MANITOBA

LAW REFORM COMMISSION
COMMISSION DE RÉFORME DU DROIT

REPORT

ON

AN INTERNATIONAL FORM OF WILL FOR MANITOBANS

Report #17

May 6, 1974

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

Kenneth R. Hanly

Professor Paul Thomas 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.

The subject of this Report is an international form of will for Manitobans.

The Diplomatic Conference on the Uniform Law governing the Form of the International Will met during the period of October 16th - 26th, 1973, at Washington, U.S.A. It convened at the invitation of the United States government. The governments of 42 countries, including Canada, were represented at the Conference. The chief of the Canadian delegation was H. Allan Leal, Q.C., the distinguished Chairman of the Ontario Law Reform Commission. The other Canadian delegates were:

Jacques Roy
Civil Law Section
Department of Justice
Government of Canada

Kenneth Lloyd Burke
Legal Division
Department of External Affairs
Government of Canada

The Conference had before it a draft Convention providing for a Uniform Law on the Form of the International Will which, after clause by clause discussion, formulation and acceptance, appears in final form as Appendix "A" to this Report. It is open for signature at Washington until December 31, 1974.

Mr. Leal reported for the delegation to the Government of Canada on November 13, 1973. In his report he touched on a number of matters, including an analysis of the Convention. Appendix "B" to this report consists of pages 5 to 15, both inclusive, of Mr. Leal's delegation report to Ottawa.

In considering this matter the Commission was helped by a further analysis of the Convention performed by our Chief Research Officer, Prof. Paul Thomas. His memorandum is annexed as Appendix "C" to this Report.

Finally, there is the conventional uniform law on the form of an international will, which itself is annexed to the Convention. This proposed uniform law is set out as Appendix "D" to this Report. As is apparent from a reading of Article I and Article VIII of the Convention (Appendix "A" hereto) in order to obtain the benefits of the Convention a province must enact the uniform law virtually as it was drafted with only minor additions. The federal state clause in Article XIV, as Mr. Leal says on page 6 of Appendix "B" hereto, enables Canada to ratify the Convention after requested to by any province or provinces and after that province or those provinces had enacted (but not necessarily proclaimed into force) the uniform law of the Convention. If so enacted, the uniform law should be proclaimed to come into force in the province six months after the instrument of ratification has been deposited, so that it will achieve local force and effect at the same time as it achieves international force and effect.

Although the provision of an international form of will is not of pressing social priority in Manitoba, yet it could accord many red-tape-cutting benefits to Manitobans, and not least to immigrants and emigrants. The extent of the benefits will be commensurate with the number of countries which ultimately ratify and accede to the Convention. The greater the number of countries, provinces and territories in which the international form of will is recognized in law, the more useful it will be.

Insofar as the present practice of making wills is concerned, the additional formalities required for an international will are not very burdensome at all. If implementation and ratification were to be effected in Manitoba, one might foresee that most of our people's wills would be executed in international form as a matter of course, for the sheer utility and flexibility of obtaining international validity as to form.

The Commission therefore recommends:

1. *That the* Uniform Law on the Form of an International Will *(Appendix "D" hereto) be enacted as a new part of* "The Wills Act", *Cap. W150 of the Statutes of Manitoba with such further provisions only as may be necessary to give the* Uniform Law *full effect in Manitoba; and*
2. *That the Government of Manitoba formally request the Government of Canada to adopt and ratify the* Convention Providing a Uniform Law on the Form of an International Will *formulated at Washington, October 1973, for implementation in and for the Province of Manitoba.*

This is a Report made pursuant to Section 5(2) of *"The Law Reform Commission Act"*, dated this 6th day of May, 1974.

F.C. Muldoon, Q.C., Chairman

R. Dale Gibson, Commissioner

C. Myrna Bowman, Commissioner

R.G. Smethurst, Q.C., Commissioner

Val Werier, Commissioner

Sybil Shack, Commissioner

Kenneth R. Hanly, Commissioner

APPENDIX "A"

CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

The States signatory to the present Convention,

DESIRING to provide to a greater extent for the respecting of last wills by establishing an additional form of will hereinafter to be called an "international will" which, if employed, would dispense to some extent with the search for the applicable law;

HAVE RESOLVED to conclude a Convention for this purpose and have agreed upon the following provisions:

Article I

1. Each Contracting Party undertakes that not later than six months after the date of entry into force of this Convention in respect of that Party it shall introduce into its law the rules regarding an international will set out in the Annex to this Convention.

