

REPORT OF THE FEDERAL JURISDICTIONAL REPRESENTATIVE

Uniform Law Conference of Canada Criminal Section Virtual meeting, August 10-13, 2020

Introduction

Each year, judges, prosecutors, policy experts, defence lawyers, and academics examine resolutions and working group reports to advance reforms to Canada's criminal law at the Criminal Section meeting of the Uniform Law Conference of Canada (ULCC). The Criminal Section of ULCC also provides a unique opportunity for the federal Department of Justice to consult criminal law experts from a broad spectrum of the criminal justice system from each province and territory.

This diversity and inclusiveness provide critical insights that help to shape criminal law policy development and to inform our legal and policy advice to the Minister of Justice and Attorney General of Canada. While the passage of resolutions calling for *Criminal Code* and other related criminal law amendments may not result in immediate legislative reform, the work of the ULCC Criminal Section is integral to this process. Officials at the federal Department of Justice turn regularly to past ULCC deliberations to inform the policy development process leading to amendments to the *Criminal Code* and related criminal statutes. The critical analysis and unique perspective from the delegates of the Criminal Section help to ensure that criminal legislation meet the highest standards of fairness, justice and respect for the rule of law and in turn that the Canadian criminal justice system retains the confidence and trust of the Canadian public.

This Annual Report highlights federal-provincial-territorial (FPT) developments of interest to ULCC (Part I) and legislative initiatives with respect to the Criminal Law (Part III). Part II provides a status update of ULCC resolutions.

Part I - FPT DEVELOPMENTS OF INTEREST TO ULCC 2019-2020

FPT Ministers Responsible for Justice and Public Safety

FPT Attorneys General and Ministers Responsible for Justice and Public Safety (Ministers) usually meet at least once a year to discuss key justice and public safety issues and give direction to government officials from the various jurisdictions on new and ongoing collaborative work being conducted over the year. Many of the issues discussed at these meetings are related to the issues raised by delegates to the ULCC.

At their January 22, 2020 meeting in Victoria, Ministers outlined key priorities of their different jurisdictions, such as Indigenous justice issues, restorative justice, medical assistance in dying, conversion therapy, rural crime, firearms, money laundering, cannabis enforcement, human trafficking, and online child sexual exploitation.

Ministers acknowledged the Calls for Justice contained in the final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls. Ministers will continue their collaboration to reduce violence against, and victimization of, Indigenous women, girls, and LGBTQ2S persons. Ministers also recognized that, in partnership with Indigenous Peoples, all governments have a responsibility to address overrepresentation of Indigenous peoples in the justice system as both victims and offenders.

Ministers reiterated their commitment to building safer and healthier communities through the expanded use of restorative justice in the criminal justice system – an approach that seeks to repair harm and provide accountability – where and as appropriate. In 2018, ministers underscored the importance of restorative justice in addressing repeat offences and overrepresentation of Indigenous and vulnerable populations in the criminal justice system. At the time, they also committed to a goal of a 5% increase in the use of restorative justice, where possible, by 2021. With this in mind, ministers agreed to release a summary report identifying our country’s existing restorative justice programs and agencies, referrals made, and concrete steps jurisdictions have taken to increase the use of restorative justice.

In light of the recent Québec Superior Court ruling on medical assistance in dying, ministers discussed the challenges of, and possible responses to, this difficult, personal, and complex issue. Ministers also affirmed their commitment to high quality hospice or palliative care. Following an update on its ongoing consultations with Canadians, the federal government reiterated its commitment to amend its medical assistance in dying legislation. Ministers affirmed their commitment to protecting vulnerable individuals and the equality rights of all Canadians.

Ministers discussed the dangerous and harmful practice of conversion therapy and support was expressed for legislative and other measures to ban this practice, including the federal government’s intention to introduce amendments to the *Criminal Code*.

Ministers underscored the impact of rural crime and ways to reduce it, including criminal law reform and enhanced police response, so all Canadians, no matter where they live, feel safe, secure, and protected in their communities. Ministers agreed to examine the problem closely and revisit it at the next FPT meeting later this year.

