UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

UNIFORM INTERJURISDICTIONAL SUBPOENA ACT PROJECT

REPORT OF THE WORKING GROUP

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Victoria, BC
August 2013

Uniform Interjurisdictional Subpoena Act
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Introduction

[1] The Uniform Interprovincial Subpoena Act was adopted by the Conference in 1974. In their 1973 report, the Manitoba Commissioners identified the issue that the Act sought to address as follows:

> Basically the problem is one of securing the attendance of witnesses from outside the province in civil suits, but not necessarily exclusively so.

[2] The "problem" stemmed from the fact that no jurisdiction in Canada was able to "legislate extra-territorially or accord extra-territorial powers to its courts".

[3] The Conference's solution to this problem was to establish a court process for the issuance and certification of an extra-provincial subpoena based on a common set of requirements. Where such certification has been obtained in the jurisdiction in which the subpoena was issued, the court of the jurisdiction in which the witness is found would be required to receive and adopt the subpoena as an order of that court.

[4] While the 1974 Uniform Act's scope was limited to subpoenas issued by a court requiring a person to attend as a witness before that court, it was noted that jurisdictions might wish to extend the definition of court to include named boards, commissions or other bodies having the power to issue a subpoena by regulation on a reciprocal basis with another province. In 1998, this approach was expressly rejected by the Conference and the Act's definition of "court" was amended to enable all such subpoenas to be subject to the process of the Act without the need for reciprocity.

[5] While all 12 of Canada's common law jurisdictions now have interjurisdictional subpoena legislation based on the 1974 Uniform Act, not all of them have amended their legislation to deal with a subpoena issued by entities that are not courts.

[6] In Quebec, Article 282 of the Code of Civil Procedure provides that a person residing in the Province of Ontario may be compelled to appear as a witness, if the judge or the clerk is satisfied that his presence is necessary and if there is not another action between the same parties

and for the same cause pending in the Province of Ontario. On April 30, 2013, Bill 28, An Act to Establish the New Code of Civil Procedure was introduced in the National Assembly. Pursuant to Article 497 a person resident in another province or in a territory of Canada may be called to attend court as a witness. The witness's evidence is to be taken at a distance unless it is established that attendance in person is necessary or possible without any major inconvenience to the witness. Article 498 provides that a subpoena issued by an authority in another province or in a territory of Canada will be confirmed in Quebec if it is endorsed with a special order and accompanied by an advance on the witness indemnity and allowances. Bill 28 has been referred to consultations which are scheduled for September 2013.

[7] At the 2011 annual meeting, the delegation for Nunavut presented a proposal that the Conference undertake a review and revision of the Uniform Act. The Conference accepted this recommendation and established a Working Group to conduct this review. The Working Group reported its preliminary recommendations to the Conference and sought its direction concerning certain outstanding issues in 2012. The Working Group continued its work last year and has reached consensus on a draft Act which it recommends to the Conference for adoption as a Uniform Act.

[8] The members of the Working Group 2012 – 2013 were:

Gregory Steele, Chair
Steele Urquhart

Joan Neatby
Alberta Justice and Solicitor General

Chris Hambleton
Saskatchewan Justice

Thomas Ahlfors, Legislative Counsel
Nunavut Justice

John Lee and Brandon Parlette
Ministry of the Attorney General Ontario

The Working Group was also assisted by Clark Dalton, Q.C. Projects Coordinator of the Commercial Law Strategy, and Myriam Anctil of the Quebec Department of Justice, who provided helpful information regarding the situation in Quebec.

Issues

Name of the Act and the References to "Province" in the Act

[9] The current Uniform Act makes reference only to provinces and omits any reference to the three territories. The use of "Interprovincial" in the name of the Uniform Act also ignores the three territories. The proposed draft Act uses the term "Interjurisdictional" in the title and also includes references to the territories as well as to provinces.

Section 1 – Definitions

Clerk

[10] As will be discussed later in this report at paragraphs 22 to 24, the Working Group concluded that work related to the receiving and adoption of subpoenas is an administrative function that does not require the exercise of judicial decision making. Section 2(2) of the draft Act provides that a subpoena from another jurisdiction shall be registered with the "Clerk" and upon being registered adopted as an order of the Court. The draft Act therefore includes a definition for "Clerk" as a senior administrative official of the Court.

