

**Uniform Law Conference of Canada  
Whitehorse, Yukon  
August 12-16, 2012**

**Civil Section Minutes**

**OPENING PLENARY**

**General Resolution respecting Appearance of Reports in the Proceedings**

**RESOLVED:**

**THAT** the written reports presented to the Civil Section and to the joint session of the Civil and Criminal Sections appear in the 2012 Proceedings of the Conference; 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 2012 Proceedings of the Conference.

**COMMERCIAL TENANCIES – Report**

Presenter: Reché McKeague, Law Reform Commission of Saskatchewan

Reché McKeague presented the report of the working group, which was established in 2011. The working group concluded that a Uniform Commercial Tenancies Act is desirable. The working group devised a list of 19 topics that will be considered in the preparation of the Uniform Act based on the British Columbia Law Institute (BCLI) 2009 *Report on Proposals for a New Commercial Tenancy Act*, the BCLI committee memos and the project proposal presented to the ULCC in 2011:

1. Implied terms, including quiet enjoyment,
2. Assignment or subletting,
3. Distress for rent,
4. Summary dispute resolution,
5. Bankruptcy of the tenant or landlord,
6. Application of contractual principles to leases,
7. Overholding tenants,
8. Formal requirements for the creation of a tenancy,
9. Merger or surrender,
10. Apportionment,
11. Relief from forfeiture,
12. Right of re-entry,
13. Tenant's rights before taking possession,
14. Special provisions for shopping centre leases,
15. Applicability of other statutes to commercial leases,

16. Registration of leases,
17. Landlord's damages for breach of a lease agreement,
18. The role of acceleration of rental payments clauses, and
19. Creation of a landlord and tenant relationship as a feature of a mortgage.

The working group has begun considering the first topic and has prepared two working memos to assist in its deliberation; one on implied terms, and one on short term leases. In addition, it has prepared two comparative charts; one demonstrating which terms are implied in each jurisdiction and in which act they appear, and the other demonstrating which terms are implied by the common law and which are implied by statute.

The working group will be considering each topic and work on a consultation document. It hopes to issue the consultation document at the 2013 meeting of the Conference.

A question was raised by delegates on the interest of examining the related areas in civil law to achieve a greater level of harmonization. It was noted that Québec addressed commercial leases in the *Civil Code of Québec* which was enacted in 1994. It was further noted that it may be interesting to examine the provisions on commercial leases of the Civil Code and the objectives for adopting them. The working group is hoping to recruit a member from the Québec Bar.

Delegates recommended that the working group attach a chart of comparative legislation to its next report to demonstrate that current legislation on commercial tenancies is piecemeal and needs reform.

**RESOLVED:**

**THAT** the Progress Report of the working group be accepted; and

**THAT** the working group continue its work and that it:

- a. consider the issues raised in the Report and the directions of the Conference; and
- b. prepare a progress report, including analysis of the issues and a proposal for consultations with stakeholders, for consideration at the 2013 meeting.

**UNIFORM WILLS ACT RENEWAL – Report**

Presenters: Peter Lown, Q.C., Alberta Law Reform Institute  
 John A. Lee, Ontario Ministry of the Attorney General  
 Maria Markatos, Saskatchewan Ministry of Justice and Attorney General  
 Sandra Petersson, Alberta Law Reform Institute

Peter Lown, John A. Lee, Maria Markatos and Sandra Petersson presented the report of the working group which was established in 2009. The working group noted that it integrated the recommendations made by the Conference at its 2011 meeting in the work it has done this year. The working group submitted four documents to the Conference along with its report:

1. a set of drafting instructions: Updated Outline of Wills Act Propositions;
2. a comparative chart of legislative provisions: Updated Legislative Comparison;
3. a skeletal draft to accompany recommendations: Legislative Draft of Uniform Wills Act Propositions; and
4. a Background Discussion on Statutory Wills.

The working group reviewed the drafting instructions and the recommendations contained therein with the Civil Section.

The working group noted that the requirement that a will must be in writing may not be dispensed with, while acknowledging that at some point in the future, when a reliable media will be available, it may be desirable to amend the Act to dispense with this requirement.

The working group asked the Civil Section whether the law should provide the means to create or modify a will for a person who does not have testamentary capacity. It was suggested by delegates that this is an area that warrants more research by the working group and that the working group should keep the United Nations *Convention on the Rights of Persons with Disabilities* in mind in its research.

Discussion among Civil Section delegates resulted in the following directions being given to the working group with respect to the new Uniform Act:

1. The new Uniform Act should not grant testamentary capacity to married minors.
2. The age of majority should be used as a marker for testamentary capacity in the new Act.
3. The new Act should exempt active service personnel from the requirement that they attain the age of majority to be granted testamentary capacity.
4. Sailors should not be exempt from the age of majority requirement in the new Act.
5. The new Act should not automatically revoke a will upon marriage.
6. The Commentary to the new Uniform Act should include an explanation on failed gifts.

