

MINUTES OF THE ANNUAL CONFERENCE
SEPTEMBER 9 TO 13, 2007

General Resolution Respecting Written and Oral Reports presented to the Conference

The meeting began by adopting the following resolution:

RESOLVED:

THAT the written reports presented to the Civil Section and to the joint session of the Civil and Criminal Sections appear in the 2006 Proceedings; and

THAT a summary of the oral reports presented to the Civil Section and to the joint session of the Civil and Criminal Sections appear in the 2006 Proceedings.

Section 347 of the *Criminal Code* of Canada: Report and Recommendations

Presenter: Jennifer E. Babe, Miller Thomson LLP

The paper prepared by Ms. Babe provided an overview of the history of the 'criminal interest rate' provision in the *Criminal Code* (section 347) and summarized the issues raised in the paper prepared by Professor Mary Anne Waldron for the Conference in 2002 on the same issue.

In her presentation, Ms. Babe described the nature of legitimate business transactions involving interest payments that are seriously affected as a result of unenforceable contractual clauses offending section 347 of the *Criminal Code*. Examples of such transactions include bridge loans, start-up businesses, equity kickers and mezzanine financiers. It was noted that while there are very few reported criminal cases considering section 347 of the *Criminal Code* there have been many cases where the section is relied on in commercial litigation – usually by a party to a transaction seeking an order that a contract term is unenforceable by reason of illegality due to section 347. This, the presenter noted, was not the activity that section 347 of the *Criminal Code* intended to address.

A report was then given on events since the presentation of that paper. The presenter reported that following the presentation of the paper to the Conference in 2003, the ULCC submitted the Waldron Report recommendations to the federal Minister of Justice for his consideration. The presenter then referred to a 2005 recommendation made by the Senate Banking Committee during its study of Bill S-19, *An Act to amend the Criminal Code (criminal interest rate)*, 1st sess, 38th Parl, 2005 (the Bill later died on the Order Paper). The Committee had recommended exempting from s. 347 of the *Criminal Code* loans where the principal amount was in excess of \$100 000. The presenter also mentioned the tabling of Bill C-26, *An Act to amend the Criminal Code (criminal interest rate)*, which focuses on payday lenders and others lending to financially vulnerable Canadians. However, it was noted that Bill

C-26, does not address the problems with respect to large business transactions outlined in the Waldron Report and that no further bills addressing the issue relating to larger business transactions were presented by the Government since the Waldron Report was submitted to the then Minister of Justice in 2004.

The presenter noted that most provinces are now moving forward with legislation to regulate payday lenders and this type of legislation is a valuable piece of consumer protection. However, this type of legislation does not address the issues relating to interests for larger business transactions.

The presenter concluded that section 347 of the *Criminal Code* continues to pose serious difficulties for larger business transactions and proposed that the Criminal Section of the ULCC examine section 347 of the *Criminal Code* in light of the problems described above taking into consideration the criminal conduct it was intended to address.

Discussion:

Following the presentation, delegates proposed ways to study section 347 of the *Criminal Code* in light of issues facing the business community, as highlighted in the presentation.

During the discussion, it was submitted that this provision may not belong in the *Criminal Code* since consumer protection laws already exist. In response, some delegates noted that other *Criminal Code* offences, such as fraud and theft, also have a consumer protection component but that the true purpose of those provisions is to distinguish between what is right and wrong. It was noted that two distinct scenarios emerge from the paper: The first refers to sophisticated business transactions while the second encompasses situations such as in the case of *Garland v Consumers' Gas* [1998] 3 S.C.R. 112 dealing with consumers paying high interest rates on late payments of consumer gas bills. For the latter cases, it was argued that a set criminal interest rate may be the only way to target corporate behaviour against individuals by stating that these corporations are acting criminal when charging such high interest rates. Therefore, it was suggested that a proposal to amend s. 347 should be restricted to addressing the problem dealing with sophisticated business transactions without affecting other parts of the section because there is a need to maintain the current 60% baseline on which to have all types of commercial and consumer behaviour rest.

One delegate expressed the view that in searching ways to address the sophisticated business transactions aspect, care should be given not to ignore implications in other areas and noted that there may be sound policy reasons for maintaining section 347 in the *Criminal Code*.

Following discussion, the Chair of the Criminal Section noted that the Criminal Section would discuss and vote on a proposed resolution to consider creating a working group to study the issues described in the paper.

RESOLVED:

THAT the Criminal Section consider examining the issue of the usefulness for criminal law purposes of section 347 of the Criminal Code, and the range of options for possible reform of this offence, from fundamental reform that would focus solely on the threats, coercion and violence characteristic of "loan sharking", to adjustments such as those recommended in the paper entitled "Section 237 of the Criminal Code: A Deeply Problematic Law" (M.A. Waldron, ULCC,2002), and report back to the ULCC in 2008.

Limitation Periods and Other Issues in Insurance Statutes: Status Report

Presenter: Lisa A. Peters (Canadian Bar Association, B. C. Branch), Lawson, Lundell LLP

At the 2005 Conference, Peter Lown (Alberta) summarized a paper prepared by the late Professor Jim Rendall on the issue of limitation periods in insurance statutes. At the 2006 meeting, Ms Peters reported that both British Columbia and Alberta had begun a comprehensive review of their *Insurance Acts*; the issue of limitation periods was one issue being addressed in these reviews.

Ms Peters then summarized what is occurring in the provinces and territories:

- Alberta: Bill 42 (the *Insurance Amendment Act, 2007*) received first reading on June 12, 2007;
- British Columbia: consultation closed on May 1, 2007. One stated goal is to harmonize with Alberta's Bill 42 to the greatest extent possible.
- Manitoba: legislation was introduced in November 2006, but progressed no further. Legislation may be reintroduced. One objective would be consistency with British Columbia and Alberta.
- New Brunswick, Nova Scotia and Prince Edward Island: in 2005, these jurisdictions decided to revisit the "*Harmonized Model Insurance Act for Atlantic Canada*" (drafted in 2003 by the superintendents of insurance of the Maritime Provinces). Discussions are continuing.
- no current projects are underway in Ontario, Québec, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut.

Ms Peters identified four possible prospects for harmonization: limitation periods; statutory conditions; the interplay of fire insurance provisions and the general parts of insurance statutes; and dispute resolution.

The Canadian Council of Insurance Regulators is also maintaining a watching brief with respect to these issues. The Council's hope is that Alberta's Bill 42 will be a template for other provinces considering insurance law reform and that it will lead to additional harmonization and uniformity. It takes the view that the ULCC could assist in the process by continuing to monitor the situation and by commenting on the Alberta Bill.

RESOLVED:

THAT the Civil Section Steering Committee continue to monitor developments respecting the issues raised in the 2005 Report to ULCC and continue to work with the Canadian Council of Insurance Regulators to address these issues.

Presumptions of Advancement and Resulting Trusts: Status Report

Presenter: Elizabeth Strange, Solicitor and Acting Queen's Printer, Office of the Attorney General, New Brunswick

At the 2006 meeting of the Conference, one topic raised in the "new projects" presentation was the necessity of maintaining the presumptions of advancement and resulting trusts. As at that time the

Supreme Court of Canada had agreed to hear two companion cases on the topic, a wait-and-see approach was taken.

Ms Strange provided a brief overview of the presumptions of advancement and resulting trusts, noting that these are presumptions respecting the intention of a person who has transferred property to another gratuitously. Both presumptions are rebuttable. The presumption of advancement from husband to wife (and vice-versa) has been largely abandoned, both judicially and legislatively. However, the issue of the application of the presumption of advancement for a parent-to-child transfer is still open to debate. Both presumptions have been the subject of criticism from academics and the judiciary, and many critics advocate their abolishment.

In the companion cases of *Pecore* and *Brooks*, the Supreme Court of Canada had an opportunity to address the topic. Both cases came from Ontario, and were similar in that an aging father had put significant funds into a joint account with an adult daughter. Ms Strange provided an analysis of both cases. In the *Pecore* case all the judges agreed that the presumptions have a role to play in disputes or gratuitous transfers, as they provide guidance for courts where there is little or no evidence as to the transferor's intent. Also, the court in *Pecore* has given direction as to when each presumption should be applied, and the standard of proof to be applied.

Ms Strange concluded that, as the Supreme Court of Canada has stated its belief in the continuing importance of the presumptions of advancement and resulting trust and has given direction as to when each should be applied, unless the Uniform Law Conference of Canada sees a strong reason to legislate in favour of a certain presumption, or to remove the presumptions legislatively, there does not appear to be an obvious project for the Conference on this topic.

RESOLVED:

THAT the Civil Section Steering Committee continue to monitor developments in the law and, if appropriate, make recommendations to the New Projects Committee.

Forms of Business Associations - Income Trusts: Uniform Act and Commentaries

Presenter: Wayne D. Gray (Ontario Bar Association), McMillan Binch LLP

At the 2005 meeting of the ULCC, a Report on Forms of Business Associations in Canada was delivered, and a Working Group was struck. In 2006, Mr. Gray, as Chairperson of the Working Group, provided a Report to the ULCC which included an overview of the income trust. The 2006 Report made 40 recommendations and concluded by reiterating that legislation dealing with income trusts must be sensitive to the distinctive tax treatment that led to the rise of income trusts. At the 2006 meeting, the Conference resolved:

1. That a Working Group be established to consider the relation of the recommendations in the report and directions of the Conference to Quebec law, and that this Working Group report its conclusions and recommendations to the Drafting Group described below as soon as possible, but no later than December 31, 2006; and
2. that a Drafting Group be established to prepare a Uniform Act and Commentaries based on the recommendations in the Report and in accordance with the directions of the Conference,

including any recommendations received from the Working Group described above, for consideration at the 2007 meeting.

Mr. Gray presented the proposed *Uniform Income Trusts Act* to the Conference. He noted that the recommendations from the 2006 Working Group Report are incorporated throughout the proposed Uniform Act for ease of reference. Mr. Gray also noted that 36 of the 40 recommendations are reflected in the draft. One recommendation – Recommendation No. 5 (Statutory Purpose) – was dropped. It had been modelled after a provision in the Canada *Business Corporations Act*, but is not common practice in Uniform Acts and raised some concerns in the Drafting Group. Mr. Gray then provided an overview of the provisions of the proposed Uniform Act and invited discussion and questions.

