UNIFORM LAW CONFERENCE OF CANADA

EDMONTON, ALBERTA

AUGUST 20 – 24, 2006

CIVIL SECTION MINUTES

A. General Resolution respecting Appearance of Reports in the Proceedings

RESOLVED:

THAT the written reports presented to the Civil Section and the joint session of the Civil and Criminal Sections appear in the 2006 Proceedings; and

THAT a summary of the oral reports presented to the Civil Section and to the joint session of the Civil and Criminal Sections appear in the 2006 Proceedings.

B. Reports Presented and Specific Resolutions Concerning Those Reports

UNIFORM TRADE SECRETS ACT--REPORT

Presenters: Clark W. Dalton, National Co-ordinator, Commercial Law Strategy

At the August 2005 ULCC meeting, Clark Dalton presented a paper prepared by Tony Hoffman on the *Uniform Trade Secrets Act* (UTSA). The UTSA was initially approved by the ULCC in 1987 and adopted in 1989, but was not subsequently enacted by any provincial or territorial legislature. It was resolved at the 2005 ULCC meeting that a review of the UTSA be undertaken and a report made in 2006. Mr. Dalton made that 2006 report. His conclusion was that there is no need to make significant revisions to the UTSA, except perhaps to notes to s. 13 dealing with the limitation of actions (because the original UTSA predated enunciation of the common law discoverability principle by the Supreme Court of Canada).

RESOLVED:

1. **THAT** the recommendations in the report be adopted.

FAITH BASED ARBITRATION–STATUS REPORT

Presenter: Gail Mildren, General Counsel, Civil Legal Services, Manitoba Department of Justice

At the 2005 ULCC meeting, two presenters from the Ontario Ministry of the Attorney General (John Gregory and Anne Marie Predko) reported on the discussions in that Province as to faith-based family arbitration under Ontario's *Arbitration Act*.

Gail Mildren of Manitoba gave an update on the issue of faith-based family arbitration. She noted that since last year's report, Ontario has adopted legislation to deal with the issue. The *Family Statute Law Amendment Act 2006*, S.O. 2006, c. 1, amended existing legislation to create a new statutory framework for family arbitrations generally. That Act received royal assent in February 2006, but the family arbitration parts of it are not in force pending the making of regulations.

Ms. Mildren noted that the *Family Statute Law Amendment Act 2006* does not focus on the use of faith-based law, but rather on the exclusive use of the law of Ontario or other Canadian jurisdictions in family arbitrations. The legislation effectively bars enforcement of family arbitrations conducted under religious law or laws of other countries and family law arbitrations made according to the arbitrator's own notions of fairness. While persons may engage in arbitrations under other laws, they will have no legal effect. The Ontario government is currently studying submissions on the development of regulations that will govern the training of arbitrators, the conduct of family arbitrations, and records related to these arbitrations.

Ms. Mildren also noted that because family law in Canada is not harmonized generally, harmonization in this particular area may be difficult.

RESOLVED:

1. **THAT** the Civil Section Steering Committee continue to monitor the issues and matters addressed in the Report and continue to liaise with the Coordinating Committee of Senior Officials, Family Law respecting the potential for uniform legislation in this field.

FORMS OF BUSINESS ASSOCIATIONS: UNIFORM INCOME TRUSTS ACT – STUDY PAPER

Presenter: Wayne D. Gray, McMillan Binch LLP

Mr. Gray reported to the ULCC on behalf of the working group that was struck following the Report on Forms of Business Associations in Canada delivered at the August 2005 meeting of the ULCC. The working group was comprised of individuals with expertise in a wide range of legal disciplines and its members were drawn from across the country.

The 2006 Report provides a brief overview of the income trust, including when, how and why it is used and explains why this vehicle has found favour with investors (due to both its favourable tax attributes when compared to corporations and its high payment ratio relative to dividend paying corporations). The Report summarizes how Canadian tax law treats corporations, trusts and limited partnerships differently.

The methodology followed by the working group was to use the *Canada Business Corporations Act* as a basis for comparison because it serves as a *de facto* model corporate statute for many provinces and because using the CBA as a frame of reference facilitates uniformity.

The working group takes the position in the Report that the advantages of uniform income trust legislation at this time outweigh the marginal advantages (if any) that might be obtained in diversity. The focus of the proposed legislation would be to achieve fair and balanced treatment for the main actors in the income trusts sector, namely unitholders, creditors, trustees and management, in a manner consistent with their commercial expectations. The guiding principles underpinning the analysis contained in the Report are as follows:

(a) Balance has to be struck between superimposing corporate rules onto income trusts in the interest of investor protection while at the same time preserving the flow-through tax status of the trust for the ultimate benefit of those same investors.

(b) Some provisions in the Uniform Act would be mandatory and override any provisions in Declarations of Trust ("DOTS"). Parties would be unable to contract out of such mandatory rules. On the other hand, in circumstances where a mandatory rule was not recommended in the Report, the working group gave consideration to the adoption of an optional or model provision. There are three types of optional provisions discussed: opt-in; opt-out; and default.

(c) The Report focuses on mutual fund trusts that are reporting issuers (other than mutual funds in which investors are entitled to receive, after demand, an amount calculated by reference to a proportionate interest in the net assets of the fund).

(d) Subsidiary trusts (*inter vivos* trusts that are directly or indirectly owned by the trustees of the reporting issuer) form part of the subject-matter of discussion.

