

# **MINUTES OF THE CRIMINAL SECTION, 2019**

**Prepared by  
Caroline Quesnel  
Secretary, Criminal Section**

**St. John's  
Newfoundland  
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## **ATTENDANCE**

[1] Thirty one delegates from ten provincial, territorial and federal jurisdictions participated in the deliberations of the Criminal Section. The Northwest Territories, Nova Scotia, Nunavut and Prince Edward Island were not represented. Delegates included policy counsel, Crown prosecutors, defence counsel, academics, as well as representatives of the Canadian Bar Association (CBA), the Indigenous Bar Association, and members of the judiciary.

### ***Chairing of the 2019 Annual Meeting***

[2] Matthew Hinshaw (Director, Policy Unit, Alberta Crown Prosecution Service), who was the Criminal Section Chair for 2018-2019, was unable to attend and preside at the 2019 annual meeting of the Criminal Section. At the request of the Criminal Section Steering Committee, Catherine Cooper (Crown Counsel, Ontario Ministry of the Attorney General), Samantha Hulme (Crown Counsel, British Columbia Prosecution Service), Joanne Klineberg (General Counsel, Justice Canada), Laura Pitcairn (Senior Counsel, Public Prosecution Service of Canada), Chloé Rousselle (Criminal and Penal Prosecuting Attorney, Director of Criminal and Penal Prosecutions, Quebec), and Dean Sinclair (Director of Criminal Appeals, Saskatchewan Ministry of Justice and Attorney General), all of whom are past or future chairs of the Criminal Section, chaired the annual meeting on a rotating basis. Joanne Klineberg, incoming 2020 Chair of the Criminal Section, chaired the opening and closing sessions of the Criminal Section, and assumed other responsibilities of the Criminal Section Chair throughout the annual meeting in terms of liaising with the Conference generally, such as reporting to the ULCC plenary session and attending meetings.

[3] The President of the ULCC, Lee Kirkpatrick (Prosecutions Coordinator, Yukon Government), wrote to the Alberta government to convey the magnitude of Matthew Hinshaw's work throughout the year and the impact that his absence at the meeting would have on the work of the Section, including the time spent by other jurisdictions to prepare for debate of Alberta's resolutions which could no longer be presented, and the inability of delegates to participate in the debate and vote on resolutions while they assumed the responsibilities of chairing. It was suggested that a formal recognition of Matthew Hinshaw's work be included in the Criminal Section minutes.

## **OPENING**

[4] The Criminal Section convened to order on Sunday, August 18, 2019. Joanne Klineberg presided as Chair for the opening session. Caroline Quesnel (Counsel, Justice Canada) acted as Secretary.

[5] Joanne Klineberg read remarks sent by Matthew Hinshaw, 2019 Chair of the Criminal

Section. Matthew Hinshaw thanked all delegates for attending and participating in the annual meeting. He noted that the criminal justice system plays a fundamental role in preserving a peaceful and law-abiding society, and noted the Criminal Section's important function within this system because of the delegates' informed opinion on a breadth of criminal law issues, and the diversity of delegates who participate in the annual meeting, giving rise to lively and collegial debates. Matthew Hinshaw thanked all who stepped in to chair part of the meeting in his absence, and expressed thanks to the ULCC President, Lee Kirkpatrick, for her assistance throughout the year leading up to the meeting. Matthew Hinshaw thanked the members of the Criminal Section Steering Committee for their efforts in organizing the 2019 meeting: Lucie Angers (General Counsel and Director of External Relations, Criminal Law Policy Section, Justice Canada), Isabelle Doray (formerly Criminal and Penal Prosecuting Attorney, Director of Criminal and Penal Prosecutions, Quebec, now municipal court judge, Municipal Court of Montreal) Samantha Hulme, Lee Kirkpatrick, Joanne Klineberg, Laura Pitcairn, Caroline Quesnel, Chloé Rousselle and Lisa Stead (Senior Crown Attorney, Department of Justice of Newfoundland and Labrador). Matthew Hinshaw also thanked Stéphanie O'Connor (Counsel, Justice Canada) for her feedback and suggestions on a number of issues, and Caroline Quesnel, for supporting the Criminal Section throughout the year.

