

# **UNIFORM LAW CONFERENCE OF CANADA**

## **CIVIL LAW SECTION**

### **INTERJURISDICTIONAL SUBPOENA ACT UPDATE**

#### **PROPOSAL AND REQUEST FOR PROJECT PARTICIPANTS**

*Readers are cautioned that the ideas or conclusions set forth in this proposal, including any comments, options or recommendations considered, have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the eventual Working Group, of the Conference or of its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.*

**Winnipeg, Manitoba**

**August 7 - 11, 2011**

**Title:** *Uniform Interprovincial Subpoena Act, Update*

**Section:** Civil Law

**Date Started:** August 2011

**Project Co-Leaders:** Ann McIntosh and ???

**ULCC Volunteers:** ???

**Related Projects:** None

### **History and Current Status**

The ULCC's *Uniform Interprovincial Subpoena Act* ("the Uniform Act") was adopted in 1974 and revised in the late 1990s. Manitoba was the first jurisdiction to enact interprovincial subpoena legislation in 1975, and Nova Scotia was the last in 1996 (Nunavut inherited its interprovincial subpoena legislation from the NWT).

*The Uniform Act is attached as **Appendix A**.*

All 12 of Canada's common law jurisdictions have interprovincial subpoena legislation modeled after the ULCC version, although there are some notable differences. For example, Manitoba's *The Interprovincial Subpoena Act*, C.C.S.M., c. S212, only recognizes extraprovincial subpoenas issued by courts, whereas Saskatchewan's *The Interprovincial Subpoena Act*, R.S.S. 1978 (Supp), C. I-12.1, recognizes extraprovincial subpoenas issued by courts, as well as by boards, commissions, tribunals, and other bodies or persons that have the power to issue subpoenas.

### **Issues to be Considered**

The interprovincial subpoena acts and Uniform Act have not evolved to meet today's socio-economic and technological realities. The Uniform Act is representative of each jurisdiction's specific legislation in this regard.

### **AUTHORITY AND PROCEDURE FOR ISSUING AN INTERJURISDICTIONAL SUBPOENA**

The Uniform Act imposes a laborious, court-based vetting process for a subpoena in both the issuing and receiving jurisdictions.

- Subsection 5(1) requires that a judge in the issuing jurisdiction certify and seal the subpoena according to the criteria described in paragraphs (a) and (b). This judge-dependent certification requirement may delay proceedings and sap vital judicial resources better expended elsewhere.

Following Saskatchewan's approach, entrusting the subpoena issuing body to determine the subpoena's necessity and appropriateness, is more consistent with recent judicial treatment of administrative bodies and would be procedurally beneficial.

- Subsection 2(1) suggests that a court in the receiving jurisdiction will not receive and adopt the subpoena unless it is accompanied by the certificate obtained under ss. 5(1) and by the witness fees and traveling expenses specified in Schedule 1. If the inclusion of witness fees and traveling expenses is in practice required, the adoption and enforcement of interjurisdictional subpoenas may be inhibited by this additional administrative burden. Instead, ss. 2(1) might be rewritten to simply require filing the subpoena and sealed certificate with a court in the receiving jurisdiction, at which time it would become enforceable there.
- Finally, perhaps the Uniform Act could provide for the electronic transmission of documents between jurisdictions and courts.

### **WITNESS IMMUNITY AND OTHER PROTECTION FOR WITNESSES**

To comply with section 3 of the Uniform Act, before an interjurisdictional subpoena may be received, an agent must be retained. The agent must appear in court in the receiving jurisdiction and produce legislative proof that section 6 or analogous witness protections will be available for the benefit of the subpoenaed party. As outlined, section 6 has been adopted in 12 jurisdictions.

We submit that this cumbersome requirement for proof regarding witness immunity might be removed. Alternately, the reciprocal guarantees of witness immunity and other witness protections presently found at section 6 and in the form of the subpoena could be revised so as to mitigate the highly disproportionate procedural burden caused by section 3.

### **METHODS OF COMPLIANCE WITH AN INTERJURISDICTIONAL SUBPOENA**

The Uniform Act responds to the out-of-jurisdiction witness as if the only way for a witness to comply with an interjurisdictional subpoena is by physically attending in the issuing jurisdiction. In many cases this can be unnecessarily cumbersome and expensive given the evolving technological, social and legal environment. For example,

- Video-conference attendance, including testimony and cross-examination, are now possible;
- Nunavut Courts and Tribunals quite commonly allow teleconference attendance and even testimony; or
- If appropriate to the proceedings in question, a subpoenaed witness' testimony could be filmed within the receiving jurisdiction and emailed or couriered to the issuing jurisdiction.