**RESOLVED:**

**THAT** the Report of the working group be accepted; and

**THAT** the working group continue its work:

- a. in accordance with the recommendations contained in the Report and the directions of the Conference; and
- b. report back to the Conference at the 2013 meeting.

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

Presenter: Marc Lacoursière, Université Laval – Faculty of Law

Marc Lacoursière presented the report of the working group which was established in 2006. He also presented a draft *Uniform Independent Guarantees and Letters of Credit Act* prepared by the working group. The current draft Uniform Act is substantively complete but will be reviewed by legislative drafters, editors and jurilinguists before it can be considered a final draft. Over the next year, the working group will develop commentaries to accompany the draft Uniform Act.

Mr. Lacoursière explained how stand-by letters of credit work and gave an overview of the 1995 *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* and the draft Uniform Act to the Civil Section.

Delegates noted that the rules in Part I of the Uniform Act are not drafted in a manner that is consistent with the rules in the Convention, although they are the same rules. A concern was raised that the rules in Part I of the Uniform Act could be interpreted in a manner that is inconsistent with the Convention. The working group agreed to examine this issue.

Some discussion was generated with respect to the expression “material effect” in section 24 of the draft Uniform Act on the exceptions to the obligation to honour. Some delegates were concerned that the expression created a second test requiring that the fraud have a material effect in order for the exceptions to apply. It was clarified that a material fraud always has a material effect. The delegates asked the working group to examine this issue and consider excluding the expression.

The working group will carry out another round of consultations with stakeholders in fall 2012 and winter 2013 using the current draft.

A final draft Uniform Act with commentaries will be presented at the 2013 ULCC Annual Meeting.

**RESOLVED:**

**THAT** the Report of the working group be accepted; and

**THAT** the working group continue its work and that it:

- a. prepare uniform legislation and commentaries in accordance with the recommendations contained in the Report and the directions of the Conference; and
- b. report back to the Conference at the 2013 meeting.

**PROPOSED UNIFORM REVIEWABLE TRANSACTIONS ACT – Report**  
(Transactions at Undervalue and Preferential Transfers – Fraudulent Conveyances and Preferences)

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

Professor Buckwold presented the Uniform Reviewable Transactions Act for consideration of the Conference.

In 2011, the Conference accepted the Supplementary Report of the working group on Part 1: Transactions at Undervalue and Fraudulent Transactions and accepted the final report of the working group on Part 2: Preferential Payments. The Conference also resolved 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.

The Uniform Reviewable Transactions Act replaces the pre-reform statutory law and common law generally referred to jointly as the law of fraudulent conveyances and fraudulent preferences. Like its precursors, the Uniform Act is an adjunct to judgment enforcement law and can only be properly understood with an appreciation of that linkage.

The Uniform Act is organized around a few basic concepts. A transfer of value in any form is a “transaction”. The person who benefits under a transaction is the “transferee.” Part I applies to proceedings involving a transaction of any kind. The rules of standing and conditions of relief are established by Part II in relation to transactions that are not “creditor transactions” and by Part III in relation to “creditor transactions”. Part IV provides for an order for relief against the transferee, who is required to restore the value lost to the applicant claimant.

The Uniform Reviewable Transactions Act does not depart radically in policy and function from the pre-reform law designed to protect unsecured creditors. However, it provides a comprehensive set of clear rules designed to overcome the uncertainty produced by more than a hundred years of incremental legislation and judicial decisions addressed to creditor-defeating dealings.

The Act advances the harmonization of provincial and territorial reviewable transactions law and the corresponding provisions of the federal *Bankruptcy and Insolvency Act* (BIA) by adopting some of the same concepts and, in relation to preferential payments, providing rules that produce comparable outcomes. The law would also have the effect of harmonizing Canadian law with American law and with the law of certain other jurisdictions.

Some of the provisions of the Uniform Act are addressed to concepts, legislation or processes that are part of the law of the common law jurisdictions, as is some of the commentary. For the most part, the Act is suitable for adoption in Québec, but adaption of the legislation will be required.

It was noted that section 1(4) contains the concept of “managing director” which is not found in some business corporations acts in Canada. It was suggested that the section be amended to reflect the terminology used in these acts.

There was some discussion on the broad insolvency test in the Uniform Act, which includes debts that exist but are not yet payable, and the fact that the test does not mirror the BIA. Professor Buckwold explained that the BIA does not provide a clear test for determining insolvency and there is conflicting jurisprudence on the matter. According to some

jurisprudence, debts that exist but are not yet payable should be considered in determining insolvency. Therefore, the Uniform Act does not contradict the BIA, but chooses one of the options that is available under the BIA for determining insolvency. Professor Buckwold also explained that if there is a cause of action that depends on insolvency, people would be able to manipulate the rules if the test for insolvency did not take into account debts that exist and that are not yet payable. The approach would allow a person who has debts that are not yet payable and that exceed his or her assets to dispose of them in any way as long as the payment of the future debt is not triggered. The problem is that unless intention can be proved, having a test for insolvency which does not take into consideration debt that is not yet payable would allow people to avoid the Act.

