SASKATCHEWAN
LAW REVIEW

The Codification of Commercial Law

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Neither a borrower nor a lender be,
For loan oft loses both itself and friend,
And borrowing dulls the edge of husbandry.
Polonius
Hamlet, Act 1, scene 3

I. INTRODUCTION

On account of its population, its geography and its history, Canada has traditionally been a borrower of laws. In the commercial law field, it borrowed the English codifications of negotiable instruments law and sales law during the late Victorian era. More recently it borrowed the United States Uniform Commercial Code ("UCC") codifications on personal property security law and securities transfer law. Now Canada has become a lender of its commercial laws. New Zealand[1] and Australia[2] have recently looked to Canada for inspiration in their reform of personal property security law.[3]

The Victorian codifications are fundamentally different from the modern codifications. The goal of the Victorian era codifications was to translate the common law into legislative form in order to render it more accessible but without intending to introduce major reforms to the law. The transplanted Articles of the Uniform Commercial Code are more radical in their aims. They reform the law and introduce a new

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1 *Personal Properties Securities Act 1999* (NZ), 1999/126. The Act came into force on May 1, 2002.

2 *Personal Property Securities Act 2009* (Cth). The Act came into force on January 29, 2012.

3 Australia relied less on the Canadian personal property security act model with the result that a major review was undertaken to fix a large number of design problems. See Anthony Duggan, "The Trials and Tribulations of Personal Property Security Law Reform in Australia" (2015) 78:2 Sask L Rev 257.

taxonomy of terms and concepts that represents a major departure from common law principles.

Uniformity is not a problem in the Victorian codifications. In the case of negotiable instruments, it is a natural consequence of there being a single federal statute that governs. In the case of sales law, it results from the choice of provinces and territories not to significantly revise the statute since its first enactment. The primary problem afflicting the Victorian commercial law codifications is rather one of statutory obsolescence.

Statutory obsolescence is not a major problem in the modern commercial law codifications. The primary problem has been that of ensuring uniformity. There has been a relatively intense degree of reform activity in the years following the initial enactment of personal property security legislation. The mechanics of the process are such that there is a natural tendency toward ever greater diversity in the legislation. This is usually not a result of differing views on policy, but is simply the result of weak coordination amongst the jurisdictions.

The paper will begin by discussing what is meant by commercial law codification in a common law system. It will examine the goals and objectives of the Victorian era commercial codes and the drafter's views on the effect of codification on the law's flexibility. It will then consider the problem of statutory obsolescence in negotiable instruments law and sales law. It will next examine the goals and objectives of the modern commercial codes and the drafters' views as to the need for ongoing revision. It will then consider the problem of non-uniformity in personal property security law. Finally, it will propose some potential responses to the problem of statutory obsolescence and the problem of non-uniformity, while recognizing that there will be a perpetual struggle against these two forces.

II. THE MEANING OF CODIFICATION IN CANADIAN COMMERCIAL LAW

Four areas of commercial law have been codified in common law Canada: negotiable instruments law is codified in the federal *Bills of Exchange Act*;[4] sales law is codified in the provincial or territorial *Sale of Goods Act*;[5] secured transaction law is codified in the provincial or territorial *Personal Property Security Act*;[6] and securities transfer law is codified in the provincial or territorial *Securities Transfer Act*.[7] The first

4 RSC 1985, c B-4 [*BEA*].

5 See e.g. *The Sale of Goods Act*, RSS 1978, c S-1 [*SGA*]. References will hereafter be made to the Saskatchewan *SGA* unless mentioned otherwise.

6 See e.g. *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 [*PPSA*]. References will hereafter be made to the Saskatchewan *PPSA* unless mentioned otherwise.

7 See e.g. *The Securities Transfer Act*, SS 2007, c S-42.3 [*STA*]. References will hereafter be made to the Saskatchewan *STA* unless mentioned otherwise.

two were part of the Victorian era commercial law codifications that were first enacted in England in the late nineteenth century and quickly spread across the commonwealth countries. The last two were heavily influenced by the UCC of the United States.

Codification in a common law system differs from codification in a civil law system.[8] The commercial codes of common law systems are more limited in their scope and do not purport to provide an exhaustive statement of legal principles. One invariably finds the inclusion of a provision to the effect that the common law continues to apply unless inconsistent with the statute.[9] They are codes in the sense that they are comprehensive in their scope and seek to state the legal principles that govern the major questions that arise in connection with a special form of contract or transaction.

This means that there is no clear demarcation between a commercial law code and other statutes that deal with commercial law matters. As with any exercise in taxonomy, there will be debates about whether a particular thing should be placed into one category or the other. Fortunately, all but one of the Canadian provinces have repealed[10] the cumbersome bulk sales statutes[11] so it is unnecessary to speculate on a suitable classification.[12] Most provinces have also enacted a *Warehouse Receipts Act*.[13] The *WRA* provides a broad statement of the rules that govern this type of document. However,

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8 See The Honorable Mr. Justice Scarman, "Codification and Judge-Made Law: A Problem of Coexistence" (1967) 42:3 Ind LJ 355; Rudolf B. Schlesinger, "The Uniform Commercial Code in the Light of Comparative Law" (1959) 1:1 Inter-American L Rev 11.

9 *BEA*, *supra* note 4, s 9; *SGA*, *supra* note 5, s 58(1); *PPSA*, *supra* note 6, s 65(2); *STA*, *supra* note 7, s 6.

10 The case for repeal of the bulk sales statutes can be found in the reports of the various Canadian law reform bodies. See e.g. Law Reform Commission of British Columbia, *Report on Bulk Sales Legislation*, LRC 67 (Vancouver: LRCBC, October 1983).

11 The legislation required a buyer in respect of a bulk sale of stock outside of the usual course of business to obtain a list of all the seller's creditors and ensure that they were paid. The *Bulk Sales Act*, RSO 1990, c B.14, remains the law in Ontario, but there are calls for its repeal. See Ontario, Business Law Advisory Council, *Business Law Agenda: Priority Findings & Recommendations Report* (Toronto: Ministry of Government and Consumer Services, June 2015), online: <www.ontariocanada.com/registry/showAttachment.do?postingId=18942&attachmentId=28451>, archived: <https://perma.cc/68FU-TJND>. A bill that repeals the bulk sales legislation in Ontario was given first reading on June 8, 2016 (Bill 218, *Burden Reduction Act, 2016*, 1st Sess, 41st Parl, Ontario, 2016, Schedule 3).

12 Article 6 of the UCC covers bulk sales, but it has now been repealed in most states. The Article always seemed out of place with the other Articles of the UCC in that it is more closely related to fraudulent preference and fraudulent conveyance law.

13 See e.g. *Warehouse Receipts Act*, RSA 2000, c W-1 [*WRA*]. Saskatchewan and Prince Edward Island have not enacted warehouse receipts legislation.

the *WRA* differs from Article 7 of the UCC in that it covers only one of the two types of documents of title (the other being the bill of lading) and therefore does not attempt to state a common set of principles in relation to all documents of title. As a result, warehouse receipts are negotiable in the sense of giving a transferee better title than that held by the transferor, whereas bills of lading do not have this attribute but are negotiable in the more limited sense of giving the transferee the right to call for possession of the goods. Because of its failure to comprehensively deal with all documents of title, I have chosen not to include the *WRA* as a codifying statute.

Although the *Bankruptcy and Insolvency Act*[14] resembles a code in terms of its scope of coverage it performs a different function than a commercial code. Insolvency law modifies the legal process available to a creditor to enforce a claim. Instead of proceeding through the provincial judgment enforcement system, a creditor must enforce its claim through the collective procedure provided by federal insolvency law.[15] Insolvency law is therefore best characterized as procedural law rather than substantive law.[16] Many provinces have modified their judgment enforcement systems.[17] These reforms, found in a comprehensive and integrated statute, provide a detailed statement of the rules that govern enforcement, and like the federal insolvency statutes they are procedural in nature. Although these can also be regarded as codifications, they are not concerned with the legal rights and duties that are generated by a special type of contract. They will therefore be excluded from this discussion, which will focus upon codes that are transactional—dealing with a particular type of commercial transaction—and substantive—describing the content of the rights that are created by that commercial transaction.

III. THE VICTORIAN COMMERCIAL LAW CODES

A. THE GOALS AND OBJECTIVES OF CODIFICATION

The *Bills of Exchange Act, 1882*[18] and the *Sale of Goods Act, 1893*[19] were both drafted by Sir Mackenzie Chalmers in the late nineteenth century. The English *Bills of Exchange Act, 1882* codified the law governing bills of exchange, promissory notes and cheques. It was

14 RSC 1985, c B-3 [*BIA*].

15 *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379.

16 See Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015) at 5.

17 See e.g. *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22. And see Professor Ronald C.C. Cuming & Donald H. Layh, *The Saskatchewan Enforcement of Money Judgments Act: Commentary and Analysis* (Regina: Office of the Queen's Printer, 2012).

18 (UK), 45 & 46 Vict, c 61.

19 (UK), 56 & 57 Vict, c 71.

adopted in slightly modified form by the Parliament in Canada in 1890.[20] Although there have been amendments, the Act has not been altered much from its first appearance. The English *Sale of Goods Act, 1893* was actually enacted in 1894, and within 30 years it had been enacted by every common law province in Canada.[21]

Neither statute was designed to significantly change the common law. The intention was to codify it in the sense that the major principles of the common law were restated as statutory rules. Following the successful implementation of the first statute in England, Chalmers wrote about the process and the rationale behind his approach to codification,[22] and later travelled to New York where he delivered a lecture about it to the American Bar Association.[23] His process was to work on a digest of law in which "the general propositions are stated in sections as in an ordinary statute."[24] Once the book was completed, he had it published and sought out comment on it. The propositions were then redrafted into legislative form and enacted.

The rationale for the codification project harkens back to the same commercial norms identified by many of the greatest commercial law jurists of the common law world. Lord Mansfield identified the need for certainty in commercial matters in this passage: "In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."[25] Chalmers echoes this sentiment:

> The object of the man of business is, not to get a scientific decision on a particular point, but to avoid litigation altogether. On the whole, he would rather have a somewhat inconvenient rule clearly stated than a more convenient rule worked out by a series of protracted and expensive litigations, pending which he does not know how to act.[26]

Chalmers believed that codification of the common law produced greater certainty. He thought that two stages were involved in the process of common law reasoning. The first stage was an inductive

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20 *The Bills of Exchange Act, 1890*, SC 1890, c 33.

