

UNIFORM LAW CONFERENCE OF CANADA

WINNIPEG, MANITOBA
AUGUST 7 - 11, 2011

CRIMINAL SECTION

MINUTES

ATTENDANCE

Twenty six delegates representing provinces, territories and the federal government participated in the deliberations of the Criminal Section. Delegates included policy counsel, prosecutors, defence counsel and members of the judiciary.

OPENING

Joshua B. Hawkes, Q.C. presided as Chair of the Criminal Section. Joanne Dompierre acted as Secretary. The Section convened to order on Sunday, August 7, 2011.

PROCEEDINGS

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

The Report of the Senior Federal Delegate was tabled and presented by Anouk Desaulniers, Senior Counsel, Criminal Law Policy Section, on behalf of Catherine Kane, Senior General Counsel, Criminal Law Policy, Department of Justice Canada who sent her regrets for being unable to attend.

Resolutions (Attached as Annex 2)

The order in which resolutions are considered is set out in the *Rules of Procedure* of the Criminal Section (“the Rules”). In accordance with these Rules, Manitoba presented their resolutions first followed by other jurisdictions in alphabetical order and then by resolutions from the Canada delegation.

Twenty seven (27) resolutions were initially presented by jurisdictions for consideration. Twenty five (25) of those resolutions were adopted as presented or amended and 2 were withdrawn after discussion.

Reports and Consultations Criminal Section

This year, two reports were considered by delegates. Josh Hawkes reported on his review of the Rules and also presented the Report of the Criminal Section Working Group on Enhanced Restitution for Fraud Victims.

Department of Justice officials consulted with delegates on the Modernization of the Bail Regime as well as on former Bill C-60, *An Act to Amend the Criminal Code (Citizen's arrest and the defences of property and persons)*.

Criminal Section Reports

Rules of Procedure – Criminal Section

Josh Hawkes presented amendments to the Rules to respond to situations arising out of proceedings for which no clear direction existed or to reflect new processes.

More specifically, the following 4 amendments to the Rules were proposed:

1. Paragraph 3.1 be amended to remove the word “senior” prior to the word “delegates” to formalize existing practice;
2. Paragraph 3.3 be amended to reflect the fact that materials to be sent to senior delegates are now sent electronically;
3. Paragraph 3.8 be amended to confirm the practice with respect to the maximum number of resolutions which can be presented by each delegation;
4. Paragraph 4.1 c) be deleted to provide flexibility within the agenda;
5. Paragraph 4.1 be amended by adding subsection f) outlining the procedure to be followed in the event that the Chair of the Section wishes to present a resolution;
6. Paragraph 4.1 be further amended by adding subsection g) confirming the existing practice that a resolution that has been considered within the past five years shall not be reconsidered without leave of the Chair.

Discussion

All of the proposed amendments were approved by delegates with a slight amendment to paragraph 4.1f) adding in the first line ... on behalf of the “Criminal Section” delegation...

Delegates also discussed other potential amendments to the Rules. These included changes to the dates by which agenda items are provided to the Secretary and by which the Secretary provides materials to senior delegates, process and dates for submission of papers, translation of documents, as well as format issues contained in paragraphs 2.3 and 2.4.

The Secretary offered to review the rules and prepare amendments on the basis of the discussion. Lee Kirkpatrick suggested that a working group be established to do this work. Lee, Stephanie O'Connor and Nancy Irving agreed to participate on the working group along with the Secretary.

Report of the Criminal Section Working Group on Enhanced Restitution for Fraud Victims

The Report of the Criminal Section Working Group on Enhanced Restitution for Fraud Victims (“the Report”) was prepared by Joshua Hawkes, Ronald MacDonald and Marina Ivanova. Mr. Hawkes, who presented the Report, noted that comments on the draft provided by several members of the Criminal Section were gratefully received.

The Report contains a thorough analysis of the historical origins and development of restitution provisions within the *Criminal Code*, their constitutional parameters¹, policy considerations, including the 1974 review by the Law Reform Commission of Canada, as well as an analysis of international developments in this area.

In conclusion, the Report suggests that extending *Criminal Code* provisions to include forensic audit costs incurred by fraud victims would be a modest expansion consistent with both international declarations and experience. The Report also suggests that further work in the area of restitution could be done through the establishment of a joint working group of the Criminal and Civil sections to consider issues such as best practices, civil enforcement, and standardized assistance to victims in relation to the filing and enforcement of such orders.

The following resolution was then put to delegates:

“The Working Group recommends that the Report of the Criminal Section Working Group on Enhanced Restitution for Fraud Victims be accepted by the Criminal Section of the Conference.

The Group further recommends that s. 738 of the *Criminal Code* should be amended allow for restitution to cover forensic audit costs incurred by fraud victims.

The Working Group also recommends that the broader issue of the enforcement of restitution orders should be studied further. Examples of potential issues include whether special civil enforcement provisions or powers should apply to restitution orders, or whether some standardized assistance to victims should be provided in relation to the filing and enforcement of these orders. These considerations, together with the exchange of best practices should form the basis for further work by a joint working group of the Criminal and Civil sections of the Conference.”

Discussion

There was considerable discussion among delegates concerning whether or not what was being proposed constituted a “modest expansion” to the existing *Code* provisions. While delegates understood the serious challenges faced by victims of fraud, some delegates expressed concern about providing for a detailed restitution analysis within the sentencing context. Courts might be reluctant to venture into an area which may overlap with civil matters. Another concern related to the unintended effect of potentially downloading the cost of the investigation to victims and then to the accused. There was also concern that amending the *Code* as suggested in the Report could create expectations for victims. There was discussion concerning the development of appropriate tests for determining how and what amounts could be allowed under any restitution provision.

