

## **CRIMINAL LAW SECTION**

### **MINUTES**

#### **ATTENDANCE**

Twenty-six delegates attended the meetings of the Criminal Law Section of the Uniform Law Conference held in Ottawa, Ontario.

#### **OPENING**

David Winkler 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 11, 1996. The heads of each delegation introduced the commissioners attending with them. Again this year the Honourable Owen Kennedy of Newfoundland participated as an observer on behalf of the Canadian Association of Provincial Court Judges; Sheldon Pinx 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**

Sixty resolutions were submitted for consideration by the Section. Of the 60 resolutions, 44 were adopted as proposed or as amended, 11 were defeated and 5 were withdrawn.

A Report of the Publication Bans Committee was considered. After some discussion, the following resolution was proposed and adopted:

That the issue areas identified in the Report be considered by Federal Justice for legislative amendment as required and that the Report be revised according to the discussion and used for further consultation as appropriate.  
[See Appendix H at <http://www.law.ualberta.ca/alri/ulc.>]

(Carried: 22-0-0)

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The Publications Ban Committee, which had been established as a result of a resolution adopted at the 1994 Conference, was commended for its excellent work. The Secretary of the Section was asked to write Graeme Mitchell and Jack Watson, the two members of the Committee who were not in attendance, in order to express the appreciation of the Section for their efforts.

Larissa Eason of Federal Justice presented a discussion paper "Should Plea Comprehension Inquiries be Codified?" Yvan Roy led a discussion based on a paper prepared by the Federal-Provincial-Territorial working Group on Multicultural and Race Relations in the Justice System entitled "Consideration of the Continued Use of a Religious Oath in a Pluralistic Society".

### REPORT OF THE SENIOR FEDERAL DELEGATE

The Section agreed that the remarks of the Honourable Shaughnessy Cohen, M.P., concerning the Criminal Law Section of the Conference given in her address at the banquet, Wednesday, August 14, provided an excellent report of the action taken by the government on Uniform Law Conference resolutions. The relevant portion is set out below:

"I would like to turn from your work on the law of commerce to make a few remarks about the role and the contribution of the Uniform Law Conference to the development of the criminal law of Canada.

As you know, my work as chair of the Standing Committee on Justice and Legal Affairs allows me to say from my personal knowledge that there has been a remarkable amount of legislative and Parliamentary activity in the criminal law area since my government took office in 1993.

In the first session of the 35th Parliament we considered and enacted such legislation as:

- Bill C-8, which brought into line with modern times the level of force that can be used to carry out arrests;
- Bill C-37, which made significant amendments to the *Young Offenders Act*;

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- Bill C-41, the sentencing legislation that will soon come into force;
- Bill C-42, with its over 100 miscellaneous amendments;
- Bill C-68, the new firearms scheme;
- Bill C-72, on the intoxication defence; and
- Bill C-104, providing for DNA warrants.

Only several months into the Second Session, we have before us four significant bills:

Bill C-17, which has over 140 proposed amendments to the *Criminal Code* and related statutes, and Bill C-27, which has provisions in relation to child prostitution, criminal harassment, female genital mutilation and child sex tourism. These bills have received second reading and have been referred to my Committee.

There is also Bill C-45, dealing with judicial review of parole ineligibility, which has been considered by my Committee, and which, I am sure, will receive early consideration by the House when it returns next month. Finally, there is Bill C-46, which concerns the production of records in sexual offence proceedings. All of these bills, and given the energy of the Minister of Justice, I am sure several others, will keep me and my colleagues occupied in the coming months.

For much of this heavy criminal law agenda, I have been informed, I owe a large vote of thanks to the Criminal Law Section of this Conference. I understand, for instance, that the federal government of the day was urged through a resolution adopted in 1989 to enact the amendments to limit the use of justifiable force by peace officers in carrying out arrests. This led to Bill C-8. The Criminal Law Section also considered discussion papers and adopted resolutions, which inspired the enactment Bill C-104, enabling the police to obtain DNA warrants.

