

**Wrestling the Octopus: Canada's Bill C-24, America's RICO, and Future Directions
for Canadian Organized Crime Legislation**

by

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Abstract

Throughout the 1990s, Canada, and particularly Quebec, bore witness to violent biker wars between various outlaw motorcycle gangs. Many were killed, including an innocent 11-year-old boy. The federal government responded to the perceived threat by enacting Bill C-95 in 1997. This legislation was found wanting and, as a result, the government responded with new legislation, Bill C-24, in 2001. The thesis examines the organized crime provisions in this bill, both in regard to their creation and their subsequent enforcement. I attempt to envisage the possible evolution of the fight against organized crime in Canada. Information and experience are lacking, however, and I turn to the United States, which has had organized crime legislation in place for thirty-five years, as a source and guide for the possible directions which Canadian organized crime legislation might take.

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Table of Contents

Chapter 1: Introduction	1
Chapter 2: The Background to and Creation of Bill C-24.....	6
<i>Introduction.....</i>	<i>6</i>
<i>A Theoretical Understanding of Organized Crime.....</i>	<i>6</i>
<i>A Brief Background of Organized Crime in Canada.....</i>	<i>11</i>
<i>Bill C-95: Canada's First Major Attempt at Legislating Organized Crime.....</i>	<i>13</i>
<i>Bill C-24: Its Creation.....</i>	<i>26</i>
<i>Enter Bill C-24.....</i>	<i>33</i>
<i>Conclusion.....</i>	<i>40</i>
Chapter 3: The Use of Bill C-24 and its Subsequent Legislation	42
<i>Introduction.....</i>	<i>42</i>
<i>Bill C-24 Comes Into Effect.....</i>	<i>42</i>
<i>Organized Crime Statistics.....</i>	<i>47</i>
<i>Data Relating to the Use of Bill C-24.....</i>	<i>54</i>
<i>Important Cases Involving Bill C-24.....</i>	<i>60</i>
<i>Conclusion.....</i>	<i>72</i>
Chapter 4: The American Experience with Combating Organized Crime.....	74
<i>Introduction.....</i>	<i>74</i>
<i>The History of Organized Crime in the United States.....</i>	<i>74</i>
<i>The Organized Crime Control Act.....</i>	<i>81</i>
<i>Enter RICO.....</i>	<i>87</i>
<i>Conclusion.....</i>	<i>91</i>
Chapter 5: RICO and Bill C-24: What Can We Learn From the American Experience	93
<i>Introduction.....</i>	<i>93</i>
<i>RICO: Expansion.....</i>	<i>94</i>
<i>RICO: Constitutional Challenges.....</i>	<i>103</i>

<i>What can RICO tell us about the possible future of organized crime legislation in Canada?</i>	111
<i>Conclusion</i>	118
Chapter 6: Conclusion	120
Bibliography	130
Appendices	137
<i>Appendix A - Standing Committee Recommendations</i>	137
<i>Appendix B - Relevant Criminal Offences Created by Bill C-24</i>	141
<i>Appendix C - The Relevant Sections of RICO</i>	145

Chapter 1: Introduction

Organized Crime. When one hears these words, many images might come to mind. Swarthy men in three-piece suits as seen in the “Godfather” films. Perhaps one imagines exotically tattooed Yakuza gang members. Organized crime is even frequently portrayed as a many-armed octopus, infiltrating and dipping its tentacles into all aspects of life.¹ Here in Canada, organized crime may conjure up images of outlaw motorcycle gang members driving around in their leather jackets harassing the good citizens of this country. The Hells Angels, probably the most well known biker gang in existence, have been active in Canada since the 1970s, and other famous gangs such as the Rock Machine appeared in the 1980s. Throughout the 1990s, biker gangs in Quebec fought over territories, or “turf,” in which to conduct their illegal activities. These biker wars were very bloody and over 150 people were killed, including two prison guards and an eleven-year-old boy who had been playing near a biker hangout.² The then existing legislation was deemed not sufficient enough to deal with the problem, and organized crime appeared to be something different, something unique, or at least it was portrayed as different and unique. Canada responded with strict new legislation aimed at combating organized crime.

Organized crime is not viewed as just “crime” in the traditional sense of the word (murder, theft, etc.), but it is something with its own intricacies, its own prevention strategies, and its own literature. In many textbooks, organized crime has been largely

¹ Claire Sterling. *Octopus: The Long Reach of the International Sicilian Mafia*. (New York: Simon & Schuster, 1991).

ignored or, when discussed, it is often lumped in with corporate or white-collar crime.³ Not only has organized crime not received much coverage in the literature, but there have even been ongoing debates for the last fifty years about something as basic as what it actually is. This, however, has not stopped the Canadian government from passing recent legislation aimed at controlling and combating organized crime.

Bill C-95 was created in 1997 in response to the biker wars in Quebec, but this was superseded in 2002 when Bill C-24, *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*,⁴ came into force in Canada. Not only is organized crime seemingly a unique phenomenon as opposed to other forms of crime, it allegedly requires its own specific legislation. Bill C-24 created numerous changes to pre-existing laws, created new offences, and even granted the police greater powers in their investigations. Bill C-24 also contained within it a new definition for organized crime, and is currently the most up-to-date legislation seeking to address the problem of organized crime in Canada.

Despite these sweeping changes, there does not appear to be much commentary or debate surrounding this legislation in the literature or in academia. Also, it came into force relatively quietly, with little debate or controversy in the media. Many people have been killed by organized crime groups, there are groups in operation throughout Canada, and it requires its own legislation, yet there is not much literature or commentary on Bill C-24 available. There seems to be a gap in this area of criminal justice, one which I seek

² CBC News Online. *Indepth: Biker Gangs – Biker Gangs in Canada*. Located at URL: <http://www.cbc.ca/news/background/bikergangs/> (Last updated April 10, 2006). This website provides a frequently updated journal of high profile biker activity in Canada.

³ Walter S. DeKeseredy & Martin D. Schwartz. "Ch. 10 - Corporate and Organized Crime," in *Contemporary Criminology*. (New York: Wadsworth Publishing Company, 1996) at 355-396.

to address in this work. How and why did this legislation come about? Laws are not created in a vacuum, thus what was the impetus for crafting this legislation, and why was it crafted in the fashion it was? Also, how it is being used; in other words, is this legislation effective at dealing with organized crime? In addition to these questions, I seek to envisage the possible future directions that this legislation, as well as organized crime law in general, may be heading in Canada. In order to address this gap in the literature, Bill C-24, the changes it has made to Canadian law, and its evolution to date are examined. It is significant to stress that in this work I am most interested in the criminal offences relating to organized crime created by C-24, although I touch briefly upon all the important changes this legislation has made to Canadian law.

It is important to note that there is not much information on the use of Bill C-24 available. There have not been many major cases involving these new laws, and none from the Supreme Court. There is not much data available from which to draw conclusions about the possible directions this legislation, or the criminal law in general, might take in Canada to combat organized crime.

Canada is not the only nation to have constructed legislation directly targeting organized crime, and in fact compared to some nations it is a relative newcomer in its attempts to deal with the problem of organized crime. For this reason, it is important to look to the United States for evidence of the possible trends that our own legislation might follow in the future. In America in 1970, they created the *Organized Crime Control Act* (OCCA), which contained within it a well known section entitled: *Racketeer Influenced and Corrupt Organizations* (RICO). This is especially illuminating since it

⁴ House of Commons Canada. *Bill C-24, An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*. 1st Session, 37th Parliament, 49-50

means that the United States has had a thirty-five year head start in this area and as a result, it should prove to be a fruitful source of information.

In Chapter 2, the general theories of organized are introduced, and I provide a brief examination of the background of organized crime in Canada, including the debates and issues surrounding organized crime law in Canada. I begin by examining Bill C-95, since this legislation was the precursor to Bill C-24, and as such it is important to examine C-95 to provide some insight into the background of C-24. In Chapter 3, I look at how the new measures and mechanisms created by Bill C-24 are being used by law enforcement and interpreted by the courts. The impetus for this chapter is that there has not been much written about how this new legislation is being used within the realm of criminal justice. As a result, the data and statistics surrounding Bill C-24, as well as important cases utilizing this legislation, are examined.

In Chapter 4, I examine the background to, and the debates in the United States Senate involving the OCCA and RICO (as was done with Bill C-24 in Chapter 2). RICO contains many of its own appealing findings, and there are interesting similarities between it and Bill C-24. In Chapter 5, the debates surrounding, and legislative history of RICO are examined, with the intention of discerning if there are observable trends in the way that legislation has been used. Examining the directions that RICO has taken could indicate the possible future directions of Canada's own organized crime legislation.

Legislation is not something that should be created in haste and whatever might be the target of legislation should be thoroughly examined, studied, and debated before it is encoded into the law. Moral panics might initially present a sense of urgency, but legislators should not rush laws through Parliament without first analyzing and

Elizabeth II, 2001.

acknowledging the possible pitfalls inherent in the legislation. Canada's organized crime legislation is an example of this phenomenon, and can show us the consequences of such haste.

Chapter 2: The Background to and Creation of Bill C-24

Introduction

To begin, I examine the background behind the creation of Bill C-24, which is the most up-to-date piece of legislation in Canada aimed at combating organized crime. Before I do that however, I would first like to present the two most popular theories surrounding organized crime: conspiracy theory and enterprise theory. These theories help provide a basis for examining and understanding the issues surrounding organized crime and the legislation aimed at fighting it. Following the summary of these theories, I will turn to a brief look at the background of organized crime here in Canada. Although it has only recently become a target of parliamentary interest and legislative efforts, organized crime is not a new phenomenon in this nation. This historical examination takes us up to the recent passing of Bill C-95 and C-24. The former was Canada's first major endeavour to combat organized crime, however many of its important sections were replaced a few years later with C-24. Seeking to build upon C-95, C-24 came into effect with the purpose of strengthening the abilities of law enforcement to fight organized crime and creating a number of special mechanisms and laws to this end.

A Theoretical Understanding of Organized Crime

As we will see later in this chapter, the question of "what is organized crime" is one which was dealt with by parliament and the various committees whose job it was to examine organized crime and develop legislation to deal with it. What was not dealt with nearly as often however, is the question of "why is organized crime?" This question, unlike the former question, seeks out a theoretical understanding of organized crime

rather than a mechanical definition of what it is. In their book on organized crime, Kenney and Finckenauer explain that any theory of organized crime should have the following key features.⁵ First, it should have a descriptive and explanatory function. This means distinguishing between and reconciling crime and criminal behaviour, the former meaning larger trends (socio-economic factors, unpopular laws, etc.) and the latter meaning individual factors (greed, impulsivity, etc.). Second, it should have a heuristic function. This means that it should stimulate and give direction to research. Third it should have explanatory and predictive functions. This means that they should provide a framework for understanding all that is known about the subject (in this case, organized crime). Finally, it should have a control function, which means that it should be applicable to efforts seeking to control and prevent organized crime.

Within the organized crime literature, there are two major theoretical approaches to understanding this form of crime: there is the conspiracy theory, and there is the enterprise theory. I will begin by briefly describing the conspiracy theory. This theory, also sometimes known as the ethnic conspiracy theory, or alien conspiracy theory, grew out of early American Senate committee hearings on the problem of organized crime (such as The Kefauver Committee) and out of the work of Donald R. Cressey and his book *Theft of a Nation*.⁶ This theory puts forth the idea that organized crime is a phenomenon that originates outside the nation, and that organized crime groups are usually composed of members of the same ethnic background.⁷ It is concerned with "the other" as the source of crime, and it tends to imagine organized crime groups as an

⁵ Dennis J. Kenney & James O. Finckenauer. *Organized Crime in America*. (Belmont: Wadsworth Publishing Company, 1995) at 31.

⁶ Donald R. Cressey. *Theft of the Nation*. (New York: Harper & Row, 1969).

enormous ethnically homogeneous collective, which has as one of its main goals the subversion of normal or wholesome society. Subversion is accomplished through the corruption of public officials (such as police, judges, politicians), infiltration into legitimate business markets, and violence. This is the theory that one encounters most in popular culture such as the media, books, and movies. Although originally it only described Italian mobsters (the Mafia), it has since expanded to include many different organized crime groups such as the Triads (Chinese), the Yakuza (Japanese), the Mafiya (Russian), Columbian drug cartels, and Jamaican Posses. Outlaw Motorcycle Gangs (OMG) also tend to be caught by this theory, and even though they do not originate from outside the nation, they do tend to be ethnically homogenous (Caucasian) and they tend to be described as a scourge threatening the good and wholesome society through violence, intimidation, and corruption.

An excellent example of the conspiracy theory in action can be found in the various Criminal Intelligence Service of Canada (CISC) reports that have been published throughout the years. Within these reports, data and information is categorized along ethnic lines, including groups such as Traditional Organized Crime (Italian-based), Eastern European-based, Asian-based, OMG, and Aboriginal-based organized crime.⁸ It is only this year (2005) that they have now decided to remove these ethnic categories as a means of arranging data and instead will now be arranging their information by activities.

The second theory of organized crime is known as enterprise theory. Originating in 1980 in the work of Dwight C. Smith, this theory claims that organized crime is not

⁷ William Howard Moore. *The Kefauver Committee and the Politics of Crime 1950-1954*. (Columbia: University of Columbia Press, 1974), at 237.

⁸ CISC. *2004 Annual Report on Organized Crime in Canada*. Located at URL: <http://www.cisc.gc.ca/AnnualReport2004/Cisc2004/annualreport2004.html>

dependent on ethnicity, othering, or conspiracy. Instead, organized crime is a business phenomenon, which is predicated on the existence of the demand for goods and services which are otherwise illegal and difficult to obtain.⁹ When something desirable is illegal or made illegal, organized crime is what steps in to fill the supply for the illicit demand. The "organization" then comes not from a large ethnic collective like the conspiracy theory describes, but from the business-like structure of these groups. Smugglers are like shippers, dealers like salesmen, money launderers like bankers, and so on. In an interesting book, this theory has been expanded upon by Donald R. Liddick, and although he uses the term "patron-client theory" in place of "enterprise theory," he is describing the same phenomenon (illegal supply and demand).¹⁰ Liddick's book is also particularly interesting because he takes issue with the conspiracy theory of organized crime; in fact, he disagrees with most of the basic assumptions of this theory. For example, he argues that there is not a monolithic criminal organization known as the mafia, nor has there ever been one as described by this theory (he bases his argument on a historical look at Sicily, the supposed birthplace of the mafia).¹¹ He explains that he, as well as most scholars in the United States, now agree that criminal organizations are not just ethnically homogeneous, but heterogeneous as well.¹² Also, he takes issue with the view that criminal organizations are long-lasting and maintains control over illegal markets on a nationwide scale (instead, he argues, they are relatively small, short-lived and limited in scope geographically).¹³

⁹ Dwight C. Smith. "Paragons, pariahs, and pirates: A spectrum-based theory of enterprise," in *Crime and Delinquency* 26(3), 358-386.

¹⁰ Donald R. Liddick. *An Empirical, Theoretical, and Historical Overview of Organized Crime*. (New York: Edwin Mellen Press, 1999).

¹¹ *Ibid*, at 6.

¹² *Ibid*, at 9.

¹³ *Ibid*, at 17.

Liddick is not the only one to dismiss the conspiracy theory, however; the above mentioned Dwight C. Smith does so as well. In order to put forth his own theory (the enterprise perspective of organized crime), Smith himself explains that “if an enterprise perspective is to emerge, the prior assumptions themselves must be challenged” (these prior assumptions being the alien conspiracy theory of the 1960s).¹⁴ Additionally, Smith states that “while theories about conspiracy and ethnicity have some pertinence to organized crime, they are clearly subordinate to a theory of enterprise.”¹⁵ Liddick and Smith are joined by Kenney and Finckenauer in dismissing the conspiracy theory. Kenney and Finckenauer in their book explain that this theory lacks explanatory power (crime existed in America prior to migration of aliens) and heuristic value (claiming the mafia myth helped to discourage research and investigation rather than encouraging it).¹⁶ Also, although it does allow for prediction and for control, it more often ends up creating a scapegoat and when taken on its own merits, this theory is more of an ideology than a true theory.

All these authors have surprisingly harsh words to say about the conspiracy theory, yet as evidenced by its discussion in each of their works, it still remains a commonly discussed theory within the organized crime literature. As explained by Kenney and Finckenauer: “The desire for simple answers to complex problems – and for scapegoats – dies hard.”¹⁷ This notion is especially interesting to this project because it may offer some insight into the creation and implementation of Bill C-24 (and the other legislation that will eventually be examined). Did Parliament, and the various witnesses

¹⁴ Smith, *supra* note 9, at 362.

¹⁵ *Ibid*, at 370.

¹⁶ Kenney & Finckenauer, *supra* note 5, at 32-33.

¹⁷ *Ibid*, at 32.

and boards cling to the conspiracy theory? or did they prefer the enterprise theory? maybe a little of both, or perhaps neither? These theories offer a good base upon which to begin an examination of the creation of Bill C-24.

A Brief Background of Organized Crime in Canada

Organized crime is not a new phenomenon in Canada, and there is a long history of its existence and operation here. For example, it is believed that Chinese Triads came over amongst the large number of honest Chinese migrants at the time of the British Columbia gold rush in 1858 (a Triad is a secret society composed of members who conduct criminal activities). These newly arrived migrants began establishing the first Canadian Chinatown on the West Coast, and this is where the Triads began setting up shop. The first publicly reported Triad in Canada was established in 1868 in Bakerville.¹⁸ Although it is now 137 years later, Triads still exist in Canada, as do a number of other criminal organizations that have established themselves between then and now.

By examining recent CISC reports, one can observe the various organized crime groups currently active in Canada.¹⁹ Some of the criminal organizations currently active in Canada include Asian-based groups (such as Triads, Tongts, and the Big Circle Boys), Eastern European-based groups (members come from various nations such as Russia and other former Soviet Union (FSU) Republics, the Czech Republic, Slovakia, and Poland), Outlaw Motorcycle Gangs (Hells Angels, Bandidos, etc.), Traditional Organized Crime

¹⁸ Martin Booth. *The Dragon Syndicates: The Global Phenomenon of the Triads*. (New York: Carroll & Graf Publishers Inc., 1999), at 48-51.

¹⁹ CISC. *2004 Annual Report on Organized Crime in Canada*. Located at URL: http://www.cisc.gc.ca/annual_reports/AnnualReport2004/coverpage_2004_e.htm

(these are the Italian-based organizations such as the Sicilian mafia, the Cosa Nostra, and the 'Ndrangheta), and Aboriginal-based groups.

These myriad groups are involved in a number of different criminal activities such as drug smuggling, production, sales, and human smuggling, which is the smuggling of people both into and out of Canada (usually to America). They are actively engaged in prostitution and the trafficking in human (distinguished from smuggling in that trafficked people tend to be unwilling participants). These groups are also involved in some newer activities such as infiltration into the Canadian diamond industry up North, the sexual exploitation of children, credit card fraud, and computer hacking.²⁰

So what is the impact of these activities? In 1998, Samuel Porteous published what is still one of the most commonly referred to documents on the impact of organized crime activities.²¹ This report is based on the total impact these activities can have on Canadian society; for example, they include health care costs, and insurance costs. Within this report, he claims that economic crimes (such as telemarketing fraud) cost Canadians \$5 billion per year. About 8,000 to 16,000 people are smuggled into Canada resulting in costs of between \$120 million to \$400 million per year. The counterfeiting of various goods costs the industry nearly \$1 billion (with the advent of DVDs and internet file-sharing, this amount has probably risen significantly). He claims that between \$5 billion and \$17 billion is estimated to be laundered in Canada each year, and shows that estimates of the Canadian illicit drug market put the dollar figure on that activity at between \$7 billion to \$10 billion, based on seizure data and interdiction estimates.²²

²⁰ *Ibid.*

²¹ Samuel D. Porteous. *Organized Crime Impact Study: Highlights*. (Ottawa: Public Works and Government Services of Canada, 1998).

²² *Ibid.*, at i-9.

Bill C-95: Canada's First Major Attempt at Legislating Organized Crime

It may seem out of the ordinary to begin the discussion of Bill C-24 with a completely separate bill, but it is important to examine Bill C-95 before I begin the other. The reason for this is that Bill C-95 is the direct precursor to Bill C-24, and as we see later, C-24 was a continuation of the goals and direction that were first set out in C-95.

As discussed above, the existence of organized crime has been apparent for well over a hundred years here in Canada. However, it was not until 1997 that Canada made its first major attempts to target and criminalize the activities of organized crime. In 1997, several pieces of legislation were passed. These include, Bill C-17 (*the Criminal Law Improvement Act*) which enhanced police search powers and instituted more restrictive bail conditions. Bill C-8 (*Controlled Drugs and Substances Act*) “modernized Canada's drug laws and together with Police Enforcement Regulations, provided exemptions from liability for police involved in drug investigations and provided for the restraint and forfeiture of offence-related property.” In addition, “thirteen Integrated Proceeds of Crime Units were created to target organized crime groups and seize their ill-gotten assets.”²³ Also that year, “Canada and the United States established a Cross-Border Crime Forum to strengthen co-operation and information sharing and to focus law enforcement efforts on such issues as cross-border crimes, telemarketing fraud, money laundering, missing and abducted children and high-tech crime.”²⁴

At the forefront of this attempt to crack down on organized crime was Bill C-95, which created the new definition of a criminal organization offence, as well as making a

²³ Department of Justice Canada. *Federal Action Against Organized Crime*. Located at URL: http://canada.justice.gc.ca/en/news/nr/2001/doc_26098.html (last visited Oct. 30, 2005).

number of legislative changes, which will be discussed below. With C-95, Canada proposed “a new approach to fighting gang activity by criminalizing participation in a criminal organization.”²⁵ Not a membership offence *per se*, it instead sought to make it an offence to participate in the activities of a criminal organization, and then criminalize that participation in and of itself (I will deal with this offence in greater detail later on).

So why was there such a push in 1997 for Bill C-95 and the other organized crime legislation? An examination of the debates that occurred in the House of Commons at this time offers some insight into the reasons why. First, there was a massive push by Quebec for some form of anti-gang legislation. Montreal had been dealing with the Hells Angels since 1977 and the so-called “Biker Wars” were erupting all over the province. One of the most important figures in this push for legislation was eleven-year-old Daniel Desrochers who was accidentally killed in a car bombing in August 1995 in the riding of Hochelaga-Maisonneuve while returning home on his bike from a community centre. This incident is brought up almost immediately within the debates by Mr. Réal Ménard, representative of that riding and member of the Bloc Québécois.²⁶ This tragedy is also mentioned numerous times throughout the debates on Bill C-95 as justification for and the impetus behind Quebec’s desire for anti-gang legislation. Ménard also explains that the mother of this boy was a tremendous driving force behind this legislation. Josée-Anne Desrochers circulated a petition and is said to have used every public forum available to awaken parliamentarians. Following this, the police in Quebec created CAPLA (Comité d’action politique pour une loi anti-gang) to help pressure their

²⁴ *Ibid.*

²⁵ Canada. Parliament. House of Commons. Debates, 2nd Session, 35th Parliament, vol. 160, April 21, 1997 at 1700. Located at URL: http://www.parl.gc.ca/35/2/parlbus/chambus/house/debates/160_97-04-21/160TOCE.html (last visited on Oct 30, 2005).

government into backing anti-gang measures.²⁷ Ménard admits that while Bill C-95 would not solve all problems, nor would it eradicate organized crime, it was nonetheless important because it “sends out a very strong message to the community as a whole to the effect that neither the official opposition nor the government will give up on this scourge.”²⁸ As a telling point of interest, “scourge” appears to be the adjective that is used the most in the debates of Bill C-95 and Bill C-24 to describe organized crime. This term also seems to reflect the conspiracy theory since it is not describing a business model for organized crime, but rather a corrupting plague, blight, and bane on society. Both theories are repeated numerous times throughout the debates on both bills, and it is interesting to note the juxtaposition of the two on various issues and subjects involving organized crime.

A second impetus appears to have been a notion amongst parliamentarians that organized crime was growing fast throughout the nineties and was out of control. Ménard himself says so early on in the debates: “one could ask what is organized crime and how come that phenomenon has grown so much over the past few years.”²⁹ He goes on to explain that the scope of organized crime has grown to enormous proportions. He cites some of the numbers associated with organized crime activities, such as in 1992 the underground economy was estimated at \$36 billion, or 5.2 percent of the gross national product of Canada.³⁰ He also mentions that the police forces have estimated the yearly income of organized crime groups at \$20 billion, which he finds especially alarming when compared with the national deficit (which is said to have been \$19 billion at the

²⁶ *Ibid*, at 1710.

²⁷ *Ibid*, at 1730.

²⁸ *Ibid*, at 1710.

²⁹ *Ibid*, at 1715.

time), and he does not see how legislators can remain idle when confronted with such facts. Mr. Jack Ramsay (Crowfoot - the Reform Party) argued that over the last thirty years Canadian law had grown too soft. Tools had been taken away from law enforcement, and drug trafficking was now so bad that gangs were killing each other over turf. He went on to say that this was a sure indication that the justice system was failing to protect families, children, and Canadian citizens from the influence of organized crime.³¹ All one had to do, he stated, was visit a Canadian high school to see evidence of this failure to protect our children against those who would kill them to make a profit; “they are turning our society into bedlam.”³² Drug trafficking, he says, exists even in small towns such as his hometown of Camrose, and “children in high schools are becoming addicted because the government and those before it have eroded the criminal justice system.”³³ Within his statements we can find many of the basic ideas of conspiracy theory. These subversive criminals are polluting schools with drugs, thus harming “our children” and throwing “our society” into bedlam. There is a disconnect between the criminals and the greater society here. This is not the enterprise theory of illicit supply and demand, or a business model of criminality. It is the image of criminal “others” harming us from the inside, corrupting and committing violence against our young ones. This is not to say that Mr. Ramsay was wrong in his point of view, or that the conspiracy theory is invalid, but we must remember that many academics such as those mentioned earlier have stated that this theory of organized crime is obsolete and

³⁰ *Ibid*, at 1735.

