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Thomas W. Mapp**

Law Reform in Canada:
The Impact of the
Provincial Law Reform
Agencies on Uniformity*

It is now generally acknowledged that during the course of the last decade the provincial law reform agencies¹ have emerged as a dominant force in the law reform movement in Canada. The author believes that an analysis of the reports published by these agencies, and the provincial legislation enacted in response to them discloses, however, that to a large extent the improvements in provincial law that have been gained have come at the expense of uniformity of law among the provinces. This erosion of uniformity under the impact of the benign efforts of the provincial law reform agencies is the subject of this article. Several questions are addressed. Is this trend in the direction of diversity harmful? Why has the work of the agencies generated diversity rather than uniformity? What can be done to reverse the movement?

1. The Benefits of Uniformity

Professor Emeritus W.F. Bowker, Q.C., who was then the President of the Conference of Commissioners on Uniformity of legislation in Canada,² concluded his address to the Conference at its annual meeting in Niagara Falls, Ontario, in August 1965, with these words:

* This article was originally presented at the annual meeting of the Canadian Association of Law Teachers held at Dalhousie University in June 1981. It has been shortened and edited for publication to reflect events which have occurred through February 1982.

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1. The provincial law reform agencies, with the year in which each began its activities, is as follows: Law Reform Commission of British Columbia (1970); Alberta Institute of Law Research and Reform (1968); Law Reform Commission of Saskatchewan (1974); Manitoba Law Reform Commission (1971); Ontario Law Reform Commission (1964); Director General, Legislative Affairs, Department of Justice of Quebec (1977); Law Reform Division, Department of Justice of New Brunswick (1971); Law Reform Commission of Prince Edward Island (1971); Nova Scotia Law Reform Advisory Commission (1972).

2. The name of the Conference was changed to the Uniform Law Conference of Canada in 1974.

Fifty years ago, Sir James Aikens and Eugene Lafleur spoke eloquently of the need for uniformity of legislation. Today the development of national communications, nation-wide businesses and a mobile population make this need much more acute than it was during World War I. Besides, there are divisive tendencies that should be balanced by forces that will bring us together. As we approach the Centenary of Confederation, is it too fanciful to suggest that this Conference can help to secure a more united Canada?³

It must be patently evident to all of us that the significance of Professor Bowker's observations has not diminished over the succeeding years, for both interprovincial transactions and divisive tendencies have increased. I think, however, that the quoted remarks can be made more explicit. Most of our activities are subject to the ultimate control of legal regimes, and as our population has grown and our socio-economic system has become more specialized and complex, the impact of these legal regimes has become more pervasive. People should be more conscious of law when they plan both their personal and commercial activities, and when conflict situations arise from either chance or deficient planning they must acquire some understanding of the law which will be applicable in the conflict resolution process. Our correlative rights and duties originate in law, and we must be relatively familiar with law in order to perform our obligations. Acquiring even a minimal familiarity with the burgeoning law which governs our conduct is a frustrating process, and obtaining professional legal advice is financially burdensome. As the Canadian population has become more mobile, and as the frequency of interprovincial transactions has increased, our people have become subject to more provincial legal regimes. When we make these regimes diverse rather than uniform, we simply pyramid the psychological and financial burdens imposed on ourselves.

It is often said that uniformity is more essential in some fields of law than it is in others, and that in many fields of law it isn't desirable at all. While I accept the first proposition, I reject the second. I believe that the advantages inherent in uniform laws are sufficiently compelling to justify a presumption in favor of uniformity throughout the law.

If this be so, one might ask why we should bother to maintain a federal system in Canada. After all, the French Republic doesn't suffer from diversification in its law. Of course there are both advan-

3. Conference of Commissioners on Uniformity of Legislation in Canada, Proceedings of the Forty-Seventh Annual Meeting, 22-23 (August, 1965).

tages and disadvantages to a federal system which are unrelated to law. Insofar as law is concerned, I would like to emphasize two situations in which I believe that the presumption in favor of uniformity is rebutted. The first situation is that in which legislation affects a relatively small group of people, or local commercial or industrial activities. A law reform project in this context will frequently require neither extensive research, nor complex socio-economic value judgments, and can usually be completed quite economically at the provincial level of government. With respect to these subjects, the benefits of uniform legislation would seldom justify the costs required to produce it.

In the second situation, the legislation under consideration is quite innovative. In order for a recommended uniform act to achieve any success in terms of adoption, it must reflect a broad consensus as to the merits of its basic principles. It is unlikely that many imaginative but untested ideas will survive the process of political and intellectual compromise which precedes the promulgation of a uniform act by a large and regionally representative group of commissioners responsible for uniform legislation. This does not mean that uniform acts must reflect the gray mediocrity so often associated with the products of committees excessively committed to the virtues of the consensual political model. A uniform act prepared by a committee of competent persons can be excellent. Such a committee will usually be able to identify and analyze the different policy issues which must be resolved; its report will usually recommend a sound, internally consistent and well drafted act; and its act will usually be accepted by uniform law commissioners without adverse amendments. But, experience demonstrates that uniform acts rarely shake any foundations; they seldom challenge generally accepted basic principles.

Significant and innovative pioneering has tended to come from some specific jurisdiction in which, at a particular point in time, a group of confident and even daring persons with political power were willing to experiment. Three well known examples come to mind. The Torrens system, which was first established in South Australia in 1858,⁴ rejected the basic principle that one could not acquire an interest in land through a transfer from a predecessor who did not own the interest purportedly transferred. Under a Torrens statute, the power of the state is used to confer the interest through registration under appropriate circumstances irrespective of whether or not the transfer in question would have been effective as a common law

4. Real Property Act (South Australia) 1958, 21 Vict., no. 15.

conveyance. New Zealand pioneered two remarkable pieces of legislation. In 1900 the Testator's Family Maintenance Act⁵ radically undercut the revered principle of freedom of testamentary disposition, and in 1972 the Accident Compensation Act⁶ substantially eroded tort law, and its basic principle that compensation for personal injuries should be based on fault, by establishing a government insurance scheme.

Reasonable persons may disagree as to the wisdom of any particular imaginative statute, but I think that they would agree that without pioneering experimentation, the law will fall too far behind the society it seeks to serve. In our federal system, the provinces are favorably positioned to test innovative legislation solutions for common problems. And, a provincial law reform agency will frequently have the resources to develop such a solution. Consequently, whenever one of these agencies can formulate a credible new strategy for solving an important socio-economic problem, I believe that the potential benefits which can be derived from experimentation rebut the presumption in favor of uniformity. Moreover, there are decided advantages to be gained by testing somewhat radical statutory strategies on the provincial level. The effectiveness of an innovative statute can be monitored more quickly and more closely in a single jurisdiction. If an act proves disastrous the damage can be minimized, for one legislature can rapidly repeal it. If the supporting strategy is sound, but the original statute was defective, curative amendments can be made more readily. After an innovative strategy has been successfully tested in one or more of the provinces it can be seriously considered as a model for a uniform act.

Before leaving the subject of the benefits of uniform laws, I would like to stress two potential benefits which, although not derived from uniform laws as such, are very likely to be gained if we mobilize our available resources efficiently to achieve uniformity in legislation when it is feasible to do so. In addition to uniformity, we should be able to obtain, (1) higher quality at (2) lower cost.