In Part 1 (Interpretation and Application), section 4 (Trust, mutual funds, not legal persons) was highlighted as a crucial provision, linked to Recommendation No. 6. For tax purposes, it is very important that an income trust not be a legal person. Part 2 – Unit Holder Immunity – incorporates Recommendations 7 and 8 of the 2006 Report. It was noted that section 9 of the proposed Uniform Act makes these immunity provisions retroactive.

With respect to Part 3 (Unit Holder Rights and Remedies), Mr. Gray indicated that the underlying philosophy was to strike a balance between all the affected parties (investors, unit holders, trustees, managers of the trust and creditors). It was noted that sections 22 and 23 establish an optional 'oppression remedy' for unit holders – the remedy is not available unless the trust instrument “opts in”. If a trust instrument opts in, the proposed Uniform Act provides certainty for unit holders as to the scope of the remedy. Alternatively, jurisdictions may wish to make the remedy available to unit holders with respect to all income trusts, regardless of whether a particular trust instrument opts in. Mr. Gray also noted that the Canadian Coalition for Good Governance has taken the position, in the context of pension funds, that such remedies should be mandatory.

Discussion:

A question was raised respecting the registration of income trusts. Mr. Gray responded by noting that Recommendation No. 38 of the 2006 Report recommended that there be no registration requirement because:

1. This looks too much like a corporation, and also noted that registration is usually an act of creation, which would not be the case here.
2. As this is not currently done, a new bureaucracy would have to be created.
3. In terms of registration providing an “information source” for the public, he noted that registry type information exists in a more robust form on SEDAR (System for Electronic Disclosure and Recovery), operated by the Canadian Securities Administrators.

It was pointed out that the Canadian Association of Corporate Law Administrators are concerned that appropriate consideration be given to the matter of whether, in the uniform legislation, income trusts should be required to “register” with corporate registries. Their concern stems from the fact that the public tends to approach corporate registries to obtain information on business organizations, presumably including income trusts. They were aware that Securities Commissions would have some information on these trusts, but did not know if this would be an adequate substitute for the information being available through a corporate registry. This issue was discussed at some length, and Mr. Gray noted that a unit holder would have access to more information under SEDAR.

In the discussion respecting Part 4 (Powers and Duties of Trustees) it was noted that some concerns with subsection 32(2) of the proposed Uniform Act – “the trustees of a trust may, but are not obliged to comply with a direction of the unit holders of a trust”. Mr. Gray noted that there was some discussion on this point in the Working Group, and that it grandfathered trusts that currently have “veto powers”. With respect to new trusts, one would have to look at the trust instrument, as most, if not all, address how to deal with matters such as disposition of assets, etc. As such agreements are not uniform, it would be very difficult to draft for this. It was also noted that there was also concern that this would attract unit holder liability. The remedy would seem to be that the unit holders can vote the trustees out. Mr. Gray pointed to section 35 as important – no provision in a contract, trust instrument or resolution relieves a trustee from the duty to act in accordance with the Act or regulations – and noted that this is a change from the current situation. Also important is section 42 (unsecured creditors), as it solves a major problem by clarifying that an unsecured creditor may be able to look to trust assets to satisfy the debt. Part 5 (Arrangements and Compulsory Acquisitions) and 6 (General) were also discussed.

There was a question about why certain remedies were optional. From the trustee and 'entity' point of view, the legislation seems designed to make the entity as much like a corporation as possible except for tax purposes. However, unit holder rights did not seem to 'track' the benefits that shareholders enjoy in this same way. In response, Mr. Gray noted that the unit holder would not have any these rights today and that investors know this going into a unit trust arrangement. The Working Group did consider this issue, but on balance the general consensus was that it is more empowering for unit holders to decide for themselves on appropriate remedies.

It was finally noted that the proposed Uniform Act, as drafted, does not follow the usual ULCC approach to respect to commentaries. Clark Dalton, Q.C. (ULCC) will work with Mr. Gray and the drafter to develop the recommendations which appear throughout the proposed Uniform Act into commentaries.

RESOLVED:

THAT the draft *Uniform Income Trusts Act* and commentaries be circulated to the jurisdictional representatives. Unless two or more objections are received by the Executive Director of the Conference by a date to be determined by the Steering Committee, but no later than November 30, 2007, the draft Act should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment.

Apology Legislation: Uniform Act and Commentary

Presenter: Russell J. Getz, Legal Counsel, Justice Services Branch, Civil and Family Law Policy Office, Ministry of the Attorney General, British Columbia

In the fall of 2006, the Civil Section Steering Committee adopted a project to prepare a draft *Uniform Apology Act* for presentation to the 2007 Annual Meeting.

The project was inspired by the interest in British Columbia's *Apology Act* of 2006, which provides that an apology is not admissible in civil proceedings for the purpose of proving liability and that an apology is not an admission of liability. After the B. C. Act was adopted, Saskatchewan enacted virtually identical provisions respecting apologies in its *Evidence Amendment Act*, 2006. The B. C. and Saskatchewan legislation had their origins in law reform and civil justice reform efforts to improve

the means available to people for resolving civil disputes. Research has indicated the benefits of apologies in resolving disputes, the real or perceived ambiguity about the legal effect of apologies, and legislative initiatives on the topic in American and Australian jurisdictions.

The paper discussed the reasons that are usually advanced in favour of apology legislation the issues raised by critics of apology legislation.

However, in general, the paper indicated that apologies are morally desirable and apology legislation encourages apologies that would not be given at all without it. Arguably, the law should let the victims judge their moral (and legal) worth. It was also noted that absence of apology legislation may well work to the disadvantage of people who, for reasons of gender, culture or religion, maybe more prone to apologize than other people.

Two models respecting the scope of protection of apology legislation were discussed: legislation that protects apologies that acknowledge fault or wrongdoing (such as the B. C. and Saskatchewan legislation) and legislation that protects expressions of sympathy only (such as many of the enactments in the U. S. and Australia). Legislation limited to protecting only expressions of sympathy would not be substantially different from the status quo, and leads to uncertainty as to whether a 'fault admitting' apology may be used against a party.

Apology legislation may also be distinguished according to the scope of wrongdoing to which it applies. The B. C. and Saskatchewan legislation is not limited to certain types of liability, whereas all American enactments apply only to medical malpractice or accidents, or both. Similarly, in Australia, apology legislation is limited to personal injury claims, negligence or torts generally.

The draft *Uniform Apology Act* was then presented with the following:

- provides that an apology encompasses statements of admitting or implying an admission of wrongdoing, in addition to expressions of sympathy or regret;
- has a broad application, extending to any matter;
- provides that an apology is not an admission of legal fault or liability, express or implied; is not relevant in determining fault or liability, and is not admissible in evidence to establish liability;
- provides that an apology cannot be used as confirmation of a cause of action in order to extend a limitation period;
- provides that an apology cannot be regarded as an admission of liability for the purpose of avoiding an insurance policy; and
- protects apologies from being used to establish liability, but does not protect them from being used in the assessment of damages. Whether they would aggravate or diminish damages may depend on the particular case.

As torts are not necessarily confined within provincial or territorial borders and people may do or suffer harm away from home, the human and legal consequences of apologies should be predictable across the country. Thus a harmonized legal approach would be beneficial.

Discussion:

A concern was raised respecting the scope of the definition of "apology" in the draft *Uniform Apology Act* and introduced a motion to amend the definition by adding a reference to an admission of "fact or fault". The motion was seconded by a delegate from Québec, and was defeated.

In response to a question respecting the experience of those jurisdictions that have apology legislation, it was noted that the legislation has not been in place long in B.C., but it was warmly received by the Bar. Although the legislation has not been in place long in Saskatchewan, if there was a problem with it, it would likely have been raised by now. The Australian delegates noted that their apology legislation was developed in a broader tort reform context; that has now been in place a few years; and that was generally supported by insurers and lawyers. NCCUSL had considered a study project where apology legislation was an element, but the time was not right for the project.

RESOLVED:

THAT the *Uniform Apology Act* and commentaries be adopted and recommended to the jurisdictions for enactment as a stand alone statute or as an amendment to the jurisdiction's *Evidence Act*.

The Hague Choice of Court Convention and the Common-Law: Paper

Presenter: Professor Vaughan Black, Dalhousie Law School

Professor Black provided a summary of the Convention, a description of the ways in which it differs from existing law in common-law Canada, some views on whether the scheme and body of the Convention would represent an improvement on that existing law and some recommendations as to whether the Convention should be adopted.

There is no other multi-lateral treaty on this subject under consideration, in Canada or elsewhere, and that there are no Canadian law reform projects underway that significantly touch on this area of the law. The scope of the Convention is narrow and accordingly most commercial practices and legal issues would not be effected by it. Even in those areas that would be covered by the Convention, the difference between the regime found in the Convention and that presently in place in the common-law provinces in Canada is not great and, based on recent case law, these differences are in fact narrowing. A practical question in determining whether to adopt the Convention, is whether other countries – and particularly Canada's trading partners – are interested in the Convention. (To date, no states have signed this Convention.)

Professor Black then discussed the history of the Convention, noting that underpinning the Convention are certain assumptions about the value of international trade. The goal of the Convention is to facilitate and promote the inclusion of 'exclusive choice of forum' clauses in certain international commercial contracts, by ensuring such clauses are more effective and certain in their effect than they currently are. The Convention is limited in that it deals only with commercial – that is, business to business – contracts; it applies only to international contracts; and it only takes effect where there is an exclusive choice of court clause. Also, the Convention applies mainly to contracts for the sale of goods and services, and there are many exclusions.

Professor Black noted that, to implement the Convention in the common law jurisdictions, some changes in detail, but no fundamental changes in principle, would be required. A few important differences from common law principles were noted.

The main objections to the Convention relate to its narrow scope, lengthy list of exclusions and its rigidity when compared to the flexibility of the common law. Also, it has been criticized as benefiting 'big business' as opposed to small businesses. A further concern (largely speculative) is that the

Convention could effectively allow certain parties to shift their dispute resolution costs from arbitration to a publicly subsidized system – namely, the courts.