³¹ *Ibid*, at 1745.

³² *Ibid*, at 1750.

³³ *Ibid*. Mr. Jack Ramsay’s concern for children is also ironic given the fact he pled guilty to the indecent assault of a 14-year-old girl. CBC News. *Ramsay sentenced to probation, community service*. Located at URL: http://www.cbc.ca/story/canada/national/2001/10/16/ramsay_011016.html (Last updated: Oct 16, 2001).

does not reflect modern realities. The words of Mr. Ramsay, and many others in the debates and discussions surrounding Bill C-95, do not appear to reflect the notion that this is an obsolete or outmoded theory.

Mr. Michel Bellehumeur (Berthier-Moncalm - Bloc Québécois) echoed many of the sentiments of Mr. Ramsay when discussing the scourge of organized crime in Quebec: “We had to have bombs. How many bombs went off in Quebec before the minister decided to take action? There had to be murder attempts. We had to find dynamite across Quebec. There had to be murders. . .Some innocent people were injured. Members also recall that young Daniel Desrochers was killed in that gang war.”³⁴

Now that we have looked at why parliamentarians believed there was a need for such a bill, it would be best to now examine what was contained in this bill. Mr. Ménard offers a concise summary of the changes this legislation made to Canadian law.³⁵ First, the legislation made it an offence to participate in a criminal organization. Any offence for which the punishment was five years imprisonment or more could be deemed a criminal organization offence, and a criminal organization is any group consisting of five or more members. The final definition changed slightly from this MP’s description:

“criminal organization” means any group, association or other body consisting of five or more persons, whether formally or informally organized,

- (a) having 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 five years or more, and
- (b) 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.³⁶

³⁴ *Ibid*, at 1810.

³⁵ *Ibid*, at 1720-1735.

This definition became known as “the three fives” rule or “rule of fives”³⁷. To find someone guilty under this new offence, courts would have to find that a group of five people had committed an offence punishable by five years or more in prison and that these five people had committed a series of offences in the past five years. This new offence was punishable by up to fourteen years in prison. Coincidentally, Mr. Ménard commented that he thought five was a good number and although he is was aware that Reform party members would like it lowered to three, he believed five better reflected the way organized crime works and the objectives of the bill are better maintained with five.³⁸ The reason I say this statement is coincidental is because, as will be seen later, Bill C-24 did in fact lower the number of participants in a criminal organization to three.

Another section of the bill deals specifically with the use of explosive materials by criminal organization participants. As seen earlier, explosives were a major concern to the MP from Quebec, and thus Bill C-95 contained a section that makes death resulting from the use of explosives by a criminal organization an automatic first degree murder charge (which in essence means criminals can be found guilty of first degree murder for the death of innocent bystanders such as Daniel Desrochers). Another important section dealt with the proceeds of crime, making it possible for police to seize both vehicles and buildings if they are found to be bought with the proceeds of crime, or aiding in the activities of criminal organizations. It also became possible for judges to issue “an order to keep the peace” (peace bond) which could prevent certain people from leaving the

³⁶ House of Commons Canada. *Bill C-95, An Act to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence*. 2nd Session, 35th Parliament, 45-46 Elizabeth II, 1996-1997.

³⁷ Dale Anne Freed. “Mob case to test new gang legislation: Expert watching how it will be applied,” in *The Toronto Star*. Dec. 11, 1999. Also located at URL: http://www.nicaso.com/pages/doc_page104.html (last visited Oct. 30, 2005).

³⁸ House of Commons Debates, 2nd Session, 35th Parliament, vol. 160, *supra* note 25, at 1720.

country, from contacting certain other people, and imposing some general measures to ensure that person keeps the peace.³⁹

One of the most surprising elements about Bill C-95 was that throughout the parliamentary debates, no witnesses were called in to contribute to the discussion on the bill. Despite making several important changes to the Criminal Code, such as introducing an entirely new definition and offence (criminal organization and participation in a criminal organization), parliamentarians did not have the benefit of hearing from experts in the field (police, lawyers, and academics). Mr. Ramsay explained why this was so within the debate itself: “If an election were not evident or imminent we would not be rushing this bill through without having witnesses.”⁴⁰ He went on to say that:

All the people the justice minister suggested to us he has consulted we should have heard from. We should have had their opinions. The members of the House, through our committee, should have had those opinions paced on the record so we could determine whether this bill should have been amended and if so in what areas. We should have had that opportunity.⁴¹

As a result, in order to examine what others outside of parliament had to say about this bill, we will have to look elsewhere.

Although the House of Commons did not hear from experts on Bill C-95 and the issues surrounding it, the Senate did. To be more specific, the Standing Senate Committee on Legal and Constitutional Affairs⁴² heard a number of witnesses, including representatives of the Department of Justice, the Canadian Civil Liberties Association, and the McGill University Faculty of Law. Each party offered a differing opinion on the

³⁹ *Ibid.*, at 1730.

⁴⁰ *Ibid.*, at 1805.

⁴¹ *Ibid.*

bill and its specifics, so it should provide an interesting counterpoint to the parliamentary debates where most people were greatly in favour of the bill.

The first people to present to the standing committee were the representatives from the Department of Justice: Mr. Yvan Roy and Mr. Fred Bobiasz. Mr. Roy explained that the Minister of Justice would not consider a membership offence within the bill because of “policy, as well as constitutional, problems with doing such a thing.”⁴³ Mere membership was not the intention of this bill, and what they were aiming to criminalize was participation in the criminal activities of criminal organizations. Mr. Roy also pointed out the fact that this bill would be the first time Parliament had defined what is meant by a criminal organization, a fact which is surprising given that organized crime has been known in this country for well over one hundred years. Mr. Roy’s arguments that this bill was not aimed at criminalizing membership becomes somewhat suspect when one reads what he had to say about this bill. He explained that when the Minister of Justice met with the police, they explained that “organized crime works because people talk to each other, plan with each other, and commit crimes together” [and] “The measure here is created for the purpose of breaking that cycle by ensuring that these people who must talk to each other in order to commit those crimes will not do that.”⁴⁴ This was to be accomplished through the use of the peace bond section of the bill, which a judge could issue. Through these peace bonds, “the judge can impose conditions as to the people this individual before the judge can associate with, or as to places, for

⁴² Canada. Parliament. Senate. The Standing Senate Committee on Legal and Constitutional Affairs, 2nd Session, 35th Parliament, Issue No. 63, April 24, 1997.

⁴³ *Ibid.*, at 63:10.

⁴⁴ *Ibid.*, at 63:12.

instance, where that person can go.”⁴⁵ These peace bonds seem to enable parliament to circumvent a membership offence, and yet still criminalize with whom that person associates and where that person spends their time.

A little later on in the proceedings, one senator asked what was a very common question surrounding Bill C-95 (and one we have already seen briefly): “Why the number five? Is five a magic number? Why not four or six?”⁴⁶ This question was asked in regard to the number of members required for a group to be considered a criminal organization. Mr. Fred Bobiasz (representative for the Department of Justice) explained that the decision came down to either five members or three members, and explained why they went with five. First, Mr. Bobiasz stated that while developing these proposals, they examined some of the American legislation, which deals with similar problems.⁴⁷ This is interesting because this is one of the few times the United States is mentioned with regards to this bill, and yet here Mr. Bobiasz seems to be explaining that the United States was an important resource for crafting our own Canadian bill. He went on to explain that in America, their legislation tends towards either three members, five members, or that a number is just not specified. The reason the government decided upon five members and not three was that they did not think only three members would hold-up under the possible arguments against it. For example, Mr. Bobiasz explained that by only using three, they are no longer talking about an organization or group, they would be talking about a few people who get together.⁴⁸ He gave the example that maybe three people live in a house together and engage in casual drug trafficking, this is

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, at 63:16.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, at 63:17.

immoral and it is criminal, but it is not the type of activity that should be considered a criminal organization. As stated before, these statements are very interesting in light of the change made in Bill C-24 with regards to the requisite number of members, from five to three. This issue will need to be examined later in the section on Bill C-24 to see whether or not such a change was justified by parliament.

Within these proceedings, an interesting statement was made by one of the senators. With regards to the bill, there was a proposed section (which eventually came into effect with the rest of the bill), which stated that those sentenced under the new participation offence would serve that time consecutively with any other associated offences. Senator Moore stated: "I find it interesting that we are making the effort to have such sentences served consecutively for this type of offence, yet we do not do it for murder."⁴⁹ This presents an interesting notion: is the perception of organized crime negative enough to justify a form of punishment that courts do not even use for arguably our most severe crime, murder? Under the enterprise theory of organized crime, this would make little sense. Is illicit supply to an illicit demand severe enough to warrant consecutive sentencing? If one sees these organizations as merely criminal enterprises with money on their minds, it seems hard to justify consecutive sentencing for a participation offence, possibly resulting in more time served than for even a first-degree murder conviction. Alternatively, the conspiracy theory offers some insight into the possible severity of sentencing offenders to such a large amount of time. If these criminals are believed to be undermining the integrity of society (through corruption, murder, violence, etc.), then it seems likely that the government would seek out severe penalties for such activities. After all, the conspiracy theory makes criminal

organizations sound seditious or treasonous, unlike the enterprise theory, which sees them more as illegal businesspeople. This is not to say that Bill C-95 only reflects the conspiracy theory of organized crime, in fact the proceeds of crime sections better reflect the enterprise theory in that they target the ill-gotten gains of criminal organizations and seek to disrupt the business aspect of their activities. This section allows of the seizure of the proceeds of organized crime activity, such as cars, houses, and drug paraphernalia.

The next witness to be heard at these proceedings was Mr. Alan Borovoy, a representative of the Canadian Civil Liberties Association (CCLA). Unlike the previous two witnesses, Borovoy was definitely not in favour of Bill C-95. Borovoy immediately states his position on the bill:

Unfortunately, Bill C-95 was the product not of deliberative debate but of precipitous stampede. The Bill was introduced a few years ago. None of us had seen it prior to that. It was subjected to a process of instant consideration. Within a couple of days, it was subjected to first, second, and third reading. There were no committee hearings of which I am aware, very little debate very little opportunity for expert commentary, and the public had very little opportunity to digest it.⁵⁰

Seemingly not one to mince words, Borovoy makes it quite clear that “the Canadian Civil Liberties Association has come to the conclusion that it contains a number of dubious features.”⁵¹ First, prior to Bill C-95, the powers of investigation, surveillance, detection, arrest, and prosecution were already quite large. Thus, according to Borovoy, a prerequisite for any increase in these powers should be a demonstration of necessity. Apart from the recital of a few of the horrors perpetrated by some criminal gangs, the public record was remarkably devoid of a demonstration or even an explanation as to

⁴⁹ *Ibid*, at 63:26.

⁵⁰ *Ibid*, at 63:28.

⁵¹ *Ibid*.

why the existing powers was not adequate.⁵² Secondly, the CCLA believed that the “three fives rule” describing the participation offence was “so broad that it is quite capable of catching within its net groups that have no relationship to the kind of criminal gangs for which the bill was designed.”⁵³ Borovoy offered examples of environmental groups, abortion organizations, and even the RCMP possibly being caught by the definition of what is a criminal organization. The CCLA also questioned increasing surveillance warrants from sixty days to one year as proposed by the bill on the basis that it would increase the intrusions into the privacy of innocent people (since criminals do not just interact with criminals, but also non-criminals in their day-to-day lives).

Another contentious point for Borovoy was the peace bond section of Bill C-95. As he explained, unlike traditional peace bonds, which were usually sought out by people when they believed they might be in danger from someone else (the bond acting to keep that person away), this bond would be much more intrusive: “What bothers us is that this provision will empower the courts to impose what may turn out to be significant restrictions on people’s liberties and particularly on their ability to associate with friends, colleagues, and associates, even though such people have not been convicted of or charged with the offence at issue. [. . .] I like to call this punishment by clairvoyance.”⁵⁴ He went on to say that these peace bonds may be a form of membership offence, and they may be a way of permitting through the backdoor what has been rejected through the front door.

In his conclusion, Borovoy suggested that the committee not pass the bill in its then present form. He saw no urgency in passing the bill overnight, Canada was not

⁵² *Ibid.*

⁵³ *Ibid.*, at 63:29.

facing an emergency that demanded an immediate solution, and he believed that no one had demonstrated why the considerable powers that already existed were inadequate to do the job.⁵⁵

The last witness at this committee meeting was Prof. Patrick Healy of McGill University. Prof. Healy generally supported the bill, but had certain questions about its scope (i.e. is the definition of criminal organization too inclusive?), whether or not a participation offence might be deemed double jeopardy, and he also questioned its constitutionality. On this last issue, he states: “I am not convinced that it is unconstitutional in anyway at all. I say this because this legislation recognizes the scourge that organized crime has become on Canadian society and it produces measures which are tailored to the severity of the harm done in Canadian society by organized crime.”⁵⁶

In the end, Bill C-95 came into force on May 2nd, 1997, only sixteen days after it was initially tabled in the House of Commons (April 17, 1997). This bill seemed to be signalling a new era for law enforcement whereby they would now have the tools to effectively go after the scourge that was organized crime. However, reality did not quite play out this way. About four years later, the House of Commons had before it another organized crime bill, one, which was making some significant changes to what was set out by Bill C-95.

⁵⁴ *Ibid*, at 63:30.

⁵⁵ *Ibid*, at 63:31.

⁵⁶ *Ibid*, at 63:33.

Bill C-24: Its Creation

Although Bill C-95 was passed into law and came into force, it appears as though many parliamentarians still desired more measures to help fight organized crime. On November 30th, 1999, the Bloc Quebecois used one of their opposition days to bring forward a motion that the Standing Committee on Justice and Human Rights conduct a study on organized crime and report to the house, with the hope of bringing to light “the existence of a major problem in Canada and in Quebec: organized crime.”⁵⁷ Mr. Bellehumeur, the same MP who pushed for Bill C-95, took the lead in making this request. He began by recounting some of the more tragic incidents involving organized crime. For example, in addition to mentioning the death of eleven-year-old Daniel Desrochers (which I recounted above), he also mentioned an incident where two prison guards were gunned down in 1997, and he explained that one of the Bloc MPs had received death threats for criticizing the growing of marijuana in his riding. Additionally, he states that between 1994 and 1998, there were 79 murders and 89 attempted murders connected to the biker wars alone, and that over the same period, there were 129 cases of arson and 82 bombings relating to these same wars.⁵⁸ Mr. Bellehumeur also mentioned some specific issues he believed should be addressed if Canada was to properly combat organized crime. For example, he raised the issue of witness and jury protection, and felt that neither were afforded adequate comfort or safety during trials. He also mentioned the issue of undercover police work, and stated that these officers should be allowed to break the law in order to gain the trust of the individuals they are investigating. He also

⁵⁷ Canada. Parliament. House of Commons. Debates, 2nd Session, 36th Parliament, No. 31, November 30, 1999 at 1005. Located at URL: http://www.parl.gc.ca/36/2/parlbus/chambus/house/debates/031_1999-11-30/toc031-e.htm (last visited on Oct 30, 2005).

⁵⁸ *Ibid*, at 1010.

discussed the issue of improving communication between the various departments (such as the RCMP, CSIS, Department of Justice) and police forces throughout Canada. He was also concerned about the issue of the corruption of public officials, but not just of the police, but also of parliament and MPs.

The issue of corruption and infiltration appeared to be of particular interest and major concern for Mr. Bellehumeur. As he stated, “I do not think that any individual or group is protected from organized crime trying to buy them off at some point in time.”⁵⁹ In these words we can see the basic underpinnings of the conspiracy theory, with this MP describing the infiltration of organized crime into our government. Mr. Bellehumeur’s solution to this threat was quite severe. In order to combat this threat, there was a need to ensure that the police can infiltrate criminal organizations. Legislation, he argued, made this exceedingly difficult however, and he hoped that the Standing Committee on Justice and Human Rights would consider this issue. Mr. Bellehumeur went on to explain that it can often take years to infiltrate such groups, however, and that there is the issue of trust within such groups. If a gang leader had any suspicions about the loyalty of a member, they would often ask that member to commit murder to prove their loyalty. It is this issue which shows how serious Mr. Bellehumeur was about combating organized crime and how far he was willing to ask the government to go:

Under the Criminal Code, this person is a criminal, at the moment. There is no way this person can be exempted from the application of the Code. In addition, this person is in a tough position. If he does not kill anyone, his days are likely numbered. If he does, his days are likely numbered as well, because he will be treated as a criminal under the Criminal Code. Has society reached a point where we will authorize an undercover officer, with all the proper authority, to go so far as to commit a crime, to go so far as to commit murder in an effort to protect

⁵⁹ *Ibid*, at 1020.

society and save tens or hundreds of people, perhaps? I think we have reached this point, and we must examine the issue in committee.⁶⁰

These words are quite alarming, and Mr. Bellehumeur appeared to be requesting that the issue of government-sanctioned murder be considered as a viable tool for combating organized crime. This reaction is easily explained by the conspiracy theory view of organized crime, since Mr. Bellehumeur views organized crime groups as murderers, corruptors, infiltrators in the government, a massive threat to society and to the lives of those who live within it. This kind of reaction would be much less common for those who subscribe to the enterprise theory, which sees organized crime merely as illicit business, and it seeks very different measures to fight organized crime, for example increasing proceeds of crime legislation, disrupting their business, and sometimes even talk of the legalization of currently illegal goods and services. Allowing undercover police officers to murder civilians (even criminal ones) in the course of their investigation would appear to be an immense over-reaction to the problem from this theoretical view of organized crime. It is only when viewing them as a threat to society and the stability of the government could one even begin to fathom such a course of action. It should also be noted that Mr. Bellehumeur's comment did not result in any objection or counterargument from other MPs in the House of Commons after it was made.

In general, the motion to have the Standing Committee examine organized crime was supported by every political party in parliament. The Progressive Conservative Party of Canada gave the motion its full support,⁶¹ as did the Reform Party.⁶² The then Solicitor General, the Honourable Lawrence MacAulay, supported the motion on behalf

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*, at 1035.

of the Liberal Party, and even stated that the government recognized it (organized crime) as the government's number one law enforcement priority.⁶³ Even the New Democratic Party (NDP) fully supported the motion. What is interesting about the NDP's support however, is that MP Mr. Pat Martin (Winnipeg Centre) brings up an issue which was unique to this debate, and was not even brought up during the future debates on Bill C-24: the societal basis of organized crime. Echoing the concepts of the strain theory of organized crime ("crime and delinquency result from the frustration and anger people feel over their inability to achieve legitimate social and financial success"),⁶⁴ Mr. Martin explained that "when we talk about organized crime everybody thinks of the mafia. It is almost a cliché" [and] "Quelle surprise. Starve people for a couple of decades and we will develop an underclass, which will become organized. When we shut people out of the main stream economy where do they go to find a standard of living."⁶⁵ There is some crossover with the enterprise theory since it is often through illegal goods and services (such as drug trafficking and sales) that these people attempt to make their living. Mr. Martin also explained that his notion of organized crime came from his experience with, and observations of, the problems in the inner city of Winnipeg and the rise of street gangs therein. Why this particular comment is interesting is that this is, to my knowledge one of the few times (perhaps the only time) that organized crime (although he is addressing mainly street gangs) is couched in terms which give it a societal origin. Mr. Martin is explaining that organized crime is often just certain members of society trying to make money through the only market that is available to them: the illicit one. Thus, criminal organizations are not just evil others or criminal outsiders, but perhaps they are

⁶³ *Ibid*, at 1040.

⁶⁴ Kenney & Finckenaer, *supra* note 5, at 37-38.

also Canadian citizens using illegal means in an attempt to acquire the same life as traditional law-abiding citizens. However, as I noted, this is an uncommon view of organized crime, especially within the parliamentary debates on this motion and later on Bill C-24 (as it was with Bill C-95, where this idea was never raised).

This motion, raised by the Bloc Québécois, raises the simple question: why was this motion necessary? Did Canada not just recently pass Bill C-95 and amend many sections of the Criminal Code in an attempt to combat organized crime? Why were these changes not sufficient enough? In order to answer some of these questions, one must turn to the parliamentary debate in which this motion was raised. Numerous times throughout this debate, different MPs explain why Bill C-95 was not working, and additionally, they brought up some of the problems that they believed had arisen requiring new and sometimes harsher measures.

Mrs. Pierrette Venne (Saint-Bruno – Saint-Hubert - Bloc Québécois), near the beginning of the debate, brought up the issue of Bill C-95. Although she said that initiative deserved some merit (for at least acknowledging that the government needed to deal with organized crime), the question needed to be asked if that was enough; she went on to say that “the only possible answer is no.”⁶⁶ She then brought up several specific issues. For example gang leaders were especially difficult to get at under the then current legislation. Bill C-95 was questionable in its attempt to prevent gang members from associating with one another, and it had not yet criminalized membership in a biker group per se. Finally, it was difficult to prove that someone’s wealth was acquired through specific and identifiable criminal offences.

⁶⁵ House of Commons Debates, 2nd Session, 36th Parliament, No. 31, *supra* note 57, at 1155.

⁶⁶ *Ibid*, at 1025.

Mr. Yvan Loubier (Saint-Hyacinth – Bagot - Bloc Quebecois) also went into detail about what he felt was wrong about the legislation. First however, Loubier explained how organized crime was terrorizing his riding. He explained that he took a helicopter ride to view the farmland in his riding. Upon viewing his riding, and then talking with colleagues afterwards he: “became aware that some 25% to 50% of fields in Quebec, and the same percentage in Ontario, have been commandeered by organized crime for the production of one of the best grades of cannabis in the world. It has nothing in common with the pot of the 1970s, as it contains 7 to 30 times more hallucinogens.”⁶⁷ One might wonder if this last sentence meant that cannabis use was more tolerable in the 1970s than the 1990s, due to the lower quantities of hallucinogens found in the plant in that era? Mr. Loubier is also alarmed because of: “the thousands of farm families terrorized year after year by organized crime, families prevented from enjoying their property in peace, from even going into their fields on pain of death. Their lives and their children’s lives threatened, and they do not dare set foot in their fields because they have been booby-trapped and there could be an explosion.”⁶⁸ Mr. Loubier also recounted some of the statistics on death caused by organized crime (the same numbers Mr. Bellehumeur mentioned, quoted earlier), and the incident involving eleven-year-old Daniel Desrochers. He also stated, with regard to the trading amongst groups of Canadian-grown cannabis for American-manufactured heroin and cocaine: “It is no surprise that, every year, there is an increase in the number of 12 and 13-year olds who

⁶⁷ *Ibid.*, at 1235.

⁶⁸ *Ibid.*

use these hard drugs, and the children of anyone here could be among them. We should be very aware of this issue and its long term impact on our society.”⁶⁹

With this backdrop, Mr. Lubier discussed a number of weaknesses he had identified with the legislation.⁷⁰ Sentencing was too lenient and it was impossible to get at gang leaders. Canada’s sentencing was lenient compared to other nations, which in turn attracted criminals from other countries. Canada had not outright made gang membership illegal, which he claimed would be possible through the use of the notwithstanding clause of the *Charter*: “I trust that the *Charter* was put in place not to help criminals, but to help honest folk.”⁷¹ Finally, he argued, Canada should adopt a reverse onus principle (as in the United States) when it comes to proceeds of crime, and force criminals to prove they bought their possessions through legitimate sources of income.

In the end, the motion was successful, and the Standing Committee on Justice and Human Rights met *in camera* to discuss organized crime (in fact, since the vote on the motion was recorded, one can observe that there was not a single “nay” recorded against said motion⁷²). In October 2000, the Sub-Committee on Organized Crime of the Standing Committee on Justice Human Rights published their report entitled “Combating Organized Crime” wherein they make eighteen recommendations.⁷³ The reason this report is important is that many of the recommendations made by the committee

⁶⁹ *Ibid*, at 1240.

⁷⁰ *Ibid*, at 1245.

⁷¹ *Ibid*.

⁷² *Ibid*, at 1745.

⁷³ Andy Scott & Paul DeVillers. *Combating Organized Crime*. October 2000. Located at URL: <http://www.parl.gc.ca/InfoComDoc/36/2/JUST/Studies/Reports/SCMRP01-E.htm> (Last visited on Nov. 11, 2005). See Appendix A for a list of the Standing Committee recommendations and for the reasons the Bloc Dissented to these recommendations.

influenced the creation of Bill C-24, however, in the end, not all recommendations of the committee were followed (this issue will be addressed later).

