

Criminal Section Minutes and Resolutions 1997

CRIMINAL LAW SECTION

MINUTES

ATTENDANCE

A total of 22 delegates attended the meetings of the Criminal Section of the Uniform Law Conference held in Whitehorse, Yukon.

OPENING

Earl Fruchtmann presided as Chair and Fred Bobiasz acted as Secretary for the Meetings of the Criminal Section of the Uniform Law Conference. The Section convened to order on Sunday, August 17, 1997. The heads of each delegation introduced the commissioners attending with them. Katherine Ker and Marvin Bloos were with the federal delegation and represented respectively, the Canadian Bar Association and, the Canadian Council of Criminal Defence Lawyers.

REPORT OF THE CHAIR

Fifty-six resolutions were submitted for consideration by the Section. Of the 56 resolutions considered, 36 were adopted as proposed or as amended, 8 were defeated and 12 were withdrawn.

The Report of the Working Group on Agents in Criminal Courts was considered. After some discussion, the following resolution was proposed and adopted:

That the Report with its recommendations be approved in principle and that the Report as revised according to the discussion be distributed to federal, provincial and territorial Justice departments and to provincial and territorial law societies for consideration as appropriate. See Appendix O at <http://www.law.ualberta.ca/alri/ulc/97pro/eagents.htm>

(Carried: 13-0-2)

It was noted that the Working Group which was to study the issue of spousal competence had not completed its study and that it intended to have the report prepared for the 1998 Conference.

REPORT OF THE SENIOR FEDERAL DELEGATE

The Secretary of the Criminal Section gave the report on behalf of the Senior Federal Delegate.

General

Since the last Conference several bills were adopted by Parliament that implemented

proposals considered by the Criminal Section

C-17 - Amendments to the Criminal Code and related Statutes

Bill C-17 was originally tabled in December 1995 as C-118. It received Royal Assent on April 26 and as of June 16 all of it is in force. It contains over one hundred and forty sections. It is estimated that over 80% of the legislation can be traced to ULC resolutions.

C-27 - Child prostitution, sex tourism, criminal harassment and female genital mutilation

Most of what is in Bill 27 was in Bill C-119 which was initially introduced in December 1995 and re-introduced, with additional provisions dealing with child sex tourism, in March, 1996. This Bill was also influenced by the work of this Section. The proposed amendment to s. 231 of the Criminal Code which would classify as first degree murder a murder committed in relation to a criminal harassment offence when the actor intended to cause fear through the harassment was the subject of extensive debate at the 1995 Conference. Other proposed amendments to s. 486 and s. 715.1 originated in resolutions. Bill C-27 received Royal Assent on April 26 and is in force.

CLOSING

The Chair thanked the delegates for their co-operation which enabled the Section to deal with a very heavy workload. The nominating committee recommended that Alex Pringle of Alberta be elected Chair for the 1998 meetings. A motion thanking Earl Fruchtman and Fred Bobiasz for their efforts in making this an interesting and productive conference was enthusiastically adopted.

RESOLUTIONS

I - ALBERTA

ITEM 1

Rules of Court - Charter Applications

That a working group or committee be created to develop a proposal respecting a body of procedural law to govern the conduct of Charter applications.

(Carried: 18-0-0)

ITEM 2

Conditional Discharge - Y.O.A. - Breach of Conditions

That s. 26 of the Young Offenders Act be amended to make it an offence to fail or refuse to comply with the conditions of a conditional discharge.

(Carried: 16-0-0)

ITEM 3

Constitutional Questions Relating to Common Law

That the Rules of the Supreme Court (or the Supreme Court Act, if necessary) be amended to require the stating of constitutional questions when the court intends to utilize the Charter of Rights to overrule or strike down common law rules.

(Withdrawn)

ITEM 4

Judicial Authorization to Arrest in a Dwelling

That the Criminal Code be amended to provide for judicial authorization of entry into a dwelling to effect an arrest.

(Carried: 18-0-0)

ITEM 5

Jury Alternates

That s. 643 of the Criminal Code be amended to allow the judge a discretion to permit the selection of two additional jurors, where the evidence will not commence on the same day as jury selection. Counsel will be allowed additional peremptory challenges in such cases. The amendment would also provide that when 14 jurors attend on the date for the calling of evidence, the additional jurors beyond the 12 required jurors will be excused, the last selection being excused first.

(Carried: 16-2-2)

ITEM 6

Jury Communication

That the issue of interaction between jury members and members of the public, particularly focusing on the circumstances, if any, in which accused persons or members of the media may contact and speak to members of a jury, be recommended to the Law Commission of Canada as a topic worthy of review.

