

UNIFORM LAW CONFERENCE OF CANADA

VICTORIA, BRITISH COLUMBIA
AUGUST 11 - 15, 2013

CRIMINAL SECTION MINUTES

ATTENDANCE

Thirty-one delegates from the federal government and all provinces and territories, with the exception of Prince Edward Island, Newfoundland and the Northwest Territories, participated in the deliberations of the Criminal Section. Delegates included policy counsel, Crown prosecutors, defence counsel and members of the judiciary.

OPENING

The Criminal Section convened to order on Sunday, August 11, 2013. Lane Wiegiers (Director of Prosecutors, Saskatchewan Ministry of Justice) presided as Chair, and Anny Bernier (Counsel, Justice Canada) acted as Secretary.

The Chair thanked the delegates for coming and reminded them about following the Rules of Procedure so that the proceedings run smoothly. Each jurisdictional representative introduced the delegates who accompanied them.

PROCEEDINGS

Report of the Senior Federal Delegate¹

Lucie Angers, General Counsel and Director of External Relations for the Criminal Law Policy Section, Justice Canada, presented and tabled the Report of the Senior Federal Delegate.

Resolutions²

The order in which resolutions are considered is set out in the *Rules of Procedure* of the Criminal Section. In accordance with the *Rules*, Ontario was the first province to present its resolutions this year, followed by the other jurisdictions, in alphabetical order, and the Canada delegation ended this presentation.

The jurisdictions initially submitted twenty-four (24) resolutions for consideration. Of that number, four (4) were each split into two resolutions to become eight (8) resolutions, which were adopted as amended. Nine (9) resolutions were adopted without amendment, six (6) resolutions were adopted as amended and four (4) resolutions were withdrawn (two of them after discussion). Finally, one

¹ This document is attached to the paper version of these Minutes and may also be consulted in electronic form at: <http://www.ulcc.ca/en/2013-victoria-bc/771-criminal-section-documents-2013/2140-report-of-senior-federal-delegate>.

² This document is attached to the paper version of these Minutes and may also be consulted in electronic form at: <http://www.ulcc.ca/en/2013-victoria-bc/770-criminal-section-resolutions-2013/2138-criminal-section-resolutions>.

resolution was rejected after discussion. The delegates therefore considered a total of twenty-six (26) resolutions.

It is important to note that the total number of votes is not always uniform as some delegates may be absent from the room during the deliberations.

Criminal Section Reports and Presentations

This year, five (5) working groups presented the results of their efforts, and two presentations were provided to the delegates.

The delegates examined three final reports. The first dealt with criminal liability for recanted K.G.B.³ statements, the second with extra-provincial/extra-territorial search warrants and the third with statutory exemptions to mandatory minimum penalties. The working group on the modernization of evidentiary notice provisions provided an interim progress report and the working group on amendments to the Criminal Section *Rules of Procedure* outlined its proposed changes.

The first presentation to delegates was on the Victoria Integrated Court project.

Lastly, Justice Canada made a presentation and consulted with the delegates regarding a proposed Canadian Victims Bill of Rights.

Reports

- ***Report of the Working Group on Contradictory Evidence: Criminal Liability for Recanted K.G.B. Statements***⁴

Presented by Joanne Klineberg, Senior Counsel, Criminal Law Policy Section, Justice Canada.

Following the adoption of a resolution at the 2012 annual meeting, which asked the Working Group to continue its study on recanted K.G.B. statements and to report back to the Criminal Section in 2013, Joshua Hawkes (Alberta Justice) and Jacques Ladouceur (Barreau du Québec representative) joined the Working Group, which already included Anthony Allman (Office of the Attorney General of New Brunswick), Catherine Cooper (Ontario Ministry of Attorney General), Lee Kirkpatrick (Yukon Department of Justice), Joanne Klineberg (Justice Canada), Laura Pitcairn (Public Prosecution Service of Canada), Kusham Sharma (Manitoba Prosecution Service) and Erin Winocur (Ontario Ministry of Attorney General).

During this second year, the Working Group attempted to identify and examine options including not criminalizing the person who contradicts his or her K.G.B. statement when testifying but nonetheless improves the prosecution's ability to deal with such a situation.

³ As per the decision of the Supreme Court of Canada ruling in *R. v. K.G.B.*, [1993] 1 S.C.R. 740, a so-called KGB statement is a statement made by a witness to the police that meets the following conditions: (a) the statement is videotaped, (b) the statement was made under oath or solemn affirmation, and (c) the witness was cautioned by police about a range of criminal offences associated with making false statements.