There was some discussion as to whether the requirement set out in section 7(3)(d)(ii)(A) of the Uniform Act – that the transferee must have knowledge of the debt – should also be included in section 7(3)(d)(ii)(B). Professor Buckwold explained that this is a drafting issue and that she would examine the section to ensure that its wording achieves what it sets out to do.

**RESOLVED:**

**THAT** the Report of the working group and the draft Uniform Reviewable Transactions Act be accepted; and

**THAT:**

- a. the directions of the Conference be incorporated into the Uniform Reviewable Transactions Act and commentaries; and
- b. the Uniform Reviewable Transactions Act and commentaries be circulated to the jurisdictional representatives. Unless two or more objections are received by the Projects Coordinator of the Conference by November 30, 2012, the draft Uniform Reviewable Transactions Act should be taken as adopted by the Conference and recommended to the jurisdictions for enactment.

**INTERPROVINCIAL SUBPOENA ACT AMENDMENTS – Report**

Presenter: Ann McIntosh, Nunavut Department of Justice

Ann McIntosh presented the interim report of the working group, which was established in 2011 to undertake a review and revision of the Uniform Interprovincial Subpoena Act adopted by the Conference in 1974.

The interim report sets out the results of the working group's deliberations, providing preliminary recommendations with respect to those issues on which the working group has reached consensus or believes that a consensus is emerging and posing questions concerning outstanding issues on which the working group remains divided.

After some discussion among delegates, the working group decided that an answer to question 1 in the report was not needed as it deals with implementation issues and can be dealt with in the commentaries or in square-bracketed provisions in the draft.

The following revised questions 3 and 2 were distributed to delegates by the working group:

3. For cases where a witness is required to attend in person at proceedings in another jurisdiction,

- 1) should the present section 5 requirements be retained essentially as they are: that is, before issuing a subpoena, the judge conducting a certification proceeding must be satisfied that the current requirements for certification have been established – the current requirements being that the judge be satisfied that personal attendance
  - a) is necessary for the due adjudication of the proceeding in which the subpoena or other document has been issued; and
  - b) in relation to the nature and importance of the proceedings, is reasonable and essential to the due administration of justice in (*enacting province*);]

or should it be replaced with a less stringent test, being either

- 2) (a) that the judge is satisfied, based on a certificate or affidavit of the issuer/applicant, [or on hearing the applicant if a judge considers it necessary], that the attendance of the witness in person is necessary for the due adjudication of the proceeding; or
 

(b) that the judge is satisfied, based on a certificate or affidavit of the issuer/applicant, [or on hearing the applicant if a judge considers it necessary], that the applicant believes that the witness has relevant information and that attendance in person is necessary for the due adjudication of the proceeding.

2. For cases where a witness can testify remotely, without leaving their own jurisdictions, should the present certification process be:

- eliminated altogether; or
- modified to provide for a simplified certification requirement for incoming subpoenas?

With respect to question 3, a jurisdictional vote was held to decide whether the current stringent test with respect to requiring the appearance of a witness that is set out in 1) should be retained or whether it should be replaced by a less stringent test. It was decided that the test should be replaced by a less stringent test. It was subsequently decided that the test set in 2(a) should be adopted.

With respect to question 2, it was decided that the present certification process should not be eliminated and that it should be modified to provide a simplified certification requirement for incoming subpoenas.

**RESOLVED:**

**THAT** the Report of the working group be accepted; and

**THAT** the working group continue its work and that it:

- a. prepare Uniform Interprovincial Subpoena Act provisions and commentaries in accordance with the recommendations contained in the Report and the directions of the Conference; and
- b. report back to the Conference at the 2013 meeting.

### **VOTER RESIDENCY, IDENTIFICATION REQUIREMENTS AND ABSENTEE MILITARY VOTING – Report**

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

Darcy McGovern presented the report of the working group which was established in 2009 to examine certain aspects of Canada's election laws. The working group submitted a draft Uniform Act and draft commentaries to the Conference for discussion.

Mr. McGovern noted that scope has been one of the biggest challenges for this project. The working group focused on modest changes aimed at addressing mobility issues.

The draft Uniform Act recommends the removal of minimal residency requirements to qualify as an elector. It was noted that this is consistent with promoting engagement in the political process rather than creating barriers to participation.