(Carried: 18-0-2)

ITEM 7

Sentence Appeals - New Sentence Hearing

That s. 687 be amended to permit the Court of Appeal to order a new sentence hearing in the trial court where the circumstances warrant it. The amendment could be made by adding a subsection "c" under s. 687(1).

(Defeated: 7-10-0)

II - BRITISH COLUMBIA

ITEM 1

Possession of Break-in Instrument

That s. 351(1) of the Criminal Code be amended by adding the words "or an offence on summary conviction".

(Carried: 18-0-0)

ITEM 2

Substitution of Judges at Transfer Hearings Under the *Young Offenders Act*

*That s. 64 or 16 of the *Young Offenders Act* be amended to allow, with the consent of the parties, transfer hearings to be conducted by a new youth court judge in the event the original judge is unable to continue the proceedings, and to authorize the new youth court judge to continue taking the evidence at the point at which the interruption in the taking of the evidence occurred.*

(Carried: 19-0-0)

ITEM 3

Prosecution for Non-Compliance with Alternative Measures

1. That s. 717 of the Criminal Code be amended to allow for the 6 month limitation period for summary conviction offences to begin on the date of non-compliance with alternative measures.

2. That s. 4 of the Young Offenders Act be amended to allow for the 6 month limitation period for summary conviction offences to begin on the date of non-compliance with alternative measures.

(Carried: 9-6-5)

ITEM 4

Probation Orders

That s. 731(1)(b) of the Criminal Code be amended by replacing the word "two" with the word "five".

(Withdrawn)

ITEM 5

Probation Orders

That s. 732.2(2)(b) of the Criminal Code be amended by replacing the word "three" with the word "five".

(Withdrawn)

III - MANITOBA

ITEM 1

Creation of a New Offence of "Prison Riot"

That a new offence of "prison riot", punishable by a maximum of ten (10) years imprisonment, should be included in the Criminal Code.

(Defeated: 5-7-8)

ITEM 2

Drafting a provision for the Criminal Code that would prevent

an individual from habitually initiating frivolous vexatious legal proceedings

That the Criminal Code be amended to provide that, on application by an Attorney General, if a superior court is satisfied that any person has habitually and persistently:

a) initiated frivolous or vexatious legal proceedings; or

b) made frivolous or vexatious applications in any legal proceedings;

the court may make an order, having given that person an opportunity to be heard:

1. That no legal proceedings shall be instituted by that person without leave of the superior court.

2. *That any legal proceeding initiated by that person, before the making of the order, shall not be continued without leave of the superior court.*
3. *That no application, (other than an application for leave) shall be made by that person in any legal proceeding in any court.*
4. *That no leave is to be granted by the superior court unless the superior court is satisfied that the proceedings or application are not an abuse of the process of the court in question.*

(Carried: 15-1-3)

ITEM 3

Home Invasions

It is recommended that Parliament give consideration to the recognition of a separate offence of "home invasion: where the intent or result of the break and enter is to perpetrate some form of violence against the resident(s).

It is further recommended that this offence be punished by a maximum of life imprisonment.

(Defeated: 2-17-0)

ITEM 4

Judicial Interim Release - Direct or Preferred Indictments Charging Same Offence

That the Criminal Code be amended to allow for the same form of release or detention to be continued where a direct indictment is filed with the court alleging the same or included offences. Further, that the Criminal Code be amended to allow for this order of detention or release to be reviewed by a Superior Court Judge upon the application of the prosecutor or the accused.

(Carried: 18-1-0)

ITEM 5

Appeal of Conditional Sentences

That s. 683(5) be amended by adding an additional condition as follows:

(e) the running of the conditional sentence.

In these cases the Court of Appeal should also have the authority to continue the accused on bail pending appeal with appropriate conditions.

(Defeated: 1-13-6)

IV - ONTARIO

ITEM 1

Indecency

Amend s.173 to provide a definition of indecency that reflects the following:

An act is indecent where:

1. (i) it occurs in a place where members of the public would not be expected to be present as part of their ordinary course of activities, and

(ii) the contemporary Canadian community would not tolerate others being willingly exposed to it; or

2. (i) it occurs in place where members of the public would be expected to be present as part of their ordinary course of activities, and

(ii) the contemporary Canadian community would not tolerate themselves or others being unwillingly exposed to it.

