

## Commercial Law 1996

### **1996 Ottawa ON**

#### **Civil Section Documents - Commercial Law**

Promote internal trade and business efficiency by modernizing and harmonizing commercial law across Canada.

Target: have this package in place by the end of the century.

Only by common action will the reforms have some chance of success.

#### **SUMMARY**

**[1] Commercial practices in Canada have changed dramatically in the past 50 years. Far more trade is carried on across provincial or territorial borders and internationally.**

**[2] Commercial law has not kept pace. Most Canadian commercial law is over 50 years old, and much of it dates from the last century. The Quebec Civil Code is an exception.**

**[3] Modernization must include harmonization. Without it, Canadians will often be at a disadvantage compared to their international competitors even within Canada. Uniform statutes are available for the task.**

**[4] Justice ministries have a key role to play, though commercial law ministries of course will lead in many areas.**

**[5] ISSUE:** How to reduce the legal barriers to efficient cross-Canada commercial relations and promote modern solutions to commercial problems.

**[6] PROPOSAL:** Have each government commit itself to a systematic enactment of modern harmonized commercial statutes on topics on which the Uniform Law Conference has adopted legislation. Package target: end of the century.

**[7] BACKGROUND:** Much of the law governing Canadian commerce arises from the common law or from statutes passed many decades ago. It is fair to say that in the common law jurisdictions, the only big change in commercial law in the past half-century has been the adoption of the Personal Property Security Act, and even that change is not yet uniform. (Consumer protection legislation may be considered another.) Quebec of course adopted a global revision to the Civil Code of Quebec in 1994. Its law is now more modern, but the question of harmonization applies to Quebec as much as to other jurisdictions.

[8] In a federal system, each jurisdiction has considerable latitude to enact laws that suit its circumstances. Not all legal rules need to be the same as those of its neighbours. However, in some areas the lack of harmony causes serious practical problems. The Uniform Law Conference of Canada (ULC) has identified several such areas. The purpose of the present package of statutes would be to reduce the legal risk to doing business across the country by eliminating uncertainty about the law that applies and by making that law suit the needs of modern commerce.

[9] In addition, as Canadian borders are opened to international trade, inconsistent legal rules within Canada put Canadian businesses at a competitive disadvantage. In several areas the rules for international transactions are uniform and modern while the internal domestic rules are not.

[10] Most of these areas may not have high enough profile to attract legislative time on their own. This is particularly true when the problem in current law is the lack of harmony with others, rather than poor law at home.

[11] Modernization and harmonization are likely to occur only through a common front. If everyone agrees to have them happen, they are more likely to happen. We can all point to each other to justify our own legislation. We eventually arrive at a critical mass, when there begin to be domestic commercial disadvantages in not being a part of the harmonized system. (As noted, international commercial disadvantage exists already but may not be widely appreciated.) That will create legislative pressure to join, at least for the matters governed by the statute in question. However, that point cannot be reached without common resolve to get started.

*role of Justice ministries (in support of commercial ministries)*

[12] There are three reasons for ministries of Justice to involve themselves in the modernization of commercial law in their jurisdictions:

- i) The relevant statutes often fall within the Justice ministry's mandate. The law of arbitration is one example. Others on the proposed list may be split between Justice and a commercial ministry, depending on the statute and the province or territory. For example, Ontario's Ministry of the Attorney General is responsible for all of the proposed statutes except disclosure of the cost of credit, commercial liens and the transfer of indirectly held securities.
- ii) The operation of the ULC originates in Justice ministries. They are therefore in a good position to recognize the value of harmonization, to appreciate the quality of the work, and thus to lead the implementation of the ULC's proposals.
- iii) The relevant commercial ministries do not have regular formal contact at the federal/provincial/territorial level. Work of harmonization must be improvised case-by-case. For example, without the existing work of the ULC on the disclosure of the cost of credit, commercial ministries would not have been able to undertake harmonization in the Agreement on Internal Trade. As a result, Justice ministries can contribute usefully to the collaboration required to harmonize the modernized commercial law.

### *role of ULC*

[13] The Uniform Law Conference is made up of representatives from all jurisdictions' governments, plus law reform agencies and private practitioners. It often consults with interested parties at the stage of adopting a project for harmonization and more frequently as the project develops. All jurisdictions have a chance to make their views known both about the principles of the project and about the drafting. As a result, the final product is likely to be of good quality and suitable for everyone.

[14] This makes the ULC a good "screen" or "test" for the need for harmonization. The ULC also accepts projects referred to it by governments, so if particular areas of law seem to others to need harmonization, the ULC can deal with them.

