St. John's, Newfoundland & Labrador

August 21-25, 2005

CRIMINAL SECTION MINUTES

Attendance

Thirty-six (36) delegates representing all jurisdictions except Nunavut, Prince Edward Island, Northwest Territories and the Yukon attended the Criminal Section. All jurisdictions were represented at the Conference as a whole. Delegates included Crown, defence counsel, policy counsel, academics, and members of the judiciary. Guests included the President of the Law Commission of Canada as well as the President of the National Conference of Commissioners on Uniform State Laws.

Opening

Bart Rosborough, presided as Chair of the Criminal Section. Stéphanie O'Connor, acted as Secretary. The Section convened to order on Sunday, August 21, 2005.

The Heads of each delegation introduced their delegation.

Proceedings

During the 2004 proceedings, the Chair tabled a consolidated version of the *Rules of Procedure* of the Criminal Section for consideration by delegates. It was agreed that the Steering Committee of the Criminal Section would review the *Rules* and a vote with respect to the *Rules* would follow at the 2005 Conference. The Steering Committee reviewed the consolidated version and suggested minor changes. The consolidated version of the *Rules* includes amendments made in recent years including the resolution submitted by British Columbia proposing a change to the order of proceedings of the Criminal Section, beginning in 2002. A resolution adopting the consolidated version of the *Rules of Procedure* of the Criminal Section (updated to July 2005) was unanimously carried.

Report of the Senior Federal Delegate (Attached as Annex 1)

The Report of the Senior Federal Delegate was tabled and presented by Catherine Kane, Acting General Counsel, Criminal Law Policy Section and Director, Policy Centre for Victim Issues, Department of Justice Canada.

Resolutions (Attached as Annex 2)

Forty-three (43) resolutions were presented by jurisdictions for consideration including two (2) floor resolutions and one submitted as a three-part resolution. Eight (8) resolutions were withdrawn without discussion, some due to similar resolutions presented and one as a result of a bill passed in Parliament addressing the issue. In addition, during the proceedings, two resolutions were divided in several parts and voted on separately. As a result, forty (40) resolutions were considered by delegates, twenty-six (26) resolutions were carried as submitted or amended, six (6) were defeated as proposed or amended and eight (8) were withdrawn following discussion.

(In some instances the total number of votes varies due to the absence of some delegates for some part of the proceedings).

reports of the uniform law conference of canada - criminal section

Criminal Section Working Group Report: Defence Election Regarding Mode of Trial in Direct Indictment Cases

Glen Reid, Senior Crown Attorney, Manitoba Justice, Prosecutions - Policy & Planning presented the Report of the ULCC Criminal Section Working Group on Defence Election Regarding Mode of Trial in Direct Indictment Cases. This Working Group Report is the result of a 2004 ULC Criminal Section resolution, which called for the creation of a ULCC Working Group to explore the issue of whether the defence should be permitted to elect its mode of trial in cases where the Crown proceeds by way of direct indictment. A working group was formed and included members from Manitoba, Ontario, Canada as well as a representative of the Canadian Bar Association.

The Report focused on five issues: (1) whether there is merit to the proposal; (2) the effect of s. 568 of the *Criminal Code*; (3) the availability of

an election before a provincial court in a direct indictment proceeding; (4) the right to re-election; and (5) *Charter* considerations.

Following discussion on the Working Group Report, the following resolution was carried:

That subsection 565(2) of the *Criminal Code* be amended to permit an accused to elect either a judge and jury trial or a trial by judge alone in the superior court. The expanded choice of mode of trial should, however, be subject to the Attorney General's power under s. 568 to require a jury trial and should be accompanied by a time limited right to re-elect the mode of trial.

Carried: 20-1-4

Criminal Section Working Group Report on Probation

Josh Hawkes, Appellate Counsel, Criminal Justice Division, Alberta Justice, presented the ULCC Working Group Report on Probation. This Report is the result of a 2004 ULCC resolution, which called for the Criminal Section of the Uniform Law Conference of Canada to make proposals to Justice Canada on how best to address the issue of an automatic nullification of a probation order when a sentence of imprisonment is in excess of two years. A Working Group comprised of members from Alberta, Saskatchewan, British Columbia, Quebec and Canada was formed to explore options.

Josh Hawkes provided an overview of the report noting that Section 139 of the *Corrections and Conditional Release Act*and Section 731 of the *Criminal Code* both require reform to address the challenge in crafting the most appropriate sentence for an offender and in administering the sentence. The CCRA provision operates to merge sentences for ease of sentence administration, but in so doing, a merged sentence may exceed 2 years and make a probation order imposed after a jail sentence a nullity. For example, where a merged sentence of 26 months invalidates a probation order of 3 years imposed on an original 12 month sentence, the probationary period, which may be the most necessary aspect for supervision and rehabilitation of the offender will not be enforced.

Delegates noted that this is a real problem and that ULCC had called for reforms many times in the past. Some expressed the view that probation orders are of minimal benefit beyond a 2 year sentence and also questioned at what point in a cumulative sentence of several years should a probation order not be possible.

The delegates discussed the options recommended by the Working Group and agreed that the proposed approach provided sufficient flexibility for judges to craft appropriate sentences.

The following 2 resolutions proposed by the Working Group were discussed and carried:

A- Probation orders can be a vital component of a fit sentence and critical to accomplishing many of the fundamental objectives of sentencing articulated in the *Criminal Code*. Subsection 139 (1) of the *Corrections and Conditional Release Act* operates in conjunction with paragraph 731(1)(*b*) of the *Criminal Code* to automatically nullify probation orders in many instances. Section 139 of the *Corrections and Conditional Release Act* should be amended to indicate that it does not affect the calculation of the length of the term of imprisonment for the purposes of paragraph 731(1)(*b*) of the *Criminal Code*.

Carried: 21-4-2

B- Subsections 732.2 (3) and (5) of the *Criminal Code* should be expanded to permit a court imposing a probation order to relieve an offender of compliance with any of the conditions of the order at any time, as a result of the operation or imposition of other sentences, upon application by the offender, the prosecutor, or the probation officer.

