

*LAW REFORM IN CANADA: DIVERSITY OR UNIFORMITY?\**  
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To answer the question posed in the topic for this panel "Law Reform in Canada: Diversity of Uniformity?" one can resort to a monosyllabic affirmative: "Both." Such a terse response invites, if it does not demand, some decent exegesis of the scriptures of the Uniform Law Conference and of some of the law reform agencies in and of Canada.

**Canada Bears Both "Genes" Constitutionally:  
Diversity and Uniformity Both Normal**

It should be noted at the outset that the question posed in this topic could hardly be usefully propounded if Canada were a unitary state. However, despite the alarmist and alarming anxieties being currently expressed in some quarters regarding constitutional reform, Canada is, and I daresay will remain, a federal state — *B.N.A. Act* style. Canada is not only a federal state, but — pertinent to this topic — a federal state with two systems of law.

Inherent in the very concept of Canada are the notions of diversity and uniformity of law. In *The British North America Act, 1867*, Section 5 divides Canada into four areas [now ten] and Section 6 separates Upper Canada and Lower Canada into Ontario and Québec. After establishing organs and institutions of government, Sections 91 and 92 distribute legislative power between Parliament and the provincial legislatures, with Section 92 expressing that "In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects" thereafter enumerated. The education jurisdiction conferred in Section 93 and some other provisions illustrate the inherent potential for diversity of laws in Canada. But there is also a countervailing "gene" for uniformity. Parliament's jurisdiction to enact laws for Canada makes for instantaneous uniformity of law from sea unto sea. Additional uniformity provisions of *The B.N.A. Act* reside in: the federal government's subsisting power of disallowance of provincial statutes under Section 90; the "peace, order and good government" legislative jurisdiction inherent in Section 91; Parliament's declaratory power under Section 92(10)(c); the absence of power in the provinces to legislate for extraterritorial effect, a power exercisable only by Parliament; and the incompetence of a provincial legislature to abrogate constitutionally entrenched rights such as the right of public debate implicit in the preamble. Taken together with Section 94, which was aimed at uniformity of laws relative to property and civil rights in the three original common-law provinces, these factors reveal the inherent potentiality for uniformity of law in Canada.

Even within the federal sphere's instantaneous uniformity, Parliament has expressed itself in favour of reconciliation of differences, if not uniformity, as between our two legal systems. Thus, Section 11 of the *Law Reform Commission Act*<sup>1</sup> provides:

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\* Copy of an address given to the Canadian Association Of Law Teachers, Halifax, Nova Scotia, July 3, 1981.

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1. R.S.C. 1970 (1st Supp.), c. 23.

The objects of the Commission are to study and keep under review on a continuing and systematic basis the statutes and other laws comprising the laws of Canada with a view to making recommendations for their improvement, modernization and reform, including, without limiting the generality of the foregoing,

- (a) the removal of anachronisms and anomalies in the law;
- (b) the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions;
- (c) the elimination of obsolete laws; and
- (d) the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society.

La Commission a pour objets d'étudier et de revoir, d'une façon continue et systématique, les lois et autres règles de droit qui constituent le droit du Canada, en vue de faire des propositions pour les améliorer, moderniser et réformer, et notamment, sans toutefois limiter la portée générale de ce qui précède, en vue de

- (a) supprimer les anachronismes et anomalies du droit;
- (b) refléter dans le droit les concepts et les institutions distinctes des deux systèmes juridiques du Canada, la *common law* et le droit civil, et concilier les différences et les oppositions qui existent dans la formulation et l'application du droit par suite des différences entre ces concepts et institutions;
- (c) supprimer les règles de droit tombées en désuétude; et
- (d) développer de nouvelles méthodes et de nouveaux concepts de droit correspondant à l'évolution des besoins de la société canadienne moderne et des individus qui la composent.