2. Each Contracting Party may introduce the provisions of the Annex into its law either by reproducing the actual text, or by translating it into its official language or languages.

3. Each Contracting Party may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory.

4. Each Contracting Party shall submit to the Depository Government the text of the rules introduced into its national law in order to implement the provisions of this Convention.

Article II

1. Each Contracting Party shall implement the provisions of the Annex in its law, within the period provided for in the preceding article, by designating the persons who, in its territory, shall be authorized to act in connection with international wills. It may also designate as a person authorized to act with regard to its nationals its diplomatic or consular agents abroad insofar as the local law does not prohibit it.

2. The Party shall notify such designation, as well as any modifications thereof, to the Depository Government.

Article III

The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties.

Article IV

The effectiveness of the certificate provided for in Article 10 of the Annex shall be recognized in the territories of all Contracting Parties.

Article V

1. The conditions requisite to acting as a witness of an international will shall be governed by the law under which the authorized person was designated. The same rule shall apply as regards an interpreter who is called upon to act.

2. Nonetheless no one shall be disqualified to act as a witness of an international will solely because he is an alien.

Article VI

1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.

2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

Article VII

The safekeeping of an international will shall be governed by the law under which the authorized person was designated.

Article VIII

No reservation shall be admitted to this Convention or to its Annex.

Article IX

1. The present Convention shall be open for signature at Washington from October 26, 1973, until December 31, 1974.

2. The Convention shall be subject to ratification.

3. Instruments of ratification shall be deposited with the Government of the United States of America, which shall be the Depository Government.

Article X

1. The Convention shall be open indefinitely for accession.

2. Instruments of accession shall be deposited with the Depository Government.

Article XI

1. The present Convention shall enter into force six months after the date of deposit of the fifth instrument of ratification or accession with the Depository Government.

2. In the case of each State which ratifies this Convention or accedes to it after the fifth instrument of ratification or accession has been deposited, this Convention shall enter into force six months after the deposit of its own instrument of ratification or accession.

Article XII

1. Any Contracting Party may denounce this Convention by written notification to the Depository Government.

2. Such denunciation shall take effect twelve months from the date on which the Depository Government has received the notification, but such denunciation shall not affect the validity of any will made during the period that the Convention was in effect for the denouncing State.

Article XIII

1. Any State may, when it deposits its instrument of ratification or accession or at any time thereafter, declare, by a notice addressed to the Depository Government, that this Convention shall apply to all or part of the territories for the international relations of which it is responsible.

2. Such declaration shall have effect six months after the date on which the Depository Government shall have received notice thereof or, if at the end of such period the Convention has not yet come into force, from the date of its entry into force.

3. Each Contracting Party which has made a declaration in accordance with paragraph 1 of this Article may, in accordance with Article XII, denounce this Convention in relation to all or part of the territories concerned.

Article XIV

1. If a State has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Depository Government and shall state expressly the territorial units to which the Convention applies.

Article XV

If a Contracting Party has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, any reference to the internal law of the place where the will is made or to the law under which the authorized person has been appointed to act in connection with international wills shall be construed in accordance with the constitutional system of the Party concerned.

Article XVI

1. The original of the present Convention, in the English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited with the Government of the United States of America, which shall transmit certified copies thereof to each of the signatory and acceding States and to the International Institute for the Unification of Private Law.

2. The Depository Government shall give notice to the signatory and acceding States, and to the International Institute for the Unification of Private Law, of:

(a) any signature;

(b) the deposit of any instrument of ratification or accession;

(c) any date on which this Convention enters into force in accordance with Article XI;

(d) any communication received in accordance with Article I, paragraph 4;

(e) any notice received in accordance with Article II, paragraph 2;

(f) any declaration received in accordance with Article XIII, paragraph 2, and the date on which such declaration takes effect;

(g) any denunciation received in accordance with Article XII, paragraph 1, or Article XIII, paragraph 3, and the date on which the denunciation takes effect;

(h) any declaration received in accordance with Article XIV, paragraph 2, and the date on which the declaration takes effect.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized to that effect, have signed the present Convention.

DONE at Washington this twenty-sixth day of October, one thousand nine hundred and seventy-three.

