LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON
PRESUMPTIONS OF SURVIVORSHIP

LRC 56

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

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

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON PRESUMPTIONS OF SURVIVORSHIP

In 1978, the Commission added the law of succession to its programme. That topic has been divided into a series of discrete projects. This Report is the second in that series.

In this Report we examine problems that arise when two or more people die in circumstances which make it difficult to determine the order in which their deaths occur. The law of survivorship, or commorientes ("those dying together") is significant in determining succession rights, as well as entitlement to insurance proceeds.

In British Columbia, we have two approaches to resolving questions of survivorship. The *Survivorship and Presumption of Death Act* provides that death is presumed to occur in order of seniority. The *Insurance Act* provides that entitlement to insurance money is resolved by presuming that the beneficiary of the policy predeceased the person whose life was insured. If the same person is beneficiary of the estate and of the insurance policy, and is younger than the insured, totally inconsistent results occur depending on which presumption applies. The Commission has made recommendations to remove these inconsistencies.

CHAPTER I INTRODUCTION

A. General

In 1981 the Commission issued its first in a series of Reports on Wills and Succession, entitled *The Making and Revocation of Wills*. Working Papers on Interpretation of Wills and on Statutory Succession Rights have also been circulated. In this Report we will examine presumptions of survivorship that arise in
cases of simultaneous death or commorientes (literally, "those dying together").

Entitlement to a portion of the testator's estate depends upon the beneficiary surviving him. If the beneficiary predeceases the testator, in the absence of a contrary direction in a will or the operation of a rule of law peculiar to the circumstances, the testamentary gift to him lapses and falls back into the testator's estate. If the beneficiary survives the testator, even by only a moment, the beneficiary or the heirs of his estate, rather than those of the testator, will enjoy that benefit.

A person named in a will may die at nearly the same time as the testator in circumstances where it cannot be determined who lived longer. In order to know whether a testamentary gift will take effect or lapse, it is crucial to determine whether the beneficiary or the testator died first. The question of survivorship also figures in determining rights with respect to intestacies, insurance proceeds, and joint tenancies.

When two people die in a common disaster, whether one survived the other is purely a question of fact. At common law, if the evidence was insufficient to establish order of death, the question was decided against the representatives of the beneficiary. This approach led to significant problems which will be discussed in the next chapter.

Legislation was enacted in England in 1925 which stipulated that, when it was uncertain in what order two or more persons died, their order of death was to be determined by seniority. The younger was presumed to survive. Similar legislation was enacted in British Columbia in 1939.

While the English presumption solved some of the problems that arose at common law, it has many drawbacks, and one may question whether the presumption achieves reasonable results. Why should a gift, for example, intended for a beneficiary who will never enjoy it, go to that beneficiary's heirs and not back into
the testator's estate for distribution among his nextofkin? Moreover, our survivorship presumptions conflict with other statutory presumptions, and the courts have not been able to resolve adequately those conflicts.

For these reasons we have concluded that the law respecting commorientes should be examined. In the following chapters we will discuss survivorship presumptions at common law and under statute in British Columbia. Various approaches to survivorship legislation have been adopted in different jurisdictions and these are examined in Chapter III. In Chapter IV we consider options for reform.

B. Circulation

For most projects, before proceeding to Report, the usual practice of the Commission is to prepare a Working Paper. That Working Paper will discuss the law and the Commission's tentative conclusions for reform, and be given wide circulation for comment and criticism. We have departed from that practice for this
project.

Presumptions of Survivorship is a subject that has been thoroughly debated and studied in the past, and one which, we believe, is largely uncontroversial. Instead of publishing a Working Paper, a draft research document was prepared and given limited circulation among people likely to be expert in this area. Primarily, that document was considered by members of the insurance industry. Canadian insurance legislation follows the general approach to questions of survivorship recommended in this Report. Our principal concern was to discover whether that approach has created, or failed to resolve, any problems that might arise in practice. The comment we received was thoughtful and extremely useful in the preparation of this Report.

CHAPTER II SURVIVORSHIP AT COMMON LAW

A. Presumption of Death

When transportation to other continents might take months, and mail delivery was infrequent at best, friends and relations might not be heard from for years. The English and Empire Digest records numerous cases where family members left England for Australia, Canada, or other inhospitable and uncivilized lands never to be heard from again. These disappearances caused innumerable problems. Who was entitled to property left behind by the missing person? Could a deserted spouse remarry? The answers to these questions turned upon resolving another: for how long must a person be missing before his death can be presumed?

Initially, no specific period was set for when the presumption would arise. The court in *In the Goods of Wheeler*, for example, presumed that after 41 years absence, Wheeler, who when last heard from had been in delicate health, could be presumed to be dead.

The question of when death could be presumed was always one of probabilities. The courts would consider the period of absence, the age and health of the missing person, and whether he was of

intemperate habits. Probate was granted after an absence of 28 years in *In the Goods of Trask*, 17 years in *In the Goods of Lambert*, seven years in *In the Goods of Booth*, and three years in *In the Goods of Matthews*.

In time it was settled at common law that the presumption arose after a lapse of seven years. Under the British Columbia *Survivorship and Presumption of Death Act*, however, the courts are no longer bound to an arbitrary time. Modern methods of communication and transportation often permit the gathering of information adequate for the courts to adjudicate accurately when a person's death should be presumed.

B. Survivorship

The issue of when a missing person might be presumed to be dead arises when there is no evidence, other than prolonged absence, which might point to that person's death. Similar problems arise when one person, and another who would benefit by the first person's death, die in circumstances rendering the order of their deaths uncertain. Uncertainty might occur when the cause of death was a common disaster, such as a shipwreck. Uncertainty might also occur when, for example, a testator and his beneficiary died from different causes but the precise time of death of one or both of them could not be ascertained.

In some early cases the courts resolved questions of survivorship by looking at the nature of the disaster and the comparative robustness of the parties to determine who had the best chance of surviving the other or others, even if only by a few seconds. In *Wright* v. *Netherwood*, *Taylor* v. *Diplock* and *Satterthwaite* v. *Powell*, the courts presumed that deaths caused by the same disaster were simultaneous. In *Colvin* v. *ProcuratorGeneral*, *In the Goods of Selwyn* and *In the Goods of Murray*, the courts presumed that the stronger would survive the weaker. Consequently, in each case, the husband was presumed to survive his wife. The headnote to *Sillick* v. *Booth* reads as follows:

> Where two persons die by the same stroke or accident, and there are no special circumstances in evidence from which it can be presumed that one died before the other, the law of England will draw that presumption from general circumstances; such as the comparative health, strength, age, or experience of the parties.

It has been suggested, that those cases which apply survivorship presumptions, were decided by courts heavily influenced by the civil law. The civil law, when survivorship was in issue, extensively used presumptions based upon the comparative robustness of the deceased persons. The position at civil law will
be discussed in greater detail in the next chapter.

It might be further argued that the willingness of some courts to weigh tenuous possibilities in order to determine survivorship was a result of the law's willingness to presume the death of a missing person upon similar considerations. If the courts were willing to presume death based upon an individual's robustness, it was a small step to presume survivorship between two or more people of differing physical conditions. Courts presumed that a person had died, however, only in order to deal with issues which might otherwise never be resolved. If a missing person left behind property, nothing could be done with it until he returned or his death was confirmed. The courts recognized that it was possible that neither event would occur. Necessity overrode the courts' reluctance to presume that a person had died. In the absence of that necessity, the courts would not embark upon an exercise which, based as it was upon tenuous inferences, obliged them to guess rather than adjudicate. For example, despite the courts' willingness to presume death after a certain period of time, they would not, if the question were in issue, assume a missing person to be alive within that period. Lord Denman
commented on the socalled presumption of continuance of life as follows:

> I must take this opportunity of saying, that nothing can be more absurd than the notion, that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption at law.

