

CRIMINAL LAW SECTION MINUTES

ATTENDANCE

A total of 34 delegates attended the meetings of the Criminal Law Section of the Uniform Law Conference held in Québec City, Québec.

OPENING

Paul Monty presided as Chair and Fred Bobiasz acted as Secretary for the Meetings of the Criminal Law Section (CLS) of the Uniform Law Conference. The Section convened to order on Sunday, August 6, 1995. The heads of each delegation introduced the commissioners attending with them. This year the Honourable Owen Kennedy of Newfoundland participated as an observer on behalf of the Canadian Association of Provincial Court Judges; Sheldon Pink and Karen Gainer were with the federal delegation and represented respectively, the Canadian Bar Association and, the Canadian Council of Criminal Defence Lawyers.

REPORT OF THE CHAIR

Forty-nine resolutions were submitted for consideration by the Section. Of the 49 resolutions considered, 44 were adopted as proposed or as amended, 3 were defeated and 2 were withdrawn.

A paper on Private Prosecutions prepared for a Federal/Provincial/Territorial Working Group on Criminal Procedure (Appendix H at page 195) was considered. After some discussion, the following resolution was proposed and adopted:

That substantive provisions regarding Private Prosecutions be enacted in the Criminal Code bearing in mind the 12 recommendations contained in the Discussion Paper tabled and discussed at the 1995 Uniform Law Conference.

(Carried: 22-0-3)

The Publications Ban Committee, which had been established as a result of a

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resolution adopted at the 1994 Conference, reported. After summarizing a discussion paper on Publication Bans, the Committee sought and received the approval of the Section to proceed as follows:

- (1) that the Committee continue its work to develop a rational structure of legislative provisions to replace the current set, and, in that respect, to develop procedural proposals. The Committee proposes that a subcommittee consisting of the Chair, Graeme Mitchell and Daniel Grégoire would take the lead in this area;
- (2) that the Committee assign to a further subcommittee the responsibility for examining the issue of third party interests and the further issue of the possible rights of the accused when compelled to testify as a witness. The Committee proposes that the subcommittee taking the lead in this respect would consist of Jack Watson and Catherine Kane;
- (3) that the Committee would also look at the larger question of procedures and policies regarding the initiation and handling of voir dires or other forms of in camera proceedings.

The Section discussed briefly an excerpt on Euthanasia from "Of Life and Death: Report of the Special Senate Committee on Euthanasia and Assisted Suicide".

REPORT OF THE SENIOR FEDERAL DELEGATE

The senior federal delegate reported on resolutions adopted in prior years. He noted that the three bills which were tabled prior to the 1994 Conference were passed and that two other relevant bills were introduced this year.

C-37 - Young Offenders

Bill C-37, now An Act to amend the Young offenders Act and the Criminal Code, c. 19, Statutes of Canada 1995, was assented to on June 22, 1995 and is expected to be brought into force towards the end of the year. Several of the

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

C-41 - Sentencing

Bill C-41, An Act to amend the Criminal code (sentencing) and other Acts in consequence thereof, c. 22, Statutes of Canada 1995, dealing with sentencing matters was assented to on July 13, 1995 and is expected to come into force in late 1995 or in early 1996. Among other things, it provides for alternative measures which responds to a call for adult diversion in an Alberta resolution adopted in 1991. Section 8 provides for variations in orders under section 810 of the Criminal Code which was proposed in a 1991 resolution from British Columbia. The legislation will also enable a judge to convert an intermittent sentence presently being served to straight time when sentencing for a new offence. This was proposed by Saskatchewan in a 1987 resolution. The Act also provides measures in a new section 734.6 of the Criminal Code in respect of civil enforcement of fines and would implement a 1993 Ontario resolution.

C-42 - Miscellaneous Criminal Law Amendments

This bill, now the Criminal Law Amendment Act, 1994, c. 44, Statutes of Canada 1994, received Royal Assent on December 13, 1994. Most of it was brought into force on February 15, 1995; the remainder on April 1, 1995. This Act contains over 100 sections. Many of the provisions implement previous ULC resolutions. The role of the Criminal Law Section of the ULC is acknowledged in the Act's Summary which reads, in part:

This enactment amends the Criminal Code, the Canada Evidence Act, the Contraventions Act, the Mutual Legal Assistance in Criminal Matters Act, and the Supreme Court Act. Most of the amendments are to the Criminal Code and implement proposals aimed at improving diverse aspects of the administration of criminal justice. *The proposals originate from the Criminal*

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Law Section of the Uniform Law Conference of Canada (italics added), the former Law Reform Commission of Canada, various judges, members of the bar and federal and provincial departments and officials.

