

Towards Commercial Law Framework for Canada 1998

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APPENDIX J

TOWARDS A COMMERCIAL LAW FRAMEWORK FOR CANADA

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Introduction

This paper puts forward the case for a commercial law framework for Canada.

In September 1996, Ministers of Consumer Affairs approved a recommendation that a strategy for the reform of commercial legislation be prepared for consideration. In February, 1997, Ministers of Justice accepted a similar recommendation. Ministers requested that the Civil Justice Committee together with Consumer Officials and the Uniform Law Conference of Canada (ULCC) work together to prepare a strategy for presentation to Ministers.

Since the last annual meeting of the ULCC, this matter has been considered by the Civil Justice Committee and the Consumer Measures Committee. Both groups have expressed interest in seeing this work continue.

A paper was prepared by Saskatchewan during the early part of 1998 which described some of the elements of a commercial law strategy. It was obvious that it was essential to obtain a buy-in to the concept of a national commercial law strategy from key interest groups in the business and legal communities. In late March, representatives from a number of key organizations met by conference call. There was a large measure of support for moving forward. Out of that discussion, a one-day planning session was held in Toronto on June 4th, 1998. The following people representing the noted organizations were present:

Jennifer Babe - National Business Law Subsection, Canadian Bar Association

Bradley Crawford, Q.C. - McCarthy Tetrault

Chris Curran - Civil Division, Newfoundland Department of Justice

Neil Ferguson - Nova Scotia Department of Justice

John D. Gregory - Ontario Attorney General Dept.

Philip Halliday - Consumer Measures Committee

Francesca Iacurto - Canadian Chamber of Commerce

Katherine Kruk - Canadian Banker 's Assoc.
Philippe Lortie -Justice Canada
Peter Lown, Q.C. - Alberta Law Reform Institute
Roderick MacDonald - Law Commission of Canada
Caroline Melia - Export Development Corporation (EDC)
Doug Moen - President, ULCC (Sask Justice)
Ken Morlock - Canadian Bar Association - Ontario
Lynn Romeo - Attorney General 's Department - Manitoba
Greg Steele - Canadian Bar Association - British Columbia
Professor Jacob Ziegel - University of Toronto, College of Law

From that discussion, this report is prepared. This is very much a work in progress. While the contents of the paper reflect the discussion of the Working Group, it should not be taken as official endorsement of the positions taken in the paper by any of the participating organizations. This constitutes a report to the ULCC on the progress of the project from the perspective of the writer.

The report will identify certain key needs of the Canadian economy from the national legislative regulatory infrastructure. Secondly, it will identify practical examples of how inefficiency is created by a lack of reform. Next, it identifies those elements of a framework for reform that the Working Group outlined above has recommended. The paper goes on to identify the Working Group 's short term priorities. Finally, the paper talks about how a project of this magnitude needs to be led and funded.

The Case for Reform

This paper makes the case that Canada is in need of a commercial law framework. In other words, Canada would benefit considerably from a strategy that gives provinces and territories as well as the federal government, a blueprint for the reform of Canadian commercial legislation. Existing commercial legislation, is for the most part, lacking in uniformity and is seriously out-of-date. The only significant effort at large-scale modernization of commercial legislation in Canada in the last 50 years has occurred in Quebec with recent enactment of the revised Civil Code and in the common law provinces, with the development and significant harmonization of the Personal Property Security Acts in a number of jurisdictions.

How is the need for such a strategy articulated? In general terms, the case can be made that the Canadian economy needs a predictable, responsive and efficient legal system regulating the marketplace. Legislation is a critical element of that regulatory framework.

1. **Predictability:** In a federal system, each jurisdiction has considerable latitude to enact laws that suit its circumstances. Not all legal rules in one jurisdiction need to be the same as those of its neighbours. However, in commercial law, in a modern nation, competing in the world economy, a lack of harmony causes serious practical problems. Harmonized commercial law brings predictability to the marketplace.

2. **Responsiveness:** The commercial world values responsiveness to the needs of business and consumers. An ad hoc approach to commercial legislative reform in thirteen (soon to be fourteen) Canadian jurisdictions means that we have an inherent inability to operate within a national vision and to be able to respond to problems as they arise in a cohesive way.

3. **Efficiency:** The marketplace values efficiency. The Internal Trade Agreement is based on the notion that Canada is a more efficient marketplace if trade barriers can be lowered within Canada. A key element of an efficient marketplace is the certainty provided by a predictable, harmonized legal infrastructure. It must be more than that however. It must be sensible, rationale and attuned to changing times.

