MANITOBA

LAW REFORM COMMISSION
COMMISSION DE RÉFORME DU DROIT

REPORTS AND RECOMMENDATIONS

1971

Reports # 1 to 6

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

The Commissioners are:

Francis C. Muldoon, Q.C., *Chairman*
R. Dale Gibson
C. Myrna Bowman
Robert G. Smethurst, Q.C.
Val Werier
Sybil Shack
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Professor John M. Sharp is Chief Research Officer to the Commission. The Secretary of the Commission is Miss Suzanne Pelletier.

The Commission offices are located at 331 Law Courts Building, Winnipeg, Manitoba R3C 0V8.

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REPORT #1

REPORT
ON
JURY SERVICE FOR REGISTERED INDIANS

Hon. A.H. Mackling, Q.C.
Attorney-General of Manitoba
Legislative Building
Winnipeg, Manitoba

Dear Mr. Attorney:

This is a report pursuant to Section 5(2) of "The Law Reform Commission Act".

The subject of this report is the extension of the right and obligation of jury service to registered Indians, residents of reserves in Manitoba.

A sad truth about the extension of civil rights and the administration of justice in Manitoba is that registered Indians are, almost by oversight but quite effectively, excluded from jury service. This situation comes about because of an obvious deficiency in "The Jury Act" (Chapter J30, R.S.M. 1970). Section 7 of that Act provides that the mayor or reeve and the clerk of each municipality are, ex officio, the first selectors of jurors for the municipality. The Act nowhere mentions the chief of an Indian band, nor the electoral officer of a reserve. Because of this deficiency in "The Jury Act" registered Indians resident on reserves are never summoned for jury duty in Manitoba. The right to vote in provincial elections was extended to registered Indians as long ago as 1952; but the clear qualification of registered Indians to serve as jurors, has never been articulated because of an unavailable selection process.

The same situation seems to apply in other provinces in which local residence, duration of residence, property qualifications or inclusion in municipal electoral rolls are the initial preconditions for ultimate selection for jury duty.

In the course of formulating our recommendations on this subject, we consulted Mr. David Courchene, President of the Manitoba Indian Brotherhood. We also made various enquiries as to the feasibility and mechanics of opening jury service to registered Indians. The results of our consultations and enquiries encouraged us to proceed with this subject.

There is no jurisdictional impediment to our Legislature's imposing jury service on Indians in view of the provisions of Section 87 of the Indian Act, a statute of the federal Parliament. It provides:

> "87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

We are advised that the amendment to the jury law which we are recommending would not be contrary to any treaty or other Act of Parliament, nor inconsistent with the Indian Act or any order, rule, regulation or by-law made under it. Indeed, what we are recommending would be in close concordance with the Indian Act which by Section 73. and subsequent sections, provides band elections for which electoral lists must be prepared and maintained in much the same way as they are prepared and maintained in municipalities throughout the province.

We can perceive no justification for excluding Indians from participation in juries in Manitoba.

We therefore recommend a reform of "The Jury Act" to provide that:

(a) the meaning of "mayor or reeve" be enlarged to include "the chief of a band" or "band chief";

(b) the meaning of "the clerk of a municipality" be enlarged to include "band manager";

(c) the meaning of "municipality" be enlarged to include "band" or "Indian band";

(d) in addition to its ordinary meaning, "list of electors" include a list, of all those persons eighteen or more years of age, extracted from the band list of any Indian band in which an electoral list is not kept and periodically revised;

all within the meaning of the Indian Act (Canada) as applied in Manitoba.

In passing, we note that the barrier of language itself could exclude a significant number of registered Indians from any useful jury service. Such persons would normally be excluded under Section 13 of "The Jury Act" which requires the initial municipal selectors to "select the names of those persons who...are, from...the extent of their information, the most...competent for the performance of the duties of jurors." Others, for whom language presents little or no barrier would be eligible for selection, as provided in the Act.

Although in proposing this reform we have not performed a thorough examination of "The Jury Act", we do not intend to suggest that a further, more systematic overhaul is not warranted. We do, however, consider that the eligibility of registered Indians for jury service is a matter of long overdue reform which we ought to recommend now, at this, our earliest opportunity.

We acknowledge the most useful assistance of our Chief Research Officer, Professor John M. Sharp, in formulating this report.

All of which is respectfully submitted.

Francis C. Muldoon, Chairman

R. Dale Gibson, Commissioner

Ken Hanly, Commissioner

C. Myrna Bowman, Commissioner

Val Werier, Commissioner

Robert G. Smethurst, Commissioner

Sybil Shack, Commissioner

April, 1971

REPORT #2

REPORT
ON
SUMMARY DISPOSITION OF BUILDERS' & WORKMEN'S LIENS

The Hon. A.H. Mackling, Q.C.
Attorney-General of Manitoba
Legislative Building
Winnipeg, Manitoba

Dear Mr. Attorney:

This is a report pursuant to Section 5(2) of "The Law Reform Commission Act".

The subject of this report is the provision of a summary means of vacating liens filed under "The Builders and Workmen Act" against land in cases where the lienor may have abandoned his interest in the claim, or has been paid and cannot be found to provide a release, or oppressively simply declines to provide a release.

We note that under Section 11 and 15 of "The Builders and Workmen Act" there is provision for the securing of "the amount of the contract price, or any unpaid portion thereof," by "lien upon the land upon which the contract is being executed," but there is no provision for requiring the lienor to enforce his lien, or for vacating such lien except by voluntary release on the part of the lienor. In conferring with the Registrar General of the land titles system and with various practicing solicitors, and from our searches of the general register of the Winnipeg Land Titles Office we have noted that this deficiency in the Act can operate to the oppression of the home or other land owner. For example, where the owner has arranged to borrow money upon the security of a real property mortgage, the mortgagee will prudently require a clear Certificate of Charge disclosing no prior liens, before it will advance the loan proceeds. If, in such a case, the lienor cannot be found, or will neither enforce nor release his lien, then the owner may be put to considerable expense to "find" the lienor and persuade him to discharge the lien, or the owner may simply be stymied.

In correcting this deficiency in the Act as it presently stands, one must not subvert the rights of the *bona fide* lienor. Therefore, we recommend the amendment of "The Builders and Workmen Act" by the enactment of summary disposition procedures similar to those in "The Real Property Act" relating to the disposition of caveats. We recommend a form of that which is commonly called a "fourteen-day notice" to the lienor requiring him to enforce the lien or suffer its discharge by the district registrar. We consider that the onus of keeping his

address for service known should lie on the lienor.

The Manitoba Law Reform Commission intends to make a thorough study of the related subjects of mechanics' liens and builders' and workmen's liens with the objective of proposing reforms, but we think that the anomalous situation presented by the described deficiency in "The Builders and Workmen Act" ought to be dealt with at the earliest opportunity without waiting for the completion of the larger project. This is a unique case which, we think, would justify specific remedial legislation.

Proposed amendments illustrating the form which the legislation might take are attached as an appendix to this report.

We acknowledge the valuable assistance of Mr. Donald M. Lamont, Registrar General, Mr. Wilfred Juravsky, a practicing Winnipeg solicitor and our Chief Research Officer, Professor John M. Sharp, in the preparation of this report.

All of which is respectfully submitted.

Francis C. Muldoon, Chairman

C. Myrna Bowman, Commissioner

Val Werier, Commissioner

R. Dale Gibson, Commissioner

Ken Hanly, Commissioner

Robert G. Smethurst, Commissioner

Sybil Shack, Commissioner

April 13, 1971

APPENDIX

PROPOSED AMENDMENTS TO "THE BUILDERS AND WORKMEN ACT"

11(1) [*present Section 11*]

11(2) Where a proprietor or owner of any land or building upon which a lien has been registered states by affidavit

(a) that the contract price has been paid in full; or

(b) that there exists between himself and the lienor or any other interested person or party a dispute as to completion of the contract, the amount due or alleged to be due or the very existence of such contract at all, and describes the nature of such dispute; and

(c) that he wishes to have the lien removed on the grounds set out in (a) or (b) above

the district registrar shall give notice, reciting the said grounds as expressed in the said affidavit, to the lienor that upon the expiration of fourteen days after the giving of such notice unless an action be commenced and a certificate of lis pendens be filed in the Land Titles Office by the lienor within that time, the lien will be vacated and the lienor's rights therein terminated as fully and effectively as if by voluntary release.

