskerville* test also created a distinction between criminal and civil cases. Criminal cases were governed by the formalistic *Baskerville* test; in civil cases, on the other hand, corroboration retained its meaning of evidence capable of inducing a rational state of belief in a witness.[102] One reason for the distinction was the higher burden of proof in criminal cases, i.e., proof beyond a reasonable doubt.

The term "accomplice" means one who is *particeps criminis*; i.e., one who shares or cooperates in the commission of a crime.[103] In *Horsburgh* v. *R.* the accused was charged with several counts of contributing to juvenile delinquency by encouraging several teens to commit sexual acts amongst themselves. The teens provided sworn testimony against Horsburgh. The Supreme Court held that a failure to provide a warning of the dangers of convicting in the absence of corroboration was fatal to the conviction. The children, as participants in the crime, were accomplices triggering the corroboration requirement. It was not necessary that the children be guilty of the crime committed. In so holding, the majority specifically rejected the proposition stated by Evans, J.A. in the Court of Appeal that a child could not be particeps criminis where the infraction was specifically designed for the protection of children.[104]

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100 [1916] 2 K B 658 at 667.

101 Law Reform Commission of Canada, *Report on Evidence* (1977); Wakeling, *Corroboration in Canadian Law* (1977)

102 *Vetrovec; Gaja* v. *R.* (1982), 67 C.C C (2d) 1 (S.C C)

103 *Horsburgh* v. *R* , [1967] S.C.R. 746 at 756, per Martland, J.

104 *Ibid* at 757-78.

The upshot of the case was that in every instance where an accomplice (with its extended meaning) testified, a corroboration warning was mandatory.[105] This lasted until the critical decision of the Supreme Court in *Vetrovec* v. *R.*; *Gaja* v. *R.*[106] which held that a warning was not triggered simply by virtue of finding that someone was an accomplice. Rejecting the notion of a fixed category that required corroboration, the court held that the circumstances of each case dictate whether any warning is required. The critical question is whether there is anything on the facts of the case which would impair the worth of a particular witness.[107]

The second critical aspect of the *Vetrovec; Gaja* decision was that the formalistic *Baskerville* test was rejected. Rather, the more "common sense" civil test of supporting belief is to be used.

(4) Sexual Cases

Cross explained the law as follows:

> Moreover, the charge of adultery could easily be concocted on account of *hysterical or vindictive* motives, and it seems reasonable enough to insist on the most careful consideration before uncorroborated evidence is acted upon.
>
> Considerations such as those mentioned in the last paragraph have led the courts to direct juries in the case *of all charges of sexual offences* that it is not safe to convict on the uncorroborated testimony of the complainant but that they may do so if satisfied of its truth.[108]

This rule had not always been the case. Early common law had it that the evidence of the complainant was sufficient with credibility to be left to the jury:

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105 *Ibid* at 754.

106 *Supra*, note 102

107 *R* v. *Ertel* (1987), 58 C.R (3d) 252 (Ont. C A)

108 *On Evidence* (4th ed.) (1974) at 181

> The party ravished may give evidence upon oath and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact..It is one thing whether a witness be admissible to be heard; another thing, whether they are to be believed when heard. It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, tho never so innocent.[109]

Within the above passage one finds an element of suspicion. In the twentieth century that hardened to a rule that required corroboration in both civil and criminal cases. In *Mattouk* v. *Massad* it was stated:

> It is now a commonplace that in judicial inquiries it is very dangerous to accept the uncorroborated story of girls of this age referring to a fifteen year old complainant in charging men with sexual intercourse. No doubt, there is no law against believing them, but in *nearly all cases justice requires such caution in accepting their story that a practical precept has become almost a rule of law*.[110]

Glanville Williams supported the requirement of corroboration:

> There is sound reason for this, because sexual cases *are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, fantasy, jealousy, spite, or simply a girl's refusal to admit that she consented* to an act of which she is now ashamed. Of these various possibilities, the most subtle are those connected with mental complexes.[111]

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109 Hale, L.C J , *Pleas of the Crown*.

110 [1943] A.C. 588 at 591

111 G Williams, *Corroboration—Sexual Cases*, [1962] Crim. L. Rev 662

(5) Evidence of Children

We have seen in the section on oaths and affirmation that the common law permitted children to give unsworn evidence in which case corroboration was required. However, the twentieth century courts required corroboration even if the child was sworn. The underlying policy was a deepening suspicion of children. In part this was due to requirements of corroboration where the child was perceived as being "particeps criminis"; in part because the complaints were often of a sexual nature. However, a third reason was doubt that young children in particular could give truthful testimony which was a change from the early common law. In part as a reaction to infamous trials such as the Salem witch trials,[112] but more directly attributable to psychological theory that a child is prone to sexual fantasy, and is subject to suggestibility, and is incapable of distinguishing between fantasy and reality; children as a class of witness were suspect.

This suspicion was accepted by courts and legal academics alike, at least until very recently. Cross was of the view that corroboration of the sworn child witness was a justifiable requirement given that children are prone to suggestibility and might allow their imaginations to run away with them.[113] In England, the courts have affirmed in three separate decisions that children are to be treated as a suspect category of witness.[114]

In Canada the proposition that children are in a suspect category was similarly adopted.[115] Based upon the *Kendall* case, it was described as *serious misdirection* for a trial judge to say that the evidence of children, once sworn, must be treated in the same way as that of a competent adult witness.[116]

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112 Goodman, *Children's Testimony in Historical Perspective* (1984), 40 Jo of Social Issues 9 at 10-11.

113 *Supra*, note 108 at 183.

114 D P P. v. *Hester*, [1973] A.C.; *D P.P.* v *Kilbourne*, [1973] 1 All E R 440; *D P.P.* v *Spencer*, [1986] 2 All E.R 928.

115 *R.* v *Kendall* (1962), 132 C C C. 216 (S.C.C.).

116 *Horsburgh* v. *R* , *supra*, note 9 at 777-78, per Spence, J

It is only recently that one can discern a shift in judicial attitudes. In *R.* v. *B(G)* Wilson, J. provided the following *obiter* comment with respect to standards of assessing credibility of children:

> Dealing first with Wakeling J.A.'s comments regarding the credibility of child witnesses it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as contradiction in a child's testimony, *should not be given the same effect as a similar flaw in the testimony of an adult*. I think his concern is well-founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years *we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration*, and I believe that this is a desirable development.[117]

Similarly, in *Khan* v. *R.* (a case dealing with hearsay exceptions) McLachlin, J. observed:

> I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence *(for example the evidence of young children on sexual encounters) should be always regarded as reliable*. The matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge.[118]

While not a corroboration case, it is strongly suggestive of a reversal of policy with respect to the evidence of young children.

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117 (1990), 56 C C C (3d) 200 (S.C C) at 219, per Wilson, J

118 Unreported, Sept 13, 1990 (S.C C.)

(6) Matrimonial/Paternity Cases

In the twentieth century rules of practice developed requiring a caution with respect to corroboration in matrimonial and paternity causes. In part this stemmed from a view that women and children could be accomplices such as in actions for adultery and incest;[119] in part from concern as to the gravity of consequences, and suspicion with respect to the evidence of spouses in this class of case.[120] A third element was that in England matrimonial causes were subject to the jurisdiction of the Ecclesiastic courts which in part maintained the requirement of a plurality of witnesses. Additionally, a Canon of 1603 posited the concern that matrimonial offences were amongst the most serious and weightiest to be adjudged, and that there was a propensity of spouses to *falsely confess* to matrimonial offences in order to secure freedom from marriage.[121]

Closely related to the matrimonial causes were affiliation proceedings. Requirements of corroboration stemmed from two concerns: (a) the original concern, starting in the 1700's, was that a mother would seek to discharge the father of responsibility by falsely denying paternity;[122] (b) by the twentieth century, the concern was that the accusation of paternity was easy to make and an "accused" father would find it difficult to refute.[123] As a result, in both instances the requirement was to caution on the need for corroboration.

(7) Estate Actions

The Court of Chancery followed the ecclesiastic rule that two witnesses were required to prove a material fact.[124] This became particularly important in estate cases where the concern was that the testimony of a claimant in support of a claim against a deceased person could

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119 Wigmore, *Evidence in Common Law Trials* (1905), Vol. 3 at 2755-76; *Galler* v. *Galler*, [1954] P 252

120 *Alli* v *Alli*, [1965] 3 All E R 480 (Div Ct.)

121 *Ibid.* at 2771-77.

122 *R.* v. *Reading*, cited in Wigmore, *supra*, note 119 at 2762

123 Cross, *supra*, note 108 at 173.

124 Wigmore, *supra*, note 119 at 2730

never of itself suffice. The underlying policy was to prevent clever and unscrupulous person making a claim against an estate where that testimony could not be directly contradicted. Although this was much criticized by Wigmore,[125] and does not appear to have become a firm rule in England,[126] it appears to have been adopted in most North American jurisdictions.

B. Statutory Requirements of Corroboration

The common law requirements of corroboration, typically laden with value judgments underlying the policy reasons, were largely codified in statute at both the federal and provincial levels in the twentieth century. In some cases the common law rules were made more rigid by the statutory requirements. While substantial reform has been effected at the federal level, at the provincial level these ancient rules largely remain. The following chart illustrates the common law rules and the extent to which they have been codified, changed or repealed by statute.

In *Bomboir* v. *Harlow*[127] the Saskatchewan provision requiring corroboration for a mother in a paternity action was held to violate section 15 of the *Charter of Rights and Freedoms*. It was held that the requirement stemmed from a stereotyping of women as more likely to lie under oath in such cases. The issue of discrimination, insofar as it has focused on women and children, has precipitated reform in other jurisdictions.[128] The Law Reform Commission of Australia was in favour of a more flexible rule, one which does not focus on classes of case or witness, but rather permitted a warning if the circumstances of the case warranted it.[129]

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125 *Ibid* at 2768-70

126 Cross, *supra*, note 108 at 183.

127 [1987] 5 W W R 55 (Sask. U F C).

128 In New Zealand and Victoria for example See: The Law Reform Commission of Australia, *Evidence*, Interim Report #26 at 271

129 *Ibid*. at 558-60.

Corroboration Rules			
Rule	**Federal provisions**	**Alberta provisions**	**Comment**
Accomplice evidence rule	no provisions	no provisions	effectively altered by the decision in Vetrovec; Gaja & R.
Unsworn evidence of children	S. 16 of the CEA was amended to repeal the requirement of corroboration.	s. 20 AEA retains the requirement of corroboration.	In Alberta, the old common law rule remains. In B.C. the requirement was removed in 1988.
Sworn evidence of children	With respect to enumerated sexual offences, the 1987 amendments to the Criminal Code repealed the requirement of corroboration. Furthermore, the trial judge is not to instruct the jury that it is unsafe to convict in the absence of corroboration.	No provision in the AEA.	In Alberta, the common law rule has not been repealed. The federal provision repeals the common law rule. One question that arises is whether a warning cannot be given under *any circumstances*. One interpretation is that it can be done if, over and above the fact that the witness is a child, there is some cause for concern about veracity.

Rule	Federal provisions	Alberta provisions	Comment
Paternity	No provisions	Parentage and Maintenance Act continues requirement of corroboration of the mother's testimony.	This rule survives only in Alberta and Saskatchewan. The Saskatchewan provision has been held to violate s. 15 of the Charter.
Estates	No provisions	S. 12 provides that estate actions require corroboration.	In B.C., Man. and Sask. there is no similar rule. There is a rule of practice where there is a sole surviving witness advancing the action, of requiring corroboration.
Mentally Disabled	No provisions	S. 13 AEA provides that actions by or against lunatics, inmates of a mental health facility, or a person incapable of giving evidence by virtue of unsoundness of minds, must be corroborated.	If the person is found competent to give evidence, should not the mental frailty go to weight without a mandatory requirement of corroboration?
Sexual Offences	The requirement of corroboration has been repealed.	S. 11 AEA provides that a breach of promise action cannot succeed unless the plaintiff's evidence is corroborated.	

C. Statutory Reform in Other Jurisdictions

The critical question in this section is whether, as a general rule, cases should be decided upon assessment of credibility in the circumstances of each individual case; or, whether there is continued validity to the value judgments which underlie the requirements of corroboration. Statutory reform has tended to concentrate on the position of women and children in sexual offence cases rather than approach the problem more generally.

At the federal level the clear answer has been that continued requirements of corroboration with respect to children and sexual offence complainants are unnecessary and undesirable. At the provincial level thus far, only British Columbia has amended its legislation to conform to the federal view.

In other jurisdictions there has been a mixture of results and proposals:

United States: Most states have repealed their corroboration requirements as they affect women and children, with the exception that, either by statute, or case law, states that permit *child hearsay* require corroboration of the statement.[130]

Scotland: The Scottish Law Reform Commission recommended no change to its rules requiring corroboration. However, the Scottish position is peculiar for in criminal matters there is a *general* requirement of corroboration whatever the type of case or witness. Because Scots law does not make distinction on the basis that certain witnesses are intrinsically less acceptable than others but rather is viewed as an essential safeguard in *all* cases, it would be without merit to diminish the safeguard for certain classes of case.[131]

United Kingdom: The *Criminal Justice Act 1988* abolishes the mandatory requirement of corroboration for unsworn testimony, and abolishes the *mandatory* requirement of a warning for a warning about dangers of conviction in the absence of corroboration. The formulation would appear to preserve a discretionary caution dependent upon the facts of the case.

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130 *Idaho* v. *Wright* (1990), 111 L. Ed. 638 at 660-63, n 2, per Kennedy, J

131 Discussion Paper No. 75, *The Evidence of Children and Other Potentially Vulnerable Witnesses* (June, 1988) at 10-11.

New Zealand: The proposed *Law Reform (Miscellaneous Provisions) Bill 1989* adopts the recommendations of the Advisory Committee to Parliament. The proposed reform is that a judge *shall not* give a warning to the jury relating to the absence of corroboration of the evidence of the complainant *if the judge would not have given such a warning had the complainant been of full age*. This formulation was intended to eliminate children as an inherently suspect category of witness but retain a judge's discretion where the circumstances of the case would give cause for concern with respect to veracity.

New South Wales: Section 42A of the *Evidence Act 1898* has been amended to eliminate the jury warning on the dangers of conviction on the uncorroborated evidence of a child, but retains the judge's discretion to give a warning if the circumstances of the case warrant it.

Victoria: The Law Reform Commission has recommended abolition of mandatory requirements of corroboration or mandatory warnings but retains the discretion to do so where circumstances warrant it.

Queensland: The *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* repeals requirements of warnings re children's testimony. However, *general* requirements of corroboration in sexual cases continue, regardless of whether the complainant is a child or adult.

South Australia: Section 12(3) of the *Evidence Act 1929* was amended to provide that in the event of unsworn testimony of a child, the evidence is to be evaluated in light of the child's cognitive development, but an accused *who has denied the charge on oath* (i.e., has testified) may not be convicted in the absence of corroboration.

Western Australia: The Task Force on child sexual abuse has recommended that mandatory requirements for corroboration or warnings be repealed but that the discretion to give a warning be retained. The discussion in this Report was particularly emphatic:

> Because of the distrust of unsworn evidence, it is generally believed that the necessary corroboration can not be supplied by other unsworn evidence. The result is that, even in a case where there may be a large number of witnesses, if those witnesses are all children judged unable to take the oath (perhaps only because of lack of religious training and consequent inability to appreciate the significance of an

oath sworn on the Bible), then no conviction will follow unless there is other independent sworn evidence implicating the alleged offender. In cases of crimes involving non-sexual physical abuse, a victim would usually sustain injuries that together with other circumstantial evidence may be sufficient to implicate the accused and secure a conviction. But where the charge is one of sexual abuse not involving sexual penetration, there will rarely be physical evidence to corroborate a child's complaint. In such cases police rarely bother to prosecute because of the certainty of an acquittal.

The arguments against the evidence of young children focus on the alleged unreliability of such evidence. It is suggested that children's evidence cannot be relied upon because:

- children do not have adequate cognitive skills to understand or describe accurately what happened;
- children have no ethical sense and readily tell lies;
- children have difficulty distinguishing fact from fantasy;
- children are inclined to tell authoritative adults what they believe the adults want to hear.

These generalizations about children's evidence tend to be based on anecdotal evidence rather than scientific study. However, a study of developmental psychology of children assists in understanding how exactly the veracity of a young child's evidence may be tested. For example, it is frequently stated that young children have difficulty in distinguishing between fact and fantasy, so that what they describe may be the product of the imagination rather than the truth. However, the prevailing view today is that the psychology of young children is such that (for

> instance) sexual abuse is not likely to be a theme of fantasy. It is also common for those who object to children giving evidence to suggest that children's memories may not be as reliable as those of adults. However, child psychologists and psychiatrists now generally agree that the accuracy of recall of children is probably at least as good as that of adults, except that older children and adults will remember for longer and in more detail. As for the belief that children are apt to tell lies, *it is worth noting that experts in child behaviour dealing with cases of alleged sexual abuse generally agree that false disclosures by children of sexual abuse are rare, though false retractions or denials are common. The same cannot be said of formal complaints by adults about sexual abuse of children.*

This passage crystallizes the inherent debate in child sexual abuse cases: (1) are our assumptions about the veracity and cognitive ability with respect to children valid; (b) is there a valid concern with respect to *source and circumstance* of the complaint — of greater weight where the source is clearly the child, of less weight where the source is a parent. The latter concern currently bedevils contested custody disputes where the foundation for a claim of custody is an allegation of sexual abuse.

Tasmania: The Law Reform Commission divided on this issue. The majority view was that requirements of corroboration should be fully retained. The reasoning of the majority was that a distinction must be made between giving evidence on oath and giving unsworn testimony. To give unsworn uncorroborated evidence the same probative force as that of a sworn adult would create a shocking imbalance.[132] The minority view was the existing law provides an obstacle to the prosecution of cases where a child is perhaps the only witness. Even if the child meets intelligence and understanding tests, the evidence is arbitrarily and compulsorily given less weight no matter how compelling. In the minority view, it should be left to the trial judge, in the individual circumstances of the case to comment upon weight of the evidence, and for the trier of fact to assess credibility.

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132 Report No. 62, *Child Witnesses*, at 19.

Three themes emerge from the law reform developments to date:

1. In the *few* jurisdictions where there are *general* requirements of corroboration, there is a disinclination to create an exception for children.

2. In the numerous jurisdictions where there have been specific requirements of corroboration with respect the children, the majority favour removal of *mandatory* requirements of, or warnings as to the desirability of, corroboration.

3. In a *few* jurisdictions, the view has prevailed that the requirements of mandatory corroboration be retained.

Discussion Questions 10, 11 & 12

10. Should there be any general requirements of corroboration with respect to either class of case or class of witness?

The current statutory and case law in Alberta continues to devalue certain types of evidence, and in particular that of women, children and the mentally disabled. The critical question is whether the suspicions as to veracity and cognitive ability (some of which are of relatively recent origin) have any continued validity. It bears repeating that current requirements of corroboration apply irrespective of how cogent or credible the witness actually appears in court. The requirements are *not* dependent upon an *actual* concern arising during the course of the court proceedings.

11. Should the Requirement of corroboration for unsworn witnesses be retained?

12. Should a trial judge have a discretion to caution if there is reason to doubt the veracity of a particular witness?

CHAPTER 4 — HEARSAY

A. Historical Introduction

The prohibition against hearsay is largely a seventeenth century development of English case law. In its twelfth century origins, the English jury was fully expected to apply what they knew about a particular case including what they had heard. The practice of calling attesting witnesses did not develop until the fifteenth century. It is only then that the need for exclusionary rules began to be addressed. Even then, not every fact had to be proved by a witness in court. Rather, witnesses were *permitted*, but most elements of a case would be established through sworn (upon oath) depositions. While such evidence was permissible, confidence in its reliability was diminished. Reaction to infamous trials such as that of Sir Walter Raleigh (who was convicted of treason based upon deposition evidence) further undermined confidence.

By the seventeenth century a rule against hearsay had crystallized (including the usage of depositions) with hearsay being allowable only to confirm the testimony of witnesses. By the end of the century a rigid rule had developed against even that.

It is important to note that the oath was no longer recognized as a sufficient guarantee of truth for sworn depositions were no longer admissible. While the oath might have had an important symbolic and religous meaning, it was considered to be insufficient in light of other concerns.

The objections to hearsay included the lack of opportunity to observe demeanour while being confronted, and thereby asses credibility, the danger that a witness might report inaccurately a statement heard out of court, and it deprived the opposing party of an opportunity to cross-examine. It was the latter reason which became the predominant basis for exclusion of hearsay evidence. One can find reference to it as early as the seventeenth century. By the twentieth century the deprivation of cross-examination was seen to deprive a party of natural justice and to deprive the court of an opportunity to assess veracity.

In a sense then, the hearsay rule is a product of the development of the English litigation system which assumes an adversary system with cross-examination as the *primary* guarantor of veracity and accuracy. The House of Lords in *Wright* v. *Tatham* stated:

> One great principle in the law is, that all facts relevant to the issue may be proved; another is, that all such facts as have not been admitted by the party against whom they were offered, or by someone under whom The claims, *ought to be proved under the sanction of an oath (or its equivalent introduced by statute, a solemn declaration) either on the trial* of the issue or some other issue involving the same question between the same parties . . .[133]

The fundamental precepts are that facts are to be proved by direct oral testimony, upon oath. Necessarily, this excludes hearsay. The right of cross-examination has been termed by the Supreme Court of Canada as "the greatest legal engine ever devised for pursuit of the truth" and an essential component of fundamental justice.

The hearsay rule did create an important policy tension: (a) on the one hand there was a desire to exclude hearsay even to the point of describing conduct as hearsay; (b) on the other hand there was a desire not to create such inflexibility that arguably reliable, and potentially the only source of evidence, would be excluded. The result has been a bewildering array of exceptions to the rule usually justified upon the twin principles of necessity (no better source of the evidence is available) and a guarantee of trustworthiness (sufficient to replace the oath and cross-examination.

The first exception, statements as original evidence, is not a true exception. Rather, it is evidence which is not offered testimonially, i.e., as proof of the truth of the facts contained in the statement, and therefore does not fall within the definition of hearsay. Falling within this category are a number of types of statements which do not fall within the strictures of the hearsay rule including: words as verbal acts (e.g., defamation, words as assault, threats, contracts, gifts or devisement of property); as evidence of a physical state (to prove injury) or a state of mind (self-defence, duress, provocation, existence of reasonable and probable grounds, good faith, proof of notice or knowledge); reputation evidence (as circumstantial evidence of good character, existence of a marriage, for non-veracity, paternity); prior statements (when used to refresh memory,

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133 (1837), 112 E.R 488 at 515; aff'd 7 E R 559.

134 *Town of Innisfil* v. *Town of Vespra*, [1981] 2 S.C.R 145.

to rebut an allegation of recent fabrication, or to impeach a witness); and as evidence to confirm in court identification).

In addition to the distinction between hearsay and non-hearsay, there exists a seemingly endless list of true exceptions, many of which are common law exceptions, some of which are created or codified by statute. A list would include:

1. spontaneous exclamations (res gestae)
2. child of tender years (both by statute and common law)
3. hearsay through an expert
4. past recollection recorded
5. reputation: marriage, good character, non-veracity, paternity
6. statements as to future intention
7. statements as to pedigree
8. statements as to public and general rights
9. statements against interest: penal, proprietary, and pecuniary
10. admissions against interest
11. dying declarations
12. statements made in the course of duty
13. public documents
14. business records
15. prior identification
16. historical treatises
17. scientific texts
18. ancient documents
19. surveys
20. summaries of compendious documents
21. prior judgments to a limited extent
22. prior statements when adopted
23. testimony at a former hearing including commissioned evidence

For the purposes of this Report it is unnecessary to review all of the details of the various exceptions. What is important is to examine the rationale for accepting hearsay, and to review current developments in key exceptions, particularly the first four listed. They are of particularly relevance to the testimony of children and possibly the mentally disabled.

(1) Spontaneous Exclamations (*Res Gestae)*

Most authors writing on the subject of *res gesae* have regarded it as a subject incapable of coherent definition. Without getting into the complexity of the rule in its entirety, the *generally accepted* test is now *spontaneity* of a statement as a guarantee of trustworthiness, as opposed to *contemporaneity* which was the older common law test. If the statement is spontaneous, it is sufficiently reliable to be admitted for spontaneitty precludes the opportunity for concoction.

The two central questions are what satisfies the necessity requirement, and what is the meaning of spontaneity? With respect to the first question, the recent decision of the Supreme Court in *R.* v. *Khan* established that necessity was present because other evidence of the event was inadmissible.[135] This was because the trial judge had ruled that the child witness was incompetent to give *unsworn* testimony, and therefore, could not be heard at all. This is a marked liberalization of the necessity test. Earlier common law cases have been fixated on death; statutory provisions usually recite death, substantial illness, or being out of the country for admission of evidence *previously given on oath or affirmation*. The test of necessity established in *Khan* does not arise as a result of operation of statute and presumably is the law within matters of provincial jurisdicition, absent an express exclusionary clause.

With respect to the test for spontaneity, this must be gleaned from the individual facts of each case, but the *Khan* case is illustrative of a situation which was held to *not* satisfy traditional requirements of spontaneity. In the *Khan* case, a young child, accompanied by her mother, attended upon a physician who saw her alone. Upon leaving the doctor's office the child did not say anything. Approximately 15 minutes later the mother asked the child to explain a stain on her sweater whereupon the child described an act of masturbation by the doctor. McLachlan, J. stated:

> I am satisfied that applying the traditional tests for spontaneous declarations, the trial judge *correctly rejected the mother's statement*. The statement was not contemporaneous, being made fifteen minutes after leaving the doctor's office and probably one-half hour after the offence was committed. Nor was

135 Unreported, Sept. 13, 1990 (S.C.C.).

> it made under pressure or emotional intensity which would give the guarantee of reliability upon which the Tspontaneous declaration rule has traditionally rested. The question then is the extent to which, if at all, the strictures of the hearsay rule should be relaxed in the case of children's testimony. the issue is one of great importance in view of the increasing number of prosecutions for sexual offences against children and the hardships that often attend requiring children to retell and relive the frequently traumatic events surrounding the episode in a long series of encounters with parents, social workers, police and finally different levels of courts.[136]

The court established either contemporaneity or the existence of pressure or emotional intensity as the test for spontaneity. However, the court did rule the statement admissible as being strongly reliable:

> T. was disinterested, in the sense that her declaration was not made in favour of her interest. She made the declaration before any suggestion of litigation. And beyond doubt she possessed peculiar means of knowledge of the event of which she told her mother. Moreover, the evidence of *a child of tender years* on such matters may *bear its own special stamp of reliability*. As Robins J.A. stated . . .
>
> > Where the declarant is a child of tender years and the alleged event involves a sexual offence, special considerations come into play in determining the admissibility of the child's statement. This is so because young children of the age with which we are concerned hare *are generally not adept at reasoned relection or at fabricating tales* of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken.[137]

136 *Ibid.* at 12.

137 *Ibid.* at 13.

The court concluded that the statement was reliable absent evident of motive to falsify, and given that the statement emerged naturally and without prompting. In short, with respect to a child of tender years, there is a presumption of reliability, the converse of the earlier position of the Supreme Court in *R.* v. *Kendall* which was not referred to. It must be taken to be no longer good authority.

There has not yet been a similar presumption of reliability established for the mentally disabled. In *R.* v. *Slugoski*,[138] a complainant with a history of mental illness had accused her son of lighting her house on fire. A neighbor was awakened in the early a.m. by the mother who was pounding on the door. The mother told the neighbor that her house was on fire, the accused son had started it, and the accused was still in the house. The house was, in fact, on fire, but the accused was not found in the house. The majority held that the statement should be excluded on two grounds: (a) it was insufficiently spontaneous; (b) the statement was insufficiently reliable given that she was not of ordinary mental and emotional makeup. The minority decision was of the view that spontaneity had been met, and the question of her mental faculties was one going to weight and not admissibility.

Several key questions arise as a result of the *Khan* case:

1. What is the meaning of "a child of tender years": does it mean a very young child as in the circumstances of that case, or is it to be given the same meaning as that contained in requirements for the oath, i.e., under fourteen years of age? If the exception is to be maintained should that be defined?

2. To what extent has the *Khan* case created a "child of tender years" hearsay exception applicable in Alberta?

3. Can and should the exception be extended to the mentally disabled?

4. Is there a need for a statutory rule for a child of tender years exception?

(2) Child of Tender Years Exception

In the *Khan* case, the court considered several factors, some of which are open to argument:

(1) The court held that the modern trend toward hearsay is a flexible one provided that the tests of necessity and guarantee of reliability are present.

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138 (1985), 17 C C C (3d) 212 (B.C.C.A.)

(2) The flexible approach is exemplified by the decision in *Ares* v. *Venner*[139] which adopted the dissenting judgment in *Myers* v. *D.P.P.*[140] which simply requires that the statement be made where it is difficult to obtain other evidence, it is not in the interest of the declarant, it is made without prior to the existence of a dispute or litigation, and the declarant must have had peculiar means of knowledge.

(3) The flexible approach was stated to be particularly evident with respect to children. The court asserted that U.S. courts have relaxed the requirements of admissibility of children of tender years statements. That is not as clear as is suggested in the *Khan* case. Both in the federal courts, and in numerous states, legislatures have enacted statutory provisions governing the admissibility of hearsay, and have typically included a "residual" hearsay clause which was thought to justify the reception of hearsay from young children.[141] Two recent U.S. Supreme Court decisions (not referred to in *Khan*) cast doubt on that. First, in *Ohio* v. *Roberts*,[142] the court held that a residual hearsay clause must require necessity and a guarantee of trustworthiness, so as not to violate the right of confrontation. The latter requirement could be inferred in a case where the evidence falls within a "firmly rooted hearsay exception". In other cases, the evidence must be excluded, at least absent a demonstration of particularized guarantees of trustworthiness.

Additionally, it should be noted that the American residual rules operate against a background of comprehensive discovery rules in both civil and criminal trials.

This theoretical framework was applied by the court to the hearsay declaration of a child in *Idaho* v. *Wright*.[143] The accused was charged with lewd conduct with two minors, aged five and a half, and two and a half, at the time of the charge. A medical examination of the

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139 [1970] S.C R 608.

140 [1965] A.C. 1001 (H L.).

141 See Rules 803-804 *Federal Code of Evidence* The federal code has been adopted by approximately half of the U.S states: McCormick, *On Evidence* (3d ed., 1984) at vii

142 448 U.S. 56

143 110 S Ct 2139 (1990)

older daughter revealed evidence of sexual abuse. An experience pediatrician examined the younger daughter finding conditions strongly suggestive of vaginal abuse. He asked the following questions of the child: "do you play with daddy", "does daddy play with you", does daddy touch you with his pee-pee", "do you touch his pee-pee". The child answered the first three questions in the affirmative and was silent on the last. The child did not amplify on what constituted "touching" but volunteered that it happened more to her older sister than to her. The older daughter did testify and gave evidence of sexual abuse both with respect to herself and the younger child. At issue was the admissibility of the younger child's statement.

The majority held that exceptions to the hearsay rule are rooted in the policy reasoning that the guarantees of trustworthiness are so strong that cross-examination would be of marginal utility. The guarantee is presumed if the statement falls within a "well rooted" exception, citing a number of examples, none of which are a child of tender years exception. Rather, the court held that with respect to the child's statement did not fall within such an exception and therefore, the onus was upon the state to establish particularized guarantees arising from the circumstances of the statement. While eschewing a mechanical test, and expressly reserving comment on the result of individual cases, the majority noted that with respect to a child the factors identified by courts as potentially providing a guarantee include: spontaneity and constant repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, lack of motive to fabricate. On the other hand, if there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inadequate indicator. In the instant case the statement was held not to be akin to an "excited utterance" and the usage of leading questions was fatal to its admissibility.

A third factor in *Khan* was the stated view that courts in general have been moving toward more flexibility in the reception of child hearsay separate and apart from the spontaneous declaration exception. Two lines of authority are used to support this proposition:

(a) The decision of the House of Lords in *Official Solicitor* v. *K.*[144] makes hearsay admissible in child protection proceedings: this is not quite correct. At issue was whether a confidential report had to be disclosed to the mother, particularly if it was to be relied upon. Lord

144 [1963] 1 All E R. 191 (H L).

Evershed was of the view that such material should be disclosed unless its disclosure would cause harm to the child;[145] Lord Devlin's judgment deals directly with the hearsay issue. He used a balance of convenience test, pointing to the practice of Chancery courts to interview children in private, indicating that the hearsay rule is not inflexible. However, he considered it unlikely that any court would allow a grave allegation to be proven solely by hearsay.[146]

In short, the majority judgment is to the effect that a parent is not entitled as a matter of right to a confidential report, the disclosure of which might prove harmful to a child. Since that case, other decisions have cast doubt upon a broad interpretation of it by: (a) disparaging the practice of interviewing children in private (particularly in hotly contested custody cases);[147] (b) holding that hearsay going to the central allegation is not admissible under this decision.[148]

The reference to *Official Solicitor* v. *K.* is, in any event, an incomplete statement when describing the state of the law in the United Kingdom. There, as in many U.S. jurisdictions, the current law must be measured against the backdrop of an extensive statutory regime.[149] Section 1(1) of the *Civil Evidence Act, 1972* largely abolished the application of the hearsay rule in civil proceedings generally, permitting first hand hearsay, and much second hand documentary hearsay.[150] However, the statute does not apply to all proceedings in which hearsay statements by children may arise.

The application of the rule to child cases (particularly those involving allegations of child sexual abuse) has been inconsistent with

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145 *Ibid.* at 196-97. Similar conclusions were drawn by Lord Jenkins (at 205), Lord Hodson (at 207)

146 *Ibid* at 211

147 *J* v *J.* (1980), 16 R.F.L. (2d) 239 (Man. C A). Other cases demonstrate a reluctance to follow the practice: *M* v *M* (1988), 11 R.F.L (3d) 66 (B C.S C); *U* v *U.* (1988), 14 R F L. (3d) 26 (Ont C.A)

148 *J* v. *J*, *ibid* at 249; *Young* v. *Young* (1985), 48 R.F.L. (2d) 391 (Alta Q.B.); *Cardinal* v *Cardinal* (1989), 17 R F L (3d) 23 (Q B)

149 For a complete discussion of the hearsay rule in the U.K. see: The Law Commission, *The Hearsay Rule in Civil Proceedings*, Consultation Paper No 117 (1990)

150 Cross, *On Evidence*, (7th ed., 1990) at 42.

the hearsay rule not applied strictly in wardship cases,[151] but applied full force in care proceedings under the *Children and Young Persons Act 1969*,[152] and in custody cases under the *Matrimonial Causes Act 1973*.[153]

In direct response to the case of *K.* v. *K.*[154] the *Children Act 1989* was enacted which, by section 96(2) permitted children in civil proceedings to give unsworn testimony. Section 96(3) enables the Lord Chancellor to make an order that the hearsay rule shall not apply in civil cases involving the upbringing, maintenance or welfare of a child. Such an order has been issued but only with respect to matters before the High Court or a county court.[155]

The situation in the U.K. is made complex by the variety of proceedings in which the hearsay issue arises, and the inconsistent position with respect to the hearsay rule.

(b) Canadian decisions point in the direction of flexibility with McLachlan, J. pointing to two lines of authority:

> (1) Cases which admit hearsay on the basis that child proceedings are non-adversarial: there is an extensive line of British Columbia authority to support this.[156] However, these have been distinguished on the basis that other provincial

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151 *Re W (Minors)*, [1990] 1 F L R 203 at 227 in which Neill, L.J. indicated that hearsay was admissible provided it is used with care and in such a way that, unless the interests of the child make it necessary, the rules of natural justice must be observed This has been approved by the Court of Appeal in *Reg* v. *B* , [1991] 1 W L R 221 at 230

152 *Reg* v *B.*, *ibid*

153 *K* v *K* , [1989] 3 W L.R 933 (C A) in which it was held that statements made to social workers were inadmissible In order to fall within the *Civil Evidence Act* it was necessary that the children be capable of being sworn. Since they were too young, and could not be sworn, the hearsay statements were inadmissible

154 *Ibid*

155 *Supra*, note 150 at 34

156 *D R H.* v. *Sup't of Child Services* (1984), 41 R.F.L. (2d) 336 (B C C A); *F* v *F.*, [1988] W D.L F 799 (B.C C.A)

statutes impose the civil burden of proof, and that given the potentially grave consequences, this burden is an onerous one. Generally, these cases do admit hearsay, either on the basis of express statutory authority,[157] or on the twin tests of necessity and reliability.

(2) Cases which rely upon the twin tests: there is substantial support for this view,[158] but generally qualified by a caution that hearsay going to the fundamental allegation must be supported by other evidence.

There is a third line of authority, previously mentioned,[159] which holds that hearsay going to the fundamental issue is never admissible. These must be taken to have been implicitly overruled by the *Khan* case.

A further factor listed in the *Khan* case is that there was corroboration (semen stains on the young girl's sweater). It is not clear from the judgment whether this corroboration is required or simply an additional factor to be considered. As previously mentioned in the context of corroboration, in the U.S. states which have passed hearsay exceptions for children in child sexual abuse cases have generally added a statutory requirement of corroboration. The U.S. Supreme Court has held that this is a constitutional requirement under the confrontation clause.

The *Khan* case must be taken to have established two critical points: (a) the test of spontaneity is relaxed in the case of young children; (b) in cases of sufficient indicia of necessity and reliability, spontaneity is not required.

Discussion Questions 13 & 14

13. If the *Khan* case has established a child of tender years exception, is there any need to codify it?

14. Should there be any restrictions placed upon it?

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157 See *Re N L et al* (1986), 72 A.R. 241 (P C.F D.) In Alberta, s. 74(1) of the *Child Welfare Act* permits the receipt of hearsay where the court is satisfied that no better form of evidence is readily available. See also *Child and Family Services* v *N Q.* (1989), 59 Man R. 247 (Q.B)

158 *Ibid*

159 *Supra*, note 148

B. Hearsay Through an Expert

It seems to have been firmly established in Canadian law that hearsay is admissible through an expert, not as proof of the content of the statement, but to establish the basis of the opinion.[160] In child sexual abuse cases in criminal courts, experts have been permitted to testify as to consistency of version to rebut an allegation of recent fabrication.[161]

However, the recent decision of the Supreme Court in *R.* v. *Lavallee*[162] has potentially expanded the scope of hearsay through experts. Ms. Lavallee was charged with the murder of her husband. At trial she mounted the defence of battered wife syndrome which was accepted by the Supreme Court as a part of the general defence of self-defence. The accused did not testify, but a statement to the police was entered as an exhibit. The critical evidence was that of a psychiatrist who interviewed the accused, reviewed a police report and hospital reports, and interviewed the accused's mother. Based on these sources of information, with heavy reliance upon the interviews with the accused, the expert concluded that the accused was a victim of battered wife syndrome and provided an explanation as to why she did not leave the house.

The central issue was whether the information provided by the accused and her mother, through the mouth of the expert, could be relied upon testimonially. It was held that it could. The majority held that the case of *R.* v. *Abbey* did not stand for the proposition that each specific fact must be proven before any weight could be given to the opinion. Rather, as long as there is *some admissible evidence to establish the foundation*, the jury is to be cautioned as to weight, but not told to ignore the testimony.[163] In this case the hospital records constituted admissible evidence as did the testimony of others who had seen the accused striking the deceased. Admissible evidence also included evidence of an emergency room doctor who had treated the accused for injuries. She explained that she had received the injuries by falling off a horse, which the doctor disbelieved.

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160 *R.* v. *Abbey*, [1982] 2 S C R 24, in which it was held that cross-examination is necessary as the primary test of veracity

161 *R* v. *Manahan* (unreported, Nov. 2, 1990) (Alta. C.A.).

162 (1990), 55 C C C. (3d) 97

163 *Ibid* at 129-30

It is of some interest that the court did not apply the criteria of necessity and reliability as they later did in the *Khan* decision. This may well mean that necessity and reliability will not be requirements if: (a) the hearsay is entered through an expert; (b) there is other admissible evidence to support the opinion.