Professor Black concluded that the Convention represents a modest but useful initiative, and appears generally uncontroversial and orthodox. He recommended that:

- Canada ratify the Convention;
- Canada refrain from making declarations under Articles 19 and 20;
- Canada make a declaration under Article 22, dealing with non-exclusive choice-of-court clauses;
- No declarations need be made under Article 26 at this time;
- Declarations will be required under Article 28 for any provinces that do not elect to implement the Convention at this time; and
- Declarations will be required under Article 21 for those provinces that will only implement the Convention if they can prevent its application to specific matters (for example, B. C. has specific legislation precluding enforcement of foreign judgments respecting injury arising from asbestos mined in that province).

Discussion:

Kathryn Sabo (federal government) noted that countries, including Canada, have adopted a 'wait and see' attitude to this Convention, and are waiting for the Convention's Explanatory Report. The NCCUSL representative thanked Professor Black for his excellent report and noted that NCCUSL has appointed a study committee which will hopefully report by the end of the year; also, the policy arm of the American Bar Association has endorsed the Convention. Mexico has opened serious discussions on this Convention, and there are two working groups looking at it. The representatives from Australia also thanked Professor Black for his report and noted that Australia is waiting for the explanatory documents.

RESOLVED:

THAT a working group be established and directed to prepare a uniform implementing Act and commentaries for consideration at the 2008 meeting.

Québec Law and the Hague Convention on Choice of Court Agreements of 2005: Paper

Présenter: Frédérique Sabourin, Professeur, Faculté de droit, Université de Sherbrooke

Professor Sabourin was a member of the Canadian delegations involved in negotiating the Convention, from 1996 to its conclusion in 2005. The object of her report was to set out the differences that exist between Québec law and the Convention, in general terms, focusing on the three key obligations in the Convention:

- the obligations of the court chosen by the parties;
- the obligations of a court that is seized of a matter but is not the 'chosen' court; and
- the obligations of a court asked to enforce the judgement of the 'chosen' court.

There are many similarities between the Convention and Québec law which should facilitate implementation of the Convention. Professor Sabourin noted, though, that Québec has certain restrictions as well. For example, certain provisions of Québec law prevent recognition and

enforcement of a foreign court decision when the case concerns civil liability for any harm suffered in, or outside, Québec as a result of exposure to, or the use of, raw materials, whether processed or not, originating in Québec. Careful thought needs to be given to the scope of any declaration that might be made under Article 21 of the Convention.

Professor Sabourin then highlighted areas of difference or concern, including:

- the Convention provides that the jurisdiction of the chosen court is "exclusive" unless the parties to the agreement state otherwise;
- the Convention requires the agreement to be in writing, which may raise questions respecting agreements formed electronically;
- cases where all elements except the choice of court arise in the same jurisdiction;
- a 'chosen' court cannot withdraw on the basis of *forum non conveniens* (this would require an amendment to Québec law);
- in light of a recent decision of the Supreme Court of Canada, in Québec law it is possible to reduce the quantum of damages and interest awarded when enforcing a foreign judgment. This is not reflected in the Convention.

Professor Sabourin noted mixed feelings about the Convention – it is a complex document, involving a significant investment of time and resources, for one with such a limited scope. However, it is a small, but positive, step in the right direction as it provides some certainty to parties to an agreement that falls within its scope, and provides them with a real choice between using the courts and using arbitration to resolve disputes. Professor Sabourin recommended that the Conference establish a working group to see how the Convention could be implemented in Canada.

Discussion:

Kathryn Sabo (Canada) noted that it is important to look closely and critically at the Convention. The status quo respecting enforcement of foreign judgments needs to be kept in mind – as Canada currently enforces foreign judgments broadly, we need to be aware of what might be lost under the Convention. Having said that, the gain may be the ability to enforce our judgments elsewhere – the Convention is a tool with the potential to be of assistance.

RESOLVED: (see the resolution respecting the Paper on The Hague Choice of Court Convention and the Common-Law).

UN Convention on Independent Guarantees and Stand-By Letters of Credit: Interim Report

Presenter: Kathryn Sabo, General Counsel, International Private Law Section, Department of Justice, Canada

At its annual meeting in August, 2006, the Conference established a Working Group to:

- prepare, in accordance with the directions of the Conference, a uniform act and commentaries to implement the Convention for consideration at the 2007 meeting;
- report on the desirability of any other legislative recommendations; and

- work in co-operation with the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the Mexican Uniform Law Centre, should those organizations so desire.

Ms Sabo presented a status report on behalf of the Working Group. Since the August 2006 meeting, additional experts were sought and added to the Working Group.

The Working Group plans to meet over the coming year and intends to complete the draft act and commentaries to implement the Convention set out in the Annex to the Group's report for presentation to the Conference in 2008. It will also consider the development of domestic rules for independent guarantees and stand-by letters of credit along the lines of the Convention rules and taking existing common law into account. Ms Sabo noted that guidance from the Conference on whether provisions for domestic guarantees should appear in a separate act or whether rules for a domestic regime and the Convention regime should be placed in one Act would be welcome.

The Working Group anticipates working with NCCUSL and the Mexican Uniform Law Centre. NCCUSL has convened a drafting committee meeting in November in Denver, Colorado and it is expected that members of the ULCC Working Group will attend.

RESOLVED:

THAT the Working Group complete, in accordance with the directions of the Conference, a Uniform Act and commentaries to implement the Convention for consideration at the 2008 meeting; and to report on the desirability of any other legislative recommendations; and to work in co-operation with the National Conference of Commissioners on Uniform State Laws and the Mexican Uniform Law Centre, should those organizations so desire.

Collateral Use of Crown Brief Disclosure: Report and Recommendations

Presenter: Denise Dwyer, Acting Deputy Director, Litigation, Crown Law Office – Civil, Ministry of the Attorney General of Ontario and David Marriott, Appellate Counsel, Alberta Justice

The Working Group, established at the August 2006 meeting of the Conference, was tasked with considering the issues raised in the paper *Collateral Use of Crown Brief Disclosure* (prepared by Crystal O'Donnell and David Marriott, and presented to the Conference in 2006) and with making recommendations to the Conference in 2007 "respecting the desirability and feasibility of legislative or non-legislative initiatives to promote uniformity in the use of Crown Brief material in collateral proceedings".

The Working Group examined the impact of the Ontario Court of Appeal decision in *D.P. v. Wagg* respecting production of the Crown brief in civil proceedings, and similar issues being argued in the context of child protection litigation and administrative law proceedings.

For the purpose of informing the Working Group's approach to drafting recommendations that would achieve uniformity in the use of production of Crown Brief information for collateral purposes, the following guiding principles were established by the Working Group:

1. Generally, it is in the public interest to control disclosure and use of Crown Brief materials for collateral purposes in order to maintain the integrity of the criminal justice system, and to protect third party privacy and confidentiality concerns.

2. There is a public interest in protecting the administration of civil justice by ensuring that parties to a civil proceeding have full access to all relevant information.
3. The '*Wagg* screening mechanism' applies in quasi-criminal and civil proceedings, including child protection proceedings, labour arbitrations and administrative law proceedings.
4. The public interest balancing test, which is part of the *Wagg* process, must be applied in a fair and consistent manner. This requires a decision-maker with the required legal expertise to recognize administration of justice concerns that are critical to the protection of the integrity of the criminal and civil law systems.
5. Freedom of information legislation should not be used to access Crown Brief materials in circumstances where the public interest in confidentiality should prevail. Freedom of information legislation ought not to facilitate access to Crown Brief materials where consideration of the public interest concerns identified in *Wagg* would lead to the opposite conclusion.

The Working Group examined a number of issues including the 'implied undertaking rule' and concluded that the Canadian jurisprudence on the relationship between the implied undertaking rule and materials disclosed or produced in a criminal trial should be clarified. The Working Group identified issues that need to be addressed and proposed that guidelines be developed for the purpose of determining when the public interest requires ordering production, notwithstanding the existence of the undertaking.

The following recommendations were made by the Working Group:

Recommendation 1

The *Criminal Code* or the Rules of Criminal Practice should be amended to create an undertaking of confidentiality that applies to all persons, including third parties, who receive Crown disclosure.

Recommendation 2

The provinces and territories should uniformly legislate amendments to their rules of civil procedure to codify the *Wagg* screen process in those rules.

Recommendation 3

Where feasible, Protocols and Memoranda of Understanding between key stakeholders such as the police and child protection agencies, and disciplinary tribunals, should be established to regulate the sharing of vital information in urgent cases and in particular types of proceedings.

Recommendation 4

The provinces and territories should uniformly codify the *Wagg* screening process in the enabling legislation of their child protection agencies and their legislation governing the procedures and processes that apply to administrative tribunals.

Recommendation 5

Freedom of information legislation throughout Canada should be uniform in its treatment of access requests for Crown Brief materials.

Discussion:

During the discussion, a number of issues were raised by delegates. It was noted that the paper was well researched, well written and thought provoking.

One question was posed regarding the need to address whether the 1999 Supreme Court of Canada case of *Campbell and Shirose* would apply since Crown brief materials often contain the subjective assessment of the evidence retrieved by police forces. It was noted in response that there is usually not much privileged materials dealing with the Crown's assessment of the case.

The following views expressed during the Criminal Section debates were summarized and reported to joint session delegates as follows:

- Privacy interests of an accused person ought to be specifically recognized;
- With respect to the recommendation to codify implied undertakings of confidentiality, interests of defence counsel and unrepresented accused ought to be carefully considered, including whether undertakings that bind defence counsel would prevent them from sharing information with journalists;
- A court power to set aside or vary an implied undertaking should perhaps not be restricted to judges of the superior court;
- Third parties who come into possession of disclosure materials might not know that they are subject to the implied undertaking;
- There may be a difficulty for accused persons to fully appreciate the reasons why they cannot use disclosure materials in collateral proceedings in which they may be engaged, such as family proceedings;
- Unrepresented accused may not fully appreciate the obligation of an undertaking of confidentiality; and
- The starting point of the paper should be that a presumption of non-confidentiality applies to Crown brief materials and documents should generally be made available to the public before a screening process applies;

During the discussion, it was suggested that it may be more appropriate to remove the presumption of confidentiality to expedite proceedings and avoid the need to make submissions that there are special circumstances in child protection cases and other administrative proceedings where a decision must be rendered promptly. It was noted in response that in the context of *Wagg*-type motions, it is recognized that child protection proceedings and similar matters are of such importance that they would proceed expeditiously but that in cases where it is less evident that the situation constitutes a special circumstance, a determination would need to be made.

