

THE COMMERCIAL LAW STRATEGY : WHAT'S NEXT?

Introduction

This is a good news story – a very good news story. Much has been accomplished since the concept of the Commercial Law Strategy (“CLS”) within the Civil Section of the Uniform Law Conference of Canada (“ULCC”) first evolved. The issue is where does the CLS go from here. This is a presentation of my views, and not to be taken as those of the CLS Steering Committee as a whole.

Where Have We Been?

Planning the next steps for the CLS needs a short review of from where we have come.

The CLS evolved from among other steps, the initial report of Douglas Moen, Q.C. and John Gregory, entitled “Towards a Commercial Law Framework for Canada”, (the “Moen-Gregory Report”), copies of which remain on the ULCC’s website and printed in the ULCC proceedings of 1996. I think of the Moen-Gregory Report as the architects’ blueprints for building the legal structure, indicating which topics would be the key pillars and foundations. With the blueprint in hand, work began with the financial support from the federal, provincial and territorial governments. The federal funding agreement from April 1, 2002 to March 31, 2005 enabled more work to be achieved in a shorter time frame by funding the costs of face to face meetings, conference calls, consultation, translation of the CLS’ work, and very modest honoraria to drafters and researchers.

Attached as Appendix 1 is the table prepared by Jennifer Palov and Tim Rattenbury, listing some of the CLS projects that have been prepared and their respective states of enactment as at early January, 2004. This table, together with copies of all the products listed in Appendix 2, were provided to the Deputy Ministers of Justice at their meeting in [Ottawa](#) on January 20 and 21, 2004. Appendix 2 lists the initial 20 pillars called for in the Moen-Gregory Report, and the other projects produced by the Civil Section that fit with these 20 pillars.

Appendix 1 and 2 shows the extensive work that has been accomplished by the Civil Section and the CLS working groups and researchers. Many parts of the structure outlined in the Moen-Gregory Report have now been built and more parts of the structure will be completed before the end of the federal funding contract in March 2005.

An integral part of the structure to support the CLS working groups and researchers, and to facilitate the exchange of ideas, has been the upgrade of the website for the ULCC. Arthur Close merits great thanks in supervising and assisting in this development which now affords greater functionality and the ability to have all CLS papers posted in PDF format, rapidly after each annual meeting. The upgraded site also allows for list serves, the dissemination of newsletters without the ULCC being shut down as a ‘spammer’, links to other sites, and the posting and announcement of questionnaires whereby working groups may obtain input and generate discussion with other lawyers and industry groups.

There is a short period remaining under the federal funding agreement and the end of this phase is on the horizon. CLS working groups will have to deliver their remaining products by January 1, 2005, to allow time for translation, payment and a closing of the financial books for this

contract by March 31, 2005. The products for consideration by the Civil Section this last phase, are listed in Appendix 3.

The foregoing is a brief highlight of some very good news.

So, What is Next?

Assuming the Civil Section approves these choices, when these Appendix 3 products are presented to the Civil Section in August 2005 in St. John's, the structure planned in the Moen-Gregory Report will be substantially built. So what is next?

Continuing with the construction analogies, my view of what's next includes:

- (i) Renovation and repairs to existing products. There will be charges in technology, case law and international developments, to which the Civil Section will need to respond;
- (ii) when needed, some new additions. Appendix 1 notes several projects which have been deferred until a later time; and
- (iii) most importantly, encouraging the three levels of government to "move" into the structure by enacting the products.

Post March 31, 2005 I suggest that the intense CLS building phase of the Civil Section is at an end. Appendices 1 and 2 are the structure planned in the Moen-Gregory Report. There is no longer the need of a separate CLS steering group inside the Civil Section.

It is time for the CLS' remaining work to be re-integrated into the Civil Section as a whole, with the ongoing maintenance and some new additions done as part of the Civil Section's continuing work. The intense construction phase is at an end.

It will be up to the Civil Section as a whole to identify when new products and updates are needed.

Some projects which have been previously identified have not yet been undertaken for various reasons. For example, we determined that business groups had no appetite today for reform of the law of documents of title. We have also yet to find parties prepared to participate in the reform of the sale of goods legislation. Both projects are needed, but not now. The Civil Section will need to monitor the list and keep these in mind when the time is ripe.

