ULCC 2011
CIVIL SECTION MINUTES

VOTER RESIDENCY, VOTER IDENTIFICATION AND ABSENTEE VOTING BY MEMBERS OF THE CANADIAN FORCES SERVING OUTSIDE OF CANADA – Interim Report

Presenter: Darcy McGovern, Ministry of Justice and Attorney General, Saskatchewan

The Working Group consists of:

- David Nurse, Nova Scotia, Chair;
- Sarah Dafoe, Alberta Justice;
- Kristine McCulloch, Q.C., Chief Electoral Officer, Nova Scotia;
- Darcy McGovern, Ministry of Justice and Attorney General, Saskatchewan;
- Ann MacIntosh, Department of Justice, Nunavut;
- Christine Mosher, Department of Justice, Nova Scotia; and
- Peter Pagano, Q.C., Alberta Justice (drafter).

The Working Group determined that a uniform and concise list of criteria for determining a voter's residency, based on current best practices, is desirable. To the extent possible, persons with more than one residence should be given the option of electing their place of residence for voting purposes. Special residency rules for students, inmates and members of the Canadian Forces are appropriate and necessary because of the unique circumstances of each of these groups of voters.

For students, the Working Group recommended a flexible approach similar to that taken in Saskatchewan, that would allow a student with connections to more than one electoral district to elect his or her place of residency. For inmates, the Working Group preferred the approach taken in Saskatchewan, British Columbia and Nunavut, where the individual inmate is permitted to choose either the place where they were ordinarily resident before coming into custody, or the place where a spouse, parent or dependent is ordinarily resident. The option of voting where the institution is located should only be available if neither of these options is available. For members of the Canadian Forces, an approach based on existing provincial models such as Prince Edward Island and Manitoba was preferred.

With respect to voter identification requirements, the Working Group is looking at two issues:

1. requirements to provide evidence of identification, of basic qualifications to vote and of address before being added to the voter's list; and
2. voter identification requirements at the polls.

An approach that will allow for local variation in the kinds of identification required is favoured.

The Working Group will consult with Chief Electoral Officers over the next year, and hopes to produce a final report and recommended uniform legislation for the 2012 meeting of the ULCC.

DISCUSSION:

Requiring identification is becoming more prevalent in other areas – e.g. air travel – and it seems an appropriate requirement for voting. But, identification requirements must be flexible and must not become an impediment to exercising the right to vote.
Relaxing voter residency requirements to be consistent with federal law was generally supported.

Respecting students, it was noted that the more flexible approach could hypothetically result in a student being able to vote in two different provincial elections if they were held close together.

Respecting inmate voting, concern was expressed that the proposed approach seemed discriminatory. Would the 'student model' work with inmates? Are the concerns about skewed election results because of inmate 'block voting' supported by evidence or are they speculation?

RESOLVED:

That the progress report be accepted; and

That, having received the views and directions of the Civil Section, the Working Group is directed to prepare *Uniform Election Act* residency provisions and commentaries for consideration at the 2012 meeting.

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THE HAGUE CONVENTION ON SECURITIES - Report

Presenters: Michel Deschamps, McCarthy Tétrault and Manon Dostie, Justice Canada

The Hague Convention on Securities is a conflict of laws instrument that determines the law applicable to certain issues in respect of securities held with an intermediary. The Report is intended to assist in determining whether it is advisable to implement Convention in Canada.

Under the Convention, the primary conflict rule is that the law governing the securities account agreement between the account holder and the intermediary is the law selected in the agreement. The law selected in the agreement must be that of a State in which the intermediary has an office that meets certain criteria set out in the Convention. Otherwise, three fall-back provisions apply which essentially result in the law of the State where the intermediary is located being applied.

Although the structure and terminology is different, the legislation in the Canadian regimes, including Québec, leads to a primary rule identical to the Convention rule – that is, the law selected in the securities account agreement is the law governing the acquisition, perfection and priority of an interest in securities held with an intermediary (or a "security entitlement", in Canadian terminology). The Convention and the Canadian regimes do not, however, point to the same law for enforcing a security interest and the fall-back rules governing situations where the law of the securities account agreement does not apply are also different. And, unlike the Convention, the Canadian regimes provide for exceptions to these rules.

There are 7 main areas where the Convention and the Canadian regimes differ.

1. The types of financial assets covered by the Convention and the Canadian regimes differ: Cash in a securities account is excluded from the scope of the Convention, but is included in the term "financial asset" in the Canadian regimes. But as cash is not covered by the conflict rules of the Convention, Canadian regimes could continue to treat it as a "financial asset" and to apply the same conflict rules as to other financial assets. A "futures contract" is not a financial asset under the Canadian legislation, while the term "securities" in the Convention is broad enough to include

financial futures. However, as the Canadian legislation generally applies the same conflict rules to security interests in futures contracts, harmonizing the Canadian regimes with the Convention would be consistent with existing Canadian rules.

2. The "qualifying office" requirement in the Convention should not be a significant impediment, as the parties to an account agreement are unlikely to select the law of a jurisdiction in which the intermediary has no qualifying office.

3. The fall-back rules in the Convention are simpler.

4. The Canadian regimes include exceptions: perfection of a security interest by registration and perfection by attachment of a security interest granted by an intermediary.

5. The Convention and the Canadian regimes differ with respect to the law applicable to enforcement issues, but the Convention enforcement rules would lead to greater certainty and predictability, and would also fill an apparent gap in the Québec conflict of laws regime.

6. The impact of an amendment to the account agreement that changes the law of the account agreement is handled differently. The Convention rules may afford greater protection to persons who have acquired or perfected an interest under the law that was applicable before the change.

7. The transition between the "old" and "new" law is handled differently, but transition issues should be rare and, in any event, easy to resolve due to the comprehensiveness of the Convention transition provisions.

Canada may want to consider Declarations in the following areas:

- The status of a "system operator" (Article 1(5));
- Internal *renvoi* (Article 12(3));
- Qualifying office (Article 12(4)). A Declaration under this Article is not recommended. The effect would be that, if the law of the account agreement points, for example, to New Brunswick, the intermediary would be required to have an office in that province for New Brunswick law to apply. Having an office anywhere in Canada should be sufficient, and would be consistent with the conflict rules currently in effect in Canada.
- Transition provisions (Articles 16(2) and 16(3)): Declarations under these Articles are not recommended. There should be little need to resort to the transition provisions in the Convention, given the similarities between the Convention and the Canadian regimes.
- The "federal clause" (Article 20): Canada will want to avail itself of Article 20 in order to facilitate the implementation of the Convention in a timely fashion in those provinces and territories that are willing to adopt the Convention rules.

As the Convention conflict rules are similar to Canadian conflict rules, implementing the Convention should not result in significant changes in Canadian practices. The critical question is: Where there are differences, are the Convention rules preferable to the existing Canadian rules? Another question is the advisability of requiring users to adjust to new terminology – especially if a similar move does not occur in other jurisdictions such as the United States.

