UNIFORM LAW CONFERENCE
TORONTO, ONTARIO
AUGUST 19 – 23, 2001
CIVIL SECTION MINUTES

COMMERCIAL LAW STRATEGY

A status report on the project was presented by Ken Morlock and Hélène Yaremko-Jarvis.

There was a general discussion surrounding the development of a generic template for the process of conducting a ULCC project over a three year period. By using well established protocols and guidelines all projects would proceed in a similar fashion and be deliverable within a 3 year cycle. A discussion with respect to funding was deferred until a later date.

All parties agreed that the Commercial Law Strategy had made important strides in its first year, despite growing pains, towards both raising awareness of the need for a general strategy and for assisting in the passage of commercial legislation.

RESOLVED

1. That the progress report be received.
2. That the report appear in the 2001 Proceedings. [*See Appendix B, p. 172.*]

UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT

Kathryn Sabo indicated that the Working Group had prepared a draft *Uniform Act* with certain issues that needed to be resolved before it could be finalized by the Conference.

Ms. Sabo indicated that, over the past year, Frédérique Sabourin had prepared a comparative, common law/civil law document that served as the framework for a great deal of the work of the group. Ms. Sabo then advised that the Hague process for the development of an international convention with respect to this matter was not going to be finalized in a timely fashion and that accordingly, the ULCC and the Hague projects should become delinked.

In reviewing Part I of the Act, it was noted that the definition of "foreign judgment" had been expanded to recognize non-judicial decisions.

A discussion ensued regarding whether non-monetary judgments should be included within the scope of the Act as previously recommended by the Conference. There was some question as to whether non-monetary judgments created too much of a risk for Canadian jurisdictions to adopt given that within Canada such judgments are only now starting to be recognized under the *Uniform Enforcement of Judgments and Decrees Act*. Concern was raised first that this could lead to foreign non-monetary judgments being recognized before Canadian non-monetary judgments are, second, that the quality control with respect to non-monetary judgments was suspect and that without reciprocity, the idea would not be well received in Canada.

Discussion ensued as to whether or not the many substantive screens in the Act including the "public policy" provisions of the Act would not weed out any problems. It was noted that *Morguard* had forced the issue of whether non-monetary judgments would be recognized and that the intent of the Act was to provide for a formal screening process, so that such decisions could be made in a principled fashion, rather than on a case-by-case basis.

A point was also raised as to whether or not the recommendation of the Working Group that provisional measures be removed from the scope of the Act would not also provide significant assistance with respect to the concerns raised regarding non-monetary judgments. A question was raised as to whether an interpretative clause could be used similar to that used for monetary judgments to interpret foreign non-monetary judgments so that they may apply in a more acceptable fashion in Canada. This was viewed as a useful option that deserved further consideration.

A drafting point was raised regarding the definition of "foreign judgment" and the phrase "of the kind" and whether this was meant to indicate a separate meaning from the definition for "civil proceeding". The response was that it was to be more specific than the general "civil proceeding" definition. An issue was also raised as to whether the "territorial unit" language of international documents should be used to promote the federal nature of Canada.

An issue was raised respecting how the section with respect to bilateral agreements applies and particularly the extent to which a third state could have a domestic judgment first enforced in a country with which Canada has a bilateral agreement and then subsequently seek enforcement in Canada on that favoured basis. The response was that enforcement was to be of the original judgment rather than some secondary modification of that judgment by another country.

A concern was raised as to whether or not use of appeal as a stalling device should be allowed. This Act cannot be used to correct procedural deficiencies in other states.

A suggestion was made that the Act focus on the principles of jurisdiction rather then listing specific grounds. This would avoid the jurisdictional argument which has delayed proceedings at the Hague. It was noted that in Canada the words "real and substantial connection" were taken from existing jurisprudence and also that the Act reflects previous ULCC Acts. It was noted that section 7 used the term "includes" and was therefore a non-exclusive list and that other examples of "real and substantial connection" would still be possible. It was agreed that this was the intended impact of this language.

Sections 9 and 10 were pointed out as new provisions. There was some discussion as to whether they were too general, however, they were noted as intended to be flexible so that local jurisdictions may use regulations to adopt existing enforcement measures. It was agreed that the language needs to be reviewed by drafters. The difference between the French and English drafts in this area was noted specifically and will also be revisited by the drafter.

Of the options presented for section 11, option C, reflecting the *Uniform Foreign Money Claims Act* was adopted, with the corresponding change to section 12.

RESOLVED

1. That the draft *Uniform Enforcement of Foreign Judgments Act* be revised to reflect the following decisions of the conference:

    a. That the Act apply to monetary and non-monetary judgments;

    b. That a provision be added to provide safeguards against the enforcement of problematic non-monetary judgments;

    c. That foreign provisional orders be removed from the scope of the Act;

    d. That with respect to section 11, the conversion date shall be as described in Option C with a corresponding amendment to section 12.

2. That subject to paragraph 1, the draft Act be approved in principle and that the draft Act 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, 2001, the draft Act should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment.

