

UNIFORM LAW CONFERENCE OF CANADA

**Interim Report of the Chair of the
Steering Committee of the Commercial Law Strategy**

Report to the Civil Section

**Fredericton, New Brunswick
August 2003**

The Commercial Law Strategy

[1] As many of you know, I have felt for some time that a discussion of the "Strategy" in the Commercial Law Strategy would be a good idea. This is in part, no doubt, because of my incomplete knowledge. Though I was involved in the earliest discussions, when it was thought that the Strategy would be a good way of packaging and presenting existing ULC work, I did not take part in the subsequent sessions when people tried to really think through what a Commercial Law Strategy should be. Still, even making allowances for that, it seemed to me to ring true last year when Elizabeth Sanderson, or Kathy Sabo (I forget which), made the point that though there was a lot of "Commercial Law" in the Strategy, there was not a lot of "Strategy."

[2] In response to Jennifer Babe's recent e-mail and draft report, I have tried to collect my thoughts about our project list as it now is, and about the "Strategy" behind it. I have grouped our projects under eight headings (a little different from Jennifer's), and have included under each heading our "Existing Projects" and some "Other Possibilities" if any have come to mind. This is, in effect, a list of "What are we doing?" and "What have we missed?" If any of this triggers other people's thoughts about things we have "missed," or that we should or should not be doing, so much the better.

[3] In grouping our projects I have been much influenced by a comment that lodged in my mind from a commercial law course many years ago. This was to the effect that "Commercial law is the law of contract, supplemented by legislation to deal with particular kinds of contract." Thus my eight headings are these: A. General Law of Contract. B: Specific Commercial Relationships or Transactions. C. Secured Transactions. D: Statutory Troublespots. E: International Conventions. F: Consumer Protection. G: Dispute Resolution. H: Enforcement.

[4] To me, items A to D are the key areas of the Commercial Law Strategy. Item A deals with the common law. Item B deals with specific commercial relationships that either are or should be governed by statute; this item could probably be subdivided by people who know more about Commercial Law than I do. Item C, on secured transactions, is in many ways a subdivision of item B; I have carved it out simply because we seem to have a number of projects on the subject. Item D, statutory

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troublespots, I have differentiated from item A because the problems arise from unsatisfactory statutes rather than from common law principles.

[5] Item E (International Conventions) I see as rather different from A to D because we have a smaller role in determining what problems need to be fixed or what the nature of the fix should be. Essentially our function is to assist (or not) in the implementation of a predetermined add-on to domestic law. Item F (Consumer Protection) is an area where I think the Strategy has decided to tread warily. Though it is obviously an important area, I think we have decided that our expertise is limited, and that we should limit ourselves to (a) being alert to the consumer implications of our commercial law recommendations, and (b) assisting Consumer Affairs Ministries on projects at their request.

[6] Items G (Dispute Resolution) and especially H (Enforcement) seem to me to be rather questionable "commercial law" items, but for reasons connected with the earliest origins of the Strategy, enforcement has always been included, and I suppose that there is a rationale of sorts for complementing the "substantive law" in items A to F with additional items on "dispute resolution" and "enforcement".

[7] Anyway, with that as my preamble, here is my list. It includes all of the items listed in Jennifer's Attachment B – though I must admit that there are several items listed there that I had not realized had been included in the Strategy. These are noted in the list.

List Based on Jennifer's Attachment B

A.. General law of contract

1. Existing projects

a. Electronic transactions

b. Illegality of contracts

c. Frustrated contracts (has it been officially decided to include this?)

2. Other possibilities

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Here are 3 that we have addressed legislatively in New Brunswick, but I don't think anybody else has.

- a. Privity of contract
- b. Penalty clauses and liquidated damages
- c. Exemplary damages in contract (Vorvis and the "independently actionable wrong")

And here are some additional thoughts:

- d. Duty of good faith and fair dealing?
- e. Other general principles in the Civil Code that we could usefully adopt in the common law provinces?
- f. Deeds and seals
- g. I am sure that other people can probably provide a wealth of other troublesome common law rules.

B. Specific commercial relationships or transactions

1. Existing projects

- a. Franchises
- b. Sale of goods (on hold)
- c. Documents of title
- d. Commercial liens
- e. Securities transfer
- f. Leases (project discontinued, I think)
- g. Licensing of intellectual property (also discontinued)
- h. Negotiable instruments (still pending)
- i. Trade secrets (has it been officially decided to include this?)

2. Other possibilities

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- a. Landlord and Tenant Act? (which now mostly applies to commercial tenancies)
- b. Other antiquated legislation? Pick your favorite.

C. Secured Transactions

- 1. Existing projects
 - a. Bank Act security
 - b. Five harmonization issues under PPSA
 - c. Security in intellectual property
 - d. Other Federal Security interests
- 2. Other possibilities

I hesitate to suggest yet more items on secured transactions. However, Cathy Walsh and Norman Siebrasse did a proposal some years ago on a "Land Security Act" the basic aim of which was to extend a PPSA-like approach to real property security. Is this of interest?

D: Statutory troublespots

- 1. Existing projects
 - a. Criminal rate of interest
- 2. Other possibilities
 - a. Statute of Frauds?

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E: International Conventions

All of these could probably be assigned to one of the other substantive categories, but for the reasons stated in my preamble, I have grouped them here.

1. Existing projects

- a. International Sale of Goods
- b. Mobile Equipment
- c. Assignment of receivables (has it been officially decided to include this?)
- d. Factoring (as above)
- e. Leasing (as above)
- f. ICSID
- g. Canada/France enforcement
- h. International commercial arbitration

2. Other possibilities

As mentioned in my preamble, I do not think it is up to the Strategy to come up with new potential international conventions.

F. Consumer Protection

1. Existing projects

- a. Cost of credit disclosure
- b. Jurisdiction and choice of law
- c. Products liability (has it been officially decided to include this?)

2. Other possibilities

Here, too, I do not think the Strategy should be positively attempting to identify new projects.

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G. Dispute Resolution

1. Existing projects

a. Arbitration

2. Other possibilities

I doubt that we should actively solicit new "Dispute resolution" projects either.

H. Enforcement

1. Existing projects

a. General civil enforcement

b. Enforcement of Canadian judgments and decrees

c. Jurisdiction and proceedings transfer

d. Foreign judgments

e. Foreign money claims

2. Other possibilities

I am not inclined to suggest any.