11(3) Unless the district registrar otherwise orders, a notice given under subsection (2) shall be served personally on the lienor, or in case a person to be served cannot after due diligence be found, the district registrar may direct that the notice be served on him by registered mail at his last known address, or in such other manner as the district registrar directs; but in any case the responsibility for keeping the proprietor or owner, or the district registrar informed of the lienor's address for service shall be that of the lienor.

11(4) The district registrar shall, upon the expiry of the relevant 14 day period and if no relevant lis pendens be filed in his office, vacate the lien.

11(5) Where a lien has been vacated as provided in this section it shall cease to bind or affect the land or building upon which it was registered as fully and effectively as if the lienor had executed a release of such lien.

11(6) Where a proprietor or owner of any land and building makes any false material statement in his affidavit whereby he causes a lien to be vacated, then in addition to any other penalties to which he may by law be liable, he shall also be liable to pay to the lienor any amount found to be due under the contract which was secured by the vacated lien.

11(7) The lis pendens filed under the provisions of subsection (2) and any lien relating to it shall be vacated by the district registrar upon the filing in his office of a certificate of dismissal or discontinuance of the action, or any relevant vacating order of a judge of the Court in which the action was commenced, upon the expiry of the time for appeal and upon it appearing that no appeal has been taken, or upon the judge's ordering that the awaiting of the expiry of time for appeal shall be waived.

SCHEDULE B
(Section 15)

MEMORANDUM OF CONTRACT

I, A.B., of (builder, contractor or sub-contractor, as the case may be), have entered into a contract with C.D., of , to (here state work to be executed) on (here describe the parcel of land upon which work is to be done).

The contract price is (here state the consideration of contract).

My address for service of notices and process in relation to the above mentioned contract is:

and I acknowledge my responsibility to keep C.D. informed of any changes of address, and if my changed address be not listed in a current issue of a Manitoba Telephone Directory I undertake to notify the District Registrar at this Land Titles Office of such changes, too.

Witness my hand this day of , 19 .

Signature of Contractor

R.S.M., c 28, Sch.B.

REPORT
ON
DISPOSITION OF MAINTENANCE JUDGMENTS IN LAND TITLES OFFICE

The subject of this report is the recommended removal of certain practical difficulties associated with the vacating and postponing of judgments for alimony or maintenance in the Land Titles Office.

Because these kinds of judgments can be pronounced in the Family Courts, the County Courts and the Court of Queen's Bench, there is a fair multitude of routes of appeal which can be pursued from such a judgment. This situation poses problems in obtaining the certificate of "no appeal", so-called, which is required under Section 21(2) of "The Judgments Act". The applicant or counsel must satisfy "the judge or magistrate or proper officer of the Court" that no appeal on the record, or by way of trial *de novo*, or by way of stated case (whichever may be applicable) has been taken, or that any appeal taken has been disposed of.

It is only judgments for alimony and maintenance which cannot be directly discharged, in whole or in part, by the judgment creditor, because of their exemption from the operation of Section 20 of "The Judgments Act". The legislative policy of Section 20 of this Act is to permit all judgments registered against the judgment debtor's lands to be discharged entirely or partially (i.e. as to only some particular parcel or parcels of land) *except for judgments for alimony or maintenance*.

One can legitimately surmise that because support and livelihood, not only of the spouse but also frequently of minor children, are secured by such judgments, the Legislature decided to place an obstacle in the way of improvident discharging of the security. The obstacle is an application to a judge or magistrate for permission to discharge the judgment. In addition, such discharge of the lands of the judgment debtor could create a more imminent call on the public purse for welfare assistance to the spouse and children.

The application to the judge or magistrate is to be made under Section 21(1) of the Act. Section 21(1) is drafted so as to provide relief (if warranted) to **all** judgment debtors who may apply, as well as to the spouse who may apply for discharge of a judgment for alimony or maintenance. In regard to maintenance judgments, Section 21(1) of this Act is similar to Section 28(8) of "The Wives' and Children's Maintenance Act".

We do not recommend the abrogation of the present legislative policy of denying the supported spouse the right to discharge the judgment for alimony or maintenance at will. That policy is questioned by some of us and will be examined more thoroughly in our project on family law.

However, we do recommend that where the application for discharge is made by or with the consent of the supported spouse, and where the judge or magistrate grants the application, registration of the consequent order should be enabled to proceed in the Land Titles Office without a so-called "no appeal" certificate as described in Section 21(2) of the Act. The form which an amendment giving effect to this recommendation might take is indicated in the Appendix to this report. We have discussed both the form and substance of this recommendation with the Registrar-General, Mr. D.M. Lamont, and he indicated accord with both the form and efficacy of it.

There is one further anomally in regard to this matter, which we noted. The manifest legislative policy of "The Wives' and Children's Maintenance Act" in Section 28(8), and of "The Judgments Act" in Section 20 is to deny the maintained spouse the right to discharge at will the judgment for alimony or maintenance. An application to the Court must be made in every such case. As to the right, if any, of a spouse to accord priority to some other security or lease over the maintenance judgment, without the sanction of a judge or magistrate at all, it is probable that the spouse may do so at will under Section 105 of "The Real Property Act". This anomaly would be cured by adding to item (c) of subsection (1) the same words which are used in Section 20 of "The Judgments Act":

"...other than a judgment for alimony or maintenance; or..."

As stated, we intend to consider the question of freely disposable maintenance judgments in our study of family law at large.

This is a report contemplated by Section 5(2) of "The Law Reform Commission Act".

Dated, this 25th day of May, 1971.

Francis C. Muldoon, Chairman

Sybil Shack, Commissioner

C. Myrna Bowman, Commissioner

R. Dale Gibson, Commissioner

Val Werier, Commissioner

Ken Hanly, Commissioner

Robert G. Smethurst, Commissioner

APPENDIX

PROPOSED AMENDMENTS TO SECTION 21(2) AND (3) OF "THE JUDGMENTS ACT"

21. (2) Unless the judge or magistrate to whom the application for an order under subsection (1) is made otherwise directs in the order, it shall not be registered unless:

(a) the judge or magistrate or the proper officer of the court certifies that the time allowed for appealing from the order has expired, and either that no appeal therefrom has been taken or that any appeal taken therefrom has been disposed of,

or

(b) in the case of an order to which Section 21 (1) (c) applies or in any case of an order relating to a judgment for alimony or maintenance, either

i) the application for the order under Section 21 (1) is made by or on behalf of the party in whose favour the judgment for alimony or maintenance was made; or

ii) the making of the order under Section 21 (1) is consented to by both parties, as evidenced by the signature of each party or his counsel.

21. (3) The judge or magistrate to whom an application for an order is made under subsection (1) may make the order on such terms as, in the circumstances of the case, he deems to be reasonable and just *and in the case of an order under this Act or under Section 28 (8) of "The Wives' and Children's Maintenance Act" made pursuant to subsection (2) (a), or (b), the order shall include provisions in the form set out in Schedule E, or to the like effect.*

SCHEDULE E

Upon the application of pursuant to Section 28 (8) of "The Wives' and Children's Maintenance Act" (or Section 21 of "The Judgments Act") etc., and it appearing that (here set out the circumstances in 21 (2) a, or b (i) or b (ii):

IT IS HEREBY ORDERED the order made by this Court on the day of , 19 , and signed on the day of , 19 be and the same is hereby (specify whether partially or wholly discharged, postponed, etc.) so far as it affects the lands legally described as:

REPORT #4

REPORT
ON
"AN ACT RESPECTING BILLIARD AND POOL ROOMS"
PROPOSED REPEAL

The subject of this Report is "An Act Respecting Billiard and Pool Rooms", Chapter B30, R.S.M. 1970, its apparent philosophy and actual social utility.

The Commission undertook this study upon reference from the Honourable the Attorney-General received on March 29, 1971, in which we were requested to convey "...any recommendations with respect to the Act that might require legislation...".

Upon undertaking this study the Commission placed display advertisements in the province's major daily and weekly newspapers inviting public opinion as to whether the prohibition expressed in Section 1(1) of the Act ought to be continued, abolished or varied in some way. In addition to the advertisements, we specifically canvassed opinion on this subject, by letter, from the persons and groups identified in Appendix "A" to this Report. The key section of the Act, upon which we invited opinion is:

> 1(1) Every keeper of a licensed or unlicensed billiard, pool, or bagatelle room who admits a minor under the age of eighteen years thereto, or allows him to remain therein, without the consent of his parent or guardian, is guilty of an offence and liable, on summary conviction before a justice of the peace, to a fine not exceeding twenty-five dollars for the first offence and not exceeding fifty dollars for each subsequent offence, and one-half of any such fine shall go to the informant.