It did not follow from a failure to resolve a question of survivorship that property might remain ownerless. The deceased's property would, regardless of what the courts decided, devolve to others. Resolving the question of survivorship merely helped in selecting between two or more possible beneficiaries of the deceased's estate. Consequently, when two or more persons died in circumstances which rendered uncertain the order of their death, the courts, for the most part, refused to presume that one survived another, or that they died at the same moment. The issue was one of fact, which could be resolved only by sufficient evidence. As Wightman, J. observed in *Underwood* v. *Wing*:

> We may guess or imagine or fancy but the law of England requires evidence.

In the circumstances in which the question of survivorship arises, seldom will there be evidence sufficiently compelling to resolve the matter.

Lacking survivorship presumptions, and in the absence of sufficient evidence to establish order of death, the practice at common law was to grant administration to the respective nextofkin of the deceased. Administrators were permitted to swear a modified oath. That oath was to the effect that the testator and the beneficiary perished at a time named and that there was no reason to suppose that one survived the other. When evidence could not establish survivorship, the law treated the question as one incapable of being determined, and, therefore, decided against the representatives of the beneficiary. In *Underwood* v. *Wing* it was said:

> The Master of the Rolls is represented in the report of his judgment to have said,
>
> > There is therefore no evidence to show who was the survivor, and the conclusion of law is, that both died at the same moment.
>
> According to our view this is not correct; we think there is no conclusion of law upon the subject; in point of fact we think it unlikely that both actually did die at the same moment of time, but there is no evidence to show which of them was the survivor.

The law would not presume that death occurred simultaneously, but the estates of persons dying in a common disaster would be distributed as if they had. The onus of proof was on the person who asserted the affirmative. Those who founded a right upon a person having survived a particular period had to establish that fact by positive evidence.

There were two principal defects in the position at common law which required correction by legislation. Firstly, since the question of survivorship was one of fact, when it arose, inevitably it would lead to litigation. Secondly, while the court would not presume that one survived another in the absence of evidence, the estates of deceased persons were distributed as if each had survived the other. This sometimes led to serious problems of construction. *Wing* v. *Angrave* is a case in point.

In *Wing* v. *Angrave*, a husband and wife made separate wills each favouring the other. If one predeceased the other, the estate was left to William Wing. On October 13, 1853 the husband and wife and their three children boarded the Dalhousie for Australia. The ship foundered at sea on October 19, 1853. An eye witness testified that the husband, wife and two of their children, all of whom were standing on the quarter gallery, were struck by a wave and carried over the stern of the vessel into the sea.

> They were clasped together in this manner; the boys had hold of the mother, and the father had his arms round them all; and they were in that state when the sea swept over the vessel.

Beyond that, there was no evidence concerning order of death. In an application to construe the will, it was held that there was no presumption that the husband survived the wife, or the wife the husband.

Wing, unable to prove that either husband or wife survived the other, was not entitled to the legacy in either will.

Problems posed by the issue of survivorship are not limited to an earlier age when virtually all forms of transportation were hazardous. If anything, the prospect of deaths in common disasters has been increased by modern technology. One need only consider the dangers posed by the family automobile. In a comment in the Canadian Bar Review, prior to the enactment of survivorship presumptions in Canada, the following observations were made:

> To suggest that [the family automobile] has given rise to a difficult situation concerning testate and intestate succession may seem a far cry, but one has only to recall the numerous occasions in which an entire family has been swept out of existence in one motor accident to realize that problems of survivorship and passing of title in the case of commorientes [are] likely to increase. In the present state of the law in the common law provinces in Canada, this problem is one which not only seems destined to produce litigation, and thus places a strain on the estates involved, but such litigation itself will be based on an array of flimsy opinion evidence on which courts will be asked to make a decision of fact in situations that are all but impossible of determination.

In the comparatively recent case of *Re Warwicker*, a 1936 Ontario decision, Mr. and Mrs. Warwicker and their informally adopted son, Douglas, were travelling in their car when it left the highway and rolled into the Gatineau River. Only Douglas survived. Mr. and Mrs. Warwicker had each made wills leaving everything to the other. Each provided that if their spouse predeceased them, Douglas was to receive everything.

Douglas would not have been entitled to share on an intestacy, the result which would have ensued had the court been obliged to follow *Underwood* v. *Wing*. McKay, J. held that, since medical testimony was contradictory, he could form his own opinion, and held that the wife predeceased the husband. Douglas, therefore, inherited under Mr. Warwicker's will. With respect, the judge's decision is not beyond reproach, and in a comment on the case, it was doubted whether there was any more satisfactory evidence before the court than in *Wing* v. *Angrave*. As a footnote to this case it is interesting to note that the estate bore the expense of nine counsel fees before the litigation was resolved. To avoid unjust results, such as that in *Wing* v. *Angrave*,
and to avoid the litigation and its expense which tended to arise from deaths in common disasters, there was a need for legislation establishing presumptions respecting survivorship. Moreover, as observed by a New York court:

> ... it is unbecoming as it is idle for a judicial tribunal to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first.

Legislation settling issues of survivorship by an arbitrary rule was necessary if only to relieve the courts from having to resolve such problems as who was more likely to survive longer in a cyclone, the father, who was old and bedridden, or the son, who was young and in good health but had artificial feet, a question posed in *Re McCabe*.

In *Bennett* v. *Peattie*, a 1925 decision of the Ontario Court of Appeal, Middleton, J.A. observed:

> The rules of the Common Law and the rules of the Civil Law upon the subject of survivorship are alike illogical and unsatisfactory. Where upon the death of two the right depends upon survivorship, and the whole fund must go to one or the other according to the determination as a question of fact that one person killed in a common accident drew his last breath a moment after the other expired, the difficulty of the inquiry and the unsatisfactory nature of the result are obvious. There is no way by which a division of the property can be secured unless the common sense of the contending factions triumphs over the desire to litigate. Where the property is in the hands of a third party, each claimant may in his turn fail to recover because of his inability to satisfy the onus resting upon him.
>
> For many purposes, under our system of law, a day is the least unit of time, and no notice is taken of a fraction of a day; but in a solution of the question in hand the exact moment becomes vital.
>
> The Civil Law, which raises presumptions of a survivorship based upon the presumed strength of the individual, of the selfishness by which he would save himself at the expense of the weak, had, no doubt, its origin in cases of

> drownings at sea or similar catastrophes; but, in the case of a railway accident and similar disasters, mere bodily strength avails little. Legislation to clear up this situation seems to me to be needed.

Such legislation was enacted in England in 1925, and in British Columbia in 1939. That legislation is the subject of the next chapter.

CHAPTER III SURVIVORSHIP LEGISLATION

A. England

To resolve the problems noted in the previous chapter, section 184 of the *Law of Property Act, 1925* was enacted in England. It provided that:

> In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

This provision applied both to deaths in common disasters and to any other deaths in which, on the question of title to property, the order of survivorship was uncertain. The following is an example in which the issue of survivorship might arise where deaths are not caused by common disaster:

> ... if a husband goes on a long voyage and the ship completely disappears in circumstances where his death has to be presumed to have occurred, but there is no material to indicate on what date he was drowned, and if his wife was in a nursing home when he started and subsequently died under an operation, there may be absolutely no means of ascertaining which of them died first. Yet in such a case there is no "common disaster" at all. It is therefore a useful provision of the statute law which requires the question of survivorship in such a case, which otherwise remains insoluble, to be determined by asking which of them was younger.