21 See M.G. Bridge, *Sale of Goods* (Toronto: Butterworths, 1988) at 4. Ontario was the last to enact it. See *The Sale of Goods Act, 1920*, SO 1920, c 40.

22 M.D. Chalmers, "An Experiment in Codification" (1886) 2:2 Law Q Rev 125 [Chalmers, "Experiment"].

23 M.D. Chalmers, "Codification of Mercantile Law" (1902) 25 Annual Report of the American Bar Association 282 [Chalmers, "Codification"].

24 *Ibid* at 284.

25 *Vallejo v Wheeler* (1774), 98 ER 1012 at 1017.

26 Chalmers, "Codification", *supra* note 23 at 288.

process during which "[a]ll the authorities have to be examined for the purpose of discovering the general principle which they affirm."[27] This was followed by a deductive process in which the applicability of the general principle to particular facts is determined. Chalmers believed that a codification simplified reasoning by eliminating the inductive process.[28] The legislation authoritatively supplies the general principle and the sole question is whether or not the case falls within the statement of principle in the code.

Chalmers understood that codification was not advisable when the law was less well developed. He stated that "[w]hile any branch of the law is in process of formation, it is unwise to attempt to codify it."[29] Yet even in well-developed fields of law, there are lacunae in the law or points which are not quite settled. In these situations, Chalmers applied a comparative approach and looked to American and French law and to writers of textbooks[30] to derive the relevant principle. Certainty was thereby fostered not only by simplifying the process of legal reasoning, but also in these instances by resolving some unsettled issues.

Since the statutes merely changed the form of the law rather than its content, enacting them had very little effect on transactional dealings between commercial parties. The momentous shift from common law principle to statutory directive was likely not noticed at all by the commercial community.

B. THE DRAFTER'S THOUGHTS ON CODIFICATION AND THE LAW'S FLEXIBILITY

It is not at all surprising to find little contemporary discussion on the need for ongoing revision of the Victorian commercial codes. They were enacted in an age when the idea of standing law reform bodies had not yet been contemplated. Indeed, it was the aging of the earlier commercial law statutes that in part motivated the reforms of the UCC. Nevertheless, it is instructive to examine opinions expressed concerning the need for revision at the time when the Victorian commercial codes were being put into place.

The debates over commercial law codification centred primarily on whether casting the relevant principles into statutory form would cause a loss of flexibility in the law. Prior to codification, the primary

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27 *Ibid.*

28 Chalmers, "Experiment", *supra* note 22 at 131.

29 Chalmers, "Codification", *supra* note 23 at 283.

30 In the first edition of his book, published before enactment of the statute, Chalmers was heavily influenced by the French jurist Robert Pothier, *Contrat de Vente* (1762) and the American lawyer Judah Benjamin's fourth edition of *Benjamin on Sales*. See His Honour Judge Chalmers, *The Sale of Goods: Including the Factors Act, 1889* (London, UK: William Clowes and Sons, 1890).

mechanism for revision of the law was further development of legal principle by the judiciary. Critics of codification argued that it would impede this process. Chalmers defended commercial law codification against the criticism that it would deprive "the common law of its normal 'flexibility' or 'elasticity.'"[31] He argued that the claim of elasticity of the common law was exaggerated. The common law does not afford a discretion to judges to decide cases as they see fit, but requires them to determine the case in accordance with established principles. As the code replicates established principles found in the cases, "it takes from the judges nothing which they possess at present."[32] He concluded that the elasticity of the common law, if it existed at all, would not be a valuable quality, but would simply be another name for uncertainty.

Chalmers did not favour revision of the law as part of the codification project except to resolve some small gaps or uncertainties. He thought that the role of the drafter was to faithfully reproduce the existing law with "all its defects and anomalies."[33] If it is perceived to be a statement of the existing law, the legislators will leave it alone. But if it professes to alter the law every member is free to intervene with the result that "the measure is so hacked and hewed at by ill-advised and hasty amendments that it emerges from Committee wholly disfigured."[34]

C. OBSOLESCENCE IN THE VICTORIAN COMMERCIAL CODES

1. The *Bills of Exchange Act*

The *BEA* provides a noteworthy case study of statutory obsolescence in a commercial law codification. One of the central features of negotiable instruments law is that it contains a concept of negotiability that

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31 Chalmers, "Experiment", *supra* note 22 at 130, citing John R. Strong, "Remarks upon the Codification Controversy in the State of New York" (New York: 1883). The other criticism was that the common law was natural whereas codifications were artificial. This peculiar notion was employed to scuttle a codification attempt in New York. The debate seems to have been a lively one with pamphlets such as J. Bleecker Miller, *Destruction of Our Natural Law by Codification* (New York: 1882) at 3, online: <https://catalog.hathitrust.org/Record/010437157>, archived: <https://perma.cc/9PDP-FLU9>, declaring: "Our English Common Law has this immense advantage over all the other European systems, that it is the natural product of its own people, and has never been dwarfed and distorted by the introduction of a foreign law." The naturalistic argument was mentioned by Chalmers, but he did not treat it as a serious concern stating in "Experiment", *supra* note 22 at 129, "I am not sure that the terms 'natural' and 'artificial' have any definite meaning when applied to positive law."

32 Chalmers, "Codification", *supra* note 23 at 289.

33 Chalmers, "Experiment", *supra* note 22 at 132.

34 *Ibid* at 133.

allows a transferee to obtain a better title to the property than that held by the transferor.[35] It is therefore one of the earliest exceptions to the foundational *nemo dat* principle of property law in common law jurisdictions. This attribute was highly significant at the time as there was a shortage of currency, and these instruments were used as a substitute for money.[36] The paper circulated so much that it was sometimes necessary to attach an allonge when the back of the instrument became full of endorsements on transfer.[37]

Structurally, the *BEA* uses the bill of exchange as its basic model, and then provides that the provisions relating to bills apply, with such modifications as the circumstances require, to cheques[38] and promissory notes.[39] The bill of exchange no longer occupies a central position as a medium of payment, yet it is necessary to wade through its increasingly archaic rules in order to uncover the principles that govern the cheque—which is now the negotiable instrument most commonly encountered. Part III of the *BEA* governs cheques, but it provides very little on this topic, and much of what it says is misleading. The majority of Part III deals with crossed cheques despite the practice of crossing cheques not existing in Canada. That the provisions have survived so long is a testament to the inertial force of codification. The *BEA* is silent on many important matters related to the cheque such as post-dating of cheques,[40] certification of cheques, and stop payment orders.

In questions concerning the allocation of forgery losses, one must delve into the provisions of the *BEA* governing non-existent and fictitious payees.[41] These provisions were originally intended to cover a much different matter,[42] but were dragooned into deciding issues of allocation of forgery losses which they are not particularly well-suited to resolve. The provisions have produced a line of cases that is notoriously difficult to understand and apply.[43]

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35 *BEA*, *supra* note 4, s 73(b).

36 See generally Grant Gilmore, "Formalism and the Law of Negotiable Instruments" (1979) 13:2 Creighton L Rev 441 [Gilmore, "Formalism"].

37 Needless to say, the *BEA* dutifully sets out the rules pertaining to the allonge. See *BEA*, *supra* note 4, s 61(2).

38 *Ibid*, s 165(2).

39 *Ibid*, s 186(1).

40 This has led to some uncertainty whether a post-dated cheque even qualifies as a cheque. See *Wheatland Investments Ltd. v Sask Tel*, [1995] 1 WWR 671, 126 Sask R 226 (QB), in which a post-dated cheque was characterized as a bill of exchange rather than a cheque.

41 *BEA*, *supra* note 4, s 20(5).

42 See Benjamin Geva, "The Fictitious Payee Strikes Again: The Continuing Misadventures of BEA s. 20(5)" (2015) 30:3 BFLR 573 at 590 [Geva, "Strikes Again"].

43 Geva, "Strikes Again", *ibid*. See also Benjamin Geva, "Conversion of Unissued Cheques and the Fictitious or Non-Existing Payee—*Boma v. CIBC*" (1997) 28:2 Can Bus LJ 177.

The application of the *BEA* to promissory notes is also highly problematic. The practice made eminent sense when banks issued notes payable to bearer that circulated as currency, but their use was eventually prohibited in 1944. Banks later began to use promissory notes to evidence their loans to their customers. These promissory notes were never intended to circulate, yet they acquired the trait of negotiability by virtue of falling within the *BEA*'s definition.[44] It is conceivable that in the absence of codification of negotiable instruments law, the common law would have adjusted to this new reality and decreed that promissory notes no longer possessed this negotiability.[45] Courts and legislators subsequently had to restrict the negotiability concept when negotiable instruments were employed to cut off the ability of consumer buyers to raise product defences against assignees to whom the rights of the seller were transferred.[46]

Several commentators have questioned whether the concept of negotiability is of any continuing value in relation to payment systems,[47] and whether promissory notes should simply be governed by the ordinary principles of contract law.[48]

2. The *Sale of Goods Act*

One of the most serious problems associated with the enactment of the *SGA* is that it codified a late nineteenth century conception of contract law, and common law contract principles have evolved in the more than one hundred years since the passage of the statute.[49] This creates a growing divide between the general law of contract and the codified law that governs the contract of sale. The clearest example of this can be seen in the statutory provisions that classify contractual terms into conditions and warranties.

Chalmers divided contractual stipulations, whether express or implied, into two types.[50] A warranty gives the buyer the right to sue for damages, but not a right to reject the goods and treat the contract as repudiated. A condition gives a buyer the right to reject the goods and treat the contract as repudiated. A buyer is not required to reject the goods, but may accept them and treat it as a breach of

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44 Gilmore, "Formalism", *supra* note 36 at 453.

45 *Ibid* at 455-56.

46 See Benjamin Geva, *Financing Consumer Sales and Product Defences in Canada and the United States* (Carswell, 1984).

47 M.B.W. Sinclair, "Codification of Negotiable Instruments Law: A Tale of Reiterated Anachronism" (1990) 21:3 U Tol L Rev 625.

48 James Steven Rogers, *The End of Negotiable Instruments: Bringing Payment Systems Law Out of the Past* (New York: Oxford University Press, 2012) at 198-99 [Rogers, *End of Negotiable Instruments*]; Neil B. Cohen, "The Calamitous Law of Notes" (2007) 68:1 Ohio St LJ 161.

