ULCC | CHLC

**UNIFORM LAW CONFERENCE OF CANADA**

# MINUTES OF THE CIVIL SECTION, 2023

**Prepared by:**

**Stephen Flanagan**

**Prince Edward Island**

**August 2023**

## BUSINESS COMPLETED SINCE THE 2022 ANNUAL MEETING

### Oral Report

### Presenter: Valérie Simard, Canada

Ms. Simard presented an oral report on business completed since the 2022 annual meeting of the ULCC.

The *Uniform Gratuitous Crowdfunding Act*, which is the civil law version of the *Uniform Benevolent and Community Crowdfunding Act* was adopted pursuant to the November 30th rule. The working group was asked, by the annual meeting, to make stylistic revisions as required to ensure the English and French versions of the uniform Act match, and to deal with issues in section 22.

**RESOLVED:**

**THAT** the report of the past Chair of the Civil Section on business completed since the annual meeting of the ULCC in 2022 be received.

## REPORT OF AMENDMENT OF *UNIFORM BENEVOLENT AND COMMUNITY CROWDFUNDING ACT*

**Progress Report**
**Presenter: Peter Lown, K.C., Alberta**

Following adoption of the *Uniform Gratuitous Crowdfunding Act* ("*UGCA*") at the 2022 annual meeting, a number of amendments to the common law *Uniform Benevolent and Community Crowdfunding Act* (the "*UBCCA*") were proposed. Mr. Greg Blue, K.C., reviewed the proposed amendments and prepared a report in response. In Mr. Blue's absence, Peter Lown, K.C., presented the report.

Mr. Lown thanked Mr. Blue for his work on this project, and Ms. Michelle Cumyn for her work on the corresponding civil law project.

Mr. Lown advised that when the *Uniform Informal Public Appeals Act* (civil law) underwent its approximately 10-year update, the context had changed significantly – from small, local appeals to "GoFundMe" and other internet-based platforms. Based on the experience gained from that, amendments to the *UBCCA* were found to be necessary.

Mr. Lown also noted that two significant social events, the Humbolt bus disaster in Saskatchewan and the Freedom Convoy in Ottawa and Alberta (at the Coutts border crossing), have recently brought issues in this area of law to light.

Mr. Lown reviewed the issues, and the options provided for resolving those issues, as proposed in the Report. The Report's recommendations are summarized in paragraph 51.

*French Title and Commentaries to UBCCA*

Mr. Lown advised that this is essentially a translation issue. The current translation of the English title into French is problematic due to differing technical and popular meanings of "charitable". Amendments to the title of the *UBCCA* and the opening commentary are proposed as a resolution.

*Concepts and Definitions*

Mr. Lown advised that "*crowdfunding*", to most people, means "GoFundMe" or similar platforms; if the *UBCCA* utilizes this term, it may limit the application of this legislation to only these scenarios, excluding smaller, local fundraising efforts. The continued use of "*public appeal*" throughout the *UBCCA*, instead of "*crowdfunding*" is recommended.

Mr. Lown noted that this would result in the *UBCCA* being compatible with, but not identical to, the *UGCA*.

Mr. Lown also advised that there will be stylistic differences between the *UGCA* and the *UBCCA*; use and placement of definitions being one example. The *UBCCA* will require definitions at the beginning, while the *UGCA* does not.

*Right to halt a public appeal: UGCA s.22 / UBCCA s.25*

This is an issue of termination – what if one beneficiary, for example, wants to withdraw from the public appeal? The *UGCA* has dealt with this issue and it's recommended that the common law version should as well.

*Illegality and Public Policy*

Mr. Lown noted that it is important to note the difference between common and civil law in this area - the concept that something is contrary to public order is well-known in civil law; but not in common law. It is suggested to make specific acts of illegality explicit in the UBCCA rather than try to import the public order concept.

Discussion on Report's Recommendations

A delegate commented that, on the public policy question, working in the context of international conventions, there is almost always a public policy exception. This sort of exception is much more effective in civil law, as it can be used, but at common law the threshold would be very high and it may not get much use. As such, it may not make sense to have this exception in the *UBCCA*.

Mr. Lown noted that he was relatively comfortable with the recommendation, but also that we must be mindful of compatibility between the *UGCA* and *UBCCA*.

It was noted that, unlike in the case of a convention, a uniform Act does not necessarily need to be cohesive bijurally, but the ULCC must be satisfied that it has achieved as much compatibility as possible.

Delegates were generally of the view that public policy exception should not be in the *UBCCA*, and that, in terms of commentaries, ULCC legislation does not normally speak to variations between uniform Acts.

It was agreed that the *UBCCA* should list three types of illegality as set out in paragraph 38 of the Report. The recommendations set out in paragraphs 51, 53 and 54 of the Report were accepted.

Further, it was agreed that it would be reasonable to have the amendments drafted and adopted under the November 30th rule.

**RESOLVED:**

**THAT** the report on amendment of the *Uniform Benevolent and Community Crowdfunding Act* be accepted;

**THAT** amendments to the *Uniform Benevolent and Community Crowdfunding Act* be prepared in accordance with the Report;

**THAT** the revised Uniform Act be circulated to federal, provincial and territorial representatives of the Civil Section by the ULCC Legal Project and Research Coordinator by October 31, 2023; and

**THAT** following such circulation, unless two or more objections are received by the ULCC Legal Project and Research Coordinator by November 30, 2023, the revised Uniform Act be deemed adopted and recommended for enactment.

## DRAFTING CONVENTIONS

### Final Report
### Presenter: John Mark Keyes, University of Ottawa

Mr. Keyes noted that the ULCC's Drafting Conventions (the "Conventions") have existed since the beginning of the ULCC (1919). The Conventions establish best practices for drafting uniform Acts, but also serve as a reference for drafters at the federal, provincial and territorial levels (less so at the municipal level). Courts also use them, and Ruth Sullivan has suggested in her writing that the Conventions may be used to aid statutory interpretation.