Loosely, the English presumption is based upon a factor which, statistically, would indicate who is likely to live longer. In fact, however, only accidentally will the survivor determined by the presumption be the one who actually survived the other or others. In a shipwreck, a child of, say, one year is significantly less likely to survive as long as a healthy adult, but the presumption dictates that the child will be taken to survive the adult.

The presumption applies when it is "uncertain" in what order two or more persons die. This wording raises several questions. When is order of death uncertain? What burden of proof must be met to rebut the presumption? Who must assume the burden of proof? We will examine each of these questions separately.

1. When is the Order of Death Uncertain?

The general principle is that if there is evidence respecting order of survival the presumption does not apply. Although this is a test which seems simple and clear, an issue which went unresolved for some time was whether the Act applied when evidence suggested death occurred simultaneously. Related issues are whether it is possible for deaths to occur simultaneously, and if simultaneous death is possible, whether it can be proved.

The solution to these issues may turn upon interpretation of the document in question, or upon the availability of evidence. In *Re Pringle*, the testatrix left all of her estate to her sister A. By codicil the testatrix provided that if she and her sister A died simultaneously, the estate was to be divided between her two
sisters, B and C. The testatrix and her sisters, A and C, were killed in an air raid by the same bomb. The court was asked to determine whether the events contemplated by the codicil had occurred, or whether the

codicil had no effect because simultaneous death was impossible by the provisions of section 184 of the *Law of Property Act, 1925*. It was held that the events which occurred were those contemplated by the testatrix, and the presumption respecting survivorship did not apply. Cohen J. said:

> The mind of the testatrix was directed, not to the establishment of an absolutely scientific truth, but to a correct conclusion in point of law. If, therefore, she meant by "simultaneous death" death at the same moment of time, she meant not death in such circumstances that a metaphysician would hold that simultaneous death had been proved but death in such circumstances that the ordinary man would infer that death was simultaneous.

Basically this case turned upon interpreting what the testatrix meant by "simultaneous." *Re Rowland* concerned a similar question of interpretation. There the testator left everything to his wife, unless their deaths "coincided" and then to B. The testator and his wife died in a shipwreck. The English Court of Appeal held
that the words used in the will must be strictly construed. The gift to B would only succeed if he were able to establish that the deaths of the testator and his wife coincided. Beyond the fact of the common disaster, there was no evidence by which order of death could be proved, and therefore section 184 applied.

In cases which do not involve issues of interpretation, the courts have settled that section 184 applies, notwithstanding that the circumstances surrounding the death by common disaster suggest virtually simultaneous death. In *Hickman* v. *Peacey*, five people sought shelter from an air raid in the basement of a house. The Battle of Britain was then at its height. The house was struck by a German highexplosive bomb which did not explode until it penetrated to the basement. Two of these people had made wills which benefitted each other and some of their companions in the shelter. An application was made to determine whether they had died simultaneously or whether, under section 184 of the *Law of Property Act, 1925*, their deaths must be presumed to have occurred in order of seniority.

The Court of Appeal held that all of the people in the bomb shelter died simultaneously, rejecting the philosophical argument that simultaneous death was an impossibility. Lord Greene, M.R. said:

> It was argued ... that the possibility of simultaneous death is not recognized by the law on the ground that, as time is infinitely divisible, it must always be certain that one of two persons in fact died before the other, although it may be, and in most cases of what would popularly be described as simultaneous death it will necessarily be, impossible to prove which in fact died first. The statement that time is infinitely divisible was said to be a scientific fact. I should prefer to call it a metaphysical conception. No doubt, when a bevy of angels is performing saltatory exercises on the point of a needle it is always possible to find room for one more, but propositions of this character appear to me to be ill suited for adoption by the law of this country which proceeds on principles of practical common sense.

The House of Lords held that section 184 applied. The argument that had convinced the Court of Appeal, that from the facts it could be inferred death had been contemporaneous and therefore there was no uncertainty to resolve, was rejected. Even if simultaneous death were theoretically possible, it was held, that finding was not justified on the facts of the case. Moreover, it was suggested, the section was framed to apply even if simultaneous deaths were proved. Lord Porter said:

> ... I think the section itself is so framed as to exclude the possibility of simultaneous death from ever being recognized as a certainty and to include it amongst the uncertainties. It does not speak of uncertainty as to whether the persons concerned died at the same time, but seeks to determine which survived the other. It seems to be concerned with survivorship or no survivorship, and not to be concerned with some *tertium quid* which is neither the one nor the other.

2. Burden of Proof

A number of different standards of proof which must be met to rebut the presumption have been adopted by the courts or argued before them. In *Hickman* v. *Peacey*, for example, it was argued that, be-

cause the section applies if there is "uncertainty" the presumption may only be rebutted by evidence which establishes
order of death with certainty. Such a standard of proof would be greater than the "beyond a reasonable doubt" required in criminal trials. This proposition was rejected. It was held that "the uncertainty there referred to is uncertainty which is not removed by evidence leading to a defined and warranted conclusion."

This measure for the burden of proof was subsequently adopted in *Re Bates*. In that case a husband and wife died in their home by carbon monoxide asphixiation. Evidence was lead respecting carbon monoxide saturation in the blood. Since saturation ceases at death, it was argued, the deceased whose blood showed the highest level of carbon monoxide saturation lived the longest. The testimony of medical experts on this point was conflicting, and it was held that the burden of proof had not been met. Section 184 applied.

In *Re Lindop*, a husband and wife, asleep in their bedroom, died from a bomb explosion in an enemy air raid. The husband was the older of the two. His heirs attempted to establish that the deaths of the husband and wife occurred simultaneously. It was said:From the cases quoted above, I elicit the rule that, where two or more persons die in circumstances requiring a finding as to the sequence of their death, there is a presumption that there is an uncertainty, and, therefore, that the older died before the younger according to the provisions of the *Survivorship Act*, but that presumption may be rebutted by a preponderance of evidence that the younger died before the older.

> Time being infinitely divisible, the fact of two persons dying at exactly the same moment of time is so highly improbable that the evidence relied upon to prove it must be looked upon closely and critically.

Notwithstanding dicta that suggests the burden of proof may be more rigorous, the accepted view is that uncertainty need only be rebutted on the usual civil standard, the balance of probabilities. It must be recognized that, in the circumstances in which this issue arises, it will be very difficult to satisfy even the civil standard of proof.

B. British Columbia

1. Generally

In British Columbia, legislation patterned after the English provision was enacted in 1939 following the adoption of model legislation in 1938 by the Conference of Commissioners on Uniformity of Legislation. In the Report of the Ontario Commissioners to that Conference, a presumption of survivorship was preferred over a presumption of simultaneous death for the following reason:

> ... it is apparent that the chances of simultaneous deaths as compared with the chances against such a likelihood are infinitely small. Accordingly a presumption of survivorship in accordance with the usual probabilities of life is more conducive to an equitable result than no presumption or a presumption of simultaneous death for although the cases [at common law] indicate that there is no presumption at all, the final result appears to be the same in fact as though the presumption were in favour of simultaneous death.

