

## THE COMMERCIAL LAW STRATEGY, A 2003-2004 OVERVIEW

### Introduction

The Commercial Law Strategy (the "Strategy"), and the role of the National Coordinator, moved into a different phase since the 2003 Annual Meeting. The Steering Committee and the National Coordinator shifted their focus from the goals of publicity and soliciting support for the Strategy to one of direct administrative support for the Working Groups.

In addition, the Steering Committee commissioned a number of preliminary studies with a view to the initiation of further Strategy projects. Finally, the Steering Committee focused its efforts on the future of the Strategy, the direct funding for which expires at the end of March, 2005. The following report is a brief outline of the work done, work in progress, work initiated, and the Steering Committee's views on the future of the Strategy within the Uniform Law Conference of Canada.

### Work Completed in 2003-2004

#### *Uniform Securities Transfer Act*

The Strategy, through the work of Eric Spink, Max Paré (of the OSC) the Canadian Securities Administrators' Uniform Securities Transfer Act Task Force, and the ULCC's Committee on Reform of Canadian Secured Transactions Law (see below), was instrumental in the completion of the Uniform Securities Transfer Act (the "USTA"), which work was substantially finished as of March 31, 2004. With the exception of the enacting language, the USTA, and consequential amendments has passed the comment period prescribed by the Canadian Securities Administrators. As noted by Msrs Spink and Paré in their report, the implementation - by the provinces - of the USTA is contingent on the implementation of the *Convention on the law applicable to certain rights in respect of securities held with an intermediary*.

#### *Civil Enforcement of Money Judgments*

The Uniform Civil Enforcement of Money Judgments Act Working Group also concluded the work it commenced in the year 2000. As of March 31, 2004, the Working Group had completed the majority of the substantive work on the draft Act. Over the course of two face-to-face meetings and a number of conference calls, the last of which took place in June of this year, the Working Group created a draft Act of 16 Parts. As noted in Professor Robinson's report, the major feature of the draft Act is that it provides for the registration of a notice of judgment, in most cases in the Personal Property registry of a province or territory.

## *Documents of Title*

As a consequence of a consultative conference call of industry experts in January of 2004, the Documents of Title project was postponed. This consultative group was convened at the suggestion of Professor Jacob Ziegel in the paper he presented at last year's Annual Meeting. The participants on the conference call determined that it was too soon, and there was not enough industry or governmental interest in a review of this area of law, for the ULCC and the Strategy to initiate a project. As noted in her *clôture* report (and the attached memorandum), Jennifer Babe notes the following reasons for the decision to postpone the project:

1. The law of documents of title is in flux, and a project initiated under the auspices of the ULCC and the Strategy may be premature to achieve harmony with all aspects of law and the parties involved in international trade.
2. Technology has not developed to the point where it would be effective and reliable. Thus industry would unlikely have confidence in any reformulation or revision of the law and created prior to technological implementation.
3. The shipping industry, for whom documents of title are crucial, will be reluctant to switch to a new system rather than to depend on their current methods for secure commercial transactions.

As a result of this consultation, the Steering Committee of the Strategy determined that the project should be postponed.

## *Reform of Canadian Secured Transactions Law*

The Secured Transactions Working Group is the final project whose work terminated in 2004. The Working Group's efforts were primarily concentrated on the interface between provincial PPS Acts and the USTA, and the conflict of laws issues which the PPSA-USTA and the Hague Convention raise. The PPSA-USTA interface and the conflicts of law issues were discussed over the course of a number of meetings with the CSA Task Force and conference calls over the course of the past year, terminating shortly after the fiscal year-end of March 31, 2004.

Professor Ron Cuming notes in his report to this Meeting that there remains significant interest on the part of the Working Group members to work towards a *Uniform Personal Property Security Act*, however, the Working Group feels that such work would require two to three years of Working Group collaboration.

## **Work In Progress in 2003-2004**

### *Uniform Franchise Act*

The Uniform Franchise Act Working Group has, pursuant to instructions from the ULCC at the 2003 Annual Meeting, completed a draft Uniform Franchise Act. The drafting, review, and commentaries were accomplished over the course of two face-to-

face meetings and a number of conference calls involving members from British Columbia to Nova Scotia. The Working Group intends to complete its mandate – to complete draft uniform regulations to accompany the draft Uniform Act – by December 31, 2004.