In complete candor we acknowledge that **only two** of our correspondents—but **not** the one collegiate student council which responded—unequivocally advocated outright abolition of the prohibition expressed in Section 1(1) of the Act. Although some of our correspondents suggested abolition as an alternative to reducing the age to which parental consent is required, most of our correspondents favoured retention of the prohibition and of these latter, a significant number suggested reduction of the prescribed age limit. On the part of these, the prevalent suggestion is to reduce the age limit at which parental consent is required from 18 years to 16, and to prohibit children under the age of 14 absolutely from admission, under any circumstances.

No one suggests that the games of billiards and pool are inherently evil or socially sinister. (One rarely, if ever, sees bagatelle played or even offered these days in recreational establishments.) Indeed, we are well aware that in some homes and in many quite respectable clubs these games are played for the same

sort of innocent recreation as one plays darts, ping-pong, bowling, checkers or table hockey.

It is apparent to us, from reviewing the Act and our correspondents' responses, that the past and present objections to the presence of minors in billiard rooms and pool halls rest not on the nature of the games themselves, but on the social conditions and atmosphere of the premises in which the games are offered.

Legislation on this subject was first enacted in Manitoba by Chapter 2, 6-7 Edward VII, "An Act respecting Billiard and Pool Rooms", which was accorded Royal Assent on February 13, 1907. Other prohibitions were enacted and later repealed so that, (with the exception of Section 5 relating to closing hours in unorganized territory) the Act remains basically the same today as it was when first enacted in 1907.

We note that provincial legislatures have not taken a consistent approach to the problem of age restrictions required to gain entrance to commercial and recreational facilities. A perusal of billiard and poolroom and similar legislation across Canada reveals various approaches which provincial legislatures have followed to protect the moral well-being of the younger generation.

In British Columbia there is an absolute prohibition against persons under the age of 16 years entering poolrooms. On prosecution, a person is deemed to be a "youth" (i.e. under 16 years of age) unless the contrary is proved. In Alberta, billiard rooms and bowling alleys were regulated under the same statute until 1958 when references to playing the game of bowling were repealed. In 1962, the Legislature of Alberta repealed the age restriction upon employment in bowling alleys. At the same time, the age requirement for entrance to billiard parlours was reduced to 16 years from 18 years.

Saskatchewan, alone among the western provinces, chooses to delegate the authority for regulating the age at which a person may enter a billiard parlour to the various city and town councils.

"The Minors' Protection Act" of Ontario (R.S.O. 1960, c. 243) provided that no child under the age of 18 years could enter a billiard parlour unless accompanied by a parent or guardian. This provision was repealed in 1968. As a result, Ontario has no billiard parlour legislation. Quebec prohibits the playing of billiards **and** bowling by any person under the age of 18 years. Other regulations regarding billiard parlours and bowling alleys are left to local authority.

In the Maritimes, only New Brunswick has no "poolroom legislation." In Nova Scotia, the towns regulate bowling alleys and billiard rooms and may enact by-laws which would establish a curfew prohibiting children under the age of 16 years from frequenting "places of amusement" after a designated hour. Prince Edward Island and Newfoundland have nearly identical legislation to that of Nova Scotia, except that in Prince Edward Island the curfew age is 15 years while in Newfoundland (and in New Brunswick) the town councils have free hands in establishing the curfew age.

Manitoba has legislated the toughest "poolroom legislation" in the country by prohibiting anyone under the age of 18 years from entering a billiard parlour, except with the consent of a parent or guardian. Moreover, the Manitoba Act makes provisions for enabling police officers to enter and search the premises as a mode of enforcing the legislation.

As stated, the main concern of legislators seems to have been the social conditions and atmosphere of the premises in which the games are offered commercially. Of the range of games available in various premises, billiards and pool seem pre-eminently not to be so-called "family" games, in practice, as distinguished from bowling, for example. In our judgment the legislation, itself, together with the reaction it engenders in the community and among the keepers of billiard and pool rooms, has contributed inexorably to the attitudes and atmosphere of "non-respectability" about such premises. We do note that in recent years the proprietors of some billiard and pool rooms have attempted to attract a mixed clientele. To that end they have effected brighter, more open and more tasteful re-decoration and re-arrangement of their premises so as to make them seem less forbidding to women and girls. Nevertheless billiard and poolrooms do not generally attract family or team players as do bowling establishments, for example. We think that this factor may well tend to be self-perpetuating in view of the disapproval with which the law regards "billiard, pool, or bagatelle rooms".

In reiterating the observable sociological distinctions between bowling establishments and billiard and pool rooms we acknowledge that they are partly due to the different natures and physical requirements of the respective games. Bowling lends itself well to team participation and requires large, brightly lighted premises, but billiards and pool lend themselves more readily to individual, "one against one", type participation and can be accommodated in confined and generally ill-lighted premises. These aspects of pool and billiards make for a more casual and personal contact and association between spectators and players, alike, of whatever age or proclivity. Again because the nature of pool and billiards involves the pitting of the skill of one player directly in obstruction and intervention of and in, that of the other, the outcome of such games is much more attractive to bettors than games in which the players achieve their scores independent of the efforts of other players, as in bowling, for example.

Thus, we recognize that billiard and pool rooms can be, and no doubt are, attractive to youths resorting to them for mere innocent recreation, but also to drug "pushers" and a criminal element generally. In making this observation, we do not mean so to characterize all billiard and pool rooms indiscriminately. By the same token, the less well operated and appointed billiard and pool rooms are not the only establishments in the community which attract the community's unsavory elements. We emphasize, however, that the effect of the Act is not to "sanitize" the billiard and pool rooms of unsavory characters, but rather to impede access to such places by young persons. There are many other commercial establishments and public places in Manitoba to which access is rightly accorded to young persons, but which are also not "sanitized."

In light of these considerations, we think that the concept of parental responsibility which the Act invokes is founded on a good principle, but, from our enquiries and personal knowledge of the practices indulged in by proprietors and patrons alike under this system, we seriously doubt that it is even minimally effective. Although the Act does not require the consent of the parent or guardian to be in writing, we observe that most, if not all, proprietors (for their own protection at least) dispense consent forms which young patrons return to them signed by someone. Which young patrons do this? All who look to be under the prescribed age do it. Those who really and truly obtain the consent of an actual parent or guardian are truly exempted from the prohibition expressed in the Act. Those who really and truly consult a parent or guardian and actually abide by

the result of that consultation are not the young people whom the Act purports to protect, although it may induce the consultation in the first place. We asked ourselves if it were not altogether too easy to flout the Act and parents' non-consent, also: we conclude that the answer is "yes." There is no sanction imposed on the young patron who breaches the parental consent provision of the Act and therefore no effective deterrent to the young; and that provision is no worry to the proprietor who has a signed consent form to match every young patron who appears to be under the prescribed age.

Section 2 declares that it is an offence for the keeper of such premises **knowingly** to permit "gambling, drunkenness, or any violent, quarrelsome, riotous, or disorderly conduct to take place in his premises, or" to permit or to suffer "persons of notoriously bad character to assemble or meet on his premises." It seems to us that many of these matters are already adequately provided for under other laws (*Criminal Code*, "The Liquor Control Act" and others). The prosecution quite rightly must prove knowledge which it would be relatively easy to establish in cases of violent or riotous conduct if the keeper were present, but which might not be easy in cases of gambling on the outcome of games. Who is of notoriously bad character? The motorcycle club member? The long-haired, bearded youth? The ex-inmate of a gaol or penitentiary? And who can be certain that there is only one bad character at a time on one's premises, since this section forbids the proprietor's permitting or suffering them only to "**assemble** or **meet** on his premises"?

Section 3 authorizes the arrest on view of any person contravening Section 2. Of course, if Section 2 were repealed the *raison d'être* of Section 3 would vanish.

Section 4 provides:

> 4. All police officers and provincial constables shall aid in enforcing this Act, and in detecting and preventing any violation thereof, and every police officer and provincial constable may, for any such purpose as aforesaid, enter into any and every part of any building in which there is a licensed or unlicensed billiard, pool, or bagatelle room and the premises connected therewith, and make searches in every part thereof.