[6] Joanne Klineberg noted that 2019 marked the 75<sup>th</sup> anniversary of the Criminal Section. Each jurisdictional representatives introduced the delegates of their jurisdiction. The agenda of the meeting was approved.

[7] Samantha Hulme, immediate past Chair of the Criminal Section and Chair of the Selection Committee, established the Selection Committee, comprised of Lucie Angers, Catherine Cooper, Matthew Hinshaw and Lee Kirkpatrick. She indicated that the Committee would present its recommendation for incoming Chair of the Criminal Section for 2020-2021 at the end of the week.

[8] Joanne Klineberg explained that, at the initiative of Matthew Hinshaw and in an effort to improve fairness and efficiency, resolutions would be presented in a slightly different order. Jurisdictions would still be called upon to present their resolutions in alphabetical order with Canada going last, but instead of a jurisdiction presenting all of its resolutions before moving to the next, each jurisdiction would present one of its resolutions, until each jurisdiction had presented one resolution, at which time jurisdictions would take turns to present their second resolution, and so on. All jurisdictions would therefore have an opportunity to present earlier in the week, and presenting one resolution at a time might facilitate the process of amending resolutions. To anticipate when a particular resolution would be debated, jurisdictions were asked to indicate in which order they intended to present their resolutions.

[9] The unique nature of this year's meeting (with the several rotating chairs) was noted. Following a discussion on the possibility of a chair to weigh in on debate of a resolution, it was

decided that interventions by a chair would be allowed, but should only occur sparingly and in a way that was careful not to influence the debate. Delegates were asked to note their views on this different way of presenting resolutions for discussion at the closing session.

[10] Joanne Klineberg noted that although resolutions from Nova Scotia (6) and Alberta (4) had been distributed to delegates prior to the meeting, they would not be presented at the meeting since no representatives from these jurisdictions were able to attend to present their resolutions.

[11] Joanne Klineberg noted that several resolutions that would be presented this year raise questions about the mandate of the Criminal Section (prosecutorial discretion, prison policy, immigration consequences of convictions). She noted that the Steering Committee had discussed these resolutions and that Matthew Hinshaw, as Chair and in consultation with the Steering Committee, decided the Criminal Section as a whole should determine whether debating and voting on these resolutions was within its mandate. She encouraged delegates to reflect on this question in anticipation of the discussion that would take place when these resolutions would be presented.

[12] Joanne Klineberg reminded delegates of their responsibility to amend their jurisdiction's resolution when necessary, prepare them in both official languages on the template provided by the Secretary, and distribute them to the Section. To minimize the use of paper, amended resolutions in French and English are to be included on the same page and sent electronically to all delegates; paper copies would be provided only to those delegates who requested one.

## **PROCEEDINGS**

### ***Amendments to the Criminal Section Rules of Procedure***

[13] Joanne Klineberg explained that the Criminal Section Rules of Procedure were amended to align with the revised ULCC Constitution and By-Laws (2018), to remove duplication, standardize language, clarify the role of the Criminal Section Chair, update the confidentiality provisions, and add a provision setting out the procedure to approve amendments to the Rules of Procedure, as the ULCC By-Laws require. This work was led by Matthew Hinshaw, and many delegates participated and provided input in the revisions throughout the past year. The revised Rules of Procedure were distributed to all delegates prior to the annual meeting. The amendments to the Criminal Section Rules of Procedure were adopted unanimously by jurisdictional vote (27-0-0).

### ***Report of the Federal Jurisdictional Representative<sup>1</sup>***

[14] On Monday, August 19, 2019, Lucie Angers (General Counsel and Director of External Relations, Criminal Law Policy Section, Justice Canada) presented and tabled the Report of the Federal Jurisdictional Representative.