Carried: 23-0-3

Report on the Joint Session of the Criminal and Civil Sections

Criminal and Civil Section delegates considered a public consultation document on the creation of a DNA Missing Persons Index. This paper was prepared by the Department of Public Safety and Security Preparedness Canada. It was presented by Michael Zigayer, Senior Counsel, Department

of Justice Canada. The consultation document posed a number of questions that touch on various aspects of identifying human remains and cross-matching DNA samples of unidentified remains with those of missing persons for positive match. Following discussion, a two-part resolution regarding a DNA Missing Persons Index was adopted:

Resolved:

1. That the report on the DNA Missing Persons Index - Public Consultation Paper be received.

2. That the copies of the public discussion paper entitled DNA Missing Persons Index (MPI) - A Public Consultation Paper appear in the minutes of proceedings of the Civil and the Criminal Section.

Discussion Paper

Spousal Testimony in Criminal Cases: Preliminary Proposals for Reform of Section 4 of the *Canada Evidence Act*

Catherine Kane, Acting General Counsel, Department of Justice Canada, provided an overview of a paper prepared by Joanne Klineberg, Counsel, Criminal Law Policy Section, Department of Justice Canada describing options for possible reform of s. 4 of the *Canada Evidence Act* regarding spousal testimony in criminal cases. It was noted at the outset that views expressed in the paper were intended to stimulate discussion and the views expressed during the discussion by delegates would be considered in the development of proposals for the reform of the law.

The paper addresses the following three related components: spousal incompetence, spousal non-compellability and marital communication privilege. The paper summarizes the criticisms and implications of several options for reform advanced over the last three decades regarding the rules on spousal testimony in criminal cases.

The following options were summarized and discussed:

(1) abolish the rule of spousal incompetence;

(2) make spouses compellable by the Crown in all cases;

(3) maintain the (confidential) marital communications privilege;

(4) expand the communications privilege for common law and same sex relationships; and

(5) consider further limitations on the privilege.

Delegates welcomed the paper as a thorough review of the issues regarding spousal competence. Many expressed agreement that the rules regarding spousal testimony are in need of reform. However, there was no consensus on how the law should be reformed. For example, there were mixed views regarding the option of extending the communications privilege to other types of relationships. Some recommended that the rule should be abolished altogether and did not support extending the communications privilege to other types of relationships as that would preclude more situations where relevant information could not be presented in court, particularly in situations where a private communication is legally intercepted and is relevant evidence that may not be admitted into evidence as a result of the privilege. In further developing proposals, some suggested that questions such as what the communications privilege protects and to whom the privilege belongs should be clarified. It was also noted that there should be particular emphasis on the interest of the spouse receiving the privileged communication. For instance, there may be a need to maintain the privilege even after the relationship has ended in order to avoid the risk of harm in abusive relationships. In this respect, some favoured the Australian model, which provides the court with the possibility of excusing a competent witness if the harm to the relationship outweighs the need for evidence. However, others cautioned against a proposed scheme that would put judges in the difficult position of assessing the viability of a relationship in order to determine whether the privilege applies. It was suggested that if the privilege is to be maintained as part of a reform, its application should be assessed against clear and objective criteria. It was also noted that if the option of maintaining the privilege is retained, a clear definition of what is considered "confidential" would be required and there would be a need to ensure that the privilege did not apply where both spouses are committing the crime together.

Closing

The Chair thanked the Secretary for her continued work throughout the year as well as the interpreters and technicians for their assistance during the course of the proceedings. Delegates thanked the Chair for his guidance during discussions and good work throughout the year. Delegates thanked the host, Newfoundland and Labrador for the warm welcome and for the organization of the 2005 Conference. The Nominating Committee recommended that Dean Sinclair of Saskatchewan be elected as Chair of the Criminal Section for 2005-2006 and it is recommended that Michel Breton of Québec be nominated to be the next Chair of the Criminal Section 2006-2007.

Annex 1

REPORT OF THE SENIOR FEDERAL DELEGATE

Department of Justice Canada

Uniform Law Conference of Canada

Criminal Section 2005

Introduction

The Uniform Law Conference is an excellent forum for consultation on criminal law reforms and criminal law policy. The resolutions submitted at the Uniform Law Conference identify emerging issues and highlight the need for specific amendments to the *Criminal Code* and to other related criminal statutes that may not otherwise be brought to the attention of the Department of Justice. The Discussion papers provide a basis for expert discussion on topical and complex issues to identify the need for, nature and scope of amendments. In addition, the Discussion papers provide a resource for the Department to stimulate additional discussion with other stakeholders.

The Minister of Justice is committed to consultation with provinces, territories and a wide range of stakeholders. The ULC Criminal Section is a key stakeholder, providing expert advice and a range of perspectives.

Resolutions passed by the ULC Criminal Section are carefully considered by Senior Officials in the Department of Justice. The Deputy Minister of Justice and the Minister of Justice are thoroughly briefed on the outcome of ULC discussions.

Delegates to the Uniform Law Conference often question why resolutions do not result in prompt legislative reform. In some cases a specific legislative amendment may need further study or further consultation with stakeholders not represented at the Uniform Law Conference or may be addressed either as part of a broader review or, by other non-legislative means. Furthermore, all legislative reform proposals require approval of the federal Cabinet.

The work of the Uniform Law Conference continues to significantly influence the reform of the criminal law as noted in the information that follows.

This Report is divided in two parts. Part I provides an overview of several legislative initiatives of the last year (2004-2005) that have been influenced by and benefited from the work of the ULC Criminal Section, many of which address resolutions that were passed in recent years and issues that have been the subject of discussion. This Part also includes other legislative initiatives that may be of interest to Criminal Section delegates. Part II provides general information about the status of law reform initiatives and follow up to specific ULC resolutions.