The ULCC has reviewed the Conventions four times in the 20th century, but they were last updated in 1989 – which is now more than 30 years ago. In 2019, a working group was established to review the Conventions. Many leaders of drafting offices across the country are part of the working group.

Last year, a progress report was presented proposing revisions to the first four parts of the Conventions. Comments have been received from across the country since that time, so the working group has made some further revisions to those parts. Those comments also led the working group to break Part 2 of the Conventions into two separate parts, resulting in the following structure:

Part 2 – Provisions of Legislative Texts
Part 3 – Formal Elements of Legislative Texts
Part 5– Drafting Practices

Two new parts have been added as well:
Part 6 – Language
Part 7 – Multilingual Drafting

Mr. Keyes advised that the move has been made beyond bilingual to multilingual drafting – Nunavut, for example, publishes in 3 languages. Languages reflect the reality of people who speak them – a lot of legislative concepts have never been expressed in Inuktitut, so a significant amount of work is being done in this area.

This is similar to what has happened over the past 30 years with respect to French language drafting in common law jurisdictions.

The working group has maintained the structure of the Conventions, with the exceptions noted above, but some of the elements have been rearranged. Also, while the initial conventions were based entirely on primary legislation, the revised Conventions have been expanded to also cover delegated legislation.

Although principally focused on the drafting of model laws, Mr. Keyes noted that the Conventions reflect the expertise of drafting offices across the country. Although there is much in common across jurisdictions – there are also significant differences, which are reflected in the amendments, which, in places offer different jurisdictional approaches.

The working group also considered bijural issues and considered including common law/civil law guidance, but these concerns will instead be addressed in a forthcoming style guide.

Mr. Keyes then went through the new conventions part-by-part, providing a summary of each part:

Part 1 – Introduction
Part 2 – Provisions of Legislative Texts
Part 3 – Formal Elements of Legislative Texts
Part 4 – Arrangement
Part 5 – Drafting Principles
Part 6 – Language
Part 7 – Drafting Multilingual Legislative Texts
Annex – Decimal Numbering (for use when adding new provisions in legislation)

Mr. Keyes noted that the working group is working on a style guide and aims to have that ready for next year's annual meeting.

A delegate noted that, with respect to the style guide, bijural uniform legislation is becoming necessary for more projects that the ULCC works on. Currently, it's at the policy options/decisions point in the process that bijuralism really needs to be considered and that the style guide will be very important for working groups in this regard.

Mr. Keyes reviewed the current and proposed new conventions in English and French and noted that:

- providing more detail on "*audience*" was considered, however, the working group determined that it would just be too difficult to come to a clear, definite conclusion;
- references to "*legislative text*" throughout the Conventions are references to primary and secondary legislation;
- omnibus bills were not really considered – the ULCC focuses on a particular subject matter, and a particular Act to cover that subject matter; and
- jurisdictions are doing things differently, as do drafters within jurisdictions, but the Conventions remain the same.

Delegates discussed that consequential to adopting the conventions, the ULCC may need to review the *Principles for Drafting Uniform Legislation Giving Force of Law to an International Convention* to ensure coherency with the new conventions.

**RESOLVED:**

**THAT** the report of the working group on Drafting Conventions be accepted; and

**THAT** the Drafting Conventions be adopted; and

**THAT**, having adopted the Drafting Conventions, the ULCC recognizes that it is desirable to review the *Principles for Drafting Uniform Legislation Giving Force of Law to an International Convention* and ULCC products prepared in accordance with the Principles to ensure coherence, and therefore asks the ACPDM to consider a project to undertake such review; and

**THAT**, having adopted the Drafting Conventions, the Civil Section recommends that the Executive Committee consider withdrawing the ULCC's 1989 drafting conventions.

## NON-DISCLOSURE AGREEMENTS

### Progress Report
### Presenters: Jennifer Khor, Supervising Lawyer, SHARP Workplaces Legal Clinic, Community Legal Assistance Society and Peter Lown, K.C., Alberta

Ms. Khor began by explaining what a non-disclosure agreement ("NDA") is and noted that non-disparagement clauses are also considered NDAs.

Ms. Khor explained the purpose of the project, noting that research shows that 95% of persons who sign NDAs experience negative mental health consequences, and that systemic inequalities are exacerbated by NDAs.

Ms. Khor then provided a brief history of NDAs – which were first used in the 1940's to protect intellectual property rights. Later, NDAs were used in public health cases (asbestos and tobacco, for example), and then later in employment disputes, both in contracts and to settle claims. In the past, NDAs were made with respect to non-disclosure of the settlement amount, and more recently, with respect to disclosure of anything at all related to the settlement.

Ms. Khor outlined the findings of research that has taken place with respect to the use of NDAs in the United States and Ireland and noted the absence of Canadian research.

With respect to enforcement, Ms. Khor advised that NDAs are enforced under the law of contract and that there are provisions in various pieces of legislation dealing with NDAs (such as within workers compensation legislation).

A summary of existing and in-progress NDA legislation was presented:

- P.E.I. has adopted NDA legislation;
- Ontario has adopted two pieces of legislation addressing NDAs; one in post-secondary education and the other in real estate;
- Federally, and in a number of other provinces, including Nova Scotia, Manitoba, B.C. and Ontario, draft bills have been prepared;
- In the US, several states and the federal government have adopted NDA legislation and the process is underway in several other states;
- Draft bills/work towards draft bills is underway in the UK, Ireland and Australia.

In the PEI legislation, "*harassment*" and "*discrimination*" have been defined quite broadly. When the working group discussed this, it was agreed that wrongful conduct based on harassment, discrimination and violence should be within the scope of the model legislation, along with retaliation, but beyond that where the line should be drawn is not yet clear.

With respect to legislative approaches, Ms. Khor advised that the working group settled on three possibilities, all of which are set out in the report –

(1) banning NDAs entirely,

(2) restricting NDAs subject to certain conditions; or

(3) permissive legislation (defining what NDAs could be used for).

