Civil Section Minutes 2007

CHARLOTTETOWN, PRINCE EDWARD ISLAND, SEPTEMBER 9 – 13, 2007

General Resolution Respecting Written and Oral Reports Presented to the Conference

The meeting began by adopting the following resolution:

RESOLVED:

THAT the written reports presented to the Civil Section and to the joint session of the Civil and Criminal Sections appear in the 2007 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 2007 Proceedings.

Limitation Periods and Other Issues in Insurance Statutes

Presenter: Lisa A. Peters (Canadian Bar Association, B. C. Branch), Lawson, Lundell LLP

At the 2005 Conference, Peter Lown (Alberta) summarized a paper prepared by the late Professor Jim Rendall on the issue of limitation periods in insurance statutes. At the 2006 meeting, Ms. Peters reported that both British Columbia and Alberta had begun a comprehensive review of their *Insurance Acts*; the issue of limitation periods was one issue being addressed in these reviews.

Ms. Peters then summarized what is occurring in the provinces and territories:

Alberta: Bill 42 (the *Insurance Amendment Act*, 2007) received first reading on June 12, 2007;

British Columbia: consultation closed on May 1, 2007. One stated goal is to harmonize with Alberta's Bill 42 to the greatest extent possible.

Manitoba: legislation was introduced in November 2006, but progressed no further. Legislation may be reintroduced. One objective would be consistency with British Columbia and Alberta.

New Brunswick, Nova Scotia and Prince Edward Island: in 2005, these jurisdictions decided to revisit the *"Harmonized Model Insurance Act for Atlantic Canada"* (drafted in 2003 by the superintendents of insurance of the Maritime Provinces). Discussions are continuing.

No current projects are underway in Ontario, Québec, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut.

Ms. Peters identified four possible prospects for harmonization: limitation periods; statutory conditions; the interplay of fire insurance provisions and the general parts of insurance statutes; and dispute resolution.

The Canadian Council of Insurance Regulators is also maintaining a watching brief with respect to these issues. The Council's hope is that Alberta's Bill 42 will be a template for other provinces considering insurance law reform and that it will lead to additional harmonization and uniformity. It takes the view that the ULCC could assist in the process by continuing to monitor the situation and by commenting on the Alberta Bill.

RESOLVED:

THAT the Civil Section Steering Committee continue to monitor developments respecting the issues raised in the 2005 Report to ULCC and continue to work with the Canadian Council of Insurance Regulators to address these issues.

Presumptions of Advancement and Resulting Trusts

Presenter: Elizabeth Strange, Solicitor and Acting Queen's Printer, Office of the Attorney General, New Brunswick

At the 2006 meeting of the Conference, one topic raised in the "new projects" presentation was the necessity of maintaining the presumptions of advancement and resulting trusts. As at that time the Supreme Court of Canada had agreed to hear two companion cases on the topic, a wait-and-see approach was taken.

Ms. Strange provided a brief overview of the presumptions of advancement and resulting trusts, noting that these are presumptions respecting the intention of a person who has transferred property to another gratuitously. Both presumptions are rebuttable. The presumption of advancement from husband to wife (and vice-versa) has been largely abandoned, both judicially and legislatively. However, the issue of the application of the presumption of advancement for a parent-to-child transfer is still open to debate. Both presumptions have been the subject of criticism from academics and the judiciary, and many critics advocate their abolition.

In the companion cases of *Pecore* and *Brooks*, the Supreme Court of Canada had an opportunity to address the topic. Both cases came from Ontario, and were similar in that an aging father had put significant funds into a joint account with an adult daughter. Ms. Strange provided an analysis of both cases. In the *Pecore* case all the judges agreed that the presumptions have a role to play in disputes or gratuitous transfers, as they provide guidance for courts where there is little or no evidence as to the transferor's intent. Also, the court in *Pecore* has given direction as to when each presumption should be applied, and the standard of proof to be applied.

Ms. Strange concluded that, as the Supreme Court of Canada has stated its belief in the continuing importance of the presumptions of advancement and resulting trust and has given direction as to when each should be applied, unless the Uniform Law Conference of Canada sees a strong reason to legislate in favour of a certain presumption, or to remove the presumptions legislatively, there does not appear to an obvious project for the Conference on this topic.

RESOLVED:

THAT the Civil Section Steering Committee continue to monitor developments in the law and, if appropriate, make recommendations to the New Projects Committee.

Forms of Business Associations – Income Trusts

***Uniform Act* and Commentaries**

Presenter: Wayne D. Gray (Ontario Bar Association), McMillan Binch LLP

At the 2005 meeting of the ULCC, a Report on Forms of Business Associations in Canada was delivered, and a Working Group was struck. In 2006, Mr. Gray, as Chairperson of the Working Group, provided a Report to the ULCC which included an overview of the income trust. The 2006 Report made 40 recommendations and concluded by reiterating that legislation dealing with income trusts must be sensitive to the distinctive tax treatment that led to the rise of income trusts. At the 2006 meeting, the Conference resolved:

1. That a Working Group be established to consider the relation of the recommendations in the report and directions of the Conference to Quebec law, and that this Working Group report its conclusions and recommendations to the Drafting Group described below as soon as possible, but no later than December 31, 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 Working Group described above, for consideration at the 2007 meeting.

Mr. Gray presented the proposed *Uniform Income Trusts Act* to the Conference. He noted that the recommendations from the 2006 Working Group Report are incorporated throughout the proposed Uniform Act for ease of reference. Mr. Gray also noted that 36 of the 40 recommendations are reflected in the draft. One recommendation – Recommendation No. 5

(Statutory Purpose) – was dropped. It had been modelled after a provision in the *Canada Business Corporations Act*, but is not common practice in Uniform Acts and raised some concerns in the Drafting Group. Mr. Gray then provided an overview of the provisions of the proposed Uniform Act and invited discussion and questions.

In Part 1 (Interpretation and Application), section 4 (Trust, mutual funds, not legal persons) was highlighted as a crucial provision, linked to Recommendation No. 6. For tax purposes, it is very important that an income trust not be a legal person. Part 2 – Unit Holder Immunity – incorporates Recommendations 7 and 8 of the 2006 Report. It was noted that section 9 of the proposed Uniform Act makes these immunity provisions retroactive.

With respect to Part 3 (Unit Holder Rights and Remedies), Mr. Gray indicated that the underlying philosophy was to strike a balance between all the affected parties (investors, unit holders, trustees, managers of the trust and creditors). It was noted that sections 22 and 23 establish an optional "oppression remedy" for unit holders – the remedy is not available unless the trust instrument "opts in". If a trust instrument opts in, the proposed Uniform Act provides certainty for unit holders as to the scope of the remedy. Alternatively, jurisdictions may wish to make the remedy available to unit holders with respect to all income trusts, regardless of whether a particular trust instrument opts in. Mr. Gray also noted that the Canadian Coalition for Good Governance has taken the position, in the context of pension funds, that such remedies should be mandatory.