In response to the question of the proper court jurisdiction to hear *Wagg*-type applications, it was submitted that the recommendation flowed naturally from the explanation provided by the Court in *Wagg* in which it was stated that the origin of the power of the Superior Court to hear such applications stemmed from the Superior Court's inherent power. In addition, it was noted that the main concern of the Working Group is that the question be handled by a court of proper expertise so the Court may fully appreciate the impact of decisions on the fairness of criminal proceedings.

However, it was agreed that the proper court jurisdiction could be changed if delegates felt it was appropriate.

One delegate observed that the creation of a right of appeal similar to the one pursuant to section 37 of the *Canada Evidence Act* where the court makes an interlocutory order not to restrict access to Crown brief materials should be considered.

Also raised was the situation where a special procedure is created in the criminal context to obtain sensitive information (e.g. s. 278.2 of the *Criminal Code* – production of records to accused) but where the accused commences an action against the victim before the criminal proceedings have been instituted and obtains the information that would not otherwise be available to the accused in the criminal context. It was noted in response that most situations are usually the reverse: the plaintiff, who is the alleged victim in the criminal trial, does not have access to crown brief materials for the purpose of the civil action against the defendant who is the accused in the criminal trial; but the accused receives Crown brief materials through disclosure.

In reference to Recommendation 2.c, it was suggested that accused persons who require Crown brief materials to defend themselves in a civil proceeding should have access to these materials in the same manner as the police and Crown without being required to follow the screening mechanism described in the *Wagg* decision. In response, it was noted that the Court in *Wagg* determined that the screening mechanism does not apply to the police and the Crown brief materials could be used by police officers to defend themselves in a collateral proceeding. In addition, it was submitted that the Crown brief is created in anticipation of a criminal prosecution and that it would give rise to an odd situation if the creator of the record could not access it to defend himself or herself in a litigation that arises from the creation of the record. It was further submitted that the screening mechanism is not a complete barrier to accessing Crown brief materials.

The vote on the following resolution was deferred to the closing plenary and was adopted.

RESOLVED:

1. That recommendation number one of the Report, as amended*, be adopted.

2. That the Joint Civil/Criminal Working Group continue and that it consider the issues raised in the Report and the directions of the Conference and:

(a) prepare model uniform rules of civil procedure to codify the *Wagg* screening process in those rules;

(b) prepare uniform provisions to codify the *Wagg* screening process to govern production of Crown Brief materials in the child protection and administrative tribunal regimes; and

(c) prepare uniform access to information provisions governing access requests for Crown Brief materials

for consideration at the 2008 meeting.

(* Recommendation number one, at paragraph 146 of the Paper, is amended by replacing the terms “superior court” with the terms “court of competent jurisdiction”.)

Identity Theft: Paper

Presenter: Josh Hawkes, Appellate Counsel, Criminal Justice Division, Alberta Justice

In 2006, a Joint Criminal/Civil Section Working Group on Identity Theft was established to look at:

- What ancillary orders or declarations might be made in conjunction with a criminal prosecution to assist a victim in the process of rehabilitating their financial and other aspects of their identity; and
- The issue of mandatory breach reporting or breach notification.

The working group was also tasked with the responsibility of identifying areas for further research and examination.

The presenter described the scope of the problem of identity theft including the potential for significant financial losses and lasting consequential harm to its victims such as harm to credit ratings, financial reputation as well as erroneous criminal records created in the name of the victim where stolen identity is being used by an individual apprehended for a different crime. Criminal identity theft also potentially raises national security concerns. It has been the subject of extensive study by a wide range of groups, organizations and governments both in Canada and abroad.

In terms of victim impact, the presenter indicated that studies have identified four major issues: discovery of identity theft; time spent by victims repairing or restoring their financial history; consequences of identity theft; and benefits of early discovery.

The working group examined the following two options for assisting victims under the criminal law:

1. A broader approach used in the state of South Australia, which consists of legislation that provides for a court to issue a certificate to victims of identity theft following the conviction of a person found guilty of identity theft;
2. A narrower approach based on California's 'factual declaration of innocence' model, which defines "criminal identity theft" as identity theft that occurs when a suspect in a criminal investigation identifies himself or herself using the identity of another innocent person. Under this model, the victim of criminal identity theft may apply for a declaration of factual innocence, which could lead to the sealing and destruction of records. The victim who is granted an order may also apply for inclusion in the Identity Theft Registry.

The presenter noted that in the Canadian context, the approach to victim assistance in the *Criminal Code* has a narrow focus – sections 738 to 741.2 address the circumstances in which a restitution order may be given either to the victim or to others, and deal with the enforcement of such orders and the relationship of these provisions to other civil remedies.

The paper notes that there are limits to the extent to which the two approaches may be applied to the Canadian context. The working group noted the constitutional constraints and other operational limits in following the broad approach taken in South Australia or the narrow approach based on the California model including the fact that the issuance of a certificate or declaration at the conclusion of a criminal proceeding would not be provided in sufficient time for the victim to rehabilitate his or her

credit history or limiting the amount of loss. Such process commences shortly after the victim is made aware of the theft.

The Paper also notes that identity theft resulting in the issuance of criminal process or criminal conviction in the name of an innocent individual - which name may appear in local or national police records or databases or shared between jurisdictions both nationally and internationally - is a serious problem. The presenter noted, however, that before any solutions are proposed, further study is indicated including an examination of current practices as well further research to determine the scope of the problem in order to evaluate the need to implement a similar approach in Canada.

The working group also examined the legal and policy issues relating to mandatory reporting of data loss (or “breach notification”), which, among other, enables potential victims of identity theft to protect themselves. The most effective measures to minimize the risk of identity theft continue to be the subject of debate. The working group favoured a consistent approach to breach notification by all levels of government. Many organizations in Canada have operations and hold data from individuals in more than one jurisdiction. They would greatly benefit from uniform rules about responding to a data breach.

In considering the role of the Conference regarding the subject of identity theft, it was noted that the work of the several existing working groups and organizations looking at the issue of identity theft will need to be monitored to ensure there is no unnecessary duplication or overlap in any future work undertaken by this Conference.

To further guide the work of the working group, three broad conclusions were presented:

- Empirical research indicates both that identity theft is significantly underreported to police or other agencies, and that time is of the essence in providing effective assistance to victims in overcoming the effects of identity theft;
- Breach notification should be the subject of continued examination including civil and penal remedies such as those already developed in various jurisdictions; and
- As preventive measures are a critical component of any solution to the problem of identity theft, the Conference should consider examining ways to enhance identity security with a view to reducing the risks of identity theft.

In light of these conclusions, the working group recommended:

1. That the working group develop a principled framework for a breach notification scheme that could be used in all jurisdictions, together with an examination of related civil remedies and processes.
2. That the working group conduct a detailed examination of remedies and processes to aid victims of identity theft where criminal or other official records have erroneously been created in the name of the victim.
3. That the long term objective of the group be to examine identity security, and what steps might be taken to enhance the security of identification documents and practices with a view to reducing the risks of identity theft.

Discussion:

During the discussion, several questions were raised regarding the various aspects of identity theft. One issue raised for discussion was that while remedial measures are an essential in addressing identity theft, prevention is equally important. It was noted that the Working Group explored whether they should study the preventive measures component in the Paper but concluded that a number of existing groups were already currently studying that aspect of identity theft. Also raised was whether the Working Group had the opportunity to consider the notion of issuing one single piece of identification. In response, it was noted that the narrow mandate of the Working Group did not extend to this issue. In addition, it was mentioned that at least one security expert did not favour this approach because such an item becomes the single factor identification that will not be questioned and this would cause more challenges in an identity theft situation.

One member of the Working Group noted the importance of having persons with the proper expertise and experience, such as representatives of a privacy office, to assist the working group, in particular to examine the issue of breach notification.

After the discussion, the following resolution was presented:

RESOLVED:

1. **THAT** the Joint Criminal/Civil Section Working Group on Identity Theft:
 - (a) develop a principled framework for a breach notification scheme that could be used in all jurisdictions, together with an examination of related civil remedies and processes; and
 - (b) conduct a detailed examination of remedies and processes to aid victims of identity theft where criminal or other official records have erroneously been created in the name of the victim.
2. **THAT** the Working Group report back to the Conference in 2008.

Malicious Prosecution: Paper

Presenter: Judy Mungovan, Counsel, Policy Division, Ministry of the Attorney General of Ontario

In 2006, a Joint Criminal/Civil Section Working Group was established to consider the need for uniform legislation to respond to concerns being reported across Canada regarding common law developments in the intentional tort of malicious prosecution.

The presenter provided an overview of the Supreme Court of Canada decision of *Nelles v. Ontario* as well as subsequent interpretations by the Courts including the latest Saskatchewan Court of appeal decision in *Miazga v. Kvello Estate*

It was noted that, in *Nelles*, the Supreme Court of Canada (largely on policy grounds) brought an end to the notion of complete immunity for Crown prosecutors but that it is clear from the Supreme Court's reasons that the exception it intended to carve out from the doctrine of absolute immunity for the Crown was to be sufficiently narrow and onerous so as to catch only Crown conduct that was truly maliciously motivated. Despite the policy rationale stated in *Nelles* regarding the balance between preventing absolute immunity for Crowns in malicious prosecution actions, while ensuring a healthy

respect for Crown discretion in prosecutorial decisions, the subsequent jurisprudence has diminished the safeguards the Supreme Court of Canada created.

