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of the

LAW REFORM COMMISSION OF BRITISH COLUMBIA

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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THE HONOURABLE ALLAN WILLIAMS, Q.C.
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present Annual Report for 1980, outlining the progress made by the Commission during that year.

I. INTRODUCTION

The Law Reform Commission of British Columbia was constituted by the *Law Reform Commission Act* which became law on July 1, 1969. The Commission began its work in March 1970. During the past year, formal Reports were submitted to you on Civil Litigation in the Public Interest, Calculation of Interest on Foreclosure and the Recovery of Unauthorized Disbursements of Public Funds. The Commission has also issued Working Papers on The Making and Revocation of Wills, Distress for Rent and Other Debts, and Benefits Conferred under a Mistake of Law. The contents of these documents are described more particularly below.

During 1980 the composition of the Commission underwent a significant change with the appointment of The Honourable Mr. Justice John S. Aikins as Chairman of the Commission, effective July 1, 1980. This was a welcome development as during the nine months preceding the appointment the Commission was without a Chairman. Mr. Justice Aikins will serve the Commission substantially on a full-time basis.

As presently constituted the Commission consists of six members: the Chairman and Messrs. Peter Fraser, Kenneth C. Mackenzie, Bryan Williams, Professor Jenny F. Sheppard and Arthur L. Close. Mr. Close serves full-time and the other members serve part-time.

The appointment of the Chairman has reinforced the revitalization of the Commission that commenced in 1979. One aspect of this revitalization has been an increase in the size and strength of our research establishment. As a result, the Commission is now better equipped to carry out its functions than at any time in its history. The work of the Commission has gained a momentum that is now beginning to yield tangible results and which is expected to continue through 1981. The only impediment is that the Commission's suite of offices is now too small to house adequately its research staff and library. We are currently exploring the possibility of obtaining more commodious premises with the officials within your Ministry responsible for facilities management.

II. THE ROLE OF THE COMMISSION

In March of 1980 the Commission had its tenth anniversary. It seems appropriate to offer some reflections on the work of the Commission during the past ten years, the view that has emerged of its role, and the way it has approached the functions entrusted to it by the Legislature.

The purposes of the Commission are set out in the *Law Reform Commission Act*. Section 2 of that Act provides:

> The Commission is to take and keep under review all the law of the Province, including statute law, common law, and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law . . .

The broad, flexible terms of reference are similar to those of other law reform agencies in the Commonwealth. The projects undertaken and reported on by the Commission have covered a wide range. Some have concerned technical and historical topics such as our Report on the *Absconding Debtors Act* and *Bail Act*

(LRC 37, 1978) while others have dealt with more controversial matters such expropriation (LRC 5, 1971) and landlord and tenant relationships (LRC 13, 19

A general mandate to simplify and modernize the law, however, requires priorities be developed and that consideration be given to the role of the Comm sion. In its 1974 Annual Report the Commission made its only prior pu pronouncement which attempted to define the role of the Law Reform Commiss

> All the Commissioners, and the entire professional staff of the Commission, are lawyers, and this in itself imposes certain constraints upon us. While lawyers' skills and values are important in the social process, they are not the whole of it. Lawyers are not specialists in omniscience, and while they do have a considerable and distinctive contribution to make to modernization and improvement of the legal system, theirs is by no means the only contribution.
>
> Lawyers, as lawyers, probably have little more to contribute than other citizens in the resolution of pressing social issues, except perhaps in the sense that they may have a heightened appreciation of the limitations of the law and its processes in the resolution of such issues. The distinctive contribution that the Commission can make to the improvement of the legal system lies in its capacity for careful research and thoughtful analysis.
>
> The Law Reform Commission is not an omnibus vehicle for law reform of all kinds. It is but one among a variety of mechanisms available for the purpose. There are matters of law reform that should not be left to lawyers alone, although what those matters are cannot be stated with any precision. The judgment of when the Law Reform Commission is an apt vehicle is a sensitive one that must be made in the light of experience and an informed intuition.

The view set out above is negative in the sense that it says what a Commission is and should not do.

The Commission's view of what it is and should be doing emerges only fr an examination of the subject matter of its past Reports and work in hand. T themes are visible. The first is that the work has been concentrated principa although not exclusively, in areas having a high degree of legal complexity. T flows from our mandate to "simplify" the law. That which is in need of simplif tion must perforce be complex. The second is that legal relationships betw citizen and citizen as opposed to the legal relationship between citizen and s have been emphasized in our programme. (*see* Appendices A and B.)

The Law Reform Commission began active work in 1970. Like any inst tion, it has profited from experience; and, while none of the past Reports seem r to us to have been inappropriate, it is probably true that we have a more sophi cated understanding of the important factors governing the selection of project relation to our time and resources. What emerges is a cautious approach developing our programme, but one which we are anxious should not be mis derstood. Some of our Reports such as those on Security Interests in Real Prope Remedies on Default (LRC 24, 1975) or Proof of Marriage in Civil Proceedi (LRC 32, 1977) may seem to deal with obscure issues but studies like these important. They have a very substantial impact, either in terms of altering the le rights of members of the public or in terms of a saving of expense to both the pul and to the government. Our recent Report on Civil Litigation in the Public Inte has similar implications.

There are pragmatic reasons for our cautious approach. First, much of w was said in 1974 concerning the role of the Commission as set out above rema true today. It should not be regarded as an omnibus vehicle for broad social refor Its work should be confined to those areas in which its views are credible in the e of government and the public. To fail in this would be to waste our resources and the long run, be harmful to the Commission.

Secondly, the Commission's methodology imposes certain limitations. Fou the six members serve on a part-time basis. The work of the Commission revol around periodic meetings of the Commissioners at which research materials

eports are considered. This pattern means that certain kinds of projects present grave difficulties if undertaken by us. These would include projects by their nature, call for the day-to-day involvement of all Commissioners, or s calling for extensive empirical research. Experience has demonstrated ven the existing structure and methodology of the Commission, it functions effectively in addressing short, discrete topics. This does not preclude large, rm studies but we are limited in the number of such projects that can be given consideration at any one time.

ubject to those observations and the limitations imposed by our size and ces, we wish to make it clear that the Commission would not seek to avoid on a project merely because it raises highly visible or contentious issues.

he Commission has traditionally drawn on a number of sources in developing gramme. Suggestions are received from bench and bar and from the general . These suggestions are often stimulated by our published Reports and ing Papers which are circulated widely among the legal profession and the . Issues arise out of the professional experience of Commission members. al decisions and developments in other jurisdictions suggest possibilities. ts may also be inspired by the work of other law reform bodies or agencies government concerned with policy development. We are, of course, con- of the need to avoid wasteful duplication of effort.

n addition, topics are added to the programme at the request of the Attorney al under the terms of the *Law Reform Commission Act*. These form a icant part of our programme. Two of the Reports submitted in 1980 were the of such requests: our Reports on Civil Litigation in the Public Interest, and on alculation of Interest on Foreclosure. This source of projects raises the more al issue of the relationship of the Commission to other branches of the try and to the government in general. It is desirable to clarify our views on the to which the programme of a law reform agency should reflect the needs and ties of government.

