THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

The Voice of
the Legal Profession

La voix de la
profession juridique

June 8, 2006

Mr. Art Hanger, M.P.
Chair
Standing Committee on Justice and Human Rights
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Hanger,

RE: Review of *Criminal Code* sections 25.1-25.4

I am writing on behalf of the Canadian Bar Association's National Criminal Justice Section (CBA Section), with respect to the Justice Committee's review of sections 25.1–25.4 of the *Criminal Code* (formerly contained in Bill C-24). The CBA is a national association of 36,000 lawyers, notaries, students and law teachers, with a mandate to seek improvements in the law and the administration of justice. The CBA Section represents both prosecutors and defence counsel from every province and territory in Canada, as well as legal academics specializing in criminal law.

Prior to its enactment, the CBA Section expressed strong concerns about Bill C-24's failure to comply with the rule of law, questioning the justification for public officers and their agents to commit certain *Criminal Code* offences in the name of law enforcement. In response to the concerns raised by the CBA Section and other organizations, the Bill was ultimately passed with accountability mechanisms, including:

- Section 25.2 (requiring that a public officer file a report of acts or omissions committed pursuant to section 25.1);
- Section 25.3 (requiring the competent authorities to publish annual reports); and
- Section 46.1 (the transitional provision requiring a review of the operation of section 25.1 to section 25.4 within three years after the law came into force).

Four and a half years later, the CBA Section continues to have the same concerns expressed in our original submission. We continue to believe that section 25.1 of the *Criminal Code* is antithetical to the rule of law, and undermines the integrity of the administration of justice and

500 - 865 Carling, Ottawa, **ONTARIO** Canada K1S 5S8
Tel/Tél. : (613) 237-2925 **Toll free/Sans frais :** 1-800-267-8860 **Fax/Télécop. :** (613) 237-0185
Home Page/Page d'accueil : www.cba.org **E-Mail/Courriel :** info@cba.org

public confidence in the fair and proper administration of justice by condoning intentional and calculated violations of the law by agents of the state.

The CBA Section recommends that sections 25.1 – 25.4 be repealed in their entirety. At a minimum, the exemption from criminal liability they offer should be restricted to public officers, and should not extend to the commission of acts or omissions by other persons.

If these sections are not repealed, we recommend that their protection should be dependent upon prior judicial authorization of the proposed act or omission under 25.1. Further, more detailed reporting and record keeping should be mandatory, and the operation of the sections should be subject to ongoing Parliamentary review.

Rule of Law

Section 25.1 represents a significant departure from the central premise of the rule of law, that the law applies equally to all. Any suggestion that this exemption better enables police officers to investigate criminal offences is an unsatisfactory basis to justify such a radical departure from the rule of law. It demands more than mere compliance with law. In our view, the rule of law also demands that law comport with constitutional norms, including basic principles of fundamental justice.

We believe that police officers should not be exempt from the application of Canadian criminal law, and are even more concerned that section 25.2 includes an exemption for "other persons acting [under the] direction" of public officers. Those "other persons" will most frequently be agents for the police, commonly people with criminal records who continue to live a criminal life.

In a challenge to a wiretap authorization based upon the information supplied by an informant, the British Columbia Court of Appeal stated:

> In many cases of this kind, the informant or agent will be a person of questionable character who is involved in the very operations which are the subject of the proposed investigation. That was certainly the case with Mr. Molsberry. It is well for the police to maintain a skeptical attitude with respect to information supplied by such persons, and the case law requires that they do so. Thus evidence of a tip from an informer by itself is generally insufficient to establish reasonable and probable grounds.[1]

Police agents may too readily disregard the constraints of law or any direction from the police. The "skeptical attitude" suggested by the court in accepting the information supplied by an agent should equally apply when considering whether an agent will willingly and scrupulously follow the direction of a public officer. In our view, the risk associated by including an agent within the authorization provided under section 25.1 outweighs any potential benefits.
The CBA Section also remains concerned that police officers, rather than independent judicial officers, weigh competing interests and decide "on reasonable grounds that the commission of

