

**Uniform Law Conference of Canada
Quebec, Quebec
August 12-16, 2018**

Minutes of the Civil Section, 2018

**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 2018 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 2018 Proceedings.

RULES OF PROCEDURE FOR THE CIVIL SECTION - Oral Report

Presenter: Clark Dalton, Alberta

Mr. Dalton presented on the history of the Rules of Procedure of the Civil Section, which were originally adopted in 1983 and last amended in 1985. Some of the matters in the Rules, particularly in matters of procedure, have been overtaken by the draft bylaws of the Conference. Other rules have fallen into disuse. He asked delegates if the Rules should be amended or repealed.

Delegates discussed the benefits of having formal rules, which may support the ULCC's reputation as a professional organization. They also debated whether the method for project selection and working group selection is sufficiently defined. Questions were raised about whether civil section rules ought to be delayed until the ULCC's revised constitution and bylaws of Conference are finalized.

Some issues that should be added to the rules include a description of the "November 30 rule" process, clarification of "model Act" versus "uniform Act", and consideration of records management rules related to presentation of documents on the ULCC website.

RESOLVED:

That the report be accepted; and

That a working group be created to proceed with the recommendations and directions of the Conference and to report back to the Conference at the 2019 Meeting.

BUSINESS COMPLETED SINCE THE 2017 CONFERENCE - Oral Report

Presenter: Sarah Dafoe, Alberta

Amendments to the *Uniform Vital Statistics Act, 1987* were adopted last year, subject to certain revisions and reconsiderations identified by Civil Section delegates. Over the past year, the working group updated the report accompanying the uniform Act. It clearly reflects the directions provided by the Civil Section in 2016 and 2017. The working group identified necessary amendments to the *Uniform Change of Name Act*, to ensure that it is consistent with the updated *Uniform Vital Statistics Act*. In addition, the proposed surname provisions were confirmed to be in accordance with *Trociuk v. BC* (SCC 2013), and other minor changes were made to ensure internal consistency and clarity within the Act and accompanying commentaries.

Some minor changes were made to the French language version of the documents, to ensure clarity and consistency with the English language version.

A package containing the revised report, draft Act and commentaries were circulated to Jurisdictional Representatives in the fall and no objections were received by the November 30th deadline. As such,

1. The *Uniform Vital Statistics Act* of 1987 has been withdrawn,
2. The revised *Uniform Vital Statistics Act* of 2017 has been adopted, and
3. The *Uniform Change of Name Act* has been amended to ensure consistency with the *Uniform Vital Statistics Act*.

The final version of the Act, commentaries and the related report are on the Conference's website.

RESOLVED:

That the report of the past Chair of the Civil Section be accepted.

UNIFORM COMMERCIAL TENANCIES ACT - Report and Uniform Act

Presenters: Leah Howie, Saskatchewan
Richard Olson, British Columbia
Alexander Fyfe, British Columbia
James Leal, Ontario

Linda Galelessiere, Ontario
Michelle Cumyn, Quebec

Ms. Howie and Mr. Olson presented the final report of the working group, which builds on the previous written reports presented in each of 2012, 2013, 2014, 2016, and 2017 and an oral report in 2015. The presenters walked the delegates through the various provisions of the draft Uniform Act, and presented one question to the delegates on whether landlords should be required to repair leased premises.

Ms. Howie indicated that the majority of the working group felt there should be no duty to repair and the common law does not impose such an obligation on landlords. Given the broad variety of leases this legislation would apply to, predicting the scope of such an obligation would be difficult.

On the other hand, a provision may help ensure fairness. Mr. Olsen provided an example of a twenty year lease on bare land: once the building is constructed, even if it is erected by the tenant, the building becomes part of the land and property of landlord and if the lease is not carefully drafted, the landlord may have the burden of repairing the building put up by tenant. This additional obligation may not be reflected in the rent paid to the landlord.

