

UNIFORM LAW CONFERENCE
YELLOWKNIFE, NORTHWEST TERRITORIES
AUGUST 18 – 22, 2002
CIVIL SECTION MINUTES

COMMERCIAL LAW STRATEGY

A status report on the Commercial Law Strategy was presented by National Co-ordinator of the Commercial Law Strategy, Hélène Yaremko-Jarvis. In her comprehensive report to the Conference, Hélène Yaremko-Jarvis provided a review of the ongoing and new projects of the Commercial Law Strategy.

Turning first to review the ongoing projects of the Commercial Law Strategy, Ms. Yaremko-Jarvis noted first the project to amend the *Uniform Personal Property Security Act*. A working group, co-chaired by Professor Ron Cuming and Professor Catherine Walsh has been established and has held several productive meetings during the past year. In keeping with the stated intention of the Commercial Law Strategy to ensure broad consultation, a number of consultation papers arising out of this working group have been circulated to a broad stakeholder group. It was noted that Professor Rod Wood would be reporting on the work of this group in further detail later in the conference.

The second ongoing project was the *Uniform Enforcement of Civil Judgments Act*. The ULCC is working closely with the British Columbia Law Institute to conduct research on this topic for the preparation of a report for the Conference. Professor Lyman Robinson, Q.C., is the chair of this working group which has broad representation, from both academic and government members.

The third ongoing project was the *Uniform Securities Transfer Act*. The goal of this project is to create a product which will be implemented in each province without amendment. Since the United States and the European Union have addressed these issues by adopting new laws, Canada is becoming uncompetitive internationally. A working group consisting of representatives of the Canadian Securities Administrators and legislative counsel from British Columbia, Alberta, Ontario and Quebec have been working on a draft for a number of years and Mr. Eric Spink, Vice-chair of the Alberta Securities Commission, will be providing a progress report on this project during the week.

The fourth ongoing project was with respect to Federal Secured Transactions. This project, which is being carried out jointly with the Law Commission of Canada, seeks to address inconsistencies and difficulties related to security interests under the various federal statutes that regulate particular industries and types of property. In particular, the project was focusing on problems related to leveraging knowledge assets in secured transactions. Following a successful consultation meeting conducted by the Law Commission of Canada (LCC),

Professors Catherine Walsh and Norman Siebrasse were retained to conduct further research to determine the appropriate next steps for the project. They will be reporting on their project later in the Conference as well.

The fifth ongoing project is with respect to jurisdiction and consumer protection in electronic commerce. In recognition of the exponentially increasing cross-border electronic transactions involving consumers, both the Consumer Measures Committee (CMC) and the ULCC had indicated a need to develop jurisdictional rules for Internet transactions. The CMC and the ULCC have established a joint working group to consider policy options and develop a draft proposal for jurisdictional rules for cross-border business and consumer transactions on the Internet. The joint working group consultation paper has been circulated to business, legal and consumer stakeholders with comments on the draft proposal to be provided by September 6, 2002. Karen Pflanzner and Lynn Romeo will present a detailed report of the working group during the week.

Ms. Yaremko-Jarvis then turned her attention to the new projects undertaken on behalf of the Commercial Law Strategy since the 2001 annual meeting.

A working group has been established to develop uniform franchises legislation. It is co-chaired by two leading Canadian franchise lawyers, Mr. John Sotos, Sotos Associates, and Mr. Frank Zaid, Osler, Hoskin & Harcourt LLP, and enjoys a broad ranging membership of franchise experts. The committee intends to engage in a wide consultative process, including use of a web list-serve, in order to receive input from all interested parties.

A new project on section 347 of the *Criminal Code (Canada)* was launched by the Civil Section Steering Committee to complement the work being done already by the CMC. The two groups agreed to keep each other informed on their progress, with a view towards an eventual co-ordination of their recommendations. Professor Mary Anne Waldron, University of Victoria, a recognized expert on these issues, was retained to prepare a preliminary report which would be provided during this Conference. As part of Professor Waldron's study, a survey was circulated to the chairs of the Canadian Bar Association provincial Business Law Sections and to the Commercial Law Strategy's endorsers requesting preliminary feedback on the subject. This initial consultation generated over 60 responses which overwhelmingly supported the need to circumscribe the scope of application of section 347 in the business context.

The project respecting section 427 of the *Bank Act* was closely related to the *Personal Property Security Act* project. It addresses issues arising when the holder of a provincial security interest or hypothec comes into competition with a federal *Bank Act* security in the same collateral. The project has been initiated by the ULCC in conjunction with the LCC. A consultation paper prepared on this subject by Professor Rod Wood is to be distributed to stakeholders for comment to determine support for this project.

Ms. Hélène Yaremko-Jarvis outlined the efforts that have been made to identify interested parties with respect to a Sale of Goods project. Because of the difficulties encountered, the Steering Committee has decided that the project would be deferred to a later date.

Notwithstanding this decision, the committee believes that developing modern sales legislation should continue to be a goal of the Commercial Law Strategy.