C-68 - Firearms Control

This Bill was tabled on February 14, 1995 and has passed the House of Commons and is now being considered in the Senate. Among other things, it will revamp Part III of the Criminal Code. Offences in relation to weapons trafficking are included. This implements, in part, a 1994 Ontario resolution. It will also provide for prohibition orders in relation to offences involving explosive substances, as was proposed in a 1993 British Columbia resolution.

C-104 - Forensic DNA Analysis

Bill C-104, now c. 27, Statutes of Canada, 1995, was introduced this spring and, with the consent and co-operation of all parties, was passed in record time. It came into force upon receiving Royal Assent, July 13, 1995. Resolutions from New Brunswick (1988), British Columbia (1993) and Ontario (1993) have been implemented, in whole or in part, by this legislation.

In conclusion, the senior federal delegate took the opportunity to outline approaches to criminal procedure reform which are under consideration by Federal, Provincial and Territorial Deputy Ministers. Delegates were invited to provide comments either through provincial officials or to the Criminal Law Policy Section of the Department of Justice.

CLOSING

The Chair thanked the delegates for their cooperation which enabled the Section to deal with a very heavy workload. The nominating committee recommended that David Winkler of British Columbia be elected Chair for the 1996 meetings. Mr. Winkler, upon being elected, thanked the Chair on behalf of all the delegates for his efforts in making this an interesting and productive conference.

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RESOLUTIONS

I - ALBERTA

ITEM 1 Intermittent Sentences

That s.737(1)(c) of the Criminal Code be amended to restrict its operation to cases in which a straight term of imprisonment would result in harm to the ability of the offender to sustain self or family, or to avoid other unusual hardship.

(Defeated: 8-12-8)

ITEM 2 Prowling by Night

That s. 177 of the Criminal Code be amended to create an offence which is committed between sunset and sunrise or during hours of darkness.

(withdrawn and replaced)

That s. 177 of the Criminal Code be amended to delete the reference to the term "loiter" as a manner in which the offence may be committed, and to delete any reference to the time of day during which the offence may be committed.

(Carried 12-11-4)

ITEM 3 Consecutive Sentences

That s. 717 of the Criminal Code be amended in order to remedy the problem identified in R. v. Paul so that a consecutive sentence can be imposed for a subsequent conviction where an offender has been convicted of an offence but not yet sentenced.

(Carried: 17-0-5)

ITEM 4 Presumption that breath test results over .08 means blood alcohol level at driving was over .08

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That s. 258(1)(c) of the Criminal Code be amended to provide that where the results of the breath test analyses exceed .08 at the time they are taken, it will be presumed that the accused had a blood alcohol level exceeding .08 at the time of the offence, in the absence of evidence to the contrary.

(Carried: 9-8-12)

ITEM 5 Enterprise Crime offences -- Pyramid Schemes

That the list of offences included in s. 462.3 be amended to include offences under s. 206(1)(e) of the Criminal Code.

(Carried: 21-2-2)

ITEM 6 Secondary Search Warrants for Income Tax Documents

That s. 241(4) of the Income Tax Act be amended to include as an additional exception judicial orders under s. 490(15) of the Criminal Code.

(Carried: 14-2-8)

ITEM 7 Proof of Contents of Court Transcripts

That either s. 646 of the Criminal Code or s. 23 of the Canada Evidence Act be amended to expressly permit the introduction into evidence of any transcript of judicial proceedings, on the transcript being certified by an official court reporter or court officer, with the transcript being proof of its contents in the absence of evidence to the contrary and without requirement of proof of the signature or official capacity of the certifier.

(Carried: 28-0-0)

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ITEM 8 Exigent Circumstances Search Authority

That the Criminal Code be amended, for its purposes, to provide for statutory recognition of, and authority for, with appropriate safeguards respecting, searches and seizures in exigent circumstances.