The *Nelles* case set out four discrete grounds for the tort of malicious prosecution against a Crown prosecutor. However, with regard to the third element (absence of reasonable and probable cause), cases subsequent to *Nelles* show an increasing judicial willingness to review the Crown's reasoning in determining that a prosecution should go forward. Also, it was noted that there is a disconnect between the standard a Court uses to review the decision to prosecute (reasonable and probable cause), and the standard a prosecutor is instructed to follow when deciding to prosecute (reasonable prospect of conviction). Of even more concern, where courts have determined that no reasonable and probable cause exists, some have used this to infer malice on the part of the Crown, thereby 'conflating' the fourth element (requiring malice or some improper purpose) with the third. Indeed, the Saskatchewan Court of Appeal, in *Miazga*, ultimately concluded that a Crown's subjective views about the accused's guilt or innocence spoke directly to the existence of reasonable and probable cause and may in turn be evidence of malice. The fourth element of malice was intended by the Supreme Court to be a bulwark against frivolous actions and actions based solely on negligence, but the jurisprudence has not evolved in this manner.

The presenter noted that the development of the jurisprudence is of serious concern to Crown prosecutors. The three provinces that do keep annual records (Alberta, Quebec and Ontario) show an increasing rate of malicious prosecution civil suits. The Working Group identified early on the dangers that stem from an apparent loosening of the criteria for bringing a claim of malicious prosecution against a Crown prosecutor:

- an increased risk of frivolous prosecution claims that demoralize both the Crown named and Crowns in general;
- an increased risk that this will lead not only to more malicious prosecution claims, but also to other actions in tort to which Crowns have been traditionally immune; and
- the lack of clarity in recent jurisprudence has left Crowns unsure how to best fulfil their quasi-judicial roles as "ministers of justice" due to an apparent gap between the standard that compels a Crown to proceed with a prosecution that is in the public interest and the standard a Court uses when subsequently reviewing that same decision to proceed.

It was also noted that Courts are reviewing the general exercise of Crown discretion in new ways. In addition to allowing actions alleging malicious prosecution, they have also reviewed decisions of Crowns to *not* prosecute.

Although the focus of the presentation and the paper was on recent interpretation of the *Nelles* test, the Working Group also identified other issues for further consideration, such as:

- do public policy considerations support suggestions in jurisprudence that prosecutorial liability can or should be founded on torts other than malicious prosecution (such as misfeasance in a public office, breach of fiduciary duty, conspiracy and interference with economic relations);
- is there a need for uniform rules of court that effectively and fairly screen out frivolous lawsuits against prosecutors; and
- is there a need to develop uniform legislation restricting the ability of plaintiffs to sue prosecutors in their personal capacity for professional decisions made as agents of the Attorney General?

The Working Group recommended that the Conference consider the following three issues:

- the preparation of a uniform law entrenching the *Nelles* criteria as the exclusive basis on which Crown prosecutors may be sued for malicious prosecutorial acts;
- the preparation of a uniform law making Attorneys General solely liable for the torts committed by prosecutors as agents of the Attorneys General and the only party to be named in actions for malicious prosecution and related claims; and
- the preparation of other uniform jurisdictional responses that would fairly and effectively limit the harm caused by frivolous malicious prosecution lawsuits.

Discussion:

During the discussion, it was noted that Criminal Section delegates generally supported the goals of the Working Group as well as their recommendations. The main points raised during the Criminal Section debates were reported as follows:

- There is general agreement that there is a disconnect between the standard of reasonable prospect of conviction applied in the context of a prosecution and the subjective component of the third element of the test enunciated in *Nelles*, which requires absence of reasonable and probable grounds that an offence has been committed to bring an action for malicious prosecution;
- From a public policy perspective, Crown prosecutors should be in a position to evaluate, at every stage of the process, whether there continues to be reasonable prospect of conviction and determine whether charges against the accused should be withdrawn without the possible threat of a lawsuit for malicious prosecution; and
- There is a need to define what constitutes improper purpose or malice in legislation and clarify the type of evidence required to prove malice or improper purpose so that cases that do not have merit can be promptly dismissed.

It was also noted during the joint session discussion that because claims in malicious prosecution are fact-based, the meaning given through legislation to the terms improper purpose and malice should not be too specific. It was further noted that what is needed is a requirement that only very flagrant evidence of malice be accepted and not simply evidence inferred from lack of reasonable and probable grounds.

After the discussion, the following resolution was presented:

RESOLVED:

That the Joint Civil/Criminal Working Group continue and, pursuant to the recommendations in the Report and the directions of the Conference:

- (a) prepare a draft Act and commentaries; and
- (b) recommend other uniform jurisdictional responses that would fairly and effectively limit the harm caused by frivolous malicious prosecution lawsuits for consideration at the 2008 meeting.

The Canada *Interest Act*. Paper

Presenter: Professor Thomas G. W. Telfer, University of Western Ontario

Professor Telfer's preliminary background paper examines the original purpose of the Canada *Interest Act* and compares these original purposes with how the Act is being interpreted in light of today's commercial reality. He noted that all of the current provisions of the Canada *Interest Act* can be traced back to the late 19th century. Today, the legislation has been described as “hopelessly dated” and “functionally dead”.

The Act does not seek to govern fairness in lending by fixing or capping interest rates. Rather, it deals with five main issues – freedom to set the interest rate by contract or agreement (section 2); the default rate of interest (section 3); disclosure regimes for non-mortgage and mortgage transactions (section 4 and 6); prohibiting increasing the rate of interest or charging fines or penalties after default on a mortgage (section 8) and repayment rights respecting mortgages (section 10). A detailed analysis of the history of these five issues, and their treatment by courts, was provided.

Section 2 – the freedom to set a rate of interest by contract – is not absolute. For example, as section 2 is limited by other Acts of Parliament, it must be limited by section 347 of the *Criminal Code* (the criminal interest rate provision).

The default rate of interest in section 3 of the Act was last changed in 1900 to 5%; the scope of the provision has been limited by the growth of prejudgment legislation and court decisions have tended to “narrow the scope of section 3 to the rare case, if any, where a court or statutory body cannot legitimately award interest”.

The underlying aim of section 6 -- the mortgage disclosure provision – has not been met, as most court decisions have restricted the scope of the application of the section. Also, the courts have had to grapple with the “imprecise and obscure language” of the section. It was noted that, as a result of interpretations applied by the courts, the most common type of mortgage in Canada (amortized mortgage with half-yearly compounding and fixed monthly payments containing an element of principal and an element of interest that changes each month) is probably not covered by section 6. Also, what information must be disclosed under the section is far from understandable.

Section 8 only applies to mortgages and, in general, precludes the lender from increasing the rate of interest on default. Although there is extensive case law on section 8, one court concluded that “the only thing on which the courts seem to agree is the difficulty of construing the language of section 8 in the context of the modern commercial world”.

Subsection 10(1), which provides for a repayment right after 5 years, is described as Parliament's response to the prevailing practice in 1880 of long-term mortgages. Today, the commercial reality is short-term mortgage with amortization. Subsection 10(2) exempts mortgages “given by a joint stock company or other corporation” from the right of repayment, and has provided another source of litigation.

Section 4 provides for a disclosure regime for non-mortgage loans. However, there is an underlying disagreement in the case law as to whether section 4 should be restricted to the protection of consumers or whether it should also cover sophisticated borrowers. Furthermore, the case law has found a number of exceptions with restrict the scope of the provision. It was noted that limitations of the section itself and the case law have undermined parliament's originally intention of an understandable disclosure regime.

In conclusion, the Canada *Interest Act* is a 19th century statute that predates the emergence of modern credit and that has not kept up with present day commercial reality. In approaching changes,

the fundamental question should be: what are the underlying policy issues to be addressed in the Act.

Discussion:

It was noted that, in looking at this Act, its constitutional aspect must be kept in mind -- "interest" is a federal power under the Constitution. However, the courts have also acknowledged that the provinces have a significant role to play in the area of consumer protection. Another comment described sections 4 and 8 as "international embarrassments", but also noted we should not be quick to abandon the Act as a whole, as some provisions may still have a use.

RESOLVED:

THAT a Working Group be established to consider the issues in the Report, examine the provisions of the *Interest Act* in light of provincial legislation and common law developments and report to the ULCC at the 2008 meeting.

Reform of Fraudulent Conveyances and Fraudulent Preferences Law
(Transfers at Undervalue and Preferential Transfers):
Paper and Recommendations

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

In 2006 Professor Buckwold presented a project proposal for reform of the provincial and territorial law of fraudulent conveyances and preferences (following on a feasibility study presented in 2004). The project strategy was endorsed and her Report provides a summary of progress to date and work to be done.

The first step, Part 1 of a study paper that includes an introduction to the subject of fraudulent conveyances and fraudulent preferences and a discussion of fraudulent conveyances, is near completion. Part 2 of the study paper addresses fraudulent preferences and should be completed by the end of 2007.

By way of introduction to the subject of reform, Ms Buckwold provided a number of scenarios involving fraudulent conveyances and fraudulent preferences. The unifying theme of fraudulent conveyance and fraudulent preferences law is that both address circumstances in which a debtor deals with property in a manner that obstructs or defeats the right of one or more creditors to satisfaction through resort to the debtor's assets. A fraudulent conveyance is a transfer of property intended by a debtor to place property that would otherwise be available to creditors beyond their reach. A fraudulent preference involves a transfer of property by a debtor to a creditor with the intention of satisfying that creditor at the expense of other creditors.

In general, the primary substantive basis upon which creditors may currently challenge a transaction under either branch of the law is the debtor's intention to defeat creditors so that the type of transaction that gives rise to a remedy is designated as fraudulent. There is a more modern view that the law should be primarily concerned with the actual effect on creditors of a debtor's dealing with property, rather than whether the debtor intended to prejudice their rights. This shift in approach results in a change of terminology: with respect to fraudulent conveyances, the term used is "transaction at undervalue" and with respect to fraudulent preferences, the term used is "preferential transfer".

Professor Buckwold then addressed the three primary components of the study paper respecting transactions at undervalue (i.e. fraudulent conveyances): a Summary of Current Law; Policy Considerations and the Regulation of Transactions at Undervalue; and Issues for Determination

Professor Buckwold set out the specific issues that must be decided in the design of reformed legislation under five general headings:

- (i) Transactions within the scope of the Act;
- (ii) Standing: Who may claim a remedy under the statute?
- (iii) Grounds for a remedy (basis for challenging transaction);
- (iv) Defences and protection of third parties; and
- (v) Remedies.