Having reviewed the existing and new projects of the Commercial Law Strategy, Ms. Yaremko-Jarvis then turned to the issue of profile raising for the Strategy. She outlined briefly her efforts in profile raising, particularly in developing and nurturing relationships with stakeholders and securing formal endorsements of the Strategy. To facilitate ongoing communications with stakeholders the Commercial Law Strategy continues to rely on its newsletter “The Commercial Law Strategy Update” as its most successful communication tool. In addition, ongoing communications are facilitated by the improved website of the ULCC, by articles and public speaking engagements by Ms. Yaremko-Jarvis and other members of the Commercial Law Strategy Steering Committee, by the annual report to the Council of the Canadian Bar Association (CBA), by active recruitment of volunteers and interested individuals, as well as through improved formal ties to the CBA and National Conference of Commissioners on Uniform State Laws (NCCUSL). Ms. Yaremko-Jarvis requested that all members of the Conference reinvigorate their efforts to ensure appropriate and ongoing communication between government departments responsible for implementation of draft legislation and the Commercial Law Strategy. In this regard, she continues to meet with representatives in all jurisdictions in Canada.

Finally, the National Co-ordinator provided an outline of the action plan for the coming year which endorsed the overall priorities of moving forward projects and developing new ones, as well as continuing to raise the profile of the Strategy among stakeholders and nurture those relationships that have been established. She also stressed continuing to encourage the enactment of the uniform Acts targeted for speedy enactment and maintaining the rapport which has been established with government supporters.

Ms. Hélène Yaremko-Jarvis thanked the Steering Committee of the Commercial Law Strategy and, in particular, Mr. Ken Morlock for his work as past Chairperson and Ms. Jennifer Babe for agreeing to now take on the role as Chairperson.

Ms. Jennifer Babe, as incoming Chairperson, noted the challenges for the Steering Committee to respond to the Commercial Law Strategy requirements and the new steps that need to be taken. She also commented on the following strategic issues:

- Secure funding for the Commercial Law Strategy;
- Timing of the meetings of the Uniform Law Conference of Canada;
- Consultation and consensus building; and
- Meeting the commercial need for uniformity.

RESOLVED

1. That the progress report be received.
2. That the report appear in the 2002 proceedings. [*See Appendix B, p.158.*]
3. That the Conference express its appreciation to Ken Morlock for his considerable contribution to the success of the Commercial Law Strategy.
4. That the Conference express its appreciation to our funders for their continued support of the Commercial Law Strategy.

UNIFORM UNCLAIMED INTANGIBLE PROPERTY ACT

A progress report was delivered by Mr. Russell Getz. Mr. Getz outlined the three outstanding issues that were identified at last year's meeting. After consideration of several alternatives, the policy of the United States *Uniform Unclaimed Property Act*, with respect to these three issues, has been adopted in recognition that it provides the most developed and comprehensive approach to these issues and has the advantage of being the predominant legislative scheme in North America. In addition to consideration of these issues, Mr. Louis Curras, of the office of the Public Curator of Quebec, had offered a number of suggestions, several of which have gratefully been adopted, including suggestions to enhance the administrator's data base.

The focus of the working group at present is on obtaining expert advice to ensure that the principles and language in the American *Uniform Act* are appropriately adapted to the Canadian context. Once this task is completed, a draft Act is to be circulated for adoption.

RESOLVED

1. That the draft Act and commentaries be finalized in accordance with the report of the committee.
2. That the draft Act and commentaries be circulated to provincial and territorial governments, public trustees and groups representing industry and consumers for comments.
3. That the committee make any amendments to the draft Act and commentaries that it considers appropriate to reflect the comments received.
4. That the draft Act then be circulated to the jurisdictions. 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 April 30, 2003, the draft Act should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment.
5. That the *Uniform Act* and commentaries appear in the 2002 proceedings. [*Note: The adoption process was not completed.*]

SECURITY INTERESTS IN INTELLECTUAL PROPERTY

Professor Norman Siebrasse, University of New Brunswick, presented a comprehensive report entitled “Leveraging Knowledge Assets” that he had prepared with Professor Catherine Walsh, McGill University. Professor Siebrasse outlined that the purpose of the report was to assist the Conference to become familiar with the practical legal obstacles that may need to be addressed to facilitate access to secured credit based on Intellectual Property Rights (IPR). In his report Professor Siebrasse noted that they have concluded that, currently, secured lending based on IPR faces challenges both because of valuation difficulties and because of the inadequate legal regime governing security interests and IPRs. In their review, they have determined that governmental action directed at improving the valuation of IPR collateral is not required. It is their view that the valuation expertise has been and will continue to be developed by the private sector as the importance of intellectual property assets evolves. They have, however, concluded, that action is needed to modernize the legal regime governing security interests and IPR, as the present system is unacceptably uncertain in its outcomes in several respects.

With this conclusion, Professor Siebrasse outlined two approaches to securing IPRs: the provincial approach and the federal approach. The fundamental disadvantage of the provincial approach are the problems which arise from the need to search titles through an ownership registry and the security registry in a number of separate jurisdictions. If the debtor name rules are not uniform among jurisdictions, as between the ownership registries and security registries and as between provinces, a full search can be very burdensome and uncertain. It is acknowledged that this problem would be significantly ameliorated by uniform debtor name rules among provincial and federal registries. This does not, however, solve the problem of a foreign debtor who appears in the chain of title. In such case, it would be necessary to search a foreign registry, if one existed, for encumbrances. In some cases foreign law would not require registration of security interests in IPR in which case the prior interest would be undiscoverable. Short of an international IPR security registry, no immediate solution is identified. It was noted that a gateway approach to searching would direct a single inquiry to multiple registries but would also not resolve this problem. Thus, while it is a more desirable approach than searching a number of jurisdictions, it would not solve the fundamental problems of the provincial approach.