3. That the Uniform Act and commentaries appear in the 2001 Proceedings.

[Note: *The adoption process was not completed. The conference paper is available at http://www.ulcc.ca/en/poam2/*]

UNIFORM PERSONAL PROPERTY SECURITY AMENDMENT ACT

Professor Ron Cuming reviewed the mandate of the Working Group which was to explore approaches that might be used by the ULCC to encourage greater harmonization of provincial and territorial laws dealing with security interests in personal (moveable) property.

The intention was to identify five or six issues of a non-controversial nature for the Working Group to consider. Professor Cuming indicated that the lesson that he learned from this process was that the approach itself was not successful. The identification of non-controversial issues proved difficult given that issues are so integrated in the Act and that even apparently simple changes had a substantive policy impact on other areas. Accordingly, it was difficult to choose issues which could easily be dealt with. In the report, the Committee recommends a new approach which would require significant additional funding and structural change in order to proceed.

Professor Cuming noted the history of the development of the PPSA and questioned whether the significant resources required to produce a Uniform Act between the existing western model, as adopted by eight provinces and two territories, and the Quebec and Ontario models would be useful given the unlikelihood of Ontario and Quebec changing. A debate arose as to how best to approach the issue with the alternatives being whether to proceed with amendments similar to the previous amendments put forward by Professors Walsh and Cuming such that the existing Uniform Act may be updated from the 1989 model or whether

to proceed with a new Act which would have as its goal to produce a common Act among all jurisdictions in Canada in the interests of promoting uniformity and secured transaction predictability.

Interventions were made regarding what was needed to achieve this goal with Professor Cuming indicating that from his perspective, we had to ask:

- Is Ontario interested?
- Is there a true desire for a pan-Canadian Act?
- Is it worth delaying the Canadian model changes suggested by Walsh and Cuming?
- Can we get around the functional veto of CBA Ontario?

There was some concern that there would be a loss of uniformity among those provinces and territories with the existing "western" legislation. It was noted that the PPSA was central to the Commercial Law Strategy and that it was imperative that it form the building block for a number of other provisions. It was suggested that support for PPSA and the western model could be achieved through further consultations with the Canadian Conference on Personal Property Security Law (CCPPSL). Ron Cuming indicated that the CCPPSL cannot replace the role of the ULCC with respect to the creation of Uniform Acts as they are not structured that way. It was again noted that it would be nice to have a Uniform Act, however, in the short term perhaps that was not easily achieved given competing interests and political realities. The United States process under Article 9 was discussed and how over time they finally achieved uniformity.

It was agreed that a position paper would be useful to determine how much interest in a wholly uniform approach could be identified. If there is no interest they should proceed with the "eight out of ten" jurisdictions approach.

RESOLVED

1. That the Cuming and Walsh project on revisions to the Personal Property Security Law Model Act continue until completion.
2. That the report be presented to the ULCC PPSA study committee for review.
3. That the mandate of the ULCC PPSA study committee be expanded to permit a review of the key differences between the Model Act, the Ontario Act, and the Quebec *Civil Code* to assess the feasibility of designing a strategy towards adoption of a new uniform PPSA.
4. That the report appear in the 2001 proceedings. [*See Appendix C, p. 173.*]

ELECTRONIC COMMERCE: ENFORCING OUR LAWS ON THE INTERNET

Professor Michael Geist provided the conference with an overview of the history of internet jurisdictional issues from a court jurisdiction perspective. He indicated that initially a passive vs. active test was the governing test for both American and Canadian courts. The debate with respect to this approach turned on whether the simple provision of a passive website was too broad of a basis to ground jurisdiction. The concern was that the internet would become the most over-regulated area of the law in that placing anything on a website would be sufficient to ground jurisdiction. The *Zippo* test moved away from the passive-active analysis for jurisdiction and instead adopted an approach whereby the level of activity and the nature of the action on the website would have an impact on whether or not jurisdiction would be grounded. The *Braintech* case imported the *Zippo* test to Canada.

It became apparent, however, that the *Zippo* approach, while more useful than the passive/active approach, still had its own problems. For example, while foreseeability was properly the basis for this test and it did preserve local laws, it was not sufficiently subtle to pick up passive sites that had an intentional effect on a third party state, and vice-versa. Furthermore, the policy approach in *Zippo* mandated that as parties moved to more and more active websites as a commercial reality, we would, by default, return to the initial concern of the passive versus active analysis whereby all websites, by nature of their interactivity, would ground jurisdiction. This was much broader than was desired. A further point was made that the cost of websites dictates implementing an active site on a cost/benefit analysis, which would exacerbate the problem. The United States is starting to recognize this issue. For example, *People v. People* is moving away from *Zippo* and recognizing targeting as an alternative analysis for grounding jurisdiction.

Professor Geist himself promotes a targeting approach that has three basic arms: whether or not there is a contract, the availability of targeting technology, and active or passive knowledge with respect to effect. The three point targeting test is not exclusive, but rather any one of them, or taken together, could ground jurisdiction. With respect to a contract, it was recognized that choice of court clauses may not represent a truly informed consent, and that the nature of the contract that parties enter into regarding jurisdiction will be examined to determine its validity, and whether it should govern jurisdiction. Technology is now available to track the location of anybody who uses a website thereby reducing the argument that targeting is impossible on a website. *IcraveTV* and *JumpTV* as well as *Yahoo France* cases were given as examples of cases which were engaged with this principle. With respect to actual knowledge, the question became what is my intention, where will my clients be? The example was given of the Washington Capitals owner who blocked Pittsburgh Penguin applicants for tickets as a reflection of how flexible targeting is truly done. In other words, the website manager had a clear knowledge of the impact and effect of their site through targeting and screening.