In child sexual abuse cases the Supreme Court has stated that expert evidence is often invaluable.[164] It appears that the scope of an expert's testimony in such cases may have been considerably expanded. It bears repeating that these rulings, while flowing from criminal cases, are part of the common law and thus applicable to matters within provincial jurisdiction. Under the Rules of Court[165] which are incorporated into the *Child Welfare Act*[166] a party intending to call an expert witness must provide a copy of a statement stating the substance of the opinion. "Substance" would include underlying facts which should include hearsay.[167] A question, which applies generally, given the rapid expansion of admissible hearsay, is whether our rules are explicit enough on requiring notice of intended hearsay.

A more critical concern will be whether this development will spur the development of a protocol on interviewing and assessment of childrens' statements. Current tensions surrounding the credibility of experts, exemplified by decisions which describe feminist therapy techniques as virtually brainwashing,[168] parallel the outcome of cases such as that of *People* v. *Buckley*.[169] There, owners of a day care were acquitted on 52 counts of sexual abuse. Interviews with jurors revealed that most blamed the trial on "badgering" by therapists.[170] The danger is that trials will beset by a switched focus from suspicion of the child's testimony to that of the expert. Most current literature stresses the need to separate therapy and investigative roles, which requires the development of an investigative protocol for independent experts.

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164 *R.* v. *B(G)* (1990), 56 C.C.C (3d) 200 at 220

165 Rule 218 1.

166 Alta Reg 184/85

167 *Commonwealth Constr. Co* v. *Syncrude* (1985), 40 Alta L.R (2d) 89 (Q B)

168 *D.* v *D* , unreported, Jan. 1990, (Alta. Q.B.)

169 Jan. 1990, L A Sup Ct.

170 *The Longest Trial Finally Ends*, in California Lawyer (Feb. 1990) at 30

C. Past Recollection Recorded

The past recollection recorded exception permits a record of what a witness has previously said to be admitted as proof of the truth of the contents of the statement provided:

1. The witness suffers from total memory loss of the incident in question which satisfies the requirement of necessity.

2. The record was made when memory was fresh which is some guarantee of trustworthiness.

3. The witness must affirm that it was a truthful statement at the time it was made.[171]

This exception to the hearsay rule has not been used often. Yet, it is available in cases where memory lapse is a problem, whether it stems from age (the young child or very old) or mental disability. It may have received some rejuvenation as a result of the recent decision in *R.* v. *Meddoui*.[172]

The *Meddoui* case deals with the interpretation of section 715.1 of the *Criminal Code* which authorizes the usage of videotaped statements in trials involving enumerated sexual offences. That section provides that if the complainant was under 18 at the time of the offence, and the video statement is taken within a reasonable time, in which the acts complained of are described, may be entered into evidence, provided the complainant "adopts" the content while testifying.

Previously, an Alberta court had held that this section was contrary to the *Charter of Rights and Freedoms*.[173] This decision must be held to be implicitly overruled by *Meddoui*. The central question before the court was the interpretation of the word "adopts". Kerans, J.A. stated that there were four possibilities:

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171 *R* v *Rouse & McInroy* (1979), 42 C.C.C. (2d) 481 (S.C.C.).

172 Unreported, Nov. 23, 1990, (Alta. C.A.).

173 *R.* v *Thompson* (1989), 68 C r (3d) 328 (Alta Q.B.).

(a) The witness might adopt the earlier statement in the strongest sense of recalling both it and the events discussed, and positively confirming the truth of what the statements say about the events.

This interpretation was rejected on the basis that this would offend the rule against usage of prior consistent statements.[174]

(b) The witness might adopt the earlier statement in the less strong sense that, whether or not she recalls the events discussed, she does believe them to be true because she recalls giving the statement and her attempt then to be honest and truthful.

This interpretation was accepted. It was held that the Parliamentary intention was to lift the requirement of clear memory loss. Additionally, it was intended to address problems such as the ambiguity in a child's courtroom testimony resulting from limited verbal ability. The young cannot verbalize all they know. Where a child might remain mute in a courtroom, more might be divulged in casual and spontaneous activity, including play activity. The statement might have more probative force than the courtroom testimony. It is indicated that similar problems arise with victims of heart stroke who might have difficulty articulating their stories.[175]

(c) The witness might adopt the statement in the weak sense that, while she has no present recall, she does believe them to be true because she at least recalls giving the statement and her attempt then to be honest and truthful.

This interpretation was rejected because it would be a mere restatement of the already existing past recollection recorded exception.[176]

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174 *Ibid* at 14

175 *Ibid*. at 7-10.

176 *Ibid* at 12-13.

It would appear, therefore, that independent of a statutory provision, videotaped statements which meet the requirements of past recollection recorded are admissible. This potentially opens up avenues for children and other vulnerable witnesses.

(d) The witness might adopt in the weakest sense of admitting that the statement was made but will not admit that it is truthful.

This interpretation was rejected for it would mean that a disavowed statement could become positive evidence.[177] One Alberta court has refused to admit a tape on this basis.[178] While recantation can be evidence of child sexual abuse accomodation syndrome,[179] it was thought that absent statutory requirements of guarantees of trustworthiness, it would be too dangerous to allow such statements to be used as evidence.

The central point of the decision is that under section 715.1 of the Code, the Crown can use a videotaped statement only where there is adoption in the second sense. There is no equivalent provision under current Alberta law. Provisions for limited usage of affidavits, commissioned evidence, and evidence de bene esse are by no means an equivalent.

However, the case does assert that, independent of a statutory provision, videotaped statements can be used as past recollection recorded. Again, in common with other hearsay developments, several important questions arise:

Discussion Questions 15, 16, 17, & 18

15. Should Alberta enact notice provisions with respect to the intention to introduce hearsay evidence?

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177 *Ibid* , at p. 17.

178 *Keller* v. *Keller*, unreported, June 4, 1989, (Alta Q.B.).

179 Summit, *The Child Sexual Abuse Accomodation Syndrome* (1983), 7 Child Abuse & Neglect 177 at 188

16. Should there be a hearsay provision in the Alberta Evidence Act setting out criteria for reliability? If so, what factors should be considered? Should they apply to experts?

17. Does the expansion of hearsay usage point to the need for a protocol on statement assessment?

18. Is there a need for a corroboration rule where hearsay is used?

D. Reform in Other Jurisdictions

United States

Federal Rule 803, and approximately 23 state statutes provide for a residual hearsay rule. The impact of these rules must be read in light of the decision in *Idaho* v. *Wright*.[180] It must be noted that the state legislation typically requires corroboration of hearsay, and provides criteria for reliability including absence of leading questions, the interviewer is available for cross-examination, disclosure of the tape prior to trial. In Texas, the requirements also include: no attorney for either party is present, and voice identification.[181]

United Kingdom

The *Report of the Advisory Group on Video Evidence*[182] adopted the view that a contemporaneous account is frequently more accurate than one given later in court. The Commission was of the view that videotaped statements should be admissible, provided that it is made within a few days of the incident in question, and that the investigative process must be kept separate from the therapeutic process. The report recommends a Code of Practice providing guidelines for interviewers modelled upon Yuille's protocol.[183]

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180 *Supra*, note 130.

181 *Texas Criminal Procedure Code Ann.*, art. 38 071(2) 1985, s 2(a)

182 Home Office, 1989 (commonly referred to as the Pigot Committee)

183 See McEwan, *In the Box or on the Box The Pigot Report and Child Witnesses* (1990), Crim Law Rev. 361

Scotland

The Law Reform Commission has recommended that any previous consistent statement by any witness be admitted as evidence of the facts, provided it is in permanent form. This would apply to any case. The child would not have to attend court.

New South Wales

Section 122 of the *Children (Care and Protection) Act 1987*, provides that in cases where a child is alleged to have been assaulted, ill-treated, etc., the child need not attend if it is unncessary; an authorized justice may take a written statement, and that statement admitted, if the evidence of a medical practitioner is that attendance would be injurious to health.

Victoria

The Victoria Law Reform Commission has recommended that hearsay rules should be revised in the context of general reform of the hearsay rules proposed by the Australian Law Reform Commission. That latter commission has recommended an elaborate codification of the hearsay rule which incorporates a residual hearsay exception, but also requires that notice of intention to introduce must be given.

The Victoria commission has also recommended that a video or audio recording should be admissible where the child is available for cross-examination. The interviewing for this purpose is to be done by trained interviewers to ensure compliance with rules of evidence.

Queensland

The *Evidence Act 1977-78* was amended with section 21A now providing for documents (including a video tape) made by a child to be admissible, provided the child is available to testify. Additionally, special procedures apply to children under 12, persons who as a result of intellectual impairment or cultural differences would be a disadvantaged witness, any person likely to suffer emotional trauma. The special procedures include clearing the courtroom, enabling the witness to give evidence from a different room, presence of a person for emotional support, permitting a video tape of the evidence to be made and to be admitted in evidence.

South Australia

Section 106(6) *Justices Act* provides that child victims of sexual abuse are not required to attend court, absent exceptional circumstances. A written or videotaped statement is admissible.

New Zealand

A recommendation that a special hearsay exception for children be created was not excepted by Parliament.

CHAPTER 5 — FORMS OF EVIDENCE

A. Introduction

In dealing with the subject of evidence of children and other vulnerable witnesses, it is common that the subject of witness trauma is raised. A number of jurisdictions have accepted the proposition that child witnesses suffer from trauma, particularly where the case involves emotionally charged allegations such as child sexual abuse.

Measures adopted in some jurisdictions to alleviate trauma have included the usage of videotaped evidence as a substitute for the witness; providing evidence by way of closed circuit television, or from behind a screen; special witness rooms; usage of courtroom furniture appropriate to the size of children; removal of robes in cases involving children; permitting a child to sit on an adult's lap; and usage of substitute witnesses.[184]

These measures are a mixture of special provisions with respect to hearsay, and measures designed to reduce the emotional intensity of the courtroom setting. Underlying the measures is an assumption that children, and other vulnerable witnesses, are potentially victimized as much by the courtroom process as by the incident that brought them into court as witnesses.[185] One study concluded:

> [c]hildren are immature in their physical, cognitive and emotional development. This immediately takes its toll when children are involved in court proceedings. When these cases do go to court, an entirely different set of problems arises for children who are required to testify. Judges may seem to loom large and powerful over small children who may feel isolated in the witness stand. Attorneys often use language children do not understand and seem to argue over everything the children say. Defense attorneys ask questions intended to confuse them for reasons children cannot comprehend. Many people are watching every move the child

184 *Infra*, at 104-07.

185 The Law Reform Commission of Australia, *Children's Evidence By Video Link* Discussion Paper No· 40 (July, 1989) pp. 3-4.

> witness makes—especially the defendant. Under such conditions, children cannot be expected to behave on a par with adults. It is not unusual for them to recant or freeze on the witness stand, refusing to answer further questions.[186]

There have been two major problems associated with the psychological literature on the subject of courtroom trauma to date. First, the question of impact of courtroom appearance on children is in a nascient state. Goodman states that further research is "still needed on the emotional effects of witnessing or experiencing crime, but even less is known about the child's emotional response to the legal process".[187] Goodman reports that few studies are based on systematic research and are currently lacking.[188]

A second problem, flowing from the first, is that many of the studies contain either bare assertions[189] or have been anecdotal rather than empirically based.[190] However, in the recent decision of the U.S. Supreme Court in *Maryland* v. *Craig*[191] it was accepted that the potential for courtroom trauma could justify a departure from the constitutionally protected confrontation right of an accused. In an earlier case, *Coy* v. *Iowa*,[192] the same court had held that usage of screens which prevent eyeball to eyeball confrontation was unconstitutional.

In *Craig* the court held that confrontation was not an absolute right. Rather, if a case specific finding was made that the presence of the accused would traumatize a child, that child could give evidence by way

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186 D. Whitcomb, *Prosecuting child sexual abuse — new approaches* (National Institute of Justice Reports, 1986) at 2-3.

187 G Goodman, *The Child Witness· Conclusions and Future* (in Papers From a National Policy Conference On Legal Reforms in Child Sexual Abuse Cases 61, 1985) at 71.

188 *Ibid.* at 71-72

189 See for example, E. Benedek & D. Schetky, *The Child as Witness* (Hospital and Community Psychiatry 1225, 1986) at 1227.

190 In *Hocheiser* v *Superior Court of California* 208 Cal. Reptr. 273 (1985) at 283, the Cal. Court of Appeal dismissed the "traumatic effect" argument on the basis of lack of empirical data

191 (1990), 111 L Ed 666

192 (1988), 108 West's Sup Ct Repts 2798

of closed circuit television. The majority was of the view that there was a growing body of professional literature documenting the psychological trauma suffered by child abuse victims in court.[193]

Equally, virtually every law reform commission which has addressed it's mind to the issue of trauma has concluded that, on the best evidence available, courtroom trauma is likely, and will serve as an obstacle to the reception of evidence. The Scottish Law Commission stated:

> The most commonly voiced complaint when children are required to give evidence in person in court is that this can be a harmful experience for them not only because being subjected to examination and cross-examination in unfamiliar and possibly frightening surroundings is likely to be distressing in itself, but also because in some cases the "reliving" of terrifying or shameful experiences may cause acute embarrassment or may impede the gradual healing process being brought about as a result of therapy or simply by the natural process of the passage of time. It is said that this may be all the worse if the child is required to give evidence in the presence of the accused.
>
> A further point to bear in mind is that, when a child is required to give evidence in court proceedings, possibly many months after the events in question, it may be necessary to subject him to multiple interviews prior to the giving of evidence . . . This, it is said, does nothing to alleviate the trauma caused by the events in the first place.[194]

The commissioners acknowledged that the research is incomplete but accepted that the growing body of literature supported the proposition of trauma.

Similarly, the Law Reform Commission of Australia concluded that the current literature supports the view that trauma is problematic:

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193 *Supra*, note 191 at 683-85, and studies cited at 685.

194 *Ibid.* at 21-22

> Although empirical data are scarce, over recent years a number of studies of criminal cases and of child physical and sexual abuse cases have shown that the children involved, especially young children, are emotionally and mentally traumatised due to the experience of giving evidence in court. It is generally accepted that a child's trauma rarely results from reluctance to make a false complaint but rather from fear and intimidation or because intervention is unhelpful.[195]

Additionally:

> Apart from the question of trauma, the circumstances described are likely to affect the quality of the evidence given. They may prevent a child witness from giving evidence satisfactorily or at all. A child may have great difficulty in speaking above a whisper, be tongue-tied or too shy to talk. He or she may be unable to answer questions accurately or completely or may be easily confused and distracted. As a result, the court may not have any probative evidence on which to base its findings.
>
> A number of factors have been identified as likely to contribute to the child's trauma and adversely affect his or her ability to give evidence. As well as factors likely to operate before the trial commences and even after the trial, there are many factors which are likely to operate during the actual trial in court.[196]

The Commission identified sources of trauma as the unfamiliar setting of courts, formal and legalistic procedures, unfamiliar language, embarrassment and, close relation to the parties in domestic violence cases.

In examining the assumptions underlying the thrust for reform, they are three-fold: (a) that there will be a problem with courtroom trauma; (b) that communicative problems may prevent the obtainment of probative evidence in the traditional fashion; (c) that with some witnesses, memory lapse may be a problem.

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195 *Children's Evidence by Video Link* (1989) at 3-4.

196 *Ibid.* at 4, and studies cited therein.

B. Current Canadian Reform

In response to these identified problems, the Canadian federal government has introduced two reforms:

> (1) In enumerated child sexual abuse cases pursuant to the Criminal Code, a videotaped statement of a complainant describing the acts complained of is admissible; provided the complainant was under the age of 18 at time of commission of the offence, the statement was made within a reasonable time of the commission of the offence, and the complainant adopts the statement while testifying.[197]
>
> (2) In enumerated child sexual abuse cases pursuant to the Criminal Code, where the complainant is under the age of eighteen at the time of trial, the court may order that the testimony may be given from outside the courtroom, or from behind a screen; provided the court concludes it is necessary to obtain a full and candid account of the acts complained of; and provided the accused, counsel, judge and jury are able to watch the proceedings by closed circuit television.[198]

Quite apart from serious interpretation problems arising from the wording of these provisions,[199] there are several problems of principle:

> (1) The provisions are limited by age reference. This limitation ignores the potential communicative difficulties that other witnesses may have in testifying in court. For example, communicative problems are often associated with mental disability.[200] This does not *necessarily* equate with lack of intelligence, for example, the victim of cerebral palsy. Most understand speech more than they can express; indeed the person may not be able

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197 S 643.1, *Criminal Code.*

198 S. 442(2.1), *Criminal Code*

199 Commented upon by the Alberta Court of Appeal in *R* v *Meddoui* (unreported, Nov. 23, 1990) at 3. See also: Robb & Kordyban, *The Child Witness· Reconciling the Irreconcilable* (1989) Alta. Law Rev. 327, at 341-45

200 C. Hass and L. Brown, *Silent Victims: Canada's Criminal Justice System and Sexual Abuse of Persons with a Mental Handicap* (1989) at 53.

to speak at all. This can add to the confusion and trauma that such a person would experience in court.[201]

(2) The provisions are limited by category of crime. The federal provisions ignore the reality that children are witnesses to a wide variety of situations which may give rise to a civil or criminal action. Children are injured in road accidents; they are often the witnesses to domestic violence. Additionally, the federal provisions ignore the fact that there are other victims of sexual abuse who may similarly suffer from the communicative and trauma problems described above. Research is gradually emerging indicating that the mentally disabled are equally prone to sexual abuse as children, with estimates ranging from 40 to 70% of mentally disabled persons experiencing some type of sexual abuse.[202]

(3) The videotape provisions do not serve to reduce courtroom trauma. While they may serve to reduce the number of interviews necessary, the witness must be present in court for cross-examination. In the U.S., the approximately 35 states which have passed similar legislation have intended the videotaped statement to replace the appearance of the child (in some cases, adults victims of major crimes).[203] It is only when combined with the provisions for giving testimony from behind a screen, or by way of closed circuit television that the possibility of preventing trauma arises. This combination occurred in *R.* v. *Hiller*.[204] A wrinkle emerged when the accused dismissed counsel and insisted upon conducting his own cross-examination. The trial judge required him to put his questions to the child through an intermediary. The appeal from conviction was granted upon the grounds that procedural fairness had been breached. In the absence of clear parliamentary intent to limit the right of an accused to communicate through cross-examination with the child, the requirement of an intermediary was a diminution of the right of cross-examination.

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201 *Ibid*

202 *Supra*, note 200 at 9-10; Sobsey, Varnhagen, Pyper and Reimer-Heck, *Sexual Abuse and Exploitation of People with Disabilities* (Health and Welfare Canada, 1988)

203 *People* v *Gomez* 26 Cal. App (3d) 225; *Warren* v *U.S.* 436 A. 2d 821

204 [1990] Man J. No 363

(4) At least in Alberta, the judicial interpretation of the word "adopt" has been given a limited meaning.[205] In *Meddoui* the court described the effect of the videotape provisions as "[a]n unremarkable exception to the hearsay rule".[206]

(5) The videotape provisions address neither the issue of competence of the interviewer, or requirements of guarantees of trustworthiness in the taking of the statement. The literature would clearly indicate that competence of the interviewer is a key element in lending probative value to the tape.[207] In the U.S., videotape legislation generally contains procedural rules with respect to the obtainment of the statement.[208] It must be observed, however, that this arises in the context of a statutory provision which intends the statement to replace the witness, thus preventing any cross-examination.

In addressing the question whether Alberta should adopt the federal provisions, regard must be had to these problems. A starting point would be to identify the use that could be made of videotaped statements, and then to determine whether those uses would alleviate the trauma and communication problems, and from there what safeguards should be necessary. With respect to screens and closed circuit television, the major question is whether these measures actually do anything to reduce trauma.

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205 *R* v *Meddoui*, *supra*, note 199

206 *Ibid* at 7

207 Butler, Glasgow, Ucrel, *Child Testimony: The Potential of Forensic Linguistics and Computational Analysis for Assessing the Credibility of Evidence*, [1991] Fam. Law 34 at 34; Bevan, *Child Law* (1989), at 456; Whitcomb, *When the Victim is a Child Issues for Judges and Prosecutors* (1985) at 62.

208 The Texas Criminal Procedure Code Ann., art. 38 071(2) 1985, s 2(a), for example, requires: that no attorneys be present; proof of integrity of the tape; proof that the statement was not made in response to questioning calculated to elicit a particular statement; voice identification; that the interviewer be present as a witness; and that the tape be made available to the accused prior to trial

C. Videotaped Evidence

There are four possible uses to videotaped evidence. The first use is to capture evidence, both examination in chief and cross-examination, on film for production in court, replacing the necessity of calling the witness. Stepping away from the child sexual abuse area, this is a concept which has gradually gained acceptance.[209] Videotape evidence for the purpose of commissioned evidence is expressly permitted in three Canadian jurisdictions, and for the purpose of evidence de bene esse in Ontario.[210] This has been permitted by express amendments to provincial and federal rules of court. Generally, it is permitted upon consent or by order of the court.

In Alberta, Rule 270 (1) of the *Alberta Rules of Court* authorizes, "where it appears necessary", the taking of evidence upon oath before an officer of the court at any place within or without the jurisdiction. While capable of broad interpretation, it is more typically used in cases of advanced age and ill health.[210]

Additionally, it applies only to actions in courts as defined by the *Judicature Act*, and therefore is not applicable to all proceedings in which children, or other disadvantaged witness might appear. The question does arise as to whether the concept might be a useful alternative for the disadvantaged witness, and the courts, for two reasons: (1) it creates the possibility of capturing evidence at an earlier stage before memory problems become insurmountable (particularly for young children and some mentally disabled persons); (2) the examination and cross-examination would be preserved, but conducted in a less intimidating atmosphere than a courtroom.

Discussion Questions 19 & 20

19. Should there be a general provision in the Alberta Evidence Act which permits a court to authorize the taking of pre-trial evidence by way of videotape?

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209 Goldstein, *Photographic and Videotape Evidence in the Civil Courts of England and Canada* (1987), 6 Civil Justice Q 312 at 316-19

210 *Ibid*

211 As in *Paterson* v *Christy* (1983), 41 O.R. (2d) 145.

20. If so, what criteria should be applied?

A second use for videotape evidence is the taking of a statement which would serve a true hearsay function, i.e., it would replace the witness. This is the position in U.S. states which have passed videotape legislation.[212] Arguably, it is presently possible in Alberta in some circumstances. The Alberta Court of Appeal in *Meddoui* stated:

> In my view, the law under review deals with this area of problem. One weakness of the traditional formulation of the rule is that it fails to deal with the witness whose memory might be good but whose present ability to articulate is very weak. In such a circumstance, a very early account might be of more probative force than present testimony, and arguably should be admitted for consideration. I think, for example, of the victim of a stroke, who, even though his memory is perfect, finds himself physically unable to communicate verbally to others. If he, earlier, had made a verbal assertion in trustworthy circumstances I see no reason why we should deny him a right to refer to it now. (Indeed, I suspect that the strict rule is often honoured in the breach in trial courts in a case like that.) *Any circumstance that makes it extremely difficult for the witness in the box to repeat what was said before arguably offers a valid reason to admit a prior statement that meets a test for a hearsay exception. The "memory loss" exception itself is a good example.* (emphasis added)[213]

Clearly this is an obiter comment, but it does create an arguable point that even absent authorizing legislation, some hearsay evidence would be admissible by way of videotaped statement.

Additionally, some statutes such as the *Child Welfare Act* do authorize the reception of hearsay. In such circumstances, would it be

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212 Although, it should be noted that the statutes are usually confined to criminal proceedings and their constitutional status is very uncertain in light of decisions such as *Long* v. *State of Texas* 694 S.W. 2d 185, which declared the Texas statute to be unconstitutional.

213 *Supra*, note 199 at 9-10.

preferable to have the more direct account (by way of videotape) or a second hand account by way of another person's notes or memory. The English Court of Appeal has expressed a clear preference for the videotaped statement.[214]

At the heart of the issue is the question of hearsay which deprives an opposing party of the opportunity of cross-examination. The U.K. Law Commission commented that cross-examination may in some circumstances be inappropriate, for example, where the witness is particularly vulnerable (young children), or is overawed by the task of giving direct evidence (which could encompass both children and the mentally disabled).[215] In some cases, the issue becomes whether it is better to receive the evidence in the form available, or not receive evidence of a key witness at all.

Even if one assumes that some form of videotaped statement is, or should be admissible, one is left with vexing questions: should one have to obtain prior judicial authorization; under what circumstances should an order be granted; should notice of intent to use the statement be mandatory; who would do the interviewing[216] and using what techniques;[217] should it be confined to particular classes of case or witnesses?

The third possibility is to use videotaped statements as a means of reducing the number of pre-trial interviews, preserving memory by taking an early account, and relieving the witness of some in court stress by simply having the witness adopt the statement in court. This is the federal option and is constrained by the notion of adoption as defined in the *Meddoui* case. In some circumstances, for example, some professionals would argue that retraction of a statement is itself part of child abuse accommodation syndrome and symptomatic of child sexual

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214 *H.* v. *H.*, [1989] 3 W L R 933 at 949.

215 The Law Commission, *The Hearsay Rule in Civil Proceedings* (1991), at 50-51.

216 Given the potential influence of an interviewer on the outcome: see Quinn, White, Santilli, *Influences of an Interviewer's Behaviors in Child Sexual Abuse Investigations* (1989), 17 Bull Am. Acad. Psych. Law 45.

217 For example, there is a major controversy with respect to the usage of anatomically correct dolls in child sexual abuse cases: compare Yuille, *The Systematic Assessment of Children's Testimony* (1988), Can. Psychology 247 with White, *Should Investigatory Use of Anatomical Dolls Be Defined by the Courts?* (1988), Jo of Interpersonal Violence 471 and White and Santilli, *A Review of Clinical Practices and Research Data on Anatomical Dolls* (1988), Jo. of Interpersonal Violence 430.

abuse,[218] and therefore arguing the necessity for the second possible usage of any statement taken in trustworthy circumstances — as evidence of the truth of its content.

The real issue, however, is the adversary system itself which has become a major focus of attention in child sexual abuse cases. In some jurisdictions such as Israel, West Germany, and the U.K. to some extent, the adversarial process is at least partially displaced by the usage of experts and statement validation protocols.[219] Statement validity analysis entails the usage of expert to interview children (as well as others), review the evidence as a whole, and provide a report as to conclusions on the credibility of the child. Most recently, the process was recommended by the Pigot Commission in England.

This, then, is the fourth possible use of videotaped statements: the recording of the interview by experts for potential review by the court in light of a report on credibility.[220]

Discussion Questions 21, 22, 23, 24, 25, 26, & 27

21. Should there be a special provision for the taking of videotaped statements?

22. If so, what category of witness should this process be available to: children, mentally disabled or elderly persons?

23. Should there be any restriction by category of case?

24. Should the process be available as of right, or should prior judicial authorization be required?

25 Should admissibility be confined to situations where the declarant is available for cross-examination?

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218 Summit, *The Child Sexual Abuse Accommodation Syndrome* (1983), 7 Child Abuse & Neglect 177 at 188.

219 See Yuille and Farr, *Statement Validity Analysis: A Systematic Approach to the Assessment of Children's Allegations of Sexual Abuse*

220 *Which would traditionally be viewed as offending the ultimate issue rule see R v Beland & Phillips* (1987), 79 N R. 263 (S C C)

26. Should there be a requirement of adoption?

27. Is there a particular need in child sexual abuse cases for a protocol on the videotaping process and statement validation?

D. Alternate Court Arrangements

The federal provisions for screens or closed circuit television parallel legislation (actual or proposed) in the United States, United Kingdom, Scotland, New Zealand, and Australia. It has been perceived as a major means of reducing trauma particularly in cases of sexual abuse, and more particularly where the alleged offender is related to the witness.[221] The federal provision suffers from the defect of being case and age specific, rather than permitting it in case necessity circumstances.

Arising as it does in a criminal context in Canada, an unresolved issue is whether such a provision violates a right of confrontation between an accused and the witness. Unlike the United States, Canada has no express constitutional provision protecting a confrontation right. In an obiter comment, Wilson, J. expressed doubt that any such right exists in Canada if thought of in the sense of eyeball confrontation. Rather, she was of the opinion that the right to be protected is the right of cross-examination.[222] In contrast, in *R.* v. *H(D)*[223] the existence of a right to confrontation was accepted, but that it's abridgment was justifiable under section 1 of the *Charter of Rights and Freedoms.*

It is unlikely, however, that any such argument would arise within the sphere of Alberta's constitutional jurisdiction, save only provincial offences. Within Alberta, the real issue is its effectiveness as a means of reducing trauma. The Australian Law Reform Commission has recommended a 12 month pilot project with evaluation.[224]

A further reservation is whether technical and financial resources are in place in Alberta which would permit the implementation

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221 *Supra*, note 185.

222 *R* v. *Potvin* (1989), 47 C.C.C. (3d) 289 at 299 (S.C C.)

223 (1990), 55 C C.C (3d) 343 (N B.Q.B.).

224 *Supra,* note 185.

of such a system throughout courts in Alberta. There would appear to be three possible options: (1) doing nothing until evaluations from other jurisdictions are completed; (2) establishing a pilot project and allowing for a period of evaluation; adopting the system.

However, a further question which should be addressed is whether the federal provisions go far enough. In other jurisdictions the need for special courtrooms for children, special witness rooms, permitting a support person to sit with a child witness have been advocated.[225] Are these matters upon which legislation is practical or desirable?

Discussion Questions 28 & 29

28. Should there be a general provision permitting a judge to permit witnesses to give evidence by way of closed circuit television or from behind screens?

29. Are provisions needed which would authorize the establishment of special courtrooms for cases in which children, or other disadvantaged witness are involved?

E. Reform in Other Jurisdictions

Western Australia

The Law Reform Commission, in its discussion paper,[226] has issued a number of proposals: (a) Out of court statements by one under 16 in relation to child sexual abuse would be admissible provided notice is given, an opportunity to view the videotape is given, and the child is present for cross-examination, unless the appearance would be dangerous to the child's health. (b) Use of closed circuit television should be routine. (c) A legislative provision should be made for the right of a person under 16 to have a support person present and seated by the child. (d) Informal court dress should be the norm. (e) A court official should have the duty of preparing the child for the giving of testimony.

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225 *Infra*, at 104-07.

226 *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* (Project No. 87, 1990).

Tasmania

The Law Reform Commission has recommended in criminal cases involving child sexual abuse, that pre-committal, videotaped hearings may by authorized by a judge; and if such a hearing is held the child is not to be required as a witness absent exceptional circumstances. Additionally, all first official interviews with police should be electronically recorded.

New South Wales

Section 405D *Crimes Act 1900* has been amended to provide for the mandatory usage of closed circuit television. Additionally, legislation permits the modification of courtrooms so that furniture is of appropriate size for children, and court robes are not worn.

Victoria

The Law Reform Commission has recommended that closed circuit television be used; that the courts have discretion to admit a videotaped statement taken by trained interviewers, provided the child was available at trial for cross-examination.

Australia

The law Reform Commission has recommended a 12 month pilot project on the usage of closed circuit television.

New Zealand

A draft bill proposes the usage of video taped interview at criminal trials, and preliminary inquiries, provided the child is available for cross-examination at trial; it would authorize the usage of closed circuit television.

Scotland

The Law Reform Commission has recommended the creation of a special hearsay exception for statements made by a child; process for videotaped interviewing by trained interviewers; modification of courtrooms.

United Kingdom

The Criminal Justice Act 1988 approved the usage of closed circuit television for a child witness under the age of 14; usage of statements at committal proceedings rather than calling the child as a witness.

APPENDIX I

(See page 33)

UNIFORM LAW CONFERENCE OF CANADA

Documents of Title

Alberta Commissioners

APPENDIX I

THE UNIFORM LAW CONFERENCE
DOCUMENTS OF TITLE

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APPENDIX I

THE UNIFORM LAW CONFERENCE

REPORT OF THE ALBERTA COMMISSIONERS

DOCUMENTS OF TITLE

Purposes of report

The purposes of this report are

(a) to put forward the recommendations of the Alberta Commissioners which are set forth below,

(b) to give reasons for the recommendations,

(c) to provide materials upon which the Uniform Law Section can make the policy decisions necessary for the implementation of the recommendations.

Recommendations of the Alberta Commissioners

1. The Alberta Commissioners recommend that the Uniform Law Section undertake the preparation and adoption of a Uniform Documents of Title Act governing negotiable and non-negotiable documents of title which would codify the law pertaining to documents of title and which would replace the Uniform Warehouse Receipts Act.

2. The Alberta Commissioners further recommend that the Section make the policy decisions necessary for the preparation of a Uniform Act to the Drafting Section with the hope that a draft Uniform Act might be put before the Uniform Law Section for adoption at its 1992 annual meeting.

Reasons for recommendations

The reasons of the Alberta Commissioners for recommending the preparation and adoption of a Uniform Documents of Title Act are as follows:

(a) the Uniform Warehouse Receipts Act, adopted by the Uniform Law Conference in 1944, was heavily influenced by the United States Uniform Warehouse

Receipts Act. This legislation was replaced by Article 7 of the Uniform Commercial Code which consolidated and revised the Uniform Warehouse Receipts Act (U.S.) and the Uniform Bills of Lading Act (U.S.). Article 7 represents the most modern and comprehensive legislative statement of the law relating to documents of title in common law jurisdictions.

(b) the Uniform Law Conference has adopted legislation which is patterned after the Uniform Commercial Code. The Uniform Sale of Goods Act was influenced by Article 2 of the Code and the Uniform Personal Property Security Act was based upon Article 9 of the Code. Legislation based upon Article 7 is highly desirable as it would permit the integration and co-ordination of the major pieces of legislation governing commercial law.

(c) the adoption of the Uniform Warehouse Receipts Act has produced two significant anomalies in Canada:

(i) documents of title which are in the form of warehouse receipts are governed by an extensive statutory regime whereas documents of title which are in the form of bills of lading are governed predominantly by the common law.

(ii) the concept of negotiability differs depending upon whether warehouse receipts or bills of lading are involved. Negotiable bills of lading are negotiable in the sense that the right to possession of the underlying goods may be transferred by delivery (with any necessary endorsement) of the document of title, but do not give the transferee any better right than that possessed by the transferor. Negotiable warehouse receipts are negotiable in the strong sense: the right to possession of the underlying goods is transferrable by delivery (with any necessary endorsement) of the document of title and the transferee in certain cases obtains a better right than that possessed by the transferor. This is doubly anomalous because neither of these attributes was afforded to warehouse receipts by the common law.

Past consideration by the Commission on Uniformity

In 1945, the Committee on Uniformity adopted the Uniform Warehouse Receipts Act. It originated out of a report of the British Columbia Commissioners and the proposed legislation was substantially based upon the Uniform Warehouse Receipts Act (United States), which was first recommended by the National Conference of Commissioners on Uniform State Law of the United States in 1906. The legislation has been enacted in Alberta (1949), Manitoba (1946), New Brunswick (1947), Nova Scotia (1951) and Ontario (1946).

Desirability of uniformity

Uniformity, in the submission of the Alberta Commissioners, is desirable for the following reasons:

(a) negotiable documents of title are issued primarily in connection with interprovincial and international transactions, and the legal system should provide similar rules to accommodate such transactions.

(b) the current legislation governing documents of title is fragmented and often obsolete, and efforts to modernize it should proceed in a co-ordinated fashion so as to produce a comprehensive, modern and uniform statute.

Demand for uniformity

The Uniform Law Conference has devoted substantial effort towards the adoption of legislation that codifies significant areas of commercial law. The Uniform Personal Property Security Act (1971, amended 1982) and the Uniform Sale of Goods Act (1981) represent a major step in the rationalization and modernization of commercial law. The Ontario Law Reform Commissions Report on the Sale of Goods (1979) formed the basis for the considerations of the Sale of Goods Committee of the Uniform Law Conference which resulted in the adoption of the Uniform Sale of Goods Act. The Ontario Law Reform Commission noted in its report that "provincial legislation is marked by significant inconsistencies, much duplication and numerous gaps, lacking even a uniform definition of a document of title" (page 321).

Likelihood of adoption

There is no specific evidence as to whether or not a uniform act would be adopted. One might speculate that the chances of adoption would likely be greater in a jurisdiction that has enacted a Personal Property Security Act, as there would then be a greater need for an integrated approach. It is also likely that a jurisdiction that enacted the Uniform Sale of Goods Act (none have done so to date) would likely enact a Uniform Documents of Title Act at the same time. There are a number of jurisdictions which have never enacted the Uniform Warehouse Receipts Act. These jurisdictions would most likely enact the Uniform Documents of Title Act if reform of documents of title law was desired. It should be noted that the Law Reform Commission of Saskatchewan in its *Tentative Proposals for a New Personal Property Security Act* (1990) at p.109 recommended the adoption of the Uniform Warehouse Receipts Act.

APPENDIX I

TABLE OF REFERENCES

The following abbreviations are used in this report:

Uniform Commercial Code (U.S.)	UCC
Uniform Bills of Lading Act (U.S.)	UBLA
Uniform Personal Property Security Act (Can.)	UPPSA
Uniform Sale of Goods Act (Can.)	USGA
Uniform Warehouse Receipts Act (Can.)	UWRA (Can.)
Uniform Warehouse Receipts Act (U.S.)	UWRA (U.S.)

UNIFORM DOCUMENTS OF TITLE ACT

REQUIRED POLICY DECISIONS

1. BASIC PRINCIPLES

Comprehensiveness of scope

Proposition 1(1)

The Uniform Documents of Title Act would codify the law relating to all forms of documents of title which have an established commercial usage. The Act would therefore cover the major forms of documents of title (bills of lading and warehouse receipts) and would also govern both negotiable and non-negotiable documents of title.

Comment

1. The present law on this topic involves a complex mixture of statutory provisions and common law rules. A rationalization of the area can only be achieved through a comprehensive statute which codifies the major features of the law respecting documents of title.

2. There are several different kinds of problems that arise out of the current state of the law relating to documents of title. The first involves the inconsistency in treatment of the two major forms of documents of title. Bills of lading are governed by the common law whereas warehouse receipts are governed by legislation based upon an obsolete American statute. In many cases the rules governing bills of lading will differ from those governing warehouse receipts even though there is no sound commercial justification for this difference in treatment. This is most clearly demonstrated in relation to the concept of negotiability. Bills of lading are not negotiable in the sense of giving the transferee a better title than that possessed by the transferor. Warehouse receipts in contrast are afforded the incidents of negotiability in jurisdictions that have enacted the Uniform Warehouse Receipts Act, but are not negotiable in either sense in those jurisdictions which have not enacted the Uniform Act. There is no good policy reason why similar rules should not be applied to both kinds of documents of title.

3. A second problem concerns the lack of co-ordination with other major pieces of commercial legislation. For example, the Uniform Personal Property Security Act draws a distinction between

negotiable and non-negotiable documents of title (sections 22 and 29). And yet there is in Canada no established statutory criteria that defines which are negotiable and which are non-negotiable (except in the case of warehouse receipts in jurisdictions that have enacted the Uniform Warehouse Receipts Act). A Uniform Documents of Title Act would dispel this confusion in terminology by defining negotiable and non-negotiable documents of title, and would be drafted so that its provisions were co-ordinated with the other two major commercial law statutes – the Uniform Sale of Goods Act and the Uniform Personal Property Security Act.

4. The third problem involves gaps in the law where there is no comprehensive statutory presence nor a significant development of common law principles. These gaps relate primarily to bills of lading. Although there exists a body of case law in relation to bills of lading issued by a carrier of goods by sea, there is little case law dealing with the rights and obligations of parties under a non-negotiable document of title such as a straight bill of lading. This is a particular disadvantage because much of the interprovincial and international trade in Canada is continental and involves transportation by rail, truck or aircraft. In such cases, non-negotiable bills of lading are commonly issued. In addition, there are a number of important commercial innovations, such as the practice of freight forwarding, the issuance of through bills of lading and the use of delivery orders which are not adequately addressed under the present law. The adoption of a Uniform Documents of Title Act would go far in eliminating these gaps in coverage.

Article 7 of the Uniform Commercial Code as a model

Proposition 1(2)

The Uniform Act would use Article 7 of the Uniform Commercial Code as a model, but would depart from it when changes are required to create a suitable fit within the context of Canadian commercial law. The style of drafting and organization of the legislation would be changed for the convenience of Canadian users.

