ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA

MINUTES OF THE CIVIL SECTION, 2024

Prepared by
Helen Habte-Selassie and Christopher Blakeney
Ottawa, Ontario

August 2024

This document is a publication of
the Uniform Law Conference of Canada.
For more information, please contact
info@ulcc-chlc.ca

BUSINESS COMPLETED SINCE THE 2023 ANNUAL MEETING

Oral Report

Presenter: Christine Badcock, Yukon

Ms. Badcock presented an oral report on business completed since the 2023 annual meeting of the ULCC.

Amendments to the *Uniform Benevolent and Community Crowdfunding Act* were adopted pursuant to the November 30th rule. It was noted that some minor corrections will be made to these amendments.

Ms. Badcock advised that the Executive Committee resolved to withdraw the ULCC's 1989 Drafting Conventions at its September 27th, 2023 meeting, following the Civil Section steering committee's recommendation that the Executive Committee withdraw them following the adoption of new Drafting Conventions last year.

RESOLVED:

THAT the report of the past Chair of the Civil Section on business completed since the annual meeting of the ULCC in 2023 be received.

CLASS ACTIONS

Progress Report

Presenter: Jérémy Boulanger-Bonnelly, McGill University

Mr. Boulanger-Bonnelly presented the working group's preliminary report focussed on identifying issues to address in the coming year.

Mr. Boulanger-Bonnelly explained some of the history of the development of class actions in Canada including that the 1996 *Uniform Class Proceedings Act*, as amended in 2007 to include multi-jurisdictional class actions along with certain protections for class members, was still the instrument recommended by the ULCC. He explained that, since 2007, class actions have become more numerous, are increasingly more complicated, involve longer delays, and are often multi-jurisdictional - sometimes involving foreign states.

He recalled the guiding principles of class actions which are access to justice (through the pooling of legal costs), judicial economy (through the grouping of like disputes) and behavior modification (by ensuring accountability for small harms).

Next, he identified five issues potentially warranting amendments to the *Uniform Class Proceedings Act* (with section numbers in the written report): the certification (or authorization) process (3.1); overlapping class actions within the same jurisdiction (3.2); multi-jurisdictional class actions (3.3); the mechanism for monitoring the enforcement of final judgments and settlements (3.4); and the approval of class counsel's fees (3.5). To identify these issues, the

working group looked for commonalities and differences in Québec, Ontario, and British Columbia legislation, doctrine, and jurisprudence.

Mr. Boulanger-Bonnelly proposed that, following significant consultation during the coming year, the working group prepare a report on issues and proposed solutions for the ULCC annual meeting in 2025.

Discussion

Delegates noted the value of data and of consultation, including with judges and governments as well as practitioners, and observed that the perspectives of plaintiffs and defendants often diverge but that it is important to hear both. Mr. Boulanger-Bonnelly advised that both plaintiff and defendant interests are represented on the working group.

It was recognized that it would be open to the working group to return with another policy report next year without being required to resolve all the issues identified in this report.

RESOLVED:

THAT the progress report of the Class Actions working group be accepted;

THAT, in accordance with the directives from the ULCC, the working group continue its work, including identifying possible solutions to address the issues raised in the report; and

THAT the working group present a policy report to the ULCC at the 2025 annual meeting.

NON-DISCLOSURE AGREEMENTS

Progress Report

Presenter: Jennifer Khor, Supervising Lawyer, Community Legal Assistance Program

Ms. Khor traced some of the history of the motivation for the working group following the #MeToo movement and explained how non-disclosure agreements (NDAs) can cause continuing harm in that context by maintaining disparity between the parties and restricting complainants' ability to seek support.

Internationally, the United States federal government and over 20 American states are banning or restricting NDAs. In the United Kingdom, there are two statutes restricting NDAs in certain contexts: the *Higher Education (Freedom of Speech) Act 2023* restricts NDA use in cases of sexual harassment at higher education institutions, and the *Victims and Prisoners Act* of 2024 voids NDAs if they prevent the reporting of crimes or hinder victims' ability to seek support.

Ms. Khor noted the NDA legislation passed in Prince Edward Island (P.E.I) in 2021 and the more restrained legislation passed since then in Ontario and Québec. The work is not limited to these provinces however, draft bills are being developed in several other jurisdictions. Ms. Khor also referred to the 2023 Canadian Bar Association (CBA) resolution on the Principles to Prevent Misuse of NDAs in Cases of Abuse and Harassment[1] and the voluntary pledges by some post-

[1] The CBA passed a resolution to promote the fair and proper use of NDAs; discourage their use to silence

secondary institution not to use NDAs in cases involving sexual harassment, discrimination, bullying or other forms of misconduct.

Ms. Khor next explained some of the considerations discussed by the working group, including concern over the development of a culture of silence. She noted that the statistics showed that NDA legislation in American states did not reduce the rates of such settlements being reached.

In terms of scope, Ms. Khor explained that the working group preferred not to ban NDAs outright as some victims of harassment valued them, yet it also did not want to limit the proposed reform to just the employment context. Bearing in mind the public policy interests in preventing the concealment of wrongdoing and in addressing inequality in bargaining power, the working group has suggested the following:

- voiding NDAs if they do not meet the required conditions or if they establish restrictions in public interest areas;
- preventing NDAs from, in certain situations, restricting the disclosure of underlying facts and from restricting disclosure in permissible situations;
- preventing NDAs from restricting a person from reporting to law enforcement or from being required to maintain silence when doing so is against public interest;
- copying the list of situations where NDAs are inapplicable from the PEI Act and adding certain additional non-applicable situations;
- creating a list of required safeguards to be included in NDAs;
- making the legislation retrospective;
- creating an offence for entering into an NDA or attempting to enforce an NDA that is contrary to the legislation;
- requiring the list of non-applicable situations be attached to an NDA;
- ensuring NDAs are in plain language;
- ensuring legal advice is available;
- creating a reverse onus in defamation when there is a settlement agreement;
- and restarting the ULCC defamation project.