⁴ This document may be consulted at: <http://www.ulcc.ca/en/2013-victoria-bc/771-criminal-section-documents-2013/2193-contradictory-evidence-criminal-liability-for-recanted-k-g-b-statements>.

Despite conducting a comparative legal analysis of various foreign criminal laws and studying possible options (i.e. the creation of a new type of obstruction of justice or a new presumption), the Working Group concluded that it was impossible to reach a unanimous recommendation on a substantive change aimed at sanctioning the contradiction of a K.G.B. statement.

Discussion

Delegates discussed the difficulties that may arise from a lack of legal knowledge and training when taking a KGB statement.

Although some delegates would have liked the report to contain a unanimous recommendation addressing the issue of conflicting KGB statements, they recognized that it would be better to concentrate efforts on police training and the development of more rigorous interview protocols.

Delegates stated that issues of education and training do not fall within the ULCC mandate. They thanked the working group for the high quality of their report.

The following resolution was presented by the working group:

That the Uniform Law Conference of Canada Criminal Section accepts the report of the Working Group on Recanted K.G.B. Statements.

The delegates accepted the report by a vote of **23 in favour, 0 opposed and 0 abstentions**. The Chair thanked the members for their work and announced the dissolution of the working group.

- ***Report of the Working Group on Extra-Provincial/Extra-Territorial Search Warrants***⁵

Presented by: Earl Fruchtman (General Counsel, Ontario Ministry of the Attorney General)

In 2011, the ULCC Criminal Section recommended that a working group be struck to consider possible options for the enforcement of extra-provincial search warrants in the context of investigations into provincial/territorial regulatory offences.

Members of the Working Group include Nadine Smillie and Karen Anthony (Justice Nova Scotia), Peter Craig (Nova Scotia Public Prosecution Service), Cameron Gunn (Office of the Attorney General, New Brunswick), Lisa Goulden (Justice PEI), Elaine Reid (Justice Newfoundland and Labrador), Earl Fruchtman (Ontario Ministry of the Attorney General), Colleen McDuff (Justice Manitoba), Lane Wiegiers (Saskatchewan Ministry of Justice) and Monty Carstairs (Justice British Columbia).

Following the results of a survey of all representatives of the ULCC Criminal Section in 2012, the members concluded that there was sufficient national interest in the project. After reviewing the legislative frameworks for regulatory offences that are used in their jurisdictions, the Working Group discovered that each jurisdiction has its own regulatory enforcement scheme.

⁵ This document may be consulted at: <http://www.ulcc.ca/en/2013-victoria-bc/771-criminal-section-documents-2013/2191-enforcement-of-extra-provincial-search-warrants>.

In the fall of 2012, the Nova Scotia Legislature passed an act to amend the *Summary Proceedings Act*. The purpose of the amendments was to establish the reciprocal recognition of search warrants issued by the two jurisdictions that are party to the agreement. The members of the Working Group therefore discussed whether the Nova Scotia model addressed the concerns raised by the group.

Accordingly, despite the fact that a number of jurisdictions do not have general provincial offence legislation and that various legislative provisions would have to be drafted to achieve this result, the members of the Working Group concluded that the Nova Scotia initiative was the recommended approach.

Discussion

Some delegates also submitted that it would be relevant to examine the provisions relating to production orders.

The Working Group indicated that the involvement of ULCC's Civil Section is essential to achieve this objective and presented the following resolution:

1. *Accept the report of the Working Group;*
2. *Endorse the Working Group's recommendation to discuss with the ULCC Civil Section the continuation of this work through the creation of a joint working group that would use the Nova Scotia initiative as a reference point for future work.*

The delegates accepted the report and endorsed the Working Group's recommendation by a **vote of 28 in favour, 0 opposed and 0 abstentions**. The Chair thanked the members for their work.

- ***Report of the Working Group on Statutory Exemptions to Mandatory Minimum Penalties⁶***

Presented by: Eric V. Gottardi (Canadian Bar Association representative) and Josh Hawkes (Appeals Branch, Justice Alberta).