The Report makes 40 recommendations which cover the following topics:

1 – 4 Scope of the statute (types of income trust included and types of trust not included);

5 Statutory purpose (to clarify and modify certain laws applicable to income trusts and subsidiary trusts and to advance the cause of harmonizing the law applicable to these trusts with the laws in other provinces);

6 Legal status of trust (nothing in Act to be construed as making an income trust a body corporate);

7 Unitholder immunity (adopting the immunity formulation found in the Ontario liability shield statute);

8 Unitholder immunity to operate retroactively;

9 Amendments to partnership legislation re: relationship among unitholders in income trust is not a partnership;

10 Equality of units and disenfranchisement of controlled subsidiaries (units of same class or series are equal in all respects; controlled subsidiary entity not permitted to vote any units that it holds in its parent income trust);

11 Appointment or election of trustees (at unitholder meetings) and filling vacancies;

12 Removal of trustees (by simple majority vote);

13 Unitholder proposals (regime loosely modelled on shareholder proposal regime in CBCA);

14 Requisitioning unitholder meetings (by not less than 5% of unitholders holding voting units);

15 Statutory investigations (proposing a regime similar to Part XIX of the CBCA);

16 Oppression remedy (proposing a remedy modelled on s. 241 of the CBCA that would only apply on an opt-in basis);

17 Derivative actions (proposing a remedy modelled on ss. 239 and 240 of the CBCA, but on an opt-in basis only);

18 Dissent and appraisal remedy (proposing a general dissent and appraisal right modelled on s. 190 of the CBCA, which would only apply on triggering events set out in the DOT or when ordered by a court as part of a statutory arrangement) ;

19 Trustees' powers to manage or supervise expressed in broad terms; unitholders would not have power to direct trustees how to act or to compel them to act;

20 Trustees' express power to delegate to internal or external management (subject to express exceptions);

21 Fiduciary duties of trustees (stated to be owed exclusively to unitholders as a general body and, in the case of a subsidiary trust, to beneficiaries of the trust as a general body);

22 Duty of care of trustees (stated to be owed to the unitholders as a general body and, in the case of a subsidiary trust, to beneficiaries of the trust as a general body);

23 Inability to exculpate trustees (no provision in DOT, a contract or a resolution can relieve trustee from duties under Act or relieves trustee from liability for breach of Act);

24 Trustee conflicts of interest (proposing minimum conflict of interest code modelled on s. 120 of the CBCA);

25 Corporate and individual trustees (expressly permits both types of trustees, with certain limitations on corporate trustees);

26 Trustees' statutory and contractual liability (limited to the *corpus* of the trust unless the debt instrument or other contract expressly states otherwise);

27 Trustees' tortious liability (limited to the *corpus* of the trust unless circumstances are such that a corporate director would be personally liable for the tort);

28 Trustee indemnification (giving rights of indemnification out of trust assets and provided trustees comply with fiduciary duties);

29 Liability insurance for trustees (permitting trustees to approve the purchase of liability insurance out of trust monies);

30 Trustee resignation (trustees free to resign at any time provided that at least one trustee remains; provision for court approval of resignation of last trustee);

31 Claims of unsecured creditors and others against the trust *corpus* (unsecured creditors have direct unsecured claim against the *corpus* of the trust);

32 Arrangements (proposing a statutory arrangement provision modelled on s. 192 of the CBCA);

33 Reorganizations (proposing a statutory reorganization provision modelled on s. 191 of the CBCA);

34 Compulsory acquisitions (proposing a compulsory acquisition provision to facilitate take-over bids modelled on s. 206 of the CBCA);

35 Compelled acquisitions (proposing a compelled acquisition provision modelled on s. 201.1 of the CBCA);

36 Choice of governing law (proposing including express conflict of law rules in the Act);

37 Change of governing law (allowing unitholders to change choice of law in DPT by not less than 2/3rds vote);

38 No registration requirement;

39 and 40 – Matters adequately covered under securities legislation or in standard declaration of trust

The Report concludes by reiterating that any new legislation dealing with income trusts must be sensitive to the distinctive tax treatment that led to the rise of income trusts as an efficient vehicle for employing investment capital and operating more stable, cash-generating businesses. The Report does not recommend simply grafting corporate law principles onto income trusts, but rather a more principled convergence.

Attached to the report is a Schedule which sets out the effect that the Report recommendations are expected to have on existing declarations of trust.

RESOLVED:

1. **THAT** a second Working Group be established to consider the relation of the recommendations in the report and the directions of the Conference to Quebec law, and that this Working Group report its conclusions and recommendations to the Working Group described below as soon as possible, but no later than December 31st, 2006; and

2. **THAT** a Drafting Group be established to prepare a uniform act and commentaries based on the recommendations in the Report and in accordance with the directions of the Conference, including any recommendations received from the first Working Group described above, for consideration at the 2007 meeting.

SUPPLEMENTAL REPORT ON MULTI-JURISDICTIONAL CLASS PROCEEDINGS IN CANADA

Presenter: Peter J.M. Lown, Q.C., Alberta Law Reform Institute

In 2004, the ULCC established a committee on National Class and Related Inter-Jurisdictional Issues. That committee prepared a report that included a recommendation as to legislative changes that could be introduced into the *Uniform Act on Class Proceedings*. The key recommendations of the committee were amendments to the *Uniform Act* to: (a) allow courts to certify, on an opt-out basis, a class that includes class members residing outside the jurisdiction; (b) changing current rules governing jurisdiction to resolve conflicts between potentially competing class actions; and (c) to develop a central class action registry. Four areas were identified for follow-up subsequent to the 2005 ULCC meeting. The supplemental report of the special working group presented by Mr. Lown dealt with the following four follow-up areas:

1. The definition of "National Class";

2. The issue of *res judicata*;

3. The issue of whether greater precision was needed in the criteria found in sub-paragraph 3(e) of the 2005 Report; and

4. The proposed Canadian class proceedings registry.

The special working group deals with these follow-up areas in its 2006 supplementary report as follows:

1. It recommends that the 2005 Report be amended to use the term "Multi-Jurisdictional Class" rather than "National Class" to avoid the confusion caused by use of the latter term.