Challenges to the Next Steps

A. Funding

The CLS steering committee is looking for alternate funding sources for April 1, 2005 onward, to allow the Civil Section working groups to have face to face meetings which are so vital to discussion and development of products. Email and conference calls are invaluable, but we all know how superior is the face to face meeting to move projects ahead.

B. Volunteer Burn Out

The past several years of intense activity has tapped the finite Canadian resources in commercial law volunteers.

The key here is the word “volunteer”. The CLS’s working groups are comprised of volunteer lawyers from private practice, government departments and law schools. The largest honorarium the CLS has paid is \$5,000, which by my calculations equates to key people working for much less than minimum wage in their spare time. No one does law reform for the money.

There is a finite pool of commercial law lawyers. We need to identify new brains to add to the Civil Section’s pool of talent, prepared to continue as volunteers, or find the funding to pay for the work to be done.

C. Enactment

The CLS made great efforts to ensure input from industry groups so that products are acceptable to business people and their advisors. The products have been “pre-sold” to those affected by seeking their input and participation.

The Civil Section needs to focus efforts on having governments enact the products. The CLS has built an impressive structure; it needs occupants. It is exceedingly difficult to obtain the participation of volunteers working in their personal time, to only produce academic works; enthusiasm to participate is fostered by results. We need products that are enacted, so that effort is not wasted, and success feeds on success.

We have built the products. Enactment is now in my view the key focus for the next phase of the CLS. Great work has been done. The recent push on large projects such as the USTA and consequent PPSA and Civil Code amendments, franchises, civil enforcement, and cost of credit have resulted in extremely valuable products. Their true value of this work to Canadians will only come with enactment as legislation.

Jennifer E. Babe
Chair, Commercial Law Strategy

APPENDIX 1

Status of Uniform Acts Recommended by the Commercial Law Strategy

Suggested entries:

= enacted and in force
 (U) = enacted but unproclaimed
 C = comparable legislation in force
 UC = under consideration

	Uniform Act:	Alberta	B.C.	Manitoba	NB	Nfld.	NWT	NS	Nunavut	Ontario	PEI	Quebec	Sask.	Yukon
A. Completed Projects recommended for early enactment														
1.	<i>Electronic Commerce Act</i>	E	E	E	E	E	UC	E		E	E	E	E	E
2.	<i>Liens Act, 2000</i>		UC		UC	UC		E(U)		C		C	E	
3.	<i>Cost of Credit Disclosure Act</i>		E(U)		E(U)	UC	UC	E		E(U)			E(U)	
4.	<i>Enforcement of Canadian Judgments and Decrees Act</i>		E(U)		E (judgments) C (decrees)	E(U)		E(U)		UC	E, C	C	E(U)	
5.	<i>Court Jurisdiction and Proceeding Transfer Act</i>		E(U)					E(U)		UC		C	E(U)	
B. Completed Projects														
6.	<i>International Sales Conventions Act</i>		UC						E	UC		C		
7.	<i>Enforcement of Judgments Conventions Act</i>									E(U)			E(U)	
8.	<i>Settlement of International Investment Disputes Act</i>		UC							E(U)				
9.	<i>International Interests in Mobile Equipment Act</i>		UC							E(U)				
10.	<i>Enforcement of Foreign Judgments Act</i>		UC							UC			E	

	Uniform Act:	Alberta	B.C.	Manitoba	NB	Nfld.	NWT	NS	Nunavut	Ontario	PEI	Quebec	Sask.	Yukon
11.	PPSA: anti-assignment clauses													
12.	PPSA: conflict of laws													
C. Older Uniform Acts														
13.	<i>Foreign Money Claims Act</i>		E							C		C		
14.	<i>Arbitration Act</i>		C		E					E			E	
15.	<i>International Factoring (Unidroit Convention) Act</i>		UC											
16.	<i>International Financial Leasing (Unidroit Convention) Act</i>		UC											
17.	<i>International Commercial Arbitration Act</i>	E	E	E	E	E	E	E	E	E	E	E	E	E
18.	<i>International Sale of Goods Act</i>	E	E	E	E	E	E	E	E	E	E	E	E	E

