MANITOBA

LAW REFORM COMMISSION
COMMISSION DE RÉFORME DU DROIT

REPORT
ON
A REVIEW OF CERTAIN ASPECTS
OF
FIRE INSURANCE LAW IN MANITOBA

Report #22

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The Manitoba Law Reform Commission was established by "*The Law Reform Commission Act*" in 1970 and began functioning in 1971.

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FOREWORD

This Report on fire insurance law was initiated by the Manitoba Law Reform Commission because the Commission saw several important adjustments were needed in this area to eliminate a number of the annoying, the unjust, and the sometimes disastrous pitfalls for the unwary. We say with assurance that the majority of insurance policyholders could be characterized as the unwary. This is so because of the enormous complexity of regulating by law the business of standard form contractual relationships which are intended to culminate only in the event of loss, damage or some other risk, becoming a reality. We think that most consumers who have a policy of insurance are unaware of the complexities involved and that most do not or cannot even read their own policies with any reasonable degree of comprehension.

The Commission engaged the services of Professor Gerald Nemiroff, B.Sc. (McGill), B.A. (Sir Geo. Wms.), B.C.L. (McGill), LL.B. and LL.M. (Dalhousie) to prepare a Working Paper for us. When this was complete the Commission circulated the Working Paper widely in the insurance industry and asked for comments. There were many responses from the industry and from lawyers. Needless to say the responses to the proposals were mixed. Overall they were generally favourable.

It is interesting to note that some commentators advocated that the Commission should have gone further in its study than it did. For example, there should be a simplified standard homeowners policy to be used throughout the province. The Commission agrees and suggests that the Association of Superintendents of Insurance of Canada should look at this aspect of fire insurance law. Such a standard policy would be most likely to attain uniform recognition and implementation throughout Canada, if recommended, or at least approved, by each province's Superintendent of Insurance. The reformulation of homeowners policies would no doubt create some expense and inconvenience for the industry, which could be kept manageable if an acceptable new standard policy were devised for use across the country. This approach would seem to be better than promulgating reformed policies of insurance in each province or only in some of the provinces, individually.

The proposals for reform set forth in this Report deal mostly with technical matters but they are still very important. This Report does not attempt to examine completely the basic and fundamental concepts of property insurance law — the principles which are said to be at the very foundation of insurance law. The Commission and a number of commentators agree that the two assumed cornerstones of property insurance, the concept of *uberrima fides* and the principle of indemnity be subjected to a comprehensive review. For example, the concept of *uberrima fides*, upon which the duty to disclose rests, is no longer wholly realistic in modern society and its role in insurance law should be seriously reviewed.

Property insurance is said to be basically and fundamentally indemnity insurance; that is, property insurance is intended to indemnify or compensate an insured for his actual pecuniary loss but he must never be allowed to use insurance to obtain more than complete indemnification. Thus, a person cannot insure property in which he has no insurable interest. This is because if he has no legal or equitable title then he does not stand to lose, in a pecuniary way, by damage to or destruction of property. The limit of recovery under property insurance policy is thus restricted to the extent that such interest has been diminished by the damage or destruction of the property. Property insurance is designed as a means of placing the insured back into the same pecuniary position he occupied before the loss; he cannot, however, be permitted to gain a pecuniary advantage from the loss and this, it is argued, distinguishes insurance contracts from mere wagers.

The principle of indemnity appears to be attractive but there is much to be said against its strict enforcement and it is arguable that the doctrine in its present form is no longer necessary or desirable. Rigid adherence to the principles of indemnity and insurable interests has given rise to certain difficulties. It has been held by both the House of Lords and the Supreme Court of Canada that a shareholder does not have an insurable interest in the assets of a corporation, even if he is the sole shareholder, because a shareholder does not have any legal or equitable title in the property of that corporation, and thus does not stand to lose in a pecuniary way by the loss or damage to the property of the corporation. In short, that shareholder cannot insure someone else's property because to do so offends the principle of indemnity, and any policy attempting to do so cannot have any legal effect. It is difficult to justify legal concepts which can cause such hardship to an ill-advised and uninformed small businessman who mistakenly applies for a policy in his own name rather than in the name of the corporation in which he is the sole shareholder.

Similarly, difficulties are often experienced by the average consumer who makes a routine claim. An example would be in the event of the total loss of a 5 year old sofa, which cost $500.00 when bought new, the insurer is likely to offer from $200.00 to $300.00 in settlement of the claim. This follows from the principle of indemnity, because the true pecuniary loss is the depreciated value of the sofa. Thus, the insured who is inclined, as most people are, to purchase a new sofa to replace the one destroyed is forced to bear part of the loss. In circumstances such as these, it would appear that the principle of indemnity fails to fulfil the reasonable expectations of the average consumer who believes that he will be fully 'fixed up' by his insurance company. There is no question that premiums could be adjusted to permit full recovery without regard to depreciation and it is very probable that given the choice, many policyholders would prefer to obtain coverage on that basis. Although permitting recovery on such terms would clearly run contrary to the principle of indemnity, the idea is not a novel one, nor is it offensive to public policy because there are instances where the indemnity principle is not adhered to in property insurance. The most obvious case is the 'valued policy', in which specific property is insured for a fixed sum which is payable in the event of a total loss without regard to the actual

pecuniary loss to the insured. Another illustration of non-compliance with the principle of indemnity is the optional loss settlement clause found in the standard residential insurance policy. Under this provision, if the insured meets a co-insurance requirement, (that is, insures his property for a certain minimum amount) then he is entitled to recover for the repair or replacement of the insured building (but not the contents) without deduction for depreciation. This way, the insured can get a new building for an old building — a clear case of over-indemnification. And finally, the so-called 'windfall cases' provide further evidence of the erosion of the principle of indemnity in property insurance. For example, it appears to be possible for an insured to recover both the benefits under his insurance policy and payments received from a government disaster fund, and thereby the insured profits from the loss.

The fact that in some cases the principle of indemnity is no longer strictly applied brings into question the necessity of preserving the doctrine as the cornerstone of property insurance. The rationale behind the principle is apparently that to permit insurance to be used to over-compensate for a pecuniary loss may invite intentional loss. The validity of that rationalization may well be questioned. Intentional loss is clearly not recoverable under an insurance policy and there is, therefore, no need to rely on other principles to achieve the same results. Moreover it could be argued that the enforcement of this kind of morality is more properly the subject of the criminal rather than the civil law. The Commission is of the opinion that a full review should be made of this area of the law.

Property insurance contracts are only partly affected by legislation. Part IV of *"The Insurance Act"* governs only fire insurance, and then, the control is limited. Insurance against other perils — wind storms, theft, vandalism, liability coverage, etc. — is not, apart from the minimal general provisions in Part III, subject to *"The Insurance Act"*. Thus the relationship between the insured and the insurer is still largely contractual, based upon terms presumably negotiated by the two parties. There can be little doubt, however, that the reality of freedom of contract is practically non-existent, especially with respect to insurance on residential premises. The policyholder is invariably faced with a take-it-or-leave-it standard form policy carefully prepared by the underwriter. The perils insured against, the losses excluded, the property covered, the property excluded and a variety of other items and conditions are buried in a mass of technically worded provisions which are quite incomprehensible to the average consumer (who, verily enough, is instructed, in bold print, to "Read Your Policy") and which even boggle the mind of the so-called expert. In the past decade, other standard form contracts have been subject to careful scrutiny and in many cases legislation has been introduced (for example, *"The Consumer Protection Act"* and *"The Landlord and Tenant Act"*) to protect the interests of those who cannot bargain freely on their own behalf. Unfortunately the same concern has not been shown for the interests of the consumer purchasing property insurance. The Commission and some of the commentators believe that the time has arrived to review property insurance contracts completely. Serious consideration should be given to creating a standard form residential

property insurance policy based entirely upon legislation, in much the same way that residential leases are controlled by *"The Landlord and Tenant Act"*.

In summary, the Commission considers that the following matters should be made the subject of further study: (a) the doctrine of *uberrima fides*, (b) the principle of indemnity, and (c) the creation of a standard residential property insurance policy based entirely upon legislation.

In the course of formulating our recommendations in this Report we received submissions from David M. Pearlman; Arthur L. Close; Lawrence J. McComb, Winnipeg, Manager of The Canadian Indemnity Company; Mr. A.M. Zariski, Research and Policy Advisor, Alberta Consumer Affairs; Knox B. Foster, Counsel in Manitoba for The Insurance Bureau of Canada; Mr. J.A. Swifte; Mr. F.W. Keller, General Manager, Red River Valley Mutual Insurance Company; W.D. Taylor, Assistant General Manager — Claims, Economical Mutual Insurance Company; and others, some of whom asked not to be identified. The Commission is grateful to everyone who took the time to make a submission and we acknowledge the concern and advice of these organizations and persons, with the unstinting measure of thanks due for their efforts.

We also acknowledge the assistance of our Research Officer, William Webster, who participated in the formulation of this Report.

A summary of our recommendations appears at the end of this Report.

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INTRODUCTION

Fire Insurance Policies in Manitoba are governed, in part, by *"The Insurance Act"*, C.C.S.M. c. I40. Subject to certain terms prescribed by this legislation, the contract between the insured and the insurer is, like any other contract, presumed to be based on the terms negotiated by the parties, although in practice, as we all know, the insured is compelled to accept a standard form policy. This Report is not meant to deal with the purely contractual aspects of insurance policies. With rare and unavoidable exception, this Report is confined to an examination and analysis of some of the statutory law governing fire insurance policies.

Although fire insurance legislation has undergone a number of changes and amendments since its introduction in 1888, many of the older provisions have been perpetuated. Most of the changes made since 1940 have been relatively limited and largely insignificant. This Report demonstrates that the current legislation does not adequately serve the needs of the modern policyholder because it has failed to keep pace with the rapid changes of our time and is no longer responsive to the reasonable expectations of the insured. It will be seen that in some cases the courts have felt handcuffed by antiquated rules. In other cases, however, it will be seen that the courts have simply refused to apply the rules or have found and even invented ways to circumvent the Act. There is ample justification to review these unsettled areas of the law and bring about legislative reform to reflect current judicial and social thinking. It will also be demonstrated that the legislation, which was introduced to protect the insured from unreasonable contractual provisions, has in some cases had the ironic effect of placing the insured in a worse position than he would have been in had the common law not been superseded by legislation.

This Report is not a comprehensive review of all legislation governing fire insurance contracts, but is limited to a study of some of the statutory provisions which appear to be antiquated, impractical, inequitable or which appear to have deprived the insured of rights he otherwise would have enjoyed. The major concern of the Commission in this Report is to expose certain problems which appear to exist and to offer some recommendations for reform of the law. It is only a modest start, a mere beginning to what should and must become a complete and comprehensive review of the law relating to property insurance contracts.

I. DEFINITION OF INSURED

Section 2(30) of "*The Insurance Act*" defines an insured as a "person insured by a contract whether named or not". Most homeowners policies define the insured, *inter alia*, as (1) the named insured and (2) if residents of his household, his spouse, the relatives of either, and any other person under the age of 21 in the care of an insured. These definitions give rise to a number of legal issues but in particular the major issue is whether unnamed insureds have in law any legal rights under the contract.

In the typical homeowners policy, the policy is issued in the name of and the premiums are paid by the person in whose name the property is registered and quite often this is the husband. The person thus named as the insured is insuring his interest in the property (both real and personal) covered by the contract. In the typical household, however, there are persons other than the named insured who have interests in the various household and personal effects. For the purposes of this Report it is not necessary to become involved with the complex questions relating to the ownership of household and personal effects but rather it is only necessary to consider the problems arising with respect to goods owned, in whole or in part, by someone other than the named insured.

Consider, for example, the case where a wife, not being named in a policy, has her fur coat damaged or destroyed as a result of a fire. While in practice the claim would undoubtedly be paid by the insurance company, the case does give rise to an important legal question, namely, who can make the claim and on what legal basis? The husband, who is the named insured, may have no legal right to make a claim because he does not own the coat and it is doubtful that he has any insurable interest in his wife's personal effects.[1] Even assuming that the husband has some insurable interest in the coat, Fire Statutory Condition 2 would appear to invalidate his claim. The Condition states that, ". . . the insurer is not liable for loss or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the contract", and the typical policy would not indicate that the husband had an interest other than as owner in his wife's personal property.

The husband, moreover, may not be inclined to make a claim for his wife's coat if, for example, the couple is not living in amity. Could the wife claim under the husband's policy? From a strict legal point of view, this is indeed doubtful. Although defined as an "insured" in the policy, she is not the named insured, has not paid the premiums and is not one of the contracting parties; she has not furnished any consideration for the insurer's undertaking to indemnify her and under the ordinary rules of contract law the wife would not appear to have any legal right to sue in her own name.[2] Various theories and techniques have been advanced in an attempt to allow a non-contracting party upon whom a benefit is conferred by the terms of the contract to sue on that contract,[3] but they have not been widely accepted and cannot be relied upon with confidence to assist the wife in the kind of case described.

It is very doubtful that section 2(30) of *"The Insurance Act"*, defining insured as a person insured by the contract whether named or not, confers upon a stranger to the contract a right to sue in his own name. The key words, "a person insured by a contract", beg the whole question as to whether or not the wife is indeed insured by the contract. It is, at best, an ambiguous section and it would be desirable to enact legislation which would not only eliminate the uncertainties set out above but which would also legalize what appears to be the practice followed in handling claims of this nature, namely, to confer upon unnamed insureds a right to claim under the policy. This is by no means a radical or even novel recommendation. The beneficiary under a life insurance policy has the statutory right to enforce the contract by virtue of section 172 of *"The Insurance Act"*. An unnamed insured is given the right to sue on an automobile insurance policy by virtue of s. 243 of *"The Insurance Act"*. In liability insurance, the victim has, by virtue of s. 127(1) of the Act, a right to sue the insurer of the person liable for the damage suffered by the victim. The rights of third parties warrant the same protection in the area of fire insurance as in the areas of life, automobile and liability insurance. It is recommended, therefore, that legislation be enacted to provide that every person named or defined as an insured and any person for whose benefit the policy is made shall have the right to make a claim in his own name under that policy and that for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.

The only caveat we would recommend to the above mentioned principles would arise where the named insured claimed and received payment for some loss incurred by an unnamed insured. In such event, of course, the insurer should not have to pay twice for one claim. Then, the unnamed insured would have to recover, if at all, from the named insured who actually received the payout. However, where the unnamed insured's loss was not comprehended in the payout or settlement, the right to claim and be paid should survive against the insured.

This recommendation (and in particular the reference to "any person for whose benefit the policy is made") would additionally help clarify another contentious area of the law, namely, the rights of a mortgagee under a mortgage clause. In virtually every case where the property insured is mortgaged, a mortgage clause is attached to the insurance policy to protect the interest of the mortgagee.[4] The mortgage clause makes the loss payable first to the mortgagee as his interest may appear, and then to the insured (mortgagor). The clause also provides that the rights of the mortgagee shall not be prejudiced by any act or neglect of the insured and precludes the insurer from raising defences against the mortgagee based on a breach of policy committed by the insured. Under the general law of contracts the mortgagee would appear to have no legal rights under the policy because he is not a contracting party and does not furnish consideration for the insurer's undertakings.[5] Insurance companies have on more than one occasion attempted to defeat a mortgagee's claim on this very basis. The Canadian courts, however, have upheld the mortgagee's right to sue under the mortgage clause by clearly ignoring the doctrine of consideration.[6] It is both

unnecessary and undesirable to force the courts to twist the law in order to achieve a just and socially desirable result. The recommendation offered above would have the effect of "legalizing" not only the practice usually followed in the industry but also the rulings of our courts.

We received a number of thoughtful comments on the Working Paper particularly from the Insurance Bureau of Canada. The comments on this recommendation were generally not in favour of allowing unnamed insureds rights under a fire insurance policy. On the other hand, the Commission is of the opinion that such a provision would be desirable in order to give the unnamed person some legal standing and a fair chance of recovery when faced with a fire loss. This is a matter, after all, of nothing more radical than ascertaining the relevant facts and adjudicating the claim, if such there be.