The working group raised the use of NDAs in investigations and mediation as discussion topics along with the creation of reporting obligations.

Discussion

A delegate expressed concern over repetition in the protections envisioned and noted that "in the public interest" is sufficiently broad to render much of the rest unnecessary. They also raised the idea of a restricted prohibition rather than a large number of filters to have a clear scope. It was explained that the working group was recommending filters rather than a prohibition so as to have a broader scope.

At the request of a delegate concerned about adding uncertainty, Ms. Khor explained the inclusion of "express wish and preference of the complainant" as a safeguard to ensure that the NDA was discussed as a condition of settlement and negotiated. It was intended to signal to complainants that they have a say in the matter.

---

victims and whistleblowers reporting experiences of abuse, discrimination and harassment; and advocate for legislation and policies to ensure NDAs are not misused.

A delegate expressed the need to consult the bodies responsible for regulating the legal profession. Changes to the manner in which NDAs are handled could be effected through amendments to the model code of professional conduct, which governs all lawyers. This could involve inserting separate provisions on the issue in the model code or at minimum, making amendments to the commentary section. The impact of such additions on the law societies' disciplinary process would need to be considered. The working group members indicated that they would take this under consideration.

It was agreed that the term person ("personne"), as was used in the PEI statute, would be preferable to "plaignant", as the latter implied that a complaint had been filed with the police.

Delegates discussed the proposed retrospectivity whereby non-conforming prior NDAs would be invalidated. This would assist those bound by existing, indefinite NDAs. Concerns were expressed that adopting such an approach would invalidate contracts in their entirety and/or create significant litigation. Members of the working group noted the ongoing harm caused by these NDAs and stressed the need for ex post facto law. Delegates proposed limiting retrospectivity to the date the bill was introduced as an alternative, to prevent a rush to sign NDAs in the intervening period. This topic was left open for further discussion.

A delegate noted that requiring "respondents" to pay for lawyers for the "complainants" could give the impression of a lack of impartiality. Methods of structuring the payment through a third party, for example legal aid, were considered, although it was noted that in some jurisdictions payment via legal aid would not be practical.

Delegates were generally opposed to reporting obligations.

There were varied views on the types of conduct that should be captured by the legislation. Delegates largely favoured not restricting the project to the employment context by including sexual harassment; racial, religious harassment and other human rights grounds; and possibly harassment and bullying. Delegates generally favoured excluding consumer protection and environmental harms. Some would also exclude bullying and possibly human rights grounds. A delegate supported the inclusion of restrictions on NDAs that interfere with the administration of justice, particularly regarding whistleblowers.

Some delegates indicated that they would have broadened the scope to provide a rational recommendation rather than self-limit even if that meant accepting that legislatures might then restrict it. Other delegates would prefer a more modest bill which would be more likely to be implemented allowing for subsequent incremental changes. It was ultimately decided that the working group would proceed with the suggested scope in Recommendation 1 of the report, which excludes consumer protection and environmental harms, with the understanding that scope may be expanded at some point in the future.

The working group explained that they recommended avoiding an outright prohibition, as per Recommendation 2, for fear that it would limit complainants' settlement choices. Delegates supported this position, with it being noted that regulation was consistent with the value of allowing a complainant to express wish and preference.

Delegates then discussed the remaining recommendations (being recommendations 3-15 in the report).

Recommendation 3: One delegate supported the inclusion of a purpose clause because of the concern that this legislation would reach into unintended areas. That said, most opposed the use of such a clause and favoured instead the use of commentary alone to provide context. Further, delegates noted that this was a drafting and not a policy matter.

Recommendation 4: Caution was expressed concerning the potential overreach of "public interest areas" into unintended areas. It was further agreed that the working group would work on the wording of the recommendation to make it clear that, in agreements that address other issues and are not standalone NDAs, the NDA provisions may be severed while the remaining clauses remain valid.

Recommendation 5: A delegate expressed that attempting to list the proper uses of NDAs may not be a good idea as some would surely be left out. Working group members thought that they could be used as examples while the defined scope would properly delineate an appropriate versus inappropriate NDA.

Recommendation 6: There was some acceptance of this recommendation among delegates. It was noted, however, that this recommendation did not take into account the legitimate interests of innocent third parties. If left as is, it could precipitate a situation where there is disclosure desired by a complainant, which runs contrary to the wishes of another individual who is not a direct party to the proposed agreement but is implicated in the event. The working group undertook to give further consideration of how confidentiality for third parties may be addressed.

Recommendations 7 & 8: Delegates discussed the non-application list in the P.E.I legislation and noted that it would not be entirely compatible with each jurisdiction. It was suggested that each province and territory could modify the list as required. A delegate expressed that it would be preferable to avoid leaving such things to regulations and preferred they be in the legislation. Others, however, preferred the suggestion that the general principle, for example "healthcare professionals", be expressed in the legislation and more elaboration be provided in the regulations. Regarding the phrase "or otherwise in the public interest", delegates expressed that it could be so broad as to obviate the use of any other exceptions. There is no appetite to tackle a more general public interest concept at this point.

Recommendation 9: Concerns were raised regarding the clarity of "express wish and preference" and of the mutuality proposed (recommendation that the confidentiality requirement be mutual and binding on all parties). It was also suggested that the validity period of 10 years be considered further. Delegates expressed concern with paragraph 64 of the report and were of the view that the complainant would likely have better access to evidence of undue influence than the respondent, and reversing the onus when such allegations are made would not be helpful. With regard to not adversely affecting the health and safety of a third party and the public interest which was a suggested inclusion, a delegate considered the language/requirement to be too broad.