Before recommending a presumption of survivorship based upon age, the Ontario Commissioners considered various jurisdictions which possessed provisions modelled after the civil law. The Civil Code of Louisiana, for example, provided:

> 936.930.770. If several persons, respectively entitled to inherit from one another, happen to perish in the same event, such as a wreck, a battle, or a conflagration, without any possibility of ascertaining who died first, the presumption of survivorship is determined by the circumstances of the fact.
>
> 937.931. In the absence of circumstances of the fact, the determination must be guided by the probabilities resulting from the strength, age and difference of sex, according to the following rules.

938.932.721. If those who have perished together were under the age of fifteen years, the eldest shall be presumed to have survived.

If both were above the age of sixty years, the youngest shall be presumed to have survived.

If some were under fifteen years, and some above sixty, the first shall be presumed to have survived.

939.933.722. If those who have perished together were above the age of fifteen years and under sixty, the male must be presumed to have survived, where there was an equality of age, or a difference of less than one year.

If they were of the same sex, the presumption of survivorship, by which the succession becomes open in the order of nature, must be admitted, thus the younger must be presumed to have survived the elder.

Until it adopted the *Uniform Simultaneous Death Act*, California possessed similar legislation. Quebec still retains these presumptions.

The Ontario Commissioners preferred the English model to that of the civil law:

> Although these sections are worked out in some detail having regard, as they do, to the probabilities of survivorship, according to what is usually the comparative physical condition as between persons in different stages of life and of the different sexes, it must be borne in mind that any such rule is bound to be an artificial one. Having regard to this fact it is submitted that the principle enacted in section 184 of the *Law of Property Act, 1925*, (Imperial) is, in its brevity, as efficient in principle as either of the above [referring to Quebec and Louisiana Codes] more detailed sections.

The *British Columbia Act* was called *An Act respecting Survivorship in Common Disaster*, and the short title was *Commorientes Act*. The current *Survivorship and Presumption of Death Act* carries forward these provisions. That portion of the Act which deals with survivorship provides as follows:

Interpretation

1. In this Act, unless the context otherwise requires,
"Court" means the Supreme Court;
"instrument" includes the *Wills Act*;
"interested person" means any person who is or would be affected by an order made under this Act and includes

   (i) the next of kin of the person in respect of whom an order is made or for whom an order is applied, and
   (ii) a person who holds property of the person in respect of whom an order is made or for whom an order is applied.

General presumption

2. (1) Where 2 or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, such deaths are, subject to subsections (2), (3) and (4), for all purposes affecting the title to property, presumed to have occurred in the order of seniority, and accordingly the younger shall be deemed to have survived the older.

   (2) This section is subject to section 166 of the *Insurance Act*.

   (3) Subject to a contrary intention appearing by the instrument, where an instrument contains a provision for the disposition of property operative in any one or more of the following cases, namely, where a person designated in the instrument

      (a) dies before another person;
      (b) dies at the same time as another person; or
      (c) dies in circumstances rendering it uncertain which of them survived the other, and the designated person dies at the same time as the other person or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of that disposition, the case for which the instrument provides is deemed to have occurred.

(4) Subject to a contrary intention appearing by the will, where a will contains a provision for a substitute personal representative operative in any one or more of the following cases, namely, where an executor designated in the will

(a) dies before the testator;
(b) dies at the same time as the testator; or
(c) dies in circumstances rendering it uncertain which of them survived the other, and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.

(5) Where a contract of accident insurance or of sickness insurance, or both, provides for the payment of moneys upon the death by accident of the person insured and the person insured and a beneficiary perish in the same disaster, it shall be prima facie presumed that the beneficiary died first.

Section 2(1) of the current Act differs from both section 184 of the English *Law of Property Act, 1925* and the 1939 *British Columbia Act* in that the section also specifically applies when two or more persons die at the same time. The Act, therefore, gives legislative approval to the decision of the House of Lords in *Hickman* v. *Peacey*.

The 1939 Act also provided for the case where a testator provided in his will for the contingency that a beneficiary might die in circumstances rendering it uncertain whether the testator or the beneficiary survived the other. If the will made a gift over to another should the beneficiary predecease the testator, it was presumed the beneficiary predeceased the testator. The current Act extends the operation of this principle, so that it applies to any instrument which provides for a designated person dying before or at the same time as another person or in circumstances where the order of death is uncertain, and the event provided for occurs. Section 2(4) extends this general principle to the appointment of the testator's personal representative.

2. Operation of Commorientes Provisions

The presumption of death by seniority may, and often is, avoided by stipulating in a will that the beneficiary must survive the testator for a specified period. Alternatively, the testator may specifically provide for the disposition of property upon the simultaneous death of the testator and beneficiary.

In the absence of testamentary direction, or sufficient evidence, survivorship must be resolved by presumption. In British Columbia, however, there are two inconsistent presumptions which may apply.

The *Survivorship and Presumption of Death Act* provides that death is presumed to occur in order of seniority. The *Insurance Act* provides that the question of entitlement to insurance money is resolved by presuming the beneficiary of the policy predeceased the person whose life was insured. If the same person is beneficiary of the estate and of the insurance policy, and is younger than the insured, totally inconsistent results occur depending on which presumption applies.

The case of *Re Law* provides a good example of the problems which arise when contradictory presumptions apply. In that case a husband maintained three life insurance policies in favour of his wife, who perished with him when their boat capsized in a storm. Both died intestate. The case turned upon determining
which presumption applied. The wife was younger than her husband, but was the beneficiary of the insurance policies.

If the *Commorientes Act* governed, all the estate would go to the wife's nextofkin. The Act, however, was specifically subject to the *Insurance Act*. Therefore, with respect to the insurance proceeds, the wife was presumed to predecease her husband, and the insurance proceeds fell into the husband's estate. If the *Commorientes Act* then applied, the husband's estate would pass to the wife's estate to be shared by her nextofkin. If not, the proceeds would pass to the husband's nextofkin.

Macfarlane, J., felt that legislative intent could not be to deny the wife's estate the insurance proceeds under one Act and return them to her estate under another. He held, therefore, that the presumption under the *Insurance Act* continued to determine survivorship for the distribution of the deceased's estate. *Re Law* was subsequently approved in *Re Newstead* in *obiter dicta*.

In *Re Topliss*, the Ontario Court of Appeal declined to follow *Re Law*. They held that once the insurance proceeds were paid to the deceased's estate, the presumption under the *Insurance Act* was spent. Commorientes legislation then governed the distribution of the insurance proceeds together with the remainder
of the estate. *Re Law* has been doubted and distinguished in a number of Canadian cases, including *Re Biln*, *Re Currie and Currie*, *Re Cane and Cane* and *Re Fair*.

It is clear that the decision in *Re Topliss* found greater favour than that in *Re Law*. Following these cases, the Uniform Law Conference of Canada adopted revised wording for the presumption under the *Insurance Act*, which clarified that it applied only with respect to the disposition of insurance proceeds.

> Unless a contract or a declaration otherwise provides where the person whose life is insured and a beneficiary die at the same time or in circumstances rendering it uncertain which of them survive the other, for the purpose only of paying out the proceeds of the policy, the insurance money is payable in accordance with subsection ... of section ... as if the beneficiary had predeceased the person whose life is insured.