---

[1] *R. v. Pires,* (2004) 193 BCAC 42.

the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer's law enforcement duties".[2]

In the leading case of *Hunter et al v. Southam Inc.,*[3] the Supreme Court of Canada recognized that prior authorization through a valid search warrant is necessary to protect privacy interests and to ensure that searches take place only when it is demonstrated that the interests of the state are superior to the interests of the individual.[4] Further, the Court held that, "[f]or such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether the standard has been met in an entirely neutral and impartial manner".[5] The person must "at a minimum be capable of acting judicially".[6] Finally, the Court held that section 8 of the *Charter* requires that the independent judicial officer act on the standard of "reasonable and probable grounds, established upon oath".[7]

The *Criminal Code* provides for many investigative powers, and all require authorization by an independent judicial officer acting upon information under oath. Examples include:

- section 184.2 interceptions of private communications;
- section 186 interceptions of private communications;
- section 487 warrants to search;
- section 487.01 general warrants;
- section 487.012 production orders;
- section 487.05 warrants to take bodily substances for DNA analysis; and
- section 487.092 warrants for foot, hand, fingerprint or tooth impressions.

Section 25.1 is an exception to *Criminal Code* provisions and to established constitutional principles. Police officers are not independent judicial officers, and their professional obligations cause them to be constitutionally incapable of conducting the required delicate and objective balance of competing interests**.** The CBA Section recommends that the exception be repealed in its entirety, but especially in so far as it extends to persons other than public officers. If section 25.1 is not repealed, then it should be amended to require prior judicial authorization, based on information under oath, that state interests prevail over the interests of the individual, and that the state interest in the investigation must prevail over the competing state interest in maintaining the rule of law.

---

2 *Criminal Code* section 25.1(8).
3 (1984) 14 CCC (3d) 97 (SCC).
4 *Ibid*., at 109.
5 *Ibid.*, at 110.
6 *Ibid*.
7 *Ibid*., at 115.

Adequacy of Reporting Requirements

The Annual Report on the RCMP's *Use of Law Enforcement Justification Provisions*, published by Public Safety and Emergency Preparedness Canada, provides insufficient detail to properly assess and review this extraordinary law. For example, the Report states:

> In one instance, the RCMP was conducting an investigation into a drug distribution network. Justified acts or omissions that would otherwise constitute Criminal Code offences relating to the possession of stolen goods, theft over $5,000 and conspiracy to commit an indictable offence were committed.

This description makes it impossible to know whether the "drug distribution network" consisted of three friends selling marijuana at the gram level, or an internationally organized group involved in importing multi kilogram quantities of heroin. Similarly, it is impossible to know what is meant by an act or omission "relating to" theft over $5,000, or "relating to" a "conspiracy to commit an indictable offence". Meaningful review and accountability can only be achieved if the required reports provide enough detail to understand what has occurred and whether it complies with the statutory and constitutional requirements.

If these sections are not repealed, the CBA Section recommends that the *Criminal Code* be amended to require that the statutorily mandated reports include: a brief description of the offence or offences being investigated, and the act or omission committed by the police officer or agent along with a brief description of that act or omission. Further, the report should include whether the investigation resulted in any charges being laid.

We are unaware of any judicial consideration to date of section 25.1. Decisions from the courts will be required to provide detailed insight into how section 25.1 is being used and whether the section, or the manner in which the section is being used, complies with statutory and constitutional standards.

Finally, we recommend that Parliamentary reviews be conducted every three years to ensure ongoing accountability. Hopefully, by the end of the next three-year review period, we will have the benefit of more detailed reports and judicial decisions upon which to evaluate the section.

Thank you for the opportunity of adding the CBA Section's views to your deliberations concerning *Criminal Code* sections 25.1 – 25.4.

Yours truly,

(*Original signed by Greg DelBigio*)

Greg DelBigio
Chair, National Criminal Justice Section

Encl.

