UNIFORM LAW CONFERENCE OF CANADA

QUEBEC CITY
AUGUST 10-14, 2008

CIVIL SECTION

MINUTES

GENERAL RESOLUTION RESPECTING APPEARANCE OF REPORTS IN THE PROCEEDINGS

It is the practice of the Civil Section to resolve that all written reports, and summaries of all oral reports, appear in the annual Proceedings. The purpose of a general resolution to this effect is to clarify the distinction between the formal resolution and the substantive action resolutions respecting each individual report.

RESOLVED:

THAT the written reports presented to the Civil Section and to the joint session of the Civil and Criminal Sections appear in the 2008 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 2008 Proceedings.

STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPPs) – (AND OTHER ABUSIVE LAWSUITS) – REPORT

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

At the 2007 meeting of the Conference, during the discussion of new projects, a number of jurisdictions expressed interest in the issue of strategic lawsuits against public participation (SLAPPs). As a result of this interest, a Working Group was subsequently established to examine the issue.

Vincent Pelletier, as Chairperson of the Working Group, provided an overview of the Report of the Working Group. The Report presents a brief summary of the origins of SLAPPs and defines a SLAPP as a lawsuit initiated against one or more individuals or groups that speak out or take a position in a public debate on an issue of public interest. The Report notes that the purpose of SLAPPs is to limit the freedom of expression of the defendants and neutralize their actions by resorting to the courts to intimidate them, deplete their resources and reduce their means of action.

The Report examines the current common law and civil law remedies in Canada that may be used to respond to an abusive lawsuit such as SLAPPs. The Report also reviews Anti-SLAPP legislation and initiatives in Canada and in foreign jurisdictions.

The Report concludes that although the common law and civil law appear to offer a number of remedies for abusive litigation, the remedies have not been effective in relieving the effects of SLAPP suits.

The Report recommends that the Working Group continue its examination of the issue of abusive lawsuits such as SLAPPs and propose, if possible, a draft uniform law or model rules of court for consideration at the 2009 meeting and that the Working Group be expanded to include additional members, including private practice lawyers.

Delegates thanked the chair and other members of the Working Group for the work completed to date on this topic. During the discussion, it was noted that *Bill 99, An Act to amend the Code of Civil Procedure to prevent abusive use of the courts and promote freedom of expression and citizen participation in public debate* was very recently introduced in Quebec. One delegate asked whether there has been any public reaction to the Bill to this point. It was indicated that the Bill has received an enthusiastic response and that the Minister of Justice has indicated that there will be public hearings on the Bill. Another delegate asked what anti-SLAPP legislation adds to the mix that will make the courts act more quickly. In response, it was noted that the idea is to encourage courts to act more quickly. One delegate suggested that it is unlikely that amendment to rules of civil procedure will be sufficient. It will be necessary to identify SLAPP lawsuits as requiring a different approach by the courts. The tendency of the courts is that they are very reluctant to deny anyone their day in court. It was suggested that the problem is one of drafting. How do you define a SLAPP lawsuit? Do multi-national groups get the same protection as groups that are not well funded? Solutions that involve the award of costs or damages do not provide much protection.

One delegate raised the Supreme Court of Canada's decisions on advanced costs as part of a possible justification for this type of legislation. It was also suggested that the work on this topic will need to go beyond the civil procedure context. Another delegate raised the concern that it may be premature for the Conference to engage in this debate. In response, it was noted that it is an emerging area and because of the intimidating effect it has on citizens, the damage may already be done if a "wait and see" approach is taken. It was suggested that where there is a conflict of values, perhaps the Working Group might want to look at tools to manage or mitigate the consequences or impact of the litigation on the parties more fairly rather than focusing on the definition that allows litigation to be struck out completely. It was also suggested that the Working Group might want to consider an interlocutory procedure when a lawsuit is commenced with the intention of suppressing public debate.

RESOLVED:

THAT the Working Group be directed to continue its work and to prepare a draft Act and commentaries in accordance with the Report and the directions of the Conference for consideration at the 2009 meeting.

ASSISTED HUMAN REPRODUCTION – REPORT

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

In December 2007, the ULCC formed a joint working group with members of the CCSO Family Justice Working Group, at the request of CCSO. Elizabeth Strange, as co-chair of the Working Group, provided an overview of the Report of the Working Group.

During the presentation, it was noted that a paper prepared by the CCSO Family Working Group that was presented to and adopted by Deputy Ministers of Justice in October 2007 has served as the policy framework for the ULCC-CCSO Working Group. To date, the focus of the Working Group has been on reviewing the mandate, reviewing the CCSO Family Report, discussing the policy, deciding on when and who to consult, deciding on how to proceed with drafting and reviewing drafts.

The Report notes that there are two related policy questions that must be resolved:

- who are the legal parents of a child at the moment of birth; and
- who is entitled to register as the child's parents.

In summary, the Working Group has focused on the two areas of inclusivity and simplicity and has attempted to not differentiate between the types of parents, the gender of the parents or how they came to be parents. It has been a goal of the Working Group to try to treat everyone as equally as possible and in that goal the Working Group has adopted three potential indicators for parentage: the active birth, genetics and the intention to birth.

The options of becoming a parent in the Working Group's review were natural conception, assisted conception and surrogacy. In all three areas, the birth mother is the legal parent at the time of birth. Unless a statutory provision (like a presumption) provides otherwise, the genetic father and the birth mother are the parents of a child. There are two means by which the birth mother can relinquish her parental status, and another person can gain parental status: adoption and surrogacy.

The Report discusses two options for determining the parentage of children born using surrogacy. The first option focuses on a genetic link with at least one of the intended parents and intention to parent. In this option, parentage in surrogacy situations would be determined based on the provision of genetic material for the child's conception by at least one of the intended parents. Where there is no genetic link between at least one of the intended parents and the child, the intended parents must apply to adopt the child. The second option looks only at the intention to parent. It goes further than option one because it does not require the intended parents to apply to adopt the child where neither of them is genetically related to the child. The Working Group has not come to an agreement on these two options.

In addition, it was noted that after the CCSO Family Law Working Group decided they would only be considering a two parent option, the Ontario Court of Appeal decision in

AA v BB and CC concluded that there is a three parent option. At this point, the Working Group is considering the implications of this decision. The Working Group asked for direction from the Conference on a number of issues. The Working Group has attended a meeting with Assisted Reproduction Canada and will also be conducting further consultations.

During the discussion, one delegate raised the issue of the third parent and noted that the Report does not address: What is a parent? Why do we care who the parent is and what are the obligations of a parent? The idea that there are two parents is out of step with what is clearly the changing nature of the family and marital arrangements. It seems that the Report has to address the polygamy issue and provide an explanation of why a relationship like that would not automatically be one where there would be multiple parents based on relationships. It was suggested that the Report needs to be more comprehensive, complicated and forward looking on these issues. It was also pointed out by one delegate that it is important to include in the analysis what the parties can and cannot do by contract and that the consultations need to be broad and extensive. One delegate expressed the view that the concepts need to be clarified before proceeding with consultations and that the two parent presumption artificially restricts the project. It was further submitted that in light of the *AA v BB and CC* decision it is not a realistic option any longer to confine the project to a two parent presumption. It was pointed out that new vital statistics legislation introduced in Saskatchewan after this decision has recognized the ability to register more than two parents. In terms of consultations, it was suggested that the CBA Family Law Section would be a good source for consultations. It was also noted that the Quebec approach may be helpful to the Working Group and that Australia has recently prepared a draft consultation paper on surrogacy.