Discussion:

A question was raised respecting the registration of income trusts. Mr. Gray responded by noting that Recommendation No. 38 of the 2006 Report recommended that there be no registration requirement because:

1. This looks too much like a corporation, and also noted that registration is usually an act of creation, which would not be the case here.

2. As this is not currently done, a new bureaucracy would have to be created.

3. In terms of registration providing an “information source” for the public, he noted that registry type information exists in a more robust form on SEDAR (System for Electronic Disclosure and Recovery), operated by the Canadian Securities Administrators.

It was pointed out that the Canadian Association of Corporate Law Administrators are concerned that appropriate consideration be given to the matter of whether, in the uniform legislation, income trusts should be required to “register” with corporate registries. Their concern stems from the fact that the public tends to approach corporate registries to obtain information on business organizations, presumably including income trusts. They were aware that Securities Commissions would have some information on these trusts, but did not know if this would be an adequate substitute for the information being available through a corporate registry. This issue was discussed at some length, and Mr. Gray noted that a unit holder would have access to more information under SEDAR.

In the discussion respecting Part 4 (Powers and Duties of Trusties) it was noted that some concerns with subsection 32(2) of the proposed Uniform Act – “the trustees of a trust may, but are not obliged to comply with a direction of the unit holders of a trust”. Mr. Gray noted that there was some discussion on this point in the Working Group, and that it grandfathers trusts that currently have “veto powers”. With respect to new trusts, one would have to look at the trust instrument, as most, if not all, address how to deal with matters such as disposition of assets, etc. As such agreements are not uniform, it would be very difficult to draft for this. It was also noted that there was also concern that this would attract unit holder liability. The remedy would seem to be that the unit holders can vote the trustees out. Mr. Gray pointed to section 35 as important – no provision in a contract, trust instrument or resolution relieves a trustee from the duty to act in accordance with the Act or regulations – and noted that this is a change from the current situation. Also important is section 42 (unsecured creditors), as it solves a major problem by clarifying that an

unsecured creditor may be able to look to trust assets to satisfy the debt. Part 5 (Arrangements and Compulsory Acquisitions) and 6 (General) were also discussed.

There was a question about why certain remedies were optional. From the trustee and "entity" point of view, the legislation seems designed to make the entity as much like a corporation as possible except for tax purposes. However, unit holder rights did not seem to "track" the benefits that shareholders enjoy in this same way. In response, Mr. Gray noted that the unit holder would not have any these rights today and that investors know this going into a unit trust arrangement. The Working Group did consider this issue, but on balance the general consensus was that it is more empowering for unit holders to decide for themselves on appropriate remedies.

It was finally noted that the proposed Uniform Act, as drafted, does not follow the usual ULCC approach to respect to commentaries. Clark Dalton, Q.C. (ULCC) will work with Mr. Gray and the drafter to develop the recommendations which appear throughout the proposed Uniform Act into commentaries.

RESOLVED:

THAT the draft *Uniform Income Trusts Act* and commentaries be 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 Steering Committee, but no later than November 30, 2007, the draft Act should be taken as adopted as a Uniform Act and recommended to the jurisdictions for enactment

Apology Legislation: Uniform Act and Commentaries

Presenter: Russell J. Getz, Legal Counsel, Justice Services Branch, Civil and Family Law Policy Office, Ministry of the Attorney General, British Columbia

In the fall of 2006, the Civil Section Steering Committee adopted a project to prepare a draft *Uniform Apology Act* for presentation to the 2007 Annual Meeting.

The project was inspired by the interest in British Columbia's *Apology Act* of 2006, which provides that an apology is not admissible in civil proceedings for the purpose of proving liability and that an apology is not an admission of liability. After the B.C. Act was adopted, Saskatchewan enacted virtually identical provisions respecting apologies in its *Evidence Amendment Act*, 2006. The B.C. and Saskatchewan legislation had their origins in law reform and civil justice reform efforts to improve the means available to people for resolving civil disputes. Research has indicated the benefits of apologies in resolving disputes, the real or perceived ambiguity about the legal effect of apologies, and legislative initiatives on the topic in American and Australian jurisdictions.

The paper discussed the reasons that are usually advanced in favour of apology legislation the issues raised by critics of apology legislation.

However, in general, the paper indicated that apologies are morally desirable and apology legislation encourages apologies that would not be given at all without it. Arguably, the law should let the victims judge their moral (and legal) worth. It was also noted that absence of apology legislation may well work to the disadvantage of people who, for reasons of gender, culture or religion, maybe more prone to apologize than other people.

Two models respecting the scope of protection of apology legislation were discussed: legislation that protects apologies that acknowledge fault or wrongdoing (such as the B.C. and Saskatchewan legislation) and legislation that protects expressions of sympathy only (such as many of the enactments in the U.S. and Australia). Legislation limited to protecting only expressions of sympathy would not be substantially different from the status quo, and leads to uncertainly as to whether a 'fault admitting' apology may be used against a party.

Apology legislation may also be distinguished according to the scope of wrongdoing to which it applies. The B.C. and Saskatchewan legislation is

not limited to certain types of liability, whereas all American enactments apply only to medical malpractice or accidents, or both. Similarly, in Australia, apology legislation is limited to personal injury claims, negligence or torts generally.

The draft *Uniform Apology Act* was then presented, as follows:

- it provides that an apology encompasses statements of admitting or implying an admission of wrongdoing, in addition to expressions of sympathy or regret;
- it has a broad application, extending to any matter;
- it provides that an apology is not an admission of legal fault or liability, express or implied; is not relevant in determining fault or liability, and is not admissible in evidence to establish liability;
- it provides that an apology cannot be used as confirmation of a cause of action in order to extend a limitation period;
- it provides that an apology cannot be regarded as an admission of liability for the purpose of avoiding an insurance policy; and
- it protects apologies from being used to establish liability, but does not protect them from being used in the assessment of damages. Whether they would aggravate or diminish damages may depend on the particular case.

As torts are not necessarily confined within provincial or territorial borders and people may do or suffer harm away from home, the human and legal consequences of apologies should be predictable across the country. Thus a harmonized legal approach would be beneficial.

Discussion:

A concern was raised respecting the scope of the definition of "apology" in the draft *Uniform Apology Act* and a motion was made to amend the definition by adding a reference to an admission of "fact or fault". The motion was defeated.

In response to a question respecting the experience of those jurisdictions that have apology legislation, it was noted that the legislation has not been in place long in B.C., but it was warmly received by the Bar. Although

the legislation has not been in place long in Saskatchewan, if there was a problem with it, it would likely have been raised by now. The Australian delegates noted that their apology legislation was developed in a broader tort reform context; that it has now been in place a few years; and that it was generally supported by insurers and lawyers. NCCUSL had considered a study project where apology legislation was an element, but the time was not right for the project.

RESOLVED:

THAT the *Uniform Apology Act* and commentaries be adopted and recommended to the jurisdictions for enactment as a stand alone statute or as an amendment to the jurisdiction's *Evidence Act*.

