Commonwealth Legal Assistance News

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COMMONWEALTH LAW MINISTERS' MEETING, KUALA LUMPUR, APRIL 1996

The 1996 meeting of Commonwealth Law Ministers was held in Kuala Lumpur from 15 to 19 April. In expressing their view that the Commonwealth should play a major role in addressing issues concerning effective co-operation to combat crime in the C21st, Ministers invited the Commonwealth Secretary-General to convene a group of eminent Commonwealth persons to consider the impact of bills of rights or provisions safeguarding fundamental liberties upon the effective operation of international co-operation mechanisms, national and international criminal justice systems and new patterns of criminality. The Group, which Ministers expect will report to their next meeting, is also to look at the criminal exploitation of new information technology.

The vexed question of the costs of executing requests for assistance in investigating and prosecuting criminal offences was also considered by Ministers who asked the Commonwealth Secretariat to undertake a study of this issue and for Senior Officials to consider whether guidelines should be developed for use by member countries. In this context the value of asset sharing agreements between countries is also to be considered by the Secretariat and Senior Officials.

Recognising that extradition law and practice was developing at a very fast pace, Ministers asked the Secretariat to continue work on this subject and report to future meetings on changes to the London Scheme for the Rendition of Fugitive Offenders which may be needed in light of global developments.

Taking the Ministers' Programme Forward

The Commercial Crime Unit needs your assistance if it is to achieve the targets set for it by Ministers. Specifically, we need for the Group of Eminent Persons as many examples of cases in which the courts have, particularly in international co-operation cases, had to determine the validity of laws, or lawfulness of actions in the criminal justice area when accused or convicted persons have sought to challenge prosecution cases on the basis of "human rights" or fundamental freedoms. We also need any material you can provide on the use of technology to facilitate international crime and all extradition and mutual assistance case reports. Privacy and Freedom of Information legislation relevant to international co-operation is also to be considered by the Group. Please let us have your national contributions.

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ASSISTANCE TO WAR CRIMES TRIBUNALS

Chapter VII of the Charter of the United Nations is entitled "Action with respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression. Acting under powers conferred by that Chapter the Security Council of the United Nations, by resolution 827 of 1993, established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. By Resolution 955 of 1994 the Security Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994.

For present purposes, these Security Council Resolutions are binding on all member States. Chapters V and VII are the most relevant of the provisions of the UN Charter - a document which imposes obligations at international law on all states parties to it - that is all members of the United Nations. Article 25 states that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter" and Article 48 provides "The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all member states of the United Nations, or by some of them, as the Security Council may determine."

The Statutes of each of these Tribunals imposes obligations on all member states of the United Nations. The relevant articles are 29 of the Former Yugoslavia Tribunal and 28 of the Rwanda Tribunal. Each of these provide that "States **shall** co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law." Countries must therefore have laws which permit them, on behalf of the Tribunals, to take evidence, serve documents, identify and locate persons and, even more important, arrest and detain persons and surrender or transfer persons to the International Tribunals.

Few Commonwealth Countries, even those with comprehensive extradition and mutual assistance in criminal matters laws would be able to comply with a request from one of the Tribunals for assistance in the investigation of an alleged crime within the jurisdiction of the Tribunal. Reliance would therefore need to be placed on a law which gave power to take such action as was necessary to comply with an obligation imposed as a result of membership of the United Nations, or, in the absence of such a law, on specific primary legislation.

The United Kingdom has an Act entitled the United Nations Act 1946. Section 1 of that Act allows the making of Orders in Council to permit the UK to meet its obligations. It is under this power that Britain has ensured that it can comply with Resolution 827 (Former Yugoslavia) and is in the process of making an Order permitting compliance with Resolution 922 on Rwanda.

Australia, having no general regulation making power similar to that possessed by Britain, enacted the International War Crimes Tribunals Act 1995 which provides the legal basis for all forms of assistance which may be sought by either of the Tribunals.

New Zealand's law is wider than that of Australia in that it covers not only the two existing Tribunals but also allows for the provision of assistance to other ad hoc tribunals which may be established by the Security Council for the prosecution of violations of international law.

Switzerland, although not a member of the United Nations, has taken the view that the Former Yugoslav Tribunal Statute requires "all states" and not just member states to the UN to cooperate. Its legislation follows the Swiss IMAC (see CLAN Issue 3).

Ireland has adopted an innovative approach which could well commend itself to Commonwealth countries. The Irish Government has included a regulation making power in its Criminal Justice Act 1994 which states that the Irish government may "by regulations make such modifications of this Act as appear to be necessary or expedient for the purpose of adapting any of the provisions of this part of the Act to enable the State to provide cooperation under those provisions for an international tribunal or other body established for the prosecution of persons responsible for serious violations of international humanitarian law committed outside the State."