49 K.C.T. Sutton, "The Reform of the Law of Sales" (1969) 7:1 Alta L Rev 130 & 173.

50 *SGA*, *supra* note 5, s 13(2).

warranty. Chalmers believed that this merely involved a substitution of terminology from that used in the earlier case law—"condition" for "dependent covenant", and "warranty" for "independent covenant."[51]

This introduced a great rigidity in sales law that remains to this day in Canada.[52] The division of promissory terms into conditions and warranties was for many years regarded as exhaustive. The *SGA* did not seem to contemplate the possibility of a third category of term that gave the innocent party the right to treat the contract as discharged only if the breach was sufficiently serious. Although the "intermediate" or "innominate" term was later imported into the *SGA* in respect of express terms,[53] the dichotomy remains in respect of the statutory implied terms which are classified as either conditions or warranties from the outset.

Courts have attempted to evade the harshness of this rule through several devices. In some instances they have simply adopted strained interpretations to avoid the result.[54] In other instances involving sales of unascertained goods, courts have held that a seller has a right to cure the defect by retendering non-defective goods[55] despite the fact that the *SGA* does not make any mention of a right to cure, and the right to reject the goods is directly linked to the right to treat the contract as repudiated.

Further difficulties are encountered in relation to the remedies available for breach of contract. The *SGA* provides that in a contract for the sale of specific goods where property has passed to the buyer, a breach of condition can only be treated as a breach of warranty.[56] This codified the common law rule that regarded the buyer as having received the primary benefit of the bargain upon transfer of property in the goods.[57] Since property in specific goods will generally pass to the buyer the moment the contract of sale is concluded,[58] this means that a buyer will only be afforded a right to sue for damages.

Prior to the passage of the *SGA*, the implied conditions as to correspondence with description and merchantable quality were restricted to sales of unascertained goods in which the buyer had not yet had the opportunity to inspect the goods.[59] Chalmers attempted

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51 His Honour Judge Chalmers, *The Sale of Goods Act, 1893: Including the Factors Acts, 1889 & 1890*, 2nd ed (London, UK: William Clowes and Sons, 1894) at 24.

52 Lord Diplock, "Law of Contract in the Eighties" (1981) 15:2 UBC L Rev 371 at 374-75.

53 *Cehave N.V. v Bremer Handelsgesellschaft m.b.H The Hansa Nord*, [1975] 3 All ER 739 (CA) [*Cehave*].

54 See the discussion *infra* note 132.

55 *Borrowman, Phillips, & Co. v Free & Hollis* (1878), 4 QBD 500 (CA).

56 *SGA*, *supra* note 5, s 13(4).

57 *Graves v Legg* (1854), 156 ER 304 (Ex).

58 *SGA*, *supra* note 5, s 20, Rule I.

59 Ewan McKendrick, ed, *Goode on Commercial Law*, 4th ed (London, UK: Penguin Books, 2010) at 318.

to reflect this limitation when he stipulated that the implied conditions of correspondence with description and merchantable quality apply only where goods are sold by description. In failing to clearly specify that the implied conditions as to quality only applied to unascertained goods, the statute provided an opening for a fundamental alteration in the scope of the implied conditions. Courts did not treat a sale by description as synonymous with a sale of unascertained goods, but held that specific goods could be sold by description. The statutory implied conditions as to description and quality were thereby extended to virtually all contracts of sale. The reference to a sale by description became almost empty of content since it would only be in the exceptional case that goods were not sold by description.[60]

Other portions of the *SGA* have been strictly construed by courts so as to lose almost all potential application. This can be seen in connection with the implied condition of fitness for purpose. The *SGA* provides that the implied condition of fitness for purpose does not apply in the case of a contract for the sale of a specified article under its patent or other trade name.[61] Courts subsequently eviscerated this provision by holding that this limitation will only apply when the buyer places no reliance at all on the seller but relies solely on trade name.[62]

D. ATTEMPTS AT REVISION

1. The *Bills of Exchange Act*

There has been no major revision of the *BEA* since its inception, although there have been frequent calls for reform. Article 4 of the UCC on bank deposits and collections addresses many of the matters concerning cheques that are so studiously ignored in the *BEA*.[63] There have been some amendments to the *BEA*, but these have all dealt with particular problems, and a reconceptualization of the basic structure laid down by Chalmers has not been attempted. For example, in 1967 the *BEA* was amended giving a collecting bank the status of a holder in due course in respect of a cheque delivered for collection.[64] This was in response to decisions that denied a bank this

60 *Grant v Australian Knitting Mills Ltd.* (1935), 54 CLR 49 at 61 (PC).

61 See e.g. *Sale of Goods Act*, RSBC 1996, c 410, s 18. The provision is absent from the statutes in Saskatchewan, Yukon, the Northwest Territories and Nunavut. It was repealed in Saskatchewan in 1908 (*The Statute Law Amendment Act 1908*, SS 1908, c 38, s 4).

62 *Baldry v Marshall* (1924), [1925] 1 KB 260 (CA).

63 Admittedly, Article 4 has been criticised as depending too heavily on concepts of negotiability and might be better conceived as merely an instruction to pay. See Rogers, *End of Negotiable Instruments*, *supra* note 48 at 225. But Article 4 at least deals with live issues concerning cheques.

64 *An Act to amend the Bills of Exchange Act*, SC 1966-67, c 12, s 4.

status when a cheque was given to the bank for collection only, or without the endorsement of the payee/customer.[65]

A more extensive amendment was made in 1970 in relation to consumer notes.[66] It addressed the use of promissory notes in conjunction with the assignment of contract rights by a supplier of goods or services. This engaged the negotiability concept which cut off the ability of consumer buyers to raise product defences against the assignee. The provisions were poorly drafted, and though they restricted the negotiability of consumer notes they failed to make closely connected lenders subject to defences that could be raised against the supplier.[67]

A further amendment in 2007 provided that electronic presentment of an eligible image of a cheque satisfied the *BEA* requirements for presentment for payment.[68] This does not go so far as to create a paperless cheque. It carves out one instance where the physical transfer of the paper is unnecessary—in all other instances it is still mandated by the *BEA*. But the provision is likely a first step in this process.[69]

Prospects of a major revision[70] of negotiable instruments law, though never bright, appear to be fading as other payment mechanisms, such as credit and debit cards, direct deposits, and preauthorised debits, are taking an ever greater share of the market. To some, revision of negotiable instruments law may seem as futile as rearranging the deck chairs on the Titanic. If reform comes at all, it may be as part of the creation of a legislative framework that covers all payment systems.[71]

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65 The overbroad language that was used led to a furious storm of protest by commentators (see Stephen A. Scott, "The Bank is Always Right: Section 165(3) of the Bills of Exchange Act and its Curious Parliamentary History" (1973) 19:1 McGill LJ 78; Sheilah L. Martin, "Section 165(3) of the Bills of Exchange Act" (1985) 11:1 Can Bus LJ 23). The Supreme Court of Canada's decision in *Boma Manufacturing Ltd. v Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727, 140 DLR (4th) 463, construed this provision narrowly so as to alleviate these concerns.

66 *An Act to amend the Bill of Exchange Act*, SC 1969-70, c 48, s 2.

67 See generally *Canadian Imperial Bank of Commerce v Lively et al* (1974), 46 DLR (3d) 432, 19 NSR (2d) 400 (SC (TD)).

68 *An Act to amend the law governing financial institutions and to provide for related and consequential matters*, SC 2007, c 6, s 398.

69 See Benjamin Geva, "Is the Death of the Paper Cheque Upon Us? The Electronic Presentment and Deposit of Cheques in Canada" (2014) 30:1 BFLR 113.

70 Benjamin Geva, "The Modernization of the Bills of Exchange Act: A Proposal" (2011) 50 Can Bus LJ 26, provides an extensive list of potential amendments to the *BEA* while admitting that "it is only natural that a discussion on meaningful reforms in the law governing payment systems and electronic funds transfers will eclipse a discussion of basic law reform in the area of paper-based systems" (*ibid* at 50).

71 See generally Bradley Crawford, "The Future of Payment Law" (2010) 50 Can Bus LJ 1.

2. The *Sale of Goods Act*

Canadian sales law has changed very little from the time of its enactment. The few changes that have been made often came in the form of consequential amendments that occurred when reforms in other areas were implemented. Manitoba repealed the writing requirement as part of a more general reform of the *Statute of Frauds*.[72] Many provinces modified the seller in possession and buyer in possession exceptions to the *nemo dat* principle in connection with the introduction of the *PPSA*.[73] However, the absence of a major revision is not the result of a lack of trying.

One of the most sustained efforts in law reform in Canada was undertaken in relation to sales law. A complete and systematic revision of sales law was proposed that would more closely align Canadian sales law with Article 2 of the UCC. It was accompanied by a fully developed draft statute that implemented the recommendations for reform. The exercise ultimately ended in failure as no jurisdiction was willing to enact the statute.

Article 2 of the UCC had fundamentally changed American law of sales, which previously had a substantial commonality with Anglo-Canadian sales law. In 1969, a subcommittee of the Ontario Branch of the Canadian Bar Association[74] recommended the adoption of a statute based on Article 2. During the 1970s, the Ontario Law Reform Commission worked on a revision of sales law, which culminated in a three volume report.[75] The Uniform Law Conference of Canada in 1981 proposed adoption of a draft based on the Ontario report. The law reform bodies in Alberta[76] and Manitoba[77] also recommended the adoption of the revised statute.

Why then did this project fail? Although provinces were keen on establishing law reform bodies during this period, they were decidedly less enthusiastic about enacting their recommendations. In this respect, the failure reflects a more general failure of law reform in Canada—a trend that continues as the law reform bodies in Canada

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72 Manitoba Law Reform Commission, *Report on the Statute of Frauds Act*, Report No 41 (1980). British Columbia has also repealed the writing requirement in the *SGA* (*Statute Law Amendment Act, 1958*, SBC 1958, c 52, s 17).

73 See Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, *Personal Property Security Law*, 2nd ed (Irwin Law, 2012) at 250-56.

74 "Report of the Sub-Committee on Article 2 of the Uniform Commercial Code to the Commercial Law Subsection, Ontario Branch, Canadian Bar Association", reprinted in Ontario Law Reform Commission, *Report on Sale of Goods*, vol 3 (Toronto: Ministry of the Attorney General, 1979).