RESOLVED:

THAT the Working Group be directed to:

a) continue its work based upon the Report and discussion at the Conference;
b) carry out consultations with stakeholder groups; and
c) prepare further recommendations for consideration at the 2009 meeting.

CANADA INTEREST ACT – REPORT

Presenter: Lisa Peters, Canadian Bar Association – British Columbia,
Lawson Lundell LLP (Vancouver)

At the 2007 meeting of the Conference, Professor Thomas G. W. Telfer of the University of Western Ontario presented a paper on the federal *Interest Act*. In early 2008, a Working Group was established to further consider the issues raised by Professor Telfer's paper and to examine the provisions of the *Interest Act* in light of provincial legislation and common law developments.

The Report notes that while most ULCC projects raise questions and concerns as to the uniformity of provincial and territorial legislation, this project does not; instead, it raises questions as to the extent to which the provisions of the federal *Interest Act* are

duplicated in existing provincial and territorial legislation and the extent to which the *Interest Act* provisions, whether they are duplicated in provincial and territorial legislation or not, remain relevant.

The Report sets out the methodology adopted by the Working Group in conducting its review and provides a section by section analysis of the existing provisions of the *Interest Act*. The Report concludes with a summary of the preliminary findings and recommendations of the Working Group for each section of the *Interest Act*.

Delegates thanked the chair and other members of the Working Group for the work completed on this project. During the discussion, one delegate suggested that the Working Group consider the practicalities of making a loan at the outset. In particular, it was suggested that the Working Group consider as an alternative to determining the application of sections 6, 8 and 10, a financial threshold test based on a loan amount, rather than forcing the lender to investigate in every transaction whether it is a consumer or commercial transaction. It was also suggested that with respect to section 3 while it may be necessary to revise the 5% per annum rate, it is important to keep the provision as simple as possible.

RESOLVED:

THAT the Working Group be directed to:

a) continue its work based upon the Report and discussion at the Conference;
b) carry out consultations with stakeholder groups; and
c) prepare final recommendations for consideration at the 2009 meeting.

PERSONAL PROPERTY SECURITY ACT

Presenter: Clark W. Dalton, Projects Manager, Uniform Law Conference

Mr. Dalton provided an informational report on the *Personal Property Security Act* project. In briefly reviewing the history of the project, Mr. Dalton noted that the ULCC had a *Uniform Personal Property Security Act* in the 1980s. It was never adopted by any jurisdiction, other than some elements of it appear in the Ontario *Personal Property Security Ac*t. In 2002, the Conference asked a Working Group to review the personal property security act matter and the Working Group reported in 2002. In addition, the Working Group provided a report in 2004 on some proposed amendments to the Act together with some amendments that would accommodate the *Uniform Securities Transactions Act*. The *Uniform Securities Transactions Act* recommendations were adopted but none of the other amendments were adopted. As a consequence, a report was presented at the 2007 meeting of the Conference that recommended a new approach to law reform in this area and that recommendation was adopted by the Conference. The new approach involves examining areas of PPSA law identified by the director of the project through consultation with practitioners, government solicitors, provincial PPSA committees and academics.

Mr. Dalton provided a summary of the Report prepared by Professor Ronald C. C. Cuming. It was noted that in furtherance of the new approach, Professor Cuming worked with the Ontario PPSA Committee during the 2007-2008 period in examining a number of the areas of licences as collateral, cross-collateralization and purchase money security interest priority, non-security transfers of accounts and chattel paper and perfection of security interests and receivership. It is anticipated that further consideration of these topics will lead to recommendations in the 2008-2009 meeting period.

It was also noted that Professor Cuming raised the matter of the lack of an effective structure through which recommended changes to PPSA law arising out of this project may be communicated to the relevant government officials in the provinces and territories and implemented by them on a coordinated basis. Mr. Dalton asked that delegates provide him with the appropriate contacts in their jurisdictions to assist in the implementation of PPSA amendments.

RESOLVED:

THAT the update report be received and the Working Group be directed to continue its work in accordance with the protocol in the Report presented to the Conference in 2007.

UNIFORM INCOME TRUSTS ACT

Presenter: Wayne Gray, Ontario Bar Association
McMillan Binch LLP

Mr. Gray provided a brief history of the project, a summary of the changes that have been made to the draft *Uniform Income Trusts Act* since the 2007 Conference and an update on the likely future of the project.

During his presentation, Mr. Gray noted that the genesis for the project was the Report on Forms of Business Associations in Canada that was presented at the August 2005 meeting of the Conference. The Report identified income trusts at that time as being the one area where there was a governance gap and where legislation could serve a role. In 2005, income trusts were very much on the public agenda and there were a lot of conversions of ordinary corporations into income trusts. Based on this, a Working Group was established and the Working Group presented recommendations to the Conference in 2006. The recommendations were adopted and then in 2007, the Working Group presented the proposed *Uniform Income Trusts Act* to the Conference. However, it was always recognized that the driving interest for income trusts was a gap in the *Income Tax Act* and that it was a fragile project in the sense that as a result of changes to the *Income Tax Act*, the government could eliminate the tax incentive for income trusts. It was pointed out that this is exactly what happened and that on October 31, 2006, the federal Finance Minister James Flaherty announced a moratorium on income trusts and a phase out of income trusts by 2011.

It was noted that the Working Group had essentially finished its work by that point and so decided to carry on. It was pointed out that there is an exemption from the regime for real estate investment trusts if they have substantially all of their assets in real estate in

Canada. Accordingly, the Working Group still thinks the legislation would be relevant to these entities. In addition, there is a possibility that the income trusts may be more important in the future than they presently appear.

Mr. Gray noted that although the work in 2007 resulted in a draft Act, the commentary still had to be developed. Clark Dalton prepared the initial draft of the commentary and the Working Group refined the commentary. Meanwhile, there was some interest in the market sector for the legislation from the Canadian Coalition for Good Governance (CCGG) and the CCGG asked for some consultations with the Working Group. The Working Group met with CCGG in May 2008. However, the essence of the meeting was that while CCGG feels that there is need for the legislation, the lawyers at the meeting felt that there is not a need for this legislation at the moment. The concern was that it would be too much work in comparison to the benefit.

In conclusion, Mr. Gray identified the changes that had been made to the draft Act as a result of comments that were made at the 2007 meeting of the Conference and as a result of preparing the commentary and refining the work.

RESOLVED:

THAT the *Uniform Income Trusts Act* and commentaries be adopted and recommended to the jurisdictions for enactment.