2. *Res judicata* does not actually apply in the context of multi-jurisdictional class actions. Certification of a class action by one court will not in of itself preclude

another court from also exercising jurisdiction where there is a real and substantial connection between the matter and the other forum. Further, provincial class action legislation cannot operate extra-territorially so as to oblige a court in another province to give preclusive affect to the determinations of the certifying court. Therefore, rather than attempting to direct one universal outcome on these issues, the 2005 Report set out criteria in sub-paragraph 3 (e) to assist the court to answer the following key issues: 1) when should the court consider certifying a proceeding that purports to bind a claim with a reasonable and substantial connection with another forum? and 2) conversely, when should a subsequent court, where the claims of a person are already included in a class certified by another court, give preclusive effect to the certification of a class action by the other court?

3. The special working group concludes that the criteria contained in sub-paragraph 3 (e) of the 2005 Report are consistent with the principle of order and fairness. The special working group does, however, recommend some refinements to the specific criteria identified in sub-paragraph 3 (e).

4. The special working group puts forward two options in relation to the proposed Canadian class proceedings registry. Option 1: Make the registry a requirement of the Rules of Court in the provinces and territories. Class counsel moving for certification would provide notice to the other class counsel with overlapping class actions based on information in the registry. Other class counsel could then make submissions to a court that is considering certification of a class action. Option 2: The registry would alert the court and parties of the existence of overlapping class actions, but it would be up to the court whether to send out notice to other counsel and whether or not to accept submissions.

Appendix 1 to the Report sets out the revised recommendations of the special working group.

RESOLVED:

1. **THAT** the recommendations in the Supplementary Report regarding a definition of "national class action" be adopted.

2. **THAT** the recommendations in the Supplementary Report respecting *res judicata* be adopted.

3. **THAT** the legislative recommendations in the Supplementary Report, as amended by direction from the Civil Law Section, be adopted and amendments to the *Uniform Class Proceedings Act* be drafted in accordance with the recommendations and the directions of the Conference and circulated to the jurisdictional representatives. Unless two or more objections are received by the Executive Director of the Conference by a date to be determined by the Civil Section Steering Committee, but not later than November 30th, 2006, the amendments to the *Uniform Class Proceedings Act* should be taken as adopted and recommended to the jurisdictions for enactment.

4. **THAT** the Conference endorse and pursue the creation of the Canadian Class Proceedings Registry, to be operated by an appropriate national body. The Registry will include all class action filings and annotation of any other subsequent material events. Counsel applying for certification of an action will be responsible for providing the relevant information at the time the statement of claim is filed and for updating the information at certification, and/or when other material events occur.

5. **THAT** the recommendation in the Supplementary Report relating to the Guidelines Applicable to Court-to-Court Communications in Cross Border Cases where multiple class actions are certified in relation to the same issues, be recommended to the Class Action Committee of the Canadian Judicial Council.

CERTIFICATE OF TITLES SYSTEMS FOR MOTOR VEHICLES IN CANADA—STUDY PAPER

Presenter: Professor Ronald C.C. Cuming, College of Law – University of Saskatchewan

Professor Cuming prepared his Report at the request of the ULCC Commercial Law Strategy Supervisory Committee. At this point, no jurisdiction in Canada has implemented a certificate of title system for motor vehicles. Such systems do exist in the United States but are not uniform. There is a *Uniform Certificate of Title Act* prepared by NCCUSL.

A certificate of title system for motor vehicles can be compared to a Torrens system for lands. A transfer without registration of a certificate would not be effective and a security interest not filed in a registry or on title could not bind any third party. The policy reason for such legislation would be to bring about certainty as to legal ownership for law enforcement, buyers and creditors. Currently, because of the *nemo dat quod non habet* principle, a person taking title bears the risk that the person selling the vehicle is not the owner. However, there are some measures already in place that ameliorate that problem even in a simple registration system like that in existence in most Canadian jurisdictions. In a great bulk of cases, the information found in the registry is sufficient protection: in most cases involving stolen vehicles, the theft would be reported to the registry. Courts have recognized that determination of ownership for the purposes of highway traffic legislation does not control the outcome of a dispute over who the owner is from a legal perspective.

Professor Cuming raises the following points for consideration:

1. Whether or not a certificate of title system for motor vehicles would apply to all cars or just more just high-end vehicles;

2. How the legislation would deal with vehicles already in the possession of persons claiming to be owners;

3. A national certificate of title system would not be possible, since the legislation would be a matter of provincial competence. This means there would need to be a uniform set of choice of law rules regulating certain registration issues; and

4. A certificate of title system would require a great deal of administration.

Canadian jurisdictions already have sophisticated registries dealing with security interests taken over chattels, including motor vehicles. In Professor Cuming's view, there is no sense to duplicating this sophisticated regime or taking away income from personal property security registries by creating a separate motor vehicle certificate of title registry, and he recommended taking no action at this time.

RESOLVED:

1. **THAT** the recommendation in the Report be adopted.

MORTGAGE FRAUD AND DISCHARGE ISSUES—STUDY PAPER

Presenter: Sidney H. Troister, Torkin Manes Cohen & Arbus LLP

The frauds committed by Martin Keith Wirick, a former member of the Law Society of British Columbia, in relation to mortgages has focused attention on mortgage fraud generally. Mr. Troister reviewed the factual context of the Wirick affair and considered whether legislative reform was required. Mr. Troister concludes in his Study Paper that failure of lenders to provide discharges in a timely fashion did not give rise to the problem; rather, in his view, the problem arose due to conveyancing practice in British Columbia. A vendor is obligated to provide good title free of any encumbrances before closing, but frequently cannot do so because the vendor needs to apply the purchase funds to clear mortgages off title. In British Columbia and other provinces, the practice developed of a solicitor giving undertakings to discharge mortgages. The practice in Ontario at one time was for the vendor to give the undertaking (not the solicitor), but if the vendor became insolvent this was not of any benefit to the purchasers. Mr. Troister cites Ontario jurisprudence for the proposition that real estate practice should not trump the clients' contractual agreement. Mr. Troister notes that in Ontario put place a "two cheque" system whereby the amount required to discharge a mortgage was paid directly to the bank rather than the vendor's lawyer.