Court

[11] In its report to the 2012 meeting, the Working Group noted concerns with regard to references to "court" in the Act. Although the definition of "court" was amended in 1998 in order to allow subpoenas issued by bodies other than courts to take advantage of the machinery created by the Act, the Uniform Act refers to "courts" in the context of not just subpoena issuing bodies, but also as bodies carrying out oversight responsibilities associated with the certification process and responsibilities that have to do with receiving and adopting subpoenas. The Conference clearly did not intend that bodies other than courts undertake those responsibilities, but the Uniform Act, as currently drafted, does not appear to preclude this.

[12] As discussed more fully at paragraphs 17 to 21 and 27 to 30, the draft Act proposed by the Working Group makes a distinction between subpoenas requiring a person to travel to the issuing jurisdiction to testify and those that provide for the testimony to be given remotely from the witness's home jurisdiction. Because of the burden that is placed upon a witness in connection with the first type of subpoena, section 5(1)(a) of the draft Act provides for certification by the Court. The Working Group recommends that this certification process be

exercised only by a traditional court and not by a board, tribunal or other body that has issued the subpoena. Accordingly, in addition to identifying the place where subpoenas received from another jurisdiction are registered, the draft Act includes a definition of Court for this purpose as well.

Subpoena

[13] The current Uniform Act deals only with subpoenas that require a person in one jurisdiction to attend as a witness in another jurisdiction. Ontario's legislation refers to summonses "to attend as a witness at a trial, hearing or examination, to produce documents or other things or to testify before the issuing body or person." British Columbia's legislation refers to subpoenas to "attend as a witness, to produce documents or other articles or to testify before that court." Nova Scotia's statute refers to subpoenas "to attend as a witness to produce documents or other things or to testify."

[14] At first glance it might seem that adopting the Ontario approach of extending the scope of the Act to include subpoenas requiring a person to give evidence at a pre-hearing examination would be problematic for those jurisdictions which do not have such a provision included in their legislation. Upon closer examination, it becomes evident that any such problems are more imaginary than real. The purpose of the Act is to assist in the securing the attendance of witnesses to give evidence in proceedings being conducted in a jurisdiction other than where the proposed witness resides pursuant to a subpoena issued in accordance with the procedural laws of that other jurisdiction. By recognizing and enforcing a subpoena issued by Ontario requiring a person resident in British Columbia to give evidence at pre-hearing examination, for example, British Columbia assists Ontario in the enforcement of Ontario's procedural laws. Extending the scope of the Act in this manner does not require British Columbia to issue subpoenas other than in accordance with its own procedural laws but it would more fully achieve the principal purpose of the Act.

[15] The extension of the Act to include subpoenas requiring a person to produce documents or other items in their possession raises a different issue. Most jurisdictions have laws that govern the production of documents in the possession or control of a third party. These laws are designed as much to protect the holder of such documents as they are to assist in the conduct of litigation. Issues of privacy and confidentiality as well as privilege arise. British Columbia, for example, has a legitimate interest in legislating how such documents are to be subject to production and should not be required to make its interest subservient to the laws of another jurisdiction.

[16] The draft Act therefore defines "subpoena" to include subpoenas issued by bodies other than courts and subpoenas requiring a person to attend for an examination but, as it relates to production of documents in the possession or control of a third party, is limited to subpoenas requiring a person to testify and to bring to the hearing at which they are to testify, any documents or other items which are or might be relevant to their testimony.

Sections 2 and 5 - Registration and Certification of Interjurisdictional Subpoenas

[17] The current Act recognizes and adopts as orders of the receiving court all in-coming subpoenas under section 2 and provides for judicial certification of all out-going subpoenas under section 5. Because the recognition and adoption requirements under section 2 and the certification requirements in section 5 mirror each other across the country, subpoenas from any jurisdiction can be accepted in any other jurisdiction.

[18] When the Interprovincial Subpoenas Act was originally proposed in 1973, only two situations were considered as needing to be covered by legislation in each jurisdiction:

1. A subpoena from another jurisdiction requiring a witness residing in the enacting jurisdiction to testify at a place located in that other jurisdiction; and
2. A subpoena from the enacting jurisdiction requiring a witness residing in another jurisdiction to testify in the enacting jurisdiction.

[19] While the Uniform Act improved the process for obtaining evidence from witnesses across the country, it did not provide for any alternative for witnesses to provide evidence that did not require physical attendance.

