

# UNIFORM LAW CONFERENCE OF CANADA

WHITEHORSE, YUKON  
AUGUST 12 - 16, 2012

## CRIMINAL SECTION

### MINUTES

#### ATTENDANCE

Twenty seven participants from provincial, territorial and federal delegations participated in the deliberations of the Criminal Section. Delegates included policy counsel, prosecutors, defence counsel and members of the judiciary.

#### OPENING

Anouk Desaulniers, A/Director and General Counsel, Justice Canada presided as Chair of the Criminal Section. Joanne Dompierre, Counsel, Justice Canada acted as Secretary. The Section convened to order on Sunday, August 12, 2011.

#### PROCEEDINGS

##### **Report of the Senior Federal Delegate (Attached as Annex 1)**

The Report of the Senior Federal Delegate was tabled and presented by Lucie Angers, Director and General Counsel, Justice Canada.

##### **Resolutions (Attached as Annex 2)**

The order in which resolutions are considered is set out in the *Rules of Procedure* of the Criminal Section. In accordance with the *Rules*, New Brunswick presented their resolutions first followed by other jurisdictions in alphabetical order and then by resolutions from the federal delegation.

Twenty five (25) resolutions were initially presented by jurisdictions for consideration. Nineteen (19) of those resolutions were adopted as presented or amended, one (1) was rejected and five (5) were withdrawn after discussion.

#### Open Forum

##### **Yukon Alternative Courts**

The following representatives provided the delegates with an overview of Therapeutic Courts in Yukon: Brian Butt, Probation Officer, Offender Supervision and Services, Yukon Department of Justice; Nils Clarke, Executive Director, Yukon Legal Services Society; Eric Marcoux, Senior Counsel, PPSC Yukon Regional Office; Noel Sinclair, Associate Chief Federal Prosecutor, PPSC

Yukon Regional Office; and Leah White, Manager, Offender Supervision and Services, Yukon Department of Justice

### **The Domestic Violence Treatment Option (DVTO) Court**

This DVTO Court has been in place since 2001 and operates out of Whitehorse and Watson Lake.

When an accused is charged with a domestic violence related charge, the first appearance is set for the next sitting of the DVTO Court which sits every other Monday. If the accused is prepared to accept responsibility for the offence, he or she will undergo an eligibility assessment to determine whether the accused can be accepted in the DVTO treatment program. If they are accepted, they must plead guilty to at least one domestic violence charge. The court undertakes regular monthly reviews of the defendant's participation and progress while the defendant is attending treatment.

The goal of the DVTO Court is to encourage more disclosure of domestic violence, provide for early intervention, provide a non-adversarial, therapeutic court based alternative to formal criminal court as a means of responding to domestic violence and reduce the high collapse rate for domestic violence cases. Pre-court meetings bring together key players (excluding the judge) to discuss cases that are on the court docket for the day and share information about the accused, victim, and offence.

Therapeutic sentencing options for offenders, under the close supervision of the Court and treatment professionals are considered more effective than incarceration in treating this type of behaviour. The Court also allows for services to and input from victims.

Defence counsel had concern initially about proportionality in sentencing in the DVTO Court. Adjustments have been made to the program to better balance the seriousness of the offence with the scope of the treatment plan. Also, care must be taken that accused not feel pressured to plead guilty in order to be accepted into the DVTO Court and potentially receive a more lenient sentence.

### **The Community Wellness Court (CWC)**

This Court was established in 2007 in recognition that a substantial proportion of offenders had underlying issues such as alcohol and drug addictions, mental health problems, cognitive impairments or Fetal Alcohol spectrum disorder (FASD).

The CWC works with offenders who are willing to accept responsibility for their actions and want to address the root causes of their criminal behaviour. It deals mostly with property and drug offences but also handles some domestic violence and sexual assault cases. It strives to reduce recidivism while enhancing the safety of Yukon communities and addressing the needs of victims.

A suitability assessment is conducted and, if the offender is accepted into the CWC and is prepared to plead guilty, a wellness plan is developed which may include such things as treatment, schooling, alcohol programming, cognitive skills training. Some offenders have reported that the program has saved their lives. At the time of the presentation, 108 persons have been referred to the CWC since its start. 75% were male and 70% of the males were First Nations members. 42% had addictions issues, 38% had mental health issues and 18% suffered from FASD. Many were dealing with a combination of these issues.

Persons affected by FASD have special needs and without housing and supervision, their chances for success are limited. Special programs on cognitive skills and related subjects have been developed by skilled probation officers. Training for prosecution and police on FASD has also been conducted.

## **Criminal Section Working Group Reports**

### **Report of the Working Group on Contradictory Evidence: Criminal Liability for Recanted K.G.B. Statements**

The Working Group was established as a result of a 2011 resolution from the province of New Brunswick which read:

“That a criminal section working group be created to study and report on what amendments are required, if any, to capture the conduct of a person who gives evidence in a judicial proceeding contrary to the evidence previously provided in a KGB statement.”

