

**MINUTES - CIVIL SECTION
AUGUST 11 TO 15, 1996**

Attendance

Thirty-nine delegates attended the meeting of the Civil Section. For details, see the list of delegates on page 6.

Sessions

Eight sessions were held from Sunday through Thursday including one joint session with the Criminal Section as well as two formal plenary sessions.

Distinguished Visitors

The Section was honoured by the participation of:

- (a) Mr. Bion Gregory, President, National Conference of Commissioners on Uniform State Laws;
- (b) Mr. Jeremiah Marsh - Chairman of the Committee on Liaison with Canada and International Organizations, and Co-chairman of the Joint Committee on Co-operation with the Uniform Law Conference of Canada and the National Conference of Commissioners on Uniform State Laws;
- (c) Mr. Graham Walker, Q.C. - a Past President of the Uniform Law Conference of Canada.

Presidence

The sessions were chaired by Mr. Douglas E. Moen, Q.C.

UNIFORM LAW CONFERENCE OF CANADA

Arbitration of Construction Liens Claims

Presenters: Catherine Auchinleck, Chris Curran (The report was written by William W. McNamara)

The Section received a progress report from representatives of the Canadian Bar Association respecting this proposal. Further consultation and discussion on the proposal is planned with CBA branches across Canada and within the ULC on both the substance and form (e.g. guidelines, model Act) of the final product.

RESOLVED:

1. That the report on Arbitration of Construction Lien Claims be received.
2. That the report be referred back to the Legislation and Law Reform Committee of the Canadian Bar Association to oversee the preparation of a further report for consideration of the 1997 Conference.

Uniform Class Proceedings Act

Presenters: Ruth Rogers, Susan Amrud, Bob Adamson

The Section received from the British Columbia and Saskatchewan Commissioners a draft Act and Commentaries recommending the adoption of a *Uniform Class Proceedings Act*.

A number of suggestions for improvements to the draft Act that were received from the floor were approved by the Section, as well as the following policy changes:

- ▶ delete the list of criteria that the court is to consider in determining whether a class proceeding would be the preferable procedure for resolution of the common issues;
- ▶ include an opting-in provision for non-residents, consistent with the British Columbia Act;

CIVIL SECTION MINUTES

- ▶ provide, in square brackets, both the Ontario and the British Columbia approaches to costs; expand the commentary to explain to jurisdictions the issues they have to contend with in determining whether to adopt a regular costs or no-costs rule;
- ▶ add an explanation to the commentary to section 40 to alert jurisdictions that they will need to consider the issue of whether or not to delete their rule of court that allows for representative proceedings.

RESOLVED:

1. That the draft act be amended in accordance with the discussion.
2. That the draft act be circulated to the jurisdictions as soon as possible. Unless two or more objections are received by the Executive Director of the Conference by November 30, 1996, the draft act should be taken as adopted as a uniform act and recommended to the jurisdictions for enactment and the text appear in the 1996 Proceedings. (See Appendix L at <http://www.law.ualberta.ca/alri/ulc>.) [No objections were received and the Uniform Act was adopted as of November 30, 1996. - Ed.]

Uniform Cost of Credit Disclosure Act

Presenters: Richard Bowes, Alberta Law Reform Institute
Pierre Pitre - Industry Canada } representing the Consumer
David Waite - Industry Canada } Measures Committee

The Section received from the Alberta Commissioners the draft *Uniform Cost of Credit Disclosure Act* with a covering memorandum outlining developments since the 1995 Conference. With respect to the content of the draft Act, the following resolutions were agreed to:

- ▶ with respect to the requirement for APR disclosure in non-credit card open credit situations:
 - (a) we recommend that the CMC reconsider their recommendation, and require only AIR disclosure;

UNIFORM LAW CONFERENCE OF CANADA

- (b) in the alternative, if APR disclosure is required, we recommend that the proposals should clarify the assumptions to be applied in calculating it;
 - (c) in the alternative, we recommend that CMC consider prohibiting standby fees for lines of credit;
- we recommend to CMC that they reconsider the requirements with respect to the disclosure of change of interest rate for credit cards to allow for no advance notice when the interest rate is indexed; instead, once a year they should give notice of the formula.