APPENDIX "B"

EXERPT FROM REPORT OF CHIEF OF CANADIAN DELEGATION

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The Work of the Conference

After two weeks devoted to a clause by clause analysis of the draft Convention and the Uniform Law and having considered related matters, the Conference completed its work with the formulation and acceptance of the following documents:

1. A Convention making provision for a Uniform Law on the Form of the International Will. The Convention which is open for signature at Washington from October 26, 1973 until December 3, 1974 is annexed hereto as Appendix E;
2. An Annex to the Convention containing the text of the Uniform Law (Appendix E); and
3. A resolution concerning a system of safekeeping for International Wills. The resolution is annexed to this report as Appendix F.

Analysis of the Convention

Article I

The obligation in paragraph 1 that each contracting party not later than six months after the date of entry into force of the Convention in respect of that party shall introduce into its law the rules regarding an international will as provided in the Uniform Law must be read with the provisions of Article XI and, as far as Canada is concerned, Article XIV.

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Article XI provides that the Convention shall enter into force after the date of deposit of the fifth instrument of ratification. For those states ratifying after the fifth instrument of ratification, the Convention shall enter into force six months after the deposit of their own instrument of ratification.

The provisions of the federal state clause in Article XIV enables Canada to ratify on behalf of one or more of the provinces. It would appear therefore that Canada could ratify the Convention after any one province had enacted the Uniform Law and the Convention shall enter into force with respect to that province six months after the instrument of ratification had been deposited.

Paragraph 3 of Article I was added to the draft Convention by the Conference for the purpose of enabling any given State to add the necessary

provisions to the Uniform Law in accordance with its own style of legislation to complete the legislative scheme and make the Uniform Law fully effective in its own jurisdiction. This was a compromise to avoid the strictures of paragraph 2. Paragraph 4 was also added by the Conference and was necessary for the purposes of information in view of the addition of paragraph 3.

Article II

Paragraph 1 provides that the persons authorized to act in connection with international wills shall be designated by the Contracting Party on

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ratification. Presumably, in Canada, this is a matter for the individual provinces. This would appear to cause no difficulty, in the sense that all practitioners must be members of the law society and subject to its control, since each of the provinces has an integrated bar, and in addition, the Province of Quebec has the office of notaire. In the common law provinces it is common practice to have a will executed before the solicitor who drafted it.

The second sentence of paragraph 1 was added by the Conference since it is common practice with many states to have their diplomatic and consular officials perform these duties abroad with respect to their own nationals. It is subject to any overriding prohibition of the local law in the place where the act is done. An attempt to extend the jurisdiction to ships captains, airline pilots and the like was rejected after full debate. It may be that a change in the practice of Canadian diplomatic or consular agents in this regard may be desirable. Our information is that this service is not provided at the present time.

Article III

This article in the draft Convention was amended by the Conference to delete paragraph 2 which provided for the recognition, in limited circumstances, of an international will made in a non-contracting state.

Article IV

The use of the word "effectiveness" in the English text and, indeed, the

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use of the word "valeur" in the French text of this article may seem a little strange. It is simply illustrative of the many compromises in drafting that must be made when establishing the text of a multi-lateral and multi-lingual treaty or convention. It is probably meant to convey in English "validity and effect".

Article V

This article of the draft Convention was also amended by the Conference. The word "internal" was removed here and throughout the Convention to ensure that the reference to "law" would also include the choice of law rules of the forum. The provision with respect to interpreters was added since there is no prescription that the will should be drafted in the language of the testator and in that event the will would have to be translated or interpreted for him. The word "interpreter" here is referable to linguistics and not construction of the words used. The remaining changes in wording are matters of elegance and style and not substance.

Article VI

The reference to the certificate is new in paragraph 1. It does not appear in the draft Convention. A form for the certificate was added to the Uniform Law by the Conference.

Paragraph 2 of the draft Convention was amended by the Conference to make it clear that the competent authorities of the receiving state, in a case

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of doubt, might require evidence to be produced to authenticate the signature of the authorized person.

Article VII

This article does not appear in the draft Convention. There was a good deal of debate whether a scheme for the safekeeping of the international will should be made mandatory. In the end it was decided that this was a matter for the law of the place under which the authorized person was designated. The Conference strongly favoured the establishment in each state of a scheme for safekeeping but the language of the Resolution is framed in precatory language and, of course, it does not form part of the Convention or the Uniform Law.

Article VIII

This article of the draft Convention was retained but in the face of strong representations to permit reservations.

