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UNIFORM LAW CONFERENCE OF CANADA

***UNIFORM ACT TO IMPLEMENT THE CONVENTION ON
THE INTERNATIONAL PROTECTION
OF ADULTS (2020)***

As adopted – February 1, 2020

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

Uniform Act to Implement the Convention on the International Protection of Adults (2020)

Comment: This Uniform Act implements the *Convention on the International Protection of Adults*, which sets rules to protect incapacitated adults and their property when they are involved in cross-border situations by harmonizing applicable conflict of law rules and establishing a structure for effective co-operation on such cases between Contracting States.

The ULCC adopted the Uniform International Protection of Adults (Hague Convention) Implementation Act in 2001. The present act updates that act in accordance with the 2014 *Principles for Drafting Uniform Legislation Giving Force of Law to an International Convention* as well as the *Guidelines for Drafting Uniform Legislation Giving Force of Law to an International Convention* (2019). As the act does not bring any substantive changes to the 2001 act, it is addressed at jurisdictions that have not adopted that act. The 2001 act was withdrawn by the ULCC with the adoption of this act.

An enacting jurisdiction will have to indicate to Justice Canada whether Canada shall make for that jurisdiction the declaration permitted by paragraph 32(2) and Article 55 of the Convention.

Article 55 is a standard provision in private international law conventions. It allows federal states to identify the territorial units to which the application of the Convention will extend by making a declaration to this effect either upon signature, ratification, acceptance, approval or accession or at any time thereafter. The content of Article 55 is reflected in the force of law provision of this Uniform Act.

Paragraph 32(2) permits Canada to declare, in relation to a particular province or territory, that competent authorities from other Contracting States shall address requests for information relevant to the protection of an adult under paragraph 32(1) exclusively to the Central Authority of the province or territory. Since this declaration does not modify the substantive legal scope of the Convention, it is not necessary to reflect its content in the Uniform Act.

The Convention also requires Contracting States to provide certain specific information to the Permanent Bureau of the Hague Conference on Private International Law, and this information must be provided by the enacting jurisdictions to Justice Canada for transmission abroad. See Articles 28, 38 and 42.

Interpretation

1. In interpreting the Convention, recourse may be had to the *Explanatory Report on the Hague Convention of 13 January 2000 on the International Protection of Adults*.

Comment: The Explanatory Report was prepared by Paul Lagarde and is available on the Hague Conference website. The purpose of this interpretation rule is to ensure that courts and parties will refer to the material set out in the provision before referring to domestic law to interpret the Convention. This provision is in addition to the treaty interpretation principles codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37. The object of permitting judicial recourse to supplementary sources of interpretation is reflected in the observation of Justice La Forest in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at p. 578, that

[i]t would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the treaty must have intended. Not surprisingly, then, the parties made frequent references to this supplementary means of interpreting the Convention, and I shall also do so. I note that this Court has recently taken this approach to the interpretation of an international treaty in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

Section 1 is not intended to have the effect of excluding other possible sources of interpretation. It merely indicates the principal source to be used in interpreting the Convention. It is expected that over time other helpful resources will emerge.

[Inconsistent Acts

2. In the event of any inconsistency between this Act and any other Act, this Act prevails to the extent of the inconsistency.]

Comment: Legislation that is inconsistent with the act should be identified and amended to the extent of its inconsistency. If necessary, the act may contain the precedence rule set out by this provision; however, such a provision should be avoided as it imposes upon users the burden of determining the extent to which a provision of the act is inconsistent with the provisions of another act of the Legislative Assembly. A precedence rule may also create difficulties in interpreting subsequent acts dealing with the same subject-matter. To avoid internal conflict, enacting jurisdictions should ensure that if an equivalent provision appears in other acts with which this act might potentially be inconsistent, those other acts should be amended to give precedence to this act.

Force of law

Option A

3. The *Convention on the International Protection of Adults* set out in the Schedule has the force of law in [jurisdiction] on the first day of the month following the expiration of three month after the notification by Canada of a declaration extending the application of the Convention to [jurisdiction] in accordance with subparagraph 57(2)(c) of the Convention.