Where the tribunal or decision-maker seeking evidence considers these other options to be appropriate and fair in all the circumstances, they would be much cheaper than transporting, accommodating and providing for the witness on a multiday journey to and from the issuing jurisdiction.

Bear with us for emphasizing that the inconvenience and expense of the present approach under the Uniform Act are magnified where the costs of transport to and

accommodations and meals in a jurisdiction are extraordinary. Nunavut may be the best case on point, but many other provinces and territories face similar challenges in their northern/remote regions, or when the witness of interest has relocated to such a place.<sup>1</sup>

Extreme prices make conventional, in-person proceedings following an interjurisdictional subpoena very inefficient or even prohibitive in a remote jurisdiction like Nunavut. The disproportionate expense of travel to and between remote communities, especially fly-in communities (which comprise all of Nunavut's communities), makes in-person attendance following service of an interjurisdictional subpoena prohibitively inefficient.

We recommend that the revision provide a presumption of in-person response to interjurisdictional subpoenas, but also the discretion to arrange or utilize cheaper, faster alternatives when the issuing tribunal or decision-maker considers fit.

### **OTHER MATTERS**

Without limiting the other matters to be considered by the ULCC working group, the revision of Sch. 1 should be considered. The Schedule's calculation process for witness fees and traveling expenses is unclear and the minimum amounts specified for fees and expenses significantly underestimate today's salaries and costs of goods and services.

- Schedule 1 stipulates that the cost of the witness' stay for at least three days in a hotel must be covered, in an amount not less than \$60.
- The Schedule also requires that the cost of the witness' meals during the journey and during at least three days at the place of attendance must be covered, in an amount not less than \$48.
- Minimum hotel and meal allowances of \$20/night and \$16/day grossly underestimate average hotel and meal costs in 2011. The Schedule's provision for a \$20/day allowance totaling a minimum of \$60 is also insufficient for contemporary lost-opportunity costs.

Although these described allowances are minimums, there is an increasing tendency on the part of government / financial officials to issue payment only in response to a clear legal requirement or order. Responding to impecunious witnesses with a promise of reimbursement may also cause difficulty, hardship or a failure to appear. Some options for consideration might include

- Creating a regulation-making authority or other vehicle whereby
  - travel expenses and per diems could be tied to government rates; or
  - travel could be arranged by the issuing authority in appropriate cases.
- Increasing the minimum witness fee and travel expense amounts.
- Perhaps the discretion to set witness fees and traveling expenses should be unfettered except as expressed in an updated subpoena form, given

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<sup>1</sup> The only commercial passenger transport into Nunavut is by air and the cheapest roundtrip air ticket from southern Canada to Iqaluit (seat of the Nunavut Court of Justice) is approximately \$1500. Hotel accommodations in Iqaluit are on the order of \$150-250 per night, while food costs are 50-60% higher than they are in most major Canadian cities.

- the wide variance of circumstance and expense between jurisdictions, regions and proceedings;
- the diversity of witnesses involved; and
- the potential to add new means of compliance with or appearance following an interjurisdictional subpoena.

## **Rationale for ULCC Development**

### **WHY IS THIS PROJECT WORTHWHILE?**

The proposed update will benefit an expanding spectrum of administrative and enforcement proceedings within territorial or provincial jurisdiction, such as those arising in professional self-governance, environmental regulation and commercial dispute resolution. Non-exhaustive research on the types of proceedings likely to benefit from streamlining the interjurisdictional subpoena process, is summarized in **Appendix B**.

Further preliminary inquiries would indicate that northern tribunals and decision-makers, such as coroners, are so little assisted by the current Uniform Act that “persuasion” has taken over as the preferred approach when tribunals are securing needed evidence. The downsides are obvious:

- A witness may appear to have been persuaded, but not appear – at this point it is too late to initiate the steps required by the Uniform Act to secure their appearance and it may also be too late to contemplate a delay or reorganization of part or all of the proceedings;
- By receiving only the evidence available voluntarily, through persuasion alone, outcomes may be subtly or profoundly skewed, contrary to the interests of justice;
- In a proceeding or location requiring many such witnesses, persuasion all too frequently leads to “negotiation” about the timing of the hearing or appearance, and to the unreasonable delay of proceedings;
- When proceedings are delayed, the chance that one or more critical witnesses may move away increases, further increasing the need for recourse to more effective, efficient interjurisdictional subpoenas; and
- Having no reasonably efficient and effective enforcement mechanism for securing necessary evidence, the interests of justice and the objectives for which proceedings were initiated may be impacted, endangered or utterly thwarted.