A delegate noted that there was some overlap of ideas and protections which were unnecessary if NDAs were properly scoped. The working group acknowledged the overlap.

It was agreed that the working group would retract and revise the recommendation.

Recommendation 10: Many delegates opposed the retrospective application of the legislation. The working group agreed to withdraw the recommendation and to re-examine it with particular consideration given to the Manitoba Law Reform Commission Report on this topic.

Recommendation 11: Delegates questioned how penal provisions would be administered/applied and also contemplated situations where establishing which party is the "respondent" party is not evident. There was little support for the penalties, but including a specific, limited offence was not rejected. Delegates wanted to ensure that the act would not contain hollow provisions.

Recommendation 12: Delegates considered directing how public funds are to be spent to be beyond the scope of the project. The working group accepted the suggestion of delegates to note, in the final report, that constraining the use of public funds was outside the scope of the project but that jurisdictions should be alive to the issue.

Recommendation 13: Some delegates questioned the consequences if an NDA were not written in plain language and thought there would be little ability to enforce such a provision. There was tentative support for requiring the relevant provisions to be appended to the NDA so those signing it can have a sense of what the legislation provides and what they may be entitled to.

Lastly, with regard to the working group's recommendation that the ULCC consider restarting its defamation project, delegates instead preferred a suggestion that any future defamation work done at the ULCC consider situations involving settlement agreements and the use of defamation as a silencing tool.

RESOLVED:

THAT the second policy report of the working group on Non-Disclosure Agreements be accepted;

THAT the working group continue its work in accordance with the directions of the ULCC;

THAT a draft uniform act on Non-Disclosure Agreements be prepared based on the recommendations of the second policy report and further directions provided by the working group; and

THAT the working group report back to the ULCC at the 2025 annual meeting.

PRINCIPLES FOR DRAFTING UNIFORM LEGISLATION GIVING FORCE OF LAW TO AN INTERNATIONAL CONVENTION

Report

Presenter: Valérie Simard, Canada

Last year, the Civil Section resolved to undertake a review of the *Principles for Drafting Uniform Legislation Giving Force of Law to an International Convention* and ULCC uniform acts prepared in accordance with the Principles to ensure coherence with the new Drafting Conventions adopted by the Section in 2023.

Ms. Simard indicated that she had undertaken a review and made consequential and cross-referential amendments that were necessary to ensure consistency between the Principles and the new Drafting Conventions. Further to the changes proposed in the document, Ms. Simard suggested an amendment to the Comments section of the Purpose Clause on the basis of a comment received. The text now notes that purpose clauses can assist in understanding

legislative texts and can help provide direction on the interpretation of generally worded provisions. Ms. Simard indicated that no amendments were needed to ULCC uniform acts.

RESOLVED:

THAT the Final Report on updates to the *Principles for Drafting Uniform Legislation Giving Force of Law to an International Convention* be accepted; and

THAT the amended, updated *Principles for drafting Uniform Legislation Giving Force of Law to an International Convention* be adopted by the Civil Section.

GUIDE FOR PREPARING UNIFORM ACTS AND REGULATIONS

Report and Style Guide

Presenter: John Mark Keyes, University of Ottawa

Mr. Keyes recalled that the ULCC had approved a revised set of conventions for drafting model legislation in 2023. The revision reflected consensus on general approaches to drafting acts and regulations. The ULCC agreed that the working group should prepare a drafting guide to encourage uniformity in model legislation. The guide prepared relates to:

- References to units of text (paragraphs, subparagraphs, clauses, subclauses). Items in lists are to be numbered as are other units of text. Whole numbers are to be used. Cross-references are to be made in a consolidated form with the numbers for each unit separated by parentheses and prefaced by the name of the lowest unit of text being referred to.

- Definitions. In a provision defining multiple terms, the definitions are to be preceded by "the following definitions apply in this [Act / Part / section]". Each definition is to be a separate sentence, and definitions are to be arranged in alphabetical order in each language.

- Navigation aids (headings, notes, tables of content). Headings may be used to group related sections. Notes are to be included for each section; notes are to be included only at the section level, and tables of contents consisting of the headings are to be included in acts and regulations of more than two pages.

- Commentaries and references. Commentaries are to be included to succinctly explain the provisions as well as acknowledge the adjustments that may be needed to adapt the model law to the particular jurisdiction of implementation. When an act or regulation refers to other legislation, it is to be described in general terms in square brackets.

- Bijural drafting. When common law and civil law versions are prepared, they are to include cross-references to the equivalent provisions in the other version.

Discussion

A delegate explained that, in practice, the civil law version of legislation is prepared after the adoption of the common law version and is adopted a year or two later. The two versions are not identical but are harmonized; cross-references are included to demonstrate the consistency between both versions. The delegate noted that while simultaneous drafting may be ideal, it is not always realistic due to resource constraints. Mr. Keyes clarified that he did not have any strict preferences with regard to the drafting approach. His suggestion was merely that a common approach be adopted.

The working group suggested in their report that the subcommittee on Rules of Procedure and Policies require adherence to the Drafting Conventions and the Drafting Guide in the policy and include guidance on the bijural dimension of preparing uniform legislation. Additionally, Mr. Keyes noted the value of developing formalized guidance on obtaining drafting resources.

The Chair noted the ULCC policy on bijuralism, which may be an appropriate vehicle for the type of guidance suggested by the working group and indicated that the subcommittee on Rules of Procedure and Policies would consider including a reference to the policy as a directional flag but clarified for delegates that adoption of this report would not pre-empt discussions on the report of the subcommittee on Rules of Procedure and Policies.