Enter Bill C-24

In April 2001, Bill C-24 was tabled in the House of Commons for its first and second reading. The Honourable Anne McLellan (Minister of Justice and Attorney General of Canada - Liberal Party) introduced the bill by saying, “building upon the foundation that the government put into place over the past several years, including the 1997 anti-gang amendments to the criminal code, the proposed legislation would enable law enforcement to respond to the threat of organized crime in the country.”⁷⁴ The proposals contained in Bill C-24 fall under four major categories.⁷⁵ First, measures to protect people who play a role in the justice system from intimidation. Second, the creation of an accountability process to protect law enforcement from criminal liability when committing otherwise illegal acts in the course of an investigation (this issue is often referred to as police immunity). Third, to broaden and improve the legislation involving the seizure of the proceeds of crime. Finally, to create a number of new offences targeting the involvement of people in criminal organizations (such as dropping the required number of participants from five to three, and a section singling out group leaders). As one can see, a number of new dimensions were added to the criminal code to help target organized crime.

⁷⁴ Canada. Parliament. House of Commons. Debates, 1st Session, 37th Parliament, No. 46, April 23, 2001 at 1300. Located at URL: http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/046_2001-04-23/HAN046-E.htm (last visited on Oct 30, 2005).

⁷⁵ *Ibid*, at 1305.

The first set of changes brought about by Bill C-24 was the creation of new offences for intimidating those within the justice system. Ms. McLellan explained that the criminal justice system depends upon a number of people at various levels of the systems to function properly. Parliamentarians, judges, lawyers, witness, and jurors are all vital to the process, and they should all be free to act without being subject to intimidation, physical injury, or threats. Those attempting to impede the administration of criminal justice would face a possible 14-year prison sentence.⁷⁶ In addition to the debates surrounding the second reading in the House of Commons, there were also a number of meetings held by the Standing Committee on Justice and Human Rights held throughout May that addressed Bill C-24 (it should also be noted that witnesses were given only two days notice to prepare their presentations to the committee). Many of the new offences contained in the bill were debated in these meetings. The new intimidation offences, for example, were challenged by Mr. Alan Borovoy (CCLA) at the committee meeting held on May 8th 2001. He explained that since this bill also protects members of Parliament and the Senate, a number of civil liberty questions arise. For example, since the bill says you cannot, with a view of impeding them in their operation, beset and watch a place where they are working, does this mean that picketing their office in order to get them to change their minds about a policy is now an offence?⁷⁷ Similarly there was a prevention against numerous communications, so what about letter writing campaigns? Mr. Borovoy considered these new offences to be overly broad.

Second, Bill C-24 grants police immunity from certain offences while in the course of an investigation. This part of the bill was by far its most controversial aspect.

⁷⁶ *Ibid*, at 1305-1310.

Ms. McLellan explained that there was a need for this section due to the well known *R. v. Campbell* (also known as the *Shirose and Campbell* case) ruling by the Supreme Court of Canada.⁷⁸ In this case, the Supreme Court ruled unanimously that the police are not immune from criminal liability when committing criminal offences during the course of a valid criminal investigation. As a result, the Supreme Court left it up to parliament to delineate the nature and scope of the immunity and the circumstances in which it is available.⁷⁹ Mr. R.G. Lesser (Chief Superintendent of the RCMP) argued that the *Shirose and Campbell* ruling all but crippled police investigations. For example, officers could no longer investigate human smuggling operations because it would involve infiltration into the group, but such involvement is criminal and thus they may no longer perform such investigations. Further, he stated that officers would be unable to register into hotels with false names. Also, night time surveillance of smuggling operations in the waters around Akwesasne was now all but impossible since leaving their boat lights off was against the small vessel regulations and thus prohibited. To quote Mr. Lesser, “from the ridiculous to the sublime, there’s nothing we can do, or that we’re allowing our people to do, that is against the law.”⁸⁰

However, many witnesses presenting before the Standing Committee had a problem with this immunity section. For example, Ms. Anne-Marie Boisvert (representative of the Barreau du Québec) cautioned that we should keep in mind that these new provisions would apply to all police work, and not just investigations involving

⁷⁷ Standing Committee on Justice and Human Rights, May 8th, 2001. Located at URL: <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev12-e.htm> at 1100.

⁷⁸ *R. v. Campbell*, [1999] 1 S.C.R. 565, 1999 CanLII 676 (S.C.C.)

⁷⁹ House of Commons Debates, 1st Session, 37th Parliament, No. 46, *supra* note 74, at 1310.

⁸⁰ Standing Committee on Justice and Human Rights, May 15th, 2001. Located at URL: <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev17-e.htm> at 1710.

criminal organizations.⁸¹ She also argued that it should be kept in mind that the reason the Supreme Court ruling was initially handed down was that according to the rule of law, the police should not be above the law. Mr. Borovoy and the CCLA also had great trouble with this immunity, and he came to the Committee with a number of objections to present.⁸² First, he believed there should be a test of necessity applied when using this immunity, and it should not just be used when it is helpful. Second, no acts or threats of physical violence should be allowed. Although no bodily harm would be permitted, Borovoy brought up the issue of kidnapping at gunpoint (which does not involve direct bodily harm). Third, he argued that the police should not be allowed to instigate these illegalities. Fourth, the power to delay notice to the victims of law-breaking should reside with the courts and not with a minister or police official. Fifth, there should be compensation in every case where any police law-breaking causes damage or injury to innocent civilians. Finally, Mr. Borovoy argued there should be independent audits (independent of the police, the government, and any interested party) of this practice in place before any law-breaking is allowed. He concluded his presentation, however, with a general dismissal of this part of Bill C-24 since he (and the CCLA) believed that there has not been sufficient justification given during the debates and committee meeting for this kind of permitted law-breaking.⁸³

The third set of proposals, involving the proceeds of crime, appears to have arisen directly out of the enterprise theory of organized crime. Ms. McLellan explained: “The offences initially listed as enterprise crimes were those considered most likely to be committed by organized crime groups. Over the years, as organized crime evolved and

⁸¹ Standing Committee on Justice and Human Rights, May 8th, 2001, *supra* note 77, at 1010.

⁸² *Ibid*, at 1025.

moved into new areas of criminal activity, new offences were added to the list of enterprise crimes.”⁸⁴ Seeking to target the monies and goods of criminals, this part of the bill recognizes that one of the best ways to go after criminal organizations was by targeting their profits. The Canadian Bar Association warned however, that a section of the bill, which allowed for the forfeiture of real property (land, houses), should be reconsidered. Although “the proposal suggests that real property could be forfeited only if the forfeiture is not disproportionate to the nature and gravity of the offence, the surrounding circumstances and the criminal record, if any of the person charged with, or convicted of the offences,”⁸⁵ they still remain wary because “the proposed standard does not address our concern that the justice system should not be the instrument that renders people homeless.”⁸⁶

The fourth measure was an important change made by this bill, because, as Ms. McLellan explained “Law enforcement officials and provincial attorneys general have called for a simplified definition of criminal organization and for offences that respond to all harmful forms of involvement in criminal organizations.”⁸⁷ What this means is that “taking part in the activities of a criminal organization, even if such participation does not itself constitute an offence, will now be a crime where such actions are done for the purpose of enhancing the ability of the criminal organization to facilitate or commit indictable offences.”⁸⁸ Much of Bill C-24 seems to have arisen out of frustration, and often the legal frustration in not being able to properly deal with organized crime. For

⁸³ *Ibid.*

⁸⁴ House of Commons Debates, 1st Session, 37th Parliament, No. 46, *supra* note 74, at 1320.

⁸⁵ Canadian Bar Association. *Submission on Bill C-24 – Criminal Code Amendments (Organized crime and Law Enforcement)* (Ottawa: Canadian Bar Association: 2001), at 31.

⁸⁶ *Ibid.*

⁸⁷ House of Commons Debates, 1st Session, 37th Parliament, No. 46, *supra* note 74, at 1315.

⁸⁸ *Ibid.*

example, Mr. Peter MacKay (Pictou – Antigonish – Guysborough - Progressive Conservative) lamented the lack of funding provided to law enforcement, the disbanding of the ports police (the enforcement agency which monitored the waters around Canada) and “the limitless resources of the organized criminal element highlight the fact that the police are often left feeling that they are not on a level playing field legislatively because of their limitations within the law.”⁸⁹

One odd section of this bill was the one targeting the leaders of criminal organizations. Traditionally, it is believed that leaders do not directly involve themselves with the specific crimes of their group, tending to stay behind the scenes and orchestrate their group’s activities. For this reason, it was difficult to arrest them on charges involving activities such as trafficking, the sale of illegal goods, prostitution, or human smuggling. Ms. McLellan expresses this legal frustration when she states:

The bill also addresses the concern expressed by law enforcement officials and provincial attorneys general that the current requirement of proving beyond reasonable doubt that the accused was a party to a specific crime shields from prosecution those in the upper echelons of criminal organizations who isolate themselves from day to day activities.⁹⁰

Trying to get around the “reasonable doubt” requirement of a criminal trial would seem to be a questionable project for the government to undertake, and appeared to have arisen out of frustration. This frustration can be seen when the MPs make statements like “leaders of criminal organizations pose a unique threat to society. Operationally they threaten us through their enhanced experience and skills. Motivationally they threaten us through their constant encouragement of potential and existing criminal organizations

⁸⁹ *Ibid.*, at 1625.

⁹⁰ *Ibid.*

members.”⁹¹ This view of group leaders almost makes them seem like bogeymen. This view also reflects the conspiracy theory of organized crime. Viewing criminal organizations as monolithic and structured, with an intelligent controlling leader at the very top who never gets their hands dirty (i.e. “The Godfather” books and movies) is exactly the phenomenon that Cressey and other early American researchers described fifty years ago. Additionally, to show how serious they are about these leaders, this new offence brought along with it a possible sentence of life imprisonment. Interestingly, the words of Mr. Stephen Owen (Vancouver Quadra - Liberal Party) also seemed to contradict this view when he said later on in the debates: “criminal organizations working together in Canada and around the world are no longer monolithic crime families that are suspicious of each other or competitive with each other against criminal projects for turf” [and] “Organized criminal activity works in networks, works in cells, across criminal organizations and across borders.”⁹²

The wording of the new definition of “criminal organization” found in Bill C-24 also does not reflect the view of organized crime as a massive nationwide syndicate of criminals:

“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.

⁹¹ *Ibid*, at 1320.

⁹² *Ibid*, at 1640.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.⁹³

As one can see, this new definition not only lowered the number of required people (dispelling the notion of organized crime groups being large monolithic entities), but it also now includes the goals of such groups. There is now a requirement that the group has as one of its primary goals the commission of offences that results in materialistic or financial benefit. This can better be explained by viewing organized crime through the lens of the enterprise theory that the conspiracy theory which traditionally views corruption, intimidation, and infiltration as its primary goals.

Despite the statements of a number of dissenters (many of whom I have quoted above), on December 18th 2001, Bill C-24 received royal assent with no major amendments made to its initial wording.

Conclusion

Organized crime has existed for many years in Canada, yet it is only recently that it has caught the attention of Parliament. The moral panic stirred by the biker wars in Quebec and the death of Daniel Desrochers resulted in the creation of Bill C-95: the panic spurred Parliament into a state of action, and the bill was rushed through due to an upcoming election and without the aid of witnesses. The scourge of organized crime seemingly had to be dealt with, and it had to be dealt with now. Violence and corruption were allegedly occurring in Canadian society, and organized crime was to blame. Bill C-

⁹³ Bill C-24, *supra* note 4. See Appendix B for relevant sections of the *Criminal Code* addressing criminal organizations.

95 was deemed insufficient, however, and was soon followed by another legislative attempt to deal with organized crime.

The Bloc utilized one of their opposition days in 1999 to once again draw attention to the issue of organized crime and to the perceived deficiencies of C-95. Coupled with the *Shirose and Campbell* ruling, Parliament was prompted into action once again. Bill C-24 was drafted to address these issues, yet C-24 did not arrive into law without its own baggage. The CCLA and the Bar Association both warned of the possible abuses of this bill, but the bill came into effect with no major amendments. Bill C-24 contained several new legal powers to deal with this form of criminality, such as the granting of police immunity and a life sentence for criminal organization leaders. In the next chapter, I examine the current state of the C-24 legislation and what has occurred since the passing of this legislation.

Chapter 3: The Use of Bill C-24 and its Subsequent Legislation

Introduction

In this chapter, I address the question of what is the current state of organized crime regulation in Canada? Bill C-24 was intended to make sweeping changes to the laws involving organized crime, so it is important to analyse just what effect it is having. Bill C-24 did not come into effect without problems, however, and to begin this chapter I look at the argument that C-24 was still not deemed strong enough to deal with organized crime. Following that, I examine the current state of organized crime statistics in Canada. In order to examine if C-24 is successful, it is important to look at the available statistics in this area. In addition to this, I look at the police justification section and its use because this was seen as an important new weapon within C-24. To finish this chapter, I examine some of the more important cases that have arisen involving C-24 legislation. These cases are important to understanding the direction that the courts are moving in their interpretation of the legislation.

Bill C-24 Comes Into Effect

Bill C-24 came into effect January 7th 2002, and it retained all the important features which were discussed at the end of Chapter 2: three new offences, new definitions, the police justification section, and new laws regarding the proceeds of crime. Although passed unanimously by parliament, Bill C-24 did not come into effect without some controversy. For example, it is interesting to note that although Bill C-24 contained some major changes to the way Canada fights organized crime, it did not reflect many of

the recommendations of the October 2000 Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights.

This issue was raised and discussed in the parliamentary debates by MP Gurmant Grewal (Surrey Central - Canadian Alliance).⁹⁴ Mr. Grewal states that previous legislation (including Bill C-95) was ineffective in dealing with organized crime. He goes on to claim that in the early 1980s, the government of the day not only ignored the recommendations of law enforcement agencies, “but it even refused to acknowledge the existence of organized criminal activities in Canada.”⁹⁵ Additionally, Grewal found it sad that the recommendations of the subcommittee (of which he was a member) were not fully implemented in C-24, and although it would help enhance the fight against organized crime, it was not enough. Grewal then goes on to describe the standing committee recommendations which were not included in the final bill.⁹⁶ The following are some of the issues Grewal believed should not have been excluded from Bill C-24. First, it was argued that all the new offences should have been collected with older existing offences and written into one section of the *Criminal Code* entitled enterprise crime. Rather than having all the new legislation spread throughout the code, it should all be placed into one easily accessible section of its own. Second, the *Criminal Code* should have been amended to allow for the designation of criminal organization offenders as dangerous offenders and long term offenders. Third, with regard to the legislation involving judicially authorized surveillance (audio and video), the committee recommended that the warrant period be increased from sixty days to at least a period of one hundred and twenty days, and that the process be streamlined to allow for swifter and

⁹⁴ House of Commons. Debates, 1st Session, 37th Parliament, No. 46, *supra* note 74.

⁹⁵ *Ibid.*, at 1700.

easier access to such warrants. Grewal explained that in order to obtain a warrant, officers need to write about a thousand pages worth of reports, and sixty days is not nearly enough time to monitor people and activities that may have been occurring for months or years. Fourth, there was a recommendation that upon sentencing offenders under criminal organization offences, those convicted be required to serve the entirety of their sentence. This is different than the normal period (one third of an offender's sentence is served before they are eligible for parole), and the change contained in Bill C-24 (which changes the period from one third to one half of time served before parole eligibility). Fifth, Grewal noted that the committee recommended that there be a reverse onus placed on those accused under criminal organization legislation that seized assets have not been acquired or improved as a result of criminal activity. Currently the onus is on the police to prove that such assets were acquired illegally. Finally, Grewal lamented the fact that Bill C-24 did not contain a membership offence, and believed that such an offence could have been included if it specified membership in groups which had already been declared criminal in Canada. It should be noted that the standing committee did not recommend this particular issue in its report. However, it was in fact mentioned in the dissenting opinion section of the report where the Bloc Quebecois proposed that membership in a criminal organization be made a crime, that the definition of "gang" be brought before the Supreme Court to judge upon its constitutionality; if it were to be found unconstitutional, then the notwithstanding clause should be resorted to.⁹⁷

The reason this issue is interesting is that it might point to future changes or amendments to the organized crime legislation in Canada. It is also interesting to note

⁹⁶ *Ibid*, at 1705-1715.

⁹⁷ Scott & DeVillers, *supra* note 73.

that all the recommendations of the standing committee that were not implemented were much harsher than what was eventually contained in Bill C-24. Many MPs were in agreement that Bill C-24 was not severe enough nor did it go far enough,⁹⁸ and it seems likely that based on the parliamentary debates, that were the issue of organized crime legislation to come up again before parliament, it would result in even stricter measures as opposed to more lenient ones.

Some in the media also questioned the bill, though for different reasons. Leo Knight, for example, made his feelings on the proposed laws known in a piece entitled “New organized crime law misses mark.”⁹⁹ Knight begins his article with a brief recap of what he considers to be the failure of the former anti-gang legislation, Bill C-95. Although created in 1997, it took until 2001 for the first successful convictions to occur. Four men were convicted in Montreal, however that investigation took three years and cost over \$5 million. Additionally although 33,000 conversations were intercepted by police, and more than 100,000 pages of text outlining the evidence were introduced into court, it still took the testimony of a high profile gang member (former Rock Machine member Peter Paradis) to convict the four men.¹⁰⁰ In Knight’s opinion, Bill C-24 was designed to streamline the legislation to address cases such as this one, but it still repeated many of the mistakes of C-95. For example, although it dropped the number of participants from five to three, Knight argued that this did not reflect the reality of

⁹⁸ *Ibid*, see 1715 - Mr. Bernard Bigras, and 1720 - Mr. Robert Lanctot

⁹⁹ Leo Knight. “New organized crime law misses mark” in *North Shore News*. April 11, 2001. Also located at URL: <http://www.nsnews.com/issues01/w041601/opinion/editorial/11-opinion-knight.shtml> (Last visited January 25th, 2006).

¹⁰⁰ *Ibid*. More can be read about this case here: CBC News. *Quebec bikers jailed under anti-gang law*. Located at URL: http://cbc.ca/cgi-bin/templates/view.cgi?category=Canada&story=/news/2001/03/02/antigang_sentence010302 (Last updated: March 2, 2001).

criminal organizations. Criminal organizations, such as the Hells Angels, are comprised of individuals engaging in criminal activity not for the benefit of the club as a whole, but using the backing and structure of the club to further their own personal criminal endeavours.¹⁰¹

Knight is also critical of Bill C-24 on an issue which we have just seen above, there was no membership offence included in the legislation. He argues that as it now stands, the police are required to prove each and every time that the gang in question is an organized criminal enterprise, and that what the criminals truly fear is making membership in an organized crime group a crime in itself.

Alan Borovoy also wrote a piece in the *Globe and Mail* about Bill C-24, although he focussed mainly on the police justification section.¹⁰² It was his opinion that this section of Bill C-24 was not needed since the issue had already been ruled upon in court (police were once again allowed to pose as drug vendors for sting operations), and it was a questionable section since it goes above and beyond organized crime and can be used for offences the police might commit while investigating any crimes.

Nonetheless, on January 7th, 2002, Bill C-24 came into effect. The section dealing with police justification came into effect a little while later on February 1st, 2002, in order that police forces could be trained and make themselves familiar with this part of the legislation. It came into effect with much fanfare on the part of the government: "Canadians have made it clear that organized crime and the devastation it causes will not be tolerated," Minister McLellan said. "The Government of Canada is following through

¹⁰¹ *Ibid.*

¹⁰² A. Alan Borovoy. "Don't Give Police Carte Blanche," in *Globe and Mail*, 8/5/01. Also located at URL: http://www.ccla.org/news/01-5_police.shtml (Last visited: January 25th, 2006).

on its commitment to protect the security and safety of our communities from organized crime."¹⁰³

Organized Crime Statistics

Unlike other areas of criminal justice (such as corrections, offences, or rehabilitation) information on organized crime is relatively difficult to find, and there is not a lot of technical information available in this field. Evidence of this can be observed in the Statistics Canada report "Crime Statistics in Canada, 2004" which makes only one reference to organized crime with regards to cannabis growing operations.¹⁰⁴

Additionally, the CISC Annual Report on Organized Crime does not contain a section on statistics, and tends towards specific examples such as cases, or high profile busts.¹⁰⁵

Statistics involving organized crime in general are difficult to find, and thus information on the use of the new measures created by Bill C-24 were also difficult to track down.

Within this section, I hope to investigate this phenomenon by examining a few of the studies on this topic that have been undertaken by the government and released to the public.

One of the studies undertaken into the issue of organized crime statistics was completed in September 2002. Entitled "Organized Crime in Canada: An investigation into the Feasibility of Collecting Police-Level Data," this report created by the Canadian Centre for Justice Statistics (CCJS) attempted to develop a strategy to collect quantitative

¹⁰³ Farah Mohamed & Dan Brien. *DoJ News Room: Organized Crime Legislation Comes into Force*. Located at URL: http://canada.justice.gc.ca/en/news/nr/2002/doc_29525.html (Last Updated: 2005-10-20).

¹⁰⁴ Julie Sauvé. "Crime Statistics in Canada, 2004," in *Juristat: Canadian Centre for Justice Statistics*. Statistics Canada, Catalogue no. 85-002-XPE, Vol. 25, no. 5. Also located at URL: <http://www.hamiltonpolice.on.ca/NR/rdonlyres/4B12A796-B0C9-436C-9F64-840D3EBEE09F/0/CrimeStatisticsinCanada2004.pdf> (Last visited January 25th, 2006).

data on organized crime.¹⁰⁶ In the executive summary of this report, the CCJS presents what it considers to be the then current problems with collecting data on organized crime (based on the data that was collected from the various police agencies interviewed for this report). Firstly, there is “still a significant problem in terms of an accepted uniform definition of what constitutes ‘organized crime’” [and] “most forces found the *Criminal Code* definition to be too broad and use supplementary criteria.”¹⁰⁷ This conclusion expresses the difficulty in researching organized crime. As of 2002, there was no agreed upon definition of organized crime for police or researchers to use in their reports, and even a seemingly obvious middle-ground, the *Criminal Code* definition, was deemed too broad to be used for research purposes. Secondly, the CCJS reports that it had become difficult to distinguish between organized crime groups, “in some instances, organized crime groups are forging new alliances and are working collaboratively together. In addition, there is an increasing number of multi-cultural criminal organizations.”¹⁰⁸ This view directly reflects the alien conspiracy theory of organized crime, and it is fascinating to note that as of 2002 research and data were still being organized along ethnic lines. These groups were suggested by the CCJS and were based on the annual reports of CISC; they include Outlaw Motorcycle gangs, Asian-based, Italian-based (or “Traditional”), Aboriginal-based, Eastern European-based, Other (those not covered by another category), and street gangs. In fact, ten out of eleven respondents reported that these standard categories were in line with the way in which police classify organized crime

¹⁰⁵ CISC. *2005 Annual Report on Organized Crime in Canada*. Located at URL:

http://www.cisc.gc.ca/annual_reports/annualreport2005/table_of_contents_2005_e.htm

¹⁰⁶ Lucie Ogrodnik. “Organized Crime in Canada: An investigation into the Feasibility of Collecting Police-Level Data,” in *Canadian Centre for Justice Statistics*. Statistics Canada, Catalogue no. 85-556-XIE. Also located at URL: <http://www.statcan.ca/english/freepub/85-556-XIE/85-556-XIE2002001.pdf> (Last visited January 25th, 2006).

¹⁰⁷ *Ibid*, at 5.

groups.¹⁰⁹ Unfortunately, as was just stated, these strict ethnic lines did not reflect the reality of the organized crime scene in Canada. Groups work together collaboratively (i.e.: one group would smuggle drugs into Canada, another group would sell it on the street, and a third would launder the profits). Respondents reported that “[t]hese new alliances being forged between organized crime groups may create difficulties for coding criminal offences to any one particular organized crime group.”¹¹⁰ Respondents also reported that data was difficult to collect due to the increasing multi-cultural composition of organized crime groups. Additionally this report explains that “[a]lthough there are organized crime groups composed of members drawn predominantly from one particular ethnic group, there are other groups of multi-cultural composition.”¹¹¹ It should also be noted that instead of adapting classification standards to this new reality, or rethinking ethnic divisions for organized crime groups, the police respondents recommended that even more ethnic groups be added to the list. These included: Columbian, Latinos, Haitian, Lebanese, South American, Japanese (Yakuza), Quebecois traditional, Indo-Canadian, Nigerian, Jamaican, and Somali.¹¹²

This report concludes that organized crime statistics and reporting should be included in a number of existing polling instruments, such as the Uniform Crime Reporting Survey (UCR2), and that issue-driven special studies should be conducted.¹¹³ CCJS also concludes that although quantifying organized criminal activity presents a great challenge:

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, at 17.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*, at 18.

¹¹³ For a complete list of recommendations, see *Ibid.*, at 23-34.

Nevertheless, sound statistics are necessary to provide quality information to governments, the police community and the general public about the extent and impact of organized crime in Canada. Without ongoing data to update Canadians on the state of organized crime in Canada, it will be difficult for governments, policy makers, and the police to set priorities, and make policy decisions regarding the fight against organized crime.¹¹⁴

This report begs the question of what information Bill C-95, the Standing Committee in 2000, and Bill C-24 were based on? If, as of 2002, there were no sound statistics on organized crime in Canada, and this study says that there wasn't, what data did law makers use? It will be interesting to see if the other reports below reach a similar conclusion about the lack of statistical information (as it relates to organized crime), and especially with regard to the use of Bill C-24 measures.

