SOME RECENT CRIMINAL JUSTICE REFORMS IN CANADA – EXAMPLES OF RESPONDING TO GLOBAL AND DOMESTIC PRESSURES

Presented at:

The Canada China Procuratorate Reform Cooperation Programme Lecture Series I
Xi'an, Shaanxi Province and Lanzhou, Gansu Province – August 2005

and

The 1st Session of the International Forum on Contemporary Criminal Law
Criminal Law Reform in the era of Globalization
International Community's Experience and its Inspiration to China
Beijing – August 2005

Eileen Skinnider
Research Associate, International Centre for
Criminal Law Reform and Criminal Justice Policy

International Centre for Criminal Law Reform
and Criminal Justice Policy
Le Centre international pour la réforme du droit criminel
et la politique en matière de justice pénale

1822 East Mall, Vancouver, B.C.
Canada V6T 1Z1
Tel: + 1 604 822 9875
Fax: + 1 604 822 9317
Email: icclr@law.ubc.ca
http://www.icclr.law.ubc.ca

SOME RECENT CRIMINAL JUSTICE REFORMS IN CANADA – EXAMPLES OF RESPONDING TO GLOBAL AND DOMESTIC PRESSURES

By Eileen Skinnider
Research Associate, International Centre for Criminal Law Reform
and Criminal Justice Policy, Vancouver, Canada

INTRODUCTION

It has been said that we are living in the globalization era.[1] Globalization affects all aspects of our lives, including reform of criminal justice both at an international and domestic level. What is happening in the global sphere not only intersects with the domestic, but influences and shapes it. And the trends we observe from the global sphere as reflected in recent international initiatives emerge from the realties of the domestic sphere.

While crime is not new to any region of the world, some argue that today crime is unprecedented both in magnitude and in manifestation.[2] Crime is seen to be evolving as cause and consequences of change in the way modern societies function and interact. Weak and collapsed governments, mass poverty, income inequality, corrupt behavior and armed conflict have become weapons and shields for criminals, traffickers and terrorists.[3] Technology, international trade and the unprecedented movement of people and businesses around the world have resulted in increasingly porous borders. This brings the benefits of globalization but also provides for new opportunities for exploitation by criminals. Globalization has created new vulnerabilities to old threats.

The Canadian criminal justice system is not immune to the difficult challenges and pressures other systems around the world are facing. Over the last 20 years there has been constant and widespread calls for toughening the criminal law, especially as it relates to issues of violence against women and children, crime by youth, organized crime and now more recently terrorism. The Canadian system has undergone different reforms in recent years to respond to pressures, both internal and external.

This paper will first briefly explore some of the pressures being experienced by criminal justice systems in countries around the world. Then, a brief review of recent trends and initiatives at the international level is undertaken to examine how countries respond to these various pressures. Lastly, how these trends have been reflected in the Canadian criminal justice system will be discussed by focusing on four areas of recent reforms: anti-terrorism; combating organised crime; corruption; and responding to the rights of victims.

---

[1] Globalization can be defined as the rapid intensification of social, economic and political transactions that cross national frontiers. This results in an emergence of issues that transcend international boundaries and which is, to some extent, facilitated by new advances in information technology. As defined by Kader Asmal, *"Human Rights and the Administration of Criminal Justice: Law Reform in the Age of Globalism"* Paper delivered at the International Society for the Reform of Criminal Law in Johannesburg, 2000 found at www.isrcl.org/paper/asmal.pdf.

[2] Antonio Marie Costa *"Global Threats to Global Governance: Crime: Crime and Terrorism Undermine Development, Security and Justice"* (2004) Paper delivered at the Confronting Globalization: Global Governance and the Politics of Development Conference, Vatican, April 2004 found at www.unodc.org/unodc/en/speech_2004-04-30-1.html.

[3] A.M. Costa, *supra* note 2.

