

MINUTES - CIVIL SECTION

August 17 to 21, 1997

1. Private Sector Protection of Personal Information

Presenter: Denis Kratchanov (Canada)

Following resolutions in 1996, a first draft of a *Uniform Protection of Personal Information Act* was prepared and circulated to members of the ULCC Working Group in March of 1997. From the comments received on the first draft, two main issues were identified. They were:

- (1) How should the CSA Model Code be reflected in the legislation?
- (2) What role should sectoral or industry codes play in the *Act*?

Question 1: How should the CSA Model Code be reflected in the legislation?

Three options were presented:

- a. That the Code itself be referenced in a schedule to the *Act* and given force of law.
- b. That the ten principles that formed the basis of the CSA Code be referenced in the legislation.
- c. That a draft act be prepared that, as far as possible, reflects the structure and wording of the CSA Model Code.

There was extensive discussion over these options with some delegates believing that the Code itself would not provide sufficient certainty and others believing that the Code, together with some or all of the notes and commentary, would be sufficient to allow the Courts to fill in the areas of uncertainty.

Delegates also felt that a determination of the effect of non-compliance would play an important part in a decision on how to proceed.

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Decision: The Working Group was instructed to use the ten principles of the CSA Code as a starting point and prepare legislation filling in wherever necessary with specific provisions.

Question 2: What role should sectoral or industry codes play in the Act?
Drafters were instructed that the legislation should prevail over sectoral codes.

RESOLVED:

That a draft *Uniform Data Protection Act* and commentaries be prepared in accordance with the discussions for consideration of the 1998 Conference.

2. Interprovincial Enforcement of Non-Money Judgements

Presenter: Arthur Close (British Columbia)

At the end of the 1996 meeting, three issues were left undecided.

- (1) Whether the Court can modify or limit enforcement.
- (2) Whether special treatment or status should be accorded orders that restrain or limit contact of one spouse with the other (protection orders).
- (3) Whether there should be one uniform act combining both the Enforcement of Non-money Judgments and Money Judgments now dealt with in the *Uniform Enforcement of Canadian Judgments Act* into a single act or whether there should be two acts allowing jurisdictions to adopt either of the acts.

British Columbia was asked to prepare a revised version of the draft legislation, consult on that legislation, and report back to the 1997 meeting. A revised act and commentaries were prepared and circulated for consultation to jurisdictional reps, the Canadian Bar Association, and the Annual Workshop on Commercial Consumer Law at the University of Toronto, Faculty of Law.

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DECISIONS

Powers of the Court to Modify or Limit Enforcement - Section 6

There was general consensus that section 6, as drafted, was too broad and moved too far from the concept of full faith and credit. The drafters were asked to redraft section 6(2) to narrow its application [the redrafted section was approved later in the week].

Protection Orders

No change was recommended to section 7 of the draft *Act* dealing with protection orders.

Orders in Relation to Probate and Administration

There was no discussion on this item and the subsection remains square-bracketed.

Number of Acts

It was agreed that a separate *Uniform Enforcement of Canadian Decrees Act* would be prepared along with an act combining the *UECDA* and *UECJDA* allowing jurisdictions to choose to enact the legislation as two separate acts or one complete act.

RESOLVED:

1. That the draft *Uniform Enforcement of Canadian Decrees Act* and commentaries be adopted as a uniform act and recommended to the jurisdictions for enactment and that the text appear in 1997 Proceedings.
2. That a draft act combining Enforcement of Money and Non-money Judgements, together with 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 November 30, 1997, the revised *Act* should be taken as adopted as a *Uniform Act* and recommended for enactment to those jurisdictions wishing to deal with the enforcement of all judgments in a single statute and the text appear in the 1997 Proceedings.

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Note: The deadline for circulation was later extended to February 28, 1998, by the Executive of the Conference. No objections were received. See Appendix I: the Report at <http://www.law.ualberta.ca/alri/ulc/97pro/eenmj.htm>, and the Act at <http://www.law.ualberta.ca/alri/ulc/acts/edecrees.htm>. A version of the Uniform Act combined with the *Enforcement of Canadian Judgements Act* is at Appendix J at <http://www.law.ualberta.ca/alri/ulc/acts/ecomcomb.htm>.