Those of us who have been closely associated with law reform have become grimly aware of its costs. It is an extremely labor intensive business, for its three major and related requirements are research, analysis and writing. A strong argument can be made that highly experienced lawyers, whether drawn from government, private practice or teaching, are more economical because the quality and quantity

5. Testator's Family Maintenance Act (New Zealand) 1900, 64 Vict., no. 20.

6. Accident Compensation Act 1972, R.S.N.Z. 1975, 2-1409, as am. S.N.Z 1977, no. 139 and S.N.Z. 1978, no. 36.

of their work more than offsets the increased cost of their time. These persons are scarce; none of the provincial law reform agencies have access to enough of them, either on staff or as consultants. Moreover, each law reform project an agency undertakes requires a blend of expertise. By mounting a joint project to produce a uniform act, a group of even three agencies with access to the most qualified experts available could allocate these persons to a working group which, cumulatively, would marshal far more expertise than any one of the agencies could assemble on its own. Unless a law reform project is too radically innovative to make uniformity a feasible short term goal, enlightened cooperation among the provincial law reform agencies should be able to secure uniform acts of high quality at a reasonable cost.

2. The Trend Towards Diversity

Why has the work of the provincial law reform agencies generated diversity rather than uniformity of law among the provinces? Two sets of causal factors have been responsible. First, these agencies have controlled the lion's share of the resources available for provincial law reform in Canada; their reports and recommended acts, on balance, have been good and have led to provincial legislation; and, the Uniform Law Conference of Canada has had neither the resources nor an organization adequate to stem the tide. Secondly, with rare exceptions, the provincial law reform agencies have made no serious attempts to organize their resources to either produce or secure the adoption of uniform acts.

a. Control of resources by the provincial law reform agencies

The entities which control the resources allocated to law reform will control the direction of law reform, and in Canada the provincial law reform agencies have enjoyed a near monopoly of the funds. The most recent annual report⁷ of most of the agencies contains a list of the substantive reports submitted by the agency during its existence, and the sheer quantity of these substantive reports evidences the substantial resources the agencies had available.

7. The most recent annual report available to me of each of the provincial law reform agencies is as follows: Law Reform Commission of British Columbia, Annual Report 1979 (January 1, 1980); Alberta Institute of Law Research and Reform, Annual Report 1979-80 (July, 1980); Law Reform Commission of Saskatchewan, Sixth Annual Report 1979 (March, 1980); Manitoba Law Reform Commission, Ninth Annual Report 1980 (February 25, 1980); Ontario Law Reform Commission, Thirteenth Annual Report 1979 (March 31, 1980); Law Reform Division, Department of Justice of New Brunswick, 1979

The Uniform Law Conference of Canada has been less fortunate. The General Fund of the Conference is totally dependant on annual contributions from Canada and the provinces, and a small amount of interest earned on those contributions. For the period August 11, 1978 to July 16, 1979, the General Fund had receipts of \$37,788, disbursements of \$17,421, and a balance of \$42,216.⁸ The largest single disbursement was the honorarium for the Executive Secretary of \$11,200.⁹ The Conference also has a Research Fund derived from annual contributions of \$25,000 from Canada since 1974. For the period under consideration, disbursements from the Research Fund totaled \$34,759, and there was a balance of \$42,657 at the end of the period.¹⁰

Any extensive comparison between the process of law reform in Canada and the United States would be beyond the scope of this article. However, some comments with respect to the funding of law reform in the United States are quite relevant to the subject under consideration. The organization comparable to the Uniform Law Conference of Canada is the National Conference of Commissioners on Uniform State Laws. For the year ending June 30, 1979, the General Fund of the National Conference had receipts of \$463,337, disbursements of \$395,275, and a balance of \$553,163.¹¹ Most of the receipts (81%) reflected contributions from the states; interest earned, sale of literature, and annual meeting fees accounted for most of the remaining receipts.¹² The National Conference also had Special Funds of \$59,487 on June 30, 1979.¹³

Although the Uniform Law Conference of Canada had minimal resources in comparison to those available to the National Conference (United States), the latter organization's funds were marginal relative to its size and activities. Perhaps the crucial reality is that in the United States the National Conference controls most of the money available for systematic law reform, and hence determines the

Annual Report (August, 1979); Law Reform Commission of Prince Edward Island, Annual Report 1979 (January 23, 1980); and Nova Scotia Law Reform Advisory Commission, Fifth Report 1977 (November, 1977).

8. Uniform Law Conference of Canada, Proceedings of the Sixty-First Annual Meeting, Appendix C, 68 (August, 1979). Hereafter, citations to the Conference Proceedings will be in the form "Uniform Law Conference Proceedings, Appendix when appropriate and page (date)."

9. *Id.*

10. *Id.*

11. National Conference of Commissioners on Uniform State Laws, Handbook (1979) at 130-32.

12. *Id.*

13. *Id.* at 134.

direction of law reform. To the best of my knowledge, only two states, New York¹⁴ and California,¹⁵ have state law reform agencies. The National Conference is the dominant force. Its Executive Director is Professor William J. Pierce of the University of Michigan School of Law. In addition, it has two full time employees: an Executive Secretary and a Legislative Director, and a permanent office in Chicago.

Like its Canadian counterpart, the National Conference conducts its formal business at an annual meeting. Here however, the analogy stops. An inspection of one of the annual handbooks of the National Conference will disclose that it operates through an elaborate structure of standing committees. While some of these committees perform administrative functions, most of them are responsible for specific proposed or promulgated uniform acts, and are variously described as study, drafting, review, or standby committees depending on the status of the act. These committees are staffed by eminent lawyers drawn from practice, government, the judiciary and law schools. Their members are not compensated, and academics are more than willing to serve on them because of the professional prestige associated with being asked to participate in the work of the National Conference. By the time an act is promulgated it reflects broad input from economic and regional interest groups. In the final result, if a state wants a modern well developed statute, it has little choice but to adopt the uniform act. Consequently, the National Conference has been very successful in promoting uniformity of laws in the United States.

b. Lack of coordination among the provincial law reform agencies

Seven of the most recent annual reports of the provincial law reform agencies contain a specific reference to the relationship between the reporting agency and the other Canadian agencies.¹⁶ The most detailed statement, and the one which I suggest most accurately describes the measure of, and the reasons for, the present cooperation between the agencies, is contained in the latest Report of the Law Reform Commission of Saskatchewan, as follows:

The Commission has, during the course of the year, continued to develop good liaison with other law reform agencies both in and

14. New York State Law Revision Commission, Report for 1980 (January 31, 1980).

15. California Law Revision Commission, Annual Report (December 1980).

16. *Supra*, note 7, British Columbia at 13, Alberta at 23, Saskatchewan at 12, Manitoba at 13, Ontario at 17, New Brunswick at 9, and Nova Scotia at 10.

outside Canada. This exchange of information is essential to the functioning of the Law Reform Commission of Saskatchewan. Such close liaison minimizes the replication of research and makes available to this Commission research papers, reports and proposals which can be adapted to the Saskatchewan legal environment without incurring the financial burden necessitated by initiating original legal research in each area undertaken. The Saskatchewan Commission has gained substantially from the research completed by other commissions in areas of mutual interest.¹⁷

The remaining six annual reports contain somewhat blander commitments to cooperation; I award the Alberta Institute of Law Research and Reform the 1979 prize for subdued enthusiasm:

The Director, an Associate Director and Counsel enjoyed a beneficial meeting with representatives of other Canadian law reform bodies in Saskatoon, Saskatchewan on 19 August 1979.¹⁸

In fairness to my employer, prize winning Alberta has cooperated generously with the other provincial law reform agencies, but with some exceptions to be discussed subsequently, to the degree and for the reasons expressed in the Saskatchewan Report. The agencies have *cooperated* in order to husband their resources in the production of their own independent reports. To date I know of no instance in which the agencies *coordinated* their efforts in order to produce a joint report recommending an act which could serve as the model for a uniform act.