Ms. Khor summarized each of the three approaches.

Ms. Khor provided some findings from research carried out in the United States which indicates that the passage of NDA legislation does not have a chilling effect on settlements, as settlement rates have not changed over the past 35 years.

It was noted that both utility and uniformity should be kept in mind during the scope discussion, noting that a patchwork of legislation is already beginning to appear.

Delegates discussed a range of issues including:

> What does "violence" mean in this context – the report of the Manitoba Law Reform Commission used "*abuse*" (harassment, discrimination and *abuse*), as opposed to "*violence*"?
>
> Ms. Khor advised that this had not yet been considered in depth by the working group.
>
> How are conflicts of law dealt with? Has it been a jurisdiction of contract approach, a place of doing business approach etc.?
> In the US litigation, the suits have been brought in the location where the conduct occurred, but this is primarily due to limitation clauses, as states with NDA legislation often extend limitation periods for those cases.
>
> Have any jurisdictions taken the complete ban approach?
> Ms. Khor advised that 6 jurisdictions have taken this approach, but within certain contexts (3 more have bills in development). Washington, for example, has taken this approach, but only with respect to sexual harassment and assaults.
>
> The working group was encouraged to consider a combined approach, to ban some categories, and limit others.
>
> With respect to scope considerations, after reviewing the legislation in other jurisdictions, the working group established a continuum of conduct for consideration. The continuum is set out in the report. Ms. Khor also explained that whistleblowing applies to each category in the continuum and that existing whistleblowing legislation may not be adequate.

Ms. Khor reviewed what protections could be made available if the legislation is to permit NDAs, noting the approaches taken in various jurisdictions. The working group is of the view that NDAs should not prohibit someone from speaking with a law enforcement or regulatory body.

The working group sought direction on where the line should be drawn on the continuum of applicable behaviour set out in the report and delegates agreed with the respect to the first three columns in the behaviour continuum and no objection was voiced to the notion of expanding application beyond the employment context.

A delegate commented that the working group may wish to consider whether the potential for a chilling effect on settlements should not affect the policy side of the analysis, namely that lessening the possibility of settlement in certain situations may be a necessary price to pay to ensure a behaviour is not permitted to continue and further harm done to others.

In terms of remedies, a delegate commented that empirical evidence would be helpful before deciding the question of remedies.

Delegates also discussed the report of the Manitoba Law Reform Commission and its cautious recommendations, including whether NDAs subject to restrictions with respect to disclosure to law enforcement/regulatory bodies should be enforceable.

Ms. Khor summarized the discussions, confirming that this is an area where the ULCC would like to proceed with developing uniform legislation, that scope covering the first three columns in the table in the report is acceptable to delegates, that the working group should consider different models (ban, permit NDAs with conditions etc.) and there should be clarity with respect to specific exclusions. There was also interest expressed in obtaining more data on the possible chilling effects of settlements.

**RESOLVED:**

**THAT** the progress report of the Working Group on Non-Disclosure Agreements (NDAs) be accepted;

**THAT** the working group continue its work in accordance with the directions of the ULCC; and

**THAT** the working group report back to the ULCC at the 2024 meeting.

## REFORM OF GENERAL PARTNERSHIP LAW/JOINT-VENTURES

### Progress Report
### Presenter: Maya Cachecho, University of Montreal

Ms. Cachecho began by explaining that a joint venture is a collaborative agreement between two or more companies or ventures for the realization of a specific project. It allows parties to join forces and share contributions. Joint ventures are also time limited – they are not a continuing association.

Joint ventures are often used in large scale projects that cannot be carried out by one company alone (for example in mining projects). They are a contract-based relationship (not the creation of a separate legal entity).

Ms. Cachecho noted that joint venturers are subject only to the terms of their contract, yet they are working with third parties. As a result, there is a risk that a court will treat the relationship between the parties as a partnership, based on their conduct, having shared liabilities.

Ms. Cachecho provided a brief history of the working group, noting that the work of the Alberta Law Reform Institute (ALRI) in this area has been the starting place for the working group.

Historically, one of advantages of the joint venture has been its flexibility – parties can quickly come together and carry out a project with each party retaining autonomy (parties may even be competitors).

Common Law

The working group noted that joint ventures are treated differently under English common law than they are under American common law. The English common law system does not distinguish between a general partnership and a joint venture. In the American common law system, joint ventures are recognized as something different from partnerships.

Canada has accepted the American common law position – the criteria for establishing a joint venture are:

- contributions by each entity;
- joint interest in the project;
- mutual control;
- an expectation of profit;
- limited to one object or purpose.

Some authors have criticized the *Central Mortgage & Housing Corp.* case, suggesting these are the same criteria for a partnership.

Among the criteria listed above, two appear to be most indicative of joint ventures:

- mutual control;
- limited to one object or purpose.

Civil Law

In Quebec, joint ventures were recognized in a 2018 decision as a distinct legal entity.

In common law provinces, when parties attempt but fail to establish that they are a joint venture before a court, the court will classify the parties as being in a partnership. In Quebec, in the same situation, the court would find the parties to be in a *société en participation*, which translates (roughly) to 'undeclared partnership'. Not general, not limited, but *undeclared* partnership.

In Quebec, joint venturers must declare in their contract that they are not an undeclared partnership.

As the ULCC prepares uniform legislation with respect to joint ventures, what should be taken into account?

*An end to joint ventures* – Some authors would prefer to abandon the concept of a joint venture altogether and have everyone who would be a joint venture be a partnership. On the other hand, some find joint ventures to be a flexible, convenient legal tool, and support their continued existence.

*Registration* – To be a joint venture you must register as one. However, this would diminish the efficiency the joint venture model offers. ALRI recommended against this approach. In Quebec, the situation may be different – registration is important for the protection of third parties. Since joint ventures are not recognized in the Civil Code, they are not required to register but they often do so voluntarily.

