

2003 Fredericton, NB

August 10-14, 2003

CIVIL SECTION MINUTES

1. Commercial Law Strategy:

Presenters:

- Jennifer Babe, Chairperson of the Commercial Law Strategy
- Arthur L. Close, Q.C., British Columbia Law Institute

(1) Discussion of Strategy

A status report on the Commercial Law Strategy ("Strategy") was presented by Jennifer Babe, Chairperson of the Strategy. Ms. Babe reviewed the beginnings of the Strategy, how the Strategy has developed since its inception and the direction which the Strategy may undertake in the future. Ms. Babe discussed the factors which are limiting the progress of the Strategy, noting a possible lack of political will to implement uniform products and a requirement that the Strategy focus on marketplace needs and apply its finite budgetary and volunteer resources to projects which respond to the requirements of the marketplace, which may in turn stimulate the political will to enact the resulting uniform products. Ms. Babe suggested that a questionnaire be prepared to determine the needs and priorities of the marketplace.

Ms. Babe reviewed Table E of the report which detailed the work plan for the Strategy to August, 2005, noting in particular the progress of the PPSA Working Group and the status of projects respecting civil enforcement of judgments, illegal contracts, franchising, uniform documents of title, intellectual property projects, tiered holdings, cross border e-commerce transactions, the credit repair industry and income trusts.

Discussion ensued regarding concerns faced by the Strategy, including a lack of identified marketplace needs and limited political will to implement Strategy products. It was suggested that the Strategy identify the

differences in areas of commercial law that constitute barriers to internal trade. Addressing the barriers to trade may be required to re-establish the political will to implement products and stimulate marketplace support. There was comment that the Strategy had been providing a number of deliverables on commercial law and should not veer from that course at present. However, it may be appropriate to conduct a reexamination of the mission of the Strategy for the purpose of preparing a package for an additional funding cycle. An interim report on the progress of the Strategy could also be published.

(2) Discussion of Website

Arthur Close of British Columbia followed the discussion on the Strategy by providing a presentation on the internet presence of the Conference and the development of the ULCC website. Mr. Close's demonstration of the website included an overview of the website and a description of the pages of the website. The website contains the proceedings of the annual meetings and the uniform Acts. The conference documents from 2001 and 2002 had been brought on line and the Acts have been updated and rationalized. PDF format has been adopted as the standard for document display. A search function has been also implemented. An audit of the website is being undertaken to develop an upgrade strategy, which work is ongoing. Budget provision for the Phase 2 implementation of the Upgrade Strategy is to be addressed.

RESOLVED:

1. **THAT** the Report of the Commercial Law Strategy be received.
2. **THAT** the Report appear in the 2003 proceedings.
3. **THAT** the Strategy undertake necessary consultations with its endorsers and the marketplace to determine the priority areas to address commercial law reform and to fill voids.
4. **THAT** the Strategy address its original and amended lists of areas of commercial law reform and update the status of existing ULCC uniform Acts that have not progressed to legislation.

2. Uniform Franchises Act - Report of the Working Committee

Presenters: Frank Zaid, Osler, Haskin and Harcourt, LLP

John Sotos, Sotos Associates

Frank Zaid and John Sotos provided separate presentations on the *Uniform Franchises Act*. Mr. Zaid provided the background, legislative summary and progress report of the Committee. Mr. Sotos then described the format and provisions of the model *Uniform Franchises Act*.

Regarding the activities of the Working Committee, Mr. Zaid noted that the Committee has engaged in consultations with the legal community and with representatives of the public and private sectors. The Committee has a dedicated list serve which contains a number of questions upon which comment is sought. The Committee has undertaken several research papers, has reviewed and compared international franchise laws, Canadian franchise laws, the UNIDROIT franchise law as well as the Quebec Civil Code, has reviewed case law on franchises and has examined dispute resolution mechanisms. The Committee is also considering directors' and officers' liability for misrepresentation in disclosure documents, relationship issues between franchisors and franchisees, including renewals, terminations, transfers and the disclosure of rebates, regulations regarding disclosure, a central document repository and the use of disclosure documents from other jurisdictions.

Mr. Sotos reviewed the model *Uniform Franchises Act* itself and noted that the Committee had primarily adopted the Ontario legislation as the working model. Mr. Sotos reviewed a number of definitions, the application of the draft uniform Act, disclosure requirements and exemptions from disclosure, remedies for non-delivery of disclosure documents, defences to liability and the possibility of some form of mandatory, party-initiated mediation without derogation of the right to litigate, if the parties so choose. Detailed comments on these and other issues were contained in the comprehensive report of the Working Committee which accompanied the presentation.

The Committee's objective is to deliver the Act, Regulations and Commentaries in 2004. However, drafting may require some time to complete. It was suggested that a legislative drafter be assigned to this project for drafting purposes, preferably a drafter with bilingual and bijural competence. Ontario may be able to provide some drafting assistance. It was further recommended that the Committee prepare an explanatory guide to the model uniform Act.

RESOLVED:

1. **THAT** the Report of the Committee be received.
2. **THAT** the Report appear in the 2003 proceedings.
3. **THAT** the Committee be directed to continue the project and prepare a further report with recommendations for a draft uniform Act with regulations and commentaries for consideration at the 2004 meeting of the Conference.