It is clear that once a matter is before a law reform agency it must be free to op its recommendations as it sees fit. This independence must exist in both ance and appearance. Less clear cut, however, is the degree of independence priate in the development of the programme of a law reform agency. In British mbia the Commission is almost entirely funded by government and, moreover, *aw Reform Commission Act* plainly states that the Attorney General has rtant responsibilities in the development of the Commission's programme for m. It is equally plain that the Commission, while recognizing the statutory role Attorney General, must also exercise its independent judgment in developing ogramme. In the Commission's view the Act contemplates a balance between equirements of government and the views of the Commission but leaves the se equilibrium to be worked out between the Commission and the Attorney ral.

We are anxious to ensure, and indeed must do so, that the work of the mission is relevant and responsive to the needs of government. At the same , we are equally anxious to retain the independence to undertake work in areas elieve to be important, even if government has not indicated a similar belief. independence is critical to the Commission's credibility and usefulness to the le of the Province. In saying this we do not suggest that there is any issue as to Commission's independence. There is none. The Commission's present pro- mme comprises topics of importance referred to us and like topics initiated by Commission.

III. THE PROGRAMME

A. CARRYING OUT THE PROGRAMME

1. Research and Writing

The research to carry out the programme calls for time consuming work qualified persons. This can be achieved by having the research done by person who are employed as full-time staff, or by persons with special expertise who retained on a part-time or occasional basis. Although in the early years Commission relied heavily on outside consultants, our experience has led t preference for the former approach. Consequently, most of the research and writi is now done by full-time members of the Commission staff.

2. The Consultation Process

The Commission is making a general practice of inviting comment a criticism on its research and analysis before submitting a formal Report to you any particular subject. This process of consultation greatly assists the Commissi in the making of proposals for the reform of the law that are both relevant and sour

The chief means by which the Commission carries out this process is throu the circulation of Working Papers to those persons, groups or organizations w would find the subject under study of interest. The Working Paper sets out the vie of the Commission, and the background on which these views are based, and invi comment.

Occasionally, when the topic under consideration makes wide circulation o Working Paper inappropriate, copies of a draft Report may be given limit circulation for comment.

Whatever consultation mechanism is adopted, the tentative conclusions a thoroughly re-examined in the light of the comment and criticism received and fi recommendations developed accordingly.

During 1980 significant initiatives were taken by the Chairman to improve o consultation process. This involved establishing new procedures, and strengthe ing existing procedures, to facilitate our communication with the various organs the legal profession and the two law schools in the Province.

B. THE PROJECTS

The description below is limited to those projects upon which Reports ha been made in the past year or upon which work is in progress. Details of oth Reports, and projects which have been discontinued may be found in earlier Ann Reports. Included as Appendix A is a table setting out all Reports which t Commission has made to date, and references to legislation in which the re ommendations have been implemented in whole or in part. In Appendix B there another table setting out those matters which are now under consideration.

1. Debtor-Creditor Relationships

(a) Crown Liens

A large number of provincial statutes create liens over real and perso property to secure money that is payable to the government or its agencies. Su liens tend to be legislated on an *ad hoc* basis and their scope and priority are oft uncertain. There is no evidence in the statutes of any uniform policy or of consistent set of principles with respect to such liens.

the project on Crown liens we hope to rationalize this area of the law and ie an appropriate balance between the needs and expectations of government, ctors, and third parties.

esearch on this project was commenced in 1979 and continued throughout 0The preparation of a Working Paper is in its final stages and we hope to ote it early 1981.

viewable Transactions

study on the operation of the *Sale of Goods in Bulk Act*, *Fraudulent vance Act* and *Fraudulent Preference Act* is currently in progress. Back-l research on the law respecting the current operation of the *Fraudulent vance Act* and the *Fraudulent Preference Act* is virtually complete. Research *Sale of Goods in Bulk Act* will commence shortly.

his project is a large one and we do not anticipate that we will be in a position e a Working Paper until late in 1981. Preliminary research has, however, questions about the utility of these Acts, particularly the *Fraudulent Prefer-ct*. It seems safe to say at this point that among the options for reform which ll be considering will be one for the outright repeal of one or more of the Acts, rationalization and modernization of what remains.

int Liability

here are a number of aspects to the project on joint liability. The first is an nation of the distinction between joint liability and joint and several liability, can be crucial. For example, a judgment obtained against a person jointly will bar any action against the others with whom he is liable. If the liability is nd several, judgment obtained against one will not bar any action against the

We also propose to examine the law concerning joint obligations and its onship with the law of contributory negligence. In particular, the provisions of *gligence Act* relating to the apportionment of liability, and rights of contribu-among persons jointly liable need to be examined. We expect to profit from the of the Uniform Law Conference in this area. The work of the Conference in oping new uniform legislation is nearing completion.

nforcement of Judgments

Our work on execution against shares and securities has been deferred pending itcome of our study on the office of the sheriff. The latter study will provide us much needed information concerning current practices in relation to execution st shares and any conclusions arising out of that study may well have an impact e direction taken by our research and recommendations in respect of shares.

RSONAL INJURY COMPENSATION

eriodic Payments

A project on personal injury claims was added to the Commission's pro-me in 1978, largely as a result of the dissatisfaction with the present system of nal injury compensation that had been voiced in the Supreme Court of Canada hat arose out of work and studies in other jurisdictions. The scope and asis of the project were left undefined while background materials were red and certain preliminary research undertaken with a view to developing priate terms of reference. The work on this project has accelerated as a result

of an interest shown in it by the Chief Justice of the Supreme Court of Brit Columbia and the Deputy Attorney General.

During 1980 our views sharpened considerably and we have identified principal issue in this project as whether a credible scheme can be develo whereby, as an alternative to the present "lump sum" awards, a court award compensation for personal injuries can take the form of a stream of perio payments.

(b) Discount Rates

Where an award of damages is intended to compensate for losses or expen to be incurred in the future, the calculation of that award involves determining "present value" of the loss. An essential component of this calculation is the called discount rate. This rate is usually identified with the predicted differe between the long term investment rate of interest and the long term rate of pr inflation.

At present, the discount rate is a question of fact to be determined in each c on the evidence adduced. In the result, much court time is taken up in hear evidence from economists and actuaries with respect to the appropriate disco rate. This evidence is repetitive and to relatively little purpose as the recommen rates usually fall within a very narrow range. This adds to the expense which m be borne by litigants and detracts from the efficient administration of justi Moreover, the discount rate is intended to reflect general economic conditions a interest rate factors. Thus the rate should not vary from case to case depending the vagaries of the evidence called with respect to those conditions in particu cases.