RESOLVED:

1. That Richard Bowes be authorized to transmit the recommendations as contained in the Minutes to the Consumer Measures Committee.
2. That subject to minor policy amendments arising out of consultations with the Consumer Measures Committee and drafting action relating to them, the draft act be circulated to the jurisdictions as soon as possible. Unless two or more objections are received by the Executive Director of the Conference by November 30, 1996, the draft act should be taken as adopted as a uniform act and recommended to the jurisdictions for enactment and the text appear in the 1996 Proceedings. [The date was subsequently moved to June 30, 1997, to accord with the schedule of the responsible ministers. The final text will appear on the Web site at that time. - Ed.]

Creditor Access to Future Income Security Plans and Insurance Contracts

Presenter: Donna Molzan

The Section received from the Alberta Commissioners a proposal to review the issue of creditor access to future income security plans and insurance contracts.

CIVIL SECTION MINUTES

RESOLVED:

That the Steering Committee be directed to establish a Working Group to work on the topic of exigibility of future income security plans and to prepare an issues paper and, if possible, a draft act for consideration of the 1997 Conference.

Data Protection in the Private Sector

Presenter: Tom McMahon

The Section received from the Federal Commissioners a report recommending a legislative approach to data protection in the private sector.

Recommendation #1: The responses to the first consultation paper revealed that there is strong consensus that such a law should apply to everyone in the private sector, regardless of size and including non-profit organizations, and should apply to all personal information, using standard definitions of personal information (any information about identifiable persons).

Agreed that a legislated approach is desirable.

Recommendation #2: Data protection principles are fairly universal, even though they can differ from one data protection instrument to another. The principles in the CSA Model Code represent a good base on which to build a Uniform statute and these principles are consistent with the principles in the Quebec Act which regulates data protection in the private sector. There do not appear to be significant differing options with respect to the selection of data protection principles.

Agreed, but not to the exclusion of specific sectoral codes.

UNIFORM LAW CONFERENCE OF CANADA

Recommendation #3: Of the various options (courts only; new agencies; sectoral commissions; panels of mediators/arbitrators appointed sectorally; existing data protection commissions) there is a large consensus for using existing data protection bodies to oversee laws regulating data protection in the private sector. This is the model adopted in the Quebec legislation.

Agreed, but flexibility must be provided to jurisdictions to determine which commission would be most appropriate. The working group must bear in mind that some provinces do not have existing data protection commissions and some do not have public sector privacy legislation.

Recommendation #4: Based on the above, a uniform statute should provide the data protection commission with a mandate for public education, powers to receive complaints (but generally only after the organization's process had been tried first), conduct investigations, mediation and adjudication. Whether the adjudication would be better done by a single Commissioner, full-time hearing officers, or from an *ad hoc* roster should be the subject of further consultation. Also, the law should not expressly provide for compliance audits or for technology assessments (although it is probable and acceptable that a Commission might issue papers or reports on how certain technologies affect privacy). The law should provide the Commission with the power to publicize the names of organizations with poor performance (although even if the law did not expressly provide for this, the Commission's decisions and reports would be public in any event). It would be useful to conduct more consultation on whether and how the law might recognize private standards registration processes. The law should contain an offence provision similar to the one in the Quebec Act.

The working group was instructed to consider whether the commission could play a role in approving sectoral codes. It was also suggested that

CIVIL SECTION MINUTES

ad hoc compliance audits are a cost effective way to put pressure on industry to comply.

Recommendation #5: The Uniform statute should express universally applicable data protection principles and an implementation mechanism, and should not attempt to set out specific rules for medical information, credit reporting or deal with privacy issues that are broader than data protection, such as workplace surveillance and invasion of privacy torts. More consultation should be undertaken with respect to the use of sectoral codes.