Option B

3. The *Convention on the International Protection of Adults* set out in the Schedule has force of law in [jurisdiction].

Comment: The force of law provision gives force of law to the entire Convention. Giving force of law only to some articles of the Convention is not recommended as jurisdictions run the risk of omitting to give force of law to matters over which they have jurisdiction. Furthermore, it may be difficult to distinguish or to separate what is of federal or provincial jurisdiction.

The Convention should be annexed to the Uniform Act. Simply referring to an external publication which contains the Convention, such as the website of the international organization which adopted it may not be sufficient to allow a court to take judicial notice of the Convention. The legislation governing evidence of some jurisdictions provides that a court shall take judicial notice of conventions that are printed by the Queen's Printer or the official printer of the jurisdiction in question.

The Uniform Act offers two options with respect to the force of law provision. Each jurisdiction should determine which option is the most appropriate. Because of the short period of time set out in subparagraph 57(2)(c) between the deposit by Canada of its a declaration extending the application of the Convention to a jurisdiction and the application of the Convention to the jurisdiction at international law, the time required to take measures necessary to bring the act into force will be relevant in deciding which option to select.

Together, option A of the force of law provision and option A of the commencement provision allow jurisdictions to bring their act into force without giving force of law to the Convention until it applies to their jurisdiction at international law. A jurisdiction may select these options to avoid problems linked to coordinating the day on which the act enters into force with the day on which the Convention applies to it at international law.

Option A is also useful when a jurisdiction has legislation that provides for the repeal of legislation that is not in force within a certain period of time. Option A would thus allow the jurisdiction to bring its implementing act into force to avoid the application of such legislation but the Convention would not have force of law until it applies to the jurisdiction at international law.

Each jurisdiction should ensure that its act is in force when the Convention starts applying to it at international law (see the comment accompanying the commencement provision). Where this has not been possible and the Convention starts applying to the jurisdiction at international law before the act comes into force, option A should not be used as it may raise issues with respect to the retroactive effect of the Convention. In such a case, it would be expected that the act would be brought into force as soon as it had been adopted and so option B would be used.

A jurisdiction selecting option A of both the force of law and the commencement provisions should note that this approach is not entirely transparent: on the face of the act it is not apparent if the Convention has started applying to the jurisdiction at international law. The jurisdiction may wish therefore to provide notice to the public when the Convention starts applying. This may be done, for instance, by publishing a notice in the jurisdiction's official publication. Ideally the notice would be available indefinitely, so that people would be able to determine the effective date years later. Additionally, according to the jurisdiction's practice, a reference to the date on which the Convention applies could be included in the published version of the act. The publication of the notice in the jurisdiction's official publication or the inclusion of the application date in its act must not be a condition precedent to the application of the Convention.

The wording of option A can be limited to referring to subparagraph 57(2)(c) of the Convention which prescribes the mechanism for calculating the date on which the Convention starts applying to the jurisdiction internationally:

The Convention on the International Protection of Adults set out in the Schedule has force of law in [jurisdiction] from the date determined in accordance with subparagraph 57(2)(c) of the Convention.

Option B allows a jurisdiction to give force of law to the Convention from the day on which its act comes into force. Option B may be needed by those jurisdictions where additional steps are necessary such that option A is problematic or where the Convention already applies to the jurisdiction at international law. Paired together, option B of this section and option B or C of the commencement provision ensure that the Convention will not have effect in the jurisdiction by legislation before it applies to the jurisdiction at international law.

Jurisdictions selecting option B must be able to bring their act into force on the day on which the Convention applies to their jurisdiction at international law. They should communicate with Justice Canada to coordinate these events.

[Central Authority

4. The *[name of authority designated by Canada in consultation with the jurisdiction]* is the Central Authority for *[jurisdiction]* for the purposes of the Convention.]

Comment: In line with Article 28 of the Convention, an enacting jurisdiction will designate or identify the authority that will act as the Central Authority for the purposes of the Convention and Canada will communicate this information to the Permanent Bureau of the Hague Conference on Private International Law.

