UNIFORM LAW CONFERENCE OF CANADA

OTTAWA, ONTARIO

AUGUST 9-13, 2009

CIVIL SECTION MINUTES

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 2009 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 2009 Proceedings**.**

INTEREST ACT REVIEW – Oral Report

Presenter: Lisa Peters, Canadian Bar Association, British Columbia
Lawson Lundell LLP

Ms. Peters presented a status report on behalf of the working group. In 2007 a background paper was presented to the ULCC which reviewed the federal *Interest Act* in the context of reviewing its continuing relevance and specifically questioning whether its provisions were still relevant in light of extensive consumer legislation across the country, particularly regarding disclosure of the cost of borrowing.

A working group was established in 2008 to study the issues and its preliminary report to the 2008 Conference concluded that sections 2 and 3 of the Act are still operable and serve a purpose. The working group recommended consultation with shareholders regarding sections 4 (requires disclosure of a yearly rate of interest), 6 (disclosure provisions for mortgages), 8 (prevents a lender from increasing the interest rate upon default) and 10 (mortgagor may repay the mortgage after 5 years).

The planned consultation has not yet been completed but the working group anticipates completing consultations by the end of 2009. A list of stakeholders will be sent to jurisdictional representatives in August, and any additional recommendations would be appreciated. A Final Report and draft amendments will be ready for discussion at the 2010 Conference.

RESOLVED:

THAT the working group be directed to:

a. continue its work based on the Report and discussion at the Conference;
b. carry out consultations with stakeholder groups; and
c. prepare final recommendations for consideration at the 2010 meeting.

PERSONAL PROPERTY SECURITY ACT – Oral Report

Presenter: Clark Dalton, Uniform Law Conference

Mr. Dalton provided an overview and update on the PPSA project. The ULCC developed the Uniform Act in 1983, but it has not been adopted by any jurisdiction. Some attempts have been made over the years to amend the Uniform Act, but not much has happened. In November 2008, Professor Ron Cumming attempted to get in touch with jurisdictional experts, but had difficulty generating interest in the subject of further amendments. That being said, he noted that there is already much uniformity already existing amongst the provinces, including the Civil Code.

Mr. Dalton asked for input regarding whether or not the ULCC should continue to pursue PPSA amendments. It may be possible to put together a small group of experts and have that group develop proposals for amendments to the Act. A broader group could be used as a sounding board.

One delegate commented that there is an overall pattern of uniformity in PPSA law in Canada, so similar conflicts of law rules would be a good addition. Other delegates noted that other national and jurisdictional groups are involved in reviewing and working on personal property securities, and perhaps ULCC should coordinate with those groups. Concerns were raised that much of ULCC's work in this area over the last 10 years has not been used in the jurisdictions.

RESOLVED:

THAT the report be received and the project be referred to the Advisory Committee for review with respect to the implementation of existing PPSA resolutions and for further consideration as to when this subject should be brought back to the Civil Section for further work.

MEXICAN CENTER OF UNIFORM LAW – Oral Report

Presenter: Dr. Jorge Sánchez Cordero, Mexican Center of Uniform Law

Dr. Sánchez Cordero discussed the work and successes of the Mexican Center of Uniform Law that have taken place over the last year, and highlighted a few key events and processes currently underway in Mexico.

Mexican states and the nation as a whole have realized the importance of uniformity, and particularly beneficial to Mexican society will be the reduction in legal costs that comes with uniformity. The Mexican legal system has also made considerable progress in the area of security, in the form of two new public registries. Also, penal reform is ongoing, with the hope that 10 years from now there will be a new penal system in Mexico. Finally, recently the Mexican Congress and all of the federal states approved a constitutional amendment which was the final step in ratifying the UNESCO convention on safeguarding cultural heritage.

In November 2008, Mexico hosted a thematic conference under the auspices of the International Academy of Comparative Law and UNIDROIT. Three members of ULCC attended: Kathryn Sabo, Peter Lown and Russell Getz. Six main topics were addressed at the Conference:

1. The challenges of bringing uniformity into a federal system
2. Arbitration
3. The impact of the Vienna Convention on National Laws
4. Reception of private international laws (UNCITRAL, Hague Convention, and UNIDROIT)
5. Penal procedures regarding international civil rights conventions
6. The importance of uniform law in cultural units that are subject to differing legal systems.

Kathryn Sabo noted that the meeting in Mexico City was a valuable opportunity for Canada's ULCC delegates to get a real appreciation for the challenges existing in Mexico, and also Mexico's great willingness to push for change.

RESOLVED:

THAT the ULCC express its thanks to Dr. Jorge Sánchez Cordero, Director of the Mexican Uniform Law Centre for the interesting and informative presentation.

ASSISTED HUMAN REPRODUCTION – Report

Presenters: Elizabeth Strange, Office of the Attorney General, New Brunswick
Betty Ann Pottruff, Coordinating Committee of Senior Officials (Family)

Lisa Hitch, Coordinating Committee of Senior Officials (Family)

A joint ULCC-CCSO working group was established in late 2007 to examine issues regarding legal parentage at birth and eligibility to register as parents. At the 2008 Conference, the working group was directed to prepare recommendations.