The second approach outlined is the federal approach. The main perceived drawback to the federal system is that it would require dual registration to take security interests in all the debtor’s assets. However, in view of the search problems raised in the provincial system, the overall search and registration burden under a federal system seems much less than that of the provincial system. Furthermore, a one stop gateway registration system between the federal and provincial system would address this problem technologically.

Another perceived objection to the federal approach is that it would require a radical overhaul of the federal registry system. This is acknowledged as a problem, however, it is one that is unavoidable. The current federal system requires a major overhaul even to allow the proper operation of the present system. Given that such a major overhaul is already required, the changes discussed to implement a federal approach would not be an additional burden.

The report of Professors Siebrasse and Walsh indicates, that, in their view, the most serious problem facing the federal system would be the implementation of a system to allow security interests in after-acquired property in the context of an asset indexed system. Accordingly, they have proposed a system which would allow security interests in after-acquired property in a federal system.

Following a detailed review of the positives and negatives of each approach and the practical applications for creditors and debtors, they reached the conclusion that they would recommend the federal approach. It is their view that the problems facing the federal approach could be dealt with in a good system design, whereas the provincial approach faces the irreducible problem of foreign debtors and the titles chain which cannot be accommodated. In reaching their conclusion they note that this is premised upon sufficient technological change at the federal level to accommodate the proposed model. In the absence of such change, it is recognized that the federal approach may not be preferred.

An issue was raised respecting whether there were constitutional problems with the proposals. The Conference was advised that there were no such concerns with respect to establishing a federal registry for federal interests. There was no suggestion that the provincial registries would cover federal registrations. It was noted that the jurisdiction for registry matters is generally determined in the same fashion as land with respect to location of initial registration.

The question was asked as to whether or not the use of patent and trademark numbers could be a method of tying into the provincial system. Insofar as serial number identification works well at the provincial level, have we considered carving out patents and trademarks for a federal registration system with copyright left out as more of a long term problem. The Conference was advised that this had been considered and may be worthy of further discussion.

RESOLVED

1. That the report delivered on behalf of the Law Commission of Canada be received.
[Available at <http://ulcc.ca/en/poam2/> See "Commercial Law Documents."]
2. That the Uniform Law Conference requests that the Law Commission of Canada continue to work in conjunction with the Conference, particularly the Study Committee on Reform of Canadian Secured Transactions Law to carry out consultations and prepare final recommendations for consideration of the Conference at its 2003 meeting.

JURISDICTION AND CONSUMER PROTECTION IN ELECTRONIC COMMERCE

A progress report on this project was provided by Lynn Romeo and Karen Pflanzner. Ms. Romeo indicated that in November 2001, the ULCC formed a joint Working Group with the Consumer Measures Committee to identify policy options and develop a draft proposal for jurisdictional rules regarding electronic commerce and consumer matters.

Ms. Romeo indicated that the Working Group had prepared a consultation paper that sets out draft proposals regarding jurisdictional rules for cross-border business-to-consumer transactions. She advised that the consultation paper was circulated for comment to a wide group of stakeholders, including business and consumer groups and the legal community.

It was noted that in developing the proposed rules, the Working Group initially considered whether traditional jurisdictional rules or principles should be applied to Internet disputes or whether a new approach or special rules should be developed. Having concluded that both consumers and business would benefit from the development of uniform jurisdictional rules, the Working Group then reviewed and assessed the merits of a number of policy options. The Working Group also reviewed a number of recent international initiatives and discussed competing policy objectives.

In conclusion, it was noted that a balanced approach is needed and that in formulating the proposed rules, the Working Group had drawn upon a number of the approaches discussed in the consultation paper.

In the comments following the presentation, it was noted that NCCUSL has also been considering this issue from the perspective of consumer contracts and were distinguishing software licensing contracts where there has been mass marketing. They had not actively considered targeting as a jurisdictionally limiting factor in the manner described in the progress report. They instead chose to have their uniform law amended to give complete jurisdictional protection for consumer contracts.

RESOLVED

1. That the report and recommendations of the working group be adopted for purposes of consultations over the next year.
2. That a draft Act and commentaries be prepared for consideration of the Conference at its 2003 meeting.
3. That the report appear in the 2002 proceedings. *[See Appendix C, p.159.]*

SECTION 427 OF THE *BANK ACT* AND THE *UNIFORM PERSONAL PROPERTY SECURITY AMENDMENT ACT*

Professor Rod Wood provided a combined progress report with respect to the project considering section 427 of the *Bank Act* and the *Uniform Personal Property Security Amendment Act* project. These projects will now be rolled together.

Professor Wood outlined that a Study Committee on the Reform of Canadian Secured Transactions Law has been created under the chairpersonship of Professors Ronald Cuming and Catherine Walsh. The mandate of the committee was to encourage greater harmonization and ongoing modernization of the provincial and territorial laws dealing with secured transactions in personal (movable) property. In pursuing its work plan, the committee has prepared consultation papers for broad dissemination.

