

## Uniform Law Conference of Canada (ULCC)

Toronto, Ontario

August 10 – 14, 2014

### Civil Section Minutes

#### **PRINCIPLES FOR DRAFTING UNIFORM LEGISLATION GIVING FORCE OF LAW TO AN INTERNATIONAL CONVENTION – Report**

Presenter: Valérie Simard, Department of Justice Canada

Valérie Simard, Chair, presented the report of the working group, which contains 16 principles recommended to be followed in drafting uniform acts to implement international conventions on international private law matters. The *Principles for Drafting Uniform Legislation Giving Force of Law* and Commentary are annexed to the report.

She reiterated that the working group took into consideration the Canadian Legislative Drafting Conventions adopted by the Conference in developing the principles.

In her discussion of the principles, she highlighted a few and commented on why the working group made certain decisions. Of note are the following:

The working group does not recommend that a preamble be included in the uniform act. But if jurisdictions decide to include a preamble, it should follow the title. Likewise, the working group does not recommend that a purpose section be included in the uniform act. It recognizes, however, that a specific statement of purpose may be required occasionally (for example, to give guidance to courts).

Principle 5 sets out the rules of interpretation that may be included in the uniform act while Principle 6 provides that, where appropriate, the uniform act may include a rule on the precedence of provisions of act and the convention over other acts of Parliament.

Principle 7 requires that the uniform act should contain a provision giving the force of law to the entire convention and reproduce the convention in an annex. The working group recommends two options for the force of law provision. The Commentary provides guidance to jurisdictions on these options. For instance, Option A is useful for sunset legislation while Option B is applicable when a convention is already in operation. The working group also points out that jurisdictions need to consider Principles 7 and 16 (commencement provision) together in determining the appropriate provisions to adopt in their acts.

Principle 10 sets out a uniform provision to allow jurisdictions adopting the uniform act to identify courts competent to exercise functions prescribed by a convention.

Principle 16 deals with commencement of the uniform act. The working group recommends that the uniform act should offer three options for the commencement provision. The Commentary discusses issues to be considered by jurisdictions in choosing which provisions to adopt in their acts.

## **RESOLVED:**

**THAT** the Report of the Working Group be accepted; and

**THAT** the recommendations in the Report and the directions of the Civil Section be incorporated into the draft principles and commentaries and circulated to the jurisdictional representatives for adoption. Unless two or more objections are received by the Projects Coordinator by November 30, 2014, the principles and commentaries should be taken as adopted and recommended to the Conference to guide its work on drafting uniform legislation giving force of law to international conventions and to jurisdictions adopting the uniform legislation.

## **A HARMONIZED APPROACH TO ELDER FINANCIAL ABUSE IN POWERS OF ATTORNEY – Report**

Presenter: Kim Nayyer, British Columbia

As a result of the federal government's commitment to eliminate elder abuse, the Minister of State (Seniors) has asked the ULCC to review legislation on powers of attorney in various Canadian jurisdictions, identify possible gaps and explore the need for harmonization in this area.

A power of attorney is a written, legal authorization to represent or act on another's behalf in private affairs, business or some other legal matter. It is a valuable financial planning tool: simple, flexible and protective of the autonomy of the donor. There are general and enduring powers of attorney. Powers of attorney are an application of the law of contract and agency. Provincial and territorial legislation establish rules about their use and their function when the person who grants the power becomes incapacitated.

In her report to the Conference, Kim Nayyer said that studies have shown that financial abuse constitutes about half of all elder abuse and that the law has been less effective in its deterrence in comparison, for example, to physical abuse.

The report, which presents policy recommendations on uniform safeguards against the misuse of powers of attorney, reviews provincial and territorial legislation on powers of attorney. It notes some existing safeguards in many of the legislative schemes such as stating the requirements for the creation of a power of attorney, duties of the attorney, responsibilities for accounting and involvement of the Public Guardian and Trustee.

The report says that existing safeguards offer at best only passive and incomplete protection. It recommends that uniform legislation be developed to provide for a strong and active regime that deters misuse of powers of attorney in financial exploitation of elders.

The report highlights existing legislative provisions in four areas that can be harmonized to help prevent elder financial abuse. These provisions relate to:

- The creation of the power of attorney – formal requirements vary considerably among Canadian jurisdictions.
- Expression of duties – need for clear communication that the stated duties of an attorney to a donor are fiduciary and to be performed in good faith.
- Accounting – variation in the requirements for monitoring or supervising an attorney's execution of duties.
- Public Guardian and Trustee – providing a role for this office to oversee accounting and other financial measures.

To increase safeguards, Ms. Nayyer identified provisions in some existing legislation that could be incorporated into proposed uniform legislation. Such laws include the British Columbia *Power of Attorney Act*, the Yukon *Enduring Power of Attorney Act*, the Manitoba *Powers of Attorney Act* and the Saskatchewan *Public Guardian and Trustee Act*.

The report also suggests implementing further safeguards in uniform legislation including the following:

- Providing for clear expression of the duties of the attorney, their fiduciary nature and the standard to which the attorney will be held.
- Requiring notice, acknowledgment and acceptance of the attorney's duties, and the incapacity of the donor.
- Clarifying and extending the duties to keep accounts to prevent co-mingling of funds or exploitation of the donor's assets.
- Providing remedial powers relating to reporting misconduct, prevention of abuse and protection of assets by freezing accounts, and to investigate.