The members of this working group include Eric V. Gottardi (Canadian Bar Association representative), Josh Hawkes (Justice Alberta), Earl Fruchtman (Ontario Ministry of the Attorney General), Kusham Sharma and Colleen McDuff (Justice Manitoba), Lane Wiegiers (Saskatchewan Ministry of Justice), Nancy Irving (Public Prosecution Service of Canada), Richard de Boer and Samantha Hulme (Justice British Columbia), Matthias Villetorte, Kelly Morton-Bourgon and Karen Beattie (Justice Canada), Juli Drolet (Justice Quebec) and Greg DelBigio (representative of Canadian Council of Criminal Defence Lawyers).

Following an analysis of Professor Yvon Dandurand's report entitled "Exemptions from Mandatory Minimum Penalties", presented at the 2012 ULCC, the Working Group examined the main legal issues that would be raised by a statutory exemption to minimum penalties in our Canadian justice system as well as the most adequate formulation if such a provision was enacted. The working group stated, however, that it would be up to Parliament to enact an

⁶ This document may be consulted at <http://www.ulcc.ca/en/2013-victoria-bc/771-criminal-section-documents-2013/2192-statutory-exemptions-to-mandatory-minimum-penalties-final-report>.

exemption scheme and accordingly that the report does not comment on the policy or legal status of any mandatory minimum penalty.

The Working Group first asked how such a scheme could function as part of an individualized sentencing scheme while respecting the fact that a mandatory minimum penalty is first a Parliamentary response that limits judicial discretion.

Second, the group addressed the issue of constitutional exemptions. Based on an analysis of various Supreme Court of Canada decisions, an individual constitutional exemption cannot be granted as a remedy for a violation of the *Canadian Charter of Rights and Freedoms* because that would represent an undue interference with Parliament's role. Therefore, if such an exemption were implemented, it would have to be part of the ordinary sentencing process and not a constitutional remedy.

The group then considered the issue of the threshold at which the exemption could be triggered and determined that "substantial and compelling circumstances" could be appropriate. The group also agreed that any exemption scheme should be consistent with existing sentencing principles and concluded that a non-exhaustive list of factors should be provided to give courts guidance. With respect to the extent and nature of the exemption, the Working Group concluded that the amount of variation between the mandatory minimum sentence and the sentence imposed pursuant to an exemption should vary according to the threshold for exemption. The higher the threshold, the more flexibility a judge should have in setting the sentence.

The members of the group also considered the issue of mandatory penalties excluded from the proposed exemption and concluded that murder should be excluded.

Discussion

Some delegates stated that mandatory minimum penalties are here to stay and that, in their view, the only way to prevent injustices is to create a statutory exemption. American guests added that the United States is currently questioning whether mandatory minimum penalties are appropriate. According to them, although the scheme seemed to be a good idea in the beginning, the result has led the country to an incredibly high incarceration rate, which is not desirable and is much too costly for society.

The Working Group presented the following resolution:

That the Criminal Section of the ULCC acknowledge, with appreciation, and receive the Report of the Working Group on Statutory Exemptions to Mandatory Minimum Penalties

The delegates received the report and approved the Working Group's recommendation by a **vote of 26 in favour, 0 opposed and 1 abstention**.

The Canadian Bar Association then presented two resolutions. The delegates carried the first resolution by a **vote of 26 in favour, 0 opposed and 1 abstention**:

A) That Justice Canada, in consultation with the Provinces and Territories, study the Report of the Working Group on Statutory Exemptions to Mandatory Minimum Penalties ;

And carried the second resolution by a **vote of 25 in favour, 0 opposed and 2 abstentions:**

B) That Justice Canada, in consultation with the Provinces and Territories, consider whether a statutory exemption should be included in the Criminal Code.

The Chair thanked the Working Group, in particular Josh Hawkes, who assumed the duties of Co-Chair of the Working Group when Anouk Desaulniers vacated that position following her appointment to the judiciary. The Chair also acknowledged Robert Stein, Harriet Lansing, David English and Michael Houghton from the United States.

- ***Report of the Working Group on the Modernization of the Evidentiary Notice Provisions***

Presented by: Susan Kennedy (Justice Alberta).

A working group was created in the winter of 2013 to study the notices required under the *Criminal Code* and the *Canada Evidence Act*. The group is co-chaired by Alberta and Justice Canada with additional representation from Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan and the Public Prosecution Service of Canada.

After distributing the analysis work, the members of the Working Group determined that it would also be appropriate to review the notices in the *Controlled Drugs and Substances Act* as well.