The Final Clauses

Articles IX to XVI comprise the so-called Final Clauses. Reference has already been made to Articles IX and XI. The denunciation clause in Article XI, paragraph 2, provides that denunciation shall take effect twelve months from the date on which the Depository Government has received the notification. There is an important qualification, however, which preserves the validity of any will made during the period that the Convention was in effect for the denouncing State.

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Articles XIII, XIV and XV contain the federal state clauses. Article XIII was in the draft Convention as Article XII and is otherwise known as the "colonial clause" since it enables the metropolitan governments such as the United Kingdom and the Netherlands to ratify the Convention on behalf of its territories outside the metropolitan territory. The representatives of the U.S.S.R. took strong objection to the inclusion of such a clause alleging that it was in breach of the declaration of the United Nations against colonialism. The clause was retained on a divided vote.

The draft Convention contained the draft of an unnumbered article of a clause concerning federal states. Both in its advance commentary and at the Conference, the Canadian representatives pressed for the adoption of a more acceptable wording. Annexed hereto as Appendix G is document P/25, being the proposal submitted by the Canadian delegation at the Conference. This proposal received the strong support of the federal states represented at the Conference and appeared to be acceptable to the unitary states as well. It was opposed strenuously and surprisingly, however, by the representative of Australia. After much debate, negotiating and redrafting Article XIV was accepted as originally drafted with the objection of Australia being noted. Article XIV is essential to enable Canada to ratify the Convention and it is in the form adopted for the Conventions of the Hague Conference, Twelfth Session in 1972.

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Article XV of the present Convention is not in the form of the Canadian proposal. Its alteration resulted from the Australian intervention and represents a compromise which would permit the Australian federal authority to legislate in the matter of the form of an international will — or so it is alleged. So far as we can ascertain it presents no constitutional problems for Canada.

It should be emphasized that the Canadian delegation attended the Conference with a specific directive to insist on a federal state clause in the form now appearing in Article XIV and so it is with some satisfaction that we can report — mission accomplished!

Analysis of the Uniform Law

Article I

The opening words of this article make it clear that the Uniform Law is only dealing with the prerequisites for formal validity of a will. Not all breaches of the prescriptions of the Uniform Law will lead to invalidity. The sanction of invalidity applies only with respect to the provisions contained in Articles 2 to 5. This reference in the draft Convention was limited to Articles 2 to 4 but a new article 2 was added by the Conference precluding the validity of joint wills as an international will. The joint will would appear to be a creature of the common law and they are not allowed in the Province of Quebec even with respect to a will "in English form".

Article 3

This was Article 2 in the draft Uniform Law and caused little difficulty.

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It was thought preferable to change the order of paragraphs 2 and 3 from the original draft.

Article 5

This article created some controversy. In jurisdictions which recognize the mystic will it is common practice for the will to be brought before the notary in a sealed envelope. The desire to maintain the absolute secrecy of the will is recognized by the expedient of placing the necessary signatures on the envelope. Some jurisdictions were loath to surrender this privilege but eventual agreement was reached that the international will should carry the signatures on the instrument itself.

Paragraph 2 of Article 5 did not appear in the original draft of Article 4. The developing African countries, due to a high level of illiteracy prevailing there, made a strong case for special provisions covering testators who are unable to sign. There are other reasons, of course, why a testator may be unable to sign and there was general agreement that this should not result in loss of testamentary power. A strong difference of opinion arose, however, as to whether the familiar practice in common law jurisdictions of allowing a third party to sign on behalf of the testator and at his direction would be accepted. The civil law generally prohibits such a procedure although the law of the U.S.S.R. is similar to the common law. In result, the practice was approved if the law of the authorized person designated sanctioned such a procedure.

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Although it is not absolutely clear, it would appear that all signatories must sign in the presence of all others. This is inferred at least from the use of the words "then and there" in the English text and "sur le champ" in the French text.

Articles 6 and 7

The compliance with these articles is not a condition precedent to the formal validity of the international will. They refer, for the most part, to matters which are frequently followed in the engrossing and execution of wills in English form but are not required by law. The one exception is that contained in paragraph 1 of Article 6 referable to the place of signature which is a condition precedent to validity in the common law provinces of Canada.

Articles 9, 10, 11, 12 and 13

These articles deal with the certificate to be completed by the authorized person and attached to the will, retaining one copy for himself

and delivering another copy to the testator. These provisions cannot be considered onerous having in mind the substantial advantages that flow from having a will in a form that is acceptable to all signatories to the Convention.

