

Civil Section Minutes 1999

Winnipeg Manitoba

August 15 to 19, 1999

Attendance

Forty-five delegates and presenters attended the meeting of the Civil Section.

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. John McClaugherty, President, National Conference of Commissioners on Uniform State Laws (NCCUSL);

(b) Mr. Jeremiah Marsh - Chair of the Committee on Liaison with Canada and International Organizations, and Co-chair of the Joint Committee on Co-operation with the Uniform Law Conference of Canada and the NCCUSL;

Professor Patricia Brumfield Fry - Chair of the Drafting Committee of the Uniform Electronic Transactions Act for NCCUSL

(d) Mr. Graham Walker, Q.C. - a Past President of the Uniform Law Conference of Canada.

Presidence

The sessions were chaired by Mr. Arthur L. Close, Q.C.

Exigibility of Future Income Security Plans

At the 1998 meeting of the Conference the working group on Exigibility of Future Income Security Plans had been directed to proceed with the preparation of a draft uniform act with commentaries based on the recommendations contained in the consultation report and to continue consultations with those organizations that had responded to the previous reports. Pursuant to this direction, Darcy McGovern, one of the Saskatchewan Commissioners and the Chair of the working group, presented a report, along with a draft uniform act for consideration.

Discussion ensued on the report and draft *Uniform Registered Plan (Retirement Income) Exemption Act*. It was noted that the definition of a deferred profit sharing plan was as defined in section 147 of the *Income Tax Act* (Canada). Accordingly, any changes to the *Income Tax Act* will be incorporated in the *Uniform Registered Plan (Retirement Income)*

Exemption Act. It will, however, be necessary for each jurisdiction to examine its own *Interpretation Act* to determine whether or not the additional words "as amended from time to time" need to be added to the definition of "Federal Act."

RESOLVED

1. That the English language version of the *Uniform Registered Plan (Retirement Income) Exemption Act* contained in the report presented by the working group, as amended, be adopted as a Uniform Act and recommended to the jurisdictions for enactment.
2. That a French language version of the *Uniform Registered Plan (Retirement Income) Exemption Act*, adopted in its English language version, be circulated to the jurisdictions as soon as possible and, unless two or more objections are received by the Executive Director of the Conference by November 30, 1999, the act should be taken to be adopted as a Uniform Act and recommended to the jurisdictions for enactment.
3. That the Act and the Report of the Saskatchewan Commissioners appear in the 1999 Proceedings.

Uniform Data Protection

The project on Data Protection was introduced to the Conference at its 1997 meeting and discussed again in 1998. At the 1998 meeting the working group was directed to consider the discussions and prepare a draft *Uniform Protection of Personal Information in the Private Sector Act* and commentaries for consideration at 1999 meeting.

In October 1998, Bill C-54, the *Personal Information Protection and Electronic Documents Act* was introduced into the Parliament of Canada. Bill C-54 covers the same subject matter as the proposed uniform data protection project. This development was considered by the Steering Committee which questioned whether there was any point in proceeding with the uniform project if the federal government was going to enact its own legislation without regard to the work of the Conference and while the reaction of the provinces to Bill C-54 was uncertain. Accordingly, the Steering Committee decided to suspend active work on the project to await further developments.

Following the introduction of Bill C-54, Industry Canada established a Federal-Provincial-Territorial working group and the Conference made enquiries to determine whether or not Industry Canada or the participants in the working group saw an ongoing useful role for the ULCC in relation to this topic. We were advised that they did not. Following this, the Steering Committee confirmed its earlier decision to discontinue work on this topic. Bill C-54 has been given second reading and it is likely that it will be given final reading when Parliament resumes in September 1999.

These developments were set out in a status report presented by Elizabeth Sanderson on behalf of the working group. Discussion ensued. Concern was expressed that certain provisions contained in Bill C-54 represented an unconstitutional intrusion into provincial affairs. It was also noted that Bill C-54 provides that it will not operate in those areas of

provincial jurisdiction where a province enacts its own legislation that embodies similar features. This may indicate a reason for reviving the project at some future time.