APPENDIX 2

A. Uniform Act or Recommendations Made

1. Arbitration Act
2. *Cost of Credit Disclosure Act*
3. *Court Jurisdiction and Proceedings Transfer Act*
4. *Electronic Commerce Act*
5. *Enforcement of Canadian Judgments and Decrees Act*
6. *Enforcement of Foreign Judgments Act*
7. *Enforcement of Judgments Conventions Act*
8. *Foreign Money Claims Act*
9. *International Commercial Arbitration Act*
10. *International Factoring (Unidroit Convention) Act*
11. *International Financial Leasing (Unidroit Convention) Act*
12. *International Interests in Mobile Equipment Act*
13. *International Sale of Goods Act*
14. *Liens Act, 2000*
15. *International Sales Conventions Act*
16. *Settlement of International Investment Disputes Act*
17. Criminal Code, Section 347
18. Security Interests in Intellectual Property

B. Projects Under Way or to Be Done: See attached tables for status notes

19. Civil Enforcement of Judgments
20. Franchises
21. Illegal Contracts
22. Jurisdiction and Consumer Protection in Electronic Commerce
23. Leases*

24. Licensing of Intellectual Property*
25. Negotiable Instruments (Bills of Exchange)*
26. Sale of Goods*
27. Secured Transactions
28. Transfer of Indirectly Held Securities
29. Unidroit Convention of International Assignments of Receivables
30. Warehouse Receipts, Bills of Lading and Other Documents of Title*

*start delayed to future date for various reasons

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ORIGINAL TOPIC	COMMENTS AND NOTES	STATUS
Civil Enforcement of Judgments	<ul style="list-style-type: none">• a very large project to reform diverse and outdated pre and post judgment enforcement laws, registration of judgments and inter-relation with secured transactions legislation.• Newfoundland, Alberta, New Brunswick and Quebec have moved on reformed legislation in this area.• the working group established to develop a uniform Act for the enforcement of civil judgments has met by conference call on two occasions since the presentation of their annual report in August 2003, to finalize the review of the draft uniform Act and commentaries.	<ul style="list-style-type: none">• first draft (incomplete) of uniform Act presented in August 2003.• final draft to be presented in August 2004.

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ORIGINAL TOPIC	COMMENTS AND NOTES	STATUS
Franchises	<ul style="list-style-type: none">• today Ontario and Alberta have legislation governing franchises.• the industry is also so large and transactional that uniform legislation is key to both franchisors and franchisees.• wide consultations are taking place via the working group's e-mail list serve.	<ul style="list-style-type: none">• first paper August 2002.• first draft uniform Act presented in August 2003.• final draft of <i>Uniform Act</i> to be presented in August 2004.• Regulations to the Act to be presented in August 2005.

ORIGINAL TOPIC	COMMENTS AND NOTES	STATUS
Illegal Contracts	<ul style="list-style-type: none"> • an analysis of how courts deal with unlawful provisions in contracts was done by B.C. Law Reform Commission in 1983; Professor Waldron updated the case law since then to see if uniform legislation may be developed. • in January 2003, Professor Mary Anne Waldron was retained to review the civil remedies available to those whose contracts are found to contain illegal provisions. • Professor Waldron prepared a paper for consideration by the Conference at its 2003 annual meeting. The paper reviewed the most significant decisions in the area of illegal transactions in the past 20 years. • over the next year, the Conference will establish a committee to prepare a draft Act and commentaries based on the Waldron Report, the applicable provisions of the <i>Quebec Civil Code</i> and the comments received from discussion at the 2003 Conference, for presentation to the conference in 2004. 	<ul style="list-style-type: none"> • first study paper presented August 2003. • draft Act to be presented in August 2004.

ORIGINAL TOPIC	COMMENTS AND NOTES	STATUS
Jurisdiction and Consumer Protection in Electronic Commerce	<ul style="list-style-type: none"> • rules needed to assist in determining which jurisdiction” laws apply in electronic commerce transactions and protect consumers. • Consumer Measures Committee (“CMC”) and ULCC joint working group conducted public consultation and prepared draft Act and commentaries. • draft Act and commentaries modified based on Conference deliberations in August 2003, and will be complete before the Conference meets again in 2004. • the working group will then study alternative dispute resolution and enforcement issues in this area. 	<ul style="list-style-type: none"> • two papers on issues presented August 2002. • uniform Act was adopted March 31, 2004.