Professor Buckwold concluded that a working group should be established, and should proceed on the basis of the study paper and ancillary report to identify the issues of policy and approach that require input from the legal profession and stakeholders and devise an appropriate consultation process (including a consultation document).

Discussion:

Vincent Pelletier (Québec) is looking for someone in Québec to work on this project, noting that it would be very interesting to see what new solutions are possible and whether they can be applied to Québec law. Another individual noted that, though antiquated, practitioners have to grapple with these statutes regularly. Professor Buckwold also noted that transactional certainty is the big competing factor that will have to be addressed by the working group.

RESOLVED:

THAT a Working Group be established to continue the work outlined in the Report, and, in accordance with the discussions of the Conference, to identify the issues of policy and approach that require input from the legal profession and stakeholders, devise an appropriate consultation process, including a consultation document, decide the issues of policy and approach involved in the formulation of legislation, and commence work on the preparation of a Draft Act and commentaries and report progress to the 2008 meeting.

National Conference of Commissioners on Uniform State Laws: Status Report

Presenter: Justice Martha L. Walters, President, NCCUSL

Justice Walters was introduced to the Conference. She has just begun her two year term as President of NCCUSL, and is the first women president in the 116 year history of that organization.

Justice Walters spoke with enthusiasm about the joint projects with the ULCC and the Mexican Uniform Law Centre over the last 2 years, noting in particular the project respecting the *Convention on the Assignment of Receivables in International Trade* and the Unincorporated Associations project. NCCUSL is committed to continuing in this work – the organization has learned so much and can see how much can be achieved by this collaborative approach. Justice Walters noted that involvement with the ULCC has emphasized the need for NCCUSL to work more closely with the US federal government – in the past it has worked largely with state governments. Some recent NCCUSL projects involve: adult guardianship; debt management services; discovery of electronic

information; health care information interoperability; the intestacy provisions of the Probate Code; powers of attorney; a project respecting business corporations; and pension legislation. International projects include the *Uniform International Wills Act*, the *UN Convention on Independent Guarantees* and the *Hague Convention on Choice of Court Agreements*. Another new project is to take uniform laws that exist, distil the core principles and make them available to countries that are interested. And, of course, NCCUSL continues to work hard to get its Acts enacted by states. Justice Walters closed by emphasizing the value of continuing to work together to identify areas for potential harmonization of laws on a North-American wide basis and introduced her own "Thank You Act": section 1: Thank you for your hard work. section 2: Thank you for working with us. section 3: Thank you for bringing us to PEI.

Mexican Uniform Law Centre: Status Report

Presenter: Dr. Jorge Sánchez Cordero, President, Mexican Conference of Commissioners on Uniform State Laws

Dr. Cordero highlighted some of the major achievements and activities over the last while. Of note are the Mexican Supreme Court initiatives to improve access to justice, which included a broad consultation process respecting the judiciary – an unprecedented step. The Court is proposing unique solutions, including the need to harmonize the civil and penal codes and practices of the various states. The experience of the ULCC and NCCUSL are of great importance in this context. Dr. Cordero also noted that the Mexican Senate will be holding public hearings this year respecting uniform law issues and issued a formal invitation to the ULCC to attend. Dr. Cordero reiterated the importance of ongoing co-operation amongst the ULCC, NCCUSL and the Mexican Uniform Law Centre.

Standing Committee of Attorneys General (Australia): Status Report

Presenters: Ian Govey, Deputy Secretary, Civil Justice and Legal Services, Commonwealth Attorney General's Department and Laurie Glanfield, Director General, Attorney General's Department of New South Wales and Secretary of SCAG

Mr. Govey remarked that they were very pleased to be the first Australians at the ULCC and noted how much we share -- not only our common law tradition, but also the way in which we approach law reform. He had already benefited from the exchange of information – for example, they are looking at a major project on securities law and will from the work being done by the ULCC and in Canada on this issue – and hoped that we would be able to work together in the future. Mr. Govey also noted that the connection with the US and Mexico greatly enhances the work of the ULCC. In providing an outline of his and Mr. Glanfield's departments, he noted that Australia consists of the Commonwealth and states and that each jurisdiction has its own constitutional jurisdiction and has developed its own approach to areas of law. SCAG is one body that tries to bring some of these issues together.

Mr. Glanfield noted that SCAG is more akin to a federal/provincial/territorial government body, and that there is nothing similar to the ULCC in Australia. Nevertheless, Australia has a good record for uniform law citing, for example, evidence legislation; corporations legislation; apology legislation (which was a part of a national tort law reform); legal professions legislation and defamation legislation. He looks forward to working with the ULCC, and sharing experiences and information, in the future.

Mr. Govey noted 6 current projects:

- personal property security;
- privacy;
- the Hague Convention on service of documents;
- limitation periods; and
- statutory declarations.

He reiterated that it was very timely sharing in the deliberations of the ULCC, and that he looks forward to working with the ULCC in the future.

RESOLVED:

THAT the ULCC express its thanks to Justice Martha Walters, President of the National Conference of Commissioners on Uniform State Laws, Dr. Jorge Sánchez Cordero, Director of the Mexican Uniform Law Centre and Messrs Ian Govey and Laurie Glanfield of the Standing Committee of Attorneys General for their interesting and informative presentations.

**Inter-Jurisdictional Enforcement of Tax Judgments:
Uniform Act and Commentaries**

Presenter: Vincent Pelletier, Directorate of Research and Ministerial Legislation, Ministry of Justice, Québec

M. Pelletier noted in his verbal report that this is the 3rd year this matter has been on the agenda of the Conference and provided a brief history. Frédérique Sabourin had presented a Report at the 2005 meeting of the Conference, at which time differing views were expressed as to whether tax judgments given by Canadian courts are included in the definition of "Canadian judgment" appearing in the *Uniform Canadian Enforcement of Judgments and Decrees Amendment*. M. Pelletier presented a follow-up Report to the Conference in 2006, in which it was recommended that, to remove any doubt, section 1 of the Uniform Act be amended to specifically include tax judgments and that the term "tax judgment" include certificates registered in respect of an amount payable under a tax law that have the same effect as a judgment. The Conference passed a resolution "that the Working Group continue and that it consider the issues raised in the Report and the directions of the Conference, and prepare a draft Act and commentaries for consideration at the 2007 meeting." M. noted that clarity on this issue would benefit all jurisdictions and that Revenue Québec remains very interested in this issue.

Discussion:

Gail Mildren (Manitoba) noted that the Tax Administrators Association of Canada would be meeting the next week, and that this matter was on their agenda. Natalie Giassa (Federal Government) asked whether the Conference could postpone its decision until after that meeting. M. Pelletier agreed that some additional time would be needed to discuss this issue with tax authorities and to obtain input from the upcoming Tax Administrators Association's meeting. Differing views as to whether the Uniform Act is uncertain were expressed.

RESOLVED:

THAT the *Uniform Canadian Enforcement of Judgments and Decrees Amendment (#2) Act* and commentaries be approved in principle;

THAT following the meeting of the Tax Administrators Association of Canada and consultations by the jurisdictional representatives with their jurisdictional experts, and should not change to the Uniform Act and commentaries as considered by the Conference be required and should the Civil Section Steering Committee consider it appropriate; the *Uniform Canadian Enforcement of Judgments and Decrees Amendment (#2) Act*, and commentaries, be circulated to the jurisdictional representatives. Unless two or more objections are received by the Executive Director of the Conference by a date to be determined by the Steering Committee, but no later than December 31, 2007, the draft Act should be taken as adopted as a uniform Act and recommended to the jurisdictions for enactment.

Inter-Jurisdictional Enforcement of Employment Standards Orders: Update

Presenter: Vincent Pelletier, Directorate of Research and Ministerial Legislation, Ministry of Justice, Québec

M. Pelletier provided an update respecting this matter, which was first raised at the 2005 meeting of the Conference. At the 2006 meeting of the Conference it was decided that the Civil Section Steering Committee would determine, after consulting with the Canadian Association of Administrators of Labour Laws, whether it is possible and appropriate to pursue uniform legislation in this field. M. Pelletier received preliminary information from the secretary of this Association in February 2007. In general, there are reciprocal arrangements in place between the provinces and territories, with the exception of Québec, but there are also differences between the laws of the various jurisdictions and the agreements in place. Two possible options were mentioned: (1) to seek approval in principle for harmonization of laws from all Ministers of Labour and, if approval is given, to establish a working group in cooperation with the ULCC; or (2) to enhance the existing reciprocal system and arrangements. M. Pelletier will continue to follow-up with the Canadian Association of Administrators of Labour Laws.

RESOLVED:

THAT the Civil Section Steering Committee continue to monitor developments and consult with the Canadian Association of Administrators of Labour Laws, to address whether it is possible and appropriate to pursue uniform legislation in this field.

Unincorporated Non-Profit Associations (Joint Project): Status Report

Presenter: Kevin Zakreski, Staff Lawyer, British Columbia Law Institute

At the ULCC meeting in 2005, a decision was made by ULCC, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the Mexican Uniform Law Centre (MCCUSL) to pursue possible joint projects. The topic of unincorporated associations (that is, two or more people coming together for a purpose other than making money) was identified as a possible joint project at that time. At the ULCC meeting in 2006, Arthur Close provided a status report and

confirmed the joint drafting committee was following a work plan and preparing a list of principles to be distilled from meetings held in the spring 2006; then it would seek to have legislative drafters assigned to the project with the goal of having versions of the uniform statute in all three languages which could be referred to the individual Conferences.

Since the ULCC meeting in 2006, a list of principles was completed and circulated to the joint drafting committee, legislative drafters were assigned, the NCCUSL team prepared and circulated a draft Uniform Act for implementation in the United States and the ULCC team began work on its uniform legislation. An initial draft of a stand-alone Uniform Act has been prepared and revised and a revised version is being shared with the NCCUSL and MCCUSL participants. In addition the ULCC team decided that a second Uniform Act should also be prepared, involving a legislative statement of the principles in a form that could be adopted directly as amendments to the *Civil Code* of Québec. The creation of a Québec specific version of the Uniform Act will be a first for the Conference and will aid the Mexican participants who also face the challenge of implementing the principles in the context of a legal tradition based on a civil code.