It is the intention of the committee to use electronic summaries of these detailed papers in the initial stage of the consultation to facilitate their broad dissemination.

It was also decided that the papers related to the “fast-track” issues as previously reported on by the committee would be included in the consultation process. Professor Wood provided the following summary of each of the consultation papers prepared by the working groups:

(a) Section 427 of the *Bank Act*

Professor Wood prepared a consultation paper addressing the project to harmonize the federal *Bank Act* and provincial secured transactions regimes. Given past attempts at reform in this area that have failed, the purpose of the consultations will be to determine whether there is sufficient consensus to move forward. The consultation paper presents the following three options for reform:

- Repeal section 427 of the *Bank Act*;
- Harmonize the priority rules of section 427 with those of the *Personal Property Security Act* and the *Civil Code* of Quebec;
- Create a separate federal secured transactions regime for *Bank Act* security and potentially other federally regulated secured transactions.

It was noted that the committee favours the first option.

(b) Harmonization of Conflict of Law (Private International Law) Rules

Professor Catherine Walsh prepared a detailed paper addressing aspects of harmonization of conflict of law rules at three levels:

- among the various *PPSA* regimes;
- between the *PPSA* regimes and the *Civil Code* of Quebec; and
- between Canadian rules and the conflict rules of Revised Article 9 of the United States *Uniform Commercial Code*.

Of particular interest among the issues identified were the harmonization of criteria for determining the location of debtor enterprises where a debtor has a place of business in more than one jurisdiction for the purposes of the choice of law rule and harmonization of legal policy concerning the appropriate balance to be struck between protecting secured creditors and protecting the integrity of a local registry in the event of a transfer of mobile assets to a different location where there is a resale of that collateral.

The paper ultimately recommends against incorporation of the new Article 9 rule of the *Uniform Commercial Code* into the Canadian regime. It is, however, recommended that the ULCC continue to pursue issues related to the harmonization of provincial registry operations and particularly the feasibility of national access gateways.

(c) Purchase Money Security Interests

The consultation paper prepared by Professor Buckwold on this point addresses the variety of existing priority rules in Canada that deal with proceeds collateral in the form of an account. The paper addresses the priority competition that may arise between a secured inventory financier claiming accounts as proceeds generated by sale of the original inventory collateral and a prior financier who has taken a general security interest in accounts or an outright assignment of accounts from the business debtor involved. In particular, the consultation paper points out that there are three different approaches to resolution of these priority disputes among the existing *PPSAs* in Canada, as well as an additional approach under the *Civil Code of Quebec*. After setting out the benefits and problems associated with each of the existing approaches, the consultation paper identifies the following questions. Which of the three options represented by the current *PPSAs* is preferable and is a uniform approach to these issues necessary or even desirable?

In conclusion, the consultation paper notes that the committee was offered no compelling evidence that the current diversified approach is creating significant difficulty either in terms of legal uncertainty or in terms of availability of credit. Accordingly, while uniformity may be desirable, it may not be essential.

(d) Licences

The consultation paper prepared by Mr. John Cameron, focuses on the need to ensure that licenses (government or private) are treated as personal property so as to be available as collateral under secured financing law. The paper proposes that secured financing law be amended to include both transferrable and non-transferrable licenses under the definition of collateral and then seeks advice as to whether this measure is commercially necessary.

(e) Anti-assignment Clauses affecting Accounts and Chattel Paper

The consultation paper prepared by Mr. John Cameron states the committee's conclusion that all *PPSAs* should provide that clauses designed to prevent assignment of accounts and chattel papers should be unenforceable except possibly to the extent that they deal with fractional assignments. They should, however, be valid to the extent that they provide the basis for an account debtor's claims for damages for breach of contract by assignors in accordance with the current legal environment and those provinces that have adopted the Canadian Conference on Personal Property Law model law.

Finally, it was noted by Professor Rod Wood that the committee did not address the issue of modifications to provincial secured financing law necessitated by drafting of the *Securities Transfer Act* as that draft Act was not yet available.

There were questions as to whether the focus of the working group continued to be a unified *PPSA* project or whether Part II of the Cuming-Walsh paper was still a priority. Professor Rod Wood indicated that Cuming-Walsh paper was still in the offing, but was not ready for presentation.

The question was put whether or not it would be recognized that from a pragmatic perspective it should be acknowledged that there was not a high likelihood in the short term of creating a unified Act and that perhaps more attention should be paid to the report. After some discussion, the decision of the group was to ask Professors Cuming and Walsh to proceed with the completion of Part II of their proposals while continuing the work of the working group towards identifying some issues that may be right for consolidation on the broad policy basis described in the paper.

RESOLVED

1. That the study committee be requested to continue its research and consultations on the issues identified by the study committee, and to develop recommendations to encourage greater harmonization and ongoing modernization of laws dealing with secured transactions in personal property.
2. That a draft Act and commentaries be prepared for consideration of the Conference at its 2003 meeting.
3. That the report appear in the 2002 proceedings. [*See Appendix D, p.188.*]

UNIFORM SECURITIES TRANSFER ACT

A project update was presented by Mr. Eric Spink, Vice-chair of the Alberta Securities Commission, regarding the *Uniform Securities Transfer Act (USTA)*. After outlining the long and somewhat complicated history of this project, Mr. Spink reported that over the past year the task force has worked through six drafts. They are now confident that the most recent draft represents a complete working draft and that it achieves substantive harmonization with Revised Article 8, including the reform amendments that relate to *UCC* Revised Article 9. The task force had also prepared draft consequential amendments to the Alberta and Ontario *Personal Property Security Acts* and a table of concordance between the *UCC* Revised Article 9 and the draft amendments.

