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Canada's Experience in dealing with Organised Crime / Gangs: Legislation and Case Law

Presented by Daniel Prefontaine QC*
Written by Eileen Skinnider**

*President , International Centre for Criminal Law Reform and Criminal Justice Policy, Vancouver, Canada
**LL.B, LL.M, Associate, International Centre for Criminal Law Reform and Criminal Justice Policy, Vancouver, Canada

I. Introduction

During the past two decades, organised crime has become a more complex phenomenon. Criminal organizations have evolved into complex networks, with activities in many countries, combining illegal with legal business and taking advantage of open markets and of government's differing levels of commitment and readiness to combat them.[1] Organised criminal groups have broadened their scope of operations, geographically and by sector. They are not merely transnational and involved in specialized crime; criminal organizations are now transcontinental and diversified, part and parcel of globalization. Forms taken by organised crime groups have also evolved over the past years; no longer predominately hierarchical in their forms. Organised crime groups can include loose networks who work together to engage in illegal profit making activities.

At the international level, the United Nations Convention Against Transnational Organised Crime (adopted 2000, in force 2003) (hereinafter referred to as the Convention) is the international community's response to the need for international cooperation and effective enforcement to combat organised crime.[2] One part of the Convention's counter organised crime measures is that of criminalization, calling on States Parties to criminalize conduct that facilitate the illegal profit making activities of organised criminal groups.[3]

Canada, as a State Party to the Convention, as well as responding to the increasing phenomenon of organised crime within its own borders[4], enacted legislation establishing a number of offences dealing with participation in a criminal organization. These offences represent a move away from the traditional concepts of criminal liability and place individual conduct culpability within the context of group activity.[5]

This paper focuses on the criminalization requirement of participation in an organised criminal group. Part one of the paper will briefly review the international framework established for combating organised crime before examining the normative provisions defining organized criminal group in Article 2 and calling for criminalization of participation in an organised criminal group in Article 5 of the UN Convention. The second part of the paper will examine the Canadian experience in implementing these offences in its domestic legislation and explore some of the relevant recent case law.

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

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

[3] The Convention is structured in four parts: criminalization; international cooperation; technical cooperation; and implementation.

[4] A number of scholars question the veracity of such a statement that organised crime is increasing in Canada. It is generally agreed that the perception that organised crime is on the rise is accurate. See David Freedman, *"The New Law of Criminal Organizations in Canada"* (2007) 85(2) Canadian Bar Review 171 and Don Stuart, *"Politically Expedient But Potentially Unjust Criminal Legislation Against Gangs"* (1998) 69 International Review of Penal Law 245.

[5] David Freedman, *ibid*.

II. The International Framework

a. Overall Scheme

The Convention Against Transnational Organised Crime focuses on offences that facilitate the illegal profit making activities of organised criminal groups. These include: participation in an organised criminal group (article 5); laundering the proceeds of crime (article 6); corruption (article 8); and obstruction of justice (article 23). More specific acts are dealt with by the three Protocols to the Convention:[6]

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

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

Criminalization allows national authorities to organize the detection, prosecution and deterrence of these offences as well as providing the legal basis for international cooperation. It should be noted that for the Convention and the international cooperation provisions to apply, the offences must involved transnationality and organised crime. However, the Convention emphasizes that neither of these should be made elements of the domestic offence.[7]

b. Definition of Organised Criminal Group: Article 2 of the UN Convention

The Convention requires that an "organised criminal group" be a structured group of three or more persons, existing for a period of time and acting in concert. This group's aim must be of committing one or more serious crimes or Convention offences, in order

[6] These Protocols are found at UNODC website: www.unodc.org/unodc/en/crime_cicp_signatures.html. Before a State can become a party to the Protocols, it must first ratify the Convention, meaning each Protocol is read in conjunction with the main Convention. The Protocol on Trafficking in Persons requires the criminalization of trafficking in persons (articles 3 and 5) and the Protocol against Smuggling of Migrants requires the criminalization of the smuggling of migrants and smuggling-related conduct (articles 3, 5 and 6).