Our current legal infrastructure does not meet any of these tests.

This analysis is interesting as far as it goes. But what are practical examples of these shortcomings in our current legal infrastructure:

1. Lack of harmonization means a higher risk of error. Where risk exists, it is harder or more expensive to do business. Reform means lower risk of error or unwanted legal result where laws are modern and reflect current business practices.
2. Lack of harmonization means that different business or consumer forms are used for different provinces - harmonization should mean that similar forms could be used throughout Canada. These include forms dealing with guarantees, exemptions, formalities, cost of credit disclosure, etc.
3. Lack of harmonization creates significant difficulty for consumers. In a highly mobile economy, consumers would be well-served by commercial law that has consistent, modern and understandable standards from one jurisdiction to the next.
4. Modernization of law reduces confusion or inconsistency with foreign laws, especially those based on modern conventions. For example, Canada is a party to the Vienna Sales Convention (UN Convention on the International Sale of Goods). That means that sales between Canadians and foreigners in contracting states (such as the USA) are governed by the Convention 's rules unless parties opt out. Those rules are modern and clearer than those under the *Sale of Goods Act*. As a result, Americans and foreign parties get better rules of law dealing with Canadian importers and exporters than Canadians do among themselves.

What are the key elements in a commercial law framework?

If we make the argument that we need a commercial law strategy for Canada and that Canada 's current commercial law infrastructure is outdated, lacks harmonization and generally needs reform, how do we define how that reform takes shape? What is this concept of commercial law - what 's in the tool kit and what is not?

These are not particularly straight forward questions. The Working Group considered these questions in their June meeting. Their response was a very practical one. They suggested that Canadian jurisdictions should consider the reform of private commercial law that is most commonly used in Canada or that needs to be used. They recommended a 10 year strategy for developing a A national framework of commercial law reform. They also suggested priorities for reform in the first years of that strategy.

The areas covered by this strategy can be generally described in two categories - firstly, commercial law that orders affairs between private parties and, secondly, enforcement law which structures dispute resolution. In considering the content of the framework, the Working Group considered projects completed, underway or under consideration by the ULCC. They reviewed the elements contained in the Uniform Commercial Code developed and revised over the last 46 years in the United States by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. They also made their own suggestions for inclusion.

The Working Group was somewhat cautious in its approach to consumer legislation. The Working Group acknowledged that many of the elements of the framework outlined below have consumer implications and, in particular, protections (Sale of Goods, Electronic Commerce and Cost of Credit Disclosure). However, a great deal of consumer legislation (such as marketplace practices or direct sellers legislation) is grounded in social policy which can vary considerably from jurisdiction to jurisdiction. While it may be desirable to have harmonization in the minds of some, this would not be universal view, and, as such this type of legislation is not recommended as part of the framework.

The elements of the recommended framework are set out below:

I. Commercial Law that Orders Affairs between Private Parties

1. Sale of Goods
2. International Sale of Goods
3. Secured Transactions
4. Federal Secured Transactions **
5. Commercial Liens
6. Warehouse Receipts, Bills of Lading and Other Documents of Title
7. Transfer of Indirectly Held Securities
8. Electronic Commerce *
9. Leases
10. Licensing of Intellectual Property
11. Negotiable Instruments (Bills of Exchange) **
12. Cost of Credit Disclosure Act

* While Electronic Commerce is listed here as a separate item because it has some stand-alone features, it also pervades a number of the other elements.

** In the view of the working group, the federal government has an important role to play in ensuring the success of a Canadian Commercial Law Framework. This is for two reasons.

First, the federal government has broad constitutional jurisdiction in many areas of commercial law under section 91 and 92(10)(a) of the *Constitution*. Second, the federal government has exercised these powers in many areas relevant to the uniform project. Leading examples are Negotiable Instruments (Bills of Exchange and Promissory Notes), Banking, Bankruptcy, Intellectual Property and Shipping. It also seems likely that in the foreseeable future, the federal government will adopt legislation dealing with the various aspects of the Internet.

II. Enforcement Law

1. Civil Enforcement
2. Enforcement of Canadian Judgments and Decrees Act
3. Court Jurisdiction and Proceedings Transfer Act
4. Enforcement of Foreign Judgments Act
5. Enforcement of Judgments Convention Act
6. Arbitration Act
7. International Commercial Arbitration Act
8. Settlement of Investment Disputes Act

The Detailed Analysis of each of these components of the framework and the reason for their inclusion are outlined in Appendix A.

