

ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA

REVIEW OF THE CRIMINAL SECTION'S MANDATE

STATUS REPORT

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**By videoconference
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Presented to the Criminal Section

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1. Background

[1] At the 2019 Annual Meeting of the Criminal Section of the Uniform Law Conference of Canada (ULCC), in St. John's (Newfoundland and Labrador), a few resolutions were the subject of lively debate to determine whether they were within the mandate of the Criminal Section.

[2] In order to determine if those resolutions ought to be debated on the merits, the Criminal Section reviewed the *ULCC Constitution* (adopted in 2018), which includes a *Statement of Purpose* as well as a *Mandate*. In relation to criminal law, the *Statement of Purpose* mentions the following:

As the criminal justice system in Canada is a matter of shared constitutional responsibility between the federal, provincial and territorial governments, the Uniform Law Conference of Canada provides an opportunity for delegates to identify legal and operational issues that might benefit from legislative reform.

Its *Mandate* pertaining to criminal law and implemented by the Criminal Section reads as follows:

[...] to recommend changes to the Criminal Code of Canada and other related criminal law statutes and to provide a forum to study and consult on evolving criminal law issues.

Other considerations were raised during this discussion, including the ULCC's purpose, the relationship between breadth of mandate and membership of the Criminal Section, as well as the expertise of the ULCC and its delegates. The resolutions in question were withdrawn after the discussion about the mandate.

[3] This process highlighted the need for greater clarity regarding the mandate of the Criminal Section, and how best to handle debates on whether a resolution properly falls within that mandate.

[4] During the 2019 Annual Meeting, the incoming Chair of the Criminal Section indicated that the Steering Committee would consider the question of mandate going forward, and may strike a working group to study the issue and prepare a paper that fleshes out the considerations and options.

[5] In December 2019, the Steering Committee of the Criminal Section created a working group responsible mainly for clarifying the general understanding of the mandate, establishing the procedure for determining whether an issue is within its purview and determining whether a process should be adopted to address resolutions that are not clearly within its main focus.

[6] The working group is composed of Lee Kirkpatrick (Justice Yukon), Samantha Hulme (British Columbia Prosecution Service), Kevin Westell (Trial Lawyers Association of British Columbia), Tony Paisana (Canadian Bar Association), Matthew Hinshaw (Alberta Prosecution Service), Craig Savage (Manitoba Prosecution Service), Catherine Cooper (Ontario Ministry of the Attorney General – Criminal Law Division), Laura Pitcairn (Public Prosecution Service of Canada), Lucie Angers, Stéphanie O’Connor, Caroline Quesnel, Normand Wong, Chloé Rousselle (Justice Canada) and Anne-Marie Boisvert (Full Professor, Université de Montréal).

2. Status of discussions

[7] The working group met four times, by teleconference, since its creation. After discussing the tasks expected of the working group, members reviewed resolutions previously debated by the Criminal Section. They looked at the mandate of the Criminal Section as set out in the ULCC *Constitution* as well as its possible components. The members also discussed options for procedure (hereinafter the “mandate procedure”) that could be followed in the future, should a situation similar to the one in 2019 arise again.

[8] The working group quickly reached the conclusion that the Criminal Section’s mandate could not, and perhaps should not, be narrowly defined. In fact, members expressed various, and sometimes opposing, views while attempting to describe the Criminal Section’s mandate. An overview of previous resolutions illustrated the variety of factors that must be taken into consideration to determine whether it is appropriate for a resolution to be debated by the Criminal Section, such as the legislation in question, the topics addressed and the desired outcome.

[9] In this context, a procedure focused on a case-by-case analysis of the potentially problematic or controversial resolutions appeared to be unavoidable. It was also decided that a decision-making grid would be developed to provide guidance to those who will be called upon to make a decision on whether or not the resolution at stake was within the mandate of the Criminal Section.