Ms. Strange, Ms. Pottruff and Ms. Hitch presented the report on behalf of the working group, noting that advances in AHR have made determining the legal parent-child relationship more complicated in certain cases. The existing legislation does not take into account AHR techniques, resulting in court challenges and judges making decisions in a policy vacuum. The goal of the working group was to provide certainty for children, donors and parents. The working group's recommended approach would recognize the birth mother link, treat the natural and assisted conception models the same as much as possible, and consider the intentions of those who wish to parent. In all instances, a court process should be available for those left out of the determination of parentage at birth, but who seek to be named as parents after birth.

The working group hopes to provide a uniform bill at next year's Conference, intended for use in common law jurisdictions only. Quebec's Civil Code has its own regime. The uniform bill would contain some core and perhaps some optional provisions. In the meantime, the working group's paper has identified eight primary and fundamental principles that would form the basis of the uniform legislation.

Following the presentation, some concerns were expressed regarding the decision not to honour surrogacy agreements. The presenters acknowledged that there are valid arguments in support of recognizing surrogacy agreements, but on the whole, case law indicates that a court will apply *parens patriae* jurisdiction even in the face of an agreement amongst parties because the most important factor is the best interests of the child. Also, there is a public policy argument against the concept of "renting a womb". Ultimately, the presumption that a surrogate mother is the child's mother will be subject to court review of what is in the best interests of the child.

Some concerns were raised regarding whether all the steps recommended to support the multiple parents model were truly necessary. Could a less complex scheme be used? The working group is still looking at this issue and may consider making some steps optional, although court oversight is advisable.

The working group sought direction from the Conference regarding whether the issue of posthumous births fell within the mandate of this project. It is a complicated area with several clear issues that need to be resolved, including whether posthumous materials should be available only for use by a spouse/partner/identified person, or whether it should be available to anyone. Also, should there be a general rule to destroy the material after a certain period of time has passed since the death? How should the privacy interests of donors be weighed against a child's right to know his or her biological history? The Conference agreed that there would be value in having the working group consider these issues.

RESOLVED:

THAT the working group be directed to continue to consider the issues raised in the Report and the directions of the Conference and that it prepare a Uniform Act and commentaries for consideration at the 2010 meeting.

STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION [SLAPP] – Report and Uniform Act

Presenter: Vincent Pelletier, Ministry of Justice, Québec

Mr. Pelletier presented the report and draft Uniform Act on behalf of the working group. In its 2008 report, the working group concluded that rules to deter abusive lawsuits, including SLAPP, exist in both the common law and civil law jurisdictions of Canada but they appear to be ineffective because of the courts' reluctance to apply them. The objective of the Uniform Act is to promote access to justice by all citizens, and prevent the improper use of a court to limit public participation in debate. The Uniform Act proposes measures to reinforce existing remedies and encourage the courts to intervene more often to deter abuse of the judicial process. The provisions could be limited for use in SLAPP lawsuits only, or could be used to supplement a jurisdiction's existing procedural rules.

Amongst other things, the Uniform Act adds the rule of proportionality to the general rules of procedure. Pleadings and means of proof must be proportionate, in terms of cost and time, to the nature and ultimate purpose of the action or application, to the complexity of the matter and to the financial position of each party. The Uniform Act also recognizes that a proceeding may be abusive even if the plaintiff has a reasonable expectation of success, if the court believes the proceeding was principally brought to deplete or exhaust the resources of the defendant or to dissuade the defendant or other persons from engaging in public participation.

Additional rules regarding defamation actions were included in the draft Uniform Act, which a jurisdiction could add to its own defamation legislation. These rules were the subject of considerable discussion. Concerns were expressed regarding the proposal to limit the ability of a corporation to sue for defamation. On the advice of the Conference, these defamation provisions will be removed. Some commentary regarding defamation issues may be retained in the working group's final report.

Mr. Pelletier noted that the English version of the draft legislation has not yet been reviewed by drafters, so while the principles have been established, the language of the next draft may change.

RESOLVED:

THAT the *Uniform Act on Abuse of Process* and commentaries be approved in principle;

THAT following a review of the Uniform Act, should no substantive change to the *Uniform Act on Abuse of Process* and commentaries as considered by the Conference be required and should the Civil Section Steering Committee consider it appropriate; that the Uniform Act and commentaries be circulated to the jurisdictional representatives. Unless two or more objections are received by the Executive Director of the Conference by January 31, 2010, the draft Act should be taken as adopted as a Uniform Act and recommended to the jurisdictions for enactment.

FRAUDULENT CONVEYANCES AND PREFERENCES – Report

Presenter: Professor Tamara Buckwold, Faculty of Law, University of Alberta

This project has two parts. The interim report presented by Professor Buckwold addresses and makes recommendations on the essential features of proposed legislation regarding Part I, namely Fraudulent Conveyances/Transfers at Undervalue. The working group will resume meeting in September to complete its work on Part I and then turn to Part II (Preferential Transfers). It is anticipated that the final report of recommendations on Part I will be ready for delivery to the Conference at its 2010 annual meeting.

The underlying policy accepted by the working group is that interference with a creditor's rights is wrong and warrants redress. It does not matter if the reason for a particular transfer is laudable; if a transfer affects a debtor's ability to pay his or her creditors, the creditors should be entitled to recover. Clear rules regarding remedies available to creditors should help deter debtors from this kind of behaviour.