I understand further that Bill C-42, the miscellaneous criminal law amendment act that was brought into force in 1995, implemented over eighty of your

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resolutions. Your contribution was noted during debate by my colleague Sue Barnes who indicated that, and I quote, 'each proposal fell within one or more of the categories said to be generally encompassed by Uniform Law Conference resolutions.'

These categories covered proposals directed at, and I further quote:

- improving public confidence in our criminal justice system;
- making the *Criminal Code* provisions more effective or more efficient;
- implementing or achieving compliance with court decisions;
- filling perceived gaps in the *Criminal Code*;
- taking advantage of advances in computer, communications and video technology;
- improving court procedures; and,
- ensuring greater fairness to the participants in the procedural process".

Bill C-42 has been in force for some eighteen months and has been well received. So well, in fact, that my colleague Allan Rock introduced an even bigger follow-up, Bill C-17, that is also, in large part, based on resolutions of the Criminal Law Section.

The contribution of this Conference in relation to both these bills was recognized by my colleague, Gordon Kirkby, during the second reading debate on Bill C-17. Some of his remarks bear repeating and should be of interest to you.

He noted that, and I quote,

"In developing this Bill, we have taken great care to obtain the input of those who have the greatest knowledge and hands-on experience with our criminal justice system" and that "the amendments in the bill originate from the Criminal Law Section of the Uniform Law Conference of Canada, from the former Law Reform Commission of Canada, from numerous judges of provincial and federal courts, from members of the bar, from the Canadian Association of Chiefs of Police, from the Canadian Police Association, the front-line officers, and from federal and provincial justice departments and officials".

After reviewing a number of its provisions he concluded by noting that the

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"over 140 clauses of the bill contain many provisions that are technical and may not attract attention ..., but they are all aimed at improving the administration of criminal justice in Canada and the confidence the public must have in our criminal law".

Even the official opposition was supportive of the bill.

I hope you take what was said about Bills C-42 and C-17 as a compliment to your work over the past several years. And I hope that by seeing many of the resolutions that you have initiated, debated and adopted now translated into law, you will be motivated to continue to keep a critical eye on the criminal law of Canada to ensure that it keeps in tune with the needs of all of us, and increases the public's confidence in our criminal justice system.

I look forward, in a month or so, to considering this bill in Committee. The opportunity of addressing you tonight will allow me to put what I will be hearing in a more human and much less arid context!"



### **CLOSING REPORT OF THE SENIOR FEDERAL DELEGATE**

The Chair thanked the delegates for their cooperation which enabled the Section to deal with a very heavy workload. The nominating committee recommended that Earl Fruchtmann of Ontario be elected Chair for the 1997 meetings. A motion thanking David Winkler and Fred Bobiasz for their efforts in making this an interesting and productive conference was enthusiastically adopted.

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### RESOLUTIONS

#### I - ALBERTA

**ITEM 1** Interim Release, No Communication Term  

*That section 516 of the Code be amended by adding a provision enabling a justice to make an order that the accused abstain from contacting any witness or other named person prior to the show cause hearing.*

(Carried: 13-5-2)

#### II - BRITISH COLUMBIA

**ITEM 1** Notice of Greater Punishment/Firearms Prohibitions

*That section 665(6) of the Criminal Code be created to provide that section 665 does not apply to section 100.*

(Defeated: 2-13-2)

**ITEM 2** Amend section 100 of the Criminal Code to impose firearm prohibitions

*That section 100(1) be amended by inserting the wording "or found not criminally responsible on account of mental disorder" after the words "section 736" so that the section reads "where an offender is convicted, or discharged under section 736, or found not criminally responsible on account of mental disorder of an indictable offence ...."*

*Amend section 100(2) by inserting the words "or found not criminally responsible on account of mental disorder" after the words "section 736".*

(Defeated: 3-17-3)

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### ITEM 3 Move the drug paraphernalia offence provisions from the *Criminal Code*

*That section 462.2 of the Criminal Code be moved into the Narcotics Control Act or Controlled Drugs and Substances Act.*

(Carried: 13-0-6)

### ITEM 4 Private Informations

*That Section 507(1) be amended by adding the following:*

- (c) *where a Justice declines to issue process under subsection (b) the Justice shall endorse the Information accordingly; and*
- (d) *where a Justice endorses an Information under subsection (c) the information shall be deemed never to have been laid unless the informant commences proceedings to compel the Justice to issue process within 30 days.*