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

to obtain, directly or indirectly, a financial or other material benefit.[8] Structured group is further defined by the Convention as to what it does not include; it does not include groups that are randomly formed for the immediate commission of an offence nor does the group need to have formally defined roles for its members, continuity of its membership or a developed structure.[9]

The definition of an "organised criminal group" does not contain a specific requirement to prove that actual crimes were committed by this group.[10] As one scholar noted the Convention definition "recognizes the structural and managerial features of sophisticated criminal enterprises" rather than focusing on the criminal activities themselves.[11] Furthermore, the *travaux preparatoires* elaborate on the term "structured group" in that it "is to be used in a broad sense so as to include both groups with hierarchical or other elaborate structures and non-hierarchical groups where the role of members of the group need not be formally defined".[12] The group must exist "for a period of time", focusing on the group itself as opposed to individual criminal activity. As one scholar notes, "organised crime is characterized by criminal activities on a sustained, repeated basis….is largely independent from individual members; their operations generally continue after individuals are arrested, die or otherwise leave the organization."[13]

c. Criminalization of participation in an organised criminal group: Article 5 of the UN Convention.

Under article 5 of the Convention, States Parties are required to establish at least two criminal offences relating to the participation in an organised criminal group.[14] The first offence could include either or both of the following:

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

The reason for this option being available is to address the fact that some countries have conspiracy laws and others do not. The second option does not require the introduction of "conspiracy" in States that do not have this legal concept.[15] This option criminalizes other

[8] Article 2(a) of the Convention Against Transnational Organised Crime – see annex for full provision.
[9] Article 2(c) of the Convention Against Transnational Organised Crime – see annex for full provision.
[10] Andreas Schloenhardt, *Submission to the Parliament of Australia, Parliamentary Joint Committee on the Australian Crime Commission: Inquiry into the legislative arrangements to outlaw serious and organised crime groups* (4 April 2008).
[11] Andreas Schloenhardt, *ibid*. See also David Freedman, *supra* note 4.
[12] UN General Assembly, *Interpretative notes for the official records (travaux preparatoires) of the negotiations of the United Nations Convention Against Transnational Organised Crime and the Protocols thereto*, UN Doc. A/55/383/Add.1.
[13] Andreas Schloenhardt, *supra* note 10. See also M. Cherif Bassiouni, *"Organised Crime and Terrorist Criminal Activities"* (1990) 4 Emery International Law Review 9.
[14] Article 5 of the Convention – see annex for full provision. The summary of article 5 requirements in this section is from The International Centre for Criminal Law Reform and Criminal Justice Policy and the Centre for International Crime Prevention, *"Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime"* (Vancouver, March 2003) at pages 20-26.
[15] Generally, it is the common law countries that use the offence of conspiracy while civil law jurisdictions use offences which proscribe an involvement in criminal organizations as they generally do not allow criminalization of mere agreements to commit an offence.

activities which may themselves not constitute a crime but does perform a supportive function for the groups' criminal activities.

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

One of the more interesting elements of this offence as defined in this Convention is the fact that it covers people who assist and facilitate the serious offence committed by an organised criminal group, even though they may not participate directly in all of its crimes. This is to ensure more effective action can be taken to combat these groups. As one can see, the Convention focuses on criminal groups rather than on individual acts. That may be why States are not required to criminalize membership in a particular organization. A legal person, such as a corporation, can also be charged with the offences and the liability can be criminal, civil or administrative.[16]

III. The Canadian Experience

a. Background to the legislation

In Canada, legislation in the area of organised crime has been passed in recent years in an effort to provide law enforcement with tools to investigate criminal organizations in their overall effort to combat organised crime.[17] Since 1997, the Canadian government has enacted legislation providing for such things as the creation of an agency to combat money laundering[18], the creation of a new criminal organization offence[19], the creation of other offences like the commission of an offence for a criminal organization and broadening the powers of law enforcement to seize property used in crime and to initiate forfeiture proceedings[20]. Canada is a State Party to the United Nations *Convention* as well as to two protocols on trafficking in persons and smuggling of migrants.[21]

In 1997, the Criminal Code was amended to include a wide variety of anti-organised crime measures.[22] The immediate context was the eve of a federal election and the