*Explicit clauses in contract*: Two approaches have been proposed:

- Designate that the relationship is a joint venture, not a partnership. In Quebec, this solution is possible. But even without it, the Civil Code requires a judge to determine the intention of the parties, regardless of the terms of the contract.
- Joint and several liability – joint venture parties are jointly and severally liable to third parties unless the joint venturers and the third party have specified otherwise. In Quebec, this solution is similar to the status quo. In the Civil Code, regardless of what is in the contract, parties remain jointly and severally liable to the third party.

The working group is also considering whether there should be a definition for "joint venture" included. There has been no definition established in the US case law, nor in Canada's beyond a list of criteria.

Turning to ALRI's recommendations, the working group is comfortable with ALRI's recommendations:

- a small definition that could be expanded upon to meet the needs of civil law;
- to recognize that the joint venturers remain jointly and severally liable to third parties unless the third party waives this liability (which would be very rare);
- registration is not required.

Ms. Cachecho concluded by noting that the working group aims to provide some clear recommendations for consideration at next year's annual meeting.

**RESOLVED:**

**THAT** the oral progress report of the working group be received; and

**THAT** the working group continue its work and report back to the ULCC at the 2024 Meeting.

## RULES OF PROCEDURE AND POLICIES OF THE CIVIL SECTION

**Report**
**Presenter: Valérie Simard, Canada**

Ms. Simard explained that the sub-committee was struck to prepare rules of procedure and policies for the civil section to complement the by-laws and that the sub-committee has sought to improve consistency and transparency in the ULCC's work.

Ms. Simard advised that, last year, the ULCC adopted its first policy – a policy on the adoption of policies. This allowed for the development of two further policies, one of which was presented last year for information and is now presented for adoption – the *Policy on the Distribution of Materials to the Civil Section for its Annual Meeting*.

The Steering Committee adopted this policy on a provisional basis in the spring of 2022 then re-adopted the policy in September 2022. The policy is now presented for adoption as a permanent policy.

Ms. Simard provided a summary of the policy and noted that the policy has been well received by working groups. This also is not a rigid policy and provides for exceptions when necessary.

The sub-committee also prepared another policy, the *Policy on Reports Presented to the Civil Section Annual Meeting*. Ms. Simard provided a summary but advised that this policy would not be presented for adoption this year. This policy will help working groups in preparing reports and offers clarity on what should be included in reports. Having uniform guidance will also help delegates in studying and analyzing ULCC projects.

Ms. Simard advised that this policy was only finalized this spring, so it may be too soon for presentation. The steering committee recommends re-adopting the policy on a provisional basis, and then considering it again next year.

Lastly, Ms. Simard advised that the sub-committee discussed the November 30th Rule and considered whether the Rule is needed, or not. Ms. Simard provided a summary of the Rule and noted that the Rule has actually been applied in situations other than those it was intended to cover, one example being to allow jurisdictional representatives more time to consider an Act where they received the proposed Act just prior to an annual meeting.

The sub-committee found the Rule to be a very useful tool that allows for the avoidance of having to wait an entire year to adopt a new Act when only minor changes need to be made, but found some of the other applications of the Rule less than ideal. The sub-committee is not currently recommending any policy be implemented with respect to the Rule at this time, as the new deadlines policy may now prevent potential misapplications of the Rule.

A delegate thanked the sub-committee for its work and noted that the November 30th rule exists for good reason and should remain in place.

A delegate noted that the November 30th rule has been mis-applied on occasion in the past. The rule is only intended to be used to allow a product to be completed short of the one-year meeting cycle, and only where the changes are clear and uncomplicated, or when the policy matter can

be clearly resolved by the working group in a short period of time. The Rule is very useful and should not abandoned for these situations.

Ms. Simard concluded by stating again that the *Policy on the Distribution of Materials to the Civil Section for its Annual Meeting* is presented for adoption and the *Policy on Reports Presented to the Civil Section Annual Meeting* is presented for information.

**RESOLVED:**

**THAT** the report of the Steering Committee sub-committee on Rules of Procedure and Policies of the Civil Section be accepted;

**THAT** the *Policy on the Distribution of Materials to the Civil Section for its Annual Meeting* annexed to the Report be adopted by the Civil Section; and

**THAT** the sub-committee continue to consider rules of procedure and policies of the Civil Section and report back to the ULCC at its 2024 Meeting.

## HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (2019)

### Pre-implementation Report
### Presenter: Catherine Walsh, McGill University

Ms. Walsh opened by noting that it would very much be in Canada's interest to adopt the *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (2019) (the "Convention"), and also that this report is limited to the common law provinces and territories; there will be a separate report issued for Quebec.

The status of the Convention has changed over the last year. It was adopted on July 2, 2019, and will enter into force in September 2023. All 27 European Union member states, aside from Denmark and Ukraine, accepted. The UK is likely to adopt the convention in the next year.

The Convention was preceded by the 2005 choice of court convention, which provided direct jurisdictional rules and indirect jurisdictional rules. The Convention only deals with indirect jurisdiction.

Ms. Walsh advised that it is important to note that the Convention does not usurp the national recognition and enforcement rules, aside from one exception. The current rules in place will continue to apply to judgments that are not eligible under the Convention.

In all but 2 provinces and territories, the rules are found in caselaw. Saskatchewan and New Brunswick are the exceptions and have enacted statutes.

Territorial Scope: Ms. Walsh summarized the Convention's enforcement rules. In Canada – the recognition of interprovincial judgments would not be covered by the Convention (there are existing statutes in place to deal with these cases).

Material Scope: The Convention only applies to civil and commercial matters – this would exclude tax, administrative matters etc. There is also a list of specific exclusions which would otherwise be considered 'civil', but are considered under other instruments, or have been found inappropriate.