RESOLVED

1. That the Report be received.
2. That the Uniform Law Conference endorses the decision of the Steering Committee to discontinue active work on this project
3. That the Report appear in the 1999 Proceedings.

Limited Liability Partnerships

A project concerning limited liability partnerships was added to the Conference's program as a result of a decision made by the Steering Committee in the autumn of 1998 when it became clear that there was a considerable demand for legislation in this area. A number of governments were feeling compelled to enact legislation establishing a framework for limited liability partnerships and it was clear that if uniformity was to be achieved, it would be necessary for the Conference to complete its work quickly. In order to accomplish this, a decision was made to "fast track" the project and to proceed with it in two sessions at the 1999 meeting.

First Session

A report prepared by the Alberta Commissioners was presented by Rick Bowes of the Alberta Law Reform Institute. Mr. Bowes outlined the history of the development of history of the limited liability partnership since its origination in Texas in 1991. He pointed out that, initially, limited liability partnerships provided only a partial shield; that is providing for protection from liability for obligations arising out of torts or professional malpractice but not the ordinary obligations of the partnership. In 1995, however, both New York and Minnesota enacted limited liability partnerships legislation which provided a full shield and, in 1996, the National Conference of Commissioners on Uniform State Laws adopted revisions to the *Uniform Partnership Act* to provide for limited liability partnerships with a full shield. Since then the trend in the United States, where virtually all of the jurisdictions have enacted limited liability partnerships legislation, has been to the full shield limited liability partnerships.

In Canada, since as early as 1994, the chartered accountants profession has been seeking limited liability partnerships legislation. Their efforts have included proposals for proportionate liability instead of joint and several liability. In 1999, the Alberta Law Reform Institute published its report on Limited Liability Partnerships in which it made recommendations for legislation allowing for limited liability partnerships of the full shield type. Both Ontario and Alberta have enacted LLP legislation but their statutes provide for only partial shield protection.

The report identified the general principles that needed to be resolved and set out various recommendations for their resolution. Discussion ensued and the necessary policy decisions were made.

Discussion initially focussed on the choice as to whether the proposed act should provide for full shield or only partial shield. After extensive discussion of the merits of each choice, the Conference adopted the recommendation of the report that the act should provide for a full shield. The remaining recommendations of the report were subsequently adopted after appropriate debate with necessary modifications to ensure that the uniform act would be neutral with respect to the existence of direct liability of partners and to make it clear that partnership property would always be available to meet the claims of creditors.

Instructions were given for the drafting of an uniform act to be brought back for the second session.

Second Session

At the second session, a draft *Uniform Limited Liability Partnership Act* was presented and reviewed.

There was extensive discussion over whether particular provisions of the draft act fully carried forward the conclusions reached at the first session. There was particular concern that the objective of ensuring that partners in limited liability partnerships remain personally liable for their own wrongful acts be clearly reflected in the Act. It was agreed that the drafters would address these questions in a final draft.

Discussion then turned to the process by which the proposed act was developed. Two particular concerns were raised.

The first concern was that, while the legislation agreed on provides a good point of departure for those jurisdictions that want legislation of this kind, there was some reticence about the Conference urging the adoption of the legislation by all jurisdictions as good policy. This would be the effect of promulgating it as a uniform act. It was agreed that this concern be met by promulgating the legislation as a "model act."

The second concern was that the "fast tracking" of the project allowed insufficient time for reflection on the issues and contents of the proposed model act and for consultation with interested parties in the individual jurisdictions. It was therefore agreed the act be adopted pursuant to the Section's "November 30th rule" which would allow further time for these purposes.

RESOLVED

1. That the draft *Limited Liability Partnership Act* and commentaries be completed in both official languages 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, 1999, the draft act should be taken as adopted as a Model Act.
2. That the Act and the Report of the Alberta Commissioners appear in the 1999 Proceedings.