75 *Ibid.*

76 Alberta Institute of Law Research and Reform, *The Uniform Sale of Goods Act*, Report No 38 (Edmonton: ALRI, 1982).

77 Manitoba Law Reform Commission, *Report on the Uniform Sale of Goods Act*, Report No 57 (Winnipeg: MLRC, 1983).

are abolished or deprived of funding. It also reflects the role played by the Uniform Law Conference of Canada ("ULCC"). The ULCC was founded in 1918 with a mandate to harmonize the laws of the provinces and territories of Canada, and, where appropriate, the federal laws as well.[78] Although the ULCC has played an important role in developing draft legislation, it has been less successful[79] in promoting its uniform adoption when compared to the ability of the National Conference of Commissioners on Uniform State Laws and the American Law Institute to achieve uniform adoption of the UCC in the United States.

The failure to implement the Uniform Sale of Goods Act seems to have had the effect of lessening the chance of more limited reform of sales law in Canada along the lines of the English reforms. England has introduced a number of amendments to its statute that have addressed many of the problems identified earlier. In particular, it has repealed the formal writing requirement,[80] eliminated the rule that precludes rejection for breach of condition when property in specific goods has passed to the buyer,[81] and limited the ability in non-consumer contracts for a buyer to reject goods for breach of the statutory implied terms when the breach is so slight that it would be unreasonable for the buyer to reject.[82] The legislation was also amended to change the rules regarding passage of property in connection with sales from a bulk.[83] Any proposal to replicate some of these more limited reforms is likely to be met with arguments that more extensive reforms are to be preferred.[84] The end result is that we can expect to remain wedded to the nineteenth century principles of Chalmers's original Act for the foreseeable future. With every new set of amendments, the English Act drifts further away from the Canadian

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78 See Arthur Close, "The Uniform Law Conference and the Harmonization of Law in Canada" (2007) 40:2 UBC L Rev 535 at 446-53; see generally W.H. Hurlburt, "Harmonization of Provincial Legislation in Canada: The Elusive Goal" (1987) 12:4 Can Bus LJ 382.

79 See Jacob S. Ziegel, "The Future of Commercial Law in Canada" (1985) 20:1 UBC L Rev 1 at 27-29.

80 *Law Reform (Enforcement of Contracts) Act, 1954* (UK), 2-3 Eliz II, c 34, s 2.

81 *Misrepresentation Act 1967* (UK), c 7, s 4.

82 *Sale and Supply of Goods Act 1994* (UK), c 35, s 4(1), amending *Sale of Goods Act 1979* (UK), c 54.

83 *Sale of Goods (Amendment) Act 1995* (UK), c 28, s 1(3), amending *Sale of Goods Act 1979*, *ibid.*

84 See Jacob S. Ziegel & Anthony J. Duggan, "The Role of a Revised Sale of Goods Act" (2000), online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/2000-victoria-bc/341-civil-section-documents/172-role-of-a-revised-sale-of-goods-act-2000>, archived: <https://perma.cc/5ZAX-8AWY>, in which they reject the more modest reforms in England and renew the call for the enactment of the Uniform Sale of Goods Act.

Acts, and yet we remain as far away as ever from the codification of sales law in the United States contained in Article 2 of the UCC.

IV. THE MODERN COMMERCIAL LAW CODES

A. THE GOALS AND OBJECTIVES OF CODIFICATION

The two modern commercial law codifications had a fundamentally different objective than the Victorian commercial codes. Both are derived from the American UCC. Article 9 of the UCC was the first to attract interest in Canada. The personal property security statutes of the provinces were heavily influenced by the American approach to the reform of secured transactions law. Unlike the earlier Victorian commercial codes that were copied with only minor modifications, the contribution of Article 9 was more on a conceptual level.[85] The fundamental building blocks of Article 9—the unitary concept of a security interest, the idea of an internal set of priority rules based on a first to register rule of priority, the concept of a purchase money security interest, and the idea of a notice registration system—were used by Canadian drafters to design personal property security statutes that in many respects departed considerably from the language of Article 9.[86] With further revisions of Article 9, the family resemblance of the statutory provisions has become less apparent though the deep structure is similar in that they both continue to adhere to many of the same fundamental concepts and principles.

Unlike the earlier commercial codifications, the reform of secured transactions law was not primarily about creating greater certainty as to the applicable substantive rule. The major thrust of the reform was to facilitate secured financing by making the outcomes more predictable so that parties would be better able to assess risk, and by simplifying the process through eliminating many impediments that made secured transactions more costly and time-consuming to complete. This involved significant and sometimes radical change to the substantive law.[87]

The reform of secured transactions law also had an impact on commercial practice that was immensely different from that associated with the earlier codifications. The enactment had an immediate effect on transactional practices. Indeed, it was for this reason that a lengthy time period was provided prior to the coming into force of

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85 Jacob S. Ziegel & Ronald C.C. Cuming, "The Modernization of Canadian Personal Property Security Law" (1981) 31 UTLJ 241 at 249-54.

86 See Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, "Secured Transactions Law in Canada—Significant Achievements, Unfinished Business and Ongoing Challenges" (2011) 50 Can Bus LJ 156 at 166 [Cuming, Walsh & Wood, "Significant Achievements"].

87 Cuming, Walsh & Wood, *Personal Property Security Law*, *supra* note 73 at 6-11.

the legislation[88] in order to give commercial parties the opportunity to alter their contracts and their credit-granting processes to adjust to the new law. The longer time for implementation was also required in order to put into place new computer registration systems, and also to permit commercial parties to adequately train their staff in connection with the new registration procedures.[89]

The influence of Article 8 of the UCC has been even greater than that of Article 9. Article 8 regarded the transfer of securities as an aspect of commercial law rather than corporate law. The approach in Canada was to view the matter as an aspect of corporate law to be dealt with in the corporate law statutes, and this led to considerable variation in its treatment.[90] Article 8 was originally premised on the idea that securities were paper-based and that possession of the certificates would ultimately be transferred to the purchasers. The assumption broke down when the volume of securities that were traded became so immense that delays in completing the transactions through physical delivery of the certificates threatened to overwhelm the whole system.[91]

Commercial parties responded by creating the indirect holding system, in which the investors do not deal directly with the issuer. Rather, they deal with their securities broker or another intermediary, and their entitlements are electronically recorded in the records of the intermediary. This eliminates the need for physical transfer of the certificate to complete the transaction. After a false start, Article 8 was revised to create the legal concepts that would support and provide a framework for these practices. One of the primary objectives behind Article 8 was to reduce systemic risk.[92] Delays between trade and settlement created the risk that the financial failure of a securities firm would lead to the failure of others. The greater the number of unsettled transactions, the greater the systemic risk.

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88 For example, the *PPSA* was enacted in 1989 in BC, SBC 1989, c 36, and in 1988 in Alberta (SA 1988, c P-4.05). Its application was delayed by one year in British Columbia, *Personal Property Security Act*, RSBC 1996, c 359, s 77(2), and two years in Alberta (*Personal Property Security Act*, RSA 2000, c P-7, s 76(2)).

89 See Geoffrey Ho, "Overview of PPSA Legislation: Transition and Registration" in *Personal Property Security Act: The Basics* (Edmonton: Legal Education Society of Alberta, 1990) at 7. Although commercial parties were able to use the pre-*PPSA* forms of security agreements, it was generally advantageous to create new forms of agreements that took full advantage of the new secured transactions regime.

90 Eric T. Spink, "The Securities Transfer Act: Fitting New Concepts in Canadian Law" (2007) 45:2 Can Bus LJ 167 at 189-90.

91 Alberta Law Reform Institute, *Transfer of Investment Securities*, Report No 67 (Edmonton: ALRI, 1993) at 20-23.

92 James Steven Rogers, "Policy Perspectives on Revised U.C.C. Article 8" (1996) 43:5 UCLA L Rev 1431 at 1437-41.

The implementation of securities transfer law was different from the implementation of personal property security law in two respects. First, the adoption of securities transfer legislation in Canada was rapid. In a relatively short period of time almost every province had implemented the Act, and the level of uniformity was very high.[93] The Canadian drafters sought to keep the wording and structure of the statute as close as possible to Article 8 in order to maintain uniformity in the highly integrated American and Canadian investment markets. Second, the adoption of the new law had a much smaller effect on transactional dealings since it was designed to provide the legal and conceptual framework for the transactional patterns that were already being employed. This meant that the new legislation did not require a lengthy transition period between its enactment and its coming into force.

The goals of the modern commercial law codifications were therefore of a fundamentally different character than the earlier Victorian commercial codes. The objective was not to capture the principles formulated by courts in order to put them into legislative form, but to put into place an entirely new system of concepts that would replace the common law rules. The earlier commercial codes were intended to create greater certainty by making it easier for commercial parties to know the applicable rule that governs the transactions that they enter into.[94] The modern commercial codes have abandoned this aspiration. They are complex documents and there is no expectation that a non-lawyer would be able to read the statutes and understand them. Although the legislation is not accessible to non-experts, the system that it supports is relatively easy for commercial parties to use and understand. A first to register rule of priority in secured transactions law is simple to apply, and the forms that must be completed to register are relatively straightforward.

B. THE DRAFTERS' THOUGHTS ON THE NEED FOR ONGOING REVISION

The drafters' attitudes toward ongoing revision of the modern commercial codes are most prominent in connection with the UCC. Grant Gilmore, one of the chief architects of Article 9, wrote extensively on this topic. His views are often complex and not always easy to summarize. He believed that the quest for certainty was a chimera because the law was constantly in a state of flux as courts

93 Spink, *supra* note 90 at 168-70.

94 Chalmers indicated that it was a goal of codification that the law should "be made accessible and intelligible to the lay as well as to the legal mind" ("Experiment", *supra* note 22 at 131).

were confronted with new economic and social conditions.[95] But this did not cause him to believe that codification of commercial law was a doomed project, only one that was fraught with difficulties:

> The draftsman is called upon to build a coherent pattern out of the infinite variety of business customs and practices in an unstable and rapidly changing economy. The more detail and color he loads into his statute, the sooner it will begin to wither on the vine; if, on the other hand, he proceeds from generalization to abstraction, his statute will never be of much use or interest to anyone. The process demands a nice eye, a steady hand, and a sure judgment.[96]

Gilmore stated that "[t]he true function of a codifying statute is to reduce the past to order and certainty—and, thus, to abolish it."[97] He recognized that there was a "museum" aspect of codification.[98] Obsolete rules are preserved in the statute "like a fly in amber" despite the fact that they have lost all relevance.[99] The benefit of codification was not that it set the legal principle in stone so that it would be there for all time and for all to see. For Gilmore, the benefits of codification are found at a more conceptual level. It allows the drafter to draw from various strands a principle or idea that has not yet been fully articulated. A prime example of this was the unitary concept of a security interest adopted by Article 9 of the UCC. Gilmore believed that the movement toward a synthesis of the rules governing the various security devices had been in the works for fifty years prior to the codification of secured transactions law.[100] The simplification that can result from the perception of a unifying principle may be dramatic, and the statute will provide "a new starting point from which further exploration can be undertaken."[101]

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95 Grant Gilmore, "On the Difficulties of Codifying Commercial Law" (1948) 57:8 Yale LJ 1341 [Gilmore, "Difficulties"] ("[w]e must not delude ourselves as to the benefits which can be derived from a general codification, however admirably executed. Experience with code law has demonstrated that it is impossible accurately to assess or project the effects of contemporary change" at 1359).