The second report I examined was a literature review finished on March 31, 2003, by Thomas Gabor on behalf of the Research and Statistics Division of the Department of Justice Canada.¹¹⁵ In this report, Gabor explains that in the context of organized crime, research designs would involve the careful monitoring of a control strategy either from the outset or after the fact, to determine whether statistically significant reductions in specified illicit activities or other changes have occurred following their implementation or in relation to comparable jurisdictions in which such initiatives have not been adopted.¹¹⁶ He found that “the use of such designs is virtually non-existent in assessment of the impact of OC control strategies,” and he cites quotes from other authors such as “the field of organized crime research, to say it modestly, suffers from ‘intellectual

¹¹⁴ *Ibid*, at 35.

¹¹⁵ Thomas Gabor. *Assessing the Effectiveness of Organized Crime Control Strategies: A Review of the Literature*. (Ottawa: Department of Justice, 2003). Also located at URL: <http://canada.justice.gc.ca/en/ps/rs/rep/2005/rr05-5/> (Last updated: 2005-10-22).

¹¹⁶ *Ibid*, at 3.

atrophy.’ Little is written that deserves our attention and that which is written often does not reflect reality.”¹¹⁷

Gabor explains that there are three different factors that one must take into account when examining the organized crime literature: definitional issues, data-related issues, and crude and varied performance measures.¹¹⁸ First, definitional issues are a problem because there is little consensus on the definition of organized crime (as was seen in the previous report that was looked at). In order to determine whether or not a program or initiative was successful, there must be some agreement on what is being examined. How can one measure something if one does not know what it is they are measuring? Second, with regards to data-related issues, Gabor explains that there is a dearth of standardized data on organized crime, which has resulted in scholars relying on other sources, some of which might be questionable. He explains that “some sources of information are likely to be self-serving and sensationalistic, while others are heavily biased in favour of a certain view of OC.”¹¹⁹ This might explain why the tragedy involving eleven-year-old Daniel Desrochers was mentioned so frequently throughout the parliamentary debates examined earlier. There was a lack of statistics on organized crime, and in order to push for a strict increase in police powers and harsher legislation to deal with organized crime, it would be necessary to portray organized crime in a wholly terrible light. This is not to say that organized crime is deserving of respect or sympathy, but this may help explain why the alien conspiracy theory can still be seen frequently in the discourse of law-makers.

¹¹⁷ *Ibid.* Citing M. Beare. *Criminal Conspiracies: Organized Crime in Canada*. (Toronto: Nelson Canada, 1996), at 35.

¹¹⁸ *Ibid.*, at 7.

¹¹⁹ *Ibid.*

Gabor himself touches upon this issue in his report. In the section dedicated to examining these data-related issues (and citing Beare, 1996¹²⁰), he explains that:

the reliability of information provided by law enforcement agencies have been the subject of considerable academic debate. These agencies have faced criticism that they have developed a fixed conception of OC. This conception is that of an 'alien conspiracy,' with OC viewed as being predatory and as corrupting society, while discounting the role of citizens who seek illicit goods and services, as well as officials who may colluded with criminal groups. Critics contend that police intelligence work and the interpretation of data generated is shaped by this conception.¹²¹

This quote is especially relevant since, as was seen earlier, the police in Canada have recommended a large number of additional categories for organized crime, all along ethnic lines.

The third and final category is crude and varied performance measures, which Gabor explains can provide problems for researchers. For example, body-count measures can be used to examine whether or not certain laws are successful (body-count measures include the number and nature of cases opened, arrests, prosecutions, and prison terms imposed) but in the case of organized crime these ignore the dark figure of crime (crimes not discovered or reported), counting individual cases provides no evidence of the overall situation that is occurring, and the nature of the offence has a bearing on the number of arrests (some crimes are easier to investigate and more arrests can be made).¹²²

Gabor concludes his report by saying that very little evaluative work, that is available to the public, has been done on organized crime, and that most of the work that does exist is American, and largely descriptive in nature.¹²³

¹²⁰ Beare, *supra* note 117, at 29-30.

¹²¹ Gabor, *supra* note 115, at 11.

¹²² *Ibid*, at 12.

¹²³ *Ibid*, at 60.

The third and final report I looked at on the issue of organized crime statistics was another Department of Justice Canada report (Research and Statistics Division and Evaluation Division), this one entitled “Pilot Study of Method to Review Closed Organized Crime Files.”¹²⁴ The purpose of this report was to examine the possibility of constructing a method whereby closed organized crime cases could be reviewed. By doing so, it was hoped that eventually this method could be applied to cases throughout all of Canada, and thus a pool of data could be amassed on issues involving organized crime cases (for example trends in offences, convictions rates, and sentencing). This report appears to be the first time such an endeavour has been undertaken, although there was another study undertaken in 1998 that sought to determine whether it would be feasible to use CASEVIEW (the Department of Justice’s electronic file management system) to identify potential organized crime files for further analysis.¹²⁵ This study appears to be building upon that one by applying the findings of that study (which concluded that the criteria created could in fact help locate and distinguish organized crime cases from others) to the Federal Prosecution Service (FPS). Utilizing a definition of organized crime quite similar to the *Criminal Code* definition, and specifying that any charges laid under C-24 and C-95 also be included, the authors were able to identify 324 people amongst the data files accused of offences relating to organized crime (ranging from 1997 to 2001).¹²⁶ These 324 accused accounted for a total of 1487 charges laid. Of these charges, 619 of them were laid under *Criminal Code* legislation (some of the others included the Controlled Drugs and Substances Act, Excise Tax Act, and the Income Tax

¹²⁴ Colin Meredith & Neil Chambers. *Pilot Study of Method to Review Closed Organized Crime Files*. (Ottawa: Department of Justice Canada, 2004).

¹²⁵ *Ibid*, at 3.

¹²⁶ *Ibid*, at 19.

Act), accounting for 41.6% of total charges (the most of any other Act). Among these charges, over thirty sections of the *Criminal Code* were noted, with the majority of charges (76% of them) being conspiracy charges laid under s.465(1), and the next most frequent charge (at 5%) being for firearms offences under s.92. As for offences laid under s.467.1, the Bill C-24 criminal organization offences, nine charges were laid in total.¹²⁷

Data Relating to the Use of Bill C-24

This last study from 2004 is very encouraging, as it shows that there are in fact some strides being made to collect data on organized crime and organized crime offences here in Canada. Unfortunately, as of right now, there has still not been much information made available to the public. For example, in the Sauvé report discussed earlier, the 2004 Statistics Canada report explains that:

In 2005, to address the lack of quantitative information on the involvement of organized crime in criminal incidents (i.e. extortion, homicide, drug trafficking), new data elements on organized crime activity and street gangs were added to the latest version of the incident-based crime survey (UCR2). In addition, new data elements were added to the UCR2 Survey on hate-motivated crime, cyber crime and geo-coding. Reliable and accurate data collection on current priorities in the justice field is important for police services, policy makers and the general public. Police services will gradually migrate to the new version of this survey as there records management systems are upgraded over time.¹²⁸

This information was not available in time for my project, and I have instead sought out and located whatever data was available relating to the use of Bill C-24 here in Canada. The reason I have done this is because the use of the legislation created by Bill C-24 is important to my work and also because I am interested in the question of whether or not

¹²⁷ *Ibid.*, at 20-21.

this legislation is in fact being used (and if so in what ways). What follows is the material currently available on Bill C-24.

To begin with, there is a technical report from late 2004 that seeks to collect together data tables on organized crime offences from the Canadian Centre for Justice Statistics (CCJS).¹²⁹ That data the CCJS collects come from a variety of surveys such as the UCR, the Homicide Survey, the Adult Criminal Court Survey (ACCS), the Youth Court Survey (YCS) and Adult Correctional Services (ACS). Although dealing with a myriad of organized crime offences, this document does contain one especially relevant table.¹³⁰

Table 1.7: Number of Cases Heard by ACCS With One or More 467.1 Charge by Outcome

Year	Total	Guilty	Acquitted	Withdrawn	Other
1997/98	9	2	0	7	0
1998/99	13	5	0	8	0
1999/00	60	16	0	44	0
2000/01	127	29	1	94	3
2001/02	82	38	0	29	15
2002/03	177	68	3	68	38

Section 467.1 of the *Criminal Code* contains the criminal organization offences, including participation in a criminal organization, commission of an offence for the benefit on a criminal organization, and instructing the commission of an organized crime offence (also known as the leadership offence). The years 1997-2001 involve the Bill C-

¹²⁸ Julie Sauvé, *supra* note 104, at 12, Text Box 4.

¹²⁹ Damir Kukec. "Working Data Tables: Available Statistics on Offences Related to Organized Crime Activities," *Criminal Justice Research Unit, Research and Statistics Division*. (Ottawa: Department of Justice Canada, 2004).

Please note this report contains 2 caveats from the author: 1. The data in the document is no longer current - it is updated as resources permit; and, 2. The document uses crime data that is identified in the literature as crime typically committed by criminal organizations. Except for the Criminal Organization Offences contained in the *Criminal Code*, we do not have any way of determining how many crimes are actually committed by criminal organizations in Canada.

95 offences, and 2002 covers the Bill C-24 offences. This table is very interesting, for example it shows that for the two years after the creation of the Bill C-95 participation offence (1997-1999), only 22 total cases were heard. It is also of note that out of these 22 cases, only 7 resulted in guilty verdicts, and 15 of the cases were withdrawn. The reason this is interesting is that throughout 1999 alone, there were many arrests made involving organized crime, including two major busts, one involving 32 Asian-based criminal organization participants and the other, 76 Outlaw Motorcycle gangs) criminal organization participants.¹³¹ It is possible this could be explained by the relative newness of the legislation, and most of those arrested were charged with conspiracy instead of the new offences. Indeed, the number of cases using the legislation does seem to go up as time goes on. The number of withdrawn cases is also quite large, for example as one can see, just as many people were convicted in 2002/03 as there were cases withdrawn. And in 2000/01, of the 127 cases heard, 94 were withdrawn (in other words 74% of cases heard that year under s.467.1 were withdrawn).

Another important aspect of Bill C-24 was the section dealing with police justification. As was explained in the previous chapter, during 2001 when Bill C-24 was being discussed and debated, then Chief Superintendent of the RCMP, Mr. R.G. Lesser, explained that police investigations had been crippled by the *R. v. Campbell* ruling, and that the police could commit no illegal acts whatsoever during the course of their activities.¹³² As a result of these comments, it would appear to be important to examine whether or not these justifications were in fact vital to the day-to-day operation of police

¹³⁰ *Ibid*, at 8.

¹³¹ CISC. *Annual Report on Organized Crime in Canada, 1999*. Also located at URL:

http://www.cisc.gc.ca/annual_reports/documents/1998_annual_report.pdf (Last visited January 25th, 2006).

¹³² Standing Committee on Justice and Human Rights, *supra* note 80.

forces throughout Canada. The following are a number of reports I was able to locate dealing with this exact issues.

In 2003, the Ontario Ministry of Community Safety and Correctional Services published a report on the previous year, which recounts the details and number of times the legislation at issue was used.¹³³ Pursuant to section 25.3 of the *Criminal Code* which requires such annual reports¹³⁴, this report covers all activity the police were involved in under s.25.1 to 25.4 which involve police justification for certain illegal acts committed during the course of investigations (as discussed in the previous chapter, certain acts such as violence and murder can never be justified under this section). These annual reports are required to report: how many times a senior officer made temporary designations, how many times a senior official authorized a public officer to commit an act or omission which constitutes an offence, how many times a public officer proceeded without such authorization due to exigent circumstance, and the nature of conduct being investigated in these instances.¹³⁵ So how often was the police justification section used in Ontario for the first year of its existence? The Ontario Ministry of Community Safety and Correctional Services reports that: “from February 1, 2002 to January, 2003, the police services in Ontario reported that no temporary designations of a public officer was done,” “For the period February 1, 2002 to January, 2003 police serviced in Ontario did not grant authorization to any public officer to commit a justified act or omission that would otherwise constitute an offence,” and finally “[f]or the period February 1, 2002 to

¹³³ Ontario Ministry of Community Safety and Correctional Services. *Annual Report on The Law Enforcement Justification Provisions – February 1, 2002 to January 31, 2003*. Also located at URL: www.mpss.jus.gov.on.ca/english/publications/policing_services/Bill_C-24_1st_report.pdf (last visited February 3rd, 2006).

¹³⁴ This is the only report for Ontario that is made available online through the Ontario Ministry of Community Safety and Correctional Services webpage, and no other years are made available: <http://www.mpss.jus.gov.on.ca/english/home/pubs.html> (last modified: September 30th, 2005).

January, 2003, police services in Ontario reported that no public officer proceed without a Senior Official's written authorization."¹³⁶ So after all the fanfare in the parliamentary debates, and the Chief Superintendent of the RCMP explaining that police investigations were crippled by the *R. v. Campbell* ruling, Canada's largest province did not use the new section even one time in its first year of operation.

British Columbia shows similar results throughout the years 2002 - 2004. In 2002, the British Columbia Ministry of Public Safety and Solicitor General reports that for the period of January 1, 2003 to December 31, 2003, no temporary Public Officer designation was made by a British Columbia police service, no senior official authorized a public officer to commit a justified act or omission, and no Public Officer proceeded without the authorization of a Senior Official.¹³⁷ British Columbia reports no such designations for 2003¹³⁸ nor for 2004.¹³⁹ Obviously the justification sections created by Bill C-24 were not vital for the province of British Columbia to investigate organized crime, nor any crime in general since it is not limited solely to organized crime investigations.

What about the RCMP though? Were they truly in dire need of this new legislation as the Chief Superintendent had described? In 2002, unlike the Ontario

¹³⁵ Ontario Ministry of Community Safety and Correctional Services, *supra* note 133, at 2.

¹³⁶ *Ibid*, at 4.

¹³⁷ BC Ministry of Public Safety and Solicitor General – Police Services Division. *Annual Report on the Law Enforcement Justification Provisions - January 1, 2002 to December 31, 2002*. Also located at URL: http://www.pssg.gov.bc.ca/police_services/publications/justification_provisions/2002report.pdf (Last visited: February 1st, 2006).

¹³⁸ BC Ministry of Public Safety and Solicitor General – Police Services Division. *Annual Report on the Law Enforcement Justification Provisions - January 1, 2003 to December 31, 2003*. Also located at URL: http://www.pssg.gov.bc.ca/police_services/publications/justification_provisions/2002report.pdf (Last visited: February 1st, 2006).

¹³⁹ BC Ministry of Public Safety and Solicitor General – Police Services Division. *Annual Report on the Law Enforcement Justification Provisions - January 1, 2004 to December 31, 2004*. Also located at URL: http://www.pssg.gov.bc.ca/police_services/publications/justification_provisions/2002report.pdf (Last visited: February 1st, 2006).

police, the RCMP did in fact use this new legislation. From February 1, 2002 to January 31, 2003, the RCMP reports that the senior official made two temporary designations, both related to an investigation involving alleged offences of assault, theft, mischief, and justified acts that would otherwise constitute offences under the *Radiocommunication Act*.

¹⁴⁰ The RCMP also reports that from February 1, 2002 to January 31, 2003, eleven authorizations were granted for directing another person to commit a justified act or omission that would constitute an offence.¹⁴¹ Five of these instances involved the investigation of the trafficking in fraudulent personal identification, another five involved investigations into the smuggling of contraband liquor and tobacco and false customs documents, and the final instance involved the investigation of a firearms offence. With regards to officers operating without prior consent from a senior officer, the RCMP reports that from February 1, 2002 to January 31, 2003, it reports that no Public Officers proceeded without the senior official's written authorization in these circumstances.¹⁴² So for all of 2002, the RCMP used the new legislation in 4 different investigations, and for a total of 13 people. One would assume based upon the Superintendent's words that this legislation would need to be invoked in a much larger number of investigations. If these 13 people had not received authorization, it seems doubtful that this void would have totally crippled the RCMP in their activities as per the warnings of Lesser described above.

¹⁴⁰ Public Safety and Emergency Preparedness Canada. *Annual Report on The Law Enforcement Justification Provisions – February 1, 2002 to January 31, 2003*. Also located at URL: http://ww2.psepc-sppcc.gc.ca/publications/policing/20030611_e.asp (Last modified: 2003-06-11).

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

What about other years? For 2003, the RCMP also produced an annual report.¹⁴³ In this report, they state that “from February 1, 2003 to January 31, 2004, the RCMP reports that the senior officials made no temporary designations.”¹⁴⁴ They go on to state that “from February 1, 2003 to January 31, 2004, the RCMP reports that six authorizations were granted, for directing another person to commit a justified act or omission that would otherwise constitute an offence.”¹⁴⁵ Two of these instances involved an investigation into fraudulent passports, two more involved an investigation into the smuggling and sale of contraband tobacco, in one instance the RCMP was investigating the alleged sale of counterfeit art, and the final instance involved an investigation into a drug distribution network. Finally, “from February 1, 2003 to January 31, 2004, the RCMP reports that no Public Officers proceeded without a senior official’s written authorization in these circumstances.”¹⁴⁶ So for all of 2003, this legislation was used by the RCMP 6 times in 4 different investigations. Was this the situation Lesser envisioned when he spoke before the Standing Committee of the importance of the proposed legislation? A mere eight investigations over a two year period?

Important Cases Involving Bill C-24

Let us now move on to some important cases involving Bill C-24, as that will also provide some insight into the uses of Bill C-24 since it has come into effect. Although, as seen, the statistics are lacking with regards to its usage, there have been a few

¹⁴³ Public Safety and Emergency Preparedness Canada. *Annual Report on The RCMP’s Use of the Law Enforcement Justification Provisions – February 1, 2003 to January 31, 2004*. Also located at URL: http://ww2.psepc-sppcc.gc.ca/publications/policing/law_enforce04_e.asp (Last modified: 2004-11-05).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

important and high profile cases involving the new organized crime legislation which should prove quite informative.

First, and arguably the most high profile case involving the new legislation is the case of *R. v. Lindsay*. Not only did this trial utilize the new legislation, but arising from a motion by the defence it also had the opportunity to deal with some of the constitutional issues surrounding Bill C-24. I will examine first the trial ruling upon the constitutionality of Bill C-24.¹⁴⁷ According to the preamble, the two accused in this case were charged with committing extortion for the benefit of, at the direction of, or in association with, a criminal organization, contrary to s.467.12 of the *Criminal Code* (the criminal organization at issue here was the Hells Angels). The defence argued that s.467.1, s. 467.12, and s.467.14 concerning membership in a criminal organization were of no force because they violated s.7 of the *Canadian Charter of Rights and Freedoms*. The preamble also explains that “this is the first court ruling upholding the constitutionality of the anti-gang provisions of the *Criminal Code*, as substantially broadened by parliament in 2002.”¹⁴⁸

The defence in this trial argued three key points. First, they argued that the definition of “criminal organization” created by Bill C-24 was overbroad, and as such, ss. 467.1 and 467.12 were unconstitutional on this basis.¹⁴⁹ The defence went on to say that although there is a legitimate state objective behind the legislation, the means to accomplish that objective are broader than necessary and, in addition, the definition of “criminal organization” does not include any requirement of a pattern of activity, nor is it

¹⁴⁷ *R. v. Lindsay* (2004) CarswellOnt 964, 182 C.C.C. (3d) 301, 20 C.R. (6th) 376, 10 O.R. (3d) 131, 117 C.R.R. (2d) 41.

¹⁴⁸ *Ibid*, under the section entitled “Annotation.”

¹⁴⁹ *Ibid*, at para 11.

limited to enterprise organizations, thus it captures too much in its net. Second, the defence argued that ss. 467.1 and 467.12 which contain the “in association with” offence is vague and unclear.¹⁵⁰ The definition does not distinguish when a person is in or out of a group, and it does not require active participation in an offence by those in a group. Third, the defence argues that there is a lack of necessity on the part of the prosecution to prove that the accused knew the identities of those who made up the group, had the intention of committing a crime in association with the group, or intended to commit an offence to further the interest of the group.¹⁵¹ Thus what we have is a criminal offence which lacks the minimum constitutionally required *mens rea*.¹⁵² In addition to these three main arguments, the defence also argued that s.467.14 (the consecutive sentencing provision) violates s.12 of the *Charter*, and that none of the breaches previously mentioned can be saved by s.1 of the *Charter*.¹⁵³

In response, the Crown in this trial argued that these sections of the *Criminal Code* are neither overbroad nor vague.¹⁵⁴ They stated that the threshold for overbreadth is high, that Parliament is allowed to enact legislation that is broad, that the legislation is not vague if it allows for judicial interpretation, it has sufficient *mens rea* (a connection between the offence and the criminal organization), and finally s.467.14 should not be considered at this time as it would be premature since sentencing has not yet occurred.

In her analysis of the issues, Justice Fuerst considers the origins of Bill C-24 and organized crime legislation in Canada. She touches upon Bill C-95, the UN Convention Against Transnational Organized Crime, and the various Standing Committees and

¹⁵⁰ *Ibid*, at para 12.

¹⁵¹ *Ibid*, at para 13.

¹⁵² *Ibid*.

¹⁵³ *Ibid*, at para 14.

parliamentary debates surrounding Bill C-24. She does this because, she explains, that legislative history may be admissible for the more general purpose of showing the mischief parliament was attempting to remedy with the legislation.¹⁵⁵ Citing *R. v. Heywood*,¹⁵⁶ Justice Fuerst explains what overbreadth means in a legal sense: “If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual’s rights will have been limited for no reason.”¹⁵⁷ Justice Fuerst does not find the legislation to be overbroad in this way. She explains that the courts have recognized before that group activity poses a particular danger to society in the case of conspiracy to commit crimes and that the legislation has made it clear that it is not just going after violent groups, but also groups in pursuit of economic crimes.¹⁵⁸ Also, she does not find that the legislation treads upon legitimate non-regulated or non-criminal conduct since it is expressly stated that one of the main purposes or activities of the group is the facilitation or commission of a “serious offence,” thus it is not merely a prohibition against group activity. Additionally, she finds that due to the wide range of activities engaged in by various criminal organizations, legislation such as Bill C-24 does not lend itself to the “particularization of a closed list of offences.”¹⁵⁹

With regards to vagueness, Justice Fuerst explains that the legal test is that “a legislation provision will be unconstitutionally vague where it does not provide an adequate basis for legal debate.”¹⁶⁰ She does not find that the term “criminal

¹⁵⁴ *Ibid*, at para 16, 17, 18.

¹⁵⁵ *Ibid*, at 22.

¹⁵⁶ *R. v. Heywood* (1994), 34 C.R. (4th) 133, 94 C.C.C. (3d) 481, 1994 CarswellBC 1247 (S.C.C).

¹⁵⁷ *R. v. Lindsay* (2004), *supra* note 147, at para 35.

¹⁵⁸ *Ibid*, at 43.

¹⁵⁹ *Ibid*, at para 44.

¹⁶⁰ *Ibid*, at para 51.

organization” is vague because the components of the term are set out in the legislation, and include a minimum number of people (also, the fact parliament could have set the minimum number of people higher than three does not render the term vague) and a common objective that is a main purpose or activity.¹⁶¹ Justice Fuerst also does not find the term “in association with” to be vague because when combined with the Oxford Dictionary definition of “association,” it merely means that the accused criminal commit an offence in connection with the criminal organization.¹⁶²

With regards to the *mens rea* defence, Justice Fuerst believes that *mens rea* is sufficient because the prosecutor will be required to prove it for the particular predicated offence involved, and that the accused acted for the benefit of, at the direction of, or in association with a criminal organization.¹⁶³ The Justice also dismissed the argument involving the consecutive sentencing because she agreed with the Crown that s. 467.14 will only arise once the accused is convicted, thus it would be premature to deal with the issue at this time.

Thus Bill C-24 survived its first constitutional challenge. Issues of vagueness and overbreadth were raised in the parliamentary debates and at the Standing Committee by the CCLA and Alan Borovoy, but it appears the courts have decided that these particular aspects of the legislation do not result in it being unconstitutional. This ruling did not arrive without some controversy though. Contained within the “Annotation” section of the case, Don Stuart (Faculty of the Law at Queen’s University) explains some of the issues surrounding the judge’s decision. First, the judge referred to a Parliamentary Subcommittee without mentioning that it was held *in camera* and dissenting opinions of

¹⁶¹ *Ibid*, at para 56, 57.

¹⁶² *Ibid*, at para 59.

witnesses were never published. Second, Justice Fuerst seemed to place organized crime offences in “the rare category of offences in which principles of fundamental justice under section 7 of the *Charter* require subjective *mens rea* given the stigma and penalty imposed.”¹⁶⁴ Stuart went on to explain that although they apparently survived a *Charter* challenge this time around, that “will not resolve questions of their necessity, wisdom, and fairness. On the issue of complexity alone recent collapses of gangsterism trials in Winnipeg, Edmonton and Montreal are grounds for concern.”¹⁶⁵

Having survived the *Charter* challenge, *R. v. Lindsay* was free to go to trial, and eventually the case was decided on June 30th, 2005.¹⁶⁶ This case involved two Hells Angels who were seeking to extort money from a man who was designing and selling devices to intercept satellite television signals. The man in question had come into contact with Lindsay and Bonner (the two Hells Angels members) through a third party who had sold the two of them devices purchased from this man. Due to the nature of technology, and the constant efforts of satellite companies, the machines Lindsay and Bonner apparently purchased had depreciated in value, or had stopped working all together. These two men then went with the third party to the man’s house, where they demanded \$75,000. Both men wore Hells Angels jackets to the man’s house, and they were noticed when they turned around to leave. The threatened man called the police, who eventually arrested Lindsay and Bonner after the initial man agreed to wear a wiretap to a meeting with Lindsay and Bonner at a restaurant to discuss the payment of the money.

¹⁶³ *Ibid*, at para 64.

