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UNIFORM LAW CONFERENCE OF CANADA

**WORKING GROUP ON THE
REVIEW OF SECTION 487 OF THE *CRIMINAL CODE*
(SEARCH WARRANTS)**

STATUS REPORT

**Presented by
Normand Wong**

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Presented to the Criminal Section

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For more information, please contact
info@ulcc-chlc.ca

[1] The Uniform Law Conference of Canada (ULCC) Criminal Section Working Group on the Section 487 Review met via teleconference 5 times since it was established by ULCC in Quebec City at its August 2018 meeting. During those teleconferences it discussed the scope of the review and ultimately this status report, in light of the resolution that provides for the mandate of the Working Group (Can-CBA2018-05):

A working group should be formed to review section 487 of the *Criminal Code* (information for search warrant) and examine how this investigative power should be modernized, taking into account new technologies, the *Canadian Charter of Rights and Freedoms* and relevant national and international developments. At the discretion of the working group, it will report back to the Section with either an interim or final report at the next conference. (Carried 28-0-1)

[2] During the teleconferences the Working Group identified the scope of the review and thus the scope of the report that will be the result of its work. Once that was determined it also focused on the drafting of the existing section 487 warrant, in particular the considerations that must be taken into account by the justice, and also what types of investigative activities should be authorized by this warrant, and what could be searched using this power. The working group also discussed how any recommended changes might impact upon the privacy of the search subjects and identified possible privacy considerations that might have to be addressed or that might mitigate privacy impacts.

[3] Although the mandate given by ULCC is fairly broad, the Working Group decided to examine only issues relating to the core nature of the section 487 search warrant, which it saw as an “open” search power. Section 487 is the only general “open” search tool. “Open” is considered to refer to the overt nature of this investigative tool and the fact that the search warrant provides law enforcement officials with the authority to search and seize property with the knowledge of the search subject. Although there were a number of discussions relating to surreptitious search powers, the Working Group decided that the breadth of this review should be constrained to “open” searches given the scope of the current section 487. With this in mind, the Working Group had a number of discussions on what types of open search activities police currently undertake, either pursuant to section 487 or section 487.01 (general warrant), and what the police should be able to do in an “open” search context. This involved discussions of search of premises, conveyances, computers and people.

[4] The Working Group in looking at the components of the existing provision agreed that the factors that the judge takes into account when issuing the search warrant should be modernized to correspond with more recent search tools (production orders, transmission data recorder warrant, etc.), which were drafted to incorporate the findings of the leading cases in this area of the law. The Working Group also decided not to tinker with the threshold of reasonable grounds to believe, which will also be retained at least in relation to the ordinary search warrant. While the Working Group was in agreement that the threshold should not necessarily be changed, it did recognize that new

investigative activities that could potentially be authorized by a revamped section 487 could implicate different privacy considerations, for example the search of a person or the seizure of intangibles. A privacy analysis will be included in the report.

[5] The Working Group discussed jurisprudential developments in relation to searches of a computer including those that relate to the volume of data seized and invasiveness of the search (e.g., *R. v. Vu*). In addition, the Working Group discussed how in the context of computers a search may start as open (with the knowledge of the subject of the search) and may, given the circumstances, go into areas that might be considered by some as “covert.” Much more discussion is needed before the Working Group will be in a position to decide how searches of computers should be dealt with in the context of a search warrant.

[6] While issues related to “search” were the primary focus of the Working Group over the last year, it also discussed seizure issues apart from the search authority, especially in respect of intangibles and/or information that do not amount to a “thing”, which are not seizable under the current regime. Conceptually it may be hard to imagine a seizure that does not deprive the search subject of anything, as in you cannot have theft without a deprivation (*R. v. Stewart* [1988] 1 S.C.R. 964). However when it comes to the state’s ability to interfere with private matters it is generally accepted that when the state obtains information or data in the context of a reasonable expectation of privacy, it has effected a seizure, whether or not deprivation occurs. For example, the acquisition of data through the use of a production order is considered a seizure even though there has been no deprivation. The ability to seize or obtain this form of information would be useful in many scenarios, including for example, the use of drones to take pictures of property or to enter on to property to take simply take measurements or photographs. This type of investigative technique is not covered by the section 487 warrant and currently needs to be authorized via a general warrant. While this has not proven to be overly problematic for police, the general warrant is a catch-all for unique police investigative techniques that are not routinely sought and not provided for elsewhere in the *Criminal Code*. It would also seem to be inconsistent with the privacy impact of this type of search, which currently requires the use of a more onerous tool when the privacy impact is lesser than other types of searches.

[7] During the 2019-2020 timeframe, the Working Group will continue its monthly teleconferences to advance work on this issue and begin working on a final report that is expected to be presented to ULCC at its August 2020 meeting.

[8] Members of the Working Group include: Randy Schwartz (ON), Kevin Westell (Pender), James Wood (KavaWood), Nadine Nesbitt (AB), Karen Lee (NB), Mia Manocchio (defence Bar), Paul Pearson (BC), Nicolas Abran and Chloé Rousselle (QC DCP), Normand Wong, Stéphanie O’Connor, Glen Boyd and Karen Audcent (Justice Canada).