The standard forms of agreement have been amended in some provinces, including British Columbia, to allow lawyers' undertakings and to confirm that the discharge of mortgage need not be provided on closing. Mr. Troister advised that the Law Society of British Columbia wanted to implement the two cheque system in that province but met with resistance. Instead, the Law Society of British Columbia put in place rules requiring proof of that the mortgage is paid out and requiring that a discharge be registered within in a set number of days.

Mr. Troister concluded that on his analysis, no legislation is required to address mortgage fraud.

RESOLVED:

1. **THAT** the recommendation in the Report be adopted.

LIMITATION PERIODS AND OTHER ISSUES IN INSURANCE STATUTES— STATUS REPORT

Presenter: Lisa A. Peters, Canadian Bar Association – British Columbia

At the 2005 meeting of the ULCC, Peter Lown summarized the paper prepared by the late Professor Jim Rendall on the issue of limitation periods in insurance statutes. Professor Rendall focused on the appropriate formulation of a limitation period or periods to apply to an insurance claim and the question of whether such limitation period or periods should be set out in the insurance statute or the more general limitations statute.

Since the 2005 meeting, British Columbia and Alberta have embarked on the process of reviewing their insurance statutes and obtaining input from industry and other stakeholders through consultation sessions. The Atlantic Provinces are also engaged in an active review of their insurance statutes with a view to harmonization.

Alberta is expected to introduce legislation in the spring of 2007, B.C. in 2008.

The limitation period issues, and the desirability of harmonization on the resolution of such issues where possible, naturally arise in the course of these ongoing insurance statute reviews. Other areas identified as having possible scope for harmonization include dispute resolution mechanisms; protection of innocent co-insureds; and the question of whether statutory conditions should continue to form an integral part of insurance legislation.

RESOLVED:

1. **THAT** the Civil Section Steering Committee continue to monitor developments respecting the issues raised in the Report and continue to work with the Canadian Council of Insurance Regulators to address these issues.

COLLATERAL USE OF CROWN BRIEF DISCLOSURE (JOINT SESSION OF THE CIVIL AND CRIMINAL LAW SECTIONS)

Presenters: Crystal O'Donnell – Ontario Ministry of Attorney General, Crown Law Office - Civil

David Marriott – Alberta Justice, Appeals Branch, Criminal Justice Division

This Study Paper examines the legal and policy issues arising out of the collateral use of prosecution materials, discusses the different policies and procedures adopted by some of the provinces and provides suggestions for possible reforms.

The collateral use and disclosure of Crown Brief materials impacts on a number of legal rights and interests including solicitor-client privilege; litigation privilege; public interest privilege; protection of privacy rights; Crown immunity; criminal disclosure; implied undertakings; jurisdiction; and overarching concerns regarding the administration of justice and the integrity of the prosecution.

A seminal case dealing with Crown Brief disclosure is the Ontario Court of Appeal decision in *D.P. v. Wagg* (2004), 239 D.L.R. (4th) 501 (Ont. C.A.) ("*Wagg*"). In the Divisional Court, Mr. Justice Blair refused to make a blanket rule prohibiting disclosure, and instead set out a screening process by which it could be determined whether a Crown Brief should be disclosed in a collateral proceeding. He also confirmed that the mere relevance test used in the civil proceeding context would not be sufficient reason to require disclosure of a Crown Brief. The process outlined in *Wagg* involves notice to the Attorney General and an obligation on the part of the Attorney General to review the documents with a view to ensuring that disclosure issues were determined with due consideration of the public interest. The screening mechanism outlined by Blair J. was upheld by the Court of Appeal, although that Court noted that the screening mechanism would require additional resources and increased costs.

The Study Paper outlines a number of issues arising including the following:

- The term "Crown Brief" is most often used to describe the entire Crown file (not just the part provided to the accused). This gives rise to difficulty in terms of what materials a party in a collateral proceeding making a *Wagg* application is seeking production of.

- Crown Brief materials arise from the investigative process and as such are often gathered by way of legal compulsion and the use of legitimate legal coercive force. There is a need to protect the criminal trial process, protect informants, avoid witness contamination and ensure witness safety. The Study Paper notes that the administration of justice relies on civilian witnesses coming forward.

- There are certain rules contained in the *Youth Criminal Justice Act* concerning production of youth records and in the *Criminal Code* as to release of any evidence obtained by compulsion of a warrant.

- There is some inconsistency in the case law in terms of whether privilege is waived by the Crown when material is provided to the accused in a criminal trial as required by *R. v. Stinchcombe*. There is also a question as to the extent to which the Crown can rely on either solicitor-client or litigation privilege for work product.

- There are varying procedures in terms of *Wagg* applications in each province. There is also an issue in some provinces as to whether the Crown as a "non-party" to collateral proceedings is subject to discovery at all.

- The Ontario experience has established that Crown Brief disclosure applications have imposed a significant administrative burden on the Crown Law Office (an estimated 9,000 hours of time docketed in 2005).

- There is a distinction made in recent Ontario cases between freedom of information and protection of privacy requests and *Wagg* applications.

- There are special issues that arise in the context of child protection proceedings. There is a recent Ontario case stating that the *Wagg* screening mechanisms should not apply in this context.

- In the context of disciplinary tribunals in which disclosure and collateral use of the Crown Brief may be sought, procedural issues may arise.

- There is an issue as to whether the *Charter* applies to the disclosure of private information contained in a Crown Brief.

The Study Paper concludes with a suggestion that there be a consistent approach across the country in responding to the requests for disclosure of Crown Brief and criminal investigation documents for use in collateral proceedings. It further recommends that Protocols and Memoranda of Understanding between key stakeholders, such as the police and child protection agencies and disciplinary tribunals, be drafted to assist in the sharing of vital information in urgent cases and in particular types of proceedings. The Study Paper acknowledges that difficulties may arise in addressing jurisdictional concerns regarding which court or forum has the ability to hear any motions or applications for particular documents and which level of government will be required to make the necessary changes.

