

UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

**CONVENTION ON THE LAW APPLICABLE TO CERTAIN
RIGHTS IN RESPECT OF SECURITIES HELD WITH AN
INTERMEDIARY**

INTERIM REPORT FROM THE WORKING GROUP

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St-John's, Newfoundland and Labrador

August 18-22, 2019

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Report from the Working Group

August 2019

I. Background

[1] The subject of this report is the *Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (the “Convention” or “The Hague Securities Convention”). The purpose of this Interim Report is to report on the activities of the Working Group in the past year.

[2] The Working Group on the Hague Securities Convention, which had last been active in 2013, resumed its activities this year. The mandate of the Working Group is to develop uniform implementing legislation for the Hague Securities Convention. The Working Group held eight teleconference meetings in the winter and spring of 2019. The Working Group members are:

- Dominique D’Allaire, Justice Canada (Chair)
- Sam Becker, Finance BC
- Ian Binnie, Blakes LLP, Toronto
- Michel Deschamps, McCarthy Tétrault, Montréal
- Jean-Francois Lord, Finance Québec
- Paul Morrison, Innovation, Science and Economic Development Canada
- Joseph Primeau, Finance BC

II. The Convention

[3] The Convention was prepared under the auspices of the Hague Conference on Private International Law and was adopted during a diplomatic session held in The Hague in December 2002. The Convention is in force since 2017. Switzerland, Mauritius and the United States are party to it.

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[4] The objective of the Convention is to determine the law applicable to a number of issues relating to securities held with an intermediary, including the perfection of transfers or security interests relating to securities of that nature. The Convention is a conflict of laws instrument in the traditional sense and for this reason does not propose substantive law rules. The Convention essentially deals with private international law rules applicable to transfers of securities and the rights of interest holders in these securities, but does not concern the regulation of trading in securities or the issuance of securities.

[5] The subject matters covered by the Convention can be divided into four different groups:

- provisions dealing with key concepts or definitions with respect to securities held through intermediary;
- the scope of application of the Convention;
- the conflict of laws rules per se; and
- final clauses dealing primarily with the coming into force of the Convention and its possible application on a province-by-province or territory-by-territory basis.

III. Current Canadian legislation

[6] The implementation of the Convention in Canadian law would impact existing legislation dealing with securities held through intermediaries and security interests, particularly the Uniform Securities Transfer Act, approved by the ULCC in 2004.

[7] The *Securities Transfer Acts* (“STAs”) adopted by the Canadian provinces and territories are uniform. Each of the provinces and territories’ STA provides a legal foundation for the market practices of indirect securities holding or holding through an intermediary. The key concept is the “security entitlement”, which is the term used to describe the special property interest of a person who holds a financial asset in a securities account with a securities intermediary.

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[8] Security entitlement is defined in the legislation as “the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 6” (Part 6 deals with securities entitlements). The entitlement holder’s rights may only be asserted against its immediate intermediary. This locates the entitlement holder’s property interest with the entitlement holder’s intermediary, greatly simplifying the situation. So, for example, it becomes clear that a creditor wishing to seize the entitlement holder's property must deal with that entitlement holder’s intermediary.

[9] The STAs also contain conflict of laws rules with respect to indirect holding of securities i.e., which law applies to certain rights of the securities holder, in particular rights resulting from the transfer of securities and when the transfer is effective.

[10] Provincial and territorial *Personal Property and Security Acts* (PPSAs) provide rules on the validity and enforceability of security interests over personal property. They recognize that security interests can attach to security entitlements.¹ PPSA legislation is relatively consistent across all Canadian common law jurisdictions. In Québec, provisions covering the same subject matters are found in the Civil Code.²

IV. Report on the activities of the Working Group

[11] Based on the 2011 Pre-implementation Report by Michel Deschamps, the Working Group reviewed the similarities and differences between the rules of the Convention and those applicable in Canada, including in relation to the STAs, the PPSAs and the Québec Civil Code. The Working Group specifically discussed the changes that would be required under each of the STAs, the PPSAs and the Civil Code to bring Canadian legislation into line with the Convention. The Working Group reviewed implementation techniques (e.g., incorporation of the Convention itself into legislation or incorporation of the content of the Convention into specific provisions dealing with the same subject matter). Finally, the Working Group thoroughly considered the relative benefits of the current Canadian rules over those found in the Convention, in particular in light of the benefit of having harmonized conflict of law rules among the provinces and territories.

[12] The Working Group has also prepared a consultation paper. This document has been distributed to provincial and territorial governments as well as to a limited number of

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experts in the field, seeking comments on aspects of the implementation of the Convention. Comments received will be useful for the preparation of the uniform act.

V. Next steps

[13] The Working Group recommends that work continue on the preparation of implementing legislation with the objective of presenting a uniform act at the next ULCC annual meeting. The Working Group will also report on the comments made by stakeholders in its activity report.

¹ For example: sections 2(1), 7.1, and the definition of “security interest”, Ontario PPSA, 1990 R.S.O. c. P-10.

² Civil Code of Québec, Book 6 (sect. 2644 et seq.).