The working group proposed three causes of action designed both to redress loss to creditors and to deter debtors and those who deal with them from entering into transactions that defeat or obstruct creditors' rights of recovery. The working group has not finalized the remedies at this point, but has identified that the objective is to restore to creditors the value lost due to the debtor's loss of asset base by way of the transaction.

The working group will address transactions between spouses and other family members when it reconvenes in September. At this point, the working group is uncertain whether to create special rules for transactions which occur in the context of a separation agreement or matrimonial property order. Some comments were made by the Conference about the thorniness of property valuation, as well as fairness issues regarding undoing an otherwise final separation of property.

The working group made a conscious decision not to make special rules for transactions which convert non-exempt property into exempt property in the debtor's hands. This kind of transaction should be dealt with in exemptions law, not in fraudulent conveyances and preferences law. Similarly, no special rules will be created to address the interface between the reformed Act and creditor's relief law.

Some questions were asked about the differences between the proposed scheme and the federal *Bankruptcy and Insolvency Act* and its recent amendments. Professor Buckwold indicated that these differences have been the subject of considerable discussion amongst the working group. Ultimately, the working group felt that this project should not fully adopt the methodology of the BIA amendments, due to some perceived deficiencies with those amendments. A recommendation was made to include commentary in the final report regarding what problems are seen with the BIA amendments.

A written report on the law of Quebec was completed by Professor Élise Charpentier, Faculté de droit, Université de Montréal, Québec. It confirmed that the recommendations of the working group are reasonably consistent with the principles established by the Civil Code, as interpreted by Quebec courts.

RESOLVED:

THAT the working group be directed to:

a. continue its work based on the Report and discussions at the Conference;
b. finalize policy recommendations on Part I: Fraudulent Conveyances/Transactions at Undervalue; and
c. report back to the Conference at the 2010 meeting.

UN CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT – Report

Presenters: Mireille-France LeBlanc, Justice Canada
Professor Marc Lacoursière, Université Laval, Québec
Steven Jeffery, Blaney McMurtry LLP

In March 2006, the Conference recommended that the *1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* be adopted in Canada. A working group was established following the 2006 Annual Meeting.

Ms. Leblanc presented an overview of the report on behalf of the working group, and Professor Lacoursière and Mr. Jeffery provided information regarding the substance of the draft Uniform Act that was provided for consideration of the 2009 Conference.

Currently, there is no existing legislation on this subject in common law jurisdictions. The Civil Code does address this subject, to some degree.

Part 1 of the draft Uniform Act establishes domestic rules, basically codifying existing common law and civil law rules that are consistent with the Convention. It addresses domestic transactions in the area of independent guarantees and letters of credit as well as aspects of international transactions not covered by the Convention. It will eventually include commentaries.

Part 2 implements the Convention in Canada and includes commentaries.

The working group has participated over the last 2 years with Mexico and the United States regarding issues of implementation of the Convention.

During the next year, consultation will continue with the major stakeholders (the Canadian Manufacturers and Exporters Association, the Canadian Bar Association, major Canadian banks and the Canadian Bankers Association). It is anticipated that a final draft Uniform Act and commentaries will be presented at the 2010 ULCC Annual Meeting.

RESOLVED:

THAT the working group be directed to continue to consider the issues raised in the Report and the directions of the Conference and that it prepare a Uniform Act and commentaries for consideration at the 2010 meeting.

JOINT WORKING GROUP ON THE COLLATERAL USE OF CROWN BRIEF DISCLOSURE – Status Report

Presenters: Greg Steele, Q.C., Steele, Urquhart Payne, Barristers and Solicitors, Vancouver, BC
Nancy Irving, Senior Counsel, Office of the Director of Public Prosecutions, Public Prosecution Service of Canada and
Gail Mildren, Civil Legal Services, Manitoba Justice

The report provides an update on the work undertaken by the Working Group since the 2008 Conference. The report notes that drafting of model legislation has commenced but that further discussion and consultation is needed before presenting a final uniform Act for discussion. The purpose of the proposed model legislation is to codify principles set out in the Ontario Court of Appeal decision in *D.P.* v. *Wagg* (2004), 71 O.R. (3d) 229 to be applied by courts in addressing applications for the disclosure of prosecution records to be used in collateral proceedings. The draft scheme includes a judicial application process to determine whether access to prosecution records, in whole or in part, should be provided in those cases where the Attorney General or the police have refused access. The proposed framework also provides that the Court will apply the codified test set out in *D.P.* v. *Wagg* in deciding whether to grant production of such records by considering all relevant factors such as privacy interests, the stage at which the collateral proceedings are and availability of the information from another source. In addition, the draft framework includes a rebuttable presumption to be applied in collateral proceedings in favour of the court not allowing disclosure of prosecution records to a third party where there is an on-going investigation or prosecution. Restrictions on the scope of the proposed legislation are contemplated to ensure that the model act does not have the unintended effect of overriding or negatively impacting other legal principles related to the disclosure and use of prosecution records such as where documents are subject to

privilege or prohibited from disclosure by law. The report notes that further work will need to be undertaken on the model legislation such as its impact on undertakings given by defence counsel to the Crown regarding disclosure and use of prosecution records; how the scheme would be aligned with freedom of information and privacy legislation; and whether the process should apply in child protection proceedings.