That revision has not been picked up in British Columbia. Section 166 of the British Columbia *Insurance Act* still follows the old wording of the *Uniform Act*. The phrase "for the purpose only of paying out the proceeds of the policy" is omitted from that section. Section 166 reads as follows:

Unless a contract or a declaration otherwise provides, where the person whose life is insured and a beneficiary die at the same time or in circumstances rendering it uncertain which of them survive the other, the insurance money is payable in accordance with section 145(1) as if the beneficiary had predeceased the person whose life is insured.

Section 2(2) of the British Columbia *Survivorship and Presumption of Death Act*, which makes that Act subject to section 166 of the *Insurance Act*, has been in the British Columbia legislation since its inception. British Columbia legislation, therefore, provides no guidance as to how the different survivorship presumptions should be applied.

Even if legislation prescribed how these two different presumptions should apply, their combined effect would achieve strange results such as that which Macfarlane J. sought to avoid in *Re Law*. The British Columbia Commissioners, in their report to the Uniform Law Conference on a new *Uniform Survivorship Act*, noted:

> At present the rules of devolution and distribution of property where sequence of death is unknown are inconsistent under the *Survivorship Act* and the *Insurance Act*. The rule of the *Survivorship Act* in these circumstances causes the property to be distributed as if the younger survived the older, while the rule of the *Insurance Act* causes the proceeds of insurance to be paid to the insured. As the beneficiary in an estate is usually the younger, the effect is that, depending on whether the property is insurance proceeds or other property, totally opposite rules apply.

Two inconsistent approaches to survivorship cannot help but operate curiously from time to time. It is evidence of a need for reform. The presumptions provided by the *Insurance Act* and the *Survivorship and Presumption of Death Act* should be the same. In the next chapter we will discuss which presumption is the more appropriate of the two.

CHAPTER IV REFORM

A. Uniform Survivorship Act

In their report to the Commissioners on the Uniformity of Legislation in Canada, the Alberta Commissioners preferred the rule contained in the *Insurance Act* to that provided by the *Survivorship and Presumption of Death Act*:

> In our opinion the scheme of the *Insurance Act* is based on fairness; the insurance should go to the estate of the insured rather than to the estate of the beneficiary. *Re Law* puts the insurance moneys where it should go while *Re Topliss* does not unless by chance the insured is younger than the beneficiary. The fact that the assets other than insurance are governed by an arbitrary rule is no reason why insurance should be governed by the same rule ... To sum up, our insurance provision is based on principle while the general survivorship provision is arbitrary. For this reason, the *Survivorship Act* should be amended to make it clear that section 2(1) does not apply to insurance. It is apparent from the discussion above that the Alberta Commissioners would favour the further step of changing the presumption created by the *Survivorship Act*, though the matter referred to us was the narrower one as to whether the general presumption of the *Survivorship Act* should apply to insurance.

In 1971, the Conference, in its second consideration of commorientes legislation, adopted uniform legislation which provided that each deceased, in respect of his separate property, should be presumed to have survived the other. The full text of the *Uniform Act* follows:

> 1. (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others.
>
> (2) Unless a contrary intention appears, where two or more persons hold legal title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person is, for the purposes of subsection (1), deemed to have an equal share with the other or with each of the others in that property.
>
> (3) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will
>
> (a) dies before the testator; or
> (b) dies at the same time as the testator; or
> (c) dies in circumstances rendering it uncertain which of them survived the other, and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.

The *Uniform Act* does not contain a provision similar to section 2(3) of the *British Columbia Act*, which provides that the contingency respecting survivorship specified in a legal instrument, such as a will, prevails if order of death is uncertain. It is difficult to determine why this provision is missing. In the draft *Uniform Act* proposed to the Uniform Law Conference, a section similar to section 2(3) of the *British Columbia Act* was included:

> (2) Where a testator and a person who, if he had survived the testator, would have been a beneficiary of property under the Will, die in circumstances rendering it uncertain which of them survived the other; and the Will contains further provisions for the disposition of property in case that person had not survived the testator, or died at the same time as the testator, or in circumstances rendering it uncertain which survived the other, then for the purpose of that disposition the Will shall take effect as if that person had not survived the testator or died at the same time as the testator or in circumstances rendering it uncertain which survived the other.

One would expect that such a provision would be an essential part of survivorship legislation. If the testator has recognized that the beneficiary may not live to enjoy the gift, the law should strive to give effect to the testator's intention to benefit someone else. This will not necessarily occur if survivorship legislation dictates that the younger is presumed to survive, or that the will takes effect as if the beneficiary predeceased the testator. One need only recall the result in *Re Rowland*. A gift to B., in the event the testator and his wife's

death coincided, failed when the testator and his wife died in a shipwreck under circumstances in which the order of their death was uncertain. Section 184 of the *English Act* dictated that the younger survived, and, accordingly, the deaths of the testator and his wife did not coincide. Presuming that the beneficiary predeceases the testator would achieve the same result.

The new *Uniform Act* was, with only minor changes, incorporated into The *Succession Law Reform Act* in Ontario as Part IV of that Act. The pertinent sections of that Act are contained in Appendix A to this Report.

B. U. S. Legislation

1. Uniform Simultaneous Death Act

The current provisions of the *Uniform Survivorship Act* adopted by the Uniform Law Conference of Canada, correspond to those of the American *Uniform Simultaneous Death Act*, approved by the American Bar Association and the National Conference of Commissioners on Uniform State Laws. That Act is contained in Appendix B to this Report.

2. Uniform Probate Code

A different approach is contained in the *Uniform Probate Code*, which avoids the problem of simultaneous death by providing in section 2104:

> **Section 2104. [Requirement That Heir Survive Decedent For 120 Hours.]**
>
> Any person who fails to survive the decendent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state under Section 2105. [S. 2105 provides when property escheats to the state.]

and in section 2601:

> **Section 2601. [Requirement That Devisee Survive Testator by 120 Hours.]**
>
> A devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator, unless the will of decedent contains some language dealing explicity with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

The effect of these sections is the same as providing that the beneficiary is presumed to have predeceased the testator where two or more deaths occur within a short span of time. The 120hour rule has the effect of expanding the period of time within which the law regards death as coinciding. The rationale for this approach is again the presumption that the testator intends to benefit an individual, not that individual's estate.

C. Reform in British Columbia

We are in general agreement with the approach adopted by the Uniform Law Conference. Presuming that a testator survives his beneficiary permits the testator's estate to devolve subject to contingent provisions in his will or pursuant to intestate succession. In either case, the result is more likely to satisfy the testator's intention than permitting the gift to be shared by the deceased beneficiaries' successors. If a testator intends to benefit the estate of the beneficiary he is at liberty to make that provision expressly in

his will. The effect of the current survivorship presumption is to benefit that individual's estate and through him the relatives of the beneficiary, who may have little, if any, connection with the testator. The result may be to give an interest in his estate to complete strangers. As the Ontario Law Reform Commission observed, presuming that the youngest survives is:

> ... unjust to the relatives of the person deemed to have predeceased since the effect in many cases is to pass all the property to the relatives of the deemed survivor.

They recommended that the estate of each person should be distributed separately. We agree with that recommendation. We have concluded that section 1(1) of the *Uniform Act* should be adopted in British Columbia.

The Commission recommends that:

1. *(a) Section 2 of the British Columbia* Survivorship and Presumption of Death Act *be repealed.*
   (b) Questions of survivorship, in the absence of evidence, should be resolved by distributing the estate of each deceased as if he had survived the other. A section comparable to section 1(1) of the Uniform Act *should be enacted in British Columbia.*

This amendment will bring the general survivorship presumption into line with that provided by the *Insurance Act*.