Unless the Act is invoked as a necessary aid in enforcing the anti-narcotics laws, Section 4 seems far too drastic for the patent objectives of this Act. If the Act is meant to be invoked for such purposes, it should say so.

One municipal police department did indicate that the Act is useful in allowing "the Police to keep a certain amount of control on billiard parlor operators to prevent juveniles congregating in billiard halls or poolrooms or using these premises as hangouts." This department cited certain instances of using such premises for transactions in drugs and stolen goods, for glue-sniffing, and as a starting point for disorderly conduct and wilful damage to the property of persons living in the vicinity. This department's reply went on to say: "Prosecutions ensued as a result of investigations pertaining to all of these instances but I am sure you will agree that prevention is preferable to prosecution."

Another municipal police department replied in these terms:

> "It was deemed advisable years ago, particularly during hard times, when pool rooms were in fact frequented by boosters and other criminal types, to have the police attend at irregular intervals for the pur-

pose of detecting stolen goods, etc. I presume that Sec. 4 of the Act was enacted primarily for this purpose. In my view, now that we have the drug phenomenon it would still be advantageous to have police check these places not only for drug pushers but also for what I have referred to above. A check of these places would reveal known drug users to the police which would inevitably lead to pushers making contact with addicts who in many cases frequent pool rooms as well as cafes, etc. However, as you say, this should be spelled out within the law."

We certainly have not considered lightly the views expressed by these and the other municipal police departments who have responded thoughtfully to our enquiries. On balance, however, we consider it wrong in principle to maintain a statute which, on the surface, is enacted to regulate billiard rooms, as a kind of limited writ of assistance.

It would appear that the matters which are the subject of Section 5 are adequately covered by the *Lord's Day Act,* and this section could be repealed without any effect on the lives of the people of Manitoba.

Upon deliberating on all of the foregoing we have concluded that while "An Act Respecting Billiard and Pool Rooms" (Chapter B30, R.S.M. 1970) may have been enacted upon sound philosophy in 1907, its social utility today is not demonstrable. Its provisions, we consider, are inconsistent with the realities of life in Manitoba, at this point in history. We do not assert that there is utterly no moral risk to young folk in frequenting any billiard or pool room whatever; but we do assert that this law is ineffective to protect them from such risks; that an ineffectual law is not a good law; and that this law itself contributes to the covert atmosphere and faintly sinister image of billiard and pool rooms.

We recommend that Chapter B30 of the Revised Statutes of Manitoba, 1970, "An Act Respecting Billiard and Pool Rooms" be repealed.

We also recommend that, in logical consequence, the words "public pool room or" be deleted from item (k) of Section 6(1) of "The Child Welfare Act" so that "a child who frequents or visits a public pool room" could no longer be deemed to be a "neglected child" within the meaning of this Act.

This is a report pursuant to Section 5(3) of "The Law Reform Commission Act".

Dated this 19th day of October 1971.

Francis C. Muldoon, Chairman

Val Werier, Commissioner

R. Dale Gibson, Commissioner

Sybil Shack, Commissioner

C. Myrna Bowman, Commissioner

Ken Hanly, Commissioner

Robert G. Smethurst, Commissioner

APPENDIX "A"

PERSONS CANVASSED FOR OPINIONS REGARDING "AN ACT RESPECTING BILLIARD AND POOL ROOMS"

School Presidents of:

Neelin High, Brandon
Brandon Collegiate Institute
Portage Collegiate Institute
Tech-Voc High
Sisler High
St. John's High
Kelvin High
Grant Park High
Gordon Bell High
Daniel MacIntyre High School
Churchill High
Garden City Collegiate
West Kildonan Collegiate
Dakota Collegiate
Glenlawn Collegiate
Windsor Park Collegiate
Louis Riel Collegiate
River East Collegiate
Miles Macdonell Collegiate
*Nelson McIntyre Collegiate

Police Chiefs of:

Charleswood
East St. Paul
North Kildonan
Old Kildonan and West St. Paul
*St. James Assiniboia
*Fort Garry
*Transcona
St. Vital
*East Kildonan
Tuxedo
West Kildonan
*St. Boniface
*Winnipeg
*Brandon

Executive Directors of:

*The Children's Aid Society of Winnipeg
*The Children's Aid Society of Eastern Manitoba
The Children's Aid Society of Central Manitoba
The Children's Aid Society of Western Manitoba
The Jewish Child and Family Service

Correspondents who responded to our direct invitation to express an opinion are identified above with an asterisk (*) and those others who responded, presumably to our newspaper advertisements, are listed as follows :

Deputy Minister of Education
Mrs. Georgina A. Boux, Brandon, Manitoba
Mr. George Cocar, Thompson, Manitoba
One anonymous reply

REPORT
ON
RECOMMENDED RIGHT OF MORTGAGORS TO OBTAIN ANNUAL STATEMENTS

The subject of this report is the provision of a right for mortgagors to obtain at least once per year on demand and without charge from their mortgagees, a statement setting out the balance of account between the two parties and the apportionment of payments made by the mortgagor as between principal, interest and (where applicable) taxes.

We note that at present, although most corporate mortgagees do supply, either automatically or on demand, such a statement to their mortgagors, no legal obligation to do so is imposed on mortgagees by "The Mortgage Act".

We have, in considering the creation of such a right by statute, consulted with members of the Mortgage Loans Association of Manitoba and have had correspondence with a number of corporate mortgagees in this regard. We regard it unnecessary to provide for the automatic furnishing of such a statement, since many mortgagors neither desire nor indeed have need for such a statement. At least one practicing solicitor has commented that some mortgagors, on receipt of such a statement, have interpreted the document as a request for extra payments and have become unduly agitated about the matter.

Our recommendation is, therefore, that the statement be made available expeditiously on request but without obliging the mortgagee automatically to provide annual statements to all mortgagors whether they want such or not.

We also realized that certain mortgagors might abuse this facility if it is unrestricted. Therefore, we think that any requests made by the mortgagor over and above the supply of one statement per year except for pay-out and sale purposes could legitimately be subject to a reasonable charge made by the mortgagor. The provision of a right to request the statement under these conditions would be equitable to both the mortgagor and the mortgagee; it would give the mortgagor the opportunity to be conversant with the state of accounts as between himself and the mortgagee and would not place an unduly onerous duty upon the mortgagee. No violent opposition came from representatives of the various lending institutions with whom we consulted in this matter, subject to the attaching of the restriction referred to above.

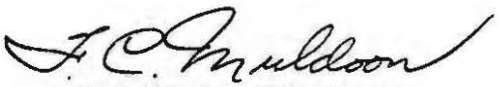
We, therefore, recommend that an amendment be made to "The Mortgage Act" to include a provision of this nature, and we attach as an Appendix to this report a model amendment which may serve as an illustration of the form which the amendment could take.

We acknowledge the valuable assistance of those members of the mortgage loan industry, the benefit of whose advice we have received in this matter.

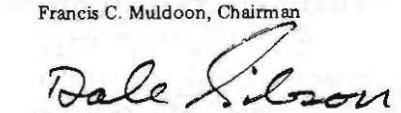
We note a recent amendment to "The Consumer Protection Act" which expresses the principle of our recommendation in a similar field of borrower-lender relations. We refer to the newly enacted provisions added to Section 19 of that Act. There are discrepancies between the respective methods of obtaining detailed accounts of the borrowers indebtedness set out in the new amendments, and in our recommendations for projected amendments to "The Mortgage Act". These discrepancies do not create any direct conflict, because the newly amended provisions of "The Consumer Protection Act" do not apply to real property mortgages. Because this matter of securing an annual statement of the outstanding debt secured by real property mortgage was referred to us by the Honourable the Attorney-General, we addressed ourselves to that question specifically. If our recommendations regarding real property mortgages be translated into legislation, then we think the astute course would be to watch with vigilance the actual practical effects of the respective modalities, and ultimately to make the more efficacious provisions apply to all types of indebtedness, where practical, and no matter how secured. This Commission would be an appropriate body to perform that task.

This is a report pursuant to Section 5(3) of "The Law Reform Commission Act".

Dated this 19th day of October 1971.