The jurisdictional sphere of Parliament carries "instantaneous uniformity" principally in a geographic sense. That is to say, even when Parliament enacts a law which operation is limited to the provinces of a particular region of Canada<sup>2</sup>, the effect, as it is with most Acts of Parliament<sup>3</sup>, is trans-provincially uniform. However, when Parliament, making laws quite within its sphere of legislative jurisdiction, parcels out jurisdictional preserves among its array of administrative agencies, it may neglect to invest its creatures with much procedural uniformity. The effort to achieve functionally appropriate uniformity in the agencies' procedures is a matter of concern for the Law Reform Commission of Canada. It is, of course, not trans-jurisdictional uniformity: nor is any similar exercise within the law of any one province or territory.

In terms of their legislative jurisdictions, provinces are really unitary states governed by their respectively unique governments and legislatures. The

2. See e.g., *Bankruptcy Act*, R.S.C. 1970, c. B-3, Part X - Orderly Payment of Debts; *Interest Act*, R.S.C. 1970, c. I-18, s. 12-15 - Judgment Debts.

3. A prime example is the *Criminal Code*, R.S.C. 1970, c. C-34.

provinces, subject always to the overriding powers of the Government and the Parliament of Canada provided for in *The B.N.A. Act*, were made to accommodate diversity. The Government and the Parliament of Canada, subject always to the preserves of provincial jurisdiction, were made to effect uniformity.

This has been perhaps an overly elaborate exercise to demonstrate that our federal state — *B.N.A. Act* style — carries the fully concurrent potential for both diversity and uniformity of laws. *A fortiori* so does law reform. Unless some process, of which I see no evidence, was to collapse us into a unitary state, natural benefits to Canadian society can continue to flow from both diversity of law and uniformity of law, especially as manifestations of law reform.

### **Reform Is A Political Process**

All reform bespeaks change, but of course not all changes constitute reforms. Reform has the special connotation of change for the better. So, from the inception of the law reform process right along to the implementation of the proposed reform, everyone who is effectively engaged in the process must understand it to be an amelioration, or else it will simply not occur. Law reform is frequently, if not always, an extremely multifarious, nonélitist process. It is true that frequently it has its beginning in some judge's, or some practising or academic lawyer's perception of the law's flaws, but its beginning may also arise through a complaint by a constituent to an M.L.A. or M.P., or through the resolutions and policy process of a partisan political organization. In a democracy we should never forget that our political parties are, or purport to be, law reform agencies *par excellence*. In effect, the ultimate stage of every successful law reform involves the favourable judgment of the elected tribunes of the people in the various rôles of cabinet ministers, caucus members, law amendment committee members and finally legislators. In our secular, federal, parliamentary democracy each of these persons, subject to the constraints of individual conscience as well as party discipline, is working toward the favourable judgment of the voting public. While elections rarely, if ever, turn upon the legislatively implemented recommendations of a law reform commission or of the Uniform Law Conference, the approval of our elected tribunes of the people will not be accorded to a proposed change of the law which seems to them to involve something less than a change for the better.

### **Law Reform Agencies Essentially Non-Partisan**

Law reform is, therefore, a truly political process. Of course, one must not exclude from law reform the creative interpretations of the judiciary. However, in the sense that judicial determinations operate in and upon the body politic, the judicial process is also a political one, even though it must always be scrupulously non-partisan. It is also so with law reform commissioners. They must above all be scrupulously non-partisan in the performance of their duties.

Nowhere have these considerations been more vividly realized than in the creation and operation of the Manitoba Law Reform Commission and in its felicitous but arms-length relations with the Legislative Assembly of

Manitoba.<sup>4</sup> At the outset in 1970, the Schreyer government heeded the rather blunt, if not downright sceptical, advice of the bar that, if the government truly desired the commission to be credible and effective, the government ought not to fill the commission with only the government's N.D.P. friends. Probably because that government, to its credit, did as it was advised, the Manitoba Law Reform Commission has enjoyed great credibility with the Legislative Assembly and the public of the province. By having a multi-partisan composition, it became effectively non-partisan and has seen the overwhelming majority of its recommendations implemented by legislation.