This suggests that it would be beneficial to devise other ways of determin the discount rate. Ontario has recently amended its *Judicature Act* to provide t the discount rate in that Province may be set by its Rules Committee subject to approval of the Lieutenant Governor in Council.

Early in 1980 we received a request from the Deputy Attorney General to as in the development of a scheme that might be adopted in British Columbia for fix discount rates. This was done in consultation with the Chief Justice of the Supre Court of British Columbia, whose concerns inspired the request.

The Commission's suggestions as to an appropriate scheme were forwarde the Chief Justice in November. A copy of our letter to the Chief Justice and suggested legislation is set out as Appendix C to this Report.

3. Applicability of English Statute Law

Section 2 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224 provides that laws of England, as they existed on November 19, 1858, are in force in Brit Columbia to the extent that they are not inapplicable through local circumstan and have not been repealed or superseded by federal or provincial legislation. follows from this that an uncertain number of English statutes are in force in t Province.

The aim of this project is to introduce a degree of certainty concerning extent to which English statute law is in force here. We hope to identify th statutes which are in force, with a view to rationalizing this aspect of our statute l

This has always been recognized as a long-term project and much of our w has been devoted to gathering background information. Considerable progress been made in organizing these materials, and a preliminary list of statutes has b established. Our research in this area will continue in 1981.

ARBITRATION

The law covering Arbitration was the subject of intense research by the Commission in 1978 and 1979. The focus of our attention was commercial arbitration and the imperfections of the existing *Arbitration Act*. In April 1979 the Commission circulated a Working Paper that set out a number of proposals for change. We are in the process of evaluating the response to the Working Paper and developing our final recommendations. We hope to submit our final Report in 1981.

CIVIL PROCEDURE

Civil Litigation in the Public Interest

Generally speaking, a private individual has no standing to sue to protect the public at large from a wrongful invasion of its rights. He may only sue when the interference with the public right is such as to interfere with a private right of his or where he has suffered special damage or has some interest peculiar to himself. Where such factors are absent only the Attorney General, suing either ex officio or, more usually, on the relation of a private individual or public authority, may seek redress in the courts in respect of a wrongful invasion of a public right. The role of the Attorney-General has recently been a matter of particular controversy in England owing to the decision of the House of Lords in *Gouriet* v. *U.P.W.*, [1978] A.C. 435.

In 1976 your predecessor requested that the Commission examine this area of the law. This has been done and in June 1980 we submitted our final Report setting out our conclusions and recommendations for change.

The recommendations made in the Report would, if implemented, enable private individuals, in certain circumstances, to bring public interest proceedings in their own name without the joinder of the Attorney General as a party and would assist in their gaining greater access to the courts to vindicate public rights.

Class Actions

It has long been recognized there are situations in which it is appropriate to allow a litigant to bring an action on his own behalf and on behalf of numerous other persons who may have similar claims. Rule 5(11) of the Supreme Court Rules permits such actions but the scope and operation of the Rule is often uncertain, and its scope has been criticized as undesirably narrow.

It is particularly desirable that the law in this area be uniform throughout Canada and we intend, as far as possible, to co-ordinate this project with similar work being done within the Province of Quebec and by the Law Reform Commission of Ontario and, through the Uniform Law Conference, with the reforms adopted or under consideration in other provinces.

Prejudgment Interest

The *Court Order Interest Act* (formerly entitled the *Prejudgment Interest Act*) was enacted to implement recommendations made in a Report (LRC 12) submitted by the Commission in 1973. Six years of experience under the Act has produced a growing body of jurisprudence and is sufficient time for any difficulties in the legislation to have emerged. The Commission has embarked on an examination of the operation of the Act and will be reporting in due course on what, if any, changes are desirable.

Complementing our own work in respect of prejudgment interest is the work of the Uniform Law Conference of Canada aimed at developing a uniform model act available for adoption across Canada. At the 1980 meeting of the Conference the

underlying policy issues were the subject of intense consideration and it is expecte that in 1981 a draft act will be available for consideration by that body.

6. Estates Projects

(a) The Making and Revocation of Wills

In April 1980 the Commission issued Working Paper No. 28 on the Makin and Revocation of Wills. This Paper explores a number of issues of concern to person contemplating the execution of a will, and to a Court of Probate called upo to determine the validity of a testamentary instrument. These issues include th capacity of minors, soldiers' and mariners' wills, the international form of will, th impact of marriage breakdown on prior wills, gifts to witnesses, the designation of beneficiary under a plan such as a RHOSP, and conflict of laws. Proposals are mad with respect to all these matters.

The Commission has received a number of thoughtful responses to Workin Paper No. 28 from academics, the Bench, and the Bar. These responses are beir collated and will be useful in assisting the Commission in formulating fin recommendations. We hope to issue our final Report early in 1981.

(b) Statutory Succession Rights

The right of a person to succeed to the property of another on death may aris by will or by statute. In Working Paper No. 28, we were concerned mainly wi testamentary succession rights. In this part of the project we propose to examir rights which flow from statute, and which exist regardless of a deceased person intent. Such rights may be mandatory, such as those which arise upon an intestac under the *Estate Administration Act*, or they may be discretionary — such as thos accorded to certain persons under the *Wills Variation Act*.

A number of fundamental issues arise. Who should enjoy a statutory succe sion right? On what basis should courts interfere with other vested rights i exercising their discretion under the *Wills Variation Act?* What relief should b granted under such an act? What should be the position of a surviving spouse havir regard to interests that may arise upon marriage breakdown under the *Fami Relations Act?*

Our background research in this area is in its final stages.

(c) The Interpretation of Wills

Once a will has been admitted to probate, doubts may arise concerning th meaning of words used by the testator. Over several hundred years the common la has developed a bewildering array of rules concerning the construction of wor used in a will. Many of these rules are both archaic and obscure. In this part of th project we will examine these rules with a view to proposing reforms which wi enable courts more readily to ascertain and give effect to the testator's true inten

Intensive research is underway, and it is hoped that a Working Paper will b distributed in 1981.

(d) The Effect of Testamentary Instruments

Even where the testator's original intent is beyond dispute, events may occ which render it impossible to give effect to his intent. A beneficiary may predecea the testator. Property disposed of by will may have altered in form. In this four part of the Wills and Estates Project the Commission will examine a number issues arising out of such occurrences. In particular, we will examine the legal rul concerning lapse, ademption, conversion, election, disclaimer, and survivorshi

robate Procedure and Administration

t is planned that this study will examine the law of British Columbia con-
ng the procedure used in obtaining letters probate or letters of administration,
he law relating to the administration of the estates of deceased persons, with a
o its consolidation, rationalization, and simplification. We will also consider
ocedural implications of recommendations made in other parts of the project.
changes in the law concerning procedure depends to some extent upon the
antive law, it is anticipated that aspects of our work on this topic will be
ed until the completion of the other parts of the Wills and Estates Project.