In sum, jurisdiction was therefore initially based on an active/passive analysis but then moved to a *Zippo* test which is now evolving into a targeting approach.

Maxime Faille's presentation addressed the issue of regulatory or prescriptive internet jurisdiction and notes that there is much less case law in this area. The analysis was, therefore, somewhat more strictly on a policy basis.

There is a traditional regulatory problem with respect to the extra-territorial effect of statutory provisions, and with respect to the habitual silence of statutes to cross-border effect (one exception being the Saskatchewan *Consumer Protection Act*). There is also some reluctance to prescribe grounds giving rise to multiple levels of jurisdiction, although that is not a problem in common law. Clearly, multiple jurisdictions may apply if a particular contract or action has multiple effects.

Mr. Faille reviewed the Canadian constitutional context for this issue noting that historically any extra-provincial regulatory effect was extremely limited. A more modern view regarding this issue suggested increased flexibility where there was a "real and substantial connection" between the prescribing jurisdiction and the action in question. There was now an increasing expectation that a jurisdiction could enforce their laws extra-territorially within Canada.

Following a brief review of the international context for prescriptive internet jurisdiction and the *BrainTech* precedent in Canada, Mr. Faille turned to a discussion of the policy options available to Canada for this issue. Starting from the Consumer Measures Committee's basic presumption of equal jurisdictional protection for internet consumers, it must nevertheless be recognized that jurisdiction will need to be limited to a sufficient, real and substantial connection to ground jurisdiction. It must also be recognized that the ability to contract out of any such protective jurisdiction for consumers will have to be carefully considered by each enacting jurisdiction.

Mr. Faille concluded with the following recommendations for consideration regarding prescriptive internet jurisdiction:

- establishment of a presumption in favour of the applicability of the consumer's prescriptive jurisdiction subject to limits regarding foreseeability for the seller and the seller's ability to opt out of selling in that jurisdiction;
- establishment of mutual assistance measures for extra-provincial enforcement with respect to a defined, harmonized core set of electronic commerce consumer protection standards; and
- harmonization of internet-related consumer protection principles based on the draft harmonization template developed with the Consumers Measures Committee.

Rob Harper, as a representative of Industry Canada and the Consumer Measures Committee, spoke promoting harmonization of internet-related consumer law. He noted that in this instance efficiency is cost-effective. In May 2001 an internet sales policy was adopted which was very similar to Mr. Faille's principles. Equal protection for electronic and non-electronic consumers is fine in concept however there are things that fall in the gaps. Policy makers need to stay involved to protect consumers. A regulatory framework to support both investment and consumers is the goal, but we need competitive remedies. How do we make

this work? Access to courts is not a big advantage for consumers given the cost so it is important to make the law practical. It must be readily enforceable to be effective.

Consumer assistance is difficult to define. In New Zealand for example the policy choice was to promote internet access over consumer protection as the fear was that companies would simply omit selling to New Zealand rather than risk exposure to the high cost of prescriptive consumer jurisdiction. The ULCC needs to pursue a consumer supportive approach, but also carefully consider whether targeting will create the required certainty. It was noted that the contracting-out issue remains and that we must be careful to determine who in fact is the consumer here and how much protection is required.

The direct seller cooling off period was cited as a possible solution. The Consumer Measures Committee had noted that the direct seller's approach was instructive, however not determinative, and that they chose not to adopt a cooling off period given the ability for the consumer to simply turn off the computer. For this reason, credit card remedies were viewed as a real option from a practical perspective. Domestic credit card legislation would align the Canadian position with United States credit card policies.

RESOLVED

1. That the reports on jurisdiction be received. [*Available at http://www.ulcc.ca/en/poam2/*]
2. That the Steering Committee of the Section consider creating a Working Group to examine legislative options for addressing internet jurisdictional issues and to work with the Consumer Measures Committee in addressing internet jurisdictional issues in relation to consumer matters.

FEDERAL SECURITY INTERESTS

Rod Wood advised the conference of the history of the project and the reasons why the Law Commission of Canada chose this project. Primarily, it was a reaction to a number of concerns raised with federal security interests. A decision was made to focus on intellectual property and security interests by reason of the high likelihood of enactability and the general support for change in this area. In particular, there are no federal intellectual property statutes that address priority issues and security issues with any degree of sophistication. It is becoming a financing issue in that industry, particularly now when there may be a return to debt financing from investment funding.

He noted that there are four areas of uncertainty under existing intellectual property statutes:

do federal provisions apply at all to security assignments or only to outright sales or pure assignments;

problems with old language in the new PPSA era;

effect of section 4 of the PPSA re. third parties, may not apply at all; and

does federal registration pre-empt the PPSA.

In response, the Law Commission of Canada engaged Howard Knopf to conduct a round table conference on intellectual property issues. The purpose of this conference is to more effectively target issues for reform and to receive stakeholders' input. However, consensus will be difficult as a number of disparate interests are being represented. A series of options were identified including leaving security issues to the *Personal Property Security Acts* under a provincially centred response, a mixed federal/provincial system or a more elaborate federally based response.