### **Lay Law Reform Commissioners As An Expression of Diversity**

The Manitoba Law Reform Commission provides another example of diversity in law reform. It has always numbered among its commissioners lay members, that is, persons who are not lawyers. This aspect of the commission was deliberately imparted to avoid what might have been regarded as an unacceptably élitist law reform process. In his introduction to the Manitoba Legislative Assembly of the Bill which was later enacted as *The Law Reform Commission Act*<sup>5</sup>, then Attorney-General, Hon. A.H. Mackling, stated:

... [T]he composition of the commission will recognize the fact that other citizens of other vocations will have an important role to play in the review of the laws in this province, as is the case with the supreme law-making body composed of the honourable members present. In my discussions with members of the Law Society and the Bar Association, they have accepted the principle that I have just enunciated.<sup>6</sup>

From the commission's operational beginning in February, 1971, and during its first seven years of operations, three of the six part-time members were lay commissioners.<sup>7</sup> The principle enunciated by Mr. Mackling has continued in effect even though the 1977 general election produced a change of government. Two lay commissioners are presently serving on the Manitoba Law Reform Commission. One can note here that the Law Reform Commission of Canada, during its early years, included a lay commissioner, although Dr. J.W. Mohr, a distinguished criminologist and Professor at Osgoode Hall Law School, was no stranger to the law.<sup>8</sup>

### **Conflict Within The Uniform Law Section: The 1976 Powers of Attorney Debate**

Thus, the government of one province, to take the Manitoba example, exercised its undoubted right to partake of our constitutionally inherent diversity by appointing persons who are not lawyers to function in all respects and in all matters as law reform commissioners.<sup>9</sup> This fact may seem to have only a vaguely peripheral bearing, if any bearing at all, upon the topic of diversity or uniformity in law reform in Canada. Yet, in the deliberations of the

4. On this particular aspect of the topic, the writer relies on personal knowledge and recollection.

5. R.S.M. 1970, c. L95.

6. Debates & Proceedings of The Legislative Assembly of Manitoba, 1970, 2nd Session, 29th Legislature at 3217.

7. See the analysis of Paul Thomas in "The Manitoba Law Reform Commission: A Critical Evaluation" (1975-76), 2 Dalhousie L.J. 417.

8. Law Reform Commission of Canada, (1971-72), 1st Annual Report, at 3.

9. By contrast, the Alberta Institute of Law Research and Reform, has noted in its substantive subject-matter publications that the non-lawyer member of the Board bears no responsibility for the preparation of each Report.

Uniform Law Conference of Canada, to which no lay commissioners are appointed, this fact has, on at least one occasion, generated a sharp division of opinion not only about the substantive subject-matter then under discussion but indirectly, as well, about the purposes and procedures of the Uniform Law Section of the Conference. Perhaps a similar incident could arise in the future, even if the considered work of the respective law reform bodies were produced only by lawyers. In fact, it did arise at the 1976 meeting in Yellowknife seemingly because of the participation of lay commissioners in a Report of the Manitoba Law Reform Commission which, along with those of the Ontario and British Columbia Commissions, provided one of the topics for discussion.

The topic was special, enduring powers of attorney and mental incapacity. There was general agreement that the statutory creation of a special power of attorney, which would remain in full force and effect during and after the donor's mental incapacity, would require a reform of the law of agency. The three law reform commissions had produced reports recommending such legislation. However, despite uniformity of concept, their actual recommendations evinced considerable diversity in construction.<sup>10</sup> That diversity was expressed in the provisions intended to safeguard the estate and rights of the donor of the power.

The Law Reform Commission of British Columbia, being the third of the three commissions to consider the subject, had the advantage of reviewing and commenting on the reports of the Ontario and Manitoba Commissions. According to the perceptions of the British Columbia Commission<sup>11</sup>:

The recommendations of the Ontario Law Reform Commission, contained a relatively complex set of safeguards aimed at the protection of the principal who gives an enduring power of attorney.<sup>12</sup>

and of the Manitoba Commission's Report, it was asserted: "The recommendations made by that [Manitoba] Commission eclipsed even the Ontario scheme in technicality and complexity."<sup>13</sup> There is some truth in the British Columbia Commission's assertions. Indeed, during the discussion of enduring powers of attorney in the Uniform Law Section, some of the commissioners ventured the opinion that the complexity of safeguards in the Manitoba recommendations must have been instigated by lawyers who were too enamoured of legal technicalities.<sup>14</sup> Wrong! In truth those technical and complex safeguards were insisted upon by the lay members of the Manitoba Law Reform Commission, who had a vivid appreciation of the predatory tactics of some nursing home operators, or 'dear friends' or greedy relatives. Each had reasons, based on personal experience, which the lawyer members had to acknowledge were more cogent and compelling than the lawyers' assurances to the contrary based on their professional experience. Perhaps the lawyer commissioners were, in the circumstances, right in yielding to their lay

10. See, the analysis of three Reports in the Proceeding of the Fifty-Eighth Annual Meeting of the Uniform Law Conference of Canada (1976). Appendix T at 204 (Stephen V. Fram) prepared on behalf of the Ontario Commissioners.

11. Law Reform Commission of British Columbia. Working Paper No. 12, *Powers of Attorney and Mental Incapacity*, undated, but requesting comments by January 31, 1975.

12. *Id.*, at 20.

13. *Id.*, at 23.

14. For this, the writer relies on personal knowledge and recollection.

colleagues' insistence on detailed safeguards, despite the "technicality and complexity" of the final recommendations. After all, the lay members were in no sense merely second-class commissioners and they brought to the Commission's deliberations their own "outsiders'" perceptions of how the law should protect individuals and social values. That is not to say that lawyers could never match the experience and perceptions of the lay Commissioners, but that:

... [L]aw reform is not an isolated exercise or wise thoughts in a vacuum. Rather it is a process of determining the policy preferences of the community in which all members of the community can and should participate.<sup>15</sup>

It may well be true that lay members of a law reform body do not have a monopoly on representing the community, but their participation in the Manitoba Commission expressed a choice of diversity legitimately taken by the provincial government of the day in constituting that Commission.

The Manitoba delegates<sup>16</sup> at the Uniform Law Section defended their recommendations and position on the basis that they were not under a mandate to abandon or to bargain away considered recommendations of their law reform colleagues — lay and professional. This brought two important matters to the attention of the Uniform Law Section of the Conference. One matter was in regard to the process of registering approval of model uniform legislation. Under the rules then in force: "2. A motion shall be carried by a majority vote of the persons present at the meeting."<sup>17</sup> Several votes were taken during the debate on enduring powers of attorney. The representatives of both Manitoba and Nova Scotia observed that some other jurisdictions had marshalled their observers, in addition to their Uniform Law Commissioners, to weigh in on those votes<sup>18</sup>, since they were all "persons present at the meeting".

### Uniform Law Section Voting Reformed

As a result of the intensity of feeling generated by this debate in 1976, the Uniform Law Section established a Special Committee to review the purposes and procedures of the section and to report thereon to the 1977 meeting.<sup>19</sup> The voting rule recommended by the Special Committee was adopted by the Uniform Law Section in 1977. It provided an optional mechanism for a vote by jurisdictions. Each jurisdiction, (that is the Commissioners and representatives from a province, or a territory, or the Government of Canada) has three votes. Each jurisdiction may cast the three votes regardless of the number of its representatives attending. The member of that jurisdiction who is selected by his or her colleagues to cast the three votes may do so in any combination of for the motion, against the motion, or as abstentions. A motion is carried if the

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15. Edward F. Ryan and The Hon. Mr. Justice Antonio Lamer, "The Path of Law Reform" (1977), 23 McGill L.J. 519 at 530.

16. The writer and Robert G. Smethurst, Q.C., were also members of the Manitoba Law Reform Commission.

17. Proceedings of the Fifty-Seventh Annual Meeting of the Uniform Law Conference of Canada (1975), at 643; Proceedings of the Fifty-Ninth Annual Meeting of the Uniform Law Conference of Canada (1977), at 390.

18. For this, the writer relies on personal knowledge and recollection.

19. Proceedings of the Fifty-Ninth Annual Meeting of the Uniform Law Conference of Canada (1977), at 33 and 382.

number of votes in favour of it exceeds the number cast against it.<sup>20</sup> Thus did the Uniform Law Section reform its voting procedure.