Enforcement of Foreign Judgments

A report was presented Kathryn Sabo on behalf of the working group on foreign judgments. This project has been influenced by the developments at The Hague Conference on Private International Law which is currently working toward a convention on recognition and enforcement of judgments in civil and commercial matters. The most significant development at the Hague was the decision taken at the last meeting of the Special Commission that the proposed convention will be a mixed convention providing for mandatory grounds for jurisdiction, recognition and enforcement plus permitting a state to take jurisdiction on the basis of its national law, subject to a prohibited list and with no guarantee of recognition and enforcement.

The Conference reviewed and discussed the tentative drafting proposals set out in the report and in particular whether or not the list of real and substantial connections should be a closed list or an open list.

RESOLVED

1. That the report of the working group on the enforcement of foreign judgments be received.
2. That the working group review the deliberations in relation to Parts 1 and 2 of the draft in the *Uniform Enforcement of Foreign Judgments Act* and prepare a revised act, with commentaries including provisions in relation to enforcement and other outstanding matters (Parts 3 and 4) for consideration of the 2000 Conference.
3. That the Report appear in the 1999 Proceedings.

Commercial Law Strategy for Canada - General

Douglas Moen, Q.C., the immediate Past President of the Conference presented a progress report on this topic. He first provided a brief review of the history of the project and explained that the need to modernize commercial law had been discussed by the Conference for some time. The 1998 meeting endorsed implementation of a commercial strategy for Canada. A strategy paper was prepared and has now been endorsed by a number of a variety of organizations, including the Civil Justice Committee comprised of officials from Ministries of Justice. The working group is continuing to seek further endorsements and in particular will be meeting with the Deputy Ministers of Justice.

Discussion ensued on Mr. Moen's report and the strategy. The essential features of a commercial law strategy for Canada were identified as were the crucial steps that will have to be followed in order to achieve its implementation, obtaining political commitment, building consensus among major national organizations, tasking and funding. It was emphasized that although development of a commercial law strategy is not the same as creating an uniform commercial code for Canada, it is meant to be more than simply a collection of statutes in one book.

RESOLVED

1. That the progress Report be received and that the Uniform Law Conference supports the continued development of a commercial law framework for Canada.
2. That the Report appear in the 1999 Proceedings.

Following the general progress report, three presentations were made on specific projects falling within the commercial law strategy.

Commercial Law Strategy - Commercial Leasing

A report presented by Professor Tamara Buckwold of the College of Law, University of Saskatchewan, reviewed the need to improve Canadian law in relation to commercial leasing and provided a comparison to other law, primarily the Uniform Commercial Code Article 2A.

The report concluded that the law related to commercial leasing was both complex and inaccessible. It was governed by a number laws and statutes and there was no single source which could be consulted. Many of the common law principles were developed many years ago and not in a modern context. The report noted that many aspects are uniform throughout Canada but significant differences exist in the area of consumer leasing and, with respect to the United States, in "finance leasing." There are many deficiencies in the law relating to consumer leasing.

Although Professor Buckwold concluded that there was a need to improve the law, there was no immediately pressing demand to have the problems resolved and certainly no active lobbying. Given this situation, although a complete reform of the law relating to leasing, which might include comprehensive codification, could be undertaken the preferred approached seemed to be a more limited one involving finance leases and consumer leases.

RESOLVED

1. That the Report presented by Professor Buckwold be received.
2. That the Uniform Law Conference commends Professor Buckwold for the work which she has carried out to date
3. That the Steering Committee be requested to establish a working group to consider further the issues raised in Professor Buckwold's Report, in the light of the deliberations of the Section, and to identify and make recommendations respecting legislative options to address them.
4. That the Report appear in the 1999 Proceedings.

Commercial Law Strategy - Federal Security Interests

A report was delivered by Professor Roderick Macdonald, the President of the Law Commission of Canada, concerning federal security interests and decisions made at a meeting in June 1999 involving representatives of the LCC, the ULCC and others in Toronto.