(Carried: 17-0-2)

### ITEM 5 Sequestering Juries

*That section 647(1) of the Criminal Code be amended by deleting the words "at any time before the jury retires to consider its verdict".*

(Defeated: 1-16-1)

## III - MANITOBA

### ITEM 1 Victims of Incarcerated Offenders

*That the sentencing provisions of the Criminal Code be amended to allow the*

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*sentencing judge the power to prohibit the offender from having any contact with specified individuals during the service of the sentence. A breach of the order should be an offence subject to further prosecution. There should be a power to vary the order due to changed circumstances.*

(Carried: 20-0-1 )

### **ITEM 2 Spousal Competence**

*That the Criminal Law Section form a committee to study the issue of spousal competence and to provide the 1997 meeting with recommendations for changes in the law in this area.*

(Carried: 19-0-2)

### **ITEM 3 Delete the requirement to specify the names of jurors**

*That the Department of Justice amend sections of the Criminal Code that require calling out of the names of jurors in the empanelling process, to allow the presiding Judge discretion to order that the calling out of jurors be done by number and not by name.*

(Carried: 18-1-2)

### **ITEM 4 Provide for an increased sentence under the Criminal Code for gang membership**

*That the Department of Justice amend the Criminal Code to provide that, where gang membership can be shown to be a factor in the commission of an offence, there shall be a minimum consecutive additional sentence.*

(Defeated: 1-19-0)



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### IV - NEW BRUNSWICK

#### ITEM 1 Breach of Probation

1. *That section 732.1 CC be amended to contain a rebuttable presumption that when the accused has signed a Probation Order the accused is deemed to have received a copy of the Probation Order, to understand the conditions in it, to understand the procedure necessary to change the conditions, to understand the risk of revocation on the commission of another offence, and to be aware of the penalty for breach of probation.*
2. *That the Probation Order [Form 46] reproduce subsection 732.2(3) and (5) and section 733.1 of the Criminal Code. It is also proposed that section 732.1 be amended to require an offender who is bound by a Probation Order to endorse the Order acknowledging receipt of a copy of the Order and that the Order has been explained to the accused [similar to section 260(2) CC].*
3. *That section 732.1 CC be amended to contain a rebuttable presumption enabling the Crown to establish the element of identity of the probationer based on similarity of name, similar to the provision for proof of prior convictions in section 667 (2.1) CC.*

(Carried: 13-2-4)

#### ITEM 2 Criminal Voyeurism

*That Part V of the Criminal Code be amended to create a specific offence to sanction conduct that involves the surreptitious, non-consensual viewing/photographing/videotaping of a person for a sexual purpose, within a dwelling house or business premises, where there is an expectation of privacy.*

(Carried: 16-1-3)

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### V - ONTARIO

#### ITEM 1 Offence of municipal corruption

*Amend section 123(1) to clarify that there are two offences and four ways of committing these offences.*

(Carried: 19-0-0)

#### ITEM 2 Abduction of a child by the custodial parent

*Amend section 282 to include the situation where the (custodial) parent actions will substantially deprive the access parent of his/her right to access granted under the custody order.*

(Withdrawn)

#### ITEM 3 Protection of identity of witness under eighteen

*Amend section 486(3) to include section 212(4).*

(Carried: 18-0-2)

#### ITEM 4 Use of electronic interception of private communications to investigate offences of wilful promotion of hatred

1. *Amend the definition of "offence" in section 183 of the Criminal Code to include section 319(2).*
2. *Amend the definition of "enterprise crime offence" in section 462.3 to include section 319(2).*

(Carried: 18-0-2)

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**ITEM 5** Providing charges in official language of trial

*Amend section 530.1 to require that, where the accused requests, the charges and formal particulars be made available to the accused as soon as practicable in the official language of that accused.*

(Carried: 19-0-1)

**VI - QUEBEC** /

**ITEM 1** Appearance by a person released by a judge of the Court of Appeal

*That subsection 524(3) be amended to include the following after the expression "under subsection 522(3) by a judge of the superior court of criminal jurisdiction of any province": "or under section 679 of the Criminal Code by a judge of the court of appeal".*