(Carried: 27-0-2)

II - BRITISH COLUMBIA

ITEM 1 Examination of Objects Detained Pursuant to Section 490(1) to (3)

That s. 490(15) of the Criminal Code be amended to provide that the order for examination be made in the court in which the proceedings are taking place.

(Carried: 25-0-0)

ITEM 2 Identification of Criminals Act

Amend s. 2 of the Identification of Criminals Act to allow the fingerprinting of those charged with hybrid offences.

(Carried on a jurisdictional vote: 13-9-8)

ITEM 3 Right of Appeal of a Young Person Convicted of First or Second Degree Murder

That s. 765(2) of the Criminal Code be amended to provide for an appeal from an order made pursuant to section 742.1.

(Carried: 19-0-1)

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ITEM 4 Court Appointed Counsel for Unfit Accused

That the Criminal Code be amended to make s. 672.24 consistent with s. 684 insofar as the assignment of responsibility and determination of the amount of fees is concerned.

(Carried: 17-2-5)

III - MANITOBA

ITEM 1 Peace Bonds - Jurisdiction

That s. 811 of the Criminal Code be made an absolute jurisdiction offence under s. 553.

(Carried: 17-2-6)

ITEM 2 First Degree Murder by Stalking

That s. 231 of the Criminal Code be amended to include criminal harassment, s. 264 in circumstances in which the stalking activities are considered to be serious.

(Carried: 13-10-4)

ITEM 3 Swearing Information

That s. 504 of the Criminal Code be amended to allow for swearing of an information by means of a telecommunications device.

(Carried: 29-0-0)

ITEM 4 Officer in Charge Release

That ss. 499(2) and 503(2.1) of the Criminal Code be amended to allow the officer in charge to order the surrender of firearms and FAC's.

(Carried: 23-5-3)

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That ss. 499(2) and 503(2.1) of the Criminal Code be amended to allow the officer in charge to order, where there is evidence that alcohol was involved in the offence, the accused to abstain from the consumption of alcohol and drugs.

(Carried: 18-5-7)

IV - NEW BRUNSWICK

ITEM 1 Young Offenders Committing Offences While in Closed Custody

That s.24.1(3) of the Young Offenders Act be amended so that the Youth Court can impose closed custody on young offenders who commit summary offences while in closed custody.

(Carried: 13-1-10)

ITEM 2 Mental Disorder-Assessment Orders

That ss. 672.13 and 672.14 of the Criminal Code be amended so that the accused can be brought back to Court as soon as the assessment is completed and in any event within a period of 30 days.

(Carried: 27-0-0)

V - NOVA SCOTIA

ITEM 1 Negotiated Terms of Severance for Judges and Other Office Holders

That s. 124 of the Criminal Code of Canada be amended to recognize that there are legitimate cases for a negotiated severance for office holders.

(Carried: 23-0-4)

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VI - ONTARIO

ITEM 1 Scope of Self-Defence to Homicide Committed by an Initial Aggressor

That s.34(2) of the Criminal Code be amended to insert the words "without having provoked the assault" in the subsection at the appropriate place (that is, after the words "unlawfully assaulted" and before the words "and who causes death").

(Carried: 13-7-7)

That a comprehensive reform of the law of self-defence be undertaken.

(Carried: 14-1-2)

ITEM 2 Allowing the Use of a Screening Device for Children Testifying where Offence is Child Pornography

That s.486(2.1) of the Criminal Code be amended to include s.163.1.

(Carried: 23-0-4)

ITEM 3 Allowing the Use of Screening Devices for Children Testifying where Offences Involve Assault.

That s.486(2.1) of the Criminal Code be amended to include offences contained in ss. 266, 267, and 268.

(Carried: 18-0-8)

ITEM 4 Compellability of Child Witness at Hearing to Determine the Applicability of a Screening Device

That if the complainant is compelled to testify at a hearing to determine if an order will be made to present evidence by means provided for in s.486(2.1) of the

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Criminal Code, the presiding judge shall allow the witness to testify by means provided for in s. 486(2.1).

(Carried: 27-0-0)

ITEM 5 Stay of Driving Prohibition

Amend s.261 of the Criminal Code to allow the court that is suspending the operation of a driving prohibition to impose conditions upon the suspension.

(Carried:15-2-7)

ITEM 6 Section 150.1(3) of the Criminal Code

Repeal s.150.1(3) and amend s.150.1(2) of the Criminal Code to remove the stipulation that the complainant be 12 to 14 years of age.