Mr. Spink then outlined the difficulties of seeking implementation of such a detailed project. In particular, he noted that since amendments to *PPSA* lending rules are required for implementation of the *USTA*, both must be done simultaneously. The task force was of the view that uniform secured lending rules for investment property are just as important as uniform holding and transfer rules to maintain the global competitiveness of Canadian security markets. Much therefore depends on whether appropriate amendments to the current *PPSA* can be implemented together with the proposed *USTA*. If this is not possible, then the task force would recommend that secured lending provisions be included in the *USTA* itself.

The next step in their project is to obtain comments. If no major problems are identified in the consultation process with experts and other interested parties the following step is to finalize the consultative draft and accompanying material and publish it for comment in the bulletins of the various securities commissions. The current target date for such publication is the end of 2002.

Finally, Mr. Spink reported that they are currently working on a French translation of the draft *USTA* and that a draft for circulation to the members of the ULCC was anticipated this fall.

RESOLVED

1. That the report be received. [*Available at <http://www.ulcc.ca/en/poam2/> See "Commercial Law Documents."*]
2. That a draft Act and commentaries be prepared for consideration of the Conference at its 2003 meeting.

UNIFORM FRANCHISES ACT

A status report on a *Uniform Franchises Act* was presented by John Sotos, Sotos Associates, and Frank Zaid, Osler, Hoskin & Harcourt LLP, as co-chairs of the working group. It is the intention of the working group to engage in a wide consultative process to receive input and suggestions from all interested parties and they are committed to using a dedicated list-serve for consultation and submission purposes in this regard. The National Co-ordinator of the Commercial Law Strategy, Ms. H el ene Yaremko-Jarvis, will facilitate communications and has invited all individuals interested to contact her directly.

Mr. Sotos and Mr. Zaid outlined a Canadian franchise sector fact sheet and reviewed franchise legislation in Canada, noting in particular that Alberta and Ontario are the only provinces with existing franchise Acts. They also outlined the history of franchise regulation, most notably in the United States, as well as current trends for regulation in the franchises area. In certain jurisdictions relationship clauses have become part of the disclosure laws governing the franchise relationship after the sale of a franchise. Voluntary codes for self-regulation by industry associations are emerging in certain countries.

Mr. Zaid and Mr. Sotos proceeded to outline the relationship law and the disclosure requirements possible within a proposed *Franchises Act*. The working group has concluded that uniform provincial legislation would benefit all parties concerned or interested in franchise law. Uniform legislation will help franchisors standardize procedures and documentation, and accordingly, save costs which might otherwise be passed on to franchisees and ultimately to customers. Franchisees will be given legal protection where none currently exists since it would be expected that many provinces will adopt franchise legislation once a uniform Act has been adopted. In addition to introducing dispute resolution mechanisms, the driving force behind the interest of many franchisees in franchise legislation is the perceived lack of pre-sale information provided to prospective franchisees and in some cases the unfair treatment of franchisees following the acquisition of a franchise. In Canada, increased interest has been expressed in introducing some form of franchise legislation that would address these concerns. In so doing, however, it must be recognized that a modern regulation must seek to balance the legitimate interests of the franchisee, as well as the franchisor, by protecting the reasonable expectation of both parties such that the standard provisions of the Act reflect good business practices for responsible franchisors. Such legislation may also assist in guiding the parties in appropriate conflict resolution.

It was their submission that the appropriate regulatory response to the call for franchise legislation is no longer determined by a choice between government regulation and industry self-regulation. The concept of responsive regulation involves developing a regulatory model which incorporates the policy elements of government oversight with elements of self-regulation. It is the view of the working group that no model franchise legislation is effective without both elements. Having completed their review of the existing environment, the working group acknowledged its challenge to be recommending the appropriate model for uniform franchise legislation, keeping in mind the existing legislation in Canada including the requirements of the Quebec *Civil Code* so that enforcement and interpretation considerations will have equal applicability in both civil law and common law. The working group will be convening a full in-person meeting in September 2002, and will be proceeding on a work plan from there. The report provided by the working group on franchises also provided a summary of international franchises law as an appendix.

RESOLVED

1. That the report of the Committee be received.
2. That the Committee be directed to continue its discussions, and to prepare a further report, with recommendations toward the development of a uniform Act, for consideration of the 2003 meeting of the Conference.
3. That the report appear in the 2002 proceedings. [See Appendix E, p.189.]

UNIFORM CIVIL ENFORCEMENT OF JUDGMENTS ACT

Professor Lyman Robinson, project leader, provided the second progress report on the Civil Enforcement of Judgments project. Professor Robinson advised the Conference that this has been a very active and productive working group that had made considerable progress in identifying the main elements of a uniform Act. In particular, the working group was making progress on determining the need for a registry of money judgments, the registration process, the effect of registering a judgment, the priorities among registered judgments and the distribution of enforcement proceeds. Progress was also reported on enforcement proceedings, the common law *nemo dat* rule, the property to be exempt from execution, income exemptions and the distribution of proceeds of enforcement.