Ms. Walsh advised that "*judgement*" is defined in the Convention to include any decision on the merits (including a default decision), including an award of costs or expenses relating to a decision on the merits. This definition is also not limited to monetary judgments, which is contrary to what has traditionally been the case at common law. The *Pro Swing* case, however, has opened the door for recognition of non-monetary judgments in appropriate cases. The NB statute actually codifies the common law rule, making NB an outlier.

In the recognition context, there is no review of the foreign judgment on the merits – the requested court does not sit as a court of appeal. To be recognized, the judgment must have effect and be enforceable in the state of origin. The requesting court may postpone or refuse recognition if the decision is under review or if the limitation period has not elapsed.

Ms. Walsh advised that the 'heart' of the convention is set out in Articles 5 and 6. Ms. Walsh then summarized the three heads set out in those articles, noting comparisons between the Convention, the common law and the statutory regimes in NB and SK. The three heads:

*1. Connection between defendant and state of origin*
*2. Consent/submission by defendant to the exercise of jurisdiction by the court in the state of origin*
*3. Connections between subject matter and state of origin*

Ms. Walsh then summarized articles 6, 7, 10 and 13:
Article 6 is significant, as it deals with rights in rem in immovable property and is the only convention that is mandatory – if the judgment is within the Convention, you cannot rely on national law.

Article 7 sets out grounds for non-recognition of a judgment, even if jurisdiction is otherwise established. This rule is permissive – states may refuse to recognize or enforce a judgment under the Convention if one or more of the grounds are met.

Under Article 10, a requesting court can refuse recognition if the judgment awards non-compensatory (punitive) damages. This is contrary to the common law position.

Under Article 13, a requesting court cannot refuse recognition on the basis that recognition or enforcement should be sought in a different state.

Ms. Walsh concluded by summarizing what adoption of the Convention would mean for Canada, noting that the Convention's standards are mostly consistent with the existing law in Canada (with the exception of NB).

It was noted that, from a Canadian perspective, we need this convention more to allow Canadian judgments to circulate more freely, than for the enforcement of incoming judgements.

A delegate advised that the information in Ms. Walsh's report will be helpful for the commentary in the uniform Act. The working group will now need to consider its options for the uniform Act – a primary one being whether to exclude certain subject matters from the scope.

A delegate questioned working on an implementation regime for an unsigned convention and Ms. Walsh advised that, in terms of Canada's implementation timelines for private international law conventions – it can take up to 50 years, but without a uniform Act it will not happen. Historically, Canada has not been an early adopter of international private law conventions.

Ms. Walsh added that it is a challenge with 13 provinces and territories to do this province-by-province; the project needs to make its way onto a legislative agenda and that is not an easy task.

It was noted that ideally, we would receive a civil law report before moving toward implementation of a uniform law.

**RESOLVED:**

**THAT** the preliminary pre-implementation report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters be accepted.

## DRAFT *UNIFORM ENFORCEMENT OF CANADIAN JUDGMENTS ACT* (“*UECJA*”)

**Final Report**
**Presenter: Stephen Pitel, Western University**

Peter Lown, K.C., expressed his gratitude toward the working group for this project (each member is named in the report), along with various other individuals who were involved, including the late Clark Dalton, K.C., for consolidating the three version of the Act and Blair Barbour for creating the drafting instructions for the draft *UECJA*.

Mr. Pitel thanked the ULCC for allowing him to be involved in the project and the working group for its work.

Mr. Pitel advised that, last year in Edmonton, an Interim Report was provided and that this, final report, is relatively brief and incorporates by reference the interim report. Most substantive decisions were made in the first year of the two-year project, which freed up the second year for drafting and translation.

Mr. Pitel addressed the following issues:

The working group was focused on modernizing the statute and commentary. The initial statute was 30 years old and underwent 3 amendments. This has resulted in a patchwork of commentary. Jurisprudential and statutory developments also had to be taken into consideration. There were also aspects of the statute itself that could be revised for clarity. The substance of the statute, however, remains mostly the same.

**Limits on the defendant’s ability to challenge the rendering court’s jurisdiction**
These objections are allowed at common law and in earlier registration statutes.

The contrary view: Within a federation, it does not make sense to treat being sued in another part of the federation as akin to being sued in another country. Theoretically, disallowing these objections makes sense. Also, if jurisdiction is called into question by a defendant, this claim should be brought in the rendering court.

The drafters of the initial uniform Act recognized, even 30 years ago, that being a resident of one province and being sued in another does not present an insurmountable barrier to defending in the jurisdiction the suit is brought in. This is even more true today.

The key provision is 7(3)(a) [6(3)(a) in the Interim Report].

**Application to registrations or judgments enforcing judgments**
This is perhaps the only new substantive piece to be considered. It was not addressed in the original uniform Act but is now necessary.

Three types of judgments to be considered:

- a merits judgment;
- a common law claim on a foreign law judgment; and
- under a registration scheme, a registration of a judgment in another jurisdiction.

The question: Should a statutory registration scheme apply only to merits judgments? Courts have concluded that the answer to this question is "yes", but with reasoning that leaves questions.

In the *H.M.B. Holdings* case, a decision of the Judicial Committee of the Privy Council was sued on in British Columbia. A judgment was rendered in that province and that B.C. judgment was subsequently brought to Ontario for registration in that province. The Supreme Court of Canada held that this is not possible but did not state clearly that this is due to the scheme not allowing for it.

The working group thought it would be best to clarify this in the *UECJA* – see s. 1(3)(f).

**Setting aside registration**
Section 7 should be amended to provide a clear process for setting aside a registered judgment (the language has been expanded). This is now more of a "flow chart" provision. The key provision is s. 7(4), which clarifies that jurisdiction of the rendering court is not a basis for setting aside a registration.

**The role of public policy**
There is also a very narrow process for setting aside a judgment on public policy grounds, which would almost certainly never be used in Canada, but has been retained anyway. It was found to be acceptable 30 years ago and it is still found to be acceptable now.

**Civil protection orders**
The working group was persuaded that leaving this as-is was the appropriate choice. That said, while the substance of these provisions remains, these provisions are an optional portion of the draft Act.