LE OF GOODS LEGISLATION

Early in 1979 the Ontario Law Reform Commission submitted a massive
rt on the law concerning the sale of goods. It recommended the enactment of
egislation to replace a statute similar to the *Sale of Goods Act* in force in this
nce. The adoption of the recommended Act in Ontario only, however, would
to a serious departure from the high degree of legislative uniformity that
ntly exists among the common law provinces.

To meet this concern a special Committee of the Uniform Law Conference was
to consider the desirability of promulgating a new Uniform Sale of Goods
nd whether the proposed Ontario legislation should form the basis of such a
rm Act. Those law reform agencies concerned with this issue are providing
al assistance. We have engaged Professor David Vaver of the Faculty of Law,
ersity of British Columbia, as a consultant on this project and he is working
ly with the Committee.

The Committee made satisfactory progress during 1980 and its work will
d into 1981. We acknowledge, with gratitude, the support of the Law Founda-
n connection with this project.

XTRINSIC AIDS TO STATUTORY INTERPRETATION

Section 8 of the *Interpretation Act* provides that a statute shall be given "such
large and liberal construction as best ensures the attainment of its objects." In
taining these "objects," however, the courts are largely confined to an
ination of the legislation itself. As a general rule a court may not have regard to
sources that may assist in discovering the "objects" of legislation or the
ention" of the legislature that enacted it.

Two such sources that are frequently cited as being of potential assistance are
eports of legislative debates (Hansard) and the reports of Royal Commissions,
eform agencies and the like that may have preceded legislation. The generally
pted legal position is that the former are wholly inadmissible as an aid to
pretation and that the latter are admissible only to identify the "evil" sought to
emedied by the legislation.

A study on extrinsic aids to statutory interpretation was added to our Pro-
me in 1979. It will examine the desirability of modifying the law so as to allow
e materials to be introduced, for what they are worth, as an aid to construction.

CCOUNTING ON FORECLOSURE

In 1975 the Commission submitted a Report entitled "Security Interests in
l Property: Remedies on Default" (LRC 24). That Report explained, and made
mmendations concerning, the rights and remedies available to lenders and
owers following default by the borrower on a loan secured by a mortgage or
ement for sale of real property.

One aspect of foreclosure that was not explored in the Report and which h not emerged as an issue was the form of the "usual order" so far as it concerns calculation of interest payable if the borrower is to redeem the property by discha ing the debt. In two recent cases the courts have reached opposite conclusio

In 1977 the Supreme Court of British Columbia in *Avco Finance Servi Realty* v. *Gustafson*, (1977) 3 B.C.L.R. 67 held that the mortgagee in a foreclos proceeding was entitled only to collect interest to the date of redemption. In 19 the Court of Appeal in *North West Trust Co.* v. *Paramount Management Co* (1979) 8 B.C.L.R. 199 overruled the *Avco* decision and re-established the pr practice that entitled mortgagees to interest for the full period of redempt regardless of the actual date of redemption.

In June 1979, at the request of your predecessor, this matter was added to Programme for study. Early in 1980 we circulated a Working Paper (No. 27) wh examined these issues and interests at stake. In the light of the comment receiv the Commission concluded that the form of usual order endorsed in *Avco* should adopted, subject to an explicit discretion in the court to order the payment of inter for a longer period in appropriate circumstances. A recommendation to this eff was embodied in our final Report which we submitted in September 1980.

10. Office of the Sheriff

A recent addition to the Commission's programme is a study of the office of sheriff. It entails a comprehensive examination of the powers and duties of sheriff and current practices in the day-to-day operation of the sheriff's office historical review of the evolution of the sheriff's office in British Columbia and examination of the practice in other jurisdictions is also being undertaken.

The Commission has engaged Mr. Gordon Turriff of the British Columbia to carry out the research and assist the Commission in the preparation of a pa which will be circulated for comment. We hope that it will be completed available by the middle of 1981. The Law Foundation has provided the m financial support for this study.

11. Benefits Conferred Under a Mistake of Law

The accelerating pace of change in the common law combined with increasing number of enactments which regulate the lives of Canadians has creased the possibility of acting under a mistake of law. Nevertheless, the concerning the recovery of benefits conferred under a mistake of law is root 18th century jurisprudence. The current law is unduly complex and irrational. one commentator has noted:

> Few subjects are more confused than recovery of money paid under a mistake of law.

Working Paper No. 30, addressing the issues which arise where a party en into a transaction under a mistake of law, was issued in December, 1980. In Working Paper the Commission tentatively proposes the abrogation of the gen rule that benefits conferred under a mistake of law are not recoverable. March 3 1981 has been set as the deadline for responses to Working Paper No. 30. I expected that a final Report will be tendered to you in 1981.

12. The Recovery of Unauthorized Disbursements of Public Funds

In September 1980 the Commission reported on the law respecting the authorized disbursement of public funds. This Report was in part a response to a by the Ministry of Finance for responses to its Discussion Paper concerning a d Financial Administration Act. It was concluded in the Report that although

should continue to enjoy a prima facie right to the return of money disbursed statutory authority, that right should not be unqualified. The Report mends that the recipient of funds disbursed without statutory authority be ed to raise any defence to the action which would have been available had the framed its action as one to recover money paid under a mistake of fact.

EGAL CONTRACTS

s a general rule, Canadian Courts decline to grant relief to parties who have deliberately or unwittingly entered into an "illegal" contract. The law ining when a contract may be characterized as illegal, and the exceptions to neral rule, are uncertain and inconsistent. It may be doubted whether the results which flow from characterizing a contract as "illegal" are necessary hold public policy.

is anticipated that a Working Paper examining the issues arising out of a total ial abrogation of the general rule denying parties to an illegal contract the have their relationship settled by a court will be issued by mid-1981.

STRESS FOR RENT AND OTHER DEBTS

his project, added to our programme in 1980, examines the desirability of ng the present right of a landlord of commercial premises to seize goods ging to the tenant and to sell them to satisfy unpaid arrears of rent. The effect present law is to give the landlord a priority over the rights of other creditors nay also wish to see their debts satisfied out of the tenant's property. It may eopardize the interests of innocent third parties.

These issues were explored in a Working Paper which the Commission ated in November 1980. In the Working Paper it was tentatively concluded e landlord's common law right of distress and a number of similar statutory should be abolished. We expect to submit our final Report in 1981.