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ORIGINAL TOPIC	COMMENTS AND NOTES	STATUS
Leases	<ul style="list-style-type: none">• USA equivalent is UCC Article 2A.• the UCC Article 2A is unique given UCC Article 9 does not apply to consumer transactions and unique USA laws on motor vehicle titles to record vehicle liens.• a report considering a consumer leasing statute was prepared, but there did not appear to be a need for legislation given (i) existing consumer protection legislation (ii) cost of credit reform (iii) PPSA and <i>Civil Code</i> provisions impacting enforcement and consumer rights.	<ul style="list-style-type: none">• Paper delivered August 1999.• not continued.

ORIGINAL TOPIC	COMMENTS AND NOTES	STATUS
Licensing of Intellectual Property	<ul style="list-style-type: none"> USA equivalent is the <i>Uniform Information Transfer Act</i>; this NCCUSL Act has not been widely adopted; there appears to be very little interest in this topic in Canada at present. 	<ul style="list-style-type: none"> not started.

ORIGINAL TOPIC	COMMENTS AND NOTES	STATUS
Negotiable Instruments/Bills of Exchange	<ul style="list-style-type: none"> • USA equivalent is UCC Article 3; as this is a federal area of law, there may not be scope for a uniform Act; there maybe need of an updated federal Act that would then be harmonized as needed with uniform legislation. 	<ul style="list-style-type: none"> • not started.

ORIGINAL TOPIC	COMMENTS AND NOTES	STATUS
Sale of Goods	<ul style="list-style-type: none"> • USA equivalent is UCC Article 2. • there have been several attempts at finding a person to lead this project; no one has been prepared to do so. • existing Canadian legislation is largely based on the <i>English Act</i> of 1893. 	<ul style="list-style-type: none"> • <i>Uniform Sale of Goods Act</i> adopted August 1983; a review of developments since 1982 is desirable.

ORIGINAL TOPIC	COMMENTS AND NOTES	STATUS
<p>Secured Transactions:</p> <p>PPSA and <i>Civil Code</i> reform and harmonization</p>	<ul style="list-style-type: none"> • USA equivalent is UCC Article 9, which was revised in 2002. • a <i>Uniform Personal Property Security Act</i> was adopted in 1981. It was based on an earlier model and has not been adopted in any Canadian jurisdiction. • a <i>Personal Property Security Act</i> (“PPSA”) is in effect in all provinces and territories, except Quebec; Quebec enacted <i>Civil Code regimes for hypothecs in 1994 and registrations of other interests in moveables</i> in 1999. • all 12 PPSA and <i>Civil Code</i> statutes are different but the “western model” and the “Atlantic model” are similar. • there are generically speaking, in effect 4 “sets” of personalty laws in Canada: <ul style="list-style-type: none"> i) the Ontario PPSA; ii) the Western model PPSA; iii) the Atlantic model PPSA; iv) the <i>Civil Code</i> regime for moveables. • the working group did not perceive an ability to move legislatures to adopt a revised uniform Act and so chose in 2002 to study 5 areas where uniformity might be encouraged. These are: <ul style="list-style-type: none"> a) relationship between section 427 of the <i>Bank Act</i> and provincial security interests. Repeal of section 427 was recommended; b) conflict of law rules; 	<ul style="list-style-type: none"> • <i>Uniform Personal Property Security Act</i> adopted in 1981 but not enacted. • 5 reform papers presented August 2003 and the Conference adopted them and recommended their