The most recent annual report of most of the provincial law reform agencies contains a list of the substantive reports issued by the agency since its establishment.¹⁹ A systematic analysis of these reports would verify the extent to which the agencies have submitted independent reports covering the same or closely related subjects. I apologize for not having done so.

I have, however, examined those reports with respect to one important subject: matrimonial property. Reform of the law of matrimonial property was decidedly *au courant* during the decade of the 1970s, and six of the agencies either submitted reports or have the subject on their present programs. The activities of the agencies, and the legislative responses to it, are summarized below:

17. *Supra*, note 7, Saskatchewan at 12.

18. *Supra*, note 7, Alberta at 23.

19. *Supra*, note 7, British Columbia at 16-17, Alberta at 30-32, Saskatchewan at 13, Manitoba at 15-20, Ontario at 21-26, New Brunswick unnumbered, and Nova Scotia at 20.

Activity of agency

Legislative response

- | | |
|--|---|
| <p>(1) Alberta.²⁰
Report No. 18, Matrimonial Property (August, 1975).</p> | <p>Matrimonial Property Act, S.A. 1978, c. 22.</p> |
| <p>(2) Saskatchewan.²¹
Third Working Paper, Division of Matrimonial Property, Tentative Proposals for Reform of Matrimonial Property Law (October, 1974).
Report, Proposals for a Saskatchewan Matrimonial Homes Act (May, 1976).</p> | <p>Matrimonial Property Act, C.C.S.S., c. M-6.1 (1979).</p> |
| <p>(3) Manitoba.²²
Report No. 24, Family Law—Part II: Property Disposition (February, 1976).</p> | <p>The Matrimonial Property Act, S.M. 1978, c. 24; An Act to Amend various Acts Relating to Marital Property, S.M. 1978, c. 27.</p> |
| <p>(4) Ontario.²³
Report on Family Law: Part IV—Family Property Law (February, 1974).</p> | <p>The Succession Law Reform Act, S.O. 1977, c. 40; The Family Law Reform Act, S.O. 1978, c. 2.</p> |
| <p>(5) New Brunswick.²⁴
Discussion paper, Matrimonial Property Reform for New Brunswick (1978).</p> | <p>Marital Property Act, S.N.B. 1980, c. M-1.1.</p> |
| <p>(6) Nova Scotia.²⁵
Report, Marriage Partnership Act (1977).</p> | <p>Matrimonial Property Act, S.N.S 1980, c. 9.</p> |

Although the agencies may have consulted and exchanged ideas, they did so in order to improve the quality of their own recommendations; I do not believe that any serious attention was given to the desirability of preserving uniformity of matrimonial property law

20. *Supra*, note 7, Alberta at 31.

21. *Supra*, note 7, Saskatchewan at 13. 22. *Supra*, note 7, Manitoba at 18.

23. *Supra*, note 7, Ontario at 25.

24. *Supra*, note 7, New Brunswick unnumbered.

25. *Supra*, note 7, Nova Scotia at 5.

among the provinces. Any lawyer with experience in planning or administering family property arrangements, whether in conjunction with death or marital breakdown, is familiar with the nightmarish complications which result from diversity in the legal regimes applicable to matrimonial property. Rights in marital property acquired while the couple reside in jurisdiction A are normally determined by the law of jurisdiction A. After the couple move to jurisdiction B, the lawyer in that jurisdiction must ascertain which property was acquired in each jurisdiction, and hence which law is applicable to it. The problems associated with conflict of laws and tracing property are severe. The couple may be alive, settled in jurisdiction B, and living in harmony, but the lawyer attempting to plan a property arrangement cannot predict where they will reside at the time of death or possible future marital breakdown. The lawyers can derive solace from their remuneration earned in frequently futile attempts to solve these problems. Their clients are less fortunate. I suggest that the efforts of the provincial law reform agencies to make the world a better place through changes in matrimonial property law may well have succeeded in achieving the opposite result.

Representatives of the provincial law reform agencies have held an informal meeting before the annual meeting of the Uniform Law Conference of Canada in recent years. Prior to the annual meeting of the Conference in Charlottetown, Prince Edward Island, in August 1980, most of the agencies submitted a statement of their then current programs for information and discussion at the informal meeting. I have attempted to categorize the projects which were listed on these statements, and to list them and the agencies working on each project in terms of these categories. As anyone who has laboured in the development of the law school curriculum knows, matching subjects to an appropriate course is a somewhat arbitrary process. Family law is a good example; most of the subjects assigned to this course (or category) could with equal logic have been assigned to a more classic course (or category). The summary does not include projects completed by the agencies; it only includes present projects. It does I believe, clearly demonstrate the extent to which many of the agencies are working on identical or very similar projects.

Subject

Agency

(1) Administrative law.

(a) Judicial review of administrative decisions.

Alberta & Manitoba

(b) Procedures of administrative agencies.

Manitoba & New Brunswick

<i>Subject</i>	<i>Agency</i>
(c) Commissions of inquiry.	Quebec.
(d) Statutory powers of decision in licensing and inspection.	Saskatchewan.
(e) Review of benefit and compensation statutes.	Saskatchewan.
(f) Consolidation, revision and translation of provincial regulations into French.	New Brunswick.
(g) Access to and confidentiality of government documents.	Alberta.
 (2) Business organization.	
(a) Business corporations; comprehensive studies.	Alberta & New Brunswick
 (3) Civil procedure.	
(a) Individual actions to enforce public rights.	British Columbia & Ontario.
(b) Class actions to enforce public rights.	British Columbia & Ontario.
(c) Jury acts.	Saskatchewan & New Brunswick.
(d) Limitation of actions; comprehensive studies.	Alberta & Saskatchewan.
(e) Limitation period for tort claim or claim for contribution, against a decedent's estate.	British Columbia.
 (4) Commercial law.	
(a) Sale of goods.	See section 3a infra.
(b) Personal property security.	New Brunswick & Prince Edward Island.
(c) Commercial arbitration.	British Columbia.
 (5) Contracts.	
(a) Statute of Frauds.	Alberta & Manitoba.
(b) Frustration of contracts.	Saskatchewan.
(c) Contract law; comprehensive study.	Ontario.
 (6) Criminal offenses (provincial).	
(a) Sanctions for enforcement of provincial offenses.	Saskatchewan.

<i>Subject</i>	<i>Agency</i>
(b) Court procedures for provincial offenses.	Quebec.
(c) Pardons for provincial offenses.	Quebec.
(7) Damages.	
(a) Prejudgment interest on damage awards.	British Columbia.
(b) Interest on damage awards.	Manitoba
(c) Punitive damage awards.	Quebec.
(d) Periodic variation of personal injury damage awards.	British Columbia.
(e) Personal injury damage awards in favour of family of injured person.	British Columbia.
(f) Joint liability.	British Columbia.
(g) Contribution among wrongdoers; comprehensive study of contract and tort liability.	Ontario.
(8) Debtor-creditor relations.	
(a) Reviewable transactions.	British Columbia.
(b) Guaranties of consumer debts.	British Columbia.
(c) Exemptions from execution.	Alberta.
(d) Wage garnishment.	Alberta.
(e) Crown liens.	British Columbia.
(f) Enforcement of judgment debts; comprehensive study.	Ontario.
(g) Consumer credit law; comprehensive study.	Saskatchewan.
(9) Decedents' estates.	
(a) Probate court system.	New Brunswick.
(b) Administration of decedents' estates.	Ontario & Quebec.
(c) Succession to and administration of decedents' estates; comprehensive studies.	British Columbia & Prince Edward Island.
(10) Evidence.	
(a) Parol evidence rule.	British Columbia.
(b) Uniform rules of evidence.	Alberta.