RESOLVED:

THAT the report of the working group on the Guide for Preparing Uniform Acts and Regulations for the ULCC be accepted; and

THAT the *Guide for Preparing Uniform Acts and Regulations for the ULCC* be adopted by the Civil Section.

CHARITABLE ORGANIZATIONS

Progress Report

Presenter: Peter Lown, K.C., Alberta

Mr. Lown informed the Civil Section that the Canadian Bar Association (CBA) national section on trusts and estates was no longer involved in the project on charitable organizations, as it appeared that the project would not be mutually compatible. He reminded delegates that the project comprises two sub-projects: one on hybrid organizations and another on the redefinition of charity.

Mr. Lown noted that the subgroup on hybrid organizations had settled on the essential elements of such organizations:

i) they would need to be subject to asset restrictions limiting what they are able to do with their resources,
ii) there would need to be a variation or restriction on the Directors' duties (it cannot simply be to maximize profits for shareholders); and
iii) there would need to be a clear purpose clause that sets out the organization's charitable purpose.

The working group is currently in search of leadership and subject matter expertise as Paul Martel can no longer participate in the project. The work that will be accomplished by the subgroup over the next year will depend on the ability to recruit such leadership.

It has been previously suggested that a research and jurisdiction database be established before the ULCC takes on the second sub-project on the redefinition of charity. Mr. Lown noted however, that there is virtually no jurisprudence on this issue, aside from *Crerar* in British Columbia and *Fletcher's Fields* in Ontario. He explained that the issue of charitable purpose mostly arises in the context of Canada Revenue Agency (CRA) determinations on the granting or removal of charitable status for the purposes of the *Income Tax Act*. These are decided by the Federal Court of Appeal on administrative law standards, and rulings are often in favour of the CRA, usually at significant costs to the organizations involved. It has led many to conclude that it may not be worthwhile to challenge the CRA on the issue (hence the limited jurisprudence). This has made it difficult to advance the common law in this area.

Experiences from foreign jurisdictions reveal that there has not been a radical redefinition of charity. Legislation in Australia and the United Kingdom include a statutory definition of charity as well as a list of charitable purposes and a residuary clause. According to Mr. Lown, these lists suggest that there may be general consensus in these two countries, and perhaps in Canada, on how the existing definition of charitable purpose ought to be expanded. It may be worthwhile for the subgroup to explore expanding the definition to include the prevention of poverty and existing provincial provisions on amateur sports, and to clarify how religious organizations are to be dealt with in this area.

Discussion

A delegate reiterated their jurisdiction's position that any definition or redefinition of charity requires buy-in from the federal government (Department of Finance or CRA). Mr. Lown noted that the subgroup could work on aspects of the project falling under provincial jurisdiction, and this may eventually gain some traction with the CRA. He also advised that some members serving on the CRA Policy Advisory Committee had been slated to join the working group on charitable organizations when this was a joint project with the CBA and while they will no longer be participating in the project, the subgroup could still liaise with them.

A delegate asked whether it would be more appropriate for the subgroup to return to the 2025 annual meeting with a more defined proposal for discussion, thereby also providing provinces and territories (PT) an opportunity to consult on the charitable purposes being put forward. Mr. Lown explained that it is unlikely that there would be much provincial or territorial pushback on the recognition of prevention of poverty and amateur sports, as many have already taken such steps within their respective jurisdictions. The handling of religious organizations however is less established and would likely require extensive PT consultation. Mr. Lown was hesitant to delay work related to the prevention of poverty and amateur sports pending input on religious organizations.

Mr. Lown indicated that the members of the working group on charitable organizations were willing to proceed with the subgroups and be engaged in the work as described.

Mr. Lown thanked Professor Mark Gillen of the University of Victoria for his valuable input and for providing access to his wide network of experts in this area.

RESOLVED:

THAT the progress report of the working group on Charitable Organizations be accepted;

THAT the subgroup of the working group continue its work in accordance with the directions of the ULCC; and

THAT the subgroup of the working group on redefinition of charitable purpose concentrate its work on sports, prevention of poverty, and religious organizations; and

THAT the working group report back to the ULCC at the 2025 annual meeting.

CASH PAYMENTS

Progress Report

Presenter: Michelle Cumyn, McGill University

Ms. Cumyn began by noting the legal uncertainty regarding the use of cash as a method of payment. It is unclear the extent to which a creditor may validly refuse a payment in cash under current law. The default rule in Québec is that a creditor cannot refuse a cash payment. That said, it is possible for parties to change the payment rules through a contract. This appears to differ from other jurisdictions where creditors may be able to refuse cash payments even if such payments are not contractually excluded. Ms. Cumyn agrees with Québec's approach but believes that it requires refining by including, for instance, the ability to refuse cash payments in situations involving large sums.

In addition to cash payments, there are two categories of methods of payment in the Civil Code of Québec which can release a debtor from their contractual obligations: i) scriptural money (money sent from a debtor's account in a financial institution to a creditor's bank account – e.g. interac transfers), and ii) methods of payment which offer sufficient guarantee even before the creditor receives any money (e.g. certified cheques). Debtors have the ability to choose their form of payment provided that creditors are able to receive it in that form (e.g. the debtor can only pay by credit card if the creditor has a card terminal).

Ms. Cumyn enumerated the benefits of cash: it is resilient, inclusive, and private. She also noted certain drawbacks, including that it is expensive for merchants and financial institutions to handle (there is an increased risk of theft) and that its private and untraceable nature facilitates crime including tax evasion. She briefly touched on the approaches adopted in foreign jurisdictions to ensure the continued circulation of cash on the one hand and limit crimes on the other. New York City, for instance, amended its Administrative Code in 2020 to make it unlawful for merchants in food and retail establishments to refuse cash payments, while France placed an upper limit on the use of cash payments for transactions above €1,000.