2.1 Mandate procedure

[10] When developing the mandate procedure, the working group sought a solution that would balance the following objectives:

- Avoid potential debates about the issue of the Criminal Section’s mandate during annual meetings, where the time for discussions and votes on resolutions is already limited;

- Build on an existing structure within the ULCC Criminal Section, so as to avoid a procedure that would require the creation of a new committee;
- Allow for a flexible approach based on discussion and fairness;
- Ensure consistency in decision making;
- Grant decision-making powers to a body sufficiently representative of the ULCC Criminal Section’s composition.

[11] The working group members agreed on two options for discussion by delegates of the Criminal Section at the 2020 Annual Meeting (see Appendix A).

[12] Both options involve the Criminal Section Steering Committee. In that regard, the working group is considering the possibility of making a recommendation, in its final report, to recognize the importance of a diverse composition for the Steering Committee, as well as the role a representative of a defence counsel group could fill. On this, the group noted section 11 of the *ULCC By-Law* and, more specifically, provisions 11(1)(d) and 11(3), which specify that “at least two members of the Criminal Section” should be members of the Steering Committee and that those members “shall be selected [...] taking into account regional and other interests represented in the Criminal Section”.

2.2 Decision-making grid

[13] The decision-making grid sets out the key criteria related to the core elements of the mandate, as identified by the working group (see Appendix B). However, using this tool should not be a mathematical exercise. A resolution that at first may seem outside the mandate could in fact turn out to be perfectly appropriate for consideration in light of, for example, the context or the desired outcome. Also, while certain criteria may carry more weight than others, a combination of factors may as well mitigate certain aspects that were initially perceived as concerning.

[14] The working group also noted that certain criteria that weigh against including a resolution for debate at the annual meeting could be overcome if the resolution presents certain characteristics or if the submitting delegate or Jurisdictional Representative agrees to certain conditions (see “List of Characteristics or Conditions” in Appendix B).

[15] The working group members propose a draft decision-making grid, with a list of characteristics or conditions (see Appendix B), for discussion with the delegates of the Criminal Section at the 2020 Annual Meeting.

3. Next steps

[16] The working group recommends to the Criminal Section that its work continues, informed by the discussions held during the 2020 Criminal Section Annual Meeting.

[17] The working group would also continue to work on some outstanding issues, such as the specific recommendations that can be made and the manner they might be incorporated in the existing ULCC structure.

[18] It is recommended that the working group submits a final report to the ULCC Criminal Section at its 2021 Annual Meeting.

APPENDIX A

OPTIONS FOR THE MANDATE PROCEDURE

PROCEDURE BY WHICH THE CRIMINAL SECTION COULD DETERMINE
WHETHER A RESOLUTION SHOULD BE DEBATED DURING THE ANNUAL
MEETING

<p>There is a general presumption that all submitted resolutions are within the Criminal Section’s mandate and can be debated at the annual meeting.</p> <ol style="list-style-type: none">1. The Chair and the Secretary of the Criminal Section consider all resolutions received to verify whether they raise any concerns in light of the decision-making grid.2. If the Chair and the Secretary are of the opinion that a resolution might be outside the mandate, they inform the Jurisdictional Representative. Through informal consultations with the delegate or the Jurisdictional Representative who submitted the resolution, the President and the Secretary confirm the desire to maintain, amend or withdraw the resolution.3. If the Chair and the Secretary remain concerned about the resolution, they bring the resolution to the attention of the Criminal Section’s Steering Committee.	
Option A	Option B
<ol style="list-style-type: none">4. The Steering Committee schedules a meeting, which must be held at least twelve weeks before the ULCC annual meeting.5. The Steering Committee members consider and discuss the resolution in light of the decision-making grid.6. If a majority of the members are of the opinion (expressed through a vote) that the resolution is outside the mandate, the said resolution is submitted to the Jurisdictional Representatives for further consideration. <u>If a majority of the members vote in favor of the resolution being debated by the Criminal Section at the annual meeting, that is the final decision.</u>7. The Jurisdictional Representatives consider and discuss the resolution	<ol style="list-style-type: none">4. The Steering Committee schedules a meeting, which must be held at least ten weeks before the ULCC annual meeting.5. The Steering Committee members consider and discuss the resolution in light of the decision-making grid.6. If a majority of members are of the opinion that the resolution is outside the mandate, the said resolution is rejected. <u>The result of the vote is the final decision.</u>7. At step 5, the delegate or the Jurisdictional Representative who submitted the resolution has the opportunity to make a case for why the resolution should not be rejected, if the delegate or the Jurisdictional Representative chooses to do so.