DISCUSSION:

There are 4 signatories to the Convention (including Canada and the U.S.) and the U.S. is moving towards ratification. The impetus for Canada to move forward is linked to what is done in the U.S. The difference in terminology may be a challenge. Also, maintaining a connection between the conflict rules and substantive law rules is important. The Working Group will need to study the best approach to implementing this Convention. Careful drafting will be required.

RESOLVED:

That a Working Group be established to develop uniform implementing legislation for the Hague Securities Convention for consideration at the 2012 ULCC meeting.

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UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT - Interim Report

Presenters: Mireille-France LeBlanc, Justice Canada, and Michel Deschamps, McCarthy, Tétrault

The Working Group consists of:

- Mireille LeBlanc, International Private Law Section, Justice Canada;
- Professor Marc Lacoursière, Université Laval;
- Steven Jeffery, Blaney McMurtry LLP;
- Michel Deschamps, McCarthy, Tétrault LLP;
- Professor Benjamin Geva, Osgoode Hall Law School; and
- Clark Dalton, Projects Coordinator for the ULCC.

The Working Group was established to prepare a Uniform Act and commentaries to implement the Convention, to report on the desirability of any other legislative recommendations and to work in cooperation with the American Uniform Law Commission and the Mexican Uniform Law Center. The U. S. signed the Convention in 1997 and work towards its ratification is fairly far advanced. The Convention's rules are generally consistent with those in Article 5 of the U. S. Uniform Commercial Code.

The Working Group continued its work on a draft Uniform Act that implements the Convention and establishes specific rules to address domestic transactions and all aspects of international ones that are not covered by the Convention. A preliminary draft Uniform Act was provided:

Part 1 - establishes domestic rules, basically codifying existing common law and civil law rules that are consistent with the Convention;
Part 2 - implements the Convention in Canada and includes commentaries.

Consultations took place between February 2008 and 2009 with various stakeholders. The Canadian Bar Association expressed support for the project; other key stakeholders, including the Canadian Bankers Association, have not provided comments to the Working Group, but have also not objected to the project. A final draft Uniform Act, with commentaries, is expected to be presented at the 2012 meeting of the ULCC.

DISCUSSION:

The Working Group requested the Conference's direction on the following policy questions:

1. To what extent should substantive law differences between the Convention and Canadian common law and civil law on letters of credit lead to changes from the Convention when preparing draft uniform legislation on letters of credit to which the Convention does not apply? The consensus was that, where domestic and Convention rules differ, the Convention rules should apply. The same rules should apply to both domestic and international situations.

2. To what extent should the Uniform Act associate itself with concepts from Article 5 of the U. S. Uniform Commercial Code? The consensus was that, to the extent the Working Group is satisfied that Article 5 of the Uniform Commercial Code complies with the Convention, the Canadian Uniform Act should be consistent with Article 5.

3. How important is confirmation of support from industry groups such as the Canadian Bankers Association to the passing of uniform legislation? Any suggestions on how they should be engaged? Several delegates felt it was critical to get industry feed-back – especially from the Canadian Bankers Association. Otherwise, governments would be reluctant to adopt the proposed uniform legislation. Feed-back may be easier to obtain now that there is draft legislation to comment on.

4. Will implementation of the Convention and domestic legislation bring more certainty to Canadian law? The consensus was that harmonization of domestic and international rules in this area would contribute to certainty in the law.

RESOLVED:

That the interim report of the Working Group be accepted;

That key stakeholders be consulted, especially the banking industry; and

That the Working Group be directed to prepare a final report and Uniform Act and commentaries in accordance with the directions of the Conference, for consideration at the 2012 meeting.

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REFORM OF FRAUDULENT CONVEYANCES AND FRAUDULENT PREFERENCES LAW: TRANSACTIONS AT UNDERVALUE AND PREFERENTIAL PAYMENTS – Supplementary and Final Reports

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

The members of the Working Group are:

- Professor Tamara M. Buckwold, University of Alberta, Chairperson;
- Thomas G. Anderson, Q.C., Anderson Consulting (Vancouver);
- Professor Anthony Duggan, University of Toronto;

- Professor Élise Charpentier, Faculté de droit, Université de Montréal;
- Tim Rattenbury, Office of the Attorney General of New Brunswick;
- Michael MacNaughton, Borden Ladner Gervais LLP (Toronto).

The Reports and the presentation were in two parts:

Part 1: Supplementary Report on Transactions at Undervalue and Fraudulent Transactions

The Final Report of the Working Group on Part 1 of the Project was accepted by the ULCC at its 2010 meeting. The comments made by Conference delegates were fully considered by the Working Group. Generally unsuccessful efforts were made to obtain input from various organizations, such as the Canadian Association of Insolvency and Restructuring Practitioners, the Bankruptcy and Insolvency Institute of Canada and the Canadian Bar Association. The comments that were received raise four substantive questions, leading to proposed revisions to the Final Report on Part 1 of the project.

1. *Should the recommendations relating to transfers of exempt property be revised?*

Concerns were expressed regarding the potential for inconsistent outcomes in relation to pre-judgment and post-judgment dealings with exempt property. The Working Group proposed a new recommendation, that a transfer of exempt property should be subject to challenge and should be treated as exempt only while the debtor continues to use it for the purpose attracting the exemption. The result is that a transfer of exempt property may be challenged under the ordinary causes of action like any other.

2. *Should the recommendations relating to the limitation period be revised to conform to the Uniform Limitations Act?*

The Working Group concluded that a departure from the standard two year rule is necessary, as there are fundamental policy reasons for a one year limitation period in this context. The one year limitation period is an important factor in balancing the interests of creditors and of those who deal with their debtors. Finality of transactions is important in this context.

3. *Do the Part 1 recommendations subject "bona fide purchasers" to undue risk?*

The Working Group is of the view that the recommended legislation has achieved the right balance between the competing interests of creditors and transferees.

4. *Should the legislation include a "due diligence" defence barring the recovery of relief by a creditor whose claim arose after the date of a challenged transaction?*

The Working Group concluded such a defence was not necessary or appropriate as the proposed legislation offers a very limited scope for challenge by post-transaction creditors. A claim by an involuntary creditor (spousal claimants, tort claimants, victims of a post-transaction breach of contract, etc.) should not be barred by actual or imputed knowledge of the debtor's financial circumstances and should not be subject to a due diligence defence. The risk to transferees is limited by the one year limitation period.

Part 2: Final Report on Preferential Payments

The Final Report on Part 2 of the Project – Preferential Payments – recommends that many of the recommendations in the Final and Supplementary Reports on Part 1 be applied, with or without modification, to an action challenging a preferential payment.

The *Uniform Reviewable Transactions Act* and would be structured as follows:

- Definitions;
- Transactions at Undervalue and Fraudulent Transactions;
- Preferential Payments; and
- Common Provisions.