### Word-For-Word Uniformity Re-Thought

The 1976 debate on powers of attorney also generated some re-thinking about the purposes of uniformity. Perusal of the published Proceedings of the Conference over the years reveals what might be described almost as a fetish for word-for-word and line-by-line uniformity as well as for reciprocity. These notions have definite value in some circumstances, but they ought not be blindly revered.

The debate on enduring powers of attorney in 1976 was conducted as if the recommended uniform act simply had to be identical in every respect wherever adopted. But accepting the concept of a special enduring power of attorney on the part of two or more provincial legislatures, why would the form and procedures of such a power of attorney duly constituted under the statute of Manitoba have to be identical with such a power under B.C. law, in order to gain valid operational status in British Columbia? Why should the statutes of the two or more enacting provinces be rigidly word-for-word, line-by-line identical? Would it not be reasonable and sufficient to accord legal recognition in one enacting jurisdiction to a validly created power given in compliance with the law of the province of origin, another enacting jurisdiction? The only concern would be on the part of the province whose statute erects the more stringent safeguards. But why should the latter be greatly concerned if that resident of the first province, the donor, and the donee, also (in most instances) such a resident, have complied with the enacted requirements of the legislature of the first province, even though those requirements involve less stringent safeguards? Having accepted the concept of a special enduring power of attorney (to pursue this particular example), why can not the practice of uniformity reside in a form of recognition akin to full faith and credit, so that a large degree of jurisdictionally asserted diversity can also be accommodated? It would not cause great injury, if any, to the concern for detailed safeguards asserted by the Manitobans, if the occasional special attorney mandated by a British Columbian in compliance with the law of that province comes along to deal with the British Columbian's property or other interests in Manitoba.

Some necessary and salutary dilution of the fetish for rigid uniformity was effected through adoption of the Report of the Special Committee on the Purposes and Procedures of the Uniform Law Section. The new rule adopted in 1977 provides:

5. (1) Where a recommendation made under section 4 is before an annual meeting, the first matter to be decided shall be whether the matter recommended is to be undertaken by the Section.
- (2) In determining the question of whether the matter recommended should be undertaken by the Section, regard shall be had to the following:
  - (a) whether uniformity is desirable in respect of that matter;
  - (b) whether there has been any demand for uniformity in respect of that matter;

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20. *Id.*, at 382 et seq.

- (c) whether there is any indication that the proposals recommended for adoption by the Section have any likelihood of being accepted; and
- (d) the questions of policy that the Section should determine.<sup>21</sup>

The Special Committee's commentary on this matter was:

*Section 5: Deciding on additions to the Agenda.* This is similar to the present section 4 except for the recasting of the clauses in subsection (2).

The Committee is of the view that where a proposed new project involves an area of major innovation or reform, the Section must first make a decision on the basis of the desirability of uniformity, the demand for it, the likelihood of acceptance of its final proposals and the difficulties involved in reaching agreement on policy questions. The fact that a subject is under study by, or has been reported on by, one or more law reform bodies should not by itself be a reason for not undertaking a project on that subject but, on the other hand, a divergence of views among law reform bodies on the subject may serve as an indication that there will be a diversity of political views on the subject of such a degree that uniform legislation will not come to pass even on basic points of principle.

*The form of proposals for uniformity.* These sections represent a considerable departure from the present section 5 because the final proposal for uniformity may not necessarily be a Uniform Act.<sup>22</sup>

The Special Committee also recommended:

*The role of heads of law reform bodies.* It is recommended that the heads of the various law reform bodies who attend the Conference consider having a meeting by themselves apart from the annual meeting of the Section for the purposes of exploring areas of agreement and disagreement respecting matters coming before the Section in which they are involved and reaching consensus on methods of proceeding with these matters.<sup>23</sup>

So, where some diversity is required because it is asserted by one or more jurisdictions having the undoubted right, not to say wisdom, to do so, uniformity can be achieved through acceptance of the principal substantive concept, in many instances, while according faith and credit to the diverse adjectival incidents required by different legislatures. This less dogmatic species of uniformity may well be most successful because it does not purport to smother our potential for diversity.