Federal security interests were described as interests in property that is meant to secure an obligation that is somehow touched on by federal legislation or legislative competence. They may involve property created by a federal statute (such as intellectual property), a security interest expressly created by a federal statute (such as security arising under the *Bank Act*), security given by a federally regulated undertaking or security with some other federal aspect. The fundamental question to be examined is whether or not federal law allows people to fully utilize their property as collateral within the framework of a coherent scheme. The LCC group identified six topics which could form the framework of an overall study of federal security interests and two main research projects which should be undertaken as the first stage of the project development.

RESOLVED

1. That the progress Report delivered by the President of the Law Commission of Canada be received.
2. That the Uniform Law Conference endorses and welcomes the efforts of the Law Commission of Canada carrying forward this topic as part of the Commercial Law Strategy
3. That the Uniform Law Conference of Canada endorses the continued participation of the ULCC representatives in the work of the Law Commission of Canada on this topic.
4. That the Report appear in the 1999 Proceedings.

Commercial Law Strategy - Revisions to Article 9 of the Uniform Commercial Code

The Chair introduced the discussion by noting that anything undertaken by the Conference in the area of secured transactions must be done in consultation with the Canadian Conference on Personal Property Security Law. He also pointed that the Conference had previously promulgated a *Uniform Personal Property Security Act*, but it has not been widely adopted. What is commonly referred to as the Western PPSA has now been largely adopted in Canada except in Ontario which retains its own version of the legislation. Accordingly, at some point, consideration will have to be given to what should be done with the existing *Uniform Personal Property Security Act*.

Professor Ronald C.C. Cuming, Q.C., of the College of Law, University of Saskatchewan, presented a report prepared by himself and Professor Catherine Walsh, of the Faculty of Law, University of New Brunswick, regarding revisions to the Uniform Commercial Code Article 9 and their relevance to Canadian personal property security legislation. The report identified a number of changes to Article 9 which reflected existing Canadian PPSA policy as well as others which were of little relevance to the Canadian context. The report next identified changes to Article 9 which warranted consideration for Canadian legislation such as provisions relating to security interests in commercial tort claims, the concept of supporting obligations (meaning a letter of credit, or a secondary obligation such as a guarantee, that supports payment or performance of an obligation that is itself collateral), cross-collateralization of purchase money security interests and electronic chattel paper.

Finally, the report identified serious difficulties resulting from the Article 9 revisions in relation to conflict of laws rules which the report concludes destroyed "...the important harmonization which previously existed between the Article 9 and PPSA conflict of laws rules. Although the traditional approach whereby law of the location of the debtor governed perfection, the effect of perfection and non-perfection and priorities is retained with respect to intangible collateral and mobile goods; with respect to intangible collateral, the law of the location of the collateral will govern the effect of perfection and non-perfection and priorities. Not only are these and the other conflict of laws rules changes significant, they are also ones which would be very difficult to adopt in Canada because of the different policy choices made by legislators and the different contexts in which Article 9 and the Canadian PPSA's operate.

RESOLVED

1. That the status Report be received.
2. That the Uniform Law Conference commends Professor Cuming and Walsh for the work they have carried out to date.
3. That upon completion of the Cuming/Walsh study, the Steering Committee explore with the Canadian Conference on Personal Property Security Law the possibility of a joint project aimed at the creation of uniform amending provisions to the Canadian Personal Property Security Acts.
4. That the Report appear in the 1999 Proceedings.

Corporate Criminal Liability

The Civil Law and Criminal Law Sections of the Conference met in a joint session to consider a proposal for a project to consider the question of the liability of corporations for criminal activity. Discussion ensued on the various basis for imposing liability upon a corporation. These range from the developing American position based on vicarious liability, the Australian corporate cultural model, the identification theory as set out by the Supreme Court of Canada in *Canada Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 and others.

The joint session concluded without any resolution having been put forward.

Discussion ensued within the Civil Law Section. There was a consensus that the Section should not proceed with any project in this area, either on its own or jointly with the Criminal Law Section. It was agreed, however, that if the Criminal Law Section did wish to proceed with its own project on this topic it should consider including any individual members of the Civil Law Section who wish to participate in any working groups that it establishes. It was also agreed that the Civil Law Section should be receptive to any request to hold a further joint session on this topic at the 2000 meeting.