<i>Subject</i>	<i>Agency</i>
(11) Family law.	
(a) Representation of children.	Alberta.
(b) Custody of children.	Alberta & Saskatchewan.
(c) Rights of children.	
(d) Consent of minors to health care.	Saskatchewan.
(e) Illegitimacy.	Saskatchewan.
(f) Legal consequences of artificial insemination.	Saskatchewan.
(g) Family maintenance.	Alberta & Saskatchewan.
(h) Conflict between homestead and matrimonial property legislation.	Saskatchewan.
(i) Manitoba Dower Act.	Manitoba.
(j) Declaration of marital status.	Ontario.
(k) Unmarried persons living together.	Alberta.
(l) Legal status of dependent adults.	Saskatchewan.
(m) Civil commitment of incapacitated adults.	Saskatchewan.
(12) Labour-management relations.	
(a) Labour-management relations; comprehensive study.	Alberta.
(b) Employment standards.	New Brunswick.
(13) Legislation.	
(a) English statutes in force.	British Columbia, Alberta & Saskatchewan.
(b) Extrinsic aids to statutory interpretation.	British Columbia.
(c) Witnesses before legislative committees.	Ontario.
(14) Medical law.	
(a) Definition of death.	Saskatchewan.
(b) Law of coroners.	Quebec.
(15) Property law.	
(a) Real property law; comprehensive studies.	Ontario & New Brunswick

<i>Subject</i>	<i>Agency</i>
(b) Distress for nonpayment of rent.	British Columbia.
(c) Right of entry to land, buildings and private dwellings.	Ontario.
(d) Easements by prescription.	Manitoba.
(e) Mortgage law; comprehensive study.	Ontario.
(f) Foreclosure of mortgages and cancellation of agreements for sale.	Saskatchewan.
(g) Interest payable during period of redemption from mortgage foreclosure.	British Columbia.
(h) Priority of liens against property.	Manitoba.
(i) Registration of liens against property.	Manitoba.
(j) Registered ownership of interests in land; comprehensive study.	Alberta.
 (16) Restitution.	
(a) Recovery of money paid under mistake of law.	British Columbia.
 (17) Torts.	
(a) Products liability; comprehensive study.	Ontario.
(b) Consumer protection; comprehensive study	
(c) Guest passenger legislation.	New Brunswick.
(d) Occupiers' liability and trespass to land legislation.	Saskatchewan, Manitoba & New Brunswick.
 (18) Trusts.	
(a) Trust law; comprehensive study.	Ontario.
(b) The Marriage Settlement Act.	Manitoba.

3. *The Coordination of Resources to Promote Uniformity of Law*

The foregoing summary of the current projects of the provincial law reform agencies discloses that many of the agencies are working on

the same or closely related subjects. Although appreciation of the desirability of more uniformity of law among the provinces appears to be slight, the record of the agencies is not completely negative. In its most recent annual report the Law Reform Commission of British Columbia stated that uniformity of law with respect to class actions to enforce private rights was essential, and that efforts were being made to coordinate the British Columbia and Ontario projects on this subject.²⁶ The Alberta Institute of Law Research and Reform and the Governments of the Yukon and the Northwest Territories are all working on complete revisions of their Acts governing the registered ownership of interests in land, and a tentative decision to coordinate these projects in the interest of uniformity has been made.

One current project deserves special attention, for it may exemplify a new attitude towards the coordination of resources by the provincial law reform agencies to promote uniformity of law. The project is being administered under the aegis of the Uniform Law Conference of Canada, and I have captioned it "The sale of goods model".

a. The sale of goods model

The Ontario Law Reform Commission issued its Report on Sale of Goods on March 30, 1979.²⁷ This Report was published in three volumes; the third volume contains the appendices, including a draft bill for A Revised Sale of Goods Act, and the first two volumes, totaling 569 pages, contain the supporting text. In their Conclusion, the Ontario Commissioners state that the sales project was "the most difficult experienced during its [the Commission's] fifteen years."²⁸ Their Conclusion also contains the following paragraph:

Earlier in our Report we have emphasized the desirability of involving the Uniform Law Conference in recommending to the common law Canadian jurisdictions a revised and uniform Sale of Goods Act. Our hope is that the draft Act that we have prepared may become the basis of such a Uniform Act in the early future. However, we do not suggest that Ontario await uniformity before dealing with our recommendations.²⁹

26. *Supra*, note 7, British Columbia at 10.

27. Ontario Law Reform Commission, Report on Sale of Goods, (1979).

28. *Id.* at 568.

29. *Id.*

A different group of Ontario Commissioners, the Ontario Commissioners to the Uniform Law Conference submitted a Report to the Conference dated June 6, 1979.³⁰ This Report began with a recital of the fact that the Attorney General of Ontario had tabled the Report of the Ontario Law Reform Commission on Sale of Goods in the Ontario Legislature in early June 1979, and concluded with the following proposal:

We propose that a committee be appointed by the Executive consisting of six members, one from the Atlantic Provinces, one from Quebec, one from the Federal Government, one from Ontario, one from the three Prairie Provinces, and one from British Columbia. The mandate of the Committee should be to consider the need for new revised uniform sale of goods legislation, and, if such a need exists, to assess the utility of the Ontario Law Reform Commission's Report as a basis for such a uniform law and to report back to the Uniform Law Section. We propose that Professor Jacob S. Ziegel of the Faculty of Law, University of Toronto, should be approached to act as a technical advisor to the Committee.³¹

The meeting of the Uniform Law Conference held at Saskatoon, Saskatchewan opened Sunday evening August 19, 1979 and concluded on August 25, 1979. An informal meeting of representatives of most of the provincial law reform agencies was held in Saskatoon during the morning and afternoon of Sunday, August 19, 1979. I was at this meeting, and I believe that I can safely say that we were all concerned at the increasing divergence between the law of the provinces which could be attributed to the different solutions to common problems which had been recommended by the provincial law reform agencies. Not surprisingly, the proposal of the Ontario Commissioners with respect to the Ontario Report on Sale of Goods arose in the course of our discussion. The Chairman of our meeting was Dr. Derek Mendes da Costa, Q.C., and our response to the committee proposed by the Ontario Commissioners is contained in a letter which he wrote, on our behalf, to Mr. Pdraig O'Donoghue, Chairman, Uniform Law Section, dated August 20, 1979. The last two paragraphs of this letter read as follows:

The Ontario Law Reform Commission has recently published a report on the Sale of Goods. It is to be expected that, unless action is taken without delay, this report may generate patchwork reform of sales law across Canada, activity that would only serve to impede the

30. Uniform Law Conference Proceedings, Appendix S1 (August, 1979).

31. *Id.*

development of inter-provincial trade. For this reason, the law reform agencies were pleased to learn that the Ontario Commissioners propose that a committee be formed with the mandate to consider the need for new revised uniform sale of goods legislation, and, if such a need exists, to assess the utility of the Ontario Law Reform Commission's report as a basis for such a uniform law, and to report back to the Uniform Law Section.

On behalf of the law reform agencies, I am writing to tell you of our support for this proposal of the Ontario Commissioners. *I have also been asked to stress that the law reform agencies would be more than willing to participate in the work of this proposed committee.* In this way, our agencies may more easily be able to move collectively in the direction of reform, rather than engage in individual projects dealing with the Law of Sales. Finally, may I say that it is the hope of the law reform agencies that should the proposed committee conclude that there is a need for reform, its terms of reference will enable it to move directly to the formulation of a proposed Uniform Act without any obligation to report back to the Uniform Law Section.³² (Emphasis added.)