The NCCUSL Uniform Act will be formally presented to the NCCUSL annual meeting (July 27 – August 3, 2007). NCCUSL's by-laws require Uniform Acts to be read at two consecutive annual meetings before approval and this 'first reading' of the NCCUSL Uniform Act will allow the project to conform to those by-laws. In addition, a meeting of the joint drafting committee will take place in fall 2007 to review the draft Uniform Acts prepared by the ULCC, NCCUSL and Mexican Uniform Law Centre teams and to discuss their approaches to implementing the principles and whether it is possible to harmonize the language used in the Acts and commentaries.

Mr. Zakreski then outlined some key principles in the Statement of Principles including: Principle 1 (organizations covered); Principle 2 (Internal rules of practice) and Principles 9 and 10 (Applicability of other law).

Discussion:

The discussion centred around concerns with some of the principles in the Statement of Principles. With respect to Principle 1 (organizations covered), it was noted that the scope of the draft legislation is broad and that it could apply both to sophisticated organizations that probably should incorporate and to little groups formed for long or short term or specific purposes – the latter would become legal entities, even if they chose not to be. Mr. Zakreski noted that this was intentional. With respect to Principle 2 (internal rules), again it was noted that the scope is very broad – what do provisions like this mean for informal groups such as book clubs, for new associations, etc.? A question as to whether the legislation could be seen as inhibiting freedom of association was raised. Another question: to what extent does the 'default' approach in the legislation change the law respecting unions or "oust" newer developments in the law respecting unions? A Québec representative noted with appreciation the focus on Québec's interest in the project and that the approach taken -- developing principles first and then legislation -- will be of assistance to Québec. The Chairperson noted that the discussion identified issues that will need to be thought through.

RESOLVED:

THAT the joint ULCC, NCCUSL and MCCUSL Working Group continue its work to address the issues described in the Report, taking into consideration any discussion at the Conference, and report on the results thereof to the 2008 meeting.

UN Convention on the Assignment of Receivables in International Trade – Uniform Act and Revised Commentaries

Presenter: Kathryn Sabo, General Counsel, International Private Law Section, Department of Justice, Canada

At its August 2005 meeting, the Conference approved a pre-implementation report prepared by J. Michel Deschamps and Catherine Walsh on the *UN Convention on the Assignment of Receivables in International Trade* (the “Convention”). Acting on the recommendations in the Report, the Conference approved the establishment of a Working Group to prepare a uniform act to implement the Convention and to prepare complementary legislation. The Working Group was mandated work with the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the Mexican Uniform Law Centre with a view to coordinating implementation of the Convention in all three NAFTA countries.

In August 2006, the Working Group presented a final draft Uniform Act, with commentaries and related recommendations to the Conference. The *Uniform Assignment of Receivables in International Trade Act* was approved in principle, with final approval postponed until the final meetings on the joint project had taken place.

A joint meeting and consultation session was held in New York on October 16, 2006 which was aimed at determining whether industry supported ratification of the Convention in the United States. A further joint session was held in Chicago in November 2006. Thereafter, work continued by conference call through August 2007. The Chair specifically thanked the Working Group for its enthusiasm, and on behalf of the Working Group and thanked the Mexican Uniform Law Centre and NCCUSL for organizing and hosting the very productive joint meeting and conference calls.

The joint meetings between representatives of the ULCC Working Group and their U.S. and Mexican counterparts produced a consensus that implementation of the Convention in the three countries would produce significant benefits at two levels. First, it would substantially harmonize receivables financing law throughout the NAFTA region. Second, it would encourage other states to adopt the Convention so as to eventually bring about global harmonization. The joint discussions led to a modification to the commentary respecting section 2 of the Draft Uniform Act – the commentary now mentions article 23(3) of the Convention (dealing with a form of declaration). This is the only difference between the version submitted to the Conference in 2006 and the version submitted this year.

The Conference was reminded that, in its 2006 Report, the Working Group also submitted suggested complimentary amendments to Personal Property Security Acts to remedy the incompatibility with the Convention that certain PPSA amendments proposed by Ontario would create.

The Working Group recommended:

1. That the Conference approve and adopt the Draft *Uniform Assignment of Receivables in International Trade Act* and commentaries set out in Appendix 1 to the Report, along with the proposed PPSA amendments set out in Appendix 2.
2. Should the Conference undertake work with respect to personal property security, it is recommended that the complimentary amendments set out in Appendix 1 to the 2006 Report

of the Working Group be considered and that implementation of the Convention be taken into account.

Discussion:

Ian Govey (Australia) noted that they would be looking with interest at the work that has been done on this joint project, as they are considering reforming their personal property securities legislation.

RESOLVED:

THAT the *Uniform Assignment of Receivables in International Trade Act* and amended Commentaries as presented to the Conference be adopted and recommended to the jurisdictions for enactment.

THAT the Civil Section Steering Committee continue to have under consideration the reforms to secured transactions legislation contemplated in the Report of the Working Group presented to the Conference at its August 2006 meeting and that they be addressed in connection with any project undertaken respecting secured transaction legislation.

Changes to the Personal Property Security Acts: Paper

Presenter: Clark W. Dalton, Q.C. National Coordinator, Commercial Law Strategy, ULCC, on behalf of Professor Ronald Cuming, Q.C.

In the early 1980's, the ULCC promulgated a *Uniform Personal Property Security Act*. While features of this Act were later included in the provincial Acts, it never served as a model, primarily as events overtook it.

The Report provides a historical overview that concludes:

- personal property security legislation (PPSAs) of all jurisdictions other than Ontario, Yukon and Quebec are largely uniform;
- recent amendments to the Ontario Act have brought it closer to the Canadian Conference on Personal Property Security Law model (formerly known as the Western Canada model) in a few important respects;
- any efforts to improve the existing CCPPSL model should not threaten this uniformity;
- apart from changes designed to accommodate the *Uniform Securities Transfer Act*, recent ULCC efforts to secure uniform, modernized secured transactions law have been unsuccessful.

The Report describes the new approach being taken to law reform in this area by ULCC, which essentially involves identifying discreet areas of law that require amendment through consultation, and consulting on proposals for change widely. Aspects of this new approach have been implemented in developing the proposed changes to the PPSA conflict of laws provisions discussed in the Report.

The Report notes that revised conflict of laws rules were developed and enacted in Ontario (*Ministry of Government Services Consumer Protection and Service Modernization Act*, 2006, Chapter 34, Schedule E) but remain unproclaimed. A 'generic version' of the recommended provisions for

jurisdictions with a CCPPSL Model Act is attached as an appendix to the Report. Work is ongoing to facilitate contemporaneous implementation of these provisions in all common law jurisdictions (other than Ontario).

The Report concludes that, as the *Uniform Personal Property Security Act* is no longer of significance in the development of this area of the law in Canada, there is little point in recommending amendments to it. However, it is recommended that the Conference recommend to the common law provinces and territories (other than Ontario) that they amend their PPSA's to incorporate the proposed conflict of laws provisions in the Appendix to the Report.

Discussion:

It was noted that the US has revised Article 9, and that this should be looked at as it will be very relevant for Canadian businesses. Perhaps this could be a new, discrete project? It was also noted that the proposed amendments respecting conflict of interest have not gone through the ULCC drafting process. Another individual commented that, as this is a complex area, a drafter would need a good deal of drafting direction and that the ULCC should adopt "principles" first and then refer it to the drafting section. It was also suggested that the proposal not be adopted immediately, but that there be some opportunity to consider it and to also consider the proposals made last year by the *UN Convention on the Assignment of Receivables in International Trade Working Group*. The need to ensure uniformity in drafting in this area is a concern.

RESOLVED:

THAT the Conference approve the implementation of a new approach to law reform in relation to the review of The Personal Property Security Act, taking into account the discussions of the Conference;

THAT the Civil Section Steering Committee continue to have under consideration the reforms to secured transactions legislation contemplated in the Report of the Working Group on the *UN Convention on the Assignment of Receivables in International Trade* presented to the Conference at its August 2006 meeting and that they be addressed in connection with any project undertaken respecting secured transactions legislation.

Privity of Contract and Third Party Beneficiaries: Paper

Presenter: Sandra L. Petersson, Research Manager, Alberta Law Reform Institute, on behalf of Maria Lavelle, Alberta Law Reform Institute

The paper reviews the issue of privity of contract and third party beneficiaries. It concludes that the law is in need of reform and that a uniform proposal for reform from the ULCC would improve the prospects for implementation across Canada.

The paper focuses on the 'first limb' of the doctrine of privity of contract: a "contract cannot, generally, confer rights or impose obligations arising under it on any person except the parties to it". An overview of the history of the doctrine, examples of the problems created by it and the arguments 'for and against' the doctrine were provided.

The doctrine has long been criticized as artificial and contrary to the parties' intention to benefit a third party. As a result, the courts have frequently resorted to devices such as agency or trust to allow a third party to enforce a benefit conferred upon it. Legislation has also made incremental inroads into the doctrine by providing for certain specific exceptions. Furthermore, the Supreme Court of Canada has created a "principled exception" to the doctrine – in the 1992 *London Drugs* case and allowed a negligent third party beneficiary to rely on a provision in their employer's contract limiting liability for damaged goods. However, subsequent lower courts decisions have tended to limit the application of this "principled exception" holding that it cannot be used by third parties as a sword, but only as a shield. The result is a complex series of exceptions and judicial devices which, although mitigating the application of the privity doctrine, have not precluded the possibility of injustice occurring.

Arguments against reform of the doctrine of privity include:

- a third party should not be able to sue in the absence of consideration;
- a third party should not be able to obtain contractual rights in the absence of consent;
- it is undesirable for a promisor to be subject to double recovery or a flood of litigation brought about by third party beneficiaries;
- it is unjust that a third party beneficiary can sue on the contract but cannot be sued;
- the potential for infringement of the contracting parties' ability to rescind or vary the contract.

Arguments in favour of reform include:

- the law concerning privity of contract is unduly complex, uncertain and artificial;
- the doctrine frustrates the enforcement of sensible commercial and personal arrangements made on a daily basis;
- the person who has suffered the loss cannot sue, while the person who has suffered no loss can sue;
- an injustice results to a third party who has relied on the promise.