FOOTNOTES

1. Unless the husband has a legal obligation to provide his wife with a fur coat, or is a trustee or bailee of his wife's coat he would appear to have no insurable interest in the coat as he would have no legally enforceable legal or equitable title or right in the coat. Without an insurable interest, the husband could not maintain a claim in his own name, notwithstanding the wording in the standard homeowner's policy which purports to cover the personal property owned by someone other than the insured.

2. The point is well summarized by Mitchell, *Rights of Unnamed Insureds and Third Parties* (1962), Law Society of Upper Canada Lectures 331 at p. 339 where he states, "... where the individuals are not specifically named in the policy then it would appear that the insurance insofar as they are concerned is only what is known as an 'honour policy' and generally speaking they cannot sue on the contract ... the basic reason for this state of affairs is that at common law no person can sue on a contract who is not a party thereto and has not given consideration therefor". This conclusion is well borne out by the case law; for example, *Vandepitte v. Preferred Accident Insurance Corporation of New York,* [1933] A.C. 70; and as to the general principles of contract law, *Beswick v. Beswick,* [1968] A.C. 58.

3. It has been suggested, for example, that in taking out the policy the husband acts not only on his own behalf but as agent for his wife and so the wife is also one of the contracting parties. *Spencer v. Continental Insurance Co.,* [1945] 3 W.W.R. 161 (B.C.S.C.). However sound in theory, it is hardly a practical solution to the problem because it is necessary to establish that at the time the policy was taken out the wife had authorized the husband to act as her agent. In many cases the husband takes out the policy without ever discussing the matter with his wife; furthermore, if the couple is not living in amity the husband is unlikely to volunteer that he had his wife's authorization and that he acted on her behalf.

4. S. 133(5) of *"The Insurance Act"* gives a mortgagee a right to require that the policy contain a mortgage clause.

5. Heighington, *Insurance and the Mortgagee* (1949), 27 Can. Bar Rev. 879.

6. *Bonser v. London and Midland General Insurance Co. et al,* [1973] I.L.R. 1-478 (S.C.C.).

II. DEFINITION OF FIRE LOSS

"Where there is smoke, there is fire" is not always axiomatic in insurance law. While every standard homeowners policy insures against loss or damage by fire, neither "*The Insurance Act*" nor the insurance policy define the term "fire". It is apparent that certain fires are clearly not covered by the contract. A person who lights and smokes a cigarette obviously cannot claim its value from his insurer; the logs burned in a fireplace cannot be the subject of a claim. Basic common sense tells us that the consumption by fire of a substance intended to be consumed by fire is not within the contemplation of coverage under a fire insurance policy and it should not be particularly necessary to spell out the obvious in a statute or elsewhere. It appears, however, that less obvious cases have been excluded from the realm of fires under the policy. For example, s. 138(1)(a)(i) of "*The Insurance Act*" provides that there is no recovery under a fire insurance policy for loss or damage by fire to goods undergoing any process involving the application of heat. Thus, if in the course of ironing clothes, an iron is accidentally set at an excessive temperature thereby setting the clothes on fire, no recovery can be made under the policy. Under s. 138(1)(a)(ii) of the Act, there is no recovery for loss or damage by fire resulting from a riot, civil commotion, war, invasion, act of foreign enemy, hostilities, civil war, rebellion, revolution, insurrection or military power. Thus, if in the course of a riot during a crisis of the kind experienced during the FLQ uprising in Quebec, a molotov cocktail is thrown through a window setting a house on fire, there would be no coverage under the policy. Section 138(2) of "*The Insurance Act*" excludes from coverage any loss or damage caused by contamination of radio-active material directly or indirectly resulting from fire. Apart from the statutory exclusions, the insurance policy excludes certain fire losses; for example, any fire loss or damage caused while the house is vacant for more than thirty consecutive days is not covered by the contract. A fire loss caused by a criminal or wilful act or omission of the insured is likewise excluded.

As to the common law limitations, the English case of *Harris v. Poland*[1] well illustrates a serious problem generated in this area of the law. After an attempted burglary at her home, the insured hid some money and jewels in her fireplace for safekeeping. Sometime thereafter, and having forgotten what she had done, the insured lit the fireplace and in so doing her money and jewels went up in smoke. The insurer refused to indemnify her, not on the ground that the insured was negligent[2] but on the ground that the loss by fire of the jewels and money was not, in the circumstances, a "fire loss" within the meaning of the policy. The gist of the insurer's argument was that the occurrence of a fire in a place where fire is intended (viz., a fireplace) is not a fire within the meaning of the contract.[3] In rejecting the insurance company's argument, Atkinson J. made the following observations:

> I have no doubt that the ordinary man when he insures against loss by fire believes that he is insuring against every kind of loss which he may suffer from the more or less compulsory use of fire by

himself or his neighbour. If he were told that the words in a Lloyd's policy meant only loss from contact with fire where no fire ought to be, many questions would spring to his mind — as they spring to mine. Am I not covered, he would ask, if the wind blows something — say a valuable manuscript or a sheet of foreign stamps — into the fire in the grate? Or if a careless servant drops something into the fire — or if my wife stumbles and causes her lace scarf or silver fox tie to get caught by a flame in the fire grate? To all these questions [counsel for defendant] answers No. But what if part of the scarf is consumed in the grate, and the rest of it outside the grate on the hearth-rug? Do I get compensation for the part burnt outside the grate, though not for the part burnt in the grate? And what if the burning scarf burns a hole in the carpet? That is not the fault of the fire in the grate; that fire has not broken bounds. Am I covered for that? Again, what is the position if the lace catches fire by coming in contact with a lighted candle on the dinner table? The flame of the candle is in the exact place where it is intended to be. Is it on a par with the fire in the grate?

What if the wind blows a curtain against a lighted gas jet and the curtain catches fire? I imagine that the ordinary man would say: "Your policy is no use to me. I should never know where I was. I want an underwriter who knows what he means and says what he means." There certainly ought to be some clear understanding as to the meaning of these apparently simple words so that persons insuring may know where they stand, and — if the defendant is right — not continue in a fool's paradise, believing that they have a protection which, in fact, they have not.

Atkinson J. then went on to formulate what he considered to be the proper meaning to be given to the term "fire" by stating,

> . . . the risks [insured against] include the risk of insured property coming unintentionally in contact with fire and being thereby destroyed or damaged, and it matters not whether that fire comes to the insured property or the insured property comes to the fire.

Accordingly, the insured was held to be entitled to recover her loss under the policy.

It is a matter of some concern that Canadian case law does not appear to be in accord with the propositions advanced in *Harris v. Poland*. In 1955,[4] Judge Kennedy of the County Court of Ontario, stated that where a fire is,

> . . . employed for the ordinary purposes of heating, and such fire is confined within its usual limits, it is not a fire within the usual terms of a policy and the insured cannot recover loss or damage caused thereby, such as damage caused by heat which does not result in ignition or damage by smoke or soot.

He stated that coverage is restricted to cases where the fire is,

> . . . one which becomes uncontrollable and breaks out from where it was intended to be and becomes a hostile element, and where there is such a fire the insured may recover resulting losses or damages including losses or damages in regard to which there has been no actual ignition, such as a loss or damage caused by smoke.

Fires falling within the first category and not covered by the policy have been labelled as "friendly fires" while those of the latter category have been labelled as "hostile fires". The American cases also appear to draw the very same distinctions.[5] Using this approach, the insured in *Harris v. Poland* could not recover. Nor would there be any recovery under a fire insurance policy for smoke damage caused by the escape of smoke from a fireplace, stove or chimney unless the policy expressly insured against smoke damage as a separate and specified peril.[6] Property accidentally thrown into a fireplace or furnace would likewise be unrecoverable.

The major difference between the two opposing views is essentially that under the apparent Canadian rule of allowing recovery only if the fire is "hostile", an accidental quality must attach to the fire itself whereas under the English rule, it is sufficient if the occurrence of the loss or damage by fire is accidental and it matters not whether the fire itself is "friendly" or "hostile". The legal purist may argue that an accidental quality must attach to the cause of the loss, namely, the fire, because the peril insured against is fire and not merely unintentional loss by fire. It is submitted, however, that the rule advanced by Atkinson J. in *Harris v. Poland* is to be preferred to the propositions enunciated by Kennedy C.C.J. in *Young v. Waterloo Mutual Fire Insurance Co.* for the very reasons set forth by Atkinson J. in his judgment. Because there are Canadian decisions conflicting with this view, it is recommended that the issue should not be left to rest until further judicial review but that legislation be enacted to provide that in every fire insurance policy the term "fire" shall mean to include unintentional loss or damage to property proximately caused by fire.

Assuming the adoption of a new definition of "fire", it next becomes necessary to consider whether certain losses falling within that definition should or should not be permitted to be excluded from coverage. It has been pointed out earlier that both the statute and the standard insurance policy exclude certain fire losses. There are, undoubtedly, some very good reasons why certain fire losses have been excluded. In the case of loss or damage by fire to goods undergoing the application of heat, or in the case of smoke damage from a fire in a fireplace,[7] claims would, on the whole, be relatively petty in nature (e.g., damage to a shirt being ironed, slight smoke damage to a cupboard or curtain, etc.) and presumably too costly to administer. Problems of this nature could easily be overcome by imposing a reasonable deductible (e.g. $50) on all claims. It would surely be in the consumer's best interest to be provided with broader coverage at the expense of eliminating petty claims, for it is protection from potentially heavy losses which better fills the needs and expectations of the ordinary policyholder.

The contractual exclusion of fire losses when the property has been vacant for more than thirty consecutive days is based on the assumption that

the risk of a loss is greater during a prolonged period of vacancy. It is recommended however, that whether or not a vacancy increases the risk of fire should be left as a question of fact to be decided in each particular case and be governed by Fire Statutory Condition 4 concerning changes material to the risk. That condition reads as follows:

> Any change material to the risk and within the control and knowledge of the insured shall avoid the contract as to the part affected thereby, unless the change is promptly notified in writing to the insurer or its local agent; and the insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the contract, or may notify the insured in writing that, if he desires the contract to continue in force, he must, within fifteen days of the receipt of the notice, pay to the insurer an additional premium; and in default of such payment the contract shall no longer be in force and the insurer shall return the unearned portion, if any, of the premium paid.

In view of this condition, a clause in the policy excluding losses during a period of vacancy would appear to be unnecessary.

In any event, it would be more just, while retaining the somewhat well known 30 day period, to accord an insured who fails to give notice the opportunity of persuading the court that the longer vacancy did not in fact materially increase the risk. Such could well be the case if the insured arranged with a neighbour or relative to enter and examine the property from time to time during the absence of the insured's family. Thus, Fire Statutory Condition 4 might properly be amended in accordance with the above expressed recommendation.

The excluded losses under s. 138(1)(a)(ii) (riot, civil commotion, etc.) and s. 138(2) (radio-active contamination) appear to be based on the assumption that losses of this nature tend to result in major catastrophes and could cause an insurer to bear an impossible financial burden. There may, therefore, be ample justification to exclude these fire losses, at least so long as property insurance remains in the hands of private industry. Once the government becomes involved in underwriting fire insurance it may well be more reasonable, if not more economical, for government contracts not to exclude these losses. In the event of a common disaster, the government inevitably becomes involved in making funds available to victims and by underwriting the coverage they could presumably offset part of their expenditures by earning premiums for the coverage.

It is recommended, therefore, that apart from s. 138(1)(a)(ii) and s. 138(2) and subject to a reasonable deductible provision, there should be no limitation to the right to recover for unintentional loss or damage to property proximately caused by fire. Consequently, it is recommended that s. 138(1)(a)(i) be repealed and that the proposed definition of "fire" be made part of the Fire Statutory Conditions. This latter suggestion would have the effect of rendering void any clause in the policy which purported to alter, vary, exclude, limit or omit any coverage contemplated by the proposed definition. [8]

It was suggested to the Commission that there have been few problems in this area. "Insurers consistently pay the type of losses that are suggested are not necessarily covered". Well and good. Again, however, in fairness to the consumer, the Commission is recommending that the existing practice be included in written form in the legislation.

FOOTNOTES

1. [1941] 1 All E.R. 204 (K.B.).
2. Mere negligence on the part of the insured does not, in itself, preclude recovery. Indeed, one of the objects of insurance is to protect oneself from the consequences of one's negligence.
3. The insurer relied upon an old English case, *Austin v. Drewe* (1816), 6 Taunt 436, 128 E.R. 1104, contending that the case supported the proposition that a fire which takes place in a location where fire is intended to occur does not fall within the definition of the term "fire" as used in the insurance policy.
4. *Young v. Waterloo Mutual Fire Insurance Co.*, [1955] I.L.R. 1-202 (Ont. Cty. Ct.).
5. E.g. *Youse v. Employers Fire Insurance Co.* (1951), 238 P (2d) 472 (Ka. S.C.).
6. Most standard homeowners policies include smoke damage as a separate and specified peril, but expressly exclude loss or damage caused by smoke from a fireplace.
7. Smoke damage from a fire emanating from a fireplace would be covered by the proposed definition of fire because the smoke damage would be proximately caused by the fire.
8. By reason of s. 142(1), there can be no variation or omission of or addition to any "statutory condition".

III. INTENTIONAL LOSS

Under common law it is well recognized that it is contrary to public policy to allow someone to benefit from his own criminal acts.[1] Thus a murderer cannot claim the benefits of a life insurance policy insuring the life of the victim where the murderer is the beneficiary under that policy. Similarly, an insured cannot avail himself of the proceeds payable under his fire insurance policy if he has committed arson. The rule, that it is contrary to public policy to allow someone to benefit from his own criminal acts, is often difficult to apply because it co-exists with the well accepted principle that insurance policies, by their very nature, are intended to provide protection from the consequences of one's negligence. The point is well summarized by Vance, as follows:

> While the insured is not indemnified under a contract for the consequences of his criminal wrong, the same principle is not extended so far as to preclude his right to indemnity where the loss is occasioned by his own negligence. . . . An overwhelming percentage of all insurable losses sustained because of a fire can be directly traced to some act or acts of negligence. Were it not for the errant human element, the hazards insured against would be greatly diminished. It is in full appreciation of these conditions that the property owner seeks insurance, and it is after painstaking analysis of them that the insurer fixes his premiums and issues the policies. It is in recognition of this practice that the law requires the insurer to assume the risk of negligence of the insured and permits recovery by an insured whose negligence proximately caused the loss.[2]

It is easy to appreciate that in many cases it may be very difficult to draw the line between mere negligence and conduct amounting to a criminal act. An insured who causes a fire as a result of being careless or negligent is entitled to indemnity but not if his negligence is so advertent as to amount to a criminal act.

Another difficulty with the common law rules is that it is not clear what kind of criminal conduct precludes recovery.[3] Would the accidental discharge of a loaded rifle causing fire damage (e.g. by the bullet striking and exploding the hot water tank) preclude recovery if, under the circumstances, the insured's conduct amounted to a violation, however technical, of the criminal law? Would an insured, who accidentally set fire to his sofa with a marihuana cigarette be denied indemnity?

In an attempt to overcome these difficulties legislation was introduced to limit the circumstances in which the defence based on criminal acts could be raised by the insurer. Section 92 of *"The Insurance Act"* reads, in part, as follows:

> Unless the contract otherwise provides, a violation of any criminal or other law in force in the province or elsewhere shall not, *ipso facto*, render unenforceable a claim for indemnity under a

> contract of insurance except where the violation is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage . . . .

The effect of this provision is to preclude coverage not upon the mere occurrence of an unlawful act but only where the insured intends to bring about loss or damage. Unfortunately, s. 92 allows the insurance company to override the statute by so providing in the contract and in the case of the standard homeowners policy insurers have indeed contracted out of s. 92 by stipulating, under the heading of "Losses Excluded", that the policy does not cover "loss or damage caused by a criminal or wilful act or omission of the insured . . . ". The legislation has thus been rendered ineffective and the problems it had hoped to solve have been re-introduced.[4]

It is therefore recommended that s. 92 of *"The Insurance Act"* be made mandatory and that the opening words in that section, "unless the contract otherwise provides", be amended to read, "notwithstanding any agreement to the contrary". It is further recommended that s. 92 should be put into Part III — Insurance Contracts in Manitoba [General Provisions] of the Act, but that it be made subject to s. 165(1).[5]

The Insurance Bureau suggests that there are very few problems with this area in actual practice. Their response goes on to say: "If it is thought, however, that the recommendation would clarify and improve the existing law, the Bureau would support such a change".

FOOTNOTES

1. The leading case in this area of the law is *Beresford v. Royal Insurance Co., Ltd.*, [1938] A.C. 586.
2. Vance, *Handbook on the Law of Insurance* (3rd ed.), pp. 91-92.
3. The courts appear to have been reluctant to preclude recovery where the offence complained of was not a serious one. In the *Beresford* case, Lord Wright, M.R., put it this way: "In these days there are many statutory offences which are the subject of the criminal law, and in that sense are crimes, but which would, it seems afford no moral justification for a court to apply the maxim. There are likewise some crimes of inadvertence which, it is true, involve *mens rea* in the legal sense but are not deliberate or, as people would say, intentional". See also, *Bunting v. Hartford Accidental & Indemnity Co.*, [1955] 2 D.L.R. 700 (Ont. Cty. Ct.); *Yorkshire Insurance Co. v. Tremblay*, [1962] Que. Q.B. 143.
4. The effectiveness of the clause in the policy excluding coverage for criminal acts can be seen in *McConkey v. Imperial Life Insurance Co.*, [1973] I.L.R. 1-531 (Ont. S.C.). The case involved accidental death benefits under a life insurance policy which excluded coverage where death resulted "either directly or indirectly from committing a criminal offence". The court found that the insured was driving while impaired and because this was a criminal offence, the exclusion clause applied even though the court was satisfied that the insured did not intend to bring about any loss or damage.
5. It would be necessary to make s. 92 subject to s. 165(1) of *"The Insurance Act"* so as to continue to permit the underwriting of life insurance in the case of death by suicide. Although death by suicide is no longer a crime in Canada and is therefore not subject to the rule of public policy, suicide amounts to intentionally bringing about loss or damage and since intentional loss is, by common law, unrecoverable, special statutory provision to authorize such coverage would appear to be necessary and advisable.

IV. ASSIGNMENT OF THE POLICY

An assignment of a policy of fire insurance occurs frequently in practice. It is usually done after the sale of property, where as part of the transaction, the vendor assigns his fire insurance policy to the purchaser. It is done out of habit and convenience. In order to effect a valid assignment of the policy, the written consent of the insurance company is required; furthermore, the person to whom the policy is assigned must have an insurable interest in the property and the assignment must be made contemporaneously with the acquisition of that interest.[1]

It is generally believed that the effect of an assignment of the policy[2] is to make the assignee the new owner of the policy and that the assignee is to be treated as if he had applied for and obtained his own insurance policy. Under common law, however, the effect of an assignment of a policy is that,

> . . . the rights and duties of the original assured devolve upon the assignee, who becomes, to all intents and purposes, the assured under the policy which he may accordingly enforce in his own name. . . . any act done by the original assured after the assignment [will not] affect the validity of the policy. . . . however, [the assignee] takes the policy subject to equities, since the assignment is the assignment of an existing contract, and must therefore bear the consequences of any act or omission of the original assured before the assignment.[3]

It is to be observed that the assignee, under common law, takes the policy subject to the equities existing at the time of the assignment; that is, if at the time of the assignment, the policy is ineffective (e.g., because the insured misrepresented a material fact when applying for the insurance) the assignee acquired an ineffective contract. Under the common law, therefore, it is imprudent to take an assignment of a policy because the assignee may have no way of knowing that he is acquiring a useless piece of paper. This very problem was the centre of controversy in the case of *Springfield Fire and Marine Insurance Co. v. Maxim*,[4] decided by the Supreme Court of Canada in 1946. The vendor of the property (and assignor of the policy) was guilty of making a material misrepresentation when he applied for the policy and thus as against the vendor, the insurer could consider the policy void under Fire Statutory Condition 1. The insurance company argued that the purchaser of the property and assignee of the policy, took the policy subject to the equities then existing and that according to the law of assignment the assignee has no greater rights than the assignor and that consequently the assignee's claim should fail. The Supreme Court of Canada, in a split decision, upheld the assignee's right to recover under the policy by holding that the effect of an assignment of the policy is to create a new contract

between the purchaser-assignee and the insurance company and that this new contract was not subject to any of the defects plagueing the old policy between the vendor and the insurance company.

As a matter of strict law, the decision of the Supreme Court of Canada is open to question.[5] The common law rule that an assignee takes subject to the equities at the time of the assignment appears to have been completely abandoned. The contention that an assignment of the policy operates to create a new contract is open to question because in some cases, at least, there would be no consideration moving from the assignee to the insurer to support a new contract between these two parties.[6] Notwithstanding these objections, the resulting effect of the decision is laudable because it protects the unsuspecting assignee and also because it spares the assignee the trouble of applying for a new policy. The assignee can take the policy with the confidence that he will be treated in the same way as if he had applied for and obtained a new insurance policy. It also appears that the current practice of insurance companies is to regard the assignee of the policy as being immune from the defects attached to the vendor's contract.

Nevertheless, the fact that from a strict legal view the soundness of the *Maxim* decision may be subject to question, suggests that legislation would be desirable here. It is recommended that the decision of the Supreme Court of Canada be incorporated into *"The Insurance Act"* and that the statute prescribe that an assignment of the policy consented to by the insurer shall operate as a new contract between the assignee and the insurer on the same terms and conditions as the assigned policy, making the assignee the insured and that consideration shall be deemed to have been given therefore by the assignee and that the assignee shall not be subject to any defence which the insurer could have raised against the assignor.

We should observe that, in response to our Working Paper, no one suggested that the provision of section 40 of *"The Law of Property Act"* ought to be lifted and re-enacted in Part IV of *"The Insurance Act"* and we make no recommendation in that regard.

In response to this recommendation, Mr. A.M. Zariski stated: "There exists a case in the Supreme Court of Canada which decides that the assignee is not affected by such equities, and therefore it would appear that the amendment recommended by the paper is not necessary". The Insurance Bureau's comments were along the same line but the Bureau went on to suggest that if this recommendation were enacted "in all probability companies would refuse assignments altogether and require the new owner to apply for his own insurance". If this were the effect of translating our recommendation into legislation it would not be a wholly undesirable effect. This is so, in the Commission's opinion, because the present system, whereby a person acquiring property simply takes an assignment of the fire insurance policy, is not a sound practice. The person in question has not negotiated the

policy and may not be familiar with its terms; nor may that person know that the assignor misrepresented some material fact to the insurance company, if and when such be the case. All in all, we are not persuaded to recede from our recommendation in this regard.

FOOTNOTES

1. *Re Lavitt Potato Co. Ltd.; Royal Bank of Canada v. Eastern Trust Co.*, [1951] 4 D.L.R. 192 (P.E.I.S.C.).
2. As opposed to the assignment of the proceeds of the policy. An assignment of the proceeds clearly does not operate to substitute a new insured but merely makes the assignee a new creditor who succeeds to the insured's rights in respect of the sum payable under the policy.
3. Ivamy, *General Principles of Insurance Law*, p. 269 (emphasis added).
4. [1946] S.C.R. 604.
5. See Phelan, *Case and Comment* (1947), 25 Can. Bar Rev. 1003.
6. The only way to support the contention that an assignment operates as a new contract is to assume that before the expiration of the term of the original policy the insured-assignor has a right to cancel the policy and thus obtain a refund of unearned premiums, and that when he assigns the policy he assigns those rights to the assignee. The assignee then gives up these rights to the insurer in consideration of the company insuring the assignee as a new contracting party. This argument breaks down, however, if the original insured-assignor is not, for some reason (e.g. because the policy expressly states that the entire premium is fully due and earned at the commencement of the risk), legally entitled to a pro-rata rebate of the premium.

V. SUBROGATION

Subrogation is an equitable doctrine which serves, in part, to prevent an insured from being over-indemnified for a loss. In simple terms the doctrine of subrogation entitles an insurer, who has indemnified an insured for a loss, to avail itself of all the rights and remedies which the insured has or had at his disposal which if exercised by the insured would serve to compensate the insured for his loss.[1] In the majority of cases, the doctrine is used by the insurance company to recover the amount paid to its insured from the party who is legally responsible for the loss, other than, of course, the insured himself.

Although subrogation can be and often is regulated by legislation and contractual stipulation, its existence arises out of the operation of law. Under common law, subrogation rights arise where the insurance policy is one of indemnity and the insured has been fully indemnified for a loss. When exercising its right of subrogation, the insurer must sue in the insured's name[2] and for all intents and purposes, stands in the shoes of the insured and has no greater rights than the insured.[3] The insured cannot prejudice or compromise the insurer's rights of subrogation[4] and is obliged to assist the insurer in prosecuting its subrogation claim.

The common law rule that the insured must be fully indemnified before the insurer's right of subrogation arises stems from the fact that the sole purpose of subrogation was to prevent the insured from being over-indemnified for a loss. The common law thus created a hardship for insurance companies in cases where the insured is under-insured. For example, let us suppose that a house, valued at $40,000 but insured for only $25,000, is totally destroyed by fire as a result of the negligence of a third-party. The insured would be entitled to recover $25,000 from his insurer, but since his true loss totals $40,000 the insurance recovery does not fully indemnify him (albeit, through no fault of the insurer). Under common law, the insurer would not acquire any rights of subrogation[5] and would thus be unable to take any action against the third-party responsible for the loss.[6]

In 1956 legislation was introduced to rectify this seemingly unfair situation. Section 146(1) of "*The Insurance Act*" states that,

> the insurer, upon making any payment or assuming liability therefor under a contract of fire insurance, shall be subrogated to all rights of recovery of the insured against any person, and may bring action in the name of the insured to enforce such rights.

This section of "*The Insurance Act*" would appear to confer subrogation rights upon the insurer notwithstanding that the insurance recovery does not fully indemnify the insured for his loss. Yet in the recent case of *Sheridan v. Tynes*[7], Mr. Justice Dubinsky, of the Nova Scotia Supreme Court, came to the conclusion that the section[8] does not override the common law rule. He stated, in part, that

> The legislature could not have intended to mean that the insurer on making any payment, would be entitled to all rights of recovery irrespective of whether the insured was completely indemnified or not . . . . The insurer can [bring an action] only if the insured has been fully compensated.

This conclusion appears to have been reached out of concern for the rights of the under-compensated insured. The court was troubled with the fact that if the insurer was permitted to proceed against the tortfeasor before the insured received full indemnity, the insured would lose his rights of recovery against that wrong-doer because the third-party cannot be subject to two actions arising out of the same act. Thus if the insurer only sued the tortfeasor to recover its loss, the insured would have no means of recovering his full loss.[9] If the decision of Dubinsky J. accurately reflects current judicial thinking, further legislative action is now appropriate to permit subrogation rights to arise before there has been full indemnity while at the same time protecting the rights of the insured who has not been fully compensated. It is recommended, therefore, that s. 146(1) be amended to read as follows:

> The insurer, upon making any payment or assuming liability therefor under a contract of fire insurance, shall be subrogated to all rights of recovery of the insured against any person notwithstanding that the insured has not been fully indemnified for his loss, and may bring action in the name of the insured to enforce such rights provided that in bringing such action the insurer protects the rights and interests of the insured for whom recovery under the policy does not provide full indemnity.

Assuming that the insurer is permitted to exercise rights of subrogation before there has been full indemnity, it next becomes necessary to consider the way in which the amount recovered from the wrong-doer is distributed in the case where such amount is less than the actual loss suffered (e.g. because the tortfeasor does not have sufficient assets to satisfy in full the loss for which he is responsible). Referring to the example used above, let us suppose that a house valued at $40,000 but insured for only $25,000 is totally destroyed by fire as a result of the negligence of a third-party. The insurance company, upon paying the insured $25,000 would, in virtue of s. 146(1), bring action against the tortfeasor to recover $40,000 (with the view of recovering $25,000 for itself and turning $15,000 over to the insured). Since, however, the tortfeasor has limited assets, the amount recovered from him, let us assume, is $20,000. Section 146(2) of "*The Insurance Act*" directs that,

> Where the net amount recovered, after deducting the costs of recovery is not sufficient to provide a complete indemnity for the loss or damage suffered that amount shall be divided between the insurer and the insured in the proportions in which the loss or damage has been borne by them respectively.

Under this formula, the $20,000 recovered from the wrong-doer would be divided $7,500 to the insured and $12,500 to the insurer.[10] Thus, the insured, under this scheme would receive a total of $32,500 for his $40,000 loss. Prior to the 1956 amendments, the insured would have received full compensation for his loss; he would have obtained $25,000 from his insurer and retained $15,000 from the amount recovered from the tortfeasor. The insurer had no right to sue for or lay claim to the proceeds received from the wrong-doer until the insured had been fully compensated. The net effect of the 1956 amendments was not only to give the insurer rights it never enjoyed (namely, rights of subrogation before full indemnity) but also to deprive the insured of rights long established in the law (namely, the right to obtain full compensation for his losses).

Section 146(2) is nothing but a would-be devious device to compel an insured to insure for the full value of his property. An insured who dares to under-insure, intentionally or otherwise, is condemned to pay the penalty of foregoing his rights to obtain full compensation; the insurer, on the other hand, is given to enjoy the best of two worlds — to obtain the highest possible premium coupled with the opportunity to recover its losses fully. There can be no question that the 1956 amendments placed the insured in a worse position than under the common law. Householders continue to under-insure because they are not avid readers of insurance statutes and policies. The provisions of s. 146(2) have been ineffectual in causing insureds to contract for insurance to the full value of their properties. It is submitted that it was both unnecessary and undesirable to have compromised the interests of the insured for the benefit of the insurer. It is therefore recommended that the insurer's rights of subrogation under s. 146(1) be retained but that the insured's common law rights to be fully indemnified be restored by amending s. 146(2) to read as follows:

> Where the insurer exercises its rights of subrogation whether by action, settlement or otherwise, the net amount so recovered, after deducting the costs of recovery, shall first be applied to indemnify the insured fully for the loss he has suffered and then to the insurer.

The insurance industry may object to this proposal on the ground that such a change will invite people to under-insure. This is hardly convincing because it is wholly unrealistic to assume that the present legislation has any effect on deterring people from under-insuring. The other objection to the recommendation may be that it would have the effect of reducing the insurer's ability to recover its losses thereby rendering insurance more expensive. It is, however, doubtful that premiums are calculated on the basis of the insurer's potential ability to recoup certain losses. Even if the case for higher premiums can be made, the adjustment is bound to be slight and in any event the consumer would be better served by being restored to the position where he can be fully indemnified for his loss.[11]

This proposal would be a significant improvement over the existing situation. The comments received were generally against changing the section

as it now stands. Still, a change in the section as recommended would better serve the consumer. As The Insurance Bureau points out:

> It is stated that in the majority of cases the doctrine of subrogation is used by the insurance company to recover the amount paid to its insured from the party who is legally responsible for the loss. This is correct in theory but there are many cases in which the right of subrogation is not of much practical value. Concern is expressed that if the insurer only sued the tortfeasor to recover its loss the insured would have no means of recovering his full loss. It seems unlikely that any insurer in exercising subrogation rights would fail to take into consideration the rights of the insured. Many companies as a matter of course ask their insureds when they raise an action in exercise of their subrogation rights whether the insured wishes to be joined in the action for his uninsured losses. In such cases the insured would have to agree to bear a proportionate share of the costs of such an action.