[16] Article 10(2) of the Convention Against Transnational Organised Crime.
[17] Tomas Gabor, *"Assessing the Effectiveness of Organised Crime Control Strategies: A Review of the Literature"* (Research and Statistics Division Department of Justice Canada: 2003).
[18] Bill C-22 – Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c.17 found at http://laws.justice.gc.ca/en/P-24.501/text.html.
[19] Bill C-95 – An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence, 1997.
[20] Bill C-24 – An Act to Amend the Criminal Code (organised crime and law enforcement) and to make consequential amendments to other Acts, S.C. 2001, c.32 found at www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-24/C-24-4/C-24TOCE/html.
[21] Canada has not yet ratified the third Protocol Against the Illicit Manufacturing of and Trafficking in Firearms; however signed the Protocol on 20 March 2002.
[22] Bill C-95 – An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence, S.C. 1997, c.23.

perceived need to respond to a plea by the Quebec Attorney General for measures to address a violent and protracted fight between two biker gangs in Quebec: the Hells Angels and the Rock Machine.[23] In introducing the new legislation, the Minister of Justice and the Solicitor General described Bill C-95 as "tough new measures to target criminal gang activity" which were developed through "extensive consultations with police across Canada" and a two day national forum which examined the problem of organized crime in Canada.[24] Also in 1997, Bill C-22 created an agency to combat money laundering.[25]

On the eve of another federal election in 2000, Parliament looked again at the issue of organised crime as calls for tougher measures against organised crime were increasing, in part instigated by the attempted murder of a reporter who had recently published an expose on organised crime.[26] Bill C-24 (2001) contained 70 pages of complicated amendments to the Criminal Code and other federal statutes.[27] The Bills established three criminal organization offences and also provided for targeted use of new investigative tools to be directed against criminal organizations. These include special peace bonds, new powers to seize proceeds of crime including access to income tax information, greater powers to resort to electronic surveillance and a new reverse onus bail provisions for those charged with the new offences.

b. Criminal Code: definition of criminal organization

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

In 2001, the definition of criminal organization was amended in Bill C-24. The government explained that a new definition of criminal organization was drafted to respond to concerns expressed by police and prosecutors that the 1997 definition was "too complex and too narrow in scope".[28] The existing definition was broadened in three ways by:

1. reducing the number of people required to constitute a criminal organization from five to three;

[23] Don Stuart *"Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution"* (2002) 112 Manitoba Law Journal 89.
[24] Department of Justice Canada *"Fact Sheet Bill C-95 – National Anti-Gang Measures"* (1997).
[25] Bill C-22, which was renamed the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c.17 established FINTRAC (Financial Transactions and Reports Analysis Centre of Canada).
[26] Don Stuart, *supra* note 23.
[27] Bill C-24 – An Act to Amend the Criminal Code (Organised Crime and Law Enforcement) and to make Consequential Amendments to Other Acts, S.C. 2001, c. 32.
[28] The Department of Justice Backgrounder *"Highlights of the Organized Crime Bill"* released April 2001.

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

Therefore the definition now requires that a group, however organised, meet two requirements: (1) be composed of three or more persons in or outside Canada; and (2) have as one of its main purposes or main activities the facilitation or commission of one or more serious offence that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.[29] The Criminal Code expressly provides that criminal organization will not mean a group of persons that forms randomly for the immediate commission of a single offence. The definition of "serious offence" is flexible as it can cover a wide range of criminal activities.[30] Facilitation of an offence does not require actual knowledge of a particular offence or that an offence actually has been committed.[31] Committing an offence means being a party to it or counseling any person to be a party to it.[32]

The finding by the court of a criminal organization is to be on a case by case basis and is only applicable to the individuals in that case. Therefore the groups that have been found by the courts to be criminal organizations, such as the Hell's Angels[33] and La Cosa Nostra[34], does not mean that they have been put on an official directory of criminal organizations nor is there to be continuing labeling.

c. Criminal Code offences: participation in activities of a criminal organization

The centerpiece of Bill C-24 is the definition of the three offences of participation in a criminal organization.[35] The creation of these offences seeks to cover a range of offenders that are seen to be involved with sophisticated criminal organizations. The offences establish criminal liability for three categories of persons: (1) enhancers/facilitators (criminal liability for mere participation in and contribution to the activities of criminal organizations); (2) foot soldiers (criminal liability for commission of an offence for a criminal organization); and (3) instructors/directors (criminal liability for directing criminal organizations).[36]

Section 467.11 creates the least serious of the criminal organization offences, making it an offence to participate in or contribute to any activity of the criminal organization for the purpose of enhancing the ability of a criminal organization to facilitate or commit an

