Criminal Section Minutes 2007

CHARLOTTETOWN, PRINCE EDWARD ISLAND

SEPTEMBER 9-13, 2007

CRIMINAL SECTION MINUTES

Attendance

Thirty-three (33) delegates representing all jurisdictions except Northwest Territories and Nunavut attended the Criminal Section. All jurisdictions were represented at the Conference as a whole. Delegates included Crown counsel, defence counsel, policy counsel and members of the judiciary. Guests included the President of the National Conference of Commissioners on Uniform State Laws as well as two representatives of the Standing Committee of Attorneys General.

Opening

Michel Breton presided as Chair of the Criminal Section. Stéphanie O'Connor acted as Secretary. The Section convened to order on Sunday, September 9, 2007.

The Heads of each delegation introduced their delegation.

Proceedings

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 Senior General Counsel, Criminal Law Policy Section, Justice Canada.

Resolutions (Attached as Annex 2)

Twenty-four (24) resolutions were presented by jurisdictions for consideration. One (1) resolution was withdrawn without discussion. During the proceedings, one resolution was divided in three parts and

voted on separately. As a result, twenty-five (25) resolutions were debated during the proceedings and voted on separately. Of the twenty-five (25) resolutions considered by delegates, eighteen (18) were carried as submitted or amended, three (3) resolutions were defeated as submitted or amended and four (4) resolutions were withdrawn following discussion.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.

Discussion Papers

The papers presented at this year's Conference addressed issues that consisted of both civil and criminal law components. The Papers were presented during two joint sessions of the Criminal and Civil sections.

In preparation of the joint session, Criminal Section delegates discussed the papers on Identity Theft, Collateral Use of Crown Brief Disclosure and Malicious Prosecution to narrow the specific criminal law issues and allow for a more focused discussion during the session.

The Paper regarding section 347 of the *Criminal Code* (criminal interest rate) was presented at a joint session following the opening plenary session and proposed a resolution for debate and vote by Criminal section delegates.

A summary of each Paper can be found under the heading *Joint Session of the Criminal and Civil Sections*.

Report of the Working Group on Collateral Use of Crown Brief Disclosure

Nancy Irving, Senior Counsel, Public Prosecution Service of Canada, provided an overview of the Report to Criminal section delegates. Delegates were joined by Denise Dwyer, Deputy Director, Crown Law Office – Civil, Ministry of the Attorney General of Ontario and David Marriott, Appellate Counsel, Alberta Justice. Delegates commended the author and the Working Group for preparing a high-quality paper that

presented complex interrelated matters. The discussions raised several issues and questions for consideration. The views expressed on this topic during the Criminal section proceedings were reported to joint session delegates. A summary of the Report as well as the views expressed during the Criminal Section proceedings can be found under the heading *Joint Session of the Civil and Criminal sections*.

Report of the Joint Criminal/Civil Section Working Group on Identity Theft: A Discussion Paper

A summary of the Report on Identity Theft was presented by Josh Hawkes, Appellate Counsel, Criminal Justice Division, Alberta Justice. Delegates noted that the Working Group produced an excellent paper.

While the paper emphasized the importance of preventive measures as an important component to address identity theft, it was highlighted that a number of organizations are currently considering various aspects of this issue including prevention. The Working Group was careful not to duplicate the work of others in this area and focused on examining certain remedial measures. To assist the Working Group and determine the need to further explore ways to address identity theft, delegates were invited to report on existing mechanisms available to aid victims of identity theft where criminal records or other official documents have erroneously been created in their name.

Report of the Joint Criminal/Civil Section Working Group on Malicious Prosecution

Dean Sinclair, Senior Crown Prosecutor, Public Prosecutions, Saskatchewan Justice, highlighted the issues raised in the paper to Criminal Section delegates.

Following the presentation, delegates discussed the implications of a perceived erosion of the legal test to be met in a malicious prosecution lawsuit as enunciated by the Supreme Court of Canada decision in *Nelles vs. Ontario* [1989] 2 S.C.R. 170, and as evidenced by subsequent decisions that have concluded that malice can be inferred from the absence of reasonable and probable cause that an offence has been committed.

Several delegates reported experiences in their own jurisdictions with respect to the implications for Crown prosecutors who are sued for malicious prosecution.

During the discussion, it was submitted that the fact that the outcome of the case has an impact personally on the Crown prosecutor undermines the prosecutor's role since the prosecutor is expected to assess whether there is a reasonable prospect of conviction throughout the criminal process while being faced with the possibility that a lawsuit for malicious prosecution may be commenced if the trial does not result in a conviction.

It was observed that the policy implications of this trend in law are sufficiently important to warrant consideration of a legislative response to reaffirm the criteria required to bring forward a lawsuit for malicious prosecution and develop measures that would allow prompt dismissal of frivolous malicious prosecution lawsuits. It was also suggested that consideration should be given to defining the meaning of the term "improper purpose" when examining legislative reform. As leave to appeal to the Supreme Court of Canada has been filed in the case of *Miazga* v. *Kvello Estate* [2007] S.J. No. 247 (Sask. C.A.), it was noted that the Supreme Court's decision could inform the work of the Working Group in developing legislative proposals.

Section 347 of the Criminal Code of Canada: Business Law Problems Remain

Criminal Section delegates discussed the possibility of creating a working group to examine the issues highlighted in the paper entitled *Section 347 of the Criminal Code of Canada: Business Law Problems Remain.* Some delegates expressed the view that section 347 of the *Criminal Code* should be examined to consider its continued usefulness noting, in particular, that there would be value in studying the issue to determine whether criminal law in this area has had an impact despite the fact that there are few reported decisions on s. 347 in the criminal law context. It was further noted that the principal issue to be considered is whether this provision needs to be adjusted in view of standard commercial transactions currently violating s. 347. It was suggested that the point of view of

financial institutions, including the ones that have a state responsibility, would be important in the determination of the usefulness of s. 347.

After discussion, the following resolution was presented:

That the Criminal Section of the Uniform Law Conference of Canada consider examining the issue of the usefulness for criminal law purposes of section 347 of the *Criminal Code*, and the range of options for possible reform of this offence.

Carried as amended: 13-0-7

Joint Session of the Criminal and Civil Sections

Section 347 of the Criminal Code of Canada: Business Law Problems Remain (Joint Session)

Presenter: Jennifer Babe, Miller Thomson LLP

The paper prepared by Ms. Babe provided an overview of the history of the 'criminal interest rate' provision in the *Criminal Code* (section 347) and summarized the issues raised in the paper prepared by Professor Mary Anne Waldron for the Conference in 2002 on the same issue.

In her presentation, Ms. Babe described the nature of legitimate business transactions involving interest payments that are seriously affected as a result of unenforceable contractual clauses offending section 347 of the *Criminal Code*. Examples of such transactions include bridge loans, start-up businesses, equity kickers and mezzanine financers. It was noted that while there are very few reported criminal cases considering section 347 of the *Criminal Code* there have been many cases where the section is relied on in commercial litigation – usually by a party to a transaction seeking an order that a contract term is unenforceable by reason of illegality due to section 347. This, the presenter noted, was not the activity that section 347 of the *Criminal Code* intended to address.

A report was then given on events since the presentation of the Waldron paper. The presenter reported that following the presentation of the

paper to the Conference in 2003, the ULCC submitted the Waldron Report recommendations to the then federal Minister of Justice for his consideration. The presenter then referred to a 2005 recommendation made by the Senate Banking Committee during its study of Bill S-19, *An Act to amend the Criminal Code (criminal interest rate)*, 1st Sess., 38th Parl., 2005 (the Bill later died on the Order Paper). The Committee had recommended exempting from s. 347 of the *Criminal Code* loans where the principal amount was in excess of $100 000. The presenter also mentioned the tabling of Bill C-26, *An Act to amend the Criminal Code (criminal interest rate)*, which focuses on payday lenders and others lending to financially vulnerable Canadians. However, it was noted that Bill C-26, does not address the problems with respect to large business transactions outlined in the Waldron Report and that no further bills addressing the issue relating to larger business transactions were presented by the Government since the Waldron Report was submitted to the then Minister of Justice in 2004.

The presenter noted that most provinces are now moving forward with legislation to regulate payday lenders and this type of legislation is a valuable piece of consumer protection. However, such legislation does not address the issues relating to interests for larger business transactions.

The presenter concluded that section 347 of the *Criminal Code* continues to pose serious difficulties for larger business transactions and proposed that the Criminal Section of the ULCC examine this provision in light of the problems described above taking into consideration the criminal conduct it was intended to address.

Discussion:

Following the presentation, delegates proposed ways to study section 347 of the *Criminal Code* in light of issues facing the business community, as highlighted in the presentation.