3. Cost of Credit Disclosure

Presenter: Peter Lown (Alberta)

The Section considered two memoranda dated June 20, 1997, and August 13, 1997, from Richard H. Bowes.

It was noted that the Ministers responsible for consumer issues had not yet approved the final legislative language as required by the Agreement on Internal Trade. It was anticipated that they would do so in late 1997.

RESOLVED:

1. That the *Uniform Cost of Credit Disclosure Act*, with the modifications set out in the memorandum of August 13, 1997, and with authority to the Executive to approve modifications to accommodate any changes in the final text of the Harmonization Agreement on the issues of broadcast advertisements and lease APR calculations, be adopted as a *Uniform Act* and recommended to the jurisdictions for enactment.
2. That the Commentary be adopted subject to such modifications as may subsequently be approved by the Executive.
3. That the report appear in the Proceedings. See Appendix M at <http://www.law.ualberta.ca/alri/ulc/97pro/eccda.htm>.
4. That the *Uniform Act* and commentary be made available to interested persons as soon as possible after they are adopted.

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4. Electronic Commerce

Presenter: John Gregory (Ontario)

John Gregory provided a report on the inception of this project last year and work to date. A Working Group had been established and had met to refine the issues. A number of possible projects were presented. The meeting agreed that the following projects should be worked on to the extent possible.

Adaptation of existing rules: This is the "Model Law on Electronic Commerce" category. What kinds of rules of law (common law, statute, regulation) impede electronic commerce now, and what can we do about it? Is the Model Law a good guide to a solution? The Model Law also deals with contract formation and attribution of messages. These issues could be stated or explored.

Webwrap/shrinkwrap licences: What kinds of agreements does one find on the Web or in shrinkwrap? How do the Webwrap ones work? What are the barriers to their enforcement? What are current rules on contracts of adhesion? Are there limits to incorporating unseen terms and conditions by reference into what one sees on a screen? (enforcement across boundaries of legal systems is not part of this issue; that is a question of jurisdiction.) Are consumer issues separable from the general ones here?

Public filing, public records: What are the implications of electronic records on filing requirements, reproduction of electronic files. The subject raises issues of authentication, among others.

RESOLVED:

1. **That the report on Electronic Commerce be received.**
2. **That the Steering Committee be directed to establish a Working Group to recommend legislative options to deal with the issues identified in the report prepared by the Ontario Commissioners.**
3. **That the report appear in the Proceedings. See Appendix B at page 143.**

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5. **Matrimonial Property and Choice of Law**

Presenter: Arthur Close (British Columbia)

This project, which attempts to prepare uniform choice of law rules to determine applicable law in domestic property proceedings, was brought forward in the late 1980's by Quebec but lapsed. The project was restarted at the request of British Columbia in 1995. A 1996 Report canvassed the issues and made recommendations. The Section established a Working Group with a request for a further report. The Working Group has produced a draft act with a request for direction in certain areas.

Before discussion began an initial issue was raised on the question of the title of the *Act*. At least one member of the Section felt that domestic property was a term that should not be used and suggested Matrimonial Property Proceedings. The Section never came to a decision on this.

The Section decided that in section X.3 (Territorial Competence Rules) the residence of the plaintiff should be sufficient to ground territorial competence. Consequential changes would be required to section X.4 (Real and Substantial Connection).

Section X.5 (Discretion About the Exercise of Territorial Competence) was adopted as drafted.

After some discussion of whether section X.8 (Choice of Law Rules: Proper Law of the Marriage) should override section X.6 (Choice of Law Rules: Contract) and whether section X.7 (Choice of Law Rules: Marriage and Community of Property) was necessary, sections X.6, X.7 and X.8 were adopted.

There was extensive discussion about the inter-relation of this *Act* and other acts dealing with the disposition of matrimonial property on death of a spouse. After extensive discussion it was decided that the draft *Act* would be adopted subject to the November 30 Rule and those who saw significant problems arising out of the inter-relationship of this *Act* and the succession legislation would research the issue and prepare a memorandum outlining

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their concerns, if any, for the delegates.

RESOLVED:

1. That subject to:

(a) **The addition to section 3 of a clause stipulating the ordinary residence of the plaintiff to be a basis for territorial competence, and**

(b) **a consequential change to section 4**

the report of the Working Group be adopted by the section and serve as drafting instructions for a uniform act.