The special rules for students and for Canadian Forces members provided in the draft Act are major changes in election law. These rules, if adopted nationally, would result in students and members of the Canadian Forces being able to elect residence in one jurisdiction where they have two possible choices, and would entitle some to vote in concurrent provincial or territorial elections. These special rules are also extended to spouses and dependants of students and Canadian Forces members. In the working group's view this flexible approach still respects the "one person, one vote" rule, because no individual would be entitled to vote twice in the same election.

The draft Uniform Act does not address requirements for voter identification and for voting in prisons. According to the working group, identification requirements are not ready for uniformity and can be highly politicized, and prison voting was not a matter of consensus.

Mr. McGovern noted that the working group discussed absentee voting procedures for members of the Canadian Forces serving outside of Canada with a representative of the Judge Advocate General's Estates and Elections Section. The Section's focus is on the administration of the Canadian Forces vote during federal elections. The Section plays a limited role in provincial and territorial elections by sharing information on these elections through the CANELECTGENS system, which is an electronic notification system.

The working group considers that the *Canada Elections Act* does not offer a model for absentee voting by members of the Canadian Forces in provincial and territorial elections, both because of the complexity of the relevant provisions and the fact that the provinces and territories cannot impose an administrative role on the Canadian Forces through their legislation.

The working group concluded that existing provisions allowing a Chief Electoral Officer (CEO) to “pilot” new procedures, technologies and equipment could be amended to specifically authorize the piloting of procedures designed to facilitate absentee voting by members of the Canadian Forces. In a jurisdiction without clear authority for the CEO to “pilot” new procedures, technologies or equipment, a stand-alone provision with the same objective could be adopted. The working group also recommends the adoption of a provision (or the modification of existing provisions) authorizing a CEO to enter into agreements with the Canadian Forces, and with the CEO for Canada or any other province or territory, for the purpose of facilitating absentee voting by members of the Canadian Forces or any other voters (e.g., students).

Delegates suggested that the commentaries mention that the Uniform Act does not address the process for registering to vote after a voters list has been established, and that each province and territory should have a process in place in to address such registration.

Some discussion was generated regarding the merits of allowing students to vote in more than one jurisdiction, but not extending the same right to individuals who work regularly for short periods in a jurisdiction other than their jurisdiction of residence. The working group explained that the draft Uniform Act allows students and members of the Canadian Forces to vote in more than one jurisdiction as they form part of identifiable groups. The working group has adopted an incremental approach to the special rules on voting in more than one jurisdiction, and has decided not to extend the rules to other groups in this Uniform Act. Delegates suggested that the incremental approach be mentioned in the commentaries.

Delegates suggested that the working group consider including regulation-making power in the Uniform Act to allow electronic voting to be dealt with in a regulation.

**RESOLVED:**

**THAT** the Report of the working group be accepted; and

**THAT** the working group continue its work and that it:

- a. undertake further consultations with the provincial, territorial and federal Chief Electoral Officers and with the Office of the Judge Advocate General;
- b. prepare Uniform Election Act provisions and commentaries, in accordance with the recommendations contained in the Report and the directions of the Conference; and
- c. report back to the Conference at the 2013 meeting.

## COMPLEMENTARY PROVINCIAL LEGISLATION – Report

Presenter: Clark Dalton, Q.C., Uniform Law Conference of Canada

Clark Dalton gave an oral report for the working group which was established in 2009 and gave a brief history of the project. Mr. Dalton noted that, following the decision of the Supreme Court of Canada in *Chatterjee v. Ontario (Attorney General)* in which the court recognized that there can be two levels of government operating cooperatively in relation to criminal law matters, the Conference established a joint Civil Section and Criminal Section working group to examine provincial legislative initiatives with a criminal law impact and the possibility for harmonization. The working group reported to the Conference in 2010 and presented the first version of the Chart on Complementary Provincial Legislation, which lists provincial legislative initiatives that have a criminal law aspect. In 2011, an updated report was provided and the Conference resolved that the Chart be updated and reviewed for possible projects. The Chart was last updated in June 2012.

The working group examined the Chart in July 2012 and concluded that there is a large uptake from jurisdictions for items 1 to 11 in the Chart and that these items did not merit expanding resources for uniform legislation.

The working group recommended that the Chart be separated into two charts, one for potential uniform legislation and the other for keeping the jurisdictions updated on legislation on items 1 to 11.

It was noted that Item 12, on Missing Persons legislation, may be a suitable subject for a joint project.

No work is proposed for item 13 on identification of criminals and item 14 on the use of animals to shield unlawful activities.

It was decided that item 16 on Athletic Commissioners should remain on the Chart.

The Conference recommended waiting to commence projects on item 15 – metal dealers and recyclers – and item 17 – guns and ammunition control – to see if they become issues.

Item 18 on Employment Protection for Foreign Nationals deals with human rights issues. It was decided to remove the item from the Chart as it does not fit in with respect to provincial legislation supporting criminal law.

