

ULCC | CHLC

UNIFORM LAW CONFERENCE OF CANADA

**WORKING GROUP ON *CHARTER* COSTS AND CIVIL
DAMAGES AWARDS AGAINST THE CROWN**

STATUS REPORT

**Presented by
Manon Lapointe**

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.

**Quebec City
Quebec
August 2018**

Presented at a joint session of the Civil and Criminal Sections

This document is a publication of
the Uniform Law Conference of Canada.
For more information, please contact
info@ulcc-chlc.ca

Working Group on *Charter* Costs and Civil Damages Award Against the Crown
Status Report of the Working Group

[1] At the 2015 ULCC meeting in Yellowknife, Northwest Territories, the Criminal Section adopted a resolution from Alberta to create a Working Group to study the impact of *R v Henry* on costs awards against the Crown. The Resolution was as follows:

A working group should be formed to monitor the development of the case law surrounding the award of costs or damages against the Crown arising from criminal prosecutions. Civil section participation in the working group would be welcome.

(Carried 14-0-0)

[2] At the 2016 ULCC meeting in Fredericton, New Brunswick, an interim report prepared by the working group was presented at the joint Civil and Criminal session. A copy of the report is enclosed at Annex 1. While there was no formal resolution, it was agreed that the Working Group should continue its work.

[3] A second interim report was presented also at the joint Civil and Criminal session at the 2017 ULCC meeting in Regina, Saskatchewan. . It was decided that this joint Working Group should continue to monitor legal developments in this area.

[4] The Working Group, chaired by Manon Lapointe of the Public Prosecution Service of Canada, is composed of Stephen Bindman (Justice Canada), Catherine Dumais (Director of Criminal and Penal Prosecutions of Quebec); Kathryn A. Gregory (Attorney General of New-Brunswick), Heather Leonoff, (Attorney General of Manitoba), Lori McMorrان (Attorney General of British Columbia); Mary-Ellen Hurman, Sunil S. Mathai (Attorney General of Ontario) and W. Dean Sinclair (Attorney General of Saskatchewan).

[5] Throughout the year, working group members shared information about developments on *Charter* costs award and civil damages against the Crown. Three decisions are worth mentioning in this status report.

[6] On December 4th, 2017, the B.C. Court of Appeal issued *Henry v British Columbia (Attorney General)*, 2017 BCCA 420. Mr. Ivan Henry had sought damages against the Province of British Columbia, the City of Vancouver and the Attorney General of Canada following his arrest, conviction and imprisonment. During the course of the trial, the City of Vancouver and the federal government settled out of court with Henry for \$5.1 million. The Court awarded Mr. Henry aggregate damages of \$8,086,691.80 in 2016. The court did not award punitive damages against the province.

[7] A court order directed that the settlement monies agreed upon by the City of Vancouver and the federal government be deducted from the damage award against the province. Mr. Henry appealed the order. He argued that the award of constitutional damages goes beyond the compensation of the plaintiff and includes damages for

Uniform Law Conference of Canada

vindication and deterrence. According to M. Henry, constitutional damages were akin to punitive damages, such that the double recovery principles should generally be inapplicable to them. The Court of Appeal rejected these arguments.

[8] In *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, the Ontario Court of Appeal held that it was a reversible error for a judge to order *Charter* damages against the Crown when the claimant had not sought *Charter* damages as a remedy and when the Attorney General had not been given notice or opportunity to make submissions on *Charter* damages.

[9] Lastly, the Court of Appeal of Ontario stated, in *Brown v Canada (Public Safety)*, 2018 ONCA 14, that a *Charter* damages claim cannot be joined to an *habeas corpus* application.

[10] In light of the continuing evolution of the caselaw on *Charter* costs and civil damages award, the working group is proposing to continue to monitor, during the next year, the development of the case law on the award of costs or damages against the Crown arising from criminal prosecutions.