

CRIMINAL LAW SECTION

MINUTES

Attendance

A total of 27 delegates attended the meetings of the Criminal Law Section of the Uniform Law Conference held in Charlottetown, P.E.I.

Opening

Michael Allen presided as Chair and Fred Bobiasz acted as Secretary for the Meetings of the Criminal Law Section (CLS) of the Uniform Law Conference. The Section convened to order on Sunday, August 7, 1994. The heads of each delegation introduced the commissioners attending with them. This year the Honourable Owen Kennedy of Newfoundland participated as an observer on behalf of the Canadian Association of Provincial Court Judges. The Deputy Minister of Justice and Deputy Attorney General of Saskatchewan, W. Brent Cotter, attended a number of sessions of the Criminal Law Section.

Report of the Chair

The Section considered 44 resolutions. Forty three had been submitted in advance and one was proposed from the floor. Of the 44 resolutions considered, 39 were adopted as proposed or as amended, 3 were defeated and 2 were withdrawn.

Three papers submitted by the Department of Justice were discussed. One dealt with mandatory HIV/AIDS testing; another discussed the need to create an AIDS specific offence; and the third considered obtaining and banking DNA forensic evidence. The Criminal Law Section also met jointly with the Uniform Law Section to consider issues relating to computer-produced records in court proceedings and a report on jury reform. The joint session was also provided with a status report on a 1992 resolution calling for the reconsideration of the Uniform Mental Health Act in light Bill C-30 which provided amendments to the Criminal Code concerning mentally disordered offenders.

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Report of the Senior Federal Delegate

The senior federal delegate reported on resolutions adopted in prior years. He noted that 1993/94 was a particularly productive year for criminal law legislation. Although only one bill was passed four others were tabled just before the summer recess.

Bill C-8 amended section 25 of the Criminal Code and came into force on the first of July. It limits the justification for the use of force available to peace officers and responds to a 1989 Ontario resolution.

Bill C-37 provides for amendments to the Young Offenders Act. Several of the amendments implement ULC resolutions. Clause 35(5) proposes a new subsection 56(5.1) - providing that statements made by individuals who represent themselves to be 18 or over are admissible. It implicitly clarifies that statements made by individuals who are in fact 18 or over are admissible giving effect to a 1992 Ontario resolution. Clause 13(1) provides for conditional discharges in a new paragraph 20(1)(a.1). A 1993 Ontario resolution called for this change.

Bill C-41 dealing with sentencing matters was introduced on June 13th. Among other things, it provides for alternative measures which responds to a call for adult diversion in an Alberta resolution adopted in 1991. Clause 8 provides for variations in orders under section 810 of the Criminal Code which was proposed in a 1991 resolution from British Columbia. This bill would also permit a judge to be able to convert an intermittent sentence presently being served to straight time when sentencing for a new offence. This was proposed by Saskatchewan in a 1987 resolution. The bill also provides measures in a new section 734.6 in respect of civil enforcement of fines and would implement a 1993 Ontario resolution.

Bill C-45 which amends the Corrections and Conditional Release Act and related statutes in clause 79 would amend section 6 of the Prisons and Reformatories Act to respond to a 1993 Alberta resolution dealing with earned remission.

C-42 - Miscellaneous Criminal Law Amendments.

This bill was tabled on June 15th and contains over 100 clauses. Most of the provisions in this bill would implement previous resolutions of the Criminal Law

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Section. The role of the Uniform Law Conference is acknowledged in the bill's Summary at page 1a, which reads, in part:

This enactment amends the Criminal Code, the Canada Evidence Act, the Contraventions Act, the Mutual Legal Assistance in Criminal Matters Act and the Supreme Court Act. Most of the amendments are to the Criminal Code and implement proposals aimed at improving diverse aspects of the administration of criminal justice. The proposals originate from the Criminal Law Section of the Uniform Law Conference of Canada, the former Law Reform Commission of Canada, various judges, members of the bar and federal and provincial departments and officials.