Priorities

The Working Group in their deliberations felt that, in recommending a Canadian Commercial Law Framework to governments in Canada, certain priorities should be suggested:

First of all, the group felt that the elements of category I - Commercial Law that Orders Affairs between Private Parties - should receive priority over enforcement law. They recognized however, that a significant amount of effort has gone into enforcement law reform and that these pieces of proposed legislation are very largely ready for enactment.

Secondly, within the first category certain priorities should be recommended for development or enactment as the case may be:

a. **Transfer of Indirectly Held Securities:** The Working Group agreed with the Production Committee working on this project that the proposed reforms are essential to maintaining the global competitiveness of Canada's securities markets, and that they will benefit all market participants. These measures would be critically important in the face of a financial calamity. Given the likelihood that the ULCC will consider this project in 1999, it is appropriate to recommend it as an early priority.

b. **Cost of Credit Disclosure:** Both the Consumer Measures Committee and the ULCC have finalized their work on this project. It was identified as a target for harmonization in the

Internal Trade Agreement process. It has the potential to significantly harmonize a complex area of law that is highly relevant to consumers and to business.

c. **Electronic Commerce:** Electronic Commerce initiatives have been identified as priorities by Justice and Consumer Ministers and Ministers responsible for the Information Highway. These issues need to be addressed to ensure legal structures keep pace with technological development.

d. **Leases:** The Working Group agrees that, because of the serious gaps in Canadian legislation and the increasing need to pursue solutions, developmental work on a leasing project should begin immediately.

e. **Federal Secured Transactions:** Attention needs to be given to a number of areas of concern including the ability to properly secure mobile equipment, particularly aircraft, the level of uncertainty around security in intellectual property, and the need to harmonize section 427 of the Bank Act with provincial secured transactions regimes. The Federal government should consider this project a priority.

Leadership

In order for a project of this nature to be successful, leadership is essential. There are three basic components required.

a. **Political Commitment** - Our political leadership in the federal government as well as the provinces and territories needs to see the value of a national vision around commercial law reform. There needs to be some commitment to the principles of harmonization and the recognition of the need to have a legal commercial infrastructure that is predictable, responsive and efficient.

b. **A Dynamic Consensus** - There needs to be support at the grass roots level for such an enterprise. Canadian governments, business, consumer organizations, the academic community and the legal community must, first of all, see value in this work and secondly must be willing to support it politically and financially. The reality is that without this support, this project will not succeed.

c. **Tasking** - There must be an orderly effort at delivering the goods . It is one thing to establish a framework, it is quite another to be able to co-ordinate the work necessary to make the strategy a reality over the next decade. The ULCC is probably the only organization best suited to undertaking this work assuming that it is supported by the commitments referred to above. It must be done in such a way that political leadership and stakeholders always have a concept of overall conceptual goals and timelines.

Funding

There is no question that additional funding will be necessary to ensure this strategy can proceed. It is estimated that the project will require approximately \$50,000 per year over the next 10 years. That would be only a first phase as commercial legislation will always be in need of revision.

This money will be used to fund scholarly research, consultation and project management in key areas as directed by the ULCC and supported by government and stakeholders in the legal and business community. The project will require financial, volunteer and in-kind support from governments, law commissions, the academic, legal and the business community to achieve the intended result.

Conclusion

It is not as widely appreciated as it should be that the volume of trade between the provinces and territories of Canada actually exceeds the volume of trade between Canada and the outside world. Yet, while Canada has signed many conventions and treaties designed to harmonize the rules of international trade, and to improve the flow of international commerce, these international developments have not always been matched by comparable progress at the domestic level. The federal and provincial governments have recognized this by signing the Agreement on Internal Trade. The AIT is designed both to dismantle existing interprovincial barriers to trade to encourage the adopting of uniform provincial legislation.

The proposed commercial law framework for Canada represents an important departure for the reform of Canadian commercial law. It postulates that, in order to have a coherent legislative framework, a national vision is required. This vision should respond to those needs within the Canadian economy - that a legislative framework be predictable, responsive and efficient. It should address the practical problems that create legal barriers to trans-Canada and international commercial relations.