3. Proposed Provincial Uniform Securities Transfer Act (USTA)

Presenters: Eric T. Spink, Barrister and Solicitor, Edmonton, Alberta

Max Paré, Ontario Securities Commission and Chair of Securities Administrators USTA Task Force

Eric Spink provided an overview of this agenda item. A pressing concern is the need to harmonize uniform securities transfer law and to harmonize Canadian law with US law. Canada ought to have a product equivalent to the US Uniform Commercial Code. It was proposed that existing Canadian securities transfer law be removed from Business Corporations Acts and placed in separate stand-alone statutes which would have the same scope as the article in the Uniform Commercial Code. It is hoped that implementing the USTA will be an important step forward for the Commercial Law Strategy and Mr. Spink noted that the Canadian Securities Administrators have a strong commitment to the project.

PPSA conforming amendments will be an integral part of this reform. The Task Force had consultations with the PPSA working group in 2002 and 2003 and a number of significant improvements over the USTA Task Force

proposals were developed. Particular improvements involve changing the definition of "financial asset" to clarify that credit balances held in a securities account will be normally treated as a security entitlement and including cut-off rules in the PPSA that specifically address the rights of purchasers of investment properties and those who have registered security interests. Another important development over the past year was the finalization of the Hague Convention on private international law. The Hague Convention recognizes the importance of having clear choice of law rules applicable to modern securities trading and holding practices. The Convention should not affect domestic choice of law rules but may have an impact if a Canadian organization deals with a foreign party in an international securities transfer transaction.

Alberta is very receptive to the USTA and is prepared to consider implementation by next spring. British Columbia is also receptive to the USTA. The securities industry tends to support the USTA.

Max Paré spoke on the importance of the Act. The USTA determines applicable substantive law in securities transfers, securities clearance and settlement. The USTA should assist in responding to and mitigating systemic risk in the financial system, in securities transfers and with securities regulation. The control of systemic risk is a core objective of securities regulation. There must be clear domestic rules governing the ownership, transfer and pledging of securities which allow investors to know the nature of their rights and obligations. As well, Canada must maintain comparable securities transfer practices and operational and legal systems with the US, particularly due to the substantial amount of inter-listed stocks between the two countries

The USTA working group will offer assistance to the jurisdictions in explaining the legislation and will interact with the industry. A work plan is still being developed and will be taken to the chairs of the Canadian Securities Administrators. The working group plans to contact the jurisdictions by the end of the year.

RESOLVED:

3.1 **THAT** the Report be received.

3.2 **THAT** the Report appear in the 2003 Conference proceedings.

3.3 **THAT** the draft *Uniform Securities Transfer Act* and commentaries, as modified during the consultation process, be referred back to the Conference for consideration and adoption at the 2004 Conference.

3.4 **THAT** the USTA Working Group, in conjunction with the Canadian delegation, draft implementing legislation for the *Hague Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary*.

4. Personal Property Security Act (Amendment)

Reform of the Law of Secured Transactions - Report of the Working Group 2002-2003

Presenters: Catherine Walsh, Faculty of Law, McGill University

Rod Wood, Law Commission of Canada and Faculty of Law, University of Alberta

Professors Catherine Walsh and Rod Wood presented the report of the Working Group on the reform of Canadian secured transactions law.

Professor Walsh noted that the mandate of the working group is to develop recommendations for changes to regulations and for the harmonization and ongoing modernization of the laws of secured transactions in moveable property and personal property. The development of a uniform Act is still on the group's agenda but was not an immediate objective during the past year. The group spent much time during the past year dealing with the *Uniform Securities Transfer Act* (USTA) and complementary amendments to the PPSA. The work product for the year consists of a series of recommendations made for harmonization of issues in provincial and territorial secured transactions law and the group work on the USTA. A consultation process was set up on national harmonization issues such as the *Bank Act* security regime.

Professor Wood discussed the recommendations contained in the Report of the Working Group 2002-2003 which accompanied the presentation, in particular the recommendation regarding repeal of the *Bank Act* security

provisions to avoid confusion regarding priorities where there is competition between a provincial security interest and *Bank Act* security. There were three possible approaches identified to address the issue of *Bank Act* security interests and s.427 of the *Bank Act*, the first being the outright abolition of the *Bank Act* security provisions so that all lenders would take the provincial or territorial security device. The second approach would attempt to make priority outcomes more predictable. The third approach is the development of a modernized federal security regime recognizing the bijural nature of Canada by coordinating the PPSA regimes and the Quebec Civil Code. The preferred option of the working group was to abolish the *Bank Act* security provisions, an option which was supported in the consultation process.

The Working Group consultation process addressed other potential areas for harmonization, including harmonizing conflict of law rules governing security and moveable property, harmonization with respect to claims for debts and consideration of a harmonized approach to address clauses in a contract that purport to prohibit a contracting party from assigning, selling or granting security in monetary claims owed to that debtor. Such anti-assignment clauses are not in the interest of business and should be prohibited. The final area of substantive consideration by the Working Group involved security interests in licences and in the interest of licensees and licensors respecting receivables. This area requires further consultation before a recommendation can be made and will be carried forward to the next year.

The balance of the Working Group's report dealt with the interface between the *Personal Property Security Act* and the *Uniform Securities Transfer Act*. The recommendations on this matter were not discussed in detail but many of the recommendations were incorporated on the website.

RESOLVED:

1. **THAT** the Report be received.
2. **THAT** the Report appear in the 2003 proceedings.