96 *Ibid* at 1341.

97 Grant Gilmore, "On Statutory Obsolescence" (1967) 39:4 U Colo L Rev 461 at 476 [Gilmore, "Obsolescence"] [footnotes omitted].

98 Gilmore, "Formalism" *supra* note 36 at 461.

99 *Ibid*.

100 Grant Gilmore, *Security Interests in Personal Property* (Boston: Little, Brown & Co, 1965) vol 1 at 288-89.

101 Gilmore, "Obsolescence", *supra* note 97.

Gilmore ultimately believed that the codification of commercial law was an ongoing project. He cautioned:

> The theory of the proposed Commercial Code is that we must keep our statutes up to date. If the project is successfully carried through, we should understand that we have probably committed ourselves to basic revisions at fairly short time intervals. However excellent the new Code may be it will no doubt be necessary, in another twenty-five years or so, to revise the revisions.[102]

C. OBSOLESCENCE IN THE MODERN COMMERCIAL CODES

Given that the Victorian commercial codes are well over one hundred years old and that the modern commercial codes are of a much more recent vintage, it will be no surprise that the problem of statutory obsolescence is more pronounced in the Victorian codes. Nevertheless, we can detect already in the *PPSA* some of the first signs in the aging process. The root of the problem lies in a shift from paper to electronic media.

When the *PPSA* was first enacted, it divided up personal property into several different categories. On one pole there were goods, and on the other there were intangibles that had no physical existence. In between there were several types of intangible assets that were represented by some form of writing. The *PPSA* classified these as documents of title, instruments, money, securities, and chattel paper. The paper was a physical manifestation of the right in the intangible, and the *PPSA* reflected this understanding by allowing a security interest in these assets to be perfected by possession. It also created a special set of priority rules that gave priority to a purchaser who took possession of the paper without knowledge. This began to break down when commercial parties started to view the physical transfer of the paper as a burden that might be avoided through the movement of information in its place.

The consequential amendments to the *PPSA* made when the *STA* came into force have put into place the necessary rules to accommodate this change in respect of investment property (which replaces the former category of securities). However, other provisions of the *PPSA* are also affected by this shift away from paper. The special priority rules of the *PPSA* that govern instruments require that the purchaser obtain possession of the paper (typically a cheque). The growth of new forms of payment systems was not contemplated in the statute with the result that it became necessary to decide whether

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102 Gilmore, "Difficulties", *supra* note 95 at 1359.

payments that were made by electronic funds transfer should be equated with purchasers of cheques when resolving priority competitions.

Canadian courts have divided on this issue. The Saskatchewan Court of Appeal, in *Flexi-Coil Ltd. v. Kindersley District Credit Union Ltd.*,[103] held that a payment made by electronic funds transfer should be afforded the same treatment as payments made by cheques for the purposes of the priority rules. The British Columbia Supreme Court, in *CFI Trust v. Royal Bank of Canada*,[104] came to the opposite conclusion and held that the payments did not qualify for protection as they did not fall within the wording of the protective rules because they did not involve the transfer of the possession of money or instruments. This has created both non-uniformity and uncertainty—non-uniformity in that a few provinces have amended their *PPSA*s to encompass other payment mechanisms, but most have not; and uncertainty because we cannot predict whether the Saskatchewan or British Columbia decision will be followed in the other, non-amending provinces.

D. THE PROBLEM OF NON-UNIFORMITY IN THE MODERN COMMERCIAL CODES

The major complications associated with the Victorian commercial codes have arisen out of their neglect. The modern commercial codes do not suffer from the blight of statutory obsolescence. Relative to the other areas of commercial law, the legislative activity is intense. In three provinces, there has been a complete overhaul of the *PPSA*—so much so that their current versions can be regarded as a second generation *PPSA*.[105] Two provinces have already moved to address the problem of electronic funds transfers and other payment systems by extending the special priority rule to encompass them,[106] and other jurisdictions may consider similar changes.[107]

The problem with the modern commercial codes is therefore not one of statutory obsolescence, but one of lack of uniformity. This

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103 (1993), 107 DLR (4th) 129 at 148, [1994] 1 WWR 1 (Sask CA).

104 2013 BCSC 1715 at paras 212-19.

105 These substantial revisions came into force in Ontario in 1989, *Personal Property Security Act, 1989*, SO 1989, c 16, Saskatchewan in 1995, *PPSA*, *supra* note 6, proclaimed in force 1 April 1995, (1995) S Gaz I, 359, and Manitoba in 2000 (*The Personal Property Security Act*, SM 1993, c 14, proclaimed in force 5 September 2000, (2000) M Gaz I, 1413 [Manitoba *PPSA*]).

106 Saskatchewan and Manitoba have enacted provisions (with some significant differences in approach) that extend the priority rule so as to cover other payment systems. See *PPSA*, *supra* note 6, s 31(2)-(3); Manitoba *PPSA*, *ibid*, s 31(2)-(3).

107 The CCPPSL recommended the adoption of the amendment at its 2016 meeting (the author is a member of the CCPPSL and attended the 2016 meeting in Charlottetown, PEI on June 15-17, 2016).

is a problem with the *PPSA* but not the *STA*. The *STA* has been enacted in every province and territory except P.E.I.[108] The legislation is virtually identical in every jurisdiction. The high priority placed on risk reduction[109] and the harmonization of securities transfer law both within Canada and with American law meant that there was little tolerance for provincial variation in the statute.[110]

The experience with the *PPSA* has been vastly different. Non-uniformity is a problem that has plagued the modernization of Canadian secured transactions law from the outset. Ontario was the first province to enact a *PPSA* in 1969, and it developed its own model statute. The other provinces and territories enacted later, but developed a different model of the *PPSA*.[111] Although there are many more similarities than there are differences, the differences are often significant and it is always dangerous to assume that the practices and outcomes in Ontario will correspond with those in other jurisdictions. To give but one example, a security agreement that describes the collateral as "consumer goods" or "equipment" with nothing more is fully enforceable in Ontario.[112] Elsewhere, it is unenforceable against third parties.[113]

The emergence of two competing models at the outset made uniformity much more difficult to achieve. The idea of path dependence helps to explain why this is so. This involves the idea that "an outcome or decision is shaped in specific and systematic ways by the historical path leading to it."[114] Once a law has been enacted, it is costly to change it and there is therefore a tendency for the rule to become locked in.[115] Changing from the old chattel

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108 *STA*, *supra* note 7; SBC 2007, c 10; SNS 2010, c 8; SA 2006, c S-42.3; SNL 2007, c S-13.01; SNWT 2009, c 14; SNu 2010, c 15; SY 2010, c 16; SO 2008, c 8; SNB 2008, c S-5.8; SM 2008, c 14; *An act Respecting the Transfer of Securities and the Establishment of Security Entitlements*, CQLR c T-11.002. PEI in 2014 issued a discussion paper that indicated that draft legislation in respect of an *STA* was being developed (Prince Edward Island, Consumer, Labour and Financial Services Division, "Business Corporations Act Securities Transfer Act", Discussion Paper (Charlottetown: CLFSD, 28 July 2014), online: <http://www.gov.pe.ca/photos/original/elj_bscorpactpa.pdf>, archived: <https://perma.cc/3PZH-BSWZ>). No bill has yet been introduced at the time of writing.

109 Spink, *supra* note 90 at 172-74.

110 Eric T. Spink & Maxime A. Paré, "*The Uniform Securities Transfer Act*: Globalized Commercial Law for Canada" (2004) 19 BFLR 321 at 382-88.

111 See Ronald C.C. Cuming, "Second Generation Personal Property Security Legislation in Canada" (1981) 46:1 Sask L Rev 5.

112 *Personal Property Security Act*, RSO 1990, c P.10, s 11 [Ontario *PPSA*].

113 *PPSA*, *supra* note 6, s 10(3).

114 Oona A. Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86:2 Iowa L Rev 601 at 604.

115 Michael P. Van Alstine, "The Costs of Legal Change" (2002) 49:3 UCLA L Rev 789; S.J. Liebowitz & Stephen E. Margolis, "Path Dependence, Lock-In, and History" (1995) 11:1 JL Econ & Org 205.

security regime to a modern secured transactions regime was costly, but it produced many benefits that outweighed those costs. A subsequent change that is designed to create uniformity in the common law provinces and territories creates a new set of transition costs, but the benefits are not nearly as great as those that were obtained on the initial enactment of the statute. The upshot is that it is vitally important to attempt to agree upon a uniform statute before enactment by any one jurisdiction.

For this reason, neither Ontario, which has adopted its own model, nor the other jurisdictions, which have adopted the Canadian Conference on Personal Property Security Law[116] ("CCPPSL") model, have been prepared to abandon their version in favour of one that would be uniform across common law Canada. Instead, a process of gradual convergence has occurred. Amendments have been made to the Ontario *PPSA* that reduce the number of differences between the two models of *PPSA*.[117] The most notable was the change in 2007 in which Ontario brought true leases for a term of more than one year within the scope of the *PPSA* with the result that there is now substantially similar treatment of these throughout all the *PPSA* jurisdictions.[118]

There is a tension between uniformity and innovation and this can be observed in the *PPSA*. There are important legislative differences even among the jurisdictions that use the CCPPSL model. Some of the differences in the statutes may simply be due to a time lag problem.[119] For example, Saskatchewan and Manitoba have each amended their *PPSA* in order to recognize newer types of payments systems.[120] As *PPSA* reform is considered in the other jurisdictions, these amendments may be introduced there. But in other instances, the amendments may not be adopted with the result that the statutes will begin to drift apart.