In discussing the report, it was pointed out that providing further safeguards in legislation on powers of attorney should be balanced with educating elders on the issue of financial abuse.

In view of article 12 of the UN Convention on the Rights of Persons with Disabilities, the Conference suggested the issue of supported decision and substitute decision should be examined in consultation with offices of the Public Guardian and Trustee. There was also a discussion on issues relating to freezing of assets and proposal on a central registration system for powers of attorney.

**RESOLVED:**

**THAT** the Report be accepted; and

**THAT** a Working Group be established 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 2015 meeting.

### **UNIFORM COMMERCIAL TENANCIES ACT – Report**

Presenters: Rechè McKeague, Law Reform Commission of Saskatchewan

Brennan Carrol, Borden Ladner Gervais, Toronto, Ontario

Rechè McKeague and Brennan Carrol presented the third report of the working group. They noted that commercial tenancies law in Canada is fragmented, outdated and in, some respects, obsolete. Statutory measures that exist are often scattered in various Acts. In furtherance of its work to develop a modern commercial tenancies act that could address contemporary issues in commercial leasing, discussions of the working group since the last progress report have focused on three areas of reform. These are: (1) formal requirements of a lease, (2) registration of a lease, and (3) distress for rent.

The working group discussed four possibilities on whether to include a requirement for writing in a Uniform Commercial Tenancies Act. However, the working group could not agree on whether or not to include any reference, or to include a provision similar to section 59 of the British Columbia's *Law and Equity Act*. It proposed that stakeholders be consulted on this issue.

On whether the requirement for writing should apply to leases less than three years, the working group has recommended that if a writing requirement is included in a Uniform Act, it should provide that all leases must be in writing, regardless of the length of the term of the lease.

Noting that lease registration is not contemplated by Canadian commercial tenancy acts, the working group has recommended that a Uniform Act should not mention lease registration in land title systems.

The bulk of the working group's recommendations are on issues relating to distress for rent. The working group noted that Quebec has successfully abolished its remedy in favour of landlords analogous to distress for rent: the lessor's privilege. None of the Canadian common law jurisdictions has followed suit; although distress for rent has been abolished for commercial tenancies in four Australian jurisdictions and nine

American states. On April 4, 2014, the United Kingdom abolished the remedy and replaced it with a new statutory regime.

The working group has recommended that distress for rent be modernized and included in a Uniform Commercial Tenancies Act. Reason: abolishing it would cause more difficulties for all parties to a lease. It commented that if a common law jurisdiction abolished distress for rent, the summary procedure to be included in the Uniform Act would be of even greater importance to resolve disputes over rent arrears.

To modernize the remedy of distress for rent in its current framework, the working group has made a number of recommendations that deal with all aspects of the law of distress for rent. These include the nature of distress, whether distress should remain a self-help remedy or judicial process, amount of distress, goods to be distrained or exempt from distress, levying of distress, right of set-off, impounding distress, replevin or power to sell, wrongful distress, tenant misconduct and disputes as to right to distrain.

Most of the questions that came up during the Conference were on issues relating to distress for rent. They included questions on the commercial practice regarding distress provisions and goods that can be restrained or exempt from distress. On whether there is a power to restrain at common law and whether there are any procedural safeguards, it was noted that although exercising the power is potentially risky, the pragmatic approach is to engage a qualified bailiff to get a peace officer to assist in entering the premises. Accordingly, such a remedy has to be structured under a Uniform Act rather than leaving its operation to the vagaries of common law.

On next steps, the working group is continuing work on the remaining issues in the list of discrete issues set out in its 2013 progress report, with a view of presenting another progress report at the 2015 Conference. The working group hopes to develop draft legislation within two years for review and adoption by the Conference.

**RESOLVED:**

**THAT** the 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 for consideration by the Conference at the 2015 meeting.

**UNIFORM RULES ON SERVICE IN OTHER CONTRACTING STATES TO THE  
CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL  
DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS SIGNED AT THE HAGUE ON  
NOVEMBER 15, 1965 – Interim Report**

Presenter: Valérie Simard, Department of Justice Canada

Valérie Simard presented the 2014 report of the working group, which contains draft Uniform Rules and Comment to implement the rules set out in the Convention for the service of judicial documents in other Contracting States.

The Conference mandated the working group to prepare rules for the uniform implementation of the Convention. Although the Convention has applied in Canada since 1989, the absence of uniform legislation has contributed to inconsistencies in its interpretation by the courts.

She said the working group would like the draft Uniform Rules to be adopted by amendments to all rules of civil procedure that govern civil and commercial proceedings rather than being adopted as a stand-alone regulation. The working group's suggestion is that the Uniform Rules be placed in the same division or part of the rules of civil procedure as the rules addressing service in non-Contracting States.

The working group noted that although the application of the Convention to the service of judicial documents in civil or commercial matters is mandatory, it is optional for the service of extrajudicial documents. Jurisdictions are urged to take note of this distinction and to amend their rules of civil procedure which take precedence over the Uniform Rules.