It was suggested that the working group may want to look into legislation regulating private security companies and the degree to which the legislation adequately imposes obligations upon their employees to be knowledgeable about Charter rights and use of force.

**RESOLVED:**

**THAT** the Oral Report of the working group and the updated Chart on Complementary Provincial and Territorial Legislation be accepted;

**THAT** the projects identified by the working group and the Conference for possible uniform legislation be referred to the Civil and Criminal Section Advisory Groups for further consideration and, if appropriate, the establishment of a working group or groups; and

**THAT** the working group:

- a. continue to update the Chart on Complementary Provincial and Territorial Legislation and create a Chart of Potential Uniform Law Projects in this area;
- b. continue to obtain information from all jurisdictions to update the Charts;
- c. continue to review the Charts for possible uniform legislation projects;
- d. circulate the updated Charts prior to the 2013 meeting; and
- e. report back to the Conference at the 2013 meeting.

### **INTERPRETATION ACT – Oral Report**

Presenter: Elizabeth Strange, New Brunswick, Department of Justice and Attorney General

Elizabeth Strange presented an oral report on behalf of the working group on the Uniform Interpretation Act.

The Conference was approached by the federal government to consider undertaking a review and renewal of the Uniform Interpretation Act and associated uniform acts given the recent developments in the law in Canada and in other Commonwealth countries. The current Uniform Interpretation Act dates back to 1941.

The working group decided that the work would be divided into two phases, starting with the Uniform Interpretation Act and followed by other related acts.

The working group agreed that it would use the Ontario *Legislative Act* as a starting point for its research. It has identified sections that should form part of the Uniform Interpretation Act. The working group reviewed provincial and territorial legislation, as well as the legislation of other Commonwealth jurisdictions, and compared it with the Ontario legislation.

#### **RESOLVED:**

**THAT** the Oral Report of the working group be accepted; and

**THAT** the working group:

- a. continue its work on the Uniform Interpretation Act and related provisions in accordance with the recommendations in the Report and the directions of the Conference; and

- b. report back to the Conference at the 2013 meeting.

### **UNIFORM TRUSTEE ACT – Report**

Presenter: Russell J. Getz, British Columbia Ministry of Justice

Russell Getz presented the final report on the Uniform Trustee Act project, which is aimed at creating new legislation to replace existing trustee statutes. The working group prepared the Uniform Trustee Act based on a report by the British Columbia Law Institute and informed by the Saskatchewan *Trustee Act 2009* and the 2007 Symposium of the Society of Trust and Estate Practitioners of Canada.

The purpose of the Uniform Trustee Act is to provide a modernized statute that addresses the administration of trusts as comprehensively as is practicable, including the appointment and removal of trustees, the vesting of trust property, the duties and powers of trustees, trustee remuneration and accounts, and the variation, termination and resettlement of trusts. It also applies to trusts generally, including charitable trusts, charitable corporations acting as trustees, and non-charitable purpose trusts, insofar as they are not subject to other enactments. The Uniform Act makes substantive reforms to both statutory and non-statutory rules when deemed appropriate on grounds of legal principle and modern practice. The Act does not apply generally to an implied trust, a resulting trust, a constructive trust or any other trust that arises by operation of law other than an enactment, or through a judgment or order of a court. The Uniform Act also thoroughly revises the language and structure of existing trustee statutes. Modern drafting conventions are applied. Provisions are clarified and conceptually grouped with other provisions dealing with similar subject matter into distinct parts.

The Uniform Trustee Act is not a code of trust law. Rather, it is enabling and supplementary to the general, and largely non-statutory, law of trusts. Except for certain provisions which are essential to the operation of trusts and are expressly stated to prevail over a conflicting term of a trust instrument, the provisions of the Uniform Act would apply only when a trust instrument does not make other provisions or is silent. As such, it retains the default character of existing trustee statutes.

Some discussion was generated among delegates regarding the list in section 29(2) of information that a court can order a trustee to provide upon application by a qualified beneficiary and whether it is exhaustive and, if not, if it could include providing information to a beneficiary of a timeshare trust about the other beneficiaries. It was suggested that the provision of such information would be covered by section 29(1). It was noted that it may be that timeshare trusts present a number of discrete issues that could be considered as a separate project.

It was noted that section 77 – trust property held for charitable purposes not to be seized – is the subject of a standalone consultation report and that diverging policy views exist on the matter. It was acknowledged that some jurisdictions may take a different view on the matter.

It was also noted that the text in subparagraph 74(3)(c)(i) is bracketed to give jurisdictions the opportunity to identify their own list. There was concern that the law should not go too far in permitting non-charitable purpose trusts, as they could be used for money laundering.