Part I 2004-2005 Legislative Initiatives

Bill C-2 *Protection of Children and Other Vulnerable Persons*

Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, was introduced on October 8, 2004 in support of commitments in the Speech from the Throne (to crackdown on child pornography) and by the Prime Minister (June 2004) to immediately reintroduce its predecessor (former Bills C-12

and C-20 that had both died on the Order Paper). It proposes criminal law reforms in 5 key areas:

- Enhancing child pornography prohibitions including broadening the definition, increasing maximum penalties; and providing a new, clearer and narrower two-part, harms-based "legitimate purpose" defence;
- Providing increased protection to youth (between 14 and 18 years of age) against sexual exploitation;
- Increasing penalties for offences against children to ensure that offences involving the abuse, neglect and sexual exploitation of children better reflect the serious nature of such conduct;
- Facilitating testimony by child and other vulnerable victims/witnesses to ensure that all child victims/witnesses under the age of 18 can benefit from the use of testimonial aids and other measures unless it would interfere with the proper administration of justice. It also proposes to allow children under 14 to give their evidence if they are able to understand and respond to questions, without the need for a competency hearing; and
- Creating new voyeurism offences to protect against the surreptitious viewing or recording of persons in specific circumstances that give rise to a reasonable expectation of privacy.

Bill C-2 was referred to the Justice Committee for a review before Second Reading. The Justice Committee concluded its review on June 1st and reported the Bill back to the House of Commons, with amendments, on June 6, 2005. Amendments were made to add 8 new mandatory minimum penalties for sexual offences against children:

- ss. 151, 152, and 153 (sexual interference, invitation to sexual touching, sexual exploitation): 14 days on summary conviction; 45 days on indictment;
- ss. 163.1(2) and (3) (making and distribution of child pornography): 90 days on summary conviction; 1 year on indictment;

- ss. 163.1(4) and (4.1) (possessing and accessing child pornography): 14 days on summary conviction; 45 days on indictment;
- ss. 170 and 171 (parent procuring; householder permitting): 45 days where child is between 14-18; 6 months where child is under 14;
- ss. 212(2) (living off the avails of a juvenile prostitute): 2 years; and,
- ss. 212(4) (using the sexual services of juvenile prostitute): 6 months.

Amendments were made to the *Criminal Code* regarding facilitating testimony to clarify that motions for the use of testimonial aids for child victims/witnesses under 18 years and other vulnerable witnesses could be brought during the pre-trial stage and to the *Canada Evidence Act* to clarify that a child could not choose to testify on oath.

Bill C-2 received Royal Assent on July 20th, 2005 as S.C. 2005, c. 32. The amendments will be proclaimed into force on a date to be determined.

Bill C-2 amendments reflect ULC resolutions passed in recent past years (1999-2002) as

described in the 2003 and 2004 reports of the Senior Federal Delegate.

Bill C-10 *Mental Disorder*

Bill C-10, *An Act to amend the Criminal Code (mental disorder)* was introduced on October 8, 2004. The Bill was reviewed by Committee after First Reading and was reported back to the House with amendments on December 10, 2004. Bill C-10 was passed by the House of Commons on February 7, 2005. Second Reading in the Senate took place on February 22, 2005 and the bill was thoroughly reviewed by the Senate Standing Committee on Legal and Constitutional Affairs. The Senate Committee passed the bill without further amendment but made several observations in its Report regarding the need for on-going review and monitoring of the amendments and, more generally, of the law governing mentally disordered accused.

Bill C-10 received Royal Assent on May 19, 2005 as S.C. 2005, c. 22.

Bill C-10 includes the amendments previously introduced as Bill C-29 (March, 2004), which was described in the 2004 Report of the Senior Federal Delegate with a few very minor modifications.

Bill C-10 provides: 1) new powers for Review Boards to ensure that they have the essential information to determine whether a mentally disordered accused should be released, detained or supervised with conditions; 2) more options for the police when an arrest is made for breach of a disposition; 3) streamlined transfer provisions; 4) additional safeguards for the permanently unfit accused including an ability for the court to order a judicial stay of proceedings, to respond directly to the Supreme Court of Canada decision in *Demers* (2004); 5) the repeal of the unproclaimed provisions of the 1992 *Act*, including capping; and, a range of other clarifying amendments.

The amendments in Bill C-10 include new provisions for an unfit accused who is not a significant threat to the safety of the public by providing for a court hearing to determine whether a judicial stay should be ordered in appropriate cases. An unfit accused who is dangerous could not be granted a stay.

The amendments necessary to provide a constitutional regime to apply to the unfit accused not likely to ever become fit came into force on June 30, 2005. This includes proclamation of the clauses of the Act that complement and are necessary for the proper implementation of the provisions to permit a judicial stay. The remaining clauses of the *Act* will come into force on January 2, 2006.

Bill C-13 *DNA*

Bill C-13, *An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act*, reforms aimed at strengthening Canada's DNA data bank legislation, received Royal Assent on May 19, 2005 as S.C. 2005, c. 25. The amendments will allow courts to make DNA data bank orders for a much wider range of offences - potentially, for any offence punishable by a sentence of five years or more. It will also expand the retroactive provisions of the legislation so that all persons convicted before June 30, 2000, of murder, manslaughter or a sexual offence, and

who are still under sentence, could be included in the National DNA Data Bank.

Other amendments to the *Criminal Code* in Bill C-13 include:

- making it mandatory for a court to make a DNA data bank order for those persons convicted of the very worst and most violent offences, for example, murder, manslaughter and aggravated assault;
- authorizing courts to make DNA orders for persons who have been found to have committed a designated offence, but who have been found "not criminally responsible on account of mental disorder";
- adding Internet luring of a child, child pornography and criminal organization offences to the list of "primary designated offences"; and,
- providing a mechanism that will result in the review of DNA data bank orders that may have been made without legal authority.

The Bill also makes changes in the procedures governing the collection and analysis of DNA samples to address operational issues that have been identified in the almost five years that the National DNA Data Bank has been in operation.

The expansion of the retroactive provisions in Bill C-13 and some procedural changes came into force on Royal Assent. The other provisions will come into force at a future date, so that training can be provided to police and prosecutors.

Bill C-13 reflects several ULC resolutions passed in 2001. Other resolutions in relation to DNA will be considered in the context of the five-year parliamentary review of the DNA data bank legislation.

Bill C-16 *Drug Impaired Driving*

Bill C-16, *An Act to amend the Criminal Code (drug impaired driving*), received First Reading on November 1, 2004 and was referred to the Standing Committee on Justice and Human Rights and Public Safety and Emergency Preparedness (prior to Second Reading).