3. **THAT** the President on behalf of the ULCC write the federal Ministers of Justice, Finance and Industry recommending repeal of the provisions of the *Bank Act*, which create a separate regime for security interests in personal property distinct from PPSA and CCQ.

4. **THAT** the President on behalf of the ULCC write the provincial and territorial ministers responsible for secured transactions law recommending implementation of the recommendation of the Working Group relating to anti-assignment clauses and harmonization of the conflict of laws rules on security in moveable property.

5. **THAT** the Working Group be directed to carry out further consultation and research in respect of security interests in licences.

6. **THAT** the Working Group be directed to continue its assessment of the issues that arise from the interface between the PPSA and the USTA of the changes to PPSA law proposed by the CSA Task Force.

7. **THAT** the Working Group be directed to continue its examination of the issues raised in the Cuming-Walsh *Discussion Paper on Potential Changes to the Model Personal Property Security Act of the Canadian Conference on Personal Property Security Law* presented to the ULCC in 2000.

5. A Public Inquiries Act - Issues Paper

Presenter: Professor Alastair R. Lucas

Faculty of Law, University of Calgary

The paper presented by Professor Lucas examined a number of issues respecting public inquiries and included recommendations regarding the issues. Professor Lucas reviewed the history of public inquiries, the lessons learned from both law reform body studies and the extensive use of inquiries by governments, the advantages of and concerns respecting public inquiries and how inquiries are established by the executive of a government. Professor Lucas also reviewed the twelve recommendations proposed in his paper respecting the history of inquiries and lessons learned, the independence of inquiries from the authority of the executive, constitutional limitations, joint inquiries, judicial review,

efficiency and fairness, inquiries as a vehicle for public participation, the different modes of inquiries, evidentiary issues, protection for commissioners, the incorporation of *Inquiries Act* power under other statutes, the regulation of inquiry costs and other administrative matters.

A number of items were discussed following the presentation addressing the issues of qualifications for commissioners of inquiries, the scope of judicial review of inquiry matters, the scope of powers for an inquiry, the management of exhibits and budgetary matters. In particular, on the issue of judicial review, it was suggested that some inquiries should not be subject to judicial review at all, that the commission of inquiry should be trusted and that the courts could be left out of review. Professor Lucas responded that the Charter has constitutionalized protections and there may be less need for judicial review than before Charter jurisprudence. However, it would be virtually impossible to legislatively oust jurisdiction for judicial review, although it may be possible to limit a judicial challenge only to a matter of jurisdiction. It was also suggested that the findings of fact in an inquiry should be used in subsequent civil proceedings. The findings could be challenged in the subsequent proceedings if necessary.

RESOLVED:

1. **THAT** the Issues Paper prepared by Professor Alastair Lucas identifying issues to be addressed in a *Uniform Public Inquiries Act* be received.
2. **THAT** the Paper appear in the 2003 proceedings.
3. **THAT** the Working Group be directed to prepare a draft *Uniform Public Inquiries Act* and commentaries based upon the recommendations contained in the Lucas Issues Paper, as modified by discussion at the Conference, for presentation at the next annual meeting in 2004.
6. Civil Enforcement of Judgments Project.

Third Progress Report of the Working Group

Presenter: Professor Lyman Robinson, Q.C., British Columbia

Project Leader

This project has been on the program of the Conference for some time. Professor Robinson reviewed its history and gave an overview of its general scope and direction. The aim is to produce a comprehensive statutory regime that covers all aspects of the enforcement of money judgments including proceedings against tangible personal property, land, various forms of intangible assets and which strikes an appropriate balance between the needs of creditors, debtors and others affected by the process.

Alberta, Newfoundland and Labrador and New Brunswick have all moved in the direction of modernized enforcement law. In addition a Report has been prepared recommending a modernized enforcement law for Saskatchewan. All of these sources have assisted the Working Group

Following a preliminary description, Professor Robinson proceeded to review the draft Act. It was stressed that the draft Act that was distributed was a work in progress and that it reflects only the provisional views of the group and that some portions of the draft had not yet been formally considered by the Working Group.

Professor Robinson's part-by-part review of the draft generally followed the written report that had been distributed.

At the conclusion of the presentation it was noted that a committee in Quebec is reviewing the uniform Act but there may be difficulty in that province implementing the legislation on a uniform basis.

RESOLVED:

1. **THAT** the Report of the Working Group be received.
2. **THAT** the Report appear in the 2003 proceedings.
3. **THAT** the Working Group be directed to continue its work based upon the Report and discussion at the Conference.
4. **THAT** a draft Act and commentaries be prepared for presentation to the Conference for adoption at the 2004 meeting.

7. *Criminal Code* - Section 347

Presenter: Professor Mary Anne Waldron

Professor of Law, University of Victoria

Professor Waldron reviewed her paper on the effect of section 347 of the *Criminal Code*. The principal issue was the concern created by s.347 for activities in the area of commercial lending as a criminal offence is created for the charging of an illegal rate of interest which is above 60% as the effective annual rate on credit advanced under an agreement or arrangement. Professor Waldron did not recommend the outright repeal of s.347 but did present recommendations to address the commercial concerns.