During the discussion, presenters indicated that the process created by the uniform Act was not intended to impede existing consensual sharing of information processes and would apply only when the informal process is malfunctioning. Presenters noted that the Working Group was of the view that the scheme would be better developed as a stand-alone Act or provisions that can be incorporated by jurisdictions to existing statutes rather than amending various court rules, which would be a difficult exercise.

Presenters sought the views of delegates regarding the insertion of a purposive clause in the scheme to assist in providing interpretive direction. In this respect, one delegate noted that some jurisdictions do not, as a rule, allow purposive clauses to be included in legislation and it is also difficult to capture the intent of a whole statute in a purposive clause.

Presenters informed delegates that the Working Group is currently considering whether a different process should apply in child protection cases, disciplinary proceedings, public inquiries and coroners' inquiries. With respect to child protection cases, presenters noted that there are two strong competing public policy concerns to be considered: maintaining the integrity of the criminal process and the need to act quickly to protect a child at risk. Further consideration is being given to whether the process should be streamlined or whether the rebuttable presumption currently in the scheme should apply. Delegates were informed that the Working Group intends to consult experts on these issues including the Federal-Provincial-Territorial Coordinating Committee of Senior Officials (Family Justice). It was noted that case law currently being developed regarding disclosure of information in child protection cases and protocols currently being drafted in the province of Ontario will serve to inform the work of the Working Group.

One delegate queried whether the Working Group intends to examine the substantive aspects of this issue more fully; in particular, whether the uniform legislation should specifically address what information is not accessible; whether the meaning of "public interest" should be specifically tailored to ensure the uniform legislation does not leave important components to jurisdictions, thereby avoiding inconsistency of key elements of the test to be applied; or whether there should be a very high threshold before the Court can authorize access to documents, perhaps even higher that what was proposed in the *Wagg* decision. In response, presenters indicated the substantive aspect of the scheme has not yet been completely examined and that further work will need to be developed.

The Chair of the Civil Section thanked the presenters for updating the Conference on the work. After discussion, the following resolution was presented to delegates:

RESOLVED:

THAT the Joint Civil/Criminal Section Working Group be directed to continue to consider the issues raised in the Report and the directions of the Conference and that it prepare a Uniform Act and commentaries for consideration at the 2010 meeting.

JOINT WORKING GROUP ON MALICIOUS PROSECUTION – Report

Presenter: Erin Winocur, Crown Counsel, Criminal Law Policy Branch, Ministry of the Attorney General of Ontario.

The 2009 report notes that the Working Group presented a report with a proposed scheme for discussion by delegates at the 2008 annual meeting. The proposed scheme intended to address specific concerns principal among which are those resulting from courts conflating the third and fourth elements of the test for liability for malicious prosecution as set out in the 1989 Supreme Court of Canada decision in *Nelles* v. *Ontario* [1989] S.C.R. 601. The Working Group's proposed scheme provides that the four elements laid out in *Nelles* to establish liability for malicious prosecution ((1) proceeding was initiated by defendant; (2) prosecution was terminated in favour of the plaintiff; (3) absence of reasonable and probable cause; (4) there was malice or that the primary purpose of the prosecution was other than that of carrying the law into effect) must always be proven in a civil action for prosecutorial misconduct, including evidence of improper motive as an indicator of malice.

Leave to appeal to the Supreme Court of Canada was granted in *Miazga* v. *Kvello Estate* [2007] S.J. No. 247 on February 7, 2008. The Working Group anticipated reconvening after the decision was released to consider whether changes to their proposed scheme would be required and to present an updated model scheme for discussion at the 2009 annual meeting. However, while oral argument was presented on December 12, 2008, the judgment was still on reserve at the time of the 2009 Conference. Accordingly, the 2009 report briefly summarizes the submissions made by the parties and the interveners, all of whom focused on either the third or fourth elements of the test in *Nelles* or both, and highlights the arguments presented in facta before the Supreme Court of Canada. These arguments focused on two main issues: 1- What should be the test for reasonable and probable grounds? 2- How do you find malice and can it be inferred from the absence of reasonable and probable grounds?

The Working Group will review their proposed scheme in light of the Supreme Court of Canada decision in *Miazga* and prepare an analysis of the relation between the two and potentially amend the proposed scheme as a result of the reasons set out in the decision.

The Chair of the Criminal Section thanked the presenter for the overview of the submissions. After the presentation, the following resolution was presented:

RESOLVED:

THAT the Joint Civil/Criminal Section Working Group be directed to:

a. continue its work on the issues raised in the Report in accordance with the direction of the Conference;
b. monitor the results of the *Miazga* appeal and its impact on the recommendations of the Working Group; and
c. report back to the Conference at the 2010 meeting.

JOINT WORKING GROUP ON INTERPROVINCIAL SERVICE OF OFFENCE NOTICES – Report

Presenter: Lee Kirkpatrick, Head of Prosecutions, Yukon Department of Justice

At the 2008 Conference, the Criminal Section passed a resolution to, together with the Civil Section, examine how provincial offence notices are served on accused persons in other jurisdictions and develop a consistent statutory approach for consideration by all jurisdictions.

The Working Group discussed existing practices in Quebec, Yukon and Alberta. In all three jurisdictions, the *Criminal Code* procedure regarding personal service/service to someone over 18 years old was used for the most serious offences. Quebec also provides for extra-provincial service for these, if there is an agreement in place with the other jurisdiction. However, no agreements are in place at this time.