The group agreed that this issue required further discussion and were not prepared to vote on a resolution amending the *Code* at this time.

It was agreed that the Report would be modified to reflect suggestions made by delegates. The amended Report was then distributed by the Secretary.

Delegates agreed to accept the amended Report with a vote of 20 in favour, 0 opposed and 1 abstention.

¹ *R. v. Zelensky*, [1978] 2 S.C.R. 940.

Consultation –Improving the Criminal Code’s Bail Regime- Select Proposals from the Working Group on Procedure of the Coordinating Committee of Senior Officials (Criminal)

Anouk Desaulniers (Justice Canada) made the presentation to delegates on behalf of the Coordinating Committee of Senior Officials (CCSO) Working Group on Criminal Procedure.

Ms. Desaulniers provided some background information on the origins of ongoing Federal-Provincial-Territorial (F/P/T) work on the issue of reforms to the bail regime, and outlined areas identified for reform. Select proposals for reform developed by the CCSO Working Group on Criminal Procedure were presented. Delegates discussed the benefits and challenges associated with these proposals, and were offered an opportunity to provide further comments following the Conference.

Self Defence and Defence of Property: former Bill C-60, *An Act to Amend the Criminal Code (Citizen’s arrest and the defences of property and persons)*

Joanne Klineberg (Justice Canada) presented reforms to the regime included in former Bill C-60 which died on the Order Paper at the end of the previous Parliamentary session.

Ms. Klineberg indicated that reforms proposed were the work of an ad hoc working group of the CCSO and had been approved by F/P/T Ministers Responsible for Justice in 2009. They are intended to clarify and simplify laws related to self defence and defence of property as current laws were found to be overly detailed and difficult for judges instructing juries.

Ms. Klineberg provided an overview of the provisions as well as their intended objectives and interpretation. She indicated that the defense of property provisions were modeled on the self defence provisions.

Discussion

The group had questions with respect to the wording and intent of some of the provisions. Overall, the group supported the intent of the proposed changes. The Canadian Bar Association (CBA) indicated that it would provide written comments, particularly with respect to the objective assessment of danger in the proposed provision.

Open Forum

This was a new feature for the Criminal Section. It was intended to allow for a free flowing discussion of issues of concern or interest to participants, particularly the defense bar.

Delegates discussed the issue of representation of provinces and the defence bar at the annual Criminal Section conference. Members agreed that it is important to encourage participation. A number of options were discussed, including finding new sources of funding through new mechanisms such as sponsorship, as well as promoting the work of the Conference with senior government officials.

It was agreed that a working group comprised of Josh Hawkes, Michel Breton, Nancy Irving and Anouk Desaulniers would develop a document intended for Deputy Ministers describing the

importance, value and relevance of the work the ULCC Criminal Section. Ontario and Manitoba indicated they would discuss participation with their own provincial colleagues.

It was also agreed that providing feedback to the Conference on status or implementation of resolutions adopted by the Criminal Section was essential and that an effort would be made to track resolutions and report on their impact on legislation and policy development.

The group also agreed that the Criminal Section should do more to orient new delegates on their role and responsibilities, as well as the Conference's mandate, governance and rules of procedure.

Issues relating to mandatory minimum sentences and their impact on persons who suffer from mental illness and conditions such as Fetal Alcohol Spectrum Disorder were discussed, including the issue of adding a "safety valve" to mandatory minimum provisions. A CBA resolution relating to this issue was tabled and it was agreed that a working group would be established to consider this question. Saskatchewan, Ontario, Manitoba, Quebec, Alberta, the CBA and Justice Canada indicated interest in participating.

With respect to the new "Open Forum discussion", all agreed that it was useful. Members noted the benefits of exchanging information and perspectives on a number of issues of concern. It was agreed that jurisdictional representatives would be contacted to obtain ideas for potential topics for discussion in this forum at next year's Conference.

Other topics

It was also agreed that a Working Group on Extra-provincial Service of Warrants (see Nova Scotia resolution NS 2011-02) would be established. Manitoba, Quebec and Yukon expressed an interest in participating.

With respect to New Brunswick's resolution (NB 2011-02) dealing with KGB statements and the *Criminal Code* regime relating to perjury, New Brunswick, Justice Canada and Ontario expressed an interest in working on this question.

Joint Session Paper: Complementary Provincial Legislation Chart

Joshua Hawkes, who presented the chart, explained that it had been developed as a result of a 2009 ULLC Criminal Law Section resolution recommending that a group be formed "to examine provincial legislative initiatives with a criminal law impact, such as civil forfeiture regimes, safe communities and neighbourhoods legislation, or witness protection programs, to share best practices, and to determine if model legislation in any of these areas should be recommended".

The following year, the group reported that it would not be appropriate to recommend uniform legislation for any of the 11 areas reviewed. Rather, a yearly update of provincial legislation in these areas should be prepared. As a result, the "Complementary Provincial Legislation" chart is circulated prior to the Conference to jurisdictions and is updated accordingly.

This chart was presented to delegates. They commented on the value of the document as it provides a national overview of complementary legislation adopted in the various provinces and territories. This allows jurisdictions to benefit from the work done by others in development of their own legislation.

It was agreed that the group would look at the updated list and determine if there are areas where the development of common principles and approaches would be possible.

RESOLVED

That the updated chart on complementary provincial legislation be accepted and be updated for presentation in 2012.

That the chart be reviewed for possible projects on uniform legislation.

CLOSING

By resolution of the Criminal Section, the nomination of Anouk Desaulniers, Senior Counsel, Justice Canada as Chair of the Criminal Section for 2011-2012 was accepted. The Nominating Committee recommended that Andy Rady be nominated to be the Chair of the Criminal Section for the period 2012-2013.

The Chair thanked delegates for their participation and contribution to the meeting.