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UNIFORM LAW CONFERENCE OF CANADA

MINUTES OF THE CRIMINAL SECTION, 2016

Prepared by
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Secretary, Criminal Section

Fredericton
New Brunswick
August, 2016

ATTENDANCE

[1] Twenty-eight (28) delegates from the federal, provincial and territorial levels of government, including Alberta, British Columbia, Manitoba, New Brunswick, Ontario, Quebec, Saskatchewan and the Yukon participated in the Criminal Section 2016 meeting of the Uniform Law Conference of Canada (ULCC). Delegates included policy counsel, Crown prosecutors, defence counsel, with some representing the Canadian Bar Association (CBA) and the Canadian Council of Criminal Defence Lawyers (CCCDL), as well as members of the judiciary.

[2] Regrets were received from the following jurisdictions: Newfoundland and Labrador, Nova Scotia, Prince Edward Island, the Northwest Territories and Nunavut.

OPENING

[3] The Criminal Section convened to order on Sunday, August 7, 2016. Eric Gottardi (Partner, Peck and Company, Barristers, British Columbia) presided as Chair, and Dorette Pollard (Counsel, Justice Canada) acted as Secretary.

[4] The Chair thanked the delegates for their presence and noted the ambitious Agenda for the week ahead, given the record number of resolutions and reports; foreshadowing extra sittings. Each Jurisdictional representative (JR) was invited to introduce the members of his/her delegation.

PROCEEDINGS

REPORT OF THE SENIOR FEDERAL DELEGATE[1]

[5] Lucie Angers, General Counsel and Director of External Relations for the Criminal Law Policy Section, Justice Canada tabled the Report of the Senior Federal Delegate, seconded by Josh Hawkes, Q.C., Alberta. She thanked Dorette Pollard for all of her work on the report.

[6] Delegates were invited to provide comments on Part II of the Senior Federal Delegate Report, a new section providing a status update of ULCC Criminal Section resolutions for the period 2009 to 2015.

DISCUSSION:

[7] Delegates welcomed this addition to the Senior Federal Delegate Report and were of the view that this status update should be included in future such Reports on an annual basis. It was felt that this element highlights the work of the ULCC Criminal Section. Moreover, it serves as

[1] This document is attached to the paper version of these Minutes and may also be consulted on the ULCC website.

an invaluable reference tool for JRs when making the case to senior decision-makers to justify their attendance at the ULCC Criminal Section meetings each year. Lucie Angers was pleased to note the support expressed in this regard.

[8] The Chair thanked Lucie Angers for presenting the 2016 ULCC Senior Federal Delegate Report.

RESOLVED:

Moved by Dean Sinclair, Saskatchewan and seconded by Cathy Cooper, Ontario, that the Senior Federal Delegate Report be adopted. Carried.

RESOLUTIONS[2]

IN MEMORIAM

[9] Earl Fruchtman died on January 7, 2016. To mark his untimely passing, the Steering Committee of the Criminal Section decided to make a posthumous recognition of his tireless contribution to ULCC and the Criminal Section for almost three decades. The Chair presented a resolution, which passed unanimously by delegation vote. The resolution reads as follow:

> BE IT RESOLVED:
>
> THAT the Chair of the Criminal Section of the ULCC reserve at least one open session on the agenda per year and name that session the "Earl Fruchtman Memorial Seminar"; and
>
> THAT the text from the recommendation be included in the materials and made available to all delegates in advance of the open session each year.
>
> Earl Fruchtman was a longstanding contributor to and champion of the ULCC. For most of his career, he was Counsel with the Criminal Law Division of the Ontario Ministry of the Attorney General. For his last 23 years, he was lead counsel in that Division for Federal/Provincial/Territorial matters and federal legislative reform, and was also appointed General Counsel in 2009.
>
> The overwhelming focus of Earl's work was criminal law policy and that brought him to the ULCC for the first time in 1988. Earl attended virtually every annual meeting after that, up to and including in 2015 –- an impressive, if not record, 28-year involvement. He served for many years as Ontario's Jurisdictional Representative to the Criminal Section, was Chair of the Criminal Section in the 1996-1997 term, and served as President of the Conference from 2000-2001.

[2] This document is attached to the paper version of these Minutes and may also be consulted on the ULCC website.

While Earl executed these official duties with consummate professionalism and thoughtfulness, he will probably best be remembered for his passionate, persuasive (and booming) interventions at the annual meetings, his behind-the-scenes mentorship of newer delegates, and his simply exemplary judgment. He had a singular gift for melding principle, practicality and common sense. And he set a beautiful example for the collegiality that is a hallmark of the ULCC.

Earl also understood the unique value of the ULCC as a body for generating arm's length, expert consideration of and support for law reform proposals, and as a venue for studying those issues that straddle both the criminal and civil spheres. The ULCC held a special place in Earl's heart and, likewise, Earl holds a special place in ULCC history.

RESOLUTIONS FROM JURISDICTIONS

[10] The order in which resolutions are considered is set out in Rule 3.3 of the *Rules of Procedure* of the Criminal Section. Consequently, British Columbia was the first province to present its resolutions this year, followed by the other jurisdictions, in alphabetical order, and ending with the Canada delegation.

[11] The jurisdictions initially submitted 30 resolutions for consideration. Of that number, one was in the form of a three-part resolution. In addition to the Chair's in Memoriam resolution, delegates therefore considered a total of 33 resolutions. Of these, 30 resolutions were adopted -15 as presented and 15 as amended. Only one resolution was defeated as amended, while two resolutions were withdrawn following discussion. Finally, there was one floor resolution.

[12] There were 24 voting delegates. However, in certain instances, the total number of votes may vary in light of the occasional momentary absences from the room during parts of the proceedings.