(Defeated: 2-18-7)

ITEM 7 Application to the Court of Appeal Suspending Non-Incarcerative Sentences

Amend s.683(5) of the Criminal Code to allow a single judge of the Court of Appeal to hear and decide these applications.

(Carried: 27-0-0)

ITEM 8 Use of Electronic Communications Technology to Obtain General Warrant

Amend s.487.1 of the Criminal Code to include the general warrant created by s.487.01.

(Carried: 18-1-9)

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ITEM 9 Applicability of Authorized Electronic Surveillance to Future Offences

That s.186 of the Criminal Code be amended to apply to future offences.

(Carried on a jurisdictional vote: 11-9-10)

ITEM 10 Admissibility of Evidence Produced by Electronic Surveillance to Prevent Bodily Harm

That s.184.1(2) of the Criminal Code be amended to permit the contents of an intercepted private communication obtained pursuant to s. 184.1(1) to be used: (1) in a subsequent wiretap, search warrant or arrest warrant application; or (2) in any proceedings on application of the accused.

(Carried: 23-1-1)

ITEM 11 Legal Requirement to Destroy Evidence of Unauthorized Electronic Surveillance to Prevent Bodily Harm

That s.184.1(3) of the Criminal Code be repealed and replaced with a sealing requirement scheme.

(Carried: 17-2-4)

VII - QUEBEC

ITEM 1 Penalty for failure to comply with the undertaking given in Form 11.1

That s. 145(5) of the Criminal Code be amended to eliminate the requirement that an undertaking entered into pursuant to ss. 499(2) and 503(2.1) of the Criminal Code be confirmed by a justice.

That s. 145(5) of the Criminal Code be amended to include, after the words "a recognizance entered into before", the words "a peace officer or".

Include in the Criminal Code a provision stating that ss. 145(5), 499(3) and 503(2.2) of the Criminal Code are to appear on Form 11.1.

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(Carried: 13-7-8)

ITEM 2 Failure or Refusal to Provide Blood Sample Pursuant to s. 254(3)(b)

That s. 254(3) of the Criminal Code be amended to state that the medical practitioner who certifies that taking blood samples does not endanger the life or health of the accused must inform the accused to that effect before obtaining his or her consent to have the samples taken.

That ss. 258(1)(h)(i) and (ii) of the Criminal Code be amended so as to make admissible, for a charge of refusing to provide a blood sample, the certificate containing, in addition to the statements referred to in those subparagraphs, a statement that the medical practitioner informed the accused that providing a sample would not endanger his or her life or health and certification of the accused's refusal to provide a sample.

(Withdrawn in favour of a Canada resolution on affidavit evidence)

ITEM 3 Automobile Master Key Licensing Fees

That s. 353 of the Criminal Code be amended to give the Attorney General of the province the power to set fees for the issue and renewal of licences and for periodic licence checks. The Attorney General should also be given the power to make regulations setting out the conditions under which licences may be issued and revoked and the requirements for keeping records.

(Carried: 20-0-3)

ITEM 4 Make Forgery (s. 366) and uttering a forged document (s. 368) Hybrid Offences

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Adopt for the offences of forgery (s. 367) and uttering a forged document (s. 368) the system of prosecution and punishment currently applied to fraud (s. 380).

(Withdrawn in favour of a similar Saskatchewan resolution)

ITEM 5 Include the Notion of "Service" in Section 380

That s. 380 of the Criminal Code be amended to include after the words "any property," the word "service,"

(Carried: 15-1-9)

ITEM 6 Power to Impose Conditions of Release on an Accused who Appears Without Being Held in Custody

That s. 515 of the Criminal Code be amended to give justices the power to impose, at the request of a prosecutor, with prior notice to the accused, conditions of release on an accused who appears before them without being held in custody.

(Carried: 24-0-0)

ITEM 7 Alternative to Physical Presence

That s. 515(2.2) of the Criminal Code be amended to stipulate that the consent of the accused is required only where testimonial evidence is being given and the accused cannot appear by means of video conferencing.

(Carried: 9-7-8)

ITEM 8 Statement Regarding Ownership and Value of Property

That s. 657.1 of the Criminal Code be amended to allow statements made under an undertaking to tell the truth by a person informed of the consequences of making a false statement and to require accordingly that ss. 137 and 140 appear in the statement.

