

UNIFORM LAW CONFERENCE OF CANADA

PLENARY DISCUSSION DOCUMENT

**STRATEGIC PLAN BACKGROUND / GUIDE
FOR THE UNIFORM LAW CONFERENCE OF CANADA**

**Fredericton, New Brunswick
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Introduction

[1] The Uniform Law Conference of Canada has a long and proud history as one of the foremost law reform bodies in Canada. The continued success of the organization depends not only on the committed efforts of Jurisdictional Representatives who lead each delegation at the Conference, but on the delegates themselves. The genius of the Conference is that it brings together a wide range of expertise on criminal and civil law issues in a truly national forum. As described below, the Conference has and will continue to play a key role in law reform in Canada.

[2] However, one of the challenges that we face as an organization stems from the fact that Jurisdictional Representatives and delegates to the Conference are all volunteers, doing this important work “off the corner of their desks”. The combination of a significantly increased pace of law reform and change in both civil and criminal law has simultaneously increased the pressure on that volunteer base and often decreased the time available to devote to law reform. Notwithstanding these challenges and pressures the Conference has maintained a standard of excellence, making key contributions on important issues in civil and criminal law.

[3] Maintaining that standard has come at a cost. Longer term strategic thinking and planning has been sacrificed in order to focus on the urgent and immediate. This document, and the strategic discussions planned for the 2016 Annual Meeting are an attempt to correct that imbalance, and to focus efforts and energies on key longer term issues. Failure to do so in a robust and meaningful way may ultimately increase the urgent need to address these issues while limiting the available options. Time is not our friend on these matters. In order for this initiative to succeed, we need the full participant and engagement of all – from the newest delegate to those with long experience. This is a call for everyone to give serious thought, full participation, and active and continued engagement to this process.

[4] The Uniform Law Conference of Canada is facing several unique challenges and opportunities. It has become apparent that a broad strategic review is needed in order to properly respond to these challenges. The purpose of this document is to provide a framework and describe some guiding principles for that response. It is not intended to identify and solve all of the issues facing the Conference, but to describe key issues and propose a path forward for resolving them. Like all ULCC products, the success of this initiative will be found in the implementation of concrete actions and organizational changes to address these issues. Unlike other ULCC products, the implementation of these recommendations is uniquely within our control.

[5] Key issues are identified in the sections that follow. Each section is accompanied by a series of questions. These questions are intended to prompt analysis of the issues in advance of the Annual Meeting, and serve as a focal point for the discussion that we hope will start at the opening plenary, and continue through the week. We also hope that these discussions will

encourage the participation of all delegates in the important work of strategic planning and renewal that will take place throughout the coming year.

Identifying the Key Features of the Conference

[6] There are many government and non-governmental bodies involved in various aspects of civil and criminal law reform. However, there are several aspects to the Uniform Law Conference of Canada that make it unique, and singularly well suited to continue to address the pressing law reform issues of our time. A critical task is identifying and persuasively articulating these differences to governments and other stakeholders. The independence of the Conference, described in greater detail below, is a key feature that enables consideration of a wide range of issues from a non-partisan, non-political approach. This enables governments and other key stakeholders to refer what might otherwise be very sensitive issues to the Conference for consideration and analysis. That, along with the diversity of participants, are key distinguishing features between the Conference and law reform initiatives undertaken by officials on the instructions of their respective governments.

[7] The Conference is comprised of a Civil and Criminal Section. The Civil Section brings together government lawyers, private practitioners, legislative counsel, law reformers and academics to consider areas in which provincial and territorial laws would benefit from harmonization and modernization.

[8] The work of the Civil Section is generally done in working groups consisting of delegates and experts who work throughout the year to produce policy papers and Uniform Acts in both official languages for discussion and adoption at the Annual Meeting. At any one time the Section has approximately 8 to 12 active projects.

[9] The Civil Section also plays an important role in assisting the federal government in achieving its aims for the implementation of Canada's international obligations by producing Uniform Acts to facilitate implementation of conventions.