The above-cited response encourages the Commission in putting forward the recommendation to which it relates. Indeed, even if the insured were unwilling to bear the prospective risk of being assessed with a proportionate share of the costs of an action, but the insurer nevertheless sued the tortfeasor, and collected full compensation for the loss, the Court could in justice levy an appropriate proportion of the costs against the insured's own recovery of damages.

FOOTNOTES

1. *Castellain v. Preston* (1883), 11 Q.B.D. 380.
2. Unless the insurer obtains an assignment of the insured's rights: *London and Scottish Assurance Corp. v. Urquhart* [1972] I.L.R. 1-481 (N.B.Q.B.).
3. This assures that the person legally responsible for the loss, the wrong-doer, is not sued twice, once by the person who suffered the loss (the insured) and again by the insurer.
4. E.g. the insured cannot act in bad faith by releasing the tortfeasor from liability and thereby destroying the insurer's ability to recover the monies it has paid out. *Davis v. MacRitchie,* [1938] 4 D.L.R. 187 (N.S.S.C.).
5. *Globe and Rutgers Fire Insurance Co. v. Truedell,* [1927] 2 D.L.R. 659 (Ont. S.C. App. Div.).
6. The insured, however, would have the right to recover the difference ($15,000) from the third-party responsible for the loss. In pursuing his claim against the third-party, the insured would be obliged to attempt to recover the full measure of his loss, *supra,* fn. 4, (i.e. $40,000) and if successful, he would keep $15,000 and remit $25,000 to the insurer.

   There is some question as to whether or not the insured must pursue a claim against the third-party. (The insured may be reluctant to do so if the difference between his full loss and the insurance recovery is slight.) It would appear to be arguable that

because of the doctrine of *uberrima fides* (utmost good faith) the insured is indeed bound to pursue his remedies.

7. [1971] I.L.R. 1-441 (N.S.S.C.).

8. The learned judge was there dealing with s. 100M(1) of the Nova Scotia *Insurance Act* relating to automobile insurance which is virtually identical to our s. 146(1) relating to fire insurance.

9. It is perhaps arguable, though, that the insurer must act with utmost good faith *(uberrima fides)* and thus must press the third-party for the full measure of the loss; i.e., the principles stated in fn. 6 *supra* apply *mutatis mutandis*.

10. The insured would receive $\frac{15,000}{40,000}$ x 20,000 = $7,500

    The insurer would receive $\frac{25,000}{40,000}$ x 20,000 = $12,500

11. It may be of more than passing interest to note that the equivalent of s. 146(2) for automobile insurance [viz. s. 273(2)] was abolished with the introduction of "Autopac".

VI. NOTICE OF LOSS

Fire Statutory Condition 6(1)(a) provides that upon the happening of any loss or damage to the insured property, the insured shall "forthwith give notice thereof in writing to the insurer". There are at least two issues arising from this requirement, namely, the time for giving notice and the manner in which notice must be given.

While it is undoubtedly desirable to require that prompt notice of a loss be given to the insurer to allow it to properly investigate the claim, it is perhaps questionable that the statute dictate, in such imperative terms, that notice shall be given forthwith.[1] If applied strictly, any delay in giving notice, whatever the circumstances, would give rise to a breach of the condition thereby eliminating the insured's claim. As pointed out by Ivamy,

> Where the stipulation as to time is made a condition precedent, the assured must give notice within the prescribed time. If he fails to do so, he will be precluded from enforcing the policy, even though circumstances beyond his control have rendered it impossible for him to give the notice within the prescribed time, and it has, in fact, been given at the earliest opportunity.[2]

It is not suggested here that Statutory Condition 6(1)(a) is applied with such rigidity by either the courts[3] or the insurance industry. But perhaps this is reason enough to have the requirement phrased in more flexible language. It is obvious that in certain cases notice cannot reasonably be given forthwith, as for example, where the insured is away on holidays at the time of the loss or is hospitalized. It is recommended therefore, that Statutory Condition 6(1)(a) be amended to provide that notice of loss must be given "within a reasonable time". This proposal, if implemented, would make the provision for fire insurance consistent with the statutory provisions relating to Accident and Sickness Insurance,[4] Hail Insurance,[5] Automobile Insurance[6] as well as the common law.[7]

The statutory requirement that notice be given in writing is again more onerous, from the insured's point of view, than what had been the case under common law where, "In the absence of an express condition to the contrary, the notice of loss need not be in writing, a verbal notice being sufficient".[8] Moreover, this requirement is contrary to the practice followed and apparently tolerated, if not encouraged, in the vast majority of claims, namely the giving of notice over the telephone. It would be manifestly unjust to allow the insurer to defeat an otherwise perfectly legitimate claim on the sole ground that notice of loss was not made in writing.[9] While it would be wise practice to commit the notice to writing for evidentiary purposes, there is absolutely no justification for legislation compelling that notice be given in written form. It is recommended, therefore, that the requirement that notice be given in writing be deleted from Statutory Condition 6(1)(a).[10]

The comments received on the recommendation were favourable. The existing usual practice is to waive notice in writing and legislation enacted in consequence of this recommendation would simply be consonant with the usual practice.

FOOTNOTES

1. "The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time', and imply prompt, vigorous action, without any delay . . . ." *Prairie City Oil Co. v. Standard Mutual Fire Insurance Co.* (1910), 19 Man. R. 720 at p. 728 (K.B.) per Metcalfe J., aff'd 19 Man. R. 730 (C.A.).
2. Ivamy, *General Principles of Insurance Law* (2nd ed.), pp. 351-352.
3. Although the Manitoba Court of Appeal did apply the condition very strictly in *Prairie City Oil Co. v. Standard Mutual Fire Insurance Co., supra,* fn. 1.
4. Accident and Sickness Statutory Condition 7(2).
5. Hail Statutory Condition 6.
6. Regs. 56(4)(a) and 63(5)(a) pursuant to *"The Automobile Insurance Act"*, C.C.S.M. c. A180 ("Autopac").
7. Ivamy, *supra,* fn. 2, at p. 351.
8. *Ibid.*, p. 349.
9. As was the case in *Prairie City Oil Co., supra,* fn. 1. Indeed, Metcalfe J. stated that, "The result may be startling to the community and individuals may anxiously scan their policies and try, if possible, to find out what they mean. Perhaps they may succeed, perhaps they may not."
10. The requirement that notice be in writing has been removed in Automobile Insurance; Autopac Regs., *supra,* fn. 6.

VII. WAITING AND LIMITATION PERIODS

Fire Statutory Condition 14 states that,

> Every action or proceeding against the insurer for the recovery of any claim under or by virtue of this contract shall be absolutely barred unless commenced within one year next after the loss or damage occurs.

When read in conjunction with both Fire Statutory Condition 12 and section 131 of *"The Insurance Act"*, the period within which the insured must take firm steps to enforce his claim is relatively short because these latter provisions dictate that no action can be brought against the insurer until sixty days after filing proofs of loss. Section 131 states that,

> No action shall be brought for the recovery of money payable under a contract of insurance until the expiration of sixty days after proof, in accordance with the provisions of the contract,
>
> (a) of the loss . . . .

Fire Statutory Condition 12 provides that,

> The loss shall be payable within sixty days after completion of the proof of loss, unless the contract provides for a shorter period.

The sixty day waiting period is designed to give the insurer an opportunity to assess the claim and determine whether to pay the claim or not. The net effect, however, of all of these provisions is that the insured must file his proof of loss, at the very latest, 305 days after the loss in order to comply with the sixty day waiting period before bringing his action which is statute barred after 365 days.

The real problem lies with the one year limitation period prescribed in Fire Statutory Condition 14. It seems altogether unreasonable to bar a perfectly valid claim after the expiration of such a short period of time. There may be very good reasons why an insured neglects or fails to bring his action within the one year period, yet his excuse, however reasonable in the circumstances, will be to no avail because the bar is absolute.[1] A recent Manitoba case illustrates the severity of the legislation. In *Kozak v. Dominion Insurance Corporation*,[2] the insured suffered a fire loss on January 4, 1971 and after complying with the requirements as to notice and proof of loss, he was advised by the insurer on April 13, 1971, that his claim would not be paid. Shortly thereafter, the insured became ill and was hospitalized for a considerable period of time and consequently he did not consult a lawyer until January 24, 1972, more than one year after the loss. By this time, his action was statute barred. Fortunately for the insured, he was able to obtain passage of a Private Member's Bill in the Legislature which thereby enabled him to apply to the Court for an order to grant an extension of time to sue. On hearing the application, the court granted the order,

having found that the delay in pursuing the claim was not due to any indifference or carelessness on the part of the insured and that his claim was not frivolous or vexatious.

It does seem harsh and unreasonable to put the insured through the time, trouble and expense of obtaining a Private Member's Bill and a court order to pursue his claim in the situation presented in the *Kozak* case. It is not too difficult to conceive of other situations where an insured, acting reasonably, allows the one year period to slip by. With the increase in the incidence of claims and the growing complexities of operating big businesses, many claims are not processed quickly; six or seven months may pass before all the necessary documents are filed and the investigations completed; it may take the insurer another month or two to make up its mind whether to pay or not, and another couple of months may pass before the insured begins to think about consulting a lawyer. By then, of course, it may be too late to bring an action. Again, there may be cases where the insurer denies liability just before the year is out, not leaving the insured much time to seek professional advice; and cases where the insured is led, innocently or otherwise, to believe that the insurer will pay the claim and for that reason he fails to commence legal proceedings in time.

It is true that any limitation period will occasionally work a hardship on the insured in certain cases and that by merely extending the period not all of the problems will disappear. There does, however, appear to be a need to balance the interests of the two parties and in particular to minimize the harsh effects of a limitation period on the insured. The present one year period can slip by far too easily in many cases and is unreasonably short when compared to the six year limitation period governing contracts other than insurance policies.[3]

Arguably, the limitation period should be extended to six years. Many people know of the six year limitation period and, indeed, many may think it to be more extensively utilized than it really is; and therein lies the problem. The limitation period should be short enough to focus the insured's intention to sue the insurer *before* the insurer's subrogated rights of action against third-parties expire.

It is recommended that the limitation period fixed by Fire Statutory Condition 14 be extended to two years. A two year period would still allow the insurer to exercise rights of subrogation since the limitation period with respect to actions for injury to personal and real property is two years and six years respectively. The recommended extension of time would thus not appear to create any real hardship for the insurer while at the same time it would afford the insured a better opportunity to pursue perfectly legitimate claims.

Most commentators preferred to leave the limitation period of one year as it is. In the interest of the consumer a two year limitation period would be more equitable.

Two commentators, The Insurance Bureau and Mr. J.A. Swifte made a further recommendation. The recommendation is "that if a company intends to rely on the limitation period as a basis for denying liability then it must so notify its insured not later than thirty days prior to the expiry of the limitation period". The Commission heartily endorses this recommendation and would go further and recommend as well that notice be sent by registered mail.

FOOTNOTES

1. The court does not appear to have the power in these matters to relieve against forfeiture — see Relief from Forfeiture, *infra.*
2. [1973] I.L.R. 1-511 (Man. Q.B.).
3. *"The Limitation of Actions Act"*, C.C.S.M. c. L150, s. 3(1)(g).

VIII. RELIEF FROM FORFEITURE

Section 130 of "*The Insurance Act*" reads as follows:

> Where there has been imperfect compliance with a statutory condition as to proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss insured against, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the court deems it inequitable that the insurance be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it deems just.

While this provision of the Act appears to be framed in the interests of the insured by providing him with the opportunity to obtain relief from a forfeiture resulting from his failure to comply with certain technical requirements, it is fraught with many problems and has been the subject of much litigation. Quite ironically, s. 130, having been designed to overcome technical defences, is worded and has been interpreted by the Courts in a most technical and restrictive fashion, so much so, that its scope has been unduly limited and its purpose largely defeated.

The first restriction in s. 130 is that the power of the court to grant relief is expressed to be limited to cases involving a breach of "a statutory condition". It is unclear whether this refers only to those provisions set out in s. 142 of "*The Insurance Act*" which are headed, "Statutory Conditions" or if it includes all of the provisions of the statute. For example, s. 131 states that an insured cannot bring any action against his insurer until sixty days after he has filed proofs of loss. Suppose that for perfectly legitimate reasons, the insured does not submit formal proofs of loss until eleven months have elapsed since the date of the loss. Section 131 dictates that he must postpone bringing an action for two months, but by that time, his claim would be statute barred under Statutory Condition 14 (one year limitation period). If the insured commences legal proceedings before the expiration of the sixty day waiting period, the insurer can rely on s. 131 and claim that the action is premature. Section 131, however, is not a "Statutory Condition" in the sense in which the term is used in the Act and a strict interpretation of s. 130 would suggest that relief from forfeiture is not available as a remedy to the insured who fails to wait sixty days before suing.[1]

Moreover, the fact that the court's power to intervene is limited to breaches of "a statutory condition", clearly rules out any possibility for relief with respect to a breach of a purely contractual term or condition. For example, if an insured failed to comply with a clause in the policy stating that in the event of a loss, police authorities must be notified immediately,[2] thus resulting in the insurer's denial of liability, the insured could not apply to the court, under s. 130, to seek relief because the provision requiring the giving of notice to police authorities is not one imposed by the statute.

Similarly, a mortgagee who innocently neglects to give the requisite notice prescribed in a mortgage clause endorsement would be unable to appeal to the court for relief under s. 130.

Another serious limitation of s. 130 is that the court's power to grant relief is confined to breaches of a statutory condition related to "proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss insured against . . .". Thus, the jurisdiction of the court appears to be limited to cases involving non-compliance with Statutory Condition 6 (notice of loss and proof of loss), Statutory Condition 7 (false statements in a statutory declaration), and Statutory Conditions 9(1) (salvage) and 11 (appraisal procedures).[3] Accordingly, relief from forfeiture could not be sought where the insurer's denial of liability rests on Statutory Condition 1 (misrepresentation by the insured when applying for insurance),[4] Statutory Condition 2 (failure on the part of the insured to indicate that his interest in the property is other than that as owner)[5] and Statutory Condition 4 (failure to notify the insurer of a change material to the risk)[6] because in each case, the condition alleged to have been breached is not one which relates to proof of loss or any other matter or thing required to be done with respect to the loss. It does seem incongruous to empower the court to grant relief where the insured has made a wilfully false statement in a statutory declaration in a proof of loss[7] and yet to deprive the court of jurisdiction to act where the insured innocently misrepresented a material fact at the time of application for the policy.

Perhaps the most severe and illogical limitation of s. 130 is that the court has no jurisdiction to grant relief unless there has been "imperfect compliance" with the appropriate statutory condition. This has often been interpreted to mean that where there has been non-compliance with a statutory condition relief cannot be sought. Thus, a forfeiture resulting from the insured's failure to give notice of a loss within the proper time cannot be relieved against because notice too late is non-compliance as opposed to imperfect compliance with the notice provision.[8] Again, it has been held that failure to file proof of loss before suing is non-compliance with the condition relating to proof of loss and that as a result, s. 130 cannot be brought into play.[9] It has also been held that an action brought after the limitation period constitutes non-compliance with the statutory condition governing the limitation period and thus rules out the operation of s. 130.[10]

Occasionally, however, judges have leaned in favour of a broad interpretation of s. 130. For example, in *Luke's Electric Motor and Machinery Ltd. v. Halifax Insurance Co.*,[11] Williams C.J.Q.B. expressed the view that the court has power to grant relief in cases where the insured fails to wait the necessary sixty days after filing proof of loss before suing in order to avoid the limitation period, even though the insured's conduct or omission amounted to non-compliance with the sixty-day rule. More recently, in *Schwartz & Schwartz v. Providence Washington Insurance Co.*,[12] Freedman J.A. of the Manitoba Court of Appeal expressed his preference for a wider interpretation of s. 130 by advancing the view that Fire Statutory

Condition 6, while composed of several sub-sections, was nonetheless one condition, and that if there was compliance with any part of that condition, non-compliance with its other parts only amounted to imperfect compliance with the condition as a whole, thereby entitling the court to consider whether to grant relief or not. This decision does tend to minimize the distinction between imperfect and non-compliance but it does not eliminate the issue entirely. The court, through very ingenious reasoning, was able to conclude that in the particular circumstances, the insured's failure to comply at all with certain requirements, amounted to imperfect compliance with a statutory condition.[13] "Imperfect compliance", though, still appears to be an essential element. It is difficult to understand how, and moreover why, this distinction between imperfect and non-compliance should be made. Is written notice given ten days after the loss non-compliance or imperfect compliance with a condition requiring written notice forthwith? Is verbal notice given on the day of the loss imperfect or non-compliance with that condition? In both cases, notice of loss is given to the insurer; in the former case it is made late but in the proper form while in the latter case it is given on time but not in the proper form. It is not easy to see why a court should be empowered to grant relief from forfeiture in one case but not the other on the basis of technical and somewhat arbitrary distinctions.