For lesser offences, there are differences in procedures amongst the three jurisdictions. No jurisdiction specifically allows for service of long form informations extra-jurisdictionally.

The Working Group sought direction from the Conference to continue its work and elicit input from other jurisdictions in order to determine what common practices might form the basis for a consistent statutory approach. Several jurisdictions offered support and named possible additional participants for the Working Group.

A recommendation was made that the Working Group review the *Uniform Regulatory Offences Procedure Act* to inform the work of the Working Group.

The Chair of the Criminal Section thanked the presenter and the members of the Working Group for preparing the report. The following resolution was presented to delegates:

RESOLVED:

THAT the Joint Civil/Criminal Section Working Group be directed to consider the issues raised in the Report and the directions of the Conference and report back to the Conference at the 2010 meeting.

TAX-FREE SAVINGS ACCOUNTS – Report and Amendments to Uniform Act

Presenter: Nolan Steed, Q.C., Justice and Attorney General, Alberta

Mr. Steed presented a report regarding tax-free savings accounts (TFSA). In 2008, amendments to the Income Tax Act (ITA) allowed the establishment of a TFSA on or after January 1, 2009. Income and capital gains earned are not taxed, but contributions are not deductible for income tax purposes and investment income including capital gains earned in a TFSA is not taxed even when withdrawn. The individual holder of a TFSA is able to designate a beneficiary of a TFSA.

The Conference has recognized the need to address beneficiary designation issues in relation to future income security plans in adopting the *Uniform Retirement Plan Beneficiaries Act*. The 2009 paper recommends amending the *Uniform Retirement Plan Beneficiaries Act* to allow for designating new types of savings arrangements.

The Conference agreed with the recommendation in the report and suggested that a note be added to address whether or not the amendments should be retroactive. It also noted that since not every plan covered under the uniform legislation is a retirement plan, the Uniform Act should be renamed the *Uniform Beneficiaries Designation Act.*

An additional question was raised as to whether a uniform project ought to be undertaken to address the question of whether or not proceeds that go to a beneficiary upon death become part of the deceased's estate, and thus are available to pay the obligations of the estate. In Alberta, legislation has clarified this issue. It was agreed that this suggestion should be passed to the Advisory Committee for further consideration.

RESOLVED:

THAT the amendments to the *Uniform Retirement Plan Beneficiaries Act* be adopted, including changing the title of the Act to the *Uniform Beneficiaries Designation Act* and adding a note with respect to retroactivity.

CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS – Oral Report

Presenter: John Gregory, Ontario Ministry of the Attorney General

In 2008, the Conference received 2 reports: the first concluded that the convention's provisions could be adopted by common law jurisdictions without difficulty. The second concluded that the convention's provisions regarding the electronic equivalent of writing may be incompatible with the Quebec Civil Code. At that time, the Conference

recommended that this issue be monitored. Mr. Gregory presented an update on recent progress in this matter.

Eighteen jurisdictions have signed the Convention, and the American Uniform Law Commission has urged ratification. The federal government has recently urged ULCC to revisit this Convention in light of the interest expressed by some provincial/territorial jurisdictions, and because of the benefits of uniform implementation across the country. Because of the federal state clause, if Canada were to ratify the Convention, it would be up to each province or territory to also ratify in order for the Convention to be applicable. Quebec could opt out of ratification, for example.

Ratification would help reassure Canadian companies who are doing business with foreign jurisdictions that the laws regarding electronic communication are applicable to their undertaking would be more or less the same as those they are subject to domestically. The Convention would also be applicable to the interpretation of other international conventions, such that future amendments to international conventions could be done electronically.

Mr. Gregory noted that the Americans are progressing toward ratification, there are advantages to Canadian businesses from ratification, and the Convention has a neutral affect on common law jurisdictions. As such, ratification by Canada seems to be a sensible choice. Implementing legislation could be brought to the Conference next year.

Quebec delegates stated that Quebec is not interested in the Convention and would not ratify it. They urged common law jurisdictions also to reject the Convention, as it may be inflexible when dealing with emergent technologies (further detail is contained in Jeanne Proulx's 2008 paper). It was suggested that a working group address this concern.

RESOLVED:

THAT the report be considered and, if appropriate, a working group be established and directed to report back to the Conference in 2010.

UNIFORM TRUSTEE ACT – Report and Draft Uniform Act

Presenters: Peter Lown, Q.C., Alberta Law Reform Institute
Russell J. Getz, British Columbia Ministry of the Attorney General

At the 2008 meeting, the Conference agreed to a new project proposal which would create new legislation to replace existing trustee statutes. The uniform law would act as a default statute which would be used to address issues that are not explicitly addressed in the trust instrument. The uniform law would include prudent investor rules, as recommended by earlier ULCC work.

Mr. Lown and Mr. Getz provided progress report on behalf of the working group, which identified several issues for policy consideration:

1. If there is more than one trustee, must they act unanimously if the terms of the trust are silent, or should a majority action be the default rule? The working group prefers to allow action by the majority, unless the trust instrument states otherwise.
2. While beneficiaries may terminate a trust prematurely in certain circumstances, the law is unclear as to whether beneficiaries may also vary the terms of a trust. The working group proposes to allow variation or termination without court approval, as long as all beneficiaries have been identified, are of full age and capacity, and have consented. If not all beneficiaries meet these requirements, the court would be enabled to approve the variation/termination on behalf of a beneficiary. Also, a court would be enabled to approve an arrangement in the fact of opposition by a beneficiary, if certain conditions are met.
3. Should there be a uniform general charitable law statute, separate from the trustee legislation? The working group felt that the law of charitable trusts is a big area, and that this project should not venture into it. Delegates to the Conference expressed agreement with this approach.
4. Are the rules against perpetuities and accumulations still valid and necessary? The working group agrees that it is not appropriate to continue these rules in modern day trusts.