[10] One of the major areas in which the Section felt that jurisdictions would benefit from harmonization and modernization, was commercial statute law. In 1998 the Conference adopted its Commercial Law Strategy as a project to modernize and harmonize key elements of commercial law in Canada. The Strategy was subsequently adopted by Deputy Ministers of Justice and was approved by all Ministers of Justice in December 1999. Although the Strategy was rolled into the general work of the Section in 2007, during its tenure, over 28 Uniform Acts or amendments to Uniform Acts had been adopted by the Conference.

[11] Also in addition to the pan-Canadian projects of the Section, the ULCC, particularly with its American counterpart, the Uniform Law Commission (ULC), has strived to find with them areas of mutual interest in North America that would benefit from similar harmonization and modernization, including recent work on recognition of substitute decision making documents, access to digital assets, and a joint project of the ULCC Civil Section, the ULC, and the Mexican

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Center of Uniform Law on unincorporated nonprofit associations, which culminated in a Statement of Principles that each country was to use as a basis for draft legislation in that area.

[12] Criminal Section delegates, who include prosecutors, government policy makers, members of the defence bar, and members of the judiciary, consider specific resolutions put forward by the various delegations to amend criminal statutes or to refer issues pertaining to criminal law for further study. In addition, the Criminal Section also benefits from presentations and discussions on emerging issues in criminal law on topics that have included interlocutory and third party appeals, presentence custody and the right to state funded counsel in the criminal context. Criminal Section working groups are also formed from time to time to prepare detailed reports examining a wide range of issues. Examples of such reports include Defence Election Regarding Mode of Trial in Direct Indictment Cases, Enhanced Restitution for Fraud Victims and Exemptions from Mandatory Minimum Penalties. These reports provide a solid foundation for ongoing law reform efforts and can also assist in the coordination of related provincial legislative initiatives.

[13] Another more recent feature of the Criminal Section is the Open Forum, which offers delegates an opportunity to learn about initiatives that impact on the criminal justice system. For example, in 2014, delegates were invited to listen to a panel discussion on recent changes to forensic pathology in the Ontario's Criminal Justice System, reforms which aimed at minimizing the number of miscarriages of justice related to forensic pathology in Ontario following the 2008 report on *Inquiry into Pediatric Forensic Pathology in Ontario*.

[14] The work of the Criminal Section of the Conference assists the federal Government in identifying provisions of the *Criminal Code* and related criminal law statutes in need of legislative reform. The composition of the Criminal Section also makes it an invaluable venue for Justice Canada to conduct consultations on a whole range of criminal law issues. These consultations enable policymakers to obtain a national perspective from the "front lines" of those involved in the justice system.

[15] The unique features of the Conference include:

a) ***Institutional Memory and Capacity.*** The ULCC is the oldest law reform organization in Canada, operating since 1918 in the civil law context, and since 1944 with respect to the criminal law. Not only does the Conference consider the broad sweep of civil and criminal law, it does so from a national, bi-jural, bilingual, and thorough legal policy perspective. As a result, the Conference is uniquely suited to examine issues from a broad and considered perspective, rather than in the "heat of the moment" as a spasmodic response to the latest case or tragic headline.

b) ***The Composition of Delegations and the relationship between the Conference and its constituent FPT jurisdictions is complex.*** At one level, the Conference is supported by these governments and is a tangible commitment of their interest in uniform legislation and law reform. However, in an equally important sense, the deliberations and conclusions of the Conference are independent of government, which makes it different from other federal-provincial-territorial fora such as the Coordinating Committee of Senior Officials (Criminal