The last restriction in s. 130 is that the condition breached must give rise to a "forfeiture or avoidance of the insurance in whole or in part" before a court can assume the power to grant relief. It appears, however, that the insured's failure to comply with the terms of the contract does not always give rise to a "forfeiture or avoidance of the insurance". For example, the effect of making a wilfully false statement in a statutory declaration pursuant to Statutory Condition 7 is to "vitiate the claim" and it is arguable that s. 130 does not apply to cases arising under that condition. More specifically, the courts have consistently held that failure to comply with Statutory Condition 14 — the one year limitation period — does not give rise to a "forfeiture or avoidance" but "bars a remedy" and that consequently the court has no jurisdiction to act under s. 130. In the case of *Luke's Electric Motor & Machinery Ltd.*,[14] Williams C.J.Q.B. stated,

> In my opinion [s. 130] does not authorize the court to relieve against that condition. [s. 130] provides for relief on equitable grounds against 'forfeiture or avoidance' of the policy. But [statutory condition 14] does not work in forfeiture or avoidance; it does not bar any right, it only bars the remedy.

This view has been applied and upheld several times: e.g., *Graham v. Canadian Premier Life Insurance Co.*,[15] *Presco Industrial Ltd. v. Saskatchewan Government Insurance Office*,[16] and most recently in the case, *Currado et al v. The Continental Insurance Co.*[17]

An attempt has been made thus far to demonstrate that the power given to the court to relieve against a forfeiture under s. 130 is very confined and limited not only because the section has often been interpreted strictly and narrowly but also because the provision is drafted in a technical

fashion and is by its very wording restrictive. It is submitted that all of the restrictions placed on the power of the court to grant relief are undesirable and run contrary to the spirit of equity which gave rise to the doctrine of relief from forfeiture. Historically, principles of equity were developed in our legal system to overcome the seemingly unfair and unjust consequences resulting from the application of the strict and technical rules of the common law. One such principle of equity became embodied in legislation conferring on courts an unlimited power to grant equitable relief in all cases of forfeiture. Section 63, Rule 7 of *"The Queen's Bench Act"* reads as follows:

> The court may relieve against all penalties and forfeitures, and, in granting such relief, to impose such terms as to costs, expenses, damages, compensation, and all other matters, as may be deemed just.

There does not appear to be any satisfactory explanation as to why the drafters of insurance legislation decided to override[18] s. 63[7] of *"The Queen's Bench Act"* with s. 130 of *"The Insurance Act"* thereby restricting the court's power to relieve against a forfeiture. The technical operation of s. 130 is the very thing that was intended to be avoided and overcome by equitable principles. The sole purpose of equity is to allow the courts to see that justice is done notwithstanding the availability of technical legal defences. The law appears to have come to a full circle and what is now needed is an equitable solution for an equitable solution! It is not for one moment recommended that the law should be so framed as to invite or encourage insureds to disregard their contractual obligations. What is recommended, though, is that the court's discretionary powers be fully restored.

When accorded jurisdiction in the kind of broad terms expressed in s. 63[7] of our Queen's Bench statute, a superior court in western Canada wields most plenary powers of relief, indeed. The leading case, of long standing, appears to be *Snider v Harper*,[19] a 1922 decision of the appellate division of the Alberta Supreme Court. In that judgment, Mr. Justice Stuart said:

> In my opinion the enactment of a statutory authority in such general terms when there was no necessity for it at all if the court was intended to exercise the power only in the cases in which the old Court of Chancery would have done so is quite sufficient justification for extending the field within which the power may be exercised. The section speaks clearly of 'all penalties and forfeitures' without limitation and I have no doubt that, the court being given by statute a certain power, it ought to exercise that power whenever it deems it just and equitable that it should do so.

It must be recognized that an insurance policy is a very complex document and one which even an expert in insurance matters can have considerable difficulty understanding. It is not surprising, therefore, that the

average policyholder does not always comply with all of the terms and conditions of the contract especially those relating to the procedures of making a claim. Most cases of non-compliance involve conditions in this latter category, conditions which are not conditions precedent to the insurer's liability but merely conditions precedent to recovery. The rigid enforcement of these conditions in particular should not be tolerated and it is for this reason that the court's power to grant relief should not be unnecessarily restricted.

In deciding whether or not to grant relief the court must always be concerned with the rights of both the party who has committed the breach and the party seeking to enforce the penalty or forfeiture. If the party seeking to enforce the forfeiture has been materially prejudiced by reason of the breach complained of, then relief from forfeiture should not and cannot be given. If, however, the party seeking forfeiture has not been materially prejudiced by the other party's failure to comply with the terms of the contract, then relief from forfeiture can and should be available and granted to the extent that there has been no material prejudice. The law's concern must be for equitable solutions to problems of the kind under review. The important question must not be whether or not there has been imperfect or non-compliance or whether the condition is contractual or statutory but whether the insurer has materially suffered by reason of the insured's failure to comply with the contract. It is recommended, therefore, that s. 130 of "*The Insurance Act*" be replaced by a new provision similar in scope to the provision under "*The Queen's Bench Act*".

The Insurance Bureau, in its comments, stated:

> The author is concerned about the distinction between statutory conditions and statutory provisions — it is submitted in fact that there is no problem in distinguishing between the two. A hypothetical case is cited of an insured not submitting formal proofs of loss until eleven months after the date of loss, and an insurer then relying on section 131 to claim that the action was premature where the action was raised before the expiry of the one year limitation period but before sixty days after submission of proof of loss. The point is completely academic — companies do not act in such an irresponsible manner.

As the power to grant relief under "*The Queen's Bench Act*" is much wider than the relief provision in "*The Insurance Act*" and must surely include the powers in "*The Insurance Act*", there is no merit in combining both these provisions. Indeed, we assert that combining the two would create some confusion because the inclusion of the more restrictive power may be seen by some as a directive to the court to apply its general power of relief in the case of "imperfect compliance, etc. . . ." Why else, it could be asked, would the restrictive wording in "*The Insurance Act*" be retained?

This recommendation would give the court the wide discretion it should have in dealing with fire insurance contracts in order to protect the

consumer. In view of the response, which we accept as an assertion of responsibility on the part of insurers, enactment of the substance of our recommendation would not jeopardize any responsible insurer.

FOOTNOTES

1. Although in *Luke's Electric Motor & Machinery Ltd. v. Halifax Insurance Co.* (1953), 10 W.W.R. 539 (Man. Q.B.) Chief Justice Williams observed that he would consider granting relief from forfeiture in such circumstances. But it is crucial to note that what is now s. 131 was, at that time Statutory Condition 18 of the Act, and it is therefore doubtful that the observation of Williams C.J. could be of any assistance in pleading for relief from the consequences of failing to adhere to s. 131.
2. Such a clause is standard with respect to a loss due to malicious mischief, robbery and theft.
3. The effect of s. 130 on Statutory Condition 14 (one year limitation period) is discussed below.
4. E.g. where the insured innocently misrepresents the age of his house.
5. E.g. where the insured innocently neglects to advise the insurer that he is not the owner of certain goods where his interest is as trustee or bailee of those goods.
6. E.g. where the insured innocently fails to notify the insurer that he has rented out a basement suite to a student for the school year.
7. Statutory Condition 7 is "a statutory condition as to proof of loss".
8. *National Gypsum (Canada) Ltd. v. Acadia Insurance Co.* (1959), 18 D.L.R. (2d) 179 (N.S.S.C.).
9. *Mahoney v. Car & General Insurance Corp. Ltd.*, [1955] 3 D.L.R. 786 (N.B.Q.B.).
10. *Hood v. The Home Insurance Co.*, [1964] I.L.R. 1-126 (B.C.S.C.).
11. *Supra*, fn. 1.
12. (1963), 45 W.W.R. 617 (Man. C.A.).
13. In this case the insured gave oral notice and filed proof of loss but failed to comply at all with Statutory Condition 6(1)(c), and he failed to verify his proof of loss by a statutory declaration.
14. *Supra*, fn. 1.
15. [1966] I.L.R. 1-163 (Man. Q.B.).
16. (1967), 61 W.W.R. 637 (Sask. C.A.).
17. [1974] I.L.R. 1-622 (Ont. S.C.).
18. In *Schwartz & Schwartz, supra*, fn. 12, Freedman J.A. stated that for the purposes of his decision it was not necessary for him to decide whether s. 63[7] of *"The Queen's Bench Act"* could be applied by the Court notwithstanding the provision in *"The Insurance Act"*. Mr. Justice Guy, however, in the course of delivering his dissenting opinion, stated that in his view s. 130 of *"The Insurance Act"* most specifically and deliberately overrides *"The Queen's Bench Act"*.
19. (1922), 66 D.L.R. 149 (Alta. C.A.).

IX. WAIVER

The failure on the part of the insured to abide by the terms of his policy may often result in the loss of benefits under the contract. Not infrequently, an insured neglects to observe the strict terms of the contract because he has been advised or led by the insurer to believe that he need not comply with a particular provision. For example, an insured may fail to give written notice of a loss because when he phoned his company notifying them of the loss he was told that he need not do anything further until an adjuster contacted him. Or, an insured may neglect to give written notice because he was informed by the insurer that the loss in question was not covered by the policy and that the claim could not be pursued. Under circumstances such as these, can the insurance company reject a claim on the ground that written notice of loss was not made pursuant to Statutory Condition 6(1)(a)?

Under common law the insured's failure to comply with the terms of the contract does not entitle the insurer to raise the breach as a ground for denying liability if the insurer, by its words or acts, leads the insured reasonably to believe that compliance with the terms of the policy is not necessary or will not be insisted upon. Observance with the term in question is said to be "waived" by the insurer, or more accurately, the insurer is said to be estopped or precluded from insisting that compliance with the provision is required. Little if any difficulty would arise if the general law of waiver and estoppel were allowed to operate in the area of insurance law. "*The Insurance Act*", however, cuts down the general law by providing in s. 123(1) that,

> No term or condition of a contract shall be deemed to be waived by the insurer in whole or in part unless the waiver is stated in writing and signed by a person authorized for that purpose by the insurer.

The troublesome words in s. 123(1) are, "unless the waiver is stated in writing". Applying this section to the two examples mentioned above, the insurer may well succeed in denying liability on the ground that written notice of loss was not given because the insurer did not waive in writing the formal notice requirements. There is a long list of authorities to support the proposition that a provision requiring waivers to be in writing rules out any suggestion of waiver based on oral statements or assurances, conduct and silence.[1] As an apparent adherent to this school of thought, Mr. Justice Patterson of the Nova Scotia Supreme Court has stated that,

> Great difficulties, in fact almost chaos, would arise if verbal variations or waiver of the terms of the written contract were permitted.[2]

It is respectfully submitted that if verbal waivers created chaos, which is by no means conceded, it would be a welcomed substitute for the injustice

caused by the present requirements. Moreover, to compel an insured to obtain everything in writing is both unrealistic and impractical. The insured cannot be expected but to rely upon the verbal representations of the insurer because in the vast majority of cases, all dealings between the two parties are conducted over the telephone including the application for and obtaining of the insurance coverage. Fortunately, some judges have been sufficiently troubled by the inequities generated by waiver in writing clauses and have developed a variety of schemes to overcome the effects of provisions similar to section 123(1).

One way in which the clause has been circumvented is by ruling that a waiver in writing clause can itself be waived by the insurer's verbal statements and conduct. Appleman, reviewing U.S. Law, concludes that,

> A stipulation against oral waivers and requiring any waiver to be in writing and attached to the policy is, like any other policy provision, itself subject to waiver. Such stipulation is for the company's benefit and may be waived by it. Such a waiver may be oral, or may be inferred from the acts or conduct of the insurer.[3]

Ewart agrees that,

> There can be no more force in an agreement in writing not to agree by parole, than in a parole agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it .... Clauses of the kind under consideration are, therefore, practically nugatory .... An insurance company cannot, by agreement, preclude itself from entering into subsequent agreements, or being bound by subsequent acts.[4]

The argument, that by representing to an insured that compliance with a term of the policy will not be insisted upon amounts to not only a waiver of that term but also a waiver of the insurer's right to require that waivers be in writing, has been applied by the Court of Appeal in both Manitoba[5] and British Columbia.[6] In the Manitoba case, *Beasant v. Northern Life Insurance Co.*, Cameron J. specifically referred to and adopted the position advanced by Ewart.[7] The reasoning, admittedly, appears to be circular, yet it demonstrates the extent to which some courts have gone to override what is evidently believed to be a harsh and most unreasonable provision.

An equally clever and perhaps more acceptable scheme around s. 123(1), is that the courts have sometimes labelled the insurer's conduct or oral statements as amounting to an "estoppel" rather than a "waiver" and have held that since s. 123(1) only talks in terms of waiver, estoppels do not have to be in writing. Isaacs J., of the High Court of Australia, put the matter this way:

> Since estoppel is not mentioned [in the clause] and waiver is, and since it would, from the very nature of estoppel, have been absurd, even if legally possible . . . to agree in advance that estoppel should not arise, under any circumstances except where admitted in

> writing, we are bound here to limit the word 'waiver' to its own strict legal connotation.[8]

Estoppel is a rule of evidence which precludes a party from denying the truth of a statement or representation previously made and which is acted upon by the other party. If by its words, conduct and even silence, the insurer represents to an insured that compliance with the terms of the policy is not required or will not be insisted upon, and the insured acts on that representation by refraining from doing that which he would otherwise be bound to do, the insurer will be estopped or precluded from going back on its representation. The theoretical distinction between waiver and estoppel is that waiver is said to involve an intentional relinquishment of a right and consequently a modification of the terms of the contract, whereas estoppel is merely a rule of evidence precluding the denial of the truth of certain facts and does not involve a modification of the terms of the contract. The distinction between waiver and estoppel is academically sound,[9] although not universally recognized.[10] The practical effect of the two doctrines, however, is often substantially the same, at least to the extent that both operate to prevent the insurer from raising a breach of a term of the policy as a defence to a claim. Nevertheless, the courts have often relied upon the theoretical distinction to overcome the effects of s. 123(1) and other anti-waiver clauses. For example, in *Caldwell v. Stadacona Fire and Life Insurance Co.*, Mr. Justice Strong, of the Supreme Court of Canada, observed that,

> [The insurer's] conduct, therefore, constitutes an estoppel. . . . This is, of course an entirely distinct ground from that of waiver . . . [the insurers] by their unjustifiable conduct, caused the non-compliance with the terms of the policy, which they now insist on as constituting a defence to the action. To allow them thus to avail themselves of their own wrong, would be to assist them to commit a fraud, and whenever such is the case an estoppel arises.[11]

Similarly, in *Morrow v. Lancashire Insurance Co.*, Burton C.J. noted,

> Here it is said that there can be no waiver of a condition unless in writing, but I should rather put it that the defendants have estopped themselves, by their conduct . . . from insisting upon strict compliance.[12]

A final scheme developed by the courts to overcome waiver in writing clauses is, ironically, to construe such clauses, especially the expression "in writing", very broadly. Under this approach, it is said that there need not be a clear written expression of waiver, such as "the company hereby waives . . . ", but that the anti-waiver clause is satisfied provided that there is some evidence in writing of the conduct which gives rise to the waiver. Thus, for example, a written offer of settlement after the limitation of action period may constitute a written waiver of the condition prescribing the limitation period even though the written offer does not expressly state that the condition is waived.[13]

It is evident that the law with respect to waiver in writing clauses is far from settled. The two conflicting approaches to anti-waiver clauses, one that it is an unjust limitation and the other, that "chaos" in the business world is thereby prevented, require resolution. There should be no doubt whatsoever that the former view ought to prevail. Clearly, anti-waiver clauses operate against the interests of the insured and legislative sanction of these clauses has placed the insured in a more vulnerable position than he occupied under common law. It is recommended, therefore, that the common law be allowed to operate without restriction and that s. 123(1) be completely abolished. It is further recommended that legislation be enacted to prohibit any attempt to incorporate waiver-in-writing clauses into insurance contracts.