Submission on Bill C-24

Criminal Code amendments (Organized Crime and Law Enforcement)

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

November 2001

TABLE OF CONTENTS

Submission on Bill C-24
Criminal Code amendments
(Organized Crime and Law Enforcement)

PREFACE . . . . - i -

I. INTRODUCTION 1

II. GENERAL REMARKS 2

III. EXISTING LEGAL TOOLS 4

IV. RECOMMENDED APPROACH 7

V. EXEMPTION FROM CRIMINAL LIABILITY 8
- A. Background 8
- B. The Proposed Exemption 8
- C. The Rule of Law 10
- D. Specific Concerns 12
- E. Mechanisms to Enhance Accountability 18

VI. ORGANIZED CRIME 21
- A. Intimidation 21
- B. Special Criminal Procedure 24
  - Measures to protect jurors 24
  - Measures to protect witnesses 25
- C. Criminal Organization Offences 26
- D. Expanded Definition for Enterprise Crime Offences 29
- E. Offence Related Property Issues 30
- F. Management or Destruction of Seized Things 31
- G. Enforcing Foreign Orders 31

VII. CONCLUSION 32

PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Criminal Justice Section of the Canadian Bar Association.

Submission on Bill C-24
Criminal Code amendments
(Organized Crime and Law Enforcement)

I. INTRODUCTION

The National Criminal Justice Section (the Section) of the Canadian Bar Association (CBA) appreciates this opportunity to provide the Senate Committee on Legal and Constitutional Affairs with its views on Bill C-24, *Criminal Code* amendments (organized crime and law enforcement). The Section consists of both Crown and defence counsel from every province and territory, and our submission reflects that balanced perspective.

The Section has previously considered many of the issues in Bill C-24. We prepared a submission on Bill C-95, *Criminal Code* amendments (Anti-gang) in 1997. We have reviewed the eighteen recommendations of the Sub-Committee on Organized Crime of the House of Commons Standing Committee on Justice and Human Rights.[1] We responded to *Law Enforcement and Criminal Liability* (the *White Paper*) released by the Department of Justice and the Solicitor General in June 2000, as well as a *Discussion Draft* dated December 12, 2000, circulated by the Department of Justice. We participated in a consultation with government officials in January 2001 to offer our preliminary response to the proposals contained in those documents. The Section also appeared before the House of Commons Standing Committee on Justice and Human Rights during its consideration of Bill C-24 in May, 2001. Our goal throughout this process has been to work with the government to make constructive changes to amend or add

---

1 Sub-Committee on Organized Crime of the House of Commons Standing Committee on Justice and Human Rights, Hon. Andy Scott, M.P., Chair of the Standing Committee; Paul DeVillers, M.P., Chair of the Sub-Committee, *Combating Organized Crime* (Ottawa: House of Commons, October 2000).

to the law when necessary, but to avoid making legislative changes that are unlikely to achieve the desired results or that may actually lead to unintended but deleterious consequences.

II. GENERAL REMARKS

We believe that existing law addresses the objectives of Bill C-24. Rather than achieving its desired effect, we are concerned that it would erode essential constitutional and democratic values. People should be wary of the proposition that more law and harsher penalties will eliminate organized crime. While demands for government to protect the public and control crime are understandable, it is important to be realistic about what can be accomplished and what can be lost as a result of the contemplated legislative change.

As the CBA has outlined in its submission on Bill C-36, *Anti-terrorism Act*, the proposals within Bill C-24 and Bill C-36 would, in reality, not affect only organized criminals and terrorists. They could instead infringe the constitutional rights currently protecting all Canadians. The Bill's proposals are so broad that they would permit arbitrary use against any targeted groups or individuals, including those with no association with organized crime. As suggested in our submission on Bill C-36, this potential is likely to have a discriminatory impact on particular groups on the basis of factors such as race, religion, Aboriginal descent or simply prior criminal record.