[29] Section 467.1(1) of the Criminal Code.
[30] A "serious offence" is defined to mean an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more or another offence that is prescribed by regulation.
[31] Section 467.1(2) of the Criminal Code.
[32] Section 467.1(3) of the Criminal Code.
[33] *R v Lindsay* (2004) 182 C.C.C. (3d) 301; *R v Myles* (2007) 48 C.R. (6th) 108 (Ont S.C.)
[34] *United States v Rizzuto* (2005) 209 C.C.C. (3d) 325.
[35] These Criminal Code provisions are replicated in the attached annex.
[36] These categories were described by David Freedman, *supra* note 4 and further elaborated on by Andreas Schloenhardt, *supra* note 10.

indictable offence. The section provides for a list of things the prosecution need not prove in order to make out the offence:

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

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

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

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

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

It is noteworthy that membership in a criminal organization is not an offence. When the 1997 and 2001 Bills were introduced in Parliament, the then Ministers of Justice made particular note of this and explained that such an offence would be difficult to prove and would be vulnerable to a constitutional challenge.[37] During the Standing Committee on Justice and Human Rights consideration of the 2001 Bill, the Minister of Justice explained that in reviewing other countries around the world, it appeared that only one country had taken the approach to criminalize simple membership in criminal organizations.[38] The Minister cited the concern that criminalization of simple membership could lead to possible abuse and overly wide application. In fact, sections 467.11 and 467.12 do not require that the accused be part of the group that constitutes the criminal organization, however this is a requirement for offences under s. 467.13.

[37] Minister of Justice The Honourable Allan Rock during the House of Commons Debates (21 April 1997) at 10009 and Minister of Justice The Honourable Anne McLellan during the House of Commons Debates (23 April 2001) at 2955.
[38] Minister of Justice The Honourable Anne McLellan during the Standing Committee on Justice and Human Rights (8 May 2001).

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

d. Case Law

Definition of criminal organization (s. 467.1). Earlier cases held the 1997 definition was constitutionally sound.[39] In *R v Carrier*[40] the accused along with other members of a biker group argued that the definition was overbroad and vague, that it violated an accused's right to a fair trial because of its reliance on bad character evidence, and that an accused could be punished twice for one offence. The concern was that the new crime of participation in a criminal organization extended criminal responsibility beyond the already wide net for accessories or conspirators. It would not only apply to those structured groups such as the Mafia and Hell's Angels, but also potentially allow for guilt by association for those acting in loose groups of three or more and to those who have never used violence. The Court held that the provision does not sanction a person for being a member of a gang. Instead, it is aimed at a person's participation in gang activities. In order to be found guilty, two criteria must be established: membership in the group and furtherance of criminal activity. The judge held that the expressions "participate in the activities of a criminal organization"; "substantially contribute to the activities of a criminal organization" and "a series of indictable offences" were not vague or overbroad.[41]

The first case to test the 2001 definition and criminalization of offences was *Lindsay and Bonner v The Queen.* [42] The Ontario Supreme Court judge held that the Hells Angels motorcycle gang is a criminal organization. More specifically, Judge Fuerst was satisfied beyond a reasonable doubt that Hells Angels has as one of its main purpose or activities the facilitation of one or more serious offences that would likely result in the receipt of a financial benefit by its members, in particular drug trafficking.[43] She further stated that the concept of "facilitation" in section 467.1(1) is broader than the actual commission of an offence.[44] Like the concept of conspiracy, it does not require that a substantive offence actually be committed. This is the first time that a judge declared the group, as opposed to individuals, to be criminal.

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[39] *R v Beauchamp* (11 February 2002), Montreal 500-01-003088-017, Boilard J. (C.S.Q.); [2002] R.J.Q. 3086, Beliveau J. (C.S.Q.) and *R v Doucet* (2003), 18 C.R. (6th) 103 (C.S.Q.).
[40] *R v Carrier et al* [2001] J.Q. no. 224, R.J.Q. 628 (C.S.Q.).
[41] *ibid*.
[42] *Re Lindsay and Bonner v The Queen* [2005] O.J. No. 2870 (June 30, 2005) is the decision of Madame Justice Fuerst finding that Hell's Angels is a criminal organization and the conviction of the two accused. The decision regarding the constitutional challenge to the validity of the criminal organization provisions (sections 467.1, 467.12 and 467.14 of the Criminal Code) is found at *Re Lindsay and Bonner v The Queen* (2004) 182 C.C.C. (3d) 301 (Ont SC)(Feb 2004).
[43] *ibid* at para 1079.
[44] *ibid* at para 947 and 948.