During the discussion, it was submitted that this provision may not belong in the *Criminal Code* since consumer protection laws already exist. In response, some delegates noted that other *Criminal Code* offences, such as fraud and theft, also have a consumer protection component but that

the true purpose of those provisions is to distinguish between what is right and wrong. It was noted that two distinct scenarios emerge from the paper: The first refers to sophisticated business transactions while the second encompasses situations such as in the case of *Garland* v *Consumers' Gas* [1998] 3 S.C.R. 112 dealing with consumers paying high interest rates on late payments of consumer gas bills. For the latter cases, it was argued that a set criminal interest rate may be the only way to target corporate behaviour against individuals by stating that these corporations are acting criminal by charging such high interest rates. Therefore, it was suggested that a proposal to amend s. 347 should be restricted to addressing the problem dealing with sophisticated business transactions without affecting other parts of the section because there is a need to maintain the current 60 % baseline on which to have all types of commercial and consumer behaviour rest.

One delegate expressed the view that in searching ways to address the sophisticated business transactions aspect, care should be given not to ignore implications in other areas and noted that there may be sound policy reasons for maintaining section 347 in the *Criminal Code*.

Following discussion, the Chair of the Criminal Section noted that the Criminal Section would discuss and vote on a proposed resolution to consider creating a working group to study the issues described in the paper. The following resolution and corresponding vote were reported back during the closing plenary.

Resolved:

That the Criminal Section of the Uniform Law Conference of Canada consider examining the issue of the usefulnessfor criminal law purposes of section 347 of the *Criminal Code*, and the range of options for possible reform of this offence.

Carried as amended: 13-0-7

Report of the Working Group on Collateral Use of Crown Brief Disclosure (Joint Session)

The Report was presented by Denise Dwyer, Crown Law Office – Civil, Ministry of the Attorney General of Ontario and by David Marriott, Appellate Counsel, Alberta Justice. The Working Group, established at the August 2006 meeting of the Conference, was tasked with considering the issues raised in the paper entitled *Collateral Use of Crown Brief Disclosure* (prepared by Crystal O'Donnell and David Marriott, and presented to the Conference in 2006) and with making recommendations to the Conference in 2007 "respecting the desirability and feasibility of legislative or non-legislative initiatives to promote uniformity in the use of Crown Brief material in collateral proceedings".

The Working Group examined the impact of the Ontario Court of Appeal decision in *D.P.* v. *Wagg* respecting production of the Crown brief in civil proceedings, and similar issues being argued in the context of child protection litigation and administrative law proceedings.

For the purpose of informing the Working Group's approach to drafting recommendations that would achieve uniformity in the use of production of Crown Brief information for collateral purposes, the following guiding principles were established by the Working Group:

1. Generally, it is in the public interest to control disclosure and use of Crown Brief materials for collateral purposes in order to maintain the integrity of the criminal justice system, and to protect third party privacy and confidentiality concerns.
2. There is a public interest in protecting the administration of civil justice by ensuring that parties to a civil proceeding have full access to all relevant information.
3. The '*Wagg* screening mechanism' applies in quasi-criminal and civil proceedings, including child protection proceedings, labour arbitrations and administrative law proceedings.
4. The public interest balancing test, which is part of the *Wagg* process, must be applied in a fair and consistent manner. This requires a decision-maker with the required legal expertise to recognize

administration of justice concerns that are critical to the protection of the integrity of the criminal and civil law systems.

5. Freedom of information legislation should not be used to access Crown Brief materials in circumstances where the public interest in confidentiality should prevail. Freedom of information legislation ought not to facilitate access to Crown Brief materials where consideration of the public interest concerns identified in *Wagg* would lead to the opposite conclusion.

The Working Group examined a number of issues including the 'implied undertaking rule' and concluded that the Canadian jurisprudence on the relationship between the implied undertaking rule and materials disclosed or produced in a criminal trial should be clarified. The Working Group identified issues that need to be addressed and proposed that guidelines be developed for the purpose of determining when the public interest requires ordering production, notwithstanding the existence of the undertaking.

The following recommendations were made by the Working Group:

Recommendation 1

The *Criminal Co*de or the Rules of Criminal Practice should be amended to create an undertaking of confidentiality that applies to all persons, including third parties, who receive Crown disclosure.

Recommendation 2

The provinces and territories should uniformly legislate amendments to their rules of civil procedure to codify the *Wagg* screen process in those rules.

Recommendation 3

Where feasible, Protocols and Memoranda of Understanding between key stakeholders such as the police and child protection agencies, and disciplinary tribunals, should be established to regulate the sharing of vital information in urgent cases and in particular types of proceedings.

Recommendation 4

The provinces and territories should uniformly codify the *Wagg* screening process in the enabling legislation of their child protection agencies and their legislation governing the procedures and processes that apply to administrative tribunals.

Recommendation 5

Freedom of information legislation throughout Canada should be uniform in its treatment of access requests for Crown Brief materials.

Discussion:

During the discussion, a number of issues were raised by delegates. It was noted that the paper was well researched, well written and thought provoking. One question was posed regarding the need to address whether the 1999 Supreme Court of Canada case of *Campbell and Shirose* would apply since Crown brief materials often contain the subjective assessment of the evidence retrieved by police forces. It was noted in response that there is usually not much privileged materials dealing with the Crown's assessment of the case.

The following views expressed during the Criminal Section debates were summarized and reported to joint session delegates as follows:

- Privacy interests of an accused person ought to be specifically recognized;
- With respect to the recommendation to codify implied undertakings of confidentiality, interests of defence counsel and unrepresented accused ought to be carefully considered, including whether undertakings that bind defence counsel would prevent them from sharing information with journalists;
- A court power to set aside or vary an implied undertaking should perhaps not be restricted to judges of the superior court;
- Third parties who come into possession of disclosure materials might not know that they are subject to the implied undertaking;
- There may be a difficulty for accused persons to fully appreciate the reasons why they cannot use disclosure materials in collateral

proceedings in which they may be engaged, such as family proceedings;

- Unrepresented accused may not fully appreciate the obligation of an undertaking of confidentiality; and
- The starting point of the paper should be that a presumption of non-confidentiality applies to Crown brief materials and documents should generally be made available to the public before a screening process applies.

During the discussion, it was suggested that it may be more appropriate to remove the presumption of confidentiality to expedite proceedings and avoid the need to make submissions that there are special circumstances in child protection cases and other administrative proceedings where a decision must be rendered promptly. It was noted in response that in the context of *Wagg*-type motions, it is recognized that child protection proceedings and similar matters are of such importance that they would proceed expeditiously but that in cases where it is less evident that the situation constitutes a special circumstance, a determination would need to be made.

In response to the question of the proper court jurisdiction to hear *Wagg*-type applications, it was submitted that the recommendation flowed naturally from the explanation provided by the Court in *Wagg* in which it was stated that the origin of the power of the Superior Court to hear such applications stemmed from the Superior Court's inherent power. In addition, it was noted that the main concern of the Working Group is that the question be handled by a court of proper expertise so the Court may fully appreciate the impact of decisions on the fairness of criminal proceedings. However, it was agreed that the proper court jurisdiction could be changed if delegates felt it was appropriate.

One delegate observed that the creation of a right of appeal similar to the one pursuant to section 37 of the *Canada Evidence Act* where the court makes an interlocutory order not to restrict access to Crown brief materials should be considered.

Also raised was the situation where a special procedure is created in the criminal context to obtain sensitive information (e.g. s. 278.2 of the *Criminal Code* – production of records to accused) but where the accused commences an action against the victim before the criminal proceedings have been instituted and obtains the information that would not otherwise be available to the accused in the criminal context. It was noted in response that most situations are usually the reverse: the plaintiff, who is the alleged victim in the criminal trial, does not have access to crown brief materials for the purpose of the civil action against the defendant who is the accused in the criminal trial; but the accused receives Crown brief materials through disclosure.

In reference to Recommendation 2.c, it was suggested that accused persons who require Crown brief materials to defend themselves in a civil proceeding should have access to these materials in the same manner as the police and Crown without being required to follow the screening mechanism described in the *Wagg* decision. In response, it was noted that the Court in *Wagg* determined that the screening mechanism does not apply to the police and the Crown brief materials could be used by police officers to defend themselves in a collateral proceeding. In addition, it was submitted that the Crown brief is created in anticipation of a criminal prosecution and that it would give rise to an odd situation if the creator of the record could not access it to defend himself or herself in a litigation that arises from the creation of the record. It was further submitted that the screening mechanism is not a complete barrier to accessing Crown brief materials.

The vote on the following resolution was deferred to the closing plenary and was adopted.

Resolved:

1. **That** recommendation number one of the Report, as amended*, be adopted.

2. **That** the Joint Civil/Criminal Working Group continue and that it consider the issues raised in the Report and the directions of the Conference and:

(a) prepare model uniform rules of civil procedure to codify the Wagg screening process in those rules;

(b) prepare uniform provisions to codify the Wagg screening process to govern production of Crown Brief materials in the child protection and administrative tribunal regimes; and

(c) prepare uniform access to information provisions governing access requests for Crown Brief materials for consideration at the 2008 meeting.