### ***Earl Fruchtman Memorial Seminar***

[15] On Wednesday, August 21, 2019, Iain Hollett, Director of Public Prosecutions (Newfoundland and Labrador) and Pegah Memarpour, Acting Director of Policy and Strategic Planning, Justice and Public Safety (Newfoundland and Labrador), gave a presentation entitled Another Tool for the Tool Shed in the context of the Earl Fruchtman Memorial Seminar. Their presentation provided an overview of Justice Summits held across the province of Newfoundland and Labrador. Participating stakeholders identified challenges to the criminal justice system in five regions of the province, as well as challenges that are universal to the province. These included lack of alternative processes, transportation and geography issues, court-related delays, challenges with mental health and addiction services, and staffing issues. Participants of the Justice Summits were also encouraged to identify collaborative solutions to each of the perceived challenges. Informed by the Justice Summits, the Newfoundland and Labrador Department of Justice and Public Safety identified two strategic priorities: specialized responses and alternatives to the traditional justice system, and better access to the criminal justice system and legal services.

### ***Resolutions<sup>2</sup>***

[16] The alphabetical order in which resolutions are considered is set out in the Rules of Procedure of the Criminal Section. Since New Brunswick was the first province to present its resolutions in 2018, Nova Scotia would have been the first jurisdiction to present its resolutions in 2019. Because no delegate from Nova Scotia was able to attend to present their resolutions, Ontario presented first.

[17] The jurisdictions initially submitted thirty (30) resolutions that were distributed to all delegates for consideration. However, because of two jurisdictions' inability to send delegates, a total of twenty-four (24) resolutions were presented at the annual meeting. Of that number, two (2) were duplicates,<sup>3</sup> one (1) of which was withdrawn prior to discussion. Five (5)

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<sup>1</sup> This document is available separately.

<sup>2</sup> A list of recommendations and the result of the vote for each is available separately.

<sup>3</sup> The duplicate resolutions, BC2019-01 and MB2019-02, recommended amendments to sections 450 and 452 of the *Criminal Code* to give the Crown the election to proceed by indictment or by summary conviction for the offences of possession and uttering of counterfeit currency. BC2019-01 was withdrawn.

resolutions were carried without amendment, twelve (12) resolutions were carried as amended, and two (2) resolutions were withdrawn following thorough discussion. Four (4) resolutions were withdrawn after a debate on the mandate of the Criminal Section.

### ***Criminal Section Working Groups***

[18] The Chair of the Working Group on Section 490 of the *Criminal Code*, Manon Lapointe (General Counsel, Public Prosecution Service of Canada), presented an overview of its work relating to the detention of seized property regime. The Working Group was established in 2017 and is examining the difficulties in the application of section 490 of the *Criminal Code*. The Working Group thanked Stéphanie O'Connor, who provided information about the legislative history of the provision. It was noted that this information was essential to a better understanding of the proper interpretation of the provision, and will be included in the Working Group's report. Manon Lapointe noted that two members of the Working Group have left following appointments to the bench (Luc Labonté and Isabelle Doray) and will need to be replaced. As well, she invited members of the defence bar to join the Working Group. The Working Group will continue its work and will draft proposals for reform of section 490. It expects to collaborate with the Working Group on Search Warrants, as some issues overlap. The Status Report of the Working Group on Section 490 of the *Criminal Code* was accepted by a unanimous vote (26-0-0).

[19] The Chair of the Working Group examining section 487 of the *Criminal Code* (search warrants), Normand Wong (Counsel, Justice Canada) presented an interim report. The section 487 Working Group was created in 2018 to assess how this investigative power should be modernized. The Working Group held five teleconference meetings over the past year. Members discussed the scope of the Working Group's work. The Working Group observed that section 487 needs to be modernized and aligned with modern search tools. The Working Group discussed computer searches and the difficulties they pose. While search warrants are expected to be the Working Group's primary focus, they also had discussions about seizure, especially seizure of intangibles (e.g., information and measurements). The Working Group has completed a history of section 487 and prepared an outline for the rest of the report. The Working Group Chair will present an interim or final report at the 2020 meeting. The Status Report of the section 487 Working Group was accepted by a unanimous vote (26-0-0).