RESOLVED:

1. **THAT** a joint Working Group be established to consider the issues raised in the Report and, in accordance with any directions of the Conference, report and make any recommendations to the Conference in 2007 respecting the desirability and feasibility of legislative or non-legislative initiatives to promote uniformity in the use of Crown Brief material in collateral proceedings.

STATUS REPORT ON COMPENSATION FOR THE WRONGFULLY CONVICTED (INFORMAL REQUEST TO DRAFT MODEL LEGISLATION)

Presenters: Lynn Romeo, Acting Director, Civil Legal Services, Manitoba Department of Justice

Earl Fruchtman, Acting Director, Crown Law Criminal, Ontario Ministry of the Attorney General

Canada acceded to the *United Nations International Covenant on Civil and Political Rights* in 1976. Article 14(6) of that Convention establishes the right to compensation

according to law in cases of miscarriages of justice of a person who has been convicted and suffered punishment as a result of the conviction. There is presently no statutory regime in Canada (federally or provincially) establishing a program of compensation for persons who have been wrongfully convicted.

In 2002, the Federal /Provincial/Territorial Ministers Responsible for Justice (FPT) released the Report of the Working Group on the Prevention of Miscarriages of Justice. At the same time, the Coordinating Committee of Senior Officials (Criminal) established a working group to review guidelines approved by the FPT in 1998 relating to compensation of wrongfully convicted persons. Work on this issue is ongoing and will be monitored.

RESOLVED:

1. *See General Resolutions above.*

REFORM OF THE LAW OF FRAUDULENT CONVEYANCES AND PREFERENCES—PROJECT PROPOSAL

Presenters: Professor Tamara Buckwold, Faculty of Law, University of Alberta

In 2004, a feasibility study was presented to the ULCC by Professor Richard Dunlop. This project proposal follows-up on that study.

Professor Buckwold's proposal sets out specifics of the process contemplated for the project. The process would have four primary phases: 1) research, 2) preparation of a working paper, 3) consultation and, 4) final report including a draft act.

Professor Buckwold identified three questions arising:

1. The scope of the research phase of the project. There are two options: a) devoting an extensive effort to attempting to define what the law is in each province and territorial jurisdiction as represented by the judicial interpretation and application of extant legislation, or b) identifying the issues raised by current statutory regimes and case law in aid of the design of an appropriate and effective legislative solution. Under the second approach, significant reliance would be placed on research and synthesis that is already available in texts and existing studies. The proposal sets out a research plan to be followed if the second approach is adopted.

2. Should the project be bijural in nature?

   Production of draft legislation that is relevant to Quebec as well as to common law jurisdictions demands that Quebec law be taken into account. Given the limitation of the project leader's expertise and linguistic facility, the time line and budget for this project, and the desirability of designing legislation that interfaces with reformed judgment enforcement law legislation, Professor Buckwold makes

suggestions for incorporating input from Quebec at key points in the project schedule.

3. How the consultation phase of the project is to be approached. Professor Buckwold notes that a credible consultation process need not entail unduly elaborate or expensive measures. She discusses targeted e-mailings and web-based surveys.

In discussion it was noted that significant reform in this subject-area has already occurred in the context of the Québec *Civil Code* and that input from civil lawyers would be essential.

RESOLVED:

1. **THAT** a Working Group be established to prepare a working paper respecting issues, options, and possible recommendation for consideration at the 2007 meeting.

REPORT FROM THE CHAIR OF THE DRAFTING SECTION

Presenter: Brian Greer, Chief Legislative Counsel, Ministry of Attorney General, British Columbia

Mr. Greer directed the Conference to the section of the ULCC website that traces the history of the Drafting Section, which was founded in 1968. The Drafting Section prepared the Uniform Drafting Conventions and deals with matters referred to it by the Conference, including drafting of uniform provisions for uniform statutes. He noted that the Association of Legislative Counsel meets annually. On Mr. Greer taking leave next year, Valerie Perry of Manitoba will chair the Drafting Section.

RESOLVED:

1. **THAT** the Conference express its thanks to Brian Greer for his report and his contribution as Chair of the Drafting Section.

REFORM OF GENERAL PARTNERSHIP LAW: THE AGGREGATE vs. ENTITY DEBATE—STUDY PAPER

Presenter: Professor Heather D. Heavin, College of Law University of Saskatchewan

Professor Heavin's paper reviews proposed reforms of general partnership law in both the United States and the United Kingdom. In 1994, NCCUSL adopted the *Revised Uniform Partnership Act* (RUPA), which substantially revised the 1914 *Uniform Partnership Act*. Further amendments were made to RUPA in 1997, including provisions pertaining to limited liability partnerships (RUPLA). Both RUPA and RUPLA have been adopted by some U.S. States. In 2003, the U.K. Law Commission and the Scottish Law Commission

authored a report on partnership law, which report included a revised *Partnership Act* (Draft Bill). The reforms proposed in this joint report have not yet been implemented. Both the existing U.K. statutes and the 1914 U.S. *Uniform Act* take the aggregate approach to partnership, *i.e.*, the partnership is a mere aggregation of individual partners and is not an entity separate and distinct from the partners. Both RUPA and the U.K. law reform Bill take the approach of abandoning the aggregate view in favour of giving separate legal status to a partnerships (other than for tax purposes). The motivation behind these reforms was to provide for continuity of the partnership after changes in membership and to allow for the partnership to hold title to property (which is a particular issue in the UK).

Professor Heavin reviews the current law in Canada, which takes the aggregate approach to partnerships, and summarizes the tax treatment of partnerships in Canada, the U.S. and the U.K. She notes that both the existing partnership legislation and partnership agreements themselves deal with many of the issues or concerns that arise from the aggregate model of partnership (*i.e.*, the disadvantages to creditors and others). Professor Heavin notes that if Canadian jurisdictions were to change to an entity model, the tax policy applicable to partnerships would have to be negotiated with the federal and provincial governments. A change to entity status also raises the question of whether partners would automatically obtain limited liability status in the same way as shareholders in a corporation. It also raises questions about liability of partners to creditors.