Ministers were also provided with an update on federal measures to reduce gun and gang-related violence across Canada, and discussed related issues such as drug trafficking, illegal gun sales and smuggling, and border security. As part of this conversation, they acknowledged the importance of treating law-abiding firearm owners fairly and with respect.

Ministers discussed money laundering, which is a crime that can affect all Canadians by undermining the integrity of Canada’s financial institutions and facilitating organized crime, gang activity, and gun smuggling. Ministers reiterated their support for a coordinated approach to better address this problem.

Ministers shared their views on the impact of the legalization of cannabis and enforcement issues, including the need for resources and tools to continue meeting the shared goals of

protecting youth, eliminating illicit sales, combatting organized crime, and addressing drug-impaired driving.

Ministers discussed human trafficking, which disproportionately affects women and girls, particularly Indigenous women and girls. Ministers supported further work to strengthen the response to this serious problem. Following a presentation by the Canadian Centre for Child Protection, ministers affirmed their commitment to combatting online child sexual exploitation and assisting victims.

Prior to the FPT meeting, Hereditary Chief and Songhees Elder, Elmer Seniementen George, welcomed ministers. Ministers had a conversation with representatives from the Assembly of First Nations and the Métis Nation. Participants discussed the federal government's commitment to introduce legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples. Ministers also received a presentation on B.C.'s Indigenous-led, co-developed Indigenous Justice Strategies.

FPT Coordinating Committee of Senior Officials - Criminal Justice (CCSO)

CCSO was initiated in 1986. It has responsibility for analysis and recommendations on criminal justice policy issues that are of joint concern to the FPT governments. It serves as a key forum for discussion and analysis of these issues in a manner that incorporates the interests and responsibilities of the different jurisdictions and for producing recommendations and analysis that reflect these varying interests and responsibilities. CCSO has established a broad set of working groups to handle the work that is set before it. A number of issues that were the subject of ULCC Criminal Section resolutions in recent years are currently being considered by CCSO.

At their November 7-8, 2019, meeting in Banff and at their spring 2020 virtual meetings, all CCSO working groups were again reminded to follow-up on ULCC resolutions in order to report back on their follow-up by CCSO.

Part II - STATUS OF ULCC RESOLUTIONS

Following deliberations, delegates of the Criminal Section vote on resolutions presented by the Canada, provincial and territorial delegations. Resolutions are adopted by majority vote by a show of hands and may also be amended, withdrawn or defeated. A chart containing all the resolutions adopted by the Criminal Section since 1983 can be found on the Uniform Law Conference of Canada website.

During the past five years (2015-2019), the Criminal Section considered 129 resolutions. Of these, 15 were withdrawn, and one was defeated. Furthermore, in 2016, the ULCC adopted one special resolution to mark the untimely passing of Earl Fruchtman, the longstanding Jurisdictional Representative (JR) for Ontario. Adopted unanimously by a delegation vote, this resolution renamed the Open Forum, the Earl Fruchtman Memorial Seminar, which is a regular

feature of the Criminal Section annual Conference intended to highlight areas of interest in the criminal justice system of the host jurisdiction.

Of the remaining resolutions that were adopted during this five-year period, a number have been addressed in the context of legislative amendments to the *Criminal Code* and other Acts, such as the *Canada Evidence Act*. Justice Canada continues to actively pursue policy development options in a number of resolutions. Several resolutions are also presently under study and consultation at CCSO. As this status update illustrates, the work of the ULCC Criminal Section is integral to policy development and criminal law reform in Canada.

Resolutions that have been addressed in statute

More than seventeen ULCC resolutions dealing with bail (**QC2001-06, Can-CBA-2012-01, BC2010-03, Can-CBA2015-02, BC2016-04, SK2016-01**), juries (**Can-CBA2011-03**), reclassification of offences, intimate partner violence, remote appearances (**NB2017-01**), judicial signatures (**BC2007-04**), re-election of the mode of trial (**CCCDL2008-02, AB2011-01, Can-CBA1997-03**), out-of-province warrants (see the recommendations made in the August 2016 report of the **ULCC Working Group on “Endorsement of Search Warrants, Orders and Authorizations in the Criminal Code and the Controlled Drugs and Substances Act”**), and youth justice (**BC2016-02** and **MB2013-01**) were taken into account in the development of former Bill C-75, which received Royal Assent on June 21, 2019. The Bill addressed a number of issues including: modernizing and clarifying bail provisions; providing an enhanced approach to administration of justice offences, including for youth; abolishing peremptory challenges of jurors and modify the process of challenging a juror for cause and of judicial stand-by; restricting the availability of preliminary inquiries; streamlining the classification of offences; expanding judicial case management powers; and, enhancing measures to better respond to intimate partner violence.