It is argued that the recommended framework will significantly contribute to meeting the needs of predictability, responsiveness and efficiency. This framework identifies key elements that address these practical problems. It sets in place broad priorities for commercial law reform over the next decade. The strategy requires that political leaders and key stakeholders in the business, academic, consumer and legal communities support this enterprise in order for it to have any hope for success. It challenges the ULCC to act in a leadership role to task and secure funding for this important work.

Recommendations

It is recommended to the ULCC:

1. That the ULCC support the continued development of a commercial law framework for Canada.

2. That the ULCC endorse the elements of the framework as outlined on page 4 and 5 of this report.
3. That the ULCC accept the responsibility for leading the project which would include tasking work and securing funding.

APPENDIX A - THE DETAILED ANALYSIS

I Commercial Law that Orders Affairs between Private Parties

1. Sale of Goods

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 fit in well with more modern commercial law like the PPSA, or with the international regime on the sale of goods which other jurisdictions have implemented. Significant discussion should also be had around the extension of this legislation to include services .

The new Civil Code of Quebec applies to sales contracts and as much as possible the general rules of the law of obligations were harmonized with those of the other Books (of the Civil Code), particularly with respect to security interests. In order to assure protection for the buyer, inspiration for the rules came from the *Vienna Convention on International Sales Agreements of 1980*.

A *Uniform Sale of Goods Act* was adopted in 1981, and has subsequently been refined, but is in need of modernization before it could be implemented.

In the Uniform Commercial Code, Article 2 contains the American Sale of Goods regime.

Implementation

New Brunswick is the only province to have implemented the 1981 Uniform Act.

2. United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention)

The Sales Convention establishes uniform rules for the international sale of goods which will apply in the absence of agreement to the contrary by the parties to the sales contract. While the Convention applies to contracts for the sale of goods, it excludes the sale of goods for personal use, sale by auction, judicial sales, and the sale of stocks, ships, aircraft or electricity. The provisions of the Convention deal with the formation of the contract and the rights and obligations of the seller and buyer. The Convention does not govern the validity of the contract or its terms, nor does it deal with the seller = s liability outside the contract.

Implementation

The Convention came into force for Canada on May 1, 1992, and applies uniformly across all of Canada since February 1, 1993. As of May 1998, 51 states are party to the Convention.

3. Secured Transactions

Legislation in this area governs the obtaining of consensual security interests in personal property, establishes a system for registering notices of such security interests, governs the priority of many of the competing interests in such property and establishes enforcement rules. The law is nearly uniform in most of common law Canada under what is known as the Western PPSA. It is important to complete the harmonization and to maintain the harmony in this field, especially in light of significant changes soon to be made to Article 9 of the Uniform Commercial Code in the United States.

State of the Project

Substantial uniformity in most of common law Canada in the form of the western model at PPSA is nearly complete although there are some areas of difference.

In Alberta, British Columbia, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan and the Yukon legislation following the western model has been enacted in the 1990's and is in force.

Similar legislation has been enacted in Manitoba and the North West Territories but has not yet been proclaimed.

Newfoundland is expected to pass the new PPSA legislation in 1999.

The Ontario PPSA is similar in effect to the western model but varies from the western model in some significant respects. The province is considering changes in some areas to harmonize more completely with the other provinces.

Security interest laws were reformed in 1994 in Quebec. All forms of encumbrances were grouped under the single concept of hypothec. The law relating to hypothec was made uniform such that a hypothec may encumber moveables (personal property) or immovables (real estate). A hypothec for personal property constitutes one of the major innovations of this Book (of the Civil Code). The provisions were inspired, in some areas, from Canadian common law provinces' legislation (see Articles 2644 to 2802 C.C.Q.).

4. Federal Secured Transactions

At the present time, there is considerable debate over whether the federal government should enact secured transactions legislation such as a federal PPSA to deal with the property that is within federal jurisdiction or take steps to make it clear that provincial secured transactions regimes are responsible for regulating security in what is thought of as federal property. The current scheme is arguably flawed in having, as its focal point, each individual type of federal property.

What property might fit within a federal regime? It might include:

- (i) certain property under security regimes which are contained in legislation dealing with matters under federal jurisdiction (namely, vessels, aircraft and rolling stock);
- (ii) certain property which is subject to federal jurisdiction where the relevant legislation may (or may not) contain a security regime (namely, intellectual property); and
- (iii) under the *Bank Act* (Canada) in favour of a secured party which itself is subject to federal jurisdiction (namely, a bank).