<p>in light of the decision-making grid. The Jurisdictional Representatives' meeting must be held at least ten weeks before the annual meeting.</p> <p>8. If the majority of the Jurisdictional Representatives is of the opinion that the resolution is outside the mandate, it is rejected. <u>The result of the vote is the final decision.</u></p> <p>9. At steps 5 and 7, the delegate or the Jurisdictional Representative who submitted the resolution has the opportunity to make a case for why the resolution should not be rejected, if the delegate or the Jurisdictional Representative chooses to do so.</p>	
<p>If it is not possible to follow the procedure within the established time frame, for example with floor resolutions, resolutions submitted after the deadline or if a valid concern is raised at a later date, the Chair and the Secretary can decide to withdraw a resolution from the current agenda, for the purpose of submitting the resolution to the Steering Committee before the next annual meeting.</p> <p>If the resolution is rejected, withdrawn or amended during the above-described procedure (steps 2, 5, 6, 8):</p> <ul style="list-style-type: none">• before the resolutions are shared with the Jurisdictional Representatives, the resolution is considered as never submitted (if rejected or withdrawn) or as the original (if amended);• after the resolutions are shared with the Jurisdictional Representatives, the resolution is referred to as rejected, withdrawn or amended as a result of the mandate procedure, including for the purpose of the record of resolutions.	

APPENDIX B

DECISION-MAKING GRID AND LIST OF CHARACTERISTICS OR CONDITIONS

DECISION-MAKING GRID

Criteria	Weighs in favour	Weighs against
(i) The resolution seeks legislative reform.	X	
(ii) The resolution is related to one of the following: <ul style="list-style-type: none"> • <i>Criminal Code, Youth Criminal Justice Act,</i> • <i>Controlled Drugs and Substances Act, Cannabis Act, Evidence Act,</i> • <i>Sex Offender Registration Act, Firearms Act, Corrections and Conditional Release Act.</i> 	X	
(iii) The resolution is related to legislation entirely or partially made under the federal jurisdiction over criminal law, including criminal procedure.	X	
(iv) The resolution seeks to amend legislation adopted by a province or territory.		X
(v) The resolution concerns provincial rules of court.		X
(vi) The Criminal Section has direct expertise in the topic of the resolution (NB: direct expertise means the personal expertise of the delegate, the expertise of the organization for which the delegate works or the expertise of people the delegate can easily consult).	X	
(vii) There is another forum or avenue (outside the ULCC) that would be more appropriate for dealing with issue identified by the resolution.		X
(viii) The resolution addresses prosecutorial discretion or suggests that the prosecution services or courts adopt directives or instructions.		X

(ix) The resolution concerns the executive branch of a government (e.g.: implementing a program, spending funds in a particular field or for a specific initiative).		X
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LIST OF CHARACTERISTICS OR CONDITIONS

In addition to the criteria of the decision-making grid, consideration must also be given to the presence of certain characteristics or the possibility of imposing conditions that could help to overcome certain difficulties regarding the Criminal Section's mandate. For example:

- The resolution will be amended so that the anticipated outcome is that the issue be submitted to a working group (joint or of the Criminal Section) or to the Civil Section, or be addressed through the Earl Fruchtman Seminar.
- A backgrounder will be produced and distributed before the annual meeting.
- An expert will be available for a presentation at the annual meeting.
- The resolution will be modified with more appropriate wording in regard to the mandate.