Former Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, which received Royal Assent on December 13, 2018, also contains a number of past resolutions made by ULCC, including **ON2003-01, AB2005-03** and **QC2001-05** that called for subsection 145(3) of the *Criminal Code* to be amended to include violation of an order made under subsection 516(2).

Former Bill C-84, *An Act to amend the Criminal Code (bestiality and animal fighting)*, which came into force on June 21, 2019, followed up on resolution **MB2017-01** that requested Justice Canada, in consultation with the provinces and territories, to review the Supreme Court of Canada’s decision of *R v DLW*, 2016 SCC 22 and examine whether the *Criminal Code* should be amended to criminalize any direct or indirect contact with an animal for a sexual purpose. It also took into account **BC2017-03** that requested that section 160 (Bestiality) of the *Criminal Code* be amended to include a definition for bestiality, this being that “bestiality” includes any direct or indirect contact with an animal for a sexual purpose.

With respect to resolution **SK2014-02** (election of adult sentence), Part 8 of *An Act Respecting National Security Matters*, which received Royal Assent on June 21, 2019, amends paragraphs 67(1)(c) and 67(3)(c) of the *Youth Criminal Justice Act* by replacing the current text in those

paragraphs with “the young person is charged with first or second degree murder within the meaning of section 231 of the *Criminal Code*”.

The *Criminal Code* was amended in line with ULCC Resolution **AB2014-03**, pursuant to *An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, S.C., c. 13, s. 16. This resolution called for Justice Canada to amend subsection 486.3(4.1) (Application) of the *Criminal Code* so as to allow any judge of the Court with jurisdiction over the offence to hear an application under section 486.3 (Accused not to cross-examine witness under 18) of the *Criminal Code* prohibiting the personal cross-examination of witnesses in specified circumstances. The *Act* also took into account **NS2003-02** as it amended subsections 486.3 (1) to (4.1) regarding when an accused cannot cross-examine a witness when he is self-represented.

Finally, the *Anti-Terrorism Act 2015*, S.C. 2015, c. 20, addressed the issue raised in resolution **MB2014-01 A**) which recommended that the *Criminal Code* be amended to allow the interjurisdictional transfer and enforcement of orders under sections 810, 810.01, 810.1, and 810.2 (sureties to keep the peace).

Resolutions under active consideration by Justice Canada

As mentioned earlier, the passage of resolutions calling for *Criminal Code* and other related criminal law amendments may not result in immediate legislative reform as developing criminal law policy and considering whether legislative proposals may move forward involves a number of steps. Moreover, all Government legislative reform proposals require approval of the federal Cabinet. Several legislative initiatives are of interest to the federal Minister of Justice. However, the Cabinet and legislative agenda include initiatives from all Ministers. While criminal law reform remains a government priority, it is not possible to forecast whether or when a particular ULCC proposal will result in legislative reform. While work of the ULCC may not result in prompt criminal law reform, its work remains important and has been reflected in past criminal reform legislation as outlined in the previous paragraphs.

Resolutions before CCSO

As also indicated earlier, part of the policy development process conducted by Justice Canada takes place at the CCSO. To that end and given that the issues covered in ULCC resolutions fall within the CCSO areas of expertise, more than half of the resolutions adopted during the past five years have been referred to and further studied by CCSO and its working groups, including the Working Group on Criminal Procedure, the Working Group on High-Risk Offenders, the Working Group on Sentencing, the Working Group on Cybercrime, the Working Group on Mental Disorder, as well as the Coordinating Committee of Senior Officials on Youth Justice.