RESOLUTIONS CREATING WORKING GROUPS

[13] Two new working groups were created by the Criminal Section at ULCC 2016:

TELEWARRANTS WORKING GROUP

[14] The floor resolution called upon the Criminal Section to establish a working group to examine the telewarrant process under section 487.1 (Telewarrants) of the *Criminal Code*, in order to develop recommendations to make it more efficient.

DISCUSSION:

[15] Since the first introduction of telewarrants in 1985, there have been significant advancements in telecommunications technology, which makes the restrictions in section 487.1

impractical. Several delegates supported the broadening of the scope of the section.

CRIMINAL RECORDS CHECKS WORKING GROUP

[16] The CBA presented a resolution requesting that a working group be constituted to study whether the federal, provincial and territorial governments should adopt uniform legislation to restrict the disclosure to third parties of "non-conviction" information in Royal Canadian Mounted Police (RCMP) and other police databases and whether to provide a mechanism for individuals to review and correct information contained in those databases.

[17] This resolution was adopted and followed the excellent presentation by Tony Paisana, CBA to the Joint Session of the Civil and Criminal Sections, entitled Criminal Records Check.[3] It is hoped that this would be a joint working group of the Civil and Criminal Sections in order to study the practice of criminal records checks in each jurisdiction with a view to creating a uniform law that may be inspired by the Ontario Government's *Police Record Checks Reform Act, 2015*.

DISCUSSION:

[18] Delegates recognized that there is an urgent need for this project because of the disparity in treatment of this issue across the country. It was noted that similar issues are also under review in the United States.

CRIMINAL SECTION REPORTS AND PRESENTATIONS

REPORTS

[19] Three Working Groups tabled final Reports at ULCC, Criminal Section 2016.

FINAL REPORT OF THE WORKING GROUP ON PRIVATE RECORDINGS AND PUBLIC RISK: the BALANCE AFTER *R v BARABASH*

Presenter: Josh Hawkes, Q.C., Alberta Justice

[20] A working group was struck at ULCC 2015 to examine the implications of the Supreme Court of Canada (SCC) decision in *R v Barabash*, [4]in particular the private recordings defence and the nature of consent, unlawful sexual activity and exploitation following the decision. As there was little development in the case law on this issue, a working group was not convened. However, a Paper was prepared outlining the issues, together with concerns that some of the

[3] This presentation on Criminal Records Checks is posted on the ULCC website along with all other Criminal Section documents unless otherwise specified.
[4] 2015 SCC 29.

most troubling implications of the case may not be reflected in reported case law.

[21] The Paper notes that the issue may arise as a result of an investigative or charging gap or a gap in the advice from the Crown to the police, which would not necessarily generate case law. The *Barabash* decision merits ongoing monitoring because of the Court's uncharacteristic selective reticence to pronounce on two specific issues, namely the nature of control over the recordings and the issue of exploitation affecting the consent to record as a distinct and separate category from consent to sexual activity. This leaves open the possibility that the common law with respect to consent might be applied to those areas which create a significant risk in the internet age where predatory groups can exploit young people by selling or buying photos containing intimate images of young people under age 18.

DISCUSSION:

[22] During discussions, it was clarified that the Paper does not suggest that the private use exception is available to someone who would otherwise be luring a child on the internet as set out in section 172.1 of the *Criminal Code.*

[23] The Chair thanked Josh Hawkes for his ongoing work on this matter.

[24] Following discussion, delegates voted unanimously (24-0-0) on the following resolution:

RESOLVED:

That the Criminal Section of the Uniform Law Conference of Canada accept the Working Group Report on Private recordings and public risk: the balance after *R v Barabash*.

FINAL REPORT OF THE WORKING GROUP ON THE LAW OF INFORMER PRIVILEGE

Presenter: Matthew Taylor, Justice Canada

[25] At ULCC 2014, a resolution was passed establishing a working group to examine the law of informer privilege and, as necessary, develop a legislative framework governing the issue. The Working Group provided an update on its work to the Conference at the 2015 meeting and subsequently presented its final report at the 2016 ULCC meeting.

[26] Matthew Taylor thanked Andrew Di Manno, Counsel, Criminal Law Policy Section, Justice Canada for his collaboration in the drafting of the Report and noted with appreciation the contributions of all working group members.

[27] After an overview of the Working Group's mandate, and a brief summary of the law of informer privilege, including its policy origins, Matt provided a summary of the following four

operational issues:

A. Involvement of defence counsel at first-stage (*Basi*) hearings;
B. The informer as a witness;
C. Appeal routes – the absence of interlocutory appeals at common law (non-operational); and
D. Non-disclosure on the basis of privilege and notification to the defence.

[28] The presentation then concluded with a summary of the Working Group's nine recommendations:

1. No law reform is required at this time;
2. Defense counsel should **not** be included in the circle of privilege. Courts must balance interest associated with protecting identity of Confidential Informer (CI) with fair trial rights of the accused;
3. Section 37 of the *Canada Evidence Act* provides sufficient recourse for appeal decisions regarding the status of CIs;
4. Enacting a legislative regime to permit the editing of evidence to protect the identity of CIs would be inappropriate;
5. Law enforcement should clarify the status of any potential witness as a CI as soon as possible;
6. Care should be taken, as early as possible, to delineate between CIs and witnesses;
7. Where possible, the police should seek to obtain evidence from sources other than CIs;
8. Develop training tools, guidelines and policies to better address key practical challenges; and
9. Justice Canada will continue to monitor trends in the law.

DISCUSSION:

[29] The use of *amicus curiae* in informer privilege proceedings is very expensive and remains a significant issue.

[30] It was noted that there is a newly constituted National Informer Experts Committee (NIEC) for prosecutors who handle informer privilege cases. It was suggested that the Working Group's report be shared with the new NIEC.