Francis C. Muldoon, Chairman

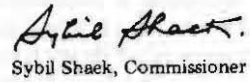


R. Dale Gibson, Commissioner

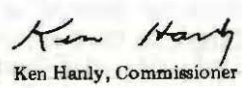
C. Myrna Bowman, Commissioner

Robert G. Smethurst, Commissioner

Val Werier, Commissioner



Sybil Shaek, Commissioner



Ken Hanly, Commissioner

APPENDIX
PROPOSED AMENDMENT TO "THE MORTGAGE ACT"

Request for statement

25(1) A mortgagor, as long as his right to redeem subsists, may, in writing, request the mortgagee to furnish to the mortgagor a statement of account of the mortgage debt.

Mortgagee to furnish statement of account

25(2) Where a mortgagee receives a request under subsection (1) to furnish a statement of account for the mortgage debt, he shall, within fourteen days of the date he receives the written request, at no cost to the mortgagor, furnish to the mortgagor or his authorized agent a statement in writing accurately setting out

(a) the amount of payments credited, including apportionment as between principal, interest, and if applicable, taxes;

(b) the amount of any payments made by the mortgagee and charged to the mortgagor's account indicating the nature of the payments;

(c) the amount of the outstanding balance owing on the mortgage debt as of the date of the last credited payment;

(d) the date of the last credited payment; and

(e) the status of the tax account, where tax instalments have been paid to the mortgagee.

Statement may be required once a year

25(3) Subject to subsection (4), a mortgagor is not entitled to receive a statement of account of the mortgage debt more than once in any single period of twelve months.

Account for payoff or sale

25(4) Where a statement of account of the mortgage debt is required in order to pay off the mortgage debt or in connection with the sale of the mortgaged property, the mortgagor may, in writing, request the statement to be furnished before the expiration of twelve months after a previous statement of account was furnished; but, in that case, the statement need not cover a period of time greater than twelve months, or the period of time that has elapsed since any previous statement was furnished under this section, whichever is the shorter period.

Costs of obtaining statement elsewhere

25(5) Every mortgagee who fails to comply with the request of the mortgagor for a statement under this section shall, in addition to any other penalty or damages to which he may be liable, suffer the reasonable costs incurred by the mortgagor in obtaining a computed statement of account of the mortgage debt elsewhere to be credited to the mortgagor as against the mortgage debt; and the amount of those costs shall be conclusively deemed to have been a payment in reduction of the principal balance outstanding as of the date upon which the amount of those costs is signified to the mortgagee by the mortgagor or his authorized agent, if the mortgagor or his authorized agent signifies the amount of those costs in writing by mail

or otherwise within thirty days of the date on which the mortgagee failed to comply with the request made by the mortgagor under this section.

Notice in mortgage

25(6) Every mortgage instrument executed on or after the day of 1972 shall have printed or stamped thereon in bold-face characters or in variant coloured ink the words *"The Mortgage Act provides that the mortgagor can obtain, free of charge, from the mortgagee a statement of the debts secured by this mortgage once every twelve months, or as needed for payoff or sale."*

Voluntary furnishing of statement

25(7) Where a mortgagee habitually and voluntarily furnishes to the mortgagor an annual statement of account of the mortgage debt containing the information described in subsection (2), the statement shall be deemed to be a statement furnished in compliance with subsection (2), unless the mortgagor first informs the mortgagee that a statement of account of the mortgage debt is required at a time or month in each year that is different from the time or month at which the statement is habitually and voluntarily furnished; and, in that case, that mortgagor shall make a request in accordance with subsection (1).

REPORT
ON
THE ENACTMENT OF A MINERAL DECLARATORY ACT

The subject of this report is the enactment of a Mineral Declaratory Act.

We note that under Section 1 (20) of "The Mines Act" "mineral" is defined as "all non-living substances formed by the processes of nature which occur on or under the surface of the ground irrespective of chemical or physical state, and includes peat, but does not include agricultural soil, surface water or ground water except such ground water as is obtained from a well." Sand and gravel are thus placed in the category of "minerals" for the purposes of "The Mines Act" and related legislation; if, for any particular and limited purpose, it has been the intent of the Legislature to exclude sand and gravel from this category, it has proved necessary expressly so to provide, as for example, in "The Mineral Exploration Assistance Act", where Section 1 (e) provides that " 'mineral' means mineral as defined in "The Mines Act," but does not include sand or gravel."

As a result of the classification of sand and gravel as minerals, many owners of land who have granted mineral leases or other rights in their land without being conversant with the categorization of sand and gravel as minerals have later found themselves unable to deal with the sand and gravel on their land. To many farmers and other landowners this situation did and does represent a very real economic hardship; similar instances have been noted where present owners took land subject to a reservation of minerals by the prior owner. We have noted that the problem described has been encountered primarily in the south-western part of the Province where it has been common for landowners to grant mineral rights to (particularly) petroleum companies for the purposes of exploration.

In considering this problem, we have scrutinized the legislation of all other Provinces bearing upon the matter. We note that in the Provinces of Alberta and Saskatchewan legislation has been enacted ("The Sand and Gravel Act", R.S.A. 1955, Chapter 296; "The Sand and Gravel Act", R.S.S. 1965, Chapter 414) which, in each case, has the effect of removing sand and gravel from the category of "minerals" and vesting ownership of them in the owner of the surface of the land. Section 2(a) of "The Mineral Act" of British Columbia achieves a similar result through its definition of "mineral" to exclude specifically sand and gravel. Other Provinces do not appear to have legislated specifically for this matter.

We felt, in our consideration of this matter, that it was desirable that all parties who might be interested in the issue should have drawn to their attention the fact that we had the matter under advice, and should be given an opportunity

of expressing their views and opinions. We, therefore, placed advertisements in daily and weekly newspapers inviting expressions of opinion from the public; at the same time we sent a circular letter in similar terms to such interested parties as sand and gravel companies, oil companies, lawyers, etc. The form of advertisement is Appendix "A" to this report.

Response to our enquiries was substantial; we received approximately fifty letters signed by almost one hundred people (some letters were signed by up to fifteen people). Almost without exception the opinions expressed supported the enactment of legislation in terms which we now recommend. In addition to the opinions of individual landowners, similar views were expressed by several Rural Municipalities. The list of correspondents is Appendix "B" to this report.

We note that certain rights created by "The Crown Lands Act" and "The Mining Royalty and Tax Act" could be found to be in conflict with certain of our recommendations; we, therefore, recommend that, in the case of such conflict, the provision of "The Crown Lands Act" or of "The Mining Royalty and Tax Act" as the case may be shall prevail.

In brief, the principal effect of these recommendations would be to vest in the owner of the surface of any land, the ownership of sand and gravel found in or on the land. (Such vesting would take place subject to rights of the Crown and municipalities already existing.) Sand and gravel deposits would, at the same time, be deemed not to be mines, minerals or valuable stone, but would be deemed to be part of the surface of the land in or on which they are situated.

The draft Bill attached as Appendix "C" to this report was not drafted by the Law Reform Commission, but was received as an enclosure with the letter from Legislative Counsel who, on behalf of the Attorney-General, requested our opinion on the Bill. Our opinion is that the Bill does substantially meet and provide for the enactment of the bulk of the recommendations which we put forward. We would, however, draw attention to two sub-sections of the Bill which we feel could be reconsidered with advantage; our remarks are directed to ss. 10(2) and 11(1) of the Bill.

Section 10 provides, in sub-section (1), that where sand or gravel has been dealt with or removed by one acting *bona fide* and claiming through the owner of the minerals in the land, or being the owner of the minerals, then where the dealing or removal occurs before the date of coming into force of the Act (or, in certain circumstances thereafter) the owner of the surface shall not have a right of action in respect thereof. Sub-section (2) provides that the holder of any interest in any sand or gravel derived from the owner of the minerals in the land prior to the coming into effect of the Act shall not have any claim for compensation after the coming into effect of the Act, except for any rental paid in advance in respect of any period after the coming into effect of the Act. It seems clear that the effect of this Section, with which we agree, renders neither the owner of mines and minerals nor the holder of the purported interest in sand and gravel liable to account to the surface owner for either payments received or sand and gravel extracted prior to the coming into effect of the proposed Act. We shall consider this subsection later in regard to compensation.

In relation to sub-section 11(1) of the draft Act, we would suggest that the division into paragraphs (a) and (b) of the text of that sub-section is unnecessary and that the sub-section be re-drafted to read as a continuous narrative thus:

> 11(1) Nothing in this Part affects the title to, or interest in, the sand and gravel within, upon, or under any land or the right to work or remove it, where that title, interest, or right arises from any patent, title, grant, deed, conveyance, lease, licence, agreement, disposition, or other document, heretofore or hereafter made or issued by the owner of the surface of the land at the time; or by an Act of the Legislature or of the Parliament of Canada; that expressly grants, transfers, conveys, or disposes of, that title or interest or right with respect to sand and gravel.