The amendments to the Criminal Code are mostly procedural. Some amendments affect evidentiary provisions. Others have to do with specific schemes within the Criminal Code such as impaired driving, riots, and the control of seized property. Among the procedural changes are matters relating to police and other law enforcement officials concerning arrest and interim release, search and seizure and associated matters. Some amendments adjust definitions, mode of trial procedure or dispositions and sentences for several offences. One amendment limits the publication of information considered at pre-trial proceedings in jury trials. Another limits the use that can be made of material and information disclosed to the defence by the prosecution for the purpose of trial preparation. An amendment to the Canada Evidence Act permits evidence to be given or affidavits made on affirmation rather than on oath as a matter of choice and not because of conscientious scruples. Another amendment makes evidence of previous statements recorded or captured on video or audio tape admissible for purposes of cross-examination. There are also amendments which would make business records and other evidence obtained in foreign states more readily admissible. The Mutual Legal Assistance in Criminal Matters Act amendments facilitate the admissibility of certificates or statements taken abroad for the purpose of explaining evidence obtained in a foreign state pursuant to a treaty and make two minor clarifications to procedural provisions.

It was also noted that when the Minister of Justice tabled this Bill, an accompanying press release indicated that a second such Bill is to follow shortly.

Rules of Procedure

Certain matters relating to the Rules of Procedure were discussed.

It was agreed that Rule 8 (requiring that delegations which present a resolution which is adopted by the Section summarize the debate on the resolution and forward the summary to the secretary within 60 days of the close of the Conference) be repealed.

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A discussion on a proposal to permit the Canadian Bar Association to participate as an independent delegation received support. However, the President of the Conference informed the Section that the bylaws limited delegations to provinces, territories and the federal government. As a consequence, it was agreed that the CBA would be invited to attend as a liaison group which would be permitted to submit resolutions. Members of the group could vote individually and the group's views would be considered by the federal delegation for jurisdictional vote purposes.

Closing

The Chair noted that he would be writing the CBA concerning their future participation. He also noted that he would convey to the Standing Committee of Justice and Legal Affairs the resolutions relating to young offenders as that Committee has been tasked with a fundamental review of the Young Offenders Act. He indicated that he would initiate discussions with the Uniform Law Section to establish a joint committee to consider matters in relation to the Financial Exploitation of Crime as proposed in a Saskatchewan resolution calling for this. Finally, he noted that a Saskatchewan resolution calling on the Section to form a Committee to examine publication bans and exclusion orders might require funding from the Conference Research Fund and that he would draw this to the attention of the Executive.

The nominating committee recommended that Paul Monty of Quebec be elected Chair for the 1995 meetings. Mr. Monty upon being elected, thanked the Chair on behalf of all the delegates for his efforts in making this an interesting and productive conference. He noted that the Conference will be held in Quebec City next year and promised to try to equal the high standard of the preceding several meetings.

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RESOLUTIONS

I - ALBERTA

Item 1

Interim Release of Young Person to Responsible Person

1. That section 7.1 of the Young Offenders Act be amended to make it inapplicable to offences listed in section 469 of the Criminal Code (offences triable only in superior court) and offences listed in section 752 of the Criminal Code (serious personal injury offences subject to dangerous offender applications).

(Defeated: 1-12-4)

2. That section 7.1 be amended to provide for review, appeal and revocation in the same manner as is provided for judicial interim release under section 515 of the Criminal Code.

(Carried: 16-0-3)

3. Alternatively, that section 7.1 of the Young Offenders Act be repealed.

(Withdrawn)

Item 2

Publicly Funded Counsel For Young Offenders

That section 11 of the Young Offenders Act be amended to specifically provide for a judicial discretion to refuse to direct the appointment of counsel if the judge if:

- (1) the young person has the independent means to retain counsel privately, or

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- (2) the young person has the ability, with the assistance of his family, to retain counsel privately, or
- (3) the charges faced by the young person, and the circumstances of the young person, are such that the proceedings can be fairly conducted without the assistance of defence counsel.

(withdrawn and replaced)

That the Federal Government, in the course of its review of the Young Offenders Act, review section 11 of the Act to determine whether it should be amended to allow a judge to consider the means of the accused young person in determining whether counsel should actually be appointed by the Court at the public expense.

(Carried 17-0-4)

Item 3

Procedure for Collection of Unpaid Fines Levied Against Young Offenders

That section 20 be amended to require a young offender who fails to pay a fine to appear in court on the date his fine is due, to show cause why another form of disposition order (short of detention) should not be made against him. Upon failure to pay the fine and failure to appear to show cause, a warrant could be issued to have the young offender returned to the court for a disposition hearing.