**RESOLVED:**

**THAT** the Report of the working group and the draft Uniform Trustee Act be accepted; and

**THAT:**

- a. the Uniform Trustee Act and commentaries be adopted and recommended to the jurisdictions for enactment; and
- b. the following four Uniform Acts be withdrawn:
  - (i) the Accumulations Act;
  - (ii) the Perpetuities Act;
  - (iii) the Trustee Investments Act (described in the ULCC Proceedings tables as the 1957 Act, ‘amended’ in 1970 and ‘revised’ in 1997); and
  - (iv) the Variation of Trusts Act.

**INFORMAL PUBLIC APPEALS – CIVIL LAW VERSION – Report**

Presenter: Michelle Cumyn, Université Laval, Law Faculty

Michelle Cumyn presented the report of the working group and the civil law version of the Uniform Informal Public Appeals Act.

At its annual meeting in Winnipeg in 2011, the Conference adopted the Uniform Informal Public Appeals Act. The Act is designed so that it may be enacted in the common law provinces and territories of Canada, excluding Québec. In Winnipeg, the Conference also adopted a resolution, pursuant to the working group’s recommendation, that a civil law version of the Uniform Act be prepared in time for its next annual meeting.

The forms of the common law and the civil law versions of the Act are quite different, but the solutions they adopt are virtually the same, with a few exceptions.

The working group reached the following conclusions as regards the civil law version:

- The trust is the most appropriate vehicle for governing an informal public appeal in Québec, just as it is in the rest of Canada.
- Under present circumstances, Québec courts are unlikely to characterize an appeal as a trust in the absence of a trust Act clearly stating that the property received is subject to a trust. The situation appears to be different in the common law provinces and territories, where applying a trust appears to be possible even in the absence of a formal document.

- The Uniform Act, civil law version, should ensure that the creation of a trust arises by operation of law, thus setting aside the requirements for constituting a trust by contract. Such requirements are usually not met in the case of an informal public appeal.
- The Uniform Act, common law version, contains several provisions which concern the disposal of the surplus of an appeal. Equivalent provisions are required in the civil law version, as the solutions derived from the *Civil Code of Québec* are inadequate.
- The Uniform Act, civil law version, should adapt or complete some of the rules governing trusts and administration of the property of others in the *Civil Code of Québec*. The appropriate solutions to problems arising out of an informal public appeal are the same in Québec as in the rest of Canada. However, the rules that need to be adopted in Québec differ in some respects from those of the common law version of the Act, since the underlying law is different.
- The Uniform Act, civil law version, should use concepts and adopt a structure that is in harmony with the *Civil Code of Québec*, which will continue to apply to an informal public appeal. It should also adopt the legislative drafting style typical of Québec civil law.

**RESOLVED:**

**THAT** the Report of the working group be accepted; and

**THAT** the civil law version of the Uniform Informal Public Appeals Act be adopted by the Conference and recommended for enactment.

**INTERNATIONAL COMMERCIAL ARBITRATION – Report**

Presenter: Gerald W. Ghikas, Q.C., Borden Ladner Gervais LLP

Gerald W. Ghikas presented the report of the working group which was established in 2011 to modernize the Uniform International Commercial Arbitration Act (UICAA) adopted by the Conference in 1986. The UICAA was adopted by the Conference to facilitate implementation by Canadian jurisdictions of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law) and the United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention).

The UICAA was adopted with relatively minor amendments by all provinces and territories other than British Columbia and Québec. British Columbia adopted a statute similar in substance to the UICAA and Québec incorporated the concepts set out in the UICAA into the *Civil Code of Québec* and the *Code of Civil Procedure*.

The report notes that there have been significant changes in international arbitration laws and practices since the UICAA was adopted. Some anomalies in the implementing legislation from in Canadian jurisdictions have been identified, and such anomalies may be perceived to be inconsistent with the representation of Canada as a UNCITRAL Model Law/New York

Convention state. Furthermore, the Model Law was amended by UNCITRAL in 2006 and these amendments are not reflected in the current UICAA.

The working group presented ten policy recommendations to the Conference to guide future work on the modernization of the UICAA.

Policy Recommendation #3, recommends that the UNCITRAL Model Law and the 2006 amendments be followed unless departures are necessary. Delegates strongly advised against such departures in the absence of international trends and suggested that, as a bench mark, the working group could examine cases in UNCITRAL's CLOUT database to identify trends, if any.

Delegates expressed some concern about Policy Recommendation #7, on reciprocal enforcement issues, which provides that the new uniform Act "should facilitate the summary recognition and enforcement of foreign arbitral awards and international arbitration awards made in Canada that have already been recognized and enforced by a court of competent jurisdiction within Canada in a manner consistent with the Uniform Enforcement of Canadian Judgments and Decrees Act." It was noted that foreign judgments that are recognized in one jurisdiction in Canada are not treated the same way as Canadian judgments under this Act for the purpose of being recognized in another jurisdiction in Canada. It would be difficult to depart from this approach and treat foreign arbitral awards differently. The working group was urged to be very cautious and to rethink this recommendation.