The Central Authority may be identified in the act. Where the Central Authority has not been identified by a jurisdiction before it adopts its implementing act or where it is liable to change over time, it may be more appropriate for the jurisdiction to identify it in regulations.

Some jurisdictions may choose not to identify the Central Authority in their act or regulations where they may have recourse to other mechanisms to assign authority, such as by orders in council or by simple administrative assignment of responsibilities.

The role of the Central Authority to be designated under the Convention by each province or territory is the key to much of the practical operation of the Convention. Its duties are not described in detail in this Uniform Act, because they are set out in the Convention itself.

[Minister Responsible for the Administration of the Act

5. The Minister of *[Ministry/Department]* is responsible for the administration of this Act.]

Comment: Specifying which minister is responsible for the administration of an act in the act depends on the practice of jurisdictions.

[Regulations]

6. The [name of regulation-making authority] may make regulations for carrying out the purposes of this Act.]

Comment: Jurisdictions should consider whether regulation-making powers are needed before providing for them in the act. Regulations may be thought desirable, or may be necessary under existing law of the enacting jurisdiction, to enable the Minister to delegate some duties under the Convention, facilitate communications and make arrangements with public authorities or other bodies to act under the Convention, or to facilitate the operation of the Convention. Regulation-making powers should be clearly expressed and should be no broader than is necessary.

Commencement

Option A – Commencement on assent before the Convention applies to jurisdiction

7. This Act comes into force on [assent / insert the date of assent to this Act].

Option B – Commencement on proclamation on day on which the Convention applies to jurisdiction

7. This Act comes into force on [proclamation / the date or dates to be set by the Government].

Option C – Commencement on a specified day which is the day on which the Convention applies to jurisdiction

7. This Act comes into force on [insert day on which the Convention applies to jurisdiction].

Comment: There is a need to ensure that the Convention has force of law in the implementing jurisdiction when it starts applying to the jurisdiction at international law. The force of law and commencement provisions offer options which help avoid issues linked to coordinating the occurrence of these two events.

Three options are available with respect to the commencement provision in the Uniform Act. The points set out below should be considered by jurisdictions in deciding which option to select.

Option A can be combined with the option A of the force of law provision so that the Convention will only have force of law on the day on which it applies to the jurisdiction at international law.

- Option A combined with option A of the force of law provision avoids the necessity for the federal and provincial or territorial governments to coordinate the application of the Convention to a jurisdiction and the commencement of the act, therefore eliminating the risk that it will not have commenced when the Convention starts applying to a jurisdiction.
- As stated in the comment to the force of law provision, jurisdictions selecting this option should publish the date on which the Convention starts applying to their jurisdiction.

Under option B, the jurisdiction must proclaim its act on the same day that the Convention applies to the jurisdiction at international law.

- When the act commences on proclamation on the date on which the Convention applies to the jurisdiction, option B would be combined with option B of the force of law provision.
- A jurisdiction that adopts this approach faces some risk. If the date on which the Convention will apply to the jurisdiction is not yet known, the jurisdiction must ensure that the proclamation will be issued on the date on which the Convention will start applying once the date is known. Proclaiming the act into force may be difficult to achieve in practice because the time between learning the effective date that the Convention will apply to the jurisdiction and the date itself may be too short to issue a proclamation.
- As stated in the comment to the force of law provision, a jurisdiction may choose option B if additional steps are necessary such that it is problematic to bring the act into force with option A.
- Option B would be combined with option A of the force of law provision if proclamation is issued before the Convention starts applying to the jurisdiction.

Option C allows the act to commence on the day specified in the commencement provision which is the day on which the Convention applies to the jurisdiction at international law.

- This option would be combined with option B of the force of law provision.
- Enacting jurisdictions can select this option if the day on which the Convention will apply to their jurisdiction is known at the time of the adoption of the act.

Schedule [*Insert the full text of the Convention. It is available on the treaty depositary's website at:*

https://treatydatabase.overheid.nl/en/Verdrag/Details/009250/009250_Gewaarmerkt_0.pdf]