Nunavut encounters these problems most importantly in regard to coroner’s inquests, which can take far too long to resolve, or become frustrated by delays or exorbitant costs due in particular to the continuous and rapid turnover in RCMP, medical, public-service/institutional staff such as prison guards or safety inspectors and other civilians likely to be involved in a particular incident. The approach of the current Uniform Act may be especially problematic

- For jurisdictions or regions with (all three apply in Nunavut)
  - a significant number of remote communities,
  - rapid turnover of population generally, regionally or within specific professions, and/or
  - a high degree of reliance on services delivered extra-territorially.

- For proceedings in which the professions commonly called upon to participate are highly mobile (e.g. RCMP, medical, and—in the case of professional discipline hearings—other relevant professionals or their clients).

More generally, high rates of immigration to and emigration from a jurisdiction will increasingly require interjurisdictional subpoenas in order to obtain required testimony, which, together with the higher per-subpoena service and appearance costs, may quite dramatically increase the cost of proceedings.

The impact of the development of the three territories and other remote areas of Canada since the 1990s, most particularly the development of their civil justice systems, appears evident in this proposal, and may not previously have been considered. Accordingly please consider a name change, e.g. *Interjurisdictional Subpoenas Act*, or similar.

The authors of this proposal work for the Nunavut Department of Justice and for the interests of *Nunavummiut*. We thank you for considering our proposal to update the *Uniform Interprovincial Subpoenas Act*. If you have any questions, we will be happy to consider them and answer if we can. We are, yours truly:

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## Appendix A

### Uniform "Interprovincial" Subpoena Act

#### INTERPROVINCIAL SUBPOENA ACT

(1974 Proceedings, pages 33, 189; 1998 Proceedings at page 53)

June 2001

1. In this Act,

(a) "court" means any court in a province and, where a board, commission, tribunal or other body or person in a province has the power to issue a subpoena, includes that board, commission, tribunal, body or person;

(b) "subpoena" means a subpoena or other document issued by a court requiring a person within a province other than the province of the issuing court to attend as a witness before the issuing court.

*(NOTE: In provinces where magistrates have power to issue subpoenas in civil matters in their official capacity and not out of a court, consideration should be given to a change in the definition of "court".)*

2. (1) A court (*enacting province*) shall receive and adopt as an order of the court a subpoena from a court outside (*enacting province*) if

(a) the subpoena is accompanied by a certificate signed by a judge of a superior, county or district court of the issuing province and impressed with the seal of that court, signifying that, upon hearing and examining the applicant, the judge is satisfied that the attendance in the issuing province of the person subpoenaed

(i) is necessary for the due adjudication of the proceeding in which the subpoena is issued, and

(ii) in relation to the nature and importance of the cause or proceeding is reasonable and essential for the due administration of justice in that province; and

(b) the subpoena is accompanied by the witness fees and travelling expenses in accordance with Schedule 1.

(2) The certificate to which reference is made in subsection (1)(a) may be in the form set out in Schedule B or in a form to the like effect.

3. A court in (*enacting province*) shall not receive a subpoena from another province under section 2 unless the law of that other province has a provision similar to section 6 providing absolute immunity to a resident of (*enacting province*) who is required to attend as a witness in the other province from all proceedings of the nature set out in section 6 and within the jurisdiction of the Legislature of that other province except only those proceedings grounded on events occurring during or after the required attendance of the person in the other province.

4. Where a person who has been served with a subpoena adopted under section 2 and given the witness fees and travelling expenses in accordance with schedule 1 not less than ten days, or such shorter period as the judge of the court in the issuing province may indicate in his certificate, before the date the person is required to attend in the issuing court, fails without lawful excuse to comply with the order, he is in contempt of court and subject to such penalty as the court may impose.

5. (1) Where a party to a proceeding in any court in (*enacting province*) causes a subpoena to be issued for service in another province of Canada, the party may attend upon a judge of (the Court of Appeal, or the Court of Queen's Bench, or a county court, or as the case may be) who shall hear and examine the party or his counsel, if any, and,

upon being satisfied that the attendance in *(enacting province)* of the person required in *(enacting province)* as a witness

(a) is necessary for the due adjudication of the proceeding in which the subpoena or other document has been issued; and

(b) in relation to the nature and importance of the proceedings, is reasonable and essential to the due administration of justice in *(enacting province)*;

shall sign a certificate which may be in the form set out in Schedule 2 and shall cause the certificate to be impressed with the seal of the court.

(2) The certificate shall be either attached to or endorsed on the subpoena.

6. A person required to attend before a court in *(enacting province)* by a subpoena adopted by a court outside *(enacting province)* shall be deemed, while within *(enacting province)* not to have submitted to the jurisdiction of the courts of *(enacting province)* other than as a witness in the proceedings in which he is subpoenaed and shall be absolutely immune from seizure of goods, service of process, execution of judgment, garnishment, imprisonment or molestation of any kind relating to a legal or judicial right, cause, action, proceeding or process within the jurisdiction of the Legislature of *(enacting province)* except only those proceedings grounded on events occurring during or after the required attendance of the person in *(enacting province)*.