ELECTRONIC COMMERCE IN INTERNATIONAL CONTRACTS – REPORT

Presenters: Professor Michael Deturbide, Professor of Law and Associate Dean, Dalhousie Law School
Professor Vincent Gautrais, Faculty of Law of the Université de Montréal

Professor Deturbide prepared a Pre-Implementation Report on the Convention on the Use of Electronic Communications in International Contracts primarily to compare the *United Nations Convention on the Use of Electronic Communications in International Contracts* (the "Convention") with the rules and norms of provincial Canadian legislation in common law jurisdictions and the common law contract formation. He noted that his conclusion is that the rules relating to electronic communications in the common law jurisdictions of Canada are for the most part in harmony with the Convention. He pointed out that, unfortunately, that does not appear to be true with respect to at least one particular aspect of Quebec law.

He then reported on how the Convention impacts and intersects with domestic law outside of Quebec. It was noted that the fundamental goal of the Convention is to remove legal obstacles with respect to electronic communications and therefore improve commercial predictability. Professor Deturbide noted that there is very little substantive law in the Convention itself and that the fundamental aspect of the Convention is that it deals with electronic communications in international contracts. Essentially, the Convention strives for some uniformity across national borders.

The fundamental purpose for comparing the Convention with the Canadian law on electronic contracting is to determine to what extent the Convention, if adopted by Canada, will conflict with established common law norms and existing domestic electronic commerce legislation. In comparing the Convention with existing Canadian law, it was noted that the primary source of law examined was the *Uniform Electronic Commerce Act* (UECA), which is based on the UNCITRAL model law on electronic commerce. In his Report, Professor Derturbide highlights a number of differences between the Convention and the UECA. For example, the Convention excludes consumer contracts and preserves party autonomy. Professor Deturbide concludes that despite the fact that the convention differs somewhat from the UECA, the models are similar. He notes that the Convention's principles are consistent with Canadian law, including the common law of contract and that the benefits gained from a uniform international scheme outweigh concerns over perfect harmonization with domestic legislation.

Professor Gautrais then presented a Paper on a Comparative Analysis of the Convention and the Civil Law of Quebec. The main purpose of the Paper is to present a comparison between the Convention and Quebec's *Act to establish a legal framework for information technology* (the LFIT Act) in order to provide a clear, concrete response regarding whether it would be appropriate for Canada to accede to the Convention, having regard to Quebec law.

The Paper provides a general discussion of the Quebec legislation and the Convention and provides a comparison of the instruments, including both the similarities and difference between the two instruments. The Report concludes with the results of the analysis and recommendations and notes that the application of the Convention by Canada is a somewhat more complex question in relation to Quebec law as it now stands than it is in relation to the law of most of the common law jurisdictions. In conclusion, the Report provides that it would be difficult for Canada to accede to the Convention without impairing the consistency of Quebec law. In particular, the Report provides that it is difficult for Quebec to change the integrity criterion without upsetting its own consistency. In addition, the Convention has not been widely adopted and the European countries seem reluctant to adopt the Convention. Finally, there is a very active debate about this in the field of arbitration, where the opposition between advocates of "strong" writing and those of "weak" or no writing has prevented any formal changes to the New York Convention of 1958.

RESOLVED:

THAT the Civil Section Steering Committee continue to monitor developments in the area of Electronic Commerce in International Contracts and, if appropriate, make recommendations to the New Projects Committee.

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

Presenters: Mireille-France Blanchard, Counsel/Avocate, Justice Canada, International Private Law Section
Marc Lacoursière, Professor, Université Laval
Steven Jeffery, Partner, Blaney McMurtry LLP

Steven Jeffery and Professor Lacoursière provided a presentation on the *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* and the implementation project. They began by providing an overview of a typical stand-by letter of credit and independent guarantee. The traditional use of a documentary letter of credit involves an international sale of goods transaction. The buyer wants its goods before it has to pay and the seller wants its money before it has to give the buyer the goods. The letter of credit is designed to bridge this problem. There are two different types of letters of credit. Documentary letters of credit involve the payment of money under a contract of sale and become payable upon the presentation by the seller and beneficiary of documents that show that the seller has taken affirmative steps to comply with the underlying contract (payment mechanism). A stand-by letter of credit and independent guarantee is payable upon certification of a party's non-performance of an agreement (guarantee). The concept of the independence of the stand-by letter of credit is what gives it its value in the transactions in which it is being used. In the famous Canadian case of *Bank of Nova Scotia v. Angelica Whitewear* [1987] 1 SCR 59, the court recognized that the fundamental principal governing the letters of credit is that disputes between the parties to the underlying contract concerning its performance cannot, as a general rule, justify a refusal by the issuing bank to honor a draft.

The letter of credit is an instrument that has been developed by merchants over several hundred years and is typically not governed by legislation in any jurisdiction. The key set of rules that govern letters of credit are the rules that have been consolidated by the International Chamber of Commerce over the years. The UN Convention is another set of rules that were negotiated among UN Countries regarding stand-by letters of credit.

Professor Lacoursière reviewed the motivation for the UN Convention project. He explained that the project was aimed at providing greater legal certainty in the use of stand-by letters of credit and independent guarantees, especially in the areas of fraud and abuse. It is aimed at harmonization in North America and comprehensive transparency and clarity.

Mr. Jeffery and Professor Lacoursière provided an overview of the Convention and noted that it deals with all of the basics that relate to letters of credit. In summary, it deals with the scope of application of the Convention, a definition of undertaking, issuance and amendment of the instrument, transfer of the beneficiary rights, assignment of the proceeds of the credit, determination of rights and obligations, standard of conduct and liability of the issuers, and demand, payment and set off. The key items that the Convention deals with but which are not dealt with in the existing rules are the fraud exception to the independence and autonomy principles and provisional court measures.

During their presentation, Mr. Jeffery and Professor Lacoursière highlighted the areas where there are differences between the Convention and existing Canadian law and practice. It was noted that the one question that arises with respect to Article 1 of the Convention is that it applies only to international letters of credit. As a result, if the Convention is adopted in Canada, it has the potential of leading to two sets of rules for letters of credit in Canada – one for domestic letters of credit and one for international letters of credit. It was also pointed out that the addition of the concept of "good faith" in Article 14 of the Convention is somewhat controversial. The reference to seven days in Article 16 of the Convention is different than the CPP 600.

Mr. Jeffery noted that the main purpose of the Convention is to address fraud. At common law, the only exception to the independence principle is the fraud exception. The Convention deals with the fraud exception in Article 19. The Convention does not use the word "fraud" but sets out a number of examples of situations in which a demand has no conceivable basis. The provisional court measures provision of the Convention is tied in with the fraud exception. If fraud is shown by the applicant to the court, the court may issue a provisional order to the effect that the issuer not honour the undertaking. The Convention slips in one more reason for enjoining payment under a letter of credit and that is where it is used for a criminal purpose.

In conclusion, it was noted that the Convention is in accordance with the desirability of as much uniformity as possible in the law with respect to letters of credit which was expressed by the Supreme Court in *Angelica Whitewear*. In general, the Convention is in line with Canadian and Quebec decisions on letters of credit and independent guarantees, but with some exceptions, particularly regarding the introduction of the requirement of "good faith" and the absence of the use of the word "fraud" in the fraud exception. It was recommended that the Conference adopt the Convention as a model law for possible adoption by the jurisdictions.