The Working Group spent a significant amount of time addressing the issue of good faith and fair dealing in franchise law, and the details of these discussions, and the conclusions of the Working Group are contained in the report from the Working Group chairs, Frank Zaid and John Sotos. The draft Uniform Act and the Working Group annual report are included with the meeting documentation.

### **Work Initiated/Completed in 2003-2004**

#### *Illegal Contracts Project*

The Illegal Contracts project was initiated by the Steering Committee in early 2004, and built on the work Professor Waldron presented to the ULCC at the 2003 Annual Meeting. Professor Michelle Cumyn of the Université de Laval and Arthur Close, of the BCLI, collaborated on the creation of a draft Uniform Illegal Contracts Act and commentaries and a review of the relevant law of illegal contracts in the Quebec (Civil Law) context. This review was deemed necessary by the Steering Committee since prior work on illegal contracts addressed only common law issues. It was noted over the course of a number of conference calls that the Quebec Civil Code already contains provisions which address illegal contracts and, as such, a determination of how these provisions parallel common law treatment of illegal contracts was both necessary and desirable.

The draft Uniform Act and commentaries, and Professor Cumyn's report, are included in the Annual Meeting documentation.

#### *Fraudulent Preferences Project*

In early 2004, Professor Dick Dunlop was retained to complete a preliminary study of the law of fraudulent preferences and conveyances. This preliminary report was completed by the end of the 2003-2004 fiscal year. Professor Dunlop's report concluded that the area of law is one that requires significant reform, as current jurisprudence and legislation are confusing, inefficient, and outdated. Professor Dunlop noted that any reform or harmonization of legislation would require expressions of interest from a number of provincial governments as well as a long-term commitment from the ULCC.

Professor Dunlop's report is included in the Annual Meeting documentation.

## *Personal Exemptions Project*

In early 2004, the Steering Committee retained the services of Professor Thomas Telfer, of the University of Western Ontario, to complete a preliminary paper on the subject of personal exemptions from seizure in the Canadian context. Professor Telfer was retained due to his previous authorship of a paper he presented on the subject at the Commercial Law Symposium at the University of Toronto in October, 2003. Professor Telfer's mandate was to work both in conjunction with, and parallel to, the Civil Enforcement Working Group, as it was acknowledged that personal exemptions from seizure fall within this area of law. As noted in his report Professor Telfer's canvass of this area of law led him to question whether a uniform exemption regime was desirable or possible, and to pose the same question regarding the proposed federal exemptions regime under the Bankruptcy & Insolvency Act.

Professor Telfer's report is included in the Annual Meeting documentation.

## **Future Projects**

Due to the termination of a number of projects under the auspices of the Strategy, the Steering Committee has proposed a number of projects for consideration by the Civil Section for future work. The Steering Committee has solicited interest from various individuals for the completion of these projects. The proposed projects include the following:

- *Limitations Act*: The proposal is to develop uniform limitation period legislation in order to harmonize such across Canadian jurisdictions.
- *Charitable Fundraising*: this project would examine the law governing private fundraising and the standards which govern such activity with a focus on consumer protection.
- *Trade Secrets Act*: The project would constitute a review of the current law of Trade Secrets and an update of the existing ULCC *Uniform Trade Secrets Act*.
- *Enforcement Statutes Up-date*: In particular, this project would focus on an update of cross-border family orders in areas of the law in which legislation does not currently exist.
- *Mortgage Fraud/Discharge of Mortgage Title Insurance*: This preliminary study would determine if recent developments regarding delayed or fraudulent mortgage discharges requires legislation.
- *E-Commerce*: A feasibility study for possible future legislative development.

- *Inter-Jurisdictional Class Actions*: A feasibility study to determine how class-actions taking place in more than one Canadian jurisdiction could be consolidated based on current law.
- *Insurance Act Up-date*: In view of new jurisprudence in this area of law, the project would look to consequential changes to the Insurance Act.

### **Administrative Efforts of the National Coordinator and Steering Committee**

In addition to the administrative support role of the National Coordinator vis-à-vis the working groups, the resources of the CLS were committed to updating the ULCC website and communication tools (listserv). Further, in a continued effort to conform to the ULCC's bilingual mandate, documentation resulting from a significant number of projects, as well as uniform legislation, was translated and posted, in PDF format, on the website for ease of access by both stakeholders and the public.

These documents are now available at <http://www.ulcc.ca>.

The above is respectfully submitted as an overview of National Coordinator Activities and Steering Committee activities in 2003-2004

Tony Hoffmann  
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