¹⁶⁴ *Ibid*, in the section entitled “Annotation” in the preamble.

¹⁶⁵ *Ibid*.

¹⁶⁶ *R. v. Lindsay* (2005) CanLII 24240 (ON S.C.)

Both men were found guilty of extortion¹⁶⁷, but what is more interesting to this project is that both men were also charged under s. 467 with committing said extortion for the benefit of, at the direction of, or in association with a criminal organization. Justice Fuerst spends the final 173 of the case's total 220 pages addressing this issue. She explains that in support of the charge under s.467.12(1), the Crown relied primarily on the viva voce evidence of five witnesses, four of whom were qualified to give expert evidence, a large quantity of documents, some submitted in their own right and some submitted for the limited purpose of showing the basis for the experts' opinions.¹⁶⁸ Witnesses included Jacques Lemieux of the RCMP, Pierre Boucher (sergeant with the Sûreté du Québec), Benoit Roberge (Montreal City Police, Guy Ouellette (retired former member of the Sûreté du Québec), and Dr. Howard Abadinsky (professor at St. John's University in New York, and an academic authority on organized crime). Each witness testified as to the nature and scope of the Hell Angels. Jacques Lemieux, for example, explained the significant of the Hells Angels' jacket, and that there is a lengthy membership process involved before one is deemed a member of sufficient standing to don the full jacket.¹⁶⁹ Benoit Roberge discussed the activities of the Hells Angels in and around Montreal, and stated that one of their main activities is the sale of narcotics, and that they tend to use violence as a tool to manage their business. In Roberge's opinion, the main purpose of the Hells Angels is to commit offences leading to material benefit.¹⁷⁰ Dr. Abadinsky introduced what he considers to be eight common characteristics of criminal organizations. He then applied these characteristics to the Hells Angels, and

¹⁶⁷ *Ibid*, at para 185.

¹⁶⁸ *Ibid*, at para 186.

¹⁶⁹ *Ibid*, at para 240, 266.

¹⁷⁰ *Ibid*, at para 614.

concluded that in his opinion, the Hell Angels are a criminal organization and they have as one of their primary purposes the acquisition of material benefit.¹⁷¹

From the testimony and the evidence before her, Justice Fuerst found that the Hells Angels are in fact a criminal organization as they exist in Canada, and that by wearing their jackets to the man's home, Lindsay and Bonner presented themselves not as individuals (as was argued by the defence), but as members of a group with a reputation for violence and intimidation.¹⁷² She went on to say: "they deliberately invoked their membership in the HAMC with the intent to inspire fear in their victim. They committed extortion with the intent to do so in association with a criminal organization, the HAMC to which they belonged."¹⁷³ As a result, Lindsay and Bonner were both convicted under the association offence.

R. v. Lindsay appears to be almost the perfect example of the Bill C-24 legislation in action. Here we have two bikers who committed an offence while wearing their full colours, and thus the court had little choice, based on this evidence, than to find them guilty of committing extortion in association with this criminal organization. This presents some interesting questions though. What if Lindsay and Bonner had not been wearing their full colours, and had instead been wearing street clothes? What if Lindsay and Bonner were not members of an internationally known and infamous criminal organization like the Hells Angels, but instead a less well-known group like the Big Circle Boys of BC (an Asian-based OC group); would there have been as much testimony and expert evidence? These sorts of questions may eventually be answered through the continued use of Bill C-24 legislation.

¹⁷¹ *Ibid.*, at para 854-883.

¹⁷² *Ibid.*, at para 1085.

One interesting case in this regard is *R. v. Sbrolla*.¹⁷⁴ This case did not involve a large multinational criminal organization like the Hells Angels, it involved only five men and a small business in Richmond Hill, Ontario. What occurred in this case was that the two accused, Mark Huynh and John Anthony Sbrolla, along with three other men, purchased lumber from a number of businesses under the guise of one of the men's employer Bancroft Lumber and Flooring Supplies, then turned around and sold the lumber at a much lower price. They made the initial lumber purchases with a number of fraudulent checks, and the funds were then laundered by one of the men who had a background in banking. Huynh and Sbrolla pleaded guilty to over forty counts of fraud (one for each business they defrauded) contrary to s. 380(1) of the *Criminal Code*. What makes this case interesting is that they were also charged under (1) s.467.1, participating in the activities of a criminal organization, and (2) s.462.31, laundering the proceeds of crime.¹⁷⁵ They both pleaded guilty to these additional charges. Due to the financial nature of their crimes, however the court also ordered that these offenders pay back \$40,000 (Huynh) and \$130,000 (Sbrolla) in restitution.¹⁷⁶ The Crown also utilized a forfeiture order under ss. 462.37(1) and 462.38 of the *Criminal Code* to seize property as proceeds of crime. This property included a bank draft worth \$22,000, about \$1,400 in cash, and some computer equipment.¹⁷⁷ Another interesting aspect of the sentence is how much time they were ordered to serve on the participation offence. Both Huynh and Sbrolla received a 1-day sentence on the charge, which the judge referred to it as a

¹⁷³ *Ibid*, at para 1088.

¹⁷⁴ *R. v. Sbrolla* (2003) CarswellOnt 6186, 2003 WL 23426433 (Ont. S.C.J.).

¹⁷⁵ *Ibid*, at para 4,5.

¹⁷⁶ *Ibid*, at para 39, 42.

¹⁷⁷ *Ibid*, at para 26.

“nominal symbolic duration” due to the nature of offence and the fact they pleaded guilty to the charges.¹⁷⁸

R. v. Sbrolla provides a nice contrast the *R. v. Lindsay*. Both cases involve the use of the organized crime legislation, but both involve very different crimes and different facts. It is encouraging for the future of the legislation that it is able to deal with two different ends of the crime spectrum. On one side there is the Hells Angels, a large, violent, multinational criminal organization, and on the other are a small group of five people who got together to commit a series a frauds involving the lumber industry. The nature of both groups is very different, but both can be caught under this legislation.

However, it has not been all smooth sailing for Bill C-24 since its inception. Although *R. v. Lindsay* upheld the constitutionality of certain sections of the bill, a recent case has struck down one of its sections. Section 467.13, the leadership offence, and the offence carrying the most severe penalty (life imprisonment) was recently successfully challenged and overturned in the British Colombia case of *R. v. Accused No. 1 et. al.* (also referred to as *R. v. Accused No. 1 and Accused No. 2*)¹⁷⁹ In this case, it is alleged that Accused No. 1, assisted by Accused No. 2, “ran a high volume drug-trafficking operation from a pub in a Vancouver hotel and used violence and intimidation to ensure the necessary cooperation of other people.”¹⁸⁰ It was alleged that Accused No. 1 was the leader, and thus he was charged under s. 467.13 which was created by Bill C-24. The defence argued that the legislation involved is vague, overbroad, and unconstitutional. First, they argued that s. 467.13 as it incorporates the definition of “criminal

¹⁷⁸ *Ibid*, at para 39, 42.

¹⁷⁹ *R. v. Accused No. 1 et. al.* (2005) BCSC 1727. Please note: this version of the case, issued on Dec. 8 2005, removes reference to information identifying the accused persons to comply with the ruling issued Dec. 12, 2005.

organization” in s. 467.1(1) is “vague and overbroad because it fails to properly describe the area of risk citizens face and exposes them to very serious potential consequences in situations that extend far beyond those Parliament intended to address when it enacted the offence.”¹⁸¹ Second, the defence argued that “the provision infringes the right to freedom of association guaranteed by s. 2(d) of the *Charter* largely because through their excessive breadth they allow for the introduction of the most damaging evidence of bad character and encourage a reasoning process that derives guilt from association.”¹⁸² Third, the defence’s final position was that “the provisions in their practical application violate an accused person’s fair trial rights as guaranteed by ss. 7 and 11(d) of the *Charter* because they allow for the introduction of the most damaging evidence of bad character and encourage a reasoning process that derives guilt from association.”¹⁸³ The defence also initially challenged the constitutionality of the s. 467.14, the section detailing that criminal organization offences be served consecutively with other sentences, but by agreement it was adjourned.¹⁸⁴ Justice H. Holmes concluded that s.467.13 as it incorporates the s.467.1 definition is vague and that the challenge thus succeeded, however for this reason, she therefore concluded that the other issues and challenges were unnecessary to consider.¹⁸⁵

This case is only the second time (the first being *R. v. Lindsay*) the constitutionality of the Bill C-24 legislation has being examined,¹⁸⁶ and already one of its sections has been rendered of no effect and force. Justice H. Holmes came to this

¹⁸⁰ *Ibid*, at para 8.

¹⁸¹ *Ibid*, at para 2.

¹⁸² *Ibid*, at para 3.

¹⁸³ *Ibid*, at para 4.

¹⁸⁴ *Ibid*, at para 21.

¹⁸⁵ *Ibid*, at para 6,7.

¹⁸⁶ *Ibid*, at para 23.

conclusion for the following reasons. First, “the instructing person’s position of authority may be unrelated to the ‘group’ which is the criminal organization,” and “the person in question may be in position to give an instruction to the recipient for a reason unrelated to the existence of the criminal organization ‘group’ in question.”¹⁸⁷ Additionally, the instruction need not be given to another member of the criminal organization; it can be given to ‘any person,’ and the instruction need not even be given to a particular person as stated in s.467.13(2)(b). Second, s.467.13 clearly contemplates that the instructed may commit an offence in close connection with the criminal organization without being a member.¹⁸⁸ Third and finally, the offence instructed need not be a serious offence as set out in s.467.1.¹⁸⁹ In fact, the way it is worded, it need not even be an indictable offence, any offence under any federal statute, even a regulatory one would qualify. Later in her decision, Justice H. Holmes goes on to explain that s.467.13 requires that the accused be one of the people who makes up the criminal organization, thus there is an obligation to define “criminal organization” in a fashion that enables a person to determine whether or not he or she is one of those people and which provides guidance as to that question to law enforcement officials.¹⁹⁰ Section 467.13 as it incorporates the definition of criminal organization does not do so and an area of risk arises only from the inherent and unconstrained meaning of “group, however organized” which is so vague as to constitute no meaningful guidance at all.¹⁹¹ Therefore, it is not only vague, but almost unbounded and thus also overbroad.

¹⁸⁷ *Ibid*, at para 96.

¹⁸⁸ *Ibid*, at para 97.

¹⁸⁹ *Ibid*, at para 98.

¹⁹⁰ *Ibid*, at para 129.

¹⁹¹ *Ibid*, at para 130.

This decision is obviously a setback for Bill C-24 and its use in Canadian courts. The leadership offence was one of the three new offences dealing with participation in a criminal organization, and it has now been deemed vague and thus of no force in British Columbia. Bill C-95 survived 3 constitutional challenges¹⁹², so the fact Bill C-24 has now failed only the second challenge brought against it does not bode well.

Conclusion

Although some statistics and data on the state of organized crime in Canada are available, there is not a lot of readily available information on the enforcement of the C-24 legislation for examination. The articles referred to above lament the lack of such data and/or recommend how such data might be collected in the future. Hopefully over the next few years, the government will begin to take notice of this deficiency and seriously attempt to rectify it. The upcoming UCR2 should be a good start in addressing this issue.

The case history of the section 467 criminal offences also appears to present quite a mixed bag. In *R. v. Lindsay* we have the example of two bikers convicted of a criminal organization offence, and the defeat of a constitutional challenge brought against the relevant sections. In *R. v. Accused No. 1 et. al.*, the British Columbia court struck down the leadership offence which was brought against a drug dealer who frequented a particular bar. In *R. v. Sbrolla*, two men were convicted of criminal organization offences yet they were clearly not organized crime in the traditional sense of the term. They were not members of the mafia, or triads, or a biker gang, and yet the criminal organization offences were enforced against them.

¹⁹² *Ibid*, at para 18.

Its recent passing, the lack of data, and the short and mixed case history make it very difficult to predict the future of organized crime legislation and enforcement in Canada. It is too new, it has only been challenged twice on a constitutional basis, and both those cases were dealing with different offences and were at the lower court level. It remains to be seen how these cases, should they be appealed, are dealt with by the Supreme Court. In the meantime, however, Canada's neighbours to the south have been combating organized crime through focused legislation for thirty-five years, and should be a fruitful source of information for examining trends in organized crime legislation and enforcement. The United States may provide us a window to view the possible future directions of our own fight against organized crime.

Chapter 4: The American Experience with Combating Organized Crime

Introduction

In 1970, the United States made a major effort to combat organized crime when Congress passed the Organized Crime Control Act, of which Title IX, the Racketeer Influenced Corrupt Organizations, is the most famous section. RICO, as it is most commonly referred to, was Congress' most concerted attempt to combat organized crime. The United States had had a long history of high-profile organized crime activity, much more so than in the case of Canada. In this chapter, I begin with an overview of the history of organized crime in the United States; this overview includes a look at some of the more famous events, including the gang-rule of New York, prohibition, the Kefauver committee, and the McClellan committee. Following that, I turn my attention to the creation of the OCCA and then end this chapter by focusing on RICO itself.

The History of Organized Crime in the United States

Organized crime is not a new phenomenon in America. For example, as early as the turn of the 19th century, New York was a hotbed for criminal activity and by the mid-1800s there were a number of prominent gangs ruling over just about every aspect of criminal behaviour in that city. This period is featured prominently in Martin Scorsese's film "Gangs of New York" from 2002. Gangs with colourful names such as the Plug Uglies, the Dead Rabbits, and the Roach Guard may sound like Hollywood invention, but these gangs actually existed and did in fact rule over the Five Points district of New York.¹⁹³ Criminals learned quickly that in order to survive they would have to join up or

¹⁹³ Kenney and Finckenaer, *supra* note 5, at 75.

form their own gangs. Using violence and corruption these gangs robbed, murdered, and ran all illegal activities within this notorious region of the city. This period also saw the rise of William M. Tweed to power. Tweed ran Tammany Hall, the notorious political party which whole in charge of the city engaged in a number of criminal activities such as kickback schemes, cooperation with many of the gangs of that period, and defrauding tax payers. One of Tweed's more infamous scams involved the new county courthouse, which began construction in 1858 and was budgeted at \$250,000. The courthouse was still not completed by 1871 and by that point it had cost taxpayers nearly \$13 million, most of which was not actually spent on the courthouse but pocketed by Tweed (for example, so much money was spent on chairs for the courthouse that if they had actually existed they would have stretched seventeen miles from end to end).¹⁹⁴ Throughout the 1800s, New York was a hotbed for criminal gang activity. It is important to note that New York was not the only city where large amounts of gang activity were present. Cities such as Chicago and many of the cities in the Midwestern United States were embroiled in similar situations.¹⁹⁵

This period also saw the mass immigration of various people and cultures from other countries to the United States. New York, for example, saw a large amount of mass immigration because it was a popular destination and also it was one of the busier ports on the east coast. Many migrants remained and settled in New York, but some also migrated to other towns and cities. From the period of the mid-1800s to the 1920s, the

¹⁹⁴ *Ibid*, at 84, quoting Browning, F. & Gerassi, J. *The American Way of Crime*. (New York: G.P. Putnam & Sons, 1980) at 294.

¹⁹⁵ *Ibid*, at 141.

United States received approximately 26 million immigrants.¹⁹⁶ Xenophobia was common in America during this period, and foreigners were consistently blamed for societal ills such as overcrowding, disease, joblessness, poverty, as well as crime. Politicians and those in the public eye were quick to blame immigrants for these problems, and scapegoat explanations were commonly accepted by the people of America.¹⁹⁷ People of Italian, Irish, or Jewish descent were commonly held responsible for societal problems, and gangs composed of these ethnic groups tended to be singled out as especially violent and devious. This problem was exacerbated because people of similar cultures tended to group together in the same regions to preserve their culture and traditions, increasing the dynamic of separateness. By the 1880s, people of Italian-descent were the largest ethnic group arriving in America, and they were met with violence and abuse.¹⁹⁸ Rather than condemning these attacks, politicians and police were quick to excuse these attacks, explaining that Italians were violent (prone to using sawed-off guns and stilettos), treacherous, vengeful, and many were said to belong to secret organizations of assassins.¹⁹⁹

Another big moment in American organized crime history was the Prohibition era. In 1920, under the Volstead Act, the United States enacted national prohibition on the sale and production of alcohol through a constitutional amendment. Gangs were quick to fill the demand for liquor that arose during this era. Actually, gangs were anticipating the Volstead Act, and there were hundreds of large-scale liquor thefts in the

¹⁹⁶ Michael Woodiwiss. *Organized Crime and American Power: A History*. (Toronto: University of Toronto Press, 2001) at 69.

¹⁹⁷ *Ibid.*, at 94.

¹⁹⁸ *Ibid.*, at 97.

¹⁹⁹ *Ibid.*

weeks leading up to the Act's passing.²⁰⁰ This era was important in the history of organized crime because it led to the nationalization of distribution and to the proliferation of groups involved in the distribution process.²⁰¹ In order to succeed in bootlegging, criminal groups had to develop networks between those who were manufacturing the alcohol, those who were smuggling it, and those who were selling it. Groups also had to pay off the police and authorities to ensure they were not arrested for these activities; they also had to frequently engage in violence against the police and also against rival gangs to maintain their business. Smaller groups could not keep up, thus larger gangs thrived and, additionally, smaller groups joined together to create larger groups. Due to the variety of activities required, these gangs also had to adapt and evolve the way they did business. For example, they had to develop cross-state, sometimes cross-country, smuggling routes. They had to hide and store vast sums of money. Also, the clientele had shifted to middle and upper-class people who were now the ones who could afford the drastically increased price of liquor during this period. Al Capone is probably the most famous figure from this era. Prohibition lasted until the early 1930s, but by then many gangs had assimilated the techniques and technologies required for bootlegging, and maintained these connections and practices in their other activities (i.e.: illegal drugs).

The next major milestone in the history of organized crime in the United States was a Senate committee in 1950-51 ran by Senator Estes Kefauver. This committee sought to examine organized crime, and examine questions such as whether a nationwide syndicate existed, and if so, who were the people of which it was composed. The

²⁰⁰ Kenney and Finckenaer, *supra* note 5, at 151.

committee televised its meetings and investigation so the public could follow along from the comfort of their own homes. Kenney and Finckenauer describe the theatrics involved in the televised meetings as “the confrontation between good and evil.”²⁰² On one side you had the small southern senator, and on the other side you had

evil personified by a bunch of swarthy Italians and Sicilians named Costello, Adonis, Moretti, Luciano, Genovese, Profaci, and Anastasia, and some Jewish hoodlums named Longie Zwillman and Meyer Lansky. White anglo-saxon, protestant, middle America was going to the mat with some dark-skinned foreigners who had brought an evil conspiracy to our shores.²⁰³

Frank Costello was an especially interesting witness since he refused to have his face shown on camera, so the camera was constantly fixed on his hands throughout his testimony.

The Kefauver committee is important in organized crime history because it is the moment when organized crime and the mafia became synonymous in policy and public consciousness. The committee heard from eight hundred witnesses and in the end it reached four conclusions:

- 1) There is a Nationwide crime syndicate known as the Mafia, whose tentacles are found in many large cities. It has international ramifications, which appear most clearly in connection with the narcotics traffic.
- 2) Its leaders are usually found in control of the most lucrative rackets in their cities.
- 3) There are indications of a centralized direction and control of these rackets, but leadership appears to be in a group rather than in a single individual.
- 4) The Mafia is the cement that helps bind the Costello-Adonis-Lansky syndicate of New York and the Accardo-Guzik-Fischetti syndicate of Chicago as well as smaller criminal gangs and individual criminals throughout the country. These groups have kept in touch with Luciano since his deportation from this country.²⁰⁴

²⁰¹ Frederick D. Homer. *Guns and Garlic: Myths and Realities of Organized Crime*. (Indiana: Purdue University Studies, 1974), at 34.

²⁰² Kenney and Finckenauer, *supra* note 5, at 234.

²⁰³ *Ibid.*

²⁰⁴ Cressey, *supra* note 6, at 56-57.

The committee also explained that the Mafia was based on muscle and murder, and that it was a secret conspiracy against law and order which would eliminate any seeking to expose its secrets and which would use any means available (murder, bribes, political influence) to prevent law enforcement from touching its top figures or disrupting its operations.²⁰⁵

The Kefauver committee formally brought organized crime to the public's attention, gave it a face (an Italian face), gave it a name (the Mafia), gave it scope (nationwide), and explained its purpose (to infiltrate America). This committee seems to have incorporated earlier notions of gangs and xenophobia into one catchall term known as the Mafia. This committee also provides the ideal description of the alien conspiracy theory of organized crime. The story presented was that some Italian immigrants (especially from the Sicilian region) brought over certain ways of life and cultural traits, such as secrecy and violence that were conducive to criminal life in America.²⁰⁶ Once in the United States, these people used conspiracy, infiltration, and corruption to construct a nationwide syndicate of criminals who had the intention of taking over the government as they had done in their native land. This was the view of organized crime that came to dominate the public consciousness, and was also supported by Harry J. Anslinger, head of the Federal Bureau of Narcotics, who sought to promote the notion that the Mafia controlled the worldwide drug trade and the core of organized crime in America.²⁰⁷ The Kefauver committee also produced twenty-two recommendations for improving the

²⁰⁵ Woodiwiss, *supra* note 196, at 247. Quoting United States Congress. *Senate Special Committee to Investigate Crime in Interstate Commerce (hereafter called the Kefauver committee)*, 82nd Congress, Third Interim Report, Washington, DC, 1951, 147-150.

²⁰⁶ Cressey, *supra* note 6, at 8-9.

²⁰⁷ Woodiwiss, *supra* note 196, at 248.

ability to combat organized crime, and especially interstate commerce.²⁰⁸ These included a federal commission to deal with organized crime, tougher anti-gambling regulations, measures dealing with immigration and deportation, however none of these recommendations caught on and none of them were accepted.

This view of organized crime remained popular throughout the 1950s, and was once again strengthened in the public consciousness in the 1960s by then attorney general Robert Kennedy and his public fight against gambling and organized crime. Kennedy spoke out constantly in the media about the evils of gambling and blamed organized crime for its proliferations throughout America. Author Michael Woodiwiss proposes the notion that “Kennedy and other influential members of the law enforcement community felt that more laws and more police manpower were required to combat organized crime and therefore they needed to add some credibility to Mafia mythology.”²⁰⁹

In 1963, another Senate Committee was convened with the support of Robert Kennedy. Chaired by Senator John L. McClellan, this meeting was different from previous committee meetings on organized crime because it had a willing organized crime participant: Joseph Valachi. Valachi, who had worked for the Vito Genovese crime family, agreed to talk about the inner workings of the mafia in exchange for a lighter sentence after killing a man in prison (who he believed was sent by Genovese to kill him). Once again the hearing was televised, and Valachi was the star attraction of the show. Furthering Woodiwiss’s theory that the committee was created to drum up public support, Kenney and Finckenauer explain that by that point, Valachi had already been talking with the FBI for a year so the law enforcement value of his testimony was pretty

²⁰⁸ *Ibid*, at 247.

²⁰⁹ *Ibid*, at 259.

much exhausted.²¹⁰ Valachi never actually used the term “mafia,” but instead referred to “La Cosa Nostra” as the name of the organization for which he had worked.²¹¹ He described an organization, which involved secret initiation ceremonies, oaths of silence, and the possibility of death if one were to share its secrets. He also described the Castellamarese War, which was the supposed take over and unification of most of the important criminal organization in America into one large super-entity.²¹² The Cosa Nostra supposedly displaced Irish and Jewish gangs throughout the United States, thus establishing the Italians as a dominant and nationwide syndicate.

After the testimony, Robert Kennedy remarked that it represented a significant intelligence breakthrough, which allowed the Department of Justice to prove conclusively the existence of the nationwide organization known as Cosa Nostra.²¹³ This hearing was important for the government in order to prove the extent of organized crime. In Valachi’s testimony, they had an actual eye-witness account of the existence and activities of the mafia, aka La Cosa Nostra, and by televising the hearings, so did the rest of America.

The Organized Crime Control Act

This long history of organized crime activity in the United States eventually led to legislative attempts to combat this form of crime. Organized crime in America was portrayed, as seen above, in an especially dangerous light because it was believed the mafia was trying to take over the United States one crime at a time. In 1970, America

²¹⁰ Kenney and Finckenauer, *supra* note 5, at 237.

²¹¹ Woodiwiss, *supra* note 196, at 259.

²¹² Kenney and Finckenauer, *supra* note 5, at 243.

²¹³ *Ibid*, at 238.

responded to organized crime with the creation of the Organized Crime Control Act (OCCA).²¹⁴ The purpose of this Act was as follows:

To seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.²¹⁵

This act consisted of ten sections seeking to amend certain laws, as well as to create new offences and new mechanisms in order to better fight organized crime.²¹⁶

Title I of the act increased the autonomy and powers of federal grand juries. Such grand juries are composed of lay people in the belief that lay people will present a better cross-section of the public than those trained in the legal profession. These grand juries are in fact official bodies of the court. Title II established a general immunity statute for witnesses in any federal court, grand jury, administrative or congressional proceeding in any kind of case. Title III provided that any witness in any court or grand jury who refused to testify could be summarily confined by the court without a jury trial until they were willing to testify. Title IV created a new offence to punish if someone who willingly lies to any court or grand jury. Although perjury already existed, it sought to create a new offence free from the common law rulings of perjury and to increase the penalties for such conduct. Title V was designed to create special government housing facilities for the protection of witnesses in important trials. Title VI provided for the taking of depositions from a witness, for both the defence and the prosecution, and the submission of those depositions into evidence whenever that witness was unavailable

²¹⁴ The Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (Oct. 15, 1970).

