

**UNIFORM LAW CONFERENCE OF CANADA
CIVIL LAW SECTION**

**ADVISORY COMMITTEE ON PROGRAM
DEVELOPMENT AND MANAGEMENT (ACPDM)**

YEAR IN REVIEW

2010 – 2011

Winnipeg, Manitoba

August 2011

ADVISORY COMMITTEE ON PROGRAM DEVELOPMENT AND MANAGEMENT YEAR IN REVIEW

Regular Meetings

[1] Again this year the ACPDM met every month on the second last Tuesday of each month for approximately one hour. A large number of the members attended each teleconference and discussion was vigorous and informed. The Membership of the Committee is set out in Appendix A.

Committee Mandate

[2] A few years ago it was determined that this Committee would focus on medium to long term issues in relation to the Civil Section and that the Steering Committee would focus on the yearly work of the Section. I observe that this practice has worked very well and especially so since past present and future Chairs of the Section are members of the Committee.

Project Review

[3] At our meeting last year I asked all jurisdictional representatives to review the current list of upcoming and ongoing projects, and identify their relevance to the jurisdiction and the likelihood of implementation in the jurisdiction.

[4] I also asked that delegates review their legislative Agenda to assist in providing answers to those two issues.

[5] The response to these pleas was not as fulsome as I would have hoped, but we did get some information that helped inform our discussions. I hope that we could develop as a standard practice that information of this nature could be supplied to the Committee to allow us a better focus for the choice of projects.

[6] At the first meeting in September members of the Committee were reminded that we had identified three elements to our work:

1. Project management and project selection;
2. Communications through the web site;
3. Implementation Strategy – We have talked a little bit about this important element of our work with the two case studies from Saskatchewan and Ontario that were presented at our Face-to-Face meeting the year before, but it seemed to us that as more jurisdictions enter into implementation of ULCC work, it is an important time to look at that strategy, for example: what are the wrap-around materials that jurisdictions need to get implementation? I will put this back on the Agenda for discussion, especially if we do meet Face-to-Face again.

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[7] We next began a review of the Current Projects with an eye to investigating what Projects would carry over in the years to come and which would end this August. This helped us not only in the consideration of the new Projects that we had on our list, but also to ensure we had adequate room and priority for meetings of the Civil Section in years to come.

[8] Each of the Proposed Projects that were presented to the Civil Section last year was reviewed and in most cases there was substantial discussion about each of them. The process then moved to a ranking of each of the Projects as High, Medium or Low, together with deleting those Projects that we considered should not proceed further or which needed some further delineation. Those Projects may be found in Appendix B with a short explanation attached.

[9] With the remaining Projects the Committee began to focus on the Projects that the Committee felt had a high priority. Those projects included Commercial Tenancies, Licensing of Fiduciaries, Interjurisdictional Recognition of Enduring Powers of Attorney and other Planning Devices and a review of the current Canadian situation with respect to Buyer's Liens.

[10] The Project on Commercial Liens is proceeding as a Joint Project with the Law Reform Commission of Saskatchewan. With respect to the other projects, we found a great deal of interest in participating in the Licensing of Fiduciaries by a number of segments of the legal community and interest in participation in the Project on Interjurisdictional Recognition of Enduring Powers of Attorney and other Planning Devices both in Canada and with our colleagues in the United States at the Uniform Law Commission, possibly pursuing this as a Joint Project between the two Conferences.

[11] We also received three potential new Projects, one dealing with amendments to our Uniform Electronic Commerce Act for which a Report was provided to delegates for this year. Another dealt with amendments to The Uniform Interprovincial Subpoena Act, which is also a matter brought before the Conference this year. The third was in relation to a possible Project on Henson Trusts where the trustees can make distributions to a disabled family member for a specified period of time, after which the assets are distributed to one or more persons identified by settlor or the trustees. Of importance is that the trustees retain absolute discretion to decide when and how much will be paid to the disabled family member. This proposal is only in its initial stages.

International Cooperation

[12] Throughout the year there have been ongoing discussions with our colleagues at the ULC. As mentioned earlier, there is considerable interest in a possible Joint Project on Interjurisdictional Recognition of Enduring Powers of Attorney and other Planning Devices. This has progressed to an advanced stage but there are some issues we have yet to resolve. As well, there was discussion about possible Joint Projects on Mareva Injunctions, the Interjurisdictional Provision of Emergency Personnel and the Interjurisdictional Enforcement of Emergency Orders. As to Mareva injunctions, as Canadian jurisdictions had long accepted these orders generally arising out of the powers of the courts, a legislative solution was not warranted here. However, I participated in meetings of the ULC on this topic and was able to provide them with

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information from our perspective. For the Interjurisdictional Provision of Emergency Personnel, we found that practices were well established between the two nations such that this was not a needed area of legislative review. With respect to the Enforcement of Emergency Orders, a Report you will have received for this August, Darcy McGovern has kindly had some interaction with the ULC and it was our understanding that this was gratefully received by the Commission. We are both heading off on different directions in this area of the law so there is no Joint Project for now.

[13] We continue to have fruitful discussion with our neighbors to the south and we have established a useful dialogue on many issues. Our mutual exchange of project planning information is particularly helpful.

Other Matters of Interest

[14] For a number of years now we have been concerned about a disconnect between the Civil Section and the Drafting Section of the Conference. At one time the Drafting Section was part of the Conference and met at the same time as the Civil and Criminal Sections. Some years ago the Drafting Section moved away from meeting at the same time and gradually some distance developed between both sections.

[15] Last September the Drafting Section met and addressed this issue. From the notes provide to us, we identified four issues that came out of that meeting:

- A link between policy and drafting by the lead jurisdiction;
- the drafting jurisdiction also takes on the translation;
- Additional resources for drafting; and
- An increase in the drafting cycle from 1 to 2 years.