Reform of provincial preferences law should respect the following principles:

1. preferences law should be limited in scope;
2. as far as possible, provincial law should be consistent with the *Bankruptcy and Insolvency Act*;
3. preferences law should be integrated with other law governing transactions at undervalue.

The effect of the rules proposed by the Working Group roughly parallel the effect of the preferences provisions in the *Bankruptcy and Insolvency Act* that apply to non-arm's length payments. One area of difference is that preferential effect is inferred from the debtor's insolvency and need not be otherwise proven. It is difficult, if not impossible, to devise a meaningful test of what constitutes preferential effect outside the context of bankruptcy, and such a test is not required as the payment of one of two or more creditors by an insolvent debtor in itself produces a preference in the vast majority of cases. The Working Group's recommendations allow only payments to non-arm's length creditors of an insolvent or nearly insolvent debtor to be recovered by other creditors.

The Final Report also addresses: the scope of the Act; standing to seek a remedy; remedies; and the limitation period.

With respect to remedies, the objective in relation to a preferential payment is to set aside the payment so that the amount paid is shared proportionately with other creditors who are qualified to share under provincial law. This approach parallels the *Bankruptcy and Insolvency Act's* treatment of preferences. With respect to subsequent transferees of property or a benefit, the result of the Working Group's recommendations is that relief may be granted against a non-creditor who receives property under a preferential payment only if each transaction in the chain of transactions leading to the defendant was not at arm's length.

The Working Group considered a one year limitation period to be appropriate for actions challenging preferential payments. The limitation period plays an important role in circumscribing the cause of action, thereby protecting the finality of transactions. Also, a limitation period of one year following the payment subject to challenge is the closest equivalent to the *Bankruptcy and Insolvency Act* rules governing preferences.

DISCUSSION:

A concern was raised with respect to Part 1, respecting transactions at undervalue – particularly that the new rules may not strike the right balance between the competing goals of transaction

finality and protection of creditors. Another concern raised related to the exclusion of payments to a related party pursuant to a court process.

The proposed limitation periods were also discussed. The general consensus was that a one year limitation period was appropriate, and consistent with the *Bankruptcy and Insolvency Act*. It was noted that the limitation period for the majority of situations was one year, but that there is a second limitation period where there has been concealment.

RESOLVED:

That the Supplementary Report of the Working Group on Part 1: Transactions at Undervalue and Fraudulent Transactions be accepted;

That the Final Report of the Working Group on Part 2: Preferential Payments be accepted; and

That the Working Group prepare a *Uniform Reviewable Transactions Act* and commentaries in accordance with the direction of the Civil Section for consideration at the 2012 meeting.

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FOREIGN CIVIL PROTECTION ORDERS –
Joint ULCC/CCSO Working Group Report with Draft Act and Commentaries

Presenter: Darcy McGovern, Department of the Attorney General, Saskatchewan

In 2005, *The Uniform Enforcement of Canadian Judgements Act* was changed to provide for immediate enforcement of Canadian Civil Protection Orders inter-provincially to promote immediate protection of victims of violence who have crossed provincial or territorial boundaries. The changes removed the requirement of registration for recognition and enforcement of these orders and provided protection from liability for enforcing police agencies acting in good faith.

In 2009, the ULCC Project Advisory Committee recommended a project to amend *The Uniform Enforcement of Canadian Judgements Act* by extending the application of the enforcement provisions for Canadian civil protection orders to foreign civil protection orders. A joint Working Group of the ULCC and the Coordinating Committee of Senior Officials/Family Justice (CCSO) was reconstituted to consider this issue.

The ULCC members of the joint Working Group are:

- Russell Getz, British Columba;
- Lynn Romeo, Manitoba;
- James Gregg, Nova Scotia; and
- Darcy McGovern, Saskatchewan.

The CCSO members of the joint Working Group are:

- Betty Ann Pottruff, Saskatchewan;
- Kim Newsham, Saskatchewan;
- Colette Chelack, Manitoba; and
- Michelle Kinney, British Columbia.

At the 2010 meeting of the ULCC, the Working Group was directed to prepare uniform legislation and commentaries for consideration at the 2011 meeting. The draft amendments to the *Uniform Act* reflect the directions provided by the ULCC at the 2010 meeting. Specifically:

- A new Part III of the *Uniform Enforcement of Canadian Judgments and Decrees Act* – Canadian Civil Protection Orders and Foreign Civil Protection Orders – has been drafted, with commentaries. Amendments to the *Uniform Enforcement of Foreign Judgments Act*, with commentaries, have also been drafted.

- The term "foreign civil protection order" is defined to cover substantively the same subject matter as the term "civil protection order''. Note: it must be a judgement of a court, not an order of an administrative tribunal or other administrative decision maker.

- The draft amendments extend a full faith and credit approach to civil protection orders from foreign States, except where a specific decision has been made to exclude a particular State from this recognition and enforcement regime.

- As is the case with Canadian civil protection orders, a "foreign civil protection order" is deemed to be an order of the "superior court" of the province or territory where it is sought to be enforced, and may be enforced in the same manner as an order of that court.

- The draft amendments state that a foreign civil protection order is enforceable by a law enforcement agency in the same manner as an order of the court.

- The protection from liability in the current *Uniform Act* is extended to any law enforcement agency for good faith actions or omissions taken in furtherance of enforcement of a real or perceived civil protection order.

- The corresponding amendments to the *Uniform Enforcement of Judgments Act* to include "foreign civil protection orders" informs the reader that these Orders are given special treatment – both the special enforcement process and the general one are available.

The American Uniform Law Commission and the Hague International Law Commission are looking at similar laws, so this uniform law project is very timely.

DISCUSSION:

It was noted that the definition of "foreign civil protection order" is not limited to domestic or family violence orders. In general, it was felt that it was preferable not to limit these enforcement provisions to family violence situations and that this should be noted in the commentaries.

A question as to whether interim orders were covered was raised and it was recommended that this should be addressed in the commentaries.

Also, the commentaries should note that, under the current Act, a court can refuse to enforce an order on public policy grounds.

With respect to the draft amendments, the consensus was that the phrase “is enforceable” would be added to section 9.2 and the term “individual” would be used in the definition to address concerns that the provisions could be subject to misuse by foreign states – e.g. by attempting to attempt to enforce orders against groups or organizations.

RESOLVED:

That the report of the Working Group be accepted.

That the directions of the Civil Section be incorporated into the *Uniform Act* and commentaries and circulated to the jurisdictional representatives. Unless two or more objections are received by the Projects Coordinator by November 30, 2011, the draft Act should be taken as adopted as a uniform act and recommended to jurisdictions for enactment.