In addition to the question of which approach should commorientes legislation take, there are a number of ancillary issues which should be considered. These include problems posed by

(a) a contrary intention disclosed by the maker of the legal instrument;
(b) gifts to two or more beneficiaries or their survivor(s);
(c) joint tenancies;
(d) appointments of personal representatives;
(e) deaths which occur within a short period of time.

1. Contrary Intention

We mentioned earlier that the current *British Columbia Act* contains a provision respecting contrary intention which is not contained in the *Uniform Act*. That section is section 2(3) and it provides:

> 2. (3) Subject to a contrary intention appearing by the instrument, where an instrument contains a provision for the disposition of property operative in any one or more of the following cases, namely, where a person designated in the instrument
>
> (a) dies before another person;
> (b) dies at the same time as another person; or
> (c) dies in circumstances rendering it uncertain which of them survived the other,
>
> and the designated person dies at the same time as the other person or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of that disposition, the case for which the instrument provides is deemed to have occurred.

Under the *Uniform Act*, the survivorship presumption applies only with respect to property each person is competent to dispose. The presumption, therefore, is effective only when one of the persons whose time of death is uncertain leaves property to another.

Example 1

A, by will, leaves property to B "unless B dies before me and then to C." A and B die in circumstances rendering it uncertain which of them survived the other. B is younger than A.

Under the *British Columbia Act*, notwithstanding that B is younger than A, the property will go to C. The provision of the *British Columbia Act*, that the younger is presumed to survive, is subject to section 2(3). Section 2(3) provides that in these circumstances the contingency contemplated by the testator is deemed to occur. Section 2(3) makes good sense. If the testator intends C to enjoy the gift if B cannot, then an arbitrary presumption should not be permitted to vest the gift in B's estate when he cannot enjoy it.

If we consider the example in the light of the *Uniform Act*, we will see that section 2(3) is no longer necessary. This is because the Act in all but two cases operates to prevent a beneficiary's estate from receiving a gift which that beneficiary cannot enjoy. The two exceptions are:

(1) where evidence can be adduced that the beneficiary survived the testator even momentarily; and
(2) where the testator expressly provides that B or his estate is to receive the gift.

In the first of these cases survivorship is not in doubt. In the second it is not in issue.

If we change the example so that the question of survivorship is not between a donor and donee, but between two possible donees, it can be seen that section 2(3) of the *British Columbia Act* still serves a valuable purpose.

Example 2

A, who is deceased, left property by will "to B, for life, remainder to C, if she should survive B, and if not, to D." B and C die in circumstances rendering it uncertain which of them survived the other. B is younger than C.

In this case the *Uniform Act* does not apply. It does not help to determine that the property of B and C is distributed as if each had survived the other. That does not determine whether C became entitled to A's gift, or whether it goes to D.

Under the *British Columbia Act*, section 2(3) would likely apply. Notwithstanding that B is younger than C, theevent contemplated by A would be deemed to occur. C would be presumed to predecease B, and D would be entitled to the gift.

It would appear, therefore, that there is a gap in the *Uniform Act* whenever the issue of survivorship arises between two or more possible donees or beneficiaries. To close this gap, section 2(3) of the *British Columbia Act* should be retained.

The Commission recommends that:

2. A section comparable to section 2(3) of the British Columbia Act *should be retained.*

2. Gifts to Two or More Beneficiaries or Their Survivor(s)

In the previous discussion we noted that special provisions are necessary to deal with questions of survivorship which arise between two or more possible donees. Recommendation 2 is designed to give effect to the testator's intention when he contemplates one donee predeceasing another. That recommendation will not be of any assistance, however, if the testator fails to indicate a preference between the donees.

Example 3

A, who is deceased, left a gift to B and C for life, and then to the survivor of them. B and C die in circumstances rendering it uncertain which of them survived the other. B is younger than C.

The *Uniform Act* cannot, in these circumstances, determine whether B or C is entitled to the gift. The *British Columbia Act* would dictate that the younger of the two, B, would be entitled. In the absence of some preference indicated by the testator, there is no reason to distinguish between B and C.

The American *Uniform Simultaneous Death Act* contains a provision which resolves these sorts of problems by providing that the gift is divided between the estates of deceased beneficiaries.

§ 2. Survival of Beneficiaries

If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person, and both persons die, and there is no sufficient evidence that the two have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived. If there is no sufficient evidence that two or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their death each of such beneficiaries would have been entitled to the property if he had survived the others, the property shall be divided into as many equal portions as there were such beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each of such beneficiaries had survived. Dividing the gift equally between the estates of deceased beneficiaries in circumstances of simultaneous death, when the testator has expressed no preference among them, is an equitable solution. That approach should be adopted in British Columbia.

The Commission recommends that:

> *3. Subject to Recommendation 2, a gift to two or more beneficiaries or their survivor, who die at the same time or in circumstances rendering it uncertain which of them survived the other or others, should be divided equally between the estates of those beneficiaries.*

To some degree both Recommendations 2 and 3 depart from the basic principle we concluded should underlie survivorship presumptions. That principle is that, between the successors of, for example, a testator and those of his beneficiary, the fairest result was to prefer those of the testator. However, in the circumstances in which Recommendations 2 and 3 will apply, we believe a departure from that principle is justified. For example, the testator may have died years before the question of survivorship and succession to his property will arise. That is the case, for example, when a gift is made subject to a life estate. Requiring the gift to fall back into the testator's estate will require opening up the administration of that estate. Perhaps the testator's successors are themselves deceased, and the gift falls into their estates. While Recommendations 2 and 3, in some respects, are inconsistent with the basic principle underlying Recommendation 1, we have concluded that they are the fairest and most administratively convenient solutions to the problems they are designed to resolve.

3. Joint Tenancies

The *British Columbia Act* does not provide for determining survivorship between two or more joint tenants who die in circumstances where it is uncertain which of them survived the others. The *Uniform Act* contains the following provision:

> 1. (2) Unless a contrary intention appears, where two or more persons hold legal title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person is, for the purposes of subsection (1), deemed to have an equal share with the other or with each of the others in that property.

A similar provision is to be found in the American *Uniform Simultaneous Death Act*.

These sections have the effect of changing a joint tenancy into a tenancy in common and ensuring that the estate of each joint tenant is entitled to a share in the property. However, if one joint tenant should actually survive, he would take the entire property by operation of the jus accrescendi, or right of survivorship. These sections apply only when all of the joint tenants perish in circumstances which render the order of their deaths uncertain. We think a comparable section should be included in the *British Columbia Act*.

The Commission recommends that:

4. A section comparable to section 1(2) of the Uniform Survivorship Act *be enacted in British Columbia.*

4. Appointment of Personal Representatives

The current *British Columbia Act* contains the following provision respecting the problems which arise when a designated executor dies at the same time as the testator:

> 2. (4) Subject to a contrary intention appearing by the will, where a will contains a provision for a substitute personal representative operative in any one or more of the following cases, namely, where an executor designated in the will
>
> (a) dies before the testator;
> (b) dies at the same time as the testator; or
> (c) dies in circumstances rendering it uncertain which of them survived the other,
>
> and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.

The *Uniform Act* contains a similar provision. Obviously no issue of survivorship arises here. The executor is dead. If the testator has designated alternate executors to serve should his first appointment predecease him, effect should be given to that direction. The current section 2(4) of the *British Columbia Act* accomplishes that.