(* Recommendation number one, at paragraph 146 of the Paper, is amended by replacing the terms “superior court” with the terms “court of competent jurisdiction”.)

Report of the Joint Criminal/Civil Section Working Group On Identity Theft: A Discussion Paper(Joint Session)

The Paper was presented by Josh Hawkes, Appellate Counsel, Alberta Justice. In 2006, a Joint Criminal/Civil Section Working Group on Identity Theft was established to look at:

What ancillary orders or declarations might be made in conjunction with a criminal prosecution to assist a victim in the process of rehabilitating their financial and other aspects of their identity; and

The issue of mandatory breach reporting or breach notification.

The Working Group was also tasked with the responsibility of identifying areas for further research and examination.

The presenter described the scope of the problem of identity theft including the potential for significant financial losses and lasting consequential harm to its victims such as harm to credit ratings, financial reputation as well as erroneous criminal records created in the name of the victim where stolen identity is being used by an individual apprehended for a different crime. Criminal identity theft also potentially raises national security concerns. It has been the subject of extensive

study by a wide range of groups, organizations and governments both in Canada and abroad.

In terms of victim impact, the presenter indicated that studies have identified four major issues: discovery of identity theft; time spent by victims repairing or restoring their financial history; consequences of identity theft; and benefits of early discovery.

The Working Group examined the following two options for assisting victims under the criminal law:

1. A broader approach used in the state of South Australia, which consists of legislation that provides for a court to issue a certificate to victims of identity theft following the conviction of a person found guilty of identity theft;
2. A narrower approach based on California's 'factual declaration of innocence' model, which defines "criminal identity theft" as identity theft that occurs when a suspect in a criminal investigation identifies himself or herself using the identity of another innocent person. Under this model, the victim of criminal identity theft may apply for a declaration of factual innocence, which could lead to the sealing and destruction of records. The victim who is granted an order may also apply for inclusion in the Identity Theft Registry.

The presenter noted that in the Canadian context, the approach to victim assistance in the *Criminal Code* has a narrow focus – sections 738 to 741.2 address the circumstances in which a restitution order may be given either to the victim or to others, and deal with the enforcement of such orders and the relationship of these provisions to other civil remedies.

The paper notes that there are limits to the extent to which the two approaches may be applied to the Canadian context. The Working Group noted the constitutional constraints and other operational limits in following the broad approach taken in South Australia or the narrow approach based on the California model including the fact that the issuance of a certificate or declaration at the conclusion of a criminal proceeding would not be provided in sufficient time for the victim to

rehabilitate his or her credit history or limiting the amount of loss. Such process commences shortly after the victim is made aware of the theft.

The paper also notes that identity theft resulting in the issuance of criminal process or criminal conviction in the name of an innocent individual - which name may appear in local or national police records or databases or shared between jurisdictions both nationally and internationally - is a serious problem. The presenter noted, however, that before any solutions are proposed, further study is indicated including an examination of current practices as well further research to determine the scope of the problem in order to evaluate the need to implement a similar approach in Canada.

The Working Group also examined the legal and policy issues relating to mandatory reporting of data loss (or “breach notification”), which, among other, enables potential victims of identity theft to protect themselves. The most effective measures to minimize the risk of identity theft continue to be the subject of debate. The Working Group favoured a consistent approach to breach notification by all levels of government. Many organizations in Canada have operations and hold data from individuals in more than one jurisdiction. They would greatly benefit from uniform rules about responding to a data breach.

In considering the role of the Conference regarding the subject of identity theft, it was noted that the work of the several existing working groups and organizations looking at the issue of identity theft will need to be monitored to ensure there is no unnecessary duplication or overlap in any future work undertaken by this Conference.

To further guide the work of the Working Group, three broad conclusions were presented:

- Empirical research indicates both that identity theft is significantly underreported to police or other agencies, and that time is of the essence in providing effective assistance to victims in overcoming the effects of identity theft;

- Breach notification should be the subject of continued examination including civil and penal remedies such as those already developed in various jurisdictions; and
- As preventive measures are a critical component of any solution to the problem of identity theft, the Conference should consider examining ways to enhance identity security with a view to reducing the risks of identity theft.

In light of these conclusions, the Working Group recommended:

1. That the Working Group develop a principled framework for a breach notification scheme that could be used in all jurisdictions, together with an examination of related civil remedies and processes.
2. That the Working Group conduct a detailed examination of remedies and processes to aid victims of identity theft where criminal or other official records have erroneously been created in the name of the victim.
3. That the long term objective of the group be to examine identity security, and what steps might be taken to enhance the security of identification documents and practices with a view to reducing the risks of identity theft.

Discussion:

During the discussion, several questions were raised regarding the various aspects of identity theft. One issue noted for discussion was that while remedial measures are essential in addressing identity theft, prevention is equally important. It was noted that the Working Group explored whether they should study the preventive measures component in the Paper but concluded that a number of existing groups were already currently studying that aspect of identity theft. Also raised was whether the Working Group had the opportunity to consider the notion of issuing one single piece of identification. In response, it was noted that the narrow mandate of the Working Group did not extend to this issue. In addition, it was mentioned that at least one security expert did not favour this approach

because such an item would become the single factor identification that will not be questioned and this would cause more challenges in an identity theft situation. One member of the Working Group noted the importance of having persons with the proper expertise and experience, such as representatives of a privacy office, to assist the Working Group, in particular to examine the issue of breach notification.

After the discussion, the following resolution was presented:

Resolved:

1. **That** the Joint Criminal/Civil Section Working Group on Identity Theft:

(a) develop a principled framework for a breach notification scheme that could be used in all jurisdictions, together with an examination of related civil remedies and processes; and

(b) conduct a detailed examination of remedies and processes to aid victims of identity theft where criminal or other official records have erroneously been created in the name of the victim.

2. **That** the Working Group report back to the Conference in 2008.

Report of the Joint Criminal/Civil Section Working Group on Malicious Prosecution (Joint Session)

The paper was presented by Judy Mungovan, Counsel, Ministry of the Attorney General of Ontario.

In 2006, a Joint Criminal/Civil Section Working Group was established to consider the need for uniform legislation to respond to concerns being reported across Canada regarding common law developments in the intentional tort of malicious prosecution.

The presenter provided an overview of the Supreme Court of Canada decision of *Nelles* v*. Ontario* as well as subsequent interpretations by the Courts including the latest Saskatchewan Court of appeal decision in *Miazga* v. *Kvello Estate*.

It was noted that, in *Nelles*, the Supreme Court of Canada (largely on policy grounds) brought an end to the notion of complete immunity for Crown prosecutors but that it is clear from the Supreme Court's reasons that the exception it intended to carve out from the doctrine of absolute immunity for the Crown was to be sufficiently narrow and onerous so as to catch only Crown conduct that was truly maliciously motivated. Despite the policy rationale stated in *Nelles* regarding the balance between preventing absolute immunity for Crowns in malicious prosecution actions, while ensuring a healthy respect for Crown discretion in prosecutorial decisions, the subsequent jurisprudence has diminished the safeguards the Supreme Court of Canada created.

The *Nelles* case set out four discrete grounds for the tort of malicious prosecution against a Crown prosecutor. However, with regard to the third element (absence of reasonable and probable cause), cases subsequent to *Nelles* show an increasing judicial willingness to review the Crown's reasoning in determining that a prosecution should go forward. Also, it was noted that there is a disconnect between the standard a Court uses to review the decision to prosecute (reasonable and probable cause), and the standard a prosecutor is instructed to follow when deciding to prosecute (reasonable prospect of conviction). Of even more concern, where courts have determined that no reasonable and probable cause exists, some have used this to infer malice on the part of the Crown, thereby 'conflating' the fourth element (requiring malice or some improper purpose) with the third. Indeed, the Saskatchewan Court of Appeal, in *Miazga*, ultimately concluded that a Crown's subjective views about the accused's guilt or innocence spoke directly to the existence of reasonable and probable cause and may in turn be evidence of malice. The fourth element of malice was intended by the Supreme Court to be a bulwark against frivolous actions and actions based solely on negligence, but the jurisprudence has not evolved in this manner.

The presenter noted that the development of the jurisprudence is of serious concern to Crown prosecutors. The three provinces that do keep annual records (Alberta, Quebec and Ontario) show an increasing rate of malicious prosecution civil suits. The Working Group identified early on

the dangers that stem from an apparent loosening of the criteria for bringing a claim of malicious prosecution against a Crown prosecutor:

- an increased risk of frivolous prosecution claims that demoralize both the Crown named and Crowns in general;
- an increased risk that this will lead not only to more malicious prosecution claims, but also to other actions in tort to which Crowns have been traditionally immune; and
- the lack of clarity in recent jurisprudence has left Crowns unsure how to best fulfil their quasi-judicial roles as "ministers of justice" due to an apparent gap between the standard that compels a Crown to proceed with a prosecution that is in the public interest and the standard a Court uses when subsequently reviewing that same decision to proceed.