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Justice). While the Jurisdictional Representatives at the Conference are appointed by their respective federal, provincial and territorial governments, they do not officially represent those governments, nor bind them to adopting a particular proposal, resolution, or Uniform Act. Rather, Jurisdictional Representatives, and all delegates to the Conference, are independent of their respective governments, organizations or institutions. Also, while they may bring a perspective informed by the roles they play in those organizations, they come to the Conference to bring their best professional judgement, experience and expertise to the matters under consideration by the Conference. Both of these aspects of the independence of the participants at the Conference are essential to the significance of the recommendations and conclusions of the Conference. They are also an essential feature of the decision making process employed by the Conference.

c) ***Decision Making is Collaborative and Consensus Based.*** While it is true that all of the business of the Conference is conducted on the basis of resolutions, working group reports, recommendations, and Uniform Act statutes that are passed by a voting process, the work of the Conference that has the greatest impact is that which reflects a broad and deep consensus. The voting mechanisms employed by the Conference reveal those projects and proposals that have generated such a consensus. However, confidentiality is a key feature in maintaining this decision making process. As a result, the deliberations of the delegates of the Conference are confidential, and the minutes and records of the Conference do not attribute the votes to particular jurisdictions.

d) ***Delegates to the Conference bring a wide range of perspectives.*** Civil practitioners, policy counsel, government counsel, private bar, law reform agencies, prosecutors, defence counsel, academics, and members of the judiciary all participate fully in the Conference.ⁱ That breadth of participation is also reflected geographically, with delegates to the Conference coming from across Canada – from major urban centers to smaller and more remote places.

e) ***Joint sessions between the Criminal and Civil Sections.*** Another unique feature of the Conference is the possibility to explore issues that have both a criminal and civil component. The expertise of both sections allow for a joint study of the issue and provide an opportunity to explore solutions taking into consideration all aspects of an issue. Examples of these include the work completed by the ULCC on Extra-Provincial Authority of Provincially Appointed Police Officers and the work on Use of Crown Brief Disclosure in Collateral Proceedings.

Strategic Issues

[16] The following seven issues have been identified by the working group. They are listed here in no particular order of priority for the purposes of this draft:

The Untended Garden – Changing Roles and a dated Constitution

[17] The latest ULCC Constitution was adopted in 1990 and last amended in 1996. Since that time there have been several changes to the structure and function of significant components of

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the Conference. Individually, these changes were pragmatic and practical responses to the circumstances of the day. However, the cumulative effect of them has created a significant gap between the structure and process as outlined in the Constitution, by-laws, and related documents and the actual function of the Conference. Updating these documents is not mere busy work. Ensuring that the foundational and guiding documents of the Conference accurately reflect current or proposed best practices is an important step in ensuring transparency, accuracy, and accountability.

[18] While by no means an exhaustive list, the following elements in the Constitution and other documents need to be updated. Again, the order of appearance is insignificant:

a) ***The Role of the Executive Collectively and Individually.*** The role and responsibility of executive members is not as clearly delineated as would be helpful. This can lead to difficulties in ensuring that the governance and continuity functions of that group are properly understood and carried out. One possible solution is to delineate specific responsibilities for each role, including the President, Vice President, Past President, nominated Vice President, section Chairs and others. Proper definition and delineation of these roles would enable the Executive to more effectively carry out governance, planning, and administrative functions. More robust use of those coming onto and leaving the Executive would ensure appropriate continuity, workload distribution, and succession planning. A careful description and delineation of these roles would also enable a proper “gap” analysis between the current state and what might be a better or best practice. One of the critical functions of the Executive, described below, involves our relationship with FPT governments.

A related, but wider concern is the need to address the “brand and profile” of the ULCC within the broader law reform and legal community. A clear strategy and processes for defining, developing and maintaining that profile in that context must also be developed.

b) ***The Role, Function and Composition of the Advisory Committee on Program Development and Management (ACPD).*** This role should be clearly described, with roles and responsibilities carefully delineated. This would ensure that the Committee could properly focus on medium and long range project planning and management. It could also serve as both a training ground for perspective Executive members, as well as a repository of corporate knowledge and experience from past Presidents and other long serving Jurisdictional Representatives or delegates to the Conference.