[31] Following discussion, the Chair thanked Matthew Taylor and all members of the Working Group for their work and excellent Report.

[32] Delegates then voted unanimously (24-0-0) to accept the following resolution:

RESOLVED:

That the Criminal Section of the Uniform Law Conference of Canada accept the final report of the Working Group on the law of informer privilege.

FINAL REPORT OF THE WORKING GROUP ON ENDORSEMENT OF SEARCH WARRANTS, ORDERS AND AUTHORIZATIONS IN THE *CRIMINAL CODE* AND THE CONTROLLED DRUGS AND SUBSTANCES ACT

Presenter: Lucie Angers, Justice Canada

[33] Lucie Angers tabled the final report of the Working Group on endorsement of search warrants, orders and authorizations in the *Criminal Code* and the *Controlled Drugs and Substances Act* (CDSA) and thanked the participants of the Working Group for their hard work and commitment throughout the process.

[34] The presentation included a detailed overview of the approach and method of the Working Group, which was tasked as a result of a 2014 ULCC resolution to develop options on how to address the endorsement of warrants, authorizations and orders in the *Criminal Code* and the CDSA.

[35] She noted that the Report only addresses the endorsement of wiretap authorizations in Part VI (Invasion of Privacy) and investigative warrants under Part XV (Special Procedures and Powers) of the *Criminal Code* and the CDSA. Also, the Report does not address production orders because there are currently no such orders in the *Criminal Code* that require endorsement before they could be carried out in a jurisdiction other than the one in which they were issued.

[36] During the presentation, it was noted that there is a lack of consistency in the *Criminal Code* between the terms endorsement and confirmation with respect to the conditions that need to be fulfilled before a warrant may be endorsed. It was also noted that the *Criminal Code* distinguishes between an investigative warrant that is enforceable nationwide upon issuance and a warrant that requires endorsement in order to be enforceable outside the province of issuance where entry on private property or an assistance order is required to execute the warrant. The Working Group looked closely at this distinction and examined how endorsements are carried out operationally.

[37] In light of the inconsistencies and lack of clarity in the *Criminal Code*, the Working Group turned to the case law and academic literature, as well as discussions with police officers and judges. The few court decisions on the issue of endorsements tended to suggest that an endorsement is administrative in nature. With some exceptions, discussions with police officers and judges generally led to the same conclusion. Finally, it was noted that

although the Law Reform Commission of Canada had recommended in its 1984 report that out-of-province endorsement of search warrants should be maintained, the Commission had also noted that the endorsement process was a purely administrative process.

[38] The Working Group explored whether the endorsement process itself was problematic. The Working Group considered the cost and resources associated with the endorsement process, the inconsistent application of the issues including resources and efficiencies, as well as the scope of review by a judge who endorses an out-of-province warrant.

[39] There was consensus amongst members of the Working Group that endorsements did not appear to provide any added value to the process of out-of-province enforcement of investigative warrants and wiretaps.

[40] The Working Group considered the following options for reform:

A. Remove endorsement requirements and provide that Part VI and XV warrants and s. 11 CDSA warrants have effect anywhere in Canada;

B. Remove the endorsement requirements and provide that only warrants issued by a superior court judge have effect anywhere in Canada;

C. Proceed with Option A or B and require that a notice be filed with the court in the jurisdiction of execution; and

D. Maintain the status quo but clarify the process for endorsement.

[41] In closing, Lucie Angers thanked Stéphanie O'Connor who held the pen on the Report.

DISCUSSION:

[42] Delegates thanked the working group for its work and recommendation.

[43] During discussion, a question regarding the division of powers was raised with respect to option A. As most provinces have statutes pertaining to the jurisdiction of Justices of the Peace, removing the endorsement procedure in the *Criminal Code* may not fix the problem but create other division of powers concerns because Justices of the Peace, like some police officers do not have powers beyond their limited provincial jurisdiction.

[44] It was noted that the consultations did not give rise to a division of powers question.

However, as suggested in Professor Peter Hogg's treatise on constitutional law, it appears that Option A could be pursued provided that Parliament does so explicitly. If the *Criminal Code* was amended to expressly provide that a warrant has effect Canada wide, this would simply be an expression of Parliament's legislative competence over criminal law and procedure. Moreover, it was noted that there is precedent for extra provincial applications in other areas of the criminal law.

[45] Following discussion, the Chair thanked Lucie Angers and all of the members of the Working Group for their hard work.

[46] Delegates then voted to accept the following resolution (Carried: 23-0-1):

RESOLVED:

That the Criminal Section of the Uniform Law Conference of Canada accept the final Report of the Working Group on Endorsement of Search Warrants, Orders and Authorizations in the *Criminal Code* and the *Controlled Drugs and Substances Act*.

That the *Criminal Code* and the *Controlled Drugs and Substances Act* be amended to remove the requirement for out-of-province endorsement of investigative warrants and wiretap authorizations and provide that all such warrants and authorizations issued by a justice or judge, as the case may be, have effect anywhere in Canada.

PRESENTATIONS

[47] Delegates participated in five presentations; three of which were consultative in nature; another was an Open Forum on the Elsipogtog Healing to Wellness Court of New Brunswick, followed by a strategic brainstorming session on the ULCC, from the perspective of the Criminal Section.

PROPOSED REFORM OF THE IDENTIFICATION OF CRIMINALS ACT[5]

Presenter**:** Samantha Hulme, Crown Counsel, British Columbia Ministry of Justice and Attorney General

[48] Samantha Hulme outlined the current challenges with the operation of the *Identification of Criminals Act* (ICA) and discussed proposals for reform based on work stemming from past

[5] This presentation is not available on the ULCC website.