[20] With advances in communications technology, such as videoconferencing and teleconferencing which are now easily accessible and widely utilized, making it possible for a person to testify in a place by other means without being physically present, the Working Group has identified two additional situations for which legislation in each jurisdiction should provide:

1. A subpoena from another jurisdiction requiring a witness to testify at a place located in the jurisdiction in which the witness resides;
2. A subpoena from the enacting jurisdiction requiring a witness in another jurisdiction to testify at a place located in the jurisdiction in which the

witness resides.

[21] The draft Act's scope is extended by section 2(1)(b) to include subpoenas that require not only personal attendance but also attendance by other means specified in the subpoena which would allow the witness to testify at a place located in the jurisdiction in which the witness resides.

Reception and Adoption of an Interjurisdictional Subpoena

[22] The current Uniform Act provides for the reception and adoption of an interjurisdictional subpoena to be carried out by a court. The process for reception and adoption, as set out the Uniform Act, is essentially administrative as all that is required is confirmation that the subpoena is accompanied by the appropriate fees and expenses and a certificate that meets the statutory requirements.

[23] The use of the term "court" appears to have resulted in unintended consequences. In Ontario, the use of the term "court" has in practice precluded court staff from carrying out the work of reception and adoption. As a result, anyone with an extra-provincial subpoena must proceed by application to have the subpoena adopted. The Working Group believes that the requirement for the involvement of a judicial decision maker is unnecessarily burdensome to the applicant and an uneconomical use of limited judicial resources.

[24] The Working Group explored the potential for court rules to be adopted in Ontario (and in other jurisdictions that follow a similar approach to that of Ontario) so as to avoid the need for a legislative amendment. The Working Group concluded that it may be possible for such rules to be developed but this would ultimately rest upon the decisions of the relevant rules committees. In any case, the Working Group was of the view that the Uniform Act should be amended to clearly allow court staff to be involved in the reception and adoption process in order to remove any doubt as to the Conference's position and thus added section 2(2) whereby the senior administrative official of the superior or designated court of the enacting jurisdiction shall receive and register a subpoena from another jurisdiction at which point it shall be adopted as an order of the court.

[25] The Working also recommends that jurisdictions review their processes for reception and adoption of interjurisdictional subpoenas. In those jurisdictions that currently require the involvement of a judicial decision maker, the Working Group recommends that consideration be given to reforming the practice and, if necessary, adopting court rules that would allow court

staff to carry out the work.

Requirements for Certification of an Interjurisdictional Subpoena

[26] Sections 2 and 5 of the current Uniform Act sets out a two-part test for certification and adoption. The certifying judge must be:

> … satisfied that the attendance in *(enacting province)* of the person required in *(enacting province)* as a witness
>
> (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)*;

[27] This project began, in part, because these certification and adoption procedures were considered unnecessarily stringent and restrictive by some jurisdictions. During its deliberations in 2011 – 12, the Working Group quickly reached consensus that this was so with regards to subpoenas that did not require personal attendance in the issuing jurisdiction. There was much more division in the Working Group on the questions of whether or how to modify the certification procedures for cases where a witness would still be required to attend a hearing in person in the subpoena-issuing jurisdiction.

Subpoenas That Do Not Require Personal Attendance in the Issuing Jurisdiction

[28] As the existing Uniform Act makes no provision for attendance by means other than in person in the issuing jurisdiction, if the scope of the Act is amended to include such subpoenas, the recognition, adoption and certification procedures must be amended to accommodate them. The Working Group considered extending the Uniform Act's requirements for judicial certification to subpoenas requiring personal attendance to those that do not. However, considering that a person who does not need to leave his or her jurisdiction will suffer less inconvenience than a person who must do so, this appeared out of proportion to what is necessary in the circumstances. The Working Group fairly quickly agreed that this was so as it relates to subpoenas that do not require personal attendance of the witness in the issuing jurisdiction and the Working Group accordingly rejected this approach.

[29] Various alternatives for certification of subpoenas that do not require personal

attendance were considered by the Working Group. These ranged from having no certification requirement to certification effected by the issuing party simply certifying that they believe the witness has information relevant to an issue to be determined in the proceeding in the issuing jurisdiction and that the testimony of the witness is necessary for the due adjudication of the proceeding.