The working group was directed to consider further the issue of sectoral codes.

RESOLVED:

1. That a draft *Uniform Data Protection Act* and commentaries be prepared for consideration of the 1997 Conference.
2. That the working group give specific attention to compliance audits.
3. That the working group undertake to ascertain if there are effective mechanisms for the development and ratification of sectoral codes or other measures that provide more precise guidelines for the protection of privacy and disclosure interests specific to particular sectors, consistent with the general principles set out in the Act.

[The text of the presentation appears as Appendix C at page 181]

Enforcement of Foreign Judgments

Presenters: Louise Lussier, Vaughan Black, Jeffrey Talpis

The Section received two reports from the Federal Commissioners assisted by research done by Professors Vaughan Black, Jeffrey Talpis, Gerald Goldstein and

UNIFORM LAW CONFERENCE OF CANADA

Joost Blom. It was agreed that a project should be undertaken, that would work in tandem with the development of a model law by the Hague Conference on Private International Law. Extra-territorial application of foreign laws and punitive damages are two issues being considered by the Hague Conference and will be major considerations for ULC.

Substantive issues to be addressed in this project are:

1. Scope of application: monetary vs. non-monetary, interim vs. final, exceptions.
2. Conditions for recognition and enforcement: the *Uniform Court Jurisdiction and Proceedings Transfer Act* is a good starting point for determining this issue; it strikes a good balance between specificity and open-endedness.
3. Should there be a list of countries which would have a presumption that they properly took jurisdiction: this was not viewed as a preferable approach. The use of a list mis-focuses the issue: the issue is fairness in this particular case, not system wide.
4. Punitive damages

RESOLVED:

1. That, pursuant to the request of the Federal-Provincial-Territorial Ministers responsible for the Administration of Justice, the Steering Committee be directed to establish a working group to recommend legislative options to deal with the issues identified in the papers presented by the federal Commissioners.
2. That the reports appear in the Proceedings. (See Appendix I for common law jurisdictions and Appendix J for Quebec, at <http://www.law.ualberta.ca/alri/ulc.>)

Implementation of the Canada-France Convention

Presenters: Louise Lussier, John Gregory

CIVIL SECTION MINUTES

The Federal Commissioners requested the assistance of the ULC in preparing an implementing Act. The Advisory Group on Private International Law has recommended ULC's assistance be requested.

RESOLVED:

That the Steering Committee be directed to establish a Working Group to prepare a draft act and commentaries for the 1997 Conference for the purpose of implementing the Canada-France Convention.

Interprovincial Enforcement of Non-money Judgments

Presenter: Arthur Close

The Section received from the British Columbia Commissioners a report recommending that a Uniform Act be prepared dealing with the interprovincial enforcement of non-money judgments. The questions reviewed were as follows:

1. Is new legal machinery desirable?

It was agreed that the logical next step to the *Uniform Enforcement of Canadian Judgments Act* is to extend it to non-money judgments.

2. Whose judgments should be enforced?

It was agreed that this project should extend full faith and credit within Canada only. The foreign judgments project will look at non-money judgments elsewhere.

3. What kinds of judgments should be enforced?

The Act should apply generally, subject to a list of exceptions outlined in the Act. The working group should consider especially how to treat orders of other bodies registered for enforcement as a judgment of the court. Orders that already have specific legislative schemes for their enforcement should be excluded,

UNIFORM LAW CONFERENCE OF CANADA

e.g. custody, letters probate/ administration.

4. Defences where enforcement is sought

The public policy exception may have increased importance here, *e.g.* in situations where the order basically just requires compliance with local law. Further consideration should be given to whether a notice provision is appropriate here even though one was not included in the *Uniform Enforcement of Canadian Judgments Act*.