The Hague Choice of Court Convention and the Common Law

Presenter: Professor Vaughan Black, Dalhousie Law School

Professor Black provided a summary of the Convention, a description of the ways in which it differs from existing law in common law Canada, some views on whether the scheme and body of the Convention would represent an improvement on that existing law and some recommendations as to whether the Convention should be adopted.

There is no other multilateral treaty on this subject under consideration, in Canada or elsewhere, and that there are no Canadian law reform projects underway that significantly touch on this area of the law. The scope of the Convention is narrow and accordingly most commercial practices and legal issues would not be affected by it. Even in those areas that would be covered by the Convention, the difference between the régime found in the Convention and that presently in place in the common-law provinces in Canada is not great and, based on recent case law, these differences are in fact narrowing. A practical question in determining whether to adopt the Convention, is whether other countries – and particularly Canada's trading partners – are interested in the Convention. (To date, no states have signed this Convention.)

Professor Black then discussed the history of the Convention, noting that underpinning the Convention are certain assumptions about the value of

international trade. The goal of the Convention is to facilitate and promote the inclusion of 'exclusive choice of forum' clauses in certain international commercial contracts, by ensuring such clauses are more effective and certain in their effect than they currently are. The Convention is limited in that it deals only with commercial – that is, business to business – contracts; it applies only to international contracts; and it only takes effect where there is an exclusive choice of court clause. Also, the Convention applies mainly to contracts for the sale of goods and services, and there are many exclusions.

Professor Black noted that, to implement the Convention in the common law jurisdictions, some changes in detail, but no fundamental changes in principle, would be required. A few important differences from common law principles were noted.

The main objections to the Convention relate to its narrow scope, lengthy list of exclusions and its rigidity when compared to the flexibility of the common law. Also, it has been criticized as benefiting 'big business' as opposed to small businesses. A further concern (largely speculative) is that the Convention could effectively allow certain parties to shift their dispute resolution costs from arbitration to a publicly subsidized system – namely, the courts.

Professor Black concluded that the Convention represents a modest but useful initiative, and appears generally uncontroversial and orthodox. He recommended that:

- Canada ratify the Convention;
- Canada refrain from making declarations under Articles 19 and 20;
- Canada make a declaration under Article 22, dealing with non-exclusive choice-of-court clauses;
- No declarations need be made under Article 26 at this time;
- Declarations will be required under Article 28 for any provinces that do not elect to implement the Convention at this time; and
- Declarations will be required under Article 21 for those provinces that will only implement the Convention if they can prevent its application to specific matters (for example, B.C. has specific

legislation precluding enforcement of foreign judgments respecting injury arising from asbestos mined in that province).

Discussion:

Kathryn Sabo (federal government) noted that countries, including Canada, have adopted a 'wait and see' attitude to this Convention, and are waiting for the Convention's Explanatory Report. The NCCUSL representative thanked Professor Black for his excellent report and noted that NCCUSL has appointed a study committee which will hopefully report by the end of the year; also, the policy arm of the American Bar Association has endorsed the Convention. Mexico has opened serious discussions on this Convention, and there are two working groups looking at it. The representatives from Australia also thanked Professor Black for his report and noted that Australia is waiting for the explanatory documents.

RESOLVED:

THAT a working group be established and directed to prepare a uniform implementing Act and commentaries for consideration at the 2008 meeting.

Québec Law and the Hague Convention on Choice of Court Agreements of 2005

Présenter: Frédérique Sabourin, Professeur, Faculté de droit, Université de Sherbrooke

Professor Sabourin was a member of the Canadian delegations involved in negotiating the Convention, from 1996 to its conclusion in 2005. The object of her report was to set out the differences that exist between Québec law and the Convention, in general terms, focusing on the three key obligations in the Convention:

- the obligations of the court chosen by the parties;

- the obligations of a court that is seized of a matter but is not the 'chosen' court; and
- the obligations of a court asked to enforce the judgement of the 'chosen' court.

There are many similarities between the Convention and Québec law which should facilitate implementation of the Convention. Professor Sabourin noted, though, that Québec has certain restrictions as well. For example, certain provisions of Québec law prevent recognition and enforcement of a foreign court decision when the case concerns civil liability for any harm suffered in, or outside, Québec as a result of exposure to, or the use of, raw materials, whether processed or not, originating in Québec. Careful thought needs to be given to the scope of any declaration that might be made under Article 21 of the Convention.

Professor Sabourin then highlighted areas of difference or concern, including:

- the Convention provides that the jurisdiction of the chosen court is "exclusive" unless the parties to the agreement state otherwise;
- the Convention requires the agreement to be in writing, which may raise questions respecting agreements formed electronically;
- cases where all elements except the choice of court arise in the same jurisdiction;
- a 'chosen' court cannot withdraw on the basis of *forum non conveniens* (this would require an amendment to Québec law);
- in light of a recent decision of the Supreme Court of Canada, in Québec law it is possible to reduce the quantum of damages and interest awarded when enforcing a foreign judgment. This is not reflected in the Convention.

Professor Sabourin noted mixed feelings about the Convention – it is a complex document, involving a significant investment of time and resources, for one with such a limited scope. However, it is a small, but positive, step in the right direction as it provides some certainty to parties to an agreement that falls within its scope, and provides them with a real

choice between using the courts and using arbitration to resolve disputes. Professor Sabourin recommended that the Conference establish a working group to see how the Convention could be implemented in Canada.

Discussion:

Kathryn Sabo (Canada) noted that it is important to look closely and critically at the Convention. The status quo respecting enforcement of foreign judgments needs to be kept in mind – as Canada currently enforces foreign judgments broadly, we need to be aware of what might be lost under the Convention. Having said that, the gain may be the ability to enforce our judgments elsewhere – the Convention is a tool with the potential to be of assistance.

RESOLVED: (see the resolution respecting the Paper on The Hague Choice of Court Convention and the Common-Law).

UN Convention on Independent Guarantees and Stand-By Letters of Credit

Presenter: Kathryn Sabo, General Counsel, International Private Law Section, Department of Justice, Canada

At its annual meeting in August 2006 the Conference established a Working Group 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;

- report on the desirability of any other legislative recommendations; and
- work in co-operation with the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the Mexican Uniform Law Centre, should those organizations so desire.

Ms. Sabo presented a status report on behalf of the Working Group. Since the August 2006 meeting, additional experts were sought and added to the Working Group.

The Working Group plans to meet over the coming year and intends to complete the draft Act and commentaries to implement the Convention set out in the Annex to the Group's report for presentation to the Conference in 2008. It will also consider the development of domestic rules for independent guarantees and stand-by letters of credit along the lines of the Convention rules and taking existing common law into account. Ms. Sabo noted that guidance from the Conference on whether provisions for domestic guarantees should appear in a separate Act or whether rules for a domestic régime and the Convention régime should be placed in one Act would be welcome.

The Working Group anticipates working with NCCUSL and the Mexican Uniform Law Centre. NCCUSL has convened a drafting committee meeting in November in Denver, Colorado and it is expected that members of the ULCC Working Group will attend.