**Interaction with other statutes and common law**
The registration scheme in the uniform Act is intended to be an alternative route for enforcing a judgment, not the only route. The common law's preferred method is to sue on a judgment that has been rendered. The common law also allows for re-litigation. Section 10 (previously section 9) preserves all of this.

There is a concern, voiced in the commentary, that there could be multiple statutory schemes enacted to serve the same purpose – provinces/territories should consider this before adopting the uniform Act.

**<u>Final Report</u>**

Mr. Pitel then addressed the issues identified in the Final Report as follows:

**Title of the statute**
Since the 1990s, the divide between money judgments and decrees has mostly disappeared and as such, keeping "decree" in the title is not considered necessary.

**Creation of a new defence to registration**

See s. 7(2)(a)(ii) [an optional provision] – This provision has been included to provide protection to employees and consumers.

Thirty years ago, judgements with respect to consumers or employees were not special but over time, policy choices have been made at a number of levels to implement protections for vulnerable parties, including employees and consumers.

These protections can take one of two forms – sword or shield. A sword-type protection would give the vulnerable party the power to sue in a place they may not otherwise be able to (no substantial connection). A shield-type protection would require plaintiffs wanting to sue consumers or employees to do so in the jurisdiction in which the consumer or employee is ordinarily resident.

The same analysis can apply with respect to enforcement of judgments from other provinces/territories. New Brunswick and Quebec have implemented these protections. Mr. Pitel suggested that allowing vulnerable plaintiffs to sue in their jurisdiction of residence makes sense. However, with the employee/consumer as defendant, this makes less sense and including consumer/employee protections at the level of enforcement likely makes even less sense.

Defendants most often show up and defend in any jurisdiction the suit is brought in, but this will not be the case all of the time, and this provides protection for those small number of cases.

If this is to be allowed as a defence to registration, there are a number of scope questions that must be considered and answered.

**Recovery of registration costs**
The working group felt that the existing provisions potentially conflated the costs of obtaining a judgment vs. the actual registration costs.

**Clarifying language in some provisions**
Redundancies such as "*ex parte without notice*", for example, have been revised for clarity and efficiency. Several other revisions have been made for the same reason.

Paragraph 17 of the Final Report does not mention it, but the structure of the definition of "*Canadian judgement*" has been re-worked. The existing definition includes (a), (b), (c), (d) but not (e), (f) etc. Readers might be better served if all elements of the definition are in the same place.

**Expressly mention the relationship to the UCJPTA**
The working group felt that, although both statutes deal with private international law, that's where their similarities end; each statute stands on its own. There is no need to refer to the UCJPTA.

**Revisions to the commentary to Part III**
Some aspects of the commentary have been updated.

Delegates discussed a range of issues including:

The Act doesn't acknowledge the *Uniform Enforcement of Money Judgments Act*. If other administrative tribunal decisions are being registered in the money judgment registry, should we add a provision that would allow for registration of these sorts of orders under this Act without requiring an order of the court?

Mr. Pitel advised that, as a design mechanism, you would want to have the process in section 4 followed first. Then, something in the other statute that says following the appropriate steps in the registration scheme is the necessary pre-requisite.

It was noted that there was a lot of discussion with respect to these mechanics in the working group, in particular:

- In a province, you may have a tribunal that has the authority in its statute to issue orders that have the force of a court order; or
- Registration of orders of administrative tribunals may need to be registered with the court before they can be enforced by a court.

Practically, registration is an integral step. Even though it may seem unnecessary in a domestic situation, it's worth keeping in the case of a non-domestic judgment being brought in.

A delegate noted that, with a judicial order, you have the independence that becomes the bedrock you're building on; you shouldn't be second-guessing the jurisdiction of the judgment in the initial province. Even though a tribunal decision can be enforced by an order of the court (by statute), requiring registration with the court in that jurisdiction may be necessary as a safeguard.

Also, to suggest that foreign civil protection orders should be given effect even without registration in some jurisdictions (for example in Montana and Saskatchewan) is a significant policy decision.

Delegates noted that Quebec is interested in this work, as Quebec is interested in drafting a civil law for this as well. This is unusual, as the normal course would be to modify the civil code or the civil procedure code, but that may not be possible here. If an entire statute is to be drafted, Quebec will ask the working group for input.

**RESOLVED:**

**THAT** the report of the working group on the *Uniform Enforcement of Canadian Judgements Act* be accepted;

**THAT** the *Uniform Enforcement of Canadian Judgements Act* be adopted and recommended for enactment; and

**THAT** upon adoption, the *Uniform Enforcement of Canadian Judgements and Decrees Act* be withdrawn.

## INTERNATIONAL LAW SESSION

**Presenter: Carl Lisman, former President, Uniform Law Commission (US) (the "ULC")**

Mr. Lisman noted that this is his 4th ULCC annual meeting and that the ULC's current president, Mr. Tim Berg, was unable to attend due to a scheduling conflict, as he is meeting with the 51 legislative liaisons (ULC commissioners).

Mr. Lisman advised that the ULC was founded in 1892 and currently has 450 commissioners and explained the ULC's legislative development process.

Mr. Lisman highlighted some issues facing the ULC, noting that from suggestion to final approval of a uniform Act, the process can take up to five or six years. Sometimes, because this process takes so long, the legislative curve is missed – state legislatures have already acted, and once a law has been enacted convincing legislators to re-do the law is often very difficult.

Secondly, observers (those with the knowledge and expertise of the project) are sometimes lost during the long process. Since COVID, meetings are now often in a hybrid format, commissioners and the reporter attend in person; observers are asked to attend in person, but they may also attend remotely. However, remote meetings don't offer the same interactions that in-person meetings do.

Other than remote attendance, the ULC has not changed how it conducts its business in 6 decades, and it may be time to re-think how things are done.