It was also noted that courts are reviewing the general exercise of Crown discretion in new ways. In addition to allowing actions alleging malicious prosecution, they have also reviewed decisions of Crowns to *not* prosecute.

Although the focus of the presentation and the paper was on recent interpretation of the *Nelles* test, the Working Group also identified other issues for further consideration, such as:

- do public policy considerations support suggestions in jurisprudence that prosecutorial liability can or should be founded on torts other than malicious prosecution (such as misfeasance in a public office, breach of fiduciary duty, conspiracy and interference with economic relations);
- is there a need for uniform rules of court that effectively and fairly screen out frivolous lawsuits against prosecutors; and
- is there a need to develop uniform legislation restricting the ability of plaintiffs to sue prosecutors in their personal capacity for professional decisions made as agents of the Attorney General?
- The Working Group recommended that the Conference consider the following three issues:

- the preparation of a uniform law entrenching the *Nelles* criteria as the exclusive basis on which Crown prosecutors may be sued for malicious prosecutorial acts;
- the preparation of a uniform law making Attorneys General solely liable for the torts committed by prosecutors as agents of the Attorneys General and the only party to be named in actions for malicious prosecution and related claims; and
- the preparation of other uniform jurisdictional responses that would fairly and effectively limit the harm caused by frivolous malicious prosecution lawsuits.

Discussion:

During the discussion, it was noted that Criminal Section delegates generally supported the goals of the Working Group as well as their recommendations. The main points raised during the Criminal Section debates were reported as follows:

There is general agreement that there is a disconnect between the standard of reasonable prospect of conviction applied in the context of a prosecution and the subjective component of the third element of the test enunciated in *Nelles*, which requires absence of reasonable and probable grounds that an offence has been committed to bring an action for malicious prosecution;

From a public policy perspective, Crown prosecutors should be in a position to evaluate, at every stage of the process, whether there continues to be reasonable prospect of conviction and determine whether charges against the accused should be withdrawn without the possible threat of a lawsuit for malicious prosecution; and

There is a need to define what constitutes improper purpose or malice in legislation and clarify the type of evidence required to prove malice or improper purpose so that cases that do not have merit can be promptly dismissed.

It was also noted during the joint session discussion that because claims in malicious prosecution are fact-based, the meaning given through

legislation to the terms improper purpose and malice should not be too specific. It was further noted that what is needed is a requirement that only very flagrant evidence of malice be accepted and not simply evidence inferred from lack of reasonable and probable grounds.

After the discussion, the following resolution was presented:

Resolved:

That the Joint Civil/Criminal Working Group continue and, pursuant to the recommendations in the Report and the directions of the Conference:

(a) prepare a draft Act and commentaries; and

(b) recommend other uniform jurisdictional responses that would fairly and effectively limit the

harm caused by frivolous malicious prosecution lawsuits for consideration at the 2008 meeting.

Closing

The Chair expressed his appreciation for the assistance provided by the Secretary and thanked her for the work performed throughout the year and during the week. The Chair indicated that it was a privilege for him to work with members of the Executive Committee as well as those of the Criminal Section Steering Committee and thanked them for their assistance during his chairmanship. The Chair also thanked the interpretors and technicians for their assistance.

The Chair wished the incoming Chair the best of luck and assured her that he would remain available to assist her in her work throughout the year. The Chair also commended delegates for the interesting debates and for their contribution to the meeting. The Chair encouraged all delegates to participate in next year's ULCC, held in Quebec City.

Delegates thanked the Chair for his excellent chairmanship and expressed appreciation for the Chair's work throughout the year and during the week.

The Nominating Committee recommended that Nancy Irving to be elected as Chair of the Criminal Section for 2007-2008 and it was recommended that Marvin Bloos be nominated to be the next Chair of the Criminal Section 2008-2009.

Annex 1 - REPORT OF THE SENIOR FEDERAL DELEGATE

Department of Justice Canada

Uniform Law Conference of Canada

Criminal Section 2007

Introduction

The Department of Justice appreciates its ongoing involvement in the Uniform Law Conference of

Canada (ULCC). The expertise provided by the ULCC on a broad spectrum of emerging criminal law

issues greatly assists the Department of Justice in identifying the need for reform and informing the

development of options for reform.

The Department of Justice is engaged in consultation with provinces, territories and a wide range of stakeholders on a number of criminal justice issues. The ULCC Criminal Section is a key stakeholder, providing expert advice and a range of perspectives.

Senior officials of the Department of Justice, the Deputy Minister and the Minister of Justice are promptly briefed on the outcome of ULCC resolutions and of the various discussion papers and reports that are examined by the ULCC Criminal Section.

Resolutions passed by the ULCC do not always result in prompt legislative reform. There are several stages in the policy development and legislative process. For example, consultation with other stakeholders may be necessary and *Charter* consideration will be assessed. Most importantly,

reforms proposing legislative amendments require approval of the federal Cabinet.

The Cabinet and Legislative agenda include initiatives from Ministers responsible for all federal departments. The Government has identified several priorities for law reform in addition to an ongoing commitment to improving the criminal law. While a number of criminal law reforms arising from ULCC resolutions continue to be examined on a regular basis by the Department of Justice, it is not possible to indicate whether a particular resolution will result in legislative amendments.

The 2006 Report provided the status of criminal law bills in the 38th Parliament (which ended on November 29, 2005) and those introduced in the first session of the 39th Parliament (which commenced in April 2006 and will end upon prorogation of Parliament, which is expected to occur in the near future). Several bills were tabled by the Minister of Justice over the past year. The current Report provides the status, as of September 4, 2007, of bills reported on in 2006 and of bills introduced since that time.

In addition, this Report includes information on several Private Members' bills that seek to amend the criminal law as these should be of interest to delegates of the Criminal Section.

Note that Parliament is expected to prorogue following the Prime Minister's September 4, 2007 announcement of his intention to recommend prorogation. As a result, if Parliament prorogues, several of the bills described below will die on the Order Paper upon prorogation. The status of the bills as of September 4, 2007 is also noted.

2006-2007 Government Legislative Initiatives

Since April 2006, the Government has tabled 13 criminal law reform bills. To date, six have passed and have received Royal Assent and the majority of those reforms are in force.

For example, amendments to address street racing, the criminal interest rate, camcording, and to permit implementation of the United Nations Convention against Corruption have received Royal Assent and have been proclaimed into force. Amendments to restrict conditional sentences have received Royal Assent and will come into force on December 1, 2007. Amendments regarding the use of DNA received Royal Assent and some provisions are now in force.

For ease of reference, the Government legislative initiatives are set out in chronological order beginning with the most recent bills introduced. The Private Members' bills introduced in this Session and of interest to delegates are described in the next section.

Bill C-59 *Unauthorized Recording of a Movie*

Bill C-59, *An Act to amend the Criminal Code (unauthorized recording of a movie)* was introduced on June 1, 2007 and received Royal Assent on June 22, 2007 as S.C. 2007, c. 28.

Bill C-59 amends the *Criminal Code* to create two offences: the recording of a movie in a movie theatre without the consent of the theatre manager; and the recording of a movie in a movie theatre without the consent of the theatre manager for the purpose of selling, renting, or other commercial distribution of a copy of the recorded movie. It also authorizes the forfeiture of anything used in the commission of these offences.

Bill C-48 *United Nations Convention Against Corruption*

Bill C-48, *An Act to amend the Criminal Code in order to implement the United Nations Convention against Corruption* was introduced on March 22, 2007 and received Royal Assent on May 31, 2007 as S. C. 2007, c.13.

Bill C-48 enacted technical amendments to enable Canada to ratify and implement the UN *Convention against Corruption* including:

- clarifying that corruption offences in the *Criminal Code* can be committed directly or indirectly, and apply whether the benefit is

conferred on an official or another person for the benefit of the official;
- providing for the forfeiture of instruments used in the commission of an offence of bribery of foreign public officials, under the *Corruption of Foreign Public Officials Act*; and
- amending s. 118's definition of "official" that applies to corruption offences to clarify that it includes a person "elected" to discharge a public duty and to codify the interpretation given to it by Canadian courts.

Bill C-35 Reverse Onus in Bail Hearings for Firearm-related Offences

Bill C-35, *An Act to amend the Criminal Code (reverse onus in bail hearings for firearm-related offences)* was introduced on November 23, 2006.

It proposes amendments relating to judicial interim release (bail) hearings for accused charged with serious offences involving firearms or other regulated weapons. Specifically, the Bill proposes to add a reverse onus for those charged with:

- specific offences committed with a firearm: attempted murder, discharging a firearm with intent, sexual assault with a weapon, aggravated sexual assault, kidnapping, hostage-taking, robbery and extortion;
- any indictable offence involving firearms or other regulated weapons if committed while the accused is under a weapon prohibition order; or
- firearm trafficking, possession for the purpose of trafficking or firearm smuggling.