The recommendations proposed by Professor Waldron reflect a combination of strategies. It was recommended that commercial transactions which are over \$250,000 be excluded from application of the section. Technical amendments could be made to the definitions applicable to the section, such as to exclude from the definition of "interest" fees which are paid to professional persons for services rendered. Professor Waldron noted that the business of payday lending could be excluded from s.347 if that industry is to continue, but suggested that some form of regulation for the payday loan industry may be necessary given the high rates of interest that may be charged to consumers. Professor Waldron commented that it may be useful and necessary to obtain further comment on the impact of s.347 if the Conference is to make recommendations on this issue.

Professor Jacob Ziegel of the Faculty of Law of the University of Toronto commented that he would favor repeal of s.347. Professor Ziegel suggested that the section may have been enacted based on misperceptions of the problem which was to be addressed. There have been no cases of convictions for loan-sharking under s.347. Professor Ziegel was of the opinion that s.347 has become a major burden upon legitimate businesses. Professor Ziegel suggested that the approach which deals with unconscionable transactions could be adopted in addressing usurious interest rates. He was of the opinion that the answer to this matter could be comparable to the *Small Loans Act* but more specifically

crafted to deal with the issue of excessive interest rates. Further, a distinction should be drawn between commercial and consumer transactions.

It was recommended that the President of the Conference send Professor Waldron's recommendations to the federal Minister of Justice for consideration with respect to the *Criminal Code*.

RESOLVED:

1. **THAT** the Waldron Report on Section 347 of the *Criminal Code* be received.
2. **THAT** the Report appear in the 2003 proceedings.
3. **THAT** the President of the ULCC write the federal Minister of Justice recommending the Waldron Report for consideration and adoption.

8. Illegal Contracts - Issues Paper

Remedies in Case of Illegality: Twenty Years and Where Are We?

Presenter: Professor Mary Anne Waldron

Professor of Law, University of Victoria

Professor Waldron reviewed her paper on illegal contracts and noted that this issue grew out of the work which had been conducted on section 347 of the *Criminal Code*. The principal questions to be addressed are what makes a contract illegal and what would happen if a contract is determined to be illegal. Twenty years ago, the Law Reform Commission of British Columbia was of the opinion that the courts and the common law would not serve to adequately update the law on illegal contracts. Common law developments since that time indicate that such opinion was largely correct, as the courts have held closely to traditional law and the majority of cases have lacked policy discussions. Professor Waldron reviewed certain cases, particularly the decisions of *Still v. B.C.* and *Top Line Industries International Paper*, and indicated that differing approaches have led courts to produce inconsistent results in this area of law. Professor Waldron suggested that statutory reform, as had been advocated by the Law Reform Commission, would be appropriate.

The Conference was requested to consider whether a working group should be struck and legislation be prepared to take back to the next Conference. The creation of a working group was supported. However, it was suggested that the working group should give consideration to the Civil Code of Quebec and do a comparative study between the common law and the Civil Code. It may be premature to prepare draft legislation until the common law and Civil Code comparison is completed.

RESOLVED:

1. **THAT** the Report by Professor Mary Ann Waldron on illegal contracts be received.
2. **THAT** the Report appear in the 2003 proceedings.
3. **THAT** the chairperson of the Civil Section, with necessary consultation among interested participants, establish a consultative committee to prepare a draft Act and commentaries based on the Waldron Report and the applicable provisions of the Quebec Civil Code, the comments received from discussions at the 2003 Conference for presentation to the Conference in 2004.

9. NCCUSL

Presenter: Fred Miller, President, National Conference of Commissioners on

Uniform State Laws (NCCUSL)

Mr. Fred Miller, President of the National Conference of Commissioners on Uniform State Laws (NCCUSL), provided a verbal report on the various projects undertaken by NCCUSL. Mr. Miller began his presentation with a discussion of commercial law issues and noted NCCUSL had completed an update of Article 7 of the Uniform Commercial Code (UCC) to accommodate electronic commerce, among other matters. NCCUSL had previously revised Article 8 of the UCC to take into account indirect holding systems and had as well revised Article 9. NCCUSL has been having difficulty in obtaining enactment of commercial products. However, there have been certain successes, such as the *Uniform Electronic*

Transactions Act, which is now law in over 40 states. It shall be important to involve stakeholders earlier in the process of reform and more emphasis shall be required to quantify the need for uniform law reform.

Mr. Miller discussed a number of sale of goods issues and referenced, in particular, that NCCUSL has made amendments to Article 2 of the UCC dealing with the sale of goods, even though it may be difficult to achieve uniformity among the states on those revisions. Mr. Miller discussed the failure of the *Uniform Computer Information Transactions Act*, which became a battle over market share and position between large and small companies as well as licensees, and addressed the issue of certificate of title law where the laws are not uniform. As well, NCCUSL will attempt to draft uniform law to provide for electronic registration and to address the registration of foreign civil judgments.

NCCUSL is doing more work in the international area and Mr. Miller discussed the involvement of NCCUSL with UNCITRAL, the United Nations Commission on International Trade Law. Mr. Miller was of the opinion that we should be increasingly intolerant of unnecessary legal barriers to social and legal development of the North American continent.

NCCUSL is becoming active in reviewing forms of businesses and is working closely with the American Bar Association to create a uniform *Entity Transactions Act* by which a corporation may change its form without any specific authority in its own corporate statute. Other projects in which NCCUSL is active are family and wealth transfer law, investments by educational institutions and a project to revise Article 9 of the Commercial Code to facilitate aboriginal tribes obtaining financing from outside sources.