Mireille-France Blanchard provided a progress report on the activities of the Working Group. At its Annual Meeting in 2007, the Conference considered a draft uniform implementation Act and encouraged the Working Group to continue its work in developing both a draft uniform Act implementing the *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* and specific rules to address domestic transactions and all aspects of international ones.

Since the 2007 Conference, the Working Group has been meeting weekly by conference call and attended a joint meeting with the United States and Mexican colleagues to attempt to bring about a harmonized approach to implementing the Convention across the Americas. The Working Group has also held consultations sessions with key stakeholders and continues to maintain ongoing discussions with these stakeholders. The Working Group has developed a draft uniform Act that establishes domestic rules and implements the Convention in Canada and expects to complete the draft uniform Act and commentaries for presentation to the Conference in 2009.

In the comments following the presentation, it was noted that the Working Group's approach to developing the domestic rules has been to start with the Convention. However, because the Convention only deals with stand-by letters of credit, additional

provisions have been added dealing with documentary letters of credit based on Article 5 of the UCC.

RESOLVED:

THAT the Working Group be directed to continue to consider the issues raised in the Report and the directions of the Conference and that it prepare a uniform Act and commentaries for consideration at the 2009 meeting.

JOINT SESSIONS OF THE CIVIL AND CRIMINAL SECTIONS

Progress Report of the Working Group on the Collateral Use of Crown Brief Disclosure

The report was presented by Denise Dwyer, Crown Law Office – Civil, Ministry of the Attorney General of Ontario and Gail Mildren, Civil Legal Services, Manitoba Justice.

The report provides an update on the work developed by the working group in the following three areas taking into consideration views expressed by delegates during the 2007 annual meeting of the ULCC.

- the question of whether the use of Crown brief materials by the Crown and the police in the context of civil and administrative proceedings should be subject to special limits;
- the examination of underlying considerations for drafting a model rule and a statement of principles in the context of child protection and professional disciplinary proceedings such as the urgency often attached to those types of matters as well as *Charter* challenges; and
- the development of an access to information draft provision to offer broad protection against disclosure of Crown brief records.

As a result of work on these issues, the working group proposed amendments to the recommendations contained in the 2007 report. These recommendations, as amended, are reflected in the 2008 report.

Delegates thanked the presenters for a helpful summary of the issues highlighted in the report. During the discussion, one delegate was of the view that the business community may not be in favour of a blanket exception to the *Wagg* screening process for the Crown in instances where the Crown is a respondent in civil proceedings against a company, noting in particular that one of the concerns in the *Wagg* decision with respect to Crown disclosure was privacy and privilege interests of parties who are not before the Court. It was also suggested that because the privilege and privacy interests of third parties are not necessarily the same as the interests of the Crown, the model rule should include a requirement that notice be provided to individuals or corporations and allow them to bring the same type of interlocutory court proceeding. In response, it was indicated that when the Crown responds as a defendant in a civil action, the Crown ensures that information shared is properly vetted and while the Crown may not always have the same interests as those of third parties, nonetheless the Crown will protect third party rights.

It was further noted that issues that require further analysis include whether the *Wagg* screening process ought to be made to accommodate use of police and prosecution records at coroner's inquests and in public inquiries, and whether a presumption that litigants will not be able to obtain production of Crown Brief records until the prosecution has been completed should apply in family law, child welfare and professional disciplinary proceedings.

After discussion, the following resolution was presented to delegates:

RESOLVED:

THAT the Joint Civil/Criminal Section Working Group be directed to:

(a) prepare model rules and legislation in accordance with the recommendations contained in the Report;
(b) report back to the Conference at the 2009 meeting.

Report of the Joint Criminal/Civil Section Working Group on: Malicious Prosecution

The report on Malicious Prosecution was presented by Judy Mungovan, Counsel, Ministry of the Attorney General of Ontario.

The report notes that the working group was mandated by the Conference at the 2007 annual meeting to prepare uniform legislation and other jurisdictional responses as recommended in the 2007 report of the working group. In accordance with this mandate, the 2008 report provides the status of the work of the group and includes draft legislation for consideration by delegates at the 2008 annual meeting. The report notes that the draft model legislation is intended to address the following specific elements:

- address concerns resulting from courts conflating the third and fourth elements of the test for liability for malicious prosecution as set out in the 1989 Supreme Court of Canada decision in *Nelles* v. *Ontario*;
- provide that the action is to be brought only against the Attorney General and not the Crown prosecutor in order to better reflect the reality of modern prosecution services where the ultimate decision to prosecute does not necessarily rest on the Crown attorney;
- provide that the requirement that the four elements set out in *Nelles* to establish liability from malicious prosecution must always be proven in a civil action for prosecutorial misconduct including evidence of improper motive as an indicator of malice; and
- not limit the types of torts that are captured to ensure that the high threshold set out in the decision is not circumvented by initiating a different type of tort for prosecutorial misconduct.

The report also notes that leave to appeal to the Supreme Court of Canada has been granted in the *Miazga* v. *Kvello Estate* [2007] S. J. No. 247 on February 7, 2008 and that

the working group will monitor the outcome of the decision before finalizing the model legislation.

Delegates thanked the chair and other members of the working group for the work developed on this topic to date. It was confirmed at the outset of the discussion that the Supreme Court of Canada decision in *Miazga* would not necessarily provide responses to all issues raised in the 2007 report of the working group including whether or not the focus should only be on the tort of malicious prosecution or whether the Attorney General ought to be named as the party instead of the Crown attorney. Therefore, the working group will still need to address these outstanding issues.

One delegate suggested that the working group consider providing in the model legislation that where there is a subjective belief on the part of the Crown attorney in the presence of reasonable and probable cause, that this should be an answer to an allegation of malice. It was mentioned in response that one of the reasons why a purely subjective test was not selected by the working group was that, in some instances, Crown prosecutors are encouraged to seek direction from more experienced prosecutors when the decision is particularly complex. This results in one or more senior Crown prosecutors making the final determination. It was noted that the working group would be examining this issue further.

Another consideration raised was that in light of the fact that provincial rules of civil procedure generally allow for examination for discovery of a former employee, the draft section providing that the person examined for discovery be someone other than a former Crown attorney should perhaps be modified so that the starting point provides that the former employee be discoverable unless there are valid reasons not to do so.

One delegate queried whether the scheme should address the situation where there has been a determination that a person has been wrongfully convicted. In response it was noted that discussions on this issue had not been completed but that it was an appropriate and important question that should continued to be examined by the working group.

At the end of the discussion, the following resolution was presented:

RESOLVED:

THAT the Joint Civil/Criminal Section Working Group be directed to:

(a) continue its work on the issues raised in the Report in accordance with the direction of the Conference;
(b) monitor the results of the *Miazga* appeal and its impact on the recommendations of the Working Group; and
(c) report back to the Conference at the 2009 meeting.

Report of the Joint Criminal/Civil Section Working Group on Identity Theft: A Progress Report

Presenters: Josh Hawkes, Appellate Counsel, Criminal Justice Division, Alberta Justice
John Gregory, General Counsel, Policy Division, Ontario Ministry of the Attorney General

The report notes that the working group was directed by the Conference in 2007 to develop a principled framework for a breach notification scheme and to conduct a detailed examination of remedies and processes to aid victims of identity theft where criminal or other official records have erroneously been created in the name of the victim.