The Report concludes that there is a good deal of uniformity between the provinces under the current statutory regimes and that the aggregate approach to partnership also promotes freedom of contract. Professor Heavin raises the question whether lack of separate legal personality for partnerships has actually created any problem in Canadian jurisdictions, and whether there were any real problems with operating partnership that need to be addressed. In her view, the desire to provide continuity at will does not justify any reform in Canadian law. The only other possible reason for reform would be if there are other problems, such as the inability of partnerships to hold real property.

In discussion it was noted that Québec had reformed its general law of partnership in the 1990s.

RESOLVED:

1. **THAT** a Working Group be established to prepare, in accordance with the directions of the Conference, a study paper examining the merits of the options set out in the Report, and containing legislative recommendations for consideration at the 2007 meeting.

INTER-JURISDICTIONAL ENFORCEMENT OF TAX JUDGMENTS—STATUS REPORT

Presenter: Vincent Pelletier, Directorate of Research and Ministerial Legislation, Ministry of Justice, Québec

This Report follows up on the Report presented by Frédérique Sabourin at the 2005 ULCC meeting. There were differing views expressed at the 2005 meeting as to whether tax judgments given by Canadian courts are included in the definition of "Canadian judgment" appearing in the *Uniform Enforcement of Canadian Judgments and Decrees Act* ("UECJDA"). The 2006 Report notes the common law rule that "no country ever takes notice of the revenue laws of another", a concept rooted in sovereignty, and opines that this principle may well have been overruled by the Supreme Court of Canada decision in *Hunt v. T&N PLC*, [1993] 4 S.C.R. 289, which calls for the courts of each province to give full faith and credit to judgments of the courts of sister provinces. However, to remove any doubt on the issue, the Report recommends that section 1 of the UECJDA to specifically include tax judgments and that the term "tax judgment" include certificates registered in respect of an amount payable under a tax law that have the same effect as a judgment.

The Report discusses the impact of the proposed amendment from a Québec perspective. The adoption of the proposed amendment to the UECJDA would be tantamount to the adoption of reciprocity provisions and would allow other provinces and territories to recognize and enforce tax judgments obtained in Québec and vice versa.

The Report also proposes that section 11 of the UECDJA be amended to provide that the UECJDA applies to judgments obtained before its coming into force if the judgment is for the recovery of an amount payable under a tax law, including a certificate registered in respect of an amount payable under a tax law, the certificate having the same effect as a judgment.

RESOLVED:

1. **THAT** the Working Group continue and that it consider the issues raised in the Report and the directions of the Conference, and prepare a draft act and commentaries for consideration at the 2007 meeting.

INTER-JURISDICTIONAL ENFORCEMENT OF EMPLOYMENT STANDARDS ORDERS—STATUS REPORT

Presenter: Vincent Pelletier, Directorate of Research and Ministerial Legislation, Ministry of Justice, Québec

The Canadian Association of Labour Administrators will be meeting in September to consider the potential for harmonization in this area.

RESOLVED:

1. **THAT** the Civil Section Steering Committee determine, upon consultation with the Conference of Administrators of Labour Laws, whether it is possible and appropriate to pursue uniform legislation in this field.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND MEXICAN UNIFORM LAW CENTRE

Presenters: Dr. Jorge Sanchez Cordero, Director

Howard Swibel, President, NCCUSL

King Burnett, Chair, International Legal Development Committee, NCCUSL

In his address to the Conference, Dr. Jorge Sanchez Cordero reiterated the importance of the ongoing cooperation among the three organizations: ULCC, NCCUSL and the Mexican Uniform Law Centre. He outlined some of the highlights of that cooperation over the past year. Dr. Cordero noted the progress made in relation to implementing the *Convention on International Interests in Mobile Equipment* (Capetown, 2001) in his country and elsewhere.

Howard Swibel, President of NCCUSL, also underscored the value of the cooperation between the three organizations in his address to the Conference. As an example, Mr. Swibel noted the meetings in relation to implementation of the *UN Convention on the Assignment of Receivables in International Trade* held in Detroit and New York in the spring. Representatives of the U.S. Department of State and the American Law Institute also attended these meetings. He described a proposed meeting in the fall at which representatives of the three bodies will attend, along with stakeholders from the banking and finance communities.

Mr. Swibel noted that in the context of this cooperative project, and the cooperative project on unincorporated associations, each of the three organizations has benefited from the experience and input of the others. He endorsed an approach whereby all three organizations continue to ask themselves, in relation to each project on which they were embarking, whether there was potential for harmonization on a North America-wide basis.

RESOLVED:

1. **THAT** the Uniform Law Conference express its thanks to Mr. Howard W. Swibel, President of the National Conference of Commissioners on Uniform State Laws, and to Dr. Jorge Sanchez Cordero, Director of Mexican Uniform Law Centre, for their enlightening presentations.

UN CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE—UNIFORM ACT

Presenters: Professor Catherine Walsh, McGill University

Michel Deschamps, McCarthy Tetrault

At its August 2005 meeting, the ULCC approved a pre-implementation report on the *UN Convention on the Assignment of Receivables in International Trade*. A working group was established to prepare a uniform act to implement the Convention and to prepare complementary legislation. The working group was mandated to conduct its work in collaboration with NCCUSL and the Mexican Uniform Law Centre with a view to coordinating implementation of the convention in all three countries.

