ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION MINUTES (2016)

Fredericton
New Brunswick
August, 2016

PRELIMINARY MATTERS

GENERAL RESOLUTION respecting Appearance of Reports in the Proceedings

It is the practice of the Civil Section to resolve that all written reports, and summaries of all oral reports, appear in the Annual Proceedings. The purpose of a general resolution to this effect is to clarify the distinction between the formal resolution and the substantive action resolutions respecting each individual part.

RESOLVED:

THAT the written reports presented to the Civil Section and to the joint session of the Civil and Criminal Sections appear in the 2016 Proceedings; 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 2016 Proceedings**.**

INTERNATIONAL WILLS - Report and Amendments to Uniform Act

Presenter: Peter Lown

The ULCC's *Uniform Wills Act* (uniform Act) was adopted by the Conference in 2014 and addresses issues related to the creation, revocation, meaning, and validation of wills. In 2015, the Conference created a working group on international wills and directed it to prepare amendments to the uniform Act which would implement the *UNIDROIT Convention on providing a Uniform Law on the Form of an International Will* (the "Convention"). This would be the last outstanding piece of the uniform Act to be developed.

Mr. Lown presented the report of the working group, which contains draft uniform provisions as well as commentary. The provisions give force of law to the Convention, offering two options: one for those jurisdictions to which the Convention does not yet apply but who want to request that Canada extend its application to their jurisdiction, and the second that could be adopted by jurisdictions to which the Convention already applies.

The working group recommended against including a section establishing a registration system for international wills in the uniform Act, since generally speaking, the practice of depositing the will of a living person has fallen into disuse in Canada. While currently there are three jurisdictions with legislation requiring an international will to be registered (only two of which are in force), those jurisdictions were consulted and confirmed that registration is rare. Accordingly, the working group prepared two options for those jurisdictions: either the registry could be abolished, or provisions could be introduced that clarify that new registrations will not be accepted and that the jurisdiction

only has a custodial obligation to keep safe existing registered documents.

The draft uniform provisions also set out options for implementation to reflect whether or not the Convention is in force in the relevant jurisdiction. A delegate commented that section 22 appears to inadvertently give those who may not have the ability to practice law a broader authority than they otherwise have. Mr. Lown noted the comment and agreed that was not the intention; he agreed to make the minor changes necessary to clarify section 22.

RESOLVED:

THAT the report of the working group be accepted; and

THAT the recommended amendments to the *Uniform Wills Act* regarding Implementation of the *UNIDROIT Convention Providing Uniform Law on the Form of an International Will* and commentaries, as amended according to the direction of the Conference, be adopted and recommended to the jurisdictions for enactment.

UNIFORM ACCESS TO DIGITAL ASSETS BY FIDUCIARIES ACT - Report and Uniform Act

Presenter: Donna Molzan, Alberta

Ms. Molzan presented the report of the working group, which was accompanied by draft uniform legislation. The *Uniform Access to Digital Assets by Fiduciaries Act* would provide a fiduciary the right to access digital assets, subject to any instrument or specific online instruction that excludes or limits access. Digital assets are becoming more and more common in today's society and include things such as PayPal accounts, electronic bank accounts, social networking accounts and online gaming accounts.

Upon the death or incapacity of the account holder, some digital assets fall subject to a service agreement, but the law itself is silent with respect to access to digital assets. The duties of custodians of the digital assets are also unclear. As such, the uniform Act has two goals: to clarify the rights of fiduciaries to deal with digital assets, and to clarify the duty of service providers to provide access to digital assets. The hope is to facilitate fiduciary access to digital access while at the same time, respecting the privacy of the original owner of those assets.

The uniform Act clarifies that the legal duties of a fiduciary for tangible property also apply to digital property; a fiduciary can take any action that could have been taken by the account holder. It specifies that a service agreement limiting fiduciary access is void, and that access by a fiduciary is not a breach of a service agreement.

A fiduciary may apply to the court for directions and the court may make an order with directions.

Delegates to the Conference engaged in discussion about the draft and commentaries, suggesting some clarification particularly to the commentaries related to the definition of "digital asset", noting that the intention is to capture new types of digital assets as they are created. Additional suggestions were made to ensure that the French and English versions of the commentaries carried the same message.

Ms. Molzan noted that the uniform Act was not intended to change the law on fiduciaries generally, but to give directions regarding what powers fiduciaries have with respect to digital assets. Each jurisdiction may have to adjust the terminology used, if the uniform Act were to be adopted, to reflect jurisdictional needs.

RESOLVED:

THAT the report of the working group be accepted; and

THAT the *Uniform Access to Digital Assets by Fiduciaries Act* and commentaries, as amended according to the direction of the Conference, be adopted and recommended to jurisdictions for enactment.

UNIFORM VITAL STATISTICS ACT - Report

Presenters: Alex Blondin, British Columbia
Kathleen Cunningham, British Columbia

The ULCC's *Uniform Vital Statistics Act* was last updated in 1987. It has been incorporated in whole or in part in some jurisdictions, however there is a lack of uniformity across the country. Many provisions of this uniform legislation are also out of date and in need of reform. As such, a working group was established to make recommendations for renewal and modernization of the 1987 uniform Act. The working group was assisted by a national advisory committee, consisting of members with front-line experience and knowledge in the area of Vital Statistics.

Following up on last year's discussion and directions of the Conference, Mr. Blondin and Ms. Cunningham presented the working group's report and final policy recommendations. A number of "first principles" were identified, and the recommendations recognized the need for vital statistics legislation and registries to:

- provide essential vital statistics data on populations across Canada;
- remove obstacles which could interfere with human rights according to provincial, territorial and federal human rights legislation and the Charter of Rights and Freedoms;

- respect the privacy of all parties whose information is being registered;
- provide, to the extent that it is practicable, uniform practices that can be adopted generally by all Canadian jurisdictions and that do not impose unreasonable or unjustifiable obligations on registry staff; and
- provide practices and policies which reflect current societal needs and, to the extent that it is practicable, anticipate future developments in the law.

The working group noted that many policies in the uniform Act continue to be appropriate. As a result, the working group agreed that its recommendations should be incorporated into the 1987 Act, but the language of the uniform Act should be modernized.

Mr. Blondin began by reminding delegates that birth registration documents are internal documents used by Vital Statistic registrars, for statistical purposes only. Birth certificates, on the other hand, are more broadly used for many different purposes.

Some of the working group's recommendations included:

- When there is certainty as to the anatomical sex of the infant, the Registrar will make a record of the birth which includes a designation of the male or female sex of the child. However where there is uncertainty, the Registrar will make a record of the birth as "undetermined" until such time that the sex designation can be determined. A birth certificate will not be issued until sex is determined.
- The Registrar should make available an optional "short form" birth certificate which does not display the sex field.
- An individual may apply for a change of sex designation on a birth registration if the individual is an adult, a minor with capacity to make decisions about their vital records, or a parent/guardian applying on behalf of a minor who does not have the required capacity. In adults, capacity should be assumed unless there is a genuine reason to believe otherwise.
- The participation of a guarantor, rather than medical evidence, is sufficient to meet the information integrity standards needs of vital statistics agencies.
- Provisions related to information sharing should be clarified, including confirming that the Registrar has the discretion to enter into information sharing agreements (ISA) and in certain circumstances, the Registrar may only share information if an ISA is agreed upon.
- eligibility to access registration and certificate information should be clarified.
- Vital statistics agencies should ensure that applications from persons seeking adoption information are handled by agencies responsible for post-adoption services. There should be an open exchange of information with these post-adoption agencies.
- Aboriginal customary adoptions should be recognized by the uniform Act, and the Act should set out a framework of minimum standards which must be adhered

to in order to ensure that as much information as possible is collected about the parties to the adoption.
- Aboriginal applicants should be enabled to register their child's name with a single name at the time of birth, and should be enabled to register their child's name with Aboriginal characters and syllabics at the time of birth.

In accordance with the directions of the 2015 Conference, and after consulting with the Coordinating Committee of Senior Offices in Family Justice Ministries (CCSO), the working group recommended that the uniform Act defer to the jurisdiction's family law legislation definitions and principles governing births conceived using assisted human reproduction (AHR). The working group noted that where a jurisdiction lacks definitions and principles, the uniform Act should contain provisions that apply until the appropriate legislation is passed. Recommendations 21 and 22 of the working group's report contain the recommended provisions.

Delegates did not accept recommendations 21 and 22. Delegates agreed that the relevant issues are better addressed in family law legislation rather than vital statistics legislation. Putting AHR provisions in uniform Vital Statistics legislation significantly increases the risk of inconsistent policy direction as between it and the *Uniform Child Status Act.*

With respect to naming conventions, and particularly the working group's recommendation that Aboriginal applicants should be able to register their child's name with a single name and with Aboriginal characters and syllabics, delegates asked whether the recommendation ought to be applicable to more than just Aboriginal applicants. Mr. Blondin noted that the limit was intentional and that recommendation arose in part as a response to the Truth and Reconciliation Commission, in the context of individuals who went through the Residential School System.

RESOLVED:

THAT the report of the working group be accepted;

THAT the working group continue its work in accordance with the recommendations contained in the report and the directions of the Conference except recommendations 21 and 22;

THAT the working group prepare amendments to the 1987 *Uniform Vital Statistics Act* and commentaries for consideration at the 2017 meeting; and

THAT the commentaries to the *Uniform Child Status Act* be amended according to the recommendations presented.

UNIFORM ARBITRATION ACT - Report and Uniform Act

Presenters: Gerry Ghikas
William Horton

Mr. Ghikas and Mr. Horton presented for consideration a uniform Act and commentaries. The uniform Act would replace the existing *Uniform Arbitration Act* regulating domestic arbitration within Canada, with the objective of realigning the legislative framework with current expectations of those who engage in arbitration. This proposal follows on the ULCC's adoption in March 2014 of the *Uniform International Arbitration Act*.

Arbitration provides an alternative to the court system, giving participants flexibility to choose many of the decision-making procedures to which they are subject. For that reason, part of the function of the uniform Act is to carefully regulate when courts can and cannot get involved in a dispute. There was an ongoing effort to ensure that the legislation was clear that courts may intervene only when expressly mandated.

The overriding themes to the uniform Act involve recognizing the autonomy of parties, while including some fundamental procedural safeguards and limiting the possibility of judicial intervention. The uniform Act identifies some minimum standards and also sets out that parties cannot change the jurisdiction of courts by agreement. Allowing court involvement too easily could be used strategically to undermine an arbitration; as such, the uniform Act prevents a court from intervening in matters governed by the uniform Act, except as expressly provided.

The uniform Act requires a court to stay any court proceedings concerning matters that are the subject of an arbitration agreement, except in four discrete circumstances identified in the uniform Act. Further, the uniform Act clarifies that no decision, order or award of a tribunal may be appealed to, reviewed by or set aside by a court, except as provided by the uniform Act. Generally speaking, there is no right of appeal, although the parties can agree to allow appeals on questions of law only. Appeals to the Court of Appeal are with leave.

Parties are required to participate in an arbitral proceeding efficiently and in good faith, and the arbitral tribunal is given wide powers and flexibility to determine a fair and efficient procedure, having regard to the circumstances. Arbitrators are to be impartial and independent, although the requirement for independence may be waived with the parties' knowledge and agreement.

The uniform Act is of general application; there are some specific areas where jurisdictions should consider whether it is appropriate for the uniform Act to apply, or apply with modifications (for example, to labour arbitrations or in areas of family law). During the presentation, delegates discussed issues related to the ability of legislation to prevent judicial review; who is able to challenge and remove an arbitrator, and when; and whether an arbitral tribunal ought to be allowed to withhold an award from parties until

the tribunal's fees are paid in full.

RESOLVED:

THAT the existing *Uniform Arbitration Act* be withdrawn;

THAT the draft *Uniform Arbitration Act* and commentaries be approved in principle; and

THAT the draft *Uniform Arbitration Act* and commentaries be amended in accordance with the directions of the Conference and circulated to the Jurisdictional Representatives. Unless two or more objections are received by the Projects Coordinator of the Conference by November 30, 2016, the draft Act should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment.

NEW PROJECT PROPOSALS - Report

Presenter: Peter Lown

Peter Lown presented a report that recommended that the ULCC develop harmonized electronic document rules for civil and administrative law proceedings. Mr. Lown noted that every day, more businesses and individuals move to paperless information management, and our legal system needs to evolve with this reality. To date, the Canadian approach has been ad-hoc and reactive. A uniform Canadian approach could facilitate the efficient handling of electronically stored information, and facilitate the evolution of court-based dispute resolution processes towards speedier, less expensive and fairer outcomes through electronic workflow.

In addition, delegates discussed the idea of revisiting the *Uniform Limitations Act*, amending the suite of uniform legislation regarding judgments to incorporate changes related to the interjurisdictional enforceability of tax judgments, and developing uniform provisions related to the law governing condominiums and condominium corporations (issues related to governance, finance, and disclosure).

Mr. Lown advised that the ACPDM will meet in late October / early November to determine the inventory of new projects. Work on selected projects will then begin, through the creation of a work plan and the development of a working group.

JOINT SESSION ON THE STATUS REPORT FROM THE WORKING GROUP ON CHARTER COSTS AWARDS AND CIVIL CHARTER DAMAGES AGAINST THE CROWN (HENRY)

Presenter: Josh Hawkes, Q.C., Alberta Justice and Solicitor General

This Working Group was established as a result of a 2015 Criminal Section Resolution that recommended monitoring the case law surrounding the award of costs or damages against the Crown arising from criminal prosecutions as a result of the decision of the Supreme Court of Canada in *Henry v. British Columbia (Attorney General)*, 2015 SCC 24. The Resolution also stated that Civil Section participation in the working group would be welcome.

Josh Hawkes provided an overview of the costs issue noting that this topic could be of interest to both Sections and to Deputy Ministers. The threshold for significant cost awards has been relatively stable for a number of years and requires more than a simple error or technical breach by the Crown. The Supreme Court of Canada in *Henry* clarified that has to be a marked departure in behavior expected of the Crown. Further, the power to make such awards is not limited to Courts of inherent jurisdiction but is also available in statutory courts. Such cost awards signal that something may have gone very wrong in the jurisdiction; improvements in disclosure procedures, infrastructure or education may be needed. It was noted that a switch to eRecords is a helpful solution to many of the disclosure problems.

Josh Hawkes concluded that the purpose of the paper was to establish the state of the law, which would serve as a foundation of a joint session working group and be updated annually with a chart to track cost awards across the country. If the law appears to be changing, that should be reflected in the paper. This information on cost awards against the Crown could be used to inform Deputy Ministers at their annual Federal/Provincial/Territorial meetings.

DISCUSSION:

It was agreed that cost awards law is well settled but there are other emerging issues. In *R. v. Singh*, 2016 ONCA 108, for example, the Court of Appeal for Ontario addressed the issue of when should a court award costs against the Crown for non-disclosure pursuant to s. 24(1) of the Charter. The Court held that "A costs award against the Crown will not be an "appropriate and just remedy" under s. 24(1) of the Charter absent a finding that the Crown's conduct demonstrated a "marked and unacceptable departure from the reasonable standards expected of the prosecution", or something that is "rare" or "unique" that "must at least result in something akin to an extreme hardship on the defendant". The Court found that the trial judge had erred in awarding costs in this case.

Reference was also made to forfeiture in a proceeds of crime case also by the Ontario appellate court in *R. v. Fercan Developments Ltd*, 2016 ONCA 269, which held that Crown conduct represented a marked and unacceptable departure. It was noted in the discussions that in spite of Singh, the *Fercan* decision has left open the possibility that in the proceeds of crime cases and perhaps in civil forfeiture matters there will be resort to the civil rules.

It was also noted that in criminal law, there are cost awards against the Crown more often than was the case of an award for civil Charter damages in *Henry.* This suggests that implies that in data should be collected from both the civil law and criminal law side. Josh Hawkes also acknowledged that the paper lacks Quebec case law analysis.

There was a general expression of interest in participating in the work of this joint working group and although there was no formal resolution tabled to cement this intent, there was an indication that this is a project the joint session can go forward with.

RESOLVED:

That while there was no formal resolution, this joint working group will be coordinated through the Advisory Committee on Program Development and Management (ACPDM).

JOINT SESSION ON COMPLEMENTARY PROVINCIAL/TERRITORIAL LEGISLATION

Presenter: Josh Hawkes, Q.C., Alberta Justice and Solicitor General

In 2010, the ULCC resolved to gather information about provincial and territorial initiatives related to enacting legislation that is "complementary" to federal criminal law. This information could be used as a resource for jurisdictions considering implementation of similar initiatives underway.

Josh Hawkes presented a Chart that was last updated by jurisdictions in 2012, summarizing legislation from across Canada in the following areas:

- civil forfeiture,
- safe communities and neighbourhoods,
- mandatory reporting of child pornography,
- administrative license suspensions,
- restrictions on body armour and armoured vehicles,
- child protection (in relation to prostitution, drug houses or other illegal activities),
- witness protection,
- family violence,
- mandatory reporting of gunshots or other wounds,
- enforcement of court orders,

- profiting from accounts of crime,
- missing persons,
- identification of criminals,
- use of animals to shield unlawful activities,
- metal dealers and recyclers,
- athletic commissioners,
- guns and ammunition control,
- employment protection for foreign nationals, and
- security alerts on credit bureau reports.

DISCUSSION:

While much of the initial euphoria attached to this project may have faded, it was felt that there may be renewed interest in light of the decision of the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27, which established a new framework on time ceilings, the breach of which would constitute a violation of section 11 b) rights of the Charter to be tried within a reasonable time. For example, where there are complementary legislation on impaired driving, such legislation may be used separately.

There was general consensus that the chart is an effective reference tool that identifies what Canadian jurisdictions are doing in any given area of law. Further, it was felt that the Chart serves the added purpose of identifying subject areas for possible future uniform work by ULCC. To illustrate, it was noted that the uniform *Missing Persons Act* is a by-product of the Chart.

Clark Dalton indicated he would be prepared to continue to complete the Chart updates. In this regard, it was noted that certain missing items could be added to the Chart, including the following non-exhaustive list of suggestions:

- *Public Disclosure Wrongdoing Act*;
- Cyber bulling;
- Pill presses;
- Cash and dash;
- *Identification of Criminals Act*;
- Criminals Id; and
- Massage Parlours

RESOLVED:

That while there was no formal resolution, this joint working group will be coordinated through the Advisory Committee on Program Development and Management (ACPDM).

JOINT SESSION ON CRIMINAL RECORDS CHECKS

Presenter: Tony Paisana, Canadian Bar Association, British Columbia

Tony Paisana set out the current state of the law and the need for reform of criminal records checks in Canada. This issue is not unique to Canada. It was noted that the United States Uniform Law Commission has undertaken a study to rationalize criminal records checks both at the state and federal levels of government in that country.

Presently in Canada, criminal records checks come in different forms. Criminal "conviction checks" are used to verify whether an individual has a criminal record, whereas the more common "police background" check (or "vulnerable sector" check) discloses non-conviction information such as apprehensions under mental health acts; suicide attempts and drug overdoses; restraining orders; ticket offences; noise complaints; "adverse police contact"; arrests with no charges; acquittals and withdrawn/stayed charges. This latter type of check, which can be highly prejudicial, has become a routine feature of job applications in Canada.

Independent studies conducted in Alberta, British Columbia and Ontario regarding this practice have arrived at similar conclusions. First, criminal record checks are being overused. Second, criminal record checks typically involve the disclosure of highly private, and often, irrelevant personal information. Third, criminal record checks sometimes include inaccurate, outdated or mistaken information that cannot be easily corrected.

Indeed, as Mr. Paisana noted, there have been several studies that have commented on the need for reform in this area. These reports have come from the Canadian Civil Liberties Association, the John Howard Society of Ontario, and the offices of Privacy Commissioners in several provinces.

Mr. Paisana explained that there has also been an inconsistent response to this issue across the country. At the federal level, the RCMP has drafted a policy regulating the dissemination of information held in the Canadian Police Information Centre (CPIC), the largest repository of non-conviction information in the country. It has also enacted the *Criminal Records Act* (CRA). The CRA is used primarily for people seeking a pardon, but it also contains provisions regulating the sharing of *some* police held information. For example, section 6.1 of the CRA, provides that the Commissioner of the RCMP must purge all information from CPIC within one year where a person has been given an absolute discharge and within three years where there has been a conditional discharge. However, this provision does not contemplate non-conviction information like that set out above (e.g. arrests without charges). In other words, in some circumstances, a person who is actually found guilty of an offence and discharged is afforded greater privacy protections than those who were never even charged in the first place.

In British Columbia, the police chiefs have passed uniform "guidelines" regarding the sharing of conviction and non-conviction information. In Ontario, the legislature adopted the *Police Record Checks Reform Act*, which severely restricts the sharing of non-conviction information. In other jurisdictions, the practice is regulated by individual police forces/detachments on a case-by-case basis.

As demonstrated by a chart included in the presentation, these different approaches have created inconsistent protections in Ontario, British Columbia and Alberta (and elsewhere). Thus, for example, a person apprehended under a *Mental Health Act* would have this information potentially disclosed in a record check in Alberta, but have it withheld in British Columbia and Ontario. Similar inconsistencies exist regarding suicide attempts and instances where an individual has had adverse police contact including upon arrest, or where they have been designated as a suspect or witness in the course of an investigation.

In addition, each of the three example jurisdictions would disclose findings of not criminally responsible due to mental disorder (NRCMD); but in Ontario, such disclosure would be made only if the request was made within 5 years of the individual's discharge from the system. Finally, where charges have been stayed, withdrawn or resulted in an acquittal, each jurisdiction would disclose such information, with Ontario doing so only when "exceptional disclosure" criteria had been met and only for enumerated offences.

In concluding, Mr. Paisana suggested that there is a need for clarity and uniformity in the operation of these checks across the country, using the Ontario model as a good starting point. That is why it is suggested that there be a joint session working group between the civil and criminal sections to examine this question. Moreover, in articulating a legal and constitutional case for change, he argued that human rights legislation across the country prohibits discrimination on the basis of irrelevant conviction and non-conviction information. Further, the disclosure of such information may violate the *Canadian Charter of Rights and Freedoms,* notably with respect to section 11(d) and the presumption of innocence; the broader privacy interests enshrined in section 8 and the right to security of the person protected under section 7. Finally, the disclosure of non-conviction information can deny Canadians basic procedural fairness where incorrect or irrelevant information is included in such checks with no meaningful appeal or review process in place.

DISCUSSION:

The presentation on criminal records checks generated much discussion from delegates in both the civil and criminal sections. Because of the importance of this issue, delegates were unanimous in calling for the creation of a joint working group to identify best practices and to recommend draft uniform legislation to harmonize the treatment of criminal records checks in Canada.

Several delegates cited unique situations in their respective jurisdictions that cry out for reform in this area. The following is a non-exhaustive list of some of the issues identified by delegates:

- The disclosure to US border officials of police records with mental health information, resulting in unjust travel restrictions.
- Pardon applications being denied or delayed as a result of irrelevant non-conviction information being shared in the application process.
- Non-conviction data can have an impact on the impoverished and mentally ill because it can affect housing and job applications.
- There is a risk that people with similar names as those who actually have criminal records incorrectly receive "positive" criminal record checks; and there is no meaningful way to correct these kinds of mistakes in many jurisdictions.
- Ontario provides a helpful model which applies to any police service operating in Ontario.
- This is a subject of interest to the U.S. delegation who would be pleased to participate in the joint working group.

RESOLVED:

That while there was no formal resolution, this joint working group will be coordinated through the Advisory Committee on Program Development and Management (ACPDM).

UNIFORM RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT – Report and Amendments to Uniform Act

Presenter: Peter Lown

Mr. Lown presented the report of the working group, reminding delegates that this has been a joint project with the American Uniform Law Commission. The Conference approved the underlying policies of this uniform Act last year, subject to a bijural review.

A working group was struck to conduct the bijural analysis last year, The working group focused on ensuring that the language and vocabulary in the draft uniform Act is acceptable, accurate and appropriate in both languages, and in both the common law and civil law system. Some minor changes were made to the draft uniform Act to achieve that goal. Delegates noted that this kind of bijural analysis can be very beneficial when uniform legislation addresses issues relevant to both of Canada's legal systems.

RESOLVED:

THAT the report be accepted;

THAT the condition subsequent referenced in last year's resolution is satisfied; and

THAT the uniform Act and commentaries be amended in accordance with the direction of the Conference.

PRIVATE INTERNATIONAL LAW REPORT – Oral Report

Presenter: Kathryn Sabo, Justice Canada, International Private Law Section

Ms. Sabo provided an overview of activities and priorities of the Federal Department of Justice in International Private Law. A written report was also provided to delegates which outlines the Department's work in International Commercial Law, Judicial Cooperation and Enforcement of Judgments, Family Law, and Protection of Property. The report identifies the federal Department of Justice's priorities in negotiations and implementation regarding matters arising at the Hague Convention, UNIDROIT and UNCITRAL meetings.

AMERICAN UNIFORM LAW COMMISSION – Oral Report

Presenter: Rich Cassidy, President, American Uniform Law Commission
Robert Stein, Past President, American Uniform Law Commission

Mr. Cassidy recounted some of the work done by the American Uniform Law Commission (AULC) over the last year, including approval of uniform Acts related to unclaimed property, online privacy for employees and students, family law arbitration and unsworn domestic declarations. AULC established three new study committees to examine issues related to notarial acts, installment land contracts and anti-SLAPP legislation; its drafting committee is currently looking at the unauthorized disclosure of intimate images.

Mr. Cassidy confirmed AULC's interest in continuing its relationship with the Conference, noting that both organizations face similar issues and that it looks forward to exploring further opportunities for harmonization.

RESOLVED:

THAT the ULCC express its thanks to Rich Cassidy, President of the Uniform Law Commission and Robert Stein, Past President of the Uniform Law Commission, for their presentation.

UNIFORM COMMERCIAL TENANCIES ACT – Report

Presenter: Leah Howie, Saskatchewan

A working group was formed in 2011 to review commercial tenancies law in Canada, and propose reform as appropriate. Ms. Howie presented the progress report of the working group, which continues to build on reports provided in 2012, 2013 and 2014. She advised that the final report of the working group is expected to be presented at the

2017 annual Conference. The 2016 progress report raised two specific issues for discussion: overholding tenants and relief from forfeiture.

Overholding tenants are tenants that remain in possession after the expiration of a lease, without the landlord's consent. The working group reached a preliminary recommendation that the new Act should not state that acceptance of rent or compensation for use and occupation from an overholding tenant does not operate as a reinstatement of the tenancy unless both parties agree, but was unable to agree as to whether the new Act should alter the common law rule that acceptance of rent from a year to year overholding tenant creates a new yearly tenancy. It was noted that small businesses may benefit from this change. The common law rule has a greater impact on unsophisticated tenants than sophisticated tenants, as the latter generally have agreements that would cover this situation. On the contrary, the British Columbia Law Institute had recommended that the common law rule not be changed so that implicit understandings associated with agricultural leases would not be disrupted. A suggestion was made that, if the common law rule is not altered, the new uniform Act should explicitly set out the rule.

Relief from forfeiture is an equitable remedy that either party can seek to prevent a lease from terminating following a breach of certain terms. The working group's preliminary view is that the new uniform Act should not contain specific provisions regarding relief from forfeiture in the commercial leasing context as it is an unnecessary codification of the common law. Codification may act to limit the scope of the existing rule. However, the working group sought direction from the Conference on this approach and asked: (1) should the new Act affirm the court's jurisdiction to grant relief from forfeiture to either the landlord or the tenant? and (2) should the new uniform Act set out specific situations where relief from forfeiture could be granted? The ensuing discussion recognized the risk of potentially limiting the effectiveness of the common law rule if it were to be codified, but it may be possible for this risk to be mitigated by careful drafting. One of the benefits of setting out the rules in the statute is that it could make the law more accessible.

Ms. Howie agreed to take the comments received back to the working group.

RESOLVED:

THAT the report of the working group be accepted; and

THAT the working group continue its work in accordance with the recommendations contained in the Report and the directions of the Conference, and report back to the Conference at the 2017 meeting.

UNIFORM PROTECTION OF PUBLIC PARTICIPATION ACT – Report and Amendments to Uniform Act

Presenter: John Gregory, Ontario

Mr. Gregory presented a report that recommends that the ULCC withdraw its *Uniform Prevention of Abuse of Process Act* of 2010 and enact in its place uniform legislation based on Ontario's *Protection of Public Participation Act, 2015*.

The report describes the history behind Ontario's adoption of the *Protection of Public Participation Act* and identifies the advantages of that legislation over the current uniform Act, which are:

- it does not require the review of the motives of the plaintiff in a questionable suit, but only the impact of the suit on freedom of expression, compared to the harm done by the expression (i.e. whether the litigation has an undue negative impact);
- it does not qualify the protection of freedom of expression on matters of public interest based on whether the expression was lawful or otherwise socially acceptable;
- it expressly balances the value of expression on matters of public interest with the right to reputation, but puts the onus on the party seeking to restrict expression to justify the restriction by showing undue harm;
- it sets firm timelines within which a court must hear an application; and
- it presumes an award of full indemnity costs to the successful defendant, and a successful plaintiff will not have its costs.

Mr. Gregory noted that no jurisdiction has enacted the existing uniform Act since its adoption in 2010 and that response to Ontario's Act has been largely favourable.

In discussing the proposal, delegates suggested some clarification to the definition of "proceeding" to clarify that the scope of the legislation does not apply beyond court actions and into such actions as arbitrations or professional disciplinary proceedings.

Some delegates questioned why the existing uniform legislation ought to be replaced at this time, and whether there ought to be a more formal review of the Ontario Act to see if the uniform Act ought to be amended rather than replaced in full. In the end, the policies set out in the report were generally supported by the delegates, with recognition that some further work should be done to finalize the uniform Act.

RESOLVED:

THAT the draft *Uniform Protection of Public Participation A*ct and commentaries be approved in principle;

THAT the draft *Uniform Protection of Public Participation Act* and commentaries be amended in accordance with the directions of the Conference and circulated to the

Jurisdictional Representatives. Unless two or more objections are received by the Projects Coordinator of the Conference by February 1, 2017, the draft Act should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment; and

THAT if the draft *Uniform Protection of Public Participation Act* and commentaries are adopted by February 1, 2017, then the *Uniform Prevention of Abuse of Process Act (2010)* and commentaries be withdrawn.

THE REPORT OF THE INTERNATIONAL COMMITTEE, THE ADVISORY COMMITTEE REPORT AND NEW PROJECT PROPOSALS – Report

Presenters: Peter Lown

Mr. Lown discussed the progress made on international initiatives currently underway related to Domestic Violence Orders, Substitute Decision-making Documents, and Asset Preservation. He recommended a continued development of our relationship with the Uniform Law Commission of the United States, as well as exploration of other opportunities for international cooperation, such as with STEP International and the European Law Institute.

In addition, Mr. Lown presented the report of the Advisory Committee and advised that the Committee is undertaking a new approach to selecting new projects. The new approach involves circulating new project proposals before the annual Conference, and setting aside time at the annual Conference to solicit feedback on the projects. When a proposal is introduced, it will be accompanied by an issues paper upon which the Conference can provide policy direction. Including a project assessment paper that identifies issues and project viability when the project is first introduced may help reduce the length of the typical project cycle from 36-42 months to 24-30 months.

In addition, some new project assessments will take place during the year leading up to the annual Conference, which will provide Jurisdictional Representatives with more time to consider the proposals. At the Conference, a decision could then be made whether or not to accept the proposal as a new project.

RESOLVED:
THAT the Report of the Advisory Committee on Program Development and Management and the Report of the International Committee be accepted.