Bill C-35 also proposes to expand the "tertiary ground" factors that the courts must take into account in deciding whether or not a person should be released on bail. It will require the courts to consider the fact that a firearm was allegedly used in the commission of the offence, and whether the accused faces a minimum term of imprisonment of 3 years or more for a firearm-related offence.

Bill C-35 was passed by the House of Commons on June 5, 2007 and received First Reading in the Senate on June 5, 2007.

Note that if Parliament is prorogued, Bill C-35 will die on the Order Paper upon prorogation.

Bill C-32 *Impaired Driving*

C-32, *An Act to amend the Criminal Code (impaired driving) and to make consequential amendments to other Acts* was tabled in the House of Commons on November 21, 2006. As introduced, the Bill proposed reforms in three main areas:

Drug-impaired driving: police would be authorized to demand roadside physical sobriety tests and, where the officer has reasonable grounds to believe the person is impaired by a drug, to demand that the person perform further tests administered by a Drug Recognition Expert (DRE) and provide a sample of a bodily fluid to be analyzed for the presence of a drug;

Restricting "evidence to the contrary" to scientifically valid defences: absent evidence that the instrument used to measure blood alcohol concentration (BAC) malfunctioned or of operator error, a court could not accept testimony by the accused of low alcohol consumption (typically two beers) that would have given the person a BAC reading below 80, unless the pattern of consumption is consistent with a low BAC at the time of driving and with the BAC found at the time of testing; and

Procedural and sentencing changes: including creating new offences of being over 80 or refusing to provide a breath sample where the person's operation of the vehicle has caused bodily harm or death; increasing minimum penalties particularly for repeat offenders; and reducing the time between breath tests from 15 to three minutes.

The House of Commons Standing Committee on Justice and Human Rights completed its review of Bill C-32 on June 19 and reported the Bill back to the House of Commons, with amendments, on June 20, 2007. One significant amendment made at Committee is the removal of the proposal

with respect to reducing the time between breath tests from 15 to three minutes.

Note that if Parliament is prorogued, Bill C-32 will die on the Order Paper upon prorogation.

Bill C-27 *Dangerous Offenders and Recognizance to Keep the Peace*

C-27 *An Act to amend the Criminal Code (dangerous offenders and recognizance to keep the peace)* was introduced in the House of Commons on October 17, 2006.

Bill C-27 amends the dangerous offender (DO) and long-term offender (LTO) provisions, including:

- imposing a rebuttable presumption of dangerousness upon a third designated conviction;
- requiring a Crown declaration of intent to bring a DO application upon a third designated conviction;
- codifying that the burden of proof is not on the Crown to prove the issue of fitness of sentence (codification of the 2003 SCC decision in *Johnson*); and
- amending the s. 810.1 and 810.2 peace bond provisions to extend their duration from one to two years, while clarifying that a broad scope of conditions may be imposed.

Bill C-27 was referred to a Legislative Committee for review on May 8, 2007, following Second Reading in the House of Commons.

Note that if Parliament is prorogued, Bill C-27 will die on the Order Paper upon prorogation.

Bill C-26 *Criminal Interest Rate*

C-26, *An Act to amend the Criminal Code (criminal interest rate)* was introduced in the House of Commons on October 6, 2006 and passed by the House of Commons on February 6, 2007. Bill C-26 received Royal Assent on May 3, 2007 as S.C. 2007, c. 9.

Section 347 of the *Criminal Code* makes it an offence to enter into an agreement or arrangement to receive interest at a criminal rate (defined as exceeding 60 % per annum), or to receive a payment of interest at a criminal rate. Bill C-26 amends the *Criminal Code* to create a new provision (section 347.1) which exempts certain payday lenders from the application of s. 347 when:

(a) the jurisdiction has consumer protection legislation applicable to payday lending;

(b) the legislation includes a limit on the total cost of payday borrowing;

(c) the payday lender is licensed or otherwise authorized by the jurisdiction to provide payday loans; and

(d) the jurisdiction has been designated by the federal government for the purpose of the exemption.

Bill C-23 *Criminal Procedure, Language of the Accused, Sentencing and Other Amendments*

Bill C-23, *An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)* received First Reading in the House of Commons on June 22, 2006. Bill C-23 reflects many ULCC resolutions passed between 1996 and 2005 as detailed in the 2006 Report of the Senior Federal Delegate. This Bill proposes amendments in three main categories: criminal procedure, sentencing and language of the accused. Bill C-23 also includes other amendments to various *Criminal Code* provisions.

Of particular interest to Criminal Section delegates is an amendment made to C-23 in the House of Commons. As introduced, Bill C-23 included an increase in the maximum fine that can be imposed for summary conviction offences from $ 2,000 to $ 10,000. As a result of an amendment passed by the Standing Committee on Justice and Human Rights and as passed by the House of Commons, the maximum fine is now set at $ 5,000.

Bill C-23 reached Second Reading debate in the Senate on June 18, 2007. However, if Parliament is prorogued, Bill C-23 will die on the Order Paper upon prorogation.

Bill C-22 *Age of Protection*

Bill C-22, *An Act to amend the Criminal Code (age of protection) and to make consequential amendments to the Criminal Records Act* received First Reading in the House of Commons on June 22, 2006. As introduced, this Bill proposed to amend the *Criminal Code* to raise the age, from 14 to 16 years, at which a person can consent to non-exploitative sexual activity.

It creates an exception in respect of an accused who engages in sexual activity with a 14 or 15 year old youth and who is less than five years older than the youth. It also creates an exception for transitional purposes in respect of an accused who engages in sexual activity with a 14 or 15 year old youth and who is five or more years older than the youth if, on the day on which this Act comes into force, the accused is married to the youth. The exception also applies to the accused if, on the day on which this Act comes into force, he or she is the common-law partner of the youth or has been cohabiting with the youth in a conjugal relationship for less than one year and they have had or are expecting to have a child as a result of the relationship, and the sexual activity was not otherwise prohibited before that day. Below this age, all sexual activity with a young person, ranging from sexual touching to sexual intercourse, is prohibited. This exception would apply to **14 and 15 year old youths** who engage in non-exploitative sexual activity with a partner **who is less than five years older**.

The proposed reforms maintain an existing close-in-age exception that exists for 12 or 13 year olds who engage in sexual activity with a peer who is less than 2 years older, provided the relationship is not exploitative. The legislation also maintains the existing age of protection of 18 years old for exploitative sexual activity.

As passed by the House of Commons, on May 4, 2007, the exception in respect of an accused who engages in sexual activity with a 14 or 15 year old youth and who is five or more years older than the youth if, on the day

on which this Act comes into force, the accused is married to the youth, is now a permanent exception.

Bill C-22 was referred to the Senate Standing Committee on Legal and Constitutional Affairs on June 20, 2007. Note that if Parliament is prorogued, Bill C-22 will die on the Order Paper upon prorogation.

Bill C-21 *Non-Registration of Firearms*

Bill C-21, *An Act to amend the Criminal Code and the Firearms Act (non-registration of firearms that are neither prohibited nor restricted)* received First Reading in the House of Commons on June 19, 2006.

This Bill proposes to amend the *Criminal Code* and the *Firearms Act* to repeal the requirement to obtain a registration certificate for firearms that are neither prohibited firearms nor restricted firearms (long-guns), as well as associated offences. Bill C-21 requires current owners to notify the Chief Firearms Officer prior to the transfer of a long-gun (e.g. selling or giving of a long-gun). This notice will invoke the Chief Firearms Officer's obligations to verify the transferee's licence status, licence eligibility and whether the transferee can possess that type of firearm, as well as authorize the transfer if it is determined that it is not contrary to the interests of the safety of the public. Finally, businesses transferring long-guns to another business will not be required to contact either the Chief Firearms Officer or the Registrar (as previously done) prior to a transfer. However, conditions that those businesses must meet with respect to such transfers to further the public safety objectives of the legislation will be prescribed in regulations. As such, this Bill amends the *Firearms Act* to provide that the Governor in Council may make regulations regulating the keeping and destruction of records by businesses in relation to long-guns.

Bill C-21 received Second Reading in the House of Commons on June 19, 2007. However, if Parliament is prorogued, Bill C-21 will die on the Order Paper upon prorogation.

Bill C-19 *Street Racing*

Bill C-19, *An Act to amend the Criminal Code (street racing) and to make a consequential amendment to the Corrections and Conditional Release*

Act received First Reading on June 15, 2006 and was passed by the House of Commons on November 1, 2006. Bill C-19 received Royal Assent on December 14, 2006 as S.C. 2006, c. 14.

Bill C-19 amends the *Criminal Code* to create new offences to specifically combat street racing. These new offences build upon existing offences, including dangerous driving and criminal negligence, and provide enhanced maximum penalties of incarceration for the most serious street racing offences. Bill C-19 also creates mandatory minimum periods of driving prohibition for those convicted of street racing.