At this point, Howard Knopf presented an outline of his paper focusing on the upcoming conference. He noted first that a number of governance issues were engaged by this project that deserved review. He then provided the history of the intellectual property point of view, whereby it had evolved slowly and separately, and now requires harmonization for effectiveness. The history of the area was such that now, debt financing may again be a going concern and it was very unclear to lenders how to value the intellectual property from a traditional financing perspective: "nothing to declare but my genius". This uncertainty was creating an impediment to development. He noted that several other countries were in the same position of rethinking how to proceed in this area.

Mr. Knopf outlined the plans for the upcoming Conference on Intellectual Property as sponsored by the Law Commission of Canada and University of Western Ontario:

a) a town hall meeting conducted by closed circuit television across Canada through a simultaneous webcast;

b) focusing on the legal framework for intellectual property with a question and answer period conducted by a number of parties aimed at providing a general understanding of the Canadian law, as well as a review of international approaches to this issue;

c) economic and valuation issues and review, particularly aspects of how to address valuations when it is intangible in nature;

d) comparative experiences in Australia, the United States, the United Kingdom and the European Union;

e) governance issues and possible solutions; and

f) closing remarks and feedback.

Mr. Knopf noted that the key note speakers are the Deputy Minister of Industry Canada and the Honourable Mary Beth Peters, the United States Registrar of Copyrights. He was very optimistic about the scope and focus of the Conference and invited all interested parties to participate.

Rod Wood asked that the Uniform Law Conference consider other topics regarding federal security interests, in particular, *Bank Act* security. It was immediately noted by several commissioners that this is a priority for the Uniform Law Conference as section 427 of the *Bank Act* and its relationship to the PPSA were central to future collaborative work between the Uniform Law Conference and the Law Commission of Canada.

RESOLVED

1. That the report on Federal Security Interests in Intellectual Property delivered on behalf of the Law Commission of Canada be received. [*Available at http://www.ulcc.ca/en/poam2/*]
2. That the Uniform Law Conference endorses and welcomes the efforts of the Law Commission of Canada in carrying forward this topic as part of the Commercial Law Strategy.
3. That the Steering Committee of the Section request the Law Commission of Canada to move forward with its work on other aspects of federal security interests, particularly relating to the *Bank Act*.
4. That the Uniform Law Conference requests that the Law Commission of Canada, as its work on these topics moves forward, take into account the Conference's comments, suggestions and deliberations, and maintain a close liaison with the Conference, particularly the PPSA study committee.

CIVIL ENFORCEMENT OF JUDGMENTS

A progress report was presented by Arthur Close. Since the establishment of the Working Group two meetings have been held. The first meeting, on May 11, 2001, focussed on setting out the scope and the general approach of the project. The discussions in this regard were based on the work plan prepared by Lyman Robinson. A second meeting was held on June 21, 2001. The objective of that meeting was to discuss the details of the legal framework which integrates the enforcement of civil judgments with the registration-based schemes.

Mr. Close indicated that, once the details of the legal framework have been determined, the Working Group will consider the legal procedures that will be made available for the enforcement of payment of debts due under civil judgments. In this respect, the differences between security interests and interests arising out of registered judgments will need to be considered in order to determine the appropriate mechanism for enforcement.

RESOLVED

1. That the progress report of the working group be received.
2. That the working group be directed to continue its discussions, and to prepare a further report for consideration of the 2002 Conference.
3. That the report appear in the 2001 proceedings. [*See Appendix D, p. 174*.]

ELECTRONIC WILLS

Peter Lown presented a paper on Electronic Wills prepared by the Alberta Law Reform Institute. He noted that in the paper there was a clear conclusion against proceeding with an Electronic Wills project. The Alberta Law Reform Institute had consulted technical experts to seek further advice with respect to the technical aspects of this issue. He also advised that there had been a recent case in Saskatchewan (*Walmsley Estate*) which dealt with the dispensing powers of the courts, and that Manitoba and Queensland are considering additional dispensing powers, but were not actually looking at electronic wills.

The Conference was provided with three recommendations:

1. That the ULCC do not proceed with a project for the recognition of wills in electronic form.
2. That the ULCC amend the *Uniform Wills Act* to give the courts power to recognize a will, amendment of a will, or revival of a will in electronic form if there is clear and convincing evidence that the electronic record represents the testamentary wishes of a testator.
3. That the ULCC do not proceed with a project for the recognition of powers of attorney in electronic form.

Upon reviewing the policy objectives for the project outlined in the paper he also noted that the *Uniform Electronic Commerce Act* does not accommodate the concept of electronic wills. In part, this is because it is based on communication, as opposed to certainty, and the need for instant communication, rather than a product that can last for a long time. Since reliability, rather than communication, is the key for wills, these policy objectives do not mesh well.

With respect to the reasoning in the paper, he noted:

1. That the practical advantage of recognizing electronic wills is very small, literally just the cost of printing the paper.
2. Authentication issues create major problems in this field, not only is the technology doubtful, it is expensive to create a secure system, or a system that can properly track the original process to detect tampering.
3. Durability of records is a great problem. Experts consulted suggested it was "reckless foolishness" to expect to store a record electronically for any extended period of time and, further, to expect to be able to recover it, given the constant changes in this field.