### **Reciprocity Not Always Appropriate — Extra-Provincial Custody Orders Enforcement, An Example**

The other notion which seems to have been unduly revered in Uniform Law Conference circles is that of reciprocity. It seems that reciprocity as a principle for recognizing foreign courts' judgments and orders was a selling point for legislation to some extent, but perhaps a stumbling block in the administration of those Acts. What is the good of *reciprocity* in an Extra-Provincial Custody Orders Enforcement Act? Surely in the case of a "civil" abduction, the true concern is that unless there be circumstances which indicate serious harm to the child, or the child's welfare, the enacting jurisdiction is to be no haven for such abductions because its courts will restore the abducted child to the person having lawful custody duly awarded by the proper extra-provincial court or tribunal. In the overwhelming majority of cases, as

21. *Id.*, at 388.

22. *Id.*, at 384.

23. *Id.*, at 385.



the Conference seemed to believe, there is no *bona fide* issue, and the child ought not to be unlawfully (and usually surreptitiously) wrenched from the care of the parent who was adjudged by the home-province court to be worthy of custody of the child. Such abductions when permitted and accepted by Canadian courts, without serious reasons, are a social disgrace. So the notion of reciprocity pales into deserved insignificance when a provincial legislature enacts this kind of declaration that its courts and its officials will not be accomplices of the abductor, no matter what other jurisdictions do or tolerate.

Subject to some qualifications, which are more predominant by volume than by dilution, the uniform Act exacts that : "A court [in the enacting province] . . . shall enforce, and may make such orders as it considers necessary to give effect to, a custody order [of an extra-provincial tribunal] as if the custody order had been made by the court [in the enacting province] . . ." <sup>24</sup> This is the stuff of practical reform in our federal state. It has been enacted by seven provincial legislatures exactly as the Conference recommended and by one legislature with modifications. The Ontario and Québec legislatures did not enact it.

### **Ineffective Operation of Provincial Uniform Custody Acts Invites Federal Attention**

Unfortunately most of the eight Attorneys-General have not the will to ensure that the uniform Extra-Provincial Custody Orders Enforcement Act is effectively enforced in their provinces. Manitoba's former Attorney-General, Hon. Gerald Mercier, Q.C. is the only one to provide the services of Crown counsel and the police free of charge to parents from other provinces or countries for the enforcement of extra-provincial custody orders in Manitoba. This means not only easy access to the Courts and police departments, but also that custodial parents do not have to pay for the services of a private detective or a lawyer. In the other seven provinces the Crown and the police seem to think that enforcement of a uniform Extra-Provincial Custody Orders Enforcement Act, solemnly enacted by their respective legislatures, is a civil matter and not for them. If their respective Attorneys-General will not motivate them who will? Parliament, that is who. By the terms of Bill C-53, introduced earlier this year by the Minister of Justice, Hon. Jean Chrétien, a new Section 250.1 of the *Criminal Code* would make abduction of a child under fourteen years by a parent or guardian an indictable offence punishable by imprisonment for five years where there is a custody order extant, or for two years where there is no custody order. Once the abduction becomes characterized as a crime, it will surely engage the attention of the Crown and the police. The enactment of criminal law will of course produce that instantaneous uniformity throughout Canada of which Parliament is so pre-eminently capable. No doubt there are some who will regard Parliament's intervention as unfortunate, because the practice in Manitoba demonstrates that the uniform Act could meet the problem effectively throughout Canada without invoking criminal law sanctions, if there were the political will to enforce it in each province.

24. The Extra-Provincial Custody Orders Enforcement Act, Proceedings of the Fifty-Sixth Annual Meeting of the Uniform Law Conference of Canada, (1974), at 114.