c) ***The Finance Committee must be reconstituted and reinvigorated.*** As described in greater detail below, there are pressing immediate, medium and long-term financial issues. Ongoing work on these important issues by a dedicated finance committee is essential to the long term sustainability and viability of the Conference.

d) ***The Role of the International Committee.*** This Committee must be properly described and careful attention given to appropriate succession planning. While Peter Lown has done yeoman service to the Conference, and to our ongoing and productive relationships with our U.S. and Mexican counterparts, he is invaluable, not immortal. Proper succession in critical roles does not happen by accident.

e) ***The Role of Section Chairs (including nominated, incoming, and past).*** This role must be properly described so that individuals in these roles have a clear understanding of responsibilities, and of the organizational supports that exist to help them in this important work. One of the important roles played by the civil section chair in relation to the minutes of the civil section would benefit from clarification and greater support. The intent of the minutes, as an amalgam of the key discussions and policy decisions of the section is an important way where we can “show our work” and deliberative process to the public while maintaining the necessary confidentiality of the discussions and debates of the Conference. Consideration should be given to adding a secretary to the Civil Section to take responsibility for this important work. The chair of the Civil Section is also responsible for managing civil section working groups. This important aspect of the role must be clarified and coordinated with the review of the role of the ACPDM.

f) ***The Role of Jurisdictional Representatives.*** This role may also benefit from clarification. In addition to ongoing efforts in relation to implementation, J.R.’s could be tasked with other important functions such as maintaining contact with local CBA Sections and interested members of the profession, requesting their participation as delegates or members of working groups as appropriate. We should also explore the role of the J.R.’s in developing project ideas and recommendations. We should consider whether there is a rough analogy to the role of a J.R. in the Criminal Section where there is a clear expectation that recommendations will be brought forward and they will take an active role in participating in working groups and on other committees of the Conference. Sustained and substantive engagement of the J.R.’s is an essential element in the proper functioning of the Conference.

g) ***The Relationship of the Conference with FPT Governments.*** This relationship must be clearly stated. The relationship is multi-faceted and complex. Governments provide significant financial and manpower support to the Conference. They are also the intended and responsible audience of our advocacy for the implementation of the Uniform Acts, Resolutions and other work product of the Conference. A clear description of this relationship will ensure that boundaries are understood and that we make the most effective and appropriate use of the advocacy opportunities that we have. Lines of regular communication should also be updated and clearly described.

h) ***References to the Drafting Section.*** This relationship should be updated. The relationship of the Conference to legislative drafters is a key component of our work. The Constitution no longer accurately reflects what that relationship is, or what it should be.

i) ***The Role and Responsibilities of the Publications Committee*** should also be examined and updated. As described below, all of the means available to the ULCC to disseminate its work and communicate its ongoing activities must be examined. The role of this committee in that work must be clarified.

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Questions:

- Our current Constitution states the mandate of the ULCC like this: “The mandate of the Uniform Law Conference of Canada is to facilitate and promote the harmonization of laws throughout Canada by developing, at the request of the constituent jurisdictions, Uniform Acts, Model Acts, Statements of Legal Principles and other documents deemed appropriate to meet the demands that are presented to it by the constituent jurisdictions from time to time.” To what extent does that still reflect what our mandate should be? To what extent are we currently following that mandate? Are there things that are not stated in the mandate that we are doing or should be doing?
- How do we ensure ULCC remains relevant? Do we need to “rebrand” the ULCC? Ideas?

Financial Status

[19] At present the Conference operates at an annual structural deficit. This steady and inexorable depletion of our reserves must be addressed from two perspectives. First, are there steps that can be taken to generate revenue for the Conference? In that regard, careful consideration must be given to the creation of an independent foundation that could provide long term financial support to the Conference. Private sector and public resources must be examined and cultivated. Opportunities to licence the work product of the Conference to legal publishers as done by the U.S. Conference must also be examined. One essential aspect of this work would be to update our website such that our material would be appropriately marketable and that it would continue to be publicly accessible.