The Uniform Rules deal only with service of outgoing documents. They do not address service of incoming documents or service of outgoing or incoming extrajudicial documents. These requests are dealt with by central authorities in provinces and territories designated by Canada under the Convention.

Ms. Simard gave an overview of the draft Uniform Rules.

Rule 1 gives force of law to the Convention. Although jurisdictions can omit this rule, the draft Comment notes that the advantage of including this rule is that it gives certainty to the Convention that is applicable.

Rule 2, which implements Articles 19 and 25 of the Convention, deals with service of judicial documents in a Contracting State when the Convention applies and when it does not apply. The working group has proposed two options for service in a Contracting State when the Convention does not apply. Option 1 involves adopting a separate rule for service while Option 2 involves amending the rules on service in non-Contracting States to include service in Contracting States when the Convention does not apply.

Rule 3 sets out how service may be proved. The working group has proposed two options to jurisdictions adopting the Uniform Rules. Option 1 is a general rule on proof of service of documents in both Contracting and non-Contracting States while Option 2 is limited to proof of service in Contracting States.

Rule 4, which implements Articles 15 and 16 of the Convention, deals with two issues: conditions under which a default judgment may be issued upon service and those under which a party may apply for relief against a default judgment. The draft Comment provides guidance on whether it is necessary for a jurisdiction to adopt this rule.

**RESOLVED:**

**THAT** the Report of the Working Group be accepted; and

**THAT** the Working Group:

- a. continue its work in accordance with the recommendations in the Report and directions of the Conference;
- b. continue consulting with jurisdictions;
- c. work with drafters on the draft uniform rules; and
- d. report back to the Conference at the 2015 meeting.

**UNIFORM VITAL STATISTICS ACT RENEWAL – Interim Report**

Presenter: Jim Emmerton, British Columbia

Jim Emmerton gave an overview of what the ULCC has done to date in developing the model Vital Statistics Act as a new project. At the initiative of the Vital Statistics Council of Canada, the ULCC established an Executive Committee to direct the start-up of the project.

Following the recommendations of the Executive Committee, which has been disbanded, the Vital Statistics Committee (VS Committee) was created to provide expert advice and support for issues related to the model Act. The ULCC Working Group (ULCWG) was also created to review the issues and make tentative reform recommendations.

The ULCWG, with input from the VS Committee, has developed a project plan, which requires significant research and writing. The British Columbia Law Institute (BCLI) has agreed to provide \$15,000 yearly for research and writing while Nova Scotia and Manitoba have contributed \$4,000 each toward the project.

One of the issues driving the project is sex assignment and change. BCLI developed a first memorandum relating to this broad topic and the VS Committee and the ULCWG have reviewed alternatives to reform.

Mr. Emmerton noted that the project, which may take three years to complete, is being undertaken against a backdrop of rapidly shifting landscape in the areas of sex designation and reassignment.

The ULCWG has developed five policy recommendations on the issue of sex designation and reassignment. These are:

- (1) Recording of birth including sex designation or no designation.
- (2) Issue of birth certificates – a certificate will be issued in accordance with record at birth or no designation.
- (3) Age: who can apply for a change of sex designation – an adult or a minor who has a capacity to make a decision or a parent of a minor.
- (4) Whether the registrar of vital statistics should inquire about the capacity of the applicant – capacity will be assumed unless there is evidence to the contrary.
- (5) Issue of evidence required to submit an application for a change of sex designation.

The discussion on the rapidly shifting landscape in the areas of sex designation and reassignment generated a lot of comments. There were questions on whether a change in birth certificate can lead to a change in a birth record, whether 'sex' and 'gender' have the same meaning and the disadvantages that could result from a lack of provincial uniformity in dealing with vital statistics in a rapidly shifting landscape.

For the near future, the ULCWG will undertake more research and develop recommendations on other areas of the project for inclusion in a new Uniform Vital Statistics Act.

**RESOLVED:**

**THAT** the Report of the Working Group be accepted; and

**THAT** the Working Group:

- a. continue its work in accordance with the directions of the Conference;
- b. keep the ACPDM informed on project design and resourcing; and
- c. report back to the Conference at the 2015 meeting.

## **UNIFORM WILLS ACT RENEWAL – Act and Commentaries**

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

Peter Lown presented the draft Uniform Wills Act and commentaries for consideration and adoption.

He said the working group and legislative counsel developed the draft Uniform Wills Act as a standalone Act, but its provisions can be plugged into existing provincial and territorial legislation. He said further that the working group has not yet addressed Part III of the current Uniform Wills Act, which deals with international wills.

In reviewing the provisions of the draft uniform legislation, Mr. Lown said all the earlier directions of the Conference were reflected in the draft and that the working group also made some policy choices in some areas. For example, the draft legislation does not abolish a holograph will and the direction of the Conference on the location of signatures on a will is followed. Also, the working group has decided to abolish the publication requirement, which means that in the draft legislation, there is no requirement that a will be published to be valid.

The draft Uniform Act, which contains a definition of a will, states that “an individual who has reached the age of majority may make, alter or revoke a will if the individual has the mental capacity to do so”. However ‘mental capacity’ is not defined, leaving it to the court to decide. It provides for formal requirements for a will to be valid and also exceptions for military personnel and sailors to comply with these requirements in certain circumstances.