In the Quebec Civil Code, the duty to repair is a shared obligation: tenants are responsible for minor repairs, while landlords are responsible for major repairs. The Code provisions allow for some flexibility/negotiation, and allowed for some balancing of the rights and duties of both parties to a commercial lease.

Some delegates expressed a concern that while sophisticated parties will ensure the contract will protect their interests, unsophisticated parties need to be protected. That said, the principle of fairness is an important one. It was noted that this issue has existed for a long time.

Ultimately, the delegates recommended that the uniform Act should include a provision in square brackets that imposes a duty to repair on the landlord. Square brackets indicate that it is an optional provision. The commentary to the Act should reflect the advantages and disadvantages of such a provision, and indicate that the square bracketed provision approaches the issue in a manner to that found in the Quebec Civil Code. The working group was asked to draft a provision and commentary accordingly.

Ms. Cumyn commented on the uniform Act in the context of the Quebec Civil Code, noting that the Code contains principles rather than detailed rules, which must be interpreted in a broad and fair manner, in accordance with the jurisprudence. Ms. Cumyn identified a number of differences between the proposed uniform Act and the Civil Code in areas such as the right of quiet enjoyment, requests to assign, treatment of overholding tenants, distress and summary dispute resolution.

RESOLVED:

THAT the report of the working group be accepted; and

THAT with respect to consultation question 1, the policy direction proposed in section 2.12 is accepted and shall be included in the Act in square brackets as an option and reflected in the commentary;

THAT the French language version be revised for consistency;

THAT the recommendations in the report and 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, 2018, the *Uniform Commercial Tenancies Act* should be taken as adopted as a uniform Act and recommended to jurisdictions for enactment.

AND THAT the ULCC express its thanks to Michelle Cumyn for her presentation on the *Uniform Commercial Tenancies Act* and the Civil Code of Quebec.

ELECTRONIC DOCUMENT RULES - Report

Presenters: Crystal O'Donnell, Ontario
 Dominic Jaar, Quebec

Development of e-discovery rules were first discussed with delegates in 2016, and in 2017 the Civil Section approved the draft rules in principle. Over the last year, the working group has engaged in consultation and has further revised the rules.

Ms. O'Donnell reminded delegates that the purpose of this project is to provide draft rules to assist parties to civil litigation and administrative proceedings reasonably meet their discovery obligations, when it comes to electronic records. Currently, there are varying rules in place across the country, and overall there is an inconsistent patchwork of rules, practice directions and guidelines in Canada. In the meantime, technology continues to develop.

Highlights of the review and discussion included a review of the definitions and the application provision. Delegates expressed a concern that these provisions may be unintentionally overbroad. Ms. O'Donnell noted that the proportionality provision is an overarching principle governing e-discovery and electronic proceedings, and generally leads to a narrowing of the scope of relevance. The principles of the Sedona rules are found within the proportionality provision, rather than being incorporated by reference.

Ms. O'Donnell advised that the purpose of section 6, *Discovery Planning*, was to encourage parties to determine the discovery plan as early as possible, in order to reduce the time and costs associated with e-discovery. The plan need not be complicated. If

parties are unable to agree on a discovery plan, one party may serve on the others an affidavit of documents and its documents, and the parties served must respond with their own affidavits and documents within 60 days. Ms. O'Donnell explained the parties' obligation to use their best efforts continues, throughout the process.

The working group proposed that the draft rules be circulated to the various Rules Committees across the country, for further discussion about content and implementation. Delegates supported this approach but did not support the recommendation that ULCC jurisdictional representatives be formally engaged in lobbying the Rules Committees to implement the draft rules. It was generally felt to be beyond the scope of the ULCC itself to adopt a resolution that commits its jurisdictional representatives to specific action.

RESOLVED:

THAT the report of the working group be accepted as modified by the direction of the Conference;

THAT the recommendations in the report and the directions of the Civil Section be incorporated into the Uniform Rule and commentaries, and circulated to the jurisdictional representatives. Unless two or more objections are received by the Projectors Coordinator by November 30, 2018, the *Uniform Electronic Documents Rules* should be taken as adopted as a Uniform Rule and recommended to the jurisdictions for adoption.