The report provides a progress report of the working group and presents options for a principled framework for a breach notification scheme. The report specifically addresses the following topics:

- What information is covered by the breach notification scheme?
- What holders of information are covered?
- What is a "breach" or compromise?
- When is a breach or compromise reportable?
- Who decides if a breach has occurred and is reportable?
- What is the response to a breach?
- What does the notice of breach say?
- How are these obligations enforced?
- What else should be included in the framework?
- What form should uniform legislation take?

In addressing these topics, the report highlights that notification of a privacy breach is not free and that a balance is needed between notification in all cases and under-notification. The purpose underlying the proposals set out in the report is to protect individuals whose personal information is disclosed in violation of privacy legislation.

The report also examines various approaches that might be taken to assist victims of identity theft where criminal or other official records have erroneously been created in the name of the victim. The report notes that the term "criminal identity theft" is frequently used to refer to situations in which the perpetrator uses the name of an innocent victim, either alone or in combination with other identity documents, in dealings with law enforcement and others in the criminal justice system. Victims are affected directly when new records or entries in law enforcement records and databases are wrongfully associated or attributed to them.

The report summarizes the different approaches to victim assistance and notes that the approaches have at least two common characteristics. First, they provide for some mechanism to address the records erroneously created as a result of identity theft. Second, these mechanisms attempt to provide some authoritative method by which the innocent individual can identify themselves as having been a victim of identity theft to law enforcement authorities or others.

The report concludes that while some of the initiatives reviewed show promise in alleviating the harm caused by criminal identity theft, further study is required and that it would be premature to recommend the adoption of any of the initiatives in advance of the results of the studies. The report also indicates that a complete and accurate understanding of current practices and procedures of law enforcement and other justice system agencies and participants is needed before the implications of any proposed changes can be properly considered.

Delegates thanked the presenters for a very interesting overview of the issues raised by this topic. During the discussion, it was noted by one delegate that what is often heard is that people wish to take steps to avoid being the victim of identity theft and that the focus should also be on preventing identity theft. In response, it was suggested that while prevention was an important issue, the working group should not go beyond what is relevant for the mandate given by the Conference. One delegate asked at what stage the working group was considering consulting with the various offices of the Privacy Commissioners. It was noted in response that the working group will need to contact various interested parties as part of the development of a uniform Act. It was also pointed out by one delegate that Bill C-27, *An Act to amend the Criminal Code* (identity theft and related misconduct), 2nd Sess., 39th Parl., 2007 which relates to the new identity theft provisions, contains a provision that empowers the court to make a restitution order for costs associated with a person rehabilitating their identity.

After discussion, the following resolution was presented to delegates:

RESOLVED:

THAT the Joint Criminal/Civil Section Working Group be directed to:

(a) prepare a draft Act and commentaries regarding privacy breach notification in accordance with the directions of the Conference and the recommendations contained in the Report;
(b) provide the Report to Deputy Ministers of Justice to determine what further study should be undertaken to identify the appropriate method of assisting victims of identity theft where criminal records or other related documents have been erroneously created in the name of the victim; and
(c) report back to the Conference at the 2009 meeting.

FRAUDULENT CONVEYANCES AND FRAUDULENT PREFERENCES LAW

Presenter: Sarah Dafoe, Justice and Attorney General, Alberta

Sarah Dafoe reported to the Conference on behalf of Professor Buckwold with respect to the fraudulent conveyances and fraudulent preferences project. It was noted that the project started back in 2005, when the Civil Section approved the project and funding was provided by the Law Reform Commission of Saskatchewan. At the 2008 meeting of the Conference, the first study paper was presented which outlined the concepts of fraudulent conveyances and fraudulent preferences and identified some of the policy

issues underlying those concepts. The study paper focused on fraudulent preferences specifically. It examined the existing legislation in Canada, United States, Australia and the United Kingdom and raised the fundamental question of whether the basis for intervention in the debtor's ability to deal with his or her property should be the intention accompanying the transaction.

It was pointed out that ultimately the goal of the project is to develop uniform legislation that will help provide consistent, predictable, defensible outcomes. It was noted that the Working Group intends to adopt the new terminology that was suggested in the study paper and that fraudulent conveyances will hereinafter be referred to as transactions that undervalue and fraudulent preferences will hereinafter be referred to as fraudulent transfers.

After reviewing a brief history of the project, Ms. Dafoe provided an update on the activities and developments in the project. It was noted that the Working Group has now been established and an initial conference call has been held. The Working Group is hoping to add one more member representing the federal department responsible for reform of the *Bankruptcy and Insolvency Act*. Professor Buckwold has completed Part II of her report which focuses on fraudulent preferences. Professor Élise Charpentier of the Faculté de droit, Université de Montréal is currently working on a report that addresses Quebec law in this area and it is anticipated that this report will be completed in November or December 2008. The Working Group is planning to continue with its conference calls and its development of a number of policy recommendations. The Working Group has identified two key target groups for consultations: the Canadian Association of Insolvency and Restructuring Professionals and the Insolvency Institute of Canada. It is anticipated that the preparation of the policy recommendations will be completed for the 2009 meeting of the Conference and then assuming that support of the Conference continues after that point, the goal is to have a draft uniform statute ready for discussion and approval at the 2010 meeting of the Conference.

Following the presentation, one delegate asked the question of whether the Working Group has considered the issue of the provinces withdrawing from fraudulent preference legislation generally and simply leaving it to bankruptcy legislation. Another delegate expressed the view that provincial law is still required to supplement the federal law in this area.

RESOLVED:

THAT the Working Group continue its work and that it:

a) consider the issues raised in the Report and the directions of the Conference;
b) finalize policy recommendations preliminary to the preparation of a draft Act and commentaries; and
c) report back to the Conference at the 2009 meeting.

UNIFORM TRUSTS ACT

Presenters: Peter Lown Q.C., Director, Alberta Law Reform Institute
Arthur Close, Q.C., British Columbia

Peter Lown outlined a proposal for a project regarding a *Uniform Trusts Act*. He noted that the proposal for the project would address some of the criteria, the scope and timing of the project. He suggested that the Conference would want to consider a *Uniform Trusts Act* because of the age of the law and the spread between the statute law and jurisprudence. The statute itself is centuries old and it is drafted in an old fashioned way that is not conducive to more modern application. The context in which trusts are now utilized has changed significantly.

Arthur Close reviewed the work of the British Columbia Law Institute and highlighted some of the main themes in the British Columbia Law Reform report and draft *Trustee Act*. In particular, Mr. Close outlined the scope of the draft Act and noted that the legislation would continue to be essentially a default legal framework that would provide rules where the trust instrument does not. The draft Act is intended to simplify and clarify the way the trust powers are defined. The draft Act moves away from the tedious list of what trustees can or cannot do and clarifies the rules regarding the delegation of decision-making powers by trustees, the application of the Act to personal representatives and the rules as to vesting. The draft Act is intended to empower the trustees and beneficiaries to act without court intervention in appropriate circumstances and to simplify the rules dealing with variations of trusts, but court powers would continue to remain available where required. He noted that the draft Act deals with a number of other reform measures that would modernize the legislation.