Having provided a summary of the various issues addressed by the working group, Professor Robinson requested the direction of the Conference regarding the distribution of proceeds under the Act. In particular, would a uniform Act stay with the principle of *pro rata* distribution among judgment creditors who register their judgment in this registry regardless of the date and time of registration or would it instead proceed with distribution on the basis of the date and time of registration of the judgment in the registry in accordance with the rules of a first to register priority regime? Following a detailed review of the pros and cons of each option, a spirited debate ensued.

The option of rewarding the first judgment creditor provides an incentive to proceed with enforcement proceeding without penalizing that creditor for going through the expense of initiating proceedings. Professor Robinson indicated this was one identified option that was a useful hybrid between the first to register and the *pro rata* régimes and that it deserved further thought.

It was noted that in Newfoundland and Alberta, following a period of significant consultation, they had implemented a process that is based on *pro rata* distribution and that it would be disappointing for the Conference to endorse an alternative.

Arguments were also made in favour of a first to register approach on the basis that it more properly reflected the policy intent of proceeding with judgments as quickly as possible.

Following a jurisdictional vote, the Conference determined that direction should be provided to the working group to proceed with a *pro rata* distribution model.

Having resolved this issue, the report was received by the Conference and the working group undertook to continue its work, including the examination and development of recommendations on enforcement proceedings against land, property exempt from execution, appointment of receivers, charging orders, pre-judgment remedies and third-party procedures relating to enforcement proceedings.

RESOLVED

- 1 That the progress report of the working group be received.
- 2 That the working group be directed to prepare a draft Act and commentaries for consideration of the Conference at its 2003 meeting.
- 3 That the report appear in the 2002 proceedings. [See Appendix F, p.248.]

REPORT ON THE ACTIVITIES OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (NCCUSL)

Mr. King Burnett, President, National Conference of Commissioners on Uniform State Laws (NCCUSL) reported on the activities of NCCUSL over the past year. Mr. Burnett indicated that the September 11, 2002, incident had affected their Conference in a number of difficult ways.

Speaking generally with respect to the conduct of their Conference, Mr. Burnett noted that funding was an ongoing issue for their Conference as well, and that some states have better records than others in making their contributions. Following September 11th, a number of states defaulted on their dues which lead to a great deal of stress on their staff.

Following a review of the staffing requirements for the Conference, Mr. Burnett noted in particular that having an individual who is dedicated to implementation and enactment of uniform laws had proven to be very useful for the Conference. He also indicated that the establishment of a foundation on a non-profit basis had privately raised a great deal of funds on behalf of the Conference. This is something the ULCC may want to consider.

Mr. Burnett also noted that private international law and Aboriginal law issues were two new areas where they were learning from the ULCC example and that they were looking at pursuing on a more active basis.

With respect to the uniform Acts and projects passed by the Conference in the past year, Mr. Burnett noted the following projects:

1. *Uniform Commercial Code, Article 7 (Warehouse Receipts, Bills of Lading and other Documents of Title)*
2. *Uniform Conversion or Merger of Different Types of Business Organizations Act*
3. *Uniform Environmental Covenants Act*
4. *Amendments to Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act*
5. *Uniform Apportionment of Tort Responsibility Act*
6. *Uniform Child Witness Testimony by Alternative Methods Act*
7. *Uniform Nonjudicial Foreclosure Act*
8. *Uniform Commercial Code, Article 2 (Sales) and Article 2A (Leases)*
9. *Uniform Securities Act*

Mr. Burnett indicated that this would be his last Canadian Conference as his role as President is winding down and he thanked the Conference for their hospitality and indicated that he had enjoyed his participation a great deal.

In response to questions from the floor, Mr. Burnett indicated that drafting committees were a much bigger process in the American Conference with the President attending every drafting committee meeting of every working group. He also noted that conflict of interest issues arising from third-party funding were just starting to be considered in a detailed fashion by NCCUSL.

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.

PRIVATE INTERNATIONAL LAW REPORT

Ms. Elizabeth Sanderson provided the Conference with an overview of the activities of the Private International Law Section, Department of Justice. A written report was distributed at the Conference. Following receipt of the report, Susan Amrud thanked Elizabeth Sanderson for her ongoing commitment and contribution to the ULCC and wished her every success in her new endeavors as this would be her last ULCC meeting for some time.

RESOLVED

1. That the report on the activities of the Department of Justice be received.
2. That the report appear in the 2002 proceedings. [See Appendix G, p.249.]

PUBLIC INQUIRIES PROJECT

Ms. Susan Amrud presented for the consideration of the Conference a synopsis of a potential project on Public Inquiries prepared by Professor Alastair Lucas of the University of Calgary. The question was put to the section as to whether this would be a desirable topic for a project on the terms outlined by Professor Lucas.

After discussing an area of concern raised regarding the case for uniformity, it was agreed that this was an important area of study and that, in particular, being able to pursue this matter in an environment which was not tainted by “the inquiry of the day” problems would be useful. An issue was raised respecting the need for flexibility in any such project, so that every inquiry does not become a full blown judicial inquiry with subpoena powers when a more subtle instrument may do the job. This was acknowledged as an important point. It was agreed that a project on public inquiries should be undertaken.