That section 26 be amended to indicate that the failure to pay a fine is not an offence.

(Carried: 10-2-8)

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Item 4

Evidence of Children in Youth Court

That section 60 of the Young Offenders Act be repealed.

(Carried: 16-0-4)

Item 5

Search Warrant Extensions

That ss.490(2) and 490(3) be amended to require the application for an extension when the seized items have been detained for 1 year. To protect the rights of the person from whom the items are seized it is recommend that:

1. Section 490(7) be amended to allow for the making of an application for return of the items seized at any time.
2. Form 5 of the Criminal Code (form of search warrant) be amended to provide notice of the right of the person from whom the items were seized to apply for their return.

(Defeated: 3-12-4)

Amended Resolution

That section 490 of the Criminal Code be amended to permit the items seized to be detained without an application under subsections 490(2) or (3) for any specified period so long as the person from whom the items were seized consents in writing to that detention for that period.

(Carried: 13-4-6)

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Item 6

Proof of Ownership by Affidavit in Joyriding Cases

That section 657.1 be amended to include the offence of joyriding (section 335, Criminal Code).

(Carried: 23-0-0)

II - BRITISH COLUMBIA

Item 1

Assessment of Mental Condition: Sentencing and Judicial Interim Release

That section 672.11 of the Criminal Code be amended to permit the judge to order a psychiatric assessment to assist at the time of sentencing or during the course of a hearing with respect to judicial interim release subject to the proviso that individual provinces and territories be permitted to opt into this scheme or not, as they wish.

(Withdrawn and replaced)

That the 1991 British Columbia resolution with respect to the authorization of psychiatric reports for sentencing purposes, subject to the legislative protections set out therein, be acted upon.

(Carried: 9-3-5)

Item 2

Right of the Attorney General to appeal against a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder

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That paragraph 676(1)(a) be amended to read "against a judgment or verdict of acquittal or verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone".

(Carried: 22-0-0)

Item 3

Use of Blood Samples

That subsection 258(4) be amended by deleting "made within three months from the day on which the samples were taken" and substituting (if any time limitation is required) "made within six months from the day on which samples of the blood of the accused were taken".

(Carried: 12-5-4)

III - MANITOBA

Item 1

Identification of Criminals Act

That section 2 of the Identification of Criminals Act be amended to read "...or the Fugitive Offenders Act, or any offence against the person where the victim is a child, may be subjected...", or words to like effect.

(Carried: 19-0-1)

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Item 2

Young Offenders Act - Appearances

That subsection 12(1) of the Young Offenders Act be amended to permit waiving the reading of the charges where a young person is represented by counsel and that section 38 of the Young Offenders Act be amended to allow for the reading of charges without making reference to the name of the victim who is a young person, consistent with the underlying principle evident in subsection 38(1).

(Carried: 21-0-2)

Item 3

Young Offenders Act - Peace Bond

That the Young Offenders Act incorporate section 810 of the Criminal Code.

(Carried: 18-0-3)

IV - NEW BRUNSWICK

Item 1

Controlled Access to Applications for New General Search Warrants, Tracking Warrants and Number Recorder

That the Criminal Code be amended to provide for a statutory basis for the sealing of applications for Search Warrants, General Search Warrants, Tracking Warrants and Number Recorder Warrants particularly where it is necessary to protect parties at risk or to protect the integrity of an ongoing investigation.

(Carried: 20-0-0)

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Item 2

Power of Court to Delay Parole

That section 673 of the Criminal Code be amended to clarify that an Order of the court to delay parole is either open to appeal or is not open to appeal.

(Carried: 22-0-0)

V - NOVA SCOTIA

Item 1

First Degree Murder - During the Course of Robbery

That the moral blameworthiness of a murder committed while committing a robbery is sufficient to justify classification of the murder as first degree murder and robbery should be added to subsection 231(5) of the Criminal Code.

(Carried on a jurisdictional vote: 9-8-10)

VI - ONTARIO

Item 1

Stay of Driving Prohibition Orders Pending Appeal

Amend section 261 of the Criminal Code so that an order to stay a section 259 prohibition order can be made by "a judge of the court" being appealed to rather than by "the court".