Authentication is also an issue where there has been a passage of a significant amount of time making proof impracticable, even with good PKI technology. However, those who choose to use an electronic will may be accommodated within the dispensing power. Recommendation #2 provides that the Act be amended to recognize this discretion.

It was noted that the Hague Convention Abolishing the Requirement of Legalisation For Foreign Public Documents was considering the effect of electronic documents and that our "providing flexibility" recommendation would be useful in accommodating this international law development.

An issue was raised regarding recommendation #3 and powers of attorney. Since a power of attorney is simply an agency agreement, it may be preferable to allow any agency agreement to be executed electronically in the same way that any other contract could be electronic, if the parties agreed.

It was pointed out that there are some formality issues with respect to enduring powers of attorney. It was also understood that perhaps what would be more clear is that it be noted that this recommendation was only with respect to an individual's power of attorney and not corporate powers of attorney. Further, the recommendation is only with respect to enduring powers of attorney, which share the same concern as wills with respect to longevity, authentication and storage.

It was noted that Quebec has a general intent provision which would accommodate this recommendation, furthermore, the recent *Information and Technology Act*, Bill 161, because of the definition of "document", would in fact recognize wills in an electronic format. They also have apparently less formality with respect to authentication, and do not view that as a problem.

A debate ensued with respect to recommendation #2 and whether the proposed amendment should occur as an express amendment or proceed simply as a change to the commentary. The general agreement was that given the nature of the area being addressed, it was preferable to make an amendment to avoid any doubts. It was suggested that the report be circulated to CBA Wills and Estates sections to raise the ULCC profile, as it is a good study.

RESOLVED

1. That the report on Electronic Wills be received.
2. That a draft Act and commentaries be prepared for consideration of the Conference to amend the existing provisions in the *Uniform Wills Act* that give courts the power to dispense with strict compliance with the formalities, to recognize electronic wills in appropriate cases.
3. That the report appear in the 2001 proceedings. [*See Appendix E, p. 176*.]

UNIFORM INTERNATIONAL PROTECTION OF ADULTS (HAGUE CONVENTION) IMPLEMENTATION ACT

UNIFORM PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN (HAGUE CONVENTION) IMPLEMENTATION ACT

Manon Dostie presented a paper regarding both Hague Conventions. After noting some of the history with respect to the Conventions, Ms. Dostie advised that the Working Group chose to do two Acts to maintain flexibility so that one could proceed if the other did not, and to reflect the different interest groups concerned with each Convention. It is important to note, as well, that the same central authority approach used in the adoption model was used, and accordingly, implementation would flow from these authorities in each province. In proceeding through the Act a number of questions were raised, in particular an issue was raised whether the Convention needed to be set out separately. Amendments were proposed regarding sections 5, 6 and 8.

RESOLVED

1. That the draft *Uniform International Protection of Adults (Hague Convention) Implementation Act* be approved in principle and that an amended version of the draft Act 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, 2001, the draft Act should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment.

2. That the Uniform Act and commentaries appear in the 2001 Proceedings. [*See Appendix F, p. 218*.]

RESOLVED

1. That the draft *Uniform Parental Responsibility and Measures for the Protection of Children (Hague Convention) Implementation Act* be approved in principle and that an amended version of the draft Act 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, 2001, the draft Act should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment.

2. That the Uniform Act and commentaries appear in the 2001 Proceedings. [*See Appendix G, p. 227*.]

NCCUSL REPORT

Susan Amrud welcomed the American President, King Burnett, to make a presentation regarding the work of NCCUSL.

Uniform Acts approved at their 2001 Conference:

1. *Uniform Mediation Act* – Issues with respect to qualifications were not addressed. The focus of the Act was largely on confidentiality, and the preservation of confidentiality through the creation of a mediator-client privilege similar to that of solicitor-client privilege. It also included provisions regarding disclosure of conflict of interest and protection of mediators from having to act as witnesses except in extraordinary circumstances such as criminal conspiracy.
2. *Uniform Limited Partnership Act* was revised to reflect the shift in use of limited partnerships from businesses to family limited partnerships used in estate planning.
3. *Uniform Interstate Family Support Act* was amended to expand the definition of "state" to include foreign countries. The Act is reciprocity based.
4. *Uniform Commercial Code*, Article 1 – There was considerable debate respecting the choice of law clause, particularly the requirement for a reasonable link to a state in choice of law clauses. They made an amendment to promote the right to choose, subject to certain consumer provisions whereby a consumer contract requires a reasonable link to the local state. The Act also defers to any local statement of consumer jurisdiction.
5. *Uniform Consumer Leases Act* – This Act is largely focused on auto leasing. It assures fair practices in consumer leasing.