Mr. Miller concluded his presentation by reviewing a number of other projects which NCCUSL is considering, including alternate dispute resolution and arbitration and mediation, an athlete agents Act, a mortgage foreclosure statute, how to treat income from an income-producing property and an environmental covenants statute to allow polluted property which has been remediated to return to some sort of productive use. Mr. Miller also stated that NCCUSL will revisit the issue of

a uniform Act on the recognition and enforcement of foreign judgments in January of 2004.

Following the presentation and discussion, the Conference expressed its thanks to Mr. Miller for his informative presentation.

RESOLVED:

1. **THAT** the Report be received.

2. **THAT** the Uniform Law Conference of Canada express to Mr. Fred Miller, President of the National Conference of Commissioners on Uniform State Laws its thanks for his informative presentation.

10. Electronic Cross Border Consumer Transactions.

Jurisdiction and Consumer Protection in Electronic Commerce Project:
Report of the Working Group

Presenters: Lynn Romeo, Department of Justice, Manitoba

Karen Pflanzner, Saskatchewan Justice

Lynn Romeo and Karen Pflanzner reviewed the report of the working group respecting proposed rules dealing with electronic cross-border consumer transactions. The working group had been established to examine legislative options regarding internet jurisdictional issues in relation to consumer matters and to unify conflict of law rules for cross-border consumer contracts.

The working group sought direction from the Conference on certain issues. The first issue dealt with the form that a draft Act would take. The preference of the working group would be for each jurisdiction to have separate statutes on the matter. The second issue for consideration was whether the rules proposed by the working group on cross-border jurisdictional issues should apply to vendors outside Canada. Conference delegates were generally of the opinion that the draft Act should have application to vendors outside Canada as many such foreign vendors may have a presence in Canada. As well, reference was made to the presumption set out in section 4 of the draft Act respecting the "real and substantial connection" as to the law of the enacting province or territory

and the location of the consumer contract. The working group's view was that the applicable law was still a presumption which may be upheld or refuted based on the circumstances of the transaction. It was questioned whether the reference to "real and substantial connection" should remain in the Act. However, it was suggested that there is utility in using the reference to real and substantial connection in the legislation rather than leaving the issue of the location of the consumer contract to the discretion of the courts.

The consensus of the Civil Section representatives was that the draft Act should be referred back to the working group for consideration of the issues raised during the discussion. A question was raised as to whether this project should come back to the Conference in 2004, but it was determined that the positions of the working group should be endorsed and that a revised draft of the Act be prepared by December 31, 2003. The working group would continue to monitor the Act's enforcement.

RESOLVED:

1. **THAT** the Report of the Working Group be received.
2. **THAT** the Report appear in the 2003 proceedings.
3. **THAT** the draft Act presented at the 2003 Conference be referred back to the Working Group for review and to take into account modifications arising from the Conference's discussions and the deliberations of the joint Working Group.
4. **THAT** the Act be distributed to the Jurisdictional Representatives for adoption, subject to a December 31 rule.
5. **THAT** the Working Group be directed to study the Alternative Dispute Resolution and enforcement issues raised by Ontario at the 2002 Annual Meeting in Yellowknife and provide a report on these issues for consideration at the 2004 Annual Meeting.

11. Discussion of New Projects

Presenters: Frederique Sabourin, Quebec

Darcy McGovern, Saskatchewan

All suggestions for new projects will be referred to the executive of the Civil Section to determine which suggestions will proceed to projects.

A possible new project would be to amend the *Uniform Limitations Act*. A further suggested new project would address the facilitation of the enforcement of judgments. It was also noted that recent case law from the Supreme Court of Canada indicated a pressing need for legislative change to the *Insurance Act*.

Other new projects that were proposed included a review of forfeited property from dissolved corporations and associated environmental concerns, an update of the *Uniform Vital Statistics Act*, a review of fund-raising campaigns, a review of all uniform Acts, a review of cost of credit disclosure and a review of family violence orders. A review of legislation in conjunction with CCSO Family Law was also suggested.

12. Uniform Enforcement of Foreign Judgments Act

(Revised Final Draft and Commentary)

Presenter: Kathryn Sabo, Justice Canada

Ms. Sabo reviewed the revised final draft of the *Uniform Enforcement of Foreign Judgments Act*. Also provided for review in the report provided with the presentation were associated commentaries and notations of the changes from the 2001 version of the Act.

Respecting the changes from the prior draft of the Act, Ms. Sabo noted that the Definitions section now has a definition for "registration" and there was a change in paragraph (d) of Article 3 to clarify that the Act does not apply to foreign judgments that recognize the judgment of another foreign state. A slight change was introduced to Article 6 so that courts would have a broader ability to provide for compensatory damages. Article 7 is new and provides mechanisms for the courts to modify foreign judgments to make the judgments enforceable, to stipulate the procedure used in enforcing the foreign judgment or to stay or limit the enforcement of the foreign judgment. Two changes were made to Article 8, those being the reference to ordinarily resident in 8(d) to determine jurisdiction in a

civil proceeding and the reference to the exercise of central management in a state of origin in 8(e).