The above recommendations apply with equal force to s. 123(2) of "*The Insurance Act*" which states that,

> Neither the insurer nor the insured shall be deemed to have waived any term or condition of a contract by any act relating to the appraisal of the amount of loss or to the delivery and completion of proofs or to the investigation or adjustment of any claim under contract.

There may be some doubt as to what this subsection is intended to cover. If it is intended to protect the policyholder from allegations of waiver of the insured's rights, it is of little value because the only obligation of the insurer after loss is to furnish to the insured proof of loss forms pursuant to s. 126(1). If this is an important concern it would be far more appropriate to provide that the insurer's obligations under s. 126(1) are absolute and cannot be dispensed with under any circumstances. Section 123(2), however, also refers to waiver by the insurer. If that is intended to rule out waivers based on the insurer's conduct and verbal statements made during the investigation of the claim, it is redundant because s. 123(1) excludes all non-written waivers. If it is intended to rule out written waivers (by construing "any act" to include written statements) made by the insurer during the course of investigation, the legislation could only be described as a monstrosity.

Most allegations of waiver arise out of the insurer's statements or conduct after the occurrence of a loss. For example, the common law has always provided that where an insurer, upon receiving an overdue or otherwise defective notice of loss without objection, acts in much the same manner as if the condition relating to notice had been completely satisfied (e.g. by fully investigating the claim and insisting that the insured prepare and file all necessary documents), the insurer cannot subsequently deny liability on the ground of improper notice.[14] The law has been well summarized by Duff J., of the Supreme Court of Canada, as follows:

> . . . if you have a clause of that type [condition relating to notice of loss] and the event has happened upon which under the terms of the clause the one party is entitled at his option to insist that the other party's rights have elapsed — and if, after the event has happened, the party in whom the right of election is vested do any

> act involving a recognition of the other party's rights as still subsisting and do it with a knowledge of the facts that entitle him to say that these rights have been terminated — then the doing of such an act is a conclusive election not to take advantage of the clause.[15]

Thus it has been held that if before the time for filing notice of loss expires the insurer fails to object to the form of the notice but denies liability on other grounds (e.g. the loss does not fall within the terms of coverage), the insured is relieved from complying with the condition of the policy as to notice because the denial of liability amounts to a representation that the giving of formal notice is both useless and unnecessary.[16] It therefore follows that the insurer cannot insist upon written notice of loss if upon receipt of verbal notice no objection is made and the insured is advised that the claim will be paid.[17] Similarly, it has been held that where an insurer demands proof of loss with the knowledge that the insured has not complied with the terms of the policy, the insurer is precluded from raising the breach as a ground for refusing payment.[18] In this latter example, the demand for proofs is regarded as an affirmation of the contract and a waiver of the breach because the insurer is only entitled to proofs of loss if the policy is valid and subsisting. Not only the insurer's conduct but also its silence may lead to a waiver or estoppel. The courts have consistently held that the insurer's failure to object immediately to a defect in proof of loss forms filed by the insured within the prescribed time will preclude the insurer from subsequently complaining of improper proofs.[19] The insurer is under a duty to act with "utmost good faith" and is thus obliged to make objections promptly so as to give the insured an opportunity to remedy the error or defect. The insurer's silence in these circumstances amounts to a waiver of its rights to subsequently raise objections.

No purpose would be served by quoting more examples; suffice to say that the law reports are filled with cases of waiver resulting from the insurer's conduct after the loss. What must be realized is that s. 123(2) of "*The Insurance Act*" appears to wash away this entire body of common law. There can be no justification for legislation of this kind. It has the intolerable effect of subjecting policyholders to defences never before permitted; it allows the insurer to blow hot and cold — to lead the insured to believe that he need not comply with the strict terms of the policy and then insist that non-compliance with the terms of the policy is a ground for denying liability. If the insurer's conduct is deliberate it is tantamount to a fraud and cannot be tolerated; if their conduct is innocent, so is the conduct of the insured who acts on the faith of the insurer's representations and the insurer cannot be allowed to escape responsibility for its actions at the expense of the insured who has been misled. It is submitted that no clearer case for reform can be made than for the abolition of s.s. 123(1) and 123(2) of "*The Insurance Act*" and for an express prohibition against all anti-waiver clauses in insurance policies.

Mr. A.M. Zariski pointed out that the courts "have construed the requirements for a written waiver sufficiently broadly, it appears, to deal

with foreseeable injustices". We think that the waiver recommendation we have made is a fair one and would not prevent the company from expressing its waiver in writing. Repeal of the cited sections would, however, help to prevent the kind of conundrum described above from ever coming to pass, if coupled with the prohibition of anti-waiver clauses in policies.

FOOTNOTES

1. *Logan v. Commercial Union Insurance Co.* (1886), 13 S.C.R. 270 (N.S.); *Atlas Assurance Co. v. Brownell* (1899), 29 S.C.R. 537 (N.S.); *Commercial Union Assurance Co. v. Margeson* (1899), 29 S.C.R. 601 (N.S.); *Guimond v. Fidelity-Phenix Fire Insurance Co.* (1912), 47 S.C.R. 216; *Calhoun v. The Union Mutual Life Insurance Co.* (1879), 19 N.B.R. 13 (Sup. Ct.); *McKean v. The Commercial Union Assurance Co.* (1882), 21 N.B.R. 583 (Sup. Ct. in Appeal); *LeBlanc v. The Commercial Union Assurance Co.* (1902), 35 N.B.R. 665 (Sup. Ct.); *Maple Leaf Milling Co. v. Colonial Assurance Co.* (1917), 36 D.L.R. 202 (Man. C.A.); *Smith v. Excelsior Life Insurance Co.* (1912), 4 D.L.R. 99 (Ont. C.A.); *Colpitts v. The Continental Life Insurance Co.* (1919), 47 N.B.R. 332 (K.B. Div.); *Magrath v. Sydenham Mutual Fire Insurance Co.*, [1923] 3 D.L.R. 44 (Ont. Sup. Ct.); *Dubinsky v. Stuyvesant Insurance Co.* (1934), 1 I.L.R. 186 (Man. C.A.); *Kahn v. Western Assurance Co.* (1936), 3 I.L.R. 354 (Que. K.B.); *Continental Insurance Co. v. Adilman* (1941), 8 I.L.R. 195 (Que. K.B.); *Maddison v. Prudential Insurance Co. of America* (1936), 3 I.L.R. 469 (N.B. Sup. Ct.); *Racine v. Dominion Fire Insurance Co.* (1943), 10 I.L.R. 203 (Que. S.C.); *Hall v. General Security Insurance Co. of Canada*, [1951] I.L.R. 1-039 (Que. S.C.); *Aubert v. Alliance Insurance Co. of Philadelphia*, [1951] I.L.R. 1-036 (Que. S.C.); *Tarr v. Westchester Fire Insurance Co.*, [1953] I.L.R. 1-106 (Ont. C.A.); *Luke's Electric Motors & Machinery Ltd. v. The Halifax Insurance Co.*, [1954] I.L.R. 1-133 (Man. C.A.); *Colp v. Quebec Fire Insurance Co.*, [1962] I.L.R. 1-054 (N.S. Sup. Ct.); *D.S. Ashe Trucking Ltd. v. Dominion Fire Insurance Corp.* (1966), 56 D.L.R. (2d) 730 (B.C.C.A.).
2. *Colp v. Quebec Fire Insurance Co.* (1961), 30 D.L.R. (2d) 393 (N.S.S.C.).
3. Appleman, *Insurance Law and Practice*, Vol. 16, No. 9210.
4. Ewart, *Waiver Distributed*, at p. 285.
5. *Beasant v. Northern Life Insurance Co.*, [1923] 1 W.W.R. 362 (Man. C.A.).
6. *Cadeddu v. Mount Royal Assurance Co.*, [1929] 2 D.L.R. 867 (B.C.C.A.).
7. *Supra*, fn. 5 at pp. 365-366.
8. *Craine v. Colonial Mutual Fire Insurance Co.* (1920), 28 C.L.R. 305 (H. Ct. of Australia), at pp. 325-326.
9. Waiver and estoppel are two distinct and separate doctrines: *Nippon Menwa Kabushiki Kaisha v. Dawsons* (1935),51 Lloyd's Rep. 147 (J.C.P.C.); Halsbury, *Laws of England* (3rd ed.), vol. 22, No. 432; *Caldwell v. Stadacona Fire and Life Insurance Co.*, (1883), 11 S.C.R. 212; *McKnight v. General Casualty Insurance Co.* [1931] 3 D.L.R. 476 (B.C.C.A.); *Crump v. McNeil* [1919] 1 W.W.R. 52 (Alta. S.C. App. Div.); *Glagovsky v. National Fire Insurance Co. of Hartford*, [1931] 1 W.W.R. 573 (Man. K.B.); 28 Am. Jur. 2d, *Estoppel and Waiver*, No. 30.
10. Waiver and estoppel are synonymous: *Teasdall v. Sun Life Assurance Co. of Canada*, [1927] 2 D.L.R. 502 (Ont. S.C.); *Tarr v. Westchester Fire Insurance Co.*, [1953] I.L.R. 1-106 (Ont. C.A.); *D.S. Ashe Trucking Ltd. v. Dominion Insurance Corp.* (1966), 56 D.L.R. (2d) 730 (B.C.C.A.).

11. (1882), 11 S.C.R. 212 at pp. 240-242.

12. (1899), 26 O.A.R. 173 at p. 179.

13. *Miller v. Portage la Prairie Mutual Insurance Co.*, [1936] 2 W.W.R. 104 (Sask. C.A.); *Miller et al v. Toronto General Insurance Co.* (1966), 59 D.L.R. (2d) 507 (P.E.I.S.C.).

14. *McKnight v. General Casualty Insurance Co.*, [1931] 3 D.L.R. 476 (B.C.C.A.); *Flinn v. Canadian Surety Co.* (1935), 2 I.L.R. 438 (N.S.S.C. *in banco); J.R. Mooney and Co. v. Pearl Assurance Co.* (1942), 9 I.L.R. 379 (Ont. S.C.); *Geracimo Brothers Inc. v. Yorkshire Insurance Co. of York, England,* [1952] I.L.R. 1-085 (Que. S.C.). See also Ivamy, *General Principles of Insurance Law,* p. 331.

15. *Canadian Railway Accident Insurance Co. v. Haines* (1911), 44 S.C.R. 386 at pp. 391-392.

16. *Noranda Limited v. U.S. Fidelity & Guarantee Co.* (1943), 10 I.L.R. 122, (Que. S.C.).

17. *Sproul v. National Fire Insurance Co.*, [1925] 1 D.L.R. 1152 (N.S.S.C.).

18. *National Benefit Life and Property Assurance Co. v. McCoy* (1918), 57 S.C.R. 29.

19. *Caldwell v. Stadacona Fire and Life Insurance Co.* (1883), 11 S.C.R. 212 at p. 241 (N.S.); *The Ocean Accident and Guarantee Corp. Ltd. v. Fowlie* (1902), 33 S.C.R. 253 (Ont.); *Bell Brothers v. The Hudson Bay Insurance Co.* (1911), 44 S.C.R. 419 at p. 431 (Sask.); *Canada Landed Credit Co. v. Canada Agricultural Insurance Co.* (1870), 17 Gr. 418 at p. 424 (Ont. Ct. of Chancery); *Garceau v. Niagara Mutual Insurance Co.* (1877), 3 Q.L.R. 337 (Que. S.C.); *Kirk et al v. Northern Assurance Co.* (1898), 31 N.S.R. 325 at p. 330 (Sup. Ct. in appeal); *Green v. Manitoba Insurance Co.* (1901), 13 Man. R. 395 at p. 403 (K.B.); *Western Assurance Co. v. Pharand* (1902), 11 K.B. 144 (Que. K.B.); *Strathcona Assurance Co. v. Carbray* (1915), 21 R.L. (n.s.) 447 at p. 450 (Que. K.B.); *Adams v. Glen Falls Insurance Co.* (1916), 31 D.L.R. 166 at p. 168 (Ont. Sup. Ct. App. Div.); *Maple Leaf Milling Co. v. Colonial Assurance Co.* (1917), 36 D.L.R. 202 (Man. C.A.); *Glagovsky v. National Insurance Co. of Hartford,* [1931] 1 W.W.R. 573 (Man. K.B.); *American Equitable Insurance Co. of New York v. Fournier* (1934), 1 I.L.R. 273 (Que. K.B.); *McCoy v. Alliance Insurance Co. of Philadelphia,* [1951] I.L.R. 1-003 (Ont. Sup. Ct.).

X. MISREPRESENTATIONS AND NON-DISCLOSURES

Under common law every person applying for a policy of insurance is under a duty to act with the "utmost good faith" *(uberrima fides)* and is thus obliged to disclose to the insurer all facts material to the risk to be insured against. The insured's duty of disclosure in fire insurance law is now governed by Fire Statutory Condition 1 which states,

> If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to any property in relation to which the misrepresentation or omission is material.

Although most fire insurance policies, especially those relating to residential premises, are applied for over the telephone without written application, Fire Statutory Condition 1 nonetheless governs the effect of any misrepresentation and non-disclosure made by the applicant.

Because a contract of fire insurance is a personal contract between the insured and the insurer, facts about the character and personality of the applicant and about the physical attributes of the property to be insured are always of concern to the insurer, and legitimately so. The insurer is not, however, entitled to require that the applicant disclose and accurately represent every fact it deems relevant. The insurer is only entitled to obtain particulars of material facts, that is to say, facts which a reasonable insurance company would take into account in assessing the premium or deciding whether to underwrite the risk or not.[1] This legal test for "materiality" has always prevailed both in England, where it originated, and in Canada. In recent years, however, the test for materiality has come under attack because it allows an insurer to avoid a policy on the basis of a misrepresentation or non-disclosure of a fact which the insured did not reasonably know to be material to the risk. For example, an applicant may fail to disclose that his house has aluminum wiring because although he is aware that his house is so wired, it does not occur to him and he does not realize that this information is material. If, however, a reasonable insurer would regard aluminum wiring as a material particular (because the risk of fire loss is considered to be greater), the insured's failure to make that disclosure would, under common law, render the insurance ineffective. Fire Statutory Condition 1 modifies the common law by providing that non-disclosure of a material fact is of no consequence unless made fraudulently, that is, unless the fact was concealed by the applicant with the intention of deceiving the insurer.[2] It would seem that short of a confession of guilt, the applicant could only be deemed to have intended to deceive the company if he knew that the insurer would likely use such information to judge the risk and that he withheld that information for precisely that reason. In other words, it would appear that under Statutory Condition 1 the matters concealed must be material

according to the test described above and the applicant must believe that the fact he concealed was material for the non-disclosure to have any effect; an innocent concealment of a material fact is of no consequence.