We are aware of intense demands by the public and some provinces for the federal government to take steps to eliminate organized crime and we acknowledge that to be a laudable goal. We are also cognizant of the heightened demands of Canadians for a sense of stability and security since the tragic events of September 11, 2001. However, we have consistently argued that drastic legislative changes should not be made unless there is a clear and demonstrable need for such change, and evidence to suggest that the proposed change will

achieve the desired objective. Despite the current outcry, we see no such need. There have been innocent victims of organized crime, but would different legislation have prevented those tragedies? Insufficient time has passed to assess the impact of anti-gang legislation enacted in 1997.[2] Surely, it is prudent to wait for a serious evaluation of those amendments, including their constitutionality and their efficacy, before adding new intrusive provisions to the already cumbersome *Criminal Code*.

There was initially some discrepancy between the views of prosecutors and defence counsel within the Section on the idea of a legislated response to *R. v. Shirose*.[3] However, there has been little disagreement following the proposal in the *White Paper* or on the proposals now contained in Bill C-24. In our view, the Bill would allow police and even agents of the police to commit serious criminal acts without appropriate accountability.

Certainly, police must have the tools they need to do their job. However, would a criminal exemption for police and their agents create the possibility of a justice system prone to abuse and misuse of power? Is it justifiable for a justice system designed to prosecute and condemn illegal activity to allow the same acts by those asked to serve and protect society? While certain illegal activities may have become routine in the "war" against organized crime, does that demonstrate that those activities were absolutely required and that they should now be sanctioned by law? Further, is it possible that existing levels of public distrust of law enforcement personnel will be exacerbated by such legislation? We do not doubt that law enforcement personnel are generally dedicated people who can be trusted to scrupulously monitor their own conduct, but the inherent assumption in the Bill is that this is always the case. One need only to consider police actions in such

---

2 S.C. 1997, c. 23 (formerly Bill C-95).

3 (1999), 133 C.C.C. (3d) 257.

notorious cases as those of Donald Marshall, Jr., Guy Paul Morin or David Milgaard, to know that this assumption is unreliable.

The Section rejects the proposal to authorize law enforcement personnel to violate the law in the name of law enforcement. In our experience, the justice system can accommodate reasonable and proportionate violations of the law by police officers when imperative for valid law enforcement objectives. When a contravention would be serious, we believe it is appropriate for a judge to review the circumstances on a case-by-case basis. The proposal being considered would very significantly extend the exemption for criminal liability beyond anything in current law, not only to the police but also to agents of the police. We consider that extension extremely troubling.

If Parliament decides that allowing illegal activity by law enforcement personnel is absolutely imperative for successful law enforcement, such activity must be narrowly defined, used only as a last resort and subjected to rigorous independent external review. The administration of justice and the public might not be offended by police possessing contraband cigarettes or alcohol, posing as prostitutes or possessing small quantities of narcotics, but any type of violence or serious property damage cannot be condoned. Where to draw the line is no easy task.

III. EXISTING LEGAL TOOLS

What will it take to eradicate organized crime? One thing is certain. Giving law enforcement personnel the resources they need to match those available to organized criminals will help. The House Sub-Committee's first recommendation is to ensure that the relevant elements of existing legislation, resources, investigative and prosecutorial practices are deployed to their full potential.[4] In a

---

[4] *Supra*, note 1.

letter written to then Minister of Justice, Allan Rock, just prior to the enactment of Bill C-95, the CBA also emphasized that current problems were largely not because of deficiencies or shortcomings with the legislation.

> Rather, they are the result of insufficient resources available to law enforcement officials. Some proposals for dealing with organized crime appear intended to make the process less onerous for law enforcement officials attempting to deal with gang members. To the extent that such proposals go beyond reduction of paperwork or bureaucracy, this "streamlining" or "simplifying" may more accurately be characterized as exchanging procedural safeguards designed to protect individual liberty and privacy interests for increased effectiveness in combating gangs.[5]

Funds can also be better spent in the "war" against organized crime by training law enforcement officials about existing provisions such as applications for warrants and obtaining evidence. Society's interests are best met by ensuring that investigative procedures are used properly. All citizens are harmed by improper police procedure, false arrest, and delayed trials.