Mr. Lisman noted that the ULC and the ULCC have a history of taking on joint projects together and that, having been involved in two joint projects, he felt that the ULC and the ULCC are overdue for a third. The ULC is currently studying supply chain matters and whether there should be a law on transparency – human trafficking, child labour and substandard production issues - and Mr. Lisman identified this project as having potential as a possible joint project.

Mr. Lisman then discussed some of the ULC's current initiatives, including the recurring service charges committee and the use of AI by state governments as well as NDA legislation and the differences among state NDA statutes (some of which are significant).

**RESOLVED:**

**THAT** the ULCC express its thanks to Mr. Carl Lisman of the Uniform Law Commission for his presentation.

## PRIVATE INTERNATIONAL LAW REPORT

**Oral Report**
**Presenter: Kathryn Sabo, Canada**

Ms. Sabo advised that a written report would be released shortly in the usual form.

Ms. Sabo began by providing some context with respect to her group's projects – with work done with three international organizations:

- The Hague Conference of Private International Law ("HCCH")
- The International Institute for the Unification of Private Law ("UNIDROIT")
- The United Nations Commission on International Trade Law ("UNCITL")

Ms. Sabo advised that:

- HCCH's main mandate is to harmonize the rules of private international law; rules relating to jurisdiction and applicable law. An example of this would be the 2005 Choice of Court Convention. HCCH's responsibilities also overlap with UNIDROIT and UNCITL (more overlap with UNIDROIT).
- UNIDROIT's focus is on the harmonization of the rules of private law; not conflicts of law, and not private international law. An example would be the Genevea Convention on the Substantive Law of Intermediated Securities.
- UNCITL's focus, from the perspective of Canada, is primarily on private international commercial law. An example would be the Convention on the Assignment of Receivables in International Trade.

Each organization has a workplan, and the role of governments/states in each organization's respective workplan varies. Ms. Sabo noted that UNCITL, for example, does most of its work through 6 working groups and participation in those groups is by state delegation. At UNIDROIT, most work is not done with direct state involvement. At HCCH, states play a primary role, but there are also a number of expert or working groups that are tasked with developing additional guidance for an existing instrument.

How are projects chosen? By consulting the advisory group on private international law, which is composed of representatives from the constitutional, administrative and international law sections at the Department of Justice and 6 provincial/territorial representatives. With respect to participation in projects, Ms. Sabo noted that provincial and territorial participation has increased post-pandemic.

Ms. Sabo noted that the report will contain the usual chart of priorities and provided a list of categories into which those priorities would fall, and then provided a list of projects currently underway and at the negotiation stage, all of which will be set out in detail in the written report.

Ms. Sabo expressed appreciation for ULCC, and for the work delegates do in getting implementation projects onto their respective provincial/territorial legislative agendas.

The Chair thanked Ms. Sabo for her presentation.

## ADVISORY COMMITTEE ON PROGRAM DEVELOPMENT AND MANAGEMENT

**Report**
**Presenter: Peter Lown, K.C., Alberta**

Mr. Lown began by thanking all members of the Advisory Committee on Program Development and Management (the "ACPDM") for their work. Mr. Lown then provided an overview of the ACPDM's annual cycle.

This year, in a couple of instances, it was necessary for the working group to be slightly late getting documentation out in advance of the annual meeting, which triggered the waiver process. Mr. Lown acknowledged that everyone wants to take a breather after the annual meeting but stressed the importance of beginning ULCC work again as soon as possible after the annual meeting (ideally in late September/early October).

Mr. Lown noted that the production of compatible, but not identical, English/French versions of uniform Acts is a constant challenge – the process has improved and must continue to improve. This cannot be an afterthought and must be recognized in the ULCC's timelines.

With respect to project selection/proposals, Mr. Lown advised that providing a little bit more context in proposals will help the ULCC to better understand the suggestion and may also help to find effective working group membership and leadership.

Mr. Lown noted that the ACPDM's biggest challenges are finding:

- subject matter expertise/working group leadership; and
- engaged working group members.

Mr. Lown provided an overview of projects in-progress:

- Enforcement of Canadian Judgments and Drafting Conventions: Complete.
- Crowdfunding: Seeking a drafter ahead of possible adoption under the November 30 rule.
- Non-Disclosure Agreements: The policy portion of this project will hopefully be finalized for August 2024.
- Joint Ventures: A solid policy outline should be provided in August 2024.
- Class Proceedings: Catherine Piché was initially the scientific director and project lead, but she has now been appointed as judge in the Superior Court of Quebec. Ms. Cachecho has taken over as scientific director and new leadership has been identified to commence next January (2024).
- Private International Law: A couple of projects which are being developed in accordance with federal timelines and federal resources. Kathryn Sabo provided an update – Two projects have been in-progress for several years:
    - A uniform implementing Act for the UN Convention on Independent Guarantees and Standby Letters of Credit; and
    - Hague Convention on Securities held with Intermediaries
- Franchises: it was decided not to proceed with amendments to the uniform Act.
- Online Defamation: This project is on hold as there was a federal initiative undertaken to consider the creation of a super regulator for all online activity. Based on the response to this initiative it has been pulled back for further consideration. The ULC was also looking at this topic and has tried to bring some definition to the issues in this area. That study group has reported but there is no consequent action at the present time. For the ULCC,

one idea being considered is to tweak the uniform Defamation Act to deal with the change from paper-based conduct to online conduct.

Delegates were asked to provide input on Online Defamation and did not indicate a strong interest in pursuing the project at this time.

- Remote Execution: Mr. Lown noted that this project is being explored following on from COVID measures and the question is would it be worthwhile/would there be interest in having a uniform Act dealing with remote validation generally?

  Delegates were asked to provide input on Remote Execution and spoke to initiatives in Saskatchewan, Quebec, British Columbia, Alberta and Manitoba.

In conclusion, Mr. Lown noted that all current members of the ACPDM have agreed to stay on for another term.

**RESOLVED:**

**THAT** the report of the Advisory Committee on Program Development and Management and the direction undertaken by the Advisory Committee be accepted.