Article 11 dealing with the recognition of foreign judgments is new and was prepared without the direction of the Conference. The working group believed Article 11 was necessary. The purpose of the Article is to allow for the recognition of the unenforceability of a foreign judgment to serve as a defence to a claim in the domestic jurisdiction. Article 12 addresses the registration of a foreign judgment. In particular, Article 12(4) stipulates the filing requirements for the registration of a foreign judgment. Article 14 was noted for subsection 14(2) which references the jurisdiction of a court to order enforcement of only one or more of the parts of a judgment. Finally, the working group was of the opinion that Article 16 may not serve a purpose and should be deleted.

In the discussion following the presentation, it was suggested that there should also be a provision in the Act to remove judgments made by a foreign jurisdiction which Canadian courts would not themselves have made. There should be a clear statement that a judgment based on facts that would not give rise to an issue in Canadian courts would not be enforced. However, there were comments that such a provision would not be appropriate for the Act as there may be a concern with a retrial of a matter. Regarding issues respecting definitions, it was noted that the term "person" is defined in the *Uniform Interpretation Act* so that it may be unnecessary to include the definition in the Act. It was also determined that the reference to "registration" should remain in the Act.

RESOLVED:

1. **THAT** the Report of the working group be received.
2. **THAT** the Report appear in the 2003 proceedings.
3. **THAT** the draft *Uniform Enforcement of Foreign Judgments Act* be adopted as a Uniform Act and recommended to the jurisdictions for enactment.

13. Private International Law

Activities and Priorities of the Department of Justice in Private International Law

Presenter: Kathryn Sabo, Justice Canada

Ms. Sabo reviewed the report which had been distributed on the activities and priorities of the federal Department of Justice in matters of private international law. Issues respecting electronic commerce, security and priorities with respect to international commercial law, including work on the *UNIDROIT Convention on International Interests in Mobile Equipment*, the *Convention on the Settlement of Investment Disputes* and the *Convention on the Limitation Period in the International Sale of Goods*, were addressed. Additional priority items respecting judicial cooperation and the enforcement of judgments, family law issues and the protection of property were also noted.

A questionnaire has been distributed respecting the international conventions which may assist the Department in its activities. Ms. Sabo also mentioned that Canada is closely involved in the UNCITRAL carriage of goods by sea convention and is seeking to address provincial and territorial interests in this matter. It was further suggested that the jurisdictional representatives should be active in promoting the international conventions, particularly those respecting family law.

RESOLVED:

1. **THAT** the Report on the activities of the Department of Justice be received.

2. **THAT** the Report appear in the 2003 proceedings.

14. Documents of Title: Issues Paper

Presenter: Professor Jacob Ziegel

Professor of Law, University of Toronto

Professor Ziegel reviewed his issues paper on whether the Conference should revive its work on a *Uniform Documents of Title Act*. The Alberta Commissioners had presented a draft *Uniform Documents of Title Act* to the Conference in 1995 but the Act was never circulated and never adopted.

At the time, Article 7 of the US Uniform Commercial Code was also being reviewed to provide for the use of electronic documents of title. Article 7 of the Uniform Commercial Code has now been revised and adopted in the US.

Professor Ziegel was of the opinion that it would be appropriate for the Conference to revive the topic of a uniform documents of title Act for Canada but noted certain precautions. The project must have federal government support. Professor Ziegel indicated that the federal government had not extensively exercised its jurisdiction over documents of title. There should also be uniformity between federal and provincial legislation regarding matters pertaining to documents of title. Professor Ziegel noted that the importance of documents of title is particularly apparent in the area of shipping. Bills of lading are used extensively in shipping and forms of documents of title are regularly used as collateral in international shipping. Professor Ziegel also discussed Article 7 of the US Uniform Commercial Code and noted that a new feature in Article 7 deals with the issue of electronic documents of title in commercial transactions. There should as well be provision made in the present project for the matter of electronic documents of title.

Professor Ziegel recommended that there was a strong case for reviving the project on the *Uniform Documents of Title Act* but that it would be important for the Conference, before it commits itself to the project, to consult with the federal government and the commercial community on their interest in the project. If the feedback of such consultation is positive, a working group could undertake the project, which may be similar to the work done on Article 7 of the US Uniform Commercial Code, while having the appropriate exceptions for the Canadian context.

RESOLVED:

1. **THAT** the Report be received.
2. **THAT** the Report appear in the 2003 proceedings.
3. **THAT** the chairpersons of the Civil Section and of the Commercial Law Strategy, with necessary consultation among interested participants,

establish a consultative committee to report to the Conference at its 2004 meeting as to whether the uniform documents of title project should proceed.

15. Unclaimed Intangible Property

Presenter: Russell Getz, British Columbia

Russell Getz of British Columbia presented the report of the working group on uniform legislation respecting unclaimed intangible property and also reviewed aspects of the *Uniform Unclaimed Intangible Property Act*. The provisions of the Act draw on the US *Uniform Unclaimed Property Act* of 1995. Mr Getz noted that the obligations set out under the Uniform Act would not replace obligations which are provided in the federal *Income Tax Act*. Intangible property to which the Act applies would be property held, issued or owned by a business, governmental organization or a government itself and includes all income or increments derived from the property. The Act is intended to provide a clear, comprehensive and harmonized statutory model with respect to the process for addressing the delivery of and dealing with unclaimed property. The Act had been sent for comments to a number of groups, including trustees and comptroller generals, but no specific comments had been received by the working group.

It was noted that the working group had considered Quebec legislation in this area as being similar legislation and express mention of this similarity should be made.