Comment

1. The American Uniform Commercial Code is without doubt the most ambitious commercial law project ever undertaken in the Anglo-American legal world. Canadian efforts to modernize commercial law have been heavily influenced by the Uniform Commercial

Code. The 1972 Official Text is divided into eleven Articles. The last two Articles deal with Effective Date and Transition Provisions. The other Articles deal with the following matters:

Article 1:	General Provisions
Article 2:	Sales
Article 3:	Commercial Paper
Article 4:	Bank Deposits and Collections
Article 5:	Letters of Credit
Article 6:	Bulk Transfers
Article 7:	Warehouse Receipts, Bills of Lading and Other Documents of Title
Article 8:	Investment Securities
Article 9:	Secured Transactions and Sale of Accounts and Chattel Paper

The imprint of the Uniform Commercial Code can be easily detected in modern Canadian commercial law legislation. Article 2 was influential in the drafting of the Uniform Sale of Goods Act. The Parliament of Canada and the majority of the provinces have enacted modern business corporations legislation which uses Article 8 as a model in creating a comprehensive code that regulates all corporate security transfer transactions. Article 9, formed the model for the Uniform Personal Property Security Act, which has been enacted in Ontario, Manitoba, Saskatchewan, Alberta, British Columbia and the Yukon Territories.

2. One difficulty with the Canadian approach to reform is that the piecemeal implementation of statutory reform has often led to difficulties in co-ordinating the various commercial law statutes. Article 1 of the Uniform Commercial Code sets out a set of definitions that apply throughout the Uniform Commercial Code. This approach is not yet possible in Canada. Accordingly, the Uniform Act should be drafted as an independent statute with a self-contained definition section. The drafting of the Uniform Act should attempt to co-ordinate its provisions of the Uniform Sale of Goods Act and the Uniform Personal Property Security Act.

3. The Uniform Commercial Code adopts an unconventional style of drafting and organization of sections. These features have not been carried over into the Uniform Sale of Goods Act or the Uniform Personal Property Security Act, and the Uniform Documents of Title Act should similarly utilize the conventions of Canadian legislative drafting.

Central focus on documentary aspect

Proposition 1(3)

The Uniform Documents of Title Act would primarily deal with legal aspects of bills of lading and warehouse receipts as documents of title and should leave collateral issues such as the tort liability of bailee's and bailee's liens to other sources of law.

Comment

1. Article 7 of the Uniform Commercial Code was a less ambitious project than the drafting of Article 2 (Sales) and Article 9 (Secured Transactions). To a large degree it was a consolidation and rewriting of the Uniform Bills of Lading Act (U.S.), the Uniform Warehouse Receipts Act (U.S.), and the Carmack Amendment to the Interstate Commerce Act. Article 7 did, however, produce a number of important innovations in its treatment of destination bills (UCC 7-305), through bills of lading (UCC 7-302), freight forwarders (UCC 7-503(3)), and delivery orders (UCC 7-502(1)(d)). The previous legislation did not provide any guidance with respect to these commercially important developments.

2. Article 7 strays beyond the legal aspects of bills of lading and warehouse receipts. In common with the Uniform Bills of Lading Act (U.S.) and the Uniform Warehouse Receipt Act (U.S.) which it replaced, Article 7 dealt with the duty of care required of bailees and regulated the taking and enforcement of the bailee's lien. These features are not central to legislation, and therefore they have not been included in the proposal for a Uniform Documents of Title. Of course, the provisions could be included by a province without any detrimental effect on uniformity.

3. Articles 7-204 (warehouse receipts) and 7-309 (bills of lading) set out the bailee's duty of care. In both cases, the approach taken is to provide a non-variable reasonable person standard of care on the part of the bailee, but to permit terms limiting liability for damages up to a stated ceiling provided that there is an opportunity to obtain more extensive protection through the payment of a higher fee. There is no equivalent provision presently in existence in Canada. The Uniform Warehouse Receipts Act (Can.) in sections 3 and 13 sets out a statutory standard of care which cannot be varied by contract, but is silent on the question of the validity of limitation of damages clauses. The Supreme

Court of Canada in *Evans Products Co. Ltd. v. Crest Warehousing Co. Ltd.* [1980] 1 S.C.R. 83 held that a statutory limitation of liability is not inconsistent with the statutory duty of care imposed upon warehousemen. In the case of bills of lading, the duty of the carrier is often provided for by statutes, such as the Carriage by Air Act, R.S.C. 1985, c.C-26, the Carriage of Goods by Water Act, R.S.C. 1985, c.C-27 and the Railway Act, R.S.C. 1985, c.R-3, ss. 303, 310, and further legislation in this area is probably unnecessary.

4. Articles 7-209, 7-210 (warehouseman's lien) and Articles 7-307, 7-308 (carrier's lien) set out the law governing the extent, nature and enforcement of the bailee's lien. In the case of a warehouseman's lien, the Code departed from the prior law and permitted both a specific lien which covers the usual charges arising out of a contract of storage, and a general lien extending to like charges in relation to other goods of the owner stored by the warehouseman. In Canada, warehouseman's liens are covered by the Uniform Warehousemen's Lien Act whereas carriers liens are governed by the common law.

Withdrawal of Uniform Warehouse Receipts Act

Proposition 1(4)F

The Uniform Warehouse Receipts Act would be withdrawn by the Uniform Law Conference upon the adoption of the Uniform Documents of Title Act.

Comment

1. The Uniform Warehouse Receipts Act (Canada) (which was adopted in 1944) was heavily influenced by the Uniform Warehouse Receipts Act (United States). The United States Uniform Warehouse Receipts Act was replaced by Article 7 of the Uniform Commercial Code which consolidated and revised the Uniform Warehouse Receipts Act (U.S.) and the Uniform Bills of Lading Act (U.S.).

2. The Uniform Documents of Title Act, which is modeled upon Article 7 of the Uniform Commercial Code, incorporates the key features of the Uniform Warehouse Receipts Act (in a revised and expanded form). Accordingly, the Uniform Warehouse Receipts Act should be withdrawn upon adoption of the Uniform Documents of Title Act.

3. Appendix B contains a table of concordance which sets out the sections of the Uniform Warehouse Receipts Act (Can.) and gives the equivalent sections of the Uniform Warehouse Receipts Act (U.S.) and Article 7 of the Uniform Commercial Code. Appendix C contains a table of concordance which sets out the sections of Article 7 and gives the equivalent sections of the Uniform Bills of Lading Act (U.S.), the Uniform Warehouse Receipts Act (U.S.) and the Uniform Warehouse Receipts Act (Can.).

Codification of law governing bills of lading

Proposition 1(5)

The Uniform Act would codify the law governing bills of lading. However, to the extent that any statute of Canada is applicable, the Uniform Act should provide that its provisions are subject to it.

Comment

1. Unlike the law governing warehouse receipts which is primarily statutory in nature, the law governing bills of lading is, for the most part, of common law origin. The one notable legislative intrusion of general application is the Bills of Lading Act, 1855 (U.K.). This statute modified the common law by providing that negotiation of a negotiable bill of lading contractual rights as well as the property in the goods. This legislation has been enacted by the federal Parliament and by Ontario and Nova Scotia.

2. The Parliament of Canada has enacted several statutes which give effect to international conventions and which contain some provisions relating to bills of lading. These statutes include the Carriage by Air Act, R.S.C. 1985, c.C-14 and the Carriage of Goods by Water Act, R.S.C. 1985, c.15. The Uniform Act should be made expressly subject to such legislation.

3. The attempt to achieve uniformity in the United States has been greatly hindered by the presence of the federal Bills of Lading Act, which was enacted in 1916. The federal Act is virtually a copy of the Uniform Bills of Lading Act (U.S.) which was superseded by the Article 7 of the Uniform Commercial Code. As a result, the scope of Article 7 is greatly diminished since it will apply only to the intrastate transportation of goods. In Canada, the federal presence in the field is much less extensive, so that the problems of federal/provincial overlap are much less likely to occur.

Structure of Uniform Documents of Title Act

Proposition 1(6)

The Uniform Act would be organized into five major parts as follows:

INTERPRETATION

PART 1
WAREHOUSE RECEIPTS: SPECIAL PROVISIONS

PART 2
BILLS OF LADING: SPECIAL PROVISIONS

PART 3
WAREHOUSE RECEIPTS AND BILLS OF LADING: GENERAL OBLIGATIONS

PART 4
WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER

PART 5
WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS

Comment

1. The Uniform Documents of Title Act will govern both bills of lading and warehouse receipts. In some instances, there is no need to distinguish between the two forms of documents of title. Accordingly, Parts 3, 4 and 5 will apply to both kinds of documents of title.

2. In other cases, a difference in legislative treatment is justified on the basis that the commercial context dictates different rules depending upon whether the document of title is used in respect of a transportation transaction (as in the case of a bill of lading) or a storage transaction (as in the case of a warehouse receipt). Parts 1 and 2 contain these special rules.

Miscellaneous provisions relating to documents of title

Proposition 1(7)

The Uniform Documents of Title Act would not address itself to a number of anomalous statutory provisions dealing with documents of title. A jurisdiction that enacts the Act should review its existing legislation in order to identify and repeal such provisions.

Comment

1. The enactment of a Uniform Documents of Title Act would go far in producing a rational and coherent body of law governing all forms of bills of lading. However, some further modification of statutory provisions may still be necessary in some jurisdictions. For example, Ontario has retained a number of provisions relating to the pledge documents of title in the Mercantile Law Amendment Act R.S.O. 1980, c.265, ss.9-13. These provisions (which were based on an earlier version of the federal Bank Act) create problems with both the operation of the Personal Property Security Act and the Uniform Documents of Title Act.

2. The Bank Act, R.S.C. 1985, c.B-1 contain two sets of provisions that relate to documents of title. Sections 186 and 187 deal with the pledge of documents of title to a bank. Sections 178 to 180 create a special non-possessory security device (section 178 Bank Act security) which incorporates the documentary pledge concept into its priority rules by providing that the bank obtains "the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which such property was described" (see section 178(2)). A possible solution would be to replace these provisions with a modernized personal property security system (in effect, a federal Personal Property Security Act). In drafting this system, co-operation between the federal government and the provinces would be highly desirable in order to ensure harmonization with the provincial personal property security system. These matters fall outside the scope of the Uniform Documents of Title Act, which could be implemented whether or not any progress was made in this area. However, repeal of these provisions would go far in reducing the variety and complexity of laws governing documents of title.

2. INTERPRETATION

Definition of document of title

Proposition 2(1)

A document of title is a writing that purports to be issued by or addressed to a bailee, purports to cover goods in the bailee's possession that are identified or fungible portions of the identified mass, and in the ordinary course of business is treated as establishing that the person in possession of the document is, with any necessary endorsement, entitled to receive, hold and dispose of the goods it covers.

Legislation

UCC 1-201(15); UPPSA, s.1(g); USGA, s.1(o).

Comment

1. The term "document of title" is defined in both the Uniform Sale of Goods Act and the Uniform Personal Property Security Act. This formulation may be criticized on the basis that it seems to suggest that a non-negotiable document of title falls outside of the definition because possession of it by someone other than the named person is **not** treated as "establishing that the person in possession of the document of title is ... entitled to receive, hold and dispose of the goods it covers". For this reason the Personal Property Security Act of Alberta and British Columbia provide a somewhat different formulation:

> "document of title" means a writing issued by or addressed to a bailee
>
> (i) that covers good in the bailee's possession that are identified or are fungible portions of an identified mass, and
>
> (ii) in which it is stated that the goods identified in it will be delivered to a named person, or to the transferee of the person, to bearer or to the order of a named person;

2. Although the Alberta and British Columbia provision is more clear, the clarity it produces does not outweigh the desirability of having a standardized definition in the Uniform Sale of Goods Act, the Uniform Personal Property Security Act and the Uniform Documents of Title Act. Therefore, it is recommended that the definition used in the other Uniform Act be retained. It should also be noted that Article 1-201(15) adopts a substantially similar formulation.

3. The adoption of a single uniform definition of a document of title is not completely effected. A different formulation appears in the Bank Act, R.S.C. 1985, c.B-1 in the definitions in section 2 of a "bill of lading" and a "warehouse receipt". The Bank Act security provisions should be either repealed or modernized, however this is not a necessary condition for the enactment of a Uniform Documents of Title Act. See Proposition 1(7).

4. The factors legislation of the various provinces also contain a different definition of a "document of title". This definition could be changed so as to bring it into conformity with the other legislation by substituting the definition of a negotiable document of title. This would produce a greater conceptual unity. The central idea is that where negotiable documents of title are involved the documents represent title to the underlying goods, but where non-negotiable documents of title are issued the parties essentially deal with the goods rather than with the documents.

Definition of negotiable and non-negotiable documents of title

Proposition 2(2)

A negotiable document of title is a document of title in which it is stated that the goods are to be delivered to bearer or to the order of a named person. Any other document of title is a non-negotiable document of title.

Legislation

UCC 7-104, UWRA (Can.), ss. 1(e) (f).

Comment

The definitions of "negotiable document of title" represents a departure form the common law position. At common law only bills

of lading were considered to be negotiable in the sense that the transfer of the document operates as a transfer of constructive possession of the goods. This feature was not afforded to warehouse receipts by the common law, and was conferred on them only by statute (See Uniform Warehouse Receipts Act (Can.), Canada Grain Act, R.S.C. 1985, c.G-10, s.111). Documents other than a bill of lading could obtain the status of a document of title upon proof of a custom to that effect in relation to that particular kind of document. See, for example, *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* (1877), 5 Ch.D. 205. This approach is rejected in favour of the rule that any document of title will be regarded as negotiable if by its terms it indicates that the goods are to be delivered to bearer or to the order of a named person.

Definition of bill of lading

Proposition 2(3)

A bill of lading is a document evidencing the receipt of goods for shipment issued by a person transporting or forwarding goods, and includes an air consignment note or air waybill.

Legislation

UCC 1-201(6); USGA, s.1(c).

Comment

The definition encompasses freight forwarders' bills and bills issued by contract carriers as well as those issued by common carriers. It also covers air waybills.

Definition of warehouse receipt

Proposition 2(4)

A warehouse receipt is a receipt issued by a person engaged in the business of storing goods for hire.

Legislation

UCC 1-201(45); UWRA (Can.), ss. 19 (j), (k)

Comment

The definition combines the definition of ''warehouse receipt'' and the definition of ''warehouseman'' in sections 1(j) and (k) of the Uniform Warehouse Receipts Act (Can.).

Definition of delivery order

Proposition 2(5)

A delivery order is a written order to deliver goods directed to a warehouseman, carrier or other person who in the ordinary course of business issue warehouse receipts or bills of lading.

Legislation

AUCC 7-102(d)

Comment

A delivery order refers to an order given by an owner of goods to a person in possession of them (the carrier or warehouseman) directing that person to deliver the goods to a person named in the order. A delivery order was not regarded as a document of title at common law with the result that the transfer of the delivery order did not effect transfer of constructive possession of the goods. Attornment on the part of the bailee was required (i.e., an acknowledgement that the bailee held the goods on behalf of the transferee). The Uniform Documents of Title Act permits the use of negotiable delivery orders (if the order directs delivery to a named person or order). However, it is still necessary to single out delivery orders for special treatment. Until the delivery order is accepted by the bailee, there is no basis for imposing obligations on the bailee. See discussion under Propositions 6(2) and 6(3). See also the definition of issuer.

Definition of issuer

Proposition 2(6)

An ''issuer'' means a bailee who issues a document of title except that in relation to a delivery order it means the person who orders the possessor of goods to deliver. Issuer includes any person for whom

an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, notwithstanding that the issuer received no goods or that they were misdescribed or that in any other respect the agent or employee violated his instructions.

Legislation

UCC 7-102(g).

Comment

1. The definition designates the owner of the goods as the issuer in respect of an unaccepted delivery order. Once the bailee accepts the delivery order, the bailee is treated as the issuer and the document is treated as an ordinary warehouse receipt or bill of lading for all intents and purposes.

2. The definition is designed to reverse the common law rule first laid down in *Grant v. Norway* (1851), 10 C.B. 665, 20 L.J.C.P. 93. See the discussion under Proposition 4(1).

Other definitions

Proposition 2(7)

The Uniform Documents of Title Act should also set out the following definitions:

"bailee" means the person who by a warehouse receipt, bill of lading or other document of title acknowledges possession of goods and contracts to deliver them;

"consignee" means the person named in a bill to whom or to whose order the bill promises delivery;

"consignor" means the person named in a bill as the person from whom the goods have been received for shipment;

"goods" means all things which are treated as movable for the purposes of a contract of storage or transportation;

"purchase" includes taking by sale, lease, discount, assignment, negotiation, mortgage, pledge, issue, reissue, gift or any other consensual transaction creating an interest in property;

"security interest" means an interest in personal property that secures payment or performance of an obligation';

"value" means any consideration sufficient to support a simple contract, and includes an antecedent debt or liability.

Legislation

"bailee"	BUCC 7-102(1)(a);
"consignee"	UCC 7-102(1)(b);
"consignor"	UCC 7-102(1)(c);
"goods"	UCC 7-102(1)(f);
"purchase"	UCC 1-201(32); UPPSA, s.1(o);
"security interest"	UCC 1-201(37); UPPSA, s.1(2); USGA s.1(ee);
"value"	UPPSA, s.1(z); UCC 1-201(44).

Comment

The definition of "bailee", "consignee" and "consignor" simply set out the normal commercial meaning of these terms. The definition of "purchase", "security interest" and "value" are consistent with those used in the Uniform Personal Property Security Act.

3. WAREHOUSE RECEIPTS: SPECIAL PROVISIONS

Form of warehouse receipt

Proposition 3(1)

A warehouse receipt need not be in any particular form, but a failure to include the following information will render the warehouseman liable for damages caused by the omission:

1. Location of the warehouse or other place where the goods are stored.

2. Name of the person by whom or on whose behalf the goods are deposited.

3. Date of issue of the receipt.

4. Statement that the goods received will be delivered to the holder or that the goods will be delivered to bearer or to the order of a named person.

5. Rate of storage charges.

6. Description of the goods or of the packages containing them.

7. Signature of the warehouseman or his authorized agent.

8. Statement of the amount of any advance made and of any liability incurred for which the warehouseman claims a lien.

A warehouseman may insert in a receipt any other term which is not contrary to the Act and does not impair his obligation of delivery.

Legislation

UWRA (Can.), s.2; UCC 7-202.

Comment

This provision is substantially the same as section 2 of the Uniform Warehouse Receipts Act (Can.), except that the information requirements extend to non-negotiable warehouse receipts as well (the UWRA provision only applied to negotiable warehouse receipts).

Liability for non-receipt or misdescription

Proposition 3(2)

A party to or a purchaser for value in good faith of a document of title other than a bill of lading who relies upon the description of goods contained in the document may recover from the issuer damages caused by the non-receipt or misdescription of the goods, except to the extent that the document conspicuously indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description if such indication is true. Where a description is on the goods or on the packages containing them, that the goods are said by the depositor to be goods of a certain kind, or by a statement of similar import, the statement does not impose any liability on the warehouseman in respect of the nature, kind or quality of the goods.

Legislation

UCC 7-203, UWRA (Can.), ss. 11 and 12.

Comment

The provision is similar to sections 11 and 12 of the UWRA (Can.) except that it extends to purchasers for value of documents of title and to a party to the document of title (whereas the sections of the UWRA (Can.) are limited to holders of negotiable warehouse receipts). This expansion in scope will allow the consignee of a non-negotiable warehouse receipt to sue for damages caused by non-receipt or misdescription on the part of the warehouseman. This would apply where the owner stored goods and had the warehouse receipt made out in the name of a bank which would thereby obtain a possessory security interest in the goods. It is unlikely that the owner of the goods could invoke this provision because the owner does not typically rely upon the description of the goods contained in the warehouse receipt.

Ordinary course buyer of fungible goods

Proposition 3(3)

A buyer in the ordinary course of business of fungible goods sold and delivered by a warehouseman who is also in the business of buying and selling such goods takes free of any claim under a warehouse receipt even though it has been duly negotiated.

Legislation

UCC 7-205

Comment

The Comment to UCC 7-205 indicates that the typical case covered by the provision is that of an insolvent warehouseman dealer in grain. The issue is whether the receipt holder can trace and recover grain shipped to farmers and other purchasers from the elevator. The provision resolves the conflict in favour of the ordinary course buyer, and in this respect is similar to the ordinary course buyer rule found in personal property security legislation.

Termination of storage at warehouseman's option

Proposition 3(4)

A warehouseman may, on notifying the person on whose account the goods are held and any other person known to have an interest in the goods, require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document, or, if no period is fixed, within a stated period of not less than thirty days after the notification. If the goods are not removed before the date specified in the notification, the warehouseman may sell them in accordance with the provisions governing the enforcement of a warehouseman's lien.

If a warehouseman, in good faith, believes that the goods are about to deteriorate or decline in value to less than the amount of the lien, the warehouseman may specify any reasonable shorter time for removal of the goods, and if they are not removed, the warehouseman may sell them at a public sale held not less than 10 days after advertisement.

If as a result of a quality or condition of goods of which the warehouseman had no notice at the time of deposit the goods are a hazard to other property or to the warehouse or to persons, the warehouseman may sell the goods at public or private sale without advertisement on reasonable notification to all persons known to claim an interest in the goods. If the warehouseman, after a reasonable effort, is unable to sell the goods, he may dispose of them in any lawful manner and shall incur no liability by reason of such disposition.

The warehouseman may satisfy his lien from the proceeds of any sale or disposition but must hold the balance for delivery on demand of any person to whom he would have been bound to deliver the goods.

Legislation

UCC 7-206, UWRA (Can.), s.17.

Comment

1. This provision is an expanded version of section 17 of the UWRA (Can.). The provision defines the power of the warehouseman to terminate the bailment. This is important because warehousing is often contracted for an indefinite term. The 30 day period provided when the document does not carry its own period of termination corresponds to commercial practice of computing rates on a monthly basis (see Official Comment to UCC 7-206).

2. The UWRA (Can.) did not distinguish between the case where the warehouseman knowingly undertook to store perishable or hazardous goods and the case where the warehouseman did not have such knowledge until after storage of the goods. The provision distinguishes between these two situations and provides that the summary power of removal and sale only applies to the latter.

Separation of goods; fungible goods

Proposition 3(5)

Unless the warehouse receipt provides otherwise, a warehouseman must keep the goods covered by such receipt separate and apart so as to permit the identification and delivery of those goods, except that fungible goods may be commingled.

Fungible goods that are commingled are owned in common by the persons entitled to it and the warehouseman is severally liable to each owner for that owner's share. Where a mass of fungible goods is insufficient to meet all the receipts which the warehouseman has issued against it, each holder is entitled to such proportion of it as the quantity shown by his receipt to have been deposited bears to the whole.

Legislation

UCC 7-207, UWRA (Can.) s.14.

Comment

This is an expanded version of section 14 of the UWRA (Can.), which only dealt with commingled goods. The provision establishes the duty to keep the goods separate and apart unless the contract provides otherwise.

Altered warehouse receipts

Proposition 3(6)

Where a blank warehouse receipt has been filled in without authority, a purchaser for value and without notice of the want of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any receipt enforceable against the issuer according to its original tenor.

Legislation

UCC 7-208

Comment

The provision deals with the situation where a warehouse receipt is issued in blank or where an unauthorized alteration is made. There is no similar provision in the UWRA (Can.). The inclusion of the provision is desirable because warehouse receipts were not regarded as documents of title under the common law and therefore the issue of altered warehouse receipts is not addressed in the decisional law.

4. BILLS OF LADING: SPECIAL PROVISIONS

Liability for non-receipt or misdescription

Proposition 4(1)

A consignee of a non-negotiable bill of lading who has given value in good faith or a holder to whom a negotiable bill of lading has been duly negotiated and who relies upon the description of goods contained in the bill of lading may recover from the issuer damages caused by the misdating of the bill of lading or non-receipt or misdescription of the goods, except to the extent that the document indicates that the issuer does not know whether any part of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity or condition or the receipt or description is qualified by "contents or condition of contents of packages unknown", "said to contain", "shipper's weight, load and count" or the like if such indication is true.

Where goods are loaded by an issuer who is a common carrier, the issuer must count the packages of goods, if package freight and ascertain the kind and quantity if bulk freight. In such cases "shipper's weight, load and count" or other words are ineffective except as to freight concealed by packages. The issuer may, by inserting in the bill of lading the words "shipper's weight load and count" or other words of like purport, indicate that the goods were loaded by the shipper.

A shipper shall be deemed to have guaranteed to the issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition and weight, as furnished by him; and the shipper shall indemnify the issuer against damages caused by inaccuracies in such particulars. The right of the issuer to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Legislation

UCC 7-301; Carriage of Goods by Water Act (Can.), Article III.

Comment

1. The provision attempts to rationalize the law relating to misdescription of the goods contained in a bill of lading. At common

law a bill of lading is evidence of the facts stated in it. The provision will not protect the shipper if it is proved that the described goods were not in fact delivered to the issuer. Rather, it applies in favour of third parties who rely upon the description of the bill. In this respect, the provision codifies the common law position. See *Smith v. Bedouin Steam Navigation Co.* [1896] A.C. 70; *Compania Naviera Vasconzada v. Churchill & Sim,* [1906] 1 K.B. 237. It provides some further guidance where terms such as "shipper's weight, load and count" are used.

2. At common law, it was held that the master of a ship has no authority, real or apparent, to sign a bill of lading where the goods that have not been put on board. See *Grant v. Norway* (1851) 10 C.B. 665; *Erb v. Great Western Railway Co. of Canada* (1881) 5 S.C.R. 367. This meant that the carrier was not liable either to the shipper or an endorsee of the bill. A similar rule prevailed in the United States. Section 4 of the Bills of Lading Act (Can.) provides that a bill of lading is conclusive evidence in favour of a consignee or endorsee for valuable consideration of the shipment as against the master or other person signing the bill of lading, notwithstanding that the goods or some part thereof may not have been shipped. However, this does not give the holder or consignee any right against the carrier. The Uniform Documents of Title Act changes the law by making the issuer of the bill responsible for non-receipt. This is made clear by the definition of "issuer" which provides that an issuer "includes any person for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, notwithstanding that the issuer received no goods or that the goods were misdescribed or that in any other respect the agent or employee violated his instructions."

3. The provision remains subject to other federal law which may alter the position in relation to certain kinds of bills of lading. See Proposition 1(4). For example, the Schedule of Rules Relating to Bills of Lading under the Carriage of Goods by Water Act, R.S.C. 1985, c.C-27 provide similar rules governing bills of lading in relation to the carriage of goods by water in ships carrying goods from any port in Canada to any other port, whether in or outside Canada.

4. The shippers erroneous report to the carrier concerning the goods may cause damage to the carrier. The indemnity provision which is found in Article III(5) of the Schedule to the Carriage of Goods by Water Act and in UCC 7-301(5) should be included so that it will extend to all types of bills of lading.

Through bills of lading

Proposition 4(2)

The issuer of a through bill of lading or other document embodying an undertaking to be performed in part by persons acting as its agents or by connecting carriers is liable to anyone entitled to recover on the document for any breach by such other persons or by a connecting carrier of its obligations under the document. This liability may be varied by agreement of the parties.

Where the goods covered by a through bill of lading or other document embodying an undertaking to be performed in part by persons other than the issuer are received by any such person, he is subject with respect to his own performance while the goods are in his possession to the obligation of the issuer. His obligation is discharged by delivery of the goods to another such person pursuant to the document, and does not include liability for breach by any other such persons or by the issuer.

The issuer of a through bill of lading or similar document shall be entitled to recover from the connecting carrier or such other person in possession of the goods when the breach of the obligation under the document occurred, the amount it may be required to pay to anyone entitled to recover on the document and the amount of any expense reasonably incurred by it in defending any action brought by anyone entitled to recover on the document.

Legislation

UCC 7-302

Comment

1. Through bills of lading are used when the initial carrier uses the services of other carriers in delivering the goods. When this involves more than one mode of transport the bill is sometimes referred to as a "combined transport bill of lading".

2. The common law position is far from clear as "[t]he multiplicity of different types of through bills of lading makes it difficult to lay down hard and fast principles governing the liabilities and relationships of the various parties involved" *(Scrutton on Charterparties,* (19th ed. 1984) at p. 377). At common law, the rule in relation to successive railway companies was that the company receiving the goods

from the shipper was *prima facie* liable as carrier for the whole distance, but it was less clear whether this rule applied to other kinds of through bills of lading *(Scrutton on Charterparties,* (19th ed., 1984) at pp. 377-8). The provision adopts the rule that the issuer of the through bill of lading is responsible, unless it is excluded by the terms of the bill.

3. The provision also makes it clear that any connecting carrier holds the goods on the terms which are set out in the bill of lading even though the connecting carrier did not issue the document. Accordingly, the connecting carrier must honour a proper demand for delivery and obtain the benefits or the excuses for non-delivery and limitations of liability provided for the original bailee. At common law, the connecting carrier could not obtain the benefit of such clauses unless an agency relationship was established between the carriers. See *Gill Manchester Ry. Co.* (1873) L.R. 8 Q.B. 186.

4. The issuer of a through bill of lading may become liable for the fault of another person, and the provision gives the issuer a right of recourse against that person.

Diversion; reconsignment; change of instructions

Proposition 4(3)

Unless the bill of lading provides otherwise, the carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods on instructions from:

(a) the holder of a negotiable bill;

(b) the consignor on a non-negotiable bill notwithstanding contrary instructions from the consignee;

(c) the consignee on a non-negotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the bill;

(d) the consignee on a non-negotiable bill if he is entitled as against the consignor to dispose of them.

Unless such instructions are noted on a negotiable bill of lading, a person to whom a bill is duly negotiated can hold the bailee according to the original terms.

Legislation

UCC 7-303

Comment

1. At common law, the bill of lading was not regarded as a contract of carriage, but only evidence of its terms. Where, however, a negotiable bill of lading was negotiated to a holder, the bill of lading was regarded as the contract of carriage and the holder could therefore hold the carrier to its terms. See *Leduc v. Ward* (1888), 20 Q.B.D. 475. This feature of the law is codified in the provision.

2. The position at common law in relation to non-negotiable bills of lading is less clear. Although the non-negotiable bill of lading may name someone other than the consignor, the contract is concluded between the consignor and the carrier. The uncertainty will place the carrier at considerable risk if a conflict arises between the consignor and the consignee. The provision contains rules which indicate the extent to which the carrier may follow the instructions of the consignor or the consignee.

Bills of lading in a set

Proposition 4(4)

Except where customary in overseas transportation, a bill of lading shall not be issued in a set of parts. The issuer is liable for damages caused by non-compliance.

Where a bill of lading is lawfully drawn in a set of parts, each of which is numbered and expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitute one bill.

Where a bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to whom the first due negotiation is made prevails as to both the document and the goods even though any later holder may have received

the goods from the carrier in good faith and discharged the carrier's obligation by surrender of his part.

Any person who negotiates or transfers a single part of a bill of lading drawn in a set is liable to holders of that part as if it were the whole set.

The bailee is obliged to deliver against the first presented part of a bill of lading lawfully drawn in a set, and such delivery discharges the bailee's obligation on the whole bill.

Legislation

UCC 7-304

Comment

1. The use of bills of lading in a set arose when communications were slow and the risk loss of a bill of lading was not inconsiderable. As early as 1882 the practice was criticized by Lord Blackburn as unnecessary in light of speedier forms of communication *(Glyn, Mills, Currie & Co. v. East and West India Dock Co.* (1882), 7 App Cas. 591 at 605). The practice greatly increases the potential for fraud since the parts may be transferred to different persons. The provision attempts to discourage the practice by permitting it only where it is customary in overseas trade.

2. Where a bill in sets is lawfully issued, the provision codifies the common law rule that the holders take priority in the order in which the parts were negotiated *(Barber v. Meyerstein* (1870), L.R. 4 H.L. 317) and the rule that the carrier may, in ignorance of the fact that a part had been transferred to some other party who would be entitled to priority, deliver the goods against another part of the set *(Glyn, Mills, Currie & Co. v. East & West Dock Co.* (1882) 7 App. Cas. 591).

Destination bills

Proposition 4(5)

Instead of issuing a bill of lading to the consignor at the place of shipment, a carrier may at the request of the consignor procure the bill to be issued at destination or at any other place designated in the request.

Upon request of anyone entitled as against the carrier to control the goods while in transit and on surrender of any outstanding bill of lading or other receipt covering such goods, the issuer may procure a substitute bill to be issued at any place designated in the request.

Legislation

UCC 7-305

Comment

The provision relating to "destination bills" is designed to resolve problems associated with high speed air or truck transportation in which the goods may arrive at their destination before the bill of lading can arrive by mail. This can be particularly inconvenient for carriers by truck or by air who do not have terminal facilities where shipments can be held to await the consignee's appearance. The provision authorizes the carrier, at the request of the consignor, to arrange for the issuance of the bill at the destination or some other point.

Altered bills of lading

Proposition 4(6).

An unauthorized alteration or filling of a blank in a bill leaves the bill enforceable according to its original tenor.

Legislation

UCC 7-306.

Comment

1. There is some common law authority to the effect that an alteration of a bill of lading will render it a nullity if the alteration goes to the essence of the contract but less fundamental alterations the instrument remains alive. *(Kwei Tek Chao v. British Traders and Shippers Ltd.,* [1954] 2 Q.B. 459.) The provision adopts the rule that an alternation does not void the bill, but leaves it enforceable according to its original tenor.

2. The provision should be contrasted with the treatment of warehouse receipts in which a *bona fide* purchaser may treat the filling in of a blank in a negotiable warehouse receipt as authorized. A similar rule is not provided in the case of bills of lading on the theory that they must often be prepared by truck drivers and others away from the issuer's place of business. The validity of the completion of the blanks would, therefore, depend upon an agency analysis.

5. WAREHOUSE RECEIPTS AND BILLS OF LADING: GENERAL OBLIGATIONS

Duplicate receipt or bill; overissue

Proposition 5(1)

Neither a duplicate nor any other document of title purporting to cover goods already represented by an outstanding document of the same issuer confers any right in the goods, except as provided in the case of bills in a set, overissue of documents for fungible goods and substitutes for lost, stolen or destroyed documents; but the issuer is liable for damages caused by his overissue or failure to identify a duplicate document as such by conspicuous notation on its face.

Legislation

UCC 7-402; UWRA (Can.), s.4.

Comment

1. This provision continues the policy found in section 4 of the UWRA (Can.) and extends its application to bills of lading. A duplicate which is not properly identified as such is treated like any other overissue of documents: a purchaser of the document acquires no title but only a cause of action for damages against the person who made the deception possible. If the document conspicuously indicates that it is a duplicate, it follows that no deception is possible, and the bailee is not liable for preparing it.

2. The provision does not apply to a case where two valid documents of different issuers are outstanding for the same goods at the same time. The Official Comment to UCC 7-402 gives the example of freight forwarders who issue bills of lading to their customers for small shipments to be combined into carload shipments for which the railroad will issue a bill of lading to the forwarder. Similarly, a warehouse receipt may be outstanding and the holder of the receipt may issue delivery orders against the same goods. In these cases, a dealing with the subsequently issued document may be effective to transfer title, and a further provision of the Uniform Documents of Title Act provides for rules governing conflict between such valid documents. See Proposition 6(3).

Obligation of warehouseman or carrier to deliver; excuse

Proposition 5(2)

The bailee must deliver the goods to a holder of a negotiable document of title, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a non-negotiable document of title, unless the bailee establishes:

(a) delivery of the goods to a person whose receipt was rightful as against the claimant;

(b) damage to or delay or destruction of the goods for which the bailee is not liable;

(c) previous sale or other disposition of the goods in lawful enforcement of a lien or on the warehouseman's lawful termination of storage;

(d) the exercise by a seller of his right to stop delivery;

(e) a diversion reconsignment or other disposition pursuant to a provision in the Uniform Documents of Title Act;

(f) release, satisfaction or any other fact, affording a personal defence against the claimant;

(g) any other lawful excuse.

A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests. Unless the person claiming is one against whom the document confers no right, the bailee must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery on it. Failure to do so shall render the bailee liable to any person to whom the document is duly negotiated.

Legislation

UCC 7-403; UWRA (Can.), ss. 6, 8, 18.

Comment

1. This provision revises and simplifies the obligation on the part of the bailee to deliver goods set out in section 6, 8 and 18 of the UWRA (Can.) and extends these obligations to bailees under bills of lading. The provision codifies the excuses justifying non-delivery by the bailee. A number of the references simply incorporate common law concepts. For example, clause (a) restates the common law rule that a bailee, although generally estopped from denying the bailor's title, is entitled to deliver the goods to a person who has evicted the bailee by title paramount (where the bailee has had to surrender the goods) or where the bailee is acting on behalf of and with the authority of a person with superior title: *Biddle v. Bond* (1865), 6 B. & S. 225; *Rogers, Sons & Co. v. Lambert & Co.*, [1891] 1 Q.B. 318 (C.A.). Clause (b) amounts to a reference to the law of torts, as modified by statute, that determines the varying responsibilities and standards of care applicable to commercial bailees. Clause (d) is a cross-reference to the seller's right to stop delivery (s.104 of the Uniform Sale of Goods Act; the reference would also encompass the seller's right of stoppage in transit under existing provincial sale of goods legislation). Clause (f) provides a defence to the bailee where the authority to deliver was conferred orally or otherwise informally.

2. The rule regarding cancellation of negotiable warehouse receipts, and notation of partial deliveries on negotiable warehouse receipts is extended to bills of lading. See UWRA (Can.), s.8.

No liability for good faith delivery pursuant to receipt or bill

Proposition 5(3)

A bailee who in good faith and in observance of reasonable commercial standards has received goods and delivered or otherwise disposed of them according to the terms of the document of title or pursuant to the Uniform Documents of Title Act is not liable for such delivery. This rule applies even though the person from whom the bailee received the goods had no authority to procure the document or dispose of the goods and even though the person to whom the bailee delivered the goods had no authority to receive them.

Legislation

UCC 7-404; UWRA (Can.), s.7.

Comment

The provision restates the rule in section 7 of the UWRA (Can.) and extends its application to bills of lading. The provision also provides that liability for conversion by innocent intermeddling with another person's property is not applicable to the operations of commercial carriers and warehousemen.

6. WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER

Form of negotiation and requirements of "due negotiation"

Proposition 6(1)

The following principles concerning negotiation of a document of title should be set out in the Uniform Documents of Title Act:

(1) A negotiable document of title running to the order of a named person is negotiated by his endorsement and delivery. After his endorsement in blank or to bearer any person can negotiate it by delivery alone.

(2) A negotiable document of title is negotiated by delivery alone when by its original terms it runs to bearer.

(3) When a document running to the order of a named person is delivered to him the effect is the same as if the document had been negotiated.

(4) Negotiation of a negotiable document of title after it has been endorsed to a specified person requires endorsement by the special endorsee as well as delivery.

(5) A negotiable document of title is "duly negotiable" when it is negotiated to a holder who purchases it in good faith without notice of any defence against or claim to it on the part of any person for value, unless it is established that the negotiation is not in the ordinary course of business or financing or involves receiving the document in settlement or payment of money obligations.

(6) Endorsement of a non-negotiable document neither makes it negotiable nor adds to the transferee's rights.

(7) The naming in a negotiable bill of lading of a person to be notified of the arrival of goods does not limit the negotiability of the bill nor constitute notice to a purchaser of any interest of such person in the goods.

Legislation

UCC 7-501; UWRA (Can.), s.19

Comment

1. The provision sets out the rules governing negotiation of a negotiable document of title. Paragraphs (1), (2), (4) restate the contents of section 19 of the UWRA (Can.) and extend its application to all negotiable documents of title. In addition, paragraph (3) makes it clear that a negotiation results from a delivery of the document of title to a banker or buyer to whose order the document has been taken by the person making the bailment. The position under the present law is not entirely clear: under negotiable instruments law, a distinction is drawn between issuance of a bill and negotiation of it. See *R.E. Jones Ltd.* v. *Waring and Gillow Ltd.,* [1926] A.C. 670. If this position were extended to the UWRA (Can.), it would follow that a bank to whom a negotiable warehouse receipt is transferred by the person who warehoused the goods would not be considered to have obtained a negotiation of it. As a consequence, the bank would not obtain the benefits of negotiability: i.e., the insulation from defect of title defences that exist between other parties. This result is contrary to the common law position which regarded the purchaser as a remote party who could take the bill free from such defences even though the purchaser may have been named as an immediate party on the instrument. See *Munroe* v. *Bordier* (1849), 8 C.B. 862.