A number of jurisdictions volunteered to work on this project including Alberta, Quebec, Saskatchewan, Nova Scotia, British Columbia and the Federal Government. It was noted that the work done by the Alberta Law Reform Institute would be a good starting point for the working group. A working group is to be struck starting with the volunteer members mentioned above.

REPORT ON *UNIFORM VITAL STATISTICS ACT* PROPOSED PROJECT

Mr. Chris Curran provided a status report on the proposal for a new *Uniform Vital Statistics Act*. In this report he summarized the background to the project whereby the Vital Statistics Council for Canada had requested the assistance of ULCC to undertake a review of the *Uniform Vital Statistics Act*. At the suggestion of Mr. Curran, the Council had tasked a subcommittee of the members with responsibility to review the current Act and develop proposals for its modernization.

The membership of the *Uniform Vital Statistics Act* committee outlined a number of issues of considerable complexity which would have an impact on vital statistics legislation in ways far beyond those initially contemplated. Fifteen of these issues are outlined in the report of Mr. Curran. The commissioners for Newfoundland and Labrador prepared a brief analysis of the issues as presented to the committee in order to analyze and review the grouping of the issues.

Following this process the committee brought its proposals before the Annual General Meeting of the Council in June 2002. The committee recommended that it commence its review of the Act without delay. Provisionally, the committee suggested that it attempt to

complete its review and analysis of the Act and present its proposals for legislative amendments to modernize the Act to the 2003 meeting of the Conference.

The report of the committee to the Annual General Meeting of the Council determined that there was no national consensus on amendments with respect to these issues. A number of jurisdictions expressed the concern that some of the problems identified raised religious, moral and philosophical issues that would have much broader implications than simple amendments to the uniform Act. Following debate, the Council determined that it was premature to proceed with a review of the Act at this time and that it should withdraw its request for assistance from the ULCC for a comprehensive review of the uniform Act. It was concluded, however, that the matter remain on the Council's agenda for their next annual meeting in 2003.

The ULCC agreed with the conclusion of Mr. Curran that the proposed review of the legislation was indeed far too broad to be a manageable project.

RESOLVED

1. That the report be received.
2. That the Conference await further communication from the Vital Statistics Council for Canada respecting next steps on this project.

SECTION 347 OF THE *CRIMINAL CODE (CANADA)*

Professor Mary Anne Waldron, University of Victoria, presented a report on section 347 of the *Criminal Code (Canada)* by way of teleconference. She outlined the various concerns that have been identified since the repeal of the *Small Loans Act* by the *Criminal Code* provision. These included the unintended civil consequences of this section, as well as what was viewed as an unrealistically low level of criminal interest in the context of certain high risk but common loan ventures.

The debate as to whether repeal was the answer as opposed to amendment remains at the core of any project regarding section 347. Apart from repeal, the alternatives identified were to limit the definition of interest in ways that will not seriously erode the purposes of this section in controlling criminal behaviour, to raise the commercial rate, to exempt certain transactions or lenders or to limit the civil consequences for exceeding the statutory rate.

In her paper, Professor Waldron concludes that the following amendments should be made to section 347:

1. The definition of "interest" should exclude the value of consideration for a loan that takes the form of participation in the borrower's profits, whether by an equity share, by royalty for use of property or by genuine pre-estimate of profits. It should also exclude the value of fees paid to independent professionals.
2. The criminal rate of interest should be raised significantly. The figure should be selected in consultation with law enforcement authorities.

3. The civil consequences of violating the criminal provision should be restricted unless the transaction is the subject of a criminal prosecution.
4. Certain industries which are subject to separate regulation should be exempted from the operation of the statute entirely. This could include payday lenders as well as utilities already subject to scrutiny by regulatory agencies.

It was her submission that these amendments would virtually eliminate the typical case in which a sophisticated corporate borrower attempts on technical grounds to avoid performance of a business obligation.

It was suggested that it would be difficult to justify the proposed increase in the criminal interest rate to 500 percent regardless of the commercial rationale.

It was determined that the challenge was to attempt to control the unintended consequences of section 347 in the commercial field while still preserving criminal law consequences where appropriate for matters such as loan sharking.

RESOLVED

1. That the report be received.
2. That the report be referred to a joint committee of the Uniform Law Conference and the Consumer Measures Committee to undertake consultations and report back to the Conference in 2003 with final recommendations.
3. That the report appear in the 2002 proceedings. [See Appendix H, p.250.]

REPORT ON UNIFORM WILLS AMENDMENT ACT

Mr. Peter Lown, Director of the Alberta Law Reform Institute, presented a Report on the Recognition of Wills and Powers of Attorney in an Electronic Format.

Mr. Lown outlined the background to his report whereby the Conference concluded that it would not undertake a project for the recognition of electronic wills and powers of attorney and that, rather, the phenomenon and incidences of electronic wills should be accommodated within the substantive compliance provisions of section 19.1 of the *Uniform Wills Act*. The purpose of his report was to suggest the wording of amendments to section 19.1 which, if accepted, would allow the courts to accommodate electronic wills within the parameters of the substantial compliance provision.