Article 14

Although the making of an international will is attended with special formalities its revocation may be brought about by what might be referred to as revocation in "common form". The inclusion of this provision in the Uniform Law was not arrived at without considerable debate and difference of opinion. It is difficult to envisage, however, what alternatives would be

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acceptable bearing in mind the diverse methods by which wills may be revoked, including physical destruction and, in certain circumstances, subsequent marriage of the testator.

Article 15

The provisions of Article 15 are not dissimilar to those provisions contained in the Canada Evidence Act, the provincial evidence acts, and the former model acts of the Conference of Commissioners on the Uniformity of Legislation in Canada. It is to be hoped that they are given wider acceptance and application.

The Resolution

Although perhaps not happily worded, the resolution gives expression to a desideratum that is well recognized even with respect to domestic wills. It is generally recognized that the estates of a substantial number of deceased persons are administered as on an intestacy whereas the testator has made a will. It is not being overly cynical to state that many persons have cause to conceal the fact that a will has been made. Some jurisdictions, such as the Province of Quebec, provide for compulsory registration of certain relevant information pertaining to the fact that a will has been made. This facilitates post mortem inquiry without jeopardizing the privacy of this essential information during the testator's lifetime.

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Some of the common law provinces have statutory provisions for the deposit of a will for safekeeping. These procedures are voluntary and not used frequently. There is common ground that registration should not be a condition precedent to the validity of the will. But short of that there is ample scope for procedures to be fashioned both as to safekeeping the will itself and providing a ready reference after the death of the testator for information concerning the fact that a will has been made. Lines of investigation and action to ensure these results, within the spirit of the Resolution, should be welcomed by the provinces.

Conclusion

May I record here my special thanks and appreciation to Mr. Kenneth L. Burke and Mr. Jacques Roy. At all times they demonstrated a wide knowledge of the subject matter and a singular devotion to the tasks assigned to them. They were entirely worthy representatives of their country on this important occasion. It was a privilege to work with them.

H. Allan Leal
Chief of Delegation

November 13, 1973

APPENDIX "C"

Memorandum

From: Paul Thomas, Chief Research Officer March 12, 1974

A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

As a result of The Diplomatic Conference on Wills held at Washington, D.C., October 16-26, 1973, the "Convention Providing a Uniform Law on The Form of an International Will" was set forth. As an annex to the Convention, the Uniform Law on the Form of an International Will was laid down. Canada could ratify the Convention should one of the Provinces enact the "Uniform Law" as part of the law of that Province. Under Article XI of The Convention, the Convention will enter into force with regard to the ratifying State, six months after the instrument of ratification is deposited. Provisions are made in the Convention for such deposit.

Since, therefore, it is open to each Province to decide whether to accede to the Uniform Law, this brief report is intended to place the proposed concept of the International Will in perspective for the purpose of possible adoption by Manitoba.

1. PRESENT LAW IN MANITOBA

Part II of The Manitoba Wills Act deals with principles of law to be applied in the case of wills where there is a conflict of laws. Thus, where a foreign element (extra-provincial or international) arises in a case involving wills, the rules set down in Part II will be applied by the court. These rules are concerned with the validity of wills and place the questions involved into two categories: a) manner and formalities of making a will and b) the intrinsic validity and effect of the will. Category b) will not here be dealt with extensively since the Convention is intended only to deal with manner and formalities of making a will. The general rules in the Act relating to intrinsic validity and effect are merely that if an interest in land is involved, the law of the place where the land is situated will be applied by the court hearing the case to decide the validity and effect of the will. If an interest in moveable property is involved, the law of the testator's domicile at death will be applied by the court.

Where the question in dispute is not whether a provision involving property in a will is valid and effective, but whether the manner of drawing a will or its form is valid, a different set of rules will be employed. (It is to be noted at this stage that the dividing line between manner and formalities on the one hand and intrinsic validity and effect on the other may well be clouded in some cases. However, suffice to say in this context that this problem will be one of classification for the court hearing the case.)

The object of the common law has always been to seek, wherever possible, to give effect to the intentions of the testator. With this policy in

mind, courts have tended to interpret wills so that they shall, if at all possible, be rendered valid. This policy seems to be reflected in The Manitoba Wills Act in dealing with a will having extra-provincial elements where the formal validity of the will is in question.