2. That the draft act and commentaries 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, 1997, 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 1997 Proceedings.

Note: The deadline was later extended to February 28, 1998, by the Conference Executive. No objections were received. See Appendix H at page 321.

6. International Convention on the Settlement of Investment Disputes

Presenter: Philippe Lortie (Canada)

This project arose out of a request from the Department of Justice of Canada to prepare a Uniform Law Conference of Canada Uniform Act to implement the Convention on settlement of investment disputes between States and nationals of other States (ICSID Convention). A report and draft act were presented to the Section.

A threshold issue was raised by Alberta. Alberta questioned whether or not the section should be proceeding with adopting a Uniform Act to implement

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this Convention when the Convention itself cannot be adopted by Canada until all of the provinces agree. To date, three provinces have not indicated that agreement.

It was agreed that the discussion would proceed with explicit recognition that discussion does not in any way prejudice the decision of the Alberta government to support or not support the Convention. The Section agreed to adopt the *Act* subject to the November 30 Rule and a review of the drafting of sections 5 and 7. It was also suggested that the Uniform Act references be added where provisions were described as standard. While provinces may use other language in sections 14 (Application of Convention) and 15 (Publication), the proposed language was flexible and efficient.

RESOLVED:

- 1. That the draft *Uniform Settlement of International Investment Disputes Act* be amended in accordance with the discussions.**
- 2. That the draft *Act* and commentaries 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, 1997, the draft *Act* should be taken as adopted as a *Uniform Act* and recommended to the jurisdictions for enactment if and when all jurisdictions indicate their support for Canada's accession to the Convention and the text appear in the 1997 Proceedings.**
- 3. That the report appear in the Proceedings.**

Note: The draft *Act* was circulated and no objections were received. See Appendix G at page 265 for the report and page 284 for the Act.

- 7. Update of Transfers of Investment Securities (Tiered Holding System)
Presenter: John Gregory (Ontario)**

The Uniform Law Conference of Canada has approved, in principle, the

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adoption, with appropriate modifications, of Article 8 of the U.S. Uniform Commercial Code.

- This won't change the way security transactions are settled but will bring the law up-to-date to support what is now done. Adoption of the new *Act* will reduce risk and make sure there are no legal impediments to settlement.
- This project has considerable industry support.
- It is important to understand that this is not a statute where any jurisdiction will gain any competitive advantage. The settlement rules only apply where the participants are solvent; otherwise bankruptcy legislation is paramount.
- The Conference concurred that the Working Group should proceed to draft a *Securities Transfer Act* based on article 8 of the Uniform Commercial Code.

RESOLVED:

***A Uniform Securities Transfer Act* and commentary be prepared in accordance with the 1997 report for consideration at the 1998 Conference.**

See Appendix L at <http://www.law.ualberta.ca/alri/ulc/97pro/etiered.htm>

8. Arbitration and Construction Liens

Presenter: Bill Turnbull (Saskatchewan)

This project began with a discussion paper prepared by the National Construction Law Section of the Canadian Bar Association on Builders'/Mechanics' Lien Acts: Interaction with Arbitration Procedures. The paper recommended the formation of a Working Group of the Uniform Law Conference of Canada to identify legislation options and make recommendations. The Uniform Law Conference agreed to take on the project.

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The basic issue is the clash that arises between arbitration procedures and *Builders'/Mechanics' Lien Act* procedures. Arbitration acts generally and the *Uniform Arbitration Act* in particular require a stay of proceedings while the arbitration is in process but Builders' Liens legislation contain mandatory time limits. In addition the parties to the arbitration may not be the same as the parties to the lien action.

- a. **The impact of a stay of the court process pending the completion of arbitration on the various statutory limitations that apply to the registration of liens and the prosecution of lien actions.** The paper presented four options. The Conference approved option 4 as recommended which would add a provision to lien legislation that any stay order to permit arbitration shall not operate so as to prohibit the taking of any step required in order to preserve a lien, or to protect the land or money to which it attached.
- b. **Problems arising out of a multiplicity of parties where all parties are not privy to the arbitration clause.** The Conference approved adding a provision to lien legislation to make it clear that the third party actions may proceed without reference to a related arbitration which is pending.
- c. **The risk that a step taken in either proceeding might constitute a waiver of rights in the other proceeding.** The Conference approved adding provisions to lien legislation to provide that the taking of a required step by a party under lien legislation will not constitute a waiver of the party's right to arbitrate the dispute.
- d. **The rules and location of the arbitration hearing.** The Conference felt that no recommendation should be made in this area and the matter should be referred back to the Construction Section. The sense of the Conference appeared to be that this is something for the parties to negotiate.
- e. **The impact of an arbitration clause upon sureties who may have issued labour, or material payment or performance bonds to secure payment or performance by the parties to the construction contract.**