In terms of the overall scope of the proposed project, Mr. Lown pointed out that there are probably seven areas that would be covered: powers of trustees, duties of trustees, decision-making powers, investments powers, the relationship with beneficiaries, trustee's liability and a miscellaneous category to cover other issues. The idea would be to build on the work of the British Columbia Law Institute and ensure that it is conceptually based without any local idiosyncrasies. The national *Uniform Act* would be adapted to modern usage and functions and would not be routinely dependent on court intervention.

It was recommended that a Working Group be established and that the British Columbia Law Institute report be used as a starting point. The STEP Conference report and other trust initiatives could supplement the report. The work and drafting on the non-contentious issues could begin immediately and the areas that require further policy clarification or debate could be brought to the 2009 meeting of the Conference. The idea would be to present the Uniform Draft Act and commentaries at the 2010 meeting of the Conference. It was noted that it was considered essential that drafting proceed simultaneously and in a coordinated way in both English and French.

In discussion, it was noted that a number of jurisdictions support the project and that the drafting instructions will need to take into account the bijural nature of the Conference.

RESOLVED:

THAT a Working Group be established and directed to prepare a Report in accordance with the direction of the Conference for consideration at the 2009 meeting.

HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

Presenter: Kathryn Sabo, Justice Canada, International Private Law Section

At the 2007 meeting of the Conference, Frédérique Sabourin and Vaughn Black presented their reports regarding the 2005 *Hague Convention on Choice of Court Agreements* from both a common law and a civil law perspective.

Ms. Sabo provided an update on this project and highlighted some of the provisions of the Convention. She noted that the Convention applies to exclusive choice of forum clauses in certain international commercial contracts. Ms. Sabo briefly discussed some of the points that were raised in the 2007 reports and asked for direction from the Conference.

Ms. Sabo also reviewed the draft Act and commentaries set out in the Annex to her report and requested direction from the Conference in order to facilitate the Working Group's task of presenting a draft Act and commentaries for the 2009 meeting of the Conference. With respect to declarations, it was noted that there may be an interest in making sure that declarations that are made by jurisdictions are harmonized to the greatest extent possible among all of the jurisdictions.

In terms of the next steps, Ms. Sabo indicated that a Working Group would be convened in the Fall of 2009 and that the Working Group would need to review the draft Act and commentaries to determine whether the implementation approach is appropriate and whether further explanation should be provided with respect to the commentaries.

During the discussion, it was noted that those jurisdictions which leave in place the reciprocal enforcement of judgments framework while enacting the uniform Act for enforcement of Canadian judgments and foreign judgments will have to look at how the legislation fits with the implementation of this Convention. One delegate expressed some concern regarding the fit between the Convention and how the Conference has developed the legislation dealing with recognition and enforcement of Canadian and foreign judgments. It was pointed out that if the Convention is to be used in areas where there are adhesion contracts, courts will likely raise the issue that there was no choice of exclusivity and that there was an imposed forum. It was also pointed out that Mexico has ratified the Convention and that the United States and Australia are working on the Convention.

RESOLVED:

THAT a Working Group be established and directed to prepare a uniform implementing Act and commentaries in accordance with the Report and the directions of the Conference for consideration at the 2009 meeting.

UNICORPORATED ASSOCIATIONS

Presenters: Kevin Zakreski, Lawyer, British Columbia Law Institute
Jake Harms, Deputy Legislative Counsel and Registrar of Regulations, Manitoba Justice
Arthur Close, Q.C., British Columbia
Vincent Pelletier, Directorate of Research and Ministerial Legislation, Ministry of Justice, Quebec

Arthur Close provided a brief history of the project and reported on the work completed by the Working Group over the last year. The project started over three years ago when a proposal for a project on this topic was developed and brought forward to the Conference for consideration at its meeting in 2005. It was originally conceived as simply a project for the Conference but was subsequently transformed into a joint project between the Conference, the Uniform Law Commission and the Mexican Center on Uniform Laws.

As an international undertaking, the Working Group faced a formidable task which involved bringing together four different legal traditions and three different languages. The goal was to create a harmonized legal framework for unincorporated nonprofit associations for North America. The approach of the Working Group was to develop and agree on a common set of principles that would provide a point of departure for drafting. Québec has provisions in its Civil Code that directly govern unincorporated nonprofit associations. The Working Group has found useful guidance on many issues from the treatment of unincorporated nonprofit associations under the Québec Civil Code. The Working Group has developed four different versions of the uniform Act – a common law version and a Quebec version and each of those in both official languages.

Vincent Pelletier provided comments regarding the project and Quebec's participation in the project. The treatment of unincorporated nonprofit associations under the Québec Civil Code differs from their treatment under the laws of the other Canadian provinces. An unincorporated nonprofit association in Québec is considered an entity in its own right, separate and distinct from its members, although not a full legal person. The project allowed the weaknesses and strengths of the current system in Quebec to be reviewed and for improvements to be identified for reform of the Civil Code. The project has been worthwhile from Quebec's perspective and because of the approach taken is well adapted to Quebec's civil system.

Kevin Zakreski provided a brief introduction on the legal background to unincorporated nonprofit associations. In the common law tradition, there are three primary modes of organizing collective nonprofit activity: the nonprofit corporation, the charitable trust and the unincorporated nonprofit association. The unincorporated nonprofit association is the residual form. At common law, an unincorporated nonprofit association is not a legal entity that is separate from its members. The Uniform Act is intended to remedy deficiencies in the common law by establishing a coherent legal framework for unincorporated nonprofit associations. Many of the provisions of the Uniform Act are framed as default rules that are intended to give some basic structure to these informal

bodies. All unincorporated nonprofit associations would be able to modify these default rules.

Mr. Zakreski reviewed the draft Act and commentaries and briefly explained the content and purpose of each section of the draft Act. During the discussion of the draft Act, one delegate raised concern about the interaction between subsection 4(2) and section 13 of the draft Act. It was also suggested that the approach taken may undermine what jurisdictions are trying to accomplish under their nonprofit corporations legislation. In response, it was noted that the draft Act is essentially remedial and does not include onerous requirements for compliance. The draft Act is aimed at creating rules for small community based organizations. Another delegate noted that while the approach will create a bit of a burden for those who deal on the other end with these entities, it is expected that this will work itself out.

Section 7 really articulates the key policy choice of the Working Group. It is the idea that an unincorporated nonprofit association would be treated as a separate legal entity. It was thought that on balance this would be the best solution. There was also discussion with respect to whether section 20 was meant to include fiduciary duties. With respect to section 24, the question was asked what if two nonprofit associations merge without complying with the provision. It was noted that a merger that does not comply with section 24 would not be a merger for the purposes of the Act. It was pointed out that one of the main reasons for providing for mergers is that many of these organizations deal with gifts. The provision enables the merged entity to receive the gift that was provided to the prior entity. The issue of constraints on distribution was debated in the Working Group and the decision that was made on this issue is reflected in section 26.