RESOLVED:

THAT the Working Group complete, in accordance with the directions of the Conference, a Uniform Act and commentaries to implement the Convention for consideration at the 2008 meeting; and to report on 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.

The Canada *Interest Act*

Presenter: Professor Thomas G. W. Telfer, University of Western Ontario

Professor Telfer's preliminary background paper examines the original purpose of the Canada *Interest Act* and compares these original purposes

with how the Act is being interpreted in light of today's commercial reality. He noted that all of the current provisions of the Canada *Interest Act* can be traced back to the late 19th century. Today, the legislation has been described as "hopelessly dated" and "functionally dead".

The Act does not seek to govern fairness in lending by fixing or capping interest rates. Rather, it deals with five main issues – freedom to set the interest rate by contract or agreement (section 2); the default rate of interest (section 3); disclosure régimes for non-mortgage and mortgage transactions (section 4 and 6); prohibiting increasing the rate of interest or charging fines or penalties after default on a mortgage (section 8) and repayment rights respecting mortgages (section 10). A detailed analysis of the history of these five issues, and their treatment by courts, was provided.

Section 2 – the freedom to set a rate of interest by contract – is not absolute. For example, as section 2 is limited by other Acts of Parliament, it must be limited by section 347 of the *Criminal Code* (the criminal interest rate provision).

The default rate of interest in section 3 of the Act was last changed in 1900 to 5%; the scope of the provision has been limited by the growth of prejudgment legislation and court decisions have tended to "narrow the scope of section 3 to the rare case, if any, where a court or statutory body cannot legitimately award interest".

The underlying aim of section 6 – the mortgage disclosure provision – has not been met, as most court decisions have restricted the scope of the application of the section. Also, the courts have had to grapple with the "imprecise and obscure language" of the section. It was noted that, as a result of interpretations applied by the courts, the most common type of mortgage in Canada (amortized mortgage with half-yearly compounding and fixed monthly payments containing an element of principal and an element of interest that changes each month) is probably not covered by section 6. Also, what information must be disclosed under the section is far from understandable.

Section 8 only applies to mortgages and, in general, precludes the lender from increasing the rate of interest on default. Although there is extensive case law on section 8, one court concluded that "the only thing on which the courts seem to agree is the difficulty of construing the language of section 8 in the context of the modern commercial world".

Subsection 10(1), which provides for a repayment right after 5 years, is described as Parliament's response to the prevailing practice in 1880 of long-term mortgages. Today, the commercial reality is short-term mortgage with amortization. Subsection 10(2) exempts mortgages "given by a joint stock company or other corporation" from the right of repayment, and has provided another source of litigation.

Section 4 provides for a disclosure régime for non-mortgage loans. However, there is an underlying disagreement in the case law as to whether section 4 should be restricted to the protection of consumers or whether it should also cover sophisticated borrowers. Furthermore, the case law has found a number of exceptions with restrict the scope of the provision. It was noted that limitations of the section itself and the case law have undermined Parliament's original intention of an understandable disclosure régime.

In conclusion, the Canada *Interest Act* is a 19th century statute that predates the emergence of modern credit and that has not kept up with present day commercial reality. In approaching changes, the fundamental question should be: what are the underlying policy issues to be addressed in the Act.

Discussion:

It was noted that, in looking at this Act, its constitutional aspect must be kept in mind -- "interest" is a federal power under the Constitution. However, the courts have also acknowledged that the provinces have a significant role to play in the area of consumer protection. Another comment described sections 4 and 8 as "international embarrassments", but also noted we should not be quick to abandon the Act as a whole, as some provisions may still have a use.

RESOLVED:

THAT a Working Group be established to consider the issues in the Report, examine the provisions of the *Interest Act* in light of provincial legislation and common law developments and report to the ULCC at the 2008 meeting

Reform of Fraudulent Conveyances and Fraudulent Preferences Law

(Transfers at Undervalue and Preferential Transfers)

Presenter: Professor Tamara M. Buckwold, Faculty of Law, University of Alberta

In 2006 Professor Buckwold presented a project proposal for reform of the provincial and territorial law of fraudulent conveyances and preferences (following on a feasibility study presented in 2004). The project strategy was endorsed and her Report provides a summary of progress to date and work to be done.

The first step, Part 1 of a study paper that includes an introduction to the subject of fraudulent conveyances and fraudulent preferences and a discussion of fraudulent conveyances, is near completion. Part 2 of the study paper addresses fraudulent preferences and should be completed by the end of 2007.

By way of introduction to the subject of reform, Ms. Buckwold provided a number of scenarios involving fraudulent conveyances and fraudulent preferences. The unifying theme of fraudulent conveyance and fraudulent preferences law is that both address circumstances in which a debtor deals with property in a manner that obstructs or defeats the right of one or more creditors to satisfaction through resort to the debtor's assets. A fraudulent conveyance is a transfer of property intended by a debtor to place property that would otherwise be available to creditors beyond their reach. A fraudulent preference involves a transfer of property by a debtor to a creditor with the intention of satisfying that creditor at the expense of other creditors.

In general, the primary substantive basis upon which creditors may currently challenge a transaction under either branch of the law is the debtor's intention to defeat creditors so that the type of transaction that gives rise to a remedy is designated as fraudulent. There is a more modern view that the law should be primarily concerned with the actual effect on creditors of a debtor's dealing with property, rather than whether the debtor intended to prejudice their rights. This shift in approach results in a change of terminology: with respect to fraudulent conveyances, the term used is "transaction at undervalue" and with respect to fraudulent preferences, the term used is "preferential transfer".

Professor Buckwold then addressed the three primary components of the study paper respecting transactions at undervalue (i.e. fraudulent conveyances): a Summary of Current Law; Policy Considerations and the Regulation of Transactions at Undervalue; and Issues for Determination

Professor Buckwold set out the specific issues that must be decided in the design of reformed legislation under five general headings:

(i) Transactions within the scope of the Act;

(ii) Standing: Who may claim a remedy under the statute?

(iii) Grounds for a remedy (basis for challenging transaction);

(iv) Defences and protection of third parties; and

(v) Remedies.

Professor Buckwold concluded that a working group should be established, and should proceed on the basis of the study paper and ancillary report to identify the issues of policy and approach that require input from the legal profession and stakeholders and devise an appropriate consultation process (including a consultation document).

Discussion:

Vincent Pelletier (Québec) is looking for someone in Québec to work on this project, noting that it would be very interesting to see what new solutions are possible and whether they can be applied to Québec law. Another individual noted that, though antiquated, practitioners have to

grapple with these statutes regularly. Professor Buckwold also noted that transactional certainty is the big competing factor that will have to be addressed by the working group.

RESOLVED:

THAT a Working Group be established to continue the work outlined in the Report, and, in accordance with the discussions of the Conference, to identify the issues of policy and approach that require input from the legal profession and stakeholders, devise an appropriate consultation process, including a consultation document, decide the issues of policy and approach involved in the formulation of legislation, and commence work on the preparation of a Draft Act and commentaries and report progress to the 2008 meeting.