Part III - LEGISLATIVE INITIATIVES 2019-2020

Three (3) Justice-led Government bills are before Parliament. One bill of interest to Justice but lead by another Minister received Royal Assent.

During the same period, the Minister of Justice was leading the Government's response to Private members' business: three (3) Private Members' Bills and four (4) Senate Public Bills.

Further detail of these legislative initiatives are provided in the passages that follow.

Bills Lead by the Minister of Justice

1) Bill C-5, *An Act to amend the Judges Act and the Criminal Code*

This enactment amends the *Judges Act* to restrict eligibility for judicial appointment to persons who undertake to participate in continuing education on matters related to sexual assault law and social context. It also amends the *Judges Act* to require that the Canadian Judicial Council report on seminars offered for the continuing education of judges on matters related to sexual assault law. Finally, it amends the *Criminal Code* to require that judges provide reasons for decisions in sexual assault proceedings.

The Bill was introduced on February 4, 2020 and is currently being studied by the Standing Committee on Justice and Human Rights (March 10, 2020).

2) Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*

This enactment amends the *Criminal Code* to, among other things,

- (a) repeal the provision that requires a person's natural death be reasonably foreseeable in order for them to be eligible for medical assistance in dying;
- (b) specify that persons whose sole underlying medical condition is a mental illness are not eligible for medical assistance in dying;
- (c) create two sets of safeguards that must be respected before medical assistance in dying may be provided to a person, the application of which depends on whether the person's natural death is reasonably foreseeable;
- (d) permit medical assistance in dying to be provided to a person who has been found eligible to receive it, whose natural death is reasonably foreseeable and who has lost the capacity to consent before medical assistance in dying is provided, on the basis of a prior agreement they entered into with the medical practitioner or nurse practitioner; and
- (e) permit medical assistance in dying to be provided to a person who has lost the capacity to consent to it as a result of the self-administration of a substance that was provided to them under the provisions governing medical assistance in dying in order to cause their own death.

The bill was introduced on February 24, 2020 and was debated at second reading February 26 and 27, 2020.

3) Bill C-8, *An Act to amend the Criminal Code (conversion therapy)*

This enactment amends the *Criminal Code* to, among other things, create the following offences:

- (a) causing a person to undergo conversion therapy against the person's will;
- (b) causing a child to undergo conversion therapy;
- (c) doing anything for the purpose of removing a child from Canada with the intention that the child undergo conversion therapy outside Canada;
- (d) advertising an offer to provide conversion therapy; and,
- (e) receiving a financial or other material benefit from the provision of conversion therapy.

It also amends the *Criminal Code* to authorize courts to order that advertisements for conversion therapy be disposed of or deleted.

The Bill was introduced on March 9, 2020.

Bills of Interest under the Lead of Other Ministers

Bill C-4, *An Act to implement the Agreement between Canada, the United States of America and the United Mexican States*

Under the lead of the Deputy Prime Minister and Minister of Intergovernmental Affairs, this enactment implements the Agreement between Canada, the United States of America and the United Mexican States, done at Buenos Aires on November 30, 2018, as amended by the Protocol of Amendment to that Agreement, done at Mexico City on December 10, 2019.

The general provisions of the enactment set out rules of interpretation and specify that no recourse is to be taken on the basis of sections 9 to 20 or any order made under those sections, or on the basis of the provisions of the Agreement, without the consent of the Attorney General of Canada.

Part 1 approves the Agreement, provides for the payment by Canada of its share of the expenditures associated with the operation of the institutional and administrative aspects of the Agreement and gives the Governor in Council the power to make orders in accordance with the Agreement. Part 2 amends certain Acts to bring them into conformity with Canada's obligations under the Agreement. Part 3 contains the coming into force provisions.

The Bill was introduced on January 29, 2020, and received Royal Assent on March 13, 2020. The majority of the provisions in Bill C-4 came into force on July 1, 2020, including clauses 35–38, which create two new trade secrets offences in the *Criminal Code*.