RESOLVED:

THAT the working group be directed to consider the issues raised in the Report and the directions of the Conference and that it prepare a Uniform Act and commentaries for consideration at the 2010 meeting.

HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS – Report

Presenter: Kathryn Sabo, Justice Canada

Ms. Sabo presented a status report on behalf of the working group. This Convention was adopted by The Hague in 2005, and applies to proceedings between commercial parties when there is an exclusive choice of court provision. Ms. Sabo explained that the Convention would require that the court chosen by the provision is obliged to exercise its jurisdiction. A court not chosen is obliged not to exercise jurisdiction. There is no application of the principle of *forum non conveniens*. Further, a court with jurisdiction is obliged to recognize and enforce a judgment arising in accordance with the Convention. There is some opportunity for a court to review damages awards that go beyond actual loss or harm, though.

The Convention is in line with the series of implementing acts regarding court jurisdiction and recognition of judgments. While there may be some overlap between this Convention and others, there is not expected to be any conflict.

Over the last year, the working group continued to prepare the uniform implementing Act and commentaries. The current product needs to be reviewed by legislative drafters.

Ms Sabo also made a general comment regarding the language used by ULCC in its implementing legislation. Frédérique Sabourin has examined the language used by ULCC in its implementing legislation and her work has revealed significant variations in the language. Further consideration should be given to create more uniformity within implementing acts. This issue was referred to the Advisory Committee.

RESOLVED:

THAT the uniform implementing Act and commentaries be approved in principle;

THAT following a review of the uniform implementing Act, should no substantive change to the uniform implementing Act and commentaries as considered by the conference be required and should the Civil Section Steering Committee consider it appropriate; the uniform implementing Act and commentaries be circulated to the jurisdictional representatives. Unless two or more objections are received by the Executive Director of the Conference by January 31, 2009, the draft Act should be taken as adopted as a uniform implementing Act and recommended to the jurisdictions for enactment.

IDENTITY THEFT: BREACH NOTIFICATION – Report and Draft Uniform Law

Presenter: John Gregory, Ontario Ministry of the Attorney General

In 2008, the Identity Theft working group was directed to prepare a draft Uniform Act to impose a duty on entities holding personal information to notify people if the security of the information has been compromised. Mr. Gregory presented a report and draft Uniform Act on behalf of the working group. The draft provisions could be added to privacy legislation already in existence in each jurisdiction, and the provisions would apply where a holder of personal information has reason to believe that the information has been accessed in a manner not authorized by the privacy legislation. If that access presents a risk of significant harm to the people to whom the information relates, the holder must notify them of the breach of security.

The working group sought further direction from the Conference on a number of issues. Mr. Gregory also advised that the working group varied somewhat from the instructions of the ULCC from 2008 on the issue of who should be notified of the breach. Rather than requiring information holder to advise the Commissioner of a breach and abide by the subsequent directions of the Commissioner with respect to who must be notified, the

working group decided it would be best to impose notification obligations directly on the information holder. The goal is not to overburden Commissioners, and also to reduce delay between the breach and notification thereof.

Discussion also ensued regarding whether privacy Commissioners should be notified of every single breach, or only those where the breach could result in a risk of significant harm. Also, what amounts to a risk of significant harm? A delegate recommended that the commentary provide some examples. It was noted that there may be a danger in introducing a threshold for notifying the privacy Commissioner, given that a data holder may be tempted to underestimate the harm so that reporting is not necessary.

With respect to breach notification when police have indicated it could harm an ongoing investigation, some delegates indicated that there may be a way to limit disclosure rather than completely rejecting disclosure. The working group should keep sight of the overall goal of protecting individuals at risk of serious harm, in this context.

The working group plans to consult with Commissioners across the country and proposes to present a Uniform Act for adoption in 2010.

RESOLVED:

THAT the working group be directed to:

a. continue its work based upon the Report and discussion at the Conference
b. carry out consultations with stakeholder groups; and
c. prepare a Uniform Act and commentaries for consideration at the 2010 meeting.

WILLS AND SUCCESSION CONFLICT PROVISIONS – Report

Presenter: Professor Gerald B. Robertson, Q.C., Professor of Law, University of Alberta

Professor Robertson presented his paper on conflict of law issues in succession law, focusing on possible issues for reform of the choice of law rules directly relating to (1) testate succession, (2) intestate succession and (3) matrimonial property rights on death.

(1) Testate succession: The *Uniform Wills Act* (as amended in 1966) codifies the common law choice of rules with respect to testate succession. It adopts a policy of upholding the validity of wills wherever possible, so as to give effect to the intention of the testator. Currently, Canadian jurisdictions have implemented the choice of law provisions in the *Uniform Wills Act* to varying degrees. While the paper recommends that some changes be made to the *Uniform Wills Act,* it also urges those jurisdictions that have not implemented the uniform legislation to consider doing so.