National Conference of Commissioners on Uniform State Laws

Presenter: Justice Martha L. Walters, President, NCCUSL

Justice Walters was introduced to the Conference. She has just begun her two year term as President of NCCUSL, and is the first women president in the 116 year history of that organization.

Justice Walters spoke with enthusiasm about the joint projects with the ULCC and the Mexican Uniform Law Centre over the last 2 years, noting in particular the project respecting the *Convention on the Assignment of Receivables in International Trade* and the Unincorporated Associations project. NCCUSL is committed to continuing in this work – the organization has learned so much and can see how much can be achieved by this collaborative approach. Justice Walters noted that involvement with the ULCC has emphasized the need for NCCUSL to work more closely with the US federal government – in the past it has worked largely with state governments. Some recent NCCUSL projects involve: adult guardianship; debt management services; discovery of electronic information; health care information interoperability; the intestacy provisions of the Probate Code; powers of attorney; a project respecting business corporations; and

pension legislation. International projects include the *Uniform International Wills Act*, the *UN Convention on Independent Guarantees* and the *Hague Convention on Choice of Court Agreements*. Another new project is to take uniform laws that exist, distil the core principles and make them available to countries that are interested. And, of course, NCCUSL continues to work hard to get its Acts enacted by states. Justice Walters closed by emphasizing the value of continuing to work together to identify areas for potential harmonization of laws on a North-American wide basis and introduced her own "Thank You Act". Section 1: Thank you for your hard work. Section 2: Thank you for working with us. Section 3: Thank you for bringing us to PEI.

Standing Committee of Attorneys General (Australia and New Zealand)

Presenters: Ian Govey, Deputy Secretary, Civil Justice and Legal Services, Commonwealth Attorney General's Department

Laurie Glanfield, Director General, Attorney General's Department of New South Wales and Secretary of SCAG

Mr. Govey remarked that they were very pleased to be the first Australians at the ULCC and noted how much we share – not only our common law tradition, but also the way in which we approach law reform. He had already benefited from the exchange of information – for example, they are looking at a major project on securities law and will benefit from the work being done by the ULCC and in Canada on this issue – and hoped that we would be able to work together in the future. Mr. Govey also noted that the connection with the U.S. and Mexico greatly enhances the work of the ULCC. In providing an outline of his and Mr. Glanfield's departments, he noted that Australia consists of the Commonwealth and states and that each jurisdiction has its own constitutional jurisdiction and has developed its own approach to areas of law. SCAG is one body that tries to bring some of these issues together.

Mr. Glanfield noted that SCAG is more akin to a federal/provincial/territorial government body, and that there is nothing similar to the ULCC in Australia. Nevertheless, Australia has a good record for uniform law, citing, for example, evidence legislation; corporations legislation; apology legislation (which was a part of a national tort law reform); legal professions legislation and defamation legislation. He looks forward to working with the ULCC, and sharing experiences and information, in the future.

Mr. Govey noted 6 current projects:

- personal property security;
- privacy;
- the Hague Convention on service of documents;
- limitation periods; and
- statutory declarations.

He reiterated that it was very timely sharing in the deliberations of the ULCC, and that he looks forward to working with the ULCC in the future.

RESOLVED:

THAT the ULCC express its thanks to Justice Martha Walters, President of the National Conference of Commissioners on Uniform State Laws, Dr. Jorge Sánchez Cordero, Director of the Mexican Uniform Law Centre and Mssrs. Ian Govey and Laurie Glanfield of the Standing Committee of Attorneys General for their interesting and informative presentations.

Inter-Jurisdictional Enforcement of Tax Judgments

Uniform Act and Commentaries

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

M. Pelletier noted in his verbal report that this is the 3rd year this matter has been on the agenda of the Conference and provided a brief history.

Frédérique Sabourin had presented a Report at the 2005 meeting of the Conference, at which time differing views were expressed as to whether tax judgments given by Canadian courts are included in the definition of "Canadian judgment" appearing in the *Uniform Canadian Enforcement of Judgments and Decrees Amendment*. M. Pelletier presented a follow-up Report to the Conference in 2006, in which it was recommended that, to remove any doubt, section 1 of the Uniform Act be amended 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 Conference passed a resolution "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." M. noted that clarity on this issue would benefit all jurisdictions and that Revenue Québec remains very interested in this issue.

Discussion:

Gail Mildren (Manitoba) noted that the Tax Administrators Association of Canada would be meeting the next week, and that this matter was on their agenda. Natalie Giassa (Federal Government) asked whether the Conference could postpone its decision until after that meeting. M. Pelletier agreed that some additional time would be needed to discuss this issue with tax authorities and to obtain input from the upcoming Tax Administrators Association's meeting. Differing views as to whether the Uniform Act is uncertain were expressed.

RESOLVED:

THAT the *Uniform Canadian Enforcement of Judgments and Decrees Amendment (#2) Act* and commentaries be approved in principle;

THAT following the meeting of the Tax Administrators Association of Canada and consultations by the jurisdictional representatives with their jurisdictional experts, and should no change to the Uniform Act and commentaries as considered by the Conference be required and should the Civil Section Steering Committee consider it appropriate; the *Uniform Canadian Enforcement of Judgments and Decrees Amendment (#2) Act*,

and commentaries, be 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 Steering Committee, but no later than December 31, 2007, the draft Act should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment.

Inter-Jurisdictional Enforcement of Employment Standards Orders

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

M. Pelletier provided an update respecting this matter, which was first raised at the 2005 meeting of the Conference. At the 2006 meeting of the Conference it was decided that the Civil Section Steering Committee would determine, after consulting with the Canadian Association of Administrators of Labour Laws, whether it is possible and appropriate to pursue uniform legislation in this field. M. Pelletier received preliminary information from the secretary of this Association in February 2007. In general, there are reciprocal arrangements in place between the provinces and territories, with the exception of Québec, but there are also differences between the laws of the various jurisdictions and the agreements in place. Two possible options were mentioned: (1) to seek approval in principle for harmonization of laws from all Ministers of Labour and, if approval is given, to establish a working group in cooperation with the ULCC; or (2) to enhance the existing reciprocal system and arrangements. M. Pelletier will continue to follow-up with the Canadian Association of Administrators of Labour Laws.

RESOLVED:

THAT the Civil Section Steering Committee continue to monitor developments and consult with the Canadian Association of Administrators of Labour Laws, to address whether it is possible and appropriate to pursue uniform legislation in this field.

Unincorporated Non-Profit Associations (Joint Project)

Presenter: Kevin Zakreski, Staff Lawyer, British Columbia Law Institute

At the ULCC meeting in 2005, a decision was made by ULCC, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the Mexican Uniform Law Centre (MCCUSL) to pursue possible joint projects. The topic of unincorporated associations (that is, two or more people coming together for a purpose other than making money) was identified as a possible joint project at that time. At the ULCC meeting in 2006, Arthur Close provided a status report and confirmed the joint drafting committee was following a work plan and preparing a list of principles to be distilled from meetings held in the spring 2006; then it would seek to have legislative drafters assigned to the project with the goal of having versions of the uniform statute in all three languages which could be referred to the individual Conferences.