While we acknowledge that there is room for improvement in the support offered to law enforcement, in our view the legislative tools needed to control organized crime are already available. To replace or duplicate those tools unnecessarily will only impede the successful prosecution of organized crime, generating significant potential for constitutional challenges and uncertainty in the law. Trials will be longer or delayed, and appeals will increase. If new trials are ordered on appeal, witnesses will be harder to locate, more reluctant to testify, and the value of their testimony will diminish by the passage of time. In the meantime, accused will either be serving "dead" time on remand or remain in the community, without resolution either for them, the prosecution or the community.

In contrast, existing *Code* provisions can and should be used to deal successfully with all crime, with a degree of security in their constitutionality. The existing

---

[5] Letter from CBA President, Russell Lusk, Q.C. to Justice Minister Allan Rock (Ottawa: Canadian Bar Association, 1997).

"arsenal," either in statute or through common law, is impressive, and importantly, has generally survived at least some level of *Charter* challenge. For example:

- *Criminal Code* section 2 definitions of "criminal organization," "criminal organization offence" and "offence-related property;"
- *Criminal Code* section 17 removal of "compulsion" as a defence for members of a conspiracy;
- the broad scope of the "parties to an offence" provisions in *Criminal Code* sections 21 through 24;
- the permissible force, on "justifiable and reasonable grounds" allowed by *Criminal Code* sections 25 to 31;
- the potential for life imprisonment already in place for breaches of offences listed in the "Offences against the Public Order" Part of the *Code*;
- the particularly invasive procedures of Part VI of the *Code* dealing with the detection and prevention of all crime, and which are more easily accessed if in the name of combating a "criminal organization," including:
  - the definitions;
  - the general ease of obtaining interceptions, with particularly broad exceptions under sections 186(1.1), 196(5) and section 492, for example;
  - the broad power to keep information secret, both under Part VI and XV of the *Code* (e.g. section 487.3); and
  - the "good faith" exemption even if the limits of these provisions are breached;
- the already tested and generous provisions of section 264.1 (Criminal Harassment);
- the potential for virtually any offence (from murder through arson and even "negligence") to generate a life sentence;
- the entire Proceeds of Crime provisions in Part XII.2;

- Part XIII relating to attempts and conspiracies, and its particular reference to criminal organization (for example, section 467.1);
- the "special procedures" already in place to ensure safe courtrooms, including the power to have an accused removed, video-link provisions, testimony of witnesses from behind screens;
- the reverse onus provisions in section 515(6)(a)(ii) and the practically absolute power in section 515(10)(c) for detention of an accused; and
- the many powers of sentencing judges, and the deference paid by appellate courts to sentences imposed at first instance.

IV. RECOMMENDED APPROACH

Canada's justice system must be based on sound principles and constitutional guarantees. Given the dramatic change to the law envisioned by Bill C-36, *Anti-terrorism Act*, we suggest that this is a time for particular prudence in changing other long standing aspects of our criminal law. Additional powers in unprecedented measure would be conferred by Bill C-36. To couple that infusion of power to law enforcement agencies with an exemption from criminal liability and insufficient accountability is a genuine cause for concern.

The actual criminal acts committed by organized criminals are already associated with an aggravated penalty deemed appropriate and proportional. Judges invariably recognize involvement in organized crime as an aggravating factor and impose lengthy sentences to publicly denounce it. Imposing an extra sanction over that which already exists based on membership in a criminal organization forces participation in the dangerous exercise of defining the indicators of organized crime. The Bill proposes ways to integrate what people wear or with whom they associate into our criminal justice system as a basis for sanction.

These complexities support a cautious approach to legislative change. With respect, we have not seen evidence of such cautious deliberation in addressing this critical issue.[6]

V. EXEMPTION FROM CRIMINAL LIABILITY

A. Background

In *Shirose*,[7] the Supreme Court of Canada held that the investigative techniques used by the police were illegal. The police had engaged in a "reverse sting" money laundering scheme to gain evidence against people suspected of trafficking in narcotics. Effective as the technique had been, the finding of illegality meant that police could no longer use that investigative method. It is important to note that the decision did not alter existing law by criminalizing previously legal conduct. Instead, it clarified both the actual state of the law and the appropriate legislative route for making any change.