### *priorities*

[15] The Agreement on Internal Trade requires everyone to have uniform legislation in force on the disclosure of the cost of consumer credit by the end of 1996. Except for that, each jurisdiction may choose its own priorities. The point is to bring everyone's commercial law into harmony in essential areas by the end of the century.

[16] Here are the uniform statutes that should be part of this program:

- i) Disclosure of Cost of Consumer Credit Act
- ii) Arbitration Act (in force in Alberta, Saskatchewan, Ontario and New Brunswick; adopted in P.E.I. in 1996; parallel legislation in force in Canada and Quebec; similar legislation in force in British Columbia.)
- iii) Sale of Goods Act
- iv) Trade Secrets Act
- v) Commercial Liens Act
- vi) Documents of Title Act
- vii) Indirectly Held Securities - project
- viii) Personal Property Security Act

[17] Here is a brief description of each statute and of the problems created by a lack of harmony among the jurisdictions.

### *Disclosure of Cost of Consumer Credit Act*

#### **description**

[18] This project proposes to unify the rules for calculating and disclosing the cost of consumer loans. Doing so is an obligation of all jurisdictions before the end of 1996, under the Agreement on Internal Trade. The uniform legislation will deal with advertising, grace periods, and repayment rights as well.

#### **need for harmonization**

[19] Much consumer credit in Canada today is provided through national organizations, such as banks and trust companies, as well as retail chains such as department stores, gas

stations, and airlines. When different rules apply to their operations in different jurisdictions, their efficiency suffers. In addition, consumers who look for credit in different places, or who move from one jurisdiction to another, may face difficulties in comparing what they are offered in different places. Different rules now apply to federally-regulated and provincially-regulated lenders, which adds to the confusion.

#### *Uniform Arbitration Act*

##### **description**

[20] This Act is designed to modernize the law of commercial arbitration, though it applies on its face to other kinds of arbitration too, except labour arbitration. It builds on the United Nations Model Law on International Commercial Arbitration, which is in force across Canada. The new Act provides a simple and fair framework for conducting an arbitration from start to finish, while leaving the parties a lot of latitude to design rules that suit themselves. It gives the courts less discretion than does the old law to intervene in (interfere with) the conduct or result of arbitration. It also allows for simple enforcement of arbitral awards, both those made in the enacting province and those from elsewhere in Canada.

##### **need for harmonization**

[21] Arbitration is an increasingly popular way to resolve commercial disputes. It is fast, expert and private. It is the norm in international commerce, and businesses familiar with it there like to have access to it at home too. Different rules in different jurisdictions hamper interprovincial trade by raising uncertainty about the efficient resolution of disputes. In addition, enforcement of an award was doubtful under the old law; the new law is strong on this point.

#### *Uniform Sale of Goods Act*

##### **description**

[22] The current law on the sale of goods in the common law provinces is based heavily on the English statute of 1893. The law does not conform to what businesses actually do; it does not support commercial expectations. Its rules are often not reasonable in late twentieth century transactions. Despite a century of application, the legal outcome of many disputes remains uncertain. Further, this law does not fit in well with more modern commercial law like the PPSA, or with the international regime on the sale of goods to which Canada is a party (and which all the jurisdictions have implemented).

##### **need for harmonization**

[23] The main drive for harmonization comes from the uncertainty that the old law, mixed with province-by-province interpretation, gives to cross-Canada commercial transactions. Many goods are sold across provincial or territorial borders. Trading partners often try to avoid the consequences of the sales law rather than accept it as fair and workable. International sales have a uniform (better) regime than sales in Canada.

## *Uniform Trade Secrets Act*

### **description**

[24] This Act clarifies the common law on trade secrets. Present law is vague about the conditions of maintaining commercially valuable confidential information and about the duties of those who deal with it.

### **need for harmonization**

[25] Businesses that operate in more than one part of Canada need to collect, store and transmit information across provincial and territorial borders. They must take advantage of their research and development across the country. This is more difficult when the rules for protecting the confidentiality are unclear or unsatisfactory. The operation of a network of different laws adds to the uncertainty.

## *Uniform Commercial Liens Act*

### **description**

[26] This Act aims to create a unified set of rules about the nature and extent of non-consensual liens, the priority of the lien against third parties and the procedure for its enforcement. Some common examples are liens in favour of garage owners, innkeepers, warehousemen, and woodmen. Under present law, assignment of lien rights to third parties is generally not allowed. Also, liens are necessarily lost when possession is given up, which often does not make business sense for either the lien creditor or the debtor.