Since the ULCC meeting in 2006, a list of principles was completed and circulated to the joint drafting committee, legislative drafters were assigned, the NCCUSL team prepared and circulated a draft Uniform Act for implementation in the United States and the ULCC team began work on its uniform legislation. An initial draft of a stand-alone Uniform Act has been prepared and revised and a revised version is being shared with the NCCUSL and MCCUSL participants. In addition the ULCC team decided that a second Uniform Act should also be prepared, involving a legislative statement of the principles in a form that could be adopted directly as amendments to the *Civil Code* of Québec. The creation of a Québec specific version of the Uniform Act will be a first for the Conference and will aid the Mexican participants who also face the challenge of implementing the principles in the context of a legal tradition based on a civil code.

The NCCUSL Uniform Act will be formally presented to the NCCUSL annual meeting (July 27 – August 3, 2007). NCCUSL's by-laws require Uniform Acts

to be read at two consecutive annual meetings before approval and this 'first reading' of the NCCUSL Uniform Act will allow the project to conform to those by-laws. In addition, a meeting of the joint drafting committee will take place in fall 2007 to review the draft Uniform Acts prepared by the ULCC, NCCUSL and Mexican Uniform Law Centre teams and to discuss their approaches to implementing the principles and whether it is possible to harmonize the language used in the Acts and commentaries.

Mr. Zakreski then outlined some key principles in the Statement of Principles including: Principle 1 (organizations covered); Principle 2 (Internal rules of practice) and Principles 9 and 10 (Applicability of other law).

Discussion:

The discussion centred around concerns with some of the principles in the Statement of Principles. With respect to Principle 1 (organizations covered), it was noted that the scope of the draft legislation is broad and that it could apply both to sophisticated organizations that probably should incorporate and to little groups formed for long or short term or specific purposes – the latter would become legal entities, even if they chose not to be. Mr. Zakreski noted that this was intentional. With respect to Principle 2 (internal rules), again it was noted that the scope is very broad – what do provisions like this mean for informal groups such as book clubs, for new associations, etc.? A question as to whether the legislation could be seen as inhibiting freedom of association was raised. Another question: to what extent does the 'default' approach in the legislation change the law respecting unions or "oust" newer developments in the law respecting unions? A Québec representative noted with appreciation the focus on Québec's interest in the project and that the approach taken – developing principles first and then legislation – will be of assistance to Québec. The Chairperson noted that the discussion identified issues that will need to be thought through.

RESOLVED:

THAT the joint ULCC, NCCUSL and MCCUSL 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 2008 meeting.

UN Convention on the Assignment of Receivables in International Trade

Uniform Act and Revised Commentaries

Presenter: Kathryn Sabo, General Counsel, International Private Law Section, Department of Justice, Canada

At its August 2005 meeting, the Conference approved a pre-implementation report prepared by J. Michel Deschamps and Catherine Walsh on the *UN Convention on the Assignment of Receivables in International Trade* (the "Convention"). Acting on the recommendations in the Report, the Conference approved the establishment of a Working Group to prepare a Uniform Act to implement the Convention and to prepare complementary legislation. The Working Group was mandated to work with the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the Mexican Uniform Law Centre with a view to coordinating implementation of the Convention in all three NAFTA countries.

In August 2006, the Working Group presented a final draft Uniform Act, with commentaries and related recommendations to the Conference. The *Uniform Assignment of Receivables in International Trade Act* was approved in principle, with final approval postponed until the final meetings on the joint project had taken place.

A joint meeting and consultation session was held in New York on October 16, 2006 which was aimed at determining whether industry supported ratification of the Convention in the United States. A further joint session was held in Chicago in November 2006. Thereafter, work continued by conference call through August 2007. The Chair specifically thanked the Working Group for its enthusiasm, and on behalf of the Working Group

and thanked the Mexican Uniform Law Centre and NCCUSL for organizing and hosting the very productive joint meeting and conference calls.

The joint meetings between representatives of the ULCC Working Group and their U.S. and Mexican counterparts produced a consensus that implementation of the Convention in the three countries would produce significant benefits at two levels. First, it would substantially harmonize receivables financing law throughout the NAFTA region. Second, it would encourage other states to adopt the Convention so as to eventually bring about global harmonization. The joint discussions led to a modification to the commentary respecting section 2 of the Draft Uniform Act – the commentary now mentions article 23(3) of the Convention (dealing with a form of declaration). This is the only difference between the version submitted to the Conference in 2006 and the version submitted this year.

The Conference was reminded that, in its 2006 Report, the Working Group also submitted suggested complementary amendments to Personal Property Security Acts to remedy the incompatibility with the Convention that certain PPSA amendments proposed by Ontario would create.

The Working Group recommended:

1. That the Conference approve and adopt the Draft *Uniform Assignment of Receivables in International Trade Act* and commentaries set out in Appendix 1 to the Report, along with the proposed PPSA amendments set out in Appendix 2.

2. Should the Conference undertake work with respect to personal property security, it is recommended that the complementary amendments set out in Appendix 1 to the 2006 Report of the Working Group be considered and that implementation of the Convention be taken into account.

Discussion:

Ian Govey (Australia) noted that they would be looking with interest at the work that has been done on this joint project, as they are considering reforming their personal property securities legislation.

RESOLVED:

THAT the *Uniform Assignment of Receivables in International Trade Act* and amended Commentaries as presented to the Conference be adopted and recommended to the jurisdictions for enactment.

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 presented to the Conference at its August 2006 meeting and that they be addressed in connection with any project undertaken respecting secured transaction legislation.

Changes to the Personal Property Security Acts

Presenter: Clark W. Dalton, Q.C. National Coordinator, Commercial Law Strategy, ULCC, on behalf of Professor Ronald Cuming, Q.C.

In the early 1980's, the ULCC promulgated a *Uniform Personal Property Security Act.* While features of this Act were later included in the provincial Acts, it never served as a model, primarily as events overtook it.

The Report provides a historical overview that concludes:

- personal property security legislation (PPSAs) of all jurisdictions other than Ontario, Yukon and Quebec are largely uniform;
- recent amendments to the Ontario Act have brought it closer to the Canadian Conference on Personal Property Security Law model (formerly known as the Western Canada model) in a few important respects;
- any efforts to improve the existing CCPPSL model should not threaten this uniformity;
- apart from changes designed to accommodate the *Uniform Securities Transfer Act*, recent ULCC efforts to secure uniform, modernized secured transactions law have been unsuccessful.

The Report describes the new approach being taken to law reform in this area by ULCC, which essentially involves identifying discrete areas of law that require amendment through consultation, and consulting on proposals for change widely. Aspects of this new approach have been implemented in developing the proposed changes to the PPSA conflict of laws provisions discussed in the Report.