ULCC resolutions. [6]

[49] Section 2 of the ICA allows fingerprinting and other identification methods only if the person is either in lawful custody charged with or convicted of an indictable offence, or, if the person is released on process to appear for fingerprinting. Particular problems arise in charge screening jurisdictions (British Columbia, New Brunswick and Quebec) where a person arrested for an indictable (or hybrid) offence cannot be fingerprinted (without consent) until the charge is approved by the Crown and process to attend for fingerprinting is confirmed by a justice. This results in delays in obtaining prints and confirming identity. Sometimes accused persons do not return for fingerprinting as required, and the police must then pursue a warrant or failure to appear charge. This is also a challenge in non Crown charge assessment jurisdictions. Additionally, with the increased hybridization of offences, where Crown elect to proceed summarily on hybrid offences, the operation of the ICA and current state of the case law has led to convictions not being recorded in the Canadian Police Information Centre (CPIC).

[50] Proposals for modernization of the ICA aim to ensure a consistent approach across the country as to when fingerprints can be taken and what use can be made of them. Consistent with past ULCC resolutions, it has been proposed that fingerprints be taken upon arrest, including for hybrid offences no matter how the Crown elects to proceed, but that the prints only be used for identification purposes upon arrest, and only uploaded to CPIC if and when charges are laid. Safeguards have been proposed which mandate the destruction of prints where no charges are laid, a process for destruction on request upon acquittal or stay after a minimum time, and a right of appeal to a court from a decision against destruction. It is proposed that there should be a consistent policy across the country for all police forces with respect to how long fingerprints are retained and a procedure to request their destruction.

DISCUSSION:

[51] Delegates expressed general support for establishing consistency across the country in the taking and retention/destruction of fingerprints in the *Criminal Code* and other related criminal law statutes such as the CDSA, and the *Immigration and Refugee Protection Act*. However, the need for a mechanism by which a person can be informed and reassured that their

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[6] Canada - 2001 - 03 That consideration be given to amending section 2 of the *Identification of Criminals Act* to ensure that suspects who have been arrested but not yet charged with an indictable offence can be fingerprinted and photographed, etc. where the police intend to lay charges or to seek charge approval. (Carried: 24-5-9);
BC - 2001 - 06 - That the *Identification of Criminals Act* be expanded to permit fingerprinting for summary conviction offences under the *Criminal Code* (Carried: 25-8-5);
BC - 2004 - 06 –That s. 2 of the *Identification of Criminals Act* be amended to ensure that, in pre-charge screening jurisdictions, persons who are in lawful custody, but not yet charged with an indictable offence, can be fingerprinted and photographed where the police intend to seek charge approval. (Carried as amended 22-3-4); and
MB - 2009 - 02 – Allow the identification processes as provided for in the *Identification of Criminals Act* for all hybrid offences even after the Crown has elected to proceed summarily. (Carried as amended 25-3-2).

fingerprints and photos have been destroyed was noted. Notwithstanding an acquittal, withdrawal or stay of proceedings, reference was made to the need to retain fingerprints with respect to subsequent proceedings where the Crown may be trying to allege prior incidents as part of a dangerous offender proceeding for example. It was suggested that the reference to identifying "criminals" in the title of the act was not appropriate and should be amended given the presumption of innocence.

[52] Following discussion, the Chair thanked Samantha Hulme, as well as delegates for expressing their views on this matter.

PRESENTATION ON CRIMINAL JUSTICE SYSTEM REVIEW

Presenter: Matthew Taylor, Justice Canada

[53] The Minister of Justice and Attorney General of Canada was tasked in her mandate letter to: […] conduct a review of the changes in our criminal justice system and sentencing reforms over the past decade with a mandate to assess the changes, ensure that we are increasing the safety of our communities, getting value for money, addressing gaps and ensuring that current provisions are aligned with the objectives of the criminal justice system. Outcomes of this process should include increased use of restorative justice processes and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians, and implementation of recommendations from the inquest into the death of Ashley Smith regarding the restriction of the use of solitary confinement and the treatment of those with mental illness […].

[54] It was noted that Justice Canada has created an internal group to support the Minister of Justice in her review of the criminal justice system and that the Minister has extended an open invitation to Ministers of Justice and Attorneys General across the country to join her in reforming Canada's criminal justice system. To support this review, the Minister has participated in various roundtables comprised of key stakeholders. Delegates were encouraged to contribute to these roundtables that will be taking place in different jurisdictions in the coming months.

[55] Further, it was noted that the Minister is firmly of the view that this comprehensive reform will take more than one mandate for the type of reforms envisaged. The presentation focused on four general themes:

1. **Core principles of the Criminal Justice System (CJS): What is the criminal justice system supposed to be about**

   Over the past ten years and beyond, criminal law reform has been piecemeal and sporadic, often taken in response to public outrage to specific events and crises. The review of the criminal justice system provides an opportunity to examine the core

principles that should guide Canada's CJS, as was done in 1982, when Justice Canada produced its comprehensive review of the purpose of the criminal law, entitled "Criminal Law in Canadian Society"[7]. The intent is to revisit this document and share it with the jurisdictions and the wider legal community to determine whether the core principles articulated in it remain applicable and if they do, whether the CJS reflects those values.

2. **Efficiency in the CJS**
   The objective is to ensure that the CJS works fairly and efficiently. Not only is criminal law, such as bail hearings, complex, but there are also concerns about whether the system is allocating resources in the most effective way.

3. **Sentencing**
   Sentencing and offences with mandatory minimum penalties (MMPs) are issues of concern. Justice Canada has given priority to the review of the over 70 MMPs in the *Criminal Code* and the *Controlled Drugs and Substances Act* and is consulting with the provinces and territories.