Ms. Cumyn stated that there appeared to be no imminent danger that cash payments would disappear from the Canadian economy. While Canadians may be relying less on cash to purchase goods and services, the volume of cash in circulation is increasing. It appears that Canadians continue to carry cash as backup to other payment methods. That said, a small minority of Canadians are impacted by the rarefication of cash. These include the economically or socially

vulnerable, the elderly, new immigrants and persons living in remote communities such as Indigenous peoples.

Ms. Cumyn presented the various policy goals of this initiative, including protecting consumers' access to goods and services particularly for the unbanked and underbanked, recognizing other methods of payment that provide good discharge of a monetary obligation, facilitating competition that will reduce costs to merchants and consumers without driving out cash, and preparing for the possible implementation of a central bank digital currency, among others. While she acknowledged that a uniform act is unlikely to address them all, she noted that it should not impede any such efforts.

Discussion

A delegate supported the recommendation made by Ms. Cumyn that the project focus on all methods of payment. The delegate indicated that limiting it to cash payments would lead to a less useful model legislation.

Ms. Cumyn noted the challenge of having to anticipate and account for technological advancements in methods of payment to ensure the continued relevance of a uniform act. In terms of approach, she proposed providing general descriptions of methods of payment (rather than providing a list of such payments) to avoid the act becoming out-of-date. She further noted the need to reiterate and clarify the default rule – that debtors can choose among available methods of payment as long as the creditor can accept them, though modifications to the accepted methods of payment may be made through a contract. An imperative rule like the one in New York City may be included to protect individuals who do not have access to bank accounts, noting that for some transactions in defined contexts, creditors could not refuse cash payments. An exception could also be made for situations involving large sums where there may be an increased risk of crime. Rather than imposing an upper limit for cash payments however, as is the case in France, Ms. Cumyn suggested adopting a standard of reasonableness.

A delegate cautioned that this approach would leave it up to each individual to determine what may be 'reasonable' in the circumstances. Obtaining clarity on such a standard would require a court challenge, the financial implications of which would be burdensome on debtors. Ms. Cumyn took note of the concern and indicated that she would look into how France is faring with its prohibition on cash payments above €1000.

In terms of the working group, Ms. Cumyn indicated that she would appreciate input from those familiar with the common law to ensure that the resulting product is useful to jurisdictions across the country and from the private sector (e.g. PayPal, Apple Pay) to provide insight on the technological advancements they anticipate in this area. She also asked for representation from the Federal government to offer that perspective.

Ms. Cumyn plans to return to the 2025 annual meeting with a specific orientation for the project and to the 2026 annual meeting with a final report and a proposed uniform act.

RESOLVED:

THAT the progress report of the working group on cash payments be accepted;

THAT the working group continue its work in accordance with the directions of the ULCC; and

THAT the working group report back to the ULCC at the 2025 annual meeting.

RULES OF PROCEDURE AND POLICIES OF THE CIVIL SECTION

Report

Presenter: Valérie Simard, Canada

Ms. Simard recalled that the *Policy on Adoption and Amendment of Civil Section Rules of Procedure or Policy* and the *Policy on the Distribution of Materials to the Civil Section for its Annual Meeting* were presented to the Civil Section by the Steering Committee subcommittee on Rules of Procedure and Policies and approved by the Section in 2022 and 2023 respectively. She noted that the third policy prepared by the subcommittee and now submitted to the Section, the *Policy on Reports Presented to the Civil Section at the Annual Meeting*, sought to harmonize the content of these reports.

Ms. Simard recalled the thoughtful recommendations made to the subcommittee during the presentation on the *Guidelines for Drafting Uniform Legislation*. The first was that the Policy on Reports require adherence to the Drafting Conventions and Drafting Guide. She referred to article 5(2) of the Policy and noted that the subcommittee had deliberately kept the language in the policy flexible. The intention was to note the existence of the drafting aids and indicate that drafters should have regard to them without putting the Civil Section in a position in which it would have to refuse products that did not adhere to them. The subcommittee also decided against listing each relevant ULCC product in the Policy to avoid having to update it each time a new product is adopted by the ULCC.

A further recommendation was that the Policy on Reports include guidance on addressing the bijural aspect of uniform legislation. Ms. Simard recalled the Chair's comment that the ULCC has an existing policy on bijuralism. The subcommittee agreed that the existence of these policies should be acknowledged in the Policy on Reports and proposed amending subsection 5(2) of the Policy to state the following: "Draft uniform acts should be drafted having regard to drafting aids and policies adopted by the ULCC".

Ms. Simard briefly touched on the other documents distributed by the subcommittee. She noted the inclusion of two existing guidance documents that the Executive Committee had requested the subcommittee review on Preparing Minutes for the Civil Section Annual Meeting, and on the Role of the Civil Section Chair (these were not up for adoption). There was also a third guidance document that the subcommittee had prepared on its own initiative for Chairs of Civil Section Working Groups. Ms. Simard indicated that this may be a helpful tool for Jurisdictional Representatives to use in their efforts to recruit working group members.

Delegates agreed with the approach adopted by the subcommittee, noting that working groups should be provided with flexibility to depart from a drafting style or rule when appropriate. This is especially the case given the challenges of recruiting legislative counsel.

Ms. Simard concluded her presentation by announcing that the subcommittee had exhausted its mandate and thanking subcommittee members for their contribution to this work.

RESOLVED:

THAT the report of the Steering Committee subcommittee on Rules of Procedure and Policies of the Civil Section be accepted; and

THAT the *Policy on Reports Presented to the Civil Section Annual Meeting* annexed, as amended, to the Report be adopted by the Civil Section.