Commonwealth countries which have mutual assistance in criminal matters legislation based on the model prepared to assist with the implementation of the Harare Scheme probably can only respond to requests for assistance from "countries". A simple amendment to such laws would permit the "designation" of international tribunals, courts, or other bodies established for relevant purposes. If an International Criminal Court is ultimately established, such a provision would permit countries to provide assistance to that body.

The extradition laws of most, if not all Commonwealth countries, would not support surrender of persons to the jurisdiction of the Tribunals. Although not actually extradition, the process of arresting, detaining and surrendering a person to a Tribunal would require specific legislative authorization. One option would be to incorporate specific provisions in extradition laws if a country chose not to enact specific legislation to deal with this, and future similar issues.

The Commercial Crime Unit will give all the assistance it can to assist any member country needing copies of Commonwealth country laws dealing with this issue.

UNITED NATIONS DRUGS CONVENTIONS

In CLAN, Issue 1, we listed Commonwealth country membership of the various United Nations Drugs Conventions. Since that time a number of member countries have become States Parties to those Conventions and alterations to the list published in our first issue are as follows:

1961 Single Convention and 1972 Protocol

Cameroon, St Kitts and Nevis, Sierra Leone, South Africa, Swaziland and Zimbabwe are States Parties to both instruments. Dominica and Mauritius are recorded by the UN as now being parties to the Protocol as well as the Single Convention. Pakistan is recorded as not being a party to the Protocol.

1971 Psychotropic Substances Convention

Cameroon, St Kitts and Nevis, Sierra Leone, South Africa, Sri Lanka, Swaziland, Zambia and Zimbabwe should be added to the list of States Parties.

1988 Trafficking Convention

Brunei Darussalam, Cameroon, Dominica, Jamaica, Lesotho, Malawi, Malaysia, Malta, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Sierra Leone, Swaziland, Tanzania, Trinidad and Tobago, Zambia and Zimbabwe are all States Parties. Tonga is to accede very soon.

CASE NOTES

Extradition - admissibility into evidence of computer printouts - place of commission of offence.

The United States sought the extradition of a person charged with theft, forgery, false accounting, unauthorised access to a computer and unauthorised modification of computer material. The fugitive was alleged to have used his skill as a computer programmer, inter alia, to gain access to a US bank and divert funds into his own false accounts.

Arguments on behalf of the applicant/fugitive included a contention that records of instructions and transfers contained in computer printouts were hearsay and not admissible under the Police and Criminal Evidence Act 1984 (PACE) because that Act did not apply to extradition proceedings. It was also argued that computer printouts of bank records were improperly admitted by the magistrate because the computer had been improperly used with the result that the requirements of the Criminal Evidence Act had not been met. A final major ground of appeal was that, if a forgery had been made, it had been made in Russia and not in the United States.

Section 69 of PACE provides that in any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown...that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer and that at all material times the computer was operating properly.

Held:

1. That the decision in *R. v. Governor of Belmarsh Prison and Anor; ex parte Francis,* [1995] 1 WLR 1121, (see CLAN Issue 7), insofar as it may have held that extradition proceedings were not criminal proceedings, was wrong and should not be followed. Extradition proceedings before the committing magistrate had their origins in acts or conduct punishable under the criminal law and were not in a separate class of their own.

2. Mere unauthorised use of a computer was not of itself a ground for believing that the statements recorded by it were inaccurate. Computer printouts can be given in evidence to prove that an accused had obtained unauthorised access to the computer for the purposes of committing a crime.

3. On the issue of whether entering a computer password and other information created an instrument as required for the offence of forgery under S.1 of the Forgery and Counterfeiting Act 1981, the magnetic disk was within the definition of "instrument".

4. On the issue of where the offence had been committed, when the applicant's keyboard had been connected electronically with the bank's computer in the US then, as the applicant pressed the keys, his actions, as he intended, recorded or stored information for all practical purposes simultaneously and the offence was committed where the disk was created.

R v. Governor of Brixton Prison and Another, Ex parte Levin. Queen's Bench Divisional Court, The Times March 11 1996.

Extradition - applicant agreeing to launder money held out to him as being derived from commission of crime - attempt - conspiracy - dual criminality.