Section 37(3) in part, and section 38[1] suggest that the court in determining whether a will is formally valid, may make reference to a number of legal systems. If the will is formally valid by any *one* of these systems then it will be regarded as valid by the court. This is so even though the will might be formally invalid by the law in force in the jurisdiction where the court sits (the forum). Though the combined effect of 37(3) and 38 may be open to more than one interpretation due to unclear drafting, it is suggested that the following is the proper interpretation: By Section 38, when a question relating to manner and formalities of making a will regarding moveable property arises, whether the will be made in or outside the province, resort may be had to the following laws by the court: law of the place where the will was made; or law of the place where the testator was domiciled when the will was made; or law of the place where testator had his domicile of origin. Additionally by Section 37(3), again in the case of moveables, resort may also be had to the law of the place where the testator was domiciled at the time of his death. If the will is formally valid by any *one* of these systems, this will be accepted by the court in the case of moveable property. Section 37(2) makes it clear that if the problem involves land, then the law of the place where the land is situated shall be the only law considered in determining the validity of manner and formalities of making the will.

Example of operation of Sections referred to above

X is born in England and has his domicile of origin there. He emigrates to the U.S. when he is 21 and establishes a domicile in the State of New York. While staying with friends in California he makes an unwitnessed will on a piece of notepaper. A few years later he comes to live in Canada permanently and settles in Manitoba where he is domiciled at his death. The only will found is the notepaper signed by the testator in California. It disposes of land in New York and moveable property now in Manitoba. The case is before the Manitoba Surrogate Court. The following questions will arise as to the validity of the will:

1) Is the notepaper sufficient in terms of form for a will? If such a form as bequests on notepaper signed by the testator is valid by either English law (domicile of origin), New York law (domicile when will made), California law (where will made), or Manitoba law (domicile at death), the will is formally valid in the case of the moveables and will be admitted to probate. In the case of the New York land, the formal validity of the will will be determined under New York law.

2) Are the bequests themselves valid and effective? Here, in the case of the land, validity will be determined by New York law. In the case of the moveables, Manitoba law (domicile at death) will be employed.

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1 *"The Wills Act"* cap. W150, C.C.S.M.

The operations of these rules apply, of course, only to the question of admitting the will to probate and allowing the executor or administrator to begin his work of collecting the assets and paying the debts. Questions of succession are dealt with by common law conflict of laws rules.

2. APPLICATION OF THE UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL IN RELATION TO THE MANITOBA WILLS ACT

1. The Uniform Law is intended to *supplement* the rules in The Manitoba Wills Act regarding manner and formalities of making a will. It will not deal at all with the question of intrinsic validity and effect.

2. Should the Uniform Law be adopted in Manitoba, it will mean that there will be acceptance of an additional form of will in this Province, namely, the "international will". This means that if the form of an "international will" as laid down in the Uniform Law is complied with, and such a will is laid before the Manitoba Court for probate purposes, then the Court will deem it formally valid regardless of where it is made. However, the question of intrinsic validity and effect will still be governed by section 37(2) and 37(3) of The Wills Act.

3. While The Wills Act, in enunciating a choice of law to determine formal validity talks of the "manner and formalities of making a will", the proposed Uniform Law refers only to validity as regards "form". Will this cause an interpretation problem should the Uniform Law be adopted? Probably not.

4. The Uniform Law will apply to all property — moveable or immoveable. Article 1.1,reads:

> A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

This would seem to be a departure from the scheme set out in The Manitoba Wills Act where questions relating to the formal validity and intrinsic validity of a will disposing of immoveables are always referred to the law of the place where such property is situated. What would be the result of adopting the international will in this context? Can it be said that the sovereignty of the lex situs in the case of immoveables is curtailed in a practical way? Probably there is a diminution of sovereignty on the comity level, but not on any other level. It must be remembered that questions of the validity and effect of the disposition of the immoveables will still be referred, by the Manitoba court, to the rules of the situs. Further, practical succession questions will obviously be governed by the lex situs. Thus in adopting the "international will", Manitoba will be assigning a particular status to such wills, distinct from other forms of wills which will be governed by other provisions of The Wills Act.

5. By Article 1.2 of The Uniform Law, the fact that a will is rendered invalid as an international will does not affect its formal validity as a will of another kind. Thus it would be open to the court to apply other sections of Part II of The Wills Act to the instrument of the testator which had failed as an "international will".