The court is given the authority under the draft Uniform Act to:

- Make, amend or revoke a will on behalf of a mentally incompetent individual.
- Give effect to a will or alterations to a will.
- Restore a beneficial disposition that is void.

Mr. Lown presented to the Conference three options on how to deal with automatic revocation of a will as a result of a subsequent marriage or divorce.

- Option 1 provides that entry into a marriage or other spousal relationship does not revoke the will, but on divorce or termination any beneficial dispositions to the former spouse are deemed revoked unless the court finds a contrary intention of the testator.
- Option 2 deems a will to be revoked on the subsequent marriage or spousal relationship of the testator except in certain circumstances.
- Option 3 provides for deemed intestacy on a subsequent marriage or spousal relationship if certain tests are met, unless the court grants relief.

He said the working group prefers the first option because it does the least damage to the terms of the existing will – its application results in removing any benefit provided by the will to the former spouse or partner. The Conference adopted the working group's preferred option.

The draft uniform legislation also deals with the issue of failed gifts, updating the whole area of the law relating to lapse, ademption and disqualification. It also updates the conflict of laws rules relating to succession, for example, by distinguishing between land moveable property, and articulating clear rules for the validity and effect of a will.

In finalizing the draft, the working group was urged to be cognizant of the implication of bijural application of the uniform legislation. References to real and personal property in the draft uniform legislation are not relevant to definition of property in the Quebec Civil Code and need to be adjusted accordingly. Mr. Lown said the working group was aware of this problem and would make adjustments as needed.

During discussion, Conference members suggested a number of changes to the draft legislation including the following:

- Refer to province or territory in the new Uniform Act and not province only.
- Review the French version to track the meaning of section 8 in the English version.
- Provide a heading for section 12 – “validation and electronic form”.
- Check for consistency of language in section 12 and the implication of the use of “married testator” in section 14.

The Conference adopted these changes and directed that the working group take them into account in revising the draft legislation.

On Part III of the current Uniform Wills Act, which deals with international wills, the Conference also directed that it should be revised to make it consistent with the draft legislation.

## **RESOLVED:**

**THAT** the report of the Working Group be accepted;

**THAT** the Working Group make the necessary changes to the draft Uniform Act and commentaries to reflect bijural terminology and to ensure consistency between the English and French versions;

**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, 2014, the Uniform Wills Act should be taken as adopted as a Uniform Act and recommended to jurisdictions for enactment; and

**THAT** upon its adoption, the existing Uniform Wills Act be repealed.

## **UNIFORM MISSING PERSONS ACT – Act and Commentaries**

### **Joint Session of the Civil and Criminal Law Sections**

Presenter: Nolan Steed, Q.C., Alberta Justice

In January 2013, the Deputy Ministers responsible for Justice asked the ULCC to develop uniform legislation on missing persons for consideration by provinces and territories. The ULCC Working Group decided to use the Manitoba legislation as the template for its review of missing persons legislation because British Columbia and Nova Scotia have followed the Manitoba approach in drafting their legislation. Alberta and Saskatchewan also have missing persons legislation.

Nolan Steed presented the draft Uniform Missing Persons Act and commentaries for consideration and adoption.

The proposed legislation allows a police agency to obtain personal information in missing persons cases where there is no reason to suspect that a crime has been committed. The Uniform Act, which defines a missing person, strikes a balance between the privacy of personal information and the need to access that information to enable investigations to move ahead with the goal of locating a missing person.

Three types of orders that require judicial authorization are provided for under the proposed legislation:

- Search order – the police can enter premises to search for a missing person.
- Record access order – the police can ask another person for certain information that may assist in locating a missing person.
- Third party access order – if the missing person is a minor or a vulnerable person, the police can ask for information about the person who may be accompanying the missing person.

In addition, the police can issue an emergency demand for records about a missing person without judicial authorization. The legislation specifies conditions under which such demand is allowed, e.g. when a missing person is at risk of imminent seriously bodily harm or death.

The Uniform Act limits the use and disclosure of information obtained under the Act to safeguard privacy. For instance, such information can only be used or disclosed for “the purpose of locating a missing person or a use consistent with that purpose”.

The Working Group discussed possible ways of addressing the interjurisdictional enforcement of record access orders and noted that one option would be to take the full faith and credit approach adopted by the ULCC for civil protection orders in the *Uniform Enforcement of Canadian Judgments and Decrees Act*. The other option is to delay consideration of the issue until the ongoing Working Group on the Enforcement of Extra-Provincial Search Warrants addresses the issue in relation to search warrants since both record access orders and search warrants involve police officers applying to lower level judicial authorities for authorization to access information.

Also, the working group considered the possibility of creating a category of missing person called “persons at risk”, but declined against including this proposal in the Uniform Act. It concluded that jurisdictions should have the discretion to decide on whether to treat this kind of missing persons as a category separate from minors and vulnerable persons.

During discussion at the Conference, the issue of potential misuse of the legislation was raised – for example, can the legislation be used to locate a person that does not want to cooperate in a police investigation? It was noted that an individual has a right to disappear and that the definition of a missing person in the legislation is overly broad and may have Charter implications.