[20] The Chair of the Working Group on Telewarrants, Stéphanie O'Connor, provided a status report. The Working Group examined broadening the regime for telewarrants, further studied the issue of the requirement to show that it is impracticable to appear in person in order to apply for a search warrant by telewarrant, and examined issues related to warrants obtained by telecommunications that might be impacted by the recent enactment of former Bill C-75, *An Act to amend the Criminal code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, on telewarrants. These additional issues will be

discussed in the final report. The Chair of the Working Group indicated that documents prepared on several distinct issues have been consolidated into a draft report, such that a final report can be expected at the 2020 annual meeting. The Status Report of the Working Group on Telewarrants was accepted by a unanimous vote (26-0-0).

***Joint Session: Strategic Plan Oversight Committee (SPOC) Update***

[21] Manon Dostie (Senior Counsel, Justice Canada) indicated that there are currently several projects underway, and that during the course of the year delegates will be asked to take part in in these projects and volunteer their time. Projects include: updating all the operational documents of the ULCC, updating the Civil Section and Criminal Section rules, and updating the ULCC website.

***Joint Session: Non-consensual Disclosure of Intimate Images Tort***

[22] Professor Hilary Young (University of New Brunswick Faculty of Law) gave a brief summary of her work in this area. She indicated that a number of provinces have statutes that create torts for non-consensual disclosure of intimate images, however, there is a fair amount of variability to the existing legislation.

[23] Dr. Young discussed why there is a desire for a civil remedy for the issue of non-consensual disclosure of intimate images, noting that there are already privacy and defamation laws in place across the country. It was noted that the focus was on a “quick, cheap, and easy way” to have images removed, rather than on awarding monetary damages. The idea of the availability of interlocutory relief for the removal of intimate images from social media platforms or online sites was presented. Dr. Young’s recommendation was for a fast track tort, which in essence is a tort of strict liability, and enables the quick removal of the disclosure of non-consensual intimate images.

[24] The problems with deep fake technology were discussed, and it was noted that the proposed tort is not solely about reputation, but also about the idea and guarantee of privacy in certain situations. Delegates engaged in a lengthy discussion with Dr. Young on this topic, bringing forward a wide range of issues for discussion.

**IT WAS RESOLVED:**

**THAT** the report of the working group on the Non-Consensual Disclosure of Intimate Images be accepted; and

**THAT** the working group prepare uniform legislation and commentaries in accordance with the recommendations on Page 1 of the report and the directions of the Conference, and report back to the Conference at the 2020 meeting.

## OTHER BUSINESS

### *Mandate of the Criminal Section*

[25] Certain resolutions presented at the annual meeting raised questions about the scope of the Criminal Section’s mandate. The resolutions made recommendations aimed at prosecution policy in the provinces, the adoption of legislation and regulations on adjudication of prison discipline in “all regions”, remuneration for federal prisoners, and immigration consequences of certain criminal convictions. These resolutions, presented by the Canadian Bar Association, fostered a lively debate about the scope of the Criminal Section’s mandate.

[26] In addition to considerations that were specific to these resolutions, delegates noted that resolutions adopted in the past—and during the 2019 meeting—are not all directed at *Criminal Code* amendments, and at times included broader statements of principles. Delegates noted the text of the recently revised ULCC Constitution, which contains some slight differences between the English and French versions, notably that the word “legislative” (in the phrase “legislative reform”) is present in the English version, but not in the French version. Some were of the view that the text of the Constitution may not provide sufficient guidance to delineate the scope of the Criminal Section’s mandate.

[27] Delegates also noted that consideration of the scope of the Criminal Section’s mandate could be informed by the desired impact of the Criminal Section. Delegates noted the importance of having a diverse range of participants in the Criminal Section, and the recent trend in increasing this diverse membership was encouraged to continue. Some noted concerns that a narrow mandate may narrow the membership of non-governmental participants; conversely, a broad mandate may better support a broad membership. The importance of seeking the right balance was emphasized.

[28] Delegates also noted that the expertise of most participants from government may be limited to matters related to the *Criminal Code* and criminal trials, and will generally not be as broad as the expertise of private bar participants working in criminal defence on the ancillary effects of a criminal conviction (e.g., such as immigration consequences). Some delegates noted that if few members have expertise or knowledge about a resolution, this may lead to a greater number of abstentions, or could affect legitimacy and credibility of the Criminal Section’s work. Others noted that Criminal Section members have adequate knowledge or access to resources to prepare to debate and vote on a wide range of resolutions about which they are not experts.