### Reciprocity in Interprovincial Subpoenas

The uniform Extra-Provincial Custody Orders Enforcement Act is an example of a situation in which it was most appropriate not to have insisted upon reciprocity. Reciprocal uniform laws do, however, serve some needs. The uniform Interprovincial Subpoena Act is a good example of a need for reciprocity of legislation. The problem addressed by this uniform Act is that of ensuring the attendance of a witness from outside the province, but only for the purpose of testifying or producing documents or other articles, or both, and not for any ulterior purpose of the litigant seeking the attendance of the witness.

The uniform Interprovincial Subpoenas Act was adopted and recommended by the Uniform Law Conference in 1974. Seven jurisdictions have enacted it, three of them without making any modifications. Here, some reciprocal features are needed to ensure that any extraneous, ulterior purposes are effectively thwarted. The uniform Act provides that the subpoena from another province will not be received unless the witness resident in the enacting province be accorded absolute immunity, when attending in the other province, from seizure of goods, service of process, execution of judgment, garnishment, imprisonment or molestation of any kind relating to a legal or judicial right, cause, action, proceeding or process within the jurisdiction of the legislature of that other province, except only those proceedings grounded on events occurring during or after the required attendance of the witness in that other province. The uniform Act also confers the same immunity upon a witness who is required to attend in the enacting jurisdiction. This is, after all, a safeguard which can be enjoyed by a witness who merely remains "at home" to be examined on Commission from another jurisdiction. This uniform Act appropriately embodies the cited reciprocal features. The reciprocal features of this reform measure almost surely require word-for-word, line-by-line uniformity. Thus we close the circle of this survey which exemplifies the state of both uniformity and diversity in law reform and in the law reform bodies.

### Law Reform Agencies Represented In Uniform Law Conference

The "Conference of Commissioners on Uniformity of Laws throughout Canada", now the Uniform Law Conference of Canada, was formed in 1918 in Montréal, upon an earlier initiative in that regard on the part of The Canadian Bar Association. The Conference has expanded in response to perceived needs over the years by the addition of the Criminal Law Section in 1944 and the Legislative Drafting Section in 1968. The establishment and impending establishment of law reform commissions throughout Canada was noted with some interest by the Conference prior to the 1969 annual meeting in Ottawa. At that meeting the plenary session of the Conference passed this resolution:

That it be recommended to the Federal Government, and to each Provincial Government that has or hereafter establishes a law reform body, that the Government, wherever possible in addition to the present complement, appoint the chairman of such body or his nominee as a member of the Conference.<sup>25</sup>

25. Proceedings of the Fifty-First Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1969), at 57; *see also*, Proceedings of the Fifty-Third Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1971), at 69, 70 and 129 *et seq.*

Since the passage of the resolution, the government of each jurisdiction has complied with the recommendation. More and more one sees innovative projects coming before the Conference through initiatives which can be traced to the law reform bodies represented in the Conference. A foremost example is the Ontario Law Reform Commission's initiative in having a uniform Sale of Goods Act undertaken as a project of the Uniform Law Conference. This is an example of the best kind of co-operative reform in, through, and with uniformity. The subject is technical and complex, and its commercial connotation makes it naturally apt for trans-provincial uniformity of legislation.

### **Initial Agency Failure To Co-operate Creates Difficulties For Later Uniformity In Evidence Law**

On the other side of the ledger is the failure of the law reform bodies, and in particular the Law Reform Commission of Canada and the Ontario Law Reform Commission, to get together on a joint project on the law of evidence, despite the attempt made at a meeting in Ottawa in March, 1972, convened by the Law Reform Commission of Canada. Finally, after each of those Commissioners expressed diversity through their respective published Reports<sup>26</sup> on evidence, the Uniform Law Conference in 1977 established a joint federal/provincial Task Force on Evidence.<sup>27</sup>

The initial failure to establish a joint project resulted in diverse recommendations which have presented major difficulty to the Task Force on Evidence. In this field it is apparent, as the proposer of the Task Force, Dr. Richard Gosse, Q.C. noted, that there is a need for uniformity in reform. In this instance, uniformity of federal and provincial evidence law is what is most needed and that, in turn, would produce uniformity of the provincial laws. Already two special plenary sessions of the Uniform Law Conference have been convoked, in April and in May, 1981, to consider the monumental work of the Task Force.