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REAL ESTATE TRANSACTIONS IN THE *UNIFORM ELECTRONIC COMMERCE ACT* – Report with Draft Amendment

Presenter: John D. Gregory, Ministry of the Attorney General, Ontario

The *Uniform Electronic Commerce Act*, adopted by the ULCC in 1999, is based on principles from the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, and is the basis for most of the electronic commerce legislation in Canada. Its purpose was to remove barriers to the legally effective use of electronic communications by setting out a “functional equivalent” to existing form requirements. Both the U. N. Model Law and the *Uniform Act* were minimalist and technology neutral. The principles were new in the mid-1990s, and the ULCC excluded a number of communications from the *Uniform Act* – such as wills, testamentary trusts, personal powers of attorney and land transfers that would require registration to be effective against third parties.

It was recommended that the *Uniform Act* be amended to remove the exclusion for real estate transfers for the following reasons.

1. The scope of the exclusion is very limited. The *Uniform Act* simply states that, where the law requires writing or an original, the requirement may be satisfied by an electronic document of certain characteristics. In real estate transactions the “in writing” requirement is in other statutes, such as the *Statute of Frauds*.

2. Since the *Uniform Act* was drafted and adopted, our understanding of “writing” requirements has evolved, and the distinction between hard “traditional” and electronic documents is evaporating. Courts in common law jurisdictions – e.g. Alberta; Singapore – have held that electronic communications satisfy the *Statute of Frauds* form requirements of writing and signature without any statutory help.

3. Five Canadian jurisdictions, including Québec, do not have this exclusion. The American equivalent to the *Uniform Act* does not exclude land transfers. The UN Model Law was revisited in 2005, and it was decided that, since some countries already

allowed electronic land transfers, there was no global principal against them but individual countries could exclude them, if desired.

4. The *Uniform Act* states that it yields to any other law that authorizes, prohibits or regulates electronic communications. This clears the way for electronic registration statutes, and ensures that even a general permission to satisfy writing and signature requirements of land transfers would stop short of making an e-transfer registrable without further compliance with the registry's rules.

5. Even if the law on registration relies on special forms of document or special instructions from an authorized user of the system, it may be helpful to have the underlying legal obligation in an enforceable electronic form.

6. There is a potential for harm arising from the exclusion, as it creates doubt. Also, there are benefits to being able to resort to the *Uniform Act* that go beyond meeting writing and signature requirements, such as the provisions that support electronic documents – validation of electronic documents, support for the use of electronic agents, the ability to correct errors and the presumptions about the time and place of sending and receipt of electronic messages.

7. The *Uniform Act* was clear in its policy that excluding land transfers was not a statement that these transfers should never be done electronically, but only that additional security might be needed.

8. Industry practice also seems to have evolved, and the risk of fraud, by the creation of multiple inconsistent transfer agreements for example, is arguably no higher for electronic then for paper documents.

It was recommended that clause 2(3)(d) of the *Uniform Electronic Commerce Act* be repealed.

DISCUSSION:

The consensus was that the commentary to the *Uniform Act* should be revised to explain why this provision is being repealed.

RESOLVED:

That the report recommending that the *Uniform Electronic Commerce Act* be amended to remove the exception for land transfers be accepted;

That the directions of the Civil Section regarding adding a commentary to the repealed provisions be incorporated into the *Uniform Act* and circulated to the jurisdictional representatives; and

That unless two or more objections are received by the Projects Coordinator by November 30, 2011, the amendment to the *Uniform Act* and commentaries should be taken as adopted and recommended to the jurisdictions for enactment.

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PROPOSAL FOR A PROJECT ON COMMERCIAL TENANCY LAW - Report

Presenter: Reché McKeague, Saskatchewan Law Reform Commission

At the 2010 meeting, the Saskatchewan Law Reform Commission accepted leadership of a potential project on commercial tenancy law. Canadian law dealing with commercial tenancies is fragmented, outdated and, in some respects, obsolete. While law reform agencies in a few jurisdictions have issued reports recommending modernization of aspects of this area of the law, no Canadian jurisdiction has enacted legislation that can be a modern precedent for reform. But, commercial leasing is a very important feature of the Canadian economy, and the law relating to commercial tenancies is called upon to address a wide range of issues that arise in the context of modern commercial leasing arrangements. Areas the project could be expected to consider include:

- the need for statutory regulation of some or all aspects of commercial leases, including what aspects of commercial leasing are best left to negotiation and contract law;
- the extent to which there is a social need to balance rights between parties to commercial leases;
- whether legislation should take the form of a "code" or address only problem areas;
- the extent to which the change from "conveyance" to contract as the basis for leasing law affects the need for or nature of new statutory provisions;
- the approach to balancing a landlord's interest in selecting a reliable tenant and a tenant's right to protect its economic interest in a lease through an assignment;
- damages and remedies – e.g. acceleration of rental payment clauses, the right of distress, remedies in cases of an over-holding tenant, etc.;
- the interface between landlord and tenant law and the *Bankruptcy and Insolvency Act*;
- the implications of permitting the creation of a landlord and tenant relationship as a feature of a mortgage;
- the need for expeditious dispute resolution mechanisms that do not involve litigation; etc.

It was proposed that a Working Group be established, a survey paper be prepared and reviewed by the Working Group and that a detailed progress report be provided to the ULCC at the 2012 meeting.

DISCUSSION:

It was agreed it will be important to ensure that there is wide expertise on the Working Group – e.g. lawyers who act for landlords, for tenants and, if possible, someone bringing the smaller tenant's perspective to the project. Someone from Québec should be included on the Working Group, as similar concerns have arisen, and interesting approaches have developed there.

RESOLVED:

That the proposal of the Law Reform Commission of Saskatchewan for a project on commercial tenancies be accepted; and

That a Working Group be formed to undertake the project and prepare a detailed progress report for consideration at the 2012 meeting.

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ETHICS COMPONENT AT ULCC ANNUAL CONFERENCES? - Oral Report

Presenter: Ian Rennie, Justice, Northwest Territories

This was an oral presentation to generate discussion as to whether an ethics "component" or "module" should be added to the Uniform Law Conference of Canada's meetings, and, if so, how one might go about developing it.

It was suggested that such a component could:
1. help delegates and other participants – especially those from smaller jurisdictions – meet the continuing professional development or continuing legal education requirements of their respective law societies; and
2. potentially enhance the quality of ULCC projects.

DISCUSSION:

It was acknowledged that the subject of ethics is extremely important to the ULCC. Ethical considerations and decisions are a fundamental aspect of each individual project and are integral to the ULCC drafting process. It was also noted that the meetings of the ULCC are working meetings, not educational conferences. After much discussion, the general consensus was to not pursue the subject as a stand-alone educational component.

RESOLVED:

That the report on an ethics component be received.

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UNIFORM ELECTRONIC COMMUNICATIONS CONVENTION ACT –
Report with draft Act and commentaries

Presenter: John D. Gregory, Ministry of the Attorney General, Ontario

At its 2010 meeting, the Civil Section of the ULCC adopted in principle the report on implementing the *Convention on the Use of Electronic Communications in International Contracts* developed by United Nations Commission on International Trade Law (UNCITRAL) and endorsed a number of recommendations – including the recommendation that Canada accede to the Convention, at least for international contracts.