Unfortunately, because of time constraints and competing priorities, not all members of the group were able to complete their initial analysis in time for a report to be finalized for this meeting. Nonetheless, accommodations regarding the timing of the final report were made to reflect the fact that a new federal co-chair will have to assume the duties of Karen Markham (Justice Canada), who is retiring in August 2014.

In the circumstances, **it was resolved** that the Working Group continue its examination of the issues and table its report and recommendations at the 2014 ULCC meeting.

- ***Report of the Working Group on the Rules of Procedure of the Criminal Section***⁷

Presented by: Joanne Dompierre (Justice Canada).

Following the amendments to the *Rules of Procedure* of the Criminal Section adopted last year, the amendments proposed by the Working Group that the delegates did not have time to comment on at the last ULCC meeting were presented.

Discussion

First, the delegates discussed whether it was necessary to include the obligation to mention in resolution that the Section has already examined a similar issue. Discussion then turned to the issue of delegation votes. After some short exchanges, the delegates agreed to propose the following amendments:

⁷ The *Rules of Procedure* of the Criminal Section may be consulted at <http://www.ulcc.ca/en/criminal-section/270-rules-of-procedure/2199-criminal-section-rules-of-procedure-2013>.

Replace paragraph 3.1(c) with the following:

(c) Where feasible, make reference to any previous known resolutions on similar issues considered by the Section; and

Replace paragraph 5 with the following:

5. Delegation Vote

- 5.1 *Where so requested by a delegate, voting on any question at a meeting of the Criminal Section shall be by jurisdiction in which case each constituent jurisdiction represented at the meeting shall be entitled to cast three votes.*
- 5.2 *Where a delegation vote is called, this vote takes precedence over the vote of individual delegates.*

A unanimous vote by the delegates ratified the proposed changes: **25 votes in favour, 0 opposed and 0 abstentions**. Joanne Dompierre will make the amendments and will send a copy of the document as amended so that the new *Rules of Procedure* can be published on the ULCC Web site.

Presentations

- ***Victoria Integrated Court (VIC)***

Presented by:

- Judge Ernest Quantz (Provincial Court of British Columbia);
- Jacquelyn Nelson (Professor of Psychology at the University of Victoria and the University of Saskatchewan and VIC community garden manager);
- Sharon Bristow (a former probation officer and a member of the VIC outreach team).

At the end of the 1990s, there were a lot of homeless people in downtown Victoria; there were a lot of car thefts, assaults and drug-related offences and public places were littered with dirty needles. Unfortunately, people were not getting treatment and the sentencing principle of deterrence seemed to have no impact on these individuals. Therefore, rehabilitation and community reintegration became the focussed goal in respect of them. The Victoria Integrated Court (VIC) became the embodiment of that focus. It is a community-court initiative aimed primarily at homeless people with substance use issues or mental illness disorders who commit minor criminal offences.

Targeting the problem of homelessness as a starting point, three multidisciplinary treatment teams (social services, probation services and health services) were put in place to work in the community directly with homeless people. Practical services (accompanying them to therapy, helping them seek housing, helping them manage their money, etc.) were implemented to guide these individuals on a daily basis.

The eligibility of the offenders is determined based on information gathered by various stakeholders and with the informed consent of the offender, who is always represented by counsel. All of the information concerning the offender is shared orally with the court, and counsel then states his or her claims with respect to an appropriate sentence. The individual can qualify for the program if a probation order is imposed.

The program's philosophy is to encourage offenders to see their problem as an illness; it is a modern approach to chronic repeat offenders. Its objective is to put in place a means for them to be treated and guided toward eventual reintegration into society. Even though some of them will never be considered "normal" in the society, they can contribute to improving the community to the best of their ability. In order to do so, conditions must be realistic and community service must be effective and immediate. Whether cleaning up garbage downtown or working in the community garden, offenders must be able to feel useful and valued in order to understand that their community is larger than their own backyard. Presenters mention that we are not responsible for their actions, but we can help these people move forward.

On behalf of the delegates, the Chair graciously thanked the three speakers for their presentation.

- ***The Canadian Victims Bill of Rights***⁸

Presented by: Joanne Dompierre (Justice Canada).

This is a new initiative by the federal government that aims to increase victims' rights within the Canadian criminal justice system. An interdepartmental committee, led by Justice Canada's policy centre for victim issues, was responsible for examining the role that victims currently play in our system and for developing proposals to improve their right to information, protection, restitution, as well as their participation in the Canadian legal process without compromising the rights of the accused.