[30] The question was considered by the 2012 meeting. The meeting rejected the idea of eliminating the certification requirement for subpoenas that did not require the witness to travel from their home jurisdiction in order to testify but did resolve that certification process be modified to provide for a simplified certification requirement for such subpoenas. This is accomplished in sections 2(1)(b) and 5(1)(b) which provide that in the case of such subpoenas the certifying authority is a judge of the court or a presiding officer of the tribunal that is seized of the proceeding in which the witness is required to testify.

Subpoenas That Require Personal Attendance in the Issuing Jurisdiction

[31] As noted in paragraphs [11] and [12], the Working Group believes that the oversight responsibilities associated with registration, adoption and certification of subpoenas requiring personal attendance in the issuing jurisdiction should be exercised by traditional courts and not by boards, tribunals or other bodies that have issued a subpoena. The Working Group therefore recommends the enactment of sections 2(1)(a) and 5(1)(a) whereby the certifying authority for subpoenas requiring personal attendance in the issuing jurisdiction be a superior or designated court in the jurisdiction in which the proceedings are being conducted.

The Test for Certification

[32] The 1973 ULCC commissioners regarded the certification test as “a safeguard against frivolous or vexatious abuse of the scheme”, and deliberately made the test more stringent than the requirements to obtain out-of-jurisdiction letters of examination. It was the view of some members of the 2011 – 2012 Working Group that in attempting to weed out the frivolous and vexatious, the process was made so cumbersome that it is often avoided by those with completely legitimate grounds for issuing subpoenas. Other members of the Working Group felt that the Working Group had only heard anecdotal evidence to support the change and that such a change would weaken the test to obtain certification.

[33] The Working Group discussed the issue at length in 2011 – 2012 and was unable to reach a consensus. The question was referred to the annual meeting of the Conference in 2012.

The meeting resolved that the strict test should be eliminated and that a requirement that the certifying authority be satisfied that the attendance of the witness in person is necessary for the due adjudication of the proceeding be substituted for it. Provision for this is found in section 5(2).

Need to hear and examine the party or counsel before issuing the certificate

[34] Another issue considered by the Working Group is the requirement in sections 2(1)(a) and 5(1) of the current Act "hear and examine" the party or counsel before issuing the certificate. It is felt by some members of the Working Group that this requirement may require the judge conducting the certification procedure to have the party seeking the subpoena or its counsel personally appear before the judge. While it is now possible for judges to "hear and examine" parties by telephone or video- conference, reducing the time and inconvenience for both judge and parties for such a process, there is no obvious reason to limit a judge's flexibility to be "satisfied" by other forms of information. Although there was some disagreement as to whether or not the present sections require that the certifying judge hear and examine the issuing party or its counsel, there is no disagreement that such a requirement is unnecessary, and that for greater certainty it should be removed. The need for the hearing and examination of the party seeking the subpoena would remain at the discretion of the judge.

Sections 3, 4 and 7 – Immunity and Enforcement

[35] Minor changes have been made to sections 3, 4 and 6 (now section 7) relating to immunity and enforcement. While these affect time periods and similar things, the Working Group does not believe they introduce any substantive changes to the Act.

Section 6 - Transition

[36] A possible problem identified in modifying the certification process would be the continued existence of section 2 in its current form in jurisdictions that do not amend their Acts. In order to allow for such cases, the Working Group recommends that the new Act retain section 5 (now section 6) essentially in its present form but modified such that resort to it would only be needed in those cases where the intended receiving jurisdiction required such a process as a condition of reception and adoption of an interjurisdictional subpoena.

Section 8 – Original Documents not to be removed

[37] An issue that came to the attention of the Working Group was the possibility that a party examining a witness in a place other than the issuing jurisdiction might demand to take away with them original documents that the witness produced at the examination. While the draft Act does not specify any power to do so, the Working Group felt that for greater certainty, section 8, which prohibits this without the consent of the witness or an order of the court in the enacting jurisdiction, should be added.

Section 9 – Non-Application to Criminal Proceedings

[38] The draft Act retains its non-application to criminal proceedings.

Section 10 - Witness Fees and Travelling Expenses

[39] Under the Uniform Act, the appropriate fees and expenses that must accompany an interjurisdictional subpoena are to be set by the jurisdiction in which the witness is found. The Schedule of fees and expenses set out in the Uniform Act is merely a recommendation and each jurisdiction is free to set whatever fees and expenses it deems fit. The Working Group is of the view that the Schedule of fees and expenses is outdated and does not provide sufficient guidance.