2. Paragraph (4) introduces a new requirement of negotiation in the ordinary course of business or financing. The requirement can be derived from the whole purpose behind the negotiability of documents. The principle of negotiability emerged out of the need to protect dealings in the ordinary course of trade. There is no good commercial purpose to be satisfied if the transaction in question is one that does not take place in the ordinary course of business. The Official Comment to UCC 7-501 indicates that there are two aspects to the usual and normal course of mercantile dealings. The first centres around the person making the transfer and requires that the transferor be a person who ordinarily deals in such documents. The second aspect centres around the nature of the transaction itself and requires that the transaction be one that occurs in the regular course of business.

Rights acquired by due negotiation

Proposition 6(2)

Subject to the provision which follows (Proposition 6(3)), and with the provision dealing with fungible goods (Proposition 3(5)), a holder to whom a negotiable document of title has been duly negotiated thereby acquires:

(a) title to the document;

(b) title to the goods;

(c) all rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and

(d) the direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defence or claim by him except those arising under the Uniform Documents of Title Act. In the case of a delivery order, the bailee's obligation accrues only upon acceptance and the obligation acquired by the holder is that the issuer and any endorser will procure the acceptance of the bailee.

Subject to the provision which follows (Proposition 6(3)), title and rights so acquired are not defeated by any stoppage of the goods represented by the document or by surrender of the goods by the bailee and are not impaired even though the negotiation or any prior negotiation constituted a breach of duty or even though any person has been deprived of possession of the document by misrepresentation, fraud, accident, mistake, duress, loss, theft or conversion, or even though a previous sale or other transfer of the goods or document has been made to a third person.

Legislation

UCC 7-502; UWRA (Can.), ss.22, 26-28.

Comment

1. The provision largely restates the substance of sections 22 and 26 to 28 of the UWRA (Can.) and extends their application to all

forms of negotiable documents of title. The provision will substantially change the law as it relates to negotiable bills of lading in two major areas: (1) effect of the transfer on the obligation of the issuer; and (2) introduction of a true notion of negotiability to bills of lading.

2. Under the common law, contracts were not assignable. Accordingly, although the transfer of a bill of lading could effect a transfer of property in the goods, it did not operate as an assignment of the contract of carriage. As a result, the transferee could not claim damages from the carrier for breach of contract in failing to deliver the goods. In order to overcome this problem, the Bills of Lading Act, 1855 (U.K.) was enacted. The equivalent provisions can be found in the Bills of Lading Act, R.S.C. 1985, c.B-5; The Mercantile Law Amendment Act, R.S.O. 1980, s.265, ss.7-8; and the Bills of Lading Act, R.S.N.S. 1967, c.22. In other provinces (such as Alberta and Saskatchewan) it is possible that legislation is in force as an Imperial statute. See *The Status of English Statute Law in Saskatchewan,* Law Reform Commission of Saskatchewan (1990) at pp. 156-7.

The statute provided that the transferee of a bill of lading to whom the property in the goods has passed "shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself". This provision not only made the carrier liable to the transferee for any default under the contract of carriage; it also made the transferee liable on the contract for freight. The provision has created difficulties because the Act will not apply where property passes either before or after the consignment or endorsement (which is a persistent problem in the case of bulk cargo) and does not apply at all if a document other than an order bill of lading is issued. This aspect has been criticised by a number of commentators who have called for reform of the legislation. See B.J. Davenport (1989) 105 L.Q.R. 174; F.M.B. Reynolds, (1990) 106 L.Q.R.1.

The Uniform Document of Title resolves this problem by providing that the person to whom the document of title is negotiated obtains the direct obligation of the issuer. The provision does not render the consignee or endorsee liable on the contract, presumably on the theory that the carrier has a lien on the goods. The enactment of the Uniform Documents of Title Act would operate to supplement the Bills of Lading Act. The Uniform Documents of Title Act would give an additional remedy to a person to whom a document of title was negotiated and likely would not result in an operational conflict. If it were

determined that there was a conflict between the two provisions, the federal provision would govern by virtue of federal paramountcy and by the provision of the Uniform Act which subordinates it to federal legislation. See Proposition 1(4). In any case, the provision would operate in any situation falling outside the scope of the Bills of Lading Act. Provinces which have enacted a provincial version of the Bills of Lading Act could repeal the legislation upon adoption of the Uniform Documents of Title Act.

3. The provision also changes the law pertaining to the negotiability of documents of title in two ways ("negotiability" is used here to denote the ability of a transferee to obtain a better title than the transferor had). First, the notion of negotiability is extended to bills of lading. Under the UWRA (Can.), negotiable warehouse receipts are afforded negotiability in the true sense, whereas bills of lading, which remain governed by the common law, are transferrable by delivery and any necessary endorsement but are not negotiable in the strict sense. This difference in treatment is unjustified. At common law, only bills of lading were considered transferrable (i.e., they did not require attornment on the part of the bailee: possession of the goods was locked up in the document). It was only by virtue of statute that warehouse receipts became acquired the same attribute. However, section 26 of the UWRA (Can.) went even further and provided that the validity of a negotiation of a warehouse receipt is not impaired by the fact that "the negotiation was a breach of duty on the part of the person making the negotiation" or "the owner of the receipt was induced by fraud, misrepresentation or duress to entrust the possession or custody of the receipt to such person". It makes no sense to afford negotiability to warehouse receipts but not to bills of lading – the same principle should be applied to both kinds of documents of title.

The second change involves a slight expansion in the notion of negotiability itself. The American Uniform Warehouse Receipts Act (U.S.), upon which the UWRA (Can.) was modelled, provided that negotiation was not impaired by "breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was deprived of the same by loss, theft, fraud, accident, mistake or conversion". The Uniform Law Conference of Canada adopted in its place a somewhat watered down version of negotiability found in the Washington Warehouse Receipts Act and restricted the concept by eliminating the reference to "loss", "theft", "accident" and "conversion". The Uniform Documents of Title Act employs the full notion of negotiability. There are good policy reasons for not maintaining the

restricted version of negotiability found in the UWRA (Can.). First, it is easy for the parties to minimize the risk of loss through theft or conversion of the document of title simply by ensuring that the document is made out to the order of a named person. If a party takes a document of title made out to bearer or endorses a document of title in blank thereby rendering it a bearer instrument, the risk of loss is properly placed on that party and not upon an innocent transferee for value without knowledge.

4. The provision regarding the seller's lien and right to stoppage of delivery does not constitute any change in the law. The provision is found in section 28 of the UWRA (Can.) and section 104(a) of the Uniform Sale of Goods Act. A similar provision is found in the provincial Sale of Goods Act. See, e.g., Ontario Sale of Goods Act, R.S.O. 1980, c.462, s.45.

5. The reference to delivery orders is new. Prior legislation in both the United States and Canada failed to deal with the operation of delivery orders despite their widespread use in commercial dealings (particularly in the case of bulk cargo that is split into more parcels than there are bills of lading). A delivery order is a written order to deliver goods addressed to a warehouseman or carrier (the document is sometimes referred to as a delivery warrant). At common law, a delivery order was not regarded as a document of title. Attornment by the bailee was required when the delivery order was transferred. See *The Julia* [1949] A.C. 293. In addition, a subsequent transfer of the delivery order after an attornment required that a fresh attornment be made. The provision rationalizes the law relating to delivery orders. A delivery order may be negotiated if it is by its terms made out to a named person or to bearer, but the transferee does not obtain the direct obligation of the bailee until the bailee accepts the delivery order. After acceptance of the delivery order by the bailee, the legal position of a delivery order is identical to any other document of title.

6. The common law is changed in one other respect. At common law a transfer of an order bill of lading could operate to transfer the transferor's property in the goods if the transfer was made with that intention, but this presumption could be rebutted if it were shown that it was not the intention of the parties that property should pass. See *Lickbarrow v. Mason* (1787), 2 T.R. 64. The provision adopts the rule that a due negotiation of a bill of lading transfers the property in the goods. The passage of property is of much less importance under the Uniform Sale of Goods Act, and therefore this change will usually

not be central to many disputes. This provision coordinates with section 60(3) of the Uniform Sale of Goods Act.

Documents of title defeated in certain cases

Proposition 6(3)

A document of title confers no right in goods against a person who before issuance of the document had a legal interest or a perfected security interest in them and who neither delivered or entrusted them or any document of title covering them to the bailor or his nominee with actual or apparent authority to ship, store or sell or with power to obtain delivery or with power of disposition under any statute or law nor acquiesced in the procurement by the bailor or his nominee of any document of title.

Title to goods based upon an unaccepted delivery order is subject to the rights of anyone to whom a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. Such title may be defeated under the next provision (Proposition 6(4)) to the same extent as the rights of the issuer or a transferee from the issuer.

Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of anyone to whom a bill issued by the freight forwarder is duly negotiated; but delivery by the carrier pursuant to its own bill of lading discharges the carriers obligation to deliver.

Legislation

UCC 7-503

Comment

1. The concept of negotiability involves the idea that a good faith purchaser of a negotiable document of title cuts off a substantial portion of outstanding equities and claims of prior parties both to the document of title and to the goods it covers. However, not all claims are cut off. This provision recognizes that the simple procurement and negotiation of a document of title will not give the purchaser good title to stolen goods. It is only when the owner of goods introduces the goods into the stream of commerce by authorizing or acquiescing in the issuance of a negotiable document of title that the owner's title may be defeated through the operation of negotiability. The provision incorporates

through reference the provision of the Uniform Documents of Title Act that deals with power to direct delivery (Proposition 5(2)) as well as other bodies of commercial law: agency law principles of actual and apparent authority, factors legislation, the ordinary course buyer rule in section 28 of the Uniform Personal Property Security Act and the entrustment provisions in section 64 of the Uniform Sale of Goods Act.

2. The provision contains a rule that an unaccepted delivery order may be defeated by due negotiation of a negotiable warehouse receipt or bill of lading that covers the same goods. Until a delivery order is accepted by the bailee, the bailee is not obligated on it. Therefore, the subsequent negotiation of a negotiable document of title covering the goods will defeat the holder of the unaccepted delivery order.

3. The provision also covers the potential for conflict between a bill of lading that is issued by a freight forwarder to its customer and a bill that is issued by the carrier to the freight forwarder. A bill of lading issued to a freight forwarded by the carrier is subordinated on the theory that the bill on its face gives notice that a freight forwarder is involved. Accordingly, if the forwarder issues a bill which is duly negotiated, the holder will prevail over the holder of a bill issued to the forwarder by the carrier. The carrier is, however, discharged if it complies with the delivery term in the bill it issued.

Rights acquired in the absence of due negotiation; effect of diversion; seller's stoppage of delivery

Proposition 6(4)

A transferee of a document of title, whether negotiable or non-negotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual or apparent authority to convey.

In the case of a non-negotiable document of title, until but not after the bailee receives notification of the transfer, the rights of the transferee may be defeated.

(a) by a buyer from the transferor in the ordinary course of business if the bailee has delivered the goods to the buyer or received notification of his rights; or

(b) as against the bailee by good faith dealings of the bailee with the transferor.

A diversion or other change of shipping instructions by the consignor in a non-negotiable bill of lading which causes the bailee not to deliver to the consignee defeats the consignee's title to the goods if they have been delivered to a buyer in the ordinary course of business and in any event defeats the consignee's rights against the bailee.

Delivery pursuant to a non-negotiable document may be stopped by a seller (under section 104 of the Uniform Sale of Goods Act). A bailee honouring the seller's instruction is entitled to be indemnified by the seller against any resulting loss or expense.

Legislation

UCC 7-504; UWRA (Can.), s.21

Comment

1. This provision covers essentially two kinds of transfers that do not amount to a "due negotiation". First, it applies to the transfer of non-negotiable documents of title, since these can only be transferred and not negotiated. Second, it applies to negotiable documents of title where any element of due negotiation is lacking. In such cases, the transferee does not take title to the goods free from the equities and defences that may have been available to more remote parties.

2. The provision departs from UCC 7-504(1), which that it provides that a transferee obtains "the title and rights which his transferor had or had actual authority to give". This creates the anomaly, identified by many American commentators, that the transferee of a negotiable document of title covering the goods will sometimes acquire less of a title than if the transferee had dealt directly in the goods themselves in the first place. No convincing reason has ever been given for this rule, and the better position is to treat a transferee of a non-negotiable document of title (or of a negotiable document of title who does not satisfy the criteria of due negotiation) in the same manner as a purchaser of the goods themselves. See R.A. Riegert, "The Rights of a Transferee of a Document of Title Who is Not a Holder by Due Negotiation" (1978), 9 Cumberland L. Rev. 27. Accordingly, the provision refers to "the title and rights which his transferor had or had actual **or apparent** authority to convey" (emphasis added).

3. The transferee of a non-negotiable document of title should generally notify the bailee immediately. Failure to do so will place the transferee at risk that the transfer will be defeated by an ordinary course sale if the bailee has delivered the goods to the buyer or received notification of the buyer's rights. Therefore, in a competition between two transferees of a non-negotiable document of title, priority is given to the first to take delivery of the goods or notify the bailee. Failure to give notice also places the transferee at risk that the transferor will deal with the bailee (for instance, by obtaining delivery of the goods or by obtaining a negotiable document of title in substitution of the non-negotiable document).

4. The provision deals with the case where a carrier delivers or disposes of the goods on the instructions of the consignor under a non-negotiable bill of lading (See Proposition 4(3)). The consignee's rights against the bailee are defeated if the bailee obeys the consignor's instructions to divert

5. The provision gives the carrier an express right to indemnity where it honours a seller's request to stop delivery. See Uniform Sale of Goods Act, s.104.

Endorser not a guarantor

Proposition 6(5)

The endorsement of a document of title issued by a bailee does not make the endorser liable for any default by the bailee or by previous endorsers.

Legislation

UCC 7-505; UWRA (Can.), s.25

Comment

The endorsement of a negotiable document of title differs from the endorsement of a negotiable instrument. Endorsement of a negotiable instrument is regarded as both a contractual act that renders the endorser liable on the instrument, as well as an act of conveyance of a property interest. Endorsement of a negotiable document of title is regarded simply as a conveyance of the property interest with the result that the endorsement does not render the endorsee liable for any default

by the bailee or by previous endorsers. This provision simply codifies the common law position, which is also set out in section 25 of the UWRA (Can.)

Delivery without endorsement: right to compel endorsement

Proposition 6(6)

The transferee of a negotiable document of title has a specifically enforceable right to have his transferor supply any necessary endorsement, but the transfer becomes a negotiation only as of the time the endorsement is supplied.

Legislation

UCC 7-506; UWRA (Can.), s.23.

Comment

Where a negotiable document of title is delivered without a necessary endorsement, the party to whom it is delivered takes as a transferee since the requirements of due negotiation have not been satisfied. However, the transferee obtains the right to obtain an endorsement from the transferor at which time the transfer becomes a negotiation. A similar provision in relation to negotiable instruments is found in section 60(1) of the Bills of Exchange Act, R.S.C. 1985, c.B-4.

Warranties on negotiation or transfer

Proposition 6(7)

Unless otherwise agreed, a person who negotiates or transfers a document of title for value, he warrants to his immediate purchaser only, in addition to any warranty made in selling the goods:

(a) that the document is genuine;

(b) that he has no knowledge of any fact which would impair its validity or worth; and

(c) that his negotiation or transfer is rightful and fully effective with respect to the title to the document and the goods it represents.

Legislation

UCC 7-507; UWRA (Can.), s.24.

Comment

The provision is a rewritten version of section 24 of the UWRA (Can.) that is extended to apply to all forms of documents of title. An analogous provision relating to negotiable instruments is found in section 137 of the Bills of Exchange Act, R.S.C. 1985, c.B-4. The reference to the implied terms of merchantability and fitness for purpose that appear in the UWRA (Can.) are omitted because these terms derive from the contract of sale and not from the transfer of the document of title.

7. WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS

Lost and missing documents

Proposition 7(1)

If a document has been lost, stolen or destroyed, a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any person comply with such order. If the document was negotiable the claimant must post security approved by the court to indemnify any person who may suffer loss as a result of non-surrender of the document. If the document was not negotiable, such security may be required at the discretion of the court.

A bailee who without court order delivers goods to a person claiming under a missing negotiable document of title is liable to any person injured thereby, and if the delivery is not in good faith is liable for conversion.

Legislation

UCC 7-601; UWRA (Can.), s.9.

Comment

1. The provision authorizes a court order for issuance of a substitute document or for delivery of the goods. Section 9 of the UWRA (Can.) provided only for an order for delivery of the goods and only in respect of a negotiable document of title. There is no reason in principle why an order for compulsory issuance of a substitute document should not be available if a continuation of the bailment is desired. Claimants under non-negotiable documents of title are also permitted to invoke this procedure since straight bills of lading and other non-negotiable documents may sometimes provide that the goods shall not be delivered except upon production of the document. Although in the ordinary case no order for security would be needed, in the case of loss of a non-negotiable document, the court has the discretion to do so which might be exercised where there was some controversy over the negotiability of the document.

2. If the bailee chooses to deliver without court order it remains liable for any loss caused but is not liable in conversion unless it acted in bad faith.

Attachment of goods covered by a negotiable document

Proposition 7(2)

Where goods are delivered to a bailee by the owner or a person with a power of disposition and a negotiable document of title is issued for them, they cannot thereafter while in the possession of the bailee be levied under execution unless the receipt is surrendered to the bailee.

Legislation

UWRA (Can.), s.15; UCC 7-602.

Comment

The provision is substantially the same as section 15 of the UWRA (Can.) except that it is extended to cover all negotiable documents of title. Once a negotiable document of title is issued, the only way to levy execution against the goods is through seizure of the document of title. The provision does not apply where the goods are attached under legal process prior to the issuance of a negotiable document of title.

Conflicting claims: interpleader

Proposition 7(3)

If more than one person claims title or possession of the goods, the bailee is excused from delivery until he has had a reasonable time to ascertain the validity of the adverse claims or to bring an action to compel all claimants to interplead and may compel such interpleader, either in defending an action for non-delivery of the goods, or by original action, whichever is appropriate.

Legislation

UCC 7-603; UWRA (Can.), s.10

Comment

The provision is simply a restatement of section 10 of the UWRA (Can.) extended to cover all forms of documents of title. It enables a bailee faced with conflicting claims to goods to compel the claimants to litigate with each other.

APPENDIX A

EXISTING LEGISLATION

CANADA

Bank Act, R.S.C. 1985, c.B-1, ss.178-180, 186-187.
Bills of Lading Act, R.S.C. 1985, c.B-5.
Canada Grain Act, R.S.C. 1985, c.G-10, ss. 111-114.
Carriage by Air Act, R.S.C. 1985, c.C-26.
Carriage of Goods by Water Act, R.S.C. 1985, c.C-27.
Railway Act, R.S.C. 1985, c.R-3, ss. 303, 310.

ALBERTA

Factors Act, R.S.A. 1980, c.F-1.
Personal Property Security Act, S.A. 1988, c. P-4.05
Sale of Goods Act, R.S.A. 1980, c.S-2.
Warehouse Receipts Act, R.S.A. 1980, c.W-2.
Warehousemen's Lien Act, R.S.A. 1980, c.W-3.

BRITISH COLUMBIA

Personal Property Security Act, S.B.C. 1989, c.36.
Sale of Goods Act, R.S.B.C. 197, c.370.
Warehouse Receipts Act, R.S.B.C. 1979, c.428.
Warehousemen's Lien Act, R.S.B.C. 1979, c.427.

MANITOBA

The Factors Act, R.S.M. 1987, c.F-10.
The Personal Property Security Act, R.S.M. 1987, c.P-35.
The Sale of Goods Act, R.S.M. 1987, c.S-10.
The Warehouse Receipts Act, R.S.M. 1987, c.W-30.
The Warehouseman's Lien Act, R.S.N.B. 1987, c.W-20.

NEW BRUNSWICK

Factors and Agents Act, R.S.N.B. 1973, c.F-1.
Sale of Goods Act, R.S.N.B. 1973, c.S-1.
Warehouse Receipts Act, R.S.N.B. 1973, c.W-3.
Warehouseman's Lien Act, R.S.N.B. 1973, c.W-4.

NEWFOUNDLAND

The Sale of Goods Act, R.S. Nfld. 1970, c.341.
The Warehouse Receipts Act, R.S. Nfld. 1970, c.392.
The Warehousemen's Lien Act, R.S. Nfld. 1970, c.391.

NORTHWEST TERRITORIES

Factors Ordinance, R.O.N.W.T. 1974, c.F-1.
Sale of Goods Ordinance, R.O.N.W.T. 1974, c.S-2.
Warehousemen's Lien Ordinance, R.S.N.W.T. 1974, c.W-2.

NOVA SCOTIA

Bills of Lading Act, R.S.N.S. 1989, c.38.
Factors Act, R.S.N.S. 1989, c.157.
Sale of Goods Act, R.S.N.S. 1989, c.408.
Warehouse Receipts Act, R.S.N.S. 1989, c.498.
Warehousemen's Lien Act, R.S.N.S. 1989, c.499.

ONTARIO

Factors Act, R.S.O., 1980, c.150.
Mercantile Law Amendment Act, R.S.O. 1980, c.265.
Personal Property Security Act, S.O. 1989, c.11.
Sale of Goods Act, R.S.O. 1980, c.462.
Warehouse Receipts Act, R.S.O. 1980, c.528.
Repair and Storage Liens Act, 1989, S.O. 1989, c.17.

PRINCE EDWARD ISLAND

Factors Act, R.S.P.E.I. 1988, c.F-1.
Sale of Goods Act, R.S.P.E.I. 1988, c.S-1.
Warehousemen's Lien Act, R.S.P.E.I. 1988, c.W-1.

QUEBEC

Civil Code, Articles 1971(2), 1979(2).
Bill of Lading Act, R.S.Q. 1979, c.C)53, amended S.Q. 1982, c.55.

SASKATCHEWAN

The Factors Act, R.S.S. 1978, c.F-1.
The Personal Property Security Act, S.S. 1979-80, c.P-6.1.
The Sale of Goods Act, R.S.S. 1978, c.S-1.
The Warehousemen's Lien Act, R.S.S. 1978, c.W-3.

YUKON TERRITORIES

Factors Ordinance, R.S.Y. 1986, c.61.
Personal Property Security Ordinance, R.S.Y. 1986, c.130.
Sale of Goods Ordinance, R.S.Y. 1986, c.154.
Warehouse Keepers Lien Act, R.S.Y. 1986, c.176.
Warehouse Receipts Act, R.S.Y. 1986, c.177.

APPENDIX B

TABLE OF CONCORDANCE
UNIFORM WAREHOUSE RECEIPTS ACT (CANADA)

Description of Provision	UWRA (Can).	UWRA (U.S.)	Article 7 UCC
Interpretation	1	58	7-102
Form of Receipts	2	2,3	7-201
Negotiable and non-negotiable receipts	3	5	7-104
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Marking of Non-negotiable receipts	5	7	—
Duty to deliver	6	8,10	7-403
Delivery on presentation of negotiable receipt	7	9	7-404
Cancellation of negotiable receipts	8	11,12	7-403
Lost or destroyed receipts	9	14	7-601
Reasonable time to determine validity	10	18	7-603
Conclusiveness of negotiable receipt	11	20	7-203
Description of goods	12	20	7-203
Liability for care of goods	13	21	7-204
Co-mingled goods	14	23	7-207
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Negotiable receipt must state charges re lien	16	30	7-209
Perishable or hazardous goods	17	34	7-206
Effect of sale	18	36	7-403
Negotiation of negotiable receipt	19	37,38	7-501
Transfer of receipt	20	39	7-504
Rights of person to whom receipt transferred	21	42	7-504
Rights of person to whom receipt negotiated	22	41	7-502
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Warranties on sale of receipt	24	44	7-507
Endorser not a guarantor	25	45	7-505
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Application to existing receipts	29	59	—

APPENDIX C

TABLE OF CONCORDANCE
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Short Title.	7-101	—	—	—
Definitions and Index of Definitions.	7-102	1,53	58	1
Relation of Article to Treaty, Statute, Tariff, Classification or Regulation.	7-103	—	—	—
Negotiable & Non-Negotiable Warehouse Receipt, Bill of Lading or Other Document of Title.	7-104	4,5	4,5	1
Construction Against Negative Implication.				
PART 2 - WAREHOUSE RECEIPTS: SPECIAL PROVISIONS				
Who May Issue a Warehouse Receipt; Storage Under Government Bond.	7-201	—	1	—
Form of Warehouse Receipt; Essential Terms; Optional Terms.	7-202	—	2	2,3
Liability for Non-Receipt or Misdescription.	7-203	—	20	11,12
Duty of Care; Contractual Limitation of Warehouseman's Liability.	7-204	—	3,21	13
Title Under Warehouse Receipt Defeated in Certain Cases.	7-205	—	—	—
Termination of Storage at Warehouseman's Option.	7-206	—	34	17
Goods Must be Kept Separate; Fungible Goods.	7-207	—	22,23.24	14
Altered Warehouse Receipts.	7-208	—	13	—
Lien of Warehouseman.	7-209	—	23-32	16
Enforcement of Warehouseman's Lien.	7-210	—	33	—
PART 3 - BILLS OF LADING: SPECIAL PROVISIONS				
Liability for Non-Receipt or Misdescription; "Said to Contain"; "Shipper's Load and Count"; Improper Handling.	7-301	23	—	—
Through Bills of Lading and Similar Documents.	7-302	—	—	—
Diversion; Reconsignment; Change of Instructions.	7-303	—	—	—
Bills of Lading in a Set.	7-304	6	—	—
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Description of Provision	Article 7 UCC	UBLA (US)	UWRA (US)	UWRA (CAN.)
Altered Bills of Lading.	7-306	16	—	—
Lien of Carrier.	7-307	16	—	—
Enforcement of Carrier's Lien.	7-307	27-32	—	—
Duty of Care; Contractual Limitation of Carrier's Liability.	7-309	3	—	—
PART 4 - WAREHOUSE RECEIPTS AND BILLS OF LADING: GENERAL OBLIGATIONS				
Irregularities in Issue of Receipt or Bill Conduct of Issuer.	7-401	23	20	2
Duplicate Receipt or Bill; Overissue.	7-402	7	6	4
Obligation of Warehouseman or Carrier to Deliver; Excuse.	7-403	11-15 19,22	8-12,16, 19	6,8,18
No Liability for Goods Faith Delivery Pursuant to Receipt or Bill.	7-404	13	10	7
PART 5 - WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATIONS AND TRANSFER				
Form of Negotiation and Requirements of "Due Negotiation".	7-501	9,29-31,38	37-40,47	19,10 26
Rights Acquired by Due Negotiation.	7-502	32,38-40,42	41,47-49	22,26-28
Document of Title to Goods Defeated in Certain Cases.	7-503	32	41	—
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Indorser Not a Guarantor for other Parties.	7-505	36	45	25
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Warranties on Negotiation of Transfer.	7-507	35	44	24
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PART 6 - WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS				
Lost and Missing Documents.	7-601	17	14	9
Attachment of Goods Covered by a Negotiable Document.	7-602	24	25	15
Conflicting Claims, Interpleader.	7-603	20,21	16,17	10

APPENDIX J

(See page 33)

UNIFORM ENFORCEMENT OF CANADIAN JUDGMENTS ACT

Contents

Section

Definitions

1. In this Act

"Canadian judgment" means

(a) a final judgment or order made in a civil proceeding by a court of a province or territory of Canada other than [enacting province or territory],

(b) a final order that is made in the exercise of a judicial function by a tribunal of a province or territory of Canada other than [enacting province or territory] and that is enforceable as a judgment of the superior court of unlimited trial jurisdiction of the province or territory where the order was made, and

(c) an order that is made under section 725 or 726 of the Criminal Code (Canada) by a court of a province or territory of Canada other than [enacting province or territory] and that is entered as a judgment in the superior court of unlimited trial jurisdiction of the province or territory where the order was made;

"judgment creditor" means a person entitled to enforce a Canadian judgment;

"judgment debtor" means a person liable under a Canadian judgment;

"registered Canadian judgment" means a Canadian judgment that is registered under this Act.

Right to register judgment

2. (1) Subject to section 5, a Canadian judgment for the payment of money may be registered under this Act for the purpose of enforcing payment of the money unless the judgment is

(a) for maintenance or support, including an order enforceable under the [appropriate Act in the enacting province or territory], or

(b) for the payment of money as a penalty or fine for committing an offence.

(2) A Canadian judgment that contains provisions for the payment of money and also contains other provisions may be registered under this Act in respect of the provisions for the payment of money but may not be registered in respect of the other provisions.

Procedure for registering judgment

3. A Canadian judgment is registered under this Act by paying the fee prescribed by regulation and by filing in the registry of the [superior court of unlimited trial jurisdiction in the enacting province or territory]

(a) a copy of the judgment certified as true by a judge, registrar, clerk or other proper officer of the court or tribunal that made the judgment, and

(b) the additional information or material required by regulation.

Effect of registration

4. Subject to sections 5 and 6, a registered Canadian judgment may be enforced in [enacting province or territory] as if it were a judgment of, and entered in, the [superior court of unlimited trial jurisdiction in the enacting province or territory].

Time limit for registration and enforcement

5. A Canadian judgment shall not be registered or enforced under this Act

(a) after the time for enforcement has expired in the province or territory where the judgment was made, or

(b) later than [xxx] years after the day on which the judgment became enforceable in the province or territory where it was made.

Power to stay or limit enforcement of registered judgment

6. (1) The [superior court of unlimited trial jurisdiction in the enacting province or territory] may make an order staying or limiting the enforcement of a registered Canadian judgment, subject to any terms and for any period the court considers appropriate in the circumstances, if

(a) such an order could be made in respect of a judgment of the [superior court of unlimited trial jurisdiction in the enacting province or territory] under [the statutes and the rules of court] [any enactment of the enacting province or territory] relating to creditors' remedies and the enforcement of judgments,

(b) the judgment debtor has brought, or intends to bring, in the province or territory where the judgment was made, a proceeding to set aside, vary or obtain other relief in respect of the judgment,

(c) an order staying or limiting enforcement is in effect in the province or territory where the judgment was made, or

(d) the judgment is contrary to public policy in [the enacting province or territory].

(2) The [superior court of unlimited trial jurisdiction in the enacting province or territory] shall not make an order staying or limiting the enforcement of a registered Canadian judgment on the grounds that

(a) the judge, court or tribunal that made the judgment lacked jurisdiction over the subject matter of the proceeding that led to the judgment or over the judgment debtor under

(i) principles of private international law, or

(ii) the domestic law of the province or territory where the judgment was made,

(b) the [superior court of unlimited trial jurisdiction in the enacting province or territory] would have come to a different decision on a finding of fact or law or on an exercise of discretion from the decision of the judge, court or tribunal that made the judgment, or

(c) a defect existed in the process or proceeding leading to the judgment.

Interest on registered judgment

7. (1) Interest is payable on a registered Canadian judgment as if it were a judgment of the [superior court of unlimited trial jurisdiction in the enacting province or territory].

(2) For the purpose of calculating interest payable under subsection (1), the amount owing on the registered Canadian judgment is the total of

(a) the amount owing on that judgment on the date it is registered under this Act, and

(b) interest that has accrued to that date under the laws applicable to the calculation of interest on that judgment in the province or territory where it was made.

Recovery of registration costs

8. A judgment creditor is entitled to recover, as if payable under the registered Canadian judgment, all costs, charges and disbursements

(a) reasonably incurred in the registration of a Canadian judgment under this Act, and

(b) taxed, assessed or allowed by [the proper officer] of the [superior court of unlimited trial jurisdiction in the enacting province or territory].

Judgment creditor's other rights not affected by registration

9. Neither registering a Canadian judgment nor taking other proceedings under this Act affects a judgment creditor's right

(a) to bring an action on the Canadian judgment or on the original cause of action, or

(b) to register and enforce the Canadian judgment under the [Reciprocal Enforcement of Judgments Act].

Power to make regulations

10. Lieutenant Governor in Council may make regulations [rules of court]

(a) prescribing the fee payable for the registration of a Canadian judgment under this Act,

(b) respecting additional information or material that is to be filed in relation to the registration of a Canadian judgment under this Act,

(c) respecting forms and their use under this Act, and

(d) to do any matter or thing required to effect or assist the operation of this Act.

Application of Act

11. This Act applies to

(a) a Canadian judgment made in a proceeding commenced after this Act comes into force, and

(b) a Canadian judgment made in a proceeding commenced before this Act comes into force and in which the judgment debtor took part.

APPENDICE J

(See page 33)

LOI UNIFORME SUR L'EXÉCUTION DES JUGEMENTS CANADIENS

Table des matières

LOI UNIFORME SUR L'EXÉCUTION

Définitions

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

créancier judiciaire Personne ayant le droit d'exécuter un jugement canadien. (''judgment creditor'')

débiteur judiciaire Personne tenue responsable aux termes d'un jugement canadien. (''judgment debtor'')

jugement canadien

a) jugement ou ordonnance définitif qu'un tribunal d'une province ou d'un territoire du Canada, à l'exception de (inscrire le nom de l'autorité législative en cause), a rendu dans une instance civile;

b) ordonnance définitive qu'un tribunal d'une province ou d'un territoire du Canada, à l'exception de (inscrire le nom de l'autorité législative en cause), a rendue dans l'exercice de fonctions judiciaires et qui est exécutoire de la même manière qu'un jugement de la cour supérieure de compétence illimitée de la province ou du territoire où l'ordonnance a été rendue;

c) ordonnance qu'un tribunal d'une province ou d'un territoire du Canada, à l'exception de (inscrire le nom de l'autorité législative en cause), a rendue en vertu de l'article 725 ou 726 du Code criminel (Canada) et qui est enregistrée de la même manière qu'un jugement de la cour supérieure de compétence illimitée de la province ou du territoire où l'ordonnance a été rendue. (''Canadian judgment'')

jugement candien enregistré Jugement canadien enregistré en vertu de la présente loi. (''registered Canadian judgment'')

Droit d'énregistrer un jugement

2. (1) Sous réserve de l'article 5, un jugement canadien portant sur le paiement d'une somme peut être enregistré en vertu de la présente loi en vue de son exécution, à moins qu'il ne s'agisse:

a) soit d'un jugement rendu à l'égard d'aliments, notamment une ordonnance exécutoire en vertu de (loi applicable de l'autorité législative en cause);

b) soit d'un jugement relatif au paiement d'une somme à titre de peine ou d'amende imposée à la suite d'une infraction.

(2) Un jugement canadien qui prévoit le paiement d'une somme et d'autres dispositions peut être enregistré en vertu de la présente loi uniquement à l'égard des dispositions relatives au paiement de la somme.

Procédure d'enregistrement des jugements

3. L'enregistrement d'un jugement candien en vertu de la présente loi se fait par paiement des droits réglementaires et par dépôt, au greffe de (inscrire le nom de la cour supérieure de compétence illimitée de l'autorité législative en cause), des documents suivants:

a) un double du jugement certifié conforme par un juge, un registraire, un greffier ou par un autre auxiliaire de la justice compétent du tribunal judiciaire ou administratif qui a rendu le jugement;

b) les renseignements ou les documents supplémentaires requis par règlement.

Effet de l'enregistrement

4. Sous réserve des articles 5 et 6, un jugement canadien qui a été enregistré peut être exécuté dans (inscrire le nom l'autorité législative en cause) comme s'il s'agissait d'un jugement de (inscrire le nom de la cour supérieure de compétence illimitée de l'autorité législative en cause) qui y était inscrit.

Délai d'enregistrement et d'exécution

5. Un jugement canadien ne peut ni être enregistré ni étre exécuté en vertu de la présente loi:

a) après l'expiration du délai d'exécution dans la province ou le territoire où le jugement a été rendu;

b) plus de (xxx) ans après la date à laquele le jugement est devenu exécutoire dans la province ou le territoire où il a été rendu.

Suspension ou restriction de l'exécution d'un jugement enregistré

6. (1) La (inscrire le nom de la cour supérieure de compétence illimitée de l'autorité législative en cause), peut rendre une ordonnance suspendant ou restreignant l'exécution d'un jugement canadien enregistré, sous réserve des conditions et pendant le délai qu'elle juge indiqués les circonstances, si selon le cas:

a) l'ordonnance pourrait être rendue relativement à un jugement de (inscrire le nom de la cour supérieure de compétence illimitée de l'autorité législative en cause), en vertu de (indiquer les lois et les règles du tribunal) (indiquer les textes législatifs et réglementaires de l'autorité législative en cause) ayant trait aux recours des créanciers et à l'exécution des jugements;

b) le débiteur judiciaire a intenté ou a l'intention d'intenter dans la province ou le territoire où le jugement a été rendu une instance afin de faire annuler ou de faire modifier le jugement ou d'obtenir d'autres mesures de redressement;

c) une ordonnance suspendant ou restreignant l'exécution est en vigueur dans la province ou le territoire où le jugement a été rendu;

d) le jugement est contraire à l'ordre public dans (indiquer l'autorité législative en cause).

(2) La (inscrire le nom de la cour supérieure de compétence illimitée de l'autorité législative en cause) ne peut rendre une ordonnance suspendant ou restrignant l'exécution d'un jugement canadien enregistré au motif que, selon le cas:

a) le juge, le tribunal judiciaire ou le tribunal administratif qui a rendu le jugement n'avait pas compétence à l'égard de l'objet de l'instance qui a donné lieu au jugement ou à l'égard du débiteur judiciaire en vertu:

(i) soit des principes de droit international privé,

(ii) soit du droit interne de la province ou du territoire où le jugement a l'été rendu;

b) la (inscrire le nom de la cour supérieure de compétence illimitée de l'autorité législative en cause) aurait rendu une décision différente relativement à une conclusion de fait ou de droit ou à l'exercice d'un pouvoir discrétionnaire;

c) la procédure ou l'instance donnant lieu au jugement était entachée d'un vice de forme.

Intérêt payable à l'égard d'un jugement enregistré

7. (1) L'intérêt est payable à l'égard d'un jugement canadien enregistré comme s'il s'agissait d'un jugement de (inscrire le nom de la cour supérieure de compétence illimitée de l'autorité législative en cause).

(2) Aux fins du calcul de l'intérêt payable, le montant dû à l'égard du jugement canadien enregistré correspond au total des sommes suivantes:

a) le montant dû à l'égard du jugement à la date de son enregistrement en vertu de la présente loi;

b) l'intérêt couru à la date d'enregistrement en vertu des lois applicables au calcul de l'intérêt relatif au jugement dans la province ou le territoire où il a été rendu.

Recouvrement des frais d'enregistrement

8. Le créancier judiciaire a le droit de recouvrer touts les frais et, débours qui:

a) d'une part, ont été entraînés par l'enregistrement d'un jugement canadien en vertu de la présente loi;

b) d'autre part, ont été liquidés, évalués ou attribués par (inscrire le nom de l'auxiliaire de la justice compétent) de (inscrire le nom de la cour supérieure de compétence illimitée de l'autorité législative en cause).

Les frais et débours sont recouvrés comme s'ils étaient payables en vertu d'un jugement canadien enregistré.

Protection des droits du créancier judiciaire

9. Ni l'enregistrement d'un jugement canadien ni l'introduction de procédures en vertu de la présente loi ne portent atteinte au droit qu'a le créancier judiciaire:

a) soit d'intenter une action relativement au jugement canadien ou à la cause d'action initiale;

b) soit d'enregistrer et d'exécter le jugement canadien en vertu de la (Loi sur l'exécution réciproque des jugements).

Règlements

10. Le lieutenant-gouverneur en conseil peut, par règlement (règles du tribunal):

a) fixer les droits payables pour l'enregistrement d'un jugement canadien en vertu de la présente loi;

b) prendre des mesures concernant les renseignements ou les documents supplémentaires qui doivent être déposés relativement à l'enregistrement d'un jugement canadien en vertu de la présente loi;

c) prendre des mesures concernant les formules et leur utilisation en vertu de la présente loi;

d) prendre toute mesure d'application de la présente loi.