To address the potential misuse of the legislation by the police, it was suggested that the definition of a missing person be revised by deleting clause (b) of the definition. It was also suggested that a purpose section be included in the legislation to guide the court regarding the competing interest of finding a missing person and protecting the privacy of that person.

Mr. Steed said the working group considered already the concerns raised at the Conference about potential police misuse in developing the legislation, noting that the appropriate balance is maintained between providing police with powers to access information about a missing person and protecting personal privacy.

The Conference voted to accept the report of the working group containing the Uniform Act and commentaries. Five delegates opposed and four abstained.

## **RESOLVED:**

**THAT** the final report of the Working Group be accepted; and

**THAT** the Uniform Missing Persons Act and commentaries be approved and recommended to the jurisdictions for enactment.

## **PROJECT ON ENFORCEMENT OF EXTRA-PROVINCIAL SEARCH WARRANTS – Progress Report**

### **Joint Session of the Civil and Criminal Sections**

Presenter: Genevieve Harvey, Nova Scotia

This project originated from the ULCC Criminal Section, which adopted a resolution in 2011 recommending that a working group be formed to consider options for enforcement of extra-provincial search warrants in the context of provincial and territorial regulatory investigations.

In 2013, the Criminal Section Working Group recommended that a joint working group of Civil and Criminal Sections be formed to undertake the project because the issue encompasses both areas of law.

The project arose out of concerns about difficulties experienced by some investigators enforcing provincial or territorial legislation due to their inability to obtain evidence necessary to prosecute a regulatory offence because the evidence is located in another jurisdiction. This situation most frequently occurs when a corporation under investigation holds relevant documents in a corporate office outside the investigating jurisdiction.

Genevieve Harvey gave a progress report on the activities of the joint working group. She said that the joint working group has reviewed the work of the Criminal Section working group, especially potential concerns identified in executing search warrants in other jurisdictions and its proposal to use the Nova Scotia amendments to the *Summary Proceedings Act* as a model to address the concerns. The Nova Scotia model is based on reciprocity.

She said that since the Civil Section's preference is for a non-reciprocal model, the joint working group was committed to examining if there are any non-reciprocal models that could meet the concerns identified by the Criminal Section working group. The benefit of a non-reciprocal model is that it would not require each jurisdiction to enter into agreements with all other jurisdictions and to amend their laws to add jurisdictions as reciprocal agreements are reached.

It was noted that developing rules on enforcement of extra-provincial search warrants would be useful to Yukon, which is interested in joining the working group.

#### **RESOLVED:**

**THAT** the Report of the Working Group be accepted; and

**THAT** the Working Group:

- a. continue its work in accordance with the recommendations contained in

- b. the Report and the directions of the Conference; and  
report back to the Conference at the 2015 meeting.

## **UNIFORM INTERPRETATION ACT RENEWAL – Interim Report**

Presenters: Peter Pagano, Q.C., Alberta Justice

Dawn Leroy, British Columbia Ministry of Justice

Peter Pagano updated the Conference on what the working group has done to date, including holding a meeting of legislative counsel in Edmonton, Alberta on April 3 and 4, 2014 to discuss the second draft of a new Uniform Interpretation Act. He said the working group has followed the methodology discussed at the 2013 ULCC meeting in reviewing the existing Uniform Interpretation Act. The working group is using Ontario *Legislation Act* as a template in developing the new Uniform Act.

Although a third draft of the new Uniform Act was prepared, the working group decided not to present it for discussion at the Conference because of some outstanding matters to sort out. Instead, it has prepared a Table which sets out:

- Recommendations as to whether the existing provisions of the Uniform Interpretation Act should be retained (with or without changes) or should not be retained at all.
- Specific questions for the delegates of the Civil Section.
- Other provisions from the Ontario Act that are recommended for the new Uniform Interpretation Act.

Both Mr. Pagano and Dawn Leroy reviewed the Table to elicit comments from delegates to the Conference. Some highlights are as follows:

- Unlike the definition in the existing Uniform Act, the working group recommends that the definition of regulation be limited to an instrument that is required to be filed under the Regulations Act or similar law.
- The working group recommends that the provision which deals with the application of the Act not be retained and that the Ontario approach be followed instead.
- It recommends that an Act or portion of it be brought into force by an order in council (OIC) and not by proclamation, noting that British Columbia brings their legislation into force by a regulation made by OIC.
- According to the working group, the new Uniform Act should include a provision that reflects Driedger's modern principle on fair, large and liberal interpretation of laws.

- Regarding the power to act for ministers and public officers, the working group recommends following the Saskatchewan model which further clarifies and expands the Carltona Doctrine. Under this common law exception, the statutory power is not exercised by a subordinate in their own right. Rather, the subordinate is deemed to exercise the power for and on behalf of the person or body in whom the power was originally vested.
- The working Group recommends that the term “public officer” not be retained in the definition section. It proposes not to define the terms “may” and “shall” in the new Uniform Act because there are enough court decisions on these terms.
- The Working group further recommends that some provisions in the existing Uniform Act not be retained such as those dealing with effect of private Acts, corporate rights and powers (with the exception of the paragraph on use of names of corporations in English and French), majority and quorums, powers to judges and court officers, territorial jurisdiction, ancillary powers, exercise of power from time to time, and amendment and repeal of regulations.

The presenters also discussed matters not currently dealt with in the Uniform Interpretation Act. These include interpretation and definition provisions, survival of power to revoke, bilingual texts, succession – demise of the Crown and delegation of regulation-making power. The working group plans to follow Ontario approach and include the matters in the new Uniform Act.

Mr. Pagano discussed two issues that were raised at 2013 ULCC meeting: Aboriginal and treaty rights and interpretative provisions relating to international conventions. Although Manitoba and Saskatchewan have provisions in their Interpretation Acts that deal with Aboriginal and treaty rights, he noted that including such a provision in the new Uniform Act would amount to duplicating what is already in the Constitution and this raises the question of whether it is necessary. On the other issue, it was noted that courts are already dealing adequately with interpretation of conventions. The working group intends to consider these issues and make recommendations.

#### **RESOLVED:**

**THAT** the Report be accepted; and

**THAT** a Working Group:

- continue to prepare uniform legislation 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 2015 meeting.

## **INTERPROVINCIAL SUBPOENA ACT – Motion**

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

The Conference through jurisdictional representatives adopted the *Uniform Interjurisdictional Subpoena Act* on November 30, 2013.

Clark Dalton said that as a result of many amendments to the 1974 *Uniform Interprovincial Subpoena Act*, the Working Group decided to draft new legislation – the Uniform Interjurisdictional Subpoena Act, 2013. This new Uniform Act in essence updated the 1974 Act.

He has already consulted with the Advisory Committee on Program Development and the Steering Committee of the Civil Section on the need to bring a motion to repeal the 1974 Uniform Act. He said that there was no particular reason to retain it and requested that the Conference repeal it. The Conference approved the motion to repeal the 1974 Uniform Act.

### **RESOLVED:**

**THAT** the 1974 *Uniform Interprovincial Subpoena Act* be repealed.

## **UNIFORM DOMESTIC ARBITRATION ACT PROJECT – Preliminary Report**

Presenters: Gerry Ghikas, Q.C. British Columbia

John Gregory, Ontario

Gerry Ghikas presented a preliminary report of the activities of the working group that is developing new uniform legislation on domestic arbitration. The existing Uniform Arbitration Act was adopted in 1990.

He said more uniformity is desirable in domestic arbitration laws to make arbitration procedures more effective for Canadians. He noted that provinces and territories have laws on arbitration and there is always the question about which arbitration law applies. According to him, the law governing the conduct of the arbitration can be different from the law governing the substance of the dispute being arbitrated.

Mr. Ghikas, who gave reasons why more uniformity is required, talked about the Canadian legal landscape. He said that domestic arbitrations in British Columbia and Quebec tend to be conducted in a way similar to international arbitrations while arbitrations in Ontario, for example, tend to be conducted like a court hearing. The differences in approach, he added, result in conflicting expectations.

The working group's aim, according to him, is to develop new uniform legislation that will make the conduct of domestic arbitration less of a court-like process and more similar to the model for international arbitration. The working group has developed seven policy recommendations (principles) to guide its work, which include choices on general application, arbitrability and jurisdiction, limits on judicial intervention and user expectations.

He reported on the working group's review of the current Uniform Act, highlighting some key points of discussion. Some of the issues that the working group will consult extensively on include arbitration as an alternative to court litigation and the question of remedies. On the scope of the new Uniform Act, he said the working group will consider which specialized areas of arbitration to include in the legislation.

John Gregory spoke on family law and the use of religious arbitration. He said the current Uniform Act, by implication, covers religious arbitration and the issue should probably be revisited in light of Ontario's experience with the issue, which was reported to the Conference in 2005 and 2006. He noted that the Uniform Act is not acceptable in Quebec because it is not possible to arbitrate a family dispute with a binding decision.

He said the working group would collaborate with the Coordinating Committee of Senior Officials – Family Justice on the issue and proposals would be presented to the Committee for discussion.

In response to a question during discussion, Mr. Ghikas said the working group does not plan to include provisions on professional standards for arbitrators in the proposed uniform legislation. Instead, the working group plans to include a provision on the liability of an arbitrator in the new legislation. Mr. Gregory noted that in Ontario, training for family arbitrators is prescribed in the regulation made under the *Arbitration Act*.

On whether the new Uniform Act should have special rules dealing with consumer disputes, Conference delegates expressed some reservation, noting that consumer matters are best dealt with under consumer protection laws.

On next steps, the working group intends to prepare a discussion paper to elicit comments on some of its proposals. It also plans to conduct an online survey.

## **RESOLVED:**

**THAT** the Report be accepted; and

**THAT** the Working Group:

- a. continue its work including drafting uniform legislation and commentaries in accordance with the recommendations contained in the Report and the directions of the Conference;

- b. consult with members of the Coordinating Committee of Senior Officials-Family Justice (CCSO-FJ), the FPT Committee on Consumer Measures, and if necessary, other interested groups for guidance on how to address arbitration in their context; and
- c. report back to the Conference at the 2015 meeting.

## **LAW REFORM ON ACCESS TO DIGITAL ASSETS – Report**

Presenter: John Gregory, Ontario

John Gregory spoke on why the Uniform Law Conference of Canada (ULCC) should undertake a project on the issue of access to digital assets. According to him, people are acquiring more digital assets in this information technology age, which raises the question of how to deal with them upon death. Digital assets include bank accounts, non-bank payment accounts, gambling receipts, auction holdings and virtual life empires. They can be stored on a person's computing device or in the cloud, or on a server belonging to a service provider like Amazon.com, PayPal or Facebook.

He said that although there is no urgency to law reform in this area, it is important for the ULCC to study this issue now as Canadians are starting to explore questions relating to the power of fiduciaries over people's digital assets and whether its exercise needs an express legal framework. Also, the Uniform Law Commission (ULC) adopted the *Fiduciary Access to Digital Assets Act* in July, 2014 in Seattle, Washington. He attended as an observer two meetings of the ULC Drafting Committee on Fiduciary Access to Digital Assets.

Mr. Gregory said the Executive of the Society of Trusts and Estates Practitioners (STEP) Canada is in support of the ULCC taking on this project. According to him, members of the working group for the proposed project can be drawn from sectors such as the Canadian Bar Association and its provincial and territorial chapters, STEP Canada and estates and trusts firms.

Conference delegates commented on the scope of the proposed project – how will the proposed legislation deal with end user licence agreements and privacy implications.

Mr. Gregory made a recommendation, which was approved, that the ULCC should form a working group to study the issue of access to digital assets and prepare uniform legislation.

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

Presenters: Harriet Lansing, President, Uniform Law Commission

Michael Houghton, Immediate Past President, Uniform Law Commission

Robert A. Stein, Chair, International Committee, Uniform Law Commission

Harriet Lansing spoke about the relationship between the Uniform Law Commission (ULC) and the ULCC, noting that it has been productive especially in the area of executing joint projects.

She mentioned the joint project on Unincorporated Non-Profit Associations Act, which was completed in 2009 and the Recognition of Substitute Decision-Making Documents Act that was adopted this year. She also acknowledged the ULCC participation in the work of the ULC Drafting Committee on Fiduciary Access to Digital Assets and the Drafting Committee on Recognition and Enforcement of Domestic Violence Protection Orders.

Ms. Lansing suggested some potential projects that the two organizations can collaborate. They include unclaimed property, elder abuse as it relates to financial issues and the issue of alternative payment systems, which is still in the ULC study committee stage.

Robert Stein, who reported on the international work of the ULC, said the ULC has formed study committees with some Caribbean countries on enforcement of child support orders and enforcement of judgments. He invited the ULCC to consider participating in such international initiatives.

He said the ULC has also engaged in discussions with law commissions in other countries such as the Ireland, England and Wales. For instance, the European Law Institute attended the July 2014 ULC meeting.

Michael Houghton discussed how the law on unclaimed property has evolved in the US and the ULC involvement in helping to shape the legal landscape through its model acts. According to him, all the states in the US have some version of unclaimed property law

He said the ULC is considering reform to its *Uniform Unclaimed Property Act (1995)* since it's been 20 years this area of the law has been examined. According to him, new categories of property such as gift cards, Bitcoin and e-payments have developed over the years, necessitating the need to consider a review of the uniform legislation. Unclaimed property, he added, could be a potential area of a joint project for the ULC and ULCC.

Also in attendance were Richard Cassidy, the incoming ULC President and David English, a ULC Commissioner.

**RESOLVED:**

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

**JOINT UNIFORM LAW CONFERENCE OF CANADA AND UNIFORM LAW  
COMMISSION PROJECT – UNIFORM ACT ON INTERJURISDICTIONAL  
RECOGNITION OF SUBSTITUTE-DECISION MAKING DOCUMENTS – Oral Report**

Presenters: David English, University of Missouri School of Law

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

David English and Peter Lown presented the draft Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act and commentaries for consideration and adoption. The Uniform Act, which is the product of a joint project between the ULC and the ULCC, promotes the portability and usefulness of substitute decision-making documents.

Mr. English spoke of a scenario of signing a power of attorney in Quebec and seeking treatment, for example, in New York. The question that arises is whether New York can recognize documents from Quebec. He said the aim of the project is to create a culture of acceptance of decision-making documents by third parties in both Canada and the US. It deals with the issue of validity of documents.

He said the ULC began drafting the US version of the model law in 2012 and that ULCC representatives participated in the exercise. The US version was approved at the annual meeting of the ULC in July 2014 and was being finalized.

Mr. Lown said that although the Uniform Act embodies a three-part approach to portability modelled after the ULC *Uniform Power of Attorney Act (2006)*, there are some differences in both the Canadian and American versions due to different drafting styles. Also, in drafting the Canadian version, the working group took into account Canada's more favourable disposition toward ratifying the Hague Convention on the Protection of Adults.

The presenters said a conscious decision was made regarding the terminology of documents covered by the Uniform Act. The term "substitute decision-making document" covers a broad spectrum of documents that include power of attorney, proxy and representation agreement. The legislation does not apply to documents that merely provide advance directions for future decisions such as living will declarations and do-not-resuscitate orders. According to them, the critical distinction for purposes of the

legislation is that the document must contain a delegation of authority to a specific decision-maker.

In reviewing the Uniform Act, they noted that section 2 specifies the factors that determine the law governing the formal validity of a substitute decision-making document executed in another jurisdiction. This section is different from the US version because the Uniform Act tracks the language of the Hague Convention.

Section 3 provides for the law that governs the existence, extent, modification and extinction of a substitute decision-making document. It was noted that this section appears to be inconsistent with the Hague Convention. It was also pointed out that the working group has not consulted on whether a US or international model is preferable. The presenters noted that the portability principle is the key consideration in developing legislation on this matter.

Two versions of section 4 of the draft Uniform Act were presented to the Conference. Section 4 allows a decision maker to refuse to apply the law on the ground that it would be manifestly contrary to public policy. They said that the first version is more consistent with the Canadian and the Hague Convention. The Conference opted for the first version.

Section 5, which is designed to encourage portability, states grounds for legitimate refusals of a substitute decision-making document and the sanctions for refusals that violate Act. It was pointed out that a drafting error in section 5(2) should be corrected to clarify the provision.

Section 6 permits a person to rely in good faith on the validity of a substitute decision-making document and the validity of the decision-maker's authority unless the person has actual knowledge to the contrary. It complements section 5.

During discussion, the presenters made suggestions on revising the draft Uniform Act in response to the comments received.

## **RESOLVED:**

**THAT** the report of the Working Group be accepted;

**THAT** the Working Group make the necessary changes to the draft Uniform Act and commentaries to reflect bijural terminology and to ensure consistency between the English and the French versions; and

**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, 2014, the Uniform Act on Interjurisdictional Recognition of Substitute Decision-Making

Documents should be taken as adopted as a Uniform Act and recommended to jurisdictions for enactment.

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

Presenter: Kathryn Sabo, Justice Canada

Kathryn Sabo gave an overview of the activities and priorities of the Department of Justice Canada on international private law. She highlighted a few matters in the comprehensive written report which focuses on the priorities of Justice Canada in international private law such as international commercial law, judicial cooperation and enforcement of judgments, family law and protection of property.

She said that Justice Canada has devoted resources over the last year to developing international and national legal framework in international law. Of note is the extension of application of the Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment to Prince Edward Island and the Yukon. New Brunswick enacted legislation implementing these instruments on May 21, 2014.

Ms. Sabo said it was thought that the European Union (EU) would be in a position to ratify the Convention on the Choice of Court Agreement, (Hague). However, it would seem that the expectation would not materialize in 2014 and that it is expected that the EU will ratify the Convention in 2015. With EU's expected ratification, she noted, the Convention should be in force in 2015.

According to her, these developments are the last steps for a complete implementation of the two international instruments in Canadian law and when they come into force in all three jurisdictions, the Convention and Protocol will apply across Canada.

On projects that are under negotiation, she highlighted the work that has been done by the Experts' Group of the Judgments Project (Hague Conference) and the draft Model Law on Recognition and Enforcement of Foreign Judgments considered by the Commonwealth ministers at their last meeting in May.

Regarding future projects, Canada intends to propose to UNCITRAL to consider studying all aspects of cloud data storage. A paper on the subject is expected in 2015 that will allow UNCITRAL to decide on what to do with the request.

Ms. Sabo reminded delegates that the International Private Law Section of Justice Canada is always available for consultation and willing to provide assistance on issues relating to consideration or implementation of international private law instruments or projects.

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

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

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

Peter Lown presented the report of the Advisory Committee on Program Development and Management (ACPDM). He thanked his co-presenter, Clark Dalton, for his role in coordinating the work of the ACPDM, especially preparing agenda and minutes for monthly meetings.

He said the work of ACPDM has been guided by the four major criteria established at its in-person meeting in June 2013. The work of ACPDM is also greatly aided by the project calendar developed by Manon Dostie and Nolan Steed.

Mr. Lown reviewed the ACPDM four year project plan. The Conference has adopted the following Uniform Acts:

- The Uniform Wills Act.
- The Uniform Missing Persons Act.
- The Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act.

Some of the other highlights are as follows:

- Paper on elder financial abuse – He said the plan is to create drafting instructions based on the paper and comments received during its presentation to enable a working group develop uniform legislation.
- Fiduciary access to digital assets – He said the ACPDM would also like to establish a working group to study further the issue and prepare uniform legislation. He noted that since members of STEP Canada have already indicated their interest in participating in this project, it is incumbent on the ULCC to provide leadership in moving the project forward. He asked for volunteers for the working group.
- Unclaimed property – He said if there is a wave of interest in this area of the law, the ACPDM would consider initiating a project. Ontario may be considering updating its law and New Brunswick has expressed some interest. If the project moves ahead, it may be worth exploring the challenges on how principles relating to disposition of unclaimed property apply to digital assets.

Mr. Lown reviewed potential joint projects or those already undertaken with the ULC. This year, the ULC and ULCC concluded work on Substitute Decision-Making Documents and Recognition of Canadian Domestic Violence Protection Orders. Last year, work was completed on Asset Preservation Orders project.

He noted that there is the potential of the ULC and ULCC working together on reform to the laws governing unclaimed property.

**RESOLVED:**

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