Drafting projects underway:

1. Revision of *Uniform Commercial Code*, Articles 2 and 2A was deferred, because of difficulties encountered in establishing proper scope regarding licensing and sale of software and the extent to which software becomes part of the goods which are sold.
2. Procedures for Obtaining and Preserving Testimony of Minors – A drafting committee has been appointed to study this issue.
3. *Apportionment of Tort Liability Act* – A drafting committee has been appointed to study this issue.
4. Revision of *Uniform Commercial Code*, Article 3, Negotiable Instruments, Article 4, Bank Deposits and Collections and Article 4A, Funds Transfers: This is a very difficult area that they are starting to work on.
5. *Uniform Commercial Code*, Article 7, Warehouse Receipts, Bills of Lading and other Documents of Title: This is a very old provision that needs addressing.

6. Facilitate the Conversion or Merger of Different Types of Business Organizations: This is the issue of how a limited partnership and a company might merge given the variety of legal persons that are now created.
7. *Uniform Estate Tax Apportionment Act* and *Uniform Probate Code* section 3-916.
8. *Non-Judicial Foreclosure Act.*
9. Updating the *Uniform Securities Act.*
10. *Uniform Health Care Information Act* – federal government is now taking over the area.

Topics under consideration:

1. Revisions to *Uniform Management of Institutional Funds Act.*
2. Environmental Covenant issues.
3. *Enforcement of Foreign Judgments Act* – This is a Uniform Act that works without reciprocity. Thirty states have implemented it, although some have included a reciprocity clause. Their Act contains few of the safeguards of the Canadian Act which Mr. Burnett feels reflects the openness of the American system. He indicated that the Canadian Act would be instructive to them, and that the Hague issues were also something that they were considering.

Mr. Burnett noted that they have had their best success ever in enactment of Uniform Acts with a 100% state uniformity on the Article 9 amendments. They are having to hire staff, firstly to deal with enactment issues, and secondly to deal with the fact that the Internet, by facilitating access to their materials, has resulted in more comments being received with respect to their projects.

RESOLVED

1. That the report be received.
2. That the Uniform Law Conference express its thanks to Mr. K. King Burnett, President of the National Conference of Commissioners on Uniform State Laws for his informative presentation.

TRANSFER OF INVESTMENT SECURITIES

Maxime Paré from the Ontario Securities Commission, provided an update on this project.

Mr. Paré provided a general overview of the policy issues which are intended to be addressed by this project, including the framework for uncertified transfers, harmonization with *Uniform Commercial Code*, Article 8, and *Security Transfers Acts*, as stand-alone legislation. A question was raised as to how this linked with the ULCC process. It was acknowledged that the ULCC did a significant amount of work in this area and that it was important that it not be lost. Mr. Paré indicated that he expects that a draft Act and position paper will be published before the end of this year. He will ask the CCPPSL to review the consequential amendments to the PPSA before publication.

RESOLVED

That the Conference express its appreciation to Maxime Paré, Counsel for the Ontario Securities Commission for providing the Conference with an update on this project.

UNCLAIMED INTANGIBLE PROPERTY ACT

Russell Getz presented an interim report with a draft Uniform Act and commentaries for the consideration of the conference. The Working Group had made significant progress in its efforts to produce a Uniform Act through the deliberations of the group and with the assistance of certain expert consultees. The key issue for consideration had been establishing the basis on which a province or territory may properly claim unclaimed intangible property from a holder of that property. Uniformity with the majority of the existing North American régimes was the governing element in reaching a conclusion on this matter.

The following three issues remain unresolved:

defining intangible property in a manner that properly expresses what is required to transfer the appropriate right or interest to the administrator;

whether the period for defaulting property should be different for various types of property; and

how best to provide the administrator the ability to deal effectively with investment securities.

The Quebec commissioners made a lengthy intervention led by their Public Curator, Luis Curras. On July 1, 1999, Quebec introduced new legislation regarding this topic and he views the ULCC effort as being appropriate and useful for furthering the general issues. However, there are a number of differences between the Quebec Act and the report, starting with the scope of application. For example, the Quebec Act is much broader in that rather than requiring linkages between the place of business and individual there are a number of grounds of jurisdiction in Quebec, including simple presence of the property in Quebec. Generally speaking, he indicated that the Quebec process for reciprocity was more restrictive with the presumption being that property will remain in Quebec.

The definition of property may not include mutual funds. The definition of "unclaimed property" in the Quebec Act creates a presumption that RRSPs and RESPs would be covered. The Uniform Act as proposed is also different from the Quebec Act as to jurisdictional scope, five year versus three year deadline, and the requirement that the administrator hold the money in a separate account. Several other points of minor differences were noted, however in conclusion he views this as a big step forward. He was advised that the Committee will take this information into account in its consideration of this proposal.

An issue was raised as to whether property subject to a security interest can be transferred. It was noted that this concern was addressed by the removal of liability through the proposed statute.

The Working Group will be considering the issues raised by the Conference commissioners and the issues identified as outstanding by the group itself.

RESOLVED

1. That the draft Act be amended in accordance with the consultations to be undertaken by the Working Group.

2. That the draft Act be circulated to the jurisdictions as soon as possible. Unless two or more objections are received by the Executive Director of the Conference by a date to be determined by the Steering Committee, but no later than March 31, 2002, the draft Act should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment.