Vincent Pelletier commented on certain reservations Quebec has with the uniform legislation. It was noted that while a number of areas are very similar to Quebec law, there is one area of the project that raises concern in Quebec. Many practitioners are requesting a review of the legal capacity issue. It was noted that the Bar in Quebec is not in favor of this aspect but congratulates the Working Group on the tremendous amount of work that has been undertaken.

During the discussion of the draft Act, three areas were identified as requiring further consideration by the Conference before proceeding with the adoption of the Act. After further consideration, certain changes were made to the draft Act and the commentaries and the following resolution was presented to delegates:

RESOLVED:

THAT the *Uniform Unincorporated Nonprofit Associations Act* and commentaries and the Amendments to the Civil Code of Quebec and commentaries be adopted and recommended to the jurisdictions for enactment.

UNIFORM LAW COMMISSION, MEXICAN UNIFORM LAW CENTRE AND STANDING COMMITTEE OF ATTORNEYS GENERAL (SCAG)

Presenters: Martha Walters, President, Uniform Law Commission
Dr. Jorge Sanchez Cordero, President, Mexican Uniform Law Centre
Amanda Davies, Assistant Secretary, Classifications Policy Branch, Australia Attorney General's Department

In her address to the Conference, Justice Martha Walters reported on the projects that the Uniform Law Commission has been working on in the last year. The first international joint project that the Uniform Law Commission worked on was the International Convention on Receivables in International Trade. The second joint international project the Uniform Law Commission worked on was the Unincorporated Nonprofit Associations. She noted that as much as that project provided a good product in the end, it also provided a good format for working on projects in the future.

Justice Walters reported that the Commission also consulted with Canada and Mexico about the *Hague Family Maintenance Convention.* The continuing international projects that the Uniform Law Commission is working on involve the implementation of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, the United Nations E-commerce Convention and the Convention on Choice of Courts. As a future project, Justice Walters indicated that the Uniform Law Commission is interested in working with the Canadian and Mexican conferences on the enactment of the International Wills Convention. In closing, Justice Walters emphasized the value and ongoing importance of the three conferences continuing to work together on these international joint projects.

Dr. Jorge Cordero provided an update on some of the current projects of the Mexican Law Centre in his address to the Conference. He noted that 2007 and 2008 were very tumultuous years for Mexico and that it is a time of incredible legal change in Mexico. Mexico is restructuring its legal system from an inquisitorial to an adversarial system and from a written submission to an oral submission system. He advised the Conference that, notwithstanding this, Mexico has been making great strides. The need for reform of the election process has been recognized since the last presidential elections. The Mexican federal system has been strengthened as never before and there is recognition of the need for harmonization. A major accomplishment has been the establishment of a public information registry and a personal property registry. It is hoped that Canada and the United States may have access to this registry in the near future. Dr. Cordero concluded by thanking the Conference and the Uniform Law Commission for their wonderful assistance during this time of incredible legal change in Mexico.

Ms. Amanda Davies provided the Conference with an update on the work of the Standing Committee of Attorneys-General (SCAG). Ms. Davies began her presentation with a brief overview of how SCAG operates. It was noted that SCAG is a national ministerial council. Its members are the Australian Attorney-General and the Minister for Home Affairs, the State and Territory Attorneys-General and the New Zealand Attorney-General. Norfolk Island has observer status at SCAG meetings. SCAG provides a forum for Attorneys-General to discuss and progress matters of mutual interest. It seeks to

achieve uniform or harmonized action within the responsibilities of its members. SCAG meets three times a year to discuss and approve projects.

At the last meeting of SCAG, ministers comprehensively reviewed the SCAG agenda and processes and revised its agenda to focus on a number of high priority items and agreed to a number of procedural changes to ensure that the public is better able to access information about SCAG and its activities on its website. SCAG's focus is not only on uniform laws or harmonized laws. SCAG will also look at matters where there is a desire for national action and on occasion SCAG will look at identifying a best practice model. For example, one of the areas SCAG is currently considering is developing court excellence. SCAG is also currently working on a number of harmonization projects, including electronic transactions amendments, proportionate liability and a new electronic conveyancing system. Ms. Davies closed by indicating that SCAG is increasingly looking for new and innovative ways of dealing with issues that cross jurisdictional responsibilities of the commonwealth and states and territories or where there is a strong business interest in a national approach.

RESOLVED:

THAT the ULCC express its thanks to Justice Martha Walters, President of the Uniform Law Commission, Dr. Jorge Sanchez Cordero, Director of the Mexican Uniform Law Centre, and Amanda Davies of the Standing Committee of Attorneys General for their interesting and informative presentations.

PRIVITY OF CONTRACT

Presenter: Genevieve Tremblay-McCaig, Legal Counsel,
Alberta Law Reform Institute
Peter Lown Q.C., Director, Alberta Law Reform Institute

Ms. Genevieve Tremblay-McCaig provided a progress report on the Privity of Contract project. Ms. Tremblay-McCaig advised the Conference that following the 2007 meeting of the Conference, a Working Group was established to prepare a report examining the options for reform of the doctrine of privity of contract.

The Report of the Working Group provides an overview of the current situation and outlines a series of issues which should be addressed in order to determine a further course of action relating to privity. The first issue is whether privity of contract creates enough problems in its current form that it needs to be reformed at the present time. The second issue is what path of reform the doctrine of privity of contract could take if there is a need for reform. The third issue is what options are available if legislative reform is deemed the appropriate course of action.

The first part of the Report reviews the law surrounding privity of contract in order to determine if the rule, as it now stands, poses the type of problem which requires legislative intervention. The Report notes that two principles underpin the doctrine of privity of contract. First, only a person who is party to a contract can sue on it. Second, it is generally accepted that consideration must have been given by the promisee to the

promisor. A strict application of the privity of contract rule would prevent a third party from suing on a contract. The privity of contract rule is still regarded as a well-established feature of law in a number of common law jurisdictions. While the doctrine has resulted in unwanted outcomes in the past, the Report notes that numerous exceptions and means of circumventing privity have attenuated its harsh effects. The Report gives particular attention to the principled exception by the Supreme Court of Canada because it differentiates Canada from other common law jurisdictions which are still dealing with a stricter form of the privity rule.

The second part of the Report outlines and briefly discusses the legislative and judicial alternatives and arguments for and against each option which might be considered as a potential solution to the privity issue. In summary, the arguments in favour of legislation are: expediency; certainty; consistency; and uniformity. The arguments against legislative intervention are: irrelevancy; difficulty in defining the extent of third party rights; rigidity; and the risk of becoming obsolete. The second part of the Report also discusses what subsidiary issues could be addressed in a detailed legislative scheme, such as: the enforceability of the contract; the identification of the third party; the right to vary or cancel the contract; the third party rights subject to the terms of the contract and other defences, set-offs, counterclaims and remedies; the potential for overlapping claims; the possibility to opt-out; the exclusion of certain contracts; and the existing exceptions to privity.

The third part of the Report contains the Working Group's conclusions and recommendations to the Conference. A review of the law relating to privity of contract, especially the principled exception and other means to work around the privity rule, ultimately led the Working Group to recommend that the Conference not commit to reform the doctrine of privity at the present time.