RESOLVED:

1. **THAT** the Report be received.
2. **THAT** the Report appear in the 2003 Conference proceedings.
3. **THAT** the draft *Uniform Unclaimed Intangible Property Act* and commentaries be adopted as a Uniform Act and recommended to the jurisdictions for enactment.

16. Security Interests in Intellectual Property

Presenters: Nathalie DesRosiers, President, Law Commission of Canada

Rod Wood, Commissioner, Law Commission of Canada

Professor Catherine Walsh, McGill University

Professor Norman Siebrasse, University of New Brunswick

Security interests in intellectual property is a project of the Law Commission of Canada and the Commercial Law Strategy. The purpose of the presentation was to report on the consultation work which had been done during the prior year, present the thirteen recommendations contained in the report and request the support of the Conference for the report. Professor Wood discussed the report and noted that the recommendations were made for the purposes of reducing the legal uncertainty of using intellectual property as collateral, enhancing the intellectual property registry systems, resolving the issue of choice of law applicable to registration and priority and improving the federal registration of security interests.

Following discussion of the recommendations, Ms. DesRosiers spoke on the consultations which had been conducted with various parties on the issue of security interests in intellectual property. The conclusion reached was that this project is necessary given that intellectual property is the new wealth. The Conference was requested to approve the recommendations and it was noted that only minor changes existed from the report presented at the prior Conference.

Professor Walsh noted that the feasibility of implementation of the registry system must be examined and she emphasized that the registry would be restricted to federally regulated intellectual property rights for which a registry system exists, not for matters under provincial jurisdiction. Professor Siebrasse was of the opinion that the choice of law approach could not be implemented by simple amendments to federal legislation.

RESOLVED:

1. **THAT** the Recommendations (1-13) of the Law Commission of Canada on Security Interests in Intellectual Property (Appendix 1) be received.

2. **THAT** the Recommendations (1-13) of the Law Commission of Canada on Security Interests in Intellectual Property (Appendix 1) be approved.

3. **THAT** the President on behalf of the ULC write the federal Ministers of Justice and of Industry recommending the implementation of the Recommendations (1-13) of the Law Commission of Canada on Security Interests in Intellectual Property.

17. Uniform Wills Act (Amendment)

Presenter: Professor Peter J.M. Lown

Alberta Law Reform Institute

Professor Lown provided a brief report on this agenda item. In 2002, the Conference had been presented with certain options to allow for the consideration of electronic wills within the area of substantial compliance with formalities for wills. The Conference had rejected the option of dispensing with the requirement of writing. A second option had proposed to redefine writing for the purpose of section 19.1 of the *Uniform Wills Act*. Professor Lown had been charged with the responsibility to draft the amendment but was concerned that the proposed amendment might have the effect of allowing oral wills recorded in digital form. This alternative had been rejected by the Conference. Professor Lown thus proposed a different method of drafting which the Conference was requested to discuss.

The proposal was to add a new subsection, 19.1(4), to section 19.1 of the *Uniform Wills Act* which would clarify that a reference to the term "electronic form" in section 19.1 means, in respect of a document, data that is recorded or stored on any medium in or by a computer system, that can be read by a person and that is capable of being produced in visible form. Professor Lown recommended that the Conference approve the proposed amendment to section 19.1 of the *Uniform Wills Act*. Professor Lown also noted that the definition used would not countermand the requirement for writing. The Conference approved the proposal.

RESOLVED:

1. **THAT** the draft amendment to the *Uniform Wills Act* be adopted as a Uniform Act and recommended to the jurisdictions for enactment.

2. **THAT** the Report appear in the 2003 Conference proceedings.

18. Extra-Jurisdictional Authority of Provincially Appointed Police Officers:
Draft Legislation

Joint Session with Criminal Section, Justice Canada

Presenters: Glen Reid, Senior Crown Attorney, Manitoba Justice

Howard Bebbington, Criminal Law Policy

Glen Reid presented the report on cross-border policing and noted that the working group had consulted extensively with the police community in the development of the legislation. This issue is important for the police. There is urgency for the legislation and a need that it be passed.

The main objective of the legislation is to establish a mechanism whereby a police force can obtain police officer status for one of its members to carry out duties in another province. A police force will be required to present a written application in which the force describes the proposed police operation and provides justification as to why police officer status is required. The written application would be provided to an appointing official who would be a senior police officer in the jurisdiction in which the duties are to be performed. The senior officer would have the authority to grant peace officer status for the temporary purpose. The appointing official would review in advance the activities of the extra-jurisdictional officer and could impose conditions on the officer's activities to promote public safety. The extra-jurisdictional officer would remain under the jurisdiction of his home province while in the other jurisdiction but would be required to comply with the direction of the local police and would be under supervision while operating in a province.

Regarding police oversight issues, the extra-provincial officer would be subject to discipline in the home province where the officer was employed. In the event of improper conduct, there would be a public disciplinary hearing in the home province where the officer is employed.

However, there could also be an inquest hearing in the province in which the conduct occurred to allow for a public airing of a complaint. The legislation also addressed the indemnification of police forces for civil liability. The police community perceives this as being a pressing issue and would encourage provincial legislatures to enact the model legislation as soon as possible.

Howard Bebbington of Justice Canada noted the draft model had been discussed with the RCMP who were in agreement, subject to two comments. There should be adequate supervision of an extra-jurisdictional officer by local police in the host jurisdiction and section 5 of the draft Act should be mandatory, that there must be consultation by the appointing official with local police forces before the appointment is made. It was also noted that the legislation would not apply to the RCMP due to their national reach and they would only be a supervising force.