REFORM OF GENERAL PARTNERSHIP LAW / JOINT VENTURES

Progress Report

Presenter: Maya Cachecho, Université de Montréal

Ms. Cachecho began by explaining some of the history of the project and referring to the work done by the ULCC and the Alberta Law Reform Institute in 2012. This work led to a proposition which the working group considered and attempted to build on and update. Recognizing that the legal landscape may have changed in the intervening years, the working group proceeded with new consultations and completed additional research.

Ms. Cachecho next defined joint ventures ("coentreprise" in French) as an agreement between two or more companies to collaborate, usually temporarily, on a specific project. Currently, in common law provinces, there are two methods to proceed in such instances: either create a partnership or proceed by contract. In Québec, there exists additionally undeclared partnerships (de facto partnerships deemed to exist through verbal or written agreement even though they are not registered in the manner prescribed by legislation).

Proceeding by contract is the most common approach in common law provinces, and it is this form of joint venture which is currently not legislated and risks being characterized as a partnership or as an undeclared partnership in Québec. Being so characterized creates responsibilities which the parties may not have desired or expected. The goal of the working group was thus to fix criteria for a partnership versus a contractual joint venture.

The working group considered several possible solutions, such as: abandoning the concept of joint ventures, requiring registration of joint ventures, including non-partnership clauses in the contracts, appending joint venture to the name of the enterprise, and a clear definition. Appending joint venture to the name of the enterprise received support. Creating a definition also received support in Québec as did requiring registration. The working group consequently recommends the adoption of the proposition of the Alberta Law Reform Institute but with certain adaptations for Québec.

The Alberta Law Reform Institute proposition includes a definition of joint venture, a definition of a joint venturer, the option for a joint venture to declare in the contract that it is not a partnership, and the addition of "joint venture" to the name of the enterprise. In addition, the proposition specifically notes that a joint venture is not a corporation or partnership and that the absence of a non-partnership clause does not render the joint venture a partnership. Ms. Cachecho noted that joint venturers are jointly responsible for all debts of the joint venture towards a third party unless the contract with that third party provides otherwise.

The next steps for the working group would be to draft a uniform law on joint ventures.

Mr. Peter Lown, a member of the working group, gave some background on the Alberta Law Reform Institute work, explaining that consultations showed that in common law provinces, stakeholders were opposed to registration and generally did not want any structure imposed on them. Consequently, the goal was to maintain the contractual relationship while providing some protection/information to third parties and preventing the courts from treating joint ventures as partnerships.

Discussion

A delegate asked if it would be necessary, given the jurisprudence, to add the concept of a contribution from each of the joint venturers to the definition. Ms. Cachecho was of the opinion that it would be useful. Mr. Lown thought that contribution was inherent but agreed that the working group could review this wording.

A delegate asked how enforcement would work in a consumer protection context. Mr. Lown answered that the project would not interfere with the way in which consumer protection or environmental offences apply. Ms. Cachecho added that pursuing enterprises based on extra-contractual liability would continue to be possible.

A delegate asked about penal offences which normally would have clauses allowing the piercing of the corporate veil to reach directors directly. Mr. Lown answered that joint venturers should not be able to refuse accountability for third party claims relating to joint ventures. Third parties have no visibility into the internal structuring/arrangements of such ventures and should not be responsible for identifying which of the corporate entities within the joint venture may be liable for the loss or damage suffered. Having the joint venturers jointly and severally liable is intended to protect third parties from such situations.

The delegate suggested that the commentary address the regulatory environment, acknowledging the ongoing responsibilities of enterprises.

Another delegate noted their support of the project, indicating that the goal of a uniform act would be to offer some predictability as to the relationship between the joint venture partners and between themselves and third parties.

RESOLVED:

THAT the report of the working group on joint ventures be accepted;

THAT the working group continue working in accordance with the direction of the ULCC; and

THAT the working group present a final report as well as a draft uniform act and proposals for legislation adapted to the Civil Code of Québec at the 2025 annual meeting.

INTERNATIONAL LAW SESSION:
UNIFORM LAW COMMISSION (ULC) OF THE UNITED STATES OF AMERICA

Presenter: Lisa Jacobs, Chair of the ULC Executive Committee

Ms. Jacobs informed the Civil Section that the ULC's president, Mr. Tim Berg, was unable to attend the annual meeting of the ULCC due to illness.

Ms. Jacobs began her presentation by providing a brief history of the ULC, highlighting its founding in 1892. The ULC has since drafted legislation in broad-ranging areas of law, and Ms. Jacobs mentioned some of its better-known products, including the Uniform Commercial Code, which was adopted in every State and territory of the United States and has served as a model for similar codes in other countries. The ULC has drafted more than 300 uniform and model state laws since its inception.

Ms. Jacobs described the legislative development process at the ULC and then discussed some of its current initiatives. At its 2024 annual meeting, the ULC approved two new acts (the *Uniform Antitrust Pre-Merger Verification Act* and the *Uniform Mortgage Modification Act*) and made amendments to nine of its unincorporated organizations acts. It also enacted study committees on Mental Privacy, Cognitive Biometrics and Neural Data; the Definition and Protection of a Child's Interest in the Child's Name, Image, Likeness, or other Intellectual Property; and the use of Artificial Intelligence by State Governments. The committees on Indian Child Welfare, Occupational Licenses of Service Members of Military Spouses, and Virtual Currency Consumer Protection moved forward to the drafting stage, a process which takes approximately two years.

Discussion

A delegate asked for clarification on the scope of the recently established doxing study committee. Ms. Jacobs indicated that this study committee would examine the need for, and feasibility of, uniform legislation on the subject that would not violate rights under the First Amendment to the U.S. Constitution (freedom of speech). Ms. Jacobs explained that there have been study and drafting committees in the past which did not ultimately move forward, as the proposed solutions risked violating First and/or Fourth (freedom against unreasonable search and seizure) amendment rights.