With respect to intellectual property, there is debate over the method of registering security in intellectual property between the regimes under the various federal intellectual property statutes and provincial PPSA's. There is also an issue over what interests in intellectual property can be secured. This area of law needs clarification.

In addition, there are some serious gaps in legislation dealing with mobile equipment, particularly aircraft. The Draft UNIDROIT Convention on International Interests in Mobile Equipment and Related Draft Aircraft Equipment Protocol addresses many of these questions and needs to be the basis of federal legislation. This preliminary draft Convention provides a framework for the creation and effects of international interests in mobile equipment (i.e., airframes, aircraft engines, helicopters, registered ships, oil rigs, containers, railway rolling stock, space property and other objects that could be identified in the future). Each of these types of mobile equipment will be the subject of a specific protocol under the Convention.

The preliminary draft protocol will adapt to aircraft equipment the mechanism set out in the Convention. Among other things, it will establish a central registry to register interests in aircraft equipment.

There should be a debate over the future of *Bank Act* security. This debate has raged for many years and a productive settlement of that debate should occur.

Finally, there should be a debate over the possibility of a single, national personal property security regime or the means for electronically uniting the several existing registries.

5. Commercial Liens

Although Ontario has enacted modern lien legislation, that legislation is not in harmony. The current law in most of the other provinces provides unpredictable and often unregistrable lien claims for businesses such as repairers, storers, garage owners, innkeepers, warehousemen and woodsmen. In Quebec, when the Civil Code was reformed, the notion of liens was replaced with that of priorities. The number of liens that became priorities was also considerably reduced (see Articles 2650 to 2659 of the Civil Code of Quebec).

The *Uniform Liens Act*, adopted in 1996, creates a unified set of rules about the nature and extent of certain non-consensual liens, the priority of liens against third parties and the procedure for enforcement.

Implementation

No provinces have implemented this Act yet.

6. Warehouse Receipts, Bills of Lading and Other Documents of Title Act

A *Uniform Documents of Title Act* was approved in principle by the Uniform Law Conference in 1995 based on similar work in Article 7 of the Uniform Commercial Code, but a final draft has not yet been prepared. This Act would codify the law relating to all forms of documents of title that have an established commercial usage. It covers bills of lading, warehouse receipts and other negotiable and non-negotiable documents of title. Documents of title are used primarily in interprovincial and international trade. The law on documents of title should be harmonized to the PPSA, to ensure that the effectiveness of the PPSA is not hampered. Significant changes to the approved draft may be required given the significant technological developments in this area.

State of the Project

Considerable work would be required to make this project useful. Given the state of technological change, it is likely not sufficient to simply adopt Article 7 of the UCC. Electronic commerce implications would have to be fully considered.

7. Transfer of Indirectly Held Securities

The ULCC is one of the partners working on a project to update the law with respect to rights in securities that are held through an intermediary such as a broker. Current law does not reflect the reality that the owner of a share almost

never holds the paper certificate. Securities transfers occur in a global securities market. Intermediaries for indirectly held securities operate across the country. As a result, harmonization and modernization is essential. This work is based on revised Article 8 of the Uniform Commercial Code.

State of the Project

Considerable progress has been made on this project under the leadership of Eric Spink of the Alberta Securities Commission.

The Production Committee includes representation from the Canadian Depository for Securities Ltd., Canadian Bankers ' Association, Group of Thirty, Ontario Securities Commission and a law school professor as well as representation from certain law firms.

8. Electronic Commerce

This project would review the impact of information technologies on Canadian law. A number of specific topics can be undertaken in this area. For example, as a first step to removing barriers to electronic commerce it is proposed that the United Nations Commission on International Trade Law 's *Model Law on Electronic Commerce* be adopted. Another high

priority issue is to review the implications for government on filing requirements and reproduction of files where information is produced or stored electronically.

State of the Project

The area of electronic commerce requires work and significant initiatives are currently underway.

The federal Justice Department and Industry Canada are committing significant resources to this subject, and the ULCC has an active project devoted to this subject as well.

The United Nations Commission on International Trade Law has developed a *Model Law on Electronic Commerce*.