The length of the driving prohibitions will increase for repeat offenders. In the most serious cases involving repeat street racing offenders, a mandatory lifetime driving prohibition applies. This would occur when an offender has at least two convictions of street racing causing bodily harm or death and at least one of those convictions involves street racing causing death.

Bill C-18 ***DNA***

Bill C-18, *An Act to amend certain Acts in relation to DNA identification* received First Reading in the House of Commons on June 8th, 2006 and was passed by the House of Commons on March 28, 2007. Bill C-18 received Royal Assent on June 22, 2007 as S.C. 2007, c. 22. The following provisions come into force on a day to be proclaimed: section 7, subsection 8(1), section 10, subsections 11(2) to (4), section 12, subsection 13(2), sections 14 to 17, subsection 20(4), sections 22, 24, 26, 29, 30, 34 and 35, subsection 37(2), sections 38 to 41, subsection 43(4) and sections 45 and 46. All other provisions came into force on Royal Assent. The Parliament of Canada website (http://www.parl.gc.ca) should be consulted for more information and the text of these provisions.

C-18 makes technical amendments to strengthen DNA data bank legislation (*Criminal Code*, the *DNA Identification Act* and the *National Defence Act*) including:

- Adding attempted murder and conspiracy to commit murder to the offences covered by the retroactive provisions (which apply to

offenders convicted of a single murder, sexual offence or manslaughter prior to June 30, 2000, when the legislation that enabled the creation of the National DNA Data Bank came into force);

- Permitting a retroactive hearing where the person is still under sentence for one of the defined offences rather than requiring that the person is serving a sentence of two years for that offence;
- Making it an offence to fail to appear for DNA sampling – similar to the existing offence for failing to show up for fingerprinting;
- Allowing a court to set a date for a hearing to determine whether a DNA order should be made within 90 days after sentence is pronounced (the actual hearing could, however, be beyond the 90 days;
- Clarifying that a warrant for the arrest of a person who failed to show for DNA sampling can be executed and the bodily substances taken by any Canadian police force that arrests the person; and
- Allowing the law enforcement agency authorized to take a DNA sample to authorize another law enforcement agency to do it on its behalf when the offender has moved to or been incarcerated outside its jurisdiction.

Bill C-10 *Minimum Penalties for Firearm Offences*

Bill C-10, *An Act to amend the Criminal Code (minimum penalties for offences involving firearms) and to make a consequential amendment to another Act* was introduced in the House of Commons on May 4, 2006.

As introduced, Bill C-10 proposed three different escalating minimum penalty schemes, based on the nature and level of seriousness of the offences as detailed in the 2006 Senior Federal Delegate's Report.

However, as a result of amendments made by the Standing Committee on Justice and Human Rights and further amendments made at Report stage in the House of Commons and as passed by the House of Commons, C-10 now proposes to increase the minimum penalties (5 years on a first

offence and 7 years on a second or subsequent offence) for 8 serious offences committed with a firearm (attempted murder, discharging a firearm with intent, sexual assault with a weapon, aggravated sexual assault, kidnapping, hostage taking, robbery and extortion).

The higher minimum penalties would apply to those who use a restricted or prohibited firearm in the commission of an offence or who commit an offence in connection with a criminal organization, which includes a gang. For offences that do not involve the actual use of firearms in the commission of an offence (e.g., firearm trafficking or smuggling and the illegal possession of a restricted or prohibited firearm with ammunition), C-10 proposes a minimum penalty of 3 years imprisonment for a first offence and 5 years for a second or subsequent offence. The Bill also proposes the creation of two new offences: breaking and entering to steal a firearm and robbery to steal a firearm, both of which would be punishable by a maximum penalty of life imprisonment.

Bill C-10 was passed by the House of Commons on May 29, 2007 and received First Reading in the Senate on May 31, 2007. Note that if Parliament is prorogued, Bill C-10 will die on the Order Paper upon prorogation.

Bill C-9 *Conditional Sentence of Imprisonment*

Bill C-9, *An Act to amend the Criminal Code (conditional sentence of imprisonment)* received First Reading in the House of Commons on May 4th, 2006. Bill C-9 was passed by the House of Commons on November 3, 2006. It received Royal Assent on May 31, 2007 as S.C. 2007, c. 12. The reforms will come into force on December 1, 2007.

As introduced, Bill C-9 amended section 742.1 of the *Criminal Code* to provide that a person convicted of any offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more is not eligible for a conditional sentence.

However, as a result of amendments made by the House of Commons Standing Committee on Justice and Human Rights and as passed, Bill C-9 amends section 742.1 by eliminating the availability of a conditional

sentence for serious personal violence offences, terrorism offences and organized crime offences prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more.

Bill C-2 *Federal Accountability Act*

Bill C-2, *An act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability (federal accountability act)* received First Reading in the House of Commons on April 11, 2006 and was passed by the House of Commons on June 26, 2006. Bill C-2 received Royal Assent on December 12, 2006 as S.C. 2006, c. 9.

Bill C-2 includes amendments to a number of federal statutes as well as enacting new Acts. In particular, Part 3 enacts the *Director of Public Prosecutions Act*, which provides for the appointment of the Director of Public Prosecutions (DPP). That Act gives the Director the authority to initiate and conduct prosecutions on behalf of the Crown that are under the jurisdiction of the Attorney General of Canada, unless the Attorney General of Canada directs otherwise. In such cases, the directives must be in writing and published in the *Canada Gazette*. In addition to the other powers and duties mentioned in the Act, the Director also intervenes in matters that raise questions of public interest that may affect the conduct of prosecutions or related investigations except in proceedings in which the Attorney General has decided to intervene. The Director holds office for a non-renewable term of seven years during good behaviour and is the Deputy Attorney General of Canada for the purposes of carrying out the work of the office.

2006-2007 Other Bills of Interest

Private Members' Bills (House of Commons)

Delegates to the Criminal Section may be particularly interested in the criminal law reforms proposed by Private Members' bills. For example, Bill C-277, which has received Royal Assent, increases the sentences for luring.

This issue was the subject of a ULCC resolution in 2006. The Parliament of Canada website (http://www.parl.gc.ca) should be consulted for the full list and text of Private Members' bills. Some of the bills of interest to ULCC are described briefly below. Note that the description below refers to the status of bills as of September 4, 2007.

Bill C-277 – *An Act to amend the Criminal Code (luring a child)* – Mr. Fast (Abbotsford) was introduced in the House of Commons on May 12, 2006 and received Royal Assent on June 22, 2007 as S.C. 2007, c. 20. It amends the *Criminal Code* to increase the maximum penalties for section 172.1 (luring a child) from 6 to 18 months imprisonment on summary conviction and from 5 to 10 years imprisonment on indictment.

Bill C-299 – *An Act to amend the Criminal Code, the Canada Evidence Act and the Competition Act (personal information obtained by fraud)* – Mr. Rajotte (Edmonton-Leduc) was introduced on May 17, 2006. It proposes to amend the *Criminal Code* to create the following criminal offences:

(a) obtaining personal information from a third party by a false pretence or by fraud;

(b) counselling a person to obtain personal information from a third party by a false pretence or by fraud; and

(c) selling or otherwise disclosing personal information obtained from a third party by a false pretence or by fraud.

Bill C-299 would make other amendments, including to the *Canada Evidence Act* and the

Competition Act.

Bill C-299 received First Reading in the Senate on May 9, 2007.

Bill C-343 – *An Act to amend the Criminal Code (motor vehicle theft)* – Mr. Scheer (Regina-Qu'Appelle) received First Reading on June 22, 2006. This Bill proposes to create a separate offence of motor vehicle theft with escalating penalties, including mandatory minimum penalties (MMPs):

1st offence: MMP of 3 months imprisonment and/or fine of $1000 and maximum of

2 years imprisonment on summary conviction or 5 years on indictment;

2nd offence: MMP of 6 months imprisonment and/or fine of $5000 and maximum of

2 years imprisonment on summary conviction or 5 years on indictment; and

3rd offence: MMP of 2 years imprisonment and fine of $10,000 and maximum of 10

years imprisonment.

This Bill was referred to the House of Commons Standing Committee on Justice and Human Rights on May 2, 2007.

Bill C-376 – *An Act to amend the Criminal Code (impaired driving) and to make consequential amendments to other Acts* – Mr. Cannan (Kelowna-Lake Country) received First Reading on October 31, 2006. Bill C-376 proposes to create a new drinking and driving offence of operating, or having the care or control of, a vehicle while having a concentration of 50 milligrams or more of alcohol per 100 millilitres of blood. It also makes related amendments to the *Criminal Records Act* and the *Identification of Criminals Act*.

Bill C-376 is currently at Second Reading stage in the House of Commons.

