

Commercial Law Framework for Canada - Progress Report 1999

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The Commercial Law Framework for Canada

Progress Report

Saskatchewan

British Columbia

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BACKGROUND:

[1] 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 that Justice officials together with the Uniform Law Conference of Canada (ULCC) prepare a strategy for presentation to Ministers.

[2] A working group of ULCC commissioners, government representatives, members of the private bar, the academic community and the business community as well as law reform organizations met during early 1998. Out of those discussions, a commercial law strategy was prepared to be implemented over 10 years. It was endorsed by the ULCC in August, 1998. A strategy paper has been prepared entitled "Towards a Commercial Law Framework for Canada" which is available from the ULCC. This strategy has also been endorsed by the following organizations:

- National Business Law Section, Canadian Bar Association
- Canadian Chamber of Commerce
- Canadian Bankers Association
- Law Commission of Canada
- British Columbia Law Institute
- Alberta Law Reform Institute
- Civil Justice Committee (Officials from Ministries of Justice)

[3] Members of the Working Group are seeking endorsements from a number of other organizations representing business, legal and consumer interests in Canada.

THE CASE FOR REFORM

[4] This strategy puts forward 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 Existing commercial legislation is, for the most part, lacking in uniformity and seriously out-of-date.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 the 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.

[5] 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, that supports Canada's competitive position in the world. Legislation is a critical element of that regulatory framework.

WHAT ARE THE KEY ELEMENTS?

[6] The areas of law 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.

[7] The Working Group has recommended and the ULCC has approved the following for inclusion in the framework:

<i>I. Commercial Law that Orders Affairs between Private Parties</i>	<i>II. Enforcement Law</i>
<ol style="list-style-type: none"> 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. Commercial Leasing 10. Licensing of Intellectual Property 11. Negotiable Instruments (Bills of Exchange) 12. Cost of Credit Disclosure 	<ol style="list-style-type: none"> 1. Civil Enforcement 2. Enforcement of Canadian Judgments and Decrees 3. Court Jurisdiction and Proceedings Transfer 4. Enforcement of Foreign Judgments 5. Enforcement of Judgments Conventions 6. Arbitration 7. International Commercial Arbitration 8. Settlement of International Investment Disputes

[8] WHAT ARE THE PRIORITIES AND WHAT IS THE PROGRESS OF EACH PRIORITY?

(a) **Transfer of Indirectly Held Securities:** The Working Group agreed with Canadian Securities Administrators 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. A working draft piece of legislation is before the Uniform Law Conference at this meeting.

(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 Agreement on Internal Trade process. It has the potential to significantly harmonize a complex area of law that is highly relevant to consumers and to business. Ministers of Consumer Affairs have undertaken to implement this initiative as soon as possible.

(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. A draft Electronic Transactions Act is before the Uniform Law Conference at this meeting.

(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. A background paper on Commercial Leasing is before the Uniform Law Conference at this meeting.

(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 about security in intellectual property and the need to examine the interrelationship between section 427 of the *Bank Act* and provincial secured transactions regimes. The Law Commission of Canada and the ULCC will be jointly leading a project to rationalize this area of legislation. Work has already commenced with the preparation of a short paper on the constitutional framework relating to "federal" secured transactions. This came before a group of experts convened late in June to consider the dimensions and parameters of the project. A progress report will be presented to the Uniform Law Conference at this meeting.

[9] WHAT IS THE PROGRESS ON OTHER PROJECTS IDENTIFIED AS APPROPRIATE FOR THE FRAMEWORK?

(a) **Sale of Goods:** Professor Emeritus Jacob Ziegel, of the University of Toronto Faculty of Law has put forward a proposal to the Chair of the Civil Section that the Uniform Sale of Goods Act, adopted by the Uniform Law Conference in 1982, be reviewed in the light of more recent developments. Professor Ziegel's suggestion will be discussed at this meeting.

(b) **International Sale of Goods:** This is considered a completed project. The uniform legislation to implement the Convention on the International Sale of Goods was adopted by this Conference in 1985 and has since been enacted in almost all the common law provinces and territories.