This intermittent and disjointed process of reform presents a challenge. If new amendments are introduced into the *PPSA* of a province, there is no assurance that the other provinces will follow suit. The amending province must then balance the desirability of the amendment against the non-uniformity that it may generate. This has a tendency to lead to piecemeal reform in which a discrete set of issues is addressed rather than a revision of the entire statute. One

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116 Cuming, Walsh & Wood, *Personal Property Security Law*, *supra* note 73 at 64-65.

117 Cuming, Walsh & Wood, "Significant Achievements", *supra* note 86 at 174-76.

118 *Ministry of Government Services Consumer Protection and Service Modernization Act*, SO 2006, c 34, Sched E, ss 1-2.

119 See generally Roderick J. Wood, "Acquisition Financing of Inventory: Explaining the Diversity" (2013) 13:1 OUCLJ 49.

120 *PPSA*, *supra* note 6, s 31(2)-(3); Manitoba *PPSA*, *supra* note 105, s 31(2)-(3).

can see this tendency at work in Canada. In the early years, there was little uniformity since the majority of provinces had not yet enacted a *PPSA*. But once substantial uniformity was achieved in all the common law jurisdictions except Ontario this operated as a brake on larger scale reform. Greater efforts are now being made to coordinate a smaller set of amendments across all the CCPPSL jurisdictions.

V. CURING THE PROBLEM OF STATUTORY OBSOLESCENCE

A. IS CODIFICATION REVERSIBLE?

It seems to be assumed by most that once an area of commercial law is codified the prospect of reversing the process by repealing the codifying statute is next to impossible. The idea of repealing a commercial code is usually a response to widespread statutory obsolescence. If a statute from an earlier era that codifies even older principles and practices produces more harm than good, the solution is simply to rid ourselves of it. James Rogers has argued that Article 3 of the UCC, which is similar to the *BEA*, might simply be repealed. He concludes that:

> The fundamental problem is that the entire structure of the current law of checks and notes is profoundly anachronistic...[I]f one steps back from the seeming familiarity of the rules of negotiable instruments law, one would be hard pressed to offer any coherent explanation for why there even is a rule on a certain issue in the statute, let alone for why the rule resolves the matter as it does. We have seen that in large part the rules still set out in the statute are products of disputes and issues that may once have been significant, but no longer are.[121]

Admittedly, the idea of repealing the *SGA* or the *BEA* seems radical, but it is useful to consider whether commercial codification is reversible in a common law system. We can find very little in the way of precedent for this. Other countries that have codified negotiable instruments law or sales law have either retained it or replaced it with an even newer codification.

If one looks more broadly, there are instances when a major private law codification has been repealed. In 1880, Canada repealed its insolvency law statute with the result that for forty years bankruptcy law did not exist in Canada.[122] In the United States, almost all states

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121 Rogers, *End of Negotiable Instruments*, *supra* note 48 at 240.

122 Thomas G.W. Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press, 2014).

have repealed Article 6 of the UCC governing bulk sales. However, the repeal of these statutes simply meant that a particular process was no longer applicable. Unlike the Victorian commercial codes, these statutes did not purport to define the nature and content of the rights held by parties to a commercial transaction.

The *BEA* is the statute where the problem of statutory obsolescence is most advanced. If it were a complete dead letter, then repeal would be uncontroversial. However, there are many parts of the Act that form part of the legal framework supporting use of the cheque. For example, the provisions that govern fictitious and non-existent payees—as inadequate as they are for properly allocating forgery losses—nevertheless fulfill an important function. Is repeal even a possibility when the law, however archaic, is being used to resolve live issues?

The consequences of repealing a statute that simply codified the common law are intriguing. The field once again becomes part of the common law, but does it revert to the state of the law immediately before codification, or does it through some means incorporate the changes to the law that arose by virtue of the process of statutory construction in the years that followed enactment? The first possibility is more than a little alarming, so one would need a further section in the repealing statute to ensure that legal principles as they stood at the date of the repeal would continue, but that they would thereafter be treated as rules of the common law rather than statutory rules.

If the *SGA* were repealed, one would expect that sales law would be absorbed into the general law of contracts. The implied terms as to quality (other than the implied condition of correspondence with description) would likely come to be viewed as intermediate terms and the buyer of specific goods would be entitled to reject in respect of a substantial breach regardless of the passage of property. By virtue of again forming part of the common law, legal principles could be revised by courts in light of new social, economic and technological conditions.

A reversal of codification is therefore neither impossible nor necessarily objectionable on theoretical grounds. But is it likely to happen? It would seem doomed for the same reason that revision of the Victorian commercial codes has foundered. As much at it pains legal scholars and law reformers to hear it said, improvements to the coherence and rationality of the law do not attract the interest of political actors. If proposals to reform the law fall on deaf ears, what is the chance that the statute would be repealed altogether? No doubt some would worry about unintended or unanticipated consequences. Others would argue that even if the law is obsolete it is nevertheless better to have a law that is certain. Even a hint of controversy is usually enough to scare away political interest in matters of technical law reform.

B. A DIFFERENT APPROACH TO STATUTORY CONSTRUCTION

Assuming that the codifications are with us to stay and that reform is not on the cards, does this mean that we must simply accept control by the dead hand of the past and live with commercial matters being governed by ill-suited rules drawn from a different era? The answer is that this has not happened. The law has been able to adapt even in the absence of statutory amendment. The judiciary, through the process of statutory interpretation rather than common law development, has continued to revise the law in response to changing conditions. The real controversy is whether we are prepared to admit to judicial activism in the sphere of private law.

The problem of statutory obsolescence was examined by Guido Calabresi in his celebrated work *A Common Law for the Age of Statutes*.[123] He observed that judges are taught to honour legislative supremacy, but they have also been taught to think that they play a crucial role in keeping the law functional.[124] He argued that courts should have the authority to modify obsolete statutes in the same way they can change a common law rule. Moreover, he argued that this modification is happening already, only that it is through "subterfuges, fictions and wilful use of inappropriate doctrines."[125] Courts are doing it in the guise of interpretation. The difficulty with using subterfuges rather than candour is that it masks what the court is doing and why it is doing it.[126]

Grant Gilmore was clearly thinking along similar lines when he stated:

> The judges have of course always had, and have exercised, the power to achieve necessary reforms by the process of disingenuous, even deliberate, misconstruction of statutory texts. That is a bad way of dealing with the problem: it leads to a state of law that is fragmented, obscure, inconsistent, and incomprehensible. A major problem of law reform over the next half century will be the reformulation of our theories about the allocation of power between court and legislature.[127]

We can observe this process at play in sales law. The *SGA* provides that buyers in non-severable sales of specific goods cannot reject

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123 (Cambridge: Harvard University Press, 1982).
124 *Ibid* at 6.
125 *Ibid* at 166.
126 *Ibid* at 179.
127 Grant Gilmore, "What is a Law School?" (1982) 15:1 Conn L Rev 1 at 5.

the goods if property has passed to them. This sets the stage for the chipping away of this limitation by the judiciary. Because the restriction only applies when property in the goods passes to the buyer, courts may seek to avoid it by finding that a transfer of property has not yet occurred. There is sufficient slack in the rules for the passage of property that it is not difficult for an enterprising judge to reach this conclusion. The judge can hold that the contract was not unconditional, thereby taking it out of the presumptive rule that property passes the moment the contract is entered into.[128] The judge can find that the seller was bound to do something to put the goods in a deliverable state, thereby delaying the passage of property,[129] or find that the parties intended that property pass at some later time.[130] Alternatively, a judge may find that the parties impliedly agreed that the buyer would be entitled to reject.[131] Because this appears on the surface to be an application of formal rules, it hides the fact that the judge believes that a buyer should be entitled to reject if there is a substantial defect in the goods. We can also see the struggle at play when buyers seek to reject goods for minor defects.[132]

Taking a different interpretive stance toward the Victorian commercial codes might be justified on two grounds. The first is the idea that the principle of legislative supremacy begins to lose its grip when it is clear that a statute has become obsolete. It is for this reason that few judges think that it is necessary to refer to the wording of the *Statute of Elizabeth*,[133] concerning fraudulent conveyances, treating it instead in the same way as a common law principle. The second is that as the codification was a legislative restatement of

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128 *Varley v Whipp*, [1900] 1 QB 513. There is still considerable controversy on what the court meant in finding that the contract was unconditional. See Bridge, *supra* note 21 at 118-20.

129 *SGA*, *supra* note 5, s 20, Rule II. And see *Jerome v Clements Motor Sales Ltd.*, 15 DLR (2d) 689, [1958] OR 738 (CA).

130 *SGA*, *ibid*, s 19. And see *Goodwin Tanners Ltd. v Belick and Haiman*, [1953] 3 DLR 161 (Ont CA).

131 *SGA*, *ibid*, s 13(4). And see *O'Flaherty v McKinlay* (1951), [1953] 2 DLR 514, 30 MPR 172 (Nfld SC (CA)).

132 In *Cehave*, *supra* note 53, the goods were clearly substandard in quality. The buyer purported to reject the goods for breach of the implied condition of merchantable quality, but then repurchased them at a fire sale price and used them for the intended purpose. The court concluded that the goods were not unmerchantable if a commercial party would consider that the proper way of dealing with the defect was through an allowance on the price. This tortured interpretation of the statute gets us nowhere. If there is no breach, then the buyer will not be entitled to a price reduction. The concept of merchantability is not the problem—it is its categorization as a condition that gives rise to a right to reject for any breach that is the source of the difficulty.

133 *Fraudulent Conveyances Act, 1571* (UK), 13 Eliz I, c 5.

common law principle, the statute should be interpreted in such a way that does not produce a break between sales law and the general law of contract.

Even if courts are prepared to adopt this stance, some judges may think that it is appropriate to do so only when there is flexibility in the language of the statute. The provision that strips a buyer of the right to reject in a contract for the sale of specific goods where property has passed is subject to an express or implied term to the contrary. A court might be prepared to find that the expectations in the marketplace have shifted over the past one hundred years and that most contracts of sale are now subject to an implied term that a buyer of specific goods can reject the goods. The same judge might have more difficulty overturning the well-entrenched condition/warranty dichotomy contained in the *SGA* in order to convert statutory implied terms into intermediate terms.