The following options were identified for consideration by the Conference:

1. Option 1 identifies amendments to subsection 19.1(3) to add a reference to section 3 to allow the courts to dispense with the requirement of writing altogether providing the other evidentiary standards of this section are met.
2. Option 2(a) adds a further subsection immediately after subsection (3) that would incorporate the wording of subsection (1)(b) of the *Uniform Electronic Evidence Act*.

3. Option 2(b) adds a further subsection immediately after subsection (3) that would incorporate the wording of section 1 of the *Uniform Electronic Commerce Act*.

It was the recommendation of the report that option 2(a) be chosen. It was argued that this would effectively open up writing to include other forms of tangible data which includes electronic data without doing away with the requirement of writing altogether.

It was noted that the intention of this provision was to create an exception to the formal requirements provable by evidence which includes electronically created and stored data. The intention was not to create a blanket provision that replaces the requirement of writing with a general redefinition of the reliable means of electronic creation and storage of data.

RESOLVED

1. That the draft amendment to the *Uniform Wills Act* be approved in principle, and that an amended version of the draft Act and commentaries be circulated to the jurisdictions as soon as possible. Unless two or more objections are received by the Executive Director of the Conference by November 30, 2002, the draft amendment 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 2002 proceedings. [*Note: The adoption process was not completed.*]

UNIFORM ARBITRATION AMENDMENT ACT

Mr. Peter Lown introduced a topic for the consideration of the Conference regarding amendments to the *Uniform Arbitration Act*. These amendments arose from recent judicial decisions from the Alberta Court of Appeal and the Ontario Court of Appeal which raised the risk of running contrary to the stated intent of section 7 of the *Uniform Arbitration Act*. Following some debate as to whether or not the proposed amendment was appropriate to be considered under the November 30th rule, it was determined that most delegates agreed that there was sufficient time to review the proposal prior to being required to make a decision in November.

RESOLVED

1. That the draft amendment to the *Uniform Arbitration Act* be approved in principle, and that an amended version of the draft Act and commentaries be circulated to the jurisdictions as soon as possible. Unless two or more objections are received by the Executive Director of the Conference by November 30, 2002, the draft amendment 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 2002 proceedings. [*See Appendix I, p. 300.*]

THE ROLE OF THE UNIFORM LAW CONFERENCE IN RELATION TO ABORIGINAL LAWS

Ms. Merrilee Rasmussen, Q.C., provided an interesting and informative review of the potential role of the ULCC in relation to Aboriginal laws. In her presentation Ms. Rasmussen noted that the potential for a broad range of Aboriginal laws, either as an exercise of inherent rights of self-government or, more likely, as the result of negotiation of self-government agreements with delegated powers suggest that the harmonization of laws would be a worthwhile objective. She further noted that harmonization is a matter that is touched on in the agreements with First Nations that have been negotiated so far and will no doubt be an important consideration in the negotiations that are ongoing. Since many of the aspects of these agreements would be areas of provincial jurisdiction if Aboriginal people were not involved, it is an area that deserves the ongoing attention of the Conference. It was also noted that there is a possible scope for Aboriginal jurisdiction to apply to Aboriginal people wherever they are. In this context, questions of what laws apply to whom and in what circumstances are practical questions that must be answered and which carry with them the need or desire to secure a measure of harmonization among federal, provincial and Aboriginal legal regimes.

Ms. Rasmussen's report engendered a broad ranging discussion that recognized that while there was no immediate role for the ULCC in seeking to harmonize the broad range of Aboriginal initiatives occurring nationally, there was considerable utility in ensuring that commissioners to the ULCC remained aware of the developments in this area and of the need for constructive relationships between this emerging legal regime and the existing legal regimes.

RESOLVED

1. That the report be received.
2. That the report appear in the 2002 proceedings. [See Appendix J, p.305.]

NEW PROJECTS AND WRAP-UP

The Ontario commissioners presented a memorandum prepared by Mr. John Lee which raised the issue of whether amendments need to be made to the *Uniform Enforcement of Canadian Judgments Act* to provide additional protections for consumers.

It was noted in the debate that the concerns raised by the consumer advocates were already the environment in which they had been operating in Ontario for the several years since the *Morguard* decision. Accordingly, it was difficult to argue that the "sky was falling". It was also noted that the full faith and credit principle set out within the *Morguard* decision was not served by individual "carve outs" in this regard. The counter argument was made that consumers deserve specific protection and that it was necessary to consider making amendments to address these issues.

The second issue debated was one of procedure, namely which legislation was properly the focus of amendment, the *Uniform Court Jurisdiction and Proceedings Transfer Act* or the *Uniform Enforcement of Canadian Judgments Act*. It was argued that as this is a jurisdictional issue, the jurisdictional Act was the proper instrument notwithstanding some arguments that it should also be included in the enforcement procedure.

After some discussion it was agreed to refer this issue to the joint working group of the CMC and the ULCC on Jurisdiction and Consumer Protection in Electronic Commerce. As this working group was already considering jurisdictional issues regarding consumer protection, it was an appropriate matter for them to include in their general discussions and to report back on next year.

The meeting of the Civil Section then concluded with the receipt of the report of the Nominating Committee that Mr. Chris Curran of Newfoundland and Labrador had been elected incoming Chair of the Civil Section and that Ms. Frédérique Sabourin of Quebec was nominated to serve as Chair of the Civil Section in the following year.