It was also noted with respect to Policy Recommendation #7 that the working group should be aware that it will be difficult to enforce preliminary orders, as this was a difficult issue with respect to reciprocal enforcement between Canadian jurisdictions. Mr. Ghikus clarified that preliminary orders are not enforceable by courts as awards under the Model Law. He noted that a non *ex parte* interim measure, such as an application for an injunction or for the preservation of an asset, could be viewed as enforceable by courts under the 2006 amendments to the Model Law if the tribunal's decision takes the form of an award, but it would not be enforceable if it took the form of an order.

With respect Policy Recommendation #8, which deals with harmonization of approaches to limitation periods, delegates noted that the working group will have to deal with two issues: whether an arbitral award can be equated to a judgment and then given the life of a judgment for enforcement purposes.

Policy Recommendation #9 provides that consideration should be given to facilitating the consolidation of arbitrations without requiring consent of all parties in certain circumstances. Delegates asked whether the working group proposes addressing fairness among the parties. Mr. Ghikas responded that the end result will probably be to confer discretion on the courts.

**RESOLVED:**

**THAT** the Report of the working group be accepted; and

**THAT** the working group continue its work and that it:

- a. prepare draft uniform legislation respecting international commercial arbitration and commentaries in accordance with the recommendations contained in the Report and the directions of the Conference, and report back to the Conference at the 2013 meeting; and
- b. submit a project proposal to the Advisory Committee on Program Development and Management respecting uniform, up-dated domestic commercial arbitration legislation, for the Committee's consideration and, if appropriate, the establishment of a working group.

### **AMERICAN UNIFORM LAW COMMISSION – Oral Report**

Presenters: Michael Houghton, President, Uniform Law Commission (United States)  
 Harriet Lansing, Chair, Executive Committee of the Uniform Law Commission  
 Robert A. Stein, Immediate Past President of the Uniform Law Commission

In their address to the Conference, Mr. Houghton, Ms Lansing and Mr. Stein provided some information about the American Uniform Law Commission (ULC) annual meeting in July 2012. The Uniform Parents Custody and Visitation Act, the Uniform Marital and Premarital Agreements Act and the Uniform Manufactured Housing Act were approved by the ULC. The Uniform Courts Agreement Convention Implementation Act is being finalized by the ULC. Drafting committees are working on legislation to implement the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, on amendments to the Fraudulent Transfers Act and on legislation on fiduciary access to digital assets. A study committee is examining recognition and enforcement of foreign domestic violence protection orders as a result of the Uniform Enforcement of Canadian Judgments and Decrees Act – Foreign Civil Protection Orders adopted by the ULCC in 2011. The ULC will also debate whether there is interest in examining the Uniform Limitations Act adopted by the ULCC.

The Joint ULC – ULCC Drafting Committee will be looking at drafting principles that will guide the drafting of uniform legislation for enactment in the United States and in Canada that provides for cross-border recognition of documents such as powers of attorney for both property and health care, health care instructions, and other documents (such as instructions concerning living arrangements) as appropriate.

The ULCC delegates were also given the opportunity to see the video prepared to celebrate the 100<sup>th</sup> Anniversary of the ULC.

### **RESOLVED:**

**THAT** the ULCC expresses its thanks to Michael Houghton, President of the Uniform Law Commission, Harriet Lansing, Chair of the Executive Committee of the Uniform Law Commission and Robert Stein, Immediate Past President of the Uniform Law Commission, for their interesting and informative presentation.

## **MEXICAN UNIFORM LAW CENTRE**

Dr. Jorge Sánchez Cordero was unable to attend the International Law Session of the Civil Section.

### **RESOLVED:**

**THAT** the ULCC expresses its thanks to Dr. Jorge Antonio Sánchez Cordero Dávila, Director of the Mexican Center for Uniform Law, for his participation in and support of the Conference.

### **UNIFORM DRAFTING CONVENTIONS FOR THE IMPLEMENTATION OF INTERNATIONAL CONVENTIONS – Report**

Presenters:   Jean-Paul Chapdelaine, Justice Canada  
                  Peter Birt, Justice Canada

Jean-Paul Chapdelaine and Peter Birt, federal drafters, presented a report prepared by Justice Canada on uniform drafting conventions for the implementation of international conventions and a Draft Guide Document for Provinces that Wish to Implement an International Private Law Treaty.

In August 2010, the Conference decided to establish a working group to examine the possibilities for uniform legislation and commentaries for the implementation of international conventions. At its annual meeting in August 2011, the Conference accepted an interim report by Justice Canada. Over the past year, Justice Canada officials have continued preliminary work with a view to facilitating the work of a working group. Although initially a template for uniform legislation had been envisaged, the approach evolved to the drafting of Conventions for the Implementation International Conventions, drawing on the Conference's Uniform Drafting Conventions.

