

Securities Transfer Act - Project Update 2002

AUGUST 18-22, 2002 Yellowknife, NT

UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION UNIFORM SECURITIES TRANSFER ACT - PROJECT UPDATE

Eric Spink, Vice-Chair, Alberta Securities Commission June 26, 2002

[1] The purpose of this report is to provide an update on the status of this project. Since this project has a long history, I will briefly review the background before describing recent developments. This report will not address technical details of the proposed reforms but will concentrate on process issues.

[2] The Uniform Law Conference of Canada (ULCC) passed a resolution at their 1998 annual Conference, requesting that the Canadian Securities Administrators (CSA) and myself prepare a draft *Uniform Securities Transfer Act* (USTA) and commentaries, to be circulated broadly for comments, as a joint project of the ULCC and the CSA.

[3] On October 9, 1998, the CSA Chairs formally agreed to the ULCC request, and approved a proposal by the CSA Uniform Securities Transfer Act Task Force to use a consortium of legislative counsel representing Alberta, BC, Ontario and Québec to draft the legislation. The general instructions to legislative counsel were to prepare a draft *Act* suitable for provincial enactment in accordance with the April 30, 1997 Report of the ULCC Production Committee. The specific objectives of the CSA in this project are:

- To develop a provincial *Uniform Securities Transfer Act*, including consequential changes to secured-lending rules, that is as uniform and harmonious as possible with Revised Article 8 (Rev8) of the U.S. Uniform Commercial Code (UCC).
- To ensure that the final product is implementable in each province without amendment. This assumes uniformity in the common law provinces and as close-to- uniformity as possible in Québec having regard to Québec's Civil Code requirements.
- To publish in our bulletins for comment a consultative draft USTA together with a table of concordance, commentary and a CSA Position Paper.

[4] The drafting process has been more difficult than anticipated. The first preliminary draft USTA was prepared in 1999 but, unfortunately, Ontario legislative counsel felt unable to provide any comments or suggestions on the draft until they obtained instructions from the Ontario Securities Commission (OSC). That precipitated a comprehensive and independent review of this project by the OSC, at the conclusion of which they endorsed the project's substantive and policy objectives, as well as the drafting process and approach.

[5] Although the first preliminary draft was distributed with a request for comments to some stakeholders outside the drafting consortium and Task Force, no comments were received. This was, unfortunately, consistent with previous experience where the ULCC Production Committee received no response to material it circulated or published. We recognize that very few people are able or inclined to comment on such complex and specialized legislation, especially if it is merely in draft form. For this reason, the Task Force has made every effort to anticipate, identify and address potential issues in the development of the draft USTA. Our objective is to ensure that the draft USTA can be implemented promptly and confidently if, after it is published for comment, few comments are received.

[6] The Task Force has had ongoing discussions with the relevant government departments in Alberta, BC, Ontario and Québec. Although we have received general support for the substantive and policy objectives of the USTA, it has been apparent that most governments have been reluctant to express firmer support until they could review a complete working draft USTA (i.e. a draft that addresses all the outstanding issues that have been brought

to our attention, and which enables a reviewer to see the full scope of the proposed reforms).

[7] The Alberta Minister of Revenue has provided a memorandum to the Chair of the Alberta Securities Commission expressing political support for the substantive and policy objectives of the USTA. The memorandum notes that, in furtherance of the Task Force's objective to achieve a level of uniformity among the provinces comparable to that existing among the 50 U.S. states that have enacted Rev8, the Alberta Department of Justice has taken a flexible approach to normal legislative drafting protocols in preparing the current draft USTA. The memorandum encourages other governments to exercise best efforts to assist in achieving this objective.

[8] Over the past year, the Task Force worked through six successive drafts of the USTA with Alberta legislative counsel. Draft 7, dated June 18, 2002, is a complete working draft. The Task Force is confident that Draft 7 addresses all the outstanding issues identified to date, and that it achieves substantive harmonization with Rev8, including the conforming amendments effective July 1, 2001 that relate to UCC Revised Article 9. Over the past year, the Task Force also prepared draft consequential amendments to the Alberta and Ontario *Personal Property Security Acts* (PPSAs), and a chart showing concordance between UCC Revised Article 9 and the draft amendments.

[9] Québec has been actively involved in the development of the draft USTA. It has always been understood that Québec would need to accommodate the unique requirements of its Civil Code. We are pleased to report that, in order to overcome the difficulties inherent in achieving uniformity between the USTA and the Civil Code, the Québec Ministry of Finance recently agreed in principle to implement the USTA through a Regulation.

[10] The current draft USTA, the draft consequential amendments to the Alberta and Ontario PPSAs, and other supporting material (over 300 pages in total) are being sent to the ULCC Production Committee, the ULCC PPSA Working Group (ULCC Working Group) and the Legislation Committee of the Canadian Conference on Personal Property Security Law (CCPPSL Committee) with a request for comments. The Task Force has asked for initial comments by August 12, 2002 so that some sense of the comments can be conveyed in my oral report to the ULCC's annual meeting the following week.

[11] Since the new property concepts in the draft USTA necessitate consequential changes to secured-lending rules, it is clear that both must be done simultaneously in a single legislative process. When the CSA Task Force started its work, the plan was to include the secured-lending rules in the USTA. That approach would ensure uniformity and simplify implementation. The CCPPSL Committee pointed out in 1999 that these provisions ultimately belonged in the Model PPSA. The Task Force agrees that that would be optimal, so we drafted amendments to both the Alberta and Ontario PPSAs to examine whether it is possible to achieve substantively uniform secured-lending rules for investment property in the context of non-uniform PPSA legislation.

[12] This is a critical issue for the Task Force. In our view, uniform secured-lending rules for investment property are just as important as uniform holding and transfer rules to maintaining the global competitiveness of Canadian securities markets. The tentative view of the Task Force is that amendments to the current non-uniform PPSAs, similar to the drafts we prepared, would achieve substantive uniformity. Much depends, of course, on whether appropriate amendments to the current PPSAs can be implemented together with the USTA. If it is not possible, for any reason, to achieve substantive uniformity by this method, then the Task Force would recommend that the secured lending provisions be included in the USTA.

[13] The Task Force is also reviewing Draft 7, the draft consequential PPSA amendments and other material with the drafting consortium, government representatives and other stakeholders.

[14] The next step is to obtain comments. If no major problems are identified in this process, the next step is to finalize the consultative draft and accompanying material and publish it for comment in the bulletins of various securities commissions. The Task Force's current target date for such publication is the end of 2002.