NON-CONSENSUAL DISTRIBUTION OF INTIMATE IMAGES - Report

Presenter: Hilary Young, New Brunswick
Peter Lown, Alberta

Ms. Young and Mr. Lown introduced the project, the scope of which is still being determined. The initial discussion centered on whether identifiability should be a requirement, whether the Act should cover more than images, and what services ought to be made available to victims.

Ms. Young noted that there are three main approaches to addressing non-consensual disclosure in Canada: using existing common law and statutory torts, applying general cyberbullying or internet harms legislation, or introducing legislation specifically targeted at the online disclosure of non-consensual sexual content. Ms. Young identified a variation on the targeted legislation, namely, legislation that would be framed more broadly in order to capture wrongs that are similar in nature but that do not involve images of identifiable people. This option, referred to as option 3b, would be a new approach in Canada.

Delegates raised concerns related to describing and quantifying the harm inflicted, under option 3b. What is harm, and how could the harm be caused? Some suggested that the

project ought to begin with identifying the harm and the remedies that could be used to address it.

RESOLVED:

THAT the report of the working group be accepted;

THAT the working group continue its work in accordance with the directions of the Conference; and

THAT the working group report back to the Conference at the 2019 meeting.

**REVIEW OF SELECTED UNIFORM ACTS IMPLEMENTING
INTERNATIONAL CONVENTIONS**

Presenter: Valérie Simard, Canada

Ms. Simard presented the progress report of the working group.

In 2014 the ULCC adopted principles for drafting uniform legislation giving force to international conventions, but to date those principles have not been put into practice.

Several uniform Acts are not consistent with the recommendations of the principles. This project will make 6 Acts consistent with the principles. The working group is reviewing only 6 Acts, because these 6 have not been widely enacted by the jurisdictions.

Ontario enacted 3 of the 6 uniform acts after the principles were adopted and adopted the uniform acts in a way that is consistent with the principles. The working group will look at the Ontario Acts to inform their work.

The working group will also be reviewing and updating the commentaries.

The working group will be able to produce its final report at the 2019 meeting.

The Conference discussed the recent enactment by Ontario of several of the conventions in one statute and members suggested this approach may be one taken by other jurisdictions if their legislature allows. The Conference also discussed the role of the new Implementation committee in adoption of international conventions and suggested that committee liaise with federal delegates. Members considered that these revisions may give higher profile to these conventions and that jurisdictions may be willing to revisit them and consider adoption.

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

THAT the working group report back to the Conference at the 2019 meeting.

STATUS REPORT FROM THE JOINT WORKING GROUP ON *CHARTER* COSTS AWARDS AND CIVIL DAMAGES AGAINST THE CROWN

It was reported that there were two cases from the Court of Appeal of Ontario. First of all, there was *Brown v Canada (Public Safety)*, 2018 ONCA 14. It was found that it was not justified on the facts to award damages against the Crown and as well that it was not desirable to join a *Charter* damages claim with a *habeas corpus* application because a *habeas corpus* proceeding is a more accelerated proceeding and is not intended to determine if damages be awarded.

The other decision was *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, where the Ontario Court of Appeal found that there was a violation of procedural fairness against the Attorney General of Ontario and the Attorney General of Canada, as the Attorneys General had not been notified that damages would be requested. The court said that at the very least those parties should be notified when damages were requested and it was not appropriate to award damages when they were not requested in the first place.

A third case was mentioned: the B.C. Court of Appeal decision in *Henry v British Columbia (Attorney General)*, 2017 BCCA 420. At trial, Mr. Henry had sought damages against the Province of British Columbia, the City of Vancouver and the Attorney General of Canada following his arrest, conviction and imprisonment. During the course of the trial, the City of Vancouver and the federal government settled out of court with Mr. Henry for an amount just over \$5 million. Ultimately the Court awarded Mr. Henry aggregate damages of \$8 million. The Province of British Columbia applied to have the settlement deducted from the award. The judge granted the order and an appeal was launched by Mr. Henry.