The Commission recommends that:

5. A section comparable to section 2(4) of the British Columbia Act *should be retained.*

5. Deaths Occurring within a Short Period of time of Each Other

As we mentioned, the American *Uniform Probate Code* requires a beneficiary to survive the deceased by 120 hours in order to inherit.

These provisions extend the idea of simultaneous death. Under the current law in British Columbia and under the *Uniform Act*, if it can be proved that one individual survived the other by any period of time, however short, the survivor's estate will take on an intestacy or under the will. The estate of the testator would pass to the relatives of the beneficiary rather than to the testator's relatives. Requiring a beneficiary to survive for 120 hours increases the odds that the testator's family, and not the heirs of the beneficiary, will receive the benefit of the testator's bounty.

Our principal concern throughout this Report has been to resolve problems which arise due to lack of evidence and which tend to promote litigation. We have recommended a survivorship presumption which is designed to benefit a donor's family rather than the estate of his donee. As an arbitrary rule, this is more satisfactory than the haphazard results achieved by determining order of death by seniority.

It is pertinent to note that many professionally drawn wills contain a provision which requires the beneficiary to survive the testator for a prescribed period of time. The original justification for this provision was to prevent an estate from being depleted by a levy of succession duties when the testator died and then an additional levy of succession duties when the testator's beneficiary, often his spouse, died shortly after, often
from injuries suffered by testator and beneficiary in the same accident. Succession duties have been repealed. There are, however, other reasons to require a beneficiary or nextof kin of the deceased to survive the deceased for a prescribed period of time. Notwithstanding the repeal of succession duties, many draftsmen continue to include survivorship clauses in wills they prepare.

Requiring an heir to survive the deceased by a certain period makes it more likely, in testate succession, that the person the deceased intended to benefit, and not that person's estate, will enjoy the gift. Survivorship legislation, even if amended following our recommendations, will not prevent a testamentary gift, or intestate share, falling into the heir's estate, if it can be proved the heir survived the deceased. There is very little difference between an heir dying at the same time as the deceased or surviving him by an hour, and similar results should follow whichever event occurs. Another advantage obtained by requiring the heir to survive the deceased by a certain period of time is that multiple administrations are avoided. Legislation following the approach taken by the United States' *Uniform Probate Code* should be adopted in British Columbia.

The *Uniform Probate Code* sets the period of survivorship at 120 hours. Any period of time must be arbitrarily selected, and there is little difference between selecting a period of 120 hours (or five days), two weeks or a month. The period selected by will draftsmen is often 30 or 60 days. In our opinion, a shorter period than either of those is desirable if only because it is less likely to be inconvenient with respect to administrating the deceased's estate. The period set by the *Uniform Probate Code* should be satisfactory. We do not think, however, that period should be determined in hours. Requiring a beneficiary or nextofkin to
survive the deceased by five days, rather than 120 hours, should avoid problems which may arise of establishing exactly what time the deceased died. In some cases it is clear the deceased died on, for example, a Thursday, but there is no evidence respecting what time on Thursday death occurred.

The *Interpretation Act* directs how time expressed in days is to be calculated. That Act directs that the first day is excluded and the last day included. If the deceased dies on a Tuesday, the beneficiary must survive until the end of Sunday to inherit.

It should be observed that no other Canadian jurisdiction has adopted an approach similar to a five day survivorship rule. Consequently conflict of laws questions may arise. Even apart from the five day rule, conflicts problems may arise. Notwithstanding that, in general, our approach has been to follow the provisions of the *Uniform Survivorship Act*, not all Canadian jurisdictions have taken that step. Revising the primary presumptions relating to survivorship is a step towards increased uniformity, and therefore fewer problems of conflict of laws in this respect should arise. Absolute uniformity is, however, extremely difficult to achieve.

The general principle for choice of law, with respect to succession, is that immoveables, such as land, are governed by the law where the land is situated (the *lex rei sitae*). Moveables (personal property) are governed by the law of the deceased's domicile. That is a fairly simple principle to apply. If, in some cases, depending on the governing law, one beneficiary will receive the deceased's personal property and another his real property, that is not necessarily a "bad" result, nor does it justify creating special rules to resolve hypothetical conflicts problems in advance.

In our opinion, a five day rule promotes the fairest result. If, occasionally, that rule will raise conflicts problems, that is not reason enough to depart from it. Uniformity is not worth the price, if that price is unfair or unreasonable results. That jurisdictions may differ respecting what constitutes fair results is the reason why absolute uniformity is difficult to achieve.

In any event, since a five day rule would have beneficial results, it is our hope that other jurisdictions will follow British Columbia's example. The possibility of conflicts problems does not alter our conclusion that a five day rule should be enacted. We also think that the *Insurance Act* should follow that approach, but we make no recommendation on that point.

The Commission recommends:

6. A section be added to the *British Columbia Act* which provides that any person who fails to survive the deceased by five days is deemed to predecease the deceased. If there is insuffi-

cient evidence to establish that the person survived the deceased by five days, it is deemed that the person failed to survive by the required period.

6. Relationship with the Insurance Act

Section 2(5) of the current Act governs accident insurance and health insurance. Our recommendations are not aimed at altering the law with respect to entitlement to insurance proceeds. This section should not be included in a revised *Survivorship Act*.

In any event, section 2(5) is redundant. The *Insurance Act* was amended in 1969 to provide for circumstances in which order of death cannot be determined. Section 203 of that Act provides:

> **Simultaneous deaths**
>
> 203. Unless a contract or a declaration otherwise provides, where a person insured or group person insured and a beneficiary die at the same time or in circumstances rendering it uncertain which of them survived the other, the insurance money is payable in accordance with section 198 (1) as if the beneficiary had predeceased the person insured or group person insured.

This section is in Part V of the *Insurance Act* which governs policies of insurance for accident or sickness. Section 2(5) of the *Survivorship and Presumption of Death Act* is redundant and should be repealed.

The Commission recommends that:

7. Section 2(5) of the Survivorship and Presumption of Death Act *should be repealed.*

Our recommendations, generally, correspond to the approach taken in the *Insurance Act* with respect to the question of survivorship. Moreover, our recommendations are not aimed at altering the law regarding survivorship for the purposes of determining entitlement to insurance proceeds. Nevertheless, the approach we have recommended does differ from section 166 of the *Insurance Act*. The most significant difference is the recommended five day rule for survivorship. In order to prevent any possible confusion respecting application of these presumptions, legislation should confirm that they are subject to the *Insurance Act*. Section 2(2) of the current *Survivorship and Presumption of Death Act* provides as follows:

> 2(2) This section is subject to section 166 of the *Insurance Act*.

A section comparable to this provision should be retained. It should also refer to section 203 of the *Insurance Act*, which provides a survivorship presumption when accident or sickness insurance is involved.

The Commission recommends that:

8. The new Act should be subject to sections 166 and 203 of the Insurance Act.

CHAPTER V CONCLUSION

A. Summary

Survivorship is a question of fact, which, at common law could only be resolved by evidence establishing order of death on a balance of probabilities. In many cases, particularly when deaths of a donor and donee were caused by a common disaster, there was no evidence by which order of death could be established. The courts were faced with facts of insignificant weight, at best suggesting, on the basis

of the comparative robustness of the deceased persons, that one might have survived the other. Any conclusion derived from available evidence usually amounted to little more than a guess.