(Withdrawn)

ITEM 2

Public nudity

Amend s. 174(2) to separate the public indecency and public order elements of partial nudity and provide that where a person is partially nude in a public place and causes a disruption to public order, that person will be deemed to be nude for the purposes of s.174(1).

(Withdrawn)

ITEM 3

Indecency and Public Nudity

That a working group of the Criminal Section of the Uniform Law Conference be established to examine the indecency and public nudity provisions of the Criminal Code, as well as the legal and constitutional issues related to the feasibility of local (i.e. municipal) regulations and to report back at the next Conference.

(Carried: 12-3-4)

ITEM 4

Testimonial assistance and identity protection where charge is break and enter

(1) That s.486(2.1) and (3) be amended to include s.348 where the intent is to commit one of the offences listed in the subsection.

(Carried: 12-6-1)

(2) That s.486(2.1) and (3) be amended to include s.348 where one of the offences listed in

the subsection is committed.

(Carried: 20-0-0)

ITEM 5

Arrest by a person other than a peace officer

Amend s. 494(3) to allow the release of the person arrested where that person has identified him/herself so that he/she can be served with a summons.

(Withdrawn)

ITEM 6

Arrest of accused on interim release

Amend s.524 so that a justice can exercise the jurisdiction under s.524(3) and (8) where an accused has been taken before that justice pursuant to a lawful arrest for the commission of an indictable offence

(Carried:14-4-1)

ITEM 7

Evidence on a breach of a conditional sentence hearing

Amend s. 742.6(4) to provide that the written report of the supervisor is admissible in evidence without the need to call the supervisor as a witness

(Carried: 14-2-1)

ITEM 8

Combative Sports

That s.83(2) be amended to provide for the following:

In this section, "prize fight" means an encounter or fight with fists or hands between two persons who have met for that purpose by previous arrangement made by or for them, but the following shall be deemed not to be a prize fight:

1. a boxing contest between amateur sportsmen, where the contestants wear boxing gloves of not less than one hundred and forty grams each in mass, or any boxing contest held with the permission or under the authority of an athletic board or commission or similar body established by or under the authority of the legislature of a province for the control of sport within the province; or

2. any sport contest whose umpires or referees enforce rules that do not permit:

i. hitting the back of an opponent's head;

ii. gouging, scratching or biting;

iii. kneeling or elbowing;

iv. purposely striking an opponent who is down or is in the process of arising after being down; or

3. any sport contest held under the auspices of a sport organization identified by the Lieutenant Governor in Council of a province or a person or authority designated by the Lieutenant Governor in Council of a province to make such an identification.

(Withdrawn)

ITEM 9

Self Defence

That ss. 34(2) be amended as follows:

Everyone who is unlawfully assaulted and who intentionally causes death or grievous bodily harm in repelling the attack is justified if ...

(Defeated: 3-8-7)

ITEM 10

Floor Resolution

That the Department of Justice proceed on an urgent basis with the completion of its review and the preparing of amendments in respect of the law of self-defence.

(Carried: 19-0-0)

V - ONTARIO (Criminal Lawyers' Association)

ITEM 1

Fees charged for disclosure

That the Criminal Section of the ULC approve in principle the matters set out in the Annex to these minutes in relation to disclosure; and that the Federal/Provincial Heads of Prosecution Committee be requested to provide views and comments so that they may be discussed at next years conference.

(Carried: 18-0-1)

ITEM 2

Court Documents

(1) Accused persons should be entitled to a copy of all court documents such as informations, indictments, bail orders, etc. (but not transcripts) in relation to their case without fee for reproduction, inspection or search.

(2) No fee shall be payable by accuseds to inspect their court file or to the court for searching their file.

(Carried: 13-0-6)

VI - QUEBEC

ITEM 1

Relocation of the offences set out in s. 250 of the *Criminal Code*

Relocate the offences set out in s. 250 to the Collision Regulations, C.R.C., c. 1416, made under the Canada Shipping Act, R.S.C., c. S-9.

(Carried: 18-0-1)

ITEM 2

Scope of the offence of failing to stop a vehicle that is involved in an accident

(1) Amend s. 252 of the Criminal Code to cover a situation involving the loss of one of the components or part of the load of the vehicle, boat or aircraft.

(Carried: 8-4-8)

(2) Amend s. 252 of the Criminal Code to cover a situation involving the loss of one of the components or part of the load of the vehicle, boat or aircraft without making the presumption in ss. 252(2) applicable to this case.