²¹⁵ Kenney and Finckenaue , *supra* note 5, at 319, quoting *Congressional Record*, 116th Cong., 1970:602. See also 18 U.S.C. § 1961 (1976).

²¹⁶ Organized Crime Control. *Hearing before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives*. 91st Congress, 2nd Session, on s.30 and related proposals (1970). May-August,

(including being physically unavailable, or even dead). This would enable prosecutors to better protect their witnesses, or in the event of their being killed before the trial, the introduction into evidence of their statements. Title VII allowed for the use of any type of evidence against the defendant, including evidence acquired illegally by the police, as long as five years had passed since that evidence was initially acquired. This title would prevent the challenge of such evidence on constitutional grounds. Title VIII made it a federal offence to engage in an illegal gambling business, and/or to scheme to obstruct criminal laws with the intent to participate in or facilitate such a business. Title IX is the most famous section of the Organized Crime Control Act and is entitled “Racketeer Influences And Corrupt Organizations” (a.k.a. RICO). This section will be examined in greater detail below, but for now it should be noted that this section made it unlawful for any person to make money off a pattern of racketeering activity which disrupts interstate or international commerce. Also, it allowed for civil as well as criminal penalties for this form of offence. Title X created a new form of offender, the “special offender” who could be sentenced to up to thirty years in prison for what was considered habitual offending (two or more offences prior) or if a substantial portion of that person’s income was derived from criminal activities (in which case the offender was referred to as a “professional criminal”²¹⁷).

At the committee meetings on the Organized Crime Control Act, there were a number of objections to this new effort to combat organized crime. A number of high profile witnesses came forward to present arguments against it, including Sheldon Elsen of the Association of the Bar of the City of New York (accompanied by Robert J.

Serial No. 27, at 491-504. This section of the report provides interesting commentaries on these various Titles.

Geniesse), Selma W. Samols of the Women's International League for Peace and Freedom, Edward I. Koch a congressman from New York, and Lawrence Speiser of the American Civil Liberties Union.²¹⁸

The Bar Association of New York was concerned that many sections of the bill were not designed to go after only organized crime and that it swept far beyond the field of organized crime (specifically Titles I, III, VI, and VII).²¹⁹ In fact they referred to the bill as “Kafkaesque,” because, for example, a person could be held for three years for civil contempt with no trial and no bail, a person would be prevented from raising challenges against evidence used against them even if it had previously been rendered unconstitutional (as long as five years had passed), and once convicted could face up to thirty years in jail for something such as multiple marijuana offences.²²⁰ The Bar Association was also concerned with the RICO section (Title IX) of the Act. Although they considered it “an innovative and imaginative approach to the growing problem of organized crime’s infiltration of legitimate business” they argued that “Title IX should not be enacted in its present form but should be subjected to further analysis and revision.”²²¹ Sheldon Elsen explained to the committee that the Bar Association found RICO to be too broad.²²² Mr. Elsen and the Bar Association were especially concerned with the “special offender” (Title X) section of the OCCA. Their concerns stemmed from the fact it was not limited to organized crime (and was applicable to any criminal

²¹⁷ *Ibid*, at 296.

²¹⁸ *Ibid*, at 291-337, 344-375, 461-464, 469-472, and 490-508.

²¹⁹ *Ibid*, at 294.

²²⁰ *Ibid*, at 296.

²²¹ *Ibid*, at 327.

²²² *Ibid*, at 370.

who fit the criteria), and believed that all it did was possibly offer “hanging judges” even greater penalties to apply to criminals.²²³

Selma W. Samols and the Women’s International League for Peace and Freedom also had reservations about the OCCA. In a statement to the committee, Samols explained that although organized crime was a menace to society, a menace to the American way of life, and must be controlled, only two of the Titles actually addressed organized crime.²²⁴ Samols also raised the issue that these repressive measures would most likely target the poor, the underprivileged, and black people, and that the bill destroyed the constitutional rights of the offenders.²²⁵ Additionally, she was also concerned that because it targeted everyone, it will target a good deal of criminals who could not afford proper counsel against the charges. She explained that “[t]he Mafia has millions of dollars to spend on legal fees. They can test the constitutionality of any section of this legislation just by means of taking it up to the Supreme Court bit by bit.”²²⁶ The Mafia might have the means to do this (according to Samols), but regular criminals do not, so in the mean time while the Mafia was challenging this Act there might be hundreds or thousands of people confined to jail who could not.

Edward I. Koch, a Representative in Congress from New York, objected to the Act on the grounds that he felt it violated the rights of average citizens, and that the rights of criminals were the same as the rights of citizens, so if you remove the rights of one you end up removing the rights of the other.²²⁷ Koch also believed that by looking at the history of organized crime, one will see that organized crime is “institutionalized,” and

²²³ *Ibid*, at 332.

²²⁴ *Ibid*, at 461.

²²⁵ *Ibid*, at 462.

²²⁶ *Ibid*, at 464.

that measures designed to imprison and punish would not be very effective at combating organized crime. The imprisonment of Vito Genovese, the deportation of Charles “Lucky” Luciano, and the severe measures undertaken against organized criminals by Benito Mussolini in Italy (Koch is describing organized crime as synonymous with the Mafia), have shown that organized crime still survived and was still going strong. In Koch’s opinion, the government should have been focussed on the economic basis of organized crime instead, and that stricter penalties might just result in the removal of competitors for the bosses who can afford to pay off police and officials.²²⁸

Lawrence Speiser of the American Civil Liberties Union (accompanied by Hope Eastman), also rejected the Act, and warned that “in these times, too many are tempted to circumvent the Constitution in pursuit of goals they consider desirable. . . Unlike organized crime, law enforcement may not be able to resort to the most efficient or expedient method.”²²⁹ The ACLU objected to the majority of Titles found within the Act on constitutional grounds.²³⁰ Speiser also raised a number of what he considers to be important issues surrounding this Act. For example, he did not understand why this Act had so few Titles specific to organized crime when the intention of the bill was to combat organized crime.²³¹ If this was the intention of the Act, why then did so much of it extend beyond organized crime and possibly affect all criminals in general? Speiser also believed that the manpower dedicated to combat organized crime was not nearly enough, especially for an organization that was said to take in between seven and sixty billion

²²⁷ *Ibid*, at 469-470.

²²⁸ *Ibid*, at 470.

²²⁹ *Ibid*, at 490.

²³⁰ *Ibid*, at 491-504.

²³¹ *Ibid*, at 505.

dollars.²³² If that were true, then very few laws, no matter how they were worded, would succeed in combating organized crime because there would just not be enough resources and people available to law enforcement to combat an empire that well funded.

Enter RICO

Since 1970, Title IX of the Organized Crime Control Act has become the most famous section of this Act. As seen above, the “Racketeering Influenced and Corrupt Organizations Act” (RICO) was one of only two sections of the Organized Crime Control Act to specifically address organized crime. While the OCCA appears to have been designed to be a toolbox from which law enforcement could draw a variety of measures to combat organized crime, only Title VIII and IX directly attacked the activities of organized crime. Even then, Title VIII only attacks gambling operations, which were a major concern for the government and for Robert Kennedy who had been seeking to eliminate illegal gambling for much of his tenure as Attorney General (unfortunately, he would not live to see the passing of the OCCA, having been assassinated in 1968). Additionally, the fight against illegal gambling became less common on the government’s agenda as the years had gone on²³³, and the government’s focus on organized crime activities had shifted to other activities, especially during and since the 1980s and America’s massive anti-drug campaign and “War on Drugs.” Title IX, most commonly known as RICO remains the true legacy of the OCCA, and it has been frequently employed within the last thirty-plus years.

²³² *Ibid*, at 507.

²³³ Although with the advent and popularity of internet gambling, illegal gambling is once again becoming a hot topic. Radley Balko. “GOP Misses Mark on Internet Gambling,” at *FoxNews.com*, March 15, 2006. Located at URL: <http://www.foxnews.com/story/0,2933,188048,00.html> (Last visited March 20th, 2006).

RICO contains a number of elements the United States government felt were important in combating organized crime.²³⁴ The following is a brief summary of the current state of RICO and of its most important sections. Section 1961 of RICO sets out the definitions that are important in the rest of the Act. “Racketeering Activity” in RICO means any act or threat of murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene material, or dealing in a controlled substance, which is chargeable under State law and punishable by imprisonment for more than one year. It also includes any activities that fall under a myriad of federal statutes, such as bribery, mail or wire fraud, misuse of American passports, trafficking in counterfeit goods, gambling, and obstruction of criminal investigations. “Enterprise” in RICO means any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. In addition to these two concepts, there is also a “Pattern of Racketeering Activity.” To establish a “pattern,” it requires at least two acts of racketeering activity, one of which occurred after 1970 (the date of the Act) and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a previous act of racketeering activity.

The new offences RICO created were as follows:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal. . .to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce [. . .]

²³⁴ RICO, 18 U.S.C. §§ 1961-1968. Also located at URL: <http://www.fbi.gov/hq/cid/orgcrime/statutes/ricostatute.htm> (Last visited March 20th, 2006). Also see Appendix C for the relevant sections of RICO.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.²³⁵

To summarize, s.1962(a) makes it a crime to use funds derived from a pattern of racketeering or unlawful debt collection to further an enterprise, which affects interstate or foreign commerce. Section 1962(b) makes it an offence to maintain interest in or control of an enterprise which affects interstate or foreign commerce (either directly or indirectly), and s. 1962(c) makes it an offence for those involved with the enterprise to participate in the affairs of that enterprise through a pattern of racketeering activity or unlawful debt collection. As one can see, the United States government was greatly concerned with the infiltration of organized crime into legitimate business. In all of these new offences, "interstate and foreign commerce" is placed front and centre as one of the key subjects of the Act.

As one might imagine, the image of a nationwide syndicate of criminals seeking to infiltrate and undermine the commerce of the nation would be met with severe criminal penalties.²³⁶ Sections 1962(a)-(d) are punishable by up to twenty years in prison (or life if the corresponding racketeering activities are punishable by life in prison). Additionally, offenders originally faced up to \$25,000 in fines, but this amount has since been

²³⁵ RICO, 18 U.S.C. § 1962.

increased up to a possible maximum of \$250,000. This Act also contains the possibility that in lieu of the fine prescribed under this section, an offender who has derived proceeds or profits from an offence can be fined an amount not in excess of twice the amount of these profits or proceeds. Section 1963 also contains forfeiture provisions whereby offenders can be forced to forfeit any interest in or claim to any enterprise, which the person has established, operated, or participated in and which contravenes the act. Additionally, any property derived from any proceeds, which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962 can be ordered forfeited.²³⁷ This property can include real property, as well as tangible personal property and intangible personal property (such as rights, claims, interests or securities).

RICO also contains civil remedies that can be enacted for violations of s. 1962.²³⁸ Under civil law, American courts can take a proactive approach to dealing with organized crime by ordering that those who might be associated with an enterprise covered in the Act to divest himself or herself of any interest, direct or indirect, in any enterprise. This means the courts can impose reasonable restrictions on the future activities or investments of any suspected person (under this Act), and prohibit any person from engaging in the same type of endeavour as the enterprise. Additionally, the courts can order the dissolution or reorganization of any enterprise (defined under this Act), making due provision for the rights of innocent persons involved.

RICO also contains within s. 1964(c) the ability for any person injured in his business or property by reason of a violation of section 1962 of this chapter to sue in any

²³⁶ RICO, 18 U.S.C. § 1963.

²³⁷ *Ibid.*

appropriate United States district court in an attempt to recover threefold the damages he sustained and the cost of the suit (including attorney's fees). It should be noted that "threefold the damages" in this section is written exactly as such, and is not "up to threefold" nor up to the discretion of the judge.

Conclusion

The United States has long had a well-publicized problem with organized crime. Viewing (and presenting to the public) this form of criminality under the rubric of a conspiracy paradigm resulted in the creation of a strong legislative response in the form of the OCCA and of RICO. Many have questioned the constitutionality of the legislation, while others have questioned why so few sections of the law were aimed squarely at organized crime. Envisioning organized crime as a nationwide syndicate of criminals out to disrupt society had much to do with this, as did a lack of understanding of the subject matter. Even today, an agreed-upon definition of organized crime is as difficult to find as it was back when American lawmakers were writing the bill. The response appears to be an overreaction to a phenomenon that was not fully or truly understood. It can be argued that this form of legislative overreaction, coupled with a misunderstanding of the nature of the threat, occurred in Canada as well. Over-reactive and constitutionally questionable legislation was brought into force quickly to combat a phenomenon about which there was little knowledge but great public fear (and many surrounding myths). Both nations underwent a period of panic and responded to the perceived threat with legislation reflecting that level of fear (and often those myths).

²³⁸ RICO, 18 U.S.C. § 1964.

RICO is the section of the OCCA that became the most used and the most well known. It has been the subject of a myriad of court battles and legal challenges. There is thus much RICO can tell us of the possible future of organized crime legislation here in Canada. This is the focus of the next chapter.

Chapter 5: RICO and Bill C-24: What Can We Learn From the American Experience

Introduction

As explained in Chapter 3, there is little information or literature available on the topic of organized crime in Canada and, coupled with a short legislative history and the varied nature of court decisions to date, it becomes difficult to predict the direction or future of both the Bill C-24 legislation and organized crime legislation in general. In order to make up for this deficiency, I turn to RICO and the United States as a source for discerning possible directions because of their longer history of legislation and focused enforcement, and the resulting trends one can observe in their fight against organized crime.

The first trend I look at is that of so-called “legislative expansion”, that is, laws that are passed to deal with a specific issue, and over time come to affect activities and behaviours that may not have been originally envisioned by the drafters of those laws. After examining legislative expansion, I turn to the important issue of constitutional challenges. Canada, like the United States, has a constitution with enshrined rights, which makes it important for legislators to carefully craft legislation lest it be struck down for violating any number of rights and freedoms granted by these documents. I examine the American legislation on organized crime in the context of several of the constitutional challenges it has faced with a view to identifying some of the issues which may prove problematic for the Canadian legislation. Finally, I examine a variety of other directions which can be identified in the American experience with RICO such as the

incorporation of the civil RICO section into Canadian law and the reduction in the number of participants who make up a criminal organization.

RICO: Expansion

One of the significant trends RICO provides us with is that of expansion. As we saw in Chapter 4, RICO was initially created to go after organized crime. The type of organized crime it was designed to attack was the Mafia, a large, often multi-state, syndicate of criminals who were seeking to infiltrate legitimate business and commit acts of violence and corruption to further their own ends. This is the type of organization RICO was originally intended to pursue, and yet in the thirty-five years since RICO was enacted, it has deviated from this purpose. RICO has been interpreted by American courts in a variety of ways, which has allowed for the pursuit and prosecution of a variety of people and organizations that would not be deemed “organized crime” in the traditional “Mafia” sense of the term. As one author states: “[s]ince its enactment, RICO has grown into a tool which has gone far beyond its original organized crime limitation.”²³⁹

In the case of *H.J. Inc. v. Northwestern Bell Tel. Co.*²⁴⁰, the United States Supreme Court decided that RICO was not just limited to organized crime, and refused to read such a limitation into the statute. This case was about a civil RICO suit involving a telephone company (Northwestern Bell Co.) and a number of customers who alleged that the company made payments to the body responsible for regulating billing rates in order to be able to charge excessive rates to its users. The Court found that the language in the

²³⁹ A. Laxmidas Sawker. “From the Mafia to Milking Cows: State RICO Act Expansion,” in *41 Ariz. L. Rev.* 1133, Winter 1999, at 1134.

act did not show that Title IX was in fact specifically limited to organized crime (no such restriction was explicitly stated).²⁴¹ In regards to RICO, the Supreme Court explained that:

The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one that, although it had organized crime as its focus, was not limited in application to organized crime. In Title IX, Congress picked out as key to RICO's application broad concepts that might fairly indicate an organized crime connection, but that it fully realized do not either individually or together provide anything approaching a perfect fit with 'organized crime.'²⁴²

The ruling confirmed that although there was much discussion of the Mafia and their infiltration into legitimate business, RICO is in fact applicable to a large variety of situations. The expansion of this act is so beyond its original intentions that we should consider that this is not just an example of the United States coming to a better understanding of the nature of organized crime, for example, realizing that there are groups such as Chinese Triads, or Russian organized crime in addition to the Mafia operating in America.²⁴³ On the contrary, this expansion moves RICO beyond organized crime to what has been referred to as the "enterprise criminal."²⁴⁴

This was not the first, nor the last time the United States has moved in the direction of expanding the RICO Act, and a number of cases have been heard which are far removed from the original intentions of the Act. For example, in 1999, an Illinois court ruled in the case of *National Organization for Women v. Scheidler* that advocacy groups that block the entrances to abortion clinics can be subject to prosecution under

²⁴⁰ *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 US 229 (1989).

²⁴¹ Sawker, *supra* note 239, at 1139, citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, *Ibid.*

²⁴² *H.J. Inc. v. Northwestern Bell Tel. Co.*, *supra* note 240, at 248.

RICO (in this case the civil provisions of RICO).²⁴⁵ This case went all the way to the United States Supreme Court, and although the court found that the group in question was not guilty of a RICO offence under the civil section, the decision also stated that this section could be applied to such groups.²⁴⁶ Anti-abortion groups, and even the People for the Ethical Treatment of Animals (PETA), have been found liable under the RICO act for certain forms of conduct.²⁴⁷

RICO claims have also been brought against tobacco companies in the United States. Although generally unsuccessful, groups such as union health funds, hospitals, and even foreign governments have attempted to recover costs of treating tobacco-related illnesses from the tobacco industry.²⁴⁸ In the case of *Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc.*, the Canadian government attempted to bring a RICO claim against RJ Reynolds on the grounds that the company aided tobacco smugglers in an attempt to circumvent Canadian taxation (the case did not go forward, however, because there is a common law rule that one sovereign will not enforce tax judgements of another sovereign).²⁴⁹ The United States government has also brought a claim against the tobacco companies on the grounds that the tobacco companies engaged in racketeering by

²⁴³ For example the FBI has a Section entitled: the Asian/African Criminal Enterprise Unit of the Organized Crime Section, Located at URL: <http://www.fbi.gov/hq/cid/orgcrime/aaceindex.htm> (Last visited March 30, 2006).

²⁴⁴ Sawker, *supra* note 239, at 1139.

²⁴⁵ *National Organization for Women v. Scheidler*, 1999 WL 571010 (N.D.Ill). July 28, 1999).

²⁴⁶ *National Organization for Women v. Scheidler*, 510 U.S. 249

²⁴⁷ Nicolas Berg & Christopher Kelly. "Racketeer Influenced and Corrupt Organizations Act," in *41 Am. Crim. L. Rev.* 1027, Spring 2004, at footnotes 320 and 321, citing *Tompkins v. Cyr*, 202 F.3d 770, 787 (5th Cir. 2000) and *Huntingdon Life Sciences, Inc. v. Rokke*, 986 F. Supp. 982, 992 (E.D. Va. 1997).

²⁴⁸ *Ibid*, at 1074.

²⁴⁹ *Ibid*, at 1074-1075, citing *Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 10607 (2d Cir. 2001). See also Berg & Kelly footnote 330.

presenting the public with false information concerning the safety of smoking cigarettes.²⁵⁰

RICO has even been employed on rare occasions in divorce proceedings and even against the police. One woman in the United States has brought forward a claim that her ex-husband, along with other defendants, participated in a fraudulent scheme to conceal the true value of his income during the couple's divorce proceedings.²⁵¹ Most divorce cases attempting to use RICO have failed, but at least one commentator believes it is possible for RICO to be used in the area of divorce if the following criteria is met: first, the plaintiff must show an injury to a business or property because of the divorce proceedings, second, the plaintiff must show that the defendant acted as part of an enterprise to further the act of hiding assets to minimize divorce settlements, and, third, there must be either multiple violations of the same predicate act, or the commission of more than one predicate act.²⁵² In one case, a plaintiff convicted of drug offences was able to bring a case under RICO against a police agency on allegations that the officers unlawfully detained and searched him, planted drugs on him, illegally arrested him, and used excessive force against him.²⁵³

As one can see, the use of RICO has expanded well beyond the Mafia and the traditional view of organized crime. Although a great deal of this expansion has taken place in the area of civil RICO, the offences under civil RICO are the same as those under criminal RICO, so criminal proceedings in most of these cases would in fact be

²⁵⁰ *Ibid*, citing *United States v. Philip Morris, Inc.*, No. 1:99CV02496 (D.D.C filed 1999).

²⁵¹ *Ibid*, at 1077, citing *Perlberger v. Perlberger*, No.CIV.A.974105, 1997 WL 597955, *1 (E.D. Pa. Sept. 16, 1997).

²⁵² *Ibid*, citing Erin Alexander. "The Honeymoon is Definitely Over: The Use of Civil RICO in Divorce," in 37 *SAN DIEGO L. REV.* 541, 546, 572 (2000).

²⁵³ *Ibid*, at 1078, citing *Guerrero v. Gates*, 110 F. Supp. 2d 1287, 129192 (C.D. Cal. 2000).

possible. Although the onus on beyond a reasonable doubt may make these cases much more difficult to win than a comparable civil proceeding, the listed offences are still the same.

This idea of legislative expansion is one that we should keep in mind when it comes to the Bill C-24 legislation. It is possible that this legislation, which was drafted for the purpose of helping to combat organized crime, might also over-reach its purpose and be used in cases that one might not consider organized crime per se. It should be noted that some sections of Bill C-24 were in fact already written to apply in many situations, such as the sections allowing for police immunity and those relating to the proceeds of crime. What will be interesting to observe is if the offences which were seemingly aimed specifically at addressing organized crime, and by this I mean the offences found under sections 467 of the Canadian Criminal Code such as the definition of a criminal organization and participation in a criminal organization, are expanded beyond the traditional understanding of organized crime.

This issue of expansion has actually already been raised by some experts in the legal field and in some cases. The Canadian Bar Association in their submission on Bill C-24 warned of exactly this situation. For example, they presented the argument that it might be possible that criminal defence attorneys could be caught under the criminal organization offences of Bill C-24.²⁵⁴ Defence lawyers trying to keep their clients out of jail could be said to be participating or contributing to the criminal organization that their client might be a part of, and if they were not working pro bono, then that would mean they would be receiving a material benefit for their activities. Although it would seem to be improbable, under the law such a charge is not impossible. Additionally, the CBA

explained that in their opinion: “[t]he offences are so broad in scope that we fear even groups such as those advocating environmental activism or civil disobedience for a possibly just cause could now be considered organized criminals.”²⁵⁵

The defence in the case of *R. v. Lindsay* also brought up a variety of situations that could involve Bill C-24 expansion. The defence brought up three examples, each of which was addressed by Justice Fuerst:

(a) Three elderly retirees develop a plan to sell fraudulent diamonds to fellow retirees, by presenting the scheme as a stable investment opportunity. They follow through with the plan, turning a hefty profit by passing off zirconia stones as diamonds. The scheme becomes the trio’s main activity, and they meet weekly to discuss their progress.

(b) Three people form a group to protest the degradation of the environment. One of their main activities is spray painting environmental slogans on office buildings. They are caught doing so, and charged with mischief over \$5000. They admit having done the same thing on eight prior occasions.

(c) An individual named Jack operates a not-for-profit Internet site, called Jackster, which allows its users to exchange and distribute files that are unlicensed copies of copyrighted music. Hundreds of thousands of people are users. The Applicants suggest that Jackster is a criminal organization.²⁵⁶

In Justice Fuerst’s opinion, example (a) would constitute a criminal organization as age has no bearing on the definition of a criminal organization, example (b) fails because it is doubtful one can show financial benefit as one of the groups main goals, and example (c) does not work because Jackster cannot be a “person” under the law (although it should work if we considered the people involved rather than the website).²⁵⁷ One thing not considered, however, is that, in the case of example (b) some protest groups accept donations and even sell merchandise such as t-shirts or coffee mugs. Groups notorious

²⁵⁴ Canadian Bar Association, *supra* note 85, at 29.

²⁵⁵ *Ibid.*

²⁵⁶ *R. v. Lindsay* (2004) *supra* note 147, at para 45.

for certain activities, such as the spray painters in example (b), or those who harass whaling ships, for example, might be gaining an indirect material benefit from their criminal activities and thus it may be possible to include them under the criminal organization definition.

Madam Justice H. Holmes, who heard the case of *R. v. Accused No. 1 and Accused No. 2* (discussed at in Chapter 3) also presented some possible examples of the expansion of C-24 legislation: “For example, a martial arts teacher socializes with and gives regular martial arts lessons to members of a known criminal gang who, the teacher knows, use the learned techniques in their beatings of non-compliant gang members. On what basis is the teacher to determine whether he or she is also a member of the group that is the criminal organization.”²⁵⁸ This is an especially important issue since it would fall under s. 467.13 of the Criminal Code, which relates to the instruction of criminal organizations and carries with it a possible life sentence. Madam Justice H. Holmes also offers another example: “a person regularly goes to a ‘marijuana café’ to pass the time and to buy marijuana cigarettes, bud, and literature about home growing. Can it reasonably be said that the person, as a customer of the marijuana café, is on notice that he or she is a part of a ‘group’ that is a criminal organization.”²⁵⁹ What the Madam Justice appears to be asking is if the customers of organized crime services might also be caught under the net of the definition of a criminal organization. After all, giving money to a known criminal organization can be considered facilitation, and would thus constitute participation in a criminal organization (an activity punishable by up to five years in prison). It should also be noted that 467.11 (2) (c) and (d) makes it so a

²⁵⁷ *Ibid*, at para 46-48.