To some, evidence is merely lawyers' law which can safely be left to the experts' tinkering or even re-casting. It is, however, much more important than that! In the law of evidence reside many of the powers of the state and many of the rights and freedoms of the individual. Valid reforms, then, will have to be formulated by a wider constituency than one formed of all government lawyers and prosecutors, or of all defence counsel and civil libertarians, valid as their respective outlooks are. The balanced deliberative body convoked at annual, as distinct from "special", plenary sessions of the Uniform Law Conference, although a little government heavy, would be a more apt adviser to the legislatures and Parliament of Canada.

### **Federal/Provincial Or Trans-Provincial Aspects: The Key To Participatory Uniformity?**

It would be salutary for law reform in Canada, if the law reform bodies could find the way around or through their eternal programs of studies or

26. Law Reform Commission of Canada, *Law of Evidence Project, Report on Evidence*, December, 1975; Ontario Law Reform Commission, *Report on the Law of Evidence*, March, 1976.

27. *Supra* n. 19, at 65-66 and Appendix X at 395-400.

references from their respective Attorneys-General, to undertake more joint projects like the Sale of Goods study. With some dedicated co-operation that may become more and more usual, despite the diverse priorities and programs of the various law reform bodies. Early in 1980 the Law Reform Commission of Canada issued its Working Paper 25 on Independent Administrative Agencies. After alerting the other law reform bodies of the Paper's impending publication, the Commission then solicited comments on the Paper after its publication. It seemed a reasonable expectation, because each province maintains an array of administrative agencies similar to the federal agencies. In this regard, diversity had already co-opted the various law reform bodies, whose responses reported were "already too committed", "different priorities" as well as polite formulations of "not interested". Those are all quite legitimate responses, which ought to attract no criticism. No doubt the absence of a federal/provincial aspect, as in the evidence project, and the trans-provincial aspect, as in the sale of goods project, rendered the project on independent federal administrative agencies one for which provincial agencies' priorities quite legitimately will not be altered. We probably all need to refine our mechanisms of co-operation, without smothering our legitimate needs and opportunities for diversity.

### Conclusion

One expects to find diversity in law reform initiatives. Reform bespeaks innovation; uniformity bespeaks conformity. Both are, and always have been, inherent in our political and legal systems as well as in the way we consult and co-operate, when we do, in regard to improving those systems.

There is surely nothing to lose, and everything to gain, in encouraging and welcoming the innovative recommendations which law reform commissioners appointed in and for their respective jurisdictions will produce from their particular knowledge of and sensitivity to their respective societies' peculiarities. In that process there is again nothing to be lost if, in the wisdom of the appointing authorities, non-lawyers are designated to bring to the process their perceptions of the needs and values of the society for whom law reform is propounded. We lawyers, whatever our view of the allegedly unique perspectives of lay law reformers, ought not to permit ourselves any knee-jerk intolerance or élitism in regard to lay commissioners. After all, the politicians who appoint law reformers must be taken to know a thing or two about their own populace. In the nature of things, also, they must be accepted as having the last word on whether a proposed reform is to be implemented or not.

Thus, if the law reformers and the legislators of a particular jurisdiction ardently wish to implement a particular doctrine in, for example, family property law, even at the price of creating conflicts and problems, they should be advised not to do it. If they persist, well, that is just permissible diversity which is inherent in a federal parliamentary democracy. That kind of exercise, after all, provides useful experience for the next jurisdiction or, if appropriate, ultimately for a uniform Act.

The benefit of being diverse and not monolithic resides in the freedom to experiment, to tailor laws to perceived provincial or jurisdictional needs and to learn from the work and recommendations of other innovators. A monolithic system makes its mistakes monolithically, too. The benefit of being uniform

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resides in reduction of complexity and, in our Canadian diversity, learning from and making use of the permissible innovations. This process of uniformity is certainly to be encouraged. To return to the assigned topic: "Law reform in Canada — uniformity or diversity?" one can still cryptically answer "Both" and one can add to that "It is the 'Canadian way'; it is normal"