The Report notes that revised conflict of laws rules were developed and enacted in Ontario (*Ministry of Government Services Consumer Protection and Service Modernization Act*; 2006, Chapter 34, Schedule E) but remain unproclaimed. A 'generic version' of the recommended provisions for jurisdictions with a CCPPSL Model Act is attached as an appendix to the Report. Work is ongoing to facilitate contemporaneous implementation of these provisions in all common law jurisdictions (other than Ontario).

The Report concludes that, as the *Uniform Personal Property Security Act* is no longer of significance in the development of this area of the law in Canada, there is little point in recommending amendments to it. However, it is recommended that the Conference recommend to the common law provinces and territories (other than Ontario) that they amend their PPSAs to incorporate the proposed conflict of laws provisions in the Appendix to the Report.

Discussion:

It was noted that the US has revised Article 9, and that this should be looked at as it will be very relevant for Canadian businesses. Perhaps this could be a new, discrete project? It was also noted that the proposed amendments respecting conflict of interest have not gone through the ULCC drafting process. Another individual commented that, as this is a complex area, a drafter would need a good deal of drafting direction and that the ULCC should adopt "principles" first and then refer it to the drafting section. It was also suggested that the proposal not be adopted immediately, but that there be some opportunity to consider it and to also consider the proposals made last year by the *UN Convention on the Assignment of Receivables in International Trade* Working Group. The need to ensure uniformity in drafting in this area is a concern.

RESOLVED:

THAT the Conference approve the implementation of a new approach to law reform in relation to the review of the Personal Property Security Act, taking into account the discussions of the Conference;

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 on the *UN Convention on the Assignment of Receivables in International Trade* presented to the Conference at its August 2006 meeting and that they be addressed in connection with any project undertaken respecting secured transactions legislation.

Privity of Contract and Third Party Beneficiaries

Presenter: Sandra L. Petersson, Research Manager, Alberta Law Reform Institute, on behalf of Maria Lavelle, Alberta Law Reform Institute

The paper reviews the issue of privity of contract and third party beneficiaries. It concludes that the law is in need of reform and that a uniform proposal for reform from the ULCC would improve the prospects for implementation across Canada.

The paper focuses on the 'first limb' of the doctrine of privity of contract: a "contract cannot, generally, confer rights or impose obligations arising under it on any person except the parties to it". An overview of the history of the doctrine, examples of the problems created by it and the arguments 'for and against' the doctrine were provided.

The doctrine has long been criticized as artificial and contrary to the parties' intention to benefit a third party. As a result, the courts have frequently resorted to devices such as agency or trust to allow a third party to enforce a benefit conferred upon it. Legislation has also made

incremental inroads into the doctrine by providing for certain specific exceptions. Furthermore, the Supreme Court of Canada has created a "principled exception" to the doctrine in the 1992 *London Drugs* case and allowed a negligent third party beneficiary to rely on a provision in their employer's contract limiting liability for damaged goods. However, subsequent lower courts decisions have tended to limit the application of this "principled exception" holding that it cannot be used by third parties as a sword, but only as a shield. The result is a complex series of exceptions and judicial devices which, although mitigating the application of the privity doctrine, have not precluded the possibility of injustice occurring.

Arguments against reform of the doctrine of privity include:

- a third party should not be able to sue in the absence of consideration;
- a third party should not be able to obtain contractual rights in the absence of consent;
- it is undesirable for a promisor to be subject to double recovery or a flood of litigation brought about by third party beneficiaries;
- it is unjust that a third party beneficiary can sue on the contract but cannot be sued;
- the potential for infringement of the contracting parties' ability to rescind or vary the contract.
- Arguments in favour of reform include:
- the law concerning privity of contract is unduly complex, uncertain and artificial;
- the doctrine frustrates the enforcement of sensible commercial and personal arrangements made on a daily basis;
- the person who has suffered the loss cannot sue, while the person who has suffered no loss can sue;
- an injustice results to a third party who has relied on the promise.

Law reform bodies in Alberta, Ontario, Manitoba, Saskatchewan and Nova Scotia have recommended legislative reforms to the doctrine of privity of contract but, to date, none of these recommendations have been

implemented. Québec and New Brunswick are the only provinces with legislation addressing this issue. It was noted that, in failing to reform the doctrine of privity of contract with respect to third-party beneficiaries, Canada is out of step with other common-law jurisdictions. In Australia (Western Australia and Queensland), the United Kingdom, New Zealand, the U.S. and Singapore, the privity doctrine has been reformed through legislation. Law reform commissions in Hong Kong and Ireland recently recommended legislative reforms to address this issue.

Ms. Petersson noted that the Supreme Court of Canada, in *London Drugs*, acknowledged the academic and judicial criticisms of the restrictions imposed by the doctrine of privity but held that major reforms to the rule would have to come from the legislature. In determining whether the ULCC is the appropriate body to look at this topic, some factors to consider include: legislative interest in Canada seems low; conversely, reform has succeeded in other countries; UNIDROIT has a working group working in this area that has recommended some recognition of 3rd party beneficiaries; what are the consequences of inaction (incremental or piecemeal developments that differ across Canada?).

While enforceability of third party beneficiary agreements is the primary consideration behind any law reform project in this area, there are a number of other areas that require study, such as identification of third parties; variation and rescission; defences; and overlapping claims. Ms. Petersson also noted there are many options for reform, as not all countries have taken the same approach. The Paper concludes with a recommendation that the ULCC complete a study on this issue, including recommendations for uniform legislative reform. The ULCC project would be able to take advantage of the body of research that has already been completed by other law reform commissions on this issue.

Discussion:

The discussion centred around whether there is a need for legislative reform in this area or whether the courts are moving in the right direction, and on the experience in New Brunswick and Québec. Generally, it was agreed the issue warrants further examination.

RESOLVED:

THAT a Working Group be established to prepare, in accordance with the discussions of the Conference, a study paper examining the options and issues set out in the Report and containing legislative recommendations for consideration at the 2008 meeting.

Partnership Law

Presenter: Clark W. Dalton, Q.C., National Coordinator, Commercial Law Strategy, ULCC, on behalf of Lynn Romeo, Director, Civil Legal Services, Manitoba Justice

At last year's conference in Edmonton, Professor Heather Heavin of the University of Saskatchewan presented a Report on the subject of partnership law, which highlighted reforms in the U.S. and United Kingdom. The Conference decided that a Working Group should be established to prepare a Study Paper examining the merits of the options set out in the Report, and containing legislative recommendations for consideration at the 2007 meeting.

Volunteers were recruited for the Working Group, including Normand Royal of the Montreal office of Miller Thompson, Charles Denis of Québec and Karen Pflanzner of Saskatchewan Justice. Due to her schedule, Professor Heavin was unable to continue with the project during the year. She is, however, committed to completing the project and has a clear sense of how it should proceed. It was noted that law reform commissions, including the Alberta Law Reform Institute, are interested in this project and are waiting to see what the ULCC will be recommending. The recommendation is to continue with the project in the upcoming year.

RESOLVED:

THAT a Working Group be established to prepare, in accordance with the discussions of the Conference, a study paper examining the merits of the options set out in the Report presented to the Conference at its 2006 meeting, and containing legislative recommendations for consideration at

the 2008 meeting.