3. That the Uniform Act and commentaries appear in the 2001 proceedings.

[Note: *The adoption process was not completed. The conference paper is available at http://www.ulcc.ca/en/poam2/*]

JOINT AWARENESS SESSION ON CIVIL LAW AND BIJURALISM

France Allard provided a multi-media presentation designed to define bijuralism, explain its foundations in Canada and address its impact on the drafting of Uniform Acts. Part 1 addressed the relationship between civil law and common law and outlined the differences in legal reasoning and therefore in general perceptions between the two systems. In Part 2, she briefly outlined the development of Canadian bijuralism and the pivotal role played by the Supreme Court in this regard. In Part 3 she addressed drafting uniform or model laws from the perspective of bijuralism and the need for the conference to remain aware of the distinct differences between the two systems.

She concluded that uniformity is harder to achieve than harmonization. Both require being conscious of two ways of perceiving interpretive law, both require diversity in conceiving legislative language but harmonization provided more flexibility than uniformity in recognizing differences while seeking a common result.

Frédérique Sabourin then made a presentation to the conference entitled "Influences Between the *Civil Code* of Quebec and Other Laws". There were five parts to her presentation: Roots of codification; The 1866 *Civil Code*; The 1994 *Civil Code*; Sources of the 1994 *Civil Code;* and The 1994 *Civil Code* and Civil Law Throughout the World. In conclusion she noted that she would encourage broader interest in the *Civil Code* as a coherent, modern approach to addressing legal issues.

Louise Maguire Wellington then provided the conference with a presentation regarding the *Federal Law- Civil Law Harmonization Act, No. 1.*

The *Harmonization Act* is not based on the concept of uniformity, but rather on co-existence. The Act was triggered by the recent *Civil Code* reform and the change of a great deal of the *Civil Code* terminology. Her paper provided several examples with respect to the need to address situations where French language speakers would apply the *Civil Code*, French language speakers could apply the common law, and English language speakers could apply

both common law and civil law concepts. It was also noted that federal statutes would have to provide for all four circumstances and that mechanisms were introduced in the Act to achieve this.

In the comments following her presentation, it was noted that the American system has official commentaries and the question was asked whether this would be of assistance in explaining the purpose of these Acts. It was noted that the cost of doing this is an impediment to this approach.

The increased difficulty of finding French terms for common law concepts was noted given the differences between the *Civil Code* terms and the common law terms.

Mario Tremblay then provided a discussion of the history of *Criminal Code/Civil Code* development in the colony of Quebec and its integration with military law and royal law. With this history of integration in mind he then proceeded to note the complexities presented by interpreting the criminal law in light of a *Civil Code* tradition. In particular, he noted the difficulty that the definitions of terms such as property ownership presented in theft and fraud cases. An example given was that of a leased automobile, where in cases of overholding the lease it was difficult to establish if there had been any theft. Another example was domestic violence situations where property was held in the abusing partner's home, but it was difficult to establish a process whereby that property could be retrieved under the civil law. Section 552 of the *Criminal Code* provides a further example of the differences between the two systems.

Thus, in general terms, while the *Criminal Code* does act as a distinct code, when filtered through a *Civil Code* system there are a number of difficult issues that require attention.

RESOLVED

That the Uniform Law Conference express its thanks to France Allard, Mario Tremblay, Louise Maguire Wellington and Frédérique Sabourin for their informative presentations.

EXTRA-TERRITORIAL POLICE POWERS OF INVESTIGATION

Johnathon Bilton's presentation addressed four main areas with respect to extra-territorial police powers of investigation: definition of terms; current practices; Canadian constitutional system; Canadian legislative alternatives.

The paper recommended two alternatives for consideration of the ULCC: the first being mutual assistance programs, with supporting model legislation in each province and territory that provides for out-of-province enforcement, and the second, a national crime authority approach, which is used in Australia, which envisages the creation of a fully staffed central authority to coordinate responses to these issues.

The question was asked whether provincial recognition of another province's peace officers designation is useful. Accountability and liability issues are not addressed to any large degree in such a model.

The issue was also raised as to whether sheriffs would be under the same process. Mr. Bilton indicated that it is the same concept. General discussion ensued as to whether it was established that these changes are needed.

RESOLVED

1. That the chairpersons of the Civil Section and Criminal Section establish a joint working group to develop and present to the 2002 meeting recommendations respecting extra-territorial police powers of investigation.
2. That the report appear in the 2001 proceedings. [*See Appendix H, p. 235*.]

PRIVATE INTERNATIONAL LAW

Kathryn Sabo presented the Private International Law Report of the Department of Justice (Canada).

RESOLVED

1. That the report on the activities of the Department of Justice be received.
2. That the report appear in the 2001 proceedings. [*See Appendix I, p. 236*.]

UNIFORM INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ACT (AIRCRAFT EQUIPMENT)

Philippe Lortie presented this report. It was noted that there was a relatively large number of reservations under the Convention. Mr. Lortie described the Convention as an international personal property security scheme for high value mobile goods, such as aircraft, satellites or even mobile rolling stock. He noted that the Canadian experience, whereby we have a bijural system with a *Civil Code* that recognizes secured interests, had proven to be very useful in this context, as many *Civil Code*s did not have similar concepts.

After providing a background of the development of the Convention, he noted that there had been a number of issues around methodology:

1. Should there be a stand alone Act?
2. Should there be mirror legislation between the federal and provincial governments to avoid constitutional issues?
3. What is the best way to implement both instruments, the convention and the protocol?
4. Should there be a federal consequential amendments Act? Should there be provincial consequential amendments in the Act, that identified and modified non-consensual liens?
5. Could this solution be used for other protocols in the future?