5. Some particular issues:

- (a) Restraining orders in family law disputes: Consult with Federal-Provincial-Territorial family law committee;
- (b) Judicial escape hatch: The draft Act should provide a means to address the situation where the order does not comply with local practice and allow the court to give specific directions as to how the order may or may not be enforced almost as a procedural matter. The enforcing court should not be able to go back and revisit jurisdiction or second guess the way the discretion was exercised, but it should be able to act where the holder of the order has disintitiled himself or herself to enforcement or the enforcing court is being asked to do something offensive to its process. Another option might be to allow the enforcing court to consider whether the original court intended the order to have extra-territorial effect.
- (c) Should the scheme embrace interim orders: Based on precedent in other jurisdictions, it likely should.
- (d) Orders by Provincial Court judges: It would be consistent with the *Uniform Enforcement of Canadian Judgments Act* to include them.
- (e) Other kinds of orders: exclude orders registered in the court (as opposed to orders granted by the court after consideration of the merits).

CIVIL SECTION MINUTES

6. What form might a Uniform Act take?

While the proposals may be kept separate for consultation purposes, eventually they should be done as amendments to the *Uniform Enforcement of Canadian Judgments Act*.

RESOLVED:

1. That a draft *Uniform Enforcement of Canadian Decrees Act* (or, if the Working Group determines it to be more appropriate, draft amendments to the *Uniform Enforcement of Canadian Judgments Act*) and commentaries be prepared for consideration of the 1997 Conference.
2. That the report appear in the Proceedings. See Appendix D at page 242.

Investment by Trustees: The Prudent Investor Rule Revisited

Presenter: Thomas Anderson

The Section received from the British Columbia Commissioners a report recommending the 1970 uniform provisions on trustee investment be revised in light of subsequent legislative developments and law reform efforts directed at integrating the general standard of prudence in investment of trust property with modern portfolio theory.

Recommendation # 1: Modify the wording of the 1970 ULC Rule to refer to the degree of judgment and care that would be exercised by a prudent investor.

Agreed.

Recommendation #2: OPTIONS:

1. Allow the prudent investor rule to be silent as to

UNIFORM LAW CONFERENCE OF CANADA

whether the prudence standard is to be applied on a portfolio-wide basis or to individual decisions. or

2. Modify the prudent investor rule to declare that the trustee's conduct is to be assessed in terms of the prudence of the trustee's overall investment strategy. or

3. Same as option 2, but with the addition of an express declaration that the trustee's liability for breach of trust in investing imprudently is to be quantified by subtracting gains resulting from the imprudent investment strategy from the losses it produced.

There was no clear direction as to whether option #2 or #3 was better. The working group was requested to review the issue further.

Recommendation #3: OPTIONS:

1. No listing of investment strategy criteria accompanying the modified 1970 ULC Rule. or

2. Include criteria with the modified 1970 ULC Rule that trustees must consider in making investment decisions about investment strategy. or

3. Include optional investment strategy criteria with the modified 1970 ULC Rule for the guidance of trustees.

There was no clear consensus on which option was preferred. The working group was again requested to review this issue further.

Recommendation #4: Add a provision to the 1970 ULC Rule to provide that a trustee must diversify the trust portfolio to the extent appropriate to the requirements of the trust and market conditions.

Agreed

CIVIL SECTION MINUTES

Recommendation #5: Retain a unitary standard of care for professional and non-professional trustees.

Agreed, on the basis that this will be accomplished by the legislation being silent on this issue.

Recommendation #6: Let the 1970 ULC Rule remain silent on the matter of reviewing initial assets and allow the obligation to review them to be implied by the prudent investor standard of care and other aspects of general trust law.

Agreed

Recommendation #7: Add provisions to the 1970 ULC Rule allowing trustees to obtain and rely upon advice, and delegate decision-making powers, to the same extent as a prudent investor might do, subject to the duty to exercise prudence in the selection and supervision of the agent and in establishing the extent of the agent's authority.

Agreed. To deal with the mutual funds issue, a further recommendation was agreed to that the working group be instructed to provide that investment in mutual funds is not a delegation.