²⁵⁸ *R. v. Accused No. 1 et. al.*, *supra* note 179, at para 111.

successful prosecution need not show knowledge of the organization, nor knowledge of that organization's activities, which means a customer might even be liable if they have no idea of the true nature of the people who are selling them goods and/or providing them services (such as in the case of prostitution).

Many of these examples point to the possible expansion of Bill C-24, however they remain only possibilities and for now only offer us some insight into the future of the legislation. One of the cases I looked at in Chapter 3 however shows that this expansion might have already started here in Canada. In *R. v. Sbrolla*,²⁶⁰ one might recall that this case involved five men defrauding a number of lumber suppliers. These five men were not a large international syndicate of criminals seeking to undermine Canadian society as is often associated with the image of organized crime. These men were not pimps or drug dealers, nor did they perpetrate acts of violence against their targets. These were just five men in a small town seeking to make a quick illegal buck from defrauding lumber companies. This is a far cry from the Mafia or the Hells Angels, yet the Bill C-24 legislation, which was designed to deal with those forms of groups, was used in this instance. It is also interesting to note that the two men at trial were sentenced to one day in prison for their participation in a criminal organization. This symbolic sentence raises the question of why these men were even charged under that section of the Criminal Code in the first place? They chose to plead guilty, so the issue was not addressed at trial as to why that particular charge was laid in this case. If this is an example of the type of case that criminal organization offences can in fact be used against, then it does show an expansion of the Bill C-24 legislation from its original

²⁵⁹ *Ibid*, at 112.

²⁶⁰ *R. v. Sbrolla*, supra note 174.

purposes. I am not saying that this is a negative or a positive thing, only drawing attention to the fact Bill C-24 may in fact begin to be used in a variety of new and creative ways, some of which may not resemble the original intentions of the law to deal with organized crime.

This case could be compared with the more straightforward case of *R. v. Papequash*.²⁶¹ In this case, a man was charged with participating in a criminal organization and with drug possession with the intent to traffic. Papequash was sentenced to two years in prison on the drug possession charge, and on the charge of participating in a criminal organization, he received three years in prison (to be served consecutively with the first charge, and with a possibility of parole only after half the sentenced served as per Bill C-24's legislation). The judge explained that the sentence was based on a number of factors. First, Papequash's lengthy record and long-standing criminal lifestyle. Second, it reflected the sentencing principles of deterrence and denunciation. Finally, that his offences were tied into a serious problem facing Regina: "trafficking in drugs by individuals and organizations bent on profiting from the weaknesses of others, and wilfully blind to the destructive social consequences."²⁶² This case is a much more traditional use of the organized crime legislation, as it is aimed at a long-time criminal who trafficked drugs in association with a criminal organization, and whose activities were seen as having "destructive social consequences." What we must remember, however, is that *R. v. Papequash* and *R. v. Sbrolla* are two cases involving the same criminal organization offence, and yet which have very different facts behind them. Papequash shows that the Bill C-24 legislation is apparently being used in the sorts of

²⁶¹ *R. v. Papequash*. 2004 CarswellSask 379, 2004 SKCA 74, 254 Sask. R. 153, 336 WAC 153.

²⁶² *Ibid*, at para 8.

cases that is was initially intended to deal with, however *Sbrolla* shows that the expansion of this legislation may be beginning in Canadian courts. It should be interesting to observe if the legislation is used in other cases like *R. v. Sbrolla*, and if so, what other kinds of cases might be heard that do not involve the traditional understanding of organized crime.

RICO: Constitutional Challenges

Another trend that has appeared in regard to the RICO legislation is constitutional challenges. Since RICO has been enacted, it has undergone many challenges to its various sections on the grounds that those sections violate the United States constitution. Why this is important is that Bill C-24 is also open to constitutional challenges, and as discussed in Chapter 3, it has already in fact been challenged on a number of constitutional issues. Although it would be wrong to equate the American and Canadian constitutions, many of the challenges that have been raised are similar, and based on similar legal arguments and principles even if not based on the same constitutional document.

Legislative expansion such as that which I looked at above is tied directly to the first major area of constitutional challenges of RICO I will examine: the challenge that the legislation is vague and/or overbroad. As we have seen, RICO is a sweeping piece of legislation that has been used in a large number of different cases. As such, it would only be natural that someone would raise the issue of its overbreadth, which in this instance is founded in the notion of vagueness. The United States placed under the definition of

“racketeering activity” all the offences that would be covered by RICO.²⁶³ Under s. 1961, the United States lists a number of activities such as murder, arson, robbery, but they also list over thirty different sections of the American *Criminal Code*, which can be considered as racketeering activity. As a result of this long list of offences, one author explains that this has the effect of placing people on notice of which activities are prohibited, and what penalties are possible for these activities, and that these are the two vital criteria that vagueness and overbreadth tend to be judged against in the United States.²⁶⁴ If it is clear that an act is prohibited and that this act will be penalized, than the law will not be ruled vague or overbroad. As of 2004, no one has yet been able to successfully challenge RICO on this particular issue.²⁶⁵

This issue is very important for Canada because as of now Bill C-24 has been challenged twice for exactly this issue, yet unlike the United States a section of it has in fact been ruled unconstitutional due to vagueness. As examined in Chapter 3, vagueness was brought up in the cases of *R. v. Lindsay* and *R. v. Accused No. 1 and Accused No. 2*. In the former, the judge upheld that the legislation relating to sections 467. 1, 467. 12, and 467.14 and did not find them to be unconstitutionally vague nor overbroad. However in the latter case, the judge found that one of the sections created by Bill C-24 was in fact unconstitutionally vague and as such was struck down (s. 467.13, dealing with instructing of the commission of an organized crime offence). RICO might also offer some comparative insight into a problem with the C-24 legislation. As stated, RICO prescribes all the crimes that are covered by the legislation, but with C-24, the offences have not

²⁶³ RICO, 18 USC. § 1961 (1) (a) and (b).

²⁶⁴ Jeff Atkinson. “Racketeer Influenced and Corrupt Organizations, 18 USC §§ 1961-1968: Broadest of the Federal Criminal Statutes,” in *The Journal of Criminal Law and Criminology*, Vol. 69, No. 1, (Spring 1978), pp.1-18, at 4.

been prescribed. Under section 467.1(1) of the Criminal Code (the definitions created by C-24), a “serious offence” is defined as: “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.”²⁶⁶ This definition is directly connected with the definition of a “criminal organization” which is found in the same section of the Code: “. . .has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that. . .”. This is quite different from the laundry list of offences covered by RICO, and can be read to mean, when it comes to offences, every offence and regulation on the books is covered under this section of the Code. Similarly, the leadership offence I discussed in Chapter 3 which was at issue in *R. v. Accused No. 1 and Accused No. 2* is equally vague and states: “. . .who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament. . .”.²⁶⁷ In other words, this offence can relate to any offence in any Act of Parliament, not just those traditionally related to organized crime. Additionally the definition of “serious offence” we just looked at in the definition of a criminal organization applies even to regulatory offences, so it could possibly include parking offences, loitering, littering, and a whole host of other breaches of regulations.

RICO has survived every challenge it has faced on the basis of vagueness and overbreadth in the last thirty-five years, yet Bill C-24 so far is fifty-fifty when it comes to this form of challenge. Since both of the above cases were heard at the provincial level, it remains to be seen how the Supreme Court of Canada will treat these issues. Also, if one were to use RICO as an example, it would appear to be important for future

²⁶⁵ Berg & Kelly, *supra* note 247, at 1056.

²⁶⁶ *Criminal Code*, R.S., 1985, c. C-46, at s. 467.1(1).

legislation relating to organized crime to include a prescribed list of offences, which it seeks to cover rather than all offences under an Act of Parliament or all regulatory offences.

Another constitutional challenge that RICO has faced is the claim that it violates protections against double jeopardy, meaning that if someone is found guilty, they are not tried or punished for the same offence twice. In the United States, the Fifth Amendment offers protection against double jeopardy, and as such it was argued that RICO punishes a person twice for the same offence. For example, a drug dealer could be punished both for dealing drugs, and being part of an enterprise to deal drugs. RICO brought about a way to punish a person twice for the same activity. This issue was brought up numerous times in the 1970s in the United States, for example in that case of *United States v. Frumento*²⁶⁸, yet this challenge was never successful. Atkinson explains that the most common rationale for these decisions was that even though both charges arise out of the same conduct, the RICO offence has the added element of a “pattern” and as such the government must prove at least two separate racketeering activities. Thus, since the elements of each offence are different, it is not considered double jeopardy.²⁶⁹ Most cases in the United States have abided by these 1970s rulings, for example *United States v. Morgano* in 1994, which held that there was no double jeopardy violation for consecutive punishment on both the RICO offence and the predicate crimes.²⁷⁰ As Bourgeois Jr. et. al. explain: “So long as RICO actions require proof of elements beyond those contained in the predicate acts and the predicate acts include elements beyond those

²⁶⁷ *Ibid.*, s. 467.13.

²⁶⁸ Atkinson, *supra* note 264, at 8, citing *United States v. Frumento*, 563 F.2d 1083, 1089 (3d Cir. 1977).

²⁶⁹ *Ibid.*

contained in RICO, the crimes are distinct; therefore, the Double Jeopardy Clause does not prohibit the imposition of consecutive sentences.”²⁷¹ In other words, RICO has survived constitutional challenges because it relies on this “pattern” element, thus the accused is not really being punished for the same activity, they are being punished for the initial offence (for example, drug dealing), and for a pattern of criminal activity as set out in RICO.

This constitutional challenge is relevant to Canada since we also have a constitutional protection against double jeopardy in section 11(h) of the *Charter*. Additionally, those who commit offences in league with a criminal organization open themselves up to punishment for both the initial offence, and for participating, instructing or committing the offence on behalf of the criminal organization. Unlike the United States, however, Bill C-24 eliminated the “pattern” requirement that once existed under the Bill C-95 legislation. In Chapter 2, I explained that under Bill C-95, a vital part of the definition of “criminal organization” was “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.” Thus under Bill C-95 there was a “pattern” element somewhat similar to RICO. Bill C-24 eliminated this element, and as such it might be open to similar constitutional arguments as those used for RICO, yet it would not be able to rely on the “pattern” element used in the American cases as a bar to a possible double jeopardy claim. C-24 does not contain such an element, and the only thing resembling a “pattern” is the limitation that a criminal organization “does not include a group of persons that

²⁷⁰ Richard L. Bourgeois Jr. et. al. “Racketeer Influenced and Corrupt Organizations,” in 37 *Am. Crim. L. Rev.* 879 (Spring 2000), footnote 283, citing *United States v. Morgano*, 39 F.3d 1358, 1368 (7th Cir. 1994).

²⁷¹ *Ibid.*, at 918.

forms randomly for the immediate commission of a single offence.”²⁷² This limitation is on the criminal organization, however, and not on the individual being accused of an offence under section 467. In addition, under the participation offence, a prosecutor may:

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: . . .(b) frequently associates with any of the persons who constitute the criminal organization;. . .(d) repeatedly engages in activities at the instruction of any of the persons who constitute the criminal organization.²⁷³

Thus when determining if a person has participated in a criminal organization, the prosecutor “may consider, among other factors” whether the person frequently associates with a criminal organization, or if he repeatedly engages in activities at the behest of the group. These are not requirements as in RICO where a “pattern” must be proven, they are only an option for prosecutors to strengthen their cases. It remains to be seen if a defence attorney will challenge C-24 legislation on this issue, but it would appear to be possible, based on the American experience.

Yet another constitutional challenge that was raised with RICO is that it violated the United States Eighth Amendment’s protection against Cruel and Unusual Punishment. This issue has been raised in a variety of ways, such as the proportionality of prison sentences for RICO convictions, as well as the quantity of goods seized under the forfeiture provisions.²⁷⁴ For example, in the case of *United States v. Morelli*, the court found that Morelli could be sentenced to fifteen years under RICO even though he had only received five years for each of two predicated offences of wire fraud.²⁷⁵ To date this form of challenge has not yet been successful in the United States. Here in Canada

²⁷² *Criminal Code*, *supra* note 266, s. 467.1(1)(b)

²⁷³ *Ibid*, s. 467.11(3).

²⁷⁴ *Bourgeois Jr.*, *supra* note 270, at 920-921.

such a challenge is not only possible, but it has already occurred in *R. v. Lindsay*. As was noted in Chapter 3, the defence in this case raised the issue that the consecutive sentencing section of the s.467 offences was a violation of s. 12 of the *Charter*, the prevention of cruel and unusual treatment or punishment.²⁷⁶ The judge in this case decided not to rule on this issue however, and decided that since the issue dealt with sentencing, it would be premature to address it until the applicant had been convicted, and discussing it prior to the trial may give rise the appearance of unfairness.²⁷⁷ As it stands now, it should be possible for this challenge to arise in the Canadian context yet again. For example, in the above mentioned case of *R. v. Papequash*, Papequash received more time on the participation offence than he did on the initial drug offence. According to s.467.11, it would have been possible that upon conviction Papequash could have received a sentence of up five years in prison, over twice as much as the initial offence. We should also keep in mind that sentences under s.467 must be served consecutively with any other sentences (in this case the drug offence for which he received two years), as well as having the possibility of parole eligibility increased to one-half time served.

RICO has also been challenged on the grounds that it violates the First Amendment of the United States, which provides for the freedom of association. These cases have also failed because the United States has a strict policy that: [a]lleged RICO violators, however, may not claim this protection because constitutional safeguards do not extend to an "association" that is part of a plan to commit a crime."²⁷⁸ As noted in

²⁷⁵ *Ibid*, at footnote 310 citing *United States v. Morelli*, 643 F.2d 402, 413 (6th Cir. 1980).

²⁷⁶ *R. v. Lindsay* (2004), *supra* note 147, at para 14.

²⁷⁷ *Ibid*, at para 66-68.

²⁷⁸ *Bourgeois Jr.*, *supra* note 270, at 918.

Chapter 3, this issue was raised in *R. v. Accused No. 1 and Accused No. 2*, where the defence argued that s. 467.1(1) and s. 467.13 infringed upon the right of freedom of association guaranteed under s. 2(d) of the *Charter* because their breadth allows for the attachment of significant criminal consequences to lawful as well as unlawful association.²⁷⁹ Although s.467.13 is the section at issue in this case, s. 467.11 would seem to be the more vulnerable of the s.467 offences on the basis of a freedom of association challenge. Under that section, people can be tried for “enhancing the ability of a criminal organization to facilitate or commit an indictable offence. . . knowingly, by act or omission, participates in or contributes to any activity of a criminal organization.”²⁸⁰ In addition to this, under section 467.11 (2)(a) through (d), it is not necessary for the prosecution to show the criminal organization actually committed an offence, the contribution of the accused actually enhanced the group, nor that the accused knew of any offences being committed or anyone in the group. Section 467.11(3) also makes frequent association with any person who makes up the criminal organization a factor that can be considered in court. It remains to be seen what sorts of cases may arise should an overzealous prosecutor feel creative with the wording in this legislation. Almost anyone who associates with any member of a criminal organization, no matter how minor, could possibly be caught under this legislation. Lending a friend money, or a car, may result in criminal liability under the organized crime sections if that person happens to be a member of a criminal group. Perhaps a corner-store sells food to known gang members, or what about a gun shop owner who sells a gun to a gang member during the course of his daily business? It will be interesting to see what forms of association

²⁷⁹ *R. v. Accused No. 1 et. al.*, *supra* note 179, para 3.

²⁸⁰ *Criminal Code*, *supra* note 266, s. 467.11.

might possibly result in criminal charges under this section. Since the issue was not addressed in *R. v. Accused No. 1 and Accused No. 2*, it also remains to be seen how a challenge on association will be addressed for even more traditional organized crime cases.

These are only a few of the numerous challenges raised in America with regards to RICO²⁸¹, but they are indicative of the kinds of constitutional challenges that may be eventually raised here in Canada.

What can RICO tell us about the possible future of organized crime legislation in Canada?

In addition to expansion and constitutional challenges, there is also a wide variety of additional examples RICO can provide for those seeking to predict the future of Bill C-24 legislation and future organized crime legislation in Canada.

First, although somewhat controversial in the United States²⁸², some have discussed the incorporation of RICO's civil sections into Canadian law. The Criminal Justice Division of British Columbia (Ministry of Attorney General), in their analysis of the RICO statute from a Canadian perspective, found much to be desired in s.1964 of RICO and its ability to attack organized crime in the civil arena.²⁸³ They concluded that provisions for both private and governmental civil suits would be very useful.²⁸⁴ In the United States under the civil sections of RICO (1964 and 1968), the Attorney General

²⁸¹ For more challenges, see Bourgeois Jr., *supra* note 270, at 915-924.

²⁸² For a discussion of some of the controversial issues surrounding civil RICO see: John L. Koenig. "What have they done to civil RICO: The Supreme Court takes the racketeering requirement out of racketeering," in *35 Am. U.L. Rev.* 821 (Spring 1986).

²⁸³ BC Criminal Justice Division. *The Business of Crime: An Evaluation of the American RICO Statute from a Canadian Perspective*. (Victoria: Ministry of Attorney General, 1980).

²⁸⁴ *Ibid*, at 94.

may bring forth a civil suit to prevent or restrain violations of the act, and to divest the interest of the defendant in an enterprise, to restrict the future activities of a defendant, and/or to dissolve or reorganize any enterprise.²⁸⁵ This gives the Attorney General a variety of ways to try and dislodge organized crime from legitimate business, and also to go after what might otherwise be difficult-to-convict offenders. Although these kinds of cases do not result in a criminal sentence, it is possible to get into the pockets of these offenders. Similarly, RICO enables individuals to pursue damages when they have been harmed, for example, a businessman can sue an extortionist for money lost and also receive sizeable compensation due to these sorts of trials allowing for the recovery of three-times the damages. The Criminal Justice Division of British Columbia also argued that civil proceedings under RICO help to first, compensate the victim and work as an economic punishment to the accused, and second in cases where there is no criminal prosecution it can help prevent the unjust enrichment of the accused.²⁸⁶ The Criminal Justice Division of British Columbia also warned, however, that such legislation might be difficult to incorporate into Canadian law for constitutional reasons. Civil suits such as these would have to be legislated by the provincial governments thus creating a separation in jurisdiction, and using civil law to circumvent criminal law in tricky cases may be viewed as an abuse of power.²⁸⁷ It is possible that civil RICO may not be applicable to Canada, but civil RICO is nonetheless a popular issue in the United States and as such it may eventually be considered for enactment here.

Second, RICO may be able to offer some insight into the use of C-24 legislation because as seen in Chapter 3, there are not many sources of data on offences related to

²⁸⁵ *Ibid*, at 83.

²⁸⁶ *Ibid*, at 95.

the C-24 criminal organization offences. The example set by RICO in the United States suggests that the organized crime legislation here in Canada could increase in use over the next few years. In the United States, an early accounting of those charged under the Organized Crime Control Act revealed that only half of those considered to be organized crime members received any jail time for their crimes, and that this was generally due to the fact that most of the accused had been charged with minor initial offences (such as gambling offences), they usually had no previous criminal record (being adept at evading convictions), and prosecutors were cautious about using the legislation due to vagueness and possible constitutional appeals.²⁸⁸ As of 1977, after seven years in force, only thirty-seven individuals had been convicted under RICO.²⁸⁹ However, by the end of 1985, the federal appellate court had heard two hundred and fifty cases relating to the RICO offences as the state began utilizing the legislation more often.²⁹⁰ As seen in the chart in Chapter 3, the number of s.467.1 offences heard in the courts is also increasing, and it will be interesting to examine the upcoming Revised Uniform Crime Reporting Survey (UCR2) for 2005 which will include statistics on organized crime for the first time. It will be interesting to observe if Canada follows the trend in the United States of an increasing variety of cases heard. It is also possible however that with the result of the recent *R. v. Accused No. 1 and Accused No. 2*, the number of convictions may go down in Canada as s.467.13 was deemed not in force in the province of British Columbia. This will obviously result in fewer charges on that issue in that province, but it might also

²⁸⁷ For an in-depth analysis of Charter issue on this topic see *Ibid*, Appendix C.

²⁸⁸ Robert P. Rhodes. *Organized Crime: Crime Control vs. Civil Liberties*. (New York: Random House Inc., 1984), at 75.

²⁸⁹ *Ibid*.

²⁹⁰ Gerard E. Lynch. "RICO: the Crime of Being Criminal, Part I & II," in *87 Colum. L. Rev.* 661 (spring 1987), at 724.

make other provinces wary of using that offence for fear of it also being found unconstitutional. This case could also affect s.467 offences in general, as it opens the door for other possible challenges, and might boost the confidence in such challenges for defence lawyers.

Third, based on the decrease in the required number of required participants who comprise a criminal organization from five to three in C-24, we might see the number of people drop even further. It is also possible that the group requirement might be dropped altogether from Canadian law. As seen in Chapter 4, “enterprise” in RICO means any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.²⁹¹ The United States decided to allow for the possibility that “any individual” can be considered an enterprise. As such, “an individual such as a robber, extortionist, or gambler can be an “enterprise” within the meaning of RICO.”²⁹² Although this would seem unlikely, we should remember that Canada has removed the requirement of the pattern element from the criminal organization offences, and it has been relegated to the possible factors the prosecutor may consider under the s.467 offences. A “pattern” is vital to the RICO offences, yet Canada has have eliminated it as a part of its definition of a criminal organization. Additionally, at one point five was consider the best number (during the debates on C-95)²⁹³, and this was eventually lowered to three. It might be possible that in the future the number requirement is dropped altogether.

Finally, there seems to be a trend occurring in America that is somewhat related to most of the ones I looked at above, and that is the gradual shift in the interest in

²⁹¹ 18 USC § 1961(4)

²⁹² Atkinson, *supra* note 264, at 14-15.

organized crime to an interest in enterprise crime. As I observed earlier in this chapter, there has been a great deal of expansion in the cases heard under RICO, and it is clear that RICO is no longer used exclusively for traditional Mafia-style criminals or groups as it was originally intended. As Berg and Kelly explain:

Accordingly, courts have found that public entities and governmental agencies, as well as private entities, can constitute RICO enterprises. For example, the term "enterprise" has been found to encompass private businesses, sole proprietorships, corporations, labour organizations, schools, county prosecutors' offices, marriages, and other 'associations in fact.'²⁹⁴

Organized crime groups, in the traditional sense, appears to have been replaced in the United States with a whole host of other possible groups. RICO has moved well beyond the Mafia and there seems to be no end to the possible interpretations available to creative prosecutors. I am not saying whether this is positive or negative, but we must keep in mind the reason the OCCA and RICO was initially created as explained in its preamble:

it is the purpose of [RICO] to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.²⁹⁵

This was the stated intention of RICO, and it specifically mentions organized crime in the above statement. However, "organized crime" is not mentioned once in the Statute, nor is it defined.²⁹⁶ This leaves one to question if the act was truly aimed at organized crime as stated in the preamble, or was it aimed at something else? One of the original creators

²⁹³ House of Commons. Debates, 2nd Session, 35th Parliament, vol. 160, *supra* note 25.

²⁹⁴ Berg & Kelly, *supra* note 247, at 1038-1039 and footnotes 73-93.

²⁹⁵ Pub. L. No. 91452, 84 Stat. 922 (1970).

²⁹⁶ BC Criminal Justice Division, *supra* note 283, at 66.

of RICO, G. Robert Blakey, in an article defending the Act from a variety of attacks explains that: “. . .RICO is not, as some believe, ‘primarily a criminal statute’.

Accordingly, because of the civil scope of RICO is *broader* than its criminal scope, RICO is not primarily criminal and punitive but primarily civil and remedial.”²⁹⁷ If this were true, why then did the preamble not expressly explain this? Similarly, why is the word “civil” nowhere to be found? It is also interesting to note Blakey’s quotation of the preamble in this same article, and I repeat it here word for word: “Congress enacted the 1970 act ‘to strengthen. . .the legal tools in the evidence gathering process,. . .[to] establish. . .new penal prohibitions, and [to] provide. . .enhanced sanctions and new remedies.”²⁹⁸ It seems he has eliminated the reference to “organized crime” in his quotation. It is interesting to note that one of the creators of RICO seems to also be of the opinion that RICO no longer deals exclusively (perhaps at all?) with organized crime.

Writer Gerard E. Lynch laments the shift of RICO from its original intentions in the following excerpt:

What accounts for the continual expansion of the language of RICO to the point that the statute as enacted is protean in form and pervasive in coverage? The basic structure of the statute and the pronouncements of its supporters all support the view that the statute was initially designed to strike a blow at organized crime by criminalizing the infiltration of legitimate business by members of a nationwide criminal syndicate, and that its principal supporters in Congress never understood the statute to encompass other aspects of the organized crime problem. Nevertheless, the statute that emerged clearly goes beyond the prohibition of the act of infiltration itself and equally clearly includes more than the actions of a monolithic "Cosa Nostra." Moreover, the statute can be read without serious distortion of its language to escalate dramatically the sanctions available against business fraud and against organized criminal activity in the loosest possible

²⁹⁷ G. Robert Blakey. “RICO: The Federal Experience (Criminal and Civil) and an Analysis of Attacks Against the Statute,” in *Handbook of Organized Crime* (Ed. Robert J. Kelly, et. al.). (Westport: Greenwood Publishing Group Inc., 1994), pp.451-489, at 452.