We have a lively apprehension of the possibility of quite unforeseen situations coming to light as a result of the legislation which we propose. For example, it is possible that there may have been actual Certificates of Title to sand and gravel issued, which are derived not from the surface owner's interest, but from a mines-and-minerals owner's interest, without the knowledge, assent or participation of the surface owner. If any such situations exist, we think they must be extremely rare. Nevertheless, we recommend that such deprivation of title to sand and gravel, which would be effected by the enactment of a Mineral Declaratory Act, ought to be specifically compensible under an appropriate amendment to Section 167 of "The Real Property Act" or under some other statutory provision to the same end.

We make this recommendation after no little deliberation, despite our suspicion that few, if any, cases will come within its scope. The people of Manitoba regard a Certificate of Title to be guaranteed by the Province and to be as secure as the Province, itself. The spirit and intent of Section 167(2) of "The Real Property Act", though few could recite it, are vividly sensed by our people; it provides in part:

> 167(2) A person deprived of any land ... or of any estate or interest therein ... by the registration of any other person as owner of the land, ... estate, or interest ... and who by this Act is precluded from bringing an action for the recovery of the land, ... or the estate or interest therein, may bring an action against the district registrar of the district in which the land is situated for the recovery of the damage suffered thereby.

Thus, if the mineral declaratory provisions which we recommend were translated into legislation, the registration of the surface owner as owner of the sand and gravel would be effected and confirmed; and those few, if any, titleholders whose title to sand and gravel was derived from a mines-and-minerals title would be effectively deprived of their "land...or of any estate or interest therein" by an Act of the very institution which all regard as the guarantor of titles. They should be compensated. Because their deprivation would be effected not by error, omission, misdescription, misfeasance or fraud, but by a deliberate (and justifiable) Act of the Legislature, it would hardly seem proper to make them have to go so far as to "bring an action against the district registrar...for recovery of the damage suffered thereby." We do assert that they should have this right at least, if not a more effective one.

We think that unnecessary litigation should be avoided and that it would be avoided if the projected statute itself enunciated that the measure of damages be confined to the consideration expressed in the Transfer of Land, or the actual purchase price (with or without interest to date), or the present actual value of the estate or interest.

We think that compensation could never, on such a prescribed measure, be perfect and we think that the legislator ought not to agonize unduly over the inevitable imperfection of the compensation. In setting right a long-standing legal ambiguity, one can foresee that someone who has come, perhaps quite innocently and in good faith, to occupy the role of the potential or notional exploiter may suffer damages. Therefore, we assert that although the game of formulating "perfect" compensation may not be worth the candle, neither would it be just to deprive such persons of any compensation. We accordingly recommend **some** reasonable, legislatively prescribed compensation for those few, if any, who may find themselves on the wrong side of an historic ambiguity, now to be resolved by the Legislature's enacting that sand and gravel really have always belonged to the surface owner.

We further recommend that those who hold leases of sand and gravel, or *profit-à-prendre* agreements, or the like, derived from a mines-and-minerals title (as distinct from the so-called surface title) ought to be treated in the like manner to that in which the holder of a similarly derivative sand-and-gravel title is treated upon the statutory suppression of his title. As we recommend some reasonable, legislatively prescribed compensation for the titleholder, so we recommend for the leaseholder. Thus, where a lease or *profit-à-prendre* of sand and gravel has been accorded by the owner or lessee of the bare mines-and-minerals for current payment upon current actual extraction, then, we recommend that such arrangement be simply terminated without compensation, but, of course, without any fetter on the lessee's right to approach the surface owner (newly confirmed as the sand and gravel owner) to attempt to negotiate a renewal or a new arrangement. Where the arrangement is for a long term and the lessee has paid, and the lessor has accepted payment in advance, then, we recommend that the lessee be compensated (from public funds) for the prepaid balance of the newly abolished term, since his deprivation of his prepaid term would be effected by the tribunes of the public in Legislature Assembled. Once again we would urge them not to agonize unduly in the quest for a perfect measure of compensation. But once again we do urge some reasonable compensation for the deliberate legislative destruction of what were legitimately thought to have been valid and valuable legal arrangements. The draft Act which appears as Appendix "C" to this report gives, or at least does not take away a right of "action for the refund of any rental paid in advance in respect of the" arrangement to extract sand and gravel. Even though, as it would now transpire, the owner or lessee of mines and minerals will have no right to sell the sand and gravel for which he has already received payment, we doubt the justice of requiring him to refund money which he may already have spent, secure in the knowledge that the sand and gravel would never evaporate, deteriorate or disappear. It may be, in many instances, that the refund would be claimed from the widow or other heirs of the person who purported to sell sand and gravel. It is true that his right to sell it has been doubtful. The Mineral Declaratory Act which we recommend will remove the doubt, and will *ex post facto* nullify the right. We think that because it is impractical, if not impossible, to tailor legislation to each specific case (many of which are not even known to the legislator in detail) subsection (2) of Section 10 of the Act ought not to accord a right of action for refund against the owner or lessee of mines and minerals. The Legislature, which nullifies *ex post facto* that doubtful right, should provide for refunds in whole or in part from public funds. We acknowledge that we do not know, nor could we practically ascertain, the number

and extent of the instances in which refunds would be claimed.

We should not want to recommend compensation provisions which could create abuses. Thus, we should not want to encourage mines and minerals owners and lessees, now to accept payments in advance which would be literally "found money". As noted, we placed advertisements in a wide number of daily and weekly newspapers inviting public opinion and offering a copy of the draft Act to anyone interested. The advertisements appeared in April, 1971. We, therefore, recommend that all claims for compensation or refund for sums advanced or titles issued (we are confident that there are none) after May 1st, 1971 be barred by statute.

Insofar as compensation is concerned, we recommend that the Land Value Appraisal Commission or some temporarily and similarly constituted body be the tribunal of first instance, with a right of appeal on the record by the holder of a suppressed title or lease to the Court of Appeal or some other designated court whose judgment ought to be final. In order to achieve certain finality to such proceedings, we recommend that after intensive public notice, all claims for compensation ought to be statute-barred if not brought or commenced within two years after the coming into force of the proposed mineral declaratory legislation. Relief similar to that afforded by Part II of *"The Limitation of Actions Act"* ought to be provided. We make this recommendation fully aware of the possibility that such two year period may elapse even before written notice may be given pursuant to Section 10(1) (b) of the draft Act, in some instances.

We think it must go almost without saying that we do not consider that all *profits-à-prendre* across the board ought to be compensible. We consider that only *profits-à-prendre* relative to sand and gravel which were acquired by specific grant derived from a mines-and-minerals title or lease, for valuable consideration, ought to be compensible. No compensation ought to be accorded for suppressed *profits-à-prendre* acquired by prescription, user, by voluntary grant, or without valuable consideration in advance, for future removal, having passed to the grantor.

The foregoing recommendations concerning the cancellation of certain titles (if any) and leases to sand and gravel, with limited compensation, constitute a majority report. It is in regard only to the concept of cancellation or suppression of any such Certificates of Title, especially *profit-à-prendre* type agreements, that there is disagreement among us, and not on the course to follow if such suppression of those few titles (if any) becomes legislative policy. The majority regards the extinguishing of such titles or agreements as are found, to be philosophically akin to expropriation for a public purpose.

Three Commissioners, Mr. Smethurst, Mrs. Bowman and Miss Shack, consider that it would be wrong in principle to extinguish such titles (if any) or to suppress such agreements, even to carry out the intent of the proposed legislation. They assert that, because it is important to maintain faith in the Torrens System, it would be wise to enact an exception in favour of the validity of such Certificates of Title (and leases, licenses and *profit-à-prendre* agreements) and to provide a formula to compensate the surface owner. The minority point of view also acknowledges, but emphasizes that parties who have acted in good faith, and in the honest belief that ownership of mines and minerals imported ownership of sand and gravel, would now have to suffer this form of "expropriation." This minority of the Commissioners would prefer to deprive the surface owner of the intended benefit of the proposed statute, but with compensation; and to

leave the sand and gravel titles (if any) and agreements undisturbed.