RESOLVED:

1. That a draft *Uniform Trustee Amendment Act* and commentaries be prepared and circulated to the jurisdictions as soon as possible. Unless two or more objections are received by the Executive Director of the Conference by February 28, 1997, the draft should be taken as adopted as a uniform act and recommended to the jurisdictions for enactment and the text appear in the 1996 Proceedings. [The date was later changed to April 30, 1997. - Ed.]
2. That the report appear in the Proceedings. See Appendix N at <http://www.law.ualberta.ca/alri/ulc>.

UNIFORM LAW CONFERENCE OF CANADA

Uniform Liens Act

Presenter: Arthur Close (The Working Group for this project also included Georgina Jackson, Professor Ron Cuming and Gérald Tremblay; Professor Rod Wood has also acted as an ad hoc reviewer for the group.)

The Section received from the British Columbia and Saskatchewan Commissioners a draft Act and commentaries providing for a statutory lien for repairers, storers and carriers. Suggestions for minor modifications to the draft Act were adopted.

RESOLVED:

1. That the draft act be amended in accordance with the discussion.
2. That the draft act be circulated to the jurisdictions as soon as possible. Unless two or more objections are received by the Executive Director of the Conference by November 30, 1996, the draft act should be taken as adopted as a uniform act and recommended to the jurisdictions for enactment and the text appear in the 1996 Proceedings. [There were no objections and the Uniform Act was adopted as of November 30, 1996. See Appendix M at <http://www.law.ualberta.ca/alri/ulc>. - Ed.]

Matrimonial Property and Choice of Law

Presenter: Thomas Anderson

The Section received from the British Columbia Commissioners a report recommending choice of law rules in matrimonial property distributions. The report reviewed some of the issues to be addressed in establishing rules dealing with jurisdiction and choice of law. It was recommended that further work be done, in consultation particularly with Federal-Provincial-Territorial Family Law Committee. Consideration should also be given to how international conventions deal with these issues. It was also suggested that, while the *Uniform Court Jurisdiction and Proceedings Transfer Act* would be instructive on many of these issues, it is likely better that a separate self-contained Act be prepared.

CIVIL SECTION MINUTES

RESOLVED:

1. That the Steering Committee be directed to establish a working group to prepare a draft Act to deal with the issues identified in a paper prepared by the British Columbia Commissioners relating to choice of law rules for matrimonial property distribution.
2. That the working group specifically consider how these proposals might apply to property outside Canada and to common law relationships.
3. That the Report appear in the Proceedings. See Appendix E at page 309.

Transfers of Investment Securities

Presenter: John Gregory (The report was prepared by Eric Spink of the Alberta Law Reform Institute who also participated in the Working Group as principal researcher.)

The Section received a report from the Alberta Commissioners that suggested that there has been enough progress since January 1996 to justify continuing work on this project.

RESOLVED:

That the report on Transfers of Investment Securities be received.

Modernizing Commercial Law

Canada's Place in the Private International Legal Order

Presenter: John Gregory

The Section received reports from John Gregory on these two issues.

UNIFORM LAW CONFERENCE OF CANADA

RESOLVED:

1. That the strategic direction recommended in these papers be approved.
2. That the papers appear in the Proceedings. See Appendix F at page 342 and Appendix G at page 363.

Recent Activities of the Department of Justice in Private International Law

Presenter: Louise Lussier (on behalf of Elizabeth Sanderson)

The Section received from the Government of Canada a report on the activities of the Department of Justice in Private International Law matters.

RESOLVED:

That the report on the activities of the Department of Justice appear in the Proceedings. See Appendix O at <http://www.law.ualberta.ca/alri/ulc>.

Projects for 1997

The following topics were raised as possibilities for projects for the 1997 Conference:

- (a) interprovincial subpoenas
- (b) revocation of testamentary documents
- (c) agents appearing in criminal courts on summary conviction matters (the Criminal Law Section will share their work with us)
- (d) ICSID convention
- (e) intestate succession
- (f) status of relationships and principles that should apply to them
- (g) electronic commerce.