PRESSURES ON CRIMINAL JUSTICE SYSTEMS AROUND THE WORLD

States have been experiencing a number of various pressures to reform their criminal justice systems and to increase access to justice.[4] These demands are made by offenders, victims, local communities, specific nations as well as the international community. There is a sense that the criminal justice system has not achieved equal access to justice for all parties which has led to both rising public expectations about criminal justice and a confidence crisis that the criminal justice is not satisfying those expectations. This has resulted in public demands for reform, which have been taken up by politicians, thereby introducing a political pressure element upon the system.[5]

There is increasing concern that many criminal justice systems are becoming over-burdened, with more lengthy and costly trials as well as overcrowding in prisons. Even relatively well-resourced criminal justice systems are under pressure to cut costs. Efforts have focused on diversion and reducing the size of the prison population. Furthermore, the rise of victim advocacy has contributed to the increased interest in restorative and informal justice.[6]

All countries are experiencing demands from the international community to respond to priority crimes including: crimes involving terrorism; organized crime; money laundering; corruption; trafficking in women and children; trafficking in drugs, firearms and explosives; and cyber crimes. The recent elaboration of various international conventions in the field of criminal justice requires States to implement obligations of criminalization, prevention, training and international cooperation.

With attention on these priority crimes, there are more calls to reform criminal procedure, providing more power to the police and less power for the accused.[7] One of the biggest current challenges facing the administration of justice is the careful balancing of the rights of the accused with the newly acknowledged rights of the victims while still achieving the critical objective of doing justice.[8] The fundamental values of fair trial as reflected in the international human rights instruments and the rule of law are continually being challenged when using criminal justice to address new and old fears of security, personal as well as national.

TRENDS AT THE GLOBAL LEVEL

In exploring the more recent trends being addressed by the United Nations, it is useful to review the last Crime Congress in Bangkok and the issues of priority.[9] The priority issues cover: transnational organized crime; terrorism, including links between terrorism and other criminal activities; corruption; economic and financial crimes; and making standards work, fifty years of standard-setting in crime prevention and criminal justice.

---

[4] Background Paper: Workshop 2: Enhancing Criminal Justice Reform including Restorative Justice, Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, 18-25 April 2005 (A/CONF.203/10).

[5] See Hough, M. and Roberts, J.V (2004) Confidence in Justice: an international review. Findings, No 234. London: Home Office, Research, Development and Statistics Directorate and also see a survey conducted in the US found that more than four out of five respondents favored the idea of "totally revamping the way that the [criminal justice] system works" (see L. Sherman (2002) Trust and Confidence in Criminal Justice. National Institute of Justice Journal, 248, 22-31). This desire for radical change reflects a lack of confidence in the way that the system currently functions or is perceived to function.

[6] UN's Basic Principles on the Use of Restorative Justice in Criminal Matters, ECOSOC Res 2000/14, UN Doc. E/2000/INF/2/Add.2(2000).

[7] Klaus Volk, "The Principles of Criminal Procedure and Most Modern Society: Contradictions and Perspectives", Paper delivered at the International Society for the reform of Criminal Law in the Hague, Netherlands, 2003 found at www.isrcl.org/paper/volk.pdf.

[8] Kader Asmal, *supra* note 1.

[9] Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice, adopted at the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, 18-25 April 2005 (A/CONF.203/L.5).

Furthermore in the past few years there has also been a significant proliferation of instruments that resulted from rapid negotiation and acceptance by States. These instruments have included the *Convention Against Transnational Organized Crime* and its Protocols and the *Convention against Corruption*.[10] These international legal instruments constitute a legal framework for a comprehensive global response to crime and insecurity. Interestingly, some of the previous soft law norms, such as certain provisions from the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* have been incorporated into the recent conventions on transnational organised crime and corruption.[11]

The recent evolving body of non-binding instruments have covered a variety of issues ranging from the treatment of prisoners, to juvenile justice, protection of victims and witnesses, good governance and the independence of the judiciary. New areas for elaborating standards and norms were discussed at the recent United Nations Crime Commission and include: justice for child victims and witnesses of crime, access to prevention and treatment to HIV/AIDS for prison populations, alternatives to imprisonment, juvenile justice and restorative justice.[12] The emergence of restorative justice processes around the world demonstrates the importance of such processes as alternatives to the criminal justice prosecutorial process and to the use of imprisonment as a means of holding the offender accountable. The Bangkok Declaration called for the promotion of the interests of victims and the rehabilitation of offenders by developing restorative justice policies.

THE CANADIAN SITUATION

The numerous recent legislative reforms to the criminal justice system have appeared to some to be mainly *ad hoc* responses to calls by interest groups to be tougher.[13] There is a concern that the system is reactive, responding to pleas from victims associations, women's groups, police and prosecutors, calling on the government to counteract court rulings, respond more punitively to particular problems and/or remedy various law enforcement concerns.

The Canadian Criminal Code, which addresses substantive law, procedure and sentencing, has grown enormously to become an unwieldy and inconsistent statute of over 840 provisions, many very complex subsections. There have been an increasing number of rulings from the Supreme Court of Canada, especially those cases dealing with the Charter standards that are long and complex. This is happening at the same time when there are major cutbacks for legal aid across the country. Some see a real danger of the law becoming more difficult to understand and justice less accessible.

In addition to reacting to specific events and interest groups, there is also the concern that the criminal justice system is becoming overburdened, with increased delays, reduction of legal aid, more "complex crimes" and lengthier and more costly trials. This is happening at the same time that there has been an awareness of the overcrowding of prisons. The result is more reflection on alternative dispute resolution and restorative justice.

---

[10] As mentioned in the Report of the Secretary-General of the Congress, "Fifty years of United Nations congresses on crime prevention and criminal justice: past accomplishments and future prospects" (Eleventh UN Congress, Bangkok, 18-25 April 2005) A/CONF.203/15, the UN Convention against Transnational Organized Crime has seen a nearly doubling of the number of parties to the Convention since the first session of the Conference of the Parties in 2004. The parties to the UN Convention against Corruption, however, reflects a lack of balance and is not yet in force (26 ratifications out of the 30 required).

[11] As discussed in the Report of the Secretary-General of the Congress, *supra* note 10.

[12] In the 2005 Crime Commission, the *Guidelines on Justice for Child Victims and Witnesses of Crime* was adopted.

[13] 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.

Back in 1982, the Canadian Ministry of Justice released a broad criminal policy document which, in part, affirmed that individual rights of the accused against the power of the State must be carefully safeguarded before, during and after trial and must take precedence over rights of victims.[14] However, the question being asked is whether "the expediency of law and order politics" and the use of legislation as a solution to complex issues overridden this fundamental policy?[15]

Given the limited time available, the remainder of this paper will focus on examples of recent Canadian reforms that respond to four issues: terrorism, organised crime, corruption and the increased awareness of victim's rights in the criminal justice process.

ANTI-TERRORISM LEGISLATION

Like in other countries, the fear of terrorism has instigated recent criminal justice reforms. The Canadian Parliament quickly enacted legislation to combat terrorism following the tragic events of September 11. The *Anti-Terrorism Act 2001* creates measures not only to investigate and prosecute terrorist activities but also establishes preventive measures.[16] The new terrorist offences cover not only terrorists themselves but those who fundraise for, facilitate the activities of, instruct or harbour them.[17] This is the first time Canada has a detailed definition of terrorist activities. These provisions also allow for the executive to establish a list of entities that are considered terrorist groups.

The Act provides for controversial new special investigatory provisions, such as investigative hearings and preventative arrest.[18] These new powers can only be exercised with both consent of the Attorney General and, except in exigent circumstances, with prior judicial authorization. The Attorney General must prepare yearly reports on the use of such police powers and these powers will expire in five years time unless Parliament again authorizes their use. The new powers include an increased ability for the Attorney General to issue certificates preventing disclosure of sensitive information even to the accused. Provisions were included for a limited form of judicial review of the Attorney General's power to prevent this disclosure.

The first Charter challenge to the anti-terrorism legislation focused on the constitutional validity of the investigative hearings.[19] Section 83.28 of the Criminal Code allows for a judge to order a person to answer questions and provide documents where the police have established reasonable grounds to believe that a terrorism offence has or will be committed, that the subject has direct and material information relating to the offence and that reasonable efforts have been made to obtain such information. In this case, during the Air India trial of two accused persons, Malik and Bagri, the prosecution brought an *ex parte* application seeking an order that Satnam Kaur Reyat, the wife of Indirjit Singh Reyat who is serving a prison sentence for his role in the Air India bombing and who was a potential prosecution witness at the Air India trial, attend an investigative hearing. The application judge granted the order and set a number of terms and conditions to govern the conduct of the hearing. Ms. Reyat challenged the investigative hearing provisions on the grounds of violating her right to remain silent and infringing the principle

[14] Ministry of Justice Canada *"The Criminal Law in Canadian Society"* (1982) as discussed in Don Stuart *supra* note 13.
[15] 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.
[16] *Anti-Terrorism Act*, S.C. 2001, c.41 (Bill C-36) found at www.parl.gc.ca/37/1/chambus/house/bills/government/C-36/C-36_cover-E/html.
[17] See section 83.01 to 83.05 of the Criminal Code.
[18] Preventive arrest is dealt with in section 83.3 and investigative hearings are dealt with in section 83.28.
[19] *Re Application under s. 83.28 of the Criminal Code* [2004] S.C.J. No. 40 (QL).

against self-incrimination. As well, the independence of the judiciary and the prosecution where called into question.

The Supreme Court of Canada found that there was no violation of the right to silence and the right against self-incrimination. The legislation was consequently found to be valid as it did not violate s. 7 of the Charter. The Court thus ruled that Satnam Kaur Reyat could be compelled to testify at an investigative hearing without violating the Charter.

The Court made a number of important findings. The right against self-incrimination is a principle of fundamental justice from which three procedural safeguards have emerged: use immunity, derivative use immunity, and constitutional exemption. Section 83.28(10) provides for both use and absolute derivative use immunity and a constitutional exemption is provided by the principle that testimonial compulsion is precluded where the predominant purpose of the hearing is the determination of penal liability. While the legislation states that use and derivative use immunity will apply in the context of "criminal proceedings", the legislation does not address protection in the context of other proceedings such as extradition and deportation hearings. The Court thus re-iterated what it expressed in previous cases regarding the seriousness with which it views deportation to other countries where torture and/or death might result.[20] In order to meet the requirements of s. 7 of the Charter (right to silence and right against self-incrimination), the procedural safeguards provided for in s. 83.28 must be extended to include extradition and deportation hearings.

The Court further held that the judges acting under s. 83.28 do not lack institutional independence or impartiality, nor are they co-opted into performing an executive function. Judges are required by the provision to act judicially in accordance with constitutional norms and the historic role of the judiciary in criminal proceedings. The independence of the prosecution office was not found to be compromised by the investigative hearing as the prosecutor must conduct itself according to its proper role as an officer of the court and its duty of impartiality in the public interest.

A companion case to the one noted above is *Vancouver Sun (Re),* which examined the level of secrecy surrounding judicial investigative hearings under s. 83.28 of the Criminal Code.[21] The Vancouver Sun launched a legal challenge after being denied entry to the investigative hearing involving Ms. Reyat. The Court noted that section 83.28(2) provides that the application for an order that a judicial investigative hearing be held, is made by a peace officer with prior consent of the Attorney General (83.28(3)), and is *ex parte*. By its very nature, therefore, such an application must be presented to a judge *in camera*. The Court determined, however, that there is no express provision for any part of the investigative hearing itself to be held *in camera*. The Court noted: "This hearing requires full judicial participation in the conduct of the hearing itself… The proper balance between the investigative imperatives and the judicial assumption of openness is best achieved by a proper exercise of the discretion granted to judges to impose terms and conditions on the conduct of the hearing under s. 83.28(5)(e). In exercising that discretion, judicial officers should reject the notion of a presumptively secret hearing".[22] The Court also cautioned, however, that judges still have the discretion to shut out the public when national security concerns are of major importance.

[20] *Suresh v Canada (Minister of Citizenship and Immigration*) [2002] 1 S.C.R. 3; *United States v Burns* [2001] 1 S.C.R. 283.
[21] *Vancouver Sun (Re),* [2004] 2 S.C.R. 332.
[22] *Vancouver Sun (Re),* [2004] 2 S.C.R. 332, at pages 350-351.

ORGANISED CRIME LEGISLATION

In Canada, we have also been subjected to increasing media reports on organized crime, particularly about violent and protracted fights between biker gangs such as the Hell's Angels and Rock Machine. In 1997 and in 2001, two main Bills on organised crime amended the Criminal Code to include, in part, new offences of participation in a criminal organization.[23]

There are now three offences of participation in a criminal organization: (1) 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; (2) commission of an offence for the benefit of, at the direction of, or in association with a criminal organization; and (3) instructing commission of such offences.[24] The definition of "criminal organization" was revised in the 2001 legislation to be more in line with the definition from the UN Convention. 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 for the group.[25]

Just last month, in a precedent setting case, an Ontario court found that the biker group, Hell's Angels was a criminal organization and the two accused were found guilty of extortion and of acting in association with an identifiable criminal group.[26] The accused had challenged the constitutional validity of the criminal organization provisions as being overbroad, vague and lacking the minimum constitutionally required *mens rea* (mental element). The Court, in dismissing the claim of overbroad and vagueness, held that the objective of the legislation, hindering the organised criminal pursuit of profit, was legitimate and did not prohibit legitimate non-regulated or non criminal conduct. Nor was it merely a prohibition against any group activity, as the definition required that one of the group's main purposes or main activities must be the facilitation or commission of a serious offence. The Court emphasized the principle that moral blameworthiness is an essential component of criminal liability and is a principle of fundamental justice guaranteed by the Charter. The Court held that in this case there is substantive *mens rea*. In order to convict, the prosecutor must prove the accused had the requisite *mens rea* for the particular predicate offence (which was extortion in this case) and that the accused acted for the benefit of, at the direction of, or in association with a criminal organization.

The organised crime bills also introduced amendments to the Criminal Code to provide wider police power to ensure effective tools to investigate criminal organizations in the overall effort to combat organised crime. These include special peace bonds[27], new powers to seize proceeds of crime including access to income tax information[28], greater powers to resort to electronic

[23] Bill C-95 – An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence, 1997 and Bill C-24 – An Act to Amend the Criminal Code (organised crime and law enforcement) and to make consequential amendments to other Acts, 2001.
[24] See sections 467.11 to 467.13 of the Criminal Code.
[25] Section 476.1 of the Criminal Code.
[26] *Re Lindsay and Bonner v The Queen* (182 C.C.C. (3d) 301 (Ont. S.C.) (Feb 2004).
[27] Section 810.01 Criminal Code 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 behavior. 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.
[28] 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. Bill C-24 extended the application of its proceeds of crime provisions to indictable offences under the Criminal Code and other Acts of Parliament.

surveillance[29] and a new reverse onus bail provisions for those charged with the new organised crime offences[30]. An agency was also created to combat money laundering.[31] Also a new offence was created to prohibit the intimidation of a justice system participant or a journalist who is investigating criminal organizations.[32]

One tool for combating organised crime was to introduce 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.[33] While these provisions were introduced in the organised crime legislation, these immunity provisions apply to a broad range of offences. Some have criticized these provisions arguing that the police should not be above the law, it could weaken the defence of entrapment and it authorizes the use of force or violence.[34] However, others respond that these provisions do not provide for blanket immunity for any criminal conduct by the police. They point to the number of safeguards contained in the provisions, such as the role of the minister who will designate the eligible officer; exclusion of certain types of conduct (intentional or criminally negligent causing of bodily harm, willful obstruction of justice or conduct that would violate sexual integrity) and annual reporting requirements.[35] These provisions have not yet been judicially considered or constitutionally challenged.

Regarding the issue of trafficking in persons, the Criminal Code has long covered human trafficking-related conduct in such offences as kidnapping, forcible confinement, extortion, assault, etc. In June 2002, the *Immigration and Refugee Protection Act* included a specific offence against human trafficking.[36] However there continued to be pressure to address this serious problem head on in the Criminal Code. In May of this year, a Bill to amend the Criminal Code to include specifically human trafficking was tabled in Parliament.[37] If passed, this will establish three offences: (3) trafficking in persons; (2) prohibiting persons from receiving financial or other material benefit from trafficking in persons and (3) prohibiting the withholding or destroying documents, such as identification or travel documents, for the purpose of committing or facilitating the commission of a trafficking offence. The Bill defines trafficking as the movement or holding of persons for the exploitation of those persons. The Bill also ensures protection of victims and witnesses, such as allowing the witness to testify outside the courtroom or behind a screen or other device.

[29] 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) do not require judge to be satisfied that other investigative procedures have been tried and have failed and that other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation using other procedures.
[30] Section 515(6)(a) of the Criminal Code adds to the list of reverse onus exceptions those charged with criminal organization offences.
[31] FINTRAC(Financial Transactions and Reports Analysis Centre of Canada) was created under Bill C-22 – Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17.
[32] Section 423.1 of the Criminal Code.
[33] 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.
[34] 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).
[35] Government of Canada, "White Paper on Law Enforcement and Criminal Liability".
[36] Section 118 of the Immigration and Refugee Protection Act.
[37] Bill C-49 tabled on 12 May 2005 passed first reading in the House of Commons.

CORRUPTION

Domestic corruption in Canada has been prohibited through a combination of federal statutes, parliamentary rules and administrative provisions since the 1960s.[38] Canada ratified the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* on 17 Dec 1998. 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. 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 is 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.[39] 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 s. 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 s. 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 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.

---

[38] 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).[38] The Canadian Income Tax Act, s. 67.5(1) prohibits the deductibility of bribes or other illegal payments as a business expense.

[39] 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.[39] 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.

In November 2004, Canada was part of the APEC Ministers that endorsed the *APEC Course of Action on Fighting Corruption and Ensuring Transparency* which develops and implements the Santiago Commitment to combat corruption. The government of Canada, along with Australia, China, Japan, South Korea and the United States announced the establishment of the Anti-Corruption and Transparency Capacity Building Program. This program will provide critical support to APEC developing economies such as innovative tools, practical workshops and training programs in areas dealing with investigation and prosecutorial techniques for building corruption cases, judicial reform, anti-money laundering, asset forfeiture and recovery, terrorist financing and implementing APEC Transparency Standards.[40]

VICTIMS AND WITNESSES

There have also been a number of amendments to the Criminal Code to facilitate participation of victims and witnesses, such as publication bans, screens and the use of video-taped evidence. In 1999, Bill C-79 introduced the Act to Amend the Criminal Code (Victims of Crime). This Act highlights the need to reconcile the rights of victims and witnesses with the rights of the accused. It underscores the importance for the criminal justice system to treat victims and witnesses with courtesy, compassion and respect. The amendments recognize that participating as a victim or witness in a criminal proceeding can be a traumatic experience. The trauma may be greater for young or disabled witnesses or victims, or for victims of sexual and/or violent offences. The amendments extend to victims of sexual or violent crime up to 18 years of age protections which restrict personal cross-examination by accused persons representing themselves by providing for the appointment of counsel to conduct the cross-examination;

The amendments also permit a victim or witness who is under 14 years or with a mental or physical disability to have a support person present while giving testimony. The Act also clarifies that subsection 486(3) of the Criminal Code, which provides for a publication ban on the identity of sexual offence complainants, will protect their identity as victims of sexual offences as well as any other offences committed against them by the accused; and permit a judge to restrict publication of the identity of a wider range of victims or witnesses where the victim has established a need for such restrictions and where the judge considers it necessary for the proper administration of justice.

The amendments provide that all offenders must pay a victim surcharge of a fixed, minimum amount, except where the offender establishes undue hardship, and provide for increased amounts to be imposed in appropriate circumstances. The Criminal Code amendments allow victims to read their impact statements out loud at the time of sentencing if they wish to do so. Where the victim does not wish to read the statement, the judge is still required to consider the written statement. The judge is required to inquire whether the victim has been advised of the opportunity to prepare a victim impact statement.

Bill C-46, An Act to amend the Criminal Code (Production of Records in Sexual Offence Proceedings) was enacted in 1997 in response to a Supreme Court of Canada decision, *R v O'Connor* which mandated the disclosure of therapeutic records in the possession of prosecutors and set out a common law procedure for production and disclosure of records in the possession of third parties.[41] The intention of the Act is to regulate and restrict the access that a court, and in

[40] Daniel Prefontaine "International Efforts to Combat Corruption and Canadian Offences Against Corruption and Bribery" Paper presented for the China Lectures January 2005 (International Centre for Criminal Law Reform and Criminal Justice Policy: 2005).
[41] *R v O'Connor* (1995) 4 S.C.R. 411, 103 C.C.C. *3d) 1, 44 C.R. (4th) 1.

particular a defendant, might otherwise have to personal records kept by agencies and persons such as counselors, sexual assault centers, therapists, doctors and psychiatrists.

The Act includes a preamble emphasizing Parliament's concern about sexual violence against women and children, the need to encourage reporting of sexual offences, the effect that compelled production of records has on complainants and record holders, the need for the law to respect both the rights of accused persons and the rights of complainants and the need to carefully scrutinize applications for production of records.

The Act amends the Criminal Code, s. 278.1-278.91, to provide that in sexual offence proceedings all applications by the accused for the production of records of a complainant or witness shall be determined by the trial judge in accordance with the applicable law and procedure. A Justice presiding at a Preliminary Inquiry will not have jurisdiction to determine an application for production of records. The onus is on the accused to meet the criteria for the production of records as prescribed in the legislation.

Records or any part of a record shall not be produced to the accused unless the trial judge agrees, based on a two stage application. At the initial stage, the accused must establish: (i) that the records exist and are held by a named record holder; (ii) the specific grounds for requiring the records; and (iii) that the records contain information which is likely relevant to an issue at trial or to the competence of a witness to testify. In determining whether to order the release of the record, or any part of the record to the trial judge for review, the trial judge shall first consider: the Charter rights of the accused and complainant or witness; and several factors set out in the legislation such as: (b) that the record relates to medical or psychiatric treatment, therapy or counseling that the complainant or witness has received or is receiving or (d) that the record may disclose a prior inconsistent statement of the complainant or witness. At the second stage, the trial judge would review the records or part of the records, in private and determine whether any part of the record should be produced to the accused. If satisfied that the records are likely relevant to an issue at trial or to the competence of a witness to testify, the judge may order only those parts of a record released which satisfy the test. The Act establishes the application procedures for the release of records and provides additional safeguards for the complainant's or witness's privacy.

Another recent trend is the protection of children and other vulnerable persons from harm. There is currently a draft bill tabled by Parliament that contains a package of reforms that is meant to safeguard children and other vulnerable persons from sexual exploitation, abuse, neglect and will better protect victims and witnesses in criminal justice proceeding.[42] Proposed steps to modernize the Criminal Code include: facilitating the testimony of child victims and witnesses by providing for greater clarity, consistency and certainty for the use of testimonial aids for victims and witnesses under the age of 18 years. For example these reforms would allow children under 14 to give their evidence if they are able to understand and respond to questions. A competency hearing, which is currently mandatory, would no longer be required. Also similar reforms are proposed to facilitate the testimony by other vulnerable victims and witnesses including victims of spousal abuse, criminal harassment and sexual assault.[43]

---

[42] Key Highlights of Proposed Amendments to Protect Children and Other Vulnerable Persons, Backgrounder prepared by the Department of Justice Canada October 2004 found at http://canada.justice.gc.ca/en/news/nr/2004/doc_31248.html.

[43] Bill C-2 would also strengthen child pornography provisions by narrowing existing defenses of child pornography to a single defense of "public good" and expanding the current definition of written child pornography; create a new category of sexual exploitation to protect those between 14 and 18 years of age, allowing courts to consider whether a relationship is exploitative based on its nature and circumstances; increase maximum sentences for child-related offences, including sexual offences against children, failure to provide the necessaries of life and abandonment of a child; introduce new offences of voyeurism, which would make it a crime, under specific circumstances, to deliberately and secretly observe or record another person where a reasonable expectation of privacy exists.

CONCLUSION

In reviewing recent reforms to the criminal justice system in Canada, one can catch glimpses of the pressures being responded to by the government. Priority crimes of terrorism and organised crime are on the international as well as the domestic agenda. Victim advocacy groups are also vocal both internationally and domestically. While the concern that the government is responding to specific issues and events in an *ad hoc* manner, the brief review of the more recent case law in these areas suggest that there is an attempt to balance the individual rights of the accused against the power of the State by ensuring adequate safeguards in the legislation.