UBJECTS OF INTEREST

Preliminary research or the gathering of materials is proceeding on a number of rs which are not yet part of the Commission's programme. In most cases this is termine if a particular topic is appropriate for formal inclusion in the Pro- me as a Commission project. An example of this is product liability.

Inspired in part by a recent report of the Law Reform Commission of Ontario, Uniform Law Conference of Canada at its 1980 meeting added to its agenda the er of possible uniform legislation concerning product liability and a committee struck to examine the matter in detail. Legal change in this area is a matter of est to our Commission and accordingly we have taken steps to keep abreast of lopments in this area and to monitor and, if possible, participate in the work of committee. It is uncertain at this stage whether product liability will emerge as a fledged Commission project.

A further example is contracts of adhesion. A matter of concern is the irness which can frequently arise when one party to a transaction, for any one variety of reasons, may be in a position to impose unfavourable or onerous ractual terms on the other. Contracts formed in such circumstances are fre- ntly referred to as "contracts of adhesion." We are currently considering the ition of a project on such contracts to our programme as a matter for further ly. Progress is being made in examining particular areas which give rise to cern and in considering the legislation, experience, and proposals of other sdictions where this issue has received attention.

Many of these matters which are under preliminary consideration arise o particular suggestions made and problems drawn to the Commission's attentio the legal profession and by members of the public. This kind of assistance is alw welcome. Even if the particular suggestion or problem is not one which is appro ate for Commission study we are often able to transmit it to a person or age which is in a position to act.

IV. THE AVAILABILITY OF COMMISSION PUBLICATIONS

All final Reports issued by the Commission have been published in a typ format, with the intention that they be available to the public. Our Annual Rep are distributed by the Commission and are available on request and free of charg long as stocks last.

The Provincial Queen's Printer is responsible for the distribution of all o Reports made by the Commission. A nominal charge is made for copies of th Reports. Orders and inquiries as to prices should be directed to:

The Queen's Printer,
Parliament Buildings,
Victoria, B.C. V8V 4R6

A number of our early Reports are now out of print and are not available purchase. Those Reports are indicated with an asterisk in Appendix A.

Working Papers are produced in a typescript format by an offset process, the Commission is responsible for their distribution. Working Papers are usu produced in limited quantities and our supplies of them are invariably exhausted or shortly after, their initial distribution. Usually, therefore, we are unable respond to requests for copies of past Working Papers.

V. ACTION ON COMMISSION RECOMMENDATIONS

Appendix A lists all the Reports that we have made together with a note of legislation implementing recommendations made in those Reports. We though might be helpful, however, if we were to highlight legislation enacted during past year that directly relates to recommendations we have made. Although duri the past year there have not been any major pieces of legislation directly related recommendations that we have made there have been a number of important, alb minor, amendments to various statutes that are based in whole or in part upon o recommendations. These particular amendments were made by the *Attorney Ge eral Statutes Amendment Act, 1980*.

In sections 7 and 17 of that Act the *Estate Administration Act* and t *Negligence Act* were amended to provide that the time within which an action m be brought where the defendant had died will be determined by the *Limitation A* We recommended such an amendment by letter to the Attorney General dated Ap 3, 1979, the text of which can be found in Appendix C of our Annual Report f 1979.

Section 8 of the Act amended section 58 of the *Evidence Act* dealing with pro of marriage in civil proceedings. The section as amended is now in accord with th recommendation made in our Report on Proof of Marriage in Civil Proceeding 1977, LRC 32.

Section 11 of the Act amended section 7 of the *Power of Attorney Act* and based on a recommendation made by us in our Report on Powers of Attorney an Mental Incapacity, 1975, LRC 22.

inally Section 15 of the Act amended the *Law and Equity Act* to enable the on terms it considers appropriate, to grant relief from an "acceleration" in, for example, a mortgage, before final disposition in a proceeding to e that security. We recommended legislation similar to this in our Report on ty Interests in Real Property: Remedies on Default, 1975, LRC 24.

VI. RELATIONSHIP WITH OTHER AGENCIES

Our ties with other law reform agencies continue to strengthen and prosper, through the reciprocal arrangements for the exchange of documents and h personal contacts. As has been usual in recent years a meeting of Canadian eform bodies was held in August. It was attended on behalf of British bia by the Chairman, K.C. Mackenzie and A.L. Close. This resulted in a l exchange of information and discussion of mutual concerns. That meeting llowed by the Annual meeting of the Uniform Law Conference of Canada. hairman, Mr. Mackenzie and Mr. Close were members of the British Colum- legation to the Conference.

A useful result of our ties with the Uniform Law Conference has been our ipation in the Committee on sale of goods legislation described earlier in this rt. We welcome the opportunity to co-operate with other law reform agencies enture of this kind.

Although the Commission reported on Personal Property Security in 1975, it nues to keep abreast of more recent developments in this area through the ipation of Mr. Close in the Special Committee of the Canadian Bar Associa- on a Model Personal Property Security Act under the Chairmanship of Pro- r Jacob Ziegel.

Our relationship with other agencies of Government, both within and without inistry of Attorney General, continues to be wholly satisfactory.

VII. ACKNOWLEDGMENTS

As we have pointed out in previous Annual Reports, our policy of doing the er part of our research work internally, rather than relying upon outside ultants, has placed a heavy burden of responsibility upon the shoulders of our nanent staff. As usual they have responded to the challenge with energy, usiasm and careful scholarship.

Our research staff currently consists of Mr. Anthony J. Spence, Counsel to the mission, and Messrs. Frederick Hansford and Thomas Anderson, Assistant nsel. We wish to thank them for the very significant contribution they make to work.

Our support staff also make a notable contribution to the work of the Commis- . They bring intelligence and efficiency to their duties and share a concern that work should be of the highest quality in every respect. Our support staff ently consists of Sharon St. Michael, Secretary to the Commission, and Terry perance and Dorothy Findlay, stenographers. We thank them for their efforts on behalf.

The support which we have received from the organized bar and its individual nbers in past years continued in 1980. We rely heavily on the assistance of the l profession in a number of ways. At the research stage of our projects, vidual lawyers assist us in gathering facts and in acting as a "sounding board"

with respect to various approaches to difficult issues. Requests for help of this l are invariably the subject of a generous response. At the more formal stag consultation, various Sections of the British Columbia Branch of the Canadian Association assist our deliberations with thoughtful submissions on the var proposals and tentative conclusions set out in our Working Papers. We wish to th all members of the bar who gave generously of their time and experience in the year.

Our particular thanks goes to the Law Foundation of British Columbia. Foundation responded swiftly and generously to our requests for financial as tance in connection with the sale of goods study and with respect to our study of office of the sheriff. The latter is a project which would have been totally beyond resources at the present time if the Law Foundation had not responded to our req for funding.