Following *Shirose*, the government enacted regulations specifically to permit the police to engage in otherwise criminal conduct, by exempting them in certain circumstances from the application of specified provisions of law. In particular, the *Controlled Drugs and Substances Act (CDSA) (Police Enforcement) Regulations*[8] exempt police officers from various sections of the *Act,* including the specific conduct at issue in *Shirose*. To help ensure accountability, the *Regulations* require that a detailed annual report be filed with the Solicitor General and the Minister of Justice.

---

6 For example, Bill C-95 was passed into law within days of being tabled in the House of Commons. The Bill received First Reading on April 17, 1997 and Royal Assent on April 25, 1997.

7 *Supra,* note 3.

8 SOR/ 97- 234.

B. The Proposed Exemption

Bill C-24 would amend the *Criminal Code* to permit the police to engage in a wide range of presently illegal activity. The exemption was described in the *White Paper* as "essential to provide law enforcement officers with the tools they need to combat local, national, and global crime and protect Canadian interests and Canadians themselves."[9] The Bill outlines when otherwise illegal acts committed by law enforcement personnel will be exempted from criminal liability. The Bill recognizes three levels of illegal acts: those considered less serious; those which might cause serious loss of or damage to property; and those acts that are so objectionable that they will never be exempted from liability, such as the intentional causing of death or bodily harm or conduct that would violate the sexual integrity of a person.

For the least serious level, section 25.1(8) would allow designated officers or their agents to commit or direct an agent to commit what would otherwise be an illegal act or omission if the officer reasonably believes that, given the offence being investigated, such a course is reasonable and proportional in the circumstances, considering factors such as the act being contemplated, the nature of the investigation and other options available to achieve the objective.

Acts which might cause serious loss of or damage to property would be permissible if they are personally authorized in writing by a senior official (section 25.1(9)). As above, the official must believe on reasonable grounds that the act or omission, in light of the nature of the offence or criminal activity being investigated, is reasonable and proportional considering factors such as the nature of the act or omission, the nature of the investigation and other options available.

---

[9] *Law Enforcement and Criminal Liability - White Paper* (Ottawa: Government of Canada, June 2000) at 3.

In addition, an officer would be exempted from liability if that officer reasonably believes that the grounds for obtaining the authorization exist but that it is not feasible under the circumstances to go that route. The officer may then commit the act, or direct an agent to commit the act, if the officer reasonably believes that the act or omission is required to (a) preserve the life or safety of any person, (b) prevent the compromise of the identity of a public officer acting in an undercover capacity, a confidential informant, or a person acting covertly under the direction and control of a public officer, or (c) prevent the imminent loss or destruction of evidence in an indictable offence.

Under section 25.1(10), an agent of the police is also exempted if the act is directed by a public officer, and the agent has reasonable grounds to believe that its commission will assist the public officer in the officer's law enforcement duties.

C. The Rule of Law

In *Mack*, the court affirmed that rather than accepting or endorsing any "policy strategy that amounts to entrapment,"[10] the criminal justice system must be founded upon sound principles and values. A policy strategy that conflicts with or undermines those principles and values must be rejected.

> ...It is a deeply ingrained value in our democratic system that the ends do not justify the means. In particular, evidence or convictions may, at times, be obtained at too high a price. This proposition explains why as a society we insist on respect for individual rights and procedural guarantees in the criminal justice system.[11]

In identifying why entrapment is unacceptable by Canadian standards, the court stated that,

---

[10] (1988), 44 C.C.C. (3d) 513 (S.C.C.) at 541.

[11] *Ibid.*, at 539.