(2) Intestate succession: The principle of scission, which requires different choice of law rules for moveable and immoveable property, gives rise to a particular problem that occasionally results in the surviving spouse "double dipping" with respect to his or her preferred share on intestacy. Most commentators agree that double dipping is inequitable and is inconsistent with the underlying policy of giving effect to the presumed intention of the average deceased person. The paper sets out several possible approaches to a legislated solution. Another issue in intestacy relates to whose law determines entitlement to the preferred share. Does it rely on the existence of a valid marriage, or can those who are not legal spouses also be eligible? Whose definition of "common law spouse" would apply?

(3) Matrimonial property and succession: Whether a court characterizes something as a succession issue or a matrimonial property issue could have a significant effect on the determination of which jurisdiction's law applies. Consideration should be given to including in uniform legislation choice of law provisions which would address how to characterize the division of matrimonial property upon death.

RESOLVED:

THAT the paper be received and a working group be established and directed to consider the paper and report back to the Conference in 2010.

SUBSTITUTE HEALTH AND PERSONAL CARE DECISION MAKING – New Project Proposal

Presenter: Laura Watts, British Columbia Law Institute and Canadian Centre for Elder Law Studies

This new project proposal, presented by Ms. Watts, involves a two-part law reform project on Substitute Health and Personal Care Decision-making: a Phase 1 'landscaping' of current legislation and areas of possible harmonization for health care substitute decision-making in Canada, and a Phase 2 development of uniform or standardized processes, forms or legislation based on the findings of Phase 1.

The Canadian population is aging, is increasingly mobile and is interested in understanding and using systems for health and personal care substitute decision-making. A harmonization of substitute health and personal care systems will benefit individual Canadians who wish to make choices regarding future incapacity. In the current absence of harmonization, individuals are often left to commence costly and lengthy guardianship proceedings or to negotiate the systems themselves.

Some areas of exploration for uniformity or standardization might include: default temporary substitute decision-makers, emergency medical responses, language commonly found in health and personal care directives, formal validity of documents, and inter-jurisdictional recognition etc.

Delegates discussed the possible scope of this project, and were supportive of including an assessment of supportive decision-making provisions in Part 1, but were concerned about getting too deeply involved in health law. Some delegates noted that the benefits of uniformity in this area should make it a priority for the ULCC.

RESOLVED:

THAT the new project report be considered and, if appropriate, a working group be established and directed to report back to the Conference in 2010.

AMERICAN UNIFORM LAW COMMISSION and STANDING COMMITTEE OF ATTORNEYS GENERAL (SCAG) – Oral Report

Presenters: Robert A. Stein, Uniform Law Commission (United States)
Amanda Davies, Standing Committee of Attorneys General (Australia and New Zealand)

In his address to the Conference, Mr. Stein provided an outline of the process followed by Uniform Law Commission, which while similar to that of the ULCC is not the same.

Generally speaking, their "Scope and Program" Committee receives 25-30 new project ideas a year. After a year of study and consultation, the Committee recommends 5 or 6 projects to the Executive Committee, which in turn normally will commit to 2-3 new projects each year.

Once a new project is chosen, a drafting Committee of 8-10 Commissioners, supplemented by Bar Association advisors and specialists, meets twice a year. First reading of a proposed uniform law is held at the following Conference. In year 2, the proposed uniform law is read line by line and debated. Debates follow parliamentary procedures, and each process ends with a vote. If a majority approves, a uniform law will be adopted by the Uniform Law Commission.

Mr. Stein identified a number of areas where the Uniform Law Commission is collaborating with ULCC. He also identified some further projects that the Commission is working on, including work in the areas of misuse of genetic information in employment and insurance, military services and overseas absentee workers, oversight of charitable assets, and bringing notarial documents into the electronic age.

On behalf of the Uniform Law Commission, Mr. Stein expressed an interest in future joint projects with ULCC to address areas of shared values and common principles, similar to the previous project on unincorporated non-profit associations. Some possible areas of common interest include mental health directives, emergency health worker volunteers, and Mareva injunctions.

Ms. Davies provided an update on the work of the Standing Committee of Attorneys-General (SCAG) over the last year. She began with a reminder that SCAG is a Ministerial Council, with working groups comprised of officials from Justice and Attorney General that conduct informal consultations with non-government organizations and stakeholders.

SCAG is currently focusing on six main themes: indigenous justice, the justice system, harmonization, developing court excellence, disadvantaged groups, and planning for the future. Its most recent meeting in August focused on indigenous issues, and there are plans for a stakeholder conference in November specifically addressing offending and victimization in indigenous communities.

A harmonization conference was held in November 2008 where it was recommended that SCAG look at interstate recognition of court and guardianship tribunal orders, as well as harmonization of substitute decision-making instruments. SCAG will be focusing its efforts on distinguishing between areas of harmonization and areas where regional differences should be expected and valued, but best practices might be useful.

SCAG is also working on projects relating to personal property security, artificial conception and assisted reproduction, the Hague Convention on Choice of Court Agreements, the Convention on the use of Electronic Communication in International Contracts, and anti-discrimination legislation.

RESOLVED:

THAT the ULCC express its thanks to Robert Stein, President of the Uniform Law Commission, and Amanda Davies of the Standing Committee of Attorneys General for their interesting and informative presentations.