[40] There are two components that must be considered. These are, first, witness attendance fees and, second, the costs and expenses a witness incurs as a consequence of having to attend the hearing to testify. The first is merely compensation to the witness in having to giving up their time to attend but is not meant to give full compensation for lost wages. The latter includes travel costs by the usual means of transportation, accommodation expenses, daily allowance for meals, miscellaneous expenses and additional costs determined on a case by case basis (e.g. cost of child care incurred by a witness in order to attend the hearing).

[41] The Working Group considered various options including setting fees as a schedule to the Act itself, by regulation, or basing them on the regular tariff of fees for court proceedings in the jurisdiction where the witness resides or where the subpoena was issued. The Working Group also considered setting fees by reference to the schedule of travel expenses applicable to government travel by public servants in the various jurisdictions but found that, although such information is publicly available in each jurisdiction, it is not easily found and, in some cases does not provide sufficiently clear guidance for the purposes of issuing interjurisdictional subpoenas.

[42] The Working Group did not find any of the proposals for fees to be entirely free from problem. In the end, it felt that the best solution was that fees should be based on the regular tariff of fees for court proceedings and that a witness should be entitled to the higher of tariff rates in the issuing jurisdiction or the jurisdiction in which the witness resides. It should be noted that this latter provision could have the effect that a witness from another jurisdiction would receive higher fees than a local witness.

[43] Fees should be payable in advance in cash or by travel vouchers or tickets but in cases where a witness may be required to attend for several days, section 10(2) of the draft Act limits the amount that must be paid in advance to expenses for three days. Further, the draft Act provides that the party issuing the subpoena and the witness may determine expenses to be covered and the method of payment by agreement.

Section 11 – Order for Additional Witness Fees and Travelling Expenses

[44] The Act includes in section 10 a statement of general principle that the party issuing a subpoena is responsible for all reasonable travel and accommodation expenses of a witness, reasonable daily allowance for meals and miscellaneous expenses, and any additional costs documented by a witness. If service of a subpoena was accompanied by the fees and expenses required by the tariff, it would be enforceable but pursuant to section 11 the witness could apply for additional fees and expenses, invoking the general principle.

[45] The draft Act does not specify when an application for increased fees and expenses must be made. It is hoped that subpoenas requiring a witness to travel to another jurisdiction would be served in sufficient time to allow a request to be made before the witness has to travel but there will, of course, be instances where there does not happen and the witness will find themselves making a request for extra fees and expenses after they have completed their testimony. Similarly, the draft Act does not specify what happens if the increased fees and expenses are not paid. The Working Group recognizes these deficiencies but believes that the potential for problems is not as great as may first appear.

[46] First, often the witness will be cooperative and the issuance of the subpoena is necessary as a formality to secure the person's attendance without them appearing to be working to assist one of the parties or simply is required in order to get permission to travel away from one's work. There will likely be discussion beforehand about travel arrangements and costs and an agreement reached about what is appropriate conduct money.

[47] Further, the scenario that a person will leave a request for additional fees until they have

completed their testimony is an unlikely one. A party wanting to subpoena someone to attend across the country is likely to serve their subpoena well in advance. If the party issuing the subpoena leaves service to the last minute, they run the risk of missing the deadline or finding that the witness is able to convince the authority authorizing the subpoena that the hardship imposed by the short notice is a factor militating in favour of cancelling it. In the usual case, the Working Group believes that subpoenas of this type will likely be served well in advance giving the witness the opportunity to apply for increased expenses, something which might be accomplished by simply asking the issuing party for them.

[48] Where an order for increased fees is made before the witness travels, the order will likely specify a time by which the fees are to be paid and what happens if they are not. If the order is made after the witness has travelled, the Working Group believes that it should be up the court or tribunal conducting the proceeding to decide what sanctions or remedies to impose.

[49] It will be necessary for jurisdictions to establish simple procedures for witnesses to invoke in order to make a request for increased witness fees and expenses if agreements cannot be reached.

An Act to Amend the Uniform Interprovincial Subpoena Act or a New Uniform Interjurisdictional Subpoena Act

[50] The Working Group was divided as to whether or not the outcome of this project should be an amending act that would provide for amendments that could be made to the existing uniform act or if it should be the repeal of the existing act and adoption of an entirely new act. The Working Group has been guided by the view of the legislative drafter assigned to the project that the extent of the proposed changes is such that to try to implement them by amending the existing act would difficult and cumbersome and therefore proposes that the existing act be repealed and a new act adopted.