Substantial discussion followed the presentation whereby delegates expressed their views concerning the legislation. Following this discussion, Mr. Bebbington stated that there had been extensive face to face consultation between the working group and civilian police oversight bodies and police authorities. The concerns which had been expressed were addressed through these consultations and would continue to be addressed in future consultations. It was also noted that police are engaging in cross-jurisdictional duties now and require this legislation to bring greater formality, transparency and ease to the cross-jurisdictional policing which is already being done.

RESOLVED:

1. **THAT** the Report of the Working Group on Extra-Jurisdictional Authority of Provincially Appointed Police Officers be received.
2. **THAT** the Report appear in the Conference 2003 proceedings.
3. **THAT** the draft *Cross-Border Policing Act* as modified by discussion be adopted as a Uniform Act and recommended to the jurisdictions for enactment.

Joint Session with the Criminal Section

Presenter: Professor Wayne N. Renke

Faculty of Law, University of Alberta

Professor Renke reviewed his issues paper which addressed whether constitutionally valid legislation may be developed that would permit an exposed individual, through an appropriate procedure, to compel a source individual to undergo testing and that would permit the exposed individual to obtain the resulting health information for purposes of treatment, conduct management or reduction of anxiety for the exposed individual.

Professor Renke discussed constitutional issues involving division of powers jurisdiction and *Charter* concerns which may arise from the mandatory disclosure of health information. He addressed the conflicting expectations of privacy involving bodily integrity and personal health information versus expectations of disclosure in situations where there is the potential of a serious illness which could be communicable. Professor Renke also cautioned that legislation in this area must serve a legitimate purpose, the means used in the legislation must be reasonable and the process of obtaining the health information and its use must be constitutionally appropriate.

Professor Renke concluded that mandatory testing and disclosure legislation would be within provincial jurisdiction and that the legislation may survive constitutional scrutiny in light of a reduced expectation of privacy arising from the moral context of the interaction of exposed and source individuals and the health interests of exposed individuals. Exposed individuals would be required to establish, on a balance of probabilities, that there is a risk of infection of serious communicable disease, that testing will promote the health interests of exposed individuals and that the benefits of medical testing and disclosure would outweigh any adverse consequences of testing and disclosure. There must also be an acceptable procedure based on prior authorization from an impartial arbitrator with respect for the principles of natural justice.

Discussion ensued following the presentation respecting issues of adjudication, limiting the use of information provided by a source person and the determination of whether reasonable precautions were taken as a factor in the decision whether to order medical testing. In particular, Health Canada had indicated that the results of testing would have no impact on the prevention of health problems as treatment must be taken within hours of exposure to be of effect and testing may not be completed in time. The constitutionality of the legislation could be determined by whether there could be valuable or useful information obtained from the testing and, based on the actual state of the science, there may not be the medical support to substantiate that there is validity to testing. Professor Renke responded that this was a valid point and that better science may advance the value of testing.

RESOLVED:

1. **THAT** the Issues Paper prepared by Professor Wayne Renke entitled *Communicable Disease Exposure and Privacy Limitation* be received.
2. **THAT** the Issues Paper appear in the Conference 2003 Proceedings.
3. **THAT** the Guidelines for Constitutionally Permissible Mandatory Testing and Disclosure legislation as set out in the Issues Paper, as modified by discussion on the floor at the 2003 meeting, be referred to the Working Group for preparation of a draft Uniform act and commentaries for presentation to the Conference at the 2004 meeting.
4. **THAT** the issues in respect of communicable diseases and the criminal law and warrant authority identified by Professor Renke in Schedules A and B to his Issues Paper be referred to the Criminal Law Section for further consideration and discussion.

20. Supplementary Resolutions

Supplementary resolutions adopted by the Civil Section and referred to the Conference respecting the establishment of a translation and drafting committee and with respect to increasing the attendance of legislative counsel at the meetings of the Conference and the participation of the Parliamentary Counsel Association of Canada were as follows:

Translation and Drafting Committee

Whereas:

The Uniform Law Conference carries out its work in the French and English languages;

The cost of translating research papers and the development of uniform legislation in both official languages has significantly increased due to the increase in their length and complexity; and Draft legislation is most effectively produced if drafting personnel, both English and French, are assigned at an early stage.

Be it resolved that:

The Civil Section of the ULCC establish a committee to examine the issues of translating research papers and developing draft legislation in both official languages and the assignment of legislative drafters to the working groups and to make recommendations for the development of a policy with respect to the translation of research papers and draft legislation and for the means to be utilized for assignment of legislative drafters;

The members of the committee shall be appointed by the President of the Conference and the Chair of the Civil Section;

The committee be instructed to examine these issues and report to the 2004 meeting of the Conference.

Assignment of Legislative Drafters

Whereas:

- The Parliamentary Counsel Association of Canada used to participate extensively in the annual meeting of the Uniform Law Conference of Canada;
- The involvement of legislative counsel in the work of the Conference is essential for the effective work of the Conference.

Be it resolved that:

- The Executive be instructed to consult with the Parliamentary Counsel Association of Canada to investigate means of increasing the attendance of legislative counsel at the meetings of the Conference and the participation of the Parliamentary Counsel Association of Canada in its work.