The draft *Uniform Act* presented to the ULCC in 2010 was not adopted at that time. Rather, the direction was to look at harmonizing the draft Act with the uniform legislation for the implementation of international conventions currently being developed by the ULCC (and which is the subject of a separate report). To facilitate this harmonization, the draft *Uniform Act*

attached to the 2011 report contains drafting notes. The text of the draft *Uniform Act* and its commentaries were not changed.

Three specific drafting issues were raised and discussed.

DISCUSSION:

1. Article 19 of the Convention deals with declarations on the scope of the Convention's provisions. The recommendation that Canada not make any declarations under this provision was accepted, but the consensus was that the commentary to the *Uniform Act* should be expanded to explain this decision.

2. Article 20 of the Convention provides that its provisions also apply to the use of electronic communications in connection with the formation or performance of contracts to which five other international Conventions apply. Canada is a party to two of these other Conventions. There was discussion as to whether this should be reflected in the implementing legislation to avoid uncertainty and make the law more transparent. Also, concerns were raised that, if there is no declaration under Article 20, the Convention may apply to all existing and future Conventions. But, it was also noted that the situation was to some extent 'saved' as there is an ability to make a declaration at any time. The consensus was that these issues be addressed in the commentaries to the *Uniform Act*.

3. Some uniform implementing Acts specify that the Convention being implemented binds the Crown. It was recommended and agreed that the *Uniform Act* implementing this Convention specify that it binds the Crown.

RESOLVED:

That the report on the *Convention on the Use of Electronic Communications in International Contracts* be received; and

That the directions of the Civil Section be incorporated into the *Uniform Act* and commentaries and be circulated to the jurisdictional representatives. Unless two or more objections are received by the Project Coordinator by November 30, 2011, the draft Act should be taken as adopted as a uniform act and recommended to jurisdictions for enactment.

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UNIFORM AND SIMPLIFIED TRUST INDENTURE LEGISLATION –
Report with proposed legislation

Presenter: Philippe Tardif, Borden Ladner Gervais LLP

At its 2010 meeting, the ULCC endorsed the Working Group's recommendation that a uniform national instrument that would replace all of the federal, provincial and territorial corporate law provisions governing the minimum requirements of trust indentures be developed for consideration and adoption by the Canadian Securities Administrators. Over the following year, the Working Group notified the Canadian Securities Administrators of the Working Group's report, and worked on developing and drafting a proposed national instrument and legislation.

Schedule B to the Working Group's Report is a draft National Instrument proposed for adoption by the Canadian Securities Administrators. It addresses the minimum requirements for trust indentures contained in Canadian corporate law, including the *Canadian Business Corporations Act*:

- Interpretation and Application (sections 1 and 2): The proposed National Instrument would apply to a trust indenture if, in respect of the distribution of debt obligations, the issuer files or is required to file a prospectus under securities legislation.

- Classification of trusts (sections 3 and 4): a trustee appointed under a trust indenture must be incorporated under the laws of Canada or a province and authorized to carry on the business of a trust company, or organized and carrying on business under the laws of the United States.

- Duties of trustee (sections 5 to 9).

- Duties of issuer (sections 10 to 13).

Schedule C to the Report is a draft of proposed corresponding amendments to the *Canada Business Corporations Act*. Parallel amendments would be made to provincial and territorial corporate legislation that contain trust indenture provisions. The amendments provide:

- for an exemption from the relevant provisions of the statute for trust indentures that comply with "prescribed law". The proposed National Instrument is recognized as a "prescribed law" in the amendments;

- that the Director appointed under the corporations legislation has the discretion to grant exemptions from provisions of the Act on a case-by-case basis where it is not prejudicial to the public interest.

DISCUSSION:

A concern was raised respecting the use of a national instrument to deal with matters that are so substantive, with very little detail in legislation. It was noted that each jurisdiction could determine whether the matters dealt with in the draft National Instrument are so substantive as to belong in legislation. In response to a question, Mr. Tardif noted that the Canadian Securities Administrators had reviewed and responded positively to the draft National Instrument, but had not provided specific comments.

RESOLVED:

That the report of the Working Group respecting uniform and simplified trust indenture legislation be accepted;

That the proposed National Instrument be approved and recommended to the Canadian Securities Administrators for adoption;

That the proposed amendments to the *Canada Business Corporations Act* be approved and recommended to Industry Canada for enactment; and

That the Civil Section Jurisdictional Representatives take reasonable efforts to advise their respective jurisdictions of the proposed National Instrument and the proposed amendments to

the *Canada Business Corporations Act*, with a view to the provincial and territorial jurisdictions enacting similar amendments to their corporations legislation.

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***UNIFORM INTERPROVINCIAL SUBPOENA ACT* – Report**

Presenter: Ann McIntosh, Justice, Nunavut

The ULCC's *Uniform Interprovincial Subpoena Act* was adopted in 1974 and revised in the late 1990's. All 12 of Canada's common law jurisdictions have legislation modelled on the *Uniform Act*, although there are some notable variations. Some jurisdictions only recognize extra-provincial subpoenas issued by courts, while others also recognize extra-provincial subpoenas issued by boards, commissions, tribunals and other bodies.

The *Uniform Act* and Canadian legislation have not evolved to meet today's needs – e.g. increasing mobility; the expanding spectrum of administrative and enforcement proceedings such as those arising out of professional self-governance and environmental regulation; the needs of remote communities; etc. The *Uniform Act*:

- imposes a laborious, time and resource consuming, court-based vetting process for a subpoena in both the issuing and receiving jurisdictions;
- does not provide for the electronic transmission of documents;
- contains a cumbersome requirement for proof regarding witness immunity and other protection for witnesses;
- appears to contemplate that the only way to comply with an inter-jurisdictional subpoena is by physically attending in the issuing jurisdiction;
- contains a calculation process for witness fees and travelling expenses that is unclear, and the specified minimum amounts are low.

A change to the name of the *Uniform Act* is also desirable, to recognize the three territories.

DISCUSSION:

It was agreed that this project is a good idea. Consultations with civil litigators, court staff, larger tribunals, etc. will be desirable. Technological alternatives to witness attendance in the issuing jurisdiction should be considered – but with caution.

RESOLVED:

That the report proposing a review of the *Uniform Interprovincial Subpoena Act* be accepted; and

That a Working Group be established to consider the issues raised in the report and the direction of the Civil Section and that the Working Group prepare amendments to the Uniform Act for consideration at the 2012 meeting.