(Carried: 21-0-0)

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Item 2

Demand for Blood Samples to Determine Alcohol Content

Amend subsection 254(3) so that a second police officer could make a lawful demand for a blood sample where the accused has already been asked to provide a breath sample.

(Defeated: 10-11-2)

Item 3

Prevention measures to deal with certain kinds of offenders coming into contact with children

Amend section 161 to include section 281.

(Carried: 11-4-6)

Item 4

Use of Videotapes to Impeach Witness

Amend subsection 9(2) of the Canada Evidence Act to include the words "statement in writing or reduced to writing or on videotape or audiotape".

(Carried: 24-0-0)

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Item 5

Peace Bonds to Prevent Sexual Offences Against Children

Amend section 810.1 to include the power to commit the defendant to prison for a term not exceeding twelve months if he/she fails or refuses to enter into the recognizance.

(Carried: 23-0-0)

Item 6

Common Law Peace Bonds

Amend section 811 to include common law recognizances.

(Defeated: 1-16-5)

Item 7

Smuggling Firearms

Amend the Criminal Code to create an offence referable to prohibited and restricted firearms, modeled after section 4 of the Narcotic Control Act (trafficking and possession for the purpose of trafficking) and including the definition of trafficking in section 2 of that Act, and extended to importation, with appropriate exemptions, including as authorized by law, having a maximum penalty of life imprisonment.

(Carried: 19-0-0)

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Item 8

Challenge for Cause in Jury Selection

Amend paragraph 638(1)(d) to remove the challenge for cause based on being an alien and replace it with a ground based on residency (for non-citizens) for less than three years.

(Carried: 10-9-5)

VII - QUEBEC

Item 1

Proof of service and delivery of any document under the oath of office of a peace officer

That there be an addition to subsection 4(6) of the Criminal Code to permit peace officers to certify service or delivery of documents effected by them, under their oath of office.

(Carried: 19-0-1)

Item 2

Problem of when orders imposed on people serving a term of imprisonment come into force

That the Criminal Code be amended to provide that while persons who are sentenced to imprisonment are in custody or at large they are required to comply with the orders that have been imposed on them relating to the offence for which they are in custody or relating to any other offences.

(Carried: 3-1-11)

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Item 3

Test of Physical Coordination in Drunk Driving Cases

That section 254 Criminal Code be amended to allow peace officers to require drivers whom they suspect of violating section 253 Criminal Code to comply without delay with reasonable tests of physical coordination.

That refusal to comply with reasonable tests of physical coordination be punished in the manner provided in sections 254(5) and 259 Criminal Code.

(Defeated: 2-17-2)

Item 4

Presumption in cases of possession of a motor vehicle or a part of a motor vehicle where the identification number has been altered

That the Department of Justice study the possibility of amending section 354 of the Criminal Code in light of the Quebec Court of Appeal decision in R. v. Bouchard in order to facilitate proof of guilty knowledge of dealers and others who are in the used vehicle or motor vehicle parts business.

That subsection 354(2) of the Criminal Code be repealed.

(Carried: 16-1-3)

Item 5

Jurisdiction over an offence committed entirely in another province

That a subsection (3.1) be added to section 478 of the Criminal Code so that on the request of the Attorney General of the province in which the accused is and with the consent of the Attorney General of the province where the offence was committed, the court of the place in which the accused is would have the power

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to try the accused for an offence committed entirely in another province, taking into account the interests of justice including the right of the accused to make full answer and defence.

(Carried: 16-3-3)

Item 6

Summoning Jurors when the Panel has been Exhausted

Amend subsection (2) of the present section 642 of the Criminal Code to prevent rounding up potential jurors in the street or in other public places.

(Carried: 12-0-9)

Item 7

Admissibility in evidence of the decision of another court to prove a fact in issue

That the Criminal Code be amended to insert a provision similar to section 78 of Bill S-33 respecting the Uniform Evidence Act, which was tabled in the Senate in 1982.

(Carried: 13-3-0)

Item 8

Service of Subpoena by Mail

That section 701 of the Criminal Code be amended to permit service of subpoenas by certified or registered mail.