Application de la Loi

11. La présente loi s'applique:

a) à un jugement canadien rendu dans une instance introduite après son entrée en vigueur;

b) à un jugement canadien rendu dans une instance introduite avant son entrée en vigueur it à laquelle le débiteur judiciaire a pris part.

Document: 840-587/063

APPENDIX K

(See page 34)

UNIFORM LAW CONFERENCE OF CANADA

Department of Justice Report to the Uniform Law Conference

Federal

REGINA, Saskatchewan
August 11-16, 1991

DEPARTMENT OF JUSTICE
REPORT TO THE UNIFORM LAW CONFERENCE

Regina, August 11-16, 1991

Since the last meeting of the Uniform Law Conference, Canada participated actively in the activities of The Hague Conference on Private International Law, UNCITRAL and UNIDROIT. Also, the Department of Justice consulted regularly with the provinces on various conventions adopted by those organizations as well as 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 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 has been reconstituted in 1990, is now composed of five regional representatives, one each from the western provinces, the Atlantic provinces, British Columbia, Ontario and Quebec and, in addition, one private practitioner. We ensure that at least one member of the Group is also a member of the Uniform Law Conference. The Group has met on two occasions since last August: in November 1990 and March 1991. The agenda for these meetings was very full and gave rise to a very productive exchange of views on conventions of The Hague Conference, UNIDROIT and UNCITRAL, the Council of Europe and the Organization of American States.

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 on Canada, the Department of Justice of Canada distributes a Status Chart of Canadian Activities in Private International Law. This Chart is distributed twice a

year to give updated information on all conventions in private international law to which Canada is a party or is considering.

The last Chart was sent in June 1991 to all provinces and territories as well as to bar associations, law societies, and universities.

LATEST DEVELOPMENTS IN PRIVATE INTERNATIONAL LAW

The main event that happened over the last year, as far as Canada is concerned, is our accession to the United Nations Convention on Contracts for the International Sale of Goods in April, 1991. On this occasion, the Convention has been extended to the provinces that have enacted the necessary implementing legislation. Since Saskatchewan has adopted its own Act, the Convention will be extended to this province in the near future; this will be done with respect to Yukon and Québec when these administrations proceed to enact their implementing legislation.

We should also note the adoption by a diplomatic Conference of the United Nations of the Convention on Liability of Operators of Transport Terminals in International Trade.

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Hague Conference on Private International Law now has thirty-seven member States.

This year, Canada participated in the Special Commission on the Elaboration of a Convention on Inter-country Adoption from April 22 to May 4, 1991. We will forward to the provinces the report of the Canadian delegation to the commission on inter-country adoption in the weeks ahead.

The Special Commission for the Elaboration of a Convention on Inter-country Adoption

Under the chairmanship of Mr. T. B. Smith, the Commission has met twice, and the next meeting will be held in February 1992, with the objective of adopting a convention in 1993.

There is such a crying need for a convention on inter-country adoption, that even States that are not members of the Hague Conference but which are important sources of children for adoption, are participating in its drafting. There is a profound desire to establish a system for administrative co-operation so that there is greater legal certainty and transparency in the inter-country adoption process.

We will consult the appropriate authorities in the provinces throughout the negotiation process in order to develop a convention that will satisfy their concerns as far as possible.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters

This convention has been in force since May 1, 1989. The rules of practice in all jurisdictions have been amended to comply with it.

Convention on the Law Applicable to Trusts and their Recognition

Five provinces, New Brunswick, Prince Edward Island, British Columbia, Newfoundland and Alberta, have already adopted implementing legislation following the Uniform Act adopted by the Uniform Law Conference in 1987. Consultation continues with the other provinces, and we hope Canada will be in a position to ratify this convention in the near future.

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

So far we have received the support of six governments, and we are awaiting replies from the others. Alberta, on its part, has asked for some clarification about pre-trial discovery on non-parties; the matter has been brought to the attention of all concerned and consultation continues. We hope that the Uniform Law Conference will update the Tallin report as this will facilitate the review of this Convention so that Canada may become party to it as soon as possible.

There is no federal State clause in the Convention, so we must have the unanimous support of all the provinces and territories in order to become party to it.

Convention Abolishing the Requirement of Legalization for Foreign Public Documents

By letter of May 8, 1990, and on the recommendation of the Advisory Group on Private International Law, we submitted this Convention to the provinces and territories in order to have their opinion on its implementation. Six provinces and one territory have already expressed their support for the Convention, as others carry on a more detailed study. A report prepared by Ontario, when completed, will be distributed to all jurisdictions.

Again, there is no federsl State clause in the Convention, so we must have the unanimous support of all the provinces and territories in order to become party to it.

Convention on the Law Applicable to the Succession to the Estates of Deceased Persons

By letter of July 10, 1991, the Minister of Justice submitted the Convention to her provincial counterparts for a review in order to determine whether it should be implemented in Canada. The reports of the "Rapporteur special" and the Canadian expert have also been sent to the provinces.

Convention on the Civil Aspects of International Child Abduction

Provinces will soon be consulted respecting th accession of new states (New Zealand, Mexico) to that Convention before Canada approves such accessions. Twenty-four States are now parties to that convention.

UNCITRAL

The United Nations Commission on International Trade Law is the "core legal body within the United Nations system in the field of international trade law" and has the mandate to further the progressive harmonization and unification of the law of international trade.

The membership of UNCITRAL is limited at present to thirty-six States, structured so as to be representative of the various geographic regions and the principal economic and legal systems of the world. Observers from States and international governmental and

non-governmental organizations are welcome to participate at meetings of UNCITRAL and of its working groups. Canada is now a member of UNCITRAL.

The Commission now has three working groups: the Working Group on the New International Economic Order, the Working Group on International Payments and the Working Group on International Contract Practices.

Uncitral Work of Current Interest

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

Canada has acceded to the Convention on April 23, 1991, extending it to eight provinces and one territory that had enacted at that date necessary implementing legislation, namely, Nova Scotia, Prince Edward Island, Ontario, New Brunswick, the Northwest Territories, Manitoba, Newfoundland, Alberta and British Columbia. Federal implementing legislation was adopted in February, 1991.

Saskatchewan has recently enacted its own legislation in June and a declaration of extension will be completed in the near future. The Convention will come into force on May 1, 1992.

Draft Convention on International Bills of Exchange and International Promissory Notes

The UNCITRAL draft Convention on International Bills of Exchange and International Promissory Notes was adopted by the General Assembly of the United Nations on December 9, 1988. 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, and the United States and the U.S.S.R. have also done so. Guinea has acceded to it. The Convention will come into force after ten ratifications or accessions. In order to implement it in Canada, federal legislation would be required.

Model Law on International Credit Transfers

At the 24th session in Vienna in June, 1991 the Commission reviewed the Model Law on International Credit Transfers (formerly

Model Law on Electronic Funds Transfer) that had been prepared by the Working Group on International Payments and presented to the Commission for adoption. The review was not completed and will be taken up at the 25th session in 1992.

Stand-by Letters of Credit and Guarantees

The Working group on International Contract Practices recommended to the Commission that it should undertake the drafting of a model uniform law on stand-by letters of credit and guarantees which could be adopted by States. The Working Group began this work at its session in New York in February 1990 and is now pursuing it. The next meeting will be held in Vienna in November 1991.

Convention on Liability of Operators of Transport Terminals in International Trade

At its 22nd session at Vienna during May 1989, UNCITRAL adopted a draft Convention on Liability of Operators of Transport Terminals in International Trade and recommended to the General Assembly of the United Nations that a diplomatic conference be held with a view to its adoption by the United Nations. This conference was held in Vienna in April 1991 and the Convention was adopted there.

The purpose of the Convention is to establish uniform limits of liability for the operators of transport terminals engaged in international trade. The Convention does not apply to the carriage of goods, but rather to their transfer by, for example, stevedores or air or land terminal operators. The liability regime is similar to that established under the Montreal Protocols of the Warsaw Convention. In addition to establishing the limits of liability, the Convention provides the operators with security interest in the goods for non-payment of charges for services rendered.

Government Procurement

Work on government procurement has been commenced by the Working Group on the New International Economic Order. It is expected that the Working Group will agree upon a model law on procurement which could be adopted by States. The project will probably take about two years to complete. This subject is considered important by developing States who often perceive their access to markets in developed States as being unnecessarily limited by governmental

procurement practices, in particular. The Department of Justice is participating very actively in the work on international procurement. The Department has consulted with federal and provincial government departments and with industry as the work progressed. The next session of the Working Group will be held in Vienna in December, 1991.

Countertrade

During its session in July, 1990, the Commission examined several draft chapters from a legal guide prepared by the UNCITRAL Secretariat on countertrade and other barter-like transactions. Other draft chapters will be considered next month at a session of the Working Group on International Payments.

UNIDROIT

The International Institute for the Unification of Private Law, known as Unidroit, is a 53-member governmental organization based in Rome, of which Canada has been a member since 1969. Current members include the Soviet Union, China, Australia, States from eastern and western Europe, North and South America and Africa. The mandate of Unidroit is to harmonize and coordinate the private law of States by preparing draft laws and conventions to establish uniform law and improve international relations in the field of private law. Canada 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 on International Factoring. Both Conventions were adopted, and twelve states have thus far signed them: Belgium, Czechoslovakia, Finland, France, Ghana, Guinea, Italy, Nigeria, Morocco, the Philippines, Tanzania and the United States. The Federal Republic of Germany and the United Kingdom have signed the Convention on International Factoring, whereas Panama is a signatory of the Convention on International Financial Leasing. Canada has not yet signed the Conventions.

The Department of Justice is consulting the provinces, territories and interested private sector groups and experts on the desirability of Canada becoming a party to the Conventions.

Unidroit's Work Program

Unidroit has a number of projects on its current Work Program, listed in the headings that follow:

Security Interests in Mobile Equipment

The subject of security interests in mobile equipment is of particular interest to Canada. Following on the momentum established at the 1988 Diplomatic Conference on Leasing and Factoring, Canada proposed that Unidroit look into the desirability and feasibility of developing uniform laws on security interests in mobile equipment. Unidroit agreed and requested Professor Ronald Cuming of the University of Saskatchewan to prepare a report on the subject.

In his report, Professor Cuming stated that the conflict of laws rules of western European and North American jurisdictions are inadequate to meet the needs of those who engage in modern financing transactions involving collateral in the form of mobile equipment (such as trucks and construction equipment). He concluded that there is a need to establish a legal framework within which the financing of high-value mobile equipment can function effectively, although it would not be necessary to develop a complete code on international secured transactions law.

The Unidroit questionnaire circulated last year in commercial and financial circles to elicit further information on this matter has prompted numerous replies. These replies have been analyzed by the Unidroit Secretariat.

Principles for International Commercial Contracts

The Department has also followed the progress of the Unidroit Working Group that was established to develop an international instrument on principles for international commercial contracts. The Group is not attempting to develop a convention or any international instrument that would place obligations on States. Rather, they are drafting rules in non-technical language that incorporate concepts of the various legal systems around the world with a view to developing a

document that could assist negotiators or arbitrators who deal with international commercial contracts

The Working Group is a non-governmental body composed of 13 experts representing various legal systems. The Department is kept informed of the Group's progress by Professor Paul-André Crépeau, a member of the Group.

The Hotelkeeper's Contract

Country-wide consultations carried out last year by the Department indicated a firm opposition to the new draft convention on the hotelkeeper's contract.

The lack of real or major problems with respect to the hotelkeeper's contract, along with the existence of adequate legal rules, were put forward in support of this position.

In light of these reactions and the study conducted by the Department, Canada informed Unidroit that it would find it difficult to support the continuation of this work by Unidroit.

International Protection of Cultural Property

The first session of the Committee of governmental experts was held in Rome in May 1991 to study the preliminary draft Unidroit convention on stolen of illicitly exported cultural property.

The scope of this preliminary draft comprises demands for the recovery of stolen cultural property and demands for the recovery of cultural property exported from the territory of a reciprocating State in violation of its export legislation.

The general rule with respect to stolen cultural 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 rsepect to illegally exported property, the basic principle is that the courts or other competent government authorities of the requested State return the property to the requesting State, subject to certain conditions regarding the eligibility of the demand and on condition that an interest of the requesting State has been undermined.

The second session of the committee will likely take place in January 1992.

The Franchising Contract

Unidroit has pursued its cooperation on this matter with the international franchising committee of the business law section of the International Bar Association. The IBA intends to draft a guide on the franchising contract, which would contain, for instance, examples of key clauses to be inserted in a franchising contract.

Relations Between Principal and Agent in the International Sale of Goods

Unidroit commissioned a few years ago a study on this subject from Professor Dietrich Maskow of the Institute of Potsdam-Babelsberg. Professor Maskow concluded in his study that work should be undertaken with a view to concluding a "Convention on Contracts of Commercial Agency in the International Sale of Goods." The Convention would complement the Unidroit Convention on Agency in the International Sale of Goods, which was adopted in 1983 although it is not yet in force. In view of the limited response of the Member States in relation to the Maskow study and to the preliminary draft Convention drawn up by him on commercial agency in the international sale of goods, it has recently been decided by Unidroit that no further action on the subject was justified at the present time.

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. The Convention has recently come into force in Newfoundland and will soon be in Alberta as soon as the extension decree is adopted by the United Kingdom.

We also completed the consultation with the provinces and territories concerning the negotiation of a convention with France on mutual legal assistance. The majority of them supported the negotiation, and we are now preparing a draft convention to submit to France.

By letter of September 28, 1990, we submitted to the provinces and territories two Council of Europe conventions on mutual legal assistance: the European Convention on the Service Abroad of Documents Relating to Administrative Matters and the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters. These two Conventions would complete the mutual legal assistance regime of The Hague Conventions on the Taking of Evidence and Service Abroad. So far, five provinces have informed us that they have initiated the necessary consultations.

Organization of American States

After consulting the Advisory Group on Private International Law, the Inter-american Convention on International Commercial Arbitration will not be submitted to the provinces for a review at this moment.

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 established by the Department of Justice to advise the Department of 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. More particularly, 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 see 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.

We hope to get the update by the Uniform Law Conference on the Tallin report concerning the Convention on the taking of evidence abroad in order to facilitate the implementation of that Convention. Once we receive the support of the provinces on UNIDROIT Conventions on Leasing and Factoring, we will ask the Conference to draft the implementing legislation.

STATUS CHART ON CANADIAN ACTIVITIES IN PRIVATE INTERNATIONA LAW (August 1991)

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEEDED
THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW	Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961)	Reminder by letter of 20-02-1991 seeking reply to letter 8-05-1990	No federal State lause No reservations	Implementation in all provinces and territories	————————	————————	Reply to letter of 20-02-1991 as to implementation
	Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965)	Accession 26.9.88 In force 1.5.89	No federal State clause Declarations against certain forms of service, regarding translation requirements and delays	Admendment to rules of court in all jurisdictions	Discussed: Report 1979	Amendments to rules of court in all jurisdictions	————————

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEEDED
	Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970)	Reminder and further consultation with provinces to establish final position on accession	No federal State clause Reservations regarding language requirements, delays and pretrial discovery	Implementation in all jurisdictions	Recommended consultation with provinces and territories Requested update of information on provincial and territorial laws	————————	Reply to reminder and further consultation by 30-08-1991
	Convention on the Civil Aspects of International Child Abduction	In force throughout Canada 1.4.88 Initiation of consultation on accession of New Zealand	Federal State clause Reservation on legal aid	Implementing legislation in provinces and territories	Uniform Act 1982	All provinces and territories with reservation; no reservation in Man. (1983-1988)	Consultation on Canadian acceptance of accession of New Zealand and Mexico

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEEDED
	Convention on the Law Applicable to Trust and on Their Recognition (1985)	Signed 11.10.88 Ratification suspended pending debate on convention in Ontario	Federal State clause Declaration to include trusts created judicially Reservations: to allow mandatory rules; to exclude trusts governed by the law of a non-contracting Stare; to exclude retroactive effect	Implementing legislation in provinces and territories	Uniform Act 1988	With declaration: P.E.I. (1988) B.C. (1989) Nfld. (1989) with declaration and qualified reservation on retroactive effect: N.B. (1988) Alta. (1990)	Implementing legislation in N.S., Qc., Ont., Man., Sask., Y.T., and N.W.T.
	Convention on the Law Applicable to Succession to the Estates of Deceased Persons (1988)	Submitted to provinces and territories as to implementation	Federal State clause Reservations regarding succession agreements, applicable law of non-contracting States, choice of law	Implementing legislation in provinces and territories	————————	————————	Reply as to implementation

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEEDED
INTERNATIONAL CIVIL AVIATION ORGANISATION	Convention on the International Recognition of Rights in Aircraft (1948)	Support from all provinces and territories except Qc., and Nfld. Federal provincial and territorial draft bills finalized	No federal State clause	Implementing legislation in all jurisdictions	————————	N.S. (1988) P.E.I. (1988)	Indication of support from Qc., and Nfld.
INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)	Convention Providing a Uniform Law on the Form of an International Will (1973)	Accession 1978 for Man. and Nfld extended to Ont., Alta. (1978) and to Sask. (1982)	Federal State clause	Provincial territorial implementing legislation	————————	Alta. (1976) Man. (1975) Nfld (1975-1976) Ont. (1977) Sask (1980-1981)	Consultation with remaining provinces and territories on extension of Convention

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEEDED
	Convention on Agency in the International Sale of Goods (1983)	Not yet in force Canada has not signed nor acceded	Federal State clause Declarations: regarding States with similar rules, written authorities, applicable law, scope of the Convention and organisations not considered agents	Implementing legislation in all jurisdictions	————————	————————	Consultation with Advisory Group on Private International Law and provinces, territories and business groups on desirability of Canada becoming party after accession to Vienna Sales Convention
	Convention on International Factoring (1988)	Not in force Canada has not signed nor acceded Letters/ consultation provinces territories and industries (8-04-91)	Federal State clause Declaration: Non-applicability of convention between States with similar rules, certain assignments ineffective against debtor.	Implementing legislation in all jurisdictions	Was requested to draft uniform act	————————	Replies from the provinces the territories and industry to the letter of 8-04-1991

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEEDED
	Convention on International Financial Leasing (1988)	Not in force Canada has not signed nor acceded Letters/ consultation provinces, territories and industries (8-04-91)	Federal State clause Declaration: non-applicability of Convention between States with similar rules; substitution of domestic law in certain cases	Implementing legislation in all jurisdictions	Was requested to draft uniform act	————————	Replies from the provinces the territories and industry to the letter of 8-04-91
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)	In force throughout Canada 10.8.1986	No federal State clause	Implementing legislation in all jurisdictions	Uniform Act 1985	All jurisdictions 1986	————————

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEEDED
	Convention on Contracts for the International Sale of Goods (Vienna Sales Convention 1980)	Accession on April 23, 1991 with reservation to 1.1b) for B.C. Entry into force on May 1, 1992	Federal State clause Reservations: to exclude Part II or Part III, to exclude application between States with similar rules, to exclude 1.1.b), to allow only written contracts	Implementing legislation in provinces and territories and federal legislation	Uniform Act 1986	N.S. (1988) P.E.I. (1988) Ont. (1988) N.W.T. (1988) N.B. (1989) Man. (1989) Nfld. (1989) Alta. (1990) B.C. (1990) with reservation to 1.1b) Sask. (1991) Can. (1991)	Implementing legislation in Qc., Y.T
	Model Law on International Commercial Arbitration	Adopted by UNCITRAL	————————	Implementing legislation in all jurisdictions	Uniform Act 1986	All jurisdictions 1986-1988	————————

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEEDED
	United Nations Convention on Liability of Operations of Transport Terminals in International Trade	Adopted April 18, 1991, opened for signature until April 30, 1992	Federal State clause	Implementing legislation in all jurisdictions	————————	————————	Further consultations with provinces, industry and Advisory Group on Private International Law on implementation prospects
	Convention on International Bills of Exchange and International Promissory Notes (1988)	Adopted by the U.N. General Assembly December 9, 1988 Signed in Canada December 7, 1989	Federal State clause	Federal legislation only	————————	————————	Adoption of federal implementing legislation and ratification of Convention

ORGANISATION	ACTIVITY	STATUS	SPECIAL CLAUSES	REQUIRED LEGISLATION	UNIFORM LAW CONFERENCE	ADOPTED LEGISLATION	ACTION NEEDED
COUNCIL OF EUROPE	European Convention on the Service Abroad of Documents Relating to Administrative Matters (1977)	Submitted to provinces and territories with respect to implementation Letter: 29.9.1990	No federal state clause No reservations possible	Implementing legislation in all provinces and territories	————————	None	Reply form provinces and territories as to implementation
	European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (1978)	Submitted to provinces and territories with respect to implemention Letter: 28.9.1990	No federal state clause Reservation on exclusive use of information	Implementing legislation in all provinces and territories	————————	None	Reply from provinces and territories as to implementation
BILATERAL CONVENTIONS	Canada-UK Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (1984)	Declaration of extension to Nfld.	Federal State clause	Federal, provincial and territorial implementing legislation	Uniform Act 1983	B.C. (1984) Man. (1984) N.S. (1984) N.B. (1984) Ont. (1984) Y.T. (1984) P.E.I. (1987) N.W.T. (1988) Sask. (1988) Nfld. (1986-1989) Alta. (1990) Can. (1984)	Implementing legislation in Qc. Declaration of extension to Alta

OTTAWA CONTRACT FOR CANADIAN ACTIVITIES IN PRIVATE INTERNATIONAL LAW

ORGANISATION:	OTTAWA CONTACT:	TELEPHONE NUMBER:
The Hague Conference on Private International Law	Louise Lussier	957-7949
International Civil Aviation Organisation	Gilles Lauzon	957-4961
International Institute for the Unification of Private Law (Unidroit)	Louise Lussier	957-7949
United Nations Commission on International Trade Law (Uncitral)	Lewis Levy Ross Hornby Louise Lussier	957-4958 957-4967 957-7949
Bilateral Conventions (Canada-UK Convention on Reciprocal Recognition and Enforcement of Judgements)	Louise Lussier	957-7949
Council of Europe Conventions	Louise Lussier	957-7949

APPENDIX K

(See page 34)

REPORT OF
PRIVATE INTERNATIONAL LAW COMMITTEE

John D. Gregory
Regina, August 15, 1991

REPORT OF PRIVATE INTERNATIONAL LAW COMMITTEE

Composition of the Committee

The Private International Law Committee was reconstituted in 1990. Its members are Basil Stapleton, outgoing president of the Uniform Law Conference, Christiane Verdon, General Counsel, Constitutional and International Law, Department of Justice (and Chair of the Advisory Group on International Law), Raymond Moore, Legislative Counsel of Prince Edward Island, Denise Gervais, Ministere de la justice, Quebec, Ron Perozzo, Ministry of the Attorney General, Manitoba, and myself as Chair. There is a substantial overlap beween the members of the Committee and those of the Advisory Group on International Law. In addition, three members of the Committee also serve on the Civil Justice Committee, an association of government policy lawyers that report to the federal/provincial/territorial deputy ministers of justice.

Activities in 1990/91

The Committee met once during the year, in November 1990 in Ottawa. The main topic for discussion was how subjects are referred to the Private International Law Committee. Views were expressed similar to those governing references to the Uniform Law Section, namely that a political interest or political will should be demonstrated concerning the subject that is to be referred to the Committee. Private international law matters are often very technical, and uniform laws on the subject can therefore require a good deal of work. These tasks should not be assumed unless the product is likely to be of use to the jurisdictions in the short term.

Current Work:

The only outstanding matter of business before the International Law Committee is to update a report on the Hague Convention on taking evidence abroad. About a decade ago Rae Tallin compiled a summary of provincial rules concerning the taking of evidence that would be affected if the Hague Convention were to be implemented in Canada. Basil Stapleton is in the process of updating this report to take into account changes in rules and the law in various jurisdictions since the Tallin Report was prepared.

It is hoped that this review can be completed during the current year. That report will be circulated to the jurisdictions when it is available.

The Evidence Convention may or may not require a uniform statute. A summary of the minimal acceptable rule changes may be appropriate disposition of the Convention itself for uniform law purposes.

Future Work of the Committee:

A number of Conventions have been completed and recently referred to the jurisdictions for their views on implementation. Some of these will find their way on to the agenda of the Private International Law Committee and through it to the Conference, in the next couple of years. The most likely candidates are these:

(a) *The Ottawa Conventions on International Financial Leasing and International Factoring:*

These Conventions, sponsored by UNIDROIT, were completed at a diplomatic convention in Ottawa in 1988. The federal government has recently referred them to the provinces and territories for their views. Since there is little commercial activity in Canada in the area covered by either of the Conventions, Canada's accession to them is not urgent. The interest in the Conventions is more to demonstrate our Canada's participation in the private international law community.

(b) *The International Convention on the Settlement of Investment Disputes (ICSID):*

This Convention is a product of the World Bank. It provides a framework for arbitration between private sector investors and the national governments of countries in which they invest. The Convention has been surrounded by some controversy, with allegations that it may favour developed countries' interests over those of developing countries. However, the Convention itself merely provides the framework for arbitrating investment disputes. It does not require any particular dispute to be submitted to arbitration under the Convention. The federal government has recently referred this Convention as well to the provinces, and it seems likely that the provinces and territories will accept it. A large number of developed and developing countries are already parties to this Convention.

(c) *The Hague Convention on the Abolition of Legalization of Documents:*

This Convention dispenses with some of the formalities involved in using official legal documents in foreign countries. The requirements it imposes on contracting states are administrative rather than legislative in nature. The Committee will examine the Convention to see if any work is needed from the Uniform Law Conference on it.

(d) *The Hague Convention on the Law Applicable to Successions:*

This Convention was recently circulated by the federal government for comment by the jurisdictions. The Convention contains some novel provisions for choosing the law applicable to estates, the most striking being the doctrine of "unity": all the assets of the deceased, wherever situated, and of whatever kind (real or personal), would be governed by one law. The Convention also makes clear for the first time the ability of the testator to choose among (a limited number of) applicable laws to govern the estate. The Convention is likely to raise controversy among the practicing Bar, and no doubt many jurisdictions will refer it to the Bar Association or other representatives of the profession before giving Ottawa an answer. For this reason this Convention is unlikely to come before the Uniform Law Conference in the next year.

(e) *Other Conventions in Progress:*

Reference may be made to the chart of Conventions either in negotiation or in consideration for adoption by Canada, as distributed from time to time by the Department of Justice.

APPENDIX L

(See page 34)

UNIFORM LAW CONFERENCE

Uniform Privacy Act
Draft Act and Commentaries

Saskatchewan

Saint John, New Brunswick
August 12-17, 1990

UNIFORM PRIVACY ACT

Draft Act and Commentaries

1. This Act may be cited as The Privacy Act.

2 It is a tort actionable without proof of damage for a person to violate the privacy of an individual.

Commentary: The legislation constitutes invasions of privacy as a tort. No definition of privacy is included in the Act (but see Section 3 which stipulates that certain defined actions are *prima facie* breaches of privacy). Instead, it is expected that the courts will give substance to the new tort. Any attempt at definition would risk straightjacketing the development of the tort. This approach is intended to give broad application to the legislation, making it possible to deal with new threats to privacy as they arise. On the other hand, such an approach can be no substitute for more specific legislation such as credit reporting legislation which protects privacy by regulation of particular activities that present threats to privacy.

The privacy of the "individual" rather than the "person" is protected by the legislation. Privacy is an attribute of individuals, or natural persons, not artificial persons such as corporations. In many cases however, an activity directed at a corporation will compromise the privacy of its officers, who may bring an action.

It would be inappropriate to make actual damages the gist of the new tort. By its very nature, privacy is not a thing which can readily be given a monetary value in many cases. In this respect, it is similar to reputation, and the new tort is analogous to defamation, which is actionable without proof of damages.

3 Without limiting the generality of section 2, proof that there has been:

(a) auditory or visual surveillance of an individual, his residence or vehicle, by any means including eavesdropping, watching, spying, besetting or following, and whether or not accomplished by trespass;

(b) listening to or recording of a conversation in which an individual participates, or listening to or recording of messages to or from that individual passing by means of telecommunications, otherwise than as a lawful party thereto;

(c) publication of letters, diaries or other personal documents of the individual; or

(d) dissemination of information concerning an individual that has been gathered for commercial or governmental purposes where

(i) the dissemination was contrary to statute; or

(ii) the information was provided confidentially by the individual, and was disseminated for purposes other than the purpose for which it was provided

is prima facie proof of an invasion of privacy of an individual.

Commentary: Although the parameters of the tort of privacy are left open, the effectiveness of the legistlation is enhanced by identifying certain activities as *prima facie* breaches of privacy. The list contains clear cases of invasions of privacy. If too much doubt surrounded the scope to the *prima facie* cases, potential plaintiffs would be deterred.

The list is drawn from recent experience; it identifies some of the cases in which a broad body of opinion recognizes a threat to privacy in contemporary society. Thus 3 (a) and (b) deal with surveillance, an activity that has become more troublesome with advances in electronic technology. 3(d) is directed to data banks, a ''growth industry'' spurred by computer technology, and still inadequately regulated.

Section 3 must be read in conjunction with Section 4, whch provided defences.

4. (1) An act, conduct or publication is not a violation of privacy where:

(a) it is specifically consented to, either expressly or impliedly by some individual entitled to consent thereto, and the court is satisfied that the consent was freely given;

(b) it was reasonably incidental to the exercise of a lawful right of defence of person or property;

(c) it was authorized or required by or under a law in force in the province or by a court or any process of a court,

providing that no authorization pursuant to statute shall provide a defence unless the statute specifically authorizes the act, conduct, or publication for the purpose for which it was undertaken;

(d) it was that of:

(i) a peace officer acting in the course and within the scope of his duty; or

(ii) a public officer engaged in an investigation in the course and within the scope of his duty;

and was neither disproportionate to the gravity of the matter subject to investigation nor committed in the course of trespass, or other unlawful act;

(e) it was reasonable having regard to any relationship, whether domestic or otherwise, between the parties to the action; or

(f) the defendant neither knew or reasonably should have known that the act, conduct or publication constituting the violation would have violated the privacy of any individual.

(3) A publication of any matter is not a violation of the privacy where:

(a) there were reasonable grounds for belief that the publication was in the public interest, or

(b) the publication was privileged in accordance with the rules of law relating to defamation;

but this subsection does not extend to any other act or conduct whereby the matter published was obtained if such other act or conduct was itself a violation of privacy.

(4) In this section "court" includes any person authorized by law to administer an oath for the taking of evidence acting for the purposes for which he is authorized to take evidence.

Commentary: This section recognizes circumstances which would render acts that would otherwise be breaches of privacy unobjectionable. Some of the defences recognize circumstances that would take the case outside the scope which the notion of "privacy" is generally accepted to entail. Thus if the act was consented to, no invasion of privacy can be said to have occurred. Likewise, an act that would otherwise be an invasion of privacy may not be regarded as such if committed by a spouse or other person with a domestic relationship with the plaintiff. Some of the defences amount to justifications or excuses for invasion of privacy. Thus "public interest" is treated analogously to its treatment in defamation cases. Similarly, police officers are given protection when carrying out their investigations.

Drawing the line between an unacceptable invasion of privacy and a justified compromise of a privacy interest must in general be left to the courts. But the section anticipates some problems.

Note in particular:

(1) The term "specifically consented" is used in 4(1)(a) to oust the defence where the defendant has extracted a general consent that permits him to use information in ways not reasonably contemplated by the plaintiff.

(ii) 4(1)(c) recognizes legal authorization as a defence, but limits the defence so that vague (and probably inadequate) statutory formulas do not defeat the action.

(iii) Police officers and other investigators are afforded protection, but it is recognized that the mere existence of an investigation will not justify all invasions of privacy that can be commected to it.

5. In an action for violation of privacy, the court may as it considers just:

(a) award damages;

(b) grant an injunction;

(c) order the defendant to account to the plaintiff, for any profits that have accrued or that may subsequently accrue to the defendant by reason or in consequence of the violation;

(d) order the defendant to deliver up to the plaintiff all articles or documents that have come into his possession by reason or in consequence of the violation; or

(e) grant any other relief to the plaintiff that that appears necessary under the circumstances.

6. (1) In awarding damages in an action for violation of privacy, the court shall have regard to all the circumstances of the case, including:

(a) the nature, incidence and occasion of the act, conduct or publication;

(b) the effect of the act, conduct or publication on the health and welfare, or the social, business or financial position, of the individual or his family or relatives; and

(c) the conduct of the individual and of the defendant before and after the act, conduct or publication, including any apology or offer of amends made by the defendant.

(2) In an action for violation of privacy, the court may award punitive damages as it considers appropriate, taking into account the flagrancy of the invasion of privacy, and the conduct of the defendant.

Commentary: A breach of privacy may occasion financial loss. Clauses 5(c) and 6(1)(b) address such cases. More often, however, it is difficult to place a monetary value on the loss of privacy. Nevertheless, damage awards will often be the best way, as a matter of policy, to curtail invasions of privacy. Thus clause 5(a) gives the court a general jurisdiction to award damages, 6(1) provides some guidance in assessing damages even in cases where financial loss cannot be shown, and 6(2) permits awards of punitive damages.

In addition, injunctive and other relief is contemplated by the statute. The court must have a wide range of available remedies if it is to effectively redress the varied forms and consequences of invasion of privacy.

7. (1) The right of action for violation of privacy and the remedies under this Act are in addition to, and not in derogation of, any other right of action or other remedy available otherwise than under this Act.

(2) This section shall not be construed as requiring any damages awarded in an action for violation of privacy to be disregared in assessing damages in any other proceedings arising out of the same act, conduct or publication constituting the violation of privacy.

Commentary: The action for invasion of privacy overlaps other legal remedies. A breach of privacy may also be actionable as a breach of confidence, and some cases, as a breach of contract, for example. In general, however, the action is not a substitute for other remedies: the privacy interest is quite distinct from the interests protected by an action for breach of contract. This principle is given recognition in 7(1). On the other hand, an action for breach of confidence may protect the same interests as the action for breach of privacy. This fact is given recognition in 7(2).

8. The Crown is bound by this Act.

APPENDICE L

(Voir page 34)

LOI UNIFORME SUR LA PROTECTION DE LA VIE PRIVÉE

1 Loi sur la protection de la vie privée.

2 L'atteinte à la vie privée d'un particulier constitue un délit civil ouvant droit à poursuite, sans qu'il soit nécessaire de provuer le dommage.

3 Sans préjudice de la portée générale de l'article 2, la preuve de l'accomplissement de l'un des actes énoncés ci-dessous constitue, sauf réfutation, un preuve d'atteinte à la vie privée d'un particulier :

a) écoute ou surveillance d'un particulier, de sa résidence ou de son véhicule par quelque moyen que ce soit, y compris le fait d'écouter aux portes, d'observer, d'espionner, d'importuner ou de suivre, qu'il y ait ou non intrusion;

b) écoute ou enregistremet de conversations du particulier ou de messages qu'il reçoit ou qu'il transmet par voie de télécommunication, sauf s'il y est partie licite;

c) publication de documents personnels du particulier, notamment ses lettres, son agenda ou son journal;

d) communication de renseignements qui ont été recueillis sur le particulier à des fins commerciales ou gouvernementales lorsque :

(i) la communication était contraire à la loi,

(ii) les renseignements ont été recueillis sous le sceau du secret et ont été communiqués à des fins autres que celles auxquelles ils étaient destinés.

4 (1) Ne constitue pas un atteinte à la vie privée l'acte, la conduite ou la publication :

a) qui a été autorisé, de façon implicite ou explicite, par quelqu'un habilité à autoriser, s'il a été démontré au tribunal que cette autorisation a été donnée librement;

b) qui était accessoire à l'exercice d'un droit légitime de défense d'une personne ou d'un bien.

c) qui était autorisé ou imposé par une loi provinciale en vigueur, par un tribunal ou par un acte de procédure d'un tribunal; toutefois, une autorisation prévue par une loi ne constitue un défense qui si la loi n'autorise expressément l'acte, la conduite ou la publication aux fins visées;

d) qui était pas disproportionné par rapport à la gravité de l'affaire faisant l'objet de l'enquête, qui n'a pas eu lieu pendant la perpétration d'un acte illégal, notamment une intrusion, et qui était l'oeuvre:

(i) d'un agent de la paix agissant dans l'exercice de ses fonctions et dans le cadre de ses attributions,

(ii) d'un fonctionnaire procédant à une enquête dans l'exercice de ses fonctions et dans le cadre de ses attributions,

e) qui était raisonnable, compte tenu des liens entre les parties en cause, notamment les liens familiaux,

f) qui a donné lieu à la violation si le défendeur ne savait pas ou ne pouvait raisonnablement savoir qu'il porterait atteinte à la vie privée de quelqu'un.

(2) La publication d'une affaire ne constitue pas une atteinte à la vie privée si:

a) il existe des motifs raisonnables de croire qu'elle a été faite dans l'intérêt public;

b) elle était couverte par l'immunité prévue par les règles de droit se rapportant à la diffamation.

Le présent paragraphe ne s'applique toutefois pas aux autres actes ni autres conduites par lesquels l'affaire publiée a été obtenue, si ces actes et conduites constituaient exu-mêmes une atteinte à la vie privée.

(3) Pour l'application du présent article, sont assimilées au [tribunal] les personnes autorisées par la loi à faire prêter serment en vue de recueillir des témoignages dans le cadre de leurs attributions.

5 Dans une action pour atteinte à la vie privée, le tribunal peut, selon ce qu'il juge indiqué :

a) accorder des dommages-intérêts;

b) accorder une injonction;

c) ordonner au défendeur de rendre compte au demandeur des gains qu'il a réalisés ou qu'il peut réaliser du fait de l'atteinte à la vie privée du demandeur;

d) ordonner au défendeur de remettre au demandeur tous les objets et documents qui se trouvent en sa possession du fait de l'atteinte à la vie privée du demandeur;

e) accorder au demandeur les autres mesures de redressement qui semblent nécessaires dans les circonstances.

6 (1) Lorsqu'il accorde des dommages-intérêts dans une action pour atteinte à la vie privée, le tribunal tient compte de toutes les circonstances de l'affaire, y compris :

a) la nature, le nombre d'occurrences et les circonstances de l'acte, de la conduite ou de la publication;

b) les effets de l'acte, de la conduite ou de la publication sur la santé et le bien-être du particulier ou de ses parents ou sur leur situtation sociale, commerciale ou financière;

c) la conduite du particulier et du défendeur avant et après que l'acte, la conduite ou la publication ait eu lieu, y compris les excuses ou les offres de réparation faites par le défendeur.

(2) Dans une action pour atteinte à la vie privée, le tribunal peut accorder les dommanges-intérêts punitifs qu'il juge appropriés compte tenu du caractère flagrant de l'atteinte à la vie privée et de la conduite du défendeur.

7 (1) Le droit d'action pour atteinte à la vie privée et les recours prévus par la présente loi s'ajoutent aux droits d'action ou aux recours pouvant être exercés autrement qu'en vertu de la présente loi.

(2) Le présent article n'a pas pour effet d'exiger qu'il ne soit pas tenu compte des dommages-intérêts accordés dan une action pour atteinte à la vie privée, au moment de l'évaluation des dommages-intérêts dans une autre instance découlant du même acte, de la même conduite ou de la même publication que celui qui constitue une atteinte à la vie privée.

8 La présente loi lie la Couronne.

APPENDIX M

(See page 27)

UNIFORM REGULATORY OFFENCES PROCEDURE ACT

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UNIFORM REGULATORY OFFENCES PROCEDURE ACT

INTRODUCTION

The purpose of this Act is twofold.

One is to simplify the court procedures for the imposition of penalties for minor offences that are not seen as criminal in nature. This simplification would make a more light-handed procedure for the public's access to justice in the great number of cases that arise from the mere regulation of conduct rather than from conduct that is criminal in itself and would lighten the load on the administration of justice.

The other purpose is to separate the proceedings for conduct that is in itself permissible or even desirable but not done in the manner required from proceedings for genuine criminal conduct. This separation may be reflected in the atmosphere in which a hearing for traffic tickets is conducted when the defendant is on the list with persons charged with robbery, assault etc., or in the procedure where provisions that are appropriate to serious crimes and designed for dangerous conduct and maintaining the peace are applied equally to regulatory offences.