(Carried: 20-0-0)

**ITEM 2** Prohibition order against persons not criminally responsible

*That section 672.54 of the Criminal Code be amended to provide appropriate conditions that may be imposed, including conditions:*

*(a) prohibiting the possession of firearms;*

(Carried: 17-4-1)

*(b) prohibiting or limiting a person's driving privileges.*

(Defeated: 6-14-2)

**ITEM 3** Procedure for sealing

*That the procedure set out in subsection 184.3(3) apply where the application*

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*for an electronic surveillance authorization under section 188 of the Criminal Code is made orally in person.*

(Carried: 21-0-1)

### **ITEM 4** Obtaining electronic surveillance authorization by means of telecommunication

*That section 188 be amended to allow the application for authorization to be made by telephone or another means of telecommunication, if the circumstances make it impracticable for the applicant to attend personally before the judge.*

(Carried: 20-0-2)

### **ITEM 5** Joining an application for video surveillance to an electronic surveillance authorization

*That a provision be included in the Criminal Code to allow an application for a video surveillance warrant and an electronic surveillance application to be joined in a single application.*

(Carried: 21-0-1)

### **ITEM 6** Power of a judge who confirms an electronic surveillance authorization

*Amend section 487.02 to confer the power set out in that section on a judge who confirms an electronic surveillance authorization under subsection 188.1(2).*

(Carried: 20-0-2)

### **ITEM 7** Abduction of a child by one of the parents

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*That the federal Department of Justice examine the issue of a person who takes or receives a child outside Canada and refuses to return the child to Canada in violation of the provisions of a custody order or with the effect of denying access to anyone lawfully entitled thereto with a view to solving any problems by legislative amendment, international agreement or otherwise.*

(Carried: 16-0-4)

### **ITEM 8** Definition of the expression "place" in subsection 348(3)

*Amend the definition of "place" \ "endroit" in subsection 348(3) of the Criminal Code to adjust the aspect relating to "vessel" \ "navire" to encompass boats larger than the common ordinary un-powered, un-enclosed pleasure craft.*

(Carried: 21-0-0)

### **ITEM 9** Entering a dwelling house

*Amend section 349 of the Criminal Code to prohibit anyone from entering or being in a dwelling house without the authorization of the occupant.*

(Defeated: 8-9-1)

### **ITEM 10** Impose more severe sanctions for the offences set out in s.372(1) and s.437

*That the offences set out in subsection 372(1) and section 437 of the Criminal Code become hybrid offences subject to five years' imprisonment.*

(Defeated: 5-10-4)

### **ITEM 11** Discrepancy between French and English versions

*That the French version of section 434.1 be amended to make it consistent with the English version.*

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(Carried: 19-0-1)

### **ITEM 12** Release of persons arrested with a warrant under s.475, 544 and 800(2)

*That subsection 597(3) be amended so that the power to release is also given to a justice.*

*That sections 475, 544 and 800(2) be amended to give a judge who issues an arrest warrant the power to authorize the release of the accused under section 499 of the Criminal Code.*

(Carried: 18-0-3)

### **ITEM 13** Prohibition on the accused personally cross-examining the witness

*That the protection against cross-examination by the accused set out in subsection 486(2.3) be extended to witnesses under the age of 18 years and that subsection (1.1) be amended accordingly.*

(Defeated: 6-15-1)

*That in cases in which no available lawyer agrees to represent the accused, or where the accused does not wish to be represented by counsel, the judge have the power to screen the questions that the accused wishes to put to the witness.*

(Defeated: 6-13-3)

### **ITEM 14** Warrant to obtain information by means of a duplicate beeper

*That a paragraph (c) be added to subsection 492.2(1) to refer to a duplicate beeper.*

(Carried: 14-2-6)

### **ITEM 15** Arrest by a person who is not a peace officer

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*That subsection 494(3) be amended to read as follows:*

*(3) Any one other than a peace officer who arrests a person without warrant shall forthwith notify a peace officer and*

*(a) release the person if the police officer so directs, or*

*(b) detain the person in custody until the person is delivered to the peace officer,*