> [t]here is perhaps a sense that the police should not themselves commit crimes or engage in unlawful activity solely for the purpose of entrapping others, as this seems to militate against the principle of the rule of law. Ultimately, we may be saying that there are inherent limits on the power of the state to manipulate people and events for the purpose of attaining the specific objective of obtaining convictions.[12]

People may differ as to the appropriate balance between the competing social interests in fairness and justice versus public protection from crime, but achieving a balance is essential in a civilized society. In assessing that balance in any given case, the key elements of fairness and justice must be used to assess the legitimacy of a particular law enforcement technique. The central issue is not the power of a court to discipline police or prosecutorial conduct but, as stated by Estey J., "the avoidance of the improper invocation by the state of the judicial process and its powers."[13] The need for courts to dissociate themselves from illegal police conduct is clear in jurisprudence relating to section 24(2) of the *Charter*:

> ...[T]he administration of justice would be brought into greater disrepute, at least in my respectful view, if this court did not exclude the evidence and dissociate itself from the conduct of the police in this case... .[14]

> ...[T]he administration of justice would be brought into greater disrepute if the court did not dissociate itself from the conduct of the police by excluding the evidence...It must be recalled, however, that in addition to the consideration of a fair trial, the court must also consider whether by admitting the evidence it would be condoning unacceptable conduct by police... I conclude that the integrity of our criminal justice system and the respect owed our Charter are more important than the conviction of this offender.[15]

---

12 *Ibid.*

13 *R. v. Amato* (1982), 69 C.C.C. (2d) 31 (S.C.C.) at 73.

14 *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.) at 22-23.

15 *R. v. Greffe* (1990), 55 C.C.C. (3d) 161 (S.C.C.) at 182-195.

> ...This court must not be seen to condone deliberate unlawful conduct designed to subvert both the legal and constitutional limits of police power to intrude on individual privacy.[16]

Such cases demonstrate that a "means to an end" justification for a particular policy strategy is, without more, insufficient. The price of expanding police power beyond what can be justified is the erosion of individual rights and the rule of law. While there may be no absolute rule against some form of a law enforcement exemption, the question is how to strike the precise balance between competing values.

As recognized in *Shirose*, the rule of law requires that "everybody is subject to the ordinary law of the land regardless of public prominence or governmental status."[17] The court noted that "the seeming paradox of breaking the law in order to better enforce it has important ramifications for the rule of law."[18] It does not follow from this, however, that specific law enforcement exemptions may not be made. For example, laws exist that permit the interception of private communications and the entry into premises for the purpose of installing listening devices or the execution of a search warrant.

D. Specific Concerns

Bill C-24 would recognize and legitimize a profound distinction between police officers and regular citizens. By allowing police officers to engage in conduct which would otherwise be criminal, the law will reflect a schism beyond that consistent with the rule of law. For this reason, we vigorously oppose enacting such an exemption.

---

16 *R. v. Kovesch* (1990), 61 C.C.C. (3d) 207 (S.C.C.) at 232.

17 *Supra*, note 3, at 274.

18 *Ibid*, at 275.

RECOMMENDATION:

1. **The National Criminal Justice Section of the Canadian Bar Association recommends that, as there is no credible basis upon which to justify a pressing and substantial need for the amendments, the proposal to exempt law enforcement personnel from criminal liability should be rejected in its entirety.**

In spite of this opposition, we will detail some specific concerns and suggestions for clarification, should the exemption be enacted. To begin, the definitions contained in the Bill should be significantly circumscribed. They would presently apply to officers who enforce federal and provincial laws, including environmental officers, prison guards, customs officers, fisheries officers and many others, so that a very broad group of law enforcement personnel would be exempted from criminal liability in the circumstances described. We note that agents, who are also allowed considerable latitude in the proposal, are not defined at all, apart from as people directed to commit an act or omission by a public officer in section 25.1(10).

Section 25.1(4) allows the "competent authority," for the purposes of section 25.1(3), to designate public officers on the basis of the duties performed by the officer or group of officers, instead of a particular investigation. In our view, this is too open-ended in allowing otherwise unlawful activity, especially since it does not require an expiration date for the designation. In addition, the competent authority is not required to file an annual report on the designations it makes under sections 25.1(3) and (4). This would remove a whole area of designations from public accountability and too closely resembles the writs of assistance previously used by law enforcement personnel, prior to being struck down as contrary to the *Charter*.