In Quebec, the Civil Code contains a provision regarding signatures (Article 2827 C.C.Q.) that, according to the minister's statements, is sufficiently broad to include a specific numeric code that would allow for the personal identification of someone using a computerized code. The Civil Code also includes provisions respecting proof of computerized registrations. (Article 2837 C.C.Q. and following)

9. Leases

Leases of personal property have existed for a long time. However, in recent decades, this type of transaction has increased exponentially. Today, leasing transactions are a significant segment of commercial activity in Canada involving billions of dollars annually and ranging in scope from consumers' leases of automobiles to leases of commercial aircraft and industrial machinery. It is evident that equipment leasing is big business in Canada and, indeed, in many other countries.

Under our present law, transactions of this type are governed partly by common law principles relating to personal property and partly by principles relating to real estate leases. The legal rules and concepts derived from these sources do not adequately address many matters pertinent to lease transactions. In particular, there are uncertainties in four important areas: first, the classification of leases and, specifically, distinguishing between a true lease and a disguised secured sale; secondly, the nature of the warranties that might be implied in a lease contract in favour of the lessee; thirdly, the obligations of a lessor in a financing lease in which the lessor is neither the manufacturer nor the supplier of the item being leased; and fourthly, the remedies of a lessor where the lessee has breached its obligation under the lease.

In the United States, Article 2A of the Uniform Commercial Code pertains to Leases. It was added to the Code about ten years ago. The American experience under Article 2A merits careful study and, while views may differ as to whether the vagaries of the current law of leasing in common law jurisdictions in Canada necessitates an extensive codification of the law, there would seem to be little doubt that some reforms and clarification are in order.

10. Licensing of Intellectual Property

There are many kinds of licences. An increasingly important part of our commercial fabric is licences involving data, text and similar materials and transactions involving software, on-line and Internet commerce. As the modern economy is changing, the service sector is becoming increasingly dominant. The software industry - which provides the basic fuel for the information age - did not even exist until recent decades. The information industry now exceeds most manufacturing sectors in size.

Information transactions and, in particular, transactions involving licensing of information, differ substantially from transactions involving the sale or lease of goods. The differences are manifested in both the conditional nature of the transaction and in the fact that value lies not in the goods but in the information and rights severable from the goods. A body of law tailored to transactions intended to pass title to goods is not readily adapted to transactions whose purpose is instead to convey rights in intangible property and information.

In recent years, various groups in the United States have examined the consequences of the mismatch of concepts between contract law aimed at defining relationships in the sale or lease of goods and relationships in which information is the centre of the transaction and the contractual format most often is a licence rather than a sale or lease. They have concluded that transactions involving licensing of information differ substantively from transactions involving the sale or lease of goods. These differences, coupled with the commercial significance of the information industry, has prompted a current project in the United States to draft Article 2B to the Uniform Commercial Code concerning Licences. This project is ongoing and should be monitored closely in Canada.

11. Negotiable Instruments (Bills of Exchange)

Important aspects of the *Bills of Exchange Act* (Canada) are badly outdated and need to be revised. In the view of the Working Group, it will be logical to include a revised Negotiable Instruments Act in the framework even though it will continue to be federally enacted.

12. Cost of Credit Disclosure

This project will unify the rules for calculating and disclosing the cost of consumer loans. This project has been undertaken by the Consumer Measures Committee under the Agreement on Internal Trade working in conjunction with the ULCC. Final changes are currently being made to the *Uniform Cost of Credit Disclosure Act*, based on the drafting template prepared by the Consumer Measures Committee.

State of the Project

A uniform Act, based on the drafting template prepared by the Consumer Measures Committee under the Agreement on Internal Trade, will be approved by the Uniform Law Conference in 1998.

Alberta has introduced the framework of the drafting template as Part 9 of Bill 20, *The Fair Trading Act*.

The uniform Act will be available for use by all provinces. The CMC has yet to harmonize some key elements for regulations.

II. ENFORCEMENT LAW

1. Civil Enforcement

In many jurisdictions, civil enforcement procedures have not been recently reformed and are spread through a number of statutes and the common law.

Substantial work has been done by the Alberta Law Reform Institute on overhauling the remedies for enforcement of money judgments. The Alberta report was based on several general principles:

(a) *Universal Exigibility*: All of a debtor's property should be subject to enforcement, excepting only such property as is deliberately excepted.

(b) *Just Exemptions*: Such property as the debtor reasonably requires for the maintenance of his family should be deliberately exempt.

(c) *Sharing among Creditors*: The proceeds of enforcement processes should be shared among enforcement creditors.

(d) *Creditor Initiative*: The enforcement system should continue to be creditor driven.