	<p>c) proceeds of purchase-money security interests (“PMSIs”) vs. receivables financiers;</p> <p>d) security in licences;</p> <p>e) anti assignment clauses affecting accounts and chattel paper.</p> <ul style="list-style-type: none"> • the working group’s recommendations for amendments with respect to anti-assignment clauses and conflict of law rules were adopted in 2003, and are recommended to the jurisdictions for enactment. • The working group’s recommendation that section 427 of the <i>Bank Act</i> be repealed was adopted in 2003, and recommended to the Government of Canada for enactment. • The working group will continue to study issues where harmonization among the four models of personalty law is advisable and achievable. 	implementation..
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ORIGINAL TOPIC	COMMENTS AND NOTES	STATUS
<p>Transfer of Indirectly Held Securities</p> <p>(a) “Tiered Holdings”</p>	<ul style="list-style-type: none"> • USA equivalent is Article 8 UCC. • market need to harmonize with UCC Article 8, plus future revisions may be needed to harmonize to the PRIMA Convention from the Hague Convention on the Choice of Law applicable to securities transfers. • the Canadian Securities Administrators (“CSA”) USTA Task Force has now completed development of the <i>Draft Uniform Securities Transfer Act</i> (“USTA”) at the request of the ULCC. In January 2003, the Task Force circulated an advance draft USTA and draft consequential PPSA amendments to over 100 individuals and organizations. The objective was to solicit comments for use in preparing the consultative draft USTA to be published in securities commission bulletins. • the goal of this project is to create a <i>Uniform Securities Transfer Act</i> (“USTA”) to be implemented in each province without amendment. This assumes uniformity in the common law provinces, and as close to uniformity as possible in Quebec having regard to the requirements of the <i>Civil Code of Quebec</i>. • the proposed uniform Act and commentaries were presented to the Conference at its meeting in August 2003. • the Working Group is also preparing draft implementing legislation for the “<i>Hague Convention on the Law Applicable to Certain Rights</i> in respect of Securities held with an Intermediary”. 	<ul style="list-style-type: none"> • Public consultation Spring 2003. • model <i>Uniform Securities Transfer Act</i> delivered August 2003.

<p>(b) impact on secured transactions</p>	<ul style="list-style-type: none"> • needs simultaneous revisions to PPSA and <i>Civil Code</i> to be able to implement the <i>USTA</i>. • PPSA changes for Alberta and Ontario were presented in August 2003; a separate Act will likely be needed for Quebec. 	<ul style="list-style-type: none"> • draft PPSA revisions August 2003. • Updated PPSA revisions to be presented August 2004.
<p>(c) impact of the enforcement of civil judgments on Securities</p>	<ul style="list-style-type: none"> • Now being considered by the Enforcement of Civil Judgment working group. 	<ul style="list-style-type: none"> • Draft <i>Uniform Civil Enforcement Act</i> will address these issues.

ORIGINAL TOPIC	COMMENTS AND NOTES	STATUS
UNCITRAL Convention on International Assignments of Receivables	<ul style="list-style-type: none"> • Work will be needed in 2003 – 2004 to implement this convention and harmonize with PPSA and <i>Civil Code</i>. 	<ul style="list-style-type: none"> • 2003 – 2004.

ORIGINAL TOPIC	COMMENTS AND NOTES	STATUS
Warehouse Receipts, Bills of Lading & Other Documents of Title	<ul style="list-style-type: none"> • USA equivalent is UCC Article 7; UCC Article 7 is now being revised by NCCUSL largely for electronic commerce. • the 1995 draft Act needs to be updated and harmonized with PPSA legislation; draft not yet revised or considered. • in 2003, Professor Jacob Ziegel was retained to conduct a preliminary study on the merits of initiating a new project to modernize and harmonize Canadian laws relating to documents of title. • Professor Ziegel's study, presented at the Conference Annual Meeting in August 2003, considered previous work done by the Conference as well as subsequent developments. These include developments in Canada, revised article 7 of the <i>Uniform Commercial Code</i>, the development of electronic documents of title, NAFTA developments through the Bills of Lading Project, amendments to relevant British legislation and EU developments. • consultations with various parties indicated no interest in reform at this time. There will be a need when electronic methods afford the same security now enjoyed by industry conventions. 	<ul style="list-style-type: none"> • Draft <i>Uniform Documents of Title Act</i> from 1995. • Prof. Ziegel's paper was delivered August 2003. • not proceeding at this time.

APPENDIX 3

IDEAS FOR NEW PROJECTS FOR FISCAL 2005

Existing Projects to be Completed:

1. Franchises – complete the draft regulations.
2. Secured Transactions – further work on issues and recommendations to promote uniformity.
3. Limitations – fund the existing working group to accelerate their work and facilitate face to face sessions for the preparation of the uniform act.
4. Charitable Fund Raising Businesses – this is a consumer protection initiative; fund the existing working group to accelerate their work and facilitate face to face sessions for the preparation of a uniform act.

Consider funding research papers on the following topics:

5. updating existing enforcement products - possibly working with Arthur Close and Darcy McGovern
6. e-commerce issues to be selected – working with John Gregory to select these issues
7. mortgage discharge fraud and title insurance issues
8. trade secrets legislation
9. inter-jurisdictional class actions - working with Peter Lown
10. insurance legislation from recent significant cases