

UNIFORM LAW CONFERENCE OF CANADA

Report on the Status of the Uniform Documents of Title Project

Civil Section

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1. Conclusion:

A Uniform Documents of Title Act will be needed as technology develops to allow secure but negotiable electronic documents of title, but that day has not yet come. Any draft act done now will be premature as the law will need to reflect changes in international law now in progress, and the practices and rights evolving from the technology. As a consequence this project has been delayed to a future date.

2. History of this ULCC Project:

1991: Professor Roderick Wood presented to the ULCC, a paper recommending a Uniform Documents of Title Act, which recommendation was accepted.

1995: The ULCC approved the draft Uniform Documents of Title Act presented to the Civil Section, unless two or more objections were received by February 1996. Ultimately, this draft Act was not circulated and was withdrawn as premature as the American Uniform Commercial Code Article 7 on documents of title, was about to be revised to enable electronic documents of title.

2002: The ULCC determined to move this project forward with a report to be done on the status of changes in the law. The then National Coordinator of the CLS, Helene Yaremko Jarvis, had a difficult time finding a party prepared to take on preparation of this paper.

2003: Professor Jacob Ziegel agreed to do the task and presented his paper, "The Desirability of a Revised ULCC Documents of Title Project" to the ULCC in Fredericton, in August 2003. Professor Ziegel found a lukewarm reception when he canvassed practitioners, academics and government officials in determining if there was a current need for reform. Professor Ziegel also noted the problems in having a ULCC project for uniform legislation at the provincial level, given the constitutional powers of the federal government in industry and trade, banking and shipping, and the federal *Bills of Exchange Act*. Professor Ziegel recommended that a consultative group should be established to advise the ULCC whether the uniform documents of title act project, should be revived.

2004: A consultative meeting was held in Toronto on January 6th, with conference call participants from other cities. The group participating indicated that it was too soon for the ULCC to do this project for reasons set out in section 3 below. The participants in this meeting were:

Jennifer Babe - Chair CLS; LL.M. in admiralty law

Tony Hoffmann – National Coordinator

Frederique Sabourin – Chair, Civil Section

John Gregory – Ontario government and noted e commerce expert

Peter Jones – Paterson MacDougall LLP in Toronto – serves as counsel to the Canadian Freight Forwarders Association

John Lancaster - counsel with the Canadian Bankers Association, in Toronto

David Colford – Brisset Bishop in Montreal, maritime law practitioner

Christopher Giashi in private practice in Vancouver and Professor Marc Lacoursiere of the Faculty of Law of Laval University were unable to join the call but their views were canvassed separately by the National Coordinator and did not differ from those expressed at the meeting.

The agenda for this consultative meeting is attached as Schedule A.

3. Reasons for Delaying this ULCC Project:

a) We need to ensure the ULCC project reflects and is harmonious with other developments in the law, given the interplay among the Canadian jurisdictions and the rest of the world for businesses engaged in import and export:

In no order of importance, among others, the following developments are in play in the law of documents of title. These developments were noted during our consultation meeting:

i) **Revised UCC Article 7:** the revised Article 7 enabling electronic documents of title reflecting the United States' *Electronic Commerce Act*, and making consequent changes to Article 9 for security interests in electronic documents of title, was completed and accepted by NCCUSL and the American Law Institute in 2003. There is an article about this development by Linda Rusch in the March 2004 issue of the "Commercial Law Newsletter" published by the Business Section of the American Bar Association. The same publication notes that as at March 4, 2004, only 6 States have prepared bills to adopt this revised Article 7. 44 States have taken no action.

ii) **private agreements:** As noted in Professor Ziegel's paper and in an article by Jocelyn Dube entitled "Canadian Perspectives on the Impact of the CMI Rules for Electronic Bills of Lading on the Liability of the Carrier Towards the Endorsee" (1998-1999) 26 Transportation Law Journal at pages 108 and 109, there are several sets of private agreement 'clubs' in place, whereby members of an industry have their own contract rules governing trade in documents of title among the members of that club. For example:

- SeaDocs Registry Limited for participants in the oil tanker business;

- Bolero International Limited using the Bolero Rules for a consortium of carriers, shippers, banks, insurers and telecommunications companies; and

- Comite Maritime International ("CMI"), a private law organization based in Brussels, is composed of a group of national associations of maritime law, which has rules for electronic bills of lading using private key inscription methods. CMI is also working on reform of the law of carriage of goods by sea and its work is being endorsed by UNCITRAL according to Peter Jones.

iii) **Department of Transport:** The Canadian *Bills of Lading Act* is aged and in need of reform, and we understand that the federal government is studying reform of this statute.

iv) **International Conventions:** The Transportation Law subgroup of UNCITRAL is working on reform of the carriage of goods by sea conventions.