Interestingly, there seems to be some doubt as to whether or not a concealment of a material fact, even if made fraudulently, has any effect in cases where the applicant fills out a written questionnaire when applying for the policy. It has been held that an insured is not under a duty to volunteer any information beyond the scope of specific enquiries made by the insurer.[3] This view appears to be based on the assumption that an insurer bothering to make enquiries is presumed to have asked for information on all matters it deems important in assessing the risk, and that in so doing the insurer represents to the applicant that further particulars are not required and is therefore estopped from alleging that matters not covered by the application are material. This view can be attacked on two grounds. First, it could be argued that the doctrine of *uberrima fides* is such an integral part of insurance law that it cannot be displaced merely because the insurer makes certain specific enquiries.[4] Secondly, Statutory Condition 1 clearly allows for the avoidance of a policy on the grounds of non-disclosure, and it is unlikely that this legislation is intended to be restricted to cases where no enquiry is made by the insurer; such a departure from the doctrine of *uberrima fides* would, it could be argued, be required to be more clearly expressed by the statute. Yet, the issue, namely, whether or not there is a duty to disclose beyond the questions asked, is very much alive. Both views appear to be based on sound legal argument and it is difficult indeed to choose between them. It may well be that the doctrine of *uberrima fides* has served its time. The nature of insurance business has undergone considerable change since its inception and perhaps insurers no longer require the protection provided by the doctrine of utmost good faith because they are now fully capable and equipped to assess a risk on the basis of information they solicit and gather. Indeed, insurers today may no longer expect that unsolicited information will be volunteered by the applicant and conduct their operations accordingly. Under the circumstances, therefore, it may be preferable not to tamper with the existing legislation and allow it to receive further judicial review. While it is personally believed that the duty to disclose is unrealistic and unnecessary in modern business practice, it is suggested that a study be undertaken to determine if the doctrine of "utmost good faith" has in fact served its usefulness.

The effect of giving wrong information in response to specific enquiries is not subject to the same controversy which surrounds the duty to disclose. Clearly, the insurer is entitled to receive the truth in response to its questions. Again, however, the insurer is not entitled to seek out information on all matters it deems relevant, but is restricted to obtaining the truth about factors which are material to the risk, materiality being determined by the test in the *Ontario Metal Products* case.[5] Under common law, and now under Fire Statutory Condition 1, a misrepresentation by the insured of a material fact entitles the insurer to avoid the policy. Unfortunately, the insurer can raise the defence even if the misrepresentation is made innocently.[6] Thus, if the insured innocently mis-states the age of a

building, or the age of a furnace, or the type of electrical power servicing his house, and if these matters are material in that a reasonable insurer would take them into account in assessing the risk, the misrepresentation, though innocently made, avoids the contract. The English Law Reform Committee's review of the law of misrepresentations in insurance law resulted in the proposal,

> . . . that for the purpose of any contract of insurance no fact should be deemed material unless it would have been considered material by a reasonable insured.[7]

Under this proposal, innocent misrepresentations cannot affect the validity of the policy if the insured did not reasonably believe that the fact was one which the insurer would consider as important in assessing the risk. The proposal does fall short of imposing a test based on fraud because the essential element is the belief, not of the particular applicant, but of a "reasonable" applicant. Thus, an innocent misrepresentation made by a simple-minded person would be fatal if a "reasonable" person would have known that the fact in question was material to the risk. It is submitted that the English proposal does not go far enough and that our legislation should provide a uniform test for both misrepresentations and non-disclosures, namely, one based on fraud. Accordingly, it is recommended that Fire Statutory Condition 1 be amended to provide that only a fraudulent misrepresentation or fraudulent concealment of a material fact can render the policy ineffective. Under this proposal, an insurer could not defeat a policy unless the insured misrepresented or concealed a fact which he knew to be one which a reasonable insurer would take into account in assessing the risk, and which he misrepresented or concealed for the purpose of deceiving the insurer.

Fire Statutory Condition 1 states that the effect of an operative misrepresentation or concealment is that "the contract shall be void". In strict theory the expression "shall be void" implies that the policy is automatically null and without any legal effect from the beginning *(ab initio)*. If a contract is automatically void as a matter of law, then nothing short of a new contract can create rights and obligations between the two parties. Accordingly, the insurer could not be estopped from raising a defence to a claim on the ground of misrepresentation even if it could be shown that the insurer learned of the misrepresentation soon after the policy was issued and with that knowledge represented to the insured that the policy was effective notwithstanding the misrepresentation.[8] The courts, however, have shown great reluctance to interpret the term "void" in its strict sense and have often adopted the common law rule that misrepresentations render the policy "voidable" at the election of the insurer, notwithstanding the use of the term "void" in the statute or contract.[9] According to this approach the insurer, upon learning of a misrepresentation or non-disclosure can elect to follow one of two courses of action: it can return the premiums and treat the contract as being void or null from the beginning or it can choose to treat the policy as valid and

subsisting notwithstanding the misrepresentation or concealment. If the insurer chooses the latter course and thus represents to the insured that the policy will continue in effect, it will be estopped from going back on its word. The tendency to interpret "void" as meaning "voidable" is well summarized by Preston and Colinvaux as follows:

> The words "void" or "voidable" are commonly used, however, both in conditions themselves and judicially, to denote the effect on a policy of a breach of a condition. Such words are only however used as inapt descriptions of the right to repudiate liability for breach of condition. The use of the word "void" does not therefore exclude the affirmation of the contract by the party aggrieved. In fact, it makes no difference whether conditions in a policy are expressed to be conditions precedent to recovery or whether they declare events under which all rights under the contract are forfeited or upon which the contract is to become "void" or "voidable". In each case the breach of the condition, or the happening of the event entitles the insurers, at their option, no longer to be bound by the contract.[10]

It is recommended that the term "void" in Fire Statutory Condition 1 be amended to read "voidable" not only to reflect current judicial thinking but also because it allows for a more realistic and practical approach to the problem. The insurer should clearly be entitled to elect to continue the policy in force notwithstanding a misrepresentation or concealment. It is equally clear that if the insurer has elected to continue the policy the insured should be able to act with the confidence that his policy is effective.

The Insurance Bureau stated:

> The author would have fire statutory condition 1 amended to provide that only a fraudulent misrepresentation or fraudulent concealment of a material fact can render a policy void. An insurer could then only defeat a policy by proving the insured misrepresented or concealed a fact which he knew to be one which a reasonable insurer would take into account in accepting the risk. The Bureau would oppose any such change.

If the consumer acts honestly and innocently he should receive the benefits under his policy of insurance. The recommendation is in accord with current judicial thinking. Again the innocent consumer would be protected. While the Bureau's opposition to our recommendations in this regard is not viewed lightly by us, we have decided, after deliberation, that they describe a progressive reform.

FOOTNOTES

1. *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co. Ltd.*, [1925] A.C. 344 (J.C.P.C.).
2. *Taylor v. London Assurance Corp.* [1935] S.C.R. 422.

3. *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K.B. 863 (C.A.); *Newsholme Brothers v. Road Transport and General Insurance Co.*, [1929] 2 K.B. 356 (C.A.); *Fordorchuk v. Car & General Insurance Corp.*, [1931] 2 W.W.R. 587 (Alta. S.C.); *Valgardson v. Contingency Insurance Co.*, [1955] 5 D.L.R. 649 (Man. Q.B.); *Offstein v. Sweet* (1948), 14 I.L.R. 239 (Ont. H. Ct.).

4. The English Law Reform Committee, Fifth Report (1957), concluded that, "... as a matter of law, the answering of specific questions however detailed and searching, does not relieve the proposer from his duty to disclose material facts".

5. *Supra*, fn. 1.

6. *Murphy v. Sun Life Assurance Co. of Canada*, [1965] I.L.R. 1-142 (Alta. S.C. App. Div.).

7. *Supra*, fn. 4.

8. *Silcock v. Co-Operative Fire and Casualty Co.*, [1969] I.L.R. 1-283 (B.C.S.C.). "That conclusion [that the policy is void] is not something to be determined by either insurer or insured. The statute determines the matter. It speaks clearly." (per Wootton J.).

9. *Millican v. Scottish Metropolitan Assurance Co. Ltd.*, [1923] 2 W.W.R. 25 (Alta. S.C. App. Div.); *Davenport v. The Queen* (1877), 3 App. Cas. 115 (J.C.P.C.); *Canadian Railway Accident Insurance Co. v. Haines* (1911), 44 S.C.R. 386; *Abbi v. Klippert*, [1969] I.L.R. 1-286 (Alta. S.C.).

10. Preston and Colinvaux, *The Law of Insurance* (3rd ed.), at p. 101.

XI. WARRANTIES

A warranty in an insurance policy is a term of the contract, strict compliance with which is mandatory at all times. A warranty must be complied with even if it is not material to the risk[1] and if it is promissory in nature,[2] it must be observed throughout the duration of the policy. Although the standard fire insurance policy covering residential premises rarely contains warranties, they are not uncommon in commercial coverage. Moreover, apart from s. 145 of *"The Insurance Act"*, there is nothing to prohibit the insurer from including warranties as terms of the policy. Section 145 states, in part, that

> where a contract . . .
> (b) contains any stipulation, condition or warranty that is or may be material to the risk including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property, the . . . stipulation, condition or warranty shall not be binding upon the insured if it is held to be unjust or unreasonable by the court before which a question relating thereto is tried.

This section of the Act appears to protect the policyholder against any attempt by the insurer to incorporate terms which are unjust or unreasonable. The section, however, only applies to a term of the contract "that is or may be material to the risk". Does this mean that a term of the contract which is not material to the risk is not subject to review under s. 145? It does seem rather illogical to allow a court to strike out an unreasonable term which is material to the risk but not an unreasonable term which is not material to the risk. This incongruity is of particular concern with respect to warranties because such terms are valid even if not material to the risk.[3] The problem raised here should and can be easily remedied by striking from section 145, the words, "that is or may be material to the risk". This would allow the court to strike down any clause in the policy which was unjust or unreasonable, including warranties which are not material.

Another problem associated with warranties is that under common law, any statement warranted by the insured must be strictly true and accurate and it is no excuse that the insured had no means of knowing that his statement was inaccurate.[4] For example, if the insured warrants that his house has weeping tiles and he so reasonably believes, the insurer can disclaim liability if in fact the house does not have weeping tiles. It is said that the insurer is entitled to avoid liability because it issued the policy on the basis that the statements warranted by the insured were accurate. It does seem unreasonable however, that the insurer can hold the insured to the accuracy of statements which the insured could not reasonably be expected to have guaranteed. The English Law Reform Committee, Fifth Report (1957), advocated,

> . . . that, notwithstanding anything contained or incorporated in a contract of insurance, no defence to a claim thereunder should be maintainable by reason of any mis-statement of fact by the insured, where the insured can prove that the statement was true to the best of his knowledge and belief.

The comments received on this proposal were favourable and thus, we have no hesitation in recommending that it be adopted and translated into legislation.

FOOTNOTES

1. E.g., if a term of the contract is that the insured warrants that there are no liens on the property, and if there is in fact a lien on the property, the insurer is entitled to deny liability under the policy even if the existence of a lien does not materially affect the risk.
2. E.g., if the contract states that the insured warrants that a night watchman will be on the premises every day, non-compliance with the warranty at any time, even if unrelated to the loss, entitles the insurer to escape liability.
3. *Dawson's Limited v. Bonnin,* [1922] 2 A.C. 413 (H.L.).
4. Vance, *Handbook on the Law of Insurance* (3rd ed.), pp. 412-416.

XII. AGENTS AND BROKERS

The role of an insurance agent is indispensable in the insurance business. He is the intermediary, the go-between, between the insured and the insurer. An insurance company, by its very nature, cannot operate but through agents. The agent is the person to whom the insured turns to apply for and obtain an insurance policy, to discuss matters of concern during the life of the policy, and the person whose help is sought when claiming for a loss. The unsuspecting public does not realize that under present law, the property insurance agent is often not the agent of the insurer but of the insured. In many cases, therefore, notice to an agent is not notice to the company; the knowledge of the agent is not the knowledge of the insurer. Similarly, other acts of the agent do not bind the insurer and a waiver of a term of the policy made by an agent may be ineffective. It is not difficult to imagine the variety of problems which could arise where the insured fails to realize that the agent with whom he is dealing is not authorized to act on behalf of the insurer.

Many of the legal problems concerning the extent to which an agent's acts bind the insurer present themselves at the time an application for insurance is made, because the policy is inevitably negotiated through an agent. The leading case in this area of the law is *Newsholme Brothers v. Road Transport and General Insurance Co. Ltd.*,[1] a decision of the English Court of Appeal in 1929. The plaintiff applied for an automobile insurance policy through an agent of the defendant company. A written application signed by the applicant was found to contain wrong statements of fact and the insurer sought to escape liability under the policy issued to the plaintiff on the grounds of misrepresentation. The court found that although the application was signed by the plaintiff, it had been filled out by the insurer's agent. Further, the court found that the plaintiff had given truthful answers to the questions posed by the agent but that the agent, for reasons which were not determined, incorrectly transcribed the information he had been given. The plaintiff argued that he was not guilty of misrepresenting material facts and that the insurer, through its agent, had been given the true facts. The plaintiff would have succeeded had the court held that the agent, in filling out the application, was doing so as the agent of the company because the knowledge of the true facts acquired by the agent would have been deemed to have been imputed to the company. The court, however, rejected the plaintiff's argument and held that the agent, who was supplied with the company's forms, was only authorized by the insurer to solicit applications for insurance and collect premiums but was not expressly authorized to fill up the forms. Thus, the court held that for the purposes of filling out the application form, the agent was acting on behalf of the applicant and not the insurer — he "was writing the answers as the amanuensis of [the applicant]" — and thus any knowledge so acquired by the agent could not be imputed to the insurer. There was, therefore, a misrepresentation of material facts entitling the insurer to avoid the policy.

The principle of the *Newsholme* case, that the acts of and knowledge acquired by an agent who is merely authorized to solicit insurance and collect premiums does not bind the insurer, was readily adopted and consistently applied in Canada.[2] Indeed, the *Newsholme* doctrine has been extended to cover a wide range of other activities carried on by agents. For example, it has been held that a soliciting agent has no authority to grant insurance coverage, and an applicant is not entitled to assume that he is insured merely because he has been told so by that agent.[3] Similarly, the courts have held that a soliciting agent cannot waive a term of the policy,[4] and that notice (of a loss or change material to the risk) to such agent is not notice to the insurer.[5] In these latter examples, the courts have followed a pronouncement made in 1913 by the then Chief Justice of the Supreme Court of Canada, Fitzpatrick C.J., that

> . . . where after a risk has been accepted, and the terms of the contract are embodied in a policy . . . the applicant deals with that agent at his peril, and if in fact the agent has no authority, the assent given by him is of no avail, even although the person obtaining the assent had no knowledge of the lack of authority.[6]

These decisions and the many others like them show a total disregard for the reasonable expectations of the average policyholder. In the *Newsholme* case the court showed no sympathy for an applicant who signed a form without bothering to check the accuracy of the statements recorded by the agent. Yet, surely an applicant acts reasonably in believing and is entitled to expect that an agent entrusted with company forms and documents, and authorized to solicit applications and collect premiums for the insurer will accurately record the information he is given by the applicant. Is it an answer to say that the insurer did not authorize the agent to fill out the forms and that if an agent exceeded his authority, he then and for that purpose ceased to be an agent of the insurer? How, it must be asked, is the applicant to know that the agent is not expressly authorized to fill out the forms? How is the applicant to know that the agent who takes the application has no authority to grant coverage? Or, that the agent who delivered the policy is not empowered to waive a clause in the contract or receive notice on behalf of the insurer?