In the decision regarding the constitutional challenge to the definition, Judge Fuerst dismissed the accused's argument that section 7 of the Charter of Rights and Freedoms had been violated because the definition of "criminal organization" was overbroad.[45] The accused argued that although there is a legitimate state objective behind the legislation, the means used to accomplish that objective are broader than is necessary. The definition of a criminal organization does not include any requirement of a pattern of activity, nor is it limited to enterprise organizations. As a result, they argued, the legislation captures too much in its net.

Judge Fuerst found that the legislation was not overbroad.[46] The question is whether a State, in pursuing legitimate objective, uses means which are broader than is necessary to accomplish that objective. If so, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason.[47] One of the principles in interpreting legislation by the courts is that statutes should be construed to comply with Canada's international treaty commitments. The objective of Bill C-24 was not just to combat groups alleged to be responsible for crimes of violence, such as so-called outlaw motorcycle gangs, but also to deal with groups involved in the perpetration of economic crime, and to stem the organised criminal pursuit of profit.[48] Furthermore, the legislation is not aimed at legitimate "non-regulated" or "non-criminal" conduct. The definition of a criminal organization requires that one of the group's main purposes or main activities is the facilitation or commission of a "serious offence". It is not merely a prohibition against group activity. The phrase "serious crime" is defined to generally accord with the use of that term in the United Nations Convention Against Transnational Organised Crime. The fact that the definition incorporates offences under federal statutes other than the Criminal Code is justifiable.

Judge Fuerst further found that the term "criminal organization" is not vague.[49] The components of that term are specified in the legislation. They include a minimum number of persons and a common objective, that is, a main purpose or activity. The other terms used in the legislation such as "commission", "facilitates" and "serious offence" had settled meanings and were not impermissibly vague. Regarding vagueness, a legislative provision will be unconstitutionally vague where it "does not provide an adequate basis for legal debate", in that a conclusion cannot be reached as to its meaning "by reasoned analysis applying legal criteria". Conversely, a law is sufficiently precise if it "delineates a risk zone for criminal sanction". A vague law violates the principles of fundamental justice in two ways. It prevents citizens from knowing that they are at risk for criminal sanction and so makes compliance with the law difficult, and it puts too much discretion in the hands of law enforcement officials. The standard to be met for a finding of unconstitutional vagueness is high. The Supreme Court of Canada has recognized that there is a need for flexibility in legislative enactments, and a role for judicial interpretation of legislative provisions. When a legislative provision is enacted,

[45] Section 7 of the Charter: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
[46] *Re Lindsay and Bonner v The Queen, supra* note 42 at para 37 to 50.
[47] This principle was discussed in *R v Heywood* (1994) 3. S.C.R. 761 (S.C.C.).
[48] The objective of Bill C-24 had been discussed in *R v Beauchamp* (2002)(Que SC), see *supra* note 39.
[49] *Re Lindsay and Bonner v The Queen, supra* note 42 at para 51-60.

legislators cannot possibly foresee all the situations that may arise for its application. It is impossible for Parliament to achieve absolute certainty.

Later cases examined to what extent the criminal organization is to be "structured" and what are the limits to a flexible interpretation of the definition that is capable of capturing various forms of criminal organizations but not being overly broad to capture those who do not share the organization's criminal objective. As Justice Holmes held in *R v Accused No. 1*, the Criminal Code definition "serves to exclude from the ambit of the definition random groupings or mere classifications of people based on, for example, personal characteristics and attributes".[50] Justice Mackenzie in *R v Terezakis* expands further on this point noting that it excludes "persons who are not functionally connected to that criminal purpose or activity, irrespective of their links to organizations with legitimate purposes and activities that include persons in the criminal group."[51] In his judgment he recognizes the reality that criminal organizations do not have the incentive to conform to formal structures which are recognised by law as they do not benefit from legal remedies of enforcing illegal transactions. However, he also notes "the persons who constitute the group, however, organised cannot be interpreted so broadly as to ensnare those who do not share its criminal objectives".[52]

The Canadian definition, similar to the UN Convention definition, focuses on the on-going business of organised crime rather than the individual criminal act. Furthermore, the definition shows the understanding that "criminal organizations often blend their criminal operations with legitimate operations"[53] thereby requiring facilitation of a serious offence is one of the group's main purposes or activities and need not be the sole purpose or activity. As stated by Justice Holmes, the definition would include "persons who do not personally engage in or support or subscribe to the serious offence of the group, so long as they are part of the "group" and that the group has as one of its main purposes or activities the facilitation or commission of a serious offence or offences".[54] The courts have provided further interpretation to the meaning of what constitutes a material benefit. In one case, the courts held that the benefit for the criminal organization included turf in the illicit drug market.[55]

Participating in activities of criminal organization (s. 467.11). Currently there is little specific case law examining this offence. Judge Mackenzie, in *R v Terezakis*, makes reference to the fact that liability under s. 467.11 may involve persons outside the criminal organization who have some interaction with the group even if they are not part of the group.[56] The *Lindsay and Bonner* case dismisses the suggestion that s. 467.11 along with the other offences, lack the minimum constitutionally required mental element.[57]

[50] *R v Accused No. 1* (2005) 134 C.R.R. (2d) 274.
[51] *R v Terezakis* [2007] BCCA 384 per Mackenzie JA.
[52] *Ibid.*
[53] *R v Terezakis*, *supra* note 51 per Chiasson JA.
[54] *R v Accused No. 1*, *supra* note 50. This view was supported on appeal in *R v Terezakis*.
[55] *R v Leclerc* [2001] Q.J. No. 426 (February 15, 2001).
[56] Andreas Schloenhardt, *supra* note 10. cites *R v Terezakis* [2007] BCCA 384 per Mackenzie JA.
[57] *Re Lindsay and Bonner v The Queen*, *supra* note 42.

One scholar notes that s. 467.11 contains an expansive notion of participation.[58] This provision enables criminalization of individuals broader than that under complicity or conspiracy provisions. It will be up to the courts to determine whether this will capture the landlord, the accountant or the lawyer who have organised criminal groups as their tenants or clients. He questions how far will the phrase "guilt by association" be understood.

Commission of offence for criminal organization (s. 467.12). In *Lindsay and Bonner*, the accused challenged the constitutionality of section 467.12 arguing that the portion that renders it an offence to commit an indictable offence "in association with" a criminal organization is vague. They argued that it is unclear when a person commits an offence on this basis. Further, the definition does not indicate when a person is in or out of the group and it does not require active participation in an offence by those in the group. They also argued that the lack of necessity for the prosecution to prove that the accused knew the identity of any of the persons who constitute the criminal organization, or had an intention to commit the predicate offence would further the interests of the criminal organization, creates a criminal offence without the minimum constitutionally required *mens rea*.

Lindsay and Bonner were two members from Hells Angels accused of trying to extort $75,000 from a businessman and of acting in association with an identifiable criminal group, namely the Hells Angels.[59] The judge found that the accused persons had the requisite *mens rea* for the offence of extortion and that they acted in association with a criminal organization. The judge noted that the Supreme Court of Canada has emphasized the principle that moral blameworthiness is an essential component of criminal liability, and that such principle falls under section 7 of the Charter as a principle of fundamental justice.[60] In the case of *Lindsay and Bonner*, there is substantive *mens rea*. In order to convict an accused under this provision, the Crown must prove that he or she had the requisite *mens rea* for the particular predicate offence involved, and that the accused acted for the benefit of, at the direction of, or in association with a criminal organization. The Court held that there is an implicit requirement that the accused committed the predicate offence with the intent to do so for the benefit of, at the direction of, or in association with a group he or she knew had the composition of a criminal organization, although the accused need not have known the identities of those in the group. The Judge held that the "in association with" element of s. 467.12 was established by the evidence of the manner in which the accused chose to portray themselves, wearing jackets bearing the primary symbols of the Hells Angels and referring to others "guys" who were "the same kind of mother f--- as I am".[61] They presented themselves not as individuals, but as members of a group with a reputation for violence and intimidation.