The key sentence is the one which I have emphasized. At our informal meeting held the day before this letter was written, we had agreed to use our best efforts, to induce our respective agencies to supply skilled commercial law experts to constitute the proposed committee. However, as none of us were authorized to make a commitment binding his agency, this sentence was designed to solicit a request from the Uniform Law Conference to the provincial law reform agencies to participate in the sale of goods project. If such a request were made, the agencies could then decide whether or not they would participate by furnishing the personnel for the committee.

The first action of the Uniform Law Conference was the following resolution:

RESOLVED that the report of the Ontario commissioners be adopted having regard to the letter dated 20 August 1979 of Dr. Mendes da Costa to the chairman of the Uniform Law Section . . . and that the matter be referred to the Executive for development as speedily as possible...³³

The second action of the Conference is summarized in the following excerpt from the minutes of its closing plenary session:

10. Dr. Mendes da Costa attended a meeting of the Executive to

32. Uniform Law Conference Proceedings, Appendix S2 (August, 1979).

33. Uniform Law Conference Proceedings (August, 1979) at 36.

develop the new major project of the Uniform Law Section: Sale of Goods.

After a full discussion, the following decisions were taken:

1. to ascertain the Law Reform Agencies that wish to participate in the Sale of Goods Project;
2. to recommend to the Executive for appointment the names of not more than five persons representative of the participating provinces and of the various regions of Canada to constitute a committee to study the Draft Act attached to the Report of the Ontario Law Reform Commission on the Sale of Goods and to report thereon to the 1980 Annual Meeting of the Uniform Law Section with a recommendation for its adoption as a Uniform Act in its present form or with such changes as they consider necessary;
3. to submit a budget to the Executive for the operations of the committee during the year 1979-1980.³⁴

The tacit understanding between the Executive of the Uniform Law Conference and the provincial law reform agencies was that Dr. Mendes da Costa would contact the latter and assemble a committee which would be appointed by the former.³⁵ This is precisely what happened. As of November 13, 1979 the Committee on Sale of Goods was composed of the following persons:

<i>Name</i>	<i>Employer</i>	<i>Funding entity</i>
Professor David Vaver	Faculty of Law, University of British Columbia	Law Reform Commission of British Columbia
George C. Field	Alberta Institute of Law Research and Reform	Employer
Professor Ronald C.C. Cuming	Law Reform Commission of Saskatchewan	Employer
Professor E. Arthur Braid	Faculty of Law, University of Manitoba	Manitoba Law Reform Commission
Dr. Derek Mendes da Costa, Q.C.	Ontario Law Reform Commission	Employer
Professor Claude Samson	Faculty of Law, Laval University	Government of Quebec

34. *Id* at 53.

35. Dr. Derek Mendes da Costa, Q.C., Letter to Gordon F. Coles, Q.C., President, Uniform Law Conference of Canada (November 13, 1979).

<i>Name</i>	<i>Employer</i>	<i>Funding entity</i>
Karl J. Dore	Consumer and Corporate Affairs, Government of New Brunswick	Employer
Diane O. Campbell	Law Reform Commission of Prince Edward Island	Law Reform Commission of Prince Edward Island

Mr. Field and Professor Samson subsequently left the Committee, and were replaced by the following persons:

Michael G. Bridge	Alberta Institute of Law Research and Reform	Employer
Michel Paquette	Ministry of Justice, Government of Quebec	Employer

The expert consultant to the Committee from the time of its formation was:

Professor Jacob S. Ziegel	Faculty of Law, University of Toronto	Uniform Law Conference of Canada
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The services of all of the members of the Committee were at all times supplied, at no cost to the Uniform Law Conference, by either a provincial law reform agency or a provincial government. Only Professor Ziegel was compensated by the Conference.

The decision of the Executive of the Uniform Law Conference authorized the appointment of a Committee of not more than five persons representative of the participating jurisdictions and of the various regions of Canada. Obviously, the Committee could not be composed of five persons representative of the participating jurisdictions if more than five jurisdictions chose to participate. As the above list discloses, eight jurisdictions chose to participate, either through their government or their law reform agency. The Conference welcomed the increase in representation,³⁶ but not so warmly as to agree to underwrite the travel expenses of three additional members. British Columbia, Ontario and Quebec are regions; consequently, the travel expenses of the members from these provinces were paid by the Conference.³⁷ The Prairie Provinces and the Atlantic Provinces are also regions; consequently, the Conference paid the travel expenses

36. Dr. Derek Mendes da Costa, Q.C., Letter to W.H. Hurlburt, Q.C., Director, Alberta Institute of Law Research and Reform (January 4, 1980).

37. *Id.*

of one member from each of these regions at each meeting.³⁸ The funding entities from these regions simply took the Conference funded trip in turns; each funding entity in the Prairie Provinces paid for two out of three trips taken by its member, and in the Atlantic Provinces the ratio was one out of two trips.

Dr. Mendes da Costa served as the Chairman of the Committee on Sale of Goods from its creation. The Committee usually held two-day meetings, approximately every other month, and all of these meetings were held in Toronto. Consistent with its mandate from the Executive of the Uniform Law Conference, the Committee systematically reviewed the recommendations and the Draft Act contained in the Report on Sale of Goods of the Ontario Law Reform Commission.³⁹ The Committee submitted its Report, which included a Proposed Uniform Sale of Goods Act, to the Uniform Law Conference at its meeting held at Whitehorse, Yukon, in August 1981. Although the Proposed Uniform Sale of Goods Act is based on the Ontario Draft Act, it contains important amendments.⁴⁰ The Proposed Uniform Sale of Goods Act was adopted by the Conference at its August 1981 meeting, subject to such stylistic revisions as the Drafting Section of the Conference considered necessary.

The preceding comments have been descriptive of the organization of the sale of goods project, but they have not included any evaluation of the merits of that organization. There was a general consensus among the representatives of the provincial law reform agencies at their informal meeting in Saskatoon in favor of promoting the organizational model which did develop. In the course of our discussion many supporting reasons were advanced. As no votes were taken, I cannot relate the measure of acceptance of the various reasons, but I can produce a reasonably accurate summary of them.

Two key elements in the organizational strategy were already contained in the proposal to the Uniform Law Conference offered by the Ontario Commissioners. The first element was utilization, insofar as possible, of the Conference. The Conference is the only national institution in Canada whose purpose is developing and recommending uniform provincial legislation; it has earned its reputation by decades of solid, albeit not glamorous, accomplishment; and it provides a respected national forum, free of any taint of regional control, in which both the quality of a proposed act, and the desirability of its serving as a uniform act, can be judged.

38. *Id.*

39. Sale of Goods Committee, Report on Sale of Goods, (August, 1981) at 2.

40. *Id.* at 4.

The second element was the appointment of a regionally representative study committee. Assuming, however, that more study was still required after the monumental study Ontario had already made, why should the committee be regionally representative? It is said that an act recommended for uniform adoption should be drafted so that it will accommodate relatively specialized regional needs if at all possible. One may wonder if Alberta or Ontario have specialized regional needs insofar as a sale of goods act is concerned, and if an act which was good for Ontario might not be just as good for Alberta. One answer is that the various provinces have adopted different legislative solutions for similar problems; whether or not it is desirable, on many subjects they already have specialized legal regimes. A uniform act should be drafted to minimize the potential problems of interface with the existing laws of the adopting provinces. A regional representative can often spot the potential problems, and once they are identified, drafting language can frequently be developed which will eliminate the need for extensive modification by some adopting provinces. Another answer is that there may be specialized regional economic interests which must be compromised in a uniform act. The Ontario economy is heavily oriented towards manufacturing; it depends on the purchase of raw materials and the sale of processed goods. The Alberta economy is still primarily based on the production of raw materials and the purchase of finished products. The mere possibility that the resolution of a legal issue in a sale of goods act could benefit one economy and prejudice another serves as a justification for regional representation.