Ms. Jacobs mentioned the ULC and ULCC's history of taking on joint projects and expressed the former's desire to establish a more structured relationship with the ULCC to facilitate such collaboration. She stated that the ULC welcomed observers on any of its projects and invited interested parties to visit the ULC website (www.uniformlaws.org) for additional information.

Ms. Jacobs concluded her presentation by presenting Mr. Peter Lown with a token of appreciation for his contribution to the ULC over the years.

RESOLVED:

THAT the ULCC express its thanks to Ms. Lisa Jacobs of the Uniform Law Commission for her presentation.

ADVISORY COMMITTEE ON PROGRAM DEVELOPMENT AND MANAGEMENT

Report

Presenter: **Peter Lown, K.C., Alberta**

Mr. Lown provided a brief history of the Advisory Committee on Program Development and Management (ACPDM), finding its origin in the Steering committee of the Commercial Law Strategy. He noted that the ACPDM meets monthly. It focuses on the management of ongoing projects in the Fall, along with identification of potential new projects. Its meetings in November, December and January are dedicated to annual budgeting process, which must be incorporated into the overall ULCC budget so it can be distributed to jurisdictional representatives for review and approval in March.

In the past, the ACPDM had tried to provide for all of the potential activities that may take place in relation to projects up for consideration and for the ongoing management of those which have already been adopted. There are instances when projects do not proceed at the pace anticipated, however, and some of the work shifts over to the following fiscal year. This has implications for the Civil Section budget. In an attempt to avoid this, the ACPDM decided to adopt a different approach in 2024. By only seeking to provide for the activities which it was certain would occur, the ACPDM was able to decrease its proposed operating budget by 35-40%. Mr. Lown noted the existence of a reserve fund that could be accessed to address matters that were not anticipated in a given fiscal year.

Mr. Lown proceeded to discuss specific projects that had been under consideration, including one on the remote execution of documents. The ACPDM initially thought that it may prove useful to make the temporary measures adopted during the pandemic permanent. It was ultimately decided though, that the lack of uniformity in approaches adopted across the jurisdictions (e.g. statutory amendments, regulations, practice directions as to how notaries or lawyers could participate in the process, etc.) would be too difficult to address.

A second project that was under consideration related to defamation. The ACPDM enlisted the help of Shannon Lively, former counsel at the Alberta Law Reform Institute, to complete background research on online media regulation. Her research showed that there was not much in the regulation of online media that contributed to or modernized the ULCC *Uniform Defamation Act*, which is based almost entirely on print media activities. This is despite the fact that the majority of defamation cases now arise in electronic media. The ACPDM determined that there would be value in updating the act. It is now looking to establish a committee and find leadership with subject matter expertise.

Mr. Lown highlighted the continued challenge for the ACPDM to attract subject matter expertise and leadership for projects. He noted that this required the assistance of all delegates. The ACPDM is also looking to delegates to bring awareness of issues that are of interest in their jurisdictions, explaining the issues, the groups impacted, the prospects of implementation, and where these issues fall on the legislative agenda.

A delegate informed the Civil Section that legislation, which provides that coerced debts incurred by a victim of human trafficking while they were in such a situation cannot be used or be enforced against them, has passed in Ontario and Saskatchewan. They noted that the Canadian Bankers Association was supportive of the position that such debts should not be enforced. The delegate invited others to consider a possible project on the protections for human trafficking victims from the impact of coerced debts.

Mr. Lown thanked the members of the ACPDM for their work over the past year and concluded his presentation by expressing gratitude to the Civil Section for the privilege of serving as Chair of the Advisory Committee.

RESOLVED:

THAT the report of the Advisory Committee on Program Development and Management and the direction undertaken by the Advisory Committee be accepted.

ENFORCEMENT OF FOREIGN JUDGMENTS

Oral Report

Presenter: Geneviève Saumier, Université de Montréal

Ms. Saumier presented an oral report where she began with background, recalling the cost and complexity of going to court on private international law issues. She then presented an overview of the project which aims to address three issues in sequence: when courts can hear an action involving a foreign element, when courts will enforce interprovincial/territorial judgments, and, finally, the current issue, when courts will enforce international judgments. The first two parts of the project have been completed having produced updated uniform acts and supporting documents; the third is now in an exploratory phase.

Ms. Saumier explained some of the changes in the updated *Uniform Court Jurisdiction and Proceedings Transfer Act* and the updated *Uniform Enforcement of Canadian Judgments Act*. She explained that these acts have been adapted so that jurisdictions with existing legislation can modify that which is already in place. However, neither of the reforms have garnered much interest at the legislative level. For this reason, Ms. Saumier suggested the three reforms be promoted as a package of law reforms.

Regarding the enforcement of foreign judgments, she explained that this project begins from a different starting point as the ULCC addressed this topic in the 1930s rather than the 1990s. An updated act was adopted in 2003 with Saskatchewan being the only implementing jurisdiction. There are 16 cases which have applied it, but it is difficult to say if this small number is a sign of success in avoiding litigation or a failure of the act. The lack of implementation, she theorized, could stem from jurisdictions believing that the common law or civil code adequately addresses the issue.

Ms. Saumier continued by explaining that the ULCC had invited the working group to address this topic because it is the third piece of the private international law puzzle, because on the horizon is a Hague Conference Convention on judgments, because only one province has implemented it, and because the act does not currently reflect the current state of the jurisprudence. It was believed that this warranted a review of the elements included in the uniform act which have not been included by legislatures nor applied by judges and attempting to understand why they were included and whether they merit being retained.