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THE *UNIFORM TRUSTEE ACT* – Progress Report

Presenter: Russell Getz, Ministry of the Attorney General, British Columbia

The members of the Working Group are:

- Greg Blue, Q.C., B.C. Law Institute (also on the drafting committee);
- Arthur Close, Q.C. (also on the drafting committee);
- Rod Fehr, Ministry of the Attorney General, B.C. (also on the drafting committee);
- Russell Getz, Ministry of the Attorney General, B.C. (also on the drafting committee);
- John Gregory, Ministry of the Attorney General, Ontario;
- Joanna Knowlton, Public Trustee of Manitoba;
- Peter Lown, Q.C., Alberta Law Reform Institute;
- Tim Rattenbury, Department of Justice, New Brunswick;
- Philip Renaud, Q.C., Duncan and Craig LLP, Edmonton, Alberta;
- Donovan Waters, Q.C., Horne Coupar, Victoria, B.C., and
- Madeleine Robertson, Department of Justice, Saskatchewan (retired in 2010).

Work on the proposed Uniform Act has drawn from the B. C. Law Institute Report entitled *A Modern Trustee Act for British Columbia*, the Saskatchewan *Trustee Act* of 2008 and the 2007 Symposium of the Society of Trust and State Practitioners of Canada entitled *Trust Law Reform in Canada*. In 2009, the ULCC provided direction respecting policy issues. Over the last year, the drafting committee met almost every week, and the full Working Group met several times to consider the draft legislation being developed.

The Draft Act will be arranged as follows:

- Part 1: Definitions and Application;
- Part 2: Appointment and Discharge of Trustees;
- Part 3: Vesting;
- Part 4: Duties and Powers of Trustees;
- Part 5: Variation and Termination of Trusts and Powers of the Court;
- Part 6: Trustee Compensation and Accounts;
- Part 7: Charitable Trusts and Non-Charitable Purpose Trusts;
- Part 8: Perpetuities and Accumulations;
- Part 9: General Provisions; and
- Part 10: Transitional Provisions and Consequential Amendments.

Parts 1 to 5 have been completed.

RESOLVED:

That the progress report of the Working Group be accepted; and

That the Working Group be directed to prepare the *Uniform Trustee Act* and commentaries for consideration at the 2012 meeting.

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UNIFORM INFORMAL PUBLIC APPEALS ACT –
Final Report with draft Act and commentaries

Presenter: Arthur Close, Q.C., British Columbia

The members of the Working Group are:

- Arthur L. Close, Q.C., B.C. (Chair);
- Gregory G. Blue, Q.C., B.C. Law Institute;
- Professor Michelle Cumin, Université de Laval, Québec;
- Vera Mesenzew, Counsel, Royal Bank of Canada; and
- Professor Albert Oosterhoff, Professor Emeritus, Faculty of Law, University of Western Ontario.

Appeals to the public for donations in response to an emergency – for example, fire, flood, etc. – are usually locally based and are led by persons with limited experience in fundraising and in the administration of funds. Existing law is complex, often obsolete, and not very satisfactory in areas such as: how to deal with a surplus; documentation; rights, powers and duties; etc. The purpose of the proposed *Uniform Informal Public Appeals Act* is to provide an appropriate legal framework to assist in the creation and administration of informal public appeals.

The proposed *Uniform Act* includes commentaries, and is drafted as a stand-alone Act as the level of detail required in relation to public appeals makes this a "bad fit" with legislation applicable to trusts generally. The Working Group has taken into account the work being done on the *Uniform Trustee Act*, and the two Acts have been developed to operate in harmony.

The main features of the proposed *Uniform Informal Public Appeals Act* are as follows.

Part 1: Scope – Definitions and Applications. "Public appeals" dealt with under the *Uniform Act* are confined to sporadic, informal appeals for donations. The *Uniform Act* does not apply to funds raised by a body registered as a charity with the Canada Revenue Agency. The draft legislation establishes a "default" scheme that applies only to the extent a public appeal fund is not regulated by other legislation or a formally created trust. There are a few provisions that cannot be overridden, such as "who is a trustee of a public appeal fund".

Part 2: The Trust. A public appeal fund is subject to a trust for the benefit of the object for which it is raised and is enforceable whether or not the object is charitable. The persons who direct the management and disbursement of a public appeal fund are its trustees; a savings institution in which the fund is deposited is not a trustee. The trust can be enforced by a trustee, donor, beneficiary, the Attorney General and any person having a "sufficient interest".

Part 3: Surpluses and Refunds. The *Uniform Act* sets out rules respecting the distribution of a surplus. Any person entitled to enforce the trust may apply to a court for a distribution of a surplus. If the appeal was for a charitable object, the donor has no claim to a refund should there be a surplus. If, however, the appeal was for a non-charitable object, other considerations may apply – for example, a person who has made a substantial donation; a donation of real property that is no longer needed or cannot be used for the object of the appeal.

Part 4: Trustee Powers. Part 4 of the *Uniform Act* sets out an array of provisions that would most likely be found in a well drafted trust instrument, such as powers in relation to further appeals and donations, payments from the fund, investing and otherwise dealing with the fund, etc. These powers can be displaced by express provisions contained in a trust document or other governing authority. The wording of the provisions makes the trust discretionary.

Part 5: Trustee Duties. Part 5 places a duty on trustees to diligently monitor the operation of the trust and the objects for which it is established. A periodic review at least once each year is required. The duties are in addition to duties imposed by the *Trustee Act* of the enacting jurisdiction and the general law of trusts, and may not be excluded by a trust document.

The Model Trust Document: Schedule to the Act. The *Uniform Act* includes, as a schedule, a model trust document – short, in simple language and with helpful examples – that trustees may wish to adopt. The Model Trust Document deals with the background and objects of the appeal. The powers of the trustees have been relocated into the Act itself. This is a change from the Model Trust Document discussed at the 2010 meeting of the ULCC.

With respect to Québec law, Mr. Close noted that Justice Canada and Québec representatives have been discussing possible approaches to an alternative version for Québec – for example, specific provisions reflecting the principles of the draft *Uniform Act*.

DISCUSSION:

The decision to not 'merge' this Act with the *Trustee Act* was discussed. It was noted that the two matters are best dealt with separately, particularly as the *Trustee Act* is general while this Act must be drafted quite specifically. The *Uniform Informal Public Appeals Act* was drafted in close collaboration with the Working Group developing the *Uniform Trustee Act* – indeed, two individuals were members of both Working Groups to ensure consistency.

Some technical drafting matters were also discussed.

RESOLVED:

That the final report of the Working Group be accepted;

That the *Uniform Informal Public Appeals Act* and commentaries be approved and recommended to the jurisdictions for enactment; and

That the Working Group look into the feasibility of developing an alternative version of the *Uniform Act* suitable for the *Civil Code of Québec* and present a report at the 2012 meeting.

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RENEWAL OF THE *UNIFORM WILLS ACT* – Report and Discussion

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

The discussion took place over two sessions and centred on the issues outlined in the "Workbook for the Renewal of the *Uniform Wills Act*" provided to delegates before the meeting of the ULCC. The goal was to obtain drafting instructions for amendments to the *Uniform Wills*

Act, to be presented at the 2012 meeting of the Conference, on the following issues. As a general comment, it was noted that one goal of this project should be to encourage the making of wills and enhance their effectiveness without the need to resort to court.