4. **Impacts of the CJS on vulnerable populations**
   Vulnerable populations are disproportionately represented in the criminal justice system, as both offenders and victims. Consideration should be given to identifying ways in which the system can be adjusted to better meet the needs of vulnerable communities.

DISCUSSION:

[56] In addition to expressing deep appreciation for being consulted in such a broad way by the new Government on the important issues in the Minister's mandate letter, delegates raised the following topics for the Government's consideration:

- *Criminal Code* reform- there is a need to clean up the *Criminal Code* as highlighted in several past ULCC resolutions;

- Judicial Appointments – it is critical to have criminal law experts, including members of the criminal defence bar appointed to the Bench;

- Mental Health issues – people in contact with the CJS often have corollary mental health issues;

- Relationship of the CJS and the press – the public are informed by the Press and thus,

[7] This document is posted on the ULCC website.

CJS must be part of the conversation with the media;

- Risk assessment;
- Scope of the CJS; and
- Sentencing including the use of restorative justice; conditional sentencing orders (CSOs); MMPs and programs for inmates in federal institutions.

[57] In conclusion, Matthew Taylor thanked delegates for their thoughtful comments.

[58] The Chair thanked Matthew Taylor for his presentation, as well as the delegates for their insightful contributions to this consultative exercise.

PRESENTATION ON *R v SPENCER*[8]

Presenter: Lucie Angers, Justice Canada

[59] Following directly after a resolution presented by the Public Prosecution Services of Canada (Can-PPSC2016-02), Lucie Angers consulted delegates on the Supreme Court of Canada's unanimous decision in the child pornography case, *R v Spencer*[9]. Lucie sought their views on the ability of police forces to obtain basic subscriber information (BSI), such as an Internet Protocol (IP) address from a telecommunication service provider (TSP) on a voluntary basis.

[60] Lucie noted that the *Spencer* decision has had a significant impact not only on collaboration between law enforcement and TSPs, but also with other third parties, including transportation companies, banks and telephone companies. Third parties are now reluctant to provide voluntary assistance to law enforcement, including refusal to answer basic questions, such as whether records exist at all, which is required prior to applying for a court order. A major problem emanating from the *Spencer* decision is not only that the police had insufficient lawful authority to voluntarily obtain BSI from a TSP linked to a particular IP address, but also that the common law authority does not suffice for the police to obtain the information. However, nothing in the decision diminishes the existing powers of the police to obtain BSI in exigent circumstances and BSI can also be provided pursuant to a reasonable law or where there is no reasonable expectation of privacy. Lucie noted that there are no provisions in the *Criminal Code* to specifically compel access to basic subscriber information and that there were limits on cases in which more general provisions, such as production orders, can be resorted to in such cases.

[8] This presentation is not available on the ULCC website.
[9] 2014 SCC 43.

[61] She outlined that stakeholders, such as prosecutors and law enforcement officials, are pressing the government to urgently address the consequences of the *Spencer* decision and that the issue was under consideration at the federal-provincial-territorial level. One option would be on the one hand to amend the *Criminal Code* to provide for a court authorization process to obtain access to BSI with a greater expectation of privacy; and, on the other hand, establish a specific administrative (non-judicial) authority for access to BSI with a lesser or no expectation of privacy, such as information in telephone book.

[62] In closing, Lucie indicated that the federal government had announced its intention to launch national security[10] and cyber security[11] consultations which would provide an opportunity for Canadians to share their views on the impacts of the *Spencer* decision, as well as on other cybercrime-related issues.

DISCUSSION:

[63] Delegates discussed the impact of the *Spencer* decision in their jurisdictions and how the impact should be addressed. They unanimously supported the need to address the adverse impact of the *Spencer* decision and provide clarity on the varying thresholds to determine whether BSI is information that is subject to an expectation of privacy or is a mere administrative matter.

[64] The Chair thanked Lucie Angers for her presentation.

OPEN FORUM - THE ELSIPOGTOG HEALTH & WELLNESS CENTRE

Presenters: Tammy Augustine, B.A., LL. B., Justice Manager, Elsipogtog Health & Wellness Centre; and Katherine Piercey, Primary Case Manager Elsipogtog Health & Wellness Centre

[65] Tammy Augustine recited the following Indian Prayer in unison with all Delegates:

INDIAN PRAYER

OH GREAT SPIRIT
WHOSE VOICE I HEAR IN THE WINDS
HEAR ME, FOR I AM YOUNG SMALL AND WEAK
I NEED YOUR STRENGTH AND WISDOM

[10] The national security consultation began on September 8, 2016. This consultation ends on December 15th, 2016. For more details, click: Consultation on National Security.
[11] A public consultation on cyber security was held from August 16 to October 15, 2016. For more details, click: Consultation on Cyber Security.

I SEEK STRENGTH OH GREAT ONE
NOT TO BE SUPERIOR TO MY
BROTHERS AND SISTERS
BUT TO CONQUER MY GREATEST ENEMY
MYSELF

I SEEK WISDOM
THE LESSONS YOU HAVE HIDDEN IN EVERY
LEAF AND ROCK
SO THAT I MAY LEARN AND CARRY THIS
MESSAGE OF LIFE AND HOPE TO MY PEOPLE

MAY MY HANDS REPSECT THE MANY BEAUTIFUL
THINGS YOU HAVE MADE
MY EARS BE SHARP TO HEAR YOUR VOICE
MAY I ALWAYS WALK IN YOUR BEAUTY
AND LET MY EYES EVER BEHOLD THE RED AND
PURPLE SUNSETS