We also wish to aknowledge the contribution of the Judges Law Ref Committee. This Committee provides a continuing point of contact with judiciary. The members of the Committee are Mr. Justice Lambert of the Cour Appeal, Mr. Justice Taylor and Mr. Justice Hinds of the Supreme Court, Ju Spencer of the County Court and Judge Collings of the Provincial Court. members of the Committee assist us through responding to our working papers other consultative documents and through bringing to our attention defects in law that they are well situated to identify. They bring a unique perspective to bea our work and we are grateful for their participation.

Finally, we wish to thank you, Mr. Attorney, and others within your Mini for the attention that has been given to the Commission and its activities in 19

1 January 1981

J. S. AIKINS
PETER FRASER
K. C. MACKENZIE
BRYAN WILLIAMS
ANTHONY F. SHEPPARD
ARTHUR L. CLOSE

Appendix A

REPORTS AND RECOMMENDATIONS MADE BY THE LAW REFORM COMMISSION OF BRITISH COLUMBIA

Title	Date	Recommendations Implemented in Whole or in Part by
Limitations—Abolition of Prescription*	Dec. 17, 1970	*Land Registry (Amendment) Act, 1971*, S.B.C. 1971, c. 30 (see now *Land Title Act*, R.S.B.C. 1979, c. 219, s. 24).
Annual Report, 1970*	Dec. 31, 1970	Not applicable.
Frustrated Contracts Legislation*	Feb. 17, 1971	*Frustrated Contracts Act*, S.B.C. 1974, c. 37 (see now *Frustrated Contract Act*, R.S.B.C. 1979, c. 144); *Landlord and Tenant Act*, S.B.C. 1974, c. 45, s. 61 (e) (see now *Residential Tenancy Act*, R.S.B.C. 1979, c. 365 s. 8 (3)); *Commercial Tenancies Act*, R.S.B.C. 1960, c. 207, s. 34 (see now *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54, s. 33).
Debt Collection and Collection Agents	Mar. 19, 1971	*Debt Collection Act*, S.B.C. 1973, c. 26 (see now *Debt Collection Act*, R.S.B.C. 1979, c. 88).
Expropriation	Dec. 20, 1971	
Annual Report, 1971*	Dec. 31, 1971	Not applicable.
Mechanics' Lien Act	June 30, 1971	
Deficiency Claims and Repossessions	June 22, 1972	*Conditional Sales Act*, S.B.C. 1973, c. 19 (see now *Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373); *Bills of Sale Act*, S.B.C. 1973, c. 7 (see now *Chattel Mortgage Act*, R.S.B.C. 1979, c. 48).
Legal Position of the Crown	Dec. 12, 1972	*Crown Proceedings Act*, S.B.C. 1974, c. 24 (see now *Crown Proceeding Act*, R.S.B.C. 1979, c. 86); *Interpretation Act*, S.B.C. 1974, c. 42, s. 13 (see now *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 14).
Annual Report, 1972	Dec. 31, 1972	Not applicable.
Interim Report on Evidence	Feb. 20, 1973	*Attorney-General Statutes Amendment Act, 1975*, S.B.C. 1975, c. 4, s. 6 (see now *Evidence Act*, R.S.B.C. 1979, c. 116, s. 38).
Pre-Judgment Interest	May 16, 1973	*Prejudgment Interest Act*, S.B.C. 1974, c. 65 (see now *Court Order Interest Act*, R.S.B.C. 1979, c. 76).
Landlord and Tenant—Residential Tenancies	Dec. 11, 1973	*Landlord and Tenant Act*, S.B.C. 1974, c. 45 (see now *Residential Tenancy Act*, R.S.B.C. 1979, c. 365).
Annual Report, 1973	Jan. 1, 1974	Not applicable.
Limitations—General	Mar. 25, 1974	*Limitations Act*, S.B.C. 1975, c. 37 (see now *Limitation Act*, R.S.B.C. 1979, c. 236).
Costs of Accused on Acquittal	June 24, 1974	
Procedure Before Statutory Bodies	Nov. 18, 1974	
A Procedure for Judicial Review of the Actions of Statutory Bodies	Dec. 12, 1974	*Judicial Review Procedure Act*, S.B.C. 1976, c. 25 (see now *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209).

* Report is out of print.

No.	Title	Date	Recommendations Implemented in Whole or in Part by
19	Annual Report, 1974	Jan. 1, 1975	Not applicable.
20	Costs of Successful Unassisted Lay Litigants	Apr. 21, 1975	
21	The Termination of Agencies	Apr. 21, 1975	
22	Powers of Attorney and Mental Incapacity	May 12, 1975	*Attorney-General Statutes Amend Act, 1979*, S.B.C. 1979, c. 2, s. 5, now *Power of Attorney Act*, R.S 1979, c. 334, s. 7).
23	Personal Property Security	Oct. 27, 1975	
24	Security Interests in Real Property: Remedies on Default	Dec. 1, 1975	*Miscellaneous Statutes (Court Amendment Act*, S.B.C. 1976, c. 94 (a) [in part] (see now *Law and Act*, R.S.B.C. 1979, c. 224, s Supreme Court Rules, Rule 50 ((2) [in part]; *Land Titles Act*, S 1978, c. 25 [in part] (see now *Lan Act*, R.S.B.C. 1979, c. 219); *Att General Statutes Amendment* S.B.C. 1980, c. 1, s. 11 [in part]
25	Annual Report, 1975	Jan. 1, 1976	Not applicable.
26	Minors' Contracts	Feb. 24, 1976	
27	Extra-Judicial Use of Sworn Statements*	Apr. 26, 1976	See, e.g., *Mineral Act, 1977*, S. 1977, c. 54, s. 20 (2).
28	Rule in *Bain* v. *Fothergill*	June 28, 1976	*Conveyancing and Law of Property* S.B.C. 1978, c. 16, s. 33 (see *Property Law Act*, R.S.B.C. 197 340, s. 33).
29	Annual Report, 1976	Dec. 31, 1976	Not applicable.
30	The Rule in *Hollington* v. *Hewthorn*	Jan., 11, 1977	*Evidence Amendment Act, 1977*, S. 1977, c. 70 (see now *Evidence* R.S.B.C. 1979, c. 116, ss. 15 (3 81).
31	Waiver of Conditions Precedent in Contracts	Apr. 25, 1977	*Attorney-General Statutes Amend Act, 1978*, S.B.C. 1978, c. 11, s. now *Law and Equity Act*, R.S. 1979, c. 224, s. 49).
32	Proof of Marriage in Civil Proceedings	Apr. 25, 1977	*Attorney-General Statutes Amend Act*, 1979, S.B.C. 1979, c. 2, s. 1 now *Evidence Act*, R.S.B.C. 197 116, s. 58).
33	The *Statute of Frauds*	June 24, 1977	
34	Tort Liability of Public Bodies	June 28, 1977	
35	*Offences Against the Person Act, 1828*, Section 28	Aug. 8, 1977	*Attorney-General Statutes Amend Act, 1978*, S.B.C. 1978, c. 11, s. now *Law and Equity Act*, R.S. 1979, c. 224, s. 3).
36	Annual Report, 1977	Jan. 1, 1978	Not applicable.
37	*Absconding Debtors Act* and *Bail Act:* Two Obsolete Acts	Mar. 17, 1978	*Attorney-General Statutes Amend Act, 1978*, S.B.C. 1978, c. 11, s.
38	The *Replevin Act*	May 19, 1978	
39	The *Attachment of Debts Act*	Oct. 27, 1978	
40	Execution Against Land	Oct. 27, 1978	
41	Annual Report, 1978	Jan. 1, 1979	Not applicable.
42	Creditor's Relief Legislation: A New Approach	Jan. 2, 1979	
43	Guarantees of Consumer Debts*	June 1, 1979	
44	Parol Evidence Rule	Dec. 1, 1979	
45	Annual Report, 1979	Jan. 1, 1980	*Attorney General Statutes Amend Act, 1980*, S.B.C. 1980, c. 1, ss. (Limitation periods in actions ag estates).