[16] After discussion by our Committee, it was felt that we should say no to a formal policy of drafters following the policy jurisdiction; address the management of drafting as early as possible; have the drafting done at a time when ULCC matters can get some attention; reap the benefit of having drafters involved as early as possible with effective drafting instructions;

[17] It would be nice to have the drafters from the same province as the lead working group but it is not always possible to do this.

[18] Also during the year we discussed the possibility of expanding the ambit of our Commercial Law Newsletter to include other Projects of the Civil Section. It was agreed that this looked like a good idea but that we would have to do some work on distribution beyond our commercial law contacts.

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Challenges

[19] Project selection and management is essential to defining project scope and to scheduling work product. The committee has made great strides in this area. But the biggest challenge is still in engaging the lead researcher for a particular project. We have drawn on law reformers, practitioners and academics, but attracting the lead researcher remains a challenge. While we have been careful to identify topics that are timely and relevant, that has not yet translated into commitments by eventual consumers of the product. Personal interest takes us so far, but does not guarantee solid project leadership and research. We continue to look for ways to overcome this impasse.

Acknowledgments

[20] None of this work would have been achieved without the tireless and constant effort of our Projects Coordinator, Clark Dalton, and the individual project management of Abi Lewis.

[21] It has been my pleasure again to serve the Conference as Chair of this committee and to work with our members. They have been attentive, disciplined in our meeting schedules and mode of discussion. I want to thank each of them for their contribution and support.

Peter J.M. Lown, QC
Chair, ACPDM

Appendix A - Committee Membership

Appendix B – Deleted Projects

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Appendix A

**ADVISORY COMMITTEE ON PROGRAM DEVELOPMENT
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MEMBERSHIP

Mr. Peter Lown, QC, **Chair**
Alberta Law Reform Institute

Mr. Russell Getz
Ministry of the Attorney General
British Columbia

Mr. Arthur Close, QC
British Columbia Civil Section

Mr. Gregory Steele, QC
British Columbia Civil Section

Mr. Nolan Steed, QC
Alberta Justice

Mr. Josh Hawkes
Alberta Justice

Ms. Susan C. Amrud, QC
Executive Director
Public Law Division
Saskatchewan Justice

Mr. Darcy McGovern
Saskatchewan Justice

Mr. W. Dean Sinclair
Saskatchewan Justice
Past President, Uniform Law Conference of
Canada

Ms. Lynn Romeo
Manitoba Department of Justice

Ms. Gail Mildren
Manitoba Department of Justice

Abi Lewis
Ministry of the Attorney General
Ontario

Mr. John Twohig
Ministry of the Attorney General Ontario

Ms. Jennifer Babe
Miller Thomson LLP

Ms. Kathryn Sabo
Department of Justice Canada

Ms. Myriam Ancil
Ministère de la Justice Quebec

Ms. Elizabeth Strange
Office of the Attorney General
New Brunswick

Ms. Marie Bordeleau
Executive Director
Uniform Law Conference of Canada

Mr. Clark Dalton, QC
Projects Coordinator
Uniform Law Conference of Canada

Appendix B

Federal Securities Transfer Rules

Bank Act Security

It was pointed out that the Law Commission of Canada had already recommended repeal of s.427 of the Bank Act. The Canadian Bar Association endorsed it. Reference was also made to the two companion decisions recently given by the Supreme Court of Canada where they invite Parliament to do something about it. The best we can do is reinforce what we have already said. It was indicated that while it is a strong issue, it was not a ULCC issue.

The question was raised whether this was ever part of the ULCC process and it was pointed out that there was a report to the Conference on the topic before.

[see for example: ULCC Proceedings 2003): http://ulcc.ca/en/poam2/PPSA_Rep_2003_En.pdf]

It was noted that there isn't a new project here but a reference to previous work that shouldn't be lost.

It was agreed that we would send a letter from the President and not from the Chair of this Committee noting we have done this work and endorsed it and encourage it to be adopted, given the SCC has opened the door to say fix it.

A letter was drafted and signed by the President.

Commercial Liens

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We've done this fairly recently and updated that and it has been adopted in Saskatchewan, for example.

There is not much more to do in this area and the provinces need to start implementing.

Limited Partnerships

There was some discussion about the relationship of this proposal to our current Partnership Project. It was explained that our other Project relates to tax implications of the aggregate vs. the personality based partnerships. What this proposal seems to be is about how you set up LLP's and what happens when you have LLP's practicing across jurisdictions.

It was noted that this was fairly recent work on our part and that unless there was something clearly wrong it was not a good idea to be continually revisiting our own recent work simply because somebody may have something that might tweak or improve it.

It was also noted that our Act was a Model Act and didn't require a buy-in to the principles.

Domestic Sale of Goods Contracts

It was raised that this Project has not been viable for some time and that we do have a Uniform Act. It was a large undertaking and that the work done in the 1980's largely retains its form today. Given our resources and no indication of buy-in, unless there is some expression of interest we shouldn't take it on.

Contract Law Amendments

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There was some concern about lack of interest from governments and perhaps the profession. It was agreed that we would not take this on a general topic but wondered if some specific topics could be fleshed out. For example two possibilities were given: priority of third party rights and the requirement of consideration in certain specialty contracts. This was deleted from the list as a general topic with room to have it come back as specific areas of the law.

Negligence Act

It was noted that the Ontario Law Commission is doing a Report on joint and several liability. There are strong views on both sides on this issue and that it is controversial.

Discussion centered on the various approaches to it including sectoral application of exceptions to the general rule, such as auditors. A difficulty was mentioned about how there could be a principled debate on the concept of joint and several liability.

It was agreed to wait and see if there is some support for what the OLC comes out with later.