The federal Minister of Justice is currently travelling across the country to get feedback from Canadians and all are encouraged to submit their comments electronically to the following address by September 3, 2013: victimrights@justice.gc.ca.

Discussion

The delegates were pleased to have the opportunity to be consulted in the context of this forum and actively participated in the discussion. They stated that they are very concerned by this new federal initiative, particularly at the constitutional and operational level.

Constitutionally, the delegates vehemently maintain that this initiative falls under provincial jurisdiction and that most of the provinces already have effective laws, mechanisms and programs to serve and protect victims' rights. Attention was drawn to the fact that, with respect to victims of crime, each case is unique. They do not all seek the same result and this type of initiative risks creating completely ludicrous situations, particularly in spousal abuse cases where the victim regularly takes a position with the accused.

⁸ This document may be consulted at the following link: <http://www.ulcc.ca/en/2013-victoria-bc/771-criminal-section-documents-2013/2201-canadian-victims-bill-of-rights-info-session>.

Furthermore, they clearly indicated that this initiative would lead directly to a loss of independence for Crown prosecutors because they would have to base all of their decisions on the interests of victims instead of on the public interest. They submitted that the Bill of Rights will change the relationship between the state and victims and also change the role of the Attorney General. Many were particularly concerned about the negative repercussions that this initiative will have on them and police forces, not to mention the increased legal risks for Crown prosecutors.

The delegates then pointed out the fact that this initiative would cause huge delays in the court system as a whole, mainly because of the expanded element of participation suggested in the document.

Operationally, one of the concerns involves the legal aid program. The first issue raised was conflict of interest arising from the fact that legal aid can represent both victims and the accused. The delegates then drew attention to the financial difficulties governments would face if legal aid routinely represented victims. In their opinion, the various existing programs, in particular, services that currently help victims, would have to be eliminated to recover the amounts necessary to subsidize, at least in part, this new initiative. And what about situations where the victim becomes the accused? The eligibility as a victim and not as an accused would create completely absurd situations.

Finally, the delegates asked federal representatives to consider the critical words and sentiments expressed with respect to the federal government's new initiative and presented the following resolution:

The Uniform Law Conference of Canada (ULCC), Criminal Section, acknowledges the presentation of the "Canadian Victims Bill of Rights" Information Session.

The ULCC acknowledges the important role of victims of crime in the Canadian legal system and supports the need to ensure that all victims are treated with dignity and respect and are provided all information appropriate to their role in timely manner.

To ensure that the Canadian Criminal Justice system is fair and effective for all Canadians, and is consistent with the fundamental principles of our legal system and our Constitution, it is imperative that any legislation intended to support victims of crime does not harm, or further delay, the criminal process or undermine the independent role of prosecutors as they strive to protect the legitimate interests of victims, the rights of all Canadians and the rule of law.

Therefore, the Criminal Section of ULCC urges the Federal Government to take the time required to work with the Provinces and Territories, to meaningfully consult with legal professional organizations and scholars, to ensure that valid goals of the government do not undermine effective provincial initiatives or existing legislation or give rise to unintended adverse consequences.

The delegates adopted the resolution by a **vote of 20 in favour, 0 opposed and 2 abstentions**.
The Chair thanked all of the members for their work.

CLOSING

The Chair thanked the delegates for their participation in and contribution to the meeting. He was pleased to preside over the discussions and thanked the delegates for their patience, dedication and efforts in carrying out the week's agenda. He expressed his appreciation to the members of the various working groups for their excellent work and to the interpreters for their help and dedication.

The Chair highlighted the remarkable work of the conference secretariat and expressed deep gratitude to the organizing committee of the British Columbia Ministry of Justice, especially Richard de Boer and Samantha Hulme, for organizing the annual meeting as well as all of the social activities for the Conference.

The Chair also thanked Anny Bernier, Secretary to the Criminal Section, for her excellent work and her help throughout the week and over the course of the year.

The ULCC delegates took the opportunity to thank the Chair of the Criminal Section for the quality of his work throughout the week and for his contribution during the year.

By resolution of the Criminal Section, the nomination of Catherine Cooper, Counsel, Ontario Ministry of the Attorney General, as Chair of the Criminal Section for 2013-2014, was accepted. The nominating committee recommends that Kusham Sharma, Crown Attorney, Ministry of Justice and Attorney General of Manitoba, act in that capacity in 2014-2015.