(c) **Secured Transactions:** The immediate focus of this project to examine the newly revised UCC Article 9 and identify innovations that might be incorporated into Canadian personal property security legislation. Professor Ron Cuming, Q.C. of the University of Saskatchewan College of Law and Professor Katherine Walsh of the University of New Brunswick Faculty of law are engaged in such a study. Professor Cuming will be bringing a progress report before this meeting.

(d) **Commercial Liens:** The Uniform Liens Act was adopted as an Uniform Act in 1996. The Conference regards this as a completed project.

(e) **Civil Enforcement:** Professor Ron Cuming, Q.C. of the University of Saskatchewan College of Law, has prepared a proposal for reform for civil enforcement legislation in Saskatchewan. The B.C. Law Institute has also expressed an interest in undertaking such a project if resources can be found. Exploratory discussions are under way to see if these proposed initiatives might provide the core around which the development of a uniform Act might take place.

(f) **Enforcement of Canadian Judgments and Decrees:** This project resulted in the Uniform Enforcement of Canadian Judgments and Decrees Act in 1997. The Conference regards this as a completed project.

(g) **Court Jurisdiction and Proceedings Transfer:** The Uniform Court Jurisdiction and Proceedings Transfer Act was adopted by this Conference in 1994 and is considered by this Conference as a completed project.

(h) **Enforcement of Foreign Judgments:** A progress report is before the Conference at this year's meeting.

(i) **Enforcement of Judgments Conventions:** The Uniform Enforcement of Judgments Conventions Act was adopted by this Conference in 1997 and is considered a completed project.

(j) **Arbitration:** The Uniform Arbitration Act was adopted by this Conference in 1990 and is considered a completed project.

(k) **International Commercial Arbitration:** The Uniform International Commercial Arbitration Act was adopted by this Conference in 1986 and is considered a completed project.

(l) **Settlement of International Investment Disputes:** The Uniform Settlement of International Investment Disputes Act was adopted by this Conference in 1997. and is considered a completed project.

[10] HOW DO WE GET THE JOB DONE?

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

1. **Political Commitment** - 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.
2. **Dynamic Consensus** - There needs to be support from business, consumer organizations, the academic community and the private bar.
3. **Tasking** - There must be an orderly effort to co-ordinate the work. The ULCC has assumed this coordinating role.
4. **Funding** - Funding is necessary to ensure this strategy proceeds.

[11] Progress on the Commercial Law Strategy

Since August, 1998, significant progress has been made at moving the strategy forward:

1. **Political Commitment** - In February, 1998, Deputy Ministers of Justice endorsed the Strategy. It will now move to Ministers of Justice for their approval. In addition, there have been ongoing discussions with Deputy Ministers of Justice to ensure that progress can be made on the strategy in particular jurisdictions.

2. **Dynamic Consensus** - Significant progress has been made at building a consensus of support among major national business and consumer organizations. The following organizations have been contacted for their support:

Retail Council of Canada
Consumers' Association of Canada
National Auto Acceptance Corporations
Credit Union Central of Ontario
Credit Union Central of British Columbia
Canadian Finance and Leasing Association
Consumer Measures committee
Insurance Council of Canada
Canadian Life and Health Insurance Association
Trust Companies Association of Canada
Canada Trust

We are hopeful that additional support for the project will be forthcoming from a number of these organizations.

3. **Tasking** - As indicated above, work is underway on a number of priorities as well as on other aspects of the framework. The working group has continued to meet by conference call during the course of the year and has remained very enthusiastic about moving forward with this framework. A subcommittee has been formed to obtain endorsement from business and consumer organizations. Considerable support exists for this strategy. The

main obstacle to making progress is the volunteer nature of those who are working to support the framework.

4. **Funding** - A major boost for the strategy was received when the Law Commission of Canada agreed to endorse the federal secured transactions project and to pay for that effort. This has potential to be a major undertaking and their commitment is very much appreciated. Discussions are also being held with the Deputy Ministers of Justice encouraging financial support for this project. We are hopeful that this will lead to positive results.

Conclusion

[12] The Working Group is of the view that the recommended framework will significantly contribute to meeting the needs of predictability, responsiveness, efficiency and competitiveness. This framework identifies key elements that address the 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 succeed. It challenges the ULCC to act in a leadership role to task and secure funding for this important work. The Working Group is enthusiastic about the strategy but clearly notes that with political support and funding will be key issues in 1999 - 2000.