RESOLVED:

THAT the Civil Section Steering Committee continue to monitor developments in the area of privity of contracts and third party rights and, if appropriate, make recommendations to the New Projects Committee.

PRIVATE INTERNATIONAL LAW

Presenter: Kathryn Sabo, Justice Canada, International Private Law Section

Ms. Sabo provided the Conference with an overview of the activities of the Private International Law Section of the Department of Justice. The written Report provided to the Conference outlines the work of the Department of Justice categorized by the following themes: International Commercial Law; Judicial Cooperation and Enforcement of Judgments; Family Law; and Protection of Property. Within each of these categories, projects are ranked as high, medium or low priorities.

In the International Commercial Law category, high priorities include the Project on Harmonised Substantive Rules Regarding Indirectly Held Securities (Unidroit), the *Convention on the Settlement of Investment Disputes between States and Nationals of*

Other States (ICSID), the *Convention on International Interests in Mobile Equipment and Aircraft Protocol* (Unidroit/ICAO), the *Convention on the Law Applicable to Securities Held by Intermediaries* (Hague)(ULCC Uniform Act), the *Conventions on the Limitation Period in the International Sale of Goods and Protocol* (UNCITRAL), the *Convention on the Assignment of Receivables in International Trade* (UNCITRAL) and the *Convention on Independent Guarantees and Stand-by Letters of Credit* (UNCITRAL).

In the Judicial Cooperation and Enforcement category, high priorities include the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters* (Hague Conference), the *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents* (Hague Conference), and the *Convention on Choice of Court Agreements* (Hague Conference).

In the Family Law category, high priorities include the *Convention on the International Protection of Adults* (Hague Conference), the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children* (Hague Conference), the *Convention on the Civil Aspects of International Child Abduction* (Hague Conference), and the *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* (Hague Conference).

In the Protection of Property category, high priorities include the *Convention on the Form of an International Will* (Unidroit) and the *Convention on the Law Applicable to Trusts and their Recognition* (Hague Conference).

WILLS AND SUCCESSION

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

Lynn Romeo provided a progress report on the Wills and Succession project. Ms. Romeo indicated that this was a project proposed by Manitoba Justice at the 2007 meeting of the Conference. Manitoba submitted a project proposal respecting conflict provisions in succession matters (including wills and intestacies). Ms. Romeo described the problem and noted that clear, comprehensive conflict of laws' provisions are proposed to address the full range of situations where more than one jurisdiction's laws apply to the administration of a testate or an intestate estate.

Ms. Romeo advised the Conference that following the 2007 meeting of the Conference, several of Manitoba Justice's lawyers and Manitoba's Public Trustee met to talk about the project. In an attempt to gauge the extent of the problem and to assess whether there was any interest in proceeding with the project, Manitoba's Public Trustee sent a brief questionnaire to the Public Guardians and Trustees across Canada. A total of four formal responses were received. The responses indicated that while conflict of law issues are of concern to jurisdictions, they do not appear to arise often. The responses also indicated that there appears to be a patchwork across the country in terms of legislative provisions addressing conflict of laws in this area.

It was noted that preliminary discussions with the jurisdictions indicate that there is interest in proceeding with this project. A number of jurisdictions have expressed a willingness to participate in a working group. Alberta Justice has expressed an interest in partnering with the Conference. To date, the discussions with Alberta Justice have focused on engaging an expert to prepare a study paper on conflict of laws issues in succession law (both testate and intestate). The study paper would provide an overview of conflict provisions in succession legislation in Canadian jurisdictions, examine conflict issues and options for addressing the issues and make recommendations for consideration at the 2009 meeting of the Conference.

Ms. Romeo reported to the Conference that Alberta Justice has recently received authorization to fund the study paper and requested guidance from the Conference as to whether this would be a project that the Conference would like to undertake, if delegates have any suggestions in terms of issues that should be considered and how the project might be framed.

RESOLVED:

THAT the Civil Section of the ULCC explore partnering with Alberta Justice to engage an expert to prepare a study paper on conflict of law issues in succession law.

THAT the study paper consider the issues raised in the Report and the directions of the Conference.

THAT the study paper be prepared for consideration at the 2009 meeting.

NEW PROJECTS

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

Ms. Lynn Romeo presented the written Report regarding the Discussion of New Projects. The Report sets out 11 new proposals and provides an update on the proposals from the 2006 and 2007 meetings. Ms. Romeo provided a brief overview of the following new proposals:

- Actions against the Crown;
- Rules governing e-discovery;
- Extra-provincial Service of Provincial Offence Notices;
- Enforcement of Canadian Tax Judgments – The Question of Other Acts Administered by the Minister of Revenue;
- *Uniform Enforcement of Canadian Judgments and Decrees Act* (UECJDA);
- *Uniform Interpretation Act*;
- Agreement on Internal Trade – Dispute Resolution;
- Not-For-Profit Associations – Directors' Liability;
- *UN Convention on Contracts for the International Sale of Goods*;

- Informal Public Appeal Funds;
- Issues in Agency Law;
- Foreign Currency Maintenance Orders.

Ms. Romeo also reported briefly on the project proposals from 2006 and 2007. Following the discussion of the proposals identified in the Report, delegates were invited to identify any further projects for consideration by the Executive Committee and the Steering Committee. In this regard, it was suggested that the Conference might consider a project dealing with Enforcement of Judgments and recognition of foreign domestic dispute orders. Other general projects that were identified were: Limited Liability Protection for Limited Partners and the Conflict of Laws Rules; Extra-jurisdictional Entities Registrations; Amendments to the *Uniform Commercial Liens Act*; Contract Law Reform; Commercial Tenancies; and the Tort of Privacy.

ADVISORY COMMITTEE REPORT

Presenters: Clark W. Dalton, Projects Manager, Uniform Law Conference
Peter Lown Q.C., Director, Alberta Law Reform Institute and Chair of the Advisory Committee on Program Development and Management

Mr. Dalton provided a brief history of the Advisory Committee on Program Development and Management. It was noted that the Committee originally began as part of the Conference's major work on the Commercial Law Strategy and then subsequently became a much smaller group that concentrated strictly on uniform law with respect to commercial matters. In 2005 and 2006, the Committee was rolled into the Civil Section.

In November 2007, the Executive reviewed the Committee's existing status and considered a more comprehensive work plan for the future. At that time, it was decided that the key elements were product development, ever-greening and updating existing uniform Acts. On November, 9, 2007, a resolution was passed that named the committee the "Advisory Committee on Program Development and Management" and provided that the membership of the Committee be appointed by the Executive Committee and that the Chair of the Civil Section be a member of the Committee. The resolution also provided that the Steering Committee which was formed to oversee the activities of the Commercial Law Strategy continue for the purposes of preparing and managing medium and long-term plans and looking after the funding arrangements for the Civil Section. The Steering Committee, which is comprised of all of the jurisdictional representatives, remains the controlling body that makes the decisions in relation to the Civil Section.

Peter Lown also noted that the Advisory Committee is responsible for the relationship with the other international organizations and the long term planning for joint projects. Mr. Lown reviewed the membership of the Advisory Committee and noted that the Advisory Committee has met monthly by teleconference and will continue to have face-to-face meetings once a year.