6. It should be noted that by Article 2, the Uniform Law does not apply "To the form of testamentary dispositions made by two or more persons in one instrument".

7. The Uniform Law envisages that execution of a will shall be by the testator with witnesses and a person "authorized to act in connection with international wills". Who is an authorized person for this purpose if a testator were making an "international will" in Manitoba? Article 11.1 provides that such persons shall be designated by the contracting party i.e. the signatory to the Convention. In the case of Canada as a contracting party, it would seem that who is to be an "authorized person" is to be a question for each province. It is again presumed that a "person authorized" will be a legal practitioner in all Provinces. (In addition, the Province of Québec could assign the notaire to this position.) By Article III of the Convention the capacity of the "authorized person" shall be recognized in the territory of the other contracting parties.

3. REQUIREMENTS OF AN INTERNATIONAL WILL

The will must be in writing, but not necessarily written by the testator himself. It can be in any language, in handwritten or other form (Article 3). There are detailed procedures relating to the execution of the will. The testator must declare in the presence of two witnesses and "a person authorized to act in connection with international wills", that this is his will and that he knows the contents (Article 4.1). But the testator must sign the will, or if he has already done so, acknowledge his signature (5.1). If the testator cannot sign he must indicate the reason to the "authorized person" who must make a note of this on the will (5.2). Additionally it is stated that the testator may be authorized by the law under which the authorized person was designated (probably the place of execution) to direct another person to sign on his behalf (5.2). This provision is intended merely to allow rather than preclude a person to sign on behalf of the testator should the requisite law allow. Lastly, witnesses and the authorized person shall "there and then" attest the will by signing in the testator's presence (5.3). Though not absolutely clear, it would appear that all signatories must sign in the presence of all others (Conv. V, VI).

In his commentary on The Uniform Law, Mr. Allan Leal, Chief of the Canadian Delegation, is of the opinion that the other two articles dealing with the form of an international will (Articles 6 and 7) are not mandatory. He states:

> The compliance with these articles is not a condition precedent to the formal validity of an international will. They refer for the most part, to matters which are frequently followed in the engrossing and execution of wills in English form but are not required by law. The one exception is that contained in Article 6.1 referable to the place of signature which is a condition precedent to validity in the common law provinces of Canada.

Nevertheless, both Articles 6 and 7 are couched in imperative form. The signatures *shall* be placed at the end of the will (6.1). If there are several written sheets in the will, each sheet *shall* be signed by the testator, or if he cannot sign, then by the person signing on his behalf or if there is no such person, by the authorized person. In addition each sheet *shall* be numbered (6.2). The date of the will *shall* be the date of its signature by the authorized person (7.1). This date *shall* be noted at the end of the will by the authorized person (7.2).

Apart from the above formalities there is a requirement in Articles 9 and 10 that the "authorized person" attach a detailed certificate (see Uniform Law attached) establishing that the obligations of The Uniform Law have been complied with. The authorized person will keep one copy and another is to be given to the testator (Article 11). No evidence to the contrary, this certificate is conclusive of formal validity (Article 12). But the absence of or irregularity in the certificate does not affect the formal validity of the will under The Uniform Law.

Article 14 is most enigmatic. It deals with revocation of wills and merely says that the international will *shall* be subject to the *ordinary rules* of revocation of wills. Can this mean that the domestic rules of the forum will be applied to decide if there has been revocation? Or will the conflict of laws rules of the forum be employed? It would seem probable that since foreign elements will be involved in the case, conflict rules will be used. This being so, the rules to be employed are fairly visible. For example, in Manitoba the question whether a will is revoked on marriage is to be determined by the law of the testator's domicile at the time of marriage. The decision of that law is binding on the forum. In a letter on this matter, received from Mr. Allan Leal, Head of the Canadian Delegation to the Convention, it was stated that the rules governing revocation were the choice of law rules (i.e. conflict of laws rules) of the forum.

The final article (Article 15) is an exhortation to the effect that in interpreting the law, regard shall be had to its international origin and the need for uniformity.

4. SAFEKEEPING OF INTERNATIONAL WILLS AND THE DRAFT RESOLUTION OF THE DRAFTING COMMITTEE OF THE DIPLOMATIC CONFERENCE

Article 8 of The Uniform Law states that in the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether the latter wishes to make a declaration concerning the safekeeping of the will. If so, and at the express request of the testator, the intended place of safekeeping shall be mentioned in the certificate that the authorized person draws up.