1. *Testamentary Capacity of Minors*: Differing opinions were expressed, with some favouring reducing the age of capacity to 16 years with no exceptions. it was noted that the Working Group may have to return with other options on this issue.

2. *Statutory (or 'Court Approved') Wills for Persons Without Testamentary Capacity*: The general consensus was that any role for the courts would need to be very limited and specific. It is preferable to have the will 'speak for itself' as to the testator's intentions, even after incapacity.

3. *Oral Wills*: A few jurisdictions in Canada recognize oral wills made by sailors or fishers at sea, (Nova Scotia and Newfoundland and Labrador) or by military personnel on active military service (Nova Scotia). The consensus was that oral wills should not be permitted.

4. *Electronic Wills*: The general consensus was that the issue of electronic wills – recently considered by the ULCC and rejected – should not be revisited. As the issue is an evidentiary one (reliability, etc.), the court's "dispensing power" should be adequate to address issues.

5. *Exempt Wills*: The consensus was to retain exempt wills for persons on active service, especially as the Judge Advocate General's Office indicated support for this.

6. *Holograph Wills*: Eleven provinces and territories allow holograph wills. The legislation of the remaining two jurisdictions provides the courts with a general dispensing power. The consensus was to continue to recognize holograph wills as valid. But, issues respecting alterations to holograph wills need to be addressed.

7. *Printed Will Forms*: Possible options outlined were:
    - prohibit printed will forms;
    - delete the requirement that a holograph will be "wholly in the testator's handwriting";
    - enact a specific provision to address the problem;
    - rely on the general dispensing power conferred on the courts.

    The consensus was to continue to recognize printed will forms only if they satisfy the formal requirements for a valid formal will or holograph will.

8. *Placement of testator's signature*: The general consensus was that the legislation should not require that the testator's signature be at the end of the will; rather it should require that the placement of the signature indicate a clear intention to validate the will. The court's general dispensing power should be relied on if more is required.

9. *Witnessing requirements*: The requirement for two witnesses should continue. It was also generally agreed that the witnesses should both be present at the time the testator signs or acknowledges the will.

10. *Publication of Wills*: Some non-Canadian jurisdictions state that a witness to a will does not need to know that the document is a will. The consensus was that publication should not be a requirement.

11. *Witnesses – competency issues*: The consensus was that a witness must be competent at the time he or she witnesses the will. A person who signs on behalf of the testator should be prohibited from also acting as a witness to the will. With respect to the witness/beneficiary rule – where the witness and his or her spouse cannot be a beneficiary under the will – the consensus was that a breach of this requirement should result in the loss of the benefit rather than the invalidation of the entire will.

12. *Changes that Alter or Revoke a Will*: With respect to changes to a will, the general consensus was that a change to a formal will or a holograph will should follow the same formalities as the will itself. The Working Group was requested to look closely at the Saskatchewan approach, which allows holographic alterations to a formal will.

13. *Revocation by Law*: It was agreed that the issue of whether a will should automatically be revoked upon marriage or divorce is a difficult one that requires further study. Consultation with the Continuing Committee of Senior Officials (Family Law) should be considered. It was noted that laws such as dependant's relief legislation, matrimonial property law, etc. "trump" a testator's intention.

14. *Failed Gifts – Beneficiary Issues*: A gift made in a will may fail for a number of reasons:
    - the beneficiary predeceases the testator (the "doctrine of lapse");
    - the beneficiary is disqualified;
    - forfeiture (e.g. the beneficiary commits a criminal wrongdoing);
    - the beneficiary refuses the gift; or
    - the beneficiary does not satisfy a condition imposed by the testator.

    The general consensus was that the same rules should apply, regardless of the reason for the failed gift.

15. *Ademption by Conversion*: Where a will contains a "specific legacy", the rule of law is that if, at the testator's death, the specific property is not found among the testator's assets, the gift fails – that it is, it is said to have "adeemed". This may, in some cases, lead to harsh results that frustrate the intent of the testator, so the courts have employed a number of judicial devices to avoid it's application in particular cases.

    Should the common law rule of ademption by conversion be retained? What form should legislative exceptions to the rule take? In Canada, there are a number of different approaches. Differing opinions were expressed as to whether the ademption rule should be narrow or more permissive so as to enable specific gifts to be 'traced'.

16. *Admission of Extrinsic Evidence*: The case law has followed two different approaches to the interpretation of wills and the admission of extrinsic evidence:
    - the literal, objective or strict constructionist approach – under which the court concentrates its attention on the ordinary meaning of the words used by the testator and tends to exclude extrinsic evidence – and
    - the subjective or intentional approach – which concentrates on giving effect to the intentions of the testator and favours admission of extrinsic evidence.

The Supreme Court of Canada tends to take a traditional objective approach. But recent case law, particularly in western Canada, favours an intentional approach. Differing opinions were expressed.

RESOLVED:

That the Work Book of materials prepared by the Working Group be accepted;

That the Working Group consult with CCSO(Family) with respect to testamentary law and matrimonial property law; and

That having received the views and direction of the Civil Section, the Working Group continue to prepare a progress report containing policy decisions and drafting instructions for amendments to the *Uniform Wills Act* and commentaries for consideration at the 2012 meeting.

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AMERICAN UNIFORM LAW COMMISSION – Oral Report

Presenters: Michael Houghton, President of the Uniform Law Commission (ULC) and Robert Stein, Immediate Past President of the ULC

Mr. Houghton and Mr. Stein reported on a number of projects.

- The joint study committee with the ULCC respecting recognition of life planning documents was discussed; the ULC is interested in working with Mexico on the same initiative.

- The ULC has been following the ULCC's work on recognition of foreign civil protection orders closely and has asked its Family Section whether the ULC should look at similar amendments.

- The ULC has struck a drafting committee on asset freezing orders, drawing on information from ULCC delegates respecting the Canadian experience with Mareva injunctions.

- A drafting committee has been struck, and work is underway, respecting implementation of the *Hague Convention on the Protection of Children*.

- In the context of implementation of international treaties, the ULC is working with the U.S. federal government on orderly implementation that recognizes federal and state jurisdictional issues.

- The ULC is working with the State Department and the Executive on implementing the *Hague Convention on Choice of Court Agreements*. Implementation is challenging in light of the constitutional division of powers – many private international law treaties deal with matters within state jurisdiction. The experience and products of the ULCC have been very helpful in the context of implementing international conventions.

- A drafting committee has been struck to draft legislation dealing with prevention of and remedies for human trafficking – described as a 'human tragedy'. This was recommended by the American Bar Association and is on a very fast track. There may be possibilities for a joint project with the ULCC here.

- The ULC statute on collaborative law and alternative dispute resolution was not endorsed by the American Bar Association, but has been adopted by two states and is being considered by a third.