This case discussed the principle of double recovery under section 24(1) of the *Charter*. Paragraphs 40 and following contain a discussion of the nature of *Charter* damages, and the court cited the Supreme Court of Canada decision in *Ward* that held that *Charter* damages seek to obtain compensation, vindication and deterrence. Mr. Henry argued that the award of constitutional damages goes beyond the compensation of the plaintiff and includes damages for vindication and deterrence. It was argued that constitutional damages were akin to punitive damages, such that the double recovery principles should generally be inapplicable to them. The Court of Appeal rejected this argument (paragraph 59). It was understood that the decision is under appeal to the Supreme Court of Canada.

Manon Lapointe reported that the working group was willing to continue monitoring the situation regarding the award of costs and damages against the government.

A question was asked as to whether these reports would continue to be provided indefinitely, or would there be an end product. Ms. Lapointe understood from previous reports that the working group would continue to monitor developments and that for the meantime the purpose of the working group is to monitor developments.

IT WAS RESOLVED

THAT the report be accepted; and

THAT that the report be updated for presentation at the 2019 ULCC meeting.

FINAL REPORT FROM THE JOINT WORKING GROUP ON CRIMINAL RECORD CHECKS

The Working Group on Criminal Record Checks is chaired by Tony Paisana, a defence lawyer practising at Peck and Company Barristers in Vancouver, B.C., Chair of the Law Reform Committee of the CBA's National Criminal Justice Section, and Adjunct Professor at the UBC Faculty of Law.

The Chair of the Working Group indicated that the communication of non-conviction information following police record checks is an issue that affects hundreds of thousands of Canadians. He noted several calls to action from organizations, but also from the judiciary. Mr. Paisana observed that the ULCC was a particularly appropriate organization to address this issue, since it requires a unified response to a provincial and territorial matter, and expertise in both civil and criminal law. Since 2016, the Working Group investigated criminal record checks practices across the country, presented an interim report to the ULCC in 2017, studied Ontario's *Police Record Checks Reform Act, 2015*, S.O. 2015 c. 30 ("Ontario's legislation"), and consulted with Ontario's Ministry of Community Safety & Correctional Services.

The draft Uniform Police Record Checks Act prepared by the Working Group used Ontario's legislation as a starting point and includes three central features: 1) a standardization of the types of criminal record checks to be provided; 2) limitations on the disclosure of non-conviction information, including the development of disclosure criteria; and 3) the provision of appeal and reconsideration processes to correct inaccurate information and to challenge the inclusion of irrelevant information disclosed in criminal record checks. The Chair of the Joint Working Group noted five points of divergence between the draft Uniform Police Record Checks Act and Ontario's legislation:

1. The Uniform Act gives discretion to a police record check provider to refuse to disclose non-conviction information where a person is not going to be responsible for the well-being of a child or vulnerable person;
2. The Uniform Act gives the responsible Minister the ability to make regulations specifying a period of validity of a police record check, so that the results of a record check can be used more than once;

3. The Uniform Act clarifies, at subsection 1(3) of the Schedule, that only straight summary convictions (i.e., for an offence that is punishable *only* by way of summary conviction, not hybrid offences) are subject to the five-year limitation period, after which they are not disclosed;
4. The Uniform Act changes row 6 of the Table, expanding disclosure to family court orders and narrowing disclosure to apply only to current court orders; and
5. The Uniform Act eliminates findings of not criminally responsible by reason of mental disorder from any disclosure, and removes that row (#7 in the Ontario legislation) from the Table.

During the discussion that followed, concerns were raised with regards to the discretion to refuse to disclose non-conviction information where an applicant is not be responsible for a vulnerable person, but nonetheless in their proximity. The Working Group considered this situation and selected language from the federal *Criminal Records Act*, noting that the provision (subsection 10(6)) achieves balance and that police may still choose to disclose the non-conviction information in the context of a vulnerable sector check: specifically, it may be too high a bar to require repeated, predatory actions, thereby excluding single incidents that could still indicate a risk of harm to a child or vulnerable person. It was suggested that “behaviour indicating that the individual presents a risk of harm” would be a more appropriate test.

Delegates raised concerns with the removal of findings of not criminally responsible by reasons of mental disorder (NCRMD) from the disclosure table. The Working Group acknowledged that this may be controversial, and provided six reasons in its Final Report explaining why it recommended excluding findings of NCRMD from the disclosure table.

Delegates also expressed concerns with the language of “pattern of predation” in subsection 10(2) as the test to disclose non-conviction information in the context of a vulnerable sector check: specifically, it may be too high a bar to require repeated, predatory actions, thereby excluding single incidents that could still indicate a risk of harm to a child or vulnerable person. It was suggested that “behaviour indicating that the individual presents a risk of harm” would be a more appropriate test.

A specific concern with the French version of the Uniform Act was raised: subsection 10(1) used the word “*travail*”, which would exclude those applying for volunteer positions. The Working Group Chair confirmed that it was not the intent to limit vulnerable sector checks to paid positions, and that the French version would be changed to align with the intent.

Following discussion, it was agreed that the Final Report and *Uniform Police Record Checks Act* be put to a vote, on the understanding that the following changes would be brought to the Act if adopted:

1. Paragraph 10(2)3. (subsequently re-numbered to 10(2)(c) to align with drafting conventions) would be amended to replace the words “a pattern of predation” with “behaviour”;

2. Subsection 10(6) (discretion to not disclose non-conviction information) would remain in square brackets, for consideration by each administration;
3. The Table would be amended to reintroduce non-criminally responsible for reason of mental disorder findings into the disclosure regime, in square brackets, for consideration by each administration;
4. Section 19 would be amended to include reference to section 18 (requirements respecting third party entities) as part of the enforcement provision;
5. The Act would be amended to conform to uniform drafting standards;
6. The French version of the Act would be amended to reflect the intent of the English version of the Act; and
7. The commentary would be amended as necessary to account for the changes above.

IT WAS MOVED by Darcy McGovern, QC (SK) and seconded by Dean Sinclair, QC (SK), Uniform Law Conference of Canada

THAT the report of the working group be accepted; and

THAT the Uniform Police Record Checks Act and commentaries be adopted and recommended to the jurisdictions for enactment, subject to the direction of the Conference. The resolution was carried with six (6) abstentions.

JOINT SESSION ON THE STRATEGIC PLAN OVERSIGHT COMMITTEE (SPOC)

Manon Dostie, Chair of the ULCC, presided the SPOC session, the overall goal of which was to make progress on elements identified at annual meetings in Fredericton (2016) and Regina (2017). It was noted that while key aspects of the organization renewal were completed in time for the 100th annual meeting, the implementation of the Strategic Plan will continue in the coming years. For this purpose, it was suggested that an Implementation Committee be created.

In particular, implementation steps include: updates to the ULCC's operational documents, consideration of updates to the Civil and Criminal Sections' Rules of Procedure, continued work on the website, consideration of social media presence, implementation of new annual budget approval procedures, creation of succession plans, and the establishment of an Implementation Committee for Uniform Acts.

ADOPTION OF REVISED CONSTITUTION AND BY-LAWS

Updating the ULCC Constitution and By-laws was one of the key issues identified in the 2016 Strategic Plan. The ULCC Constitution was last amended in 1996, and inconsistencies

were identified between the structure and processes outlined in the Constitution and By-laws, and the actual functioning of the ULCC.

Manon Dostie presented a revised version of the ULCC Constitution and By-laws. She indicated that the work on the Constitution and By-laws began in 2016 under the leadership of past President Josh Hawkes, and continued through formal and information consultation of the ULCC membership since then. The overall approach was to keep the text of the Constitution brief, with more details presented in the By-laws.

Delegates agreed on amendments to the revised Constitution (the mechanism to amend the Constitution is a jurisdictional vote of two thirds or more in favour of the amendment) and By-laws (the result of any vote is determined by a majority of the votes cast; removal of the phrase “if applicable” to a provision allowing the Executive Committee to invite the secretary of the Civil Section to participate in its meetings).

The revised Constitution and By-laws, as amended during the annual meeting, were adopted.

WEBSITE UPDATE

Modernizing the ULCC website was also one of the key issues identified in the Strategic Plan 2016. Marie Bordeleau, Executive Director of the ULCC, provided an overview of the progress with the new ULCC website by presenting an offline version. The visual appearance of the website will be streamlined and modernized, and the site made more user-friendly. Efforts will be made to ensure various documents of the ULCC are clearly identified and easy to locate for users who may not be familiar with ULCC. The objective is for the new website to be operational in the new calendar year, but the task is more onerous than anticipated.

AMERICAN UNIFORM LAW COMMISSION – Oral Report

Presenter: Anita Ramasastry, President of the Uniform Law Commission
Robert Stein, Chair of the International Committee
Michael Houghton, Past President
Howard Swibel, Past President
Harriet Lansing, Past President
Carl Lisman, Chair, Executive Committee

Ms. Ramasastry started her presentation reflecting on the important relationship between ULCC and the American Uniform Law Commission (AULC), and she congratulated the ULCC on its 100th anniversary. She recounted some of the work of the AULC over the last year, noting that seven new uniform laws were adopted in July. In addition, the AULC is engaged in ongoing work on such issues as the registration of foreign money judgments, remote notarization, and e-wills. She noted that delegates from the ULCC have been observing and assisting on some of their current projects.

Mr. Stein noted the successful collaboration of AULC and ULCC on prior projects and

joint planning sessions. He also confirmed the AULC's ongoing interest in maintaining a strong relationship with ULCC, whether through future joint projects or more informal kinds of cooperation and engagement.

RESOLVED:

THAT the ULCC express its thanks to Anita Ramasastry, President of the Uniform Law Commission, for her presentation.

THAT the ULCC express its thanks to Bob Stein, Michael Houghton, Howard Swibel, Harriet Lansing and Carl Lisman for their presentations.

PRIVATE INTERNATIONAL LAW REPORT – Oral Report

Presenter: Kathryn Sabo, Canada

Ms. Sabo provided an overview of activities and priorities of the Federal Department of Justice in International Private Law. A written report was 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, UNIDROIT and UNCITRAL meetings.

Ms. Sabo reviewed the report and highlighted ongoing developments in the area of private international law. She noted that the federal Deputy Minister of Justice would be reaching out to provincial and territorial Deputy Minister to encourage jurisdictions to introduce implementation legislation in key areas.

**ADVISORY COMMITTEE REPORT AND REPORT OF THE
INTERNATIONAL COMMITTEE – Report**

Presenter: Peter Lown, ULCC

Mr. Lown provided an overview of a projects under consideration by the Advisory Committee, such as electronic wills. The ULCC previously determined electronic wills should not be admitted generally and left it to the court to determine under the dispensing powers, however the acceptance of electronic documents has changed considerably since 2003. Issues have arisen related to functional equivalence, authenticity, signature, and the virtual presence of witnesses, amongst other things.

Mr. Lown introduced the idea of initiating a project related to "ticket bots", after-market sellers who charge a significant premium on the face value of the ticket. He also presented a summary of two other projects under consideration by the Advisory Committee related to pour-over wills and crowdfunding. He noted that the ACPDM may also consider how to encourage implementation of uniform Acts.

Mr. Lown also advised that the ULCC International Committee continues to work closely

with the American Uniform Law Conference (AULC), having observers in place on several AULC study and working groups. Mr. Lown also read a letter from the European Law Institute, congratulating the ULCC on its 100th anniversary. A liaison group has been struck amongst representatives of the AULC, ULCC and the European Law Institute.

RESOLVED:

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