Apart from the provisions of Article 8, the Drafting Committee at the Diplomatic Conference saw fit to set down a Draft Resolution on the matter. The safekeeping of the will, it was felt, was an important question and there might be a particular problem in the case of an international will which might often be made by the testator when far from his home. It is arguable, however, that a testator may feel the need to keep secret the fact that he has made a will and may not wish it deposited in a public depository.

The Draft Resolution recommends the establishment of a system to facilitate "the safekeeping, search and discovery of international wills" using as a guide The Convention on the Establishment of a Scheme of Registration of Wills, signed at Basle on May 16, 1972.

It is to be noted that an active system of registration of wills is operative in Canada in the Province of Québec. Under The Notaries Act of that Province, the Board of Notaries can establish a central register of wills. In such register, the following information shall be entered: the name of the testator in full, capacity and residence of testator, date of such will and the name of the notary involved with the will. The privacy of the testator is respected in the Act. By section 201,

> no notary, provincial guardian or prothonotary who is a custodian of records shall grant communication or copies of any will or codicil except to the testator himself or to a person vested with his authorization executed en brevet or before two witnesses, or before having obtained the proof of the testator's death.

Also the Draft Resolution recommends that state signatories exchange information on such matters, and that each designate an authority or a service to handle such exchanges.

5. SIGNIFICANCE OF INTERNATIONAL WILLS

Those states signatories to the Convention will give recognition to a form of will as set down in The Uniform Law. The form of the international will is unique and by signing the Convention the signatory will accept that form as valid, despite its own domestic forms. But can such a will be made anywhere in the world? The need for specific procedures, "the authorized person" and "the certificate" suggests that the making of the will may only be facilitated in other signatory states. This would seem to be the correct interpretation of the Convention and Uniform Law. For example, Article III of the Convention reads: "The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a contracting party, shall be recognized in the territory of the other contracting parties". Mr. Leal comments that this article is the result of an amendment to delete a second paragraph to the article which provided for the recognition, in limited circumstances, of an international will made in a non-contracting state.

It would thus seem that the use to be made of the international will is going to be dependant on the number of signatories to the Convention. If widely adopted it will operate as a boon to the traveller, itinerant businessman and to the Manitoban leaving property abroad in a State signatory to the Convention. The system, fully developed, should also provide for procedures for safekeeping of the international will.

The Convention and Uniform Law is obscure in parts, but this would not seem to be a defect going to the fundamental design of the scheme. Though some traits of the "international will" are at variance with the domestic law of wills in Manitoba, this should have no significance as long as it is recognized that the "international will" stands in a category of its own.

APPENDIX "D"

ANNEX

UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

Article 1

1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

Article 2

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

Article 3

1. The will shall be made in writing.

2. It need not be written by the testator himself.

3. It may be written in any language, by hand or by any other means.

Article 4

1. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.

2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

Article 5

1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreoever, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.

3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

Article 6

1. The signatures shall be placed at the end of the will.

2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

Article 7

1. The date of the will shall be the date of its signature by the authorized person.

2. This date shall be noted at the end of the will by the authorized person.

Article 8

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

Article 9

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

Article 10

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

(Convention of October 26, 1973)

1. I, ... (name, address and capacity),

a person authorized to act in connection with international wills

2. Certify that on ..... (date) at ..... (place)

3. (testator) ..... (name, address, date and place of birth)

in my presence and that of the witnesses

4. (a) ..... (name, address, date and place of birth)

(b) ..... (name, address, date and place of birth)

has declared that the attached document is his will and that he knows the contents thereof.

5. I furthermore certify that:

6. (a) in my presence and in that of the witnesses

(1) the testator has signed the will or has acknowledged his signature previously affixed.

*(2) following a declaration of the testator stating that he was unable to sign his will for the following reason .....

.....

— I have mentioned this declaration on the will

* — the signature has been affixed by .....
(name, address)

7. (b) the witnesses and I have signed the will;

8. *(c) each page of the will has been signed by ..... and numbered;

9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;

10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;

11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:

.....

.....

12. PLACE

13. DATE

14. SIGNATURE and, if necessary, SEAL

* To be completed if appropriate.

Article 11

The authorized person shall keep a copy of the certificate and deliver another to the testator.

Article 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

Article 13

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

Article 14

The international will shall be subject to the ordinary rules of revocation of wills.

Article 15

In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation.