

**DEFINING ORGANISED CRIME
IN CANADA –
MEETING OUR OBLIGATIONS UNDER
THE UN CONVENTION AGAINST
TRANSNATIONAL ORGANISED CRIME
AND ITS PROTOCOLS
AGAINST TRAFFICKING OF PERSONS
AND SMUGGLING OF MIGRANTS?**

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Defining Organised Crime in Canada – Meeting Our Obligations
under the UN Convention Against Transnational Organised Crime and
its Protocols against Trafficking of Persons and Smuggling of Migrants?

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I. Introduction

During the past two decades, organised crime has become a more complex phenomenon. Criminal organizations have evolved into complex networks, with activities in many countries, combining illegal with legal business and taking advantage of open markets and of government's differing levels of commitment and readiness to combat them.¹ Organised criminal groups have broadened their scope of operations, geographically and by sector. They are not merely transnational and involved in specialized crime; criminal organizations are now transcontinental and diversified, part and parcel of globalization.

At the international level, the transnational character of organised crime where offenders, victims and products of crime are located or pass through several jurisdictions, a traditional law enforcement approach focusing on the local level can be frustrating.² The *Convention Against Transnational Organised Crime* (adopted 2000, in force 2003) (hereinafter referred to as the *Convention*) is the international community's response to the need for international cooperation and effective enforcement to combat organised crime.³ The *Convention* focuses on offences that facilitate the illegal profit making activities of organised criminal groups. More specific acts are dealt with by the three Protocols to the Convention:⁴

- *Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children* (in force 2003) (hereinafter referred to as the *Protocol on Trafficking in Persons*);
- *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (in force 2004) (hereinafter referred to as the *Protocol Against Smuggling of Migrants*);
- *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunitions* (in force July 2005).

Many of the provisions contained in the *Convention* and *Protocols* require States to implement at the domestic level, while recognizing that different States have different legislative and law enforcement regimes. These instruments are intended to make collective international measures both efficient and effective.

In Canada, legislation in the area of organised crime has been passed in recent years in an effort to provide law enforcement with tools to investigate criminal organizations in their overall effort to combat organised crime.⁵ Since 1997, the Canadian government has enacted legislation providing for such things as the creation of an agency to combat money laundering⁶, the creation of a new criminal organization offence⁷, the creation of other offences like the commission of an offence for a criminal organization and broadening the powers of law enforcement to seize

¹ Statement of Antonio Maria Costa, Executive Director, UN Office on Drugs and Crime, at the Third Committee of the General Assembly, 8 October 2004.

² The International Centre for Criminal Law Reform and Criminal Justice Policy and the Centre for International Crime Prevention, "*Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*" (Vancouver, March 2003) at page 6.

³ The Convention can be found at UNODC website: www.unodc.org/unodc/en/crime_cicp_signatures.html. The idea for preparing such a convention was first formally raised at the World Ministerial Conference on Organized Transnational Crime held in Naples in 1994. The emerging political will to address this issue was driven by newspaper headlines and public opinion and added to the momentum of negotiating the Convention in a relatively short period of time.

⁴ These Protocols are found at UNODC website: www.unodc.org/unodc/en/crime_cicp_signatures.html. Before a State can become a party to the Protocols, it must first ratify the Convention, meaning each Protocol is read in conjunction with the main Convention.

⁵ Tomas Gabor, "*Assessing the Effectiveness of Organised Crime Control Strategies: A Review of the Literature*" (Research and Statistics Division Department of Justice Canada: 2003).

⁶ Bill C-22 – *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c.17 found at <http://laws.justice.gc.ca/en/P-24.501/text.html>.

⁷ Bill C-95 – *An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence*, 1997.

property used in crime and to initiate forfeiture proceedings⁸. Canada is a State Party to the United Nations Convention as well as to two protocols on trafficking in persons and smuggling of migrants.⁹

This paper is part of an on-going research project between Canada and China on the implementation of international standards.¹⁰ China has ratified the *Convention Against Transnational Organized Crime* but has not signed the Protocols on trafficking and smuggling. In responding to specific questions posed by our Chinese colleagues, the focus of this paper is on the legislative framework in Canada to combat organised crime and provide some comparisons to the obligations under the Convention and Protocols. Part II will set out the definition of offences under the United Nations Convention and the two Protocols to provide the comparison of the Canadian legislation which is explored in Part III. Part IV will briefly highlight some of the criminal procedural issues that have been introduced by recent Canadian legislation dealing with organised crime. Part V examines issues relating to the protection of witnesses and victims both under the Convention and in Canada. Part VI identifies some of the main institutes in Canada that are involved in combating organised crime.

II. Crimes under the UN Convention and the two Protocols

The *Convention Against Transnational Organised Crime* and its Protocols set out basic minimum standards for countries which are to contribute to the global effort to control organised crime. In so doing, these instruments define and standardize certain terms which in the past have been interpreted and applied differently by various countries. This is to ensure better clarity and efficient cooperation. Basically, these instruments describe conduct which must be criminalized by domestic law, made punishable by appropriate sanctions and made subject to the various requirements governing extradition, mutual legal assistance and other forms of assistance and cooperation. There are also provisions regarding protection of victims and witnesses; forfeiture of proceeds of crime; international cooperation; training, research and information sharing; and prevention. This paper focuses mainly on the obligation requiring States to establish specific crimes.

The substantial criminal law provisions require criminalization of:

- participation in an organised criminal group (article 5);
- laundering the proceeds of crime (article 6);
- corruption (article 8); and
- obstruction of justice (article 23).

Criminalization allows national authorities to organize the detection, prosecution and deterrence of these offences as well as providing the legal basis for international cooperation. It should be noted that for the *Convention* and the international cooperation provisions to apply, the offences must involve transnationality and organised crime. However, the *Convention* emphasizes that neither of these should be made elements of the domestic offence.¹¹ The *Protocol on Trafficking in Persons* requires the criminalization of trafficking in persons (articles 3 and 5) and the

⁸ Bill C-24 – *An Act to Amend the Criminal Code (organised crime and law enforcement) and to make consequential amendments to other Acts*, S.C. 2001, c.32 found at www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-24/C-24-4/C-24TOCE/html.

⁹ Canada has not yet ratified the third Protocol Against the Illicit Manufacturing of and Trafficking in Firearms.

¹⁰ This paper is prepared on behalf of the International Centre for Criminal Law Reform and Criminal Justice Policy under the Canada-China Implementation of International Standards in the Criminal Justice Project, funded by CIDA.

¹¹ Article 34(2) of the *Convention Against Transnational Organised Crime* – “the offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organised criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organised criminal group”.

Protocol against Smuggling of Migrants requires the criminalization of the smuggling of migrants and smuggling-related conduct (articles 3, 5 and 6).

1. Article 5 – Criminalization of participation in an organised criminal group.

Under article 5 of the Convention, States Parties are required to establish at least two criminal offences relating to the participation in an organised criminal group.¹² The first offence could include either or both of the following:

- the agreement with one or more persons to commit a serious crime for a financial or other material benefit;
- the conduct of a person who, with knowledge of the aim and general criminal activity of an organised criminal group or its intention to commit the crime, takes an active part in the criminal activities of the organised criminal group or other activities of the group in the knowledge that his or her participation will contribute to the achievement of the criminal group's aims.

The reason for this option being available is to address the fact that some countries have conspiracy laws and others do not. The second option does not require the introduction of “conspiracy” in States that do not have this legal concept.¹³ This option criminalizes other activities which may themselves not constitute a crime but does perform a supportive function for the groups' criminal activities.

The other offence that State Parties must establish is the organizing, directing, aiding, abetting, facilitating or counseling the commission of a serious crime involving an organised criminal group. For all of these offences the required mental element is “intentionally”, meaning general knowledge of the criminal nature of the group or of at least one of its criminal activities or objectives. In the case of taking part in non-criminal but supportive activities, an additional requirement of knowledge is called for: knowing that this involvement will contribute to the achievement of a criminal aim of the group.

The *Convention* defines an “organised criminal group” as a structured group of three or more persons that exist over a period of time, the members of which act in concert aiming at the commission of serious crimes in order to obtain a direct or indirect financial or other material benefit.¹⁴ While a structured group does not need to be a formal type of organization it must be more than randomly formed for the immediate commission of an offence.¹⁵ Serious crime means conduct which would be sanctioned by four years imprisonment or more.¹⁶

One of the more interesting elements of this offence as defined in this *Convention* is the fact that it covers people who assist and facilitate the serious offence committed by an organised criminal group, even though they may not participate directly in all of its crimes. This is to ensure more effective action can be taken to combat these groups. As one can see, the Convention focuses on criminal groups rather than on individual acts. That may be why States are not required to criminalize membership in a particular organization. A legal person, such as a corporation, can also be charged with the offences and the liability can be criminal, civil or administrative.¹⁷

¹² The summary of article 5 requirements in this section is from “*Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*”, *supra* note 2, pages 20-26.

¹³ Generally, it is the common law countries that use the offence of conspiracy while civil law jurisdictions use offences which proscribe an involvement in criminal organizations as they generally do not allow criminalization of mere agreements to commit an offence.

¹⁴ Article 2(a) of the *Convention Against Transnational Organised Crime*.

¹⁵ Article 2(c) of the *Convention Against Transnational Organised Crime*.

¹⁶ Article 2(b) of the *Convention Against Transnational Organised Crime*.

¹⁷ Article 10(2) of the *Convention Against Transnational Organised Crime*.

2. Article 6 – Criminalization of the laundering of proceeds of crime

Article 6 requires State Parties to establish four offences relating to money laundering, in accordance with the fundamental principles of its domestic law.¹⁸ The first offence is the conversion or transfer of “proceeds of crime”. The mental element required is intentionality, meaning that the accused must have knowledge at the time of conversion or transfer that the assets are criminal proceeds. The acts must be done for the purpose of concealing or disguising their criminal origins or helping a person evade criminal liability for the crime that generated the proceeds. The second offence is the concealment or disguise of the nature, source, location, disposition, movement or ownership of “proceeds of crime”. The mental element is again that of intentionality where the accused must have knowledge that the property is proceeds of crime at the time of the act. However this is less stringent than the first offence requirement in that proof that the purpose of the concealment or disguise is to frustrate the tracing of the asset or conceal its true origin need not be required.

The third offence is the acquisition, possession or use of “proceeds of crime”. The mental element requires intention to acquire, possess or use proceeds of crime as well as knowledge that the property was indeed proceeds of crime. The fourth offence is the participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counseling the commission of any of the previously defined offences. The third and fourth offences need to be criminalized but can be subject to the basic concepts of the State Party’s domestic system.

“Proceeds of crime” is defined in the *Convention* as any property derived from or obtained, directly or indirectly, through the commission of an offence.¹⁹ Property means all assets, corporeal and incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets.²⁰

For the purposes of implementing the criminalization of the laundering of proceeds of crime, each State Party should apply the laundering offences to the widest range of predicate offences, but at a minimum needs to include the offences established by the *Convention* and the *Protocols* as well as serious crimes.²¹ Predicated offences includes any offence that as a result of which proceeds have been generated that may become the subject of any of the money laundering offences.²² State Parties must provide for offences committed in another jurisdictions to be included as long as that conduct is a crime where it was committed as well as the State applying the *Convention*. However the *Convention* recognizes that in some countries, prosecution is not permitted for both the predicate offence and the laundering of proceeds from that offence.

Article 7 sets out some mandatory and some optional measures for prevention of money laundering. State Parties must establish a comprehensive domestic regulatory and supervisory regime to deter money laundering and ensure that any agencies involved in combating money laundering have the ability to cooperate and exchange information at the national and international levels. The details and the precise nature of the schemes are left up to the State Party. States should consider implementing measures to monitor cash movements across their borders. The *Convention* mentions that States should consider establishing financial intelligence

¹⁸ The summary of article 6 requirements in this section is from “*Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*”, *supra* note 2, pages 38 to 54.

¹⁹ Article 2(e) of the *Convention Against Transnational Organised Crime*.

²⁰ Article 2(d) of the *Convention Against Transnational Organised Crime*.

²¹ Some States limit the predicate offences to drug trafficking. Other States have an exhaustive list of predicate offences. Others define predicate offences generically as including all crimes or all serious crimes or all crimes subject to a defined penalty threshold.

²² Article 2(h) of the *Convention Against Transnational Organised Crime*.

units to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

3. Article 8 – criminalization of corruption

Article 8 requires States Parties to establish three types of offence relating to corruption.²³ The first one covers “active” corruption, meaning the promise, offering or giving to a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties. Undue advantage can include something tangible or intangible and does not have to be immediate or directly given to the public official. The mental element requirement is that the conduct must be intentional. The State must show the link between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her official duties. The second offence is “passive” corruption, the solicitation or acceptance by a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties. The mental element is that of intending to solicit or accept the undue advantage for the purpose of altering one’s conduct in the course of official duties. The third offence is the participation in corruption, such as an accomplice in either active or passive corruption.

In addition to the three mandatory offences, the *Convention* also requires States “to consider” establishing additional offences which would deal with foreign officials or officials of international organizations as well as other forms of corruption. The definition of “public official” is left to the State Party. The *Convention* only deals with mandatory offences relating to corruption by domestic officials. It does not cover issues relating to private-sector corruption.

Article 9 contains general measures regarding anti-corruption policies. This provision was drafted with the knowledge that a more comprehensive United Nations *Convention Against Corruption* was being negotiated.²⁴ These measures are to promote integrity and to prevent, detect and punish corruption of public officials, to the extent consistent with its legal system. One way to ensure effective action by officials is to provide anti-corruption authorities with sufficient independence to deter undue influence.

4. Article 23 – Criminalization of obstruction of justice

Article 23 requires State Parties to establish two criminal offences.²⁵ First is the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to either induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings, in relation to offences covered by the *Convention*. Both negative (intimidation) and positive (corruption) inducements are covered by this offence. The term “proceeding” should be interpreted broadly to include the use of force, threats or inducement before the commencement of the trial. The mental element is that of intentionality.

The second offence is the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official to interfere with the exercise of official duties by a justice or law enforcement official in relation to offences covered by this

²³ The summary of article 8 requirements in this section is from “*Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*”, *supra* note 2, pages 73 to 80.

²⁴ The UN *Convention Against Corruption* (A/58/422) was adopted in October 2003 and entered into force 14 December 2005. To date (February 14, 2006) there are 46 ratifications and 140 Signatory States. Canada has signed but not yet ratified the *Convention Against Corruption* while China became a State Party on 13 January 2006.

²⁵ The summary of article 23 requirements in this section is from “*Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*”, *supra* note 2, pages 85 to 88.

Convention. In this offence the corruption element is not included here as it is covered by the offences of corruption as defined in article 8.

States that have more general offences, such as those for interference with criminal investigations or proceedings of any kind and those covering bribery of public officials may already be in compliance with this article.

5. Article 3 and 5 of the Protocol on Trafficking in Persons

For those States that are Parties to the *Protocol on Trafficking in Persons*, article 5 requires them to establish the offence of trafficking in persons.²⁶ Trafficking in persons is defined, and for the first time internationally, in article 3 of this Protocol. Any legislation that criminalizes trafficking in persons must consist of three basic elements:

- The action of: recruitment, transportation, transfer, harboring or receipt of persons;
- By means of: the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;
- The purpose of exploitation, which include, at a minimum: the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

This can be done as a single offence or a combination of offences that cover the full range of conduct. It should be remembered that trafficking is the combination of constituent elements and not separate elements themselves.

State Parties must also criminalize participating as an accomplice and organizing or directing other persons to commit the offence. Attempting to commit the offence should also be criminalized but only “subject to the basic concepts” of the legal system of each State Party. It was recognized that in some jurisdictions, the concept of attempt does not apply.

Liability should extend to both natural and legal persons, although for legal persons it can be criminal, civil or administrative liability. Once it has been established that the means of threat or use of force or other forms of coercion has been used, consent will not be a valid defence. If the victim is a child, then the means of threat, force or coercion need not be established as the issue of consent is irrelevant. In the case where the victim is a minor, the prosecutor must only prove action such as recruitment or transportation of the minor for the purpose of exploitation.

6. Article 3, 5 and 6 of the Protocol Against Smuggling of Migrants

Article 6 of the *Protocol Against Smuggling of Migrants* requires State Parties to criminalize a number of offences.²⁷ All of these offences must have the mental element of intentionality and in order to obtain a financial or other material benefit. The main offence is conduct constituting the smuggling of migrants which is defined in article 3 as the procurement for material gain of the illegal entry of a person into a State Party of which the person is not a national or permanent resident. Reading these articles in conjunction with article 5 which provides that migrants should

²⁶ This summary of the criminalization obligations under the *Protocol on Trafficking in Persons* is taken from UNODC, “*Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime*” (2003).

²⁷ This summary of the criminalization obligations under the *Protocol against Smuggling of Migrants* is taken from UNODC, “*Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organised Crime*” (2003).

not become liable to criminal prosecution, it is clear that State Parties need to create criminal offences that would apply to those who smuggle others for gain, but not those who procure only their own illegal entry or who procure the illegal entry of others for reasons other than gain.

State Parties are also required to criminalize:

- Producing, procuring, providing or possessing fraudulent travel or identity documents when done for the purpose of enabling smuggling of migrants;
- Enabling a person to remain in a country where the person is not a legal resident or citizen without complying with requirements for legally remaining by illegal means.

In addition, criminalization of organizing or directing any of the above crimes and attempting or participating as an accomplice in any of the above crimes must be established by State Parties but can be subject to the basic concepts of the State Party's legal system. Furthermore, State Parties must establish as aggravating circumstances conduct that is likely to endanger or does endanger the migrants concerned or that subjects them to inhumane or degrading treatment.

III. Crimes under Canadian Law

In 1997, the Criminal Code was amended to include a wide variety of anti-organised crime measures.²⁸ The immediate context was the eve of a federal election and the perceived need to respond to a plea by the Quebec Attorney General for measures to address a violent and protracted fight between two biker gangs in Quebec: the Hells Angels and the Rock Machine.²⁹ In introducing the new legislation, the Minister of Justice and the Solicitor General described Bill C-95 as “tough new measures to target criminal gang activity” which were developed through “extensive consultations with police across Canada” and a two day national forum which examined the problem of organized crime in Canada.³⁰ Also in 1997, Bill C-22 created an agency to combat money laundering.³¹

On the eve of another federal election in 2000, Parliament looked again at the issue of organised crime as calls for tougher measures against organised crime were increasing, in part instigated by the murder of a reporter who had recently published an expose on organised crime.³² Bill C-24 (2001) contained 70 pages of complicated amendments to the Criminal Code and other federal statutes.³³ The Bills established three criminal organization offences and also provide for targeted use of new investigative tools to be directed against criminal organizations. These include special peace bonds, new powers to seize proceeds of crime including access to income tax information, greater powers to resort to electronic surveillance and a new reverse onus bail provisions for those charged with the new offences.

²⁸ Bill C-95 – *An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence*, S.C. 1997, c.23.

²⁹ Don Stuart “*Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution*” (2002) 112 *Manitoba Law Journal* 89.

³⁰ Department of Justice Canada “*Fact Sheet Bill C-95 – National Anti-Gang Measures*” (1997).

³¹ Bill C-22, which was renamed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c.17 established FINTRAC (Financial Transactions and Reports Analysis Centre of Canada).

³² Don Stuart, *supra* note 29.

³³ Bill C-24 – *An Act to Amend the Criminal Code (Organised Crime and Law Enforcement) and to make Consequential Amendments to Other Acts*, S.C. 2001, c. 32.

1. Participation in activities of a criminal organization

a. Criminal Code offences

When the first Bill on organised crime, C-95, was introduced in 1997, the centerpiece of the legislation was a new offence of “participation in a criminal organization” which criminalized membership in a criminal organization. Back in 1997, “criminal organization” meant any group, association or other body consisting of five or more persons, whether formally or informally organised and met two requirements: (1) have as one of its primary activities the commission of an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for 5 years or more; and (2) any or all of the members of which engage in or have, within the preceding five years, engaged in the commission of a series of such offences.

In 2001, the definition of criminal organization was amended in Bill C-24. The government explained that a new definition of criminal organization was drafted to respond to concerns expressed by police and prosecutors that the current definition was “too complex and too narrow in scope”.³⁴ The existing definition was broadened in three ways by:

1. reducing the number of people required to constitute a criminal organization from five to three;
2. removing the requirement that at least one of the members be involved in committing crimes for the organization within the past five years; and
3. extending the scope of offence which defines criminal organizations, previously limited to indictable offences punishable by five years or more, to all serious crimes.

Therefore the definition now requires that a group, however organised, meet two requirements: (1) be composed of three or more persons in or outside Canada; and (2) have as one of its main purposes or main activities the facilitation or commission of one or more serious offence that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.³⁵ The Criminal Code expressly provides that criminal organization will not mean a group of persons that forms randomly for the immediate commission of a single offence. A “serious offence” is defined to mean an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more or another offence that is prescribed by regulation. Facilitation of an offence does not require actual knowledge of a particular offence or that an offence actually has been committed. Committing an offence means being a party to it or counseling any person to be a party to it.

The centerpiece of Bill C-24 is the definition of the three offences of participation in a criminal organization. Section 467.11 creates the least serious of the criminal organization offences, making it an offence to participate in or contribute to any activity of the criminal organization for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence. The section provides for a list of things the prosecution need not prove in order to make out the offence:

- the criminal organization actually facilitated or committed an indictable offence;
- the participation or contribution of the accused actually enhanced the ability of the criminal organization to facilitate or commit an indictable offence;

³⁴ The Department of Justice Backgrounder “*Highlights of the Organized Crime Bill*” released April 2001.

³⁵ Section 467.1(1) of the *Criminal Code*.

- the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organization; or
- the accused knew the identity of any person who constitute the criminal organization.

The section also sets out certain types of evidence that the court may consider in determining whether the offence has been proved, such as using the name, word or symbol that is associated with the criminal organization or frequently associates with other persons from the organization.

Section 467.12 creates another of the three special criminal organization offences; that of committing an indictable offence for the benefit of, at the direction of, or in association with a criminal organization. The section also provides a list of things that the prosecutor need not prove in order to make out the offence, for instance, it is not necessary to show that the accused knew the identity of any persons constituting the criminal organization.

Section 467.13 creates the most serious of the three offences, apparently aimed at the leaders of the criminal organizations. This section makes it an offence for a member of the organization to knowingly instruct any person to commit an offence for the benefit of, at the direction of, or in association with a criminal organization. The Prosecutor does not have to prove that the offence was actually committed, or that the accused instructed a particular person or that the accused knew the identity of all the persons constituting the criminal organization.

Under section 467.14 there must be a mandatory consecutive sentence and double criminality for a participant in a criminal organization who is party to an offence committed in association with that organization.

It is noteworthy that membership in a criminal organization is not an offence. When the 1997 and 2001 Bills were introduced in Parliament, the then Ministers of Justice made particular note of this and explained that such an offence would be difficult to prove and would be vulnerable to a constitutional challenge.³⁶ During the Standing Committee on Justice and Human Rights consideration of the 2001 Bill, the Minister of Justice explained that in reviewing other countries around the world, it appeared that only one country had taken the approach to criminalize simple membership in criminal organizations.³⁷ The Minister cited the concern that criminalization of simple membership could lead to possible abuse and overly wide application.

b. Case Law

Following the creation of the 1997 offence making it illegal to participate in a criminal organization, the first convictions were not until February 2001.³⁸ Four men were all found guilty of operating a drug ring for the Rock Machine motorcycle gang. Four others were acquitted of gangsterism charges but were found guilty of lesser crimes, including drug-related offences. The judge considered whether the 1997 definition violated the principle of legality, which provides that a criminal statute cannot generally apply retroactively. The accused argued a violation of this principle because it permits the leading of evidence showing that some members of the criminal organization committed a series of indictable offences over the proceeding five years, which in this case covers a period of time prior to the 1997 legislation. The Court did not accept this argument based on the fact that it was not the commission of this series of indictable offences that is the alleged offence in this case. The Judge then held that convictions under this section and for

³⁶ Minister of Justice The Honourable Allan Rock during the House of Commons Debates (21 April 1997) at 10009 and Minister of Justice The Honourable Anne McLellan during the House of Commons Debates (23 April 2001) at 2955.

³⁷ Minister of Justice The Honourable Anne McLellan during the Standing Committee on Justice and Human Rights (8 May 2001).

³⁸ *R v Leclerc* [2001] Q.J. No. 426 (February 15, 2001).

the underlying offences did not violate the Kienapple rule against multiple convictions.³⁹ On the contrary, he held, in noting the decision of the Quebec Superior court in *R v Carrier*, that convictions for trafficking in illegal substances and participation in the activities of a criminal organization when trafficking the same substance, can coexist in compliance with the law.⁴⁰

The constitutionality of section 467.1 of the Criminal Code was considered by a Quebec Superior Court judge in the case of *R v Carrier*.⁴¹ The accused along with other members of a biker group argued that the section was overbroad and vague, that it violated an accused's right to a fair trial because of its reliance on bad character evidence, and that an accused could be punished twice for one offence. The concern was that the new crime of participation in a criminal organization extended criminal responsibility beyond the already wide net for accessories or conspirators. It would not only apply to those structured groups such as the Mafia and Hell's Angels, but also potentially allow for guilt by association for those acting in loose groups of three or more and to those who have never used violence. The Court held that the provision does not sanction a person for being a member of a gang. Instead, it is aimed at a person's participation in gang activities. In order to be found guilty, two criteria must be established: membership in the group and furtherance of criminal activity. The judge held that the expressions "participate in the activities of a criminal organization"; "substantially contribute to the activities of a criminal organization" and "a series of indictable offences" were not vague or overbroad.⁴² The requirements for such findings were clearly set out in the legislation. The 1997 provisions survived two other constitutional challenges.⁴³

On June 30, 2005, *Lindsay and Bonner v The Queen* was the first case to test the federal government's 2001 anti-gang legislation, namely making it a crime to commit a serious offence for the benefit of a criminal organization.⁴⁴ The Ontario Supreme Court judge held that the Hells Angels motorcycle gang is a criminal organization. More specifically, Judge Fuerst was satisfied beyond a reasonable doubt that Hells Angels has as one of its main purpose or activities the facilitation of one or more serious offences that would likely result in the receipt of a financial benefit by its members, in particular drug trafficking.⁴⁵ She further stated that the concept of "facilitation" in section 467.1(1) is broader than the actual commission of an offence.⁴⁶ Like the concept of conspiracy, it does not require that a substantive offence actually be committed. This is the first time that a judge declared the group, as opposed to individuals, to be criminal.

Lindsay and Bonner were two members from Hells Angels accused of trying to extort \$75,000 from a businessman and of acting in association with an identifiable criminal group, namely the Hells Angels.⁴⁷ The judge found that the accused persons had the requisite *mens rea* for the offence of extortion and that they acted in association with a criminal organization. The "in association with" element was established by the evidence of the manner in which the accused chose to portray themselves, wearing jackets bearing the primary symbols of the Hells Angels and referring to others "guys" who were "the same kind of mother f--- as I am".⁴⁸ They presented themselves not as individuals, but as members of a group with a reputation for violence and

³⁹ The Kienapple rule is that a person may not be punished twice for a single offence. See *Kienapple v The Queen* [1975] 1 S.C.R. 729.

⁴⁰ *R v LeClerc*, *supra* note 38.

⁴¹ *R v Carrier et al* [2001] J.Q. no. 224, R.J.Q. 628 (C.S.Q.).

⁴² *ibid.*

⁴³ *R v Beauchamp* (11 February 2002), Montreal 500-01-003088-017, Boilard J. (C.S.Q.); [2002] R.J.Q. 3086, Beliveau J. (C.S.Q.) and *R v Doucet* (2003), 18 C.R. (6th) 103 (C.S.Q.).

⁴⁴ *Re Lindsay and Bonner v The Queen* [2005] O.J. No. 2870 (June 30, 2005).

⁴⁵ *ibid* at para 1079.

⁴⁶ *ibid* at para 947 and 948.

⁴⁷ See <http://www.yorku.ca/nathanson/CurrentEvents/Oct-Dec04.htm> and follow links to Outlaw Motorcycle Gangs.

⁴⁸ *Re Lindsay and Bonner v The Queen*. *supra* note 44 at para 1082-1087.

intimidation. A date for sentencing was to be set on July 15, 2005 but has been postponed.⁴⁹ It should be noted that those convicted under the new anti-gang law could face an additional 14 years in prison. This ruling will likely be appealed all the way to the Supreme Court of Canada.

In a February 2004 decision, the same judge in the same case addressed the accused persons' challenge to the validity of the criminal organization provisions.⁵⁰ The accused challenged the constitutional validity of sections 467.1, 467.12 and 467.14 of the Criminal Code. The judge dismissed the accused's application.

The accused argued that these provisions violate section 7 of the Charter of Rights and Freedoms in 3 ways⁵¹:

1. The definition of "criminal organization" is overbroad. Although there is a legitimate state objective behind the legislation, the means used to accomplish that objective are broader than is necessary. The definition of a criminal organization does not include any requirement of a pattern of activity, nor is it limited to enterprise organizations. As a result, the legislation captures too much in its net.
2. Section 467.1 and the portion of section 467.12 that renders it an offence to commit an indictable offence "in association with" a criminal organization are vague. It is unclear when a person commits an offence on this basis. Further, the definition does not indicate when a person is in or out of the group and it does not require active participation in an offence by those in the group.
3. The lack of necessity for the prosecution to prove that the accused knew the identity of any of the persons who constitute the criminal organization, or had an intention to commit the predicate offence would further the interests of the criminal organization, creates a criminal offence without the minimum constitutionally required *mens rea*.

The accused also argued that section 467.14 which allowed for a sentence imposed to be served consecutively to any other punishment for offences arising out of the same event or series of events was cruel and unusual punishment. The judge held that it was premature to discuss this issue at that time as in 2004 the accused had not yet been found guilty.⁵²

The Court found that the legislation was not overbroad.⁵³ The question is whether a State, in pursuing legitimate objective, uses means which are broader than is necessary to accomplish that objective. If so, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason.⁵⁴ One of the principles in interpreting legislation by the courts is that statutes should be construed to comply with Canada's international treaty commitments. The objective of Bill C-24 was not just to combat groups alleged to be responsible for crimes of violence, such as so-called outlaw motorcycle gangs, but also to deal with groups involved in the perpetration of economic crime, and to stem the organised criminal pursuit of profit.⁵⁵ Furthermore, the legislation is not aimed at legitimate "non-regulated" or "non-criminal" conduct. The definition of a criminal organization requires that one of the group's main purposes or main activities is the facilitation or commission of a "serious offence". It is not merely a prohibition against group activity. The phrase "serious crime" is defined to generally accord with the use of that term in the United Nations *Convention Against Transnational Organised Crime*.

⁴⁹ Charles Smith "Biker arrests followed Ontario convictions" (July 21, 2005: The Georgia Straight) found at www.straight.com/content.cfm?id=11731.

⁵⁰ *Re Lindsay and Bonner v The Queen* (2004) 182 C.C.C. (3d) 301 (Ont SC)(Feb 2004).

⁵¹ Section 7 of the Charter: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

⁵² *Re Lindsay and Bonner v The Queen*, *supra* note 50.

⁵³ *ibid* at para 37 to 50.

⁵⁴ This principle was discussed in *R v Heywood* (1994) 3. S.C.R. 761 (S.C.C.).

⁵⁵ The objective of Bill C-24 had been discussed in *R v Beauchamp* (2002)(Que SC), see *supra* note 43.

The fact that the definition incorporates offences under federal statutes other than the Criminal Code is justifiable.

The Court further found that the term “criminal organization” is not vague.⁵⁶ The components of that term are specified in the legislation. They include a minimum number of persons and a common objective, that is, a main purpose or activity. The other terms used in the legislation such as “commission”, “facilitates” and “serious offence” had settled meanings and were not impermissibly vague. Regarding vagueness, a legislative provision will be unconstitutionally vague where it “does not provide an adequate basis for legal debate”, in that a conclusion cannot be reached as to its meaning “by reasoned analysis applying legal criteria”. Conversely, a law is sufficiently precise if it “delineates a risk zone for criminal sanction”. A vague law violates the principles of fundamental justice in two ways. It prevents citizens from knowing that they are at risk for criminal sanction and so makes compliance with the law difficult, and it puts too much discretion in the hands of law enforcement officials. The standard to be met for a finding of unconstitutional vagueness is high. The Supreme Court of Canada has recognized that there is a need for flexibility in legislative enactments, and a role for judicial interpretation of legislative provisions. When a legislative provision is enacted, legislators cannot possibly foresee all the situations that may arise for its application. It is impossible for Parliament to achieve absolute certainty.

The Court also found that section 467.12 does not fail to meet the constitutional *mens rea* requirement.⁵⁷ The Supreme Court of Canada has emphasized the principle that moral blameworthiness is an essential component of criminal liability, and that such principle falls under section 7 of the Charter as a principle of fundamental justice.⁵⁸ In the case of *Lindsay and Bonner*, there is substantive *mens rea*. In order to convict an accused under this provision, the Crown must prove that he or she had the requisite *mens rea* for the particular predicate offence involved, and that the accused acted for the benefit of, at the direction of, or in association with a criminal organization. The Court held that there is an implicit requirement that the accused committed the predicate offence with the intent to do so for the benefit of, at the direction of, or in association with a group he or she knew had the composition of a criminal organization, although the accused need not have known the identities of those in the group.

In a recent case, on December 8, 2005 a British Columbia Supreme Court judge struck down section 467.13 which makes it illegal for a member of a criminal organization to instruct someone else to commit an offence.⁵⁹ In *R v Accused No. 1*, the judge concluded that the law was too broad and vague and therefore violated the Charter. Judge Holmes stated that the definition of a member of a criminal organization was too vague for an offence that carried a maximum penalty of life in prison.⁶⁰ She concluded that “Parliament had a constitutional duty to make clear the legal basis” on which a person is deemed to be a member of a criminal organization, and that section 467.13 failed to do that by making it clear who is or who is not a member of a criminal organization.⁶¹ While the vagueness in the offence contained in section 467.13 relates back to the definition of criminal organization found in section 467.1(1), the judge held that there was no reason to strike down the definition section since it underlies also the offences contained in sections 467.11 and 467.12.⁶² These offences do not require that the accused be a member of a criminal organization and therefore the constitutional flaw does not related to them. While this ruling does not strike

⁵⁶ *Re Lindsay and Bonner v The Queen*, *supra* note 50 at para 51-60.

⁵⁷ *Ibid* at para 61 to 65.

⁵⁸ *R v Ruzic* (2001) 1 S.C.R. 687.

⁵⁹ *R v Accused No. 1* [2005] B.C.J. No. 2702; 2005 BCSC 1727; 2005 B.C.C. LEXIS 3414 (BCSC).

⁶⁰ *ibid* at para 152.

⁶¹ *ibid* at para 148.

⁶² *ibid* at para 151-152.

down the law in other provinces, the decision could be cited by other judges across Canada and will likely be appealed all the way to the Supreme Court of Canada.

The main concern raised by this case is that the definition of “criminal organization” does not require a nexus between the characteristics of the group which causes it to be a group and the serious offence activity in which it engages in. The judge suggested that hypothetically, a martial arts teacher who gives lessons to members of a gang might be considered a gang member according to the way the law is currently written.⁶³ The judge refers to the differences between the Canadian legislation and the United Nations *Convention Against Transnational Organised Crime* noting that the UN Convention requires that the group acts in concert with “the aim of committing one or more serious crimes”.⁶⁴ In other words, the UN Convention requires that the purpose of the group is to commit serious crimes whereas the Canadian legislation does not require this specific or common purpose to be shared by members of this group.

c. Comparisons to the UN Convention

First examining the definition of criminal organization, both the UN and the Canadian definitions seek to avoid the inclusion of crimes committed by groups on an *ad hoc* basis. The 2001 definition of criminal organization contained in Bill C-24 conforms more to the UN Convention definition than the 1997 definition. It reduces the number requirement in a group from five to three, which is the number set out in the UN Convention. However, as discussed in the recent case of *R v Accused No. 1*, the UN Convention expressly requires a nexus between the creation of the group and the purpose or aim of the group of committing one or more serious crimes. Such nexus is not required in the Canadian definition of “criminal organization”. The Canadian definition is also broader than the UN definition in that it allows for the aim of the group to be not only the commission of a serious offence but also the facilitation of a serious offence. Both have the requirement that the offence be committed in order to obtain, directly or indirect, a material benefit. The new Canadian definition also adds the limit of excluding a group formed “randomly for the immediate commission of a single offence”.

In accordance with the common law criminal justice system found in most of Canada, the Criminal Code provides for the crimes of conspiracy (section 465) and similar offences, such as forming an intention in common to carry out an unlawful purpose (section 21), aiding and abetting (section 21) and counseling (section 22) a person to commit a crime. These criminal code provisions are to be read in combination with the provisions that define the three new criminal organization offences.

The Canadian definition of participating or contributing in any activity for the purpose of enhancing the ability of the criminal organization to facilitate or commit an indictable offence covers the situation of taking part in non-criminal but supportive activities, as set out in the UN Convention. The mental element required by the Convention is also met in the definitions in sections 467.11 and 467.13, by ensuring every person must knowingly, by act or omission, contribute to these criminal activities. While section 467.12 remains silent on the required intent, the Court in the recent case of *Lindsay and Bonner v The Queen* held that there is an implicit requirement of intent. This means that the prosecution must prove that there was intent not only when committing the predicate offence but also intent of benefiting the criminal organization.

⁶³ *ibid* at para 111.

⁶⁴ Article 2 of the United Nations *Convention Against Transnational Organised Crime*.

2. Laundering of proceeds of crime

a. Criminal Code offences

For some time now Canada has had strong legislative measures in place to address money laundering and proceeds of crime. Part XII.2 of the Criminal Code includes the provisions that relate to the proceeds of crime. Section 462.31 broadly defines the offence of money laundering. The offence is committed when a person deals with any property, or any proceeds of property, in any manner and by any means, with the intent to conceal or convert it, knowing or believing that the property or proceeds were, in whole or in part, obtained or derived directly or indirectly as a result of the conduct described in the definition of the term “proceeds of crime”. Proceeds of crime is defined to mean any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of the commission in Canada of a designated offence or an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.⁶⁵ A designated offence is an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation, or a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counseling in relation to, such offences.⁶⁶

These provisions also expressly provides that no offence is committed by a peace officer or a person acting under the direction of a peace officer if the acts are done for the purpose of an investigation or otherwise in the execution of the officer’s duties.⁶⁷ Additional measures in the Criminal Code deal with search, seizure, restraint and forfeiture of these proceeds of crime. These will be briefly discussed in the criminal procedure section of this paper.

The most recent development has been the passing of Bill C-53 at the end of 2005 which reforms provisions that target the illicit proceeds of organised crime.⁶⁸ The main reform introduces the “reverse onus” provision which means that once an offender has been convicted of either a criminal organization offence, or certain offences under the Controlled Drugs and Substances Act, the Court has the power to order the forfeiture of property of the offender, unless the offender proves on a balance of probabilities that the property is not the proceeds of crime. The prosecution must first prove, on a balance of probabilities, either that the offender engaged in a pattern of criminal activity for the purpose of receiving material benefit or that the legitimate income of the offender cannot reasonably account for all of the offender’s property.⁶⁹

b. Case Law

The Supreme Court of Canada examined the issue of *mens rea* and the meaning of “transfer of possession” in *R v Daoust*.⁷⁰ As part of a larger investigation into selling stolen property, the police used an undercover officer to sell goods to a second-hand store owner in which he hinted that they were stolen. The owner and employee were charged with section 462.31 with having transferred the possession of property with intent to conceal or convert that property, knowing that the property was obtained as a result of the commission of an enterprise crime offence. They

⁶⁵ Section 462.3(1) *Criminal Code*.

⁶⁶ Section 462.3(1) *Criminal Code*.

⁶⁷ Section 462.31(3) *Criminal Code*.

⁶⁸ Bill C-53, *An Act to Amend the Criminal Code (Proceeds of Crime) and the Controlled Drugs and Substances Act and to Make Consequential Amendments to Another Act*, S.C. 2005 c. 44 (royal assent 25 November 2005).

⁶⁹ Similar legislation already exists in a number of provinces, such as Saskatchewan *Seizure of Criminal Property Act*, as well as in Ontario and Manitoba.

⁷⁰ *R v Daoust* (2004) 180 C.C.C. (3d) 449 (S.C.C.).

were originally convicted at trial but the convictions were set aside on appeal and this was upheld by the Supreme Court of Canada.

The Supreme Court of Canada found that the activities criminalized by s. 462.31 all concern the same person, that is, the person who originally has the object in his or her possession and seeks to dispose of it.⁷¹ Buying or receiving property or similar acts involving the person who accepts or acquires the property do not constitute elements of the offence of laundering proceeds of crime. Basically the “transfer of possession” of property in the context of laundering proceeds of crime does not include one who buys the property with the intention of converting it.

The *mens rea* of the offence of laundering proceeds of crime has two elements: (1) intent to conceal or convert property or proceeds of property, and (2) knowledge or belief that the property or proceeds were derived from an enterprise crime offence or a designated substance offence. The term “convert” does not require an intent to conceal. The words “convert” and “conceal” are distinct terms with distinct meanings and they should not be read together. Conceal does mean to hide but convert has a broader meaning, to change or transform.

This case clarifies the different variations of this definition as found in the English and French versions of the Criminal Code. The French version is much narrower and does not include the English equivalent of “or otherwise deals with, in any manner and by any means, any property or proceeds”. Under the rules of contextual interpretation, the Court must adopt the common meaning of the two versions which in this case is the narrower French version.

c. Comparisons to the UN Convention

The definition of proceeds in crime in the Canadian Criminal Code broadly encompasses property, benefit and advantage, which easily covers the definition of property in the UN Convention: assets, corporeal and incorporeal, movable or immovable, tangible or intangible and legal documents or instruments evidencing title to, or interest in, such assets. The offence of money laundering, which is synonymous with the term laundering of proceeds of crime, is broadly defined in the Criminal Code. Dealing with any property or proceeds of property “in any manner and by any means” appears to encompass the four offences as defined in the UN Convention which include individuals who are the providers of illicit proceeds and those who are recipients who acquire, possess or use the property. However due to the inconsistency between the English and French version of this definition in the Criminal Code, a narrow meaning has been given to the definition and appears to only include providers of illicit proceeds as opposed to those who acquire and possess the property.

The Canadian definition requires the mental element of intent to conceal or covert as well as knowing or believing that the property or proceeds were derived as a result of criminal conduct. This lines up with the mental element requirement of intentionality required by the UN Convention definition.

The Canadian legislation uses the idea of predicate offence as including all crimes that are serious enough to be indictable (which includes the offences associated with organised criminal groups) and uses the term of “designated offence” as opposed to predicate offence. This meets the requirement of the UN Convention that the money laundering offences be applicable to the “widest range of predicate offences”. Furthermore, the Canadian legislation defines designated offence to include any act or omission anywhere that, if it had occurred in Canada, would have

⁷¹ *ibid.*

constituted a designated offence. This meets the requirement under the Convention where States provide for offences committed in other jurisdictions to be included, provided that the conduct is a crime where it was committed as well as in the State applying the Convention (dual criminality).

3. Corruption

a. Criminal Code offences

Canada ratified the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* on December 17, 1998.⁷² The *Corruption of Foreign Public Officials Act*, Bill C-21, seeks to implement in law those obligations Canada has undertaken by signing the OECD convention.⁷³ The Act has the flexibility to develop and evolve in the future if Canada wishes to sign additional international criminal law conventions against corruption, which it has in 2003 – the United Nations *Convention against Corruption*. The Canadian government is in the process of reviewing and revising its laws prior to ratification of the UN Convention.

Bill C-21 amended the Criminal Code, creating the offence of bribing a foreign public official.⁷⁴ There is no particular mental element expressly set out in the offence since it is intended that the offence will be interpreted in accordance with common law principles of criminal culpability. The Courts will be expected to read in *mens rea* of intent and knowledge. The conduct element (*actus reus*), however, is more complicated. It does not have to involve the physical crossing of national borders. The Act also makes it an offence to give bribes directly or through third parties or agents, including family members and political party affiliates. This offence applies to every person, whether Canadian or not, and also includes corporations as long as the offence occurs in whole or in part in Canada. To be subject to the jurisdiction of Canadian courts, a significant portion of the activities constituting the offence must take place in Canada. There is a sufficient basis for jurisdiction where there is a real and substantial link between the offence and Canada. In making this assessment, the court must consider all relevant facts that happened in Canada that may legitimately give Canada an interest in prosecuting the offence.

The Act provides for three exceptions or defenses to this new offence of bribery. Under section 3(3) if the accused can show that the loan, reward, advantage or benefit was lawful in the foreign state then they have a defense to bribery. Also another exception is if the payment is a reasonable expense, incurred in good faith, made by or on behalf of the public official, directly related to the promotion demonstration or explanation of the person's products and services or to the execution or performance of a contract between the person and the foreign State for which the official performs duties or functions. Under sections 3(4) and (5), not all payments would amount to bribing a foreign public official. The Act allows for "facilitation payments" which are made to

⁷² *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* adopted by the Negotiating Conference 21 November 1997 and found at www.oecd.org.

⁷³ *Corruption of Foreign Public Officials Act*, Bill C-21, S.C. 1998, c. 34.

⁷⁴ Bill C-21 created three new offences: (i) bribing a foreign public official; (ii) laundering property and proceeds; and (iii) possession of property and proceeds. It also covers conspiracy, aiding and abetting, attempt, and counseling.⁷⁴ However the Act to Amend the Criminal Code (Organized Crime and Law Enforcement) of 2001 amends certain sections of the *Corruption of Foreign Public Officials Act*, repealing ss. 4-7 including the two sections establishing the second and third offence. Basically, while the *Corruption Act* no longer deals with laundering and possession of property and proceeds, the 2001 Act establishes a new subsection to s. 462.3 of the Criminal Code which provides that the Attorney General of Canada may exercise all the powers and perform all the duties and functions assigned to the Attorney General by or under the Criminal Code in respect of a designated offence where the alleged offence arises out of conduct that in whole or in part is in relation to an alleged contravention of an act of parliament. Section 12(6) of the 2001 Act amends s 462.3(1) of Criminal Code by defining a "designated offence" to mean an indictable offence other than those relating to conspiracy, etc. These amendments have reorganized the statutory provisions in a consolidated way. The end result means that the Attorney General of Canada and the provincial Attorney Generals would continue to be able to prosecute possession and laundering offences in respect of the offence of bribing foreign public officials.

expedite or secure the performance by a foreign public official of any “act of a routine nature” that is part of the foreign public official’s duties or functions. Examples are given in this section but the list is not exhaustive.

Prior to the enactment of this Act, domestic corruption has been prohibited through a combination of federal statutes, parliamentary rules and administrative provisions since the 1960s. The Criminal Code includes offences which prohibit bribery of judges or members of Parliament or Provincial Legislative Assemblies (s. 119); police officers or other law enforcement officers (s. 120) and of influence peddling of government officials (s. 121). Fraud or breach of trust by a public official is an offence under section 122 of the Criminal Code. Other offences include municipal corruption (s. 123), selling or purchasing office (s. 124), influence or negotiating appointments or dealing in offices (s. 125).⁷⁵ The Canadian Income Tax Act, s. 67.5(1) prohibits the deductibility of bribes or other illegal payments as a business expense.

b. Comparisons to the UN Convention

Both the UN Convention and the Canadian legislation against organised crime recognize that an effective fight against organised crimes cannot be conducted unless it tackles the corrosive effects of corruption. The numerous Canadian offences cover both “active” corruption, for example the giving of bribes, and “passive” corruption, for example the acceptance of bribes. Offences also include “participation in corruption”. The Canadian Criminal Code also addresses the suggestion in the UN Convention to include other forms of corruption, such as corruption involving foreign officials.

In the UN Convention, the definition of public official is left to the State Parties. Section 118 of the Criminal Code defines “official” to mean a person who holds an office or is appointed to discharge a public duty. Certain of the corruption offences specifically identifies the type of official being targeted, such as judicial officers, member of Parliament or of the provincial legislature, police commissioner, peace officer or officer of juvenile court.

The required mental element in the Canadian legislation is that the offer, acceptance or solicitation must be done corruptly and there must be an attempt to influence the office-holder in his or her official capacity. This is similar to the language used in the UN Convention that requires that the conduct be intentional as well as establishing some link between the offer or advantage and inducing the official to acting or refrain from acting in the course of his or her official duties.

4. Obstruction of justice

a. Criminal Code offences

Section 139 of the Criminal Code sets out the elements of the offence of willfully attempting to obstruct justice. The first group of offences deals with sureties and prohibits anyone from indemnifying a surety or agreeing to do so for any loss arising from acting as a surety and also prohibits a surety from accepting or agreeing to accept an offer of a fee for so acting.⁷⁶ The prosecutor must show that the accused willfully attempted to obstruct, pervert or defeat the course

⁷⁵ For more details on corruption offences in Canada, see Gerry Ferguson “*Legislative Framework for Corruption and Bribery Offences in Canada*” A Paper prepared for the Canada – China Procuratorate Reform Cooperation Programme, November 29, 2004, Vancouver, British Columbia.

⁷⁶ A surety is a person who agrees to be responsible for the debt or obligation of another, from the Free Dictionary found at <http://legal-dictionary.thefreedictionary.com/surety>.

of justice in a judicial proceeding. The second group deals with obstructing, perverting or defeating the course of justice in any other manner not described by the first group of offences. The provision provides a list which is not exhaustive, but include: dissuading or attempting to dissuade a person by threats, bribes or other corrupt means from giving evidence; influences or attempts to influence by threats, bribes or other corrupt means a person in his or her conduct as a juror; or accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror. The course of justice includes the investigatory stage as well as judicial proceedings existing or proposed but is not limited to such proceedings.⁷⁷

Section 423 deals with the offence of intimidation. The offence is committed where a person, intending to compel someone to abstain from doing something he or she has a right to do, or to do something that he or she has the right to abstain from doing, wrongfully and without authority does one or more of the following acts:

- uses violence or threats of violence against that person or his or her spouse or children, or injures his or her property,
- intimidates or attempts to intimidate the person or a relative by threats of violence or injury to property,
- persistently follows the person,
- hides or deprives the person of the use of his or her property,
- with another or others follows the person in a disorderly manner on a highway,
- watches or besets the residence, work place or other place where the person happens to be; or
- blocks a highway.

In 2001, Bill C-24 introduced a new offence of intimidation. Section 423.1 makes it an offence to intimidate a justice system participant or a journalist who is investigating criminal organizations. The provision lists a number of prohibited conduct, such as using violence or causing injury to their property or threatening to engage in such conduct; persistently or repeatedly following them or anyone known to them, including following them in a disorderly manner on a highway; repeatedly communicating with, either directly or indirectly, those people or anyone known by them; or besting or watching their place of residence, business or schools.

b. Comparisons to the UN Convention

With the amendment to the Criminal Code in 2001, the Canadian legislation clearly recognized that justice cannot be done if judges, jurors, witnesses or lawyers are intimidated, threatened or corrupted. The Criminal Code defines “justice system participant” to include members of Parliament and provincial legislatures as well as prosecutors, lawyers, judge and justices, jurors, informant, prospective witnesses, witnesses under subpoena and law enforcement officers.⁷⁸

Similar to the UN Convention, the Canadian offences cover both situations, one dealing with potential witnesses and the giving of testimony or production of evidence and the other dealing with justice or law enforcement officials in the exercise of their official duties. The offences described in sections 139, 423 and 423.1 of the Canadian Criminal Code covers the situations as required by the UN Convention, namely prohibiting the use of physical force, threats or intimidation. Regarding the other situation where there has been positive inducement, as opposed to negative inducement, section 139 of the Criminal Code covers corrupting or bribing witnesses.

⁷⁷ *R v Spezzano* (1977), 34 C.C.C. (2d) 87 (Ont C.A.).

⁷⁸ Section 2 of the *Criminal Code*.

The section creating an offence of intimidating public officials does not explicitly deal with corruption as this is covered by the domestic corruption of public officials offences. The Canadian legislation is broader in respect of covering journalists who are investigating organised crimes.

5. Trafficking in persons

a. Criminal Code offences

The Criminal Code was recently amended to strengthen Canada's legal framework by building upon the existing domestic and international responses to human trafficking.⁷⁹ Bill C-49, An Act to Amend the Criminal Code (Trafficking in Persons) establishes three new offences:

1. Section 279.01 - Prohibit the trafficking in persons, which is defined as the movement or holding of persons for the exploitation of those persons: this includes recruitment and physical transportation of persons. This offence would carry a maximum penalty of life imprisonment where it involved kidnapping, aggravated assault or sexual assault, or death.
2. Section 279.02 - Prohibit persons from receiving financial or other material benefit from trafficking in persons. It would be punishable by a maximum penalty of ten years.
3. Section 279.03 - Prohibit the withholding or destroying documents, such as identification, immigration or travel documents, for the purpose of committing or facilitating the commission of a trafficking offence. This would carry a maximum penalty of five years of imprisonment.

Under these new offences, exploitation is defined as causing a person to provide labor or services, such as sexual services, by engaging in conduct that leads the victim to reasonably fear for their safety or that of someone known to them, if they fail to comply.⁸⁰ It would also apply to the use of force, coercion, deception causing the removal of a human organ or tissue. No consent to these activities is valid.⁸¹

The Bill also ensures the protection of child victims and witnesses or a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability.⁸² The court may order and allow the witness to testify outside the courtroom or behind a screen or other device. The judge can also make a restitution order to cover the victims' pecuniary damages as a result of the harm, including loss of income or support.

Even prior to these recent amendments to the criminal Code, human trafficking-related conduct was covered by a wide range of Criminal Code offences including kidnapping, forcible confinement, extortion, assault, sexual assault, prostitution-related offences and organized crime offences.⁸³ Furthermore, on June 28, 2002, a specific offence against human trafficking came into

⁷⁹ Bill C-49, *An Act to Amend the Criminal Code (Trafficking in Persons)* received royal assent 25 November 2005, S.C. 2005 c. 43 and statement from Honourable Paul Harold Macklin (Parliamentary Secretary to the Minister of Justice and Attorney General of Canada), Sponsors Speech at Second reading, House of Commons at www.parl.gc.ca/legisinfo.

⁸⁰ Section 279.04 *Criminal Code*.

⁸¹ Section 279.01(2) *Criminal Code*.

⁸² Sections 486(1.1) and 486(2.1) *Criminal Code*.

⁸³ Keeping a common bawdy house (s. 210(1)); transporting a person to a bawdy-house (ss. 211, 212(1)(f) & (g)); controlling or living off the avails of prostitution of another (a. 212); administering stupefying thing for the purpose of illicit sex (s. 212(1)(i)); living off the avails of the prostitution of a person under 18 years if age (s 212(2) & (2.1)); obtaining or attempting to obtain the sexual services of a person under 18 years of age (s 212(4)).

Causing bodily harm or death by criminal negligence (ss 220&221)

Homicide (ss. 222, 224, 226, 229-236); Uttering threats (s 264.1); Assault (ss 265-268); Sexual assault (ss 271-273)

Kidnapping (ss 279(1)&(1.1)); Forcible confinement (s 279(2); Child abduction (non-parental) (ss 280-281)

force in the Immigration and Refugee Protection Act. The trafficking offence, section 118, provides for:

118(1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use of threat of force or coercion.

(2) For the purpose of subs (1), “organize”, with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harboring of those persons.

This offence attracts very severe penalties, fines of up to \$1 million and imprisonment for up to life.

Other relevant Criminal Code offences deal with the creation of forged passports and their subsequent use or possession⁸⁴ and fraudulently using a certificate of naturalization or citizenship. It also prohibits parting with a certificate of citizenship or naturalization, knowingly and intending that it will be used fraudulently.⁸⁵ The Immigration and Refugee Protection Act further creates an offence to knowingly organize, induce, aid or abet the coming into Canada individuals that do not possess a visa, passport or other such document;⁸⁶ disembarking persons at sea for the purpose of inducing, aiding or abetting them to come into Canada;⁸⁷ and counseling misrepresentation⁸⁸. Section 121 establishes aggravating factors which the court should consider when imposing a penalty. These include participation in a criminal organization and submitting a person to “humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence”.

b. Case law

According to the United States Department of State’s report, the Canadian Department of Justice reported that at least 40 traffickers were prosecuted in the year 2003, with 16 defendants being convicted.⁸⁹ In 2004 there have been 19 convictions.⁹⁰ It is unclear which provisions of the Criminal Code were used for these prosecutions.

In April 2005, Michael Ng became the first person charged under section 118 of the Immigration and Refugee Protection Act arising from a search of a common bawdy house in Richmond, British Columbia in October 2004.⁹¹ His trial is set for March 2006. However the defence has begun a pre-trial constitutional challenge of section 118 of the Immigration and Refugee protection Act arguing that the provision is vague and therefore unconstitutional.⁹² The main argument by the defence is that the reference to fraud and deception when knowingly organizing the entry of persons into Canada is too vague since it could be used “to prosecute a travel agent who organised an excursion to Vancouver, after lying to vacationers about how sunny the city is in

Theft, robbery, extortion (s322&334, 343-344, 346(1)); Criminal interest rate (s 347)

Forgery and uttering forged documents (ss 366-368); Fraud (s. 380); Criminal breach of contract (s 422)

Intimidation (s 423); Proceeds of crime (ss 462); Conspiracy (s 465)

Participation in criminal organization activities (s 467.11); Commission of offence for criminal organization (s. 467.12); Instructing commission of offence for criminal organization (s 467.13)

⁸⁴ Section 57 of the *Criminal Code*.

⁸⁵ Section 58 of the *Criminal Code*.

⁸⁶ Section 117 *Immigration and Refugee Protection Act*.

⁸⁷ Section 119 *Immigration and Refugee Protection Act*.

⁸⁸ Section 126 *Immigration and Refugee Protection Act*.

⁸⁹ The U.S. Department of State, “*Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report*” (June 2004: U.S. Department of State) found at www.state.gov/g/tip/rls/tiprpt/2004.

⁹⁰ The U.S. Department of State, “*Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report*” (June 2005: U.S. Department of State).

⁹¹ RCMP Backgrounder, “*Keeping Common Bawdy House in Richmond Neighborhood*” (October 15, 2004) found at www.rcmp-bcmedia.ca and discussion with the RCMP during consultation for the “*Human Trafficking Reference Guide for Canadian Law Enforcement*”.

⁹² CBC “*BC man challenges human trafficking charge*” (3 February 2006) found at www.cbc.ca/bc/story/bc_ng20060203.html.

winter”.⁹³ The defence argues that what is missing from the provision is an explicit reference to people being exploited as a result of deception. This language of exploitation is used in the newly created Criminal Code offences as well as in the UN Protocol.

c. Comparisons to the UN Protocol

Unlike the *Protocol Against Smuggling of Migrants*, the *Protocol on Trafficking in Persons* only requires the criminalization of trafficking in persons and does not encompass other related conduct, such as enabling illegal residence or forging travel or identity documents. The obligation is to criminalize trafficking as a combination of the elements (action, means and purpose of exploitation) and not the elements themselves. For example while the action of kidnapping and abduction by means of assault or sexual assault cover some of the elements in the definition of trafficking in persons this likely does not meet the obligations of criminalization under the Protocol.

The trafficking offence created by the Immigration and Refugee Protection Act in 2002 was not broad enough to cover trafficking in persons as defined by the UN Protocol. It was restricted to those persons involved in organised, illegal cross-border entry of persons into Canada and did not define or use the term “exploitation”. The newly created offences in the Criminal Code ensures that no matter what form human trafficking takes or for what purpose human trafficking occurs in Canada, the laws now cover the movement of people across or within borders. This means that the new laws will affect trafficking internationally and crossing Canadian borders both as a receiving country, hosting country or transit country and will also deal with trafficking within Canada.

These offences, particularly the one prohibiting persons from receiving financial or other material benefit from trafficking in persons, broadly cover the full range of trafficking in persons and organizing, directing and participating as an accomplice. The third offence dealing with destruction of certain documents recognize the reality experienced by victims and the difficulty they have in coming forward without any identification documents. As the Legislative Guide comments: “generally simple incorporation of the definition and criminalization elements into national law will not be sufficient; given the nature and complexity of trafficking and other forms of transnational organised crime”.⁹⁴ The provisions dealing with protection and facilitation of evidence of victims and witnesses in the Canadian Bill responds to the complexity of investigating and prosecuting trafficking in person cases.

The Canadian Bill C-49 is similar to the UN Protocol in respect to ensuring that once exploitation is established, consent is irrelevant and cannot be used as a defence. However what is not clearly set out in Bill C-49 is the situation where children are victims of recruitment or transportation for the purpose of exploitation. In this case, the Protocol expressly provides that there is no need to establish improper means to prove trafficking of a minor.

7. Smuggling of migrants

a. Criminal Code offences

In Canada, smuggling-related conduct, such as producing, procuring, providing or possessing fraudulent travel or identity documents and enabling a person to remain in Canada by illegal

⁹³ *ibid.*

⁹⁴ Legislative Guide, *supra* note 26.

means, is prohibited by a number of provisions in the Criminal Code and the Immigration and Refugee Protection Act. Section 57 of the Criminal Code creates offences relating to the creation of forged passports and their subsequent use or possession. Section 58 creates the indictable offence of fraudulently using a certificate of naturalization or citizenship. It also prohibits parting with a certificate of citizenship or naturalization, knowingly and intending that it will be used fraudulently.

Part III of the Immigration and Refugee Protection Act deals with trafficking and smuggling of persons and establishes such offences as to knowingly organize, induce, aid or abet the coming into Canada individuals that do not possess a visa, passport or other such document;⁹⁵ disembarking persons at sea for the purpose of inducing, aiding or abetting them to come into Canada;⁹⁶ and counseling misrepresentation⁹⁷.

b. Comparisons to the UN Convention

The Canadian legislative framework appears to comply with the requirements for criminalization of smuggling-related conduct. It covers conduct that amounts to enabling illegal residence, where the residents lack the necessary legal status or authorization and smuggling (which means procuring illegal entry). To support the basic offences of smuggling and enabling illegal residence, Canadian provisions also criminalizes conduct relating to fraudulent travel or identity documents (section 57 and 58 of the Criminal Code) which is required by the Protocol. The Immigration and Refugee Protection Act further establishes as aggravating circumstances conduct that is likely to endanger or does endanger the migrants to inhumane or degrading treatment.⁹⁸

The Protocol remains neutral as to whether those who migrate illegally should be the subject of criminal offences. It does not require State Parties to criminalize migrants who are entering their territory illegally nor does it limit State's ability to establish offences under domestic laws to deal with illegal migrants. The Canadian scheme allows for a deferral of prosecution for any person coming into Canada who is making a refugee claim from prosecution of certain offences, such as possessing travel document for the purposes of contravening the Immigration and Refugee Protection Act, or forging a travel document or destroying documents.⁹⁹

IV. Issues of Canadian criminal procedure in these cases

The *Convention Against Transnational Organised Crime* provides in article 20 that where permitted by the basic principles of its domestic legal system, State Parties shall take necessary measures to allow for special investigative techniques, such as electronic surveillance and undercover operations.

Generally speaking, there are no real differences between the criminal procedure used in organised crime cases and other criminal cases regarding investigation, prosecution and evidentiary measures. The two organised crime bills (C-95 and C-24) introduce new provisions that confer wider police powers to assist them in investigating and combating organised crime. However these new provisions and powers are not generally limited to organised crime offences

⁹⁵ Section 117 *Immigration and Refugee Protection Act*.

⁹⁶ Section 119 *Immigration and Refugee Protection Act*.

⁹⁷ Section 126 *Immigration and Refugee Protection Act*.

⁹⁸ Section 121 *Immigration and Refugee Protection Act*.

⁹⁹ Section 133 *Immigration and Refugee Protection Act*.

but apply to the whole Criminal Code and to all kinds of investigations, whatever the nature of the crime.

1. Scheme of police immunity

The Criminal Code now has a complex and wide immunity system allowing police officers, generally those “undercover”, the power to commit certain offences as part of their investigation of crimes. While these immunity provisions apply to a broad range of offences, whether or not the offences are related to organised crime, the provisions were introduced in organised crime legislation (Bill C-24). The Canadian government recognized that police officers investigating crimes such as trafficking and smuggling of persons and drugs need to use a variety of investigative techniques including committing offences to infiltrate, destabilize and dismantle criminal operations.¹⁰⁰ Even the courts acknowledged that one of the most effective ways to investigate a criminal organization is to use an undercover officer or to engage someone who is already a member of that organization as a covert agent.¹⁰¹ In the process, it may be necessary for the officer or agent to commit criminal offences, such as trafficking in drugs to play along with their criminal targets to maintain their cover. As remarked by Chief Justice Lamer, the investigation of crime and the detection of “shrewd and often sophisticated” criminals “is not a game to be governed by the Marques of Queensbury rules”.¹⁰²

Sections 25.1 to 25.2 of the Criminal Code provides law enforcement officers and other persons acting at their direction with circumscribed protection from criminal liability for certain otherwise illegal acts committed in the course of an investigation or enforcement of an Act of Parliament. The scheme starts by declaring that the authorization power is to be exercised by the Solicitor General or provincial Attorney General. However that power is to designate police officers or groups of officers on consideration of their general duties rather than any particular investigation and the power can be delegated to a senior official. A designated officer can commit an offence if the officer reasonably believes the offence is reasonable and proportional to the criminal activity being investigated. The only real limit on this authorization is that it is not to include the intentional or criminally negligent causing of bodily harm, willful obstruction of justice or conduct that would violate sexual integrity. There are also requirements for after the fact annual reports and notice to victims to provide for some accountability in this process.

The immunity scheme provided for in Bill C-24 was in response to the 1999 Supreme Court of Canada case of *R v Campbell and Shirose*.¹⁰³ In that case, the Court held that the police had to abide by the rule of law. They were not immune from criminal liability for committing acts during an investigation which, in ordinary circumstances would be illegal, unless authorized by Parliament through legislation.¹⁰⁴ The police had engaged in a reverse sting operation where they had offered to sell drugs, which at the time was not authorized by the Narcotic Control Act. The Court ordered a new trial to consider whether there should be a stay of proceedings because of an abuse of process. The Court noted the new Controlled Drugs and Substances Act would legalize reverse sting operations in the future and that Parliament could establish public interest immunities for police operations if these were clearly set out.

¹⁰⁰ Department of Justice Backgrounder, “Royal Assent on Bill C-24 Organised Crime Legislation” (December 2001).

¹⁰¹ *R v Campbell and Shirose* [1999] 1 S.C.R. 565 (SCC).

¹⁰² *Rothman v R* [1981] 1 S.C.R. 640 (SCC).

¹⁰³ *R v Campbell and Shirose*, *supra* note 101.

¹⁰⁴ *ibid*, Justice Binnie speaking for the SCC.

Some have criticized these provisions saying it is hard to imagine a scheme of police immunity more inimical to the rule of law.¹⁰⁵ The police cannot be above the law. They argue that this scheme's structure for authorization is for the most part devoid of government control as it is essentially left up to the administrative policies of various police forces, constrained only by questionable balancing tests.¹⁰⁶ The scheme also permits the commission of some offences without obtaining an authorization. For any provision which essentially allows some citizens to break a law which is binding on all others, it must be specifically justified and narrowly defined.¹⁰⁷ Other concerns raised include weakening of the defence of entrapment and the authorization of the use of force or violence.

However others respond that these provisions do not provide for blanket immunity for any criminal conduct by police.¹⁰⁸ They also point to the number of safeguards contained in the provisions, such as the role of ministers responsible for policing who will designate the eligible officers; exclusion of certain types of conduct; and the annual reporting requirements. The provisions in sections 25.1 to 25.2 have not been judicially considered or constitutionally challenged as yet.

2. Special peace bond

Bill C-95 creates a special peace bond designed to target gang leadership and make it difficult for criminal organizations to carry out their criminal activities. A peace bond is seen as a preventive measure, a promise, enforceable under the Criminal Code, to keep the peace and be of good behaviour and to obey all other terms and conditions. Section 810.01 allows anyone, with the consent of the Attorney General, to lay an information before a provincial court judge for the purpose of having a person enter into a recognizance to keep the peace and be of good behaviour. The judge must be satisfied that there are reasonable grounds to fear that an individual will commit some of these crimes. This peace bond can include conditions such as prohibiting the person from being in possession of firearms, ammunition, explosives and associating with certain people. The government argues that police have informed them that organized crime works because people talk to each other, plan with each other and commit crimes together. This measure is to break that cycle by ensuring that these people cannot talk or plan together.¹⁰⁹ In other words, the purpose is preventive.

While it originally appeared that the intent was to establish a preventive power against gang leaders, as well as suspected terrorists, section 810.01 goes much further to include any person who it is feared may commit a criminal organized offence. Any person can be forced to enter a peace bond with conditions for up to 12 months if the justice is satisfied that an informant has reasonable grounds to fear that the person will commit a "criminal organized offence". If the person refuses or fails the conditions, he can be imprisoned for up to twelve months.

The notion of peace bonds have been around for hundreds of years in common law and has been codified under section 810 of the Criminal Code back in the 1892. Prior to amendments

¹⁰⁵ The statements made by the Barreau du Quebec and the Canadian Civil Liberties Association during the Standing Committee on Justice and Human Rights (May 8, 2001) found at www.parl.gc.ca/infoComDocs/3/1/JUST/Meetings/Evidence/justevi2-ehm.

¹⁰⁶ Kenneth Swan "A Response to Government of Canada White Paper on Law Enforcement and Criminal Liability" (November 2000: Canadian Civil Liberties Association).

¹⁰⁷ The McDonald Commission, back in 1981, rebuked the police for burning down a burn, committing burglary, theft and mail-opening and counseled against creation of any general law-breaking power for the police, as discussed in Alan Borovoy "Don't Give the Police Carte Blanche" (May 8, 2001: Globe and Mail).

¹⁰⁸ Department of Justice "Law Enforcement and Criminal Liability: White Paper" (June 2000).

¹⁰⁹ Statement by Mr. Yvan Roy, General Counsel, Criminal Law Policy Section, Policy Sector, Department of Justice Canada to the Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs (Second Session, Thirty-fifth Parliament, 1996-97 Senate of Canada: 24 April 1997, Issue No 63).

establishing section 810.01, there had been a previous amendment dealing with pedophiles.¹¹⁰ That section has been ruled to be constitutional by the Ontario Court of Appeal in the *Budreo* case.¹¹¹

Peace bonds that existed before these last two amendments were a much more narrowly focused kind of instrument. They arose when a particular person believed they were in danger from someone, and they went to court for such an order to keep that person away from them. The intrusion on the defendant's freedom was limited. Section 810.01 allows the courts to impose more significant restrictions to a person's liberty and their ability to associate with others, even when they have not been convicted or charged with the offence at issue. One commentator calls this "punishment by clairvoyance".¹¹²

Other commentators have said that this provision with its binding over powers prior to proof of the commission of an offence raises important Charter issues.¹¹³ This particular power, again bearing in mind the loose definition of criminal association, could be "a tool for State harassment based around peace bonds with non-association clauses".¹¹⁴ It could stifle political dissent, just as the American legislation on organize crime has been used against abortion protestors. This would effectively outlaw criminal associations without even the necessity of proving an offence. It is qualitatively different from peace bonds used, for example, to try and protect victims of domestic violence from further harm. Substantial data points to the probability of danger to an identified victim such as victims of domestic violence. Responding to some of these concerns, the government added a requirement that the Attorney General must consent to such applications.

There has not as yet been a constitutional challenge or judicial consideration of section 810.01. From the *Budreo* case, one can imagine the same Charter concerns being raised. In that case, the argument was that the peace bond violated section 7 of the Charter, guaranteeing the right not to be deprived of liberty except in accordance with the principles of fundamental justice. The three reasons the defence raised included: section 810.1 creates an offence based on status, it is overbroad and it is void for vagueness. However, the Court did not find a violation, and stated that peace bonds are preventive provisions, stop short of detention or incarceration and that the restrictions to the defendant's liberty is proportional to important social interests.¹¹⁵ They further held that the procedural safeguards are sufficient.

3. Reverse bail onus

The cardinal principle established by the Bail Reform Act of 1971 is that the State must show cause for pre-trial detention. Basically, prior to conviction all those persons who do not constitute a danger to the public and who will show up for trial ought not to be detained in custody. There are certain situations enumerated in the Criminal Code where the onus is on the accused to show cause as to why he or she should be released pending trial. Bill C-95 introduced an additional situation in which the accused is under a reverse onus. Section 515(6)(a) of the Criminal Code adds to the list of reverse onus exceptions those charged with criminal organization offences.

¹¹⁰ Section 810.1 of the *Criminal Code*.

¹¹¹ *R v Budreo* (1996) 104 C.C.C. (3d) 245 (Ont. Ct. (Gen. Div.), aff'd 142 C.C.C. (3d) 225 (Ont. C.A.), leave to appeal to S.C.C. refused 153 C.C.C. (3d) vi.

¹¹² Alan Borovoy, General Counsel, Canadian Civil Liberties Association making this statement at the Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, *supra* note 107.

¹¹³ These comments are discussed in Alan Borovoy's article, *ibid*.

¹¹⁴ *ibid*.

¹¹⁵ *R v Budreo*, *supra* note 111.

One commentator argues that the new reverse onus exceptions in Bill C-95 could be challenged based on the guarantee in section 11(e) of the Charter against denial of reasonable bail without just cause. However case law from the Supreme Court of Canada prior to the amendments in 1997, have held that the scope of other reverse onus exceptions were sufficiently narrow to constitute just cause under section 11 (e) and therefore are constitutional.¹¹⁶ The Court has held that the onus imposed on accused charged with serious offences under the Controlled Drugs and Substance Act is reasonable in the sense that it requires the accused to provide information which he is most capable of providing. It also noted that these special rules combat the pre-trial recidivism and absconding problems which are characteristic of systematic drug trafficking which usually occurs in a highly sophisticated and lucrative commercial setting.¹¹⁷

4. Search warrants and wiretaps

Bill C-95 provided for a new general provision for sealing orders by a justice to deny access to information to obtain a search warrant (subsequently amended in 2004). Section 487.3 of the Criminal Code provides that the order may be made only where the ends of justices would be subverted by disclosure or the information might be used for an improper purpose and the judge is satisfied that these grounds outweigh the importance of access to the information. The Criminal Code provision further lists the grounds that the ends of justice would be subverted by the disclosure. If disclosure would (1) compromise the identity of a confidential informant; (2) compromise the nature and extent of an ongoing investigation; (3) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used; or (4) prejudice the interests of an innocent person. The judge can also look at any other sufficient reason.

It has been argued that the wide power in section 487.3 to prevent access by an accused to the information leading to a search warrant after the execution of the search appears to violate the accused's right to discovery under section 7 of the Charter. Those provisions relating to protecting the identity of informers should, however, survive the Charter review given the Supreme Court of Canada ruling in *R v Leipert* that the only exception to police informer privilege is where innocence is at stake.¹¹⁸ One commentator notes that "it is hard to think of a provision that would have been more favorable to law enforcement interests".¹¹⁹ This is a most controversial and difficult area in which the public's right to know, privacy and the accused's right to discovery, need to be carefully balanced against law enforcement interests, including the need to protect undercover agents.

Regarding wiretap and electronic surveillance, Bill C-95 and revised by Bill C-24 removes the last resort requirement for electronic surveillance. Sections 185(1.1) and 186(1.1) does not require a judge to be satisfied that other investigative procedures have been tried and have failed and that other investigative procedures are unlikely to success or the urgency of the matter is such that it would be impractical to carry out the investigation using other procedures. This applies to criminal organization offences as well as terrorism offences. Section 186.1 extends the period of

¹¹⁶ *R v Morales* [1992]3 S.C.R. 711.

¹¹⁷ *R v Pearson* [1992] 3. S.C.R. 665.

¹¹⁸ *R v Leipert* [1997] 1 S.C.R. 281. Police investigation following crime stopper tip that drugs were being grown in the accused house. Tip mentioned in information to obtain a search warrant of accused's house. Crown refused to produce tip sheet on ground of informer privilege.

¹¹⁹ Don Stuart "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2002) 112 Manitoba Law Journal 89 and Don Stuart, "Politically Expedient But Potentially Unjust Criminal Legislation against Gangs" (1997), Paper presented at the Law Society of Upper Canada Session on Criminal Law and the Charter on September 27, 1997.

an authorization from 60 days up to one year in cases dealing with criminal organizations and terrorism offences.

One commentator argued that he had never heard a serious claim that the police have any difficulty getting permission to use electronic bugs against criminal gangs.¹²⁰ Regarding the extension of the period of an authorization from 60 days up to one year, he argues that this provision will accomplish nothing more than to reduce the accountability of the police. He further insists that these safeguards have been put into our wiretap legislation for an important reason. It was recognized a long time ago that electronic bugs perpetrate pervasive intrusions invariably on the privacy of innocent people. Even though the targets are suspected criminals, the technology results in intercepting much more than just their conversations. That is why it was originally to be used as a last resort. He calls for constant judicial scrutiny.

5. Disclosure

There are a number of challenges with prosecuting organized crime mega trials, such as high costs, burdens on judges and juries, and the burden of disclosure and management of evidence. The collapse of a number of mega trials due to slow disclosure by prosecutors of massive volumes of information has resulted in a February 2004 announcement by the Minister of Justice that Justice officials will be developing draft amendments to more efficiently and effectively implement the Charter mandated obligation of the prosecution to disclose all relevant materials.¹²¹

The Department of Justice produced a consultation paper on disclosure reform that seeks to address the disclosure problems encountered in the prosecution of complex criminal trials.¹²² This would not be restricted to organised crime trials. Issues that they will be looking into include:

- facilitating the electronic disclosure of material to defence;
- reducing administrative burdens in disclosure by clarifying the core materials to be given to the defence while ensuring the defence's right of access to all relevant information;
- setting up specialized court proceedings to provide a way for disclosure, including relevance;
- establishing disclosure management procedures that would clearly set out obligations relating to disclosure, including timelines; and
- address any improper use of disclosed materials.

The Department of Justice has proposed some legislative amendments to tackle the difficult issue of disclosure.¹²³ One would be that where the Crown transmits disclosure materials in electronic format, complying with specified standards, this is presumed to be a proper form of disclosure with respect to those materials unless a court, in the interests of justice, decides otherwise. It has been noted that while electronic disclosure has not been firmly accepted within the criminal justice system, neither has it been rejected. It is further suggested that, without reducing the obligation to provide disclosure, legislative amendments could permit this obligation to be fulfilled by providing the defence with reasonable access to disclosure materials and the opportunity to obtain copies. This would be restricted to "in appropriate circumstances", which would likely be in large and complex cases, which frequently generate enormous volumes of materials that are subject to the disclosure obligation.

¹²⁰ Alan Borovoy, General Counsel, Canadian Civil Liberties Association making this statement at the Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, *supra* note 107.

¹²¹ One such trial was *R v Chan* (February 2004) where the trial judge ordered the stays of proceedings saying that there had been unreasonable delay contrary to section 11(b) of the Charter.

¹²² Department of Justice "Disclosure Reform: Consultation Paper" (Department of Justice Canada: November 2004).

¹²³ These proposals and discussions is summarized from the Department of Justice consultation paper, *ibid*.

The Department of Justice argues that amendments providing for specialized court proceedings could allow disclosure motions to be heard in an expedited manner through quick access to a court and flexible proceedings before the court.¹²⁴ Specifically mentioned manners of proceedings could include proceedings by written submissions only, proceedings by oral submissions without supporting material or motion record, proceedings relying on affidavit or *viva voce* evidence, proceedings by telephone or video conference, proceedings in chambers, and *in camera* and *ex parte* proceedings. Lastly, in responding to the problem where disclosed material has been misused, these proposals suggest that it be explicitly provided for in the Criminal Code that all persons who receive disclosure information, including third parties, have a legal responsibility not to use it for improper or collateral purposes. Furthermore the judge would have power to make any order with respect to disclosure materials that it deems fit. Such an order could be made in the interests of justice or to protect the privacy of those affected by the proceedings, but subject to the right of an accused to make full answer and defence. The proposals include a suggestion for a targeted offence for misuse of disclosure material.

6. New powers to seize proceeds of crime and obtain forfeiture

In order to assist law enforcement agencies in their fight against organised crime, mechanisms of seizure of proceeds of crime and forfeiture provisions have been seen to be extremely effective and desirable tools. With this in mind, Bill C-95 first amended existing Criminal Code provisions to apply seizure of proceeds of crime powers to the new offence of participation in criminal organizations and to federal offences with penalties of five years or more. Then Bill C-24 extended the application of its proceeds of crime provisions to indictable offences under the Criminal Code and other Acts of Parliament, with a few exceptions.¹²⁵ It also extended the application of its provisions relating to offence-related property to indictable offences under the Criminal Code and provided for the management, by judicial order, of proceeds of crime and offence-related property, whether seized or restrained.

The Proceed of Crime (Money Laundering) Act (2000) has been substantially widened to embrace the seizure, freezing and confiscation of proceeds of most indictable offences rather than the 40 previously listed as “enterprise crimes”. Bill C-24 also amends the Mutual Legal Assistance In Criminal Matters Act to allow the enforcement in Canada of search warrants, restraining orders and orders of forfeiture from foreign jurisdictions. While proceeds of crime applications are not limited to organised crime situations, they are especially relevant to combating this form of crime.

The Proceeds of Crime (Money Laundering) Act replaced existing legislation of the same name that had been first enacted in 1988. The object of the Act is, in part, to implement specific anti-money laundering detection and deterrence measures to facilitate the investigation and prosecution of money laundering offences. The Act and regulations expand the scope of the reporting and record-keeping requirements for certain transactions and reporting requirements for importation and exportation of currency or monetary instruments of a prescribed value. It requires financial institutions and their intermediaries to report suspicious transactions, as well as impose requirements for client identification and record keeping. The Act also established the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), a new independent agency which collects, analyze and disclose information to assist in the prevention and deterrence of

¹²⁴ *ibid.*

¹²⁵ Part XII.2 *Criminal Code*.

money laundering. The Act was expanded in December 2001, pursuant to the Anti-Terrorism Act and renamed the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.

The Criminal Code has recently amended provisions that allow for the forfeiture of proceeds of crime.¹²⁶ Prior to this amendment, the prosecution would make an application to obtain an order of forfeiture after a conviction for an indictable offence under federal legislation. The prosecutor had to prove on a balance of probabilities that the property was the proceeds of crime and that the property was connected to the crime for which the person was convicted. If there was no connection between the offence and the property, the court could order forfeiture if it was satisfied beyond a reasonable doubt that the property was proceeds of crime. Experience showed that convictions involving organised criminal activities may not have associated proceeds, such as murder, so that the prosecutors often had to rely on the test of beyond a reasonable doubt. With this in mind, Parliament's recently enacted legislation, Bill 53, will make it easier for the Prosecutor to seize the proceeds of crime for offences related to organized crimes or drug trafficking. Bill C-53 imposes a reverse onus on those convicted of offences related to organized crime or drug trafficking to prove, on a balance of probabilities, that their assets are not proceeds of crime. In order for the reverse onus to apply, the prosecutor would first be required to prove, on a balance of probabilities, either that the offender engaged in a pattern of criminal activity for the purpose of receiving material benefit or that the legitimate income of the offender cannot reasonably account for all of the offender's property.¹²⁷

Provincial legislation has also been enacted in Ontario, Manitoba and Alberta allowing courts to make a civil order for the forfeiture of property associated with criminal activity.¹²⁸ A recent case in Ontario considered whether a person from whom money is seized has any onus in establishing the legitimacy of the origin of the money or of its use in an application by the Prosecutor, under Ontario's Act, for forfeiture of proceeds of crime. The Court held that the onus is on the Prosecutor to prove that the money "is the product of or instrumentally of unlawful activity".¹²⁹

Some have observed that although the entire notion of controlling crime by taking away the capital and the motivation is superficially appealing, there is no proof in logic or in practice that it actually works.¹³⁰ There is however ample proof that it can pose a threat to civil liberties and civilian control over police forces. The proceeds approach also involves the police intruding on territory that has historically been the preserve of the revenue authorities and raises serious possibilities of compromising the integrity of a tax system based on confidentiality and self-assessment. This is an area requiring more study.

¹²⁶ Bill C-53, *An Act to Amend the Criminal Code (Proceeds of Crime) and the Controlled Drugs and Substances Act and to Make Consequential Amendments to Another Act*, S.C. 2005 c. 44 (royal assent 25 November 2005).

¹²⁷ Department of Justice Backgrounder "Key Highlights of the Proceeds of Crime Bill" (May 2005).

¹²⁸ In December 2001, the Ontario legislation enacted the Remedies for Organised Crime and Other Unlawful Activities Act, 2001 (S.O. 2001, c.28 [Organised Crime Act]) and in Alberta, the government passed its own civil forfeiture legislation in November 2001 entitled the Victims Restitution and Compensation Payment Act (S.A. 2001, c.V-3.5 [Victims Restitution Act]).

¹²⁹ See *Ontario (Attorney General) v Wheeler* [2005] O.J. No. 97.

¹³⁰ Beare, M and Naylor, R.T "Major Issues Relating to Organized Crime: Within the Context of Economic Relationships" (Nathanson Centre for the Study of Organized Crime and Corruption: 1999).

V. Protection of witnesses and victims

States Parties of the UN *Convention Against Transnational Organized Crime* are required to provide effective protection for witnesses, within available means, including physical protection; domestic or foreign relocation; and special arrangements for giving evidence.¹³¹ States should also assist, subject to resources, with procedures for victims to claim compensation and restitution. Victims should be given the opportunities to present views and concerns at appropriate stages of the criminal proceedings, subject to domestic law.

In order to enhance investigations of organised crimes, the *Convention* requires State Parties to take appropriate measures to encourage persons, who participate in organised criminal groups to supply information for investigative and evidentiary purposes.¹³² It suggests that States should consider mitigating punishment of an accused person who provides substantial cooperation and perhaps grant them immunity from prosecution.

The Protocols also contain provisions to ensure assistance to and protection for victims. Under the *Protocol on Trafficking in Persons*, trafficked victims are entitled to some degree of confidentiality. Article 6 obliges State Parties to protect the privacy and identity of victims to the extent possible under domestic law.¹³³ Victims are also entitled to information about legal proceedings involving traffickers and should be given the opportunity to have their views presented and considered.¹³⁴ States must endeavor to provide for the basic safety and security of victims and ensure measures are established to allow for the possibility of obtaining compensation for damage suffered.¹³⁵ Some of the optional provisions to assist and support victims include supportive measures intended to reduce the suffering and harm caused to victims and to assist in their recovery and rehabilitation. The Protocol explicitly provides that the special needs of children should be taken into account when considering such measures.¹³⁶

In Canada there is a structure which recognizes the needs of victims and witnesses and their protection in the criminal justice system. Both federal and provincial laws address the concerns of victims of crime. Current provisions in the Criminal Code deal with publication bans, exclusion orders and facilitation of testimony. This is not limited to cases dealing with organised crime. The provinces and territories have also enacted victim legislation governing services and assistance and, in some jurisdictions, compensation to victims of crime.

The focus of this paper is on the federal framework and the Criminal Code. The Criminal Code has long recognised that testifying at a criminal proceeding may be even more stressful than usual for some particularly vulnerable witnesses. There are a number of sections that are available to assist victims and witnesses testifying in court which goes some way to ensuring that the court will have access to the fullest and best possible account of the evidence. Recent amendments to the Criminal Code revise the procedural sections to accommodate the needs of vulnerable complainants and witnesses, particularly in the prosecution of sexual offences.¹³⁷

- Exclusion of the public. Section 486(1) allows judges to exclude all or any member of the public where they are of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice, or necessary to prevent

¹³¹ Article 24 and 25 of the UN *Convention Against Transnational Organised Crime*.

¹³² Article 26 of the UN *Convention Against Transnational Organised Crime*.

¹³³ Article 6(1) *Protocol on Trafficking in Persons*.

¹³⁴ Article 6(2) *Protocol on Trafficking in Persons*.

¹³⁵ Article 6(5) and (6) *Protocol on Trafficking in Persons*.

¹³⁶ Article 6(4) *Protocol on Trafficking in Persons*.

¹³⁷ Bill C-2 – *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canadian Evidence Act*, royal assent 21 July 2005.

injury to international relations or national defence or national security. The proper administration of justice includes ensuring that the interests of witnesses under the age of 18 years are safeguarded in all proceedings. Prior to Bill C-2, this provision was restricted to certain proceedings which involved sexual offences or an offence in which violence was used, threatened or attempted. Now the definition of “proper administration of justice” has been broadened to include safeguarding the interests of witnesses under 18 in all proceedings.

- Support person. Section 486.1 provides for the role of a support person for certain vulnerable witnesses. The judge is required to make an order for a support person where requested for those witnesses under 18 years in any proceeding, unless the judge is of the opinion that the order would interfere with the proper administration of justice.¹³⁸ The court’s authority is now extended even further by allowing such an order for the benefit of a witness of any age in any proceeding, if the judge is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.¹³⁹ In making that determination, the court is to take into account the age of the witness, the presence or absence of mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstances considered relevant. No adverse inference is to be drawn from the fact that an order is, or is not, made under this provision.¹⁴⁰
- Remote or screened testimony. Section 486.2(1) provides that the court must make an order that any witness under 18 or who may have difficulty communicating evidence by reason of a mental or physical disability, may testify outside the courtroom or behind a screen or device that would prevent a view of the accused, where there has been a request in any proceeding unless the judge is of the opinion that the order would interfere in the proper administration of justice. New section 486(2) allows such an order for the benefit of any witness if the judge considers it necessary to obtain a full and candid account from the witness. Prior to the Bill C-2 amendments, this provision was restricted to witnesses under the age of 18 or those who may have difficulty communicating the evidence by reason of a mental or physical disability and to only limited number of offences.
- Cross-examination by the accused. Section 486.3(1) prohibits an accused from personally cross-examining a witness under 18 years in any proceedings, unless the judge is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. The judge can also make such an order in any proceedings for any age witness if the judge is of the opinion that in order to obtain a full and candid account from the witness the accused should not personally conduct the cross-examination. No adverse inference is to be drawn from the fact that counsel is, or is not, appointed under this section.
- Publication of identifying information. Section 486.4(1) allows the court to prohibit the publication of identifying information about a witness in certain proceedings. Bill C-2 adds to the list of offences for which such an order can be made.
- Videotaped evidence. Sections 715.1 and 715.2 provides for victims and witnesses under the age of eighteen to give evidence by way of video recording, if it is made within a reasonable time after the alleged offence and the victim or witness adopts the contents of the recording, while testifying. The judge has the discretion to allow videotaped evidence by any witness in any proceeding where the judge is of the opinion it is necessary.

¹³⁸ Section 486.1(1) *Criminal Code*.

¹³⁹ Section 486.1(2) *Criminal Code*.

¹⁴⁰ Section 486.1(6) *Criminal Code*.

Section 738 authorizes the making of an order requiring the offender to make restitution in the case of damage to property and bodily harm. Restitution is limited to pecuniary damages incurred as a result of the harm, including loss of income or support. Bill C-49 which amended the Criminal Code dealing with trafficking in persons amends the provision by adding physical harm as well as bodily harm.¹⁴¹

The Witness Protection Program Act 1996 establishes a formal, national program to protect those who risk their lives to assist police investigations. This program is administered by the Commissioner of the Royal Canadian Mounted Police (RCMP).¹⁴² The Act has no bearing upon witness protection programs run by provincial and municipal law enforcement agencies; however the RCMP can enter into agreements with other law enforcement agencies to protect witnesses. Witnesses are defined as someone who gives or agrees to give information or evidence or who participates or agrees to participate in a matter relating to an investigation or the prosecution of an offence and may require protection because of the risk to their security.¹⁴³ Protection under the Act may include relocation, accommodation, change of identity, counseling and financial support or any others to ensure the witness's security or to facilitate the witness's re-establishment or ability to become self-sufficient.¹⁴⁴ Witnesses who enter this program usually do so for life.

The Act sets out the criteria for admission into the Witness Protection Program. It is necessary for a law enforcement agency to recommend the candidate for the program.¹⁴⁵ Section 7 provides a list of factors that will be considered by the RCMP, including the nature of the risk to the security of the witness; the danger to the community if the witness is admitted into the program; the nature of the investigation or prosecution and the importance of the witness in this matter; the value of the information or evidence; the likelihood of the witness being able to adjust to the program; the cost; and alternative protection methods. If the candidate is deemed suitable, he or she must enter into a protection agreement with the RCMP. The RCMP can terminate this agreement if the witness does not comply with an important obligation of the agreement, such as providing evidence in court. For transparency purposes, the RCMP submits an annual report to Parliament, through the Solicitor General, however, this report provides only statistics to maintain confidentiality of the individuals under the program.

More recently, relating to capital market frauds, Bill C-13 was enacted in 2004 which contained some whistle blowing provisions.¹⁴⁶ The new section 425.1 to the Criminal Code makes it a criminal offence for an employer, anyone acting on behalf of an employer or a person in a position of authority over an employee to take or to threaten the employee with disciplinary action, demotion, termination of employment or to adversely affect the employee's employment in order to force the employee to refrain from providing information to law enforcement officials about the commission of an offence by his or her employer or by an officer, employee or director of the employer.

In Quebec, Alberta and Manitoba, special courtrooms and courthouses have been constructed to house mega-trials, including the trials of multiple members of organised criminal groups. These courtrooms and courthouses are equipped with special security measures to prevent intimidation.¹⁴⁷

¹⁴¹ Bill C-49, *supra* note 79.

¹⁴² Section 4 of the Witness Protection Program Act 1996.

¹⁴³ Section 2 Witness Protection Program Act 1996.

¹⁴⁴ Section 2 Witness Protection Program Act 1996.

¹⁴⁵ Section 6 Witness Protection Program Act 1996.

¹⁴⁶ Bill C-13, *An Act to Amend the Criminal Code (Capital Markets Fraud and Evidence Gathering)* S.C. 2004 c. 3.

¹⁴⁷ Public Safety and Emergency Preparedness Canada "Working Together to Combat Organized Crime: A Public Report on Actions Under the National Agenda to Combat Organized Crime" (2004).

VI. Organisations involved in combating organised crime

The Royal Canadian Mounted Police (RCMP) is the lead agency in Canada in combating organised crime.¹⁴⁸ There are different units such as commercial crime, immigration, smuggling, proceeds of crime, criminal intelligence, international policing and human trafficking unit.

Other federal departments involved in combating organised crime include:

- Criminal Intelligence Service Canada (CISC) which coordinates criminal intelligence among Canadian law enforcement agencies in the fight against organised crime;¹⁴⁹
- Public Safety and Emergency Preparedness Canada which includes a list of policing publications funded by the Government of Canada and a 2004 Public Report on Actions Under the National Act to Combat Organised Crime;¹⁵⁰
- Cross-Border Crime and Security: Canada-US States Cooperation which provides information on how Canada and the US jointly target cross-border crime;
- Canada Customs Enforcement;
- Department of Justice;
- Auditor General of Canada which has done assessments of the Federal Government's drug control policies and enforcement. She has also reported on the federal government's strategy on money laundering and terrorist financing. She says that while the new measures are designed to catch up with international standards, they must be balanced with rights of privacy. Some critics have complained that Canada puts too much emphasis on privacy rights, making it harder to track criminals who try to launder their profits from crime for re-use.¹⁵¹

In 2000, the Proceeds of Crime (Money Laundering) Act established the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). FINTRAC is a federal financial intelligence agency responsible for deterring and detecting money laundering.¹⁵² Its mandate is to collect, analyze, assess and, where appropriate, disclose information to law enforcement and intelligence agencies to assist in the detection, prevention and deterrence of money laundering and the financing of terrorist activities. FINTRAC became operational in Fall of 2001. Under the Proceeds of Crime and Terrorist Financing Act, financial institutions including banks, insurance companies, security dealers and foreign exchange businesses are required to report large or suspicious transactions to FINTRAC. Since then, FINTRAC has disclosed almost \$2 billion is suspected money laundering and terrorism financing. An annual report from FINTRAC is tabled in Parliament.¹⁵³ Despite the figures in these annual reports, the federal Auditor General reports that FINTRAC rarely provides information leading to new investigations. In her report on the implementation of the National Initiative to Combat Money Laundering to Parliament, the Auditor General said information disclosure by FINTRAC has never led to a new prosecution. FINTRAC's effectiveness is hampered by strict information-sharing legislation and growing pains.

There are also integrated police force response units across the country. For example:

- IMETs – Integrated Market Enforcement Teams established in 2003 to detect, prosecute and deter serious capital markets fraud. These teams are made up of RCMP investigators,

¹⁴⁸ For more information, see the web site www.rcmp.ca.

¹⁴⁹ CISC annual reports on organized crime in Canada are found at www.cisc.gc.ca.

¹⁵⁰ PSEPC's information on organized crime can be found at www.psepc-sppcc.gc.ca/policing/organized_crime/index_e.asp.

¹⁵¹ Summary of her report is found at www.yorku.ca/nathanson/

¹⁵² For more information, see www.fintrac.gc.ca.

¹⁵³ Financial Transaction and Reports Analysis Centre of Canada. 2005 FINTRAC Annual Report 2005. Ottawa: FINTRAC.

forensic accountants and lawyers in key financial centers across the country. IMET in Vancouver was launched in December 2003.

- IPOCs are RCMP led Integrated Proceeds of Crime. The units include RCMP and other police services, Crown Counsel, customs officers, forensic accountants, tax investigators and asset managers. An internal review of the program (June 2003) say uncertain funding, poor training and weak direction have undermined the elite national units set up to zero in on illicit profits of organised crime and terrorist groups.
- IROC – each province has different integrated response to organised crime units. For example in Alberta, there is an Integrated Response to Organised Crime Unit (IROC) established in June 2003, made up of RCMP and Calgary and Edmonton police services with experience in major crime investigations, wiretaps and undercover work.¹⁵⁴ The focus of the unit is the criminal organization and all the criminal activities they are involved in, including drugs, market manipulation, money laundering, counterfeit credit cards, auto theft, shipment of contraband such as cigarettes, prostitution, extortion, weapons and illegal gaming. This unit is modeled after similar units in Toronto, BC and Quebec. The idea is that a special police unit backed up by forensic accountants and other experts can without worrying about police jurisdiction and administrative wrangling.

IBETS or Integrated Border Enforcement Teams, fulfill a key commitment of the 2001 Canada-US Smart Border Declaration.¹⁵⁵ The IBET is a multi-agency law enforcement team that emphasizes a harmonized approach to Canadian and US efforts to target cross-border criminal activity. Originally developed in 1996 as an innovative method to address cross-border crimes along international land and marine borders between BC and Washington State, the IBETs have disrupted smuggling rings, confiscated illegal drugs, weapons, liquor, tobacco, vehicles and made numerous arrests. IBETs have also intercepted criminal networks attempting to smuggle illegal migrants across the border. There are 6 core partner agencies involved with IBETs: RCMP, Canada Customs and Revenue Agency, Citizenship and Immigration Canada, US Customs and Border Patrol, US Immigration and Customs Enforcement and US Coast Guards. Additional partners include municipal, provincial and state law enforcement agencies.

Provincial and municipal police agencies also have specialized units. For example, the Greater Toronto Area Combined Forces Special Enforcement Unit is a special multi-agency enforcement task force dedicated to combating high-risk organised crime groups in the Greater Toronto area.¹⁵⁶

There are also organizations like the Organised Crime Agency of British Columbia whose mandate is to facilitate the disruption and suppression of organised crime which affects British Columbians.¹⁵⁷ This agency became operational in February 2000.

¹⁵⁴ Nathanson Centre for the Study of Organized Crime and Corruption “*Organized Crime in Canada: A Quarterly Summary, January to March 2005*” found at www.yorku.ca/nathanson/CurrentEvents/Jan-March05.htm.

¹⁵⁵ Nathanson Centre for the Study of Organized Crime and Corruption “*Organized Crime in Canada: A Quarterly Summary, October to December 2003*” found at www.yorku.ca/nathanson/CurrentEvents/Oct-Dec03.htm.

¹⁵⁶ For more details see www.cfseu.org.

¹⁵⁷ The Organized Crime Agency of British Columbia “*One Year Operational Review*” (January 25, 2001) found at www.ocabc.org/publications/2000review1.html.

VII. Conclusion

The title of this paper asks a question – is Canada meeting its obligations in defining organised crime offences as required as a State Party to the UN *Convention Against Transnational Organised Crime* and its two Protocols on trafficking of persons and smuggling of migrants. The simple answer is yes. Generally speaking the legislative framework ensures that state authorities can investigate and prosecute the offences of: (1) participation in a criminal organization; (2) laundering the proceeds of crime; (3) corruption; (4) obstruction of justice; (5) trafficking in persons; and (6) smuggling in migrants and smuggling related conduct. There have been a few constitutional challenges as to how broadly some of these offences have been defined in the Canadian Criminal Code. While some of the offence provisions have been upheld by provincial courts (such as section 467.11) and others have not (section 467.13), and others remain to be challenged (section 118 Immigration and Refugee Protection Act), it will take time before the Supreme Court of Canada has the opportunity to review the constitutionality of these provisions.

The UN Convention also calls on States Parties to take necessary measures to allow for special investigative techniques to tackle organised crime, as well as ensuring effective protection for witnesses and victims of these crimes. Over the past few years, Canada has introduced a number of reforms to the Criminal Code that revises investigatory measures to expand police powers of investigation (Bill C-95 and C-24). More recently, with Bill C-2, the structure which recognizes the needs of victims and witnesses and their protection in the criminal justice system has been reformed to ensure broader protection to all victims and witnesses.

Annex

I. Definition of Crimes under the UN Convention Against Transnational Organized Crime

Article 2 – use of terms

- (a) “organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.
- (b) “serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least 4 years or a more serious penalty;
- (c) “structured group” shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

Article 5 – Criminalization of Participation in an organised criminal group

(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organised criminal group;

(ii) conduct by a person who, with knowledge of either the aim and general criminal activity of an organised criminal group or its intention to commit the crimes in question, takes an active part in:

a. criminal activities of the organised criminal group;

b. other activities of the organised criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

3. State Parties whose domestic law requires involvement of an organised criminal group for the purposes of the offences established in accordance with paragraph 1(a)(i) of this article shall ensure that their domestic laws cover all serious crimes involving organised criminal groups. Such State Party, as well as State Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offence established in accordance with paragraph 1(a)(i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

Article 6 – Criminalization of the Laundering of Proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

- (a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;
- (b) Each State Party shall include as predicate offences all serious crime as defined in article 2 and the offences established in accordance with articles 5, 8 and 23. In the case of State Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such a list a comprehensive range of offences associated with organised criminal groups;
- (c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;
- (d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;
- (e) If required by fundamental principles of domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;
- (f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

Article 7 – Measures to combat money laundering

1. Each State Party

(a) shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

(b) shall, without prejudice to article 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. State Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and business report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, State Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money laundering.

4. State Parties shall endeavor to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money laundering.

Article 8 – criminalization of corruption

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) the promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public

official or international civil servant. Likewise, each State Party shall consider establishing as criminal offences other forms of corruption.

3. Each State Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this article.

4. For the purpose of para 1 of this article and article 9 of this Convention “public official” shall mean a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function.

Article 9 – measures against corruption

1. In addition to the measures set forth in article 8, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.

2. Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.

Article 23 – criminalization of obstruction of justice

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention;

(b) the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention. Nothing in this subparagraph shall prejudice the right of State Parties to have legislation that protects other categories of public officials.

II. Definition of Crimes under the Protocols

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

Article 3 – use of terms

(a) “trafficking in persons” shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

(c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article.

Article 5 – criminalization

1. Each State Party shall adopt legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offense:

(a) subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(c) organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

Protocol Against the Smuggling of Migrants by Land, Sea and Air

Article 3 – use of terms

(a) “smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident

Article 5 – criminal liability of migrants

Migrants shall not become liable to criminal prosecutions under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol

Article 6 – criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) The smuggling of migrants;

(b) When committed for the purpose of enabling the smuggling of migrants:

(i) Producing a fraudulent travel or identity document;

(ii) Procuring, providing or possessing such a document;

(c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1(a), (b)(i) or (c) of this article, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1(b)(ii) of this article;

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1(a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2(b) and (c) of this article, circumstances:

(a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or

(b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

III. Relevant Provisions in Canada

Criminal Code

Definitions

s. 467.1(1) The following definitions apply in this Act.

“criminal organization” means a group, however organized, that

(a) is composed of three or more persons in or outside Canada; and

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.

“serious offence” means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation.

(2) For the purpose of this section and s. 467.11, facilitation of an offence does not require knowledge of a particular offence the commission of which is facilitated, or that an offence actually be committed.

(3) In this section and in ss. 467.11 to 467.13, committing an offence means being a party to it or counseling any person to be a party to it.

(4) The Governor in Council may make regulations prescribing offences that are included in the definition “serious offence” in subs (1).

Participation in Activities of Criminal Organization

s. 467.11 (1) Every person, who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding 5 years.

(2) In a prosecution for an offence under subs (1), it is not necessary for the prosecutor to prove that

- a) the criminal organization actually facilitated or committed an indictable offence;
- b) the participation or contribution of the accused actually enhanced the ability of the criminal organization to facilitate or commit an indictable offence;
- c) the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organization; or
- d) the accused knew the identity of any persons who constitute the criminal organization.

(3) In determining whether an accused participates in or contributes to any activity of a criminal organization, the Court may consider, among other factors, whether the accused

- a) uses a name, word, symbol or other representation that identifies, or is associated with, the criminal organization;
- b) frequently associates with any of the persons who constitute the criminal organization;
- c) receives any benefit from the criminal organization; or
- d) repeatedly engages in activities at the instruction of any of the persons who constitute the criminal organization.

Commission of Offence for Criminal Organization

s. 467.12(1) Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.

(2) In a prosecution for an offence under subs (1), it is not necessary for the prosecutor to prove that the accused knew the identity of any of the persons who constitute the criminal organization.

Instructing Commission of Offence for Criminal Organization

S 467.13 (1) Every person who is one of the persons who constitute a criminal organization and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organization is guilty of an indictable offence and liable to imprisonment for life.

(2) In a prosecution for an offence under subs (1), it is not necessary for the prosecutor to prove that:

- a) an offence other than the offence under subs (1) was actually committed;
- b) the accused instructed a particular person to commit an offence; or
- c) the accused knew the identity of all the persons who constitute the criminal organization.

Laundering Proceeds of Crime

s. 462.31(1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of a designated offence; or
 - (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.
- (2) Everyone who commits an offence under subsection (1)
- (a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
 - (b) is guilty of an offence punishable on summary conviction.
- (3) A peace officer or a person acting under the direction of a peace officer is not guilty of an offence under subsection (1) if the peace officer or person does any of the things mentioned in that subsection for the purposes of an investigation or otherwise in the execution of the peace officer's duties.

Intimidation of a Justice System Participant

s. 423.1 (1) No person shall, without lawful authority, engage in conduct referred to in subs (2) with the intent to provoke a state of fear in

- (a) a group of persons or the general public in order to impede the administration of criminal justice;
 - (b) a justice system participant in order to impede him or her in the performance of his or her duties; or
 - (c) a journalist in order to impede him or her in the transmission to the public of information in relation to a criminal organization.
- (2) The conduct referred to in subs(1) consists of
- (a) using violence against a justice system participant or a journalist or anyone known to either of them or destroying or causing damage to the property of any of those persons;
 - (b) threatening to engage in conduct described in para (a) in Canada or elsewhere;
 - (c) persistently or repeatedly following a justice system participant or a journalist or anyone known to either of them, including following that person in a disorderly manner on a highway;
 - (d) repeatedly communicating with, either directly or indirectly, a justice system participant or a journalist or anyone known to either of them; and
 - (e) besetting or watching the place where a justice system participant or a journalist or anyone known to either of them resides, works, attends school, carries on business or happens to be.
- (3) Every person who contravenes this section is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years.

Order denying access to information used to obtain any warrant or production order

s 487.3 (1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament or a production order under section 487.012 or 487.013, or of granting an authorization to enter a dwelling-house under s 529 or an authorization under s 529.4 or at any time thereafter, make an order prohibiting access to and the disclosure of any information relating to the warrant, production order or authorization on the grounds that

- (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subs (2) or the information might be used for an improper purpose; and
 - (b) the ground referred to in paragraph (a) outweighs in importance the access to the information.
- (2) For the purposes of paragraph 1(a), an order may be made under subs (1) on the ground that the ends of justice would be subverted by the disclosure
- (a) if disclosure of the information would
 - (i) compromise the identity of a confidential informant,
 - (ii) compromise the nature and extent of an ongoing investigation,
 - (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
 - (iv) prejudice the interests of an innocent person; and
 - (b) for any other sufficient reasons.

.....

Protection of Persons Administering and Enforcing the Law

s. 25.1(1) The following definitions apply in this section and sections 25.2 to 25.4.

“competent authority” means, with respect to a public officer or a senior official,

- (a) in the case of a member of the RCMP, the Solicitor General of Canada, personally;
- (b) in the case of a member of a police service constituted under the laws of a province, the Minister responsible for policing in the province, personally; and

(c) in the case of any other public officer or senior official, the Minister who has responsibility for the Act of Parliament that the officer or official has the power to enforce, personally.

“public officer” means a peace officer, or a public officer who has the power of a peace officer under an Act of Parliament.

“senior official” means a senior official who is responsible for law enforcement and who is designated under subs (5).

(2) It is in the public interest to ensure that public officers may effectively carry out their law enforcement duties in accordance with the rule of law and, to that end, to expressly recognize in law a justification for public officers and other persons acting at their direction to commit acts or omissions that would otherwise constitute offences.

(3) A competent authority may designate public officers for the purposes of this section and ss. 25.2 to 25.4.

(3.1) A competent authority referred to in paragraph (a) or (b) of the definition of that term in subs (1) may not designate any public officer under subs (3) unless there is a public authority composed of persons who are not peace officers that may review the public officer’s conduct.

(3.2) The Governor in Council or the lieutenant governor in council of a province, as the case may be, may designate a person or body as a public authority for the purposes of subs (3.1) and that designation is conclusive evidence that the person or body is a public authority described in that subs.

(4) The competent authority shall make designations under subs (3) on the advice of a senior official and shall consider the nature of the duties performed by the public officer in relation to law enforcement generally, rather than in relation to any particular investigation or enforcement activity.

(5) A competent authority may designate senior officials for the purposes of this section and ss. 25.2 to 25.4.

(6) A senior official may designate a public officer for the purposes of this section and ss. 25.2 to 25.4 for a period of not more than 48 hours if the senior official is of the opinion that

(a) by reason of exigent circumstances, it is not feasible for the competent authority to designate a public officer under subs (3); and

(b) in the circumstances of the case, the public officer would be justified in committing an act or omission that would otherwise constitute an offence.

The senior official shall without delay notify the competent authority of the designation.

(7) A designation under subs (3) or (6) may be made subject to conditions, including conditions limiting

(a) the duration of the designation;

(b) the nature of the conduct in the investigation of which a public officer may be justified in committing, or directing another person to commit, acts or omissions that would otherwise constitute an offence; and

(c) the acts or omissions that would otherwise constitute an offence and that a public officer may be justified in committing or directing another person to commit.

(8) A public officer is justified in committing an act or omission – or in directing the commission of an act or omission under subs (10) – that would otherwise constitute an offence if the public officer

(a) is engaged in the investigation of an offence under, or the enforcement of, an Act of Parliament or in the investigation of criminal activity;

(b) is designated under subs (3) or (6); and

(c) believes on reasonable grounds that the commission of the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer’s law enforcement duties.

(9) No public officer is justified in committing an act or omission that would otherwise constitute an offence and that would be likely to result in loss of or serious damage to property, or in directing the commission of an act or omission under subs (10), unless, in addition to meeting the conditions set out in paragraphs (8) (a) to (c), he or she

(a) is personally authorized in writing to commit the act or omission – or directs its commission – by a senior official who believes on reasonable grounds that committing the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer’s law enforcement duties; or

(b) believes on reasonable grounds that the grounds for obtaining an authorization under paragraph (a) exist but it is not feasible in the circumstances to obtain the authorization and that the act or omission is necessary to

(i) preserve the life or safety of any person,

(ii) prevent the compromise of the identity of a public officer acting in an undercover capacity, of a confidential informant or of a person acting covertly under the direction and control of a public officer, or

(iii) prevent the imminent loss or destruction of evidence of an indictable offence.

(10) A person who commits an act or omission that would otherwise constitute an offence is justified in committing it if

(a) a public officer directs him or her to commit that act or omission and the person believes on reasonable grounds that the public officer has the authority to give that direction; and

(b) he or she believes on reasonable grounds that the commission of that act or omission is for the purpose of assisting the public officer in the public officer's law enforcement duties.

(11) Nothing in this section justifies

(a) the intentional or criminally negligent causing of death or bodily harm to another person;

(b) the willful attempt in any manner to obstruct, pervert or defeat the course of justice; or

(c) conduct that would violate the sexual integrity of an individual.

(12) Nothing in this section affects the protection, defenses and immunities of peace officers and other persons recognized under the law of Canada.

(13) Nothing in this section relieves a public officer of criminal liability for failing to comply with any other requirements that govern the collection of evidence.

(14) Nothing in this section justifies a public officer or a person acting at his or her direction in committing an act or omission – or a public officer in directing the commission of an act or omission – that constitutes an offence under a provision of Part I of the Controlled Drugs and Substances Act or the regulations made under it.

Sureties to Keep the Peace

s. 810.01(1) A person who fears on reasonable grounds that another person will commit an offence under s. 423.1 or a criminal organization offence or a terrorism offence may, with the consent of the Attorney General, lay an information before a provincial court judge....

(3) The provincial court judge before whom the parties appear may, if satisfied by the evidence adduced that the information has reasonable grounds for the fear, order that the defendant enter into a recognizance to keep the peace and be of good behavior for any period that does not exceed 12 months and to comply with any other reasonable conditions prescribed in the recognizance, including the conditions set out in subs (5), that the provincial court judge considers desirable for preventing the commission of an offence referred to in subs (1).

(4) The... judge may commit the defendant to prison for a term not exceeding 12 months if the defendant fails or refuses to enter into the recognizance.

(5) Before making an order under subs (3), the... judge shall consider whether it is desirable, in the interests of the safety of the defendant or of any other person, to include as a condition of the recognizance that the defendant be prohibited from possessing any firearms, cross-bow, prohibited weapon...

(5.2) Where the... judge does not add a condition described in subs (5) to a recognizance, the judge shall include in the record a statement of the reasons for not adding the condition.

Threats and retaliation against employees

s. 425.1 (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take disciplinary measures against, demote, terminate or otherwise adversely affect the employment of such an employee, or threatened to do so,

(a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or

(b) with the intent to retaliate against the employee because the employee has provided information referral to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.

(2) Any one who contravenes subsection (1) is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) an offence punishable on summary conviction.

Bill C-49 –Trafficking in Persons

s. 279.01(1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable

(a) to imprisonment for life if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offences;

or

(b) to imprisonment for a term of not more than 14 years in any other case.

(2) No consent to the activity that forms the subject-matter of a charge under subs (1) is valid.

s. 279.02 Every person who receives a financial or other material benefit, knowing that it results from the commission of an offence under subs 279.01(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

s. 279.03 Every person who, for the purpose of committing or facilitating an offence under subsection 279.01(1), conceals, removes, withholds or destroys any travel document that belongs to another person or any document that establishes or purports to establish another person's identity or immigration status is guilty of an indictable offence and liable to imprisonment for a term of not more than 5 years, whether or not the document is of Canadian origin or is authentic.

s. 279.04 For the purposes of sections 279.01 to 279.03, a person exploits another person if they

(a) cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service; or

(b) cause them, by means of deception or the use or threat of force or of any other form of coercion, to have an organ or tissue removed.

Immigration and Refugee Protection Act

s. 118(1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use of threat of force or coercion.

(2) For the purpose of subsection (1), "organize", with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harboring of those persons.

117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

(a) on conviction on indictment

(i) for a first offence, to a fine of not more than \$500,000 or to a term of imprisonment of not more than 10 years, or to both, or

(ii) for a subsequent offence, to a fine of not more than \$1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and

(b) on summary conviction, to a fine of not more than \$100,000 or to a term of imprisonment of not more than two years, or to both.

(3) A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

(4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

119. A person shall not disembark a person or group of persons at sea for the purpose of inducing, aiding or abetting them to come into Canada in contravention of this Act

120. A person who contravenes section 118 or 119 is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

121. (1) The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether

(a) bodily harm or death occurred during the commission of the offence;

(b) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;

(c) the commission of the offence was for profit, whether or not any profit was realized; and

(d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

(2) For the purposes of paragraph (1)(b), "criminal organization" means an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence.

122. (1) No person shall, in order to contravene this Act,

(a) possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person's identity;

(b) use such a document, including for the purpose of entering or remaining in Canada; or

(c) import, export or deal in such a document.

(2) Proof of the matters referred to in subsection (1) in relation to a forged document or a document that is blank, incomplete, altered or not genuine is, in the absence of evidence to the contrary, proof that the person intends to contravene this Act.

123. (1) Every person who contravenes

(a) paragraph 122(1)(a) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to five years; and

(b) paragraph 122(1)(b) or (c) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to 14 years.

(2) The court, in determining the penalty to be imposed, shall take into account whether

(a) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization as defined in subsection 121(2); and

(b) the commission of the offence was for profit, whether or not any profit was realized.

126. Every person who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act is guilty of an offence.

131. Every person who knowingly induces, aids or abets or attempts to induce, aid or abet any person to contravene section 117, 118, 119, 122, 124 or 129, or who counsels a person to do so, commits an offence and is liable to the same penalty as that person.

133. A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the *Criminal Code*, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.