RESOLVED:

That the ULCC express its thanks to Michael Houghton, President of the Uniform Law Commission, and to Robert Stein, Immediate Past President of the Uniform Law Commission, for their interesting and informative presentations.

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MEXICAN UNIFORM LAW CENTER – Oral Report

Presenter: Dr. Jorge Antonio Sánchez Cordero Dávila, Director of the Mexican Uniform Law Center

The Center introduced to the Conference of Mexican Governors a Model Contracts Code – a "Herculean effort". All states took part in the drafting, and the intent was to create a Code that uses clear and simple language and that is understandable to the public. The Code will appear on the Center's website.

Dr. Jorge Antonio Sánchez Cordero Dávila noted that the Mexican federal system has been strengthened in a number of ways by uniform law initiatives, which have been a cohesive force. He highlighted a number of other projects, including the following:

- in the area of securities, the creation of public information corporations containing records respecting debtors in default;

- also in the area of securities, the creation of public registries for immovables, following the UNICITRAL approach. The federal government has signed agreements with each state and Mexico City to harmonize these registries – an unprecedented initiative;

- significant reforms to the criminal law. Efforts in this area are ongoing;

- the Center has been asked to harmonize state efforts to safeguard cultural heritage.

RESOLVED:

That the ULCC express its thanks to Dr. Jorge Antonio Sánchez Cordero Dávila, Director of the Mexican Uniform Law Centre, for the interesting and informative presentation.

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PRIVATE INTERNATIONAL LAW - Status Report

Presenter: Kathryn Sabo, Justice Canada

Ms Sabo provided an extensive written report, and highlighted certain Department of Justice projects in her presentation.

Two new international instruments were finalized in the past year:

- UNCITRAL's Model Law on Procurement; and
- the Judicial Materials on the UNCITRAL Model Law on Cross-Border Insolvency.

Ongoing UNCITRAL projects include:

- developing systems for online dispute resolution for business to business and business to consumer transactions;
- continued work on the Arbitration Rules;
- in the context of securities, development of a registry system similar to Canadian personal property security legislation;
- electronic commerce (a new project).

With respect to UNIDROIT, work is progressing on:

- the Protocol relating to Space Assets under the *Convention on International Interests in Mobile Equipment*; and
- securities.

Highlights of the Hague Conference work include:

- preliminary work on the law of surrogacy;
- choice of law in international contracts;
- the practical operation of the Hague *Convention on the Civil Aspects of International Child Abduction* and the Hague *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children*;
- in April 2011, Canada proposed that the Hague Conference consider a project respecting foreign civil protection orders, referring to work being done by the ULCC. There was some support for this project from colleagues in the European Union, and interest in the results of the ULCC discussions.

Canada also participates in the Commonwealth Secretariat. Two projects were noted:

- enforcement of foreign judgments;
- a project from Australia respecting a scheme to improve cooperation among commonwealth states in criminal matters – e.g. seizure of documents; taking evidence; making information available; improving access to foreign law. This project is evolving.

The high priority projects of the Private International Law Section of the Department of Justice (Canada) include work on implementation of the following instruments at the federal, provincial and territorial levels:

- the Convention on Legalization (Hague);
- the Convention on Choice of Courts Agreements (Hague);
- the Recovery of Child Support Convention (Hague);
- Protection of Adults Convention (Hague);
- Protection of Children Convention (Hague);
- Civil Aspects of International Child Abduction Convention (Hague);
- International Wills Convention (UNIDROIT);
- Trusts Convention (UNIDROIT);
- the ICSID Convention (World Bank);
- the *International Interests in Mobile Equipment Convention* and its *Aircraft Protocol* (UNIDROIT/ICAO).

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UNIFORM LEGISLATION FOR THE IMPLEMENTATION OF INTERNATIONAL CONVENTIONS - Interim Report

Presenter: Kathryn Sabo, Justice Canada

To date, the approach taken by the ULCC respecting legislation to implement international conventions has been to draft a specific implementing Act for each convention. Differences have been identified amongst these Acts. At the Annual Meeting of the ULCC in 2010, the ULCC decided to establish a Working Group to examine the possibilities for a uniform approach to legislation for the implementation of international conventions, and to report back in 2011.

The Department of Justice has completed a review of the English and French versions of various implementing Acts and an initial consideration of possible recommendations for a uniform approach. The second part of this preliminary work involves discussions with federal drafters on approaches to standardizing the legislation. Then a Working Group will need to be formed.

DISCUSSION:

There was discussion as to whether the project should be extended beyond legislation implementing private international law instruments to include public international law instruments. The example provided was human rights conventions, but it was noted that public international law instruments require a very different process which includes examination of domestic laws, programs and activities for compliance. The consensus was that the ULCC project should be limited to legislation to implement private international law instruments.

RESOLVED:

That the interim report of the Department of Justice be accepted; and

That having received the views and directions of the Civil Section, a Working Group be established and asked to prepare a final report on uniform legislation for the implementation of international conventions for consideration at the 2012 meeting.

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ADVISORY COMMITTEE ON PROGRAM DEVELOPMENT AND MANAGEMENT – Report

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

The membership of the Committee is set out in Appendix A to the written Report.

A few years ago, it was determined that the Advisory Committee would focus on medium to long term issues in relation to the Civil Section and that the Civil Section Steering Committee would focus on the Section's yearly work. This practice has worked very well, especially as past, present and future chairs of the section are members of the Advisory Committee. The Committee identified 3 elements to its work:

1. Project selection and management, including populating Working Groups;
2. Communications through the website; and
3. Implementation strategy.

Each of the proposed projects presented to the Civil Section last year were reviewed and ranked as high, medium or low. Projects the Committee considered should not proceed further, or which needed further delineation, were deleted. Of the remaining projects, the Committee focused on those it felt had a high priority:

- Commercial Tenancies;
- Licensing of Fiduciaries;
- Inter-jurisdictional recognition of enduring powers of attorney and other planning devices – a possible joint project with the U.S. Uniform Law Commission;
- Buyer's liens;
- the Interpretation Act.

In terms of joint projects with the U.S. Uniform Law Commission:

- there is considerable interest in a possible joint project on inter-jurisdictional recognition of enduring powers of attorney and other planning devices;
- there has been discussion and information sharing with respect to the enforcement of foreign civil protection orders, but we are heading in different directions so there is no joint project for now;
- the ULCC has 'observer status' respecting potential asset seizing legislation.

The biggest challenge is still finding lead researchers for particular projects. Also, while the Advisory Committee has been careful to identify topics that are timely and relevant, this has not always translated into commitments by jurisdictions to enact the ULCC products.

The Chair acknowledged the work of all members of the Committee, and particularly the Committee's Projects Coordinator, Clark Dalton, and Abi Lewis, Chair of the Civil Section.

RESOLVED:

That the report of the Advisory Committee on Program Development and Management be accepted.