Karl Llewellyn admonished judges to favour the Grand Style over the Formal Style.[134] The Grand Style connoted an approach to judging that was more concerned with the reasons behind a principle than with slavish obedience to precedent.[135] Precedent was useful in guiding the judge, but it should not control the result.[136] It was also important for the judge to have an understanding of the kind of situation that gave rise to the controversy rather than viewing the particular facts in a vacuum.[137] Llewellyn did not think that the Grand Style was restricted to the determination of common law principles. He thought that a roughly equivalent range of techniques could be applied to matters of statutory interpretation.[138] A judge who decided in the Grand Style would openly recognize the obsolescence of the legal principle set out in the statute, and in applying interpretive techniques to narrow or expand the rule would be candid in explaining the reason for the change.

C. DIFFERENT APPROACHES TO LEGISLATIVE DESIGN

Several drafting techniques can be employed in the attempt to stave off the deleterious effects of statutory obsolescence. In some instances, matters can be left to the regulations. A number of statutes stipulate that monetary amounts are to be prescribed by regulation in the expectation that this will improve the prospect of periodic updating.

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134 Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Company, 1960) at 5-6.
135 *Ibid* at 402.
136 *Ibid* at 189.
137 Llewellyn referred to this as the use of "situation-sense" (*ibid* at 121-22).
138 *Ibid* at 371-72.

The *PPSA* wisely leaves many matters concerning the details of the registry system to the regulations since advances in technology can quickly eclipse existing practices. One should not place complete faith in this approach. The same problems of inaction can be found in the institutions responsible for subordinate legislation. To give an example, the Alberta *Civil Enforcement Act*[139] provides that the monetary amounts for exemptions are set by regulation,[140] but the amounts have not been changed since the coming into force of the Act in 1996.[141]

Another technique is to include statutory requirements for periodic review. The *BIA* adopts this technique. The statute contains a provision that compels the Minister within five years of the coming into force of the previous set of amendments to report to Parliament "on the provisions and operation of this Act, including any recommendations for amendments to those provisions."[142] This technique ensures that a review will ensue, though it neither dictates the comprehensiveness of the review, nor ensures that out of date provisions will be reviewed. This can be a problem. Most of the amendments to the *BIA* have centred on changes to the restructuring provisions—the area of greatest interest to insolvency lawyers and professionals. Sadly neglected bankruptcy provisions have been left unchanged.[143] Despite several rounds of amendments, the *BIA* still adheres to the concept of an act of bankruptcy—a requirement dating back to the first English bankruptcy statute, passed in the reign of Henry VIII, that has been scrapped by many other countries. The monetary limits have been left at their 1949 levels despite the fact that, because of inflation, they now have less than one-tenth of their original value.

A third approach is to use open-textured language. Gilmore identifies the need to guard against excessive detail:

> [I]t is a matter of vital importance that the Code as a whole be kept in terms of such generality as to allow an easy and unstrained application of its provisions to new patterns of business behavior. Commercial codification cannot successfully overparticularize: the penalty for being too precise is that the statute will have to keep coming in for repairs (and amendment is a costly, cumbersome and unsatisfactory process) or else become a dead-letter.[144]

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139 RSA 2000, c C-15.
140 *Ibid*, s 88.
141 Alta Reg 276/1995, s 37(1).
142 *BIA*, *supra* note 14, s 285(1).
143 See Roderick J. Wood & David Bryan, "Creeping Statutory Obsolescence in Bankruptcy Law" (2014) 3:1 J Insolvency Institute Can 1.
144 Gilmore, "Difficulties", *supra* note 95 at 1355.

The use of broad terms such as "merchantable quality" and "fitness for purpose" in the *SGA* permits growth in the same manner as with a common law principle.

The drafters of the *STA* attempted to build in flexibility in two ways. First, they adopted a neutral position concerning the use of certificated securities, uncertificated securities and securities entitlements rather than trying to force industry practice into any particular mode. Second, the definition of "financial asset" includes property held in a securities account if the parties agree that the "property is to be treated as a financial asset."[145] This opt in is designed to provide for growth in the scope of the definition as new types of financial assets are invented.

These approaches are no panacea. Drafting strategies can delay but not prevent the onslaught of statutory obsolescence much as exercise can delay but not prevent age related disease and decline. They are also not useful in dealing with our two Victorian commercial codes as these strategies must be employed at the time the statute is drafted.

D. RESTATEMENTS OF LAW

The strategy of transforming a body of common law principle into statutory principles found its moment in a particular time in the late nineteenth century and it likely will not be repeated. It is most improbable that anyone would think it useful to repeat this process in relation to an area of commercial law—such as the law of guarantee—that is made up primarily of common law rules unless the real intent was to reform key aspects of those rules. The law of guarantees is admittedly complex and may benefit from a rigorous examination of its underlying principles. Our experience with the codification of sales law and negotiable instruments law strongly suggests that we should avoid further codification, and that a restatement of the law might be a better response.

A restatement of law is a secondary source that sets out the common law principles.[146] It is persuasive because of the high degree of consensus that is created through a process of review and critique by scholars, lawyers and judges. Benjamin Cardozo referred to restatements as "something less than a code and something more than a treatise."[147] A restatement would promote greater certainty,

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145 *STA*, *supra* note 7, s 1(2)(o)(iv).

146 On the relationship between the codification movement and the restatement movement in the United States, see Nathan M. Crystal, "Codification and the Rise of the Restatement Movement" (1979) 54:2 Wash L Rev 239. See also Kristen David Adams, "Blaming the Mirror: The Restatements and the Common Law" (2007) 40:2 Ind L Rev 205.

147 Benjamin N. Cardozo, *The Growth of the Law* (New Haven: Yale University Press, 1924) at 9.

but it would not suffer from the problems of statutory obsolescence. The influence of recent restatements, such as those in the area of restitution in the United States[148] and unjust enrichment in England[149] indicate that this may well be an avenue that is worth investigating.

E. KEEPING REFORM ON THE AGENDA

Individuals who devote their time and efforts to commercial law reform, or most other kinds of law reform for that matter, must reconcile themselves to the fact that their work will often not end in the passage of a statute. That the Victorian commercial codes have not undergone any significant amendment in over one hundred years does not provide much encouragement that things will change any time soon. Moreover, that a massive and sustained effort to reform the law of sales was tried and failed does not generate much hope that a renewed but feebler future attempt will succeed.

Although these efforts are most likely to fail, this is never preordained. Unlike Sisyphus, whose fate is to push a rock up a mountain for all of eternity, for a proponent of law reform there is always a chance that circumstances will conspire to create an opening. In some instances, the efforts of a single individual can make a difference. In Australia, the tireless efforts of Professor David Allen were instrumental in the eventual modernization of secured transaction law although it must, at times, have seemed to be a hopeless cause.[150]

In other instances, an opportunity comes about because there is a change in the wind such that some element of the reform package aligns with a government objective. The law reform body in Alberta proposed a complete overhaul of its judgment enforcement system in 1991.[151] The recommendations were swiftly implemented. The impetus was almost certainly not an interest in technical law reform but the government's plan to privatize the operational activities of the sheriff as part of an overall cost-cutting agenda.[152]

Those who control the legislative agenda must be reminded that the benefits of commercial law codification come at a cost: it is

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148 See Lionel Smith, "Legal Epistemology in the *Restatement (Third) of Restitution and Unjust Enrichment*" (2012) 92:3 BUL Rev 899, on the *Restatement (Third) of Restitution and Unjust Enrichment* (2011).

149 Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012).

150 Anthony Duggan & David Brown, *Australian Personal Property Securities Law*, 2nd ed (Chatswood, NSW: LexisNexis Butterworths, 2016) at 23.

151 Alberta Law Reform Institute, *Enforcement of Money Judgments*, Report No 61 (Edmonton: ALRI, 1991).

152 See Roderick J. Wood, "The Reform of Judgment Enforcement Law in Alberta" (1995) 25:1 Can Bus LJ 110.

necessary to engage in ongoing reform. They may choose not to heed the call, but they should not assume that neglect of their responsibilities goes unnoticed. The obsolescence of some of the commercial codes should be remarked upon at every opportunity as the neglected state of the law should be an embarrassment to those responsible.

VI. CURING THE PROBLEM OF NON-UNIFORMITY

A. A STRATEGY OF DENIAL

A strategy of denial proceeds from the premise that uniformity of laws, or even the less ambitious harmonization of laws,[153] is unobtainable[154] or that it is not a meaningful or desirable goal for law reform.[155] Some argue that the uniformity that presently exists is only a by-product of modernization of secured transactions law rather than something of value that should be pursued or preserved.[156] Borrowing and lending among jurisdictions can contribute to the harmonization of laws through a process of legislative parallelism, but harmonization is not its primary goal.[157]

Uniformity for its own sake was never the objective in the reform of secured transactions law. Indeed, it was generally assumed that nation-wide uniformity was not possible given Quebec's civil law system. Other provinces initially chose to retain the older chattel security systems. Their decision to take the plunge and adopt a *PPSA* was driven primarily by the perceived advantages of the new system. However, upon choosing to embark on that path, uniformity takes on an elevated value.

Many of the provinces and territories are small in population and the volume of decisional law is often sparse. The ability to rely on decisions from other provinces is highly beneficial. This is particularly true when the legislation adopts a new approach that breaks from the past. Relying on authorities from other provinces becomes more

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153 Harmonization of laws is regarded as a more flexible arrangement that does not require substantial similarity in legislation. It encompasses a broad range of possibilities and may be satisfied in certain contexts by having "a high degree of similarity in basic principles but not detailed provisions" (Ronald C.C. Cuming, "Harmonization of Law in Canada: An Overview" in Ronald C.C. Cuming, ed, *Perspectives on the Harmonization of Law in Canada* (Toronto: University of Toronto Press, 1985) 1 at 4). See also Marc Ancel, "From the Unification of Law to Its Harmonization" (1976-1977) 51:1 Tul L Rev 108.

154 Malcolm Evans, "Uniform Law: A Bridge Too Far?" (1995) 3:1 Tul J Intl & Comp L 145.

155 Martin Boodman, "The Myth of Harmonization of Laws" (1991) 39:4 Am J Comp L 699.

156 *Ibid* at 718-19.

157 Roy Goode, "Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law" (1991) 50:4 ICLQ 751 at 759.

difficult if the legislation has significant differences. The differences are usually not the result of a disagreement over legislative policy or reflective of different social or economic conditions within the jurisdiction. They can nevertheless produce starkly different outcomes that can surprise commercial parties and make it more difficult for them to assess risk.