Perhaps the predominant reason for regional representation is political. The Ontario Report on Sale of Goods contains recommendations on many controversial issues, and those recommendations were made by the Commissioners on the Ontario Law Reform Commission. The Sale of Goods Committee made different recommendations on some of these issues, and the Uniform Law Conference adopted the Uniform Sale of Goods Act proposed by the Committee. Ultimately, the legislatures of the provinces will have to decide whether or not to adopt the Uniform Act, with or without local amendments. The Committee was regionally representative. Whether or not its recommendations are better or worse than those which were made by the Ontario Law Reform Commission is a subject that may occupy commercial law scholars gainfully and joyfully for decades. However, on the provincial level, advocates of the Uniform Act can say that *our* local experts served on the Committee and participated in the value judgments which are reflected,

for good or for evil, in the Uniform Act which a group of regional representatives accepted as the best possible compromise. Regional representation can be justified if it creates a psychological environment receptive to a recommended uniform act.

The third element in the organizational strategy of the sales project concerns the composition of the Committee. The Ontario Commissioners had merely proposed a regionally representative committee. The representatives of the provincial law reform agencies were apprehensive at this vagueness for several reasons.

The Ontario Report on Sale of Goods represented the prodigious efforts of an impressive working team of academic and practitioner commercial law experts. For the reasons previously outlined, it seemed clear that a review of the Ontario Report by a regionally representative committee would be required. Unless the services of the members of a committee were provided by some entities with funds, it seemed likely that the Uniform Law Conference would be forced to rely on donated services. Excellent practitioners and academics have historically given their time to Conference projects. But because of the magnitude of the sales project, it seemed to us that there was a substantial risk that a volunteer committee, however expert, could not give the Ontario Report the attention it deserved. A committee which lacked either expertise or adequate time would be at a serious disadvantage. It might be tempted to give the Ontario Report a *rubber-stamp endorsement*. If this happened, neither the endorsement nor the regional representatives who produced it would have the credibility required to give a recommended uniform act meaningful support in a provincial legislature. Such a committee might be tempted to make recommendations which conflicted with those in the Ontario Report, and which either were unsound or would impair the internal consistency of the Ontario recommendations. Finally, such a committee might be tempted to reject the Ontario Report without adequate reasons for doing so. Any of the above events could serve to "generate patchwork reform of sales law across Canada", to use the language of Dr. da Costa's letter to the Chairman of the Uniform Law Section. It could be expected that Ontario would proceed with reform based on the Report of its Law Reform Commission. Without a credible uniform act, other provincial law reform agencies might begin to dabble with sales law on a piecemeal basis, and this would not only erode uniformity of sales law, but would also result in an inefficient utilization of the valuable resources of the agencies. Our conclusion was that a committee should be composed of persons with commercial law expertise at

least equivalent to that of the group which had done the legal staff work supporting the Ontario Report, and that the services of these persons should be sufficiently funded to make it possible for them to devote adequate time to their review of the Ontario Report.

The representatives of the provincial law reform agencies concluded that these agencies should move into the vacuum. The agencies have made significant progress in assembling legal staffs composed of highly qualified persons with a desirable balance of practical and academic experience. Most of them have developed reasonably effective methods of obtaining advice from members of the practicing bar in their province. Most of them have very close ties with the faculty(ies) of law in their province, and can therefore obtain the services of law professors on a consulting basis. Most of them are reasonably well funded. Moreover, by pooling their resources under the aegis of a Uniform Law Conference committee, they could utilize these resources more efficiently. Finally, they have earned credibility with their provincial governments. In a letter to Dr. Mendes da Costa, Professor Clifford H.C. Edwards, the Chairman of the Manitoba Law Reform Commission, made the following quite practical point based on this credibility:

Both Ron and I feel that if the Joint Committee on Sale of Goods does eventually come forward with recommendations for a new statute, this matter is almost certain to be referred by our respective Attorneys-General to the Law Reform agencies in their provinces. Therefore it would be helpful if each of these agencies were represented on the Joint Committee at the outset, since this would expedite our final recommendations to our governments.⁴¹

Ron is, of course, Professor Ronald C.C. Cuming, the Chairman of the Law Reform Commission of Saskatchewan.

The paragraph I have just quoted raises an issue which goes beyond the credibility of the provincial law reform agencies. What is their function insofar as an act recommended by the Uniform Law Conference is concerned? The paragraph suggests that if a Uniform Sale of Goods Act is recommended, that Act will almost certainly be referred by the Attorneys General of Saskatchewan and Manitoba to their respective law reform agencies for review, and that for this reason those agencies should be represented on the committee which prepares the Act. Professor Edwards has informed me that his statement was made with respect to the sale of goods project, and

41. Clifford H.C. Edwards, Q.C., Letter to Dr. Derek Mendes da Costa, Q.C., Chairman, Ontario Law Reform Commission (October 10, 1979).

because of the importance of this project, but was not meant to imply that the agencies generally review recommended uniform acts. I have examined the most recent annual reports of most of the provincial law reform agencies, and none of their programs appears to include a project based on review of a recommended uniform act. I do not believe that many of the agencies have developed a practice of performing this function.

To the best of my knowledge, the Sale of Goods Committee represents the first attempt of the provincial law reform agencies to coordinate their resources in order to prepare a uniform act for the Uniform Law Conference. When an agency lists a project as part of its program in its annual report this customarily means that the agency has made at least a tentative decision that the project will culminate in a final report by the agency. A reference to the agency's representation on the Sale of Goods Committee is contained in the most recent annual report of Ontario,⁴² Prince Edward Island⁴³ and Manitoba,⁴⁴ but the agency's participation is quite conspicuously not listed *as a project* on its program. The annual report for British Columbia,⁴⁵ Saskatchewan⁴⁶ and Alberta⁴⁷ does list participation on the Sale of Goods Committee as a project on the program of each agency. Although I have no information as to what significance listing this participation as a project has insofar as the law reform agencies of British Columbia and Saskatchewan are concerned, I do know that the Board of Directors of the Alberta Institute of Law Research and Reform has made a decision to issue a report containing recommendations to the Government of Alberta with respect to the Uniform Sale of Goods Act. A draft of this report is in an advanced stage.

I would like to make a final observation concerning the sale of goods project. The Uniform Law Conference asked the Sale of Goods Committee to study the Draft Act included in the Ontario Report on Sale of Goods and to make a recommendation for its adoption as a uniform act in its present form or with such changes as they considered necessary. The Committee could have decided that the changes they considered necessary were so pervasive in terms of both the structure and substance of the Ontario Draft Act that a

42. *Supra*, note 7, Ontario at 7-8.

43. *Supra*, note 7, Prince Edward Island at 3.

44. *Supra*, note 7, Manitoba at 13.

45. *Supra*, note 7, British Columbia at 10-11.

46. *Supra*, note 7, Saskatchewan at 7.