#### **Non-application of Act**

7. This Act does not apply to a subpoena that is issued with respect to a criminal offence under an Act of Parliament.

*(NOTE: Most courts have authority to require the payment of additional witness fees and conduct money where the amount paid on the service of the subpoena is inadequate. If there is any doubt about such authority, a provision similar to the following should be added:)*

#### **Order for additional witness fees and expenses**

Where a person is required to attend before a court in *(enacting province)* by a subpoena adopted by a court outside *(enacting province)*, he may request the court to order additional fees and expenses to be paid in respect of his attendance as a witness and the court, if it is satisfied that the amount of fees and expenses previously paid to the person in respect of his attendance is insufficient, may order the party who obtained the subpoena to pay the person forthwith such additional fees and expenses as the court considers sufficient, and amounts paid pursuant to an order made under this section are disbursements in the cause.

*(NOTE: The following Schedule is recommended for consideration as Schedule of Witness Fees and Travelling Expenses. The amounts might be varied and other items might be added.)*



**SCHEDULE 1****Uniform Interprovincial Subpoena Act  
Witness Fees and Travelling Expenses**

The witness fees and travelling expenses required to be given to the witness upon service of an interprovincial subpoena shall be a sum of money, or sum of money together with valid travel warrants, sufficient to satisfy the following requirements:

The fare for transportation by the most direct route via public commercial passenger carrier between the witness' place of residence and the place at which the witness is required to attend in court, in accordance with the following rules:

If the journey or part of it can be made by air, rail or bus, that portion of the journey shall be by airline, rail or bus by tourist class or equivalent class via carriers on which the witness can complete his total journey to the place where he is required to attend in court on the day before his attendance is required.

If railway transportation is necessary for part of the journey and sleeping accommodation would normally be obtained for such a journey, the fare for sleeping accommodation shall be included.

In the calculation of the fare for transportation, the most rapid form of transportation by regularly scheduled carrier shall be accorded priority over all other forms.

If the material which the witness is required to produce in court is of such weight or size as to attract extra fares or charges, the amount so required shall be included.

2. The cost of hotel accommodation for not less than three days at the place where the witness is required to attend in court, in an amount not less than sixty dollars.

3. The cost of meals for the total journey and for not less than three days at the place where the witness is required to attend in court, an amount not less than forty-eight dollars.

4. In addition to the amounts described above, an allowance of twenty dollars for each day of absence from the ordinary residence of the witness, and the witness shall be paid on account of this allowance not less than sixty dollars.



## Appendix B

ISA Update Project Proposal, August 2011

### NON-EXHAUSTIVE ASSESSMENT OF THE PROJECT'S SCOPE OF APPLICATION/IMPACT

Type of Proceedings	Specific examples	Comments
Inquiries/Inquests	Coroner's Inquests Fatality Inquiries Public Inquiries	In addition to Coroners Inquests, we considered variations that would be analogous to the <i>Westray Mine Inquiry (Nova Scotia, 1992-97)</i>
Subpoena to appear before a Committees or Commission established by a Provincial/ Territorial Assembly	We considered the 2001 proceedings of the Standing Committee on Agriculture, Forestry and environment of Prince Edward Island and <i>A.G. Canada v. MacPhee et ors</i> 2003 PESCTD 06.  Integrity Acts  Elections/Controverted Election Acts	<i>"It is remarkable that senior officials and politicians at every level can be subpoenaed by a public inquiry to testify, and to produce for public examination their personal records such as their agendas and their credit card accounts, for example."</i> <i>Mr. Justice J.H.Gomery</i>
Enforcement Proceedings  i.e. Provincial/ Territorial Laws, Citizen's rights	See above – in addition  Labour/Employment Standards  Public Health  Environmental Protection & Rights  Lotteries, Alcohol and Gaming  Freedom of Information/Access  Health Information & Privacy  Human Rights Tribunals  Ombudsman, where applicable  Child Advocate, where applicable	
Professional Self Governance and Discipline – investigations and hearings.  Public Service Standards Enforcement?	Legal, Health, Accounting Professions  Many other self-governing occupations   Public Service Laws & Codes of Conduct	
Commercial Law & Dispute Resolution	Arbitration Act Collection Act Corporate Dissolution...	
Proof of a case drawing on transient or extra-territorial medical/psychiatric expertise	Guardianship & Mental Health? Child and Family Services & similar Drug detox/ mandatory testing and disclosure (bodily substances)	