Working Group members included:

Anthony Allman, Regional Director, Justice and Attorney General, New Brunswick; Catherine Cooper, Counsel, Ministry of the Attorney General, Ontario; Lee Kirkpatrick, Prosecutions Coordinator, Yukon Department of Justice; Joanne Klineberg, Senior Counsel, Justice Canada; Laura Pitcairn, Counsel, Public Prosecution Service of Canada; Kusham Sharma, Crown Attorney, Manitoba Prosecution Service; and Erin Winocur, Counsel, Ministry of the Attorney General, Ontario.

The Group studied the issue during the winter and spring of 2012 and presented its findings to the Section in a comprehensive report. The paper offers a detailed analysis of the mischief caused by the recanting witness and examines the adequacy of existing *Criminal Code* offences in addressing the disruption and mischief to the trial process and the administration of justice. Offences considered include perjury s.131(1); witness giving contradictory evidence s.136(1); fabricating evidence s.137; obstruction of justice s.139(2); and public mischief s.140.(1).

After analyzing applicable offences and related case law, the Group was of the view that the adequacy of existing legal responses was seriously limited by operational challenges associated with lack of evidence in some situations of recantation. The group also was concerned about proceeding with the prosecution of a witness who may have been victimized and the potential for creating significant mischief to the administration of justice.

In an effort to gather more information about cases involving recanting witnesses, members of the Group undertook an informal survey of prosecutors and police within their jurisdictions.

Responses received from prosecutors confirmed the mischief caused by a recanting witness, however, concern for prosecuting a recanting domestic violence victim or other vulnerable witnesses was clear, with many suggesting they would never (or only in a small percentage of cases) prosecute such a witness.

Police indicated that the creation of a new offence to deal with recantation of a prior KGB statement would have little or no impact on their practices or the incidence of recanting. Again, there was concern for the criminalization of victims of domestic violence.

The Group identified two potential options to deal with the problem. 1. Charge two counts each relating to the statements, i.e. obstructing justice for the KGB and obstructing justice for in court testimony; 2. Charge one count of obstructing justice to cover both statements. Legal and practical challenges were identified with both strategies.

Given the complex and multi-dimensional nature of the problem, the Working Group was not able to come to a unanimous set of recommendations and instead looked to delegates for further engagement and discussion.

## **Discussion**

There was considerable discussion surrounding possible options as well as the advantages and difficulties in using existing offences to deal with the problem. Overall, delegates understood and agreed with the problems identified by the Group. Recantation causes serious mischief to trials and to the administration of justice and victims of domestic violence or other vulnerable witnesses present specific challenges. Options that could result in a criminal charge where the recanting witness is actually telling the truth in a subsequent statement create potential for miscarriage of justice. The issue of the legal differences between a statement made under oath and one that is made in court was also considered in terms of their relative value.

It was agreed that additional work was required to find an appropriate solution and that the Group would benefit from additional members. Issues relating to sec.13 of the *Canadian Charter of Rights and Freedoms (Charter)*, the differences between victim witnesses and other witnesses, direct indictments, and other related matters should also be further analyzed. Josh Hawkes and Jacques Ladouceur indicated they were prepared to participate in the work of the Group.

## **Resolution:**

That the Uniform Law Conference of Canada Criminal Section accept the report of the Working Group on Contradictory Evidence and ask the Working Group to continue its study and report back to the Uniform Law Conference Criminal Section in 2013.

Carried:        In favour 19    Opposed 0    Abstention 4

## **Progress Report of the Working Group on Enforcement of Extra-Provincial Search Warrants**

As a result of a resolution submitted by New Brunswick at last year's meeting, a Working Group was formed in the fall of 2011. Membership was composed of: Karen Anthony, Department of Justice, Nova Scotia; Peter Craig, Public Prosecution Service, Nova Scotia; Earl Fruchtman, Department of Justice, Ontario; Cameron Gunn, Office of the Attorney General, New Brunswick; Colleen McDuff, Department of Justice, Manitoba; and Nadine Smillie, Chair, Department of Justice, Nova Scotia.

The report was presented by Rickola Slawter, Criminal Law Policy Advisor, Nova Scotia Department of Justice. Ms Slawter indicated that the Group had conducted a survey of ULCC Criminal Section representatives to determine what jurisdictions were experiencing enforcement problems and whether or not there was sufficient support for the project. Five jurisdictions responded and three indicated interest in the project. Following further consultation with regulatory prosecutors, two additional jurisdictions indicated interest.

Following the presentation, delegates from Quebec, Manitoba, Saskatchewan, British Columbia, Alberta and Nova Scotia confirmed that their jurisdiction are interested in participating in the work of the Group. Newfoundland and Prince Edward Island will also be participating although there were no representatives from these provinces present at the conference. Following discussion, the following resolution was put to the Criminal Section:

**Resolution:**

The working group requests that the ULCC pass a resolution to:

1. Accept this progress report;
2. Confirm its support for the working group to explore options to address the problem with the enforcement of extra-provincial search warrants.