47. *Supra*, note 7, Alberta at 16-17.

completely new act should be drafted. Whatever the imperfections in the Ontario Draft Act, because of its overall quality and the monumental expenditures it already represented, it was exceedingly unlikely that the Committee would take this course, and it did not. The Ontario Draft Act reflects some fundamental decisions made by the Ontario Law Reform Commission. Perhaps the most fundamental decision was to track Article 2 of the American Uniform Commercial Code.⁴⁸ Evaluating the merits of that decision is not within the scope of this article. My point is that this decision was not made by a committee representative of either the provinces or the regions of Canada. As a practical matter, the Ontario Law Reform Commission established the parameters of the sale of goods project because reestablishing them would have been so dubious in terms of cost and relative benefits. In my opinion, this is a problem of substance as well as politics. I suggest that if a broadly based committee had participated in the sale of goods project from the outset, the ultimate product might have been different and would be more politically acceptable.

b. The role of law teachers in law reform

In working with our students, we law teachers continually emphasize the fact that law is not static; it is continually evolving through both the judicial and the legislative process. Those of us who are involved in legal education, as teachers and as students, are constantly evaluating the adequacy of the legal solutions which this evolutionary process is providing for current socio-economic problems. Consequently, we are all vitally concerned with substantive law reform. However, the theme of this article is, to use the ultimate academic pejorative, 'administrative'. It is concerned with how we can organize our resources to obtain higher quality law reform more efficiently. As a profession, university teachers have such an aversion to administrative matters that I sometimes wonder if we are organizable at all. We law teachers are, nevertheless, indispensable to sound law reform.

It is essential that we become interested in organization if we are to render our potential contribution to law reform. The judiciary and the legislatures may be at the cutting edge of law reform, but they seldom have time to hone the old blades, much less to develop new ones. We are paid to teach each generation of lawyers, we are given the time to think and write, and we formulate most of the ideas which are reflected in law reform. We are already well represented on the

48. Ontario Law Reform Commission, Report on Sale of Goods, (1979) at 568.

permanent staffs of the provincial law reform agencies, and we are the primary source of consultants for the agencies. Recall that the agencies staffed the Sale of Goods Committee with law teachers. Canadian law schools experienced a dramatic growth during the decade of the 1970s, and many of us began our teaching careers during this period. By now we have a wealth of legal scholars who have reached the productive years of their careers. Within the legal profession, we share the responsibility for law reform with the legislatures, the judiciary, and the practicing bar. Unless we marshal a substantial share of our academic production for systematic law reform, we will have failed to perform one of our most important tasks.

In the United States the committees established by the Commissioners on Uniform State Laws serve as the institutionalized conduits through which many law teachers work to have their ideas translated into modern legislation with a reasonable prospect of adoption by the states. Uniformity among state laws is gained in the process. Because they control so much of the funds allocated for law reform, I think that the provincial law reform agencies will serve as our principal conduits. On the provincial level, each agency performs at least three crucial functions: (1) it provides a forum where selected practitioners and professors can meet to develop proposals for law reform, (2) it provides the funds which are required to obtain the research, writing and clerical services which are essential for the production of law reform proposals, and (3) it provides an institutional channel for the submission of these proposals to provincial legislatures. By encouraging the use of interprovincial law reform committees, we should be able to improve our efficiency and the quality of law reform, and promote uniformity of law among the provinces at the same time. But in order to achieve these goals, it is incumbent upon us to secure as much coordination between the provincial law reform agencies as is reasonably possible.

4 Conclusion

I have attempted to stress the desirability of uniformity of law among the provinces, and to express my fear that the work of the provincial law reform agencies is having a severe erosive influence on uniformity. But, what can be done to reverse the trend? I think that the most important first step is for all of us who are involved in the law reform process to become consciously aware of the seriousness of the problem. If we are sufficiently concerned, we can then begin to take

affirmative steps to coordinate our resources in order to promote the goal of uniformity whenever it is feasible to do so.

Section 2b contains a summary of the projects of the provincial law reform agencies as of the dates of the annual reports upon which the summary was based. I certainly do not intend to advocate that all of these projects concern areas of law in which uniformity, however desirable it may be as a conceptual proposition, is pragmatically feasible. Some of them focus on minor defects in law unique to a particular province. Other projects concern subjects which lack sufficient social and economic importance to justify the expense which a coordinated joint agency effort would require. We sometimes refer to these as provincial 'house keeping' projects. With respect to them, diversity of law does not alarm me.

Most of the provincial law reform agencies are required to give priority to projects designated for special attention by their respective governments. If a priority project were submitted to one agency, and if another agency had an identical or a closely related project on its program, the government which had designated the priority project might be quite willing to ease its mandate in the interest of a joint agency project. If even three agencies could mount a joint effort, the prospects of economy, better quality and uniformity might well be persuasive to all the agencies and governments immediately concerned. It seems to me that, in this situation, the relevant agencies should make an honest effort to persuade their governments to authorize a coordinated project. If the political exigencies of a government precluded it from giving its agency the additional time which a joint project would entail, obviously the agency would conform to the needs of its government. Whether or not it is feasible to promote uniformity of law will frequently depend on political considerations, and denying this practical reality would be counter productive.

I previously suggested that a provincial law reform agency should pursue an innovative project without reference to the desirability of uniformity. The summary in section 2b discloses that both Alberta and Saskatchewan are making comprehensive studies in the field of limitation of actions. The Law Reform Commission of British Columbia issued a Report on Limitations—General in 1974,⁴⁹ and a new Limitations Act was enacted in British Columbia in response to this Report in 1975.⁵⁰ The Ontario Law Reform Commission issued

49. Law Reform Commission of British Columbia, Report on Limitations—General (1974).

50. Limitations Act, S.B.C. 1975, c. 37.

an earlier thorough Report on Limitation of Actions in 1969.⁵¹ The Ontario Ministry of the Attorney General issued a Discussion Paper on a Proposed Limitations Act in 1977,⁵² but no new legislation has yet been enacted. The British Columbia Limitations Act and the Ontario Proposed Limitations Act are virtually uniform. They follow the same sectional organization, and most of the sections themselves are substantially identical. The organizational uniformity is itself a distinct advantage, for by comparing sections in the two Acts bearing the same number, one can see in a matter of minutes whether or not the law is uniform, and if not, precisely how Ontario has deviated from British Columbia. The Uniform Law Conference instructed its Legislative Drafting Section to redraft a proposed Uniform Limitation of Actions Act at its annual meeting in August 1979.⁵³ The Report on Limitation of Actions⁵⁴ which was prepared by the Alberta Commissioners to the Conference, states that the proposed Uniform Act is substantially based on the Ontario Proposed Limitations Act.⁵⁵ The Conference, however, has not yet adopted the proposed Uniform Act.

In light of this background with respect to limitation of actions, it may come as a surprise when I acknowledge that the Alberta Institute of Law Research and Reform is attempting to develop a limitations act based on a radically new strategy. The Institute has not yet issued a Discussion Report. Those of us who are working on this project are relatively enthusiastic. If the project leads to an innovative new limitations act in Alberta which succeeds in operation, it will constitute a major improvement in limitations law in the common law world. We are also realists. We may have to abandon the project before it leads to legislation, and it could lead to a limitations act which proved disastrous in operation. Needless to say, we think any effort to secure uniform legislation based on the current Alberta limitations act project would not be sensible.

The summary in section 2b identifies many situations in which two or more provincial law reform agencies are working on either the same or very similar projects. In some of these fields of law uniformity would be highly desirable. Moreover, I do not perceive any reasons why the relevant agencies should not establish some joint

51. Ontario Law Reform Commission, Report on Limitation of Actions (1969).

52. Ontario Ministry of the Attorney General, Discussion Paper on Proposed Limitations Act (1977).

53. Uniform Law Conference Proceedings (August, 1979) at 35.

54. *Id.* at Appendix P.