(Defeated: 4-8-9)

ITEM 3

Telewarrant to obtain a blood sample under s. 256

Amend s. 256 to provide that a telewarrant may be executed in a province other than that in which it is issued if the person executing it is accompanied by a peace officer authorized to execute his or her duty in the territorial division where the telewarrant is executed.

(Carried: 18-0-0)

ITEM 4

Penalty for a young offender's breach of a condition in an order for discharge

S. 26 of the Young Offenders Act should be amended to include a breach of an order made pursuant to paragraph 20(1)(a.1) of the Young Offenders Act.

(Withdrawn)

ITEM 5

Addition of offences relating to credit cards and the unauthorized

use of computers to the definition of "enterprise crime offence"

That the offences relating to credit cards and the unauthorized use of computers be added to the definition of "enterprise crime offence" in s. 462.3.

(Carried: 21-0-0)

ITEM 6

Use of a certified copy of the document on which charges are based for

the purposes of the application of s. 478 and s. 479 of the Criminal Code

That a subsection be added to s. 478 and s. 479 expressly stating that the court does not lose its jurisdiction when it renders judgment on the basis of a certified copy of the document (information or indictment) on which the charges are based, even when a means of communication that provides a written copy is used.

(Carried: 19-0-2)

ITEM 7

Prohibition of access to information used to support an application for

search warrants, restraint orders, wiretap authorizations or arrest warrants

That s. 487.3 apply to the issuance of:

(1) any search warrant;

(2) any restraint order; and

(3) any arrest warrant and that the judicial authority be able to prohibit disclosure of the very existence of the warrant as long as it has not been executed

(Carried: 18-0-3)

ITEM 8

Revocation of pardon for persons convicted of a hybrid offence

(1) That the ambiguity in s. 7.2 of the Criminal Records Act be rectified to conform the English version with the French so that there will be an automatic revocation where there is a conviction for an offence which may be prosecuted on indictment.

(Carried: 11-7-2)

(2) The Criminal Section of the ULC recommends that there be a review of the Criminal Records Act as to the law and process involved in respect of sexual offences, violent offences, and of both adult and young offenders.

(Carried: 16-0-0)

ITEM 9

Restricted access to victim impact statements and pre-sentencing reports

The Criminal Code should be amended to:

(a) include the rule that the pre-sentencing reports, including the victim impact statement, referred to in s. 722 and s. 745.6(3) are not accessible to the public;

(b) provide that the prosecution, defence or any person responsible for the administration of the sentence should have access to these reports;

(c) provide that these reports should be sealed and kept for the period and under the conditions determined by the Lieutenant-Governor in Council.

(Withdrawn)

ITEM 10

Execution of warrants within a province

(1) That it be possible to execute any warrant anywhere in the province in which it is issued without any need for it to be endorsed.

(Carried: 19-0-1)

(2) The rules governing the intra- or inter-provincial execution of warrants should be brought together in Part XIV of the Criminal Code

(Carried: 17-0-3)

VII - SASKATCHEWAN

ITEM 1

DNA Warrants

That s. 487.04 be amended to add the offences of impaired driving causing bodily harm (s. 255(2)); impaired driving causing death (s. 255(3)); dangerous driving causing bodily harm (s. 249(3)); and dangerous driving causing death (s. 249(4)).

(Carried: 15-0-4)

ITEM 2

Endorsement of arrest warrants authorizing the release of the accused

That s. 507(6), Form 29 and s. 499 be amended to provide that the police may release a person arrested with a warrant unless the warrant has been endorsed to prohibit release.

(Withdrawn)

ITEM 3

Enforcement of Conditional Sentences

(1) That s. 742.6 be amended to provide in ss. (3) that the breach allegation must be heard within 30 days, or as soon as practicable after the date of the offender's arrest, where a warrant was issued, or the date when the accused first appeared in court in answer to a summons when a summons was issued.

(Carried: 11-2-7)

(2) That ss. (9) of s. 742.6 be amended to provide that where the court is satisfied that the offender has breached a condition of the conditional sentence the court shall determine the period of time during which the breach occurred.

(Carried: 11-0-9)

(3) That a new provision be added to s. 742.6 to the effect that the conditional sentence does not continue during any period of time identified by the court under paragraph (b) as being a period during which the offender was in breach of the conditional sentence.

(Carried: 12-1-7)

ITEM 4

Notice to the Attorneys General when the constitutional validity of
a common law rule is challenged in the Supreme Court of Canada

That the Chair of the Criminal Section convey to Mr. Justice Sopinka, as Chair of the committee called "Project 2000", the concern of the Criminal Section that there should be consistency in the process involved where the constitutionality of a common law rule is at issue with the process where the constitutionality of a statutory provision is at issue, such as the stating of a constitutional question, notification and intervention of Attorneys General.

(Carried: 20-0-0)

ITEM

Proposed From the Floor

That the Chair of the Criminal Section convey to Mr. Justice Sopinka, as Chair of the committee called "Project 2000", the concern of the Criminal Section that there should be consistency in the process involved where the constitutionality of a common law rule is at issue with the process where the constitutionality of a statutory provision is at issue, such as the stating of a constitutional question and notification of defence bar.

(Carried: 16-1-2)

VIII- CANADA

ITEM 1

Removal of Equipment after the Expiration of an Authorization

That s. 186 of the Criminal Code be amended to include (1) the authority to remove any thing by means of which the private communication may be intercepted within a reasonable time after the expiration period of the authorization. In the alternative, that authority similar to s. 23 of the CSIS Act be included in the Criminal Code.

(Carried: 20-0-0)

ITEM 2

Breach of a Conditional Sentence Order and Powers of Arrest

That the Department of Justice amend the Criminal Code to give a peace officer the power to arrest when an offender breaches a condition of the conditional sentence order or provide legislative direction as to how an offender who breaches the condition should be dealt with.

(Carried: 20-0-0)

ITEM 3

DNA Warrant Legislation - infanticide

That s. 487.04 of the Criminal Code be amended to include s. 237 in the designated offences list.

(Carried: 18-1-1)

ITEM 4

DNA Warrant Legislation- vehicular offences causing death or bodily harm

That s. 487.04 Criminal Code be amended to include ss. 249(3), "dangerous operation causing bodily harm"; ss. 249(4), "dangerous operation causing death"; ss. 255(2), "impaired driving causing bodily harm"; and, ss. 255(3), "impaired driving causing death", in the designated offences list.

(Withdrawn)

ITEM 5

Prize Fights

That s. 83 of the Criminal Code (prize fighting) be amended for the purpose of modernizing it and making allowance for sanctioned sport contests conducted under the auspices of recognized combative sports organizations.

(Carried: 20-0-0)

IX - CANADA (National Criminal Justice Section, Canadian Bar Association)

ITEM 1

Amend s. 187 (1.4) of the Criminal Code

That s. 187(1.4) of the Criminal Code be amended so that the application to open the sealed packet may be brought, prior to the preliminary inquiry, before a judge of the court before whom the trial is to be held.

(Carried: 9-3-6)

ITEM 2

Amend the Criminal Code and the Young Offenders Act to permit young offenders to receive conditional sentences when sentenced to serve secure or open custody.

The s. 20 of the Young Offenders Act be amended to permit conditional sentences as a disposition for young offenders

(Defeated: 5-11-4)

ITEM 3

Amend s. 561(1)(b) and (c) of the Criminal Code dealing with the re-election by an accused of the mode of trial after the completion of the preliminary inquiry.

That s. 561(1)(b) and (c) of the Criminal Code be amended to permit the accused to re-elect the mode of trial, as of right from trial before judge and jury, to trial before a judge alone, 60 days prior to the commencement of the trial and thereafter only with the consent of the Crown.

(Defeated: 5-8-5)

ITEM 4

Excluding the panel during a challenge for cause during jury selection

That the Criminal Code be amended to require, upon application by the accused, the jury panel to be excluded from the room during a challenge for cause pursuant to s. 640.

That the selected jurors shall (with the consent of counsel) or may, upon application by counsel and where the judge considers it appropriate to do so, exclude those jurors

(Carried: 18-0-2)

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ANNEX (Criminal Lawyers' Association)

Fees Charged for Disclosure

Introduction: Where disclosure obligation exists pursuant to case law, the following apply in the absence of a court order to the contrary.

A. In relation to evidence relied upon by the prosecution:

(1) the accused is entitled to a copy of all information readily capable of reproduction

(2) in relation to audio/video tapes of statements and actions of the accused, co-accused and the complainant shall be provided without fee and without the requirement on the defence to provide blank tapes

- subject to a court ruling, reasonable restrictions may

be placed upon the disclosure of witness statements

(3) in relation to audio/video tapes of other witnesses, a copy(copies) shall be provided without charge for the reproduction. The defence may be required to provide blank tapes.

B. In relation to all other relevant information not relied upon by the prosecution:

(1) the accused is entitled to reasonable access without charge

(2) where copies of the information are requested by the accused and the parties cannot agree upon a method/payment for the disclosure, either party may apply to a court of competent jurisdiction for directions.