Private Members Business

Private Members Bills of Interest to Justice

1) Bill C-218, *An Act to amend the Criminal Code (sports betting)*

This enactment repeals paragraph 207(4)(b) of the *Criminal Code* to make it lawful for the government of a province, or a person or entity licensed by the Lieutenant Governor in Council of that province, to conduct and manage a lottery scheme in the province that involves betting on a race or fight or on a single sport event or athletic contest.

The Bill was introduced and received First Reading on February 25, 2020.

2) C-236, *An Act to amend the Controlled Drugs and Substances Act (evidence-based diversion measures)*

This enactment amends the *Controlled Drugs and Substances Act* to require peace officers to consider measures other than judicial proceedings to deal with individuals alleged to have been in possession of certain substances. It also sets out principles to be taken into account in the determination of the most appropriate measures to take.

The Bill was introduced on February 26, 2020 and was placed on the Order of Precedence on March 10, 2020.

3) Bill C-238, *An Act to amend the Criminal Code (possession of unlawfully imported firearms)*

This enactment amends the *Criminal Code* to provide that a person who is charged with an offence in respect of the possession of a firearm that is alleged to have been unlawfully imported into Canada is required to demonstrate that their pre-trial detention is not justified. It also increases the mandatory minimum penalty for the possession of such weapons.

The Bill was introduced and received First Reading on February 27, 2020.

Senate Public Bills – Justice Lead

1) Bill S-202, *An Act to amend the Criminal Code (conversion therapy)*

This enactment amends the *Criminal Code* to make it an offence to advertise conversion therapy services for consideration and to obtain a financial or other material benefit for the provision of conversion therapy to a person under the age of eighteen.

The Bill was introduced on December 10, 2019 and is currently at Second Reading (December 12, 2019).

2) Bill S-204, *An Act to amend the Criminal Code and the Immigration and Refugee Protection Act (trafficking in human organs)*

This enactment amends the *Criminal Code* to create new offences in relation to trafficking in human organs. It also amends the *Immigration and Refugee Protection Act* to provide that a permanent resident or foreign national is inadmissible to Canada if the Minister of Citizenship and Immigration is of the opinion that they have engaged in any activities relating to trafficking in human organs.

The Bill was introduced and received First Reading on December 10, 2019.

3) Bill S-207, *An Act to amend the Criminal Code (disclosure of information by jurors)*

This enactment amends the *Criminal Code* to provide that the prohibition against the disclosure of information relating to jury proceedings does not, in certain circumstances, apply in respect of disclosure by jurors to health care professionals.

The Bill was introduced on December 12, 2019 and is currently at Second Reading debate (February 2 and 25, 2020).

4) Bill S-208, *An Act to amend the Criminal Code (independence of the judiciary)*

This enactment amends the *Criminal Code* to give a court the discretion to vary the punishment to be imposed in respect of an offence for which the punishment or different degrees or kinds of punishment is prescribed in an enactment.

It allows a court to decide to not make a mandatory prohibition order provided for under a provision of that Act, or to add conditions or vary any of the conditions set out in that provision, if the court considers it just and reasonable to do so. It requires the court to provide its reasons for making such a decision.

It requires a court to consider all available options prior to imposing a minimum punishment of imprisonment or period of parole ineligibility under a provision of that Act, and to provide written reasons for imposing a minimum punishment of imprisonment or period of parole ineligibility.

It gives a court discretion in the treatment or counselling program that a person who has been found guilty of an offence may attend and removes the requirement for the Attorney General to give his or her consent in order to delay sentencing under subsection 720(2) of that Act.

It provides that a judge is to take into consideration the recommendation of the jury in setting the period of parole ineligibility of a person who has been found guilty of first or second degree murder.

The Bill was introduced on February 2, 2020 and is currently at Second Reading Debate (February 6, 18, 19, 25 and March 10, 2020).

Conclusion

Justice Canada will maintain its close working relationship with ULCC and consult with the Criminal Section as it undertakes consultations in keeping with the mandate letter to the Minister of Justice and Attorney General of Canada and other related criminal law legislative proposals. Delegates are encouraged to follow the progress of these and other criminal law reforms by consulting the Parliament of Canada website, LEGISinfo at: <http://www.parl.gc.ca>.

August 6, 2020