The principal changes from the summary procedure under the Criminal Code are in procedures applying to offences for which a set fine is acceptable and procedures before trial and summary disposition when not contested. When a trial is elected, traditional standards of justice are necessary.

At the same time there are many very serious offences under provincial and territorial statutes and full procedure can be taken at the option of the defendant.

Application

1. This Act applies to proceedings for the prosecution of offences that are created by an Act of the Legislature or under a regulation or by-law that is made under the authority of an Act of the Legislature.

COMMENTARY

Offences created by the statutes of the provinces and territories are, by that fact, not criminal. In the case of statutes of the Federal Government another formula would be needed to describe the offences that are

considered regulatory and for which the procedures under the Criminal Code will be replaced.

Regulatory Offences Officer

2.-(1) A minister of the Crown may designate in writing any person or class of persons as regulatory offences officers for the purpose of all or any class of offences named in the designation.

(2) Police officers are regulatory offences officers.

COMMENTARY

The provision in subsection 2(1) is optional for the purposes of uniformity of laws. The advantage it offers is to enable administrative ministries of government to have their own inspectors lay charges on the spot during inspections and for the enforcement of ministry Acts by their own people. This permits the ministry to implement its own enforcement policy and reduces the non criminal enforcement and prosecution functions of the Attorney General.

Set Fines

3. The Chief Judge of the (court that is designated for regulatory offences and named in section 4) may by order fix a fine in respect of specific offences, as the Chief Judge considers appropriate, for the purpose of proceedings that are provided by this Act for offences that are commenced by an offence notice that specifies a set fine for the offence.

COMMENTARY

Set fines are now established in two ways. One is by regulation made by the government and the other is by the judges under the leadership of the chief or senior judge, possibly by committee or general consensus.

The prescribing of fines by regulation creates a contradiction with the Act that probably already prescribes a maximum or a miminum. It is also open to objection that the government is motivated by revenue or other considerations that are not the same as those that a court would apply in its responsibility to determine the penalty that justice requires.

The recommendation for the uniform Act is to leave the amount of fine to the court.

COMMENCEMENT OF PROCEEDINGS

Manner of Commencement

4.-(1) A proceeding in respect of a regulatory offence shall be commenced in the (name of court established by the enacting jurisdiction).

COMMENTARY

There are advantages, where possible, to have regulatory offences dealt with in a court that is separate from the criminal summary convictions court. It separates the defendants,and encourages the judges to develop a distinction between the classes of offences and the differences in the procedures. Furthermore, the court would not be operating from one code to the other in succeeding cases. The same bench could be used and assigned to one court or the other. This should not be more costly in large centres, but may be impracticable in areas with a sparse population.

(2) A proceeding in respect of a regulatory offence may be commenced by filing a certificate of offence in the office of the court named in the certificate.

(3) A certificate of offence must be filed in the office of the court named therein within three days after service of the offence notice or summons.

Charge

5.-(1) A regulatory offences officer who has reasonable belief on grounds in the personal knowledge of the officer that a person has committed an offence may issue, by completing and signing, a certificate of offence certifying that an offence has been committed, and an offence notice.

COMMENTARY

The swearing and issuing of an information is replaced with a certificate of reasonable belief on grounds in the personal knowledge of the officer that the alleged offence has been committed. Where the prosecution is initiated by a person other than the regulatory offences officer, the leave of a judge is required, which approximates the information procedure (See section 14).

(2) Where there is a set fine prescribed for the offence, the regulatory offences officer may, in his or her discretion, issue an offence notice that specifies the set fine for the offence.

Summons

6.-(1) Where the offence notice does not specify a set fine, the regulatory offences officer shall also serve a summons in the prescribed form.

(2) A summons issued under subsection (1) shall be,

(a) directed to the defendant;

(b) set out briefly the offence in respect of which the defendant is charged; and

(c) require the defendant to attend court at a time and place stated in the summons and to attend thereafter as required by the court in order to be dealt with according to law.

Summons for Trial

7. Where an offence notice and a summons are served on a defendant, the charge shall be adjudicated by a hearing.

Set Fine Dispute

8. Where an offence notice in which a set fine is specified is served on a defendant and the defendant wishes to dispute the charge, the defendant shall plead not guilty by signing the not guilty plea on the offence notice and indicating his or her desire in the form contained on the notice to appear or be represented at a trial, and shall deliver the offence notice to the office of the court that is specified in the notice.

Set Fine Payment

9.-(1) Where an offence notice in which a set fine is specified is served on a defendant and the defendant does not wish to dispute the charge, the defendant shall sign the plea of guilty on the offence notice and deliver the offence notice and the amount of the set fine to the place that is specified in the notice.

(2) Acceptance of the payment under subsection (1) constitutes a plea of guilty whether or not the plea is signed and endorse-

ment of the payment on the certificate of offence constitutes conviction and imposition of the fine in the amount of the set fine for the offence.

(3) Where the place specified in the notice to which payment of the set fine is to be sent under subsection (1) is a place other than the court office, a certificate purporting to be signed by the clerk of the municipality, or a person designated by the clerk,

(a) that payment has not been made under subsection (1); and

(b) that notice of the defendant's desire to appear or to be represented at trial has not been delivered to the place specified in the notice,

shall be received in evidence and is proof of the facts contained therein in the absence of evidence to the contrary.

Notice of Trial

10. Where an offence notice with a plea of not guilty is delivered to the court office, the clerk of the court shall, as soon as is practicable, give notice to the defendant and prosecutor of the time and place of the trial.

Set Fine on Inaction

11. Where at least fifteen days have elapsed after the defendant was served with the offence notice in which a set fine is specified, and the offence notice has not been delivered in accordance with section 8 or 9 and a plea of guilty has not been accepted, the defendant shall be deemed to not wish to dispute the charge and the court shall examine the certificate of offence and,

(a) where the certificate is complete and regular on its face, the court shall enter a conviction in the defendant's absence and without a hearing and impose the set fine for the offence; or

(b) where the certificate of offence is not complete and regular on its face, the court shall quash the proceeding with written reasons.

Defendant Outside Jurisdiction

12.-(1) Where an offence notice, whether or not it specifies a set fine, is served on a defendant whose address as shown on the certificate of offence is outside the territorial jurisdiction of the court specified in the notice, and the defendant wishes to dispute the charge but does not wish to attend or be represented at a trial, the defendant may do so by signifying his or her intention on the offence notice and delivering the offence notice to the office of the court specified in the notice together with a sworn statement in writing setting out with reasonable particularity the grounds for dispute and any facts on which he or she relies.

(2) Where an offence notice is delivered under subsection (1), the court shall, in the absence of the defendant, consider the dispute and,

(a) where the dispute raises an issue that may constitute a defence, direct a hearing and serve notice of the hearing on the defendant; or

(b) where the dispute does not raise an issue that may constitute a defence, and

(i) the offence notice specifies a set fine, convict the defendant and impose the set fine, or

(ii) the offence notice does not specify a set fine, direct a hearing and serve notice of the hearing on the defendant.

(3) Where the court directs a hearing under subsection (2) and the defendant fails to appear, the court may, in the absence of the defendant, consider all the evidence including the issues raised in the dispute, and acquit the defendant or convict the defendant and impose the appropriate penalty.

Failsafe Review

13. Where a defendant is convicted and has not had an opportunity to dispute the charge or to appear or be represented at a hearing for the reason that, through no fault of his or her own, the delivery of a necessary notice or document failed to occur in fact, and where not more than thirty days have elapsed since the conviction first came to the attention of the defendant, the

defendant may attend at the court office during regular office hours and may appear before a judge of the court or may submit affidavit evidence in the prescribed form and the judge, upon being satisfied of such facts, shall strike out the conviction, if any, and order the proceedings to be reinstituted in the manner prescribed in the order.

Private Prosecution

14.-(1) A person who is not a regulatory offences officer may commence a proceeding if the person has a reasonable belief on grounds in his or her personal knowledge that an offence has been committed and the court gives leave to commence the proceeding.

(2) The evidence upon an application under subsection (1) shall be under oath and the application for leave may be heard without notice to any other person.

(3) A proceeding under this section shall be commenced by filing in the court office a certificate of offence signed by the person who is commencing the proceeding and bearing an endorsement of the leave of the court, and the court office shall serve an offence notice that does not specify a set fine and a summons in the prescribed form on the defendant.

Evidence of Written Plea

15. A signature affixed to the form of a plea of guilty or not guilty on an offence notice, purporting to be that of the defendant, is proof that it is the signature of that person, in the absence of evidence to the contrary.

Service

16.-(1) An offence notice, or a summons and offence notice, shall be served within thirty days after the offence occurred by delivering it personally to the person to whom it is directed or, if that person cannot be found, by leaving them for the person at his or her last known usual place of abode with an inmate of that place who appears to be at least sixteen years of age.

(2) Where the person to whom the summons or offence notice is directed does not reside in Ontario, the summons or offence

notice shall be deemed to have been duly served seven days after it has been sent by registered mail to the defendant's last known or usual place of abode.

(3) Service of a summons or offence notice on a corporation may be effected by delivering it personally,

(a) in the case of a municipal corporation, to the mayor, warden reeve or other chief officer of the corporation or to the clerk of the corporation; or

(b) in the case of any other corporation, to the manager, secretary or other executive officer of the corporation or person apparently in charge of a branch office of the corporation,

or by mailing the summons or offence notice by registered mail to the corporation at an address held out by the corporation to be its address, in which case the summons shall be deemed to have been duly served seven days after the date of mailing.

(4) A judge, upon application and upon being satisfied that service can not be made effectively on a corporation in accordance with subsection (3), may by order authorize another method of service that has a reasonable likelihood of coming to the attention of the corporation.

(5) Service of a summons or notice of offence may be proved by statement under oath, written or oral, of the person who made the service.

(6) A regulatory offences officer may serve a notice of offence for a contravention of (the legislation, regulations or bylaws for parking offences, by which the owner of the vehicle is held responsible) on the owner of motor vehicle by affixing it to the vehicle in a conspicuous place at the time of the alleged offence, or by delivering it personally to the person who has the care and control of the vehicle at the time of the alleged offence.

COMMENTARY

Subsection (6) would be necessary only if the enacting jurisdiction

made the owner of a motor vehicle responsible for a breach of parking by-laws or regulations committed by a driver other than the owner.

(7) Where service of an offence notice or summons is made by the regulatory offences officer who issued the certificate of offence, the officer shall certify on the certificate of offence that he or she personally served the offence notice or summons on the person charged and the date of the service.

(8) The regulatory offences officer who serves an offence notice or summons shall not receive payment of money in respect of a fine, or receive the offence notice for delivery to the court.

TRIAL

General Jurisdiction

17.-(1) The court has jurisdiction in a proceeding commenced under this Act to perform such powers and duties as are set out in this and any other Act, and in addition has the jurisdiction and the duty to complete the proceeding in accordance with principles of justice despite the absence of a statutory provision for any specific step of the proceeding.

(2) The court retains jurisdiction over the certificate of offence notwithstanding the failure of the court to exercise its jurisdiction at any particular time or that the provisions of this Act respecting adjournments are not complied with.

COMMENTARY

Judges of the "superior and county and district courts" have the jurisdiction of the courts of common law and equity in England before confederation. They therefore have an original jurisdiction to dispense justice, subject only to specific direction given by statute. The judges appointed by a province for courts created by the province have only the jurisdiction that is given by provincial statute. It frequently occurs that a court will take the position that it is powerless to act because the statute was not specific enough to cover an unusual situation or that no form has been prescribed for a particular order. Subsection 17 (1) is an attempt to give the necessary statutory direction to enable judges to deal with a case on its merits.

The notion that the judge in a summary conviction case is seized of personal jurisdiction which can be lost if not exercised arose under the Criminal Code as a result of giving jurisdiction to persons (magistrates) to be appointed by the provinces. This obstacle is avoided by giving jurisdiction to the court and the old concept is abolished by subsection 17(2).

Limitations

18.-(1) Proceedings shall not be commenced after the expiration of any limitation period prescribed by or under any Act for the offence or, where no limitation period is prescribed, after six months after the date on which the offence was, or is alleged to have been, committed.

(2) A limitation period may be extended by a judge with the consent of the defendant.

Presiding Judge

19.-(1) The judge presiding when evidence is first taken at the trial shall preside over the whole of the trial.

(2) Where evidence has been taken at a trial and, before making an adjudication, the presiding judge dies or in the opinion of the judge or of the chief judge is for any reason unable to continue, another judge shall conduct the hearing again as a new trial.

(3) Where evidence has been taken at a trial and, after making an adjudication but before making an order or imposing a sentence the presiding judge dies or in the opinion of the judge or of the chief judge is for any reason unable to continued, another judge may make the order or impose the sentence that is authorized by law.

(4) A judge presiding at a trial may, at any stage of the trial and upon the consent of the prosecutor and the defendant, order that the trial be conducted by another judge and, upon the order being made, subsection (2) applies as if the judge were unable to act.

Prescribed Counts

20. A count in a charge that is described in a manner that is

prescribed in the regulations made under section 134 shall be deemed to incorporate all the essential elements of the offence.

Contents of Counts

21.-(1) This section applies to charges made in a certificate of offence that are not prescribed, or that are not made in the manner prescribed, by the regulations made under section 133.

(2) Each offence charged shall be set out in a separate count.

(3) Each count shall in general apply to a single transaction and shall contain, and is sufficient if it contains, in substance a statement that the defendant committed and offence that is specified in the count.

(4) Where in a count an offence is identified but the count fails to set out one or more of the essential elements of the offence, a reference to the provision creating or defining the offence shall be deemed to incorporate all the essential elements of the offence.

(5) The statement referred to in subsection (3) may be,

(a) in popular language without technical averments or allegations of matters that are not essential to be proved;

(b) in the words of the enactment that describes the offences; or

(c) in words that are sufficient to give the defendant notice of the offence with which the defendant is charged.

(6) Any number of counts for any number of offences may be joined in the same charge.

(7) A count shall contain sufficient detail of the circumstances of the alleged offence to give the defendant reasonable information with respect to the act or omission to be proved against the defendant and to identify the transaction referred to.

(8) No count is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of this section and, without restrict-

ing the generality of the foregoing, no count is insufficient by reason only that,

(a) it does not name the person affected by the offence or intended or attempted to be affected;

(b) it does not name the person who owns or has a special property interest in property mentioned in the count;

(c) it charges an intent in relation to another person without naming or describing the other person;

(d) it does not set out any writing that is the subject of the charge;

(e) it does not set out the words used where words that are alleged to have been used are the subject of the charge;

(f) it does not specify the means by which the alleged offence was committed;

(g) it does not name or describe with precision any person place or thing; or

(h) it does not, where the consent of a person, official or authority is required before proceedings may be instituted for an offence, state that the consent has been obtained.

(9) A count is not objectionable for the reason only that,

(a) it charges in the alternative several different matters or omissions that are stated in the alternative in an enactment that describes as an offence the matters, acts or omissions charged in the count; or

(b) it is double or multifarious.

(10) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negatived, as the case may be, in a charge.

Dividing Counts

22.-(1) A defendant may at any stage of the proceeding apply to the court to amend or to divide a count that,

(a) charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactment that creates or describes the offence; or

(b) is double or multifarious, on the ground that, as framed, it prejudices the defence.

(2) Upon an application under subsection (1), where the court is satisfied that the ends of justice so require, it may order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided.

Included Offences

23. Where the offence as charged includes another offence, the defendant may be convicted of the offence that is included if it is proved, notwithstanding that the whole offence charged is not proved.

Parties to Offence

24.-(1) Every person is a party to an offence who,

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other in it and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to the offence.

Counselling and Procuring

25.-(1) Where a person counsels or procures another person to be a party to an offence and that other person is afterwards a party to the offence, the person who counselled or procured is a party to the offence, notwithstanding that the offence

was committed in a way different from that which was counselled or procured.

(2) Every person who counsels or procures another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling or procuring that the person who counselled or procures knew or ought to have known was likely to be committed in consequence of the counselling or procuring.

Quashing Certificate

26.-(1) An objection to a certificate for a defect apparent on its face shall be taken by motion to quash the certificate before the defendant has pleaded, and thereafter only by leave of the court.

(2) The court shall not quash a certificate unless an amendment or particulars under section 28 would fail to satisfy the ends of justice.

Amending Certificate

27.-(1) The court may, at any stage of the proceeding, amend the certificate as may be necessary if it appears that the certificate,

(a) fails to state or states defectively anything that is requisite to charge the offence;

(b) does not negative an exception that should be negatived; or

(c) is in any way defective in substance or form.

(2) The court may, during the trial, amend the certificate as may be necessary if the matters alleged in the proposed amendment are disclosed by the evidence taken at the trial.

(3) A variance between the certificate and the evidence taken at the trial is not material with respect to,

(a) the time when the offence is alleged to have been committed, if it is proved that the certificate was issued within the prescribed period of limitation; or

(b) the place where the subject-matter of the proceeding is alleged to have arisen, except in an issue as to the jurisdiction of the court.

(4) The court shall, in considering whether or not an amendment should be made, consider,

(a) the evidence taken on the trial, if any;

(b) the circumstances of the case;

(c) whether the defendant has been misled or prejudiced in his or her defence by a variance, error or omission; and

(d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

(5) The question whether an order to amend a certificate should be granted or refused is a question of law.

(6) An order to amend a certificate shall be endorsed on the certificate as part of the record and the trial shall proceed as if the certificate had been originally laid as amended.

Particulars

28. The court may, before or during trial, if it is satisfied that it is necessary for a fair trial, order that a particular, further describing any matter relevant to the proceedings, be furnished to the defendant.

Costs on Amendment or Particulars

29. Where the certificate is amended or particulars are ordered and as a result an adjournment is necessary, the court may make an order under section 78 for costs resulting from the adjournment.

Withdrawal of Charge

30.-(1) In addition to the right of the Attorney General to withdraw a charge, the Attorney General or his or her agent may stay any proceeding at any time before judgment by direction in court to the clerk of the court in which the proceeding is

conducted and thereupon any recognizance relating to the proceeding is vacated.

(2) A proceeding stayed under subsection (1) may be recommenced by direction of the Attorney General, the Deputy Attorney General or a Crown attorney to the clerk of the court in which the proceeding was stayed but a proceeding that is stayed shall not be recommenced,

(a) later than one year after the stay; or

(b) after the expiration of any limitation period applicable, which shall run as if the proceeding had not been commenced until the recommencement,

whichever is the earlier.

Trying Together or Separately

31.-(1) The court may, before trial, where it is satisfied that the ends of justice so require, direct that separate counts or certificates be tried together or that persons who are charged separately be tried together.

(2) The court may, before or during the trial, where it is satisfied that the ends of justice so require direct that separate counts or certificates be tried separately or that persons who are charged jointly or are being tried together be tried separately.

Plea

32.-(1) After being informed of the substance of the certificate, the defendant shall be asked whether he or she pleads guilty or not guilty of the offence charged in the certificate.

(2) Where the defendant pleads guilty, the court may accept the plea and convict the defendant.

(3) Where the defendant refuses to plead or does not answer directly, the court shall enter a plea of not guilty.

(4) Where the defendant pleads not guilty of the offence charged but guilty of any other offence, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept the plea of guilty and accordingly amend

the certificate or substitute the offence to which the defendant pleads guilty.

Trial

33.-(1) Where the defendant pleads not guilty, the court shall hold the trial.

(2) The defendant is entitled to make full answer and defence.

(3) The prosecutor and defendant may examine and cross-examine witnesses.

(4) The court may receive and act upon any facts agreed upon by the defendant and prosecutor without proof or evidence.

(5) Notwithstanding section 00 of the Evidence Act, the defendant is not a compellable witness for the prosecution.

COMMENTARY

Provincial and territorial legislation for evidence is designed for civil actions. It is common to have a provision that parties to an action are competent and compellable to give evidence in the action on behalf of themselves or of any party to the action. This is not the criminal law rule which needs to be stated as in subsection (5). This question is not the issue of self incrimination, which is usually equally necessary, and provided for, in respect of civil actions.

Representation

34.-(1) A defendant may appear and act personally or by counsel or agent.

(2) A defendant that is a corporation shall appear and act by counsel or agent.

(3) The court may bar any person from appearing as an agent who is not a barrister and solicitor entitled to practise law in (enacting jurisdiction) if the court finds that the person is not competent properly to represent or advise the person for whom the agent appears or does not understand and comply with the duties and responsibilities of an agent.

Compelling Personal Appearance

35. Notwithstanding that a defendant appears by counsel or agent, the court may order the defendant to attend personally and, where it appears to be necessary to do so, may issue a summons in the prescribed form.

Non-appearance of Prosecutor

36.-(1) Where the defendant appears for a hearing and the prosecutor, having had due notice, does not appear, the court may dismiss the charge or may adjourn the hearing to another time upon such terms as it considers proper.

(2) Where the prosecutor does not appear at the time and place appointed for the resumption of an adjourned hearing under subsection (1), the court may dismiss the charge.

(3) Where a hearing is adjourned under subsection (1) or a charge is dismissed under subsection (2), the court may make an order under section 77 for the payment of costs.

(4) Where a charge is dismissed under subsection (1) or (2), the court may, if requested by the defendant, draw up an order of dismissal stating the grounds for the dismissal and shall give the defendant a certified copy of the order of dismissal which is, without further proof, a bar to any subsequent proceeding against the defendant in respect of the same cause.

Non-appearance of Defendant

37.-(1) Where a defendant does not appear at the time and place appointed for a hearing and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that a summons was served, a notice of trial was given, an undertaking to appear was given or a recognizance to appear was entered into, or where the defendant does not appear upon the resumption of a hearing that has been adjourned, the court,

(a) may proceed to hear and determine the proceeding in the absence of the defendant;

(b) may, if it thinks fit, adjourn the hearing and issue a summons to appear or issue a warrant in the prescribed form for the arrest of the defendant; or

(c) may, where the defendant does not appear in response to the summons or warrant on the date to which the hearing is adjourned, proceed under clause (a) or (b).

(2) Where the court proceeds to hear and determine the proceeding in the absence of the defendant, no proceeding arising out of the failure of the defendant to appear at the time and place appointed for the hearing or for the resumption of the hearing shall be instituted, or if instituted shall be proceeded with, except with the consent of the Attorney General or the Attorney General's agent.

Liability

38.-(1) Every element of an offence must be proved beyond a reasonable doubt.

(2) It is not necessary to prove that the defendant intended to commit the offence except insofar as intent is expressly stated to be an element of the offence.

(3) It is a defence to a charge of an offence that the defendant used all due diligence to avoid the commission of the offence unless the liability is expressly stated to be absolute.

(4) It is a defence to a sentence of imprisonment that the defendant did not have a gross disregard for the exercise of due diligence to avoid the commission of the offence.

(5) There is a presumption that the defences in subsections (3) and (4) are absent unless there is evidence to the contrary that is sufficient to raise a reasonable doubt.

(6) No civil remedy for an act or omission is suspended or affected for the reason that the act or omission is an offence.

COMMENTARY

Section 38 incorporates the decisions of the Supreme Court of Canada in R v City of Sault Ste Marie (1978), 40 C.C.C.(2d) 353 and of the Ontario Court of Appeal in R v Wholesale Travel Group Inc. (1989), 63 D.L.R. (4th) 325 and, more recently, R v Ellis Don Limited. Subsection (4) was not included in those decisions.

Common Law Defences

39.-(1) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of offences, except in so far as it is altered by or inconsistent with this or any other Act.

(2) Ignorance of the law by a person who commits an offence is not an excuse for committing the offence.

Adjournments

40.-(1) The court may, from time to time, adjourn a trial or hearing but, where the defendant is in custody, an adjournment shall not be for a period longer than eight days without the consent of the defendant.

(2) A trial or hearing that is adjourned for a period may be resumed before the expiration of the period with the consent of the defendant and the prosecutor.

Fitness to Stand Trial

41.-(1) Where at any time before a defendant is sentenced a court has reason to believe, based on,

(a) the evidence of a legally qualified medical practitioner or, with the consent of the parties, a written report of a legally qualified practitioner; or

(b) the conduct of the defendant in the courtroom,that the defendant suffers frommental disorder, the court may by order suspend the proceedings and direct the trial of the issue as to whether the defendant is, because of mental disorder, unable to conduct his or her defence.

(2) For the purposes of subsection (1), the court may order the defendant to attend to be examined under subsection (6).

(3) Where on the trial of an issue the court finds that the defendant is, because of mental disorder, unable to conduct his or her defence, the court shall order that further proceeding on the charge be suspended.

(4) Where on the trial of an issue the court finds that the defendant is able to conduct his or her defence, the court shall order that the suspended proceeding be continued.

(5) At any time within one year after an order is made under subsection (3), either party may, upon seven days notice to the other party, apply to the court to rehear the trial of the issue and where upon the rehearing the court finds that the defendant is able to conduct his or her defence, the court may order that the suspended proceeding be continued.

(6) For the purposes of subsection (1) or a hearing or rehearing under subsection (3),(4) or (5), the court may order the defendant to attend at such place or before such person and at or within such time as are specified in the order and submit to an examination for the purpose of determining whether the defendant is, because of mental disorder, unable to conduct his or her defence.

(7) Where the defendant fails or refuses to comply with an order under subsection (6) without reasonable excuse or where the person conducting the examination satisfies a judge that it is necessary to do so, the judge may by warrant direct that the defendant be taken into such custody as is necessary for the purpose of the examination and in any event for not longer than seven days and, where it is necessary to detain the defendant in a place, the place shall be, where practicable, a psychiatric facility.

(8) Where an order is made under subsection (3) and one year has elapsed and no further order is made under subsection (4), no further proceeding shall be taken in respect of the charge or any other charge arising out of the same circumstance.

Taking of Evidence

42.-(1) Evidence under this Act shall be taken under oath, except as otherwise provided by law.

(2) Proceedings in which evidence is taken shall be recorded.

(3) Where a certificate as to the content of an official record is, by any Act, made admissible in evidence as proof in the

absence of evidence to the contrary, the court may, for the purpose of deciding whether the defendant is the person referred to in the certificate, receive and base its decision upon information it considers credible or trustworthy in the circumstances of each case.

Attendance of Witnesses

43.-(1) Where a judge is satisfied that a person is able to give material evidence in a proceeding under this Act, the judge may issue a subpoena requiring the person to attend to give evidence and bring with him or her any writings or things referred to in the subpoena.

(2) A subpoena shall be served and the service shall be proved in the same manner as a summons under section 16.

(3) A person who is served with a subpoena shall attend at the time and place stated in the subpoena to give evidence and, if required by the subpoena, shall bring any writing or other thing that he or she has in possession or control relating to the subject-matter of the proceeding.

(4) A person who is served with a subpoena shall remain in attendance during the hearing and the hearing as resumed after adjournment from time to time unless the person is excused from attendance by the presiding judge.

Compelling Attendance of Witnesses

44.-(1) Where a judge is satisfied upon evidence under oath that a person is able to give material evidence that is necessary in a proceeding under this Act and,

(a) the person will not attend if a subpoena is served; or

(b) attempts to serve a subpoena have been made and have failed because the person is evading service, the judge may issue a warrant in the prescribed form for the arrest of the person.

(2) Where a person who has been served with a subpoena to attend to give evidence in a proceeding does not attend or remain in attendance, the court may, if it is established,

(a) that the subpoena has been served; and

(b) that the person is able to give material evidence that is necessary, issue or cause to be issued a warrant in the prescribed form for the arrest of the person.

(3) The police officer who arrests a person under a warrant issued under subsection (1) or (2) shall immediately take the person before a judge.

(4) Unless the judge is satisfied that it is necessary to detain a person in custody to ensure attendance to give evidence, the judge shall order the person released upon condition that the person enter into a recognizance in such amount and with such sureties, if any, as are reasonably necessary to ensure attendance.

(5) Where the judge is satisfied that it is necessary to detain the person in custody to ensure attendance to give evidence, the judge may order that the person be detained in custody to testify at the trial or to have his or her evidence taken by a commissioner under an order made under subsection (10).

(6) Where the judge does not make an order under subsection (5), the judge shall order that the person be released upon condition that the person enter into a recognizance in such amount and with such sureties, if any as are reasonaably necessary to ensure attendance.

(7) A person who is ordered to be detained in custody under subsection (5) or is not released in fact under subsection (7) shall not be detained in custody for a period longer than ten days.

(8) A judge may at any time order the release of a person in custody under this section where the judge is satisfied that the detention is no longer justified.

(9) Where a person who is bound by a recognizance to attend to give evidence in a proceeding does not attend or remain in attendance, the court before which the person is bound to attend may issue a warrant in the prescribed form for the arrest of that person and,

(a) where the person is brought directly before the court, subsections (5) and (6) apply; and

(b) where the person is not brought directly before the court, subsections (3) to (6) apply.

(10) A judge may order that the evidence of a person held in custody under this section be taken by a commissioner under section 48, which applies thereto in the same manner as to a witness who is unable to attend by reason of illness.

Order for a Prisoner to Attend

45.-(1) Where a person whose attendance is required in a court to stand trial or to give evidence is confined in a prison, and a judge is satisfied, upon evidence under oath given orally or by affidavit, that the person's attendance is necessary to satisfy the ends of justice, the judge may issue an order in the prescribed form that the person be brought before the court before which attendance is required, from day to day, as may be necessary.

(2) An order under subsection (1) shall be addressed to the person who has custody of the prisoner and on receipt of the order that person shall,

(a) deliver the prisoner to the police officer or other person who is named in the order to receive the prisoner; or

(b) bring the prisoner before the court upon payment of any reasonable charges in respect thereof.

(3) An order made under subsection (1) shall direct the manner in which the person shall be kept in custody and returned to the prison from which the person is brought.

Failure to Attend

46.-(1) Every person who, being required by law to attend or remain in attendance at a hearing, fails without lawful excuse to attend or remain in attendance accordingly is guilty of an offence and on conviction is liable to a fine of not more than $2,000, or to imprisonment for a term of not more than thirty days, or to both.

(2) In a proceeding under subsection (1), a certificate of the clerk or a judge of the court before which the defendant in that proceeding is alleged to have failed to attend stating that the defendant failed to attend is admissible in evidence as proof of the fact, in the absence of evidence to the contrary, without proof of the signature or office of the person appearing to have signed the certificate.

Commission Evidence

47.-

(1) Upon the application of the defendant or prosecutor, the court may by order appoint a commissioner to take the evidence of a witness who is out of (the enacting jurisdiction) or is not likely to be able to attend the trial by reason of illness or physical disability or for some other good and sufficient cause.

(2) Evidence taken by a commissioner appointed under subsection (1) may be read in evidence in the proceeding if,

(a) it is proved by oral evidence or by affidavit that the witness is unable to attend for a reason set out in subsection (1);

(b) the transcript of the evidence is signed by the commissioner by or before whom it purports to have been taken; and

(c) it is proved to the satisfaction of the court that reasonable notice of the time and place for taking the evidence was given to the other party, and the party had full opportunity to cross-examine the witness.

(3) An order under subsection (1) may make provision to enable the defendant to be present or represented by counsel or agent when the evidence is taken, but failure of the defendant to be present or to be represented by counsel or agent in accordance with the order does not prevent the reading of the evidence in the proceeding if the evidence had otherwise been taken in accordance with the order and with this section.

Evidence on Another Charge

48.The court may receive and consider evidence taken before the

same judge on a different charge against the same defendant, with the consent of the parties.

Evidence of Age

49. In the absence of other evidence, or by way of corroboration of other evidence, a justice may infer the age of a person from the appearance of the person.

Exhibits

50.-

(1) The court may order that an exhibit be kept in such custody and place as, in the opinion of the court, is appropriate for its preservation.

(2) Where any thing is filed as an exhibit in a proceeding, the clerk may release the exhibit upon the consent of the parties at any time after the trial or, in the absence of consent, may return the exhibit to the party tendering it after the disposition of any appeal in the proceeding or, where an appeal is not taken, after the expiration of the time for appeal.

Interpreters

51. A judge may authorize a person to act as interpreter in proceedings under this Act where the person swears the prescribed oath and, in the opinion of the judge, is competent and likely to be readily available.

False Statements

52. Every person who makes an assertion of fact in a statement or entry in a document or form for use under this Act knowing that the assertion is false is guilty of an offence and on conviction is liable to a fine of not more than $2,000.

Removal of Defendant

53.-

(1) The court may cause the defendant to be removed and to be kept out of court,

(a) when the defendant interrupts the proceedings so that to continue in the defendant's presence would not be feasible; or

(b) where, during the trial of an issue as to whether the defendant is, because of mental disorder, unable to conduct his or her defence, the court is satisfied that failure to do so might have an adverse effect on the mental health of the defendant.

(2) The court may exclude the public or any member of the public from a hearing where, in the opinion of the court, it is necessary to do so for the maintenance of order in the courtroom or to remove an influence that might affect the testimony of a witness.

Contempt of Court

54.-

(1) Except as otherwise provided by an Act, every person who commits contempt in the face of the court is on conviction liable to a fine of not more than $1,000 or to imprisonment for a term of not more than thirty days, or to both.

(2) Before proceedings are taken for contempt under subsection (1), the court shall inform the offender of the conduct complained of and the nature of the contempt and inform the offender of the right to show cause why he or she should not be punished.

(3) A punishment for contempt in the face of the court shall not be imposed without giving the offender an opportunity to show cause why he or she should not be punished.

(4) Except where, in the opinion of the court, it is necessary to deal with the contempt immediately for the preservation of order and control in the courtroom, the court shall adjourn the contempt proceeding to another day.

(5) Where the court proceeds to deal with a contempt immediately and without adjournment under subsection (4), the court may order the offender arrested and detained in the courtroom for the purpose of the hearing and determination.

(6) Where the offender is appearing before the court as an agent who is not a barrister and solicitor entitled to practise in (enacting jurisdiction), the court may order that he or she be barred from acting as agent in the proceeding in addition to any other punishment to which he or she is liable.

(7) An order of punishment for contempt under this section is appealable in the same manner as if it were a conviction of a regulatory offence.

COMMENTARY

As a court of record and a creation of statute, the regulatory offences court has powers to punish for contempt in the face of the court but not for contempt of its processes or other contempt outside of the courtroom. Section 54 retains that limit on the court's contempt jurisdiction but provides certain regular procedure.

Non-juridical Day

55. Any action authorized or required by this Act is not invalid for the reason only that the action was taken on a non-juridical day.

Irregularity and Validity

56.-

(1) The validity of any proceeding is not affected by,

(a) any irregularity or defect in the substance or form of the summons, warrant, offence notice, undertaking to appear or recognizance; or

(b) any variance between the charge set out in the summons, warrant, offence notice, undertaking to appear or recognizance and the charge set out in the certificate.

(2) Where it appears to the court that the defendant has been misled by any irregularity, defect or variance mentioned in subsection (1), the court may adjourn the hearing and may make such order as the court considers appropriate, including an order under section 78 for the payment of costs.

Extension of Time

57. Any time prescribed by this Act or the regulations made thereunder or by the rules of the court for doing any thing other than commencing or recommencing proceedings may be extended by the court, whether or not the prescribed time has expired.

Service

58.-

(1) Except where otherwise provided by this Act or the rules of the court, any notice or document required or authorized to

be given or delivered under this Act or the rules of the court is sufficiently given or delivered if delivered, whether personally or by mail.

(2) Where a notice or document that is required or authorized to be given or delivered to a person under this Act or the rules of the court is mailed to the person at his or her last known address appearing on the record of the proceeding in the court, there is a rebuttable presumption that the notice or document is delivered to the person.

SENTENCING

Presentence Report

59.-

(1) Where a defendant is convicted of an offence for which the notice of offence does not specify a set fine, the court may, where necessary for the purpose of assisting the court in imposing a sentence, direct a probation officer to prepare and file with the court a report in writing relating to the defendant.

(2) Where a report is filed with the court under subsection (1), the clerk of the court shall cause a copy of the report to be provided to the defendant or the defendant's counsel or agent and to the prosecutor.

Submission as to Sentence

60.-

(1) Where a defendant who appears personally is convicted of an offence, the court shall give the prosecutor and the counsel or agent for the defendant an opportunity to make submission as to sentence and, where the defendant has no counsel or agent, the court shall ask the defendant if he or she has anything to say before sentence is passed.

(2) The omission to comply with subsection (1) does not affect the validity of the proceeding.

(3) Where a defendant is convicted of an offence, the court may make such inquiries, on oath or otherwise, of and concerning the defendant as it considers desirable, including the defendant's economic circumstances, but the defendant shall not be compelled to answer.

(4) A certificate setting out with reasonable particularity the finding of guilt or acquittal or conviction and sentence in Canada of a person signed by,

(a) the person who made the adjudication; or

(b) the clerk of the court in which the adjudication was made,

is, upon the court being satisfied that the defendant is the person referred to in the certificate, admissible in evidence and is, in the absence of evidence to the contrary, proof of the facts stated therein without proof of the signature or the official character of the person appearing to have signed the certificate.

Time Spent in Custody

61. In determining the sentence to be imposed on a person convicted of an offence, the court may take into account any time spent in custody by the person as a result of the offence.

Minute of Disposition

62. Where a court convicts a defendant or dismisses a charge, a minute of the dismissal or conviction and sentence shall be made by the court, and, upon request by the defendant or the prosecutor or by the Attorney General or the Attorney General's agent, the court shall cause a copy of the minute certified by the clerk of the court to be delivered to the person making the request.

Minimum Penalties

63.-

(1) No penalty prescribed for an offence is a minimmum penalty unless it is specifically declared to be a minimum.

(2) Notwithstanding that the provision that creates the penalty for an offence prescribes a minimum penalty, where in the opinion of the court exceptional circumstances exist so that to impose the minimum penalty would be unduly oppressive or otherwise not in the interests of justice, the court may impose a penalty that is less than the minimum or suspend the sentence.

(3) Where a minimum penalty is prescribed for an offence and the minimum penalty includes imprisonment, the court notwithstanding the prescribed penalty, impose a fine of not more than $5,000 in lieu of imprisonment.

COMMENTARY

Minimum penalties are prescribed to force courts to penalize certain offences more severely as a matter of public policy. They always cause a strain because the courts are then compelled to comply despite the judge's conviction that in the particular circumstances of the case before him or her the minimum is not justice, although technically there is guilt. The tailoring of the penalty to individual circumstances within the public policy is the function of courts. One consequence of minimum penalties is a tendency for the court to stretch a point in interpreting the law to avoid a finding of guilt when faced with what the judge feels is an obligatory unjust penalty.

The purpose of section 63 is to permit a judge to have more flexibility in special circumstances.

Fines

64.-

(1) A fine becomes due and payable fifteen days after its imposition.

(2) Where the court imposes a fine, the court shall ask the defendant if he or she wishes an extension of the time for payment of the fine.

(3) Where the defendant requests an extension of the time for payment of the fine, the court may make such inquiries, on oath or otherwise, of and concerning the defendant as the court considers desirable, but the defendant shall not be compelled to answer.

(4) Unless the court finds that the request for extension of time is not made in good faith or that the extension would likely be used to evade payment, the court shall extend the time for payment by ordering periodic payments or otherwise.

(5) Where a fine is imposed in the absence of the defendant, the clerk of the court shall give the defendant notice of the fine and its due date and of his or her right to apply for an extension of the time for payment under subsection (6).

(6) The defendant may, at any time by application in the prescribed form filed in the office of the court, request an extension or further extension of time for payment of a fine and the court may grant the request or require a hearing in the same manner as under subsections (3) and (4).

Fine Options

65. The Lieutenant Governor in Council may make regulations establishing a program to permit the payment of fines by means of credits for work performed, and, for the purpose and without restricting the generality of the foregoing, may,

(a) prescribe classes of work and the conditions under which they are to be performed;

(b) prescribe a system of credits;

(c) provide for any matter necessary for the effective administration of the program, and any regulation may limit its application to any part or parts of (enacting jurisdiction).

Civil Suit on Default of Fine

66.-

(1) When the payment of a fine is in default, the clerk of the court may complete a certificate in the prescribed form as to the imposition of the fine and the amount remaining unpaid and file the certificate in a court of competent jurisdiction and, upon filing, the certificate shall be deemed to be an order or judgment of that court for the purposes of enforcement.