Bill C-423 – *An Act to amend the Youth Criminal Justice Act (treatment for substance abuse)* – Mr. Lake (Edmonton-Mill Woods-Beaumont) received First Reading on April 16, 2007. Bill C-423 proposes to amend the *Youth Criminal Justice Act* (*YCJA*) to require that a police officer must, before starting judicial proceedings or taking any other measures under the *YCJA* against a young person alleged to have committed an offence, consider whether it would be sufficient to refer the young person to an addiction specialist for assessment and, if warranted, treatment recommendations. If the young person enters into a treatment program as a result of such a referral and fails to complete the program, the

outcome may be the start of judicial proceedings against that young person.

This Bill reached Second Reading in the House of Commons on June 5, 2007.

Bill C-426 – *An Act to amend the Canada Evidence Act (protection of journalistic sources and search warrants)* – Mr. Ménard (Marc-Aurèle-Fortin) received First Reading in the House of Commons on April 17, 2007. The Bill is intended to protect the confidentiality of journalistic sources. It allows journalists to refuse to disclose information or a record that has not been published unless it is of vital importance and cannot be produced in evidence by any other means. It establishes specific conditions that must be met for a judge to issue a search warrant to obtain information or records that a journalist possesses.

Bill C-426 reached Second Reading stage in the House of Commons on May 15, 2007.

Bill C-428 – *An Act to amend the Controlled Drugs and Substances Act* **(***methamphetamine)* –

Mr Warkentin (Peace River) was introduced in the House of Commons on April 19, 2007. This Bill proposes to prohibit the production, possession and sale of any substance, equipment or other material that is intended for use in production of or trafficking in methamphetamine.

Bill C-428 passed Second Reading in the House of Commons and was referred to the Standing Committee on Justice and Human Rights on June 14, 2007.

Senate Bills (Other than Government Bills)

Bill S-206 – *An Act to amend the Criminal Code (suicide bombings)* (Senator Grafstein) was introduced in the Senate on April 5, 2006. Bill S-206 proposes to amend the definition of "terrorist activity" in paragraphs 83.01(1) (*a*) and (*b*) of the *Criminal Code* by adding a clause

after subsection 83.01(1.1) specifying that a suicide bombing comes within paragraphs (*a*) and (*b*) of the definition of “terrorist activity”. This amendment is intended to clarify that suicide bombings fall within the definition "terrorist activity".

This Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs on October 31, 2006.

Bill S-207 – *An Act to amend the Criminal Code (protection of children)* (Senator Hervieux-Payette) was introduced on April 5, 2006. It proposes to amend the *Criminal Code* by removing the justification available to schoolteachers, parents and persons standing in the place of parents of using force as a means of correction toward a pupil or child under their care.

It was referred to the Senate Human Rights Committee on December 14, 2006. The Committee reported back to the Senate on June 22, 2007.

Bill S-211 – *An Act to amend the Criminal Code (lottery schemes)* (Senator Lapointe) was introduced in the Senate on April 25, 2006. Bill S-211 proposes to amend the *Criminal Code* in relation to gaming offences in order to narrow the exemption that allows provincial governments to lawfully conduct and manage lottery schemes involving video lottery terminals and slot machines, by limiting the locations at which such machines can be installed to casinos, race-courses and betting theatres.

Bill S-211 was passed by the Senate on October 17, 2006. It has received Second Reading in the House of Commons and was referred to the House of Commons Justice and Human Rights Committee on February 21, 2007.

Bill S-213 – *An Act to amend the Criminal Code (cruelty to animals)* (Senator Bryden) was introduced in the Senate on April 26, 2006 and was passed by the Senate on December 7, 2006. Bill S-213 proposes to amend the *Criminal Code* to increase the maximum penalties for animal cruelty offences.

Bill S-213 was referred to the House of Commons Justice and Human Rights Committee on April 25, 2007.

Bill S-218 – *An Act to amend the State Immunity Act and the Criminal Code (civil remedies for victims of terrorism)* (Senator Tkachuk) was introduced on June 15, 2006. Bill S-218 seeks to amend the *Criminal Code* to provide a statutory civil remedy to victims of terrorism who suffered loss or damage on or after January 1, 1985 as a result of conduct contrary to Part I of the *Anti-terrorism Act* (now Part II.1 of the *Criminal Code*). The Bill also seeks to amend the *State Immunity Act* to lift state immunity from foreign states so that they may be sued for sponsoring a terrorist act carried out by a listed entity on foreign soil.

This Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs on November 2, 2006.

Other Initiatives

Delegates may also be interested in the on going work of the Department of Justice relating to criminal law reform as some of these issues have been the subject of discussion at ULCC.

Hybridization

In the summer and fall of 2006, the Department of Justice conducted, on behalf of the FPT Working Group on Criminal Procedure, a written consultation on a series of proposals for the hybridization of offences. The Consultation document on hybridization was presented at the 2006 Conference. The Working Group is currently finalizing recommendations for FPT Ministers Responsible for Justice in relation to this initiative. ULCC resolutions pertaining to the reclassification of various *Criminal Code* offences and outcome of discussions of the 2006 presentation have been considered in the context of this initiative.

Bail

A number of resolutions pertaining to bail and dating back to 1985 have been examined by an ad hoc Sub-Committee of the

Federal/Provincial/Territorial Working Group on Criminal Procedure (as referred to in the 2005 and 2006 Senior Federal Delegate's Reports). This sub-committee undertook to review the entire judicial interim release scheme, including the provisions relating to release by police officers.

The Recommendations on bail reform of the F/P/T Working Group on Criminal Procedure, which address a variety of important issues raised by F/P/T forums in recent years, including the ULCC, were approved by F/P/T Ministers Responsible for Justice at their October 2006 meeting, for implementation where appropriate, or referred to the Department and the F/P/T Working Group for further work on policy development and consultation.

Preliminary Inquiry

The Department is currently assessing the role and ongoing usefulness of the preliminary inquiry as well as the impact of amendments brought to the preliminary inquiry provisions by Bill C-15A, *An Act to amend the Criminal Code and to amend other Acts* (S.C. 2002, c. 13). This research involves gathering information from a broad spectrum of participants in the criminal justice system to determine whether the preliminary inquiry currently serves a purpose, what the purpose is and how to make improvements to the procedure if required. When data from the Canadian Centre for Justice Statistics becomes available, the research will also determine statistically the frequency of use of the preliminary inquiry, the circumstances in which these occur and whether the C-15A amendments have had an impact. This research will inform the development of proposals for reform.

Youth Justice

The Department of Justice is undertaking a comprehensive review of the pre-trial detention regime under the *Youth Criminal Justice Act*. A consultation paper dated June 1, 2007, seeking the views of experts and stakeholders in the youth justice system can be found on the Justice Canada website. The paper sets out information on experience with the

pre-trial detention regime for youth; identifies a number of issues; and raises questions about how the pre-trial detention system for youth should be structured.

Organized Crime

In the Spring of 2007, federal, provincial and territorial Ministers responsible for Justice and Public Safety agreed to a renewed commitment to a national agenda on organized crime during their Ministerial Forum on Organized Crime. The main purpose of this meeting was to discuss how to increase coordination and cooperation across the country in the fight against organized crime. Components of that strategy could include:

- strengthening mechanisms to facilitate effective national cooperation and collaboration on organized crime (i.e. governance);
- strengthening criminal and civil legislative approaches to combating organized crime, including targeting proceeds of crime;
- improving information sharing and collaboration amongst prosecutors, police and intelligence personnel;
- enhancing strategies for integrated responses to organized crime, (e.g. joint law enforcement strategies; developing a national witness protection program and developing a legal and policy framework for cross border policing);
- enhancing research to improve understanding of the evolving nature of organized crime, including its structures, activities and impact on communities; and
- enhancing training for police, prosecutors, and enforcement and corrections personnel.

Ministers agreed to target organized crime and collectively acknowledged it as a local, regional, provincial-territorial, national and global issue. Its effects are felt directly in communities across Canada, through criminal activities such as drug-related crimes including marijuana grow-ops, gang violence, identity theft, the sale of counterfeit goods and human trafficking for the purpose of sexual exploitation, especially women and

children. Ministers agreed that while many successful actions to combat organized crime have been taken by the federal, provincial and territorial governments, sustained, enhanced and integrated efforts are needed to address the serious risk organized crime presents to the safety of communities.

Ministers will review progress at upcoming federal-provincial-territorial meetings.

Victims of Crime

In March, 2007 the Federal Ministers of Justice and Public Safety announced the establishment of the Office of the Federal Ombudsman for Victims of Crime. The first Ombudsman was appointed in April, 2007.

The Ombudsman operates at arm's length from the federal departments responsible for victim issues, namely the Department of Justice and the Department of Public Safety. The provinces and territories will continue to be the primary providers of victim services.

The mandate of the Federal Ombudsman for Victims of Crime relates exclusively to matters of federal responsibility and includes:

- facilitating access by victims to existing federal programs and services by providing them with information and referrals;
- addressing complaints of victims about compliance with the provisions of the *Corrections and Conditional Release Act* that apply to victims of offenders under federal supervision and providing an independent resource for those victims;
- enhancing awareness among criminal justice personnel and policy makers of the needs and concerns of victims and the applicable laws that benefit victims of crime, including to promote the principles set out in the Canadian Statement of Basic Principles of Justice for Victims of Crime; and
- identifying emerging issues and exploring systemic issues that impact negatively on victims of crime.