Title	Date	*Recommendations Implemented* in Whole or in Part by
il Litigation in the Public	June 16, 1980	
est		
ulation of Interest on	Sept. 30, 1980	
closure		
Recovery of Unauthorized	Sept. 30, 1980	
ursements of Public Funds		

Appendix B

MATTERS UNDER CONSIDERATION BY LAW REFORM COMMISSION OF BRITISH COLUMBIA

tor-Creditor Relationships
Crown Liens
Reviewable Transactions
Joint Liability
Enforcement of Judgments

onal Injury Compensation

ute Law Revision: Applicability of English Law

itration

il Procedure

Class Actions
Prejudgment Interest Act

ates Projects
The Making and Revocation of Wills
Statutory Succession Rights
The Interpretation of Wills
The Effect of Testamentary Instruments
Probate Procedure and Administration

e of Goods Legislation

trinsic Aids to Statutory Interpretation

fice of the Sheriff

nefits Conferred under a Mistake of Law

gal Contracts

stress for Rent and Other Debts

Appendix C

TEXT OF COMMISSION'S LETTER CONCERNING DISCOUNT RATES

November 18, 198(

The Honourable Allan McEachern
Chief Justice
Supreme Court of British Columbia
The Law Courts
800 Smithe Street
Vancouver, B.C.
V6Z 2E1

Re: Discount Rates

Dear Chief Justice:

Thank you for your letter of November 4th. Coincidentally the matter of discount rate discussed by the members of the Law Reform Commission at its meeting on November 3rd. The of urgency in your own letter and the gist of our own discussions suggest that the Commiss involvement in this matter should draw to a close.

The issue of discount rates was first referred to the Commission in a letter from the De Attorney General in February of this year. That letter enclosed a copy of a draft *Prospective Pecu Damages Act* dealing, *inter alia*, with discount rates and indicated that you had a special interest Mr. Vogel requested the Commission to "assess this proposal and make constructive comments' it was in that spirit the Commission approached it. The primary task was seen as providing assistance we could to you and the Ministry of Attorney General rather than undertaking this as a fledged Commission project, with a fully researched working paper circulated for comment culm ing in a formal report setting out final recommendations.

In April the Commission wrote to the Attorney General suggesting an amendment to the *Sup Court Act* along the following lines:

> The Chief Justice, after consulting the other judges of the court and such other persons as he considers appropriate, may prescribe from time to time the rate of interest to be used in determining the capitalized value of an award in respect of future damages.

This suggestion prompted further discussion which largely centred on two principal issues:

1. Should the discount rate be set by a person or body other than the Chief Justice (S.C.B.
2. Should the discount rate prescribed be limited to one that reflects only the differ between the estimated rates of price inflation and investment or should the so-c "productivity factor" be an additional parameter?

On the first issue, the Commission adheres to the view expressed in the April letter: the C Justice, after such consultation as he may think necessary, is the appropriate person to set the disc rate. I should add, however, that the Commission has no reason to oppose the rate being set by a s committee of judges consisting, say, of the Chief Justice and two puisne judges. The Commissi view is that it is important that the determination of a discount rate be done by a judge or l committee of judges. The determination of a discount rate or rates to be used in making damage aw is now an independent judicial function. This important independent quality of the functio preserved if setting of a discount rate or rates of general application is made by the Chief Justice or committee of judges. We do not think it appropriate that the function be performed by either Legislature or by the Executive, on authorization by the Legislature, because of the close identifica in interest of Government and the Insurance Corporation of British Columbia which pays the majority of the damage awards in personal injury cases made by the Courts of this Province. example; the determination of a high discount rate by Act of the Legislature or authorized act of executive branch of Government would quite likely be construed by some as politically motivate order to save money for the Insurance Corporation.

The second issue is a more subtle and difficult one. As a starting point it might be useful to de what we understand to be the "productivity factor."

The economic information that we have received suggests, as do the cases in which this factor been noticed, that owing to advances in technology and the like our society as a whole is becom more productive in terms of the number of units of goods and services produced per citizen. benefits of this increased productivity accrue, in part, to all citizens in the form of increases in t earnings over and above those increases which simply reflect price inflation. It is this increase that

the productivity factor. The economic information stresses that this benefit accrues to *all* earners—even those employed in a particular industry where there is no identifiable increase productivity. This benefit is also distinct from earning increases (or decreases) that may be with career advancement that depends on characteristics of the individual to be compensated identifiable occupational group to which he belongs.

view of the productivity factor is based on a selective reading of cases and comment and on consultation with a senior actuary. While we have no reason to doubt its accuracy, we cannot say evidence that we have fully explored all the complexities associated with economic concepts of in

the projected general rate of increase of earnings (including productivity factor) is greater projected rate of price inflation, it appears that it would be inappropriate to apply a discount determined solely with reference to the price inflation to determine the present value of future losses. Clearly a second discount rate, one that reflects the productivity factor, should be used purpose. This second discount rate would be somewhat less than that used for non-income future losses or expenses.

Ontario, the enabling legislation appears to contemplate only a single discount rate and this view adopted by the Morden Committee in developing their "rule." The enabling provision, 14(10)(ba) of *The Judicature Act*, R.S.O. 1970, c. 228 *am.* S.O. 1979, c. 65, s. 6(5), de

ubject to the approval of the Lieutenant Governor in Council, the Rules committee may
. make . . . rules . . . for
(a) prescribing the rate of interest to be used in determining the capitalized value of an award in respect of future damages.

prescribed under that power reads as follows:

he rate of interest to be used in determining the capitalized value of an award in respect future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is 2½ per cent per annum.

options are to adopt the Ontario approach of providing for a single discount rate or to develop legislation that would provide for the setting of two discount rates.

we understand it, the object of fixing discount rates is twofold. First, it is meant to overcome unfortunate face that is put on the administration of justice when the Courts reach disparate ions on the same facts. Since the setting of a discount rate is, essentially, a prophecy as to economic events and unrelated to the facts of a particular case, inconsistent results from case to difficult to justify.