(2) A certificate shall not be filed under subsection (1) after two years after the default in respect of which it is issued.

(3) Where a certificate has been filed under subsection (1) and the fine is fully paid, the clerk shall file a certificate of payment upon which the certificate of default is discharged and, where a writ of execution has been filed with the sheriff, the clerk shall file a certificate of payment with the sheriff, upon which the writ is cancelled.

Default of Fines

67.-

(1) The payment of a fine is in default when any part of the fine is due and unpaid for fifteen days or more.

(2) Where a judge is satisfied that payment of a fine is in default, the judge,

(a) shall order that any permit, licence, registration or privilege in respect of which a suspension is authorized by or under any Act for non-payment of the fine be suspended, not renewed or not issued until the fine is paid; and

(b) may direct the clerk of the court to proceed with civil enforcement under section 66.

(3) A judge may issue a warrant in the prescribed form for the committal of the defendant where,

(a) an order or direction under clause (2) (a) has not resulted in payment within a time that is reasonable in the circumstances;

(b) the defendant has not taken the fine option;

(c) the defendant has made no arrangement for extension of the time for payment or for payment by instalments;

(d) the defendant has not responded to the notice of intent to issue a warrant;

(e) all other reasonable methods of collecting the fine have been tried and failed or, in the opinion of the judge, would not likely result in payment within a reasonable time in the circumstances;

(f) the judge is satisfied that the defendant is able to pay the fine; and

(g) the defendant has been given fifteen days notice of the intent to issue a warrant and has had an opportunity to be heard.

(4) In exceptional circumstances where, in the opinion of the court that imposed the fine, to proceed under subsection (3) would defeat the ends of justice, the court may,

(a) order that no warrant of committal be issued under subsection (3); or

(b) order imprisonment in default of payment of the fine and that no extension of time for payment be granted.

(5) Imprisonment under a warrant issued under subsection (3) or (4) shall be for three days, plus one day for each $50 or part thereof that is in default, subject to a maximum period of ninety days or half of the maximum imprisonment, if any, provided for the offence, whichever is the greater.

(6) Any payment made after a warrant is issued under subsection (3) or (4) shall reduce the term by the number of days that is in the same proportion to the number of days in the term as the amount bears to the amount in default and no amount offered in part payment of a fine shall be accepted unless it is sufficient to secure reduction of sentence of one day, or a multiple thereof.

Suspension of Fine

68. Where an Act provides that a fine may be suspended subject to the performance of a condition,

(a) the period of suspension shall be fixed by the court and shall be for not more than one year;

(b) the court shall provide in its order of suspension the method of proving the performance of the condition;

(c) the suspension is in addition to and not in lieu of any other power of the court in respect of the fine; and

(d) the fine is not in default until fifteen days have elapsed after notice that the period of suspension has expired is given to the defendant.

Custody on Imprisonment

69.-

(1) The term of imprisonment imposed by a sentence shall, unless otherwise directed in the sentence commence on the day on which the convicted person is taken into custody

under the sentence, but no time during which the convicted person is imprisoned or out on bail before sentence shall be reckoned as part of the term of imprisonment to which the person is sentenced.

(2) Where the court imposes imprisonment, the court may order custody to commence on a day not later than thirty days after the day of sentencing.

COMMENTARY

Since regulatory offences do not normally involve dangerous conduct or the need for public protection, continuous custody after conviction is not important. Subsection (2) permits the defendant to make arrangements for his or her absence from family and work.

Sentences Consecutive

70. Where a person is subject to more than one term of imprisonment at the same time, the two terms shall be served consecutively except in so far as the court has ordered a term to be served concurrently with any other term of imprisonment.

Warrant of Committal

71.-

(1) A warrant of committal is sufficient authority,

(a) for the conveyance of the prisoner in custody for the purpose of committal under the warrant; and

(b) for the reception and detention of the prisoner by keepers of prisons in accordance with the terms of the warrant.

(2) A person to whom a warrant of committal is directed shall convey the prisoner to the correctional institution named in the warrant.

(3) A sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced.

Probation Order

72.-

(1) Where a defendant is convicted of an offence in a proceeding commenced by the issuance of a summons, the court may, having regard to the age, character and background of the

defendant, the nature of the offence and the circumstances surrounding its commission,

(a) suspend the passing of sentence and direct that the defendant comply with the conditions prescribed in a probation order;

(b) in addition to fining the defendant or sentencing the defendant to imprisonment, whether in default of payment of a fine or otherwise, direct that the defendant comply with the conditions prescribed in a probation order; or

(c) where it imposes a sentence of imprisonment on the defendant, whether in default of payment of a fine or otherwise, that does not exceed ninety days, order that the sentence be served intermittently at such times as are specified in the order and direct that the defendant, at all times when not in confinement under the order, comply with the conditions prescribed in a probation order.

(2) A probation order shall be deemed to contain the conditions that,

(a) the defendant not commit the same or any related or similar offence, or any offence under a statute of Canada or (enacting jurisdiction) or any other province or territory of Canada that is punishable by imprisonment;

(b) the defendant appear before the court as and when required; and

(c) the defendant notify the court of any change in his or her address.

(3) In addition to the conditions set out in subsection (2), the court may prescribe the following conditions in a probation order,

(a) that the defendant satisfy any compensation or restitution that is required or authorized by an Act;

(b) with the consent of the defendant and where the conviction is of an offence that is punishable by imprisonment,

that the defendant perform a community service as set out in the order;

(c) where the conviction is of an offence that is punishable by imprisonment, such other conditions relating to the circumstances of the offence and of the defendant that contributed to the commission of the offence as the court considers appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant; or

(d) where considered necessary for the purpose of implementing the conditions of the probation order, that the defendant report to a responsible person designated by the court and, in addition, where the circumstances warrant it, that the defendant be under the supervision of the person to whom he or she is required to report.

(4) A probation order shall be in the prescribed form and the court that makes the order shall specify therein the period for which it is to remain in force, which shall not be for more than two years from the date when the order takes effect.

(5) Where the court makes a probation order, it shall cause a copy of the order and a copy of section 76 to be given to the defendant.

(6) The Lieutenant Governor in Council may make regulations governing restitution, compensation and community service orders, including their terms and conditions.

Commencement of Probation Order

73. A probation order comes into force,

(a) on the date on which the order is made; or

(b) where the defendant is sentenced to imprisonment other than a sentence to be served intermittently, upon the expiration of that sentence.

Probation Order and Further Conviction

74. Where a defendant who is bound by a probation order is convicted of an offence or is imprisoned in default of payment of a

fine, the order continues in force except in so far as the sentence or imprisonment renders it impossible for the defendant to comply for the time being with the order.

Amendment of Probation Order

75. The court may, at any time upon the application of the defendant or prosecutor with notice to the other, after a hearing or, with the consent of the parties, without a hearing,

(a) make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in circumstances;

(b) relieve the defendant, either absolutely or upon such terms or for such period as the court considers desirable, of compliance with any condition described in any of the clauses in subsection 72(3) that is prescribed in the order; or

(c) terminate the order or decrease the period for which the probation order is to remain in force, and the court shall thereupon endorse the probation order accordingly and, if it changes or adds to the conditions prescribed in the order, inform the defendant of its action and give the defendant a copy of the order so endorsed.

Breach of Probation Order

76. Where a defendant who is bound by a probation order is convicted of an offence constituting a breach of condition of the order and,

(a) the time within which the defendant may appeal or apply for leave to appeal against that conviction has expired and the defendant has not taken an appeal or applied for leave to appeal;

(b) the defendant has taken an appeal or applied for leave to appeal against the conviction and the appeal or application for leave has been dismissed or abandoned; or

(c) the defendant has given written notice to the court that convicted him or her that he or she elects not to appeal,

for where the defendant otherwise wilfully fails or refuses to comply with the order, the defendant is guilty of an offence and upon conviction the court may,

(d) impose a fine of not more than $1,000 or imprisonment for a term of not more than thirty days, or both, and in lieu of or in addition to the penalty, continue the probation order with such changes or additions and for such extended term, not exceeding an additional year, as the court considers reasonable; or

(e) where the judge presiding is the judge who made the original order, in lieu of imposing the penalty under clause (d), revoke the probation order and impose the sentence the passing of which was suspended upon the making of the probation order.

Costs

77.-

(1) Upon conviction, the defendant is liable to pay to the court an amount by way of costs that is fixed by the regulations.

(2) The court may, in its discretion, order costs towards fees and expenses reasonably incurred by or on behalf of witnesses in amounts not exceeding the maximum fixed by the regulations, to be paid to the court or prosecutor by the defendant or to the defendant by the person who issued the certificate.

(3) Costs payable under this section and administration fees in the proceeding that are prescribed by law shall be deemed to be a fine for the purpose of enforcing payment.

General Penalty

78.Except where otherwise expressly provided by law, every person who is convicted of an offence is liable to a fine of not more than $5,000.

COMMENTARY

This section is probably obsolete. It is well established that conduct does not become an offence by unless there is a specific statement that it is an offence. If there is still an instance where conduct is created an offence and no penalty is prescribed it is probably in a century old statute and could be better ignored.

YOUNG PERSONS

COMMENTARY

The provisions of the Young Offenders Act (Canada) apply in respect of offences against the Criminal Code. The enacting jurisdiction will require legislation to create the facilities referred to in the Young Offenders Act, probably in its social ministry legislation. Similarly the administrative structure that is necessary will be established in the children's services administration. The special provisions for alternative sentencing belong in that legislation by merely extending its application to regulatory offences. Similarly alternative measures should be provided for by extending the application of existing provisions that deal with the Federal Act. It is, however, necessary to carry out the procedural principles that are contained in the Federal legislation.

Minimum Age

79. No person shall be convicted of an offence committed while under twelve years of age.

Application of ss 81 to 89

80.-

(1) Sections 81 to 89 apply to proceedings against a young person who is a person of twelve years of age or more but under sixteen years of age, and includes proceedings against a person of sixteen years of age or more who is charged with having committed an offence while he or she was twelve years of age or more but under sixteen years of age.

(2) The provisions of this Act apply to young persons except insofar as anything in sections 81 to 89 is inconsistent with them.

(3) A reference in sections 81 to 89 to a parent includes a reference to an adult with whom the young person ordinarily resides.

COMMENTARY

When determining the upper age of a young offender for the purposes of regulatory offences a major consideration is the age in the statutes of the jurisdiction when young persons can obtain a driving licence, obtain alcohol or engage in other commonly regulated activities. The central purpose of young offender legislation is not directed at purely regulatory minor offences.

Summons

81. A proceeding commenced against a young person shall be by a certificate of offence with an offence notice and summons.

Notice to Parent

82.-

(1) Where a summons is served upon a young person or a young person is released on a recognizance under this Act, the regulatory offences officer, in the case of a summons, or the officer in charge, in the case of a recognizance, shall as soon as practicable give notice to a parent of the young person by delivering a copy of the summons or recognizance to the parent.

(2) Where notice has not been given under subsection (1) and no person to whom notice could have been given appears with the young person, the court may adjourn the hearing to another time to permit notice to be given or may dispense with the notice.

(3) Failure to give notice to a parent under subsection (1) does not in itself invalidate the proceedings against the young person.

Trial

83.-

(1) Subject to subsection 53 (1) (removal for misconduct) and to subsection (2), a young person shall be present in court during the whole of the trial.

(2) The court may permit a young person to be absent during the whole or any part of the trial, on such conditions as the court considers proper.

(3) Sections 37 (ex parte conviction) and 46 (penalty for failure to attend) do not apply to a young person who is a defendant.

(4) Where a young person who is a defendant does not appear at the time and place appointed for a hearing and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that a summons was served, an undertaking to

appear was given or a recognizance to appear was entered into, as the case may be, or where the young person does not appear upon the resumption of a hearing that has been adjourned, the court may adjourn the hearing and issue a summons to appear or issue a warrant in the prescribed form for the arrest of the young person.

(5) Where a young person does not attend personally in response to a summons issued under section 35 (court summons to attend) and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that the summons was served, the court may adjourn the hearing and issue a further summons or issue a warrant in the prescribed form for the arrest of the young person.

Protection of Identity

84.-

(1) No person shall publish by any means a report,

(a) of an offence committed or alleged to have been committed by a young person; or

(b) of a hearing, adjudication, sentence or appeal concerning a young person who committed or is alleged to have committed an offence,

in which the name of or any information serving to identify the young person is disclosed.

(2) Subsection (1) does not prohibit the following:

1. The disclosure of information by the young person concerned.

2. The disclosure of information by the young person's parent or lawyer, for the purpose of protecting the young person's interests.

3. The disclosure of information by a police officer for the purpose of investigating an offence which the young person is suspected of having committed.

4. The disclosure of information to an insurer, to enable the insurer to investigate a claim arising out of an offence committed or alleged to have been committed by the young person.

5. The disclosure of information in the course of the administration of justice, but not for the purpose of making the information known in the community.

6. The disclosure of information by a person or member of a class of persons prescribed by the regulations.

(3) Every person who contravenes subsection (1) and every director, officer or employee of a corporation who authorizes, permits or acquiesces in a contravention of subsection (1) by the corporation is guilty of an offence and is liable on conviction to a fine of not more than $10,000.

Penalties

85.-

(1) No young person shall be sentenced to be imprisoned except under clause 76(d) (breach of probation order).

(2) Where a young person is found guilty of an offence in proceedings commenced under this Act, the court may,

(a) convict the young person, and

(i) order the young person to pay a fine not exceeding the maximum prescribed for the offence or $1,000, whichever is less, or

(ii) suspend the passing of sentence and direct that the young person comply with the conditions prescribed in a probation order; or

(b) discharge the young person absolutely.

(3) A probation order made under subclause (2) (a) (ii) shall not remain in force for more than one year from the date when it takes effect.

Imprisonment for Non-payment of Fine

86.-

(1) No warrant of committal shall be issued against a young person under section 67 (default of fines).

(2) Where it would be appropriate, but for subsection (1), to issue a warrant against a young person under subsection

67(3) or (4) (imprisonment for non-payment of fine), a judge may direct that the young person comply with the conditions prescribed in a probation order after giving the young person fifteen days notice of the intention to make a probation order and giving the young person an opportunity to be heard.

(3) A probation order made under subsection (2) shall not remain in force for more than ninety days from the date when it takes effect.

Open Custody

87. Where a young person is sentenced to a term of imprisonment for breach of probation under clause 76(d), the term of imprisonment shall be served in a place of open custody designated under section 24 of the Young Offenders Act (Canada).

Arrest Without Warrant

88. No person shall exercise an authority under this or any other Act to arrest a young person without warrant unless the person has reasonable and probable grounds to believe that it is necessary in the public interest to do so in order to,

(a) establish the young person's identity; or

(b) prevent the continuation or repetition of an offence that constitutes a serious danger to the young person or to the person or property of another.

Release after Arrest

89.-

(1) Section 121 (bail procedure) does not apply to a young person who has been arrested.

(2) Where a police officer acting under a warrant or other power of arrest arrests a young person, the police officer shall, as soon as is practicable, release the young person from custody unconditionally or after serving the young person with a summons unless the officer has reasonable and probable grounds to believe that it is necessary in the public interest for the young person to be detained in order to establish the young person's identity, or prevent the continuation or repetition of an offence that constitutes a serious danger to the young person or the person or property of another.

(3) Where a young person is not released from custody under subsection (2), the police officer shall deliver the young person to the officer in charge and where the officer in charge is of the opinion that the conditions set out in subsection (2) do not or no longer exist, the officer in charge shall release the young person unconditionally or upon the young person entering into a recognizance in the prescribed form, without sureties, conditioned for appearance in court.

(4) Where the officer in charge does not release the young person under subsection (3), the officer in charge shall as soon as possible notify a parent of the young person by advising the parent, orally or in writing, of the young person's arrest, the reason for the arrest and the place of detention.

(5) Section 122 (prompt appearance in court) applies with necessary modifications to the release of a young person from custody under this section.

(6) No young person who is detained under section 121 shall be detained in any part of a place in which an adult who has been charged with or convicted of an offence is detained unless a judge so authorizes, which the judge may do on being satisfied that,

(a) the young person cannot, having regard to the young person's own safety or the safety of others, be detained in a place of temporary detention for young persons; or

(b) no place of temporary detention for young persons is available within a reasonable distance.

(7) Wherever practicable, a young person who is detained in custody shall be detained in a place of temporary detention designated under subsection 7 (1) of the Young Offenders Act (Canada).

APPEALS AND REVIEW

Appeal Court

90. An appeal lies from the regulatory offences court to the (County or District Court or equivalent lowest trial court of federally appointed judges in the enacting jurisdiction).

Stay

91.The filing of a notice of appeal does not stay the conviction unless a judge of the appeal court so orders.

Fixing Date

92.-

(1) Where an appellant is in custody pending the hearing of the appeal and the hearing of the appeal has not commenced within thirty days from the day on which notice of the appeal was given, the person having custody of the appellant shall apply to a judge of the appeal court to fix a date for the hearing of the appeal.

(2) Upon receiving an application under subsection (1), the judge shall, after giving the prosecutor a reasonable opportunity to be heard, fix a date for the hearing of the appeal and give such directions as the judge thinks appropriate for expediting the hearing of the appeal.

Payment of Fine not Waiver

93.The payment of a fine or compliance with an order imposed upon conviction is not a waiver of the right to appeal.

Transmittal of Material

94.Where a notice of appeal has been filed, the clerk of the appeal court shall notify the clerk of the regulatory offences court appealed from of the appeal and, upon receipt of the notification, the clerk of the regulatory offences court shall transmit the order appealed from and transmit or transfer custody of all other material in the clerk's possession or control relevant to the proceedings to the clerk of the appeal court to be kept with the records of the appeal court.

Right of Appeal

95.-

(1) A defendant, prosecutor or the Attorney General by way of intervention may appeal from a conviction, dismissal or sentence made by a regulatory offences court or from a finding as to ability, because of mental disorder, to conduct a defence.

(2) The appeal shall be in accordance with the rules of the appeal court.

Powers of Court

96.-

(1) The appeal court may, where it considers it to be in the interests of justice,

(a) order the production of any writing, exhibit or other thing relevant to the appeal;

(b) order any witness who would have been a compellable witness at the trial, whether or not called at the trial,

(i) to attend and be examined before the court, or

(ii) to be examined in the manner provided by the rules before a judge of the court, or before any officer of the court or other person appointed by the court for the purpose;

(c) admit, as evidence, an examination that is taken under subclause (b)(ii);

(d) receive the evidence, if tendered, of any witness;

(e) order that any question arising on the appeal that,

(i) involves prolonged examination of writings or accounts, or scientific investigation, and

(ii) cannot in the opinion of the court conveniently be inquired into before the court,

be referred for inquiry and report, in the manner provided by the rules, to a special commissioner appointed by the court; and

(f) act upon the report of a commissioner who is appointed under clause (e) in so far as the court thinks fit to do so.

(2) In proceedings under this section, the parties or their counsel are entitled to examine or cross-examine witnesses and, in an inquiry under clause (1)(e), are entitled to be present during the inquiry and to adduce evidence and to be heard.

Appearance

97.-

(1) An appellant or respondent may appear and act personally or by counsel.

(2) An appellant or respondent who is in custody as a result of the decision appealed from is entitled to be present at the hearing of the appeal.

(3) The power of the court to impose sentence may be exercised notwithstanding that the appellant or respondent is not present.

Written Argument

98.An appellant or respondent may present his or her case on appeal and argument in writing instead of orally, and the court shall consider any case or argument so presented.

Powers on Appeal Against Conviction

99.-

(1) On the hearing of an appeal against a conviction or against a finding as to ability, because of mental disorder, to conduct a defence, the court by order,

(a) may allow the appeal where it is of the opinion that,

(i) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground, there was a miscarriage of justice; or

(b) may dismiss the appeal where,

(i) the court is of the opinion that the appellant, although not properly convicted on a count or part of a certificate was properly convicted on another count or part of the certificate,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in clause (a), or

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subclause (a) (ii) the

appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

(2) Where the court allows an appeal under clause (1) (a), it shall,

(a) where the appeal is from a conviction, direct a finding of acquittal to be entered or order a new trial; or

(b) where the appeal is from a finding that the defendant is unable, because of mental disorder, to conduct a defence, order a new trial.

(3) Where the court dismisses an appeal under clause (1) (b), it may substitute the decision that in its opinion should have been made and affirm the sentence passed by the trial court or impose a sentence that is warranted in law.

Powers on Appeal Against Acquittal

100. Where an appeal is from an acquittal, the court may by order,

(a) dismiss the appeal; or

(b) allow the appeal, set aside the finding and,

(i) order a new trial, or

(ii) enter a finding of guilt with respect to the offence of which, in its opinion, the person who has been accused of the offence should have been found guilty, and pass a sentence that is warranted in law.

Appeal Against Sentence

101.- (1) Where an appeal is taken against sentence, the court shall consider the fitness of the sentence appealed from and may, upon such evidence, if any, as it thinks fit to require or receive, by order,

(a) dismiss the appeal; or

(b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,

and, in making any order under clause (b), the court may take into account any time spent in custody by the defendant as a result of offence.

(2) A judgment of a court that varies a sentence has the same force and effect as if it were a sentence passed by the trial court.

One Sentence on More than One Count

102. Where one sentence is passed upon a finding of guilt on two or more counts, the sentence is good if any of the counts would have justified the sentence.

Defect in Certificate or Process

103.-(1) Judgment shall not be given in favour of an appellant based on any alleged defect in the substance or form of a certificate or process or any variance between the certificate or process and the evidence adduced at trial unless it is shown that objection was taken at the trial and that, in the case of a variance, an adjournment of the trial was refused notwithstanding that the variance had misled the appellant.

(2) Where an appeal is based on a defect in a conviction or an order, judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect.

Additional Orders

104. A court that exercises any of the powers in sections 96 to 103 may make any order in addition that justice requires.

New Trial

105.-(1) Where a court orders a new trial, it shall be held in a regulatory offences court presided over by a judge other than the judge who tried the defendant in the first instance unless the appeal court directs that the new trial be held before the judge who tried the defendant in the first instance.

(2) Where a court orders a new trial, it may make such order for the release or detention of the appellant pending the trial as may be made by a judge under subsection 123(2) (order for conditional of person in custody) and the order may be

enforced in the same manner as if it had been made by a judge under that subsection.

Trial de Novo

□106.-
(1)
Where, because of the condition of the record of the trial in the trial court or for any other reason, the court, upon application of the appellant or respondent, is of the opinion that the interests of justice would be better served by hearing and determining the appeal by holding a new trial in the Appeal Court, the court may order that the appeal shall be heard by way of a new trial in the court in accordance with the rules, and for this purpose this Act applies with necessary modifications in the same manner as to a proceeding in a regulatory offences court.

(2) The court may, for the purpose of hearing and determining an appeal under subsection (1), permit the evidence of any witness taken before the trial court to be read if that evidence has been authenticated and if,

(a) the appellant and respondent consent;

(b) the court is satisfied that the attendance of the witness cannot reasonably be obtained; or

(c) by reason of the formal nature of the evidence or otherwise the court is satisfied that the opposite party will not be prejudiced,

and any evidence that is read under the authority of this subsection has the same force and effect as if the witness had given the evidence before the court.

Failure to Comply or Abandonment

107. The court may order that the appeal be dismissed, upon proof that notice of an appeal has been given and that,

(a) the appellant has failed to comply with any order made under section 92 (conditions for release from custody) or with the conditions of any recognizance entered into under either of those sections; or

(b) the appeal has not been proceeded with or has been abandoned.

Costs

108.-(1) Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the court may make any order with respect to costs that it considers just and reasonable.

(2) Where the court orders the appellant or respondent to pay costs, the order shall direct that the costs be paid to the clerk of the trial court, to be paid by him to the person entitled to them, and shall fix the period within which the costs shall be paid.

(3) Costs ordered to be paid under this section by a person other than a prosecutor acting on behalf of the Crown shall be deemed to be a fine for the purpose of enforcing its payment.

Implementation of Order on Appeal

109. An order or judgment of the appeal court shall be implemented or enforced by the trial court and the clerk of the appeal court shall send to the clerk of the trial court the order and all writings relating to the order.

Appeal to the Court of Appeal

110.-(1) A defendant or the prosecutor or the Attorney General by way of intervention may appeal from the judgment of the appeal court to the Court of Appeal, with leave of a justice of appeal on special grounds, upon any question of law alone or as to sentence in accordance with the rules of the Court.

(2) Leave to appeal shall not be granted under subsection (1) unless the justice of appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted.

(3) No appeal or review lies from a decision on a motion for leave to appeal under subsection (1).

Custody Pending Appeal

111. A defendant who appeals shall, if in custody, remain in custody, but a judge may order the defendant's release upon any of the conditions set out in subsection 122(2) (order for conditional release of person in custody).

Review in Minor Cases

112.- (1) Where a defendant is convicted of an offence for which the maximum penalty prescribed is a fine of $5,000 or less and no imprisonment, the defendant may elect to appeal by way of a review under this section.

(2) The review shall be conducted in the (provincial or territorial summary conviction court) as an informal review for the purpose of ensuring that the defendant has had due process and the evidence was duly considered.

(3) Upon a review, the court shall give the parties an opportunity to be heard and may,

(a) make such inquiries as are necessary to ensure that the issues are fully and effectively defined;

(b) receive any evidence that the defendant failed to present at the original hearing, notwithstanding that it was available;

(c) hear or rehear the recorded evidence or any part of it and may require any party to provide a transcript of the evidence or any part of it or to produce any further exhibit;

(d) receive the evidence of any witness whether or not the witness gave evidence at the trial;

(e) require the judge presiding at the trial to report in writing on any matter respecting the procedure and due process as is specified in the request;

(f) require the attendance of the regulatory offences officer who issued the certificate or the clerk of the trial court or any other official whose evidence is relevant to the issues raised by the defendant; and

(g) receive and act upon statements of agreed facts or admissions.

(4) Upon a review, the court may affirm, reverse or vary the decision appealed from or where, in the opinion of the court, it is necessary to do so to satisfy the ends of justice, direct a new trial.

(5) Where the court directs a new trial, it shall be held in the regulatory offences court presided over by a judge other than the judge who tried the defendant in the first instance, but the review court may, with the consent of the parties to the review, direct that the new trial be held before the judge who tried the defendant in the first instance.

(6) A decision on a review under this section is final.

COMMENTARY

In the great number of minor offences such as parking, illegal turns, stop signs, speeding and their equivalent in other activities such as jaywalking, smoking and many other similar offences, there is no legal issue that the defendants are interested in. It is much like being billed by a utility. The main questions on which the defendant seeks reassurance are of fact and amount. The principal function of the court is to give the defendant access to someone to ensure that the defendant's version of the facts are taken into consideration.

Unfortunately, the crowded courts and stylized procedure commonly leaves a defendant feeling that his or her story was never gotten across. After the gavel falls and the defendant seeks to continue, the defendant is told "You can appeal if I'm wrong". It is not access to justice in these cases to offer only an expensive formal appeal with a full dress hearing through lawyers on legal points and, of course, no appeal will be taken.

The purpose of section 112 is to review due process and correct any oversight or deficiency in the hearing. Any serious questions of law should go to the regular appeal procedure. The review is an option but, if taken, excludes an appeal.

Judicial Review

113.- (1) Upon an application by way of originating notice, the (name the superior trial court of the enacting jurisdiction) may by

order grant any relief in respect of matters arising under this Act that the applicant would be entitled to in proceedings by way of an application for an order in the nature of mandamus, prohibition or certiorari.

(2) Notice of an application under this section shall be served on,

(a) the person whose act or omission gives rise to the application;

(b) any person who is a party to a proceeding that gives rise to the application; and

(c) the Attorney General.

(3) An appeal lies to the Court of Appeal from an order made under this section.

Application for Certiorari

114.- (1) A notice under section 113 in respect of an application for relief in the nature of certiorari shall be given at least seven days and not more than ten days before the date fixed for the hearing of the application and the notice shall be served within thirty days after the occurrence of the act sought to be quashed.

(2) Where a notice referred to in subsection (1) is served on the person making the decision, order or warrant or holding the proceeding giving rise to the application, such person shall forthwith file in the (Court) for use on the application, all material concerning the subject-matter of the application.

(3) No application shall be made to quash a conviction, order or ruling from which an appeal is provided by this Act, whether subject to leave or otherwise.

(4) On an application for relief in the nature of certiorari, the (Court) shall not grant relief unless the court finds that a substantial wrong or miscarriage of justice has occurred, and the court may amend or validate any decision already made, with effect from such time and on such terms as the court considers proper.

(5) Where an application is made to quash a decision, order, warrant or proceeding made or held by a judge on the ground that the judge exceeded his or her jurisdiction, the (Court) may, in quashing the decision, order, warrant or proceeding, order that no civil proceeding shall be taken against the judge or against any officer who acted under the decision, order or warrant or in the proceeding or under any warrant issued to enforce it.

Application for Habeas Corpus

115.- (1) Upon an application by way of originating notice, the (Court) may by order grant any relief in respect of a matter arising under this Act that the applicant would be entitled to in proceedings by way of an application for an order in the nature of habeas corpus.

(2) Notice of an application under subsection (1) for relief in the nature of habeas corpus shall be served upon the person having custody of the person in respect of whom the application is made and upon the Attorney General and on the hearing of the application the presence before the (Court) of the person in respect of whom the application was made may be dispensed with by consent, in which event the (Court) may proceed to dispose of the matter forthwith as the justice of the case requires.

Costs on Judicial Review

116. The (Court) to which an application or appeal is made under section 113 or 115 may make an order with respect to costs that it considers just and reasonable.

ARREST AND BAIL

Power of Arrest

117. There is no general power of arrest in respect of the commission of a regulatory offence unless the arrest is by a police officer who has reasonable and probable grounds to believe that an offence has been committed or is about to be committed and,

(a) an arrest is necessary to identify the defendant;

(b) an arrest is necessary to preserve evidence;

(c) an arrest is necessary to prevent the continuation of the offence; or

(d) the defendant is from out of the jurisdiction and unlikely to respond to the offence notice and a deposit is required by means of the bail procedure.

Execution of Warrant

118.- (1) A warrant for the arrest of a person shall be executed by a police officer by arresting the person against whom the warrant is directed wherever found in (enacting jurisdiction).

(2) A police officer may arrest without warrant a person for whose arrest the officer has reasonable and probable grounds to believe that a warrant is in force in (enacting jurisdiction).

Use of Force

119.- (1) Every police officer, if the officer acts on reasonable and probable grounds, is justified in using as much force as is necessary to do what the officer is required or authorized by law to do.

(2) Every person upon whom a police officer calls for assistance is justified in using as much force as the person believes on reasonable and probable grounds is necessary to render the assistance.

Disclosure on Arrest

120.- (1) It is the duty of every one who executes a process or warrant to produce it when requested to do so.

(2) It is the duty of every one who arrests a person, whether with or without warrant, to give notice to that person of the reason for the arrest.

Release after Arrest

121.- (1) Where a police officer, acting under a warrant or other power of arrest, arrrests a person, the police officer shall, as soon as is practicable, release the person from custody after

serving the person with a summons or offence notice unless the officer has reasonable and probable grounds to believe that,

(a) it is necessary in the public interest for the person to be detained, having regard to all the circumstances including the need to,

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or

(iii) prevent the continuation or repetition of the offence or the commission of another offence;

(b) the person arrested is ordinarily resident outside of (enacting jurisdiction) and will not respond to a summons or offence notice.

(2) Where a defendant is not released from custody under subsection (1), the police officer shall deliver the defendant to the officer in charge of the place where the defendant is held and where, in the opinion of the officer in charge the conditions set out in clauses (1)(a) and (b) do not or no longer exist, the officer in charge shall release the defendant, after serving the defendant with a summons or after the defendant has entered into a recognizance in the prescribed form, without sureties, conditioned for appearance in court.

(3) Where the defendant is held for the reason only that he or she is not ordinarily resident in (enacting jurisdiction) and it is believed that he or she will not respond to a summons, the officer in charge may, in addition to anything required under subsection (2), require the defendant to deposit cash or other satisfactory negotiable security in an amount not to exceed the maximum fine for the offence or $500, whichever is the lesser.

Court Appearance

122.-(1) Where a defendant is not released from custody under section 121, the officer in charge shall, as soon as is practicable but in any event within twenty-four hours, bring the defendant before a judge and the judge shall, unless a plea of guilty

is taken, order that the defendant be released upon giving an undertaking to appear unless the prosecutor having been given an opportunity to do so shows cause why the detention of the defendant is justified to ensure his or her appearance in court or why an order under subsection (2) is justified for the same purpose.

(2) The judge may order the release of the defendant,

(a) upon the defendant entering into a recognizance to appear with such conditions as are appropriate to ensure his or her appearance in court; or

(b) where the offence is one punishable by imprisonment for twelve months or more, or where the defendant is not ordinarily resident in (enacting jurisdiction), upon the defendant entering into a recognizance before a judge with sureties in such amount and with such conditions, if any, as are appropriate to ensure appearance in court or, with the consent of the prosecutor, upon the defendant depositing with the judge such sum of money or other valuable security as the order directs in an amount not exceeding the amount of the maximum fine for the offence or $1,000, whichever is the lesser.

(3) The judge shall not make an order under clause (2)(b) unless the prosecutor shows cause why an order under clause (2)(a) should not be made.

(4) Where the prosecutor shows cause why the detention of the defendant in custody is justified to ensure the defendant's appearance in court, the judge shall order the defendant to be detained in custody until dealt with according to law.

(5) The judge shall include in the record a statement of reasons for the decision under subsection (1), (2) or (4).

(6) In a proceeding under subsection (1), the judge may receive and base his or her decision upon information the judge considers credible or trustworthy in the circumstances of each case except that the defendant shall not be examined or cross-examined in respect of the offence with which he or she is charged.

(7) A proceeding under subsection (1) shall not be adjourned for more than three days without the consent of the defendant.

Expediting of Trial

123.-(1) A defendant who is not released from custody under section 121 or 122 shall be brought before the court forthwith and, in any event, within eight days.

(2) The judge presiding upon any appearance of the defendant in court may, upon the application of the defendant or prosecutor, review any order made under section 122 and make such further or other order under section 122 as to the judge seems appropriate in the circumstances.

Appeal

124. A defendant or the prosecutor may appeal from an order or refusal to make an order under section 122 or 123 and the appeal shall be to the (court designated by the enacting jurisdiction for appeals under section 90) and shall be conducted in accordance with the rules of the court.

Agent for Appearance

125.-(1) Where a defendant from outside the jurisdiction who is released upon making a deposit under subsection 121(3) or clause 122 (2)(b) does not appear to answer the charge, the judge may order the amount deposited to be applied to payment of the fine and costs imposed by the court upon the conviction.

(2) An officer in charge or judge who takes a recognizance, money or security under section 121 or 122 shall make a return of it to the court where the defendant is required to appear.

(3) The clerk of the court shall, upon the conclusion of proceedings, make a financial return to every person who deposited money or security under a recognizance and return the surplus, if any.

Recognizance Binding

126. (1) The recognizance of a person to appear in a proceeding binds the person and sureties in respect of all appearances

required in the proceeding at times and places to which the proceeding is adjourned.

(2) A recognizance is binding in respect of appearances for the offence to which it relates and is not vacated upon the arrest, discharge or conviction of the defendant upon another charge.

(3) The principal to a recognizance is bound for the amount of the recognizance that is due upon forfeiture.

(4) The principal and each surety to a recognizance are bound, jointly and severally, for the amount of the recognizance that is due upon forfeiture for non-appearance.

Relieving Surety

127.-(1) A surety to a recognizance may, by application in writing to the court at which the defendant is required to appear, apply to be relieved of the obligation under the recognizance and the court shall thereupon issue a warrant for the arrest of the defendant.

(2) A police officer who arrests the defendant under a warrant issued under subsection (1) shall bring the defendant before a judge under section 122 and certify the arrest by certificate in the prescribed form and deliver the certificate to the court.

(3) The receipt of the certificate by the court under subsection (2) vacates the recognizance and discharges the sureties.

Discharge of Surety

128. A surety to a recognizance may discharge the obligation under the recognizance by delivering the defendant into the custody of the court at which the defendant is required to appear at any time while it is sitting at or before the trial of the defendant.

Forfeiture of Recognizance

129.-(1) Where a person who is bound by recognizance does not comply with a condition of the recognizance, a judge having knowledge of the facts shall endorse on the recognizance a certificate in the prescribed form setting out,

(a) the nature of the default;

(b) the reason for the default, if it is known;

(c) whether the ends of justice have been defeated or delayed by reason of the default; and

(d) the names and addresses of the principal and sureties.

(2) A certificate that has been endorsed on a recognizance under subsection (1) is evidence of the default to which it relates.

(3) The clerk of the court shall transmit the endorsed recognizance to the clerk of the regulatory offences court and, upon its receipt, the endorsed recognizance constitutes an application for the forfeiture of the recognizance.

(4) A judge of the court shall fix a time and place for the hearing of the application and the clerk of the court shall, not less than ten days before the time fixed for the hearing, deliver notice to the prosecutor and to each principal and, where the application is for forfeiture for non-appearance, each surety named in the recognizance, of the time and place fixed for the hearing and requiring each principal and surety to show cause why the recognizance should not be forfeited.

(5) The court may, after giving the parties an opportunity to be heard, in its discretion grant or refuse the application and make any order in respect of the forfeiture of the recognizance that the court considers proper.

(6) Where an order for forfeiture is made under subsection (5),

(a) any money or security forfeited shall be paid over by the person who has custody of it to the person who is entitled by law to receive it; and

(b) the principal and surety become judgment debtors of the Crown jointly and severally in the amount forfeited under the recognizance and the amount may be collected in the same manner as money owing under a judgment of the (county or district court or equivalent civil court of the enacting jurisdiction).

SEARCH AND SEIZURE

Warrant

130.- (1) Where a judge of the regulatory offences court is satisfied by information upon oath that there is reasonable ground to believe that there is in any building, receptacle or place,

(a) anything upon or in respect of which an offence has been or is suspected to have been committed; or

(b) anything that there is reasonable ground to believe will afford evidence as to the commission of an offence,he judge may at any time issue a warrant in the prescribed form authorizing a police officer or person named in the warrant to search the building, receptacle or place for any such thing, and to seize and carry it before the judge issuing the warrant or another judge to be dealt with according to law.

(2) Every search warrant shall name a date upon which it expires, which date shall be not later than fifteen days after its issue.

(3) Every search warrant shall be executed between 6 a.m. and 9 p.m., unless the judge otherwise authorizes the warrant.

Detention of Things Seized

131.- (1) Where any thing is seized and brought before a judge, the judge shall by order,

(a) detain it or direct it to be detained in the care of a person named in the order; or

(b) direct it to be returned, and the judge may in the order authorize the examination, testing, inspection or reproduction of the thing seized upon such conditions as are reasonably necessary and directed in the order, and may make any other provision as in the opinion of the judge is necessary for its preservation.

(2) Nothing shall be detained under an order made under subsection (1) for a period of more than three months after the time of seizure unless, before the expiration of that period,

(a) upon application, a judge is satisfied that having regard to the nature of the investigation, its further detention for a specified period is warranted and the judge so orders; or

(b) proceedings are instituted in which the thing detained may be required.

(3) Upon the application of the defendant, prosecutor or person having an interest in a thing detained under subsection (1), a judge may make an order for the examination, testing, inspection or reproduction of any thing detained upon such conditions as are reasonably necessary and directed in the order.

(4) Upon the application of a person having an interest in a thing detained under subsection (1), and upon notice to the defendant, to the person from whom the thing was seized, to the person to whom the search warrant was issued and to any other person who has an apparent interest in the thing detained, a judge may make an order for the release of any thing detained to the person from whom the thing was seized where it appears that the thing detained is no longer necessary for the purpose of the investigation or proceeding.

Solicitor-Client Privilege

132.- (1) Where under a search warrant a person is about to examine or seize a document that is in the possession of a lawyer and a solicitor-client privilege is claimed on behalf of a named client in respect of the document, the person shall, without examiniing or making copies of the document,

(a) seize the document and place it, together with any other document seized in respect of which the same claim is made on behalf of the same client, in a package and seal and identify the package; and

(b) place the package in the custody of the clerk of the court or, with the consent of the person and the client, in the custody of another person.