PRIVATE INTERNATIONAL LAW – Report

Presenter: Kathryn Sabo, Justice Canada, International Private Law Section

Ms. Sabo provided an overview of activities and priorities of the Federal Department of Justice in International Private Law. A draft written report was also provided to delegates which outlines the Department's work in International Commercial Law, Judicial Cooperation and Enforcement of Judgments, Family Law, and Protection of Privacy. The final version of this document will be mailed to all delegates and will be available on the ULCC website.

Some highlights of the last year include:

- there was a diplomatic conference regarding Unidroit's project on Harmonized Substantive Rules Regarding Indirectly Held Securities, which has not yet been finalized. An explanatory report will be prepared before the Convention is finalized.

- the Unidroit Convention on International Financial Leasing has been finalized.
- there will be a special commission at the Hague Convention this February to address cooperation conventions, including the *Convention Abolishing the Requirement of Legalization for Foreign Public Documents* (Canada is working to implement this), the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters* (Canada is a party), the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,* and the *Convention on International Access to Justice.*
- the federal Department of Justice has established a new advisory group of academics, which had its first meeting in December of 2008.
- on October 14, 2009 the Department of Justice is hosting a free seminar on harmonization of private law at the international level. Everyone is welcome.

At the moment, fewer projects are at the negotiation stage, so more focus will be put on implementation of conventions. Priorities include the *Convention on the Law Applicable to Trusts and their Recognition, Convention Providing a Uniform Law on the Form of an International Will, International Interests in Mobile Equipment Convention* and its *Aircraft Protocol, Conventions on the Limitation Period in the International Sale of Goods, ICSID Convention, Convention on the Protection of Adults, Convention on the Protection of Children,* and the *Convention Abolishing the Requirement of Legalization for Foreign Public Documents.*

All jurisdictions are strongly encouraged to adopt the ICSID Convention. It is important to have this legislation in place across the country in order to ensure that Canada can fully meet all of its treaty obligations.

TRUST INDENTURE PROVISIONS – New Project Proposal

Presenter: Wayne Gray, Canadian Bar Association
McMillan Binch LLP

The new project proposed and presented by Mr. Gray includes 2 phases. Phase 1 would involve compiling a set of recommendations that could be adopted federally and in all provinces and territories either as stand-alone legislation or as a discrete component of each jurisdiction's general corporate legislation. Phase 2 would involve developing a Uniform Act to implement the recommendations.

Trust indentures are used primarily by corporations to raise debt financing with investors. A trust indenture is part of a debt instrument package and sets out the financial terms of debt securities. Those terms will typically include the interest rate, repayment terms and financial covenants. The trust indenture provisions serve to 1) ensure that holders of debt obligations are served by a disinterested trustee who will operate with the high requisite duty of care outlined in the various corporate statutes in each jurisdiction, and 2) ensure that full and fair disclosure is made to holders of debt obligations at the issue of such debt

obligations but also throughout the life of such securities. In theory, then, the individual security holders no longer have to fend for themselves in the event of default by the issuer.

Investor protection regimes should apply uniformly irrespective of the jurisdiction of the issuer or the jurisdiction of the investor. However while U.S. law is uniform, Canadian law is highly fragmented. There are trust indenture provisions at the federal level as well as in six provinces and all three territories. Canadian law is not internally consistent nor generally consistent with U.S. law. Arguably, therefore, Canada's current patchwork of corporate laws governing trust indentures is not fully serving anybody: issuers, trustees, or retail and institutional investors. This is a neglected area of law, and uniform legislation could be expected to be well received by capital markets and legislators.

RESOLVED:

THAT the new project report be considered and, if appropriate, a working group be established and directed to report back to the Conference in 2010.

ADVISORY COMMITTEE REPORT AND NEW PROJECTS – REPORT

Presenters: Peter Lown, Q.C., Alberta Law Reform Institute
Clark Dalton, Uniform Law Conference

Mr. Lown and Mr. Dalton presented the report of the Advisory Committee, which has established its mandate and its relationship to the Civil Section and to the Executive. It has been active in planning the medium to long-term research agenda of the Conference, notwithstanding the severe financial challenges under which it has operated.

The Advisory Committee will manage the medium and long-term research agenda of the conference. Included on the Advisory Committee is at least one of the Civil section Chair or incoming Chair, as well as the Chair of the Criminal Section for purposes of planning joint projects. It is also anticipated that the Chair of the Drafting Section will attend some Advisory Committee meetings as necessary.

In addition to its management and planning of the various projects which are underway, the Advisory Committee has taken on five management issues:

1. Development of selection criteria, to identify potential projects and to make a rational and educated decision as to which projects to take on.
2. Development of an implementation protocol.
3. Development of a communications strategy.
4. Development of a four year rolling plan, to use as a planning document.
5. Examination of the common application form developed by law foundations across the country. Are individual projects eligible for law

foundation funding, and how should multi-jurisdictional work be presented for financial consideration?

Delegates reviewed and discussed the four year project plan, which outlines the names and timelines of those projects that are in development with 2-3 year horizons. Not all ongoing projects are included in the four year project plan. A recommendation was made that a similar document that outlines all of ULCC's ongoing and upcoming projects would be helpful.

RESOLVED:

THAT the Conference accept the report of the Advisory Committee and the direction undertaken by the Advisory Committee and the Steering Committee of the Civil Section.