The crux of the problem is that the courts have been overly concerned with the express authority given to an agent by the insurer, so much so, that they have held that anything done by an agent outside the scope of his specific powers could not bind the insurer. This is apparent from the decisions and the way in which the courts have tended to categorize agents. If the agent is regarded as a "general agent", that is, one empowered by the insurer to transact all of the company's business of a particular kind or in a particular area, the insured can confidently expect that the acts of the agent bind the insurer. If, however, the agent is merely a "soliciting agent" (sometimes called a special or local agent), the insured deals with him at his peril — this kind of agent is, apparently, a man of straw. And finally, there is the insurance "broker", who falls somewhere between the two. For some

purposes he is the agent of the company and in each case, the broker's personal arrangement with the various companies to whom he turns to place insurance determines the extent to which he can bind the company.

These labels, however, do nothing to assist the insured in knowing whether his agent can bind the company or not. For one thing, the agent does not usually announce the category into which he falls. Furthermore, even if he did identify himself as a particular type of agent, the insured cannot reasonably be expected to know the specific powers expressly conferred upon that agent by the company for whom he transacts business. More recently, some courts have begun to take a more realistic view of the problem and have begun to hold the insurer bound by the acts of agents done not only within the scope of their express authority but also within their ostensible or apparent authority. Ostensible authority, in simple terms, is the authority a reasonable insured believes the agent possesses by reason of the insurer having put the agent in such a position as to lead a reasonable insured to believe that the agent does indeed have that authority. In *Compagnie Equitable D'Assurance Contre Le Feu v. Gagne*,[7] the applicant signed an application form for autombile insurance which contained a wrong answer to one of the questions put, namely, that he had not been involved in previous accidents. The court found, however, that the applicant had disclosed to the soliciting agent that he had been previously involved in two minor accidents. The agent told the applicant that the insurer was only concerned with more serious accidents for which claims had been made and advised him to answer "no" to the question relating to previous accidents. Although the court found the answer on the form to be untrue, the insurer was held liable under the policy because the agent's conduct bound the company. The Quebec Court of Appeal stated that because the agent was expressly authorized to solicit applications on behalf of the insurer, the company in so doing, had held out the agent as having authority to interpret the meaning of the questions on its application forms. It was the apparent authority which bound the insurer here. The decision of the Quebec Court of Appeal was upheld by the Supreme Court of Canada.[8]

In the recent case of *Fallas v. Continental Insurance Co.*,[9] the British Columbia Supreme Court held that a mere soliciting agent has the ostensible authority to waive compliance with a term of the policy. The agent had no express authority but to solicit insurance and collect premiums. He was, however, provided with the company's policy and was permitted to countersign the policy at the blank space at the foot of the first page, before issuing the policy to the insured. The court held that the insurer had thus held out the agent as having authority to bind the company.

For similar reasons, some courts have held that a soliciting agent has the ostensible authority to grant coverage. In *Berryere v. Fireman's Fund Insurance Co.*,[10] the Manitoba Court of Appeal held that an agent entrusted with interim insurance receipts has the *indicia* of authority to grant coverage and thereby bind the company to a contract. In *Ledlev Corporation Ltd. v. New York Underwriters Insurance Co.*,[11] the Supreme Court of Canada held the insurer bound to a renewal policy issued by a soliciting agent, because the original policy had been signed and issued by that agent without objection by the company.

The English Court of Appeal has also had second thoughts about the strictness of the *Newsholme* doctrine. In the recent case of *Stone v. Reliance Mutual Insurance Society Ltd.*[12] a fact situation similar to that in *Newsholme* led to a completely different result. The agent wrongly filled in the application form for a fire and theft policy, although he had knowledge of the true facts. Despite a clause in the form (which was signed by the applicant) to the effect that any person completing it did so as agent of the applicant, the insurer was not permitted to repudiate liability on the ground of misrepresentation. In the course of delivering his judgment, Lord Denning M.R. stated that,

> . . . it seems to me that the agent by his conduct impliedly represented that he had filled in the form correctly . . . [this] disentitles the insurance company from relying on the printed clause to exclude their liability. Their agent represented that he had filled in the form correctly: and having done so, they cannot rely on the printed clause to say that it was not correctly filled in. So they are liable on the policy.

An important fact in this case is that the soliciting agent was expressly authorized to write down the answers and this may distinguish the case from *Newsholme*. The importance of this point was very much emphasized recently by the Supreme Court of Canada in *Blanchette v. C.I.S. Limited*,[13] where the *Stone* decision was applied by the court to hold the insurer bound by the acts of the agent who incorrectly filled out part of the application form for the fire insurance policy in question. In his judgment, Pigeon J. stressed that the agent in this case was authorized to fill out applications and it was for that reason that he followed the *Stone* case.

These cases should not, however, be viewed with that much enthusiasm. While it is true that these decisions have held the insurer liable for the acts of the agent, the courts still appear to rely very heavily on the nature of the agent's express authority. It was the good fortune of the insureds in both *Stone* and *Blanchette* that the agent in each case just happened to be authorized to fill out application forms. It is somewhat of a pity that the courts did not seize the opportunity to re-shape the law by placing more emphasis on ostensible authority.

It is readily apparent that the law in this area is far from settled. While attempts have been made to modernize the law, there is an obvious reluctance to shift away from the *Newsholme* doctrine. Mr. Justice Ritchie, dissenting in the *Blanchette* case, went so far as to maintain that the Canadian law does and should conform to the principles enunciated in the *Newsholme* case, and he was not prepared to accept any qualification of those principles, and thus he rejected the *Stone* case. The lingering of that attitude continues to expose the insured to the grave hardship that he deals with the agent at his own peril.

That matters of such grave importance continue to be determined by arbitrarily categorizing agents according to the express authority they possess should no longer be tolerated. It cannot be denied that insurance

companies invite if not require that the public deal with agents. It is also indisputable that the average policyholder believes that the person through whom he obtained the policy is the representative of the insurer, no matter what his label may be, at least to the extent that information communicated to the agent is information communicated to the company, and that information communicated by the agent is information communicated by the company. It is remarkable that there has been no public outrage over the fact that these assumptions on the part of the policyholder are often completely denied in law. There is hardly another area of law more imcompatible with the reasonable expectations of mankind.

It would be tragic to allow the law to continue in its present form. The American law has long since abandoned the *Newsholme* philosophy and has placed responsibility for the agent's acts where it properly belongs — on the shoulders of the insurer who has allowed the agent to solicit business on its behalf.[14] In the province of Quebec, Fire Statutory Condition 1[15] now provides that, "when the application is made out by the company's agent, such application shall be deemed to be the act of the company". This provision appears to overcome any attempt on the part of the insurer to argue that the agent, in filling out an application, does so as agent for the applicant.[16] In England, there is growing support for reform of the law. Ivamy puts forth the proposal that,

> . . . the proposed insured is entitled to assume that the agent knows what ought to be stated and what may be omitted, and it is submitted that the proposed insured is not responsible for the agent's failure to pass on the information to the insurers, notwithstanding that the proposal has been filled up by the agent.[17]

The English Law Reform Committee, Fifth Report, (1957) has proposed that,

> . . . any person who solicits or negotiates a contract of insurance should be deemed, for the purposes of the formation of the contract, to be the agent of the insurers, and that the knowledge of such person should be deemed to be the knowledge of the insurers.

It is recommended that at the very least, the proposal of the English Law Reform Committee be adopted and enacted here. It is suggested, however, that the proposal should be broad enough to cover not only matters affecting the formation of the contract but also matters arising after the policy takes effect. The agent through whom the policy is negotiated should be deemed to have authority to receive any notice required by the contract and any knowledge acquired by that agent relating to the insurance should be deemed to be the knowledge of the insurer. Anything short of this will only perpetuate inequities in the law.

We received some response to the above proposal in our Working Paper to the effect that it could induce insurers to withdraw and ultimately eliminate agency business. This speculation is not well founded in our

opinion. Clearly, if insurance companies find it less desirable to solicit insurance business through agents, there is nothing the law can do about that, short of compelling insurers to conduct their business through agents. In the end the choice of whether to drop agents or not will be a decision reached by insurers on economic determinations based on the return they receive for the commissions paid out to agents. We do not accept the notion that the insurance law reform which we recommend must have the effect of preserving insurance agency business at the cost of more just dispositions between the insurer and the insured. Thus, if the acts and knowledge of the agent do not bind the company, the agent's intervention amounts to a handicap when the insurer can lawfully ignore or repudiate what the agent says. The public is entitled to assume that agents' knowledge of matters reported by the insured, and the agents' words and deeds are binding on the insurance company. The law should support and confirm that reasonable assumption.

FOOTNOTES

1. [1929] 2 K.B. 356 (C.A.).
2. E.g., *Rocco v. Northwestern National Insurance Co.* (1929), 64 O.L.R. 559 (C.A.); *Sleigh v. Stevenson,* [1943] 4 D.L.R. 433 (Ont. C.A.); *Melnichuk v. London Life Insurance Co.* (1936), 3 I.L.R. 105 (Ont. C.A.); *Salata v. Continental Insurance Co.,* [1948] O.R. 270 (C.A.); *Bonneville v. Progressive Insurance Co. of Canada,* [1955] 2 D.L.R. 779 (Ont. C.A.); *Blair v. Royal Exchange Assurance,* [1968] I.L.R. 1-197 (Man. Q.B.).
3. *Potvin v. Glen Falls Insurance Co.,* [1931] 1 W.W.R. 380 (Alta. S.C.); *World Marine and General Insurance Co. Ltd. v. Leger,* [1952] S.C.R. 3.
4. *Torrop v. Imperial Fire Insurance Co.* (1896), 26 S.C.R. 585; *Colp. v. Quebec Fire Insurance Co.* (1961), 30 D.L.R. (2d) 393 (N.S.S.C.); *Dubinsky v. Stuyvesant Insurance Co.* (1934), 1 I.L.R. 186; *Roche v. Roberts* (1921), 9 Lloyd's L. Rep. 59 (K.B.); *Brook v. Trafalgar Insurance Co. Ltd.* (1947), 79 Lloyd's L. Rep. 365 (C.A.).
5. *Barrette v. Toronto General Insurance Co.* (1935), 2 I.L.R. 520; *Berlovici v. Guardian Insurance Co.* (1939), 6 I.L.R. 145 (Que. S.C.).
6. *Kline Brothers and Co. v. The Dominion Fire Insurance Co.* (1913), 47 S.C.R. 252 at pp. 255-256.
7. (1965), 58 D.L.R. (2d) 56 (Que. Q.B.).
8. [1968] I.L.R. 1-233 (S.C.C.).
9. [1973] I.L.R. 1-558 (B.C.S.C.).
10. [1965] I.L.R. 1-134 (Man. C.A.).
11. [1972] I.L.R. 1-495 (S.C.C.).
12. [1972] Lloyd's L. Rep. 569 (C.A.).
13. [1973] I.L.R. 1-532 (S.C.C.).
14. E.g. as outlined in Vance, *Handbook on the Law of Insurance,* 3rd ed., p. 461.
15. *"The Insurance Act",* R.S.Q. 1964, c. 295.
16. *Continental Insurance Co. v. Champagne,* [1951] Que. Q.B. 309.
17. Ivamy, *General Principles of Insurance Law* (2nd ed.), p. 497.

CONCLUSION

A. SUMMARY OF RECOMMENDATIONS

1. **Definition of Insured**: Enact legislation to provide that (i) every person named or defined in a contract as an insured and any person for whose benefit the policy is made shall have the right to make a claim in his own name under that contract and shall be deemed to be a party to the contract and to have given consideration therefor; and (ii) where an insurer pays a loss claim without knowledge or notice of any "unnamed insured", that person's right to claim under the contract survives against the insurer only to the extent that the loss for which payment was made by the insurer did not comprehend any part of the loss claimed by the unnamed insured.

2. **Definition of Fire Loss**: a) Enact, as part of the Fire Statutory Conditions, a definition of "fire" loss to include unintentional loss or damage to property proximately caused by fire, and permit the insurer to impose a reasonable deductible; b) Provide that unnotified vacancy exceeding 30 days is not necessarily a change material to the risk upon which avoidance can be founded; c) Repeal s. 138(1)(a)(i); d) Enact legislation to prohibit the insurer from excluding from coverage any fire loss falling within the above definition, except as provided by s. 138(1)(a)(ii) and s. 138(2).

3. **Intentional Loss**: a) Delete the opening words in s. 92, "Unless the contract otherwise provides", and substitute therefor the words, "Notwithstanding any agreement to the contrary"; b) Put s. 92 in Part III of "*The Insurance Act*", and make it subject to s. 165(1).

4. **Assignment of the Policy**: Enact legislation to provide that an assignment of a contract consented to by the insurer shall operate as a new contract between the assignee and the insurer on the same terms and conditions as the assigned contract, making the assignee the insured, and that consideration shall be deemed to have been given therefor by the assignee and that the assignee shall not be subject to any defence which the insurer could have raised against the assignor.

5. **Subrogation**: Amend s. 146 to provide that:

   (i) The insurer, upon making any payment or assuming liability therefor under a contract of fire insurance, shall be subrogated to all rights of recovery of the insured against any person notwithstanding that the insured has not been fully indemnified for his loss, and may bring action in the name of the insured to enforce such rights provided that in bringing such action or

otherwise exercising rights of subrogation, the insurer protects and does not prejudice the rights and interests of the insured for whom recovery under the contract does not provide full indemnity.

(ii) Where the insurer exercises its rights of subrogation, whether by action, settlement or otherwise, the net amount so recovered, after deducting the costs of recovery, shall first be applied to fully indemnify the insured for the loss he has suffered, and then to the insurer.

6. Notice of Loss: Amend Fire Statutory Condition 6(1)(a) to read, "give notice thereof to the insurer within a reasonable time".

7. Waiting and Limitation Periods: Amend Fire Statutory Condition 14 to extend the limitation period to two years, and to provide that if an insurer intends to rely on the expiry of the limitation period as a basis of denying liability, it shall so notify the insured by registered letter within ninety days but not later than thirty days prior to the expiry of the limitation period.

8. Relief from Forfeiture: Repeal s. 130 and enact legislation similar to the relief from forfeiture provision under s. 63[7] of *"The Queen's Bench Act"*.

9. Waiver: Repeal s. 123 in its entirety, and enact legislation prohibiting the use of anti-waiver and waiver in writing clauses.

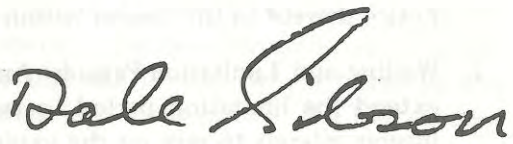
10. Misrepresentations and Non-Disclosures: Amend Fire Statutory Condition 1 to provide as follows: "If any person applying for insurance fraudulently misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be voidable at the election of the insurer as to any property in relation to which the misrepresentation or omission is material.

11. Warranties: a) Strike out the words, "that is or may be material to the risk", in s. 145(b); b) Enact legislation to provide that, notwithstanding anything contained or incorporated in a contract of insurance, no defence to a claim thereunder shall be maintainable by reason of any mis-statement of fact by the insured, if the statement was true to the best of the insured's knowledge and belief.

12. Agents: Enact legislation to provide that any person who solicits or negotiates a contract of insurance shall be deemed to be the agent of the insurers, and that the knowledge of such person shall be deemed to be the knowledge of the insurers.

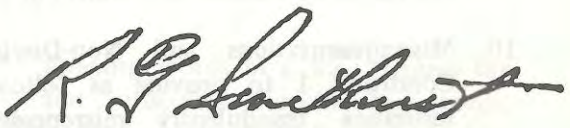
This is a Report pursuant to Section 5(2) of *"The Law Reform Commission Act"*, signed this 9th day of February, 1976.

F.C. Muldoon, Chairman



R. Dale Gibson, Commissioner

C. Myrna Bowman, Commissioner



R.G. Smethurst, Commissioner

Val Werier, Commissioner

Sybil Shack, Commissioner

Kenneth R. Hanly, Commissioner