Electronic Commerce

A report on the *Uniform Electronic Commerce Act* was presented by John Gregory on behalf of the Ontario Commissioners and discussed at two sessions of the Conference. The Chair welcomed the participation of Professor Fry in the Section's deliberations.

First Session

During the first session, the report was presented and discussed extensively. A draft act was simultaneously reviewed. A number of suggestions for changes emerged to be reflected in a revised draft act to be prepared and presented for review at the second session.

Second Session

Although there was substantial agreement with the revision, the Commissioners concluded that additional time was desirable to ensure that the revised draft act properly reflected the deliberations. Accordingly the draft act was adopted in principle and that drafting suggestions would be received by the Ontario Commissioners until August 30, 1999.

RESOLVED

1. That the draft *Uniform Electronic Commerce Act* be adopted in principle subject to drafting suggestions received by the Ontario Commissioners by August 30, 1999.
2. That a final draft act and commentaries in both official languages be prepared in light of the drafting suggestions received. The draft is to be circulated to the jurisdictions as soon as possible thereafter and unless two or more objections are received by the Executive Director of the Conference by September 30, 1999, 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 1999 Proceedings.
3. That the Act appear in the 1999 Proceedings.

Report from the Department of Justice on Private International Law

A comprehensive report on the activities of the Department of Justice in the area of private international law was presented. It was noted that a priority of the private international law group is to identify conventions which can be implemented.

RESOLVED

1. That the Report be received and published in the 1999 Proceedings.

Report from the National Conference of Commissioners on Uniform State Laws

Mr. John McClaugherty, President of the National Conference of Commissioners on Uniform State Laws provided a comprehensive report on the activities of NCCUSL and in particular on the results of deliberations at its 1999 meeting in Denver.

Mr. McClaugherty acknowledged the presence of Messrs. Close, Monty and Schnoor at the Denver meeting. He reported that eight acts were read and considered. These were:

Uniform Trust Act

Uniform Arbitration Act

Uniform Consumer Leases Act

Uniform Athletic Agents Act

Uniform Money Services Business Act

Uniform Parentage Act

Uniform Mediation Act

Uniform Interstate Enforcement of Domestic Violence Orders Act

The Conference had planned on dealing with proposals relating to the Uniform Commercial Code Articles 2 and 2A but did not do so because of the complex issues presented and lack of sufficient time.

The Conference adopted three uniform acts:

Uniform Property Disclaimer Act

Uniform Electronic Transfer Act

Uniform Computer Information Transfer Act

Mr. McClaugherty reported that the Conference as undertaken work with respect to Revised Rules of Evidence. This project is designed to codify and simplify rules relating to what can be introduced in evidence in State courts. It is designed to accommodate electronic records and developments in scientific technology, such as DNA testing. Finally, it provides uniform rules relating to various privileges as well as establishing a licenced social workers privilege.

The Chair thanked Mr. McClaugherty for his presentation

RESOLVED

1. That the Report be received and, to the extent that the document is available, published in the 1999 Proceedings.

Transfers of Investment Securities

A report was presented by Mr. Eric Spink on behalf of the Alberta Commission concerning the status of this project. Mr. Spink is lack of sufficient time and because of ice-chair of the Alberta Securities Commission.

The Transfers of Investment Securities or the Tiered Holding System Project was first discussed at the Uniform Law Conference in 1993. At that time, it was hoped that a draft act could be prepared for presentation to the 1994 meeting.

A draft act has not yet been prepared. Mr. Spink explained that it was an extremely specialized area and had been very difficult to get feedback from interested parties. He

noted that at the present time, the rules governing the settlement of trades involving securities are scattered through a variety of statutes and that market practices have outstripped the law. There is no mechanism for a coordinated view of the law and accordingly, a proposal was made to the chairs of the various Provincial Securities Commissions through the Canadian Securities Administrators. In January of 1998, the chairs established a task force comprised of Mr. Spink and Mr. Daniel Laurion, head of the Commissioners' Office, with the Commission des Valeurs Mobilières du Québec. The basic objective of the task force was to work towards the development of reformed legislation in cooperation with the Conference and consistent with the recommendations made in a report prepared by a ULC production committee formed in 1995.