Moreover, there are difficulties in interpretation in the Saskatchewan case law and several court of appeal decisions on the topic which allow the working group to identify areas which could perhaps be revised either at base or in their wording. There are also differences between the English and French versions which can contribute to interpretation difficulties, so harmonizing work would be useful.

Ms. Saumier further mentioned that the *Uniform Enforcement of Foreign Judgments Act* does not parallel the *Uniform Enforcement of Canadian Judgments Act*, yet both are moving towards more

simplification. This begs the question of why there is such a different structure for the enforcement of Canadian versus foreign judgments. She indicated that the working group, having worked on all three parts of the project, is well-placed to better align these two uniform acts on enforcement.

The working group is also conscious of aligning with the Hague Conference on Private International Law work on choice of court and judgments. It plans to undertake a major revision of the model law and will consider several important topics including the following: whether to treat a foreign decision differently than a decision stemming from another Canadian jurisdiction, whether to parrot Supreme Court of Canada decisions or make distinct policy choices, and how best to align the uniform act with other instruments in the field.

Discussion

Delegates discussed the lack of implementation and Ms. Saumier noted that private international law is rarely seen as a priority as the current system is seen as functional and it is consequently difficult to justify the resources required for enactment.

Delegates discussed the scope of the revised uniform act and particularly whether it would include decisions on the status of persons, for example whether decisions on the protection of adults would be included, and how this would interact with other conventions on such topics. Ms. Saumier indicated that the working group would reflect on this point. She explained that the working group's goal was not that the enforcement of Canadian and foreign judgments would necessarily be identical but rather that the two acts would be coherent.

Delegates expressed support for the project and suggested that the project not restrict itself to purely money judgments as there is value in avoiding litigation in other areas as well.

Finally, Ms. Saumier noted that the working group would welcome additional participants.

RESOLVED:

THAT the report on the enforcement of foreign judgments be accepted;

THAT the working group continue its work; and

THAT the working group report back to the ULCC at the 2025 annual meeting.

PRIVATE INTERNATIONAL LAW REPORT AND CONVENTION OF 2 JULY 2019 ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS

Oral Report

Presenter: Kathryn Sabo, Canada

Ms. Sabo presented the report on private international law. She noted the implementation of the Apostille Convention and of the 2007 Child Support Convention at the federal level and in three provinces. She encouraged those jurisdictions that have implemented the Child Support Convention to share their experiences with those which have not yet done so. She then referred to

other conventions which are in force in some but not all Canadian jurisdictions, including the UNIDROIT Convention providing a Uniform Law on the Form of an International Will (Wills Convention), the Trusts Convention, and the Service Convention for which there are now uniform rules for implementation.

Ms. Sabo asked jurisdictions to consider the implementation of the 1996 Child Protection Convention and the 2000 Protection of Adults Convention, and, on the commercial side, the Singapore Convention on Mediation and the Convention on Electronic Communications in International Contracts because of the benefits they would bring to Canadians who have business/personal ties abroad or who travel internationally. She also informed delegates that the Department of Justice Canada would be sending targeted letters to the political level in each province and territory, suggesting private international law priorities they may want to consider in their respective jurisdictions.

Ms. Sabo noted Ms. Saumier's suggestion that the updated enforcement of judgments Acts be advertised as a package of law reforms and extended that further, recommending the package be broader and also include the 2019 Convention on the Recognition and Enforcement of Foreign Judgments and 2005 Convention on Choice of Court Agreements. Ms. Sabo clarified that this was not to encourage an all or nothing approach. It was simply a suggestion that jurisdictions consider incorporating these five related instruments in their longer-term planning.

Ms. Sabo noted that she and a member of her team, Helen Habte-Selassie, had worked on preparing a uniform implementing act for the 2019 Convention. The working group now needs to draft the commentary, assess what is being proposed from both a common law and a civil law perspective and consider the subject-matter exclusions. Ms. Sabo added that there already was a uniform act for the 2005 Convention.

Lastly, Ms. Sabo updated delegates on work at the Hague Conference, UNIDROIT, and UNCITRAL. The Hague Conference is continuing its work on judgments, rules on parallel proceedings and related actions, parentage, and the financial aspects of intercountry adoption. UNCITRAL is working on applicable law in insolvency proceedings, asset tracing and recovery, investor-state dispute resolution reform, data transactions, and negotiable cargo documents. UNIDROIT is working on best practices for effective enforcement and a guide to the legal structure of agricultural enterprises. All three bodies are considering projects related to the digital economy and cross-border commerce.

Ms. Sabo concluded her presentation by thanking the ULCC for the opportunity to present the private international law report over the years.

REVIEW OF JUDGMENTS AND JOURNALS

Presenter: Christina Croteau, Legal Project and Research Coordinator, ULCC

Ms. Croteau reported on the occasions when the work of the ULCC has been cited by courts, journals, and other academic publications so that delegates may be aware of its impact on the legal landscape.

Between January 2023 and June 2024, the ULCC was cited 17 times at the superior court level or above. Notable citations include *Hansman v Neufeld*, 2023 SCC 14, *Hoellwarth v Vital Statistics Alberta*, 2023 ABKB 339, and *Zbitnew Estate v Park*, 2024 SKCA 4.

In academic journals and law reform agency publications, the ULCC was referenced several times, including by Guillaume Laganière in “Choice of Law Issues in Tort-based Climate Change Litigation” 74 U.N.B. L.J. 33 and by the Alberta Law Reform Institute in its report on access to digital assets by fiduciaries (Final Report 121, 2024).

Lastly, Ms. Croteau noted occasions when the ULCC was referenced in other media and noted in particular a reference in a broadcast of the CBC/Radio Canada show “La Facture”.

RESOLVED:

THAT the report of the Legal Project and Research Coordinator be received.