It would be most unfortunate if uniformity were abandoned. There are real benefits to uniformity. The differences in legislation arise simply because of the difficulty of legislative coordination. The solution is not to give up on uniformity, but to foster greater coordination of the legislative activities among the *PPSA* jurisdictions.

B. STRENGTHENING UNIFORMITY BODIES

The ULCC recognised the difficulties in promoting the implementation of uniform commercial laws. For this reason, in 1999 it adopted a commercial law strategy to modernize and harmonize commercial law in Canada, with a view to creating a comprehensive framework of commercial statute law. The strategy produced new proposals for uniform changes to the *PPSA* conflict of laws rules, ground-breaking proposals on security interests in intellectual property,[158] and a call to repeal the antiquated *Bank Act* security.[159] Again, implementation proved to be its Achilles heel. Even the proposal to repeal an obsolete and little-used federal security device was ignored despite being supported by the ULCC, the Law Commission of Canada and the Canadian Bar Association.[160] The commercial law strategy was subsequently rolled back into the Civil Section of the ULCC.

A major change in the operation or governance of the ULCC is unlikely. A more fruitful direction may be distributing efforts at reform and implementation across different law reform and uniformity bodies. The CCPPSL has developed recommendations for reform. The Alberta Law Reform Institute is presently contemplating a project on *PPSA* reforms that would consider the CCPPSL recommendations. There has been a high degree of communication and cooperation recently between provincial law reform bodies and the ULCC on judgment enforcement law and reviewable transactions law.

The recent experience with the enactment of the *STA* demonstrates that uniformity is possible when the demand for it is sufficiently great. Perhaps the positive experience with the *STA*'s implementation

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158 Law Commission of Canada, *Leveraging Knowledge Assets: Reducing Uncertainty for Security Interests in Intellectual Property* (Ottawa: LCC, 2004).

159 Law Commission of Canada, *Modernizing Canada's Secured Transactions Law: The Bank Act Security Provisions* (Ottawa: LCC, 2004).

160 Roderick J. Wood, "Bank Act—PPSA Interaction: Still Waiting for Solutions" (2011-2012) 52:2 Can Bus LJ 248.

in Canada will convince the appropriate authorities that it can be achieved if the spirit is willing.

C. FEDERAL CODIFICATION

Australia has solved the problems of non-uniformity of personal property security law within its federal state through a complex constitutional arrangement by which the states give the Commonwealth power to legislate in respect of personal property security law. A large portion of the Australian *PPSA* is devoted to the mechanics of this process. As a result, a federal statute that creates a single registry system is in place and the law is uniform throughout Australia. This idea of a federal commercial law codification had also been briefly entertained in the United States during the drafting of the UCC.[161]

The bijural nature of Canada alone, with its common law and civil law jurisdictions, would make this a daunting task without even stopping to consider its constitutional dimensions. One would also expect reluctance on the part of provinces and territories to surrender the revenue generated by the registries, or to vacate a field involving property registration in which they have developed expertise that far outstrips the federal government's. The constitutional experience in Canada in connection with a federal securities regulator implies that the use of Parliament's power to regulate trade and commerce does not provide a firm basis for federal regulation in the field of personal property security law.[162]

D. REGIONAL COORDINATION

Although coordination in personal property security law across common law Canada has stopped short of national uniformity, there appears to be a higher degree of uniformity along regional lines. In particular, there is a higher degree of uniformity in Atlantic Canada and also among the western provinces and territories. Likely due to the smaller resources available to these jurisdictions, the provinces of Atlantic Canada made a decision to base their legislation on the New Brunswick *PPSA*,[163] which was the first to be enacted in that region. Another factor is the use of the same private service provider in

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161 Grant Gilmore, "Commercial Law in the United States: Its Codification and Other Misadventures" in Jacob S. Ziegel & William F. Foster, eds, *Aspects of Comparative Commercial Law: Sales, Consumer Credit, and Secured Transactions* (Montreal & Dobbs Ferry: McGill University & Oceana, 1969) 449 at 462.

162 See generally *Reference re* Securities Act, 2011 SCC 66, [2011] 3 SCR 837. See also E.E. Palmer, "Federalism and Uniformity of Laws: The Canadian Experience" (1960) 30:2 L & Contemp Probs 250, for an analysis of the reasons for the difficulty of achieving uniformity in Canada.

163 SNB 1993, c P-7.1, s 2(5).

respect of the functioning of the registry system.[164] Although this does not itself dictate uniformity in the legislation,[165] it may support an environment of cooperation in which closer coordination amongst participants is the norm. The greater uniformity in the western provinces and the territories is more likely due to the fact that they enacted the statute at about the same time. It is also possible that the New West Partnership Trade Agreement,[166] the internal trade agreement between British Columbia, Alberta and Saskatchewan, may lead to closer coordination on future legislative changes.

E. COORDINATION THROUGH JUDICIAL INTERPRETATION

The Grand Style of judging can be used by the judiciary to address non-uniformity in legislation in the same way that it can be used to address problems of statutory obsolescence.[167] The legislation in one jurisdiction may be silent on a matter that is expressly addressed in another. A judge interpreting the legislation in the first jurisdiction may choose to consider the legislation in the other jurisdiction. This will help to illuminate the fundamental principles and policies that underlie secured transactions law, and also shed light on legislative choices.[168] This will often result in a harmonized approach even though uniformity may not be the principal consideration. In Atlantic Canada, this is taken one step further through the inclusion of a provision that directs a court to interpret the Act "in a manner that promotes the inter-jurisdictional harmony of the law of personal property security in Canada."[169]

F. COORDINATION THROUGH DELAYED PROCLAMATION

The technique of enacting an amendment but delaying its proclamation has been attempted recently in Canada to coordinate uniformity

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164 The four provinces of Atlantic Canada and the three territories all use Atlantic Canada On-Line ("ACOL") which is an alliance between the respective governments and Unisys Canada Inc. See ACOL, "Personal Property Registry System (PPRS)", online: <https://www.acol.ca/en/service/pprs/about-pprs-introduction>, archived: <https://perma.cc/BT5N-3FHK>.

165 Yukon recently joined the Atlantic Canada provinces and the other two territories in using ACOL despite the fact that its *PPSA*, RSY 2002, c 169, has significant differences from both the Ontario model and the CCPPSL model.

166 The Agreement seeks to eliminate unnecessary differences in business standards and regulations. See New West Partnership Trade Agreement, "The NWPTA: The Agreement", online: <http://www.newwestpartnershiptrade.ca/the_agreement.asp>, archived: <https://perma.cc/9YV6-CT6U>.

167 Llewellyn, *supra* note 134.

168 See e.g. *Bank of Nova Scotia v IPS Invoice Payment System Corporations*, 2010 ONSC 2101, 318 DLR (4th) 751. And see Roderick J. Wood, "Accounts, Proceeds and Conversion: *Bank of Nova Scotia v IPS Invoice Payment System Corporations*" (2011) 26:2 BFLR 359.

169 See e.g. *Personal Property Security Act*, *supra* note 163, s 2(5).

among the *PPSA* jurisdictions. Until recently, legislation in all the *PPSA* jurisdictions had substantially similar conflict of laws rules. The primary approach was to use the location of the collateral, but in respect of certain types of collateral such as intangible or highly mobile goods held as equipment or lease inventory the location of the debtor was used. The chief executive office in most cases was used to determine the location of the debtor. A difficulty with this approach was that it was often factually difficult to determine the jurisdiction of the chief executive office. For this reason, Ontario was interested in substituting a test for the debtor's location that would use the province or territory under the laws of which the debtor is incorporated, continued, amalgamated or otherwise organized.[170]

Problems of non-uniformity of law become particularly glaring when there are differences in the conflict of laws rules as this can produce different outcome depending upon where the matter is litigated. Ontario therefore delayed proclamation of the amendment to allow other provinces and territories to make similar amendments with the expectation that they would then be proclaimed into force at the same time. The Ontario amendments were enacted in 2006. Saskatchewan[171] and British Columbia[172] made similar amendments and delayed proclamation, but no other jurisdiction followed suit.

Ontario decided to proclaim the amendments into force and they became effective on January 1, 2016. British Columbia and Saskatchewan have not yet proclaimed into force their amendments. Ontario's decision to proclaim the amendments into force without further support has an element of brinkmanship. It is likely based on the hope that Saskatchewan and British Columbia will proclaim and that this will force the hand of the other provinces. Alberta would feel the pressure to amend next, as it would be at a variance with its two neighbouring provinces. Although this technique is far from ideal, it illustrates the contortions necessary in the absence of a uniformity body that can effectively coordinate the implementation of provincial and territorial legislation.

VII. CONCLUSION

The Victorian commercial codes demonstrate the dangers of codifying an area of common law without any mechanism to ensure its ongoing revision. In Canada, sales law has been frozen in time, while the law in the United States and in England has moved on. Although in theory

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170 SO 2006, c 8, s 126; SO 2006, c 34, Schedule E, s 3(2). The amendments appear in s 7 of the Ontario *PPSA* (*supra* note 112).

171 *The Personal Property Security Amendment Act, 2010*, SS 2010, c 26, ss 5-6.

172 *Finance Statutes Amendment Act, 2010*, SBC 2010, c 4, s 43.

this codification is reversible, the reality is that we are stuck with it and that any change must occur through legislative amendment. The basic impulse to codify the common law into statutory form as was done in the Victorian codes has long since passed, and the project, if it is to occur at all, will likely take the form of a restatement of law. In the absence of any enthusiasm from governments for sales law and negotiable instruments law reform, we will simply need to learn better ways to live with our obsolete statutes. Without statutory reform, the manner by which the judges seek to maintain the relevance of obsolete statutes is critical.

Although significant uniformity has been achieved in the field of personal property security legislation, a tension exists as the desire for further innovation must be weighed against the loss of uniformity it produces. Attempts are presently underway to revise the law in light of technological change and to provide answers to questions that were not anticipated at the time the legislation was enacted. A coordination of legislative agendas will be critical in order not to lose the substantial uniformity that has been gained.

The lesson is to recognise that a code should not be assumed to be the preferred vessel for our commercial laws in all cases. The mechanisms that produce statutory obsolescence, as well as those that produce non-uniformity, are strong and they never sleep. The success of the codification effort greatly depends on the degree to which these twin forces can be managed.