[27] The Uniform Act does not apply to Crown liens, as their operation raises separate and complicated questions. The Act touches only liens on personal property, not construction liens or other liens on land. It harmonizes the operation of the liens it covers with the principles of the PPSA, on the model of Ontario's *Repair and Storage Lien Act*.

### **need for harmonization**

[28] Jurisdictions have a serious need for uniformity within their own law, both common law and statute. Most have a mass of statutory liens, usually 50 to 80 years old, that reflect a different economy and different ways of enforcing rights, and which differ among themselves in their application and operation. Uniformity offers a more predictable commercial environment; the cost of determining validity, priority and enforcement drops; common forms can be used; better remedies are offered; less litigation arises.

[29] Similar considerations arise across borders. Businesses wanting to operate in another province or territory face a welter of unpredictable and often unregistered claims for differing rights. Lien rights frequently arise in the service sector in particular, which is taking over an increasing part of our economy. Thus the lack of harmony creates legal risk just where it can do most harm.

## *Uniform Documents of Title Act*

### **description**

[30] This Act would codify the law relating to all forms of documents of title which have an established commercial usage. It would cover the major forms of documents of title (bills of lading and warehouse receipts) and would also govern both negotiable and non-negotiable documents of title. The present law involves a complex mix of statute and common law rules. Modernization can only pass through codification. The Uniform Act is based substantially on Article 7 of the American Uniform Commercial Code, with adjustments for Canadian practices and drafting. A number of commercial innovations in the 50 years since the Uniform Warehouse Receipts Act (in force in several provinces) are unknown to our law, with uncertain legal results: for example, freight forwarding, through bills of lading, and delivery orders.

### **need for harmonization**

[31] Documents of title are used primarily in interprovincial and international trade. Having different and uncertain legal regimes apply adds to the risk of that trade and makes it less competitive (because less confident and more likely to look for a risk premium in pricing.) Case law in land trade based on bills of lading is much less developed than in maritime bills of lading; since much Canadian trade is continental, statutory reform on a continental basis is advisable.

[32] In addition, most Canadian jurisdictions now have or are about to have the PPSA in force. The law on documents of title should be harmonized to the PPSA, since they deal with similar issues. Otherwise the effectiveness of the PPSA is hampered. This risk can be reduced only by harmonized legislation on documents of title.

### *Transfer of indirectly-held securities*

### **description**

[33] This project aims to create new law to deal with the rights in securities that are held indirectly, through an intermediary such as a broker. Most securities in Canada are now held in that way. The paper certificate, if any, is usually in the hands of the Canadian Depository for Securities, or its western equivalent. American law (Article 8 of the Uniform Commercial Code) is being changed to provide different rights in these circumstances. At present, the law does not reflect reality. As a result, what would happen in an economic crisis is not clear. Whose rights would prevail? Would transactions thought to be closed be reopened? Legal opinions are guarded and complex. Very large investors, particularly international investors, estimate "system risk", including risk created by legal uncertainty.

### **need for harmonization**

[34] Canada should harmonize its law with American law, because that has been our general model for securities and indeed much commercial law. Securities transfers occur in a global securities market; there is virtually no difference to an Edmonton investor whether he or she trades in Toronto, New York or Tokyo. The intermediaries for indirectly held securities operate across the country. It is essential to know which law applies and that it produces the right answers.

[35] International investors judge system risk of the legal regime across Canada, not just province by province.

[36] The proposed regime allows harmony without touching the internal management of corporations, so Ontario, BC and Quebec could have different corporate law but the shares of their corporations can be traded efficiently under a single transfer statute.

#### *Uniform Personal Property Security Act*

#### **description**

[37] This Act establishes a system for registering notices of security interests in personal property and governs the priority of competing interests and the rules for enforcing them. At present the law is nearly uniform in common law Canada under what is known as the "Western" PPSA. The Atlantic provinces have now adopted the statute or announced their intention to do so. The development of the law in this field is largely in the hands of the Canadian Conference on Personal Property Security Law. The ULC may play a supporting role.

#### **need for harmonization**

[38] Many commercial transactions involve more than one province or territory and depend on credit in those places. Many other businesses carry on their affairs in more than one jurisdiction and are handicapped if they need to work with different laws in each place on something as fundamental as credit. Despite the degree of harmony now available, legislative issues still arise as financial markets evolve. It is important to complete the harmonization and then to maintain the harmony in this field.