(2) No person shall examine or seize a document that is in the possession of a lawyer without giving the lawyer a reasonable opportunity to claim the privilege under subsection (1).

(3) A judge may, upon the application of the lawyer, which may be made without notice, by order authorize the lawyer to examine or make a copy of the document in the presence of its custodian or the judge, and the order shall contain such provisions as are necessary to ensure that the document is repackaged and resealed without alteration or damage.

(4) Where a document has been seized and placed in custody under subsection (1), the client by or on whose behalf the claim of solicitor-client privilege is made may apply to a judge for an order sustaining the privilege and for the return of the document.

(5) An application under subsection (4) shall be by notice of motion returnable not later than thirty days after the date on which the document was placed in custody.

(6) The person who seized the document and the Attorney General are parties to an application under subsection (4) and entitled to at least three days notice of the application.

(7) An application under subsection (4) shall be heard in private and, for the purposes of the hearing, the judge may examine the document and, if so, the judge shall cause it to be resealed.

(8) The judge may by order,

(a) declare that the solicitor-client privilege exists or does not exist in respect of the document;

(b) direct that the document be delivered up to the appropriate person.

(9) Where it appears to a judge upon the application of the Attorney General or person who seized the document that no application has been made under subsection (4) within the time limit prescribed by subsection (5), the judge shall order that the document be delivered to the applicant.

COMMENTARY

Sections 130 to 132 are useful for adoption by reference in other statutes where searches are necessary for other purposes, such as investigations involving consumer or other public protection.

REGULATIONS

Regulations

133.-(1) The Lieutenant Governor in Council may make regulations,

(a) prescribing any matter that is referred to in this Act as prescribed by the regulations;

(b) prescribing the words and expressions to designate particular offences for the purposes of describing charges in certificates of offence, offence notices and summons;

(c) authorizing the use in a form prescribed under clause (a) of any word or expression to designate an offence;

(2) The use on a form prescribed under clause (1)(a) of any word or expression authorized by the regulations to designate an offence is sufficient for all purposes to describe the offence, including sufficient particularity of the charge.

Rules of Court

134.-(1) There shall be a Rules Committee of the (court designated or established for regulatory offences in the enacting jurisdiction) composed of such members as are appointed by the Lieutenant Governor in Council who shall designate one of the members to preside over the Committee.

(2) A majority of the members of the Rules Committee constitutes a quorum.

(3) Subject to the approval of the Lieutenant Governor in Council, the Rules Committee may make rules,

(a) regulating any matters relating to the practice and procedure of the (Court);

(b) prescribing forms that are referred to in this Act as prescribed forms, and such other forms respecting proceedings in the court as are considered necessary;

(c) prescribing and regulating the procedures under any Act that confers jurisdiction on the (Court) or a judge of the court;

(d) prescribing any matter that is referred to in an Act as provided for by the rules of the (Court).

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 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.
Criminal Injuries Compensation Act	1970	Rev. '83.
Custody Jurisdiction and Enforcement Act	1974	Rev. '81.
Defamation Act	1944	Rev '48; Am '49, '79.
Dependants' Relief Act	1974	
Devolution of Real Property Act	1927	Am. '62
Domicile Act	1961	
Effect of Adoption Act	1969	
Evidence Act	1941	Am '42, '44, '45; Rev. '45; Am '51, '53, '57; Rev. '81
— Affidavits before Officers	1953	
— Foreign Affidavits	1938	Am. '51; Rev '53.
— Hollington v. Hewthorne	1976	
—Judicial Notice of Acts, Proof of State Documents	1930	Rev. '31
— Photographic Records	1944	
— Russell v. Russell	1945	
— Use of Self-Criminating Evidence Before Military Boards of Inquiry	1976	
Family Support Act	1980	Am '86.
Fatal Accidents Act	1964	
Foreign Arbitral Awards Act	1985	
Foreign Judgments Act	1933	Rev '64.
Foreign Money Claims Act	1989	
Franchises Act	1984	Rev. '85.
Frustrated Contracts Act	1948	Rev. '74
Highway Traffic — Responsibility of Owner & Driver for Accidents	1962	
Hotelkeepers Act	1962	
Human Tissue Donation Act	1989	
Information Reporting Act	1977	
Inter-Jurisdictional Child Welfare Orders Act	1988	
International Child Abduction Act	1981	
International Commercial Arbitration Act	1986	
International Sale of Goods Act	1985	
International Trusts Act	1987	Am '88
Interpretation Act	1938	Am '39; Rev. '41; Am. '48; Rev '53, '73; Rev '84.

Title	Year First Adopted and Recommended	Subsequent Amendments and Revisions
Interprovincial Subpoenas Act	1974	
Intestate Succession Act	1925	Am. '26, '50, '55; Rev. '58; Am. '63; Rev '85.
Judgment Interest Act	1982	
Jurors' Qualifications Act	1976	
Legitimacy Act	1920	Rev. '59.
Limitation of Actions Act	1931	Am '33, '43, '44
Limitations Act	1982	
— Convention on the Limitation Period in the International Sale of Goods	1976	
Maintenance and Custody Enforcement Act	1985	
Married Women's Property Act	1943	
Medical Consent of Minors Act	1975	
Mental Health Act	1987	
Occupiers' Liability Act	1973	Am '75.
Partnerships Registration Act	1938	Am '46.
Perpetuities Act	1972	
Personal Property Security Act	1971	Rev. '82
Powers of Attorney Act	1978	
Presumption of Death Act	1960	Rev '76.
Proceedings Against the Crown Act	1950	
Products Liability Act	1984	
Reciprocal Enforcement of Judgments Act	1924	Am. '25; Rev. '56; Am. '57; Rev '58; Am. '62, '67, '89
Reciprocal Enforcement of Maintenance Orders Act	1946	Rev. '56, '58; Am. '63, '67, '71; Rev. '73, '79; Am. '82; Rev '85
Reciprocal Recognition and Enforcement of Judgments Act	1981	
Regulations Act	1943	Rev '82.
Retirement Plan Beneficiaries Act	1975	
Sale of Goods Act	1981	Rev. '82; 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	
— Substantial Compliance	1987	

TABLE II

UNIFORM ACTS PREPARED, ADOPTED AND RECOMMENDED FOR ENACTMENT WHICH HAVE BEEN SUPERSEDED BY OTHER ACTS, WITHDRAWN AS OBSOLETE, OR TAKEN OVER BY OTHER ORGANIZATIONS

Title	Year Adopted	No. of Jurisdictions Enacting	Year Withdrawn	Superseding Act
Assignment of Book Debts Act	1928	10	1980	Personal Property Security Act
Conditional Sales Act	1922	7	1980	Personal Property Security Act
Cornea Transplant Act	1959	11	1965	Human Tissue Act
Corporation Securities Registration Act	1931	6	1980	Personal Property Security Act
Fire Insurance Policy Act	1924	9	1933	*
Highway Traffic — Rules of the Road	1955	3		**
Human Tissue Act	1965	6	1970	Human Tissue Gift Act
Human Tissue Gift Act	1970	10	1989	Human Tissue Donation Act
Landlord and Tenant Act	1937	4	1954	None
Life Insurance Act	1923	9	1933	*
Pension Trusts and Plans — Appointment of Beneficiaries	1957	8	1975	Retirement Plan Beneficiaries Act
— Perpetuities	1954	8	1975	In part by Retirement Plan Beneficiaries Act and in part by Perpetuities Act Dependants' Relief Act
Reciprocal Enforcement of Tax Judgments Act	1965	None	1980	None
Testators Family Maintenance Act	1945	4	1974	

*Since 1933 the Fire Insurance Policy Act and the Life Insurance Act have been the responsibility of the Association of Superintendents of Insurance of the Provinces of Canada (*see* 1933 Proceedings, pp 12, 13) under whose aegis a great many amendments and a number of revisions have been made. The remarkable degree of uniformity across Canada achieved by the Conference in this field in the nineteen twenties has been maintained ever since by the Association

**The Uniform Rules of the Road are now being reviewed and amended from time to time by the Canadian Conference of Motor Transport Authorities

TABLE III

UNIFORM ACTS NOW RECOMMENDED SHOWING THE JURISDICTIONS THAT HAVE ENACTED THEM IN WHOLE OR IN PART, WITH OR WITHOUT MODIFICATIONS, OR IN WHICH PROVISIONS SIMILAR IN EFFECT ARE IN FORCE

**indicates that the Act has been enacted in part.*

°*indicates that the Act has been enacted with modifications.*

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. Total: 0

Assignment of Book Debts Act—Enacted by Man. ('29, '51, '57). Total: 1.

Bills of Sale Act—Enacted by Alta.† ('29); Man. ('29, '57); N.B.° ('52); Nfld.° ('55); N.W.T.° ('48); N.S. ('30); P.E.I.* ('47, '82). Total: 7.

Bulk Sales Act—Enacted by Alta.† ('22); Man. ('51); N.B.† ('27); Nfld.° ('55); N.W.T.† ('48); N.S.ˣ; Yukon ('56). Total: 7.

Child Abduction (Hague Convention) Act—Enacted by B.C. ('82); Man. ('82); N.B.ˣ ('82); Nfld. ('83); N.S. ('82); P.E.I.° ('84) *sub nom.* Custody Jurisdiction and Enforcement Act; Yukon ('81). Total: 7.

Child Status Act—Enacted by N.B. ('80) sub nom. Family Services Act; P.E.I. ('87). Total: 2.

Condominium Insurance Act—Enacted by B.C. ('74) *sub nom.* Strata Titles Act; Man. ('76); Yukon ('81). Total: 3.

Conflict of Laws Rules for Trusts Act

Conflict of Laws (Traffic Accidents) Act—Enacted by Yukon ('72). Total: 1.

Contributory Negligence Act—Enacted by Alta.† ('37); N.B.° ('25, '62); Nfld.° ('51); N.W.T.° ('50); N.S. ('26, '54); P.E.I.ˣ ('78); Sask. ('44); Yukon° ('55). Total: 8.

Criminal Injuries Compensation Act—Enacted by Alta.† ('69); B.C. ('72); N.B.ˣ ('71); Nfld.ˣ ('68); N.W.T. ('73); Ont. ('71); Yukon° ('72, '81). Total: 7.

Custody Jurisdiction and Enforcement Act—Enacted by Man. ('83); N.B.ˣ ('80); Nfld.° ('83); P.E.I.° ('84). Total: 4.

Defamation Act—Enacted by Alta.† ('47); B.C.* *sub nom.* Libel and Slander Act; Man. ('46); N.B.* ('52); Nfld.° ('83); N.W.T.° ('49); N.S.* ('60); P.E.I.° ('48); Yukon ('54, '81). Total: 9.

Dependants' Relief Act—Enacted by N.B.ˣ ('59); N.W.T.* ('74); Ont. ('73) *sub nom.* Succession Law Reform Act, 1977: Part V; P.E.I. ('74) *sub nom.* Dependants of a Deceased Person Relief Act; Yukon ('81). Total: 5.

Devolution of Real Property Act—Enacted by Alta. ('28); N.B.[o] ('34); N.W.T.[o] ('54); P.E.I.* ('39) *sub nom.* Probate Act: Part V; Sask. ('28); Yukon ('54). Total: 6.

Domicile Act—0.

Effect of Adoption Act—Enacted by N.B.[x] ('80); N.W.T. ('69); P.E.I.[x]. Total: 3.

Evidence Act—Enacted by Alta. ('47, '52, '58); B.C. ('32, '45, '47, '53, '77); Can. ('42, '43); Man.* ('57, '60); Nfld. ('54); N.W.T.[o] ('48); N.S. ('45, '46, '52); P.E.I.* ('39); Ont.* ('45, '46, '52, '54); Sask. ('45, '46, '47); Yukon[o] ('55). Total: 11.

Extra—Provincial Custody Orders Enforcement Act—Enacted by Alta. ('77); B.C. ('76); Man.[o] ('82); Nfld.[o] ('76); N.W.T. ('81); N.S. ('76); Ont. ('82); Sask.[o] ('77). Total: 8.

Family Support Act—Enacted by Yukon[x] ('81). Total: 1.

Fatal Accidents Act—Enacted by N.B.* ('69); N.W.T.† ('48); Ont. ('77); *sub nom.* Family Law Reform Act: Part V; P.E.I.[x]. Total: 4.

Foreign Judgments Act—Enacted by N.B.[o] ('50); Sask. ('34). Total: 2.

Foreign Money Claims Act.

Frustrated Contracts Act—Enacted by Alta.† ('49); B.C. ('74); N.B. ('49); Nfld. ('56); N.W.T.† ('56); Ont. ('49); Yukon ('81). Total: 7.

Highway Traffic and Vehicles Act, Part III: Responsibility of Owner and Driver for Accidents—0.

Hotelkeepers Act—Enacted by N.B.[x]. Total: 1.

Human Tissue Donation Act.

Inter-Jurisdictional Child Welfare Orders Act

International Commercial Arbitration Act—Enacted by B.C.[o] ('86); Can. ('86); N.B. ('86); Nfld. ('86); N.W.T. ('86); N.S. ('86); Ont. ('86); P.E.I. ('86); Sask. ('86); Yukon ('86). Total: 10.

International Trusts Act

Interpretation Act—Enacted by Alta.[o] ('80); B.C. ('74); N.B.[x]; Nfld.[o] ('51); N.W.T.[o]† ('48); P.E.I.[o] ('81); Que.[x]; Sask.[o] ('43); Yukon* ('54). Total: 9.

Interprovincial Subpoenas Act—Enacted by Alta. ('81); B.C. ('76); Man. ('75); N.B.[o] ('79); Nfld.[o] ('79); N.W.T.[o] ('76); Ont. ('79); P.E.I. ('87); Sask.[o] ('77); Yukon ('81). Total: 10.

Intestate Succession Act—Enacted by Alta. ('28); B.C. ('25); Man.[o] ('27, '77) *sub nom.* Devolution of Estates Act; N.B.[o] ('26); Nfld. ('51); N.W.T.[o] ('48); Ont.[o] ('77) *sub nom.* Succession Law Reform Act: Part II; P.E.I.* ('39) *sub nom.* Probate Act: Part IV; Sask. ('28); Yukon[o] ('54). Total: 10.

Judgment Interest Act—Enacted by N.B.[x]; Nfld. ('83). Total: 2.

Jurors Act (Qualifications and Exemptions)—Enacted by B.C. ('77); *sub nom.* Jury Act; Man. ('77); N.B.[x]; Nfld. ('81); P.E.I.[o] ('81). Total: 5.

Legitimacy Act—Enacted by Alta. ('28, '60); B.C. ('22, '60); Man. ('28, '62); N.W.T.[o] ('49, '64); N.S.[x]; Ont. ('21, '62); P.E.I.* ('20) *sub nom.* Children's Act: Part I; Sask.[o] ('20, '61); Yukon* ('54). Total: 9.

Limitation of Actions Act—Enacted by Alta.[o] ('35); Man.[o] ('32, '46); N.B.* ('52); N.W.T.* ('48); P.E.I.* ('39); Sask. ('32); Yukon ('54). Total: 7.

Married Women's Property Act—Enacted by Man. ('45); N.B.[o] ('51); N.W.T. ('52, '77); Yukon[o] ('54). Total: 4.

Medical Consent of Minors Act—Enacted by N.B.[o] ('76). Total: 1.

Mental Health Act

Occupiers' Liability Act—Enacted by B.C. ('74); P.E.I.[o] ('84). Total: 2.

Partnerships Registration Act—Enacted by N.B.[o] ('51); P.E.I.[x]; Sask.[x] ('41) *sub nom.* Business Names Registration Act. Total: 3.

Pensions Trusts and Plans—Appointment of Beneficiaries—Enacted by Alta. ('58); Man. ('59); N.B. ('55); Nfld. ('58); N.S. ('60); Sask. ('57). Total: 6.

Perpetuities Act—Enacted by Alta. ('72); B.C. ('75); Man. ('59); Nfld. ('55); N.W.T.* ('68); N.S. ('59); Ont. ('66); Yukon ('81). Total: 8.

Personal Property Security Act—Enacted by Man. ('77); Sask.[o] ('79); Yukon[o] ('81). Total: 3.

Powers of Attorney Act—Enacted by B.C. ('79); Sask.[o] ('83). Total: 2.

Presumption of Death Act—Enacted by B.C. ('58, '77) *sub nom.* Survivorship and Presumption of Death Act; Man. ('68); N.B.[x] ('60); N.W.T. ('62, '77); N.S.[o] ('83); Yukon ('81). Total: 6.

Proceedings Against the Crown Act—Enacted by Alta.[o] ('59); Man. ('51); N.B.[o] ('52); Nfld.[o] ('73); N.S. ('51); Ont.[o] ('63); P.E.I.* ('73); Sask.[o] ('52). Total: 8.

Reciprocal Enforcement of Judgments Act—Enacted by Alta. ('25, '58); B.C. ('25, '59); Man. ('50, '61); N.B.[x] ('25, '51); Nfld.[o] ('60); N.W.T.* ('55); N.S.[o] ('73); Ont. ('29); P.E.I.[o] ('74); Sask. ('40); Yukon ('56, '81). Total: 11.

Reciprocal Enforcement of Maintenance Orders Act—Enacted by Alta. ('47, '58); B.C.[o] ('72); Man. ('46, '61, '83); N.B.† ('52); Nfld.[x] ('51, '61); N.W.T.[o] ('51); N.S.* ('49, '83); Ont.[o] ('59); P.E.I.[o] ('51, '83); Que. ('52); Sask. ('68, '81, '83); Yukon ('81). Total: 12.

Regulations Act—Enacted by Alta.[o] ('57); B.C. ('83); Can.[o] ('50); Man.[o] ('45); N.B.[o] ('62); Nfld.[o] ('77); N.W.T.[o] ('73); Ont.[o] ('44); Sask.[o] ('63, '82); Yukon[o] ('68). Total: 10.

Retirement Plan Beneficiaries Act—Enacted by Alta. ('77, '81); Man. ('76); N.B.° ('82); Ont. ('77) *sub nom.* Law Succession Reform Act: Part V; P.E.I.ˣ; Yukon ('81). Total: 6.

Sale of Goods Act—Enacted by N.B.ˣ. Total: 1.

Service of Process by Mail Act—Enacted by Alta.ˣ; B.C.° ('45); Man.ˣ; Sask.ˣ. Total: 4.

Statutes Act—Enacted by B.C.° ('74); N.B.° ('73); P.E.I.ˣ. Total: 3.

Survival of Actions Act—Enacted by Alta.° ('79); B.C.* *sub nom.* Estate Administration Act; N.B.* ('69); P.E.I.° ('78); Yukon ('81). Total: 5.

Survivorship Act—Enacted by Alta. ('48, '64); B.C.° ('39, '58); Man. ('42, '62); N.B.† ('40); Nfld. ('51); N.W.T. ('62); N.S. ('41); Ont. ('40); Sask. ('42, '62); Yukon ('81). Total: 10.

Testamentary Additions to Trusts Act—Enacted by Yukon ('69) *sub nom.* Wills Act,s 29. Total: 1.

Testators Family Maintenance Act—Enacted by 6 jurisdictions before it was superseded by the Dependants Relief Act.

Trade Secrets Act

Transboundary Pollution Reciprocal Access Act—Enacted by Colorado ('84); Man. ('85); Montana ('84); New Jersey ('84); P.E.I. ('85). Total: 5.

Trustee Investments Act—Enacted by B.C. ('59); Man.° ('65); N.B. ('71); N.W.T. ('71); N.S.* ('57); Sask. ('65); Yukon ('62, '81). Total: 7.

Variation of Trusts Act—Enacted by Alta. ('64); B.C. ('68); Man. ('64); N.W.T. ('63); N.S. ('62); Ont. ('59); P.E.I. ('63); Sask. ('69). Total: 8.

Vital Statistics Act—Enacted by Alta.° ('59); B.C.° ('62); Man.° ('51); N.B.ˣ ('79); N.W.T.° ('52); N.S.° ('52); Ont. ('48); P.E.I.* ('50); Sask. ('50); Yukon° ('54). Total: 10.

Warehousemen's Lien Act—Enacted by Alta. ('22); B.C. ('52); Man. ('23); N.B.ˣ ('23); Nfld. ('63); N.W.T.° ('48); N.S. ('51); Ont. ('24); P.E.I.° ('38); Sask. ('21); Yukon ('54). Total: 11.

Warehouse Receipts Act—Enacted by Alta. ('49); B.C.* ('45); Man.° ('46); N.B.° ('47); Nfld. ('63); N.S. ('51); Ont.° ('46). Total: 7.

Wills Act—Enacted by Alta.° ('60); B.C.° ('60); Man.° ('64); N.B.° ('59); Nfld. ('76); N.W.T.° ('52); Sask. ('31); Yukon° ('54). Total: 8.

—Conflict of Laws—Enacted by B.C. ('60); Man. ('55); Nfld. ('76); N.W.T. ('52); Ont. ('54). Total: 5.

—(Part 4) International—Enacted by Alta. ('76); Nfld. ('76). Total: 2.

Section 17—B.C.° ('79). Total: 1.

TABLE IV

LIST OF JURISDICTIONS SHOWING THE UNIFORM ACTS NOW RECOMMENDED ENACTED IN WHOLE OR IN PART, WITH OR WITHOUT MODIFICATIONS, OR IN WHICH PROVISIONS SIMILAR IN EFFECT ARE IN FORCE

**indicates that the Act has been enacted in part*

°*indicates that the Act has been enacted with modifications*

ˣ*indicates that provisions similar in effect are in force*

†*indicates that the Act has since been revised by the Conference*

Alberta

Bills of Sale Act† ('29); Bulk Sales Act† ('22); Contributory Negligence Act† ('37); Criminal Injuries Compensation Act† ('69); Defamation Act† ('47); Devolution of Real Property Act ('28); Evidence Act—Affidavits before Officers ('58), Foreign Affidavits ('52, '58), Photographic Records ('47), *Russell v. Russell* ('47); Extra-Provincial Custody Orders Enforcement Act ('77); Frustrated Contracts Act† ('49); Interpretation Act° ('80); Interprovincial Subpoena Act ('81); Intestate Succession Act ('28); Legitimacy Act ('28, '60); Limitation of Actions Act° ('35); Pension Trusts and Plans—Appointment of Beneficiaries ('58); Perpetuities Act ('72); Proceedings Against the Crown Act° ('59); Reciprocal Enforcement of Judgments Act ('25, '58); Reciprocal Enforcement of Maintenance Orders Act ('47, '58); Regulations Act° ('57); Retirement Plan Beneficiaries Act ('77, '81); Service of Process by Mail Actˣ; Survivorship Act ('48, '64); Variation of Trusts Act ('64); Vital Statistics Act° ('59); Warehousemen's Lien Act ('22); Warehouse Receipts Act ('49); Wills Act° ('60); International Wills ('76). Total: 31.

British Columbia

Child Abduction (Hague Convention) Act ('82); Criminal Injuries Compensation Act ('72); Condominium Insurance Act ('74) *sub nom.* Condominium Act*; Defamation Act* *sub nom.* Libel and Slander Act; Evidence—Affidavits before Officers: Foreign Affidavits* ('53); *Hollington v. Hewthorne* ('77) Judicial Notice of Acts, etc. ('32), Photographic Records ('45), *Russell v. Russell* ('47); Extra-Provincial Custody Orders Enforcement Act ('76) *sub nom.* Family Relations Act*; Frustrated Contracts Act ('74) *sub nom.* Frustrated Contract Act; International Commercial Arbitration Act° ('86); Interpretation Act ('74); Interprovincial Subpoenas Act ('76) *sub nom.* Subpoena Interprovincial Act*; Intestate Succession Act ('25) *sub nom.* Estate Administration Act*; Jurors Qualification Act ('77) *sub nom.* Jury Act; Legitimacy Act ('22, '60); Occupiers' Liability Act ('74) *sub nom.* Occupiers'

Liability Act*; Perpetuities Act ('75) *sub nom.* Perpetuity Act*; Powers of Attorney Act ('79) *sub nom.* Power of Attorney Act*; Presumption of Death Act ('58, '77) *sub nom.* Survivorship and Presumption of Death Act; Reciprocal Enforcement of Judgments Act ('25, '59) *sub nom.* Court Order Enforcement Act*; Reciprocal Enforcement of Maintenance Orders Act° ('72) in Regulations under Sec. 7008 Family Relations Act; Regulations Act ('83); Service of Process by Mail Act° ('45) *sub nom.* Small Claims Act*; Survival of Actions Act *sub nom.* Estate Administration Act*; Statutes Act° ('74) Part in Constitution Act; Part in Interpretation Act; Survivorship Act° ('39, '58) *sub nom.* Survivorship and Presumption of Death Act*; Provisions now in Wills Variation Act*; Trustee (Investments) ('59) Provisions now in Trustee Act; Variation of Trusts Act ('68) *sub nom.* Trust Variation Act; Vital Statistics Act° ('62); Warehousemen's Lien Act ('52) *sub nom.* Warehouse Lien Act*; Warehouse Receipts Act* ('45); Wills Act° ('60); Wills—Conflict of Laws ('60), Sec. 17° ('79). Total: 34.

Canada

Evidence—Foreign Affidavits ('43), Photographic Records ('42); International Commercial Arbitration Act ('86); Regulations Act° ('50), superseded by the Statutory Instruments Act, S.C. 1971, c. 38. Total: 4.

Manitoba

Assignment of Book Debts Act ('29, '51, '57); Bills of Sale Act ('29, '57); Bulk Sales Act ('51); Child Abduction (Hague Convention) Act ('82); Condominium Insurance Act ('76); Custody Jurisdiction and Enforcement Act ('83); Defamation Act ('46); Extra Provincial Custody Orders Enforcement Act° ('82); Evidence Act* ('60); Affidavits before Officers ('57); Interprovincial Subpoenas Act ('75); Intestate Succession Act° ('27, '77) *sub nom.* Devolution of Estates Act; Jurors' Qualifications Act ('77); Legitimacy Act ('28, '62); Limitation of Actions Act° ('32, '46); Married Women's Property Act ('45); Pension Trusts and Plans — Appointment of Beneficiaries ('59); Perpetuities ('59); Personal Property Security Act ('77); Presumption of Death Act° ('68); Proceedings Against the Crown Act ('51); Reciprocal Enforcement of Judgments Act ('50, '61); Reciprocal Enforcement of Maintenance Orders Act ('46, '61, '83); Regulations Act° ('45); Retirement Plan Beneficiaries Act ('76); Service of Process by Mail Act*; Survivorship Act ('42, '62); Transboundary Pollution Reciprocal Access Act ('85); Trustee (Investments)° ('65); Variation of Trusts Act ('64); Vital Statistics Act° ('51); Warehousemen's Lien Act ('23); Warehouse Receipts Act° ('46); Wills Act° ('64), Conflict of Laws ('55). Total: 34.

New Brunswick

Accumulations Act[x] *sub nom.* Property Act; Bills of Sales Act[o] ('52); Bulk Sales Act† ('27); Canada U.K. Convention on the Recognition and Enforcement of Judgments[o] ('82); Child Status[x] ('80) *sub nom.* Family Services Act; Contributory Negligence Act ('25)[o] ('62); Criminal Injuries Compensation Act[x] ('71); Custody Jurisdiction and Enforcement Act[x] ('80) *sub nom.* Family Services Act; Defamation Act* ('52); Dependants Relief Act[x] ('59); Devolution of Real Property Act[o] ('34) *sub nom.* Devolution of Estates Act; Effect of Adoption Act[x] ('80) *sub nom.* Family Services Act; Fatal Accidents Act* ('69); Family Support Act[x] ('80) *sub nom.* Family Services Act; Foreign Judgments Act[o] ('50); Highway Traffic Act[x]; Hotelkeepers Act[x] *sub nom.* Innkeepers Act; International Commercial Arbitration Act ('86); Interpretation Act[x]; Interprovincial Subpoenas Act[o] ('79); Intestate Succession Act[o] ('26) *sub nom.* Devolution of Estates; Judgment Interest[x] *sub nom.* Judicature Act, see also Rules of Court; Jurors Qualification Act[x] *sub nom.* Jury Act; Limitations of Actions* ('52); Married Women's Property Act[o] ('51); Medical Consent of Minors[o] ('76); Partnership Registration Act[o] ('51); Presumption of Death Act[x] ('60); Proceedings Against the Crown[o]('52); Reciprocal Enforcement of Judgments ('25),[x] ('51); Reciprocal Enforcement of Maintenance Orders† ('52); Reciprocal Recognition and Enforcement of Judgments[o] ('84); Regulations Act[o] ('62); Retirement Plan Beneficiaries[o] ('82); Sale of Goods[x]; Statutes Act[o] ('73) *sub nom.* Interpretation Act; Survival of Actions Act* ('69); Survivorship Act† ('40); Trustees (Investments) ('71); Vital Statistics[x] ('79); Warehousemen's Lien Act[x] ('23); Warehouse Receipts[o] ('47); Wills Act[o] ('59). Total: 37.

Newfoundland

Bills of Sale Act[o] ('55); Bulk Sales Act[o] ('55); Contributory Negligence Act[o] ('51); Criminal Injuries Compensation Act[x] ('68); Custody Jurisdiction and Enforcement Act[o] ('83); Defamation Act ('83); Evidence – Affidavits before Officers ('54); Extra-Provincial Custody Orders Enforcement Act[o] ('76); Foreign Affidavits ('54) *sub nom.* Evidence Act; Frustrated Contracts Act ('56); International Child Abduction Act ('83); International Commercial Arbitration Act ('86); International Wills ('76) *sub nom.* Wills Act; Interpretation Act[o] ('51); Interprovincial Subpoena Act[o] ('76); Intestate Succession Act ('51); Judgment Interest Act[o] ('83); Jurors Act (Qualifications and Exemptions) ('81) *sub nom.* Jury Act; Legitimacy Act[ox]; Pension Trusts and Plans–Appointment of

Beneficiaries ('58) *sub nom.* Pension Plans (Designation of Beneficiaries) Act; Perpetuities Act ('55); Photographic Records ('49) *sub nom.* Evidence Act; Proceedings Against the Crown Act° ('73); Reciprocal Enforcement of Judgments Act° ('60); Reciprocal Enforcement of Maintenance Orders Act× ('51, '61) *sub nom.* Maintenance Orders (Enforcement) Act; Regulations Act° ('77) *sub nom.* Statutes and Subordinate Legislation Act; Survivorship Act ('51); Warehousemen's Lien Act ('63); Warehouse Receipts Act ('63); Wills-Conflict of Laws Act ('76) *sub nom.* Wills Act. Total: 30.

Northwest Territories

Bills of Sale Act° ('48); Bulk Sales Act† ('48); Contributory Negligence Act° ('50); Criminal Injuries Compensation Act ('73); Defamation Act° ('49); Dependants' Relief Act* ('74); Devolution of Real Property Act° ('54); Effect of Adoption Act ('69) *sub nom.* Child Welfare Ordinance: Part IV; Extra-Provincial Custody Orders Enforcement Act ('81); Evidence Act° ('48); Fatal Accidents Act† ('48); Frustrated Contracts Act† ('56); International Commercial Arbitration Act ('86); Interpretation Act°† ('48); Interprovincial Subpoenas Act° ('79); Intestate Succession Act° ('48); Legitimacy Act° ('49, '64); Limitation of Actions Act* ('48); Married Women's Property Act ('52, '77); Perpetuities Act* ('68); Presumption of Death Act ('62, '77); Reciprocal Enforcement of Judgments Act* ('55); Reciprocal Enforcement of Maintenance Orders Act° ('51); Regulations Act° ('71); Survivorship Act ('62); Trustee (Investments) ('71); Variation of Trusts Act ('63); Vital Statistics Act° ('52); Warehousemen's Lien Act° ('48); Wills Act° — General (Part II) ('52), — Conflict of Laws (Part III) ('52) - Supplementary (Part III) ('52). Total: 32.

Nova Scotia

Bills of Sale Act ('30); Bulk Sales Act×; Child Abduction (Hague Convention) Act ('82); Contributory Negligence Act ('26, '54); Defamation Act* ('60); Evidence—Foreign Affidavits ('52), Photographic Records ('45), *Russell v. Russell* ('46); International Commercial Arbitration Act ('86); Legitimacy Act×; Pension Trusts and Plans — Appointment of Beneficiaries ('60); Perpetuities ('59); Presumption of Death Act° ('63); Proceedings Against the Crown Act ('51); Reciprocal Enforcement of Judgments Act° ('73); Reciprocal Enforcement of Maintenance Orders Act* ('49, '83); Survivorship Act ('41); Trustee Investments* ('57); Variation of Trusts Act ('62); Vital Statistics Act° ('52); Warehousemen's Lien Act ('51); Warehouse Receipts Act ('51). Total: 20.

Ontario

Accumulations Act ('66); Criminal Injuries Compensation Act ('71) *sub nom.* Compensation for Victims of Crime Act° ('71); Dependants' Relief Act ('73) *sub nom.* Succession Law Reform Act: Part V; Evidence Act* ('60)—Affidavits before Officers ('54), Foreign Affidavits ('52, '54), Photographic Records ('45), *Russell v. Russell* ('46); Extra-Provincial Custody Orders Enforcement Act ('82); Fatal Accidents Act ('77) *sub nom.* Family Law Reform Act: Part V; Frustrated Contracts Act ('49); International Commercial Arbitration Act ('86); Interprovincial Subpoenas Act ('79); Intestate Succession Act° ('77) *sub nom.* Succession Law Reform Act: Part II; Legitimacy Act ('21, '62), rep. '77; Perpetuities Act ('66); Proceedings Against the Crown Act° ('63); Reciprocal Enforcement of Judgments Act ('29); Reciprocal Enforcement of Maintenance Orders Act° ('59); Regulations Act° ('44); Retirement Plan Beneficiaries Act ('77) *sub nom.* Succession Law Reform Act: Part V; Survivorship Act ('40); Variation of Trusts Act ('59); Vital Statistics Act ('48); Warehousemen's Lien Act ('24); Warehouse Receipts Act° ('46); Wills—Conflict of Laws ('54). Total: 28.

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× ('78); Defamation Act° ('48); Dependants' Relief Act° ('74) *sub nom.* Dependants of a Deceased Person Relief Act; Devolution of Real Property Act* ('39) *sub nom.* Part V of Probate Act; Effect of Adoption Act×; Evidence Act* ('39); Fatal Accidents Act×; International Commercial Arbitration Act ('86); Interpretation Act° ('81); Interprovincial Subpoenas Act; Intestate Succession Act *sub nom.* Part IV Probate Act* ('39); Jurors Act (Qualifications and Exemptions)° ('81); Legitimacy Act* ('20) *sub nom.* Part I of Children's Act; Limitation of Actions Act* ('39); Occupiers' Liability Act° ('84); Partnerships Registration Act×; Proceedings Against the Crown Act* ('73); Reciprocal Enforcement of Judgments Act° ('74); Reciprocal Enforcement of Maintenance Orders Act° ('51, '83); Retirement Plan Beneficiaries Act×; Statutes Act×; Survival of Actions Act×; Transboundary Pollution (Reciprocal Access) Act ('85); Variation of Trusts Act ('63); Vital Statistics Act* ('50); Warehousemen's Lien Act° ('38). Total: 21.

Quebec

The following is a list of Uniform Acts which have some equivalents in the laws of Quebec. With few exceptions, these equivalents are in

substance only and not in form, Bulk Sales Act: see a. 1569a and s.C.C. (S.Q. 1910, c. 39, mod. 1914, c. 63 and 1971, c. 85, s. 13) - similar; Criminal Injuries Compensation Act; see Loi sur l'indemnisation des victimes d'actes criminels, L.R.Q. (1977) ch. I-6 - quite similar; Evidence Act; Affirmation in lieu of oath: see a. 299 C.P.C. - similar; Judicial Notice of Acts, Proof of State Documents: see a. 1207 C.C. similar to }Proof of State Documents~; Human Tissue Gift Act: see a. 20, 21, 22 C.C. - similar: Interpretation Act: see Loi d'interpr§tation 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 d§clarations des compagnies et soci§t§s, L.R.Q. (1977) ch. D-1 - similar; Presumption of Death Act: see a. 70, 71 and 72 C.C. - somewhat similar: Service of Process by Mail Act: see a. 138 and 140 C.P.C. - s. 2 of the Uniform Act is identical; Trustee Investments: see a. 981a et.sq. C.C. - very similar; Warehouse Receipts Act: see Loi sur les connaissements L.R.Q. (1977) ch. C-53 - s .23 of the Uniform Act is vaguely similar; Wills Act: see C.C. a. 842 para. 2: cf. s. 7 of the Uniform Act, a. 864 para. 2: cf. s. 15 of the Uniform Act, a. 849: cf. s. 6(1) of the Uniform Act, a. 854 para. 1: cf. ofs. 8(3) of the Uniform Act - which are similar.

NOTE:

Many other provisions of the Quebec Civil Code or of other statutes bear resemblance to the Uniform Acts but are not sufficiently identical to justify a reference. Obviously, most of these subject matters are covered one way or another in the laws of Quebec.

Saskatchewan

Contributory Negligence Act ('44); Devolution of Real Property Act ('28); Evidence—Foreign Affidavits ('47), Photographic Records ('45), *Russell v. Russell* ('46); Extrajudicial Custody Order Act[o] ('77); Foreign Judgments Act ('34); International Commercial Arbitration Act ('86); Interpretation Act[o] ('43); Interprovincial Subpoenas Act[o] ('77); Intestate Succession Act ('28); Legitimacy Act[o] ('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[o] ('79); Powers of Attorney Act[o] ('83); Proceedings Against the Crown Act[o] ('52); Reciprocal Enforcement of Judgments Act ('40); Reciprocal Enforcement of Maintenance Orders Act ('68, '81, '83); Regulations Act[o] ('63, '82); Service of

Process by Mail Act[x]; Survivorship Act ('42, '62); Trustee (Investments) ('65); Variation of Trusts Act ('69); Vital Statistics Act ('50); Warehousemen's Lien Act ('21); Wills Act ('31). Total: 27.

Yukon Territory

Bulk Sales Act ('56); Child Abduction (Hague Convention) Act ('81); Condominium Insurance Act ('81); Conflict of Laws (Traffic Accidents) Act ('72); Contributory Negligence Act[o] ('55); Criminal Injuries Compensation Act[o] ('72, '81) *sub nom.* Compensation for Victims of Crime Act; Defamation Act ('54, '81); Dependants Relief Act ('81); Devolution of Real Property Act ('54); Evidence Act[o] ('55), Foreign Affidavits ('55), Judicial Notice of Acts, etc. ('55), Photographic Records ('55), *Russell v. Russell* ('55); Family Support Act[x] ('81); *sub nom.* Matrimonial Property and Family Support Act; Frustrated Contracts Act ('81); Human Tissue Gift Act ('81); International Commercial Arbitration Act ('86); Interpretation Act* ('54); Interprovincial Subpoena Act ('81); Intestate Succession Act[o] ('54); Legitimacy Act* ('54); Limitation of Actions Act ('54); Married Women's Property Act[o] ('54); Perpetuities Act[o] ('81); Personal Property Security Act[o] ('81); Presumption of Death Act ('81); Reciprocal Enforcement of Judgments Act ('56, '81); Reciprocal Enforcement of Maintenance Orders Act ('81); Regulations Act[o] ('68); Retirement Plan Beneficiaries Act ('81); Survival of Actions Act ('81); Survivorship Act ('81); Testamentary Additions to Trusts ('69) see Wills Act, s. 29; Trustee (Investments) ('62, '81); Vital Statistics Act[o] ('54); Warehousemen's Lien Act ('54); Wills Act[o] ('54). Total: 38.

CUMULATIVE INDEX

EXPLANATORY NOTE

This index specifies the year or years in which a matter was dealt with by the Conference.

If a subject was dealt with in three or more consecutive years, only the first and the last years of the sequence are mentioned in the index.

The inquiring reader, having learned from the cumulative index the year or years in which the subject in which he is interested was dealt with by the Conference, can then turn to the relevant annual *Proceedings* of the Conference and ascertain from its index the pages of that volume on which his subject is dealt with.

If the annual index is not helpful, check the relevant minutes of that year.

Thus the reader can quickly trace the complete history in the Conference of his subject.

The cumulative index is arranged in parts:

Part I. Conference: General
Part II. 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.

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