[20] Second, opportunities to reduce or control expenditures must also be examined. For example, remote simultaneous translation, if effective, could significantly reduce the overall cost of translation by eliminating the associated travel and accommodation costs. Meeting location could also be examined in this regard. While the roving location of the Conference serves to equalize travel and hosting costs and gives delegates an opportunity to understand the “on the ground” perspective of the justice system across the country, are there more cost effective ways of achieving these and other objectives?

[21] Third, the availability and use of “in kind” contributions, such as translation, drafting, assistance with publication, must also be considered. Additional sources of “in kind” contributions from universities, law students, or other groups and organizations must also be considered.

Questions:

- Are there better ways to ensure sustainable funding for the ULCC? What other funding sources might be available?
- Are there untapped areas of revenue or “in-kind” support that we could tap into?
- Are there expenses we can decrease or eliminate?

Alliances / Outreach

[22] Both the formation of the Conference, and its critical expansion into the realm of the criminal law came about as a result of resolutions and other efforts by the Canadian Bar Association. Despite these strong historic ties, more needs to be done to encourage and solidify that relationship. The contrasting role of the American Bar Association with the Uniform Law Commission of the United States is instructive. ABA representation is mandatory on every working group. Among other benefits this provides critical linkages between ongoing work and practitioners across the country. Careful consideration of the ways that both the Executive and J.R.'s could reach out to the appropriate national and provincial CBA sections on an ongoing basis should also be considered.

[23] Relationships with other groups such as law reform agencies, law schools, and corresponding international groups must also be considered on an ongoing basis. Such a continuing focus will nurture these relationships, provide avenues to seek appropriate engagement, and allow us to closely monitor international developments both for emerging projects and best practices.

Questions:

- Who should ULCC be reaching out to? For what? What do we expect?
- Should we go back to our roots and try to re-engage the CBA? (Should we encourage all jurisdictions to send CBA representatives to the Annual Meeting?)
- Are delegates engaged year round? If not, should we make efforts to do so? How?
- How do we raise the ULCC profile?

Government Relations

[24] Relationships with FPT governments are critical to the success of the Conference. These governments are a major supporter of our work and are also our intended audience. We must identify all of the appropriate avenues of communication and outreach and develop a comprehensive and coordinated approach to ensure that we use the right channel for the right purpose. Development and maintenance of these relationships should be a key responsibility of both J.R.'s and the Executive.

[25] In addition, the different types of support provided by governments must be identified, appropriately recognized, and secured on a stable and ongoing basis. These include

- a) The Annual Assessment
- b) Support through the provision of "in kind" resources
- c) Secretarial and administrative support provided at Annual Meetings

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- d) Translation Services – at present confined to documents and resolutions presented at meetings. However, all alternatives relating to the provision of simultaneous translation at the Annual Meeting should also be explored.
- e) As indicated above, the role of the Conference to Legislative Drafters must be updated and clarified. The Constitutions should be updated in this regard, as the Drafting Section no longer exists. Further, careful consideration should be given to whether the ultimate product of the Conference should be drafted legislation, as opposed to comprehensive policy directions or documentation that is the functional equivalent of drafting instructions.

Questions:

- How do we engage governments? How do we ensure that they support and value the work of the ULCC?
- How should we encourage governments to step up their “in kind” support and/or financial support?
- Should we make more effort to get on the Deputies and/or Ministers radars? How?
- Should we examine and develop linkages with government law reform and policy development bodies such as the Coordinating Committee of Senior Officials?

Communication / Website

[26] The website and other modern means of communication are critical to our success. They serve as both the repository of our work, the public face of the Conference, and a possible ongoing core revenue source should the example of the United States Commission be applicable here. In light of these important functions, it is critical that best efforts be made on an urgent basis to identify and implement a comprehensive strategy to improve the accessibility, accuracy, and currency of the website.