The implementation options were discussed, and a number of specific reservations were addressed in the paper. The outstanding issue with respect to the convention is how non-consensual liens will be identified in each jurisdiction to be included in the reservations as recommended by the Working Group. Some discussion occurred as to whether the Working Group would be conducting this identification, or whether it would fall to each jurisdiction to do so. There was some concern that the time lines for implementation would make identification difficult, and that further it must be ensured that the timelines were not affected by the requirement for this information. This was an issue that would have to be considered by jurisdictional representatives as to how best to proceed.

RESOLVED

1. That the draft *Uniform International Interests in Mobile Equipment Act (Aircraft Equipment)* be approved in principle, subject to further changes following finalization of the Convention and Protocol.

2. That the draft Act be circulated to the jurisdictions as soon as possible following the Diplomatic Conference in October-November 2001. Unless two or more objections are received by the Executive Director of the Conference by a date to be determined by the Steering Committee, but no later than March 31, 2002, the draft Act should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment.

3. That the Uniform Act and commentaries appear in the 2001 Proceedings. [*See Appendix J, p. 238*.]

TERM OF CHAIRPERSON OF CIVIL LAW SECTION

At the opening plenary, notice was given that a motion would be introduced at the closing plenary to reduce the term of the Chairperson of the Civil Law Section from two years to one year. A considerable amount of debate ensued turning largely on whether the continuity and complexity issues mandated continuing a two year term in preference over the workload concerns and the difficulty of recruiting new Chairpersons.

Arthur Close as past Chairperson and Susan Amrud as current Chairperson indicated that one year is preferable from their perspective. Mr. Close also spoke about the Nominating Committee taking a more forward looking approach and taking steps towards identifying individuals who would be the Chairperson of the Civil Law Section far in advance. This year they have done that, and Chris Curran will be the Chairperson for 2003.

FUTURE PROJECTS

A number of potential future projects were identified:

1. Interaction between the PPSA and section 427 of the *Bank Act*: The Law Commission of Canada has identified this as something to work on.
2. *Uniform Vital Statistics Act*: We are still looking for a person to lead this project.
3. *Pension Benefits Standards Act:* Last year the project was proposed to the ULCC and since then the pension administrators have continued consultations, which are expected to be done by spring 2002, following which they will be looking to the Uniform Law Conference for assistance in preparing a Uniform Act.
4. *Sale of Goods Act*: We are still looking for a project leader.
5. *Uniform Transboundary Pollution Reciprocal Access Act*: On further investigation by Ontario over the last year, it was determined that the problem was not with the wording of the existing Act, but rather with the uptake of the existing Act.
6. *Uniform Franchise Act*: This was raised during a number of the consultations conducted pursuant to the Commercial Law Strategy. The federal government is currently working on a *Model Franchises Act* for UNCITRAL. There was some discussion about whether a franchises project was required, and how much of an issue it was in different provinces. New Brunswick acknowledged that this is a growing concern, as did British Columbia and Saskatchewan.
7. *The Business Corporations Act*: It was suggested that there may be a role for the Uniform Law Conference in addressing areas like directors' liability and maintaining the existing level of uniformity. Directors' liability is an issue within business corporations and non-profit corporations legislation.
8. *Public Inquiries Act*: A uniform Act could identify principles for dealing with problems. British Columbia indicated that their new Attorney General was interested in this issue. Saskatchewan agreed that there are problems. It is not clear that it is a good harmonization issue, so there was mixed support.
9. Fraudulent conveyances and preferences: It was noted that the British Columbia Law Reform Commission did some work on this issue ten years ago.
10. *Criminal Code*, section 347: This issue has been identified by the Consumer Measures Committee and we need to work with them.
11. Scope and jurisdiction between Aboriginal governments and provincial jurisdictions: There may be a need for some early work in identifying issues in this area.
12. Private Sector Privacy: This issue has been raised in a number of Commercial Law Strategy consultations.

13. Transaction requirements for cheques: Brad Crawford has identified a potential project regarding modernizing legislation regarding cheques and separating them from the *Bills of Exchange Act.*

14. Private/Public Partnerships: Industry Canada has made initial inquiries with respect to our willingness to work in this area.

15. Adoption of the UNCITRAL Convention on Assignment of Receivables: It was agreed that it could be monitored by the Steering Committee and that if it advanced far enough, the Working Group could be struck, so that the work could commence prior to next summer, if need be.

16. *Interjurisdictional Support Orders Act*: The Family Law Committee has approved a draft which has a choice of law provision that is inconsistent with the established international standard. A subcommittee may be struck to communicate the views of the Section to Deputy Ministers.

17. Extra-territorial Police Powers of Investigation: Quebec felt that it was a criminal section project not a civil section project. There were mixed views on whether we should participate and on whether the law in this area needs to be harmonized.

18. Credit Repair Agencies: These agencies assist consumers in repairing their credit ratings. It is an issue in Ontario.

19. *Limitations Act*: Will need to be updated at some point. The *International Sale of Goods Act* has a limitation project which should be incorporated.