Choice of law issues gave raise to the greatest challenges for the working group. First, work is underway in Ontario to reform the PPSA conflict of law rules, with the proposed reforms potentially conflicting with the Convention choice of law rule in situations involving an assignor entity that is organized under U.S. or Canadian law but which has its chief executive office in the other country. Second, issues arose in terms of the desirability of making the uniform implementing legislation complementary with existing U.S. choice of law rules applicable to perfection and priority. Ultimately, the implementation strategy being pursued by the U.S. will not result in any adjustments to Article 9 of the *Uniform Commercial Code*, including its choice of law rules. As a practical matter, this means that except for receivables transactions within the scope of the Convention, the law of the state within the U.S. under whose laws a U.S. assignor or secured debtor is organized will apply, even where the U.S. entity has a foreign chief executive office.

The pre-implementation report presented to the ULCC in 2005 envisaged integrating the Convention choice of law approach with the existing PPSA and Civil Code choice of law rules applicable to intangible and mobile goods. The working group is now recommending that the U.S. strategy be adopted instead, restricting the application of the Convention choice of law rule to international assignments of receivables that fall within the territorial and subject-matter scope of the Convention. Under this approach, the choice of law rules for intangibles and mobile goods in the PPSA and the Civil Code, in their current form or as amended in the future, would continue to apply. The Convention choice of law rule will only be triggered when the Convention as a whole applies. It was noted that the Convention permits federally organized countries to adopt different criteria internally. The working group takes the position in its 2006 Report that the proposed change in strategy would leave room for greater harmonization with U.S. conflicts approaches and would relieve the provinces and territories from the burden of having to undertake significant reforms to their secured transactions choice of law rules in order to implement the Convention.

In addition to restricting the application of the Convention choice of law rule for priority to receivables transactions within the Convention's scope, the working group recommends:

- That the jurisdictions implementing the Convention opt out of the independent conflicts regime in Part V of the Convention;

- To ensure adequate time for nationally harmonized and comprehensive reform, reform of the PPSAs and the Civil Code on the treatment of anti-assignment clauses be pursued in its own right rather than being tied to the implementation of the Convention; and

- That final approval of the draft Uniform Assignment of Receivables in International Trade Act and commentaries be postponed until later in the fall, to allow NCCUSL, with the active participation of the working group, to conduct a planned industry consultation conference in October and to allow the three national organizations to then meet in November.

RESOLVED:

1. **THAT** the *Uniform Assignment of Receivables in International Trade Act* and commentaries be approved in principle.

2. **THAT** following a joint meeting of the Working Group with representatives of the National Conference of Commissioners on Uniform State Laws and the Mexican Uniform Law Centre to consider the results of industry consultation and, should no changes to the Uniform Act and Commentaries as considered by the Conference be required and should the Civil Section Steering Committee deem it appropriate; that the *Uniform Assignment of Receivables in International Trade Act* and commentaries be circulated to the jurisdictional representatives, together with a supplementary report summarizing the result of the joint meeting. Unless two or more objections are received by the Executive Direction of the Conference by a date to be determined by the Civil Section Steering Committee, but not later than December 31st, 2006, the *Uniform Assignment of Receivables in International Trade Act* and commentaries should be taken as adopted and recommended to the jurisdictions for enactment.

3. **THAT** the Civil Section Steering Committee continue to have under consideration the reforms to secured transactions legislation contemplated in the Report of the Working Group and that they be addressed in connection with any project undertaken respecting secured transactions legislations.

UN CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT—STUDY PAPER

Presenters: Professor Marc Lacoursiere, Laval University

Steven Jeffrey, Blaney McMurtry LLP

This Pre-Implementation Report considers the advisability of preparing a uniform implementing act for the 1995 *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit*. The Report examines the existing framework for the law of independent guarantees and stand-by letters of credit, both from a common law and civil law perspective, and considers whether there is a need in Canada for legislation implementing the Convention. The focus of the Convention is the relationship between a guarantor (in the case of an independent guarantee) or an issuer (in the case of a stand-by letter of credit) and a beneficiary.

On the common law side of the existing Canadian legal framework, there is no existing legislation that specifically deals with letters of credit or bank guarantees (whether of a domestic or international character). Instead, the law has been developed by courts and in international rules of practice such as the Uniform Customs and Practice for Documentary Credits (UCP). On the civil law side, there is some difficulty in classifying an independent bank guarantee: some civilians have attempted to associate it with certain nominate contracts; some commercial lawyers classify it instead as an innominate or *sui generis* contractual instrument.

In their Report, the authors track the gaps in the existing international rules, and the ways in which the Convention seeks to supplement these other rules by dealing with issues beyond their scope. Two key topics dealt with by the Convention are fraud and abuse and judicial remedies. The authors raise the question of whether it would be desirable, upon drafting implementing legislation, to also draft uniform domestic legislation so that the same rule would apply to such instruments whether or not they were international in scope.

The authors conclude that the Convention is, generally speaking, in line with Canadian law governing stand-by letters of credit and independent bank guarantees. They recommend that the ULCC adopt the Convention as a model law for possible adoption by Parliament and the provincial legislatures.

RESOLVED:

1. **THAT** a Working Group be established to prepare, in accordance with the directions of the Conference, a uniform act and commentaries to implement the Convention for consideration at the 2007 meeting; and to report of the desirability of any other legislative recommendations; and to work in co-operation with the National Conference of Commissioners on Uniform State Laws and the Mexican Uniform Law Centre, should those organizations so desire.

TAKING THE COMMERCIAL LAW STRATEGY TO ABORIGINAL JURISDICTION—STUDY PAPER

Presenter: Merrilee D. Rasmussen, Law Reform Commission of Saskatchewan

To date, there has been no mechanism for the extension of the Commercial Law Strategy of the ULCC into areas of Aboriginal jurisdiction.

Aboriginal governments have or will possess a range of jurisdiction in relation to commercial matters, whether arising from the exercise of an inherent right of self-government protected by section 35 of the *Constitution Act, 1982*; through Treaty-based self-government initiatives; or through the recognition or delegation of jurisdiction via a self-government agreement.