In the case of *United States v Rizzuto*, the court held that the commission of at least one offence for the benefit of a criminal organization is an essential element of the offence of

[58] David Freedman, *supra* note 4.
[59] See http://www.yorku.ca/nathanson/CurrentEvents/Oct-Dec04.htm and follow links to Outlaw Motorcycle Gangs.
[60] *R v Ruzic* (2001) 1 S.C.R. 687.
[61] *Re Lindsay and Bonner v The Queen. supra* note 42 at para 1082-1087.

s. 467.12.[62] In that case, the indictable offence involved a conspiracy to commit murder for the benefit of, at the discretion of, or in association with the Bonnino Family of La Cosa Nostra.

Instructing Commission of offence for criminal organization (s. 467.13). In *R v Accused No. 1,* a British Columbia Supreme Court judge struck down section 467.13 which makes it illegal for a member of a criminal organization to instruct someone else to commit an offence.[63] The judge concluded that the law was too broad and vague and therefore violated the Charter. Judge Holmes stated that the definition of a member of a criminal organization was too vague for an offence that carried a maximum penalty of life in prison.[64] She concluded that "Parliament had a constitutional duty to make clear the legal basis" on which a person is deemed to be a member of a criminal organization, and that section 467.13 failed to do that by making it clear who is or who is not a member of a criminal organization.[65] While the vagueness in the offence contained in section 467.13 relates back to the definition of criminal organization found in section 467.1(1), the judge held that there was no reason to strike down the definition section since it underlies also the offences contained in sections 467.11 and 467.12.[66] These offences do not require that the accused be a member of a criminal organization and therefore the constitutional flaw does not related to them. While this ruling does not strike down the law in other provinces, the decision could be cited by other judges across Canada and will likely be appealed all the way to the Supreme Court of Canada.

The main concern raised by this case is that the definition of "criminal organization" does not require a nexus between the characteristics of the group which causes it to be a group and the serious offence activity in which it engages in. The judge suggested that hypothetically, a martial arts teacher who gives lessons to members of a gang might be considered a gang member according to the way the law is currently written.[67] The judge refers to the differences between the Canadian legislation and the United Nations Convention Against Transnational Organised Crime noting that the Convention requires that the group acts in concert with "the aim of committing one or more serious crimes".[68] In other words, the Convention requires that the purpose of the group is to commit serious crimes whereas the Canadian legislation does not require this specific or common purpose to be shared by members of this group. However, in contrast, in March 2006, the Saskatchewan Court of Queen's Bench ruled to the contrary and upheld the constitutionality of s. 467.13.[69] Furthermore, the British Columbia Court of Appeal in *R v Terezakis* overturned the decision of Judge Holmes in *R v Accused No 1* and upheld the constitutionality of not only s. 467.13 but also 467.11 and 467.12.

[62] *United States v Rizzuto* (205) 209 C.C.C. (3d) 325 (Que C.A.); leave to appeal refused (2006) 209 C.C.C. (3d) 325 (SCC).
[63] *R v Accused No. 1, supra* note 50.
[64] *ibid* at para 152.
[65] *ibid* at para 148.
[66] *ibid* at para 151-152.
[67] *ibid* at para 111.
[68] Article 2 of the United Nations Convention Against Transnational Organised Crime.
[69] *R v Smith* (2006) 280 Sask Review 128.

IV. Conclusion

Canada's legislative framework has established a number of offences that captures different types and levels of involvement with criminal organizations, expanding criminal liability beyond complicity or conspiracy, and "covering everything from the most serious involvement to the most minor association with criminal organizations".[70] Despite the number of challenges that have argued that the legislation is overly broad and vague, most of the case law upholds the constitutionality of the offences.

In January 2007, the Standing Committee on Justice and Human Rights studied the issue of combating gangs and organised crime and heard a number of observations from practitioners such as prosecutors and police.[71] The Deputy Chief Prosecutor of the Organised Crime Prosecutions Bureau for the Department of Justice Quebec noted that in addition to the criminalization of offences as amendment by Bill C-95 and Bill C-24, they must be combined with other measures, such as the creation of specialized police task forces, participation of different police agencies, lengthy police investigations that target the whole criminal organizations, the use of civil infiltration agents, the creation of specialized teams of prosecutors, and the renovation of courtrooms which allow for mega trials.[72] He continued that while it is possible to prove what he labels "gangsterism", it can be arduous, requiring lengthy investigations, special investigative techniques which are often expensive such as wiretapping and physical surveillance and often relying on informants. Therefore the necessary resources must be available for investigation and prosecution.