The principle enunciated here by the minority is expressed in Section 5 of *The Clay and Marl Act* of Alberta. in relation to grants of leases or other dispositions of clay and marl made prior to April 12th, 1961. The section provides that it applies only during the current term of the lease or other disposition and does not apply to any renewal, extension or continuation of it. Certificates of Title are not mentioned in this regard in the Alberta statute. The named minority of the Commissioners would prefer to have the recommended Manitoba legislation include a similar validating section in relation to such titles (if any) and leases, licences and agreements created by a transfer or grant from the mines-and-minerals owner. They would prefer it further to include a provision according the surface owner compensation upon proof of loss or damage suffered as a result of such validation. It should be noted that we are unanimous in our recommendations as to the manner of awarding compensation despite our differing opinions as to the dispositions of titles and agreements which might be found to have originated in and from ownership or enjoyment of mines-and-minerals only. Our only difference of opinion as to compensation is simply as to the direction in which it should go.

Further consideration as to the contents of the Schedule to the draft Bill (Appendix "C") might profitably be undertaken by technical advisors to the Crown. Several years after passage of *The Sand and Gravel Act,* the Alberta Legislature enacted *The Clay and Marl Act*[1] which deals with the named substances in similar fashion to the earlier Alberta statute's disposition of sand and gravel. The draft Bill (Appendix "C") declares marl, for example, "to be, and at all times to have been, a mineral."

We would, in making the recommendations contained in this Report and the Appendices thereto, draw attention to a matter which, while not forming an integral part of the subject of our Report, is related thereto and which is felt to represent an issue which merits study and possibly the making of further recommendations by the appropriate department of government. We refer to the matter of environmental protection and restoration in connection with mining operations, with particular reference to the removal of sand and gravel from the surface or sub-soil of the land.

We are concerned to note, from a memorandum transmitted to us by the Department of Mines, Resources and Environmental Management, that "most mining operations unfortunately are detrimental to the landscape, greatly reducing or even eliminating normal land values and uses. Removal of soil, exposure of sterile deposits, development of steep banks and disturbed drainage patterns all affect the rate of reclamation of an area by natural vegetation. Many such acres now remain unproductive in terms of either trees, wildlife, agriculture or recreational potential. In numerous instances these areas appear as blots on the landscape. The cost of rehabilitating such areas, restoring them to a more pleasurable appearance and productive use is enormous. Lack of topsoil alone, for example, is a major factor inhibiting natural growth or plantings. In time these denuded areas will gradually be revegetated by natural processes, but only in terms of hundreds of years."

It has been stated, similarly, in a recent publication of the Ontario Department of Mines entitled "A guide for site development and rehabilitation of pits and

[1] Chapter 14, Statutes of Alberta, 1961.

quarries" that "as far as possible the extraction operation that makes an excavation, which may require repairs, should be combined with land shaping operations to convert the mined out land into a different, attractive and useful form during and after the course of the extractive operation." (The publication goes on to list the objectives of planning the rehabilitation of mining sites.)

We note that a number of other Provinces have concerned themselves with this issue. In Ontario, the Niagara Escarpment Protection Act (S.O. 1970, C. 31) regulated such operations, albeit within a limited area; during recent months, a more general Bill governing the removal of sand and gravel throughout Ontario has been placed before the Ontario Legislature. Similarly, legislation in other Provinces (e.g. The Surface Reclamation Act, S.A. 1963, C. 64, as amended S.A. 1967, C. 78) has created in those provinces duties, placed upon those who remove materials from the surface of the land, to restore and reclaim the land and to leave the surface of the land in a condition satisfactory to the appropriate Minister.

We recognize that the implementation of the recommendations contained in this Report and the Appendices thereto may lead to an increase in the rate of removal of sand and gravel from the surface and sub-soil of the land. We would, therefore, suggest that the Government of Manitoba refer to the appropriate Department, for consideration and action if deemed desirable, the specific matter arising out of the recommendations herein contained and the wider issue of the rehabilitation of mining lands in general.

In addition to making the enquiries described above, we consulted, in the course of formulating our recommendations on this subject, Mr. R.H. Tallin, Legislative Counsel; Mr. Donald M. Lamont, Registrar General of The Land Titles Office; Messrs. W. Winston Mair, Deputy Minister of Mines, M.J. Gobert, Senior Assistant Deputy Minister, J.S. Roper, Director of Mines; W.H. Hurlburt, Q.C., The Alberta Institute of Law Research and Reform; John B. Dea, Barrister & Solicitor, Field Hyndman, Edmonton; C.W. Truscott, Master of Titles, Regina; H.E. McCombs, Registrar, South Alberta Land Registration District; Peter G. Schmidt, Solicitor, North Alberta Land Registration District; Mr. Frank O. Meighen, Q.C., of Brandon and a number of practicing solicitors whose advice and assistance we acknowledge. We also acknowledge the valuable work of Prof. John M. Sharp, Chief Research Officer to the Commission.

We studied and noted, in addition, the deliberations and recommendations of the Attorney-General's former Law Reform Committee in this matter.

A summary of our recommendations in regard to the draft Act, is Appendix "D" to this report.

This is a report pursuant to Section 5(3) of "The Law Reform Commission Act."

Dated this 20th day of December, 1971.

Val Werier, Commissioner

Francis C. Muldoon, Chairman

Sybil Shack, Commissioner

C. Myrne Bowman, Commissioner

R. Dale Gibson, Commissioner

Ken Hanly, Commissioner

Robert G. Smethurst, Commissioner

APPENDIX "A"

MANITOBA

LAW REFORM COMMISSION
COMMISSION DE REFORME DU DROIT
INVITES YOUR OPINION

The Law Reform Commission has under consideration the rights of a landowner to sand and gravel which may be on the surface of his land. The Mines Act of Manitoba does not exclude sand and gravel from its definition of "minerals." As a result, confusion may arise when a landowner grants rights to "minerals" in his land, or when a reservation of "mines and minerals" is made on the sale of land. Similar problems sometimes arise in relation to other Provincial statutes affecting mineral rights. (In a number of other Provinces where the same problems arose, sand and gravel have been excluded from the general definition of "minerals.")

The Commission will be pleased to have the opinions of landowners, grantees of mineral rights, sand and gravel suppliers, farmers, lawyers with experience in this matter, and others. Letters or briefs should be forwarded to the Law Reform Commission before May 26th, next. Copies of a draft statute are available at this office on request.

Francis C. Muldoon, Q.C.
Chairman
Law Reform Commission
331 Law Courts Building
Winnipeg, Manitoba.

APPENDIX "B"

LIST OF CORRESPONDENTS

J.T. McJannet
Mr. and Mrs. C.V. Clark
E.J. Finch
C.R. Baskerville
C.C. Lounsbury
W. Glen Spratt
R.M. of Winchester
R.M. of Elton
N. Howard Wiebe
Mr. and Mrs. J.B. Johnson
R.M. of Brenda
R.M. of Cornwallis
W.T. Regan
George MacKay
L.H. Beare
A. Beare
R.M. of Argyle
Lyle G. Baker
N.K. Connon
Ross C. George
L.A. Alexander
Ron Ardiel
Grant Hargreaves
Purcell Baker
R.M. of Cameron
W. Winston Mair
Lawrence Gemmill
C.G. Mulholland
S.E.M. Spratt
Manitoba Stock Growers' Association
Donna Wiebe
G. Feuder
R.M. of Morton
R.M. of Sifton
R.M. of Daly
Mr. and Mrs. Walter R. Leslie
Mr. and Mrs. John F. Baker
Wm. Beare
L.F. Beare
Ellen I. Baker
Dennis L. Baker
Morris Feuer
Tom Norquay
Ronnie W. Robins
J.V. Baker
Keith Blight
Don Robins
Roy Baker
Doug Grossart
Keith Chapman
Lillian Coate
A.W. Kent
R.M. of Springfield
Frank O. Meighen
R.M. of Roblin
R.M. of Woodworth
R.M. of Oakland
Canadian National Railways
R.M. of Strathcona
Alan P. Cantor
John B. Dea
H.E. McCombs
B.W. Kreller
Ben Bergman
G.K. McPherson
Ernest Nicol
Margaret Roddick
R.M. of Arthur
R.M. of Pipestone
R.M. of Riverside
M.J. Gobert
R.M. of Albert
R.M. of North Cypress
R.M. of Wallace
D.M. Lamont
W.H. Hurlburt
C.W. Truscott
Peter G. Schmidt

APPENDIX "C"

DRAFT BILL

THE MINERAL DECLARATORY ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definition of "sand and gravel"

1. In this Act "sand and gravel" means sand and gravel occurring on the surface of land, or that is obtainable from land by stripping off the over-burden and excavating from the surface.