SO WHEN LIFE FADES LIKE THE SETTING SUN
MY SPIRIT WILL COME TO YOU WITHOUT SHAME

I HAVE SPOKEN

[66] Following the Indian Prayer, Ms. Augustine explained the work of the Elsipogtog Health & Wellness Centre and the origins and objectives of the Elsipogtog Healing to Wellness Court (HWC), which commenced in 2012. The Court incorporates First Nation traditions and practices dealing not only with crimes but also with the root causes of crime stemming, as she noted from the legacy of residential schools, racism, sexual abuse, drug and alcohol abuse, family violence, suicides and cultural oppression. She indicated that the HWC has two streams: conventional and wellness stream (which includes a highly-individualized treatment plan) with the aim to reduce court appearances, substance abuse and foster better health. The HWC has specific legal eligibility and treatment suitability criteria. Suitability criteria assessment is completed by the Primary Case Management in which offenders must accept responsibility and sign a waiver to follow a lengthy treatment process. When an accused is formally admitted into the HWC program, the Court will direct that a treatment plan be developed; then matters are adjourned for 60 days to allow for a stabilization plan and another 30 days for a treatment plan.

[67] In her presentation, Katherine Piercey used a case scenario of Candidate Joe to discuss the life cycle of the program, and the 11 guiding principles that shape the work with each candidate:

1. client-centered;
2. client choice;

3. relationship building;
4. holistic approach;
5. open door policy for every client whether the person is in the program or not;
6. empowerment;
7. traditional services;
8. language and culture;
9. community based;
10. collaborative practice based on a round table of key stakeholders working together for the health of the person; and
11. community development.

[68] Katherine indicated that the HWC is noted for its flexibility. Not everyone is ready to undertake the program or once undertaken to see it through to conclusion in a linear fashion. Candidates aim to complete the program within 12 to 18 months. However, for adults, the average ranges from 12 to 36 months. A similar but much more intensive program for young offenders may take up to nine months. When the person completes the Wellness program he or she quietly goes on to the next stage of completing the sentence, which often involves a community based sentence.

DISCUSSION:

[69] Delegates asked several questions both during and at the close of their captivating presentations. What happens to the victim generated much interest. It was noted that the victim is an integral part of the process in that the victim has to provide input, although it is the Crown who has the final say. Also, the HWC program provides similar healing and wellness services to both offenders and victims, especially since most are community members. Further the Court may invite other members of the Healing Team to give input on the participant's progress including the check-in discussion between the judge and the participant.

[70] Delegates also enquired about the outcomes and the impact of the HWC program. It was noted that since its launch in 2012, the HWC program has had 99 referrals, with 30 individuals having successfully completed the program. Recidivism rate is low. Even for those who are not successful, they have observed that these individuals have had fewer encounters with the criminal justice system. They have developed guiding principles for each participant: it is their choice.

[71] Elsipogtog Health & Wellness Centre developed programs to meet the needs of individuals coming through the Healing to Wellness Court. One of those programs specifically targets domestic violence. An initial assessment is followed by treatment plan development, which could include restorative justice facilitated circles. It is recognized that wellness is different for everybody and abstinence is not the only solution. An aftercare plan for those who plead guilty and are successfully completing the program, is also meant to inform probation. Individuals can go through the program more than once. Legal matters are adjourned until the

end of the program. As in the HWC program, the participants waive their *Charter* rights to a speedy trial or disposition.

[72] While the HWC is relatively new, both Ms. Augustine and Ms. Piercey noted that since its inception, the effects have been positive on the community. The presenters provided copies of two of their three brochures: ELSIPOGTOG Healing to Wellness Court Client Information and Victim Information.

[73] On behalf of all delegates, the Chair thanked the speakers for the Indian Prayer and their presentations. He noted the importance of their ongoing work in the Elsipogtog First Nation; adding that their intervention touched a chord and generated much interest among delegates.

STRATEGIC ISSUES DISCUSSIONS: THE FUTURE OF THE ULCC

Presenter: Josh Hawkes, Q.C., Alberta Justice

[74] Josh Hawkes indicated that this Criminal Section consultation on ULCC strategic issues continues the dialogue launched at the ULCC Opening Plenary on Sunday, August 7, 2016. The objective is to focus the discussion on concerns of the Criminal Section. Finally, Josh noted that the members of the Strategic Plan Objectives Committee envisage that there will be volunteers from each section working in parallel on about three of the identified key priorities. This strategic exercise is also expected to put in place a review mechanism for maintaining the ULCC current and sustainable into the next 100 years.

DISCUSSION:

[75] Delegates provided input on several items including attendance, the difference between Coordinating Committee of Senior Officials – Criminal Justice (CCSO) and ULCC, *Criminal Code* reform, reform of the Rules of Procedure of the Criminal Section, reform of the ULCC Constitution, senior federal delegate report, and the ULCC website.

[76] Josh Hawkes thanked all delegates for their contribution to the discussion and invited new delegates to provide their observations of the Criminal Section meeting.

[77] The Chair thanked Josh Hawkes and all delegates for their work and ongoing contribution to the strategic plan discussion.

JOINT SESSION OF THE CIVIL AND CRIMINAL SECTIONS

[78] There were three items for consideration at the 2016 Joint Session of the Civil and Criminal Sections; each emanating from the Criminal Section.

STATUS REPORT ON *CHARTER* COSTS AWARDS & CIVIL CHARTER DAMAGES AGAINST THE CROWN (*Henry*)

Presenter: Josh Hawkes, Q.C., Alberta Justice

[79] This Working Group was established as a result of a 2015 Criminal Section resolution recommending that a working group be formed to monitor the development of the case law surrounding the award of costs or damages against the Crown arising from criminal prosecutions as a result of the decision of the Supreme Court of Canada in *Henry v British Columbia (Attorney General)*[12]. The resolution also stated that Civil Section participation in the working group would be welcome.