The Report discusses the possibility of establishing and implementing practical methods for the development and enactment of Aboriginal laws as part of the Commercial Law

Strategy. One of the issues arising is the question of the scope of Aboriginal jurisdiction. The Report notes the significance of Treaties with First Nations people in establishing an inter-governmental process acknowledging that First Nations, who were self-governing at the time Treaties were signed, would continue to be self-governing. The Report then considers the potential scope of Aboriginal jurisdiction in the contexts of each of the inherent right of self-government, negotiated self-government agreements, and the delegation of powers under the *Indian Act* and *First Nations Governance Act*.

Ms. Rasmussen postulates that it is reasonable to assume that courts are likely to build on existing constitutional concepts such as paramountcy and interjurisdictional immunity developed in the federal/provincial context when turning their attention to Aboriginal law. The Report suggests that it may be possible to establish a process for the development of uniform commercial laws for adoption within Aboriginal jurisdiction without having to find agreement about jurisdictional boundaries. The Report notes that NCCUSL has developed a *Model Tribal Secured Transaction Act*. That Act is intended to ensure a material degree of harmonization between different tribes of American Indians and between those Tribes and State legislatures. The Report also notes that the Law Commission of Canada is engaged in a project relating to federal security interests on reserves. Ms. Rasmussen outlines some issues arising in terms of implementation of Uniform Acts by Aboriginal governments that should be addressed by the committee or working group charged with responsibility for developing a process.

After Ms. Rasmussen's presentation, discussion ensued as to how conflicts between provincial and aboriginal law might be resolved.

The Report concludes by recommending that a committee or working group be established to identify and secure appropriate representation from Aboriginal governments and to develop a process for working towards the adoption by the ULCC of Uniform Acts within the Commercial Law Strategy for ultimate adoption by Aboriginal governments.

RESOLVED:

1. **THAT** the Civil Section Steering Committee continue to have under consideration the development of a process for the enactment of uniform commercial acts within Aboriginal jurisdictions.

JOINT PROJECT TO CREATE A HARMONIZED LEGAL FRAMEWORK FOR UNINCORPORATED NON-PROFIT ASSOCIATIONS IN NORTH AMERICA—STATUS REPORT

Presenter: Arthur Close, Executive Director, British Columbia Law Institute

At the ULCC meeting in 2005, a decision was made by ULCC, NCCUSL and the Mexican Uniform Law Centre to pursue possible joint projects. The topic of unincorporated associations (*viz.*, two or more people coming together for a purpose other than making money) was identified as a possible joint project at that time. This led to

discussions between the three organizations leading to the following three key understandings:

1. The joint project is to proceed as a clean slate, with no pre-determined point of departure.

2. The organizations will use the NCCUSL older Uniform Act on unincorporated associations as a source to identify issues and solutions only.

3. The organizations will use the NCCUSL methodology in the development of its Uniform Acts.

The first meeting of the joint drafting committee was held in Portland on March 17 – 19, 2006, at which time the joint drafting committee considered memoranda discussing the common law and Québec law on the topic of unincorporated associations. A notable feature of the Portland deliberations was the guidance that could be drawn from the express provisions in the Civil Code of Québec. The President of NCCUSL, Howard Swibel, is participating in the deliberations of the joint drafting committee as an *ex officio* member.

The joint drafting committee is following a work plan, preparing a list of principles to be distilled from the Portland meeting and thereafter will seek to have legislative drafters assigned to the project. The goal is to have versions of the uniform statute in all three languages for the third meeting; the drafts would be referred to the individual conferences thereafter.

RESOLVED:

1. **THAT** the joint ULCC, NCCUSL, and MULC Working Group continue its work to address the issues described in the Report, taking into consideration any discussion at the Conference, and report on the results thereof to the 2007 meeting.

PRIVATE INTERNATIONAL LAW – STATUS REPORT

Presenter: Kathryn Sabo, Justice Canada

Kathryn Sabo summarized the negotiation and implementation activities of the Department of Justice in Private International Law over the past year. The written Report provided to the Conference outlines the work of the Department of Justice in three main subject areas: International Commercial Law; Judicial Cooperation and Enforcement of Judgments; and Family Law. Within each of those subject areas, items are ranked as high, medium or low priorities.

In the International Commercial Law area, high priorities include ongoing negotiations of a Draft Legislative Guide on Secured Transactions (UNICITRAL) (which has obvious links to the ongoing work on security interests at the ULCC) and the Project on Harmonised Substantive Rules Regarding Indirectly Held Securities (Unidroit). Priorities

in this area in terms of implementation of existing Conventions include: the *Convention on the Settlement of Investment Disputes* (World Bank); the *Convention on International Interests in Mobile Equipment and Aircraft Protocol* (Unidroit); the *Convention on Securities Held by Intermediaries* (Hague Convention); the *Convention on the Limitation Period in the International Sale of Goods and Protocol* (UNCITRAL); and the *Convention on the Assignment of Receivables* (UNCITRAL).

Ms. Sabo noted that UNCITRAL had embarked on a new project to modernize its Arbitration Rules and on new work in the area of insolvency law.

In the Judicial Cooperation and Enforcement of Judgments area, high priorities include implementation of: the *Convention on Choice of Court Agreements* (Hague Conference); and the *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents* (Hague Conference).

In the Family Law area, high priorities for implementation include the *Convention on the International Protection of Adults* (Hague Conference); and the *Convention on Jurisdiction, Applicable Law, Recognition and Enforcement, and Cooperation in respect of Parental Responsibility and Measures of Protection of Children* (Hague Conference). On the negotiation front, the Draft Convention on Maintenance Obligations has not yet been finalized, but is a high priority for Canada. Consultations with federal, provincial and territorial partners and the private and academic sectors are planned in view of the fifth Special Commission meetings scheduled for spring 2007.

Ms. Sabo noted that in November of 2006, a Hague Special Commission was formed to consider the operation of the *Convention on the Civil Aspects of International Child Abduction* (which has been implemented in all Canadian provinces and territories). This Special Commission will also discuss issues of access.

RESOLVED:

1. *See General Resolutions above.*