Application

2. This Act applies to all lands in the province and to the owners thereof, including the Crown in right of Manitoba.

PART I
SPECIAL SUBSTANCES

Substances declared minerals

3. Each substance named in the Schedule hereto that naturally occurs within, upon, or under land is hereby declared to be, and at all times to have been, a mineral.

Dealings in substances before notice

4. Where any substance named in the Schedule hereto has been dealt with or removed from any land by the owner of any part of the land, other than that substance, or by any person claiming through that owner, acting in good faith and in the honest belief that he was entitled thereto

(a) before the date this Act comes into force; or

(b) after the date this Act comes into force but before the date on which dealing with or removal of the substance is contested by the owner thereof by written notice to the person dealing with or removing the substance;

no right of action lies against the owner of the land other than the substance, or the person dealing with or removing the substance, for damages or for compensation by reason of that dealing with or that removal of the substance other than a right of action that would have existed against that owner if he had been the owner of the substance.

Right of surface owner

5. A person who owns or has an interest in the surface of land but who does not own or have an interest in a substance named in the Schedule hereto occurring within, upon, or under the land, may

(a) excavate and otherwise disturb the substance for the purpose of constructing, maintaining or abandoning any building, water well, road, highway or other structure, that he is entitled to construct, maintain or abandon, incidental to the use or occupancy of the surface of the land;

(b) disturb the substance in the course of any operations that he is entitled to conduct at or on the surface of the land; and

(c) excavate or otherwise disturb the substance for the purpose of carrying on farming operations on the land that he is entitled to carry on;

without permission from, or compensation to, any person owning or having an interest in any substance named in the Schedule.

Construction of public works

6. (1) Notwithstanding anything contained in this or any other Act, where the Crown or a municipality

(a) owns the surface of any land; or

(b) has the right to excavate and carry away material from the surface of any land;

the Crown or the municipality may, for the purpose of constructing, maintaining or abandoning a highway, thoroughfare, street, road, trail, avenue, parkway, driveway, viaduct, lane, alley, square, bridge, crossway, trestleway, culvert, ditch, drain, water control work, building, structure, or other public work, excavate and carry away any substance named in the Schedule hereto that naturally occurs upon, within, or under that land without permission from, or compensation to, any person owning or having an interest in any substance named in the Schedule.

Definition of "municipality"

(2) In this section "municipality" includes a school division, school district, school area, local government district, The Metropolitan Corporation of Greater Winnipeg, and the Commissioner of Northern Affairs.

PART II
SAND AND GRAVEL

Part subject to Crown Lands Act and Mining Royalty and Tax Act

7. This Part is subject to The Crown Lands Act and The Mining Royalty and Tax Act; and, where any provision of this Part is, in its application to any parcel of land or the owner thereof, in conflict with, or repugnant to, a provision of The Crown Lands Act, or The Mining Royalty and Tax Act, the provision of The Crown Lands Act, or of The Mining Royalty and Tax Act, as the case may be, prevails over the provision of this Act.

Ownership of sand and gravel

8. Subject to Section 11, the owner of the surface of any land is, and shall be deemed to have always been, the owner of and entitled to all sand and gravel within, upon, or under the land.

Sand and gravel deemed not to be a mineral

9. (1) Sand and gravel shall be deemed not to be a mine, mineral, or valuable stone, but, subject to section 11, shall be deemed to be, and to have always been, a part of the surface of the land within, upon, or under which it is situated and to belong to the owner thereof.

Sand and gravel not owned by owner of minerals

(2) Notwithstanding any patents, titles, grants, deeds, conveyance, lease, licence, agreement, disposition, or any document, heretofore or hereafter issued or made, that contains or reserves mines, minerals or valuable stone, but, subject to section 11, the owner of the mines, minerals, or valuable stone, within, upon, or under any land is not entitled to the sand and gravel within, upon, or under that land as against the owner of the surface of that land.

Restriction on right of action with respect to certain sand and gravel

10. (1) Where any sand and gravel has been dealt with or removed from any land by the owner of the mines, minerals, or valuable stone, or by any person claiming through him, acting in good faith and in the honest belief that he was entitled thereto

(a) before the date this Act comes into force; or

(b) after the date this Act comes into force but before the date on which the dealing with or removal of the sand and gravel is contested by the owner thereof by written notice to the person dealing with or removing the sand and gravel;

the owner of the surface of the land does not have any right of action for damages or for compensation by reason of that dealing with, or removal of, the sand and gravel other than such right of action as he would have had if the person who removed the sand and gravel had been the owner of it.

Restriction on right of action against owner of mines and minerals

(2) The holder of any interest, by way of lease, permit, licence, or other disposition, in any sand and gravel derived from the owner of the mines, minerals, or valuable stone, prior to the coming into force of this Act does not have any right of action against that owner for damages or for compensation by reason of the owner having granted the interest in the sand and gravel to the holder, except an action for the refund of any rental paid in advance in respect of the interest for any period subsequent to the coming into force of this Act.

Saving clause

11. (1) Nothing in this Part affects the title to, or interest in, the sand and gravel within, upon, or under any land or the right to work or remove it, where that title, interest, or right arises from:

(a) any patent, title, grant, deed, conveyance, lease, licence, agreement, disposition, or other document, heretofore or hereafter made or issued by the owner of the surface of the land at the time; or

(b) by an Act of the Legislature or of the Parliament of Canada; that expressly grants, transfers, conveys,

or disposes of, that title or interest or right with respect to sand and gravel.

Idem

(2) Nothing in this Part affects the title to, or any interest in, the sand and gravel within, upon, or under any land or the right to work or remove it, where that title, interest, or right arises from

(a) an express reservation of sand and gravel in any patent, title, grant, deed, conveyance, lease, licence, agreement, disposition, or other document, heretofore or hereafter made by the owner of the surface of the land at the time; or

(b) an express reservation of sand and gravel under an Act of the Legislature or of the Parliament of Canada.

Commencement of Act

12. This Act comes into force on

SCHEDULE

Amber
Anhydrite
Asbestos
Bentonite
Diatomite
Dolomite
Fire Clay
Stone usable for structural decorative or industrial purpose
Gypsum
Kaolin
Limestone
Marl
Potassium Salts
Rock Phosphates
Sandstone
Serpentine
Shale
All Soluble Salts

APPENDIX "D"

(Synopsis of recommendations for convenience. The authoritative interpretation of the recommendations ought to be taken from the actual text of this Report.)

WE RECOMMEND:

1. The enactment of a Mineral Declaratory Act similar in terms to the draft Act which is Appendix "C" to this Report, whereby ownership of sand and gravel is vested in the owner of the surface of land;
2. that subsections (1) and (2) of Section 11 of the draft Act be consolidated;
3. that all purported rights to remove sand and gravel which were not and are not accorded by the surface owner be extinguished;
4. that all such purported rights to remove sand and gravel which are not based on payment in advance for future removal and which were not accorded before May 1st, 1971, be extinguished without compensation;
5. that (i) Deeds and Certificates of Title (if any) to sand and gravel which do not originate from a conveyance from the surface owner and (ii) all leases, *profit-à-prendre* agreements or other arrangements for removal of sand and gravel which were not accorded by the surface owner and under which advance payments have been made for the right to remove sand and gravel after the coming into force of the proposed Act, be suppressed, and that compensation be paid to those so deprived from public funds;
6. that reference to an action for the refund of advance payments be deleted from Section 10(2) of the draft Act;
7. that all claims for compensation as provided above, if not asserted within two years after the coming into force of the proposed Act, be barred; but with provisions akin to those expressed in Part II of *"The Limitation of Actions Act"*;
8. that the coming into force of the proposed Act be intensively publicized by the government;
9. that the basis of compensation be prescribed in the proposed Act and that actual compensation, if any, be fixed after adjudication by the Land Value Appraisal Commission or a similar tribunal, subject to final determination on appeal to the Court of Appeal, or another court, designated in the legislation;
10. that regulations, based on sound ecological premises, be formulated by the appropriate governmental authority in relation to the removal of sand and gravel to safeguard the environment.

NOTE:

Recommendations 3, 4 and 5 are not unanimous, but express the views of the majority of the Commissioners.