[80] Josh Hawkes provided an overview of the costs issue noting that this topic would be of interest to both Sections and to Deputy Ministers. It raises a significant concern because cost awards against the Crown serve as a warning. The threshold for significant cost awards has been relatively stable for a number of years and requires more than a simple error or technical breach by the Crown. This threshold was clarified by the Supreme Court of Canada in *Henry* to indicate that there has to be a marked departure from the conduct of the Crown. Further, the power to make such awards is not limited to Courts of inherent jurisdiction but is also available in statutory courts. Such cost awards signal that something has gone very wrong in the jurisdiction and education; where the error is due to disclosure, there needs to be a change in infrastructure. It was noted that a switch to eRecords is a helpful solution to many of the disclosure problems.

[81] Josh Hawkes concluded that the purpose of the paper was to establish the state of the law, which would serve as a foundation of a joint session working group and be updated annually with a chart to indicate the cost awards across the country. If the law has changed, it can be summarized in the paper. This information on cost awards against the Crown can be used to inform Deputy Ministers at their annual Federal/Provincial/Territorial meetings.

DISCUSSION:

[82] It was agreed that cost awards law is well settled but there are other emerging issues. In *R v Singh*[13], for example, the Court of Appeal for Ontario addressed the issue of when should a court award costs against the Crown for non-disclosure pursuant to s. 24(1) of the *Charter*. The Court held that "A costs award against the Crown will not be an "appropriate and just remedy" under s. 24(1) of the *Charter* absent a finding that the Crown's conduct demonstrated a "marked

[12] 2015 SCC 24.
[13] 2016 ONCA 108.

and unacceptable departure from the reasonable standards expected of the prosecution", or something that is "rare" or "unique" that "must at least result in something akin to an extreme hardship on the defendant". The Court found that the trial judge had erred in awarding costs in this case.

[83] Reference was also made to forfeiture in a proceeds of crime case also by the Ontario appellate court in *R v Fercan Developments Ltd*[14], which held that Crown conduct represented a marked and unacceptable departure. It was noted in the discussions that in spite of *Singh*, the *Fercan* decision has left open the possibility that in the proceeds of crime cases and perhaps in civil forfeiture matters, there will be resort to the civil rules.

[84] It was also noted that in criminal law, there are cost awards against the Crown more often than is the case of an award for civil Charter damages in *Henry*. This implies that in order to be effective, the data collected by the working group would need to have representation from both the Civil and Criminal Sections in each jurisdiction. In this regard, Josh Hawkes acknowledged a deficiency in the paper regarding the absence of Quebec case law analysis.

[85] There was a general expression of interest in participating in the work of this joint working group and although there was no formal resolution tabled to cement this intent, there was an indication that this is a project the joint session can go forward with.

RESOLVED:

That while there was no formal resolution, this joint working group will be coordinated through the Advisory Committee on Program Development and Management (ACPDM).

JOINT SESSION ON COMPLEMENTARY PROVINCIAL/TERRITORIAL LEGISLATION

Presenter*:* Josh Hawkes, Q.C., Alberta Justice

[86] In 2010, the ULCC resolved to coordinate the gathering of information about provincial and territorial initiatives related to enacting legislation that is "complementary" to federal criminal law. This information could be used as a resource for jurisdictions considering implementation of similar initiatives underway.

[87] Josh Hawkes presented a Chart that was last updated by jurisdictions in 2012, summarizing legislation from across Canada in areas such as civil forfeiture, mandatory

[14] 2016 ONCA 269.

reporting of child pornography, administrative license suspensions, witness protection, missing persons, identification of criminals and guns and ammunition control.

DISCUSSION:

[88] While much of the initial euphoria attached to this project may have faded, it was felt that there may be renewed interest in certain areas, in light of the decision of the Supreme Court of Canada in *R v Jordan*[15], which established an entirely new framework on time ceilings, the breach of which would constitute a violation of section 11 b) rights of the *Charter* to be tried within a reasonable time.

[89] There was general consensus that this Chart served as a reference tool of what exists in other federal, provincial and territorial jurisdictions in any given area of law and that it may also help to identify subject areas for uniform work at ULCC, such as the uniform *Missing Persons Act*.

[90] Clark Dalton was tasked with updating the Chart. In this regard, it was noted that certain missing items could be added to the Chart, including the *Intimate Image Protection Act*, cyberbullying, pill presses, cash and dash and massage parlours.

RESOLVED:

That while there was no formal resolution, this joint working group will be coordinated through the ACPDM.

JOINT SESSION ON CRIMINAL RECORDS CHECKS

Presenter: Tony Paisana, Canadian Bar Association, British Columbia

[91] In a universally praised presentation, Tony Paisana set out the current state of the law and the need for reform of criminal records checks in Canada. It was noted that the United States law reform commission has undertaken a study to rationalize criminal records checks both at the state and federal levels of government in that country.

[92] Presently in Canada, criminal records checks come in different forms. Criminal "conviction checks" are used to verify whether an individual has a criminal record, whereas the more common "police background" check (or "vulnerable sector" check) discloses non-conviction information such as apprehensions under mental health acts; suicide attempts and

[15] 2016 SCC 27.

drug overdoses; restraining orders; ticket offences; noise complaints; "adverse police contact"; arrests with no charges; acquittals and withdrawn/stayed charges. This latter type of check, which can be highly prejudicial for obvious reasons, has become a routine feature of job applications in Canada.

[93] Independent studies conducted in Alberta, British Columbia and Ontario regarding this practice have arrived at similar conclusions. First, criminal record checks are being overused. Second, criminal record checks typically involve the disclosure of highly private, and often, irrelevant personal information. Third, criminal record checks sometimes include inaccurate, outdated or mistaken information that cannot be easily corrected.