(Carried: 16-2-0)

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Item 9

Determining the extent to which the sentencing court has taken into account any time an accused has spent in custody before trial

That the working group on sentencing be requested to determine the most appropriate method of obtaining information on the extent to which the court took into account any time that the accused spent in custody before trial in imposing sentence.

(Carried: 24-0-0)

Item 10

Parole eligibility date for second degree murder committed during the course of first degree murder

That a paragraph (a.2) be added to section 742 of the Criminal Code so that a person who commits a second degree murder in the commission of a first degree murder or an attempt to commit a first degree murder would not, upon conviction for that murder, be eligible for parole before serving 25 years imprisonment.

(Carried: 14-0-5)

Item 11

Power to Impose Orders to Keep the Peace on Young Offenders

That section 52 of the Young Offenders Act be amended to:

(a) make sections 810, 810.1 and 811 of the Criminal Code applicable to young offenders;

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(b) give the youth court jurisdiction over any proceedings commenced under those sections in respect of a young person under the age of 18 years;

(c) give the youth court the power to order that a young person who fails or refuses to enter into a recognizance to keep the peace be detained in open custody or secure custody for a maximum of six months.

(Withdrawn in favour of a similar Manitoba resolution)

Item 12

Scope of the protection against the use of incriminating evidence

That subsection 5(2) of the Canada Evidence Act be amended to cover the giving of contradictory evidence.

(Carried: 16-0-2)

VIII - SASKATCHEWAN

Item 1

Financial Exploitation of Crime

That the Criminal Law Section confirm its 1984 resolution to refer this issue to the Uniform Law Section with a view to establishing a joint committee to review the matter and that the Chair of the Criminal Law Section pursue this issue with the Chair of the Uniform Law Section immediately following this conference.

(Carried: 17-0-1)

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Item 2

Display of Erotic/Obscene Materials to Children

That the Criminal Law Section form a committee to conduct a study with respect to the display of erotic or obscene materials to children and make proposals, if appropriate, with respect to a new offence relating to that activity.

(Withdrawn)

Item 3

Probation Orders

The Criminal Code should be amended to ensure probation orders validly made are not rendered illegal by a subsequently imposed additional term of imprisonment. The order should come back into force once the individual has been released from prison at the end of the total term of imprisonment. The accused should still be able to apply to alter the terms of the probation order in light of changed circumstances.

(Carried: 24-0-0)

Item 4

Publication Bans

That the Criminal Law Section form a committee to study publication bans and exclusion orders and to provide the 1995 meeting with recommendations on changes in the law in this area.

(Carried: 23-0-0)

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IX - CANADA

Item 1

Intermediate Sanctions for Corporate Offenders

That the federal Department of Justice develop a broader and more flexible range of criminal penalties available in respect of corporate offences. These sanctions could include permitting courts to make prohibition orders and mandatory orders requiring restitution, the institution of a corporate compliance policy and other positive actions to remedy and correct the situation which gave rise to the offence.

(Carried: 24-0-0)

Item 2

Expand the Definition of Enterprise Crime Offence

That the Criminal Code and all Federal Statutes be examined with a view to expanding the scope of the proceeds of crime provisions to include other profit-making offences.

(Carried: 22-0-1)

Item 3

Undertaking for property in other provinces believed to be proceeds of crime

Amend the Criminal Code to authorize a procedure whereby the provincial Attorney General who is prosecuting the proceeds related offence may give an undertaking to another Attorney General or to the courts of another province for damages in respect of proceeds of crime to be seized or restrained in that other province.

(Carried: 17-0-2)

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Item 4

Possession of counterfeit credit card

That section 342 of the Criminal Code be amended to include as an offence the possession of a forged credit card.

(Carried: 21-0-0)

X - PROPOSED FROM THE FLOOR

Item 1

Search, seizure and detention of proceeds of crime

Amend the Criminal Code so that subsection 462.34(4) which allows a person to apply to a judge for an order returning the seized property (to meet reasonable living expenses, or reasonable business and legal expenses), will apply to all seizures made pursuant to any other provisions of the Criminal Code and/or other Federal statutes where an enterprise crime offence is charged and where the property may be subject to forfeiture pursuant to either subsections 462.37(1) or 462.38(2) of the Criminal Code.

(Carried: 14-0-5)