Carried:            In favour 21    Opposed 0    Abstention 3

**Report of the Working Group on Exemptions from Mandatory Minimum Penalties**

This Working Group was established as a result of a resolution proposed by the Canadian Bar Association (CBA) at last year's conference. Membership was composed of: Anouk Desaulniers, Earl Fruchtman, Eric Gottardi, Josh Hawkes, Colleen McDuff, Kelly Morton-Bourgon, Kevin Reitz, Kusham Sharma, Susan Kennedy, John H. Siebert, Matthias Villetorte and Lane Wiegers.

Eric Gottardi informed the delegates that the Working Group retained Yvon Dandurand from the University of the Fraser Valley to conduct a comparative research on exceptions to mandatory minimum penalties in several common law jurisdictions. He indicated that the comprehensive report provided by Mr. Dandurand, which was circulated to delegates, was of great assistance in providing the Working Group with a solid basis upon which to move forward with its work.

Mr. Dandurand provided the Criminal Section with an overview of his findings which outlined the following 9 types of relief available in other jurisdictions:

1. Relief or exclusion from the application of mandatory minimum penalties to those under 18 (juveniles);
2. Reduction of minimum penalty for early guilty pleas;
3. Relief for defendants who offer substantial assistance to the state;
4. Relief in view of mitigating factors (safety valve);
5. Relief available in exceptional or substantial and compelling circumstances ;
6. Relief in the "interest of justice" or to avoid an "unjust" sentence;
7. Relief to allow for the treatment of the offender;
8. Presumptive minimum penalties; and
9. Relief available after sentencing.

## Discussion

This session of the Criminal Section was attended by American guests to the Conference, Harriet Lansing, Chair, Executive Committee of the ULC; Robert A. Stein, Professor, University of Minnesota Law School and Michael Houghton, President, Uniform Law Commission.

Following Mr. Dandurand's presentation, delegates and guests discussed some of the models presented as well as the focus for the future work of the Group. Our American guests provided some insight into problems encountered in the United States with implementation of mandatory minimum penalties and associated guidelines or relief provisions.

Susan Kennedy presented findings of her analysis of Canadian court decisions involving challenges to mandatory minimum penalties under section 12 of the Charter.

The Working Group indicated that it would welcome participation of additional jurisdictions in the Group. Delegates from Nunavut and PPSC indicated their interest in participating.

Delegates then proceeded to vote on the following resolution:

It is recommended that the Criminal Section of the Uniform Law Conference:

- A. Receive the report by Yvon Dandurand (University of the Fraser Valley) titled "Exemptions from Mandatory Minimum Penalties";
- B. Thank Yvon Dandurand for his great contribution to the work of the Criminal Section;
- C. Agree that this report informs further work of the Working Group on Exemptions from Mandatory Minimum Penalties;
- D. Approve the Draft Terms of Reference for the Working Group;
- E. Task the Working Group to continue its work in 2012-2013 and report at the 2013 meeting of the Criminal Section.

Carried:            In favour 22    Opposed 0    Abstention 2

## Rules of Procedure – Criminal Section

Last year, Josh Hawkes presented amendments to the Rules of Procedure for the Criminal Section to respond to situations arising out of proceedings for which no clear direction existed in the Rules of Procedure or to reflect new processes. All proposed amendments were adopted by the Section. However, additional areas were identified as requiring further review. It was therefore agreed that a Working Group, consisting of the Secretary, Nancy Irving, Stephanie O'Connor and Lee Kirkpatrick would undertake a further review of the Rules and report back to the Section this year.

The Secretary presented to the Section an overview of the changes proposed by the Working Group. Essentially, the proposed changes related to:

- 1.3 and 1.4 - attendance of observers without voting rights;
- 1.7 - recognition of members of the judiciary as full delegates without voting rights;
- Updating of provisions relating to format and associated documents;
- Submission of resolutions in both official languages to the Secretary, where feasible;
- Clarifying how the show of hands will determine the vote;

- Confidentiality of documents and proceedings; and
- Delegation Votes

## **Discussion**

Delegates agreed in principle with all proposed changes, subject to minor adjustments, except the changes being proposed to the Delegation Votes. The proposed changes related to when such a vote could be called and whether the decision to allow a Delegation Vote ultimately rests with the Chair. There was considerable discussion on this issue, with some delegates supporting the changes and other disagreeing.

Unfortunately, the Section did not have sufficient time to resolve these issues and, given that some delegates were not present during the discussion, it was agreed that the amended Rules, as discussed and amended during the meeting, would be sent to delegates for comment and approval. If there are no significant changes, those provisions will be considered approved by November 30, 2012. The question of the Delegation Vote will be put on the Agenda for next year's meeting.

## **CLOSING**

By resolution of the Criminal Section, the nomination of Lane Weigers, Director of Prosecutors, Public Prosecutions, Saskatchewan Ministry of Justice as Chair of the Criminal Section for 2012-2013 was accepted. Andy Rady, who had initially been nominated Chair for this period was unfortunately unable to assume the role.

The Chair thanked delegates for their participation and contribution to the meeting.