Status Report on Private International Law

Presenter: Kathryn Sabo, General Counsel, International Private Law Section, Department of Justice, Canada

Ms. Sabo distributed a written Report respecting the activities and priorities of the Department of Justice of Canada in the area of private international law over the past year. She noted that the form of the Report has been changed to include, as Annex B, an "Overview Chart of International Private Law Priorities" and, as Appendix C, tables summarizing the priorities in the areas of international commercial law; judicial cooperation and enforcement of judgments; family law; and protection of property.

The following were identified as high priorities in the international commercial law area:

- *Convention on the Settlement of Investment Disputes between States and Internationals of other States*(ICSID/World Bank). (ULCC has adopted uniform implementing legislation.)
- *Convention on International Interests in Mobile Equipment and Aircraft Protocol* (UNIDROIT). (ULCC has adopted uniform implementing legislation.)
- Negotiations respecting the Draft Legislative Guide on Secured Transactions (UNCITRAL).
- Negotiations respecting the Project on harmonized substantive rules regarding indirectly held securities (UNIDROIT).
- *Convention on Securities Held by Intermediaries* (Hague Conference). The ULCC approved a Working Group to prepare uniform implementing legislation as part of the commercial law strategy.

- *Convention on the Assignment of Receivables in International Trade Law* (UNCITRAL). A joint ULCC/NCCUSL/Mexican Uniform Law Center project is underway.
- *Convention on the Limitation Period in the International Sale of Goods* (UNCITRAL). (ULCC has adopted uniform implementing legislation.)

High priorities in the area of judicial cooperation and enforcement of judgments were identified as:

- *Convention on Choice of Court Agreements* (The Hague).
- *Convention abolishing the Requirement of Legalisation for Foreign Public Documents* (The Hague).

In the family law area, high priorities are:

- *Convention on the International Protection of Adults* (The Hague). (ULCC has adopted uniform implementing legislation.)
- *Convention of the Jurisdiction, Applicable Law, Recognition and Enforcement, and Cooperation in matters of Parental Responsibility and Measures of Protection of Children* (The Hague). (ULCC has adopted uniform implementing legislation.)
- *Draft Convention on Maintenance Obligations* (The Hague).
- *Convention on the Civil Aspects of International Child Abduction* (The Hague).

In the area of protection of property, the high priorities are:

- *Convention providing a Uniform Law on the Form of an International Will* (UNIDROIT).
- *Convention on the Law Applicable to Trusts and their Recognition* (The Hague). (ULCC has adopted uniform implementing legislation.)

Ms. Sabo that the Private International Law Advisory Group usually meets twice a year and is one mechanism allowing the federal government to

factor in provincial, territorial and federal interests when dealing with private international law matters. A list of scheduled meetings of international bodies in the private international law area for the upcoming year is included in the Report. Ms. Sabo stated she would do her best to keep the Conference informed on these matters and invited all to provide her with feedback or to questions at any time.

Discussion:

The discussion focused on the state of implementation in the various provinces and territories in Canada of specific Conventions, and the experience of the jurisdictions in this regard. The representatives from NCCUSL noted that the document provided by Ms. Sabo was very helpful and that they were seeking a document like this from the U.S. State Department. John Twohig (Ontario) noted that the document distributed by Ms. Sabo, and the work involved, was greatly appreciated by the Conference.

The Hague Convention on the Law Applicable to Securities Held by Intermediaries

Presenter: Kathryn Sabo, General Counsel, International Private Law Section, Department of Justice, Canada

The Report distributed by Ms. Sabo respecting private international law developments contained an overview of activities respecting this Convention. The Convention was finalized and adopted in December 2002 and is a first attempt worldwide to draft cross-border rules on the law applicable to securities held with an intermediary. Canada actively participated in the negotiations relating to the Convention.

In 2004, the Conference agreed that the Canadian Securities Administrators authorize a Task Force to prepare a uniform implementing statute for the Convention, once the explanatory Report for the Hague Convention was finalized. The Explanatory Report was finalized in late 2004, and the Securities Administrators approved the CSA Task Force

pursuing implementation work in April 2005. Since then, Canadian experts have continued to focus on USTA implementation as a priority, with the result that no progress has been made on a uniform Act to implement the Convention apart from informal discussion. The Report identified the following required action: The ULCC, with the CSA Task Force, prepare a uniform implementing legislation for the Convention.

RESOLVED:

THAT a Working Group be established to prepare a uniform implementing amending Act and commentaries for consideration at the 2008 meeting.

NEW PROJECTS - Report and Discussion

Presenters:

John Lee, Counsel, Policy Division, Ministry of the Attorney General of Ontario
Sarah J. Dafoe, Barrister and Solicitor, Legislative Reform, Alberta Justice

John Lee provided a brief background with respect to the process used to solicit new proposals for projects this year. After last year's meeting of the ULCC, the Civil Section Steering Committee approved a list of ten questions to assist in the process by helping proponents to understand the aims of the Conference so they may better develop their proposals. The responses would also help the Conference to decide which projects it should undertake. The questions asked were as follows:

- Name of proponent
- What is the current law?
- What changes to the law are being proposed?
- How will the project serve the public interest?
- Why is uniformity necessary and what are the benefits?
- Is there any urgency?
- Who would support and who would not support this project?
- How long will the project take?

- Is anyone else working on a similar project?

As this was the first year using the approach, it was decided that answering the questions could be optional; however, almost everyone who made a proposal this year chose to answer the questions. In going through this year's proposals, the presenters asked that the Conference keep in mind, for later discussion, any views as to:

1. Whether this new approach is a good one.

2. Whether answering the questions ought to be mandatory.

3. Whether there are additional questions we should be asking or whether some of the questions don't need to be asked.

John and Sarah then reviewed the proposals that were submitted:

- Model Pension Law: a request from the Canadian Association of Pension Supervisory Authorities
- Conflicts Provisions respecting Wills and Succession (Including Intestacies), proposed by Manitoba Justice;
- Assisted Human Reproduction – Parental Status Law, proposed by the Coordinating Committee of Senior Officials – Family Justice;
- Uniform Joint Venture Legislation, proposed by the Alberta Law Reform Institute.

A proposal respecting civil asset forfeiture legislation was withdrawn. The following New Project Proposals from 2006 were attached to the Report as an appendix: Re-examination of Extraprovincial Licensing Requirements; Legislation Regarding the Use of Technical Protection Measures.

Discussion:

There was a good deal of discussion with respect to the model pensions legislation proposal. With respect to the joint ventures proposal, it was noted that U.S. Conference deals with this in a broader statute, and that the ULCC should investigate whether this topic should be incorporated

into the partnership project. There was also some discussion of the reasons for the withdrawal of the project respecting civil forfeiture.

The reaction to the questions asked of proponents was positive, and with the Chairperson noting that it brings discipline to the process. The Chairperson thanked John and Sarah for their work on this, as it will greatly assist in the consideration of new projects.