Questions:

- We are aware that there is work to be done to make the website more organized and useful. With that in mind, do you have any specific suggestions about what information should be included on the website or dropped from the website?
- Is there someone (e.g. a small business, a government, a university) who can provide “in kind” support for the website or could we have a sponsor(s) for the website?
- Aside from the website, do you find the ULCC’s other major publications – Communique and the Annual Proceedings – to be useful? Why or why not?
- What is the best means of communicating? Should we consider using social media?

Annual Meeting

[27] The present length of the Annual Meeting is a product of a historical context and other considerations that no longer apply. The length of the meeting, together with the possibility of holding associated committee meetings in conjunction with the Annual Meeting should be considered. A key factor in that consideration is the collegial and collaborative decision making process described above. That process and the quality of work product and consensus that it frequently creates cannot be rushed or mass produced. Sufficient time must be given for the kind of discussions and the building of relationships that are essential for that process to develop and thrive. Many delegates are initially attracted to the Conference as a result of a single issue. They may come for that issue. They return year after year because of the relationships, and the keen interest in improving the law that is at the heart of all we do.

[28] As indicated above, the practice of roving meeting locations must also be carefully considered. We must determine if we are pursuing the most effective method of achieving the stated objectives of that practice. Alternatives and all of the cost and other implications must be considered.

Questions:

- We want to ensure that Annual Meetings are well-attended and productive. With that in mind, what do you think about the length and timing of our Annual Meeting? Is it possible to condense the meeting and still cover topics with the required depth?
- What would you think about changing the practice of rotating meeting locations amongst the jurisdictions? For example, would holding more annual meetings at a central location help to facilitate attendance? What about changing the time of year?
- Can the work of the Civil and Criminal Sections be better integrated in joint sessions? Ideas?

Projects, Process and Implementation

[29] The ACPDM has taken on some of these tasks in terms of project selection and project management support for working groups, greater transparency regarding the criteria for project selection and the structure and responsibilities of working groups. Quality and consistency of the reports, commentaries and associated presentations should be developed. Linking that work together with the steps that should be taken to encourage implementation in a consistent fashion should also be examined as part of the review. Project selection and management processes may also need to be updated to reflect changes arising from the strategic review.

Questions:

- Do you think the ULCC is focusing on the right types of project/issues? Can you think of examples where we picked the right things to work on? Examples of where we missed the mark? Is there an optimal number of projects/resolutions for each year?

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- Should JRs or jurisdictions be expected to present project ideas (and lead them) in the Civil Section (similar to the approach in the Criminal Section)?
- How should we recognize the hard work and accomplishments of working group members/ULCC delegates/supporters of ULCC?
- How do we evaluate the success of the ULCC? Number of projects? Completed/number of resolutions discussed? Number of Uniform Acts or Resolutions implemented? Other factors?
- Do you have ideas about how the ULCC could support increased implementation of Uniform Acts? Are there things we could do during project selection get a better sense of whether the project will be well-received in the jurisdictions? Are there things we could do during the project – for example, do we need to provide more guidance to working groups about what they should focus on and how their end-products should be structured? Are there things we could do at the end of the project - for example, should summaries or briefing notes be provided along with the longer documents? Should we be tracking implementation with a view to understanding why some Uniform Acts get implemented and others do not?

Responding to the Issues

[30] The intent of this document is to provide background and to highlight some of the critical strategic issues facing the Conference. It is intended that this Discussion Document will provide structure for the discussion of these issues at the opening plenary and throughout the 2016 Conference meeting. The input from Jurisdictional Representatives and delegates will provide an important starting point for reform. Their participation throughout the year on initiatives to address these issues is vital to the continued success of the Conference.

ⁱ In recognition of their unique role in the justice system, and of the need to protect judicial independence and impartiality, members of the judiciary do not vote on any matter that may give any appearance of compromise or conflict in those important roles. That is particularly so with respect to the resolutions in the criminal section. However, they are fully involved and engaged in the deliberations and discussions of the Conference, and bring an invaluable perspective.