Conclusion

The work of the ULCC greatly assists the Department of Justice Canada in identifying key areas of criminal law that are in need of reform. Justice Canada will continue the process of examining resolutions proposing amendments to the *Criminal Code* and other related criminal law statutes for consideration in future legislative initiatives.

September 2007

Annex 2 - RESOLUTIONS

ALBERTA

Alberta – 01

Subsections 4 (2) to (4) of the *Canada Evidence Act* imposes restrictions on the competence and compellability of spousal witnesses and recognizes a broad privilege on spousal communication. These provisions have long been the subject of judicial and academic criticism, and repeated calls for reform. They should be repealed.

Carried: **16-6-5**

Alberta – 02
The *Criminal Code* should be amended to provide for a mandatory sealing order regarding exhibits that constitute child pornography.

Carried as amended: **24-0-4**

Alberta – 03
The Federal-Provincial-Territorial Working Group on Criminal Procedure should examine the proper scope and application of subsection 686(8) (appeal – additional powers) of the *Criminal Code*, with particular reference to the appropriate procedure when a stay of proceedings is overturned, in light of the decision of the Alberta Court of Appeal in *R. v. Yelle* [2006] ABCA 276.

Carried: **19-0-7**

BRITISH COLUMBIA

British Columbia – 01

That the Uniform Law Conference of Canada urge Justice Canada to explore options to permit courts to order psychological or psychiatric reports for sentence hearings.

Carried as amended: 20-0-7

British Columbia – 02

That the Uniform Law Conference of Canada urge Justice Canada to explore replacement of conditional sentence order enforcement procedures in the *Criminal Code* with provisions: 1) deeming the conditions of a conditional sentence order to be parole conditions, and 2) providing for enforcement of the conditions by parole authorities as parole conditions.

Withdrawn

(Following discussion)

British Columbia – 03

That the attendance order provision in s. 527 of the *Criminal Code* be amended by replacing the requirement for an affidavit setting out the "facts of the case" with policy based factors.

Carried as amended: **26-0-0**

British Columbia – 04

That section 849 (forms) of the *Criminal Code* be amended to add a clause permitting a clerk of the court, in the absence of an order to the contrary, to sign any form on behalf of an issuing judge.

Carried: 17-3-5

MANITOBA Manitoba – 01
Section 161 (prohibition order – offences in respect of person under the age fourteen years) of the *Criminal Code*should be amended to include section 212 (procurement) under the list of enumerated offences for which a prohibition order can be sought.

Carried: 23-0-2

Manitoba – 02
Section 278.2 (production of record to accused) of the *Criminal Code* should be amended to include all

personal injury offences.

Defeated: 4-16-8

NEW BRUNSWICK

New Brunswick – 01
That subsection 487.3(1) (order denying access to information used to obtain warrant or production order) of the *Criminal Code* be amended to preserve common law powers respecting sealing orders and to include other types of orders including restraint orders, income tax information orders, assistance orders, etc.

Carried as amended: 26-0-0

New Brunswick – 02
That section 29 (pre-trial detention not a substitute for social measure) of the *Youth Criminal Justice Act* be amended to remove any restrictive reference to section 39 (committal to custody) of the YCJA to provide that a court may remand into custody on a bail hearing a youth who has allegedly breached the terms of his undertaking given to the Court if such detention of the young person is necessary for the protection or safety of the public.

Withdrawn

(Without discussion)

NEWFOUNLAND AND LABRADOR
Canadian Association of Provincial Court Judges
CAPCJ – 01

1- Amend subsection 109(1) (mandatory prohibition order – firearms) of the *Criminal Code* as follows:

Where a person is convicted or discharged under section 730 of (*a*) (*b*) (*c*) (*d*)

The offender shall be prohibited from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition; prohibited ammunition and explosive substance during the period specified in accordance with section (2) or (3) as the case may be.

(2) A prohibition under subsection (1) shall be in the case of a first conviction or discharge (…) etc.

2- Amend subsection 109(3) of the *Criminal Code* to provide that a lifetime prohibition be imposed where the accused has been served with a notice of intention to seek greater punishment.

Withdrawn

(Following discussion)

CAPCJ – 02

Subsection 722 (2) (procedure – victim impact statement) of the *Criminal Code* be amended to include that no victim impact statement shall contain a recommendation as to sentence or criticism of the accused person's character or personality traits.

Defeated as amended: 5-20-1

CAPCJ –03

Amend subsection 737(3) (victim surcharge – increase) of the *Criminal Code*:

The court may order an offender to pay a victim surcharge in an amount exceeding that set out in subsection (2) if the court considers it appropriate in the circumstances and is satisfied that the offender is able to pay the higher amount or may order the offender to pay a surcharge in amount less than that set out in subsection (2) if the court is satisfied that paying the full amount would cause the offender undue hardship but the offender has the means to pay a lesser amount.

Carried: 21-2-5

ONTARIO

Ontario – 01
That Part XV (Special Procedure and Powers) of the *Criminal Code* be amended to give superior court judges the jurisdiction to do anything with respect to warrants or warrant-like orders that the *Criminal Code* allows justices of the peace or provincial court judges to do under that Part.

Carried as amended:24-1-4

Ontario – 02
That subsection 489.1(1) (restitution of property or report by peace officer) of the *Criminal Code* be amended to clarify that the Form 5.2 report to a justice does not have to be physically submitted by the seizing officer who prepared the report but can be filed by any peace officer.

Carried: 24-2-2

Ontario - 03

It is recommended that subsection 742.6(4) (evidence - breach of conditional sentence) of the *Criminal Code* be clarified and that it be amended to allow witness statements, where provided, to be in audio or video form.

Carried as amended:25-0-2

Ontario – 04
Amend paragraph 109(2)(*c*) of the *Youth Criminal Justice Act* to allow young persons to serve all or a portion of the remainder of the conditional supervision order as a custody and supervision order. Any portion of the conditional supervision order not converted to a custody and supervision order should remain as a conditional supervision order to be served after the custody and supervision order.

Withdrawn

(Following discussion)

Ontario – 05

Amend the *Youth Criminal Justice Act* to permit young persons who elect to be tried by judge and jury to be tried with adults in murder cases.

Withdrawn

(due to the fact that the question of whether the *YCJA* permits a young person to be tried together with an adult will soon be before the Supreme Court of Canada in the Quebec case of *Her Majesty the QueenS.L.G., et al*.) v.

Ontario Criminal Lawyers' Association OCLA – 01
That subsection 254(3) (sample of breath or blood – reasonable and probable grounds) of the *Criminal Code* be amended to provide that the failure or refusal to comply with a demand under subsection 254(2) (breath sample – reasonable suspicion) shall either:

give a peace officer reasonable grounds to believe that an offence under section 253 has been committed, or

shall empower a peace officer to make a demand under subsection 254(3), and

that subsection 254(5) (failure or refusal to provide sample) be amended to specify that only the refusal or failure to comply with a demand under subsection 254(3) is an offence.

Defeated: 4-21-3

CANADA
Public Prosecution Service of Canada

PPSC – 01

That a Uniform Law Conference of Canada Criminal Section Working Group study the issues of the appropriateness of legal fees paid pursuant to an order made under paragraph 462.34(4)(*c*) (order for restoration of property or revocation or variation of order) of the *Criminal Code* and of compensatory fines in lieu of forfeiture that may be imposed where the seized or restrained property has been diminished by such an order.

Carried as amended: 20-0-6

PPSC –02

A- To amend Part II (Enforcement) of the *Controlled Drugs and Substances Act* and Part XV (Special Procedure and Powers) of the *Criminal Code* to permit the immediate disposal of hazardous offence-related property.

Carried: 18-0-0

B- To amend Part II of the *Controlled Drugs and Substances Act* and Part XV of the *Criminal Code* to permit the expeditious disposal of enumerated lower-value offence-related property, to provide a compensation scheme to address unjustified disposal, and to address the issue of notice.

Carried as amended: **15-0-3**

C- To amend the *Controlled Drugs and Substances Act* and the *Criminal Code* to allow, on consent, an order for the interlocutory sale and disposition of offence-related property.

Carried: 18-0-0

PPSC – 03

Amend paragraph 725(1)(*c*) (facts forming separate charge - sentencing) of the *Criminal Code* to require the consent of the prosecutor.

Carried as amended: 21-1-3

Canadian Bar Association

CBA – 01 Amend the *Criminal Code* to provide the Court with the additional jurisdiction to order, after charges are laid, the release and independent testing of any evidence seized by the police during its investigation consistent with the procedural safeguards in section 605 (release of exhibits for testing) of the *Criminal Code*.
Carried as amended: 27-0-0