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The Conference made no recommendation in this area as the sureties would be able to protect themselves through appropriate clauses in relevant agreements.

The Conference agreed that the initiative should proceed and the group should attempt to draft a uniform series of provisions to be included in relevant Builders'/Mechanics' Liens legislation.

RESOLVED:

1. That draft legislation suitable for addition to existing lien statutes, together with commentaries, be prepared in accordance with the discussion for consideration of the 1998 Conference.
2. That the report appear in the proceedings. See Appendix C at page 155.

9. Recognition and Enforcement of Foreign Judgments

Presenter: Louise Lussier (Canada)

This project arises out of two 1996 reports of the Uniform Law Conference on the Enforcement of Foreign Judgments in Common Law Jurisdictions and Enforcement of Foreign Judgments in Quebec. The Conference established a Working Group to look into issues such as the scope of application, conditions for recognition and enforcement, propriety of a list of countries to benefit from a presumption of jurisdiction and punitive damages. The Working Group met by conference call on five occasions and presents a paper to the conference for further directions.

Discussion:

- (1) Should the act apply to non-convention and convention judgments?
 - If there is an act on enforcement of foreign judgments, do we still need conventions since there would not be an incentive for countries to

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enter into a treaty with Canada given that their judgments would be enforced under the act anyway?

- We need a clear statement in the act as to what are the conditions for enforcing foreign judgments in Canada in order to clarify the application of Morguard. Otherwise the Supreme Court may impose that.

Decision: The Conference decided to limit the *Act* to non-Convention Judgments at this time.

(2) What should be the scope of the application of the act?

The Conference considered the exclusion of the following judgments:

- tax judgments
- bankruptcy and insolvency judgments
- third state judgments
- orders of administrative tribunals
- spousal and maintenance orders
- fines and penalties

Decision: The Conference decided to exclude them.

(3) There was considerable discussion about punitive damages.

Decision: The Conference decided that the working group will monitor discussions on this issue at The Hague Conference and report to the ULCC.

(4) **Conditions for Recognition and Enforcement**

The Conference considered the following grounds for jurisdiction in the case of non-default judgments:

- i. consent at the time of the original contract or consent at the time of litigation

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- ii. consent as plaintiff or counterclaim
- iii. presence - habitual residence/principal place of business

Decision: The Conference decided to accept those grounds for non-default judgments.

(5) **Default Judgment**

The Conference considered a list of bases for default judgments in matters such as contracts, torts, etc. The meeting discussed whether a default judgment should not be enforced unless the defendant had been lawfully served according to the law of the originating state [not of the (Canadian) enforcing state], or had received notice of the proceedings in enough time to defend. Some saw such a condition as inconsistent with giving full faith and credit to foreign judgments. The condition was left in for the time being, but was to be reexamined when the general conditions for recognition and enforcement had been completed.

Decision: The Conference agreed with the proposed bases and also decided to leave the proviso for default judgments in the Act at this time but to reexamine that later after a closed list of conditions for recognition and enforcement has been decided upon.

(6) **Defences**

Should the Act include defences to enforcement?

The Conference considered the proposed list of defences, including public policy. It expressed its preference for the formulation of "fundamental fairness" over "natural justice". The Conference also did not support the need for providing definitions of such concepts.

Decision: The Conference accepted the proposed defences subject to drafting changes as indicated.

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(7) **Related Issues**

The Conference rejected the condition of reciprocity for easy enforcement proceedings such as registration. It also invited to some rethinking on this procedural question. The Conference suggested that the term "limitation" of enforcement proceedings be replaced so as to avoid confusion.

RESOLVED:

1. That a draft *Uniform Enforcement of Foreign Judgments Act* and commentaries be prepared in accordance with the discussions for consideration of the 1998 Conference.
2. That the report appear in the Proceedings. See Appendix F at page 239.