In short, the area of law is in flux and anything ULCC might prepare may be premature to incorporate and be harmonious with, these other developments. Lack of harmony would be detrimental to parties engaged in international trade.

b) technology is not ready for what industry needs to be confident to make a move to new law:

The participants noted that the *Uniform Electronic Commerce Act* was readily accepted and enacted because technology had changed, and the law needed to catch up. In this situation, the technology is not ready and the fear is the drafting legislation now, would not capture what will develop.

The hard technical issue is that electronic documents of title need to be immobilized to prevent fraud and copying for secure trade, but also have to be capable of being altered to record an endorsement when negotiated. UNCITRAL's work apparently is focusing on immobilized documents, coupled with contract rights for that unique document.

c) certainty:

Industry today has differing practices for air, water and land transportation documents of title, including bills of lading and warehouse receipts, and has developed conventions using combinations of paper and electronic means. It appears business parties are very reluctant to give up their established and certain methods for secure commercial transactions, to move to something new.

John Lancaster noted that for documentary letters of credit, paper documents are issued, with forms of electronic delivery used to effect presentation of the underlying documents.

The consultation group noted that there is no present demand from bankers or industry for Canadian law reform because what they are using is working. Professor Ziegel noted in his paper the lack of case law on the area in Canada which presumably reflects a system that is functioning well within the conventions of various industrial groups.

At the conclusion of the meeting, the participants thanked the ULCC for having consulted them, and noted that this area will need work, but not now.

All of which is respectfully submitted,

Jennifer E. Babe

SCHEDULE "A"

MEMORANDUM
Toronto

To: Peter Jones – private practice Toronto
John Lancaster – Cdn Bankers Assoc.
David Colford – private practice Montreal
Chris Giashi - private practice, Vancouver
Marc Lacoursiere - University of Sherbrooke Law School
Tony Hoffman – National Coordinator – ULCC
Frederique Sabourin - Chair, Civil Section of ULCC; Gov't of Quebec
John Gregory – Ontario Ministry of the Attorney General

From: Jennifer E. Babe
416.595.8555

Date: December 30, 2003

Subject: re: is the domestic law of Canada regarding documents of title in need of reform? repair?

Introduction:

The Uniform Law Conference of Canada ("ULCC") is working on the harmonization and modernization of commercial law in Canada, as part of its Commercial Law Strategy. In 2002-2003, the ULCC sought to determine whether the Canadian domestic law of documents of title needed to be reformed. To this end, it had Prof. Jacob Ziegel at the University of Toronto Law School prepare a paper on this topic. Prof. Ziegel's paper is attached. It did not make a convincing case for a need for reform.

The ULCC has contacted many persons identified as practicing or teaching or writing on the topic of documents of title. To date, there have been some kind expressions of interest, but no enthusiasm for a domestic law reform project in this area, despite efforts toward reform in the USA and the UK.

Purpose of this Call:

The ULCC is trying to determine whether there is a need for reform, or, whether the issue should be shelved for a future date absent any present 'need' in the market place for reform.

We ask of you, your participation in a conference call on Tuesday January 6th to discuss from your personal perspective the following questions:

1. is there a need for reform of the Canadian domestic law of documents of title? to meet paperless practices in B2B commerce? for issues raised in the UK or the USA reform work?
2. if there is such a need, would you be prepared to participate in a working group on the project? if not you, then who would you recommend that we speak to about participating?
3. if there is not such a need for wholesale reform, are there any “fixes” or “repairs” that would be desirable to solve practical problems in practice, or to resolve areas of confusion from case law or legislative drafting?
4. is there any need to harmonize Canadian law to efforts in other jurisdictions?
5. other issues you wish to raise?

We very much appreciate your thoughts and time and look forward to speaking with you.