55. *Id.* at 157.

projects, albeit on an experimental basis, in order to attempt to secure uniform legislation.

The sale of goods project, which was discussed in section 3a, reflects the first serious effort of the provincial law reform agencies to coordinate their resources in order to develop a uniform act. Although it is referred to as the sale of goods model, I believe that it would be premature for the agencies to look for any standard organizational model for joint projects at this time. Because of the many variables, I think that it would be advantageous for the agencies to retain considerable flexibility in organizing joint projects.

The sale of goods project does, however, indicate some factors which should be considered in planning joint projects. I will comment briefly on five of them.

- (1) The number of participating agencies. Eight provinces participated in the sale of goods project. Perhaps the scope and importance of this project justified broad participation, but the expense was drastically increased. I suggest that, at least after we have become more accustomed to joint projects, two or three provincial law reform agencies with the necessary funding and expertise could accomplish a project competently, efficiently and economically.
- (2) The need for regional representation. If the principle of regional representation were rigidly adhered to, five provinces would be required for each joint project. I suspect that the need for regional representation would soften with time if the provincial law reform agencies could establish several concurrent joint projects. Assume, for example, that the following joint projects could be undertaken: judicial review of administrative decisions, Alberta and Manitoba; class actions, British Columbia and Ontario; succession to and administration of decedent's estates, British Columbia, Ontario and Prince Edward Island; products liability and consumer protection, Ontario and New Brunswick. This kind of random pattern of regional representation on a group of joint projects would, it seems to me, undercut the political sensitivity which might now demand regional representation on each joint project, and would thus promote a more efficient use of the agencies' resources.
- (3) The responsibility of the joint project committee. Although a joint project committee would be composed of representatives, either permanent staff members or consultants, appointed by each of the participating provincial law reform agencies, as a practical matter I believe that the committee should be given the authority to submit its own independent report to those agencies. Consider the Committee on Sale of Goods. This Committee was

composed of eight persons, one from each of the eight participating provinces. However, the Committee was appointed by the Uniform Law Conference, the scope of its project was defined by the Conference, and the Committee Report was submitted to the Conference. Nevertheless, once appointed, the Committee functioned independently in carrying out its mandate. I am not aware of any evidence suggesting that the Committee either sought or received policy direction from the Conference. Rather, the Report of the Committee states that it reflects the decisions of the Committee.⁵⁶

By analogy, it seems to me that although the participating agencies should specify the task assigned to a joint project committee as precisely as the agencies deem appropriate, and although the committee should issue its report to those agencies, the report should express the decisions of the committee. Within the parameters of its mandate, I believe that a committee should be free to recommend the best law reform that it can devise.

Obviously, the words 'the best law reform' are judgmental. Typically, a joint project committee would submit a report containing recommended legislation and supporting text. Within the confines of the time and resources available to it, the committee would conduct as much research and engage in as much consultation as it considered justified in the circumstances. The process of preparing its report would require persistent effort, the continual re-evaluation of ideas, and patient compromise. Most law reformers accept the proposition that the potential for legislative, and hence political, acceptance of law reform recommendations is one element to be considered in judging their soundness. However, I know of no litmus test which can be used to determine what weight should be given to this element in the context of any particular set of recommendations. It is a matter of judgment which will vary with the circumstances. It would be wise for a committee to consult with those persons ultimately responsible for making the decisions of the provincial law reform agencies participating in the joint project in an effort to develop generally acceptable recommendations. The extent to which a committee should defer to the political acceptability criterion, however, will frequently depend on how seriously the deference would erode the integrity of the recommendations the committee prefers. In cases of doubt, I believe that a committee should follow its own lights on the merits, and attempt to secure agency and legislative acceptance through persuasion.

- (4) The commitment of the participating agencies. If the report of a joint project committee contains the independent recommenda-

56. *Supra*, note 39.

tions of the committee, correlatively, the participating provincial law reform agencies must reserve the freedom to respond to the report as they choose. However, I do think that these agencies should assume at least a tentative commitment to take some action. Perhaps the Committee on Sale of Goods does not furnish an apt example, for although most of the members of that Committee were provided by agencies, it was appointed by the Uniform Law Conference and reported to the Conference. Nevertheless, as the purpose of that exercise was to obtain a uniform act, and as the Conference has now recommended the Uniform Sale of Goods Act proposed by the Committee, it would seem most appropriate for the participating agencies to issue reports recommending what action they suggest that their respective governments should take. The Alberta Institute of Law Research and Reform will issue a report with respect to the Uniform Sale of Goods Act.

In what I believe will develop as a more routine pattern, the joint project committee will submit its report to the participating agencies, and they will then have four basic options. An agency could issue the committee report as its own report; it could issue a report adopting the committee report in part, adding amended recommendations where it so desired; it could reject the committee report entirely, and issue a report of its own creation; or it could abandon the project in despair. If the agencies do not take some action with respect to the committee report, the project will likely have been futile.

- (5) The role of the Uniform Law Conference. I am not convinced that the Conference has, at least at the present time, both the financial resources and the administrative organization required for the development of major law reform proposals. It is probable that even one major project would impose a severe burden. However, there seems to be general agreement that the Conference is the only organization in Canada with the capacity to evaluate proposals for uniform provincial legislation and to recommend uniform acts. The annual meetings of the Conference provide a well-organized national forum at which the broad policy issues raised by any law reform proposal can be analyzed and resolved. This is one of the primary functions of the Conference, and it is a function which it has performed with considerable distinction over the years. Nevertheless, in order for the Conference to continue to execute its judgmental responsibilities with credibility, it must have soundly developed law reform proposals to consider, and the Commissioners to the Conference must be given adequate time to study and reflect on these proposals before they are debated at an annual meeting.

The Ontario Report on Sale of Goods was unquestionably a soundly developed law reform proposal, and it was referred to the Conference by the Ontario Commissioners to the Conference. Nevertheless, both the Ontario Commissioners and the Conference took the position that the utility of the Ontario Report as the basis for a uniform act should be re-evaluated by a regionally representative committee. I suspect that one reason for this decision was the fact that only one provincial law reform agency, that of Ontario, developed the Report. Moreover, I am wary of the strategy which produced the Uniform Sale of Goods Act, even though it worked, for the Committee on Sale of Goods was potentially subject to too many masters. Because most of the members of the Committee were furnished by provincial law reform agencies, to a large degree it was a joint project committee; because the Committee took its mandate from and reported to the Conference, it was a Conference Committee.

Depending on the subject, the report of a joint project committee could be referred to the Conference as the basis for a uniform act. If a participating agency substantially accepted the report, the Commissioners from that province could submit the report to the Conference. If several of the participating agencies supported the report, the Commissioners from all of these provinces could jointly submit the report to the Conference. In the result, the Conference would have what it most urgently needs: a soundly developed law reform proposal to consider. A joint project committee report would necessarily reflect some interprovincial representation, and it would frequently reflect some regional representation as that term has come to be used in Canada. If the representation on the joint project committee produced what the Conference might define as an adequate regional mix, and if the collective support of the report by the participating agencies was sufficiently strong, the Conference could move directly to the evaluation stage without further technical study by one of its own committees.

My thoughts on how the provincial law reform agencies should organize joint projects are far from crystallized, for we are merely beginning an experimental period. Success will require patience and persistence. A strong highly centralized government could give us uniform laws more efficiently. Under a federal system, the process will be much more difficult, for the seats of authority are more dispersed. However, because more people will be involved in the decision making process, the final results are likely to be more widely accepted.