(Carried: 16-2-5)

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ITEM 9 Release of Dangerous Offenders

That s. 753 of the Criminal Code be amended to require the judge to hand down a sentence before declaring the accused to be a dangerous offender, and stipulate that the declaration of dangerous offender status must include an order that the person be detained in custody for an indeterminate period subject to release under s. 761.

Stipulate that a person found to be a "dangerous offender" is not eligible for parole prior to the date on which he or she is eligible for parole in respect of the sentence imposed.

(Defeated: 4-17-2)

That s. 761 of the Criminal Code be amended to state that the National Parole Board may not release a dangerous offender without giving the Attorney General a reasonable opportunity to be heard.

(Carried: 15-1-7)

ITEM 10 Review Board Hearings by Videoconference

That the Criminal Code be amended to permit the Review Board established under s. 672.38, with the consent of the accused, to conduct hearings by videoconference or based on the case file.

(Carried: 25-1-1)

VIII - SASKATCHEWAN

ITEM 1 Voluntary Treatment Conditions in Conditional Discharges of Mentally Disordered Offenders

That s. 672.55(1) of the Criminal Code be clarified to provide that a term concerning voluntary psychiatric treatment or the taking of medication may be included as a condition of discharge.

(Carried: 25-0-1)

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ITEM 2 Immunity for the Criminal Code Review Board (Mentally Disordered Offenders)

That Part XX.1 of the Criminal Code be amended to add a provision providing Review Board members are exempt from civil or criminal liability for decisions made in good faith.

(Carried: 22-0-5)

ITEM 3 Offences of Forgery and Uttering Forged Documents

That ss. 367 and 368 of the Criminal Code be made dual procedural offences with a ten year maximum when prosecuted on indictment.

(Carried: 22-0-4)

ITEM 4 High Speed Police Chases

That an aggravated offence of dangerous driving with a maximum penalty of 14 years be created as s. 249(5). The offence would be of dangerous driving which occurred during a high speed chase.

That the new offence be included in s. 259(2) of the Criminal Code to permit a driving prohibition to be imposed by the sentencing court.

(Defeated: 1-16-8)

I - CANADA

ITEM 1 Limitation Period - Sexual Assault

That the limitation period provided for in s. 786(1) of the Criminal Code be eliminated for the offence of sexual assault pursuant to s. 271(1)(b) of the Criminal Code.

(Defeated: 4-16-2)

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That the limitation period for sexual assault be extended to one or two years.

(Defeated: 11-11-4)

That the 1992 resolution of this Conference regarding the waiver of the limitation period on consent be implemented.

(Carried: 25-1-0)

ITEM 2 Possession of Credit Card Information

That s. 342 of the Criminal Code be amended to create an offence of possession, trafficking and/or use of payment card and/or credit card information for illicit gain or for a malicious purpose.

(Carried: 26-0-1)

ITEM 3 Create a new offence under the Criminal Code of "being a passenger" in a stolen motor vehicle and in a motor vehicle unlawfully taken (joy ridding)

That the Department of Justice study the feasibility of adding a new summary conviction offence to the Criminal Code of "knowingly being a passenger" in a stolen motor vehicle and in a motor vehicle unlawfully taken.

(Carried: 17-6-2)

ITEM 4 Affidavit Evidence of Forensic Laboratory Scientists

That the Department of Justice study possible amendments to the Canada Evidence Act to render admissible in evidence affidavits of scientific experts.

(Carried: 18-3-4)

ITEM 5 Standardization of Appeal Procedures in Summary Proceedings (Part XXVII)

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That the Criminal Code be amended with a view to combining the two appeal routes into a single one, keeping open the possibility of an agreed statement of fact or a trial de novo. Sections 812 to 839 could be recast in a logical and coherent fashion with a view to establishing the conditions and the grounds for appeal, the procedure to initiate an appeal, the procedure to regulate the appeal itself and, the powers of the summary conviction appeal court.

That s. 839(2) be amended to specifically exclude the possibility that a provincial Court of Appeal can review a decision of a judge of that court to refuse leave to appeal. This could be done by removing the reference to s. 675(4) provided for in s. 839(2) of the Criminal Code.

(Carried: 25-0-0)