*as the case may be.*

(Carried: 15-0-7)

**ITEM 16** Prohibition on persons detained in custody communicating with victims and witnesses

*That the Criminal Code be amended to prohibit any person who is detained in custody from communicating with any witness or other person designated by the peace officer, between the time the person is detained in custody and the time when the judge makes an order under subsection 515(12) of the Criminal Code.*

(Defeated: 6-15-2)

**ITEM 17** Compellability of the complainant at the release hearing

*That section 518 be amended to provide that the victim is competent to testify but is not compellable except by leave of the court in any proceedings under section 515 of the Criminal Code.*

(Defeated: 7-11-3)

**ITEM 18** Judge authorized to order transfer of the prisoner

*That subsection 527(7) be amended to provide that the power to order the*

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*transfer of a prisoner be given to a provincial court judge, or at least to a judge referred to in section 552 of the Criminal Code.*

(Withdrawn)

### **ITEM 19** Consent to a direct indictment on a non-judicial day

*That it be specified that consent under section 577 of the Criminal Code may be given on a non-judicial day.*

(Carried: 17-0-0)

### **ITEM 20** Disposition by the Review Board on the record

*That the following paragraph be added at the end of section 672.5:*

*[Interim disposition by the Review Board on the record]*

*The Review Board may make a disposition without holding a hearing where the following conditions are present:*

- (a) the accused and the person in charge of the hospital consent;*
- (b) the chairperson of the Review Board is of the opinion that the evidence in the record will likely result in a disposition which is less severe and deprives the accused of liberty to a lesser extent than the situation in which the accused then is;*
- (c) the Review Board will not hold a hearing within a reasonable time.*

*A disposition made pursuant to this subsection may not direct that the accused be discharged absolutely.*

*A disposition made pursuant to this subsection shall have effect until a new disposition is made at a hearing held in accordance with the provisions of section 672.47 and subsection 672.81(1).*

(Defeated: 7-12-2)



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**ITEM 21 Videotaping of statement by complainant**

*That section 715.1 of the Criminal Code be amended so that it also covers a person who, by reason of mental or physical disability, is vulnerable in a manner comparable to a person under the age of 18 years.*

(Carried: 14-5-3)

**ITEM 22 Power of a judge who revokes a suspended sentence**

*That the Criminal Code be amended at the earliest opportunity:*

- (1) *to reflect the recommendation adopted by this Conference in 1989, which was that a court that revokes a suspended sentence have the power to order that the sentence be served consecutive to any other sentence;*
- (2) *to provide that a suspended sentence may be revoked even after expiry of a probation order where the breach of the probation order took place before the order expired.*

(Carried: 21-0-1)

**ITEM 23 Confidentiality of witnesses' occupations and addresses**

*That a provision be added to Part XXII of the Criminal Code so that a person who is called to testify would not have to publicly state his/her home address or occupation unless the court was of the opinion that it was necessary to the proper administration of justice.*

(Withdrawn)

**ITEM 24 Forfeiture of recognizances**

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*That the schedule to section 762 be amended so that, in addition to a judge of the Superior Court, a provincial court judge could have jurisdiction to dispose of an application brought under section 771 of the Criminal Code in respect of a recognizance for the appearance of a person before a provincial court judge or a justice.*

(Carried: 20-0-2)

### **ITEM 25 Establish a system of alternate jurors**

*That a system of alternate jurors for lengthy trials be established in the Criminal Code.*

(Defeated: 7-13-1)

*That the number of jurors could be reduced to eight in lengthy trials.*

(Carried: 11-7-4)

### **ITEM 26 Deleting information erroneously entered in court files**

*That statutory amendments be made so that information that has been erroneously entered in criminal information data banks concerning innocent persons can be deleted.*

(Carried: 21-0-0)

## **VII - SASKATCHEWAN**

### **ITEM 1 Penalty for indecent acts/exposure.**

*That both offences created in section 173 when committed in relation to one or more persons under the age of eighteen be made dual procedure offences.*

(Carried: 13-6-2)

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### ITEM 2 Public Nudity

*That section 174(3), which requires the consent of the Attorney General before proceedings can be commenced under this section, be repealed.*