It is currently an offence (section 253(a) of the *Criminal Code)* to drive while impaired by alcohol or a drug. Police, however, are very limited in their ability to investigate drug-impaired driving incidents. Bill C-16 would authorize police to demand Standardized Field Sobriety Tests (at the roadside), Drug Recognition Evaluations (by a trained officer at the police station), and bodily fluid samples for laboratory analysis.

C -17 *Cannabis Reform*

Bill C-17, *An Act to amend the Contraventions Act and the Controlled Drugs and Substances Act and to make consequential amendments to other Acts*, received First Reading on November 1st, 2004.

Bill C-17 would amend the *Controlled Drugs and Substances Act* to create offences with respect to the possession of small amounts of cannabis (marihuana) and the production of cannabis (marihuana). The Bill would also amend the *Contraventions Act* to allow for the designation of certain criminal offences as contraventions and to specify that contraventions may be prosecuted by means of either a ticket or a summons through the use of a provincial ticketing scheme unless another Act of Parliament provides otherwise.

Bill C-49 *Trafficking in Persons*

Bill C-49*, An Act to amend the Criminal Code (trafficking in persons*), was introduced and received First Reading on May 12, 2005.

Trafficking involves the recruitment, transportation or harbouring of persons in order to exploit them, usually in the sex industry, or for forced labour. The proposed amendments will:

- prohibit the trafficking in persons
- prohibit persons from benefiting economically from trafficking in persons
- prohibit the withholding or destroying of identity, immigration or travel documents to facilitate the trafficking of persons.

These new reforms, together with existing related offences in the *Criminal Code* and the *Immigration and Refugee Protection Act*, would create a more

comprehensive and effective legislative framework to combat trafficking in persons in all its forms.

The proposed amendments would create three new indictable offences that specifically address human trafficking. The main offence, trafficking in persons, would prohibit anyone from engaging in specified acts for the purpose of exploiting or facilitating the exploitation of a person and would carry a maximum penalty of life imprisonment where it involves kidnapping, aggravated assault or sexual assault, or death.

The second offence would prohibit anyone from receiving financial or other material benefit resulting from the commission of a trafficking offence. It would be punishable by a maximum penalty of ten years of imprisonment.

A third offence would prohibit withholding or destroying documents, such as identification or travel documents, for the purpose of committing or facilitating the commission of a trafficking offence and would carry a maximum penalty of five years of imprisonment.

At the core of human trafficking is the exploitation of its victims. Accordingly, the proposed new offences address exploitation directly. Under these new offences, exploitation would be defined as causing a person to provide labour or services - such as sexual services - by engaging in conduct that leads the victim to reasonably fear for their safety or that of someone known to them, if they fail to comply. It would also apply to the use of force, coercion or deception causing the removal of a human organ or tissue.

Bill C-50 *Cruelty to Animals*

Bill C-50, *An Act to amend the Criminal Code in respect of cruelty to animals*, was tabled on May 16, 2005. This legislation has been introduced in very similar form four times in the past five years. It has been passed by the House several times, but never in the same form by the Senate.

The objectives of the amendments are to: (1) modernize, simplify, consolidate and rationalize existing criminal offences of cruelty; and (2) increase penalties. The amendments confirm the existing criminal

standard of cruelty, which is that of causing "unnecessary pain". They do not modify normal care practices (e.g., humane animal husbandry practices or practices governed by more specific legislation).

Bill C-53 *Proceeds of Crime*

On May 30, 2005, Bill C-53, *An Act to amend the Criminal Code (proceeds of crime) and the Controlled Drugs and Substances Act and to make consequential amendments to other acts*, was introduced. The amendments propose that:

- once an offender has been convicted of either a criminal organization offence, or certain offences under the *Controlled Drugs and Substances Act*, the court is directed to order the forfeiture of property of the offender identified by the Crown unless the offender proves on a balance of probabilities, that the property is not the proceeds of crime;
- in order for the reverse onus to apply, the Crown would first be required to prove, on a balance of probabilities, either that the offender engaged in a pattern of criminal activity for the purpose of receiving material benefit *or* that the legitimate income of the offender cannot reasonably account for all of the offenders property;

The reverse onus scheme in Bill C-53 would be available after a conviction for a criminal organization offence as defined under the *Criminal Code* or for certain drug offences under the *Controlled Drugs and Substances Act*. Under the C-53 scheme, the court would also have to be satisfied on a balance of probabilities that the offender has engaged in a pattern of criminal activity for the purpose of providing the offender with material benefit, or that income of the offender unrelated to crime cannot reasonably account for the value of all the property of the offender. Upon these conditions being satisfied, any property of the offender identified by the Attorney General would be forfeited unless the offender demonstrated, on a balance of probabilities, that the property is not proceeds of crime. Finally, the court would be permitted to set a limit on

the total amount of property forfeited under these provisions as may be required by the interests of justice.

These new amendments would apply to all criminal organization offences as defined in section 2 of the *Criminal Code* where the offence is punishable by five or more years of imprisonment or after conviction, on indictment, for an offence under sections 5, 6, and 7 of the *Controlled Drugs and Substances Act* (being the offences of trafficking, importing/exporting, and production of drugs).

In addition to the creation of the new reverse onus scheme, the amendments would also clarify the *Criminal Code* and the *Controlled Drugs and Substances Act* to ensure accord between the English and French versions of a provision; to more explicitly affirm the Attorney General of Canada's authority to pursue proceeds of crime in certain circumstances; to more explicitly affirm the ability of the Crown to seek proceeds upon conviction of offences where the Crown has the option to proceed either on indictment or by way of summary conviction; and, to ensure the applicability of *Controlled Drugs and Substances Act* warrants to investigations of drug-related money laundering and the possession of property obtained by drug-related crime.

Part II Other Initiatives

Criminal Procedure

In recent years, a number of resolutions presented at ULC Criminal Section have dealt with procedural aspects of the *Criminal Code*. These resolutions have been reviewed and considered and many have been the subject of additional consultation through the Federal-Provincial-Territorial Working Group on Criminal Procedure and with other stakeholders.

Last year, it was reported that approximately 20 criminal procedure proposals had been identified for further development and consultation, many of which have been drawn from recent past ULC proceedings. While

other initiatives in the 2004-2005 period have somewhat delayed progress on these criminal procedure proposals, Justice Canada intends to consult on these proposals, for possible inclusion in an omnibus bill in the near future.

Bail

In addition to the resolutions noted above, a number of resolutions pertaining to bail and dating back to 1985 are being examined by an ad hoc sub-committee of the F/P/T Criminal Procedure Working Group. This sub-committee undertook to review the entire judicial interim release scheme, including the provisions relating to release by police officers. Resolutions, which are currently being examined by the sub-Committee, cover a wide range of topics such as:

- the list of offences or situations where the reverse onus provisions of a bail proceeding should become operative;
- Increasing the terms and conditions that an officer or an officer-in-charge can impose at time of release, thus reducing the number of persons who need to be held pending appearance before a judicial officer;
- Review process of bail decisions. These resolutions range from a review procedure to vary release conditions on mutual consent of the accused and crown, to review procedures when indictments are preferred, and in bail pending appeal situations;
- To amend s. 525 in relation to mandatory review where a trial has been delayed - from 90 days to 180 days, and to allow for the accused to apply for a review where the trial has been delayed, after 30 days for summary offence and 60 days for an indictable offence;
- To provide for release of an accused person on an undertaking or a recognizance, by the Clerk of the Court, or Registrar of the Court without judicial intervention when the accused and crown agree on the terms and the process, and note their agreement accordingly; and
- Streamlining of bail forfeiture proceedings.

Review of Criminal Code Provisions Requiring Consent of the Attorney General

The work of the Federal-Provincial-Territorial Working Group Subcommittee on the Review of *Criminal Code* provisions requiring consent of the Attorney General, the Deputy Attorney General and agents acting on their behalf (2003 Alberta resolution) is progressing. The Subcommittee will be meeting in the fall to examine a typology setting out the current levels of consent required in relevant provisions of the *Criminal Code* and to develop a comprehensive, principled scheme regarding these provisions. It is anticipated that the Subcommittee will be in a position to report on a proposed approach in 2006.

Disclosure

The Minister of Justice Canada publicly released a Disclosure Reform Consultation Paper on November 16, 2004. A confidential Preliminary Discussion Paper on disclosure reform had been provided to ULCC Criminal Section delegates earlier in 2004 and the full public Consultation Paper was also forwarded to delegates after its release. The Consultation Paper discusses detailed proposals for potential amendments and also invites suggestions for further potential areas of disclosure reform. Responses to the Consultation have been provided by justice system partners and stakeholders. These responses are now being analyzed by Justice Canada.

Mega-trial Reform

At their fall 2003 meeting, the Federal-Provincial-Territorial Ministers Responsible for Justice endorsed the creation of a Steering Committee on Justice Efficiencies and Access to the Justice System (the "Steering Committee"). This Steering Committee, which brings together governments, the Bench and the Private Bar, identified as a high priority on its agenda the development of practical and lasting solutions to the problems experienced in the conduct of mega-trials.

In January 2005, the Steering Committee presented its Final Report on Mega-trials to the F/P/T Ministers Responsible for Justice at their January 2005 meeting. This report, which contains 14 recommendations, suggests

in particular implementing a special procedure that is exclusively applicable to mega-trials; practical approaches to facilitate the management of this type of case; and some legislative amendments. Justice Canada officials provided support for the work of the Steering Committee. Among other things, Justice officials conducted consultations on the Final Report with the corrections, police and legal aid communities. Justice officials also examined possible *Charter* implications for some of the Steering Committee's recommendations.

The results of the consultations were compiled in a report provided to the F/P/T Ministers Responsible for Justice at their January 2005 meeting. Ministers were also briefed orally on Justice Canada's assessment of Charter implications for the suggestion to reduce the minimum number of jurors in the case of mega-trials. Ministers agreed to refer the report to the Department of Justice Canada for the detailed policy work necessary to move the initiative forward and for further consultations with participants from the justice system whose voices have not yet been heard, or not sufficiently, such as court administrators and groups representing victims.

Sentencing

The issue of remand and credit for pre-trial custody is actively being examined in a number of Federal-Provincial-Territorial forums. A 2002 resolution called for the issue of credit for pre-trial custody to be referred to the FPT Working Group on Sentencing to review the issue and report back to the Uniform Law Conference. The FPT WG on Sentencing considered options and benefited from the paper prepared by Professor Allan Manson for the ULC on this issue in 2003. The Sentencing Working Group was in general agreement with the principles and rationale set out in the ULC paper that support the need to recognize credit for time served, for example:

a) contributes to fairness by recognizing that punishment is worthy of credit;

b) contributes to fairness and parity by recognizing that pre-sentence custody does not attract remission or count towards parole eligibility;

c) maintains an individualized approach to sentencing by giving discretion over that pre-sentence custody, both in respect to providing credit towards a term of imprisonment or as a factor in deciding whether to order custody or impose a community sanction; and,

d) enhances respect for the judiciary by empowering judges to consider conditions of remand confinement.

Criminal Code amendments to maintain judicial discretion in determining credit for time served but requiring the judge to take into account the time served and record the amount of time credited on the record are under active consideration.

The FPT WG on Sentencing is also currently examining options with respect to restricting the ambit of conditional sentences in some cases, such as for serious and violent offences.

Youth Justice

The *Youth Criminal Justice Act* came into force on April 1, 2003. The legislation, part of the Youth Justice Renewal Initiative launched in 1998, was developed after extensive consultation with stakeholders in the youth justice system.

In 2001, two resolutions dealing with DNA samples of young offenders were presented. The issues were capturing the information in the DNA data bank and retention periods. The DNA Identification Act provides for inclusion of DNA samples from youth and Bill C-13, *An Act to amend the Criminal Code, the DNA Identification Act and the NationalDefence Act,* which received Royal Assent in May of this year ensures that retention periods for access to such records is in accordance with privacy provisions of the *Youth Criminal Justice Act.*

In 2004 three resolutions relating to the *Youth Criminal Justice Act* were carried. Of the three that were carried, one dealt with changes to the sentencing regime, one with setting of conditions for community supervision and the last with access to psychological reports.

The Department is in the process of collecting data and conducting research studies on the operation of the youth justice system under the YCJA. This process, to be conducted on an ongoing basis, will enable the department to monitor the development and implementation of that system and assess the impact of the changes to the youth justice system during its first year of operation. In March of this year, the Department hosted a one-day forum on implementation of the legislation to obtain first hand information from a variety of stakeholders on how implementation was proceeding. In addition, the Federal-Provincial-Territorial Coordinating Committee of Senior Officials - Youth Justice is an excellent resource and forum for discussing youth justice issues. Research into the issue of access to psychological reports and privacy issues are currently being undertaken.

While no amendments to the legislation are being developed at the present time, any information gathered through research, monitoring and feedback, including ULC resolutions, will be considered as evidence to support any changes that may be required.

Identity Theft

The Department of Justice is considering whether changes to the *Criminal Code* may be needed to address behaviour that is currently not criminalized but provides a means by which other crime can be committed. The advent of the computer, and particularly of the Internet, has made it possible for identity information to be surreptitiously collected and distributed quickly and anonymously. The Department of Justice is concerned that persons whose identity has been misappropriated in this way may be at risk of being further victimized by the use of their identity information by others to commit crime. Because of the utility of identity information to create false identification documents, and the relatively low risks associated with its acquisition and distribution, identity information has become a commodity of value in and of itself.

The Department of Justice is assessing whether modifications to the *Criminal Code* may be necessary to reflect a change in crime

methodology. Modern technology has facilitated the commission of crimes that involve different actors along a continuum of criminal activity. No one person has committed all of the elements of the offence. Each person is responsible for a particular aspect of the activity that cumulatively results in the commission of the crime. The Department of Justice is assessing whether an identity theft regime is needed to adequately address the role that each person plays in contributing to commission of crimes committed in this way.

A 2004 ULC resolution was passed with respect to the activity of possession of things or data in relation to the offence of forgery. Justice Canada recognizes that the *Code* currently does not contain a general provision to address possession of data or things used to forge documents, whether the documents are tangible or virtual. The ULC resolution is being considered in the context of this initiative.

Lawful Access

Lawful access is an investigative technique that is essential to law enforcement and national security agencies in order to fight crime and threats to national security. It includes the interception of communications and the search and seizure of data, conducted with lawful authority.

Public consultations on lawful access were first held in the fall of 2002 and yielded over 300 written submissions. Detailed follow-up consultations were subsequently held from February to April of 2005.

In light of the detailed follow-up consultations, the federal departments and agencies involved in the lawful access initiative are revising the legislative proposals in order to bring them forward for consideration by Ministers who will decide upon the tabling of a bill in Parliament.

Two 2004 ULC resolutions are being addressed by the lawful access initiative. The first one called on an amendment to s. 372 of the *Criminal Code* to ensure that offences such as indecent and harassing telephone calls can be captured when committed by other means of communications. The second resolution proposed an amendment to

the *Code* to ensure that wiretap provisions apply to the offence of luring a child.

Marital Communication Privilege

Two ULC resolutions regarding marital communication privilege were presented and carried in 2000. The first one recommended that the marital communication privilege be abolished and a second resolution recommended that the wife or husband of a person accused of an offence should be competent and compellable witness for the prosecution without the consent of the accused. A year before these 2 resolutions, a study by ULC produced "mixed results" as to how to amend the law in this area. The results of the votes on these issues also demonstrated that there was no consensus. This year, Justice Canada is presenting a paper to Criminal Section delegates on draft reform proposals. Views expressed during the discussion will be considered in further developing possible draft reform proposals on this issue.

Anti Terrorism Act Review

Section 145 of the *Anti Terrorism Act* mandated a comprehensive review of the provisions and operation of the *Act* within 3 years of it coming into force. On December 9, 2004, the House of Commons adopted a motion authorizing the House of Commons Standing Committee on Justice, Human Rights, Public Safety and National Security is undertaking this work. On December 13, 2004, the Senate established a special *ad-hoc* committee that is also conducting a review of the *ATA*.

The Parliamentary Committees are required to submit their reports to Parliament by the end of December 2005, unless further extensions are sought. The Government will be required to respond to the reports within 120 days (for the report issued by House Sub Committee) and 150 days (for the report issued by the Senate Special committee).

Other ULC Resolutions

In addition to the specific resolutions mentioned above, a number of other resolutions are in active consideration for inclusion in appropriate legislative reforms in areas such as impaired driving (2000, 2001

resolutions), interlocutory and third party appeals (2001-2002 resolutions), firearms (2004 resolutions) and organized crime (2003).

Justice Canada will continue the process of reviewing past ULC resolutions as a valuable source to identify the need for potential amendments for inclusion in future legislative initiatives.

July 2005

Annex 2

RESOLUTIONS

ALBERTA

Alberta - 01

A working group of the Uniform Law Conference of Canada should be created to examine the feasibility of creating a distinct offence of strangulation as a general intent offence, and to assess whether existing provisions adequately address the seriousness and significance of this specific conduct. This form of assault is particularly prevalent in the context of domestic violence.

Carried as amended: 18-2-7

Alberta - 02

Section 507.1 (private prosecution) of the *Criminal Code* should be amended to enable a provincial court judge to preclude an individual from laying an information to initiate a hearing pursuant to section 507.1 without leave, where that individual has demonstrated a pattern of initiating repeated and persistent hearings without cause.

Defeated: 4-17-5

Alberta - 03

Amend subsection 145(3) (failure to comply with condition of undertaking or recognizance) of the *Criminal Code* to include as an offence breaches of orders made under subsection 516 (2) (non-communication orders).

Carried: 26-0-1

Alberta - 04

Paragraph 183 (a) (designated offences - interception of private communications) of the *Criminal Code* should be amended to include section 234 (manslaughter) in the list of designated offences pursuant to that section.

Carried: 22-0-5

Alberta - 05

The phrase "if the warrant has been endorsed by a justice under subsection 507(6)" should be deleted from subsection 499(1) (release from custody by officer in charge where arrest made with warrant) of the *Criminal Code*.

Withdrawn following discussion

(as a result of a similar resolution carried in 1999 - QC # 8)

BRITISH COLUMBIA

British Columbia - 01

That Justice Canada be urged to amend the financial institution provisions of the *Canada Evidence Act* to provide for the admissibility of records created and maintained through outsourcing.

Carried: 12-2-12

British Columbia - 02

That section 173 (indecent acts, exposure) of the *Criminal Code* be amended to add the offence for any person to commit an indecent act knowing that the act is open to public view or being reckless as to whether the act is open to public view.

Defeated as amended: 5-10-10

MANITOBA

Manitoba - 01

Section 259 of the *Criminal Code* should be amended to allow a judge to impose a driving prohibition where the offender is convicted of driving while prohibited.

Withdrawn

Manitoba - 02

Section 259 of the *Criminal Code* should be amended to require a sentencing judge to impose a driving prohibition where an offender is convicted of either impaired driving causing death or impaired driving causing bodily harm.

Carried: 22-0-4

New Brunswick

New Brunswick - 01

The *Criminal Code* should be amended to make section 173 (indecent acts, exposure) a hybrid offence, allowing for a greater range of sentence when dealing with repeat offenders.

Carried: 16-7-3

New Brunswick - 02

The *Criminal Code* should be amended to include section 173 (indecent acts, exposure) and not only subsection 173(2) (exposure) in subsection 172.1(1) (luring a child by means of a computer system).

Withdrawn following discussion

New Brunswick - 03

The *Criminal Code* should be amended to make subsection 210 (2) (common bawdy-house - offence) hybrid offence. Subsection 210 (3) (notice of conviction served on owner) should also be amended to allow the notification provision to apply to convictions pursuant to subsection 210 (2).

Withdrawn following discussion

New Brunswick - 04

The *Criminal Code* should be amended to include a provision for a non-communication order while an accused is serving any sentence.

Carried as amended: 26-0-2

New Brunswick - 05

Section 743.6 (power of court to delay parole) of the *Criminal Code* should be amended to replace all references to "*full parole*" to "*any form of unescorted release*".

Carried as amended: 16-6-6

Newfoundland and Labrador - 01

Amend paragraph 731(1)(*b*) of the *Criminal Code* and/or subsection 139(1) of the *Corrections and Conditional Release Act* so that the imposition of a subsequent period of imprisonment will not invalidate a prior valid probation order.

Withdrawn

(see 2005 Report of the ULCC - Criminal Section Working Group on Probation)

Floor resolution

Newfoundland and Labrador - 02

Amend section 536.4 (justice may order hearing) of the *Criminal Code* to clarify that in the absence of a statement of issues and witnesses or an agreement to limit the scope of the preliminary inquiry, the justice conducting the hearing may order that the preliminary inquiry proceed in accordance with the provisions of Part XVIII.

Defeated as amended: 5-10-11

Floor resolution

NOVA SCOTIA

Nova Scotia - 01

That subsection 4(2) of the *Canada Evidence Act* be amended to add section 163.1 (child pornography) of the *Criminal Code* as one of the offences for which a spouse is competent and compellable as a witness for the prosecution.

Defeated: 4-9-11

Nova Scotia - 02

Amend paragraph 31(5)(*b*) (issuing arrest warrant) of the *Youth Criminal Justice Act* to provide for the issuance of a warrant of committal for the young person directing peace officers to arrest the young person and deliver him or her to the keeper of a designated place of detention for young persons and to bring the young person before a youth justice court judge or justice as soon as practicable for the purposes of a judicial review of the detention.

Withdrawn following discussion

Nova Scotia - 03

Amend section 36 (guilty plea) of the *Youth Criminal Justice Act* to require that the justice conduct the finding of guilt hearing immediately upon the entering of a guilty plea by the young offender.

Defeated: 4-18-4

Nova Scotia - 04

A- That section 29 (detention as social measure prohibited) of the *Youth Criminal Justice Act* be amended to add a provision that notwithstanding subsection 29 (2) (detention presumed unnecessary) of the YCJA, where a young person is charged with an offence under subsections 145(2) - (5.1) (failure to appear, to comply with summons, undertaking, recognizance etc.) of the *Criminal Code* that is alleged to have been committed while he was at large after being released in respect of another offence, that the youth court justice may order the young person detained in custody prior to sentence.

Carried as amended: 13-3-9

B- That the Uniform Law Conference of Canada - Criminal Section recognize the need for review of the pre-sentence custody provisions in section 29 (detention as social measure prohibited) of the *Youth Criminal Justice Act* and request the Federal-Provincial-Territorial Coordinating Committee of Senior Officials - Youth Justice give priority to an immediate review of those provisions.

Carried as amended: 21-0-4

C- That the Uniform Law Conference of Canada - Criminal Section recognize the need for review of the preconditions for custody in section 39 (custody) of the *Youth Criminal Justice Act* and request the Federal-Provincial-Territorial Coordinating Committee of Senior Officials - Youth Justice give priority to an immediate review of those provisions.

Carried as amended: 20-0-5

Nova Scotia - 05

Amend subsection 39 (1) (custody) of the *Youth Criminal Justice Act* to add a provision authorizing custody for an offence where the circumstances of the offence constituted a danger to the safety of the public or member thereof and the court determines the young person to be a danger to the public or any member thereof.

Withdrawn

Nova Scotia - 06

Amend subsection 29(2) (detention presumed unnecessary) of the *Youth Criminal Justice Act* to delete the reference to paragraphs (*a*) - (*c*) so that all restrictions on custody under subsection 39 (1) can be considered in making a s. 515 (10) (*b*) (of the *Criminal Code* - pre-trial detention) determination.

Withdrawn

Nova Scotia - 07

Amend section 164.2 (forfeiture of things used for child pornography) of the *Criminal Code* to add section 172.1 (luring a child by means of a

computer system) as an offence for which forfeiture may be ordered in relation to any thing used in the commission of the offence.

Carried: 25-0-0

Nova Scotia - 08

Amend sections 145 (being at large without lawful excuse, failure to appear, breach of summons, undertaking, recognizance etc.) and 733.1 (failure to comply with probation order) of the *Criminal Code* to add a provision that in prosecutions for breach of probation or breach of undertakings that certified copies of the respective orders may be tendered without notice thereof.