(e) *One Statute*: The entire enforcement system should be governed by one consistent, coherent and logically ordered statute.

(f) *Judicial Supervision*: The enforcement system should operate with a minimum of judicial supervision, but there should be ready access to the court when directions are required.

Implementation

Alberta, New Brunswick and Newfoundland have recently modernized their civil enforcement regime. They have used the Alberta Law Reform Institute recommendations to a significant extent.

The Canadian Conference of Personal Property Law generally discussed reform of civil enforcement at its June meeting.

The ULCC will be considering a project proposal on civil enforcement in August.

2. Enforcement of Canadian Judgments and Decrees Act and Court Jurisdiction and Proceedings Transfer Act

A *Uniform Enforcement of Canadian Judgments Act* was adopted in 1992 by the ULCC. A *Uniform Enforcement of Canadian Decrees Act* was adopted by the Conference in 1997. The former deals with money judgments and the latter deals with non-money judgments. In 1997, a decision was made to roll the two Acts together in a *Uniform Enforcement of Canadian Judgments and Decrees Act*, which deals with both money and non-money judgments. A *Uniform Court Jurisdiction and Proceedings Transfer Act* was adopted in 1994. The entire package implements a harmonized system for granting and enforcing judgments throughout Canada. The jurisdiction Act provides for Canadian courts to follow a uniform set of rules in determining whether they have jurisdiction to hear a case. Then, under the enforcement Act, a judgment granted anywhere in Canada will be enforced in the same manner as if it was granted by that court.

State of the Project

The Enforcement of Canadian Judgments Act and *The Court Jurisdiction and Proceedings Transfer Act* have been passed in Saskatchewan, but are awaiting implementation by a group of provinces.

The Enforcement of Canadian Judgments Act has also been passed by British Columbia and Prince Edward Island.

Newfoundland and New Brunswick are also working on the passage of the enforcement legislation.

In Quebec, the jurisdiction of Québec's tribunals in international litigation and the rules of attornment and execution of both Canadian and foreign judgments were modernized when the Civil Code was reformed. The provisions are similar to those included in the uniform Acts.

3. Enforcement of Foreign Judgments

The ULCC is reviewing the issue of enforcement within Canada of both monetary and non-monetary judgments granted outside Canada. Full faith and credit may not always be acceptable because of the variety of legal systems around the world. Therefore Canadian courts will have additional discretion to determine whether enforcement is appropriate.

State of the Project

Two reports were presented to the Uniform Law Conference in August 1996: *Enforcement of Foreign Judgments in Common Law Jurisdictions* and *Enforcement of Foreign Judgments in Quebec*. A Progress Report was presented in August 1997.

The working group is currently preparing a draft Act for consideration by the Conference in

August 1998.

4. Enforcement of Judgments Convention Act

A *Uniform Enforcement of Judgments Convention Act* was adopted in 1997. It provides, initially, for the adoption by provinces and territories of *The Convention Between Canada and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters and on Mutual Legal Assistance in Maintenance*. It will allow for future enforcement conventions to be adopted by regulation.

Implementation

This Act has been enacted by Saskatchewan.

Since 1978, Québec is tied to a bilateral Accord with France. The Accord was put into place through legislation (R.L.Q., c. E-19).

5. Arbitration Act

This Act modernizes the law of commercial arbitration. A *Uniform Arbitration Act* was adopted in 1990. It provides a framework for conducting an arbitration, while leaving the parties latitude to design rules that suit themselves. It gives the courts less discretion to intervene in the conduct or result of arbitration. It also allows for simple enforcement of arbitral awards.

Implementation

The Uniform Act has been adopted in Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Prince Edward Island.

Parallel legislation is in force in Canada and Quebec.

Similar legislation is in force in British Columbia.

6. International Commercial Arbitration Act

A *Uniform International Commercial Arbitration Act* was adopted in 1986. It adopts the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and *Model Law on International Commercial Arbitration*.

Implementation

This Act has been implemented in every jurisdiction in Canada.

7. Settlement of International Investment Disputes Act

A uniform Act was adopted in 1997 to provide for the implementation of the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*. This

convention was sponsored by the World Bank to facilitate and increase the flow of international investment. It applies in 126 countries, including all members of the G-7 and the OECD, except Canada, Mexico and Poland. It establishes rules which parties may use to resolve investment disputes between States and nationals of other States by means of conciliation or arbitration.

Implementation

This legislation has not been adopted by any jurisdiction in Canada at the present time.