### **RESOLVED:**

**THAT** the Report of Justice Canada be accepted; and

**THAT** the Conference establish a working group to continue work on the project and that the working group:

- a.     prepare uniform drafting conventions for the implementation of international conventions in accordance with the recommendations contained in the Report and the directions of the Conference; and
- b.     report back to the Conference at the 2013 meeting.

### **PRIVATE INTERNATIONAL LAW – Status Report**

Presenter: Kathryn Sabo, Justice Canada

Kathryn Sabo provided an overview of activities and priorities of Justice Canada in international private law. A written report was also provided to delegates which outlines the Department's work and priorities in International Commercial Law, Judicial Cooperation and Enforcement of Judgments, Family Law and Protection of Property.

In the International Commercial Law category, highlights of the last year include the finalization and adoption by UNCITRAL of the Guide to the Enactment of the UNCITRAL Model Law On Public Procurement and the conclusion by UNIDROIT of the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets*, which was adopted at a Diplomatic Conference held in Berlin, Germany, from February 27 to March 9, 2012.

In the Judicial Cooperation and Enforcement of Judgments category, highlights of the past year include the preparation by a working group of the Hague Conference on Private International law of Draft Hague Principles on Choice of Law in International Commercial Contracts. A Special Commission in which Justice Canada will participate, will meet at the Hague Conference in the fall to discuss these Principles.

In the Family Law category, highlights of the past year include the second part of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, in which Canada participated in January 2012.

Ms. Sabo reminded delegates that the International Private Law Section of the Department of Justice is always happy to answer questions and provide information on any private international law instrument and project.

### **ADVISORY COMMITTEE REPORT AND NEW PROJECTS REPORT REPORT OF THE INTERNATIONAL COMMITTEE**

Presenters: Peter Lown, Q.C., Alberta Law Reform Institute  
Clark Dalton, Uniform Law Conference of Canada

Peter Lown and Clark Dalton presented the Advisory Committee's Report on Program Development and Management. The objective of the Advisory Committee is to transfer the learning and expertise gained through the Commercial Law Strategy to the medium and long-term planning of the ULCC. The Committee has a dual mandate of developing projects for the Conference and, once developed, to manage those projects to completion. The Committee carries out most of its work by way of monthly conference calls.

The Report sets out the fact that there is a certain number of projects under management and a few more under consideration. Three projects are now completed: the Uniform Trustee Act, the Uniform Reviewable Transactions Act and the Uniform Informal Public Appeals Act. The conclusion of these projects will allow the Committee to focus its attention on developing a

protocol by which completed projects can be implemented. The Committee will also ensure that the project inventory list is adequate for the next three years.

Mr. Lown noted that the level of cooperation between the ULCC and the American Uniform Law Commission (ULC) is excellent. The ULCC has drawn upon ULC projects for topics for its own projects, such as projects on prudent investors and securities transfer. The ULC has also expressed interest in a number of areas in which the ULCC has completed projects. The ULCC and the ULC have successfully completed a joint project on unincorporated associations. The ULCC and the ULC are currently working on a joint project on advanced planning documents and recognition issues. The ULCC has had observer status on a number of working groups at the ULC, including on a ULC working group on asset freezing orders (Mareva injunctions). It now has observer status on the ULC study group on access to digital information and digital accounts. A study committee of the ULC is examining the issues surrounding the recognition and enforcement of foreign domestic violence protection orders and the ULCC is sharing information on its Uniform Enforcement of Canadian Judgments and Decrees Act – Foreign Civil Protection Orders. Over the next year, representatives of the two organizations will hold a meeting dedicated at addressing potential cooperative projects between the ULCC and the ULC.

The Committee sought feedback from delegates on the six potential projects that are detailed in Appendix B of the Report.

- Delegates indicated that the first potential project – on partnership law – should not be given a high level of priority.
- Delegates agreed that further study should be done on the second project, on licensing of fiduciaries.
- It was agreed that priority should be given to the third potential project on vital statistics and the fifth potential project on fiduciary powers and authority to access digital information.
- With respect to the fourth project on buyer's liens, it was observed that a project addressing situations where buyers have already paid for items that have not been removed from the sellers' inventory at the time of receivership would be a small project that could be contained more easily.
- With respect to the sixth project on arbitration, it was recalled that a number of areas were identified by Mr. Ghikas during his presentation of the Report of the working group on International Commercial Arbitration and that working group will submit a project proposal to the Advisory Committee with respect to uniform, up-dated domestic commercial arbitration legislation for the Committee's consideration.

**RESOLVED:**

**THAT** the Report of the Advisory Committee on Program Development and Management, the New Projects Report, the Report of the International Committee, and the direction undertaken by the Advisory Committee, be accepted.

**Other**

**RESOLVED:**

**THAT** the ULCC expresses its thanks to Lisa Peters of British Columbia for her work in support of the Conference.