(Withdrawn)

### ITEM 3 Testimony outside a courtroom or behind a screen

*That section 486(2.1) be amended so that it is available for any offence.*

(Defeated: 7-11-3)

### ITEM 4 Inconsistency between the Criminal Code and the Supreme Court Act

*That section 695(2) of the Criminal Code be repealed.*

(Carried: 21-0-0)

### ITEM 5 Fingerprinting persons under arrest

*That section 2 of the Identification of Criminals Act be amended to permit the Act to apply where a person has been arrested for the commission of an indictable offence. If no charge is laid following the taking of fingerprints, the fingerprints would be destroyed.*

(Carried: 8-5-7)

## VIII - CANADA

### ITEM 1 Reproduction and Simulation of Bank Notes

*That the Department of Justice review section 457 to remove the existing ambiguities, to modernise the language to include technological change while maintaining the spirit of the original legislation.*

(Carried: 21-0-0)

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### **ITEM 2** Disclosure of Income Tax Information

*That subsection 462.48(1) of the Criminal Code be amended to provide for the disclosure of income tax information for an "Enterprise Crime" offence, as defined pursuant to section 462.3 of the Criminal Code.*

(Carried: 13-6-1)

### **ITEM 3** Deemed abandonment of appeals to the Supreme Court

*That subsection 695(2) of the Criminal Code (deemed abandonment of appeals to the Supreme Court) be repealed.*

(Withdrawn in favour of the similar Saskatchewan resolution)

### **ITEM 4** Illegal Possession and Trafficking of Uncut Rough Diamonds

1. *That section 394 of the Criminal Code be amended to include uncut rough diamonds.*
2. *That section 656 of the Criminal Code be amended to include uncut rough diamonds.*

(Carried: 21-0-0)

### **ITEM 5** Unauthorized access of a computer system anywhere in the world

*That the Department of Justice ensure that Canadian law is adequate to deal with offences under section 342.1 of the Criminal Code where someone in Canada obtains unauthorized access or use of a computer or telecommunications facility located outside of Canada.*

(Carried: 19-0-1)

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CANADA (CCCDL)

**ITEM 6** Agents Appearing in Criminal Courts

*That the question of the appropriateness and scope of agents acting in criminal matters be examined by a working group of the Criminal Law Section in liaison with the Executive of the Conference.*

(Carried: 20-0-0)

**ITEM 7** Reasons for Judgment

*That the Criminal Code be amended to provide that trial judges, after a not guilty plea, must provide reasons for judgment.*

(Carried: 14-1-6)

CANADA (CBA)

**ITEM 8** Amend Section 597 of the Criminal Code

*That Section 597(3) of the Criminal Code be amended to provide for the release of an accused on both an undertaking and recognizance.*

(Carried: 20-0-0)

**ITEM 9** Amend Section 759 of the Criminal Code dealing with appeals from the imposition of an indeterminate sentence

*That Section 759 of the Criminal Code be amended to permit that an accused who is found to be a dangerous offender is entitled to appeal a finding of dangerousness alone without having to appeal sentence.*

(Carried: 17-0-3)

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**ITEM 10** Amend the *Criminal Code* to permit an accused charged with an indictable offence to make court appearance either personally or by the representation of counsel

*That the appropriate provisions of the Criminal Code be amended to permit an accused charged with an indictable offence to appear through the representation of counsel unless otherwise directed by the court.*

(Carried: 16-0-4)

**ITEM 11** Amend Section 753 of the Criminal Code

*That Section 753 of the Criminal Code and the provisions relating to dangerous offenders be amended to allow a new trial judge in the event a judge is unable to continue with a dangerous offender hearing, to direct that the evidence heard at the trial may be read in and considered at the dangerous offender hearing.*

(Carried: 14-0-3)

**ITEM 12** Amend Section 527 of the Criminal Code

*That Section 527 of the Criminal Code be amended to permit the applicant to obtain a moving order for a prisoner without requiring the submission of an affidavit and by permitting the application to be made before a provincial court judge, court clerk, or justice of the peace, in person, by telecommunication, or in writing.*

(Carried: 15-0-4)