The United States requested the extradition from Canada of a person charged with attempting to conduct a financial transaction involving property represented to be the proceeds of drug dealing and with conspiring to so do. The applicant, a Canadian citizen who was resident in Canada agreed to launder money held out to him as being derived from commission of crime. The money was really part of a money laundering "sting" operation organised by the US authorities and was not the proceeds of crime. Although the "sting" failed because the money did not change hands the applicant was indicted in the US on two charges.

The issue for determination was whether dual criminality existed. First, whether the conduct alleged would have constituted an offence had it been committed in Canada and, second, whether the law of attempts and conspiracies can require extradition when the extradition would not be granted if the person had been charged with the substantive offence.

Held, allowing the appeal:

1. Dual criminality could not be found - even if the sting had been effective, dealing with money which was not actually the proceeds of crime is not an offence in Canada. Canadian law requires **actual knowledge** that the money being laundered was proceeds of crime. The conduct contemplated under the US Code is not an offence in Canada, therefore it is not an extradition crime.

2. On the issue of attempt, that to attempt to commit a Canadian money laundering offence an accused must intend to deal with money knowing it is derived from crime - that is, the intent must be to commit a substantive offence known to Canadian law. Where the substantive offence requires a specific mental element an accused cannot be convicted of attempt absent the specific mental element required for the substantive offence.

3. In the absence of knowledge that the money was derived from crime, any agreement entered into could not amount to a conspiracy to commit a money laundering offence as that offence is known to Canadian law.

Re United States of America v. Dynar, Court of Appeal, Ontario (1995) 25 O.R. (3d) 559

Extradition - Service of Sentence imposed on return to requesting country.

A convicted offender serving a discretionary life sentence lodged an appeal against the length of sentence arguing that the 27 months spent in custody abroad awaiting extradition should be taken into account when specifying the relevant period to be served in relation to a discretionary life sentence. (The relevant period is, effectively, a period following which a prisoner must be released on licence).

Held:

The appellant had made "an imprudent attempt" to avoid extradition by making a number of applications and appeals while in custody awaiting surrender. Accordingly 12 of the 27 months served in custody was allowed as an appropriate period to be taken into account.

Regina v. Curtis Howard, Court of Appeal, Criminal Division, UK, The Times 15 April 1996.

MUTUAL ASSISTANCE IN BUSINESS REGULATION

Commonwealth Law Ministers have revised their statement on Mutual Assistance between Business Regulatory Agencies. The new statement, like that issued following their 1993 Meeting, recognises the significance of international co-operation to ensure that proper prudential control can be exercised in the very important financial and business sectors of national economies.

In the United Kingdom, two Departments (and many agencies) provide an excellent service to foreign regulators. Her Majesty's Treasury has provided us with the following summary of a successful example of international co-operation.

> "The UK regulatory authorities recently assisted an investigation by the United States Securities Exchange Commission ("SEC"). This case demonstrates the benefits of international regulatory co-operation. The details are as follows.
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> On 17 November 1994, Hilton Hotel Corporation announced it had retained an investment banking firm to study strategic alternatives to enhance share holder value. Following this announcement, the SEC identified unusual trading in Hilton Securities immediately before the public announcement. On 23 November 1994, 6 days following Hilton's announcement, the SEC filed an emergency action in a US court against a UK resident, Jeffery Morris, alleging that he had illegally purchased Hilton Securities while in possession of non-public information regarding the transaction.
>
> Mr Morris had purchased the Hilton Securities on each of the 2 days before the public announcement, and sold the securities after the announcement, thereby making a profit of $425,625 in just 3 days of trading. Morris purchased the Hilton Securities through a salesman at a US Securities Broker - Dealer, whom he told that he had received a "tip" from a friend about Hilton and that he wanted to purchase approximately $400,000 worth call options on Hilton Stock. In his phone conversation, Morris specifically mentioned the name of Ben Lambert as one of Hilton's Directors.
>
> Following the filing of action, the SEC contacted the UK authorities to obtain detailed records of telephone calls made in the UK. These records, which were obtained using investigative powers on behalf of overseas regulatory authorities, showed the trail of the inside information from the tipper to the traders. At the same time, the SEC was able to track the trail of the non-public information from one of Lambert personal assistants to a boyfriend in Liverpool, and from him to his friends and associates in the UK who traded on the basis of information. The SEC subsequently obtained a default judgement against Mr Morris and settled with two additional defendants."

THE COMMERCIAL CRIME UNIT NEEDS YOUR COUNTRY'S CASES AND LAWS IF THIS PUBLICATION IS TO CONTINUE TO PROVIDE A USEFUL SERVICE - Please send us any material you have on international co-operation to combat crime, together with any cases or materials you think may be relevant to the work of the proposed Eminent Persons Group.