Carried: 20-2-3

Nova Scotia - 09

Add a new section to the DNA procedures which provides that the prosecutor may apply for a DNA sample under section 487.051 of the *Criminal Code* at any time in relation to an offence where the order was not made at the time of sentencing due to existence of a sample in the database and the existing sample has since been removed.

Withdrawn

Nova Scotia - 10

Amend s. 487.05 (information for warrant to take bodily substances for forensic DNA analysis) of the *Criminal Code* to add a section which provides that where the pre-conditions contained in section 487.05 are met, that a judge may authorize the use of an existing sample for the purposes of a forensic DNA analysis in that offence for which the pre-conditions are met.

Withdrawn following discussion

Nova Scotia - 11

Amend section 672.54 (dispositions that can be made regarding accused found not criminally responsible) of the *Criminal Code* to add a subsection

providing that absolute discharges cannot be ranted to an accused found not criminally responsible in relation to a murder charge.

Withdrawn

Nova Scotia - 12

Amend section 145 (being at large without lawful excuse, failure to appear, breach of summons, undertaking, recognizance etc.) of the *Criminal Code* to add a provision that the existence of a given undertaking on a particular date can be established by certifying the document to the effect that it was in force and effect on the date in question.

Withdrawn following discussion

ONTARIO

Ontario - 01

Amend s. 117.11 (firearms and other weapons - onus on the accused) of the *Criminal Code* to include s. 95 (possession of prohibited or restricted firearm with ammunition).

Withdrawn

(See SA2005-01 on similar issue)

Ontario - 02

Amend subsection 715 (1) (evidence at preliminary inquiry may be read at trial in certain cases) of the *Criminal Code*so that, where an accused is not present at the preliminary inquiry because the accused has requested the absence, any evidence taken can still be admissible at the trial.

Carried: 24-0-0

Ontario - 03

Amend s. 715.1 (videotaped evidence of complainant or witness) of the *Criminal Code* to clarify that reference to other offences in the circumstances described in the videotape, where those offences have been charged and are part of the same proceedings as the listed offences

in the section do not require removal or editing from the tape in order for the tape to be admissible in evidence.

Withdrawn

Due to the passing of Bill C-2, *An Act to amend the Criminal Code (Protection of children and other vulnerable persons)* on July 20, 2005

Ontario - 04

Amend s. 487.0911 (review of possible defective DNA order by Attorney General) of the *Criminal Code* to require that, where the Attorney General agrees that the order was taken for a non-designated offence, the Attorney General confirms this in writing to the Commissioner of the National Databank who would then be authorized to destroy the sample.

Carried: 15-3-6

QUEBEC

Quebec - 01

That section 7 of the *Criminal Code* be amended to extend the jurisdiction of Canadian courts over every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against subsections 282 (1) (abduction in contravention of custody order) or 283 (1) (abduction) of the *Criminal Code* as though that act or omission had been committed in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

Carried as amended: 23-0-3

Quebec - 02

That section 259 of the *Criminal Code* be amended to require the court to specify, at the hearing, the total duration of the prohibition to drive, and to state that it takes effect immediately, and to require this information to be recorded in the minutes of the hearing.

Withdrawn

Quebec -03

Amend subsection 259 (1.1) of the *Criminal Code* to provide that unless otherwise stated by the judge, the accused is authorized to register in the alcohol ignition interlock device program.

Carried as amended: 23-1-3

Quebec - 04

Provide, in sections 462.42 (application by person claiming interest for relief from forfeiture - proceeds of crime) and 490.5 (forfeiture of offence-related property - application by person claiming interest) of the *Criminal Code*, that unless the circumstances are exceptional, the application shall be submitted to the judge who made the confiscation order.

Withdrawn following discussion

Quebec - 05

That the Department of Justice Canada undertake a review of the regime of the detention of things seized pursuant to section 490 of the *Criminal Code*

Carried as amended: 26-0-1

Quebec - 06

That the *Criminal Code* be amended in order to grant the defence and the prosecution an equal number of additional peremptory challenges where a replacement must be found for a juror who is excused before the evidence is heard.

Carried as amended: 28-0-0

Quebec - 07

Amend the English and French versions of subsection 676 (1.1) of the *Criminal Code* to indicate that the prosecutor's appeal is of the verdict of acquittal, not a conviction.

Carried: 27-0-0

SASKATCHEWAN

Saskatchewan - 01

A- Amend s. 117.11 (firearms and other weapons - onus on the accused) of the *Criminal Code* so that it also applies to prosecutions under sections 92 (possession of firearm or other weapon knowing possession is unauthorized) and 95 (possession of prohibited or restricted firearm with ammunition) of the *Criminal Code*.

Carried: 15-3-4

B- Amend s. 117.11 (firearms and other weapons - onus on the accused) of the *Criminal Code* so that it also applies to prosecutions under section 94 (unauthorized possession of firearm or other weapon in motor vehicle) of the *Criminal Code*.

Carried: 11-8-3

Saskatchewan - Canadian Association of Provincial Court Judges - 01

That Justice Canada initiate or resume work on re-codification of the General Part of the *Criminal Code.*

Carried: 18-1-6

Saskatchewan - Canadian Association of Provincial Court Judges - 02

A- That the *Criminal Code* be amended to permit a sentence of time served, of a certain number

of stated days.

Carried: 8-5-11

B- That the *Criminal Code* be amended to require that sentences state the actual time spent on remand that has been considered in arriving at the sentence imposed.

Carried as amended 17-0-8

C- That the *Criminal Code* be amended to require that sentences state the actual time spent on remand, plus the time credited for remand which has been given in arriving at the sentence imposed.

Carried as amended 24-0-1

CANADA

Canadian Bar Association

Can-CBA - 01

That section 718.2 of the *Criminal Code* be amended to include a non-exhaustive list of examples of mitigating circumstances that shall be considered by a court in imposing sentence, to parallel the current non-exhaustive list of aggravating circumstances found in section 718.2(*a*)(*i*)-(*v*).

Defeated: 5-14-5