10. **Canada-France Convention**

Presenter: Louise Lussier (Canada)

This project arises as a result of the negotiation of a treaty between France and Canada for the enforcement of judgments. Legislation is now required to implement the Convention in Canada given that both Canada and France signed the Convention in June, 1996. A subgroup of the Working Group on Enforcement of Judgments was constituted to prepare a draft act. Three options were considered.

1. A simple act that annexes the text of the Convention.
2. A specific act that implements the substantive provisions of the Convention.
3. Incorporation of implementing provisions of the Convention in a general statute on the enforcement of foreign judgments.

The Conference approved the first approach of a statute implementing the Convention. The Conference also approved that this approach would allow for the implementation of future conventions.

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The Conference approved the adoption of a *Uniform Enforcement of Judgments Convention Act* subject to a few editorial changes

RESOLVED:

That the *Uniform Enforcement of Judgments Convention Act* be adopted as a uniform act and be recommended to the jurisdictions for enactment and the text appear in the 1997 proceedings. See Appendix E at page 227.

11. Exigibility of Future Income Security Plans

Presenter: Darcy McGovern (Saskatchewan)

This project arises out of a discussion paper circulated in 1996 by the Alberta Commissioners and deals with the ability of a creditor to access future income security plans and insurance contracts such as pensions and RRSPs. The paper stimulated extensive discussions. A question arose as to whether the Conference was examining the basic principle of whether any future income security plans such as pensions should be exempt from exigibility or whether the Conference was taking, as its starting point, the fact that pensions and some insurance contracts were now exempt and thus seeking to level the playing field for those without pensions who rely on RRSPs and such for their retirement income.

There was also discussion on whether further study on the options and refinement of the options should be undertaken before the paper was circulated.

RESOLVED:

That the paper presented by the Saskatchewan Commissioners form the basis of further consultations and the Working Group report back with an issues paper and, if possible, a draft act at the 1998 meeting.

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12. Status of Relationships

Presenter: Peter Lown (Alberta)

The Alberta Commissioners asked the Conference whether a project should be undertaken on the status of common law and same sex relationships under the *Charter of Rights* in wake of the *Miron v. Trudel* case. A paper was presented to the Section setting out problems and options. It was decided that the Section would receive the paper and not provide advice to the Steering Committee at this time.

13. Private International Law

Presenter: Elizabeth Sanderson (Canada)

The Department of Justice (Canada) presented its annual report on recent developments in private international law, and its chart of activities and priorities in this field. See Appendix N at <http://www.law.ualberta.ca/alri/ulc/97pro/epil.htm>.

14. New Projects

Interprovincial Subpoenas

Nova Scotia proposes a review of the *Interprovincial Subpoenas Act*. That Act was adopted in 1974 and is in force in 11 jurisdictions. The question to review was its application to subpoenas issued by administrative tribunals and public inquiries, and not just the courts.

Impact of New European Currency

Ontario presented a project on the impact of the proposed European currency on obligations under Canadian law. The Section agreed to refer this project to the Steering Committee.

Prudent Investor Legislation

Alberta noted that the Public Trustees have expressed problems with the *Prudent Investor Act*. Alberta has received a brief from the Public Trustees. The Section felt it was important to get the right fit between the model legislation and Public Trustee Acts. Peter Lown proposed to go back and have further discussions with the Public Trustees about the fit between the

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Public Trustee Acts and the *Uniform Act* and report to the Executive. The Executive would then determine what action should be taken.

Law of Domicile

New Brunswick asked whether any work had been done on implementing the *Uniform Act on Domicile*. It was agreed that Jeff Schnoor would circulate a paper prepared by John McEvoy of New Brunswick and the Steering Committee would consider whether a further project was appropriate.

Review Old Acts

The meeting noted that the Conference should have a way of looking at old acts to see if it should still recommend them for enactment.

Commercial Law

In 1996, the Section adopted a package presentation of some of its main commercial work.

Saskatchewan raised this topic and offered to establish a working group to do a study of the package and work with the Consumer Measures Committee on its implementation.

Convention on Limitation Period in the International Sale of Goods

Canada has suggested a project for a uniform act to implement the convention on the limitation in the international sale of goods as amended by the 1980 protocol.