²⁹⁸ *Ibid*, at 452.

sense, neither of which have any necessary relation to the infiltration problem that was all that overtly concerned the Congress. What happened?²⁹⁹

RICO interpretations place it well beyond its initial purpose, so the question should be asked if it is possible that the same might occur here in Canada in regard to the C-24 legislation? Is there evidence that this trend is already occurring, and that an act that was said to be designed to combat organized crime is instead aimed at this seemingly larger concept of enterprise crime?

An argument can be made that this process has already begun here in Canada. Although entitled “An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts,” Bill C-24 refers to organized crime as “criminal organization.” There appears to be a distancing in the wording within the legislation from the term “organized crime” which is contained in the title. The Criminal Justice Division of British Columbia report from 1980 may shed some light on this conundrum. In this report, they explain that “this report deals with organized criminal activity, or ‘enterprise crime’. . . ‘enterprise crime’ includes all types of criminal activity that are part of an ongoing arrangement between persons for the purpose of profit. . . also includes the use of an existing organization to perpetrate or disguise criminal activities.”³⁰⁰ Even in 1980, there seems to have been some understanding that the Mafia model of organized crime no longer fit the purposes of those researching to topic of organized crime such as the Criminal Justice Division of British Columbia. They go on to explain that: “[u]se of the term ‘organized crime’ is avoided out of a desire not to restrict the reader’s focus to a narrow view of the type of crime

²⁹⁹ Gerard E. Lynch, *supra* note 290, at 685. He sets out to answer “what happened?” in this article so it is an informative read for those interested in this topic.

syndicate portrayed in the media. That type of syndicate is included in the notion of enterprise crime.”³⁰¹ So in other words, “enterprise” crime is a catchall term and “organized crime” in the traditional sense can be subsumed under it.

Conclusion

As argued in Chapter 2, laws against organized crime that are founded on the concept of treating organized crime as enterprise crime, and not on the concept of monolithic criminal syndicates (as is postulated by the conspiracy theory), would be more reflective of the current state of organized crime theory. This could usefully guide future legislation that might, as a result, be more applicable to and effective against organized crime as it is and not as it is imagined. However, there seems to be a problem in current legislative formulations and that is that both pieces of legislation, RICO and Bill C-24, were purportedly created to deal with the type of crime described by conspiracy theory and the term “organized crime.” There is no doubt that the OCCA was developed to combat a monolithic entity known as the Mafia, and there is little doubt that C-95 and later C-24 were created to deal with the specific threat of biker gangs in Canada.

Why then do both pieces of legislation appear to be “Trojan Horses”, whereby the expressed intentions of and motivations behind the acts conceal what they are ultimately used for? The argument can be made that the pattern of enforcement in the United States demonstrates that the conspiracy theory of organized crime is outdated and that the law is now attacking organized (and other forms of enterprise) crime mainly under the enterprise model. In the future, legislation might be created which is aimed directly at

³⁰⁰ BC Criminal Justice Division, *supra* note 283, at 2.

³⁰¹ *Ibid.*

this broader understanding of “enterprise crime” and not specifically at organized crime. Organized crime offences might be seen as just a particular type of a broader enterprise crime offence (as stated in the report by the British Columbia Criminal Justice Division); such a broader offence would attack enterprise crime as a whole rather than just addressing organized crime. The accused in *R. v. Sbrolla* do not seem to be a good example of organized crime per se, but they would appear to be a good example of enterprise crime. The acknowledged shift towards a more enterprise model-centred piece of legislation would help to clear up some of the problems the United States has experienced with the expansion of RICO. These issues all reveal possible avenues for future research into the uses and possible evolution of organized crime in legislation in Canada.

Chapter 6: Conclusion

Concerns about the biker wars in Quebec led to the creation of Bill C-95. The legal complications created by the *Shirose and Campbell* ruling, in addition to complaints that C-95 was not as useful as it was originally believed to be, led to the creation of Bill C-24. Canada's organized crime laws originally came about to deal with organized crime in the form of outlaw motorcycle gangs, which were portrayed in the debates as being composed of violent murderous criminals who were out to corrupt children with drugs, and whose activities kill children such as Daniel Desrochers. Another good example of this can be seen in a recent April 19th, 2006, article from the CBC, which reported that the Hells Angels in British Columbia are mixing the addictive drug known as crystal meth into their other softer drugs in order to trick youths into becoming addicted to this particular drug.³⁰² In this article we can again observe the rhetoric of biker gangs threatening Canada's youth with an insidious plot involving insidious chemicals. In the words of one British Columbia youth worker: "It doesn't take long to take you right down. You steal. The increase in crime, in car thefts, in break-and-enters, all of that stuff is related to the increase in crystal meth."³⁰³ Not much has changed in the last fifty years, as moral panics such as this have also been made with regard to marijuana in the 50s and 60s, LSD in the 70s, and crack in the 80s and 90s. Organized crime is blamed as the source of these drugs, and is blamed for corrupting Canada's youth.

Bill C-95 as originally constructed was aimed at groups such as these, and it had a requirement of both numbers (5) and previous criminal activity, which reflected the view

³⁰² CBC News. "Hells Angels control booming crystal meth: report," in *CBC.ca*. Located at URL: http://www.cbc.ca/bc/story/bc_crystal-meth20060419.html (Last updated: Last updated Apr 19 2006).

³⁰³ *Ibid*.

of organized crime as comprised of large, ongoing entities. Lawmakers became unhappy with this legislation however, and Quebec used one of its opposition days to once again bring to light the problem of organized crime. Bill C-24 was drafted and it lowered the number of required participants, eliminated the previous criminal activity requirement, and also expanded the definition to include a great many other criminal groups. Was Bill C-24 still directed primarily at large criminal organizations like the Hells Angels? By expanding the definition of a criminal organization, lawmakers wanted legislation that was easier to use, but as a consequence the question arises whether they in fact constructed legislation addressing a much broader form of criminality? In spite of the rhetoric around the issue, it can be asked if the laws created by C-24 are more geared to addressing enterprise crime in general rather than organized crime?

Although there is a growing library of organized crime information in Canada, there is still not a great deal of information available surrounding the current state of organized crime law. As such, one should be careful in trying to determine long-term trends or directions based solely on Canada's own track record when it comes to combating organized crime. The provincial courts have so far been split on the issue of the constitutionality of the Bill C-24 legislation, and both cases that have been heard dealt with a different offence, so it remains to be seen how the Supreme Court might treat either issue at that level.

With regard to *R. v. Accused No. 1 et al.*, the United States has also examined the strategy of "headhunting" the leaders of organized crime groups and they have found that it is not a very successful tactic. Actual evidence that such a tactic is valuable remains

difficult to find.³⁰⁴ Quoting Lyman and Potter, Gabor addressed the question whether these efforts at decapitating and otherwise disrupting organized crime groups can be declared a success:

The problem with all this activity is that the government has failed to produce even a scintilla of evidence that any of these prosecutions have resulted in a diminution of organized crime's illicit ventures. The federal government simply has no measures of the amount of harm caused by organized crime with which to measure such an impact. . . But other indicators seem to suggest that organized crime is alive and quite healthy despite these law enforcement efforts.³⁰⁵

This is true in Canada as well; there is just not enough evidence upon which to judge the success or failure of Bill C-24. This type of data is especially important with regard to the leadership offence since that offence contains the possibility of a life sentence, the harshest punishment prescribed in Canadian law. If American experts argue that leadership offences are of questionable effectiveness, and a Canadian court has ruled that specific section of the legislation unconstitutional, perhaps this section should be revisited by Parliament.

The United States faced a very visible threat in organized crime (televised committees helped to increase its visibility) and responded in the way it thought was appropriate, but which turned out to be a response of questionable constitutionality. In Canada, the biker wars in Quebec led Parliament to react to this violent form of criminality and, as was seen with RICO, it eventually constructed legislation that is also broad and of questionable constitutionality. As discussed earlier, the argument can be made that the C-24 legislation will follow the path set by RICO and begin to be used against a variety of people which do not resemble organized crime, but a more general

³⁰⁴ Gabor, *supra* note 115, at 20-22.

³⁰⁵ *Ibid*, at 21, citing M. Lyman & G. Potter. *Organized Crime*. (New Jersey: Prentice Hall, 1997), at 435.

form of criminality known as enterprise crime. It is illuminating to note that the term “organized crime” was not actually included in any of the offences, so the question is raised about just what these pieces of legislation are actually seeking to confront. If organized crime represents a broad conspiracy of criminals with vast resources and skills, then the severity of offences and the broad language make sense. If the nation is being threatened, as the 1950s and 1960s televised hearings in the United States seemed to indicate, then it is easier to understand such over-reactive legislation. Similarly, here in Canada, MPs conjured up images of violent bikers and dead or drug addicted children as the impetus for the legislation. These are obviously serious threats, and as witnessed in Chapter 3, one MP was even willing to allow murder under the police immunity section to deal with this form of threat. The legislating of police immunity itself is also evidence of the severe reaction to the perceived threat of organized crime. There is something powerful in the image of the police, the upholders of law and justice, being granted the ability to break the law for the greater good of apprehending these types of criminals. As shown, however, these police immunity sections are not being used very often and do not appear to be as vital as they were originally argued to be in Parliament.

In the United States, it would seem that the uses and evolution of RICO point to the desire and even need for a new form of legislation dealing not just with organized crime, but with “enterprise” crime in general. By doing so, enterprise crime could be defined and legislated as its own target for attack, instead of having to adapt existing legislation as has occurred with RICO. Organized crime could be covered under such a piece of legislation, and it would instead be addressed under the umbrella of enterprise crime in general and not as its own dominant paradigm as it currently is. All organized

crime could be covered under the term “enterprise crime,” but the reverse is not always true. Not all enterprise crime is organized crime as it was described in Parliament by lawmakers and witnesses. Five men who defraud a number of lumber distributors is not the same thing as bikers in Quebec who blow up children, nor Asian-based organized crime groups who smuggle people across Canada’s borders. It is difficult to argue that five such men were seeking to disrupt or corrupt society; when they were only interested in making a quick buck. Under the conspiracy theory paradigm, it does not make sense to apply the same law to such a small group with such minor goals, and yet under the current legislation, they are also caught under the same law as the bikers in Quebec. Many theorists have argued for the use of enterprise theory in constructing legislation against organized crime³⁰⁶, and if Parliament were to adopt such a paradigm, it would help clear up some of the problems discussed, and it would also help to prevent those which might arise in the future.

Emphasizing enterprise crime rather than organized crime could also avoid many of the problems RICO has encountered in the United States. Questions of vagueness could be limited if the legislation spelled out exactly the kind of crime it was aimed at, rather than being adapted from organized crime legislation. If RICO had set out from the start what its intentions were, that would most likely have cut down on the number of challenges it faced as prosecutors and plaintiffs attempted to bring to trial a whole host of offenders that were not traditional organized criminals. Taking this route might also result in a reduction in the severity of penalty. Instead of attempting to combat a nationwide syndicate of Mafia, or a nationwide group of bikers who are seeking to

³⁰⁶ For more on this topic, see: Michael A. Moon, “Outlawing the Outlaws: Importing RICO’s Notion of ‘Criminal Enterprise’ Into Canada to Combat Organized Crime,” in *24 Queen’s L.J.* 451, Spring 1999, at

corrupt and murder our children, organized criminals could instead be seen as businessmen seeking to deal in illicit goods and services. Rather than severe life sentence penalties and police justification measures, penalties and offences could be drafted with the goal of limiting and punishing enterprise criminality. There are already aspects of enterprise criminality contained in C-24, such as the proceeds of crime section, which was created to combat organized crime by going after participants' money and seizing goods and assets.

This notion of replacing organized crime in the legislation with enterprise crime is not meant to detract from the fight against it, nor the threat posed by criminal groups. The biker wars in Quebec were real, and Daniel Desrochers did die as a result of the actions of such a group; however, Canada should not be legislating in haste and without a better understanding of the intricacies of what it is dealing with. Drafting legislation that is not theoretically sound and which does not reflect the realities of the situation does not serve society or criminal justice well. Passing legislation that is constitutionally questionable will also not serve its purpose if it is struck down by the courts. Organized crime may be a valid threat but as it is currently legislated, the leader of a three person fraud ring could face the possibility of life in prison, served consecutively with his other offences, and with the possibility of parole being set at one half time served. There is a gap between the intention of the legislation to fight organized crime and the severity of penalties, one which is explained by a conspiracy view. An enterprise paradigm could conceivably help fill this gap and new legislation could be constructed along these lines with more appropriate penalties.

sections IV and VI.

In light of recent events here in Canada, it seems that there may also be another, less efficacious, direction for organized crime legislation to take, and that is new legislation that would be even stricter, and which would create a membership offence. In early April 2006, eight bikers were found dead near London, Ontario. Eight members of the Bandidos outlaw motorcycle gang were found shot to death in abandoned vehicles; another member of the same gang has been charged with first-degree murder (four other people have been implicated in the murders).³⁰⁷ As seen in Chapters 2 and 3, high profile incidents too often result in moral panics and more legislation, particularly in regard to organized crime. This incident has already sparked debates over the inclusion of a membership offence for organized criminals. On the CBC radio show “The Current” on April 12, 2006, the issue was raised with regard to the recent addition of a terrorist group to the list of banned terrorist organizations.³⁰⁸ Since Canada has a list of banned terrorist organizations, the question was raised as to why such a list is not available for criminal organizations. Richard Marceau, former justice critic with the Bloc Québécois, was on the radio show arguing in favour of a membership offence for organized crime groups, in this case the Hells Angels. This type of membership offence would involve compiling a list of criminal organizations and making it an offence to be a member of one of the groups contained within that list. This concept is based on the Anti-Terrorism Act provisions which came into effect in 2001 and created an official list of terrorist groups.³⁰⁹ As discussed in this work, Quebec has often argued for such a membership

³⁰⁷ John Miner. “Killings drive bikers to oblivion,” in *Ottawa Sun*, April 11, 2006, at 6-7.

³⁰⁸ CBC Radio One. *The Current*. April 12, 2006. Located at URL: <http://www.cbc.ca/thecurrent/2006/200604/20060412.html> (Last visited April 12, 2006). This website contains both a summary of the show, and a streaming audio version of the show.

³⁰⁹ House of Commons Canada. *Bill C-36, An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact*

offence³¹⁰, so it is possible that it may in fact one day become a part of the *Criminal Code*; only time will tell on this issue.

RICO shows that such methods are not necessary, however, as to date the United States has not yet found the need to criminalize mere membership in organized crime groups. A membership offence could also result in a distinction between organized crime and enterprise crime in that all offenders could be charged as enterprise criminals, however, those who are members of specific criminal organizations designated on a government list could then be further subjected to harsher penalties. Such thinking, however, once again reflects the conspiracy theory of organized crime because it places organized criminals on the same level as terrorists and it would mean that organized crime is an especially threatening form of criminality, a notion still not supported by the statistics or the literature. It would also only apply to large, monolithic, criminal organizations that could be proven to exist, such as the Hells Angels and La Cosa Nostra. Legislation such as this would ignore small groups such as in *R. v. Sbrolla*, and it would move in the opposite direction of RICO, which has developed in its enforcement the much broader view of enterprise crime. RICO was originally intended to combat organized crime, yet it took thirty-five years worth of lengthy court battles to ultimately conclude that the legislation was applicable to the more inclusive concept of enterprise crime and not organized crime. Through American case law, RICO has become more than just organized crime legislation, it has become enterprise crime legislation.

measures respecting the registration of charities, in order to combat terrorism. 1st Session, 37th Parliament, 49-50 Elizabeth II, 2001.

³¹⁰ Scott & DeVillers, *supra* note 73. Quebec dissented to the recommendations of the October 2000 Standing Committee on the grounds it did not contain a membership offence. See also Appendix A.

Canada should pay heed to the United States' experience and recognize the utility and value of developing approaches based upon enterprise theory now and not thirty-five years from now. Organized crime can still be attacked under the rubric of enterprise crime, but the reverse is not necessarily true; thus, for the sake of efficiency, Canadian legislators should employ enterprise models of criminality in the fight against organized crime. Unlike the United States, however, Canada might not be able to wait thirty-five years because *R. v. Accused No.1 and Accused No. 2* has already struck down part of the C-24 legislation. Now is the time to re-examine the legislation and construct new legislation that reflects the enterprise crime paradigm. RICO can provide both positive and negative examples to Canada should it seek to re-examine the legislation, demonstrating to legislators what should and should not be included in organized crime law. For example, America has not needed to include a membership offence, and such a course would not be advisable due to the constitutional issues; it is also not reflective of the enterprise paradigm.

Canada's organized crime legislation was passed in haste by Parliament and reflected outdated conspiracy theories of and approaches to organized crime. Organized crime as composed of large, monolithic, and conspiratorial entities is not what Canada's legislation should be focused on. RICO shows us this, because in the United States, after thirty-five years of court battles, their legislation can no longer be seen as targeting organized crime, but instead as targeting enterprise crime. Legislators may have been seeking to "do good" with Bill C-24, but it is uncertain that they understood the nature of the phenomenon with which they were dealing. Organized crime as a conspiracy is not the paradigm legislators should have been, nor should be using; instead the enterprise

paradigm is much more reflective of the type of crime such legislation should be seeking to address.

It is an exciting time to study the issue of organized crime in Canada. The courts have provided mixed results on the constitutionality of the legislation, so any upcoming cases will prove interesting to examine. There is a need for more studies on virtually every topic concerning organized crime in Canada, from definitional issues, to the impact of organized crime on society. The recent murders near London have already resulted in heightened interest in biker activities, and it is difficult to be hopeful that Canada will not respond to the resulting moral panic with new and stricter legislation. In the future, Canada should examine the case history of Bill C-24, the statistics surrounding organized crime offences, the possibility of crafting enterprise offences, and the experience of the United States with RICO before it makes any legislative decisions. Organized crime is constantly changing with the times, thus Canadian legislators should also be willing to leave behind old concepts and the conspiracy paradigm in favour of the enterprise paradigm. No matter what legislators decide to do, however, the future of organized crime legislation in Canada holds many possibilities for research.

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Appendices

Appendix A - Standing Committee Recommendations

Source: Andy Scott & Paul DeVillers. *Combating Organized Crime*. October 2000.

Located at URL:

<http://www.parl.gc.ca/InfoComDoc/36/2/JUST/Studies/Reports/SCRMRP01-E.htm> (Last visited on Nov. 11, 2005).

Recommendations of the Sub-Committee:

Recommendation 1

Ensure that the relevant elements of existing legislation, resources, investigative and prosecutorial practices are being deployed to their fullest potential. If this is not so, effective strategies to fill any gaps should be developed.

Recommendation 2

Amend the *Criminal Code* so that all its provisions related to organized crime activities are brought together in a specific Part to be entitled Enterprise Crime, Designated Drug Offences, Criminal Organizations, and Money Laundering.

Recommendation 3

Amend sections 2 and 467.1 of the *Criminal Code* to reduce the number of participants in a criminal organization from 5 to 3.

Recommendation 4

Amend sections 2 and 467.1 of the *Criminal Code* so that the predicate offences (contained in section 467.1(1)(b) as an offence to which an accused is a party) include all indictable offences.

Recommendation 5

Amend sections 2 and 467.1 of the *Criminal Code* to remove the requirement that some or all of the members of the criminal organization have committed indictable offences within the preceding five years.

Recommendation 6

Amend the *Criminal Code* to allow for the designation of criminal organization offenders in a manner similar to that applicable to dangerous offenders and long-term offenders provided for at sections 752 and following of the *Criminal Code*. This would allow at the sentencing stage, after a conviction has been obtained, for

the imposition of imprisonment for an indeterminate period or for long-term supervision in the community after sentence for up to 10 years.

Recommendation 7

Amend sections 184 and following of the *Criminal Code*, dealing with judicially authorized audio and video surveillance, to increase in non-criminal organization offences from 60 days to 120 days the periods for which such activities can be authorized and renewed.

Recommendation 8

Review and amend the provisions of Part VI of the *Criminal Code* so as to streamline and simplify the requirements and practices involved in the judicial approval and renewal of audio and video surveillance as a law enforcement investigative strategy.

Recommendation 9

Amend section 743.6(1.1) of the *Criminal Code* to allow sentencing judges to order that the offender serve the full sentence of incarceration without any form of conditional release in cases where there is evidence the convicted person committed an offence to the benefit of, at the direction of, or in association with a criminal organization.

Recommendation 10

Amend the *Criminal Code* so that there is a reverse onus (dischargeable on a balance of probabilities) placed on a person convicted of an enterprise crime, a designated substance offence, a criminal organization offence, or money-laundering, whose assets have been seized, to prove that these assets have not been acquired or increased in value as the result of criminal activity. If the convicted person is unable to discharge this burden of proof to the satisfaction of the court, these assets would be declared to be forfeited.

Recommendation 11

Amend section 231 of the *Criminal Code* to make first degree murder the killing of anyone involved in the criminal justice system during or shortly after investigative or criminal proceedings.

Recommendation 12

Further measures beyond those now in place should be developed to more fully protect jurors serving in trials related to organized crime.

Recommendation 13

Amend the *Canada Evidence Act* to codify and simplify the rules related to disclosure.

Recommendation 14

Ensure that human resources, expertise and technology levels are sufficient to effectively combat organized crime.

Recommendation 15

Establish a national tactical coordinating committee to promote the exchange of information and sharing of experiences among field operatives in order to fight organized crime.

Recommendation 16

Establish special courts to try members of organized crime.

Recommendation 17

Establish special multidisciplinary teams of investigators and Crown prosecutors to investigate and prosecute organized crime.

Recommendation 18

Carry out a country-wide campaign to raise public awareness of the extent and impact of organized crime.

Dissenting Opinion Of The Bloc Quebecois

The Bloc Quebecois cannot subscribe to the interim report of the Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights of the House of Commons.

The Bloc Quebecois puts forward the three following proposals, which are in conformity with the positions it has previously taken.

The Bloc Quebecois proposes that membership in a criminal organization be made a crime.

The Bloc Quebecois advocates making a reference to the Supreme Court of Canada with the view of establishing whether or not the new definition of "gang" is constitutional.

Should the Supreme Court declare the new clause unconstitutional, the Bloc Quebecois would still be of the opinion that the section 33 notwithstanding clause of the *Charter of Rights and Freedoms* should be resorted to.

These three proposals are a minimum since the Bloc Québécois is of the opinion that the issue of organized crime requires a more thorough analysis and wider consultations.

Appendix B - Relevant Criminal Offences Created by Bill C-24

Source: *Criminal Code*, R.S., 1985, c. C-46. Also located at URL:
<http://lois.justice.gc.ca/en/C-46/index.html> (last updated: March 28, 2006)

Definitions

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

“criminal organization”

« *organisation criminelle* »

“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”

« *infraction grave* »

“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.

Facilitation

(2) For the purposes of this section and section 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.

Commission of offence

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

Regulations

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

1997, c. 23, s. 11; 2001, c. 32, s. 27.

Participation in activities of criminal organization

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 five years.

Prosecution

(2) In a prosecution for an offence under subsection (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 of the persons who constitute the criminal organization.

Factors

(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.

2001, c. 32, s. 27.

Commission of offence for criminal organization

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 fourteen years.

Prosecution

(2) In a prosecution for an offence under subsection (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.

2001, c. 32, s. 27.

Instructing commission of offence for criminal organization

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.

Prosecution

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

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

2001, c. 32, s. 27.

Sentences to be served consecutively

467.14 A sentence imposed on a person for an offence under section 467.11, 467.12 or 467.13 shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under any of those sections.

2001, c. 32, s. 27.

Powers of the Attorney General of Canada

467.2 (1) Notwithstanding the definition of “Attorney General” in section 2, the Attorney General of Canada may conduct proceedings in respect of

- (a) an offence under section 467.11; or

(b) another criminal organization 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 or a regulation made under such an Act, other than this Act or a regulation made under this Act.

For those purposes, 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 this Act.

Powers of the Attorney General of a province

(2) Subsection (1) does not affect the authority of the Attorney General of a province to conduct proceedings in respect of an offence referred to in section 467.11, 467.12 or 467.13 or to exercise any of the powers or perform any of the duties and functions assigned to the Attorney General by or under this Act.

1997, c. 23, s. 11; 2001, c. 32, s. 28.

Appendix C - The Relevant Sections of RICO

Source: RICO, 18 U.S.C. §§ 1961-1968. Also located at URL:
<http://www.fbi.gov/hq/cid/orgcrime/statutes/ricostatute.htm> (Last visited March 20th, 2006).

§ 1961. Definitions

As used in this chapter—

(1) “racketeering activity” means

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year;

(B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581–1591 (relating to peonage, slavery, and trafficking in persons), [1] section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in

monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic),

(C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501 (c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States,

(E) any act which is indictable under the Currency and Foreign Transactions Reporting Act,

(F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or

(G) any act that is indictable under any provision listed in section 2332b (g)(5)(B);

(2) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) “person” includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) “enterprise” includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) “pattern of racketeering activity” requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which

occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) “unlawful debt” means a debt

(A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and

(B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) “racketeering investigator” means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) “racketeering investigation” means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) “documentary material” includes any book, paper, document, record, recording, or other material; and

(10) “Attorney General” includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the

control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal penalties

Release date: 2005-08-03

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302 (b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may

consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.