[29] Suggestions were made about the potential for careful wording of resolutions and, in particular, recommendations, as a means of bringing matters within the Criminal Section’s mandate. Other suggestions included the use of background papers or participation of experts

for resolutions that are not core criminal law issues.

[30] The four resolutions, presented by the Canadian Bar Association, were withdrawn after the discussion about the mandate of the Criminal Section. In her role of incoming Chair, Joanne Klineberg indicated that the Criminal Section Steering Committee will consider the question of mandate going forward, and may strike a subcommittee to study the issue and prepare a paper that fleshes out the considerations and options. In addition to the members of the Steering Committee, Lee Kirkpatrick, Craig Savage (Crown Attorney, Manitoba Prosecution Services), Tony Paisana (Canadian Bar Association), Kevin Westell (Barrister, Pender Litigation, British Columbia), Catherine Cooper, Normand Wong, Samantha Hulme, Lucie Angers and Laura Pitcairn expressed an interest at being part of such a subcommittee.

## CLOSING

[31] Joanne Klineberg chaired the closing session of the Criminal Section's annual meeting. In order to recognize the work undertaken by the 2018-2019 Chair of the Criminal Section, Matthew Hinshaw, the Criminal Section unanimously adopted the following resolution:

**BE IT RESOLVED** that the Criminal Section of the Uniform Law Conference of Canada recognize Matthew Hinshaw's hard work throughout this past year to organize the annual meeting in his role of Chair of the Criminal Section for 2019. Matthew's dedication was instrumental to the meeting's success.

[32] Joanne Klineberg canvassed delegates' views on the order of presentation of the resolutions piloted at the meeting. While many noted the increased difficulty in predicting when a particular resolution would be debated, delegates noted that preparing a list setting out the order of presentation can address this, such that the general impression of the change was positive overall. Delegates noted the fairness of having all jurisdictions have the opportunity to present a resolution earlier in the week. The unique nature of the 2019 meeting with the rotating chairs may have added to the confusion, and there was agreement to try the new order again the following year. If feedback is again positive at that time, consideration should be given to amending the Rules of Procedure to clearly set out this way of proceeding.

[33] Three awards were handed out for the most valuable interventions throughout the meeting, and were given to Denise Lightning (Indigenous Bar Association), Christopher Samuel (Canadian Bar Association), and Anne-Marie Boisvert (Full professor, Université de Montréal).

[34] Joanne Klineberg thanked all the delegates for their participation in the meeting, including the jurisdictional representatives, the members of the judiciary, academics, and members of the private bar. She thanked Lisa Stead (Senior Crown Attorney, Department of

Justice of Newfoundland & Labrador) and the Newfoundland and Labrador organizing committee for the warm welcome to St. John's. Joanne Klineberg thanked the interpreters and the technicians. She also thanked Lee Kirkpatrick, President of the ULCC for 2018-2019, and Caroline Quesnel, in her role as Secretary to the Criminal Section.

[35] Joanne Klineberg thanked all delegates who stepped up as rotating chairs to ensure the meeting ran smoothly, and recognition was expressed from delegates towards Joanne Klineberg for taking on the additional duties of the Chair throughout the week.

[36] Joanne Klineberg reminded delegates that the 2020 meeting will take place in Nunavut, which presents challenges in terms of travel. Information about travel arrangements would be shared as soon as it is available, and that early booking will be imperative.

[37] Joanne Klineberg noted that this meeting would be the last for Dean Sinclair and Faith Finnestad (Associate Chief Justice, Ontario Court of Justice), and thanked them both for their contributions. The new delegates were thanked for their participation, as were the long-time participants to the ULCC.

[38] The nomination of Joanne Klineberg as Chair of the Criminal Section for 2019-2020 was confirmed. The Selection Committee recommended that Chloé Rousselle act in that capacity in 2020-2021.

[39] The Criminal Section concluded its work on Thursday, August 22, 2019 and will reconvene on Sunday, August 9, 2020 in Iqaluit, Nunavut.