[94] Indeed, as Tony noted, there have been several studies that have commented on the need for reform in this area including reports from the Canadian Civil Liberties Association, the John Howard Society of Ontario, and the offices of Privacy Commissioners in several provinces.

[95] Tony explained that there has also been an inconsistent response to this issue across the country. At the federal level, the RCMP has drafted a policy regulating the dissemination of information held in the CPIC, the largest repository of non-conviction information in the country. It has also enacted the *Criminal Records Act* (CRA). The CRA is used primarily in relation to people seeking a pardon, but it also contains provisions regulating the sharing of *some* police held information. For example, section 6.1 of the CRA, provides that the Commissioner of the RCMP must purge all information from CPIC within one year where a person has been given an absolute discharge and within three years where there has been a conditional discharge. However, this provision does not contemplate non-conviction information like that set out above (e.g. arrests without charges). In other words, in some circumstances, a person who is actually found guilty of an offence and discharged is afforded greater privacy protections than those who were never even charged in the first place.

[96] In British Columbia, the police chiefs have passed uniform "guidelines" regarding the sharing of conviction and non-conviction information. In Ontario, the legislature adopted the *Police Record Checks Reform Act*, which severely restricts the sharing of non-conviction information. In other jurisdictions, the practice is regulated by individual police forces/detachments on a case-by-case basis.

[97] As demonstrated by a chart included in the presentation, these different approaches have created inconsistent protections in Ontario, British Columbia and Alberta (and elsewhere). Thus, for example, a person apprehended under a *Mental Health Act* would have this information potentially disclosed in a record check in Alberta, but have it withheld in British Columbia and Ontario. Similar inconsistencies exist regarding suicide attempts and instances

where an individual has had adverse police contact, including upon arrest, or where they have been designated as a suspect or witness in the course of an investigation.

[98] In addition, each of the three example jurisdictions would disclose findings of not criminally responsible due to mental disorder; but in Ontario, such disclosure would be made only if the request was made within 5 years of the individual's discharge from the system. Finally, where charges have been stayed, withdrawn or resulted in an acquittal, each jurisdiction would disclose such information, with Ontario doing so only when "exceptional disclosure" criteria had been met and only for enumerated offences.

[99] In concluding, Tony suggested that there is a need for clarity and uniformity in the operation of these checks across the country, using the Ontario model as a good starting point. That is why it is suggested that there be a joint session working group between the civil and criminal sections to examine this question. Moreover, in articulating a legal and constitutional case for change, he argued that human rights legislation across the country prohibits discrimination on the basis of irrelevant conviction and non-conviction information. Further, the disclosure of such information may violate the *Canadian Charter of Rights and Freedoms*, notably with respect to section 11(d) and the presumption of innocence; the broader privacy interests enshrined in section 8 and the right to security of the person protected under section 7. Finally, the disclosure of non-conviction information can deny Canadians basic procedural fairness where incorrect or irrelevant information is included in such checks with no meaningful appeal or review process in place.

DISCUSSION:

[100] The presentation on criminal records checks generated much discussion from delegates in both the civil and criminal sections. Because of the importance of this issue, delegates were unanimous in calling for the creation of a joint working group to identify best practices and to recommend draft uniform legislation to harmonize the treatment of criminal records checks in Canada. In addition, this is a subject of interest to the United States delegation who would be pleased to participate in the joint working group.

[101] Several delegates cited unique situations in their respective jurisdictions that cry out for reform in this area. The following is a non-exhaustive list of some of the issues identified by delegates:

- The disclosure to United States border officials of police records with mental health information, resulting in unjust travel restrictions;
- Pardon applications being denied or delayed as a result of irrelevant non-conviction

information being shared in the application process;

- Non-conviction data can have an impact on the impoverished and mentally ill because it can affect housing and job applications; and

- There is a risk that people with similar names as those who actually have criminal records incorrectly receive "positive" criminal record checks; and there is no meaningful way to correct these kinds of mistakes in many jurisdictions.

RESOLVED:

That while there was no formal resolution, this joint working group will be coordinated through the Advisory Committee on Program Development and Management.

ELECTION OF CHAIR OF CRIMINAL SECTION 2017

[102] The Criminal Section Nominating Committee met this year to nominate a replacement as Chair of the Criminal Section 2017. The Criminal Section, unanimously adopted the nomination of Laura Pitcairn, Public Prosecution Service of Canada, as Chair of the Criminal Section 2017, in Regina Saskatchewan.

[103] The Chair announced that the nominating committee recommends that Samantha Hulme, Crown Counsel, Policy and Justice Issues, Criminal Justice Branch, British Columbia Ministry of Justice and Attorney General, serve as Chair of the Criminal Section 2018, in Quebec City, where the ULCC will celebrate its 100th Anniversary!

CLOSING

[104] The Chair thanked the delegates for their participation in the meeting. He noted their work ethic and willingness to sit late twice and early once during the Conference. He also thanked Dorette Pollard, Secretary to the Criminal Section, officially, for her excellent work and her help throughout the past year and during the Conference. In addition, Eric recognized his predecessors Kusham Sharma, Manitoba and Cathy Cooper, Ontario and thanked them for their sage advice. He also highlighted the remarkable work of the conference secretariat and thanked the interpreters and technical audio-visual staff for their able assistance throughout the week. Finally, heartfelt thanks were also extended to the organizing committee of the Government of New Brunswick for their warm hospitality.

[105] With a round of applause, delegates thanked Eric Gottardi, Chair of the Criminal Section for the caliber of his work and his deft management of an ambitious agenda at ULCC 2016.

[106] The Criminal Section meeting concluded its work on Thursday, August 11, 2016 and will reconvene Sunday, August 6, 2017, in Regina, Saskatchewan.

November 30, 2016