The need to resolve questions of survivorship which arose, and to limit litigation, led to the enactment of a survivorship presumption, linked to survivorship prospects based loosely upon age alone. Meantime, a separate presumption was developed for insurance proceeds which ignored who, between insured and beneficiary, was most likely to survive. It was based upon the presumption that only the beneficiary, not his estate, was intended to benefit. If the beneficiary died at the same time as the insured, as between the heirs of the insured and those of the beneficiary, it was considered fairer for the proceeds to go to the heirs of the insured.

Conflict between these two presumptions requires reform legislation. We concluded that the same presumption should apply for determining both the destination of insurance proceeds and entitlement to succession. As between a presumption which may, more often than not, determine a deemed survivor which corresponds to who actually survived, if only by seconds, and a presumption which achieves the fairest distribution in the majority of cases, we chose the latter. Additionally, we made recommendations which were necessary to close gaps in the law not covered by the general presumption respecting survivorship.

B. List of Recommendations

The following is a list of recommendations made in this Report:

1. (a) Section 2 of the British Columbia *Survivorship and Presumption of Death Act* be repealed.
   (b) Questions of survivorship, in the absence of evidence, should be resolved by distributing the estate of each deceased as if he had survived the other. A section comparable to section 1(1) of the *Uniform Act* should be enacted in British Columbia.

2. A section comparable to section 2(3) of the *British Columbia Act* should be retained.

3. Subject to Recommendation 2, a gift to two or more beneficiaries or their survivor, who die at the same time or in circumstances rendering it uncertain which of them survived the other or others, should be divided equally between the estates of those beneficiaries.

4. A section comparable to section 1(2) of the *Uniform Survivorship Act* be enacted in British Columbia.

5. A section comparable to section 2(4) of the British Columbia Act should be retained.

6. A section be added to the *British Columbia Act* which provides that any person who fails to survive the deceased by five days is deemed to predecease the deceased. If there is insufficient evidence to establish that the person survived the deceased by five days, it is deemed that the person failed to survive by the required period.

7. Section 2(5) of the *Survivorship and Presumption of Death Act* should be repealed.

8. The new Act should be subject to sections 166 and 203 of the *Insurance Act*.

C. Acknowledgements

We wish here to acknowledge the assistance we received from the representatives of the insurance industry. They responded promptly and helpfully to our request for comment on those parts of the Report that touch on insurance proceeds.

We also wish to thank Mr. J.C. ScottHarston, Q.C., who was retained as a consultant in connection with this study. His wealth of practical and academic experience greatly assisted the preparation of this Report.

Finally, we should like to record our appreciation to Mr. Thomas G. Anderson, of the Commission's legal staff, who conducted this project and who, subject to direction from the Commission, was responsible for the preparation of this Report.

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APPENDICES

APPENDIX A

ONTARIO SUCCESSION LAW REFORM ACT

PART IV SURVIVORSHIP

61. (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others.

(2) Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person shall be deemed, for the purposes of subsection 1, to have held as tenant in common with the other or with each of the others in that property.

(3) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will,

(a) dies before the testator;
(b) dies at the same time as the testator; or
(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides shall be deemed to have occurred. *New*.

(4) The proceeds of a policy of insurance shall be paid in accordance with sections 190 and 268 of *The Insurance Act* and thereafter this Part applies to their disposition. R.S.O. 1970, c. 454, s. 1 (2); 1972, c. 43, s. 1, amended.

62. (1) The *Survivorship Act*, being chapter 454 of the Revised Statutes of Ontario, 1970, and *The Survivorship Amendment Act, 1972*, being chapter 43, are repealed.

(2) The enactments repealed by subsection 1 continue in force as if unrepealed in respect of occurring before the 31st day of March, 1978.

63. This part applies in respect of deaths occurring on or after the 31st day of March, 1978.

APPENDIX B

U.S. UNIFORM SIMULTANEOUS DEATH ACT

§ 1. No Sufficient Evidence of Survivorship

Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this act.

§ 2. Survival of Beneficiaries

If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person, and both persons die, and there is no sufficient evidence that the two have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived. If there is no sufficient evidence that two or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their death each of such beneficiaries would have been entitled to the property if he had survived the others, the property shall be divided into as many equal portions as there were such beneficiaries and these portions shall be distributed respectively to those who would have taken in the that each of such beneficiaries had survived.

§ 3. Joint Tenants or Tenants by the Entirety

Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed onehalf as if one had survived and onehalf as if the other had survived. If there are more than two joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

The term "joint tenants" includes owners of property held under circumstances which entitled one or more to the whole of the property on the death of the other or others.

§ 4. Community Property

Where a husband and wife have died, leaving community property, and there is no sufficient evidence that they have died otherwise than simultaneously, onehalf of all the community property shall pass

as if the husband had survived [and as if said onehalf were his separate property,] and the other onehalf thereof shall pass as if the wife had survived [and as if said other onehalf were her separate property.]

§ 5. Insurance Policies

Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary, [except if the policy is community property of the
insured and his spouse, and there is no alternative beneficiary except the estate or personal representatives of the insured, the proceeds shall be distributed as community property under Section 4.]

§ 6. Act Does Not Apply If Decedent Provides Otherwise

This act shall not apply in the case of wills, living trusts, deeds, or contracts of insurance, or any other situation where provision is made for distribution of property different from the provisions of this act, or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided.

§ 7. Uniformity of Interpretation

This act shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact it.

§ 9. Repeal

All laws or parts of laws inconsistent with the provisions of this act are hereby repealed.

§ 10. Severability

If any of the provisions of this act or the application thereof to any persons or circumstances is held invalid such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions of this act are declared to be severable.

§ 11. Time of Taking Effect

This act shall take effect .....

APPENDIX C

SURVIVORSHIP AND PRESUMPTION OF DEATH ACT
R.S.B.C. 1979, c. 398

Interpretation

1. In this Act, unless the context otherwise requires,
"Court" means the Supreme Court;
"instrument" includes the *Wills Act*;
"interested person" means any person who is or would be affected by an order made under this Act and includes

(i) the next of kin of the person in respect of whom an order is made or for whom an order is applied, and
(ii) a person who holds property of the person in respect of whom an order is made or for whom an order is applied.

General presumption

2. (1) Where 2 or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, such are, subject to subsections (2), (3) and (4), for all purposes affecting the title to property, presumed to have occurred in the order of seniority, and accordingly the younger shall be deemed to have survived the older.

(2) This section is subject to section 166 of the *Insurance Act*.

(3) Subject to a contrary intention appearing by the instrument, where an instrument contains a provision for the disposition of property operative in any one or more of the following cases, namely, where a person designated in the instrument

(a) dies before another person;
(b) dies at the same time as another person; or
(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated person dies at the same time as the other person or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of that disposition, the case for which the instrument provides is deemed to have occurred.

(4) Subject to a contrary intention appearing by the will, where a will contains a provision for a substitute personal representative operative in any one or more of the following cases, namely, where an executor designated in the will

(a) dies before the testator;
(b) dies at the same time as the testator; or
(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.

(5) Where a contract of accident insurance or of sickness insurance, or both, provides for the payment of moneys upon the death by accident of the person insured and the person insured and a beneficiary perish in the same disaster, it shall be prima facie presumed that the beneficiary died first.

APPENDIX D

UNIFORM SURVIVORSHIP ACT

1. (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property, the property of each person, or any property ch he is competent to dispose, shall be disposed of as if he had survived the other or others.

(2) Unless a contrary intention appears, where two or more persons hold legal title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person is, for the purposes of subsection (1), deemed to have an equal share with the other or with each of the others in that property.

(3) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will

(a) dies before the testator; or
(b) dies at the same time as the testator; or
(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.