Secondly it is meant to eliminate the need to adduce repetitive and time-consuming economic that is presently necessary to enable the Court to set a discount rate in individual cases. This a significant financial burden on the parties to the litigation. Moreover the amount of Court hearing the same evidence in numerous cases suggests the present practice causes a and unnecessary wastage of trial time.

w well does the Ontario solution serve the objects stated? As Mr. Justice Dickson of the Court of Canada recently pointed out:

he award of damages is not simply an exercise in mathematics which a judge indulges in, ading to a 'correct' global figure. The evidence of actuaries and economists is of value arriving at a fair and just result. (*Lewis* v. *Todd*, October 28, 1980.)

ear, as it is in Ontario, that the productivity factor is not taken into account in setting the single rate, expert evidence will still be of value to achieve a "fair and just result." The Court has a near, and the Ontario rule will not exclude, relevant and proper evidence concerning actual loss into account the productivity factor. Thus a principal aim of a fixed discount rate(s)—relieving courts and the parties of the various burdens associated with evidence on general economic e—is not fully served. Such evidence may be led whenever the potential increase in the award tify it. Likewise the Ontario one-rate solution will not, in actions involving future loss of s, put an end to disparate results from case to case.

en if a rate similar to that provided by the Ontario rule would be accepted in practice as able to loss of future income then, while the objects of fixing a discount rate are met, it is t that justice will not be well served and imperfect compensation will result. The two discount roach seems to offer a sharper tool for the rational assessment of future damages and is likely to more precise results in this difficult area.

ving regard to the way in which the matter of discount rates was referred to us, and the way in we have approached it, we do not believe that it is appropriate to make a "recommendation" as he Commission prefers the two-rate approach but, as the final decision may involve a measure matic considerations, we believe it should be left to be worked out between you and the y General. What we have done is prepare draft legislation that embodies our preferred two-rate ch. This may provide a starting point for legislative action.

Whether the Ontario scheme or the Commission's preferred scheme is adopted, we thin important to note that its success in achieving its aims will depend on what the Morden Com Report referred to as "a discriminating judicial interpretation which is largely informed understanding of the purpose of the legislation."

I enclose our draft of an amendment to the Court Rules Act with drafting notes thereto Commission's statutory obligation is to report its views concerning changes in the law Honourable Attorney General. Accordingly, I am sending copies of this letter, the draft amen and drafting notes to the Attorney and to his Deputy.

If there are any aspects of our views that you would like to discuss, I should be pleased to se at any time at your convenience.

Yours truly,
The Hon. Mr. Justice J. S. A
Chairman

DRAFT PROVISION

t Rules Act, R.S.B.C. 1979, c. 77 is amended by adding the following section:

rates

In this section
"discount rate" means the rate, expressed as a percentage, used in calculating the present value of future damages;
"future damages" means damages to compensate for pecuniary losses to be incurred or expenditures to be made after the trial of a proceeding.
[As to the definition of "proceeding" see drafting note 1, infra]

The Chief Justice of the Supreme Court of British Columbia may from time to time
:
(a) a discount rate which shall be deemed to be the future difference between the investment rate of interest and the rate of increase of earnings due to inflation and general increases in productivity, and
(b) a discount rate which shall be deemed to be the future difference between the investment rate of interest and the rate of general price inflation.
[As to "prescribe" see drafting note 2, *infra*]

In any proceeding the discount rate prescribed under subsection (2) (a) shall be used in ng the present value of future damages that are intended to compensate for or are determined rence to
(a) loss of future earnings because of partial or total loss of income earning capacity, or
(b) loss of dependency under the *Family Compensation Act*,
and the discount rate prescribed under subsection (2)(b) shall be used in calculating the present value of all other future damages.
[N.B. Drafting notes 3 to 6 which are of general application and not specifically noted above.]

DRAFTING NOTES

"Proceeding" is defined in the *Supreme Court Act* as "an action, suit, cause, matter, appeal or ing application."
ction 40(1) of the *Interpretation Act* provides that "the interpretation section of the *Supreme ct*, so far as the terms defined can be applied, extends to all enactments relating to legal ings."
us the definition would extend to this provision.
uaere the application of the provision to an arbitration.

A rate "prescribed" under subsection (2) would seem to be caught by the general limb of the on of "regulation" in the *Regulation Act:* "every regulation, rule, order, proclamation and of a legislative nature made under or by the authority of any Act . . ."
us it would attract the provisions of the *Regulation Act* concerning filing and publication.

The draft is silent on the source of funds to be used by the Chief Justice in the discharge of his n (e.g. the cost of engaging experts to provide advice on economic and actuarial matters). no general fund is available an appropriate specific provision for funding should be made.

A potential addition to the list of future loss items to which the income discount rate should future expenditures in the form of wages. An example would be that part of an award designed ide a quadraplegic with the 24 hour services of an orderly.
mmon sense suggests that the wages of an orderly will accelerate more rapidly than other are items and that the discount rate used for income loss should apply. This view has been d in at least one B.C. case (*Bracey* v. *Johnson*, unreported, Vancouver Registry 44398/75, June 80, per Gould J. at p. 21 of the decision manuscript.)
e accepted economic view is that this is not an income related loss and it should be capitalized higher rate. This is the view reflected in the draft.

Implicit in the draft is the notion that general economic evidence is no longer relevant in the the "deeming" language of subsection (2), and that all evidence and valuation should be on a ant dollar basis."
uaere whether this should be made explicit in the draft. An earlier version of our draft contained lowing provision.

In any proceeding in which a discount rate is applicable

(a) no evidence shall be admitted with respect to rates of inflation, rates of retur investments or increases in salary or wages resulting from inflation or general incr in productivity, either past or future, and

(b) all matters relating to future contingencies or prospects shall be expressed in con dollars from which all elements of prospective inflation and prospective increas earnings attributable to general productivity increases have been removed.

6. It will be noted that there is some divergence between the definition of "future damages" section 2 (a) of the *Court Order Interest Act* as to the point in time from which damages are t regarded as future damages. This draft speaks of losses etc. arising after the "trial" while the C refers to the "date of the order." Where judgment is reserved these may be two different times.

Of the two, we believe the time of trial is, in principle, correct. This was the Commission's in its Report on Prejudgment Interest and the COIA imperfectly implemented the recommendatio this regard. In practice, however, nothing turns on this error.

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