Law reform bodies in Alberta, Ontario, Manitoba, Saskatchewan and Nova Scotia have recommended legislative reforms to the doctrine of privity of contract but, to date, none of these recommendations have been implemented. Québec and New Brunswick are the only provinces with legislation addressing this issue. It was noted that, in failing to reform the doctrine of privity of contract with respect to third-party beneficiaries, Canada is out of step with other common-law jurisdictions. In Australia (Western Australia and Queensland), the United Kingdom, New Zealand, the U.S. and Singapore, the privity doctrine has been reformed through legislation. Law reform commissions in Hong Kong and Ireland recently recommended legislative reforms to address this issue.

Ms Petersson noted that the Supreme Court of Canada, in *London Drugs*, acknowledged the academic and judicial criticisms of the restrictions imposed by the doctrine of privity but held that major reforms to the rule would have to come from the legislature. In determining whether the ULCC is the appropriate body to look at this topic, some factors to consider include: legislative interest in Canada seems low; conversely, reform has succeeded in other countries; UNIDROIT has a working group working in this area that has recommended some recognition of 3rd party beneficiaries; what are the consequences of inaction (incremental or piece-meal developments that differ across Canada?).

While enforceability of third party beneficiary agreements is the primary consideration behind any law reform project in this area, there are a number of other areas that require study, such as identification of third parties; variation and rescission; defences; and overlapping claims. Ms Petersson also noted there are many options for reform, as not all countries have taken the same approach. The Paper concludes with a recommendation that the ULCC complete a study on this issue, including recommendations for uniform legislative reform. The ULCC project would be able to take advantage of the body of research that has already been completed by other law reform commissions on this issue. .

Discussion:

The discussion centred around whether there is a need for legislative reform in this area or whether the courts are moving in the right direction, and on the experience in New Brunswick and Québec. Generally, it was agreed the issue warrants further examination.

RESOLVED:

THAT a Working Group be established to prepare, in accordance with the discussions of the Conference, a study paper examining the options and issues set out in the Report and containing legislative recommendations for consideration at the 2008 meeting.

Partnership Law: Update

Presenter: Clark W. Dalton, Q.C., National Coordinator, Commercial Law Strategy, ULCC, on behalf of Lynn Romeo, Director, Civil Legal Services, Manitoba Justice

At last year's conference in Edmonton, Professor Heather Heavin of the University of Saskatchewan presented a Report on the subject of partnership law, which highlighted reforms in the U.S. and United Kingdom. The Conference decided that a Working Group should be established to prepare a Study Paper examining the merits of the options set out in the Report, and containing legislative recommendations for consideration at the 2007 meeting.

Volunteers were recruited for the Working Group, including Normand Royal of the Montreal office of Miller Thompson, Charles Denis of Québec and Karen Pflanzner of Saskatchewan Justice. Due to her schedule, Professor Heavin was unable to continue with the project during the year. She is, however, committed to completing the project and has a clear sense of how it should proceed. It was noted that law reform commissions, including the Alberta Law Reform Institute, are interested in this project and are waiting to see what the ULCC will be recommending. The recommendation is to continue with the project in the upcoming year.

RESOLVED:

THAT a Working Group be established to prepare, in accordance with the discussions of the Conference, a study paper examining the merits of the options set out in the Report presented to the Conference at its 2006 meeting, and containing legislative recommendations for consideration at the 2008 meeting.

Private International Law: Status Report

Presenter: Kathryn Sabo, General Counsel, International Private Law Section, Department of Justice, Canada

Ms Sabo distributed a written Report respecting the activities and priorities of the Department of Justice of Canada in the area of private international law over the past year. She noted that the form of the Report has been changed to include, as Annex B, an "Overview Chart of International Private Law Priorities" and, as Appendix C, Tables summarizing the priorities in the areas of international commercial law; judicial cooperation and enforcement of judgments; family law; and protection of property.

The following were identified as high priorities in the international commercial law area:

- *Convention on the Settlement of Investment Disputes between States and Internationals of other States* (ICSID/World Bank). (ULCC has adopted uniform implementing legislation.)
- *Convention on International Interests in Mobile Equipment and Aircraft Protocol* (UNIDROIT). (ULCC has adopted uniform implementing legislation.)
- Negotiations respecting the Draft Legislative Guide on Secured Transactions (UNCITRAL).
- Negotiations respecting the Project on harmonized substantive rules regarding indirectly held securities (UNIDROIT).
- *Convention on Securities Held by Intermediaries* (Hague Conference). The ULCC approved a Working Group to prepare uniform implementing legislation as part of the commercial law strategy.
- *Convention on the Assignment of Receivables in International Trade Law* (UNCITRAL). A joint ULCC/NCCUSL/Mexican Uniform Law Center project is underway.
- *Convention on the Limitation Period in the International Sale of Goods* (UNCITRAL). (ULCC has adopted uniform implementing legislation.)

High priorities in the area of judicial cooperation and enforcement of judgments were identified as:

- *Convention on Choice of Court Agreements* (The Hague).
- *Convention abolishing the Requirement of Legalisation for Foreign Public Documents* (The Hague).

In the family law area, high priorities are:

- *Convention on the International Protection of Adults* (The Hague). (ULCC has adopted uniform implementing legislation.)
- *Convention of the Jurisdiction, Applicable Law, Recognition and Enforcement, and Cooperation in matters of Parental Responsibility and Measures of Protection of Children* (The Hague). (ULCC has adopted uniform implementing legislation.)
- *Draft Convention on Maintenance Obligations* (The Hague).
- *Convention on the Civil Aspects of International Child Abduction* (The Hague).

In the area of protection of property, the high priorities are:

- *Convention providing a Uniform Law on the Form of an International Will* (UNIDROIT).

- *Convention on the Law Applicable to Trusts and their Recognition* (The Hague). (ULCC has adopted uniform implementing legislation.)

Ms Sabo that the Private International Law Advisory Group usually meets twice a year and is one mechanism allowing the federal government to factor in provincial, territorial and federal interests when dealing with private international law matters. A list of scheduled meetings of international bodies in the private international law area for the upcoming year is included in the Report. Ms Sabo stated she would do her best to keep the Conference informed on these matters and invited all to provide her with feedback or to questions at any time.

Discussion:

The discussion focused on the state of implementation in the various provinces and territories in Canada of specific Conventions, and the experience of the jurisdictions in this regard. The representatives from NCCUSL noted that the document provided by Ms Sabo was very helpful and that they were seeking a document like this from the U.S. State Department. John Twohig (Ontario) noted that the document distributed by Ms Sabo, and the work involved, was greatly appreciated by the Conference.

The Hague Convention on the Law Applicable to Securities Held by Intermediaries: Status Report

Presenter: Kathryn Sabo, General Counsel, International Private Law Section, Department of Justice, Canada

The Report distributed by Ms Sabo respecting private international law developments contained an overview of activities respecting this Convention. The Convention was finalized and adopted in December 2002 and is a first attempt worldwide to draft cross-border rules on the law applicable to securities held with an intermediary. Canada actively participated in the negotiations relating to the Convention.

In 2004, the Conference agreed that the Canadian Securities Administrators authorize a Task Force to prepare a uniform implementing statute for the Convention, once the explanatory Report for the Hague Convention was finalized. The Explanatory Report was finalized in late 2004, and the Securities Administrators approved the CSA Task Force pursuing implementation work in April 2005. Since then, Canadian experts have continued to focus on USTA implementation as a priority, with the result that no progress has been made on a uniform act to implement the Convention apart from informal discussion. The Report identified the following required action: The ULCC, with the CSA Task Force, prepare a uniform implementing legislation for the Convention.

RESOLVED:

THAT a Working Group be established to prepare a uniform implementing amending Act and commentaries for consideration at the 2008 meeting.

New Projects: Report and Discussion

Presenters: John Lee, Counsel, Policy Division, Ministry of the Attorney General of Ontario and Sarah J. Dafoe, Barrister and Solicitor, Legislative Reform, Alberta Justice

John Lee provided a brief background with respect to the process used to solicit new proposals for projects this year. After last year's meeting of the ULCC, the Civil Section Steering Committee approved a list of ten questions to assist in the process by helping proponents to understand the aims of the Conference so they may better develop their proposals. The responses would also help the Conference to decide which projects it should undertake. The questions asked were as follows:

- Name of proponent
- What is the current law?
- What changes to the law are being proposed?
- How will the project serve the public interest?
- Why is uniformity necessary and what are the benefits?
- Is there any urgency?
- Who would support and who would not support this project?
- How long will the project take?
- Is anyone else working on a similar project?

As this was the first year using the approach, it was decided that answering the questions could be optional; however, almost everyone who made a proposal this year chose to answer the questions. In going through this year's proposals, the presenters asked that the Conference keep in mind, for later discussion, any views as to:

1. Whether this new approach is a good one.
2. Whether answering the questions ought to be mandatory.
3. Whether there are additional questions we should be asking or whether some of the questions don't need to be asked.

John and Sarah then reviewed the proposals that were submitted:

- Model Pension Law: a request from the Canadian Association of Pension Supervisory Authorities
- Conflicts Provisions respecting Wills and Succession (Including Intestacies), proposed by Manitoba Justice;
- Assisted Human Reproduction – Parental Status Law, proposed by the Coordinating Committee of Senior Officials – Family Justice;
- Uniform Joint Venture Legislation, proposed by the Alberta Law Reform Institute.

A proposal respecting civil asset forfeiture legislation was withdrawn. The following New Project Proposals from 2006 were attached to the Report as an appendix: Re-examination of Extra Provincial Licensing Requirements; Legislation Regarding the Use of Technical Protection Measures.

Discussion:

There was a good deal of discussion with respect to the model pensions legislation proposal. With respect to the joint ventures proposal, it was noted that US Conference deals with this in a broader statute, and that the ULCC should investigate whether this topic should be incorporated into the partnership project. There was also some discussion of the reasons for the withdrawal of the project respecting civil forfeiture.

The reaction to the questions asked of proponents was positive, and with the Chairperson noting that it brings discipline to the process. The Chairperson thanked John and Sarah for their work on this, as it will greatly assist in the consideration of new projects.