Mr. Spink reported that a drafting consortium of legislative counsel representing Alberta, British Columbia, Ontario and Quebec had been established and that a draft act had been sent out for consultation. That is in process.

RESOLVED

1. That Mr. Eric Spink in conjunction with the Canadian Securities Administrators, the consortium of legislative counsel and the Canadian Conference on Personal Property Security Law, be encouraged to continue work on the preparation of a draft *Uniform Securities Transfer Act* and commentaries.
2. That the consultation process in relation to this project should continue.
3. That a draft act and commentaries be submitted for consideration of the 2000 Conference.
4. That the Report appear in the 1999 Proceedings.

Unclaimed Intangible Property

A report concerning this project was presented to the Conference by Mr. Russell Getz on behalf of the British Columbia Commission. Mr. Getz' report provided a brief overview of developments in British Columbia and elsewhere in Canada as well as in the United States.

One of the fundamental issues that must be decided in unclaimed intangible property legislation is the basis upon which jurisdiction is to be exercised. In particular, because of the multi-jurisdictional issues that arise, it is essential that there be a uniform rule to provide when a given province's law is applicable. The report's recommendation was in favour of a rule in which jurisdiction would be based on the last known address of the owner of the property. Such a rule was more likely to achieve predictability, fairness and efficiency.

The report dealt with a variety of issues including holding periods, notices, reports, transfers and fees. A number of issues remain to be resolved including whether or not the administrator would have a power of recognize "moral" claims and protection from liability for holders of property who transfer such property to administrators.

RESOLVED

1. That a draft *Uniform Unclaimed Intangible Property Act* and commentaries be prepared for consideration of the 2000 Conference.
2. That the draft act would reflect the recommendations set out in the Report of the British Columbia Commissioners subject to the modifications flowing from the Conference's deliberations.
3. That the Report appear in the 1999 Proceedings.

Enforcement of Civil Judgments

The Chair delivered a status report on this project. The 1998 Conference resolved that the Steering Committee establish a working group to consider legislative options for uniformed civil judgment enforcement. The Steering Committee quickly realized that work on such a large project should not be started until all of the necessary resources were in place.

The British Columbia Law Institute submitted a proposal to the government of British Columbia pursuant to which the Institute and the province would assume leadership of the project on behalf of the Conference. No answer has been received from the government but at the time of the 1999 meeting, the Institute was not optimistic that a favourable response would be received. Discussion ensued as to how such a project could be carried out.

Both Alberta and Newfoundland have recently enacted substantial revisions to their civil judgment enforcement legislation and the Commissioners from both jurisdiction expressed a willingness to assist in a ULC project but also expressed concern that they should avoid taking leadership of the project because of their previous work and the danger of being encumbered by an entrenched position.

There was further discussions as to whether or not the project should be scaled down to a smaller set of areas where uniformity was most important and easier to obtain.

RESOLVED

1. That the status Report be received.
2. That the Steering Committee be requested to continue its efforts to identify a jurisdiction or body to provide project leadership and establish a working group in relation to this topic.
3. That the Report appear in the 1999 Proceedings.

New Projects

A number of projects had been suggested as possible additions to the program and background materials circulated by the Section Chair. These included:

Uniform Domestic Partnership Act

Choice of Law in Tort

Uniform Mediation Act

Specific revisions to the following Uniform Acts:

Uniform Liens Act

Uniform Wills Act ("Substantial Compliance")

Uniform Survival of Actions Act

Review *Uniform Sale of Goods Act* in the light of recent developments.

Discussion ensued aimed at identifying the level of interest and support among the jurisdictions for adding some or all of these to the Section's program.

It was agreed that the Section's Steering Committee take the necessary decisions on the addition of new projects, having regard to the discussions and to take whatever steps are appropriate to launch them.