[70] Andreas Schloenhardt, *supra* note 10.
[71] Standing Committee on Justice and Human Rights, Number 042, 1st Session, 39th Parliament, 30 January 2007, found at http://cmte.parl.gc.ca/Content/HOC/committee/391/just/evidence/ev2645085/justev42-e.htm#T0900.
[72] Testimony of Mr. Randall Richmond, Deputy Chief Prosecutor, Organised Crime prosecutions Bureau, Department of Justice Quebec, during the Standing Committee, ibid.

Annex

UN Convention Against Transnational Organized Crime

Article 2 – use of terms
(a) "organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.
(b) "serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least 4 years or a more serious penalty;
(c) "structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

Article 5 – Criminalization of Participation in an organised criminal group
(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
(i) agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organised criminal group;
(ii) conduct by a person who, with knowledge of either the aim and general criminal activity of an organised criminal group or its intention to commit the crimes in question, takes an active part in:
a. criminal activities of the organised criminal group;
b. other activities of the organised criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.
2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.
3. State Parties whose domestic law requires involvement of an organised criminal group for the purposes of the offences established in accordance with paragraph 1(a)(i) of this article shall ensure that their domestic laws cover all serious crimes involving organised criminal groups. Such State Party, as well as State Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offence established in accordance with paragraph 1(a)(i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

Relevant Provisions in Canadian Criminal Code

Definitions
s. 467.1(1) The following definitions apply in this Act.
"criminal organization" means a group, however organized, that
(a) is composed of three or more persons in or outside Canada; and
(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.
It does not include a group of persons that forms randomly for the immediate commission of a single offence.
"serious offence" means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation.
(2) For the purpose of this section and s. 467.11, facilitation of an offence does not require knowledge of a particular offence the commission of which is facilitated, or that an offence actually be committed.

(3) In this section and in ss. 467.11 to 467.13, committing an offence means being a party to it or counseling any person to be a party to it.
(4) The Governor in Council may make regulations prescribing offences that are included in the definition "serious offence" in subs (1). 1997,c.23, s.11; 2001, c.32, s.27.

Participation in Activities of Criminal Organization
s. 467.11 (1) Every person, who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding 5 years.
(2) In a prosecution for an offence under subs (1), it is not necessary for the prosecutor to prove that
a) the criminal organization actually facilitated or committed an indictable offence;
b) the participation or contribution of the accused actually enhanced the ability of the criminal organization to facilitate or commit an indictable offence;
c) the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organization; or
d) the accused knew the identity of any persons who constitute the criminal organization.
(3) In determining whether an accused participates in or contributes to any activity of a criminal organization, the Court may consider, among other factors, whether the accused
a) uses a name, word, symbol or other representation that identifies, or is associated with, the criminal organization;
b) frequently associates with any of the persons who constitute the criminal organization;
c) receives any benefit from the criminal organization; or
d) repeatedly engages in activities at the instruction of any of the persons who constitute the criminal organization. 2001, c.32, s.27.

Commission of Offence for Criminal Organization
s. 467.12 (1) Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.
(2) In a prosecution for an offence under subs (1), it is not necessary for the prosecutor to prove that the accused knew the identity of any of the persons who constitute the criminal organization. 2001, c.32, s.27.

Instructing Commission of Offence for Criminal Organization
s 467.13 (1) Every person who is one of the persons who constitute a criminal organization and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organization is guilty of an indictable offence and liable to imprisonment for life.
(2) In a prosecution for an offence under subs (1), it is not necessary for the prosecutor to prove that:
a) an offence other than the offence under subs (1) was actually committed;
b) the accused instructed a particular person to commit an offence; or
c) the accused knew the identity of all the persons who constitute the criminal organization. 2001, c.32, s.27.

Sentences to be Served Consecutively
s. 467.14 A sentence imposed on a person for an offence under s. 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 Attorney General of Canada
s. 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 s. 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.
(2) Subs (1) does not affect the authority of the Attorney General of a province to conduct proceedings in respect of an offence referred to in s. 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.