## CHARITABLE ORGANIZATIONS

### Progress Report
### Presenter: Peter Lown, K.C., Alberta

Mr. Lown advised that this is a joint project with the CBA national section on trusts and estates, and that the project itself is currently focused on three sub-projects. Each sub-project has its own group of committee members. Mr. Lown summarized these three projects as follows:

### Hybrid Organizations

The Report provides some background on how hybrid organizations arrived. There have been some private members bills introducing the concept of hybrid organizations in NS and BC.

Two models of hybrid organization: Benefit Corporation (B-Corp) and Corporation with a Social Mission (CSM):

Benefit Corporations

A corporation can say that it is "socially conscious", which is a self-declared characteristic. This is still a corporation, and its aim is still to generate a return for its shareholders. This is accepted in the US and adopted significantly.

Some jurisprudence deals with tempering that primary focus, including by sponsoring activities, donating to charities with profit etc. A B-Corp may undertake these socially conscious activities but is not legally obligated to do so.

Corporation with a Social Mission

This is a corporation with a focus on making a profit not for shareholders, but for an identified social mission. There are restrictions placed on the CSM's distribution of profits and use of its assets.

The working group is of the view that if you accept social responsibility as a purpose, you should be legally obligated to operate accordingly. The self-branding exercise is insufficient. A CSM would have to have an object clause and set out its social mission. There would be three specific restrictions, as per the Report.

Mr. Lown noted that, in British Columbia, both versions (B-Corp and CSM) exist.

It was agreed by the meeting that a robust approach would seem appropriate and the working group will take the direction provided.

### Home for Charities

Mr. Lown advised that one challenge for charitable organizations across the country is the disparate nature of their operations; they aren't necessarily well connected. There isn't a centralized location of experience and information, and these organizations can often struggle with decisions and activities.

Charitable organizations are taking on more and more of what were once core, publicly funded activities. Sports facilities, for example, used to be the responsibility of municipalities, whereas now they are often funded and operated by charities. A supportive, educational centre for charities would be useful.

Many charities receive government funding, but not all understand how to properly do their financial reporting – again, a centralized source of assistance would be helpful. The support would also need to be sufficiently active and clearly available to provide assistance when necessary. BC, for example, has such an organization in place.

Charities are within the responsibility of the provinces, but most provinces have deferred to Canada on account of fiscal responsibility. But that is only fiscal policy – nothing more. Some provinces have said they will regulate some aspects of charities (lotteries, cold calls etc.), but little more. See paragraph 8 of the Report – If it isn't done federally, it will be patchwork.

Three areas should be studied:

- Financial reporting and accountability;
- Responsibility of volunteers and their liabilities; and
- Directors' remuneration.

Mr. Lown noted that this sub-project remains in the study phase, rather than the defined policy stage.

A delegate asked whether the ULCC intends to rely on Canada to give this project a home? The delegate also noted as a follow-up that lobbying the federal government to create an overseer is likely beyond the ULCC's ambit.

Mr. Lown suggested that this may not be necessary. Canada taking the lead on this would be ideal, but this needs to happen one way or another. The degree of federal grant funding is so significant, any sort of accounting system a charity sets up must account for this. Federally, it would make sense in terms of accountability – to see how the grant funding given out is used.

A delegate offered a reminder that Quebec has its own organization through Revenue Quebec that does this. For Quebec, this is best done at the provincial level.

A delegate asked, when we talk about a "home" for charities, what do we mean by that? If it is a matter of a body providing guidance we should think about whether this falls within the ULCC's mandate.

A delegate noted that this speaks to government organization and resource allocation, which is beyond the ULCC's sphere of operation.

**Definition of "charity"**

Mr. Lown advised that this has been in the works for at least 50 years – the CRA and the Department of Finance (Canada) each present barriers. The provinces, however, may be sufficiently interested in cleaning up the existing common law definition of "charity". For example, in one province, the outbuildings of a church would be considered charitable for the purposes of municipal taxes, but not in another.

There is now consensus amongst the sub-project working group that it would help provinces and organizations to clarify the murky areas and identify some areas for expansion – this expansion has already occurred in some provinces (ON and AB, for example).

Some questions were put forth in paragraph 8 of the Report for consideration:

*1. Is uniformity essential?*

A delegate noted that, once more, the disparity between civil and common law will be an issue – for uniformity, this will be especially challenging for Quebec (Revenue Quebec and CRA to consider).

*2. Is the common law definition in need of clarification?*

The consensus is that, yes it would be desirable.

A delegate noted that, uniformity is good, clarification is great, but there is little need to pursue this unless there is buy in from Canada. Also, some provinces issue licenses under the *Criminal Code* to charities (generally as part of fundraising efforts) and they have issues with the definition – this could present an area of possible collaboration with the criminal section of ULCC.

Mr. Lown advised that, originally, that's what the working group thought, but gradually the thinking moved toward the possibility of clarifying a definition for the provinces only, leaving Canada to choose whether to engage.

Mr. Lown advised that he will be advising this sub-group that the ULCC is uncertain on how it would be able to put a product such as this forward.

**RESOLVED:**

**THAT** the progress report of the working group on Charitable Organizations be accepted;

**THAT** the working group continue its work in accordance with the directions of the ULCC; and

**THAT** the Working Group report back to the ULCC at the 2024 Meeting.

## IMPLEMENTATION ACTIVITIES

### Oral Report – Presenters: Jurisdictional Representatives

Delegates reported on activities in their respective jurisdictions and updates on the adoption of several ULCC uniform acts were provided, including :

- *Non-Consensual Disclosure of Intimate Images Act*
- *Amendments to the Uniform Wills Act (2015) regarding Electronic Wills (2020 amendments)*
- *Access to Digital Assets by Fiduciaries Act*
- *Missing Persons Act*

**RESOLVED:**

**THAT** the reports from jurisdictions on implementation activities be received.