RECOMMENDATION:

2. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, the definitions as to whom the exemption applies, should be very carefully and narrowly tailored to achieve the desired objective.**

While we agreed with the Statement of Principle contained in the *White Paper* under proposed section 25.1(2), that any express exemption conferred must be limited, we did not and do not believe that the exemption itself accords with the rule of law. The proposal represents a profound change in the orientation of Canadian law. Our apprehension about the exemption is increased by the deletion of the word "limited" in the corresponding section of Bill C-24.

In our view, any significant police violation of the law should first be authorized by a judge. The procedure could be similar to that currently employed for wiretap authorizations under the *Criminal Code*, which require a demonstration that other methods have been "tried and failed," before judicial authorization to proceed may be granted. Police would have to show that the breach of the law was truly a last resort in achieving the law enforcement objective.

RECOMMENDATION:

3. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, no exemption from criminal liability should exist in the absence of judicial authorization, based on an affidavit reviewable in a court of law, that supports the authorization by establishing that other investigative procedures have been tried and failed.**

Section 25.1(8) would not require prior approval, even by a more senior officer, as purported to involve only offences with less serious consequences. In our view, if judicial authorization is seen as absolutely impracticable, such offences should at least require the authorization of a senior official. What constitutes senior officials should either be precisely defined or, if that is too cumbersome, designated to be agents, as Crowns currently are for wiretap applications.

RECOMMENDATION:

4. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, and if judicial authorization is rejected, the offences contemplated under section 25.1(8) should at least require the authorization of a specifically defined senior official.**

In addition, we see no limit within section 25.1(8) to less serious offences. Section 25.1(9) would generally require authorization for offences likely to result in serious loss or damage to property, and section 25.1(11) would prohibit under any circumstances the intentional or reckless causing of death or bodily harm, wilfully obstructing, defeating or perverting the course of justice and sexual violations. It appears that all offences not specified in those two sections are allowed by default without authorization, even by a senior official, so long as the public officer believes that they are reasonable and proportional. This includes offences as serious as forcible confinement, kidnaping and extortion. While sections 25.1(7)(b) and (c) contain discretionary provisions to limit the types of acts permitted, they are insufficient to address our concern about all remaining offences being permitted by default. In addition, the reporting requirement proposed in section 25.2 would not apply to offences committed under section 25.1(8). This may be simply a drafting oversight, but it should be clarified.

RECOMMENDATION:

5. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, section 25.1(8) should be redrafted to achieve greater clarity and to explicitly limit its scope to less serious offences.**

Section 25.1(8)(a) is also worded very broadly, covering public officers engaged both in the investigation of an offence or the enforcement of an *Act* of Parliament, or the investigation of criminal activity. The section should be narrowed and should omit "or in the investigation of criminal activity." In addition, section 25.1(8)(c) gives too much subjective control or assessment to the public officer. If the proposed amendments are made, the types or classes of offences that may be exempted must be clearly specified. Public officers with a vested interest in the outcome should not also have the power to determine if they have reasonable grounds to believe that the proposed criminal activity is reasonable and proportional in the circumstances. At a minimum, the standard of reasonableness exercised in the heat of the moment must always remain subject to a later objective and impartial review by an external independent body accountable to the public. Any infringement of criminal law should be used in rare and limited circumstances, and only as a last resort when other methods of enforcement or investigation are unavailable, not according to the proposed "relative means" test.

Should Parliament see fit to allow an exemption for serious criminal activity, as suggested under section 25.1(9)(a), again, we believe that such authorization should come only from a judge, rather than a senior official. If such authorization is not included, there should be full accountability for resort to approval, such as required for wiretap authorization or *Feeney* warrant. We find it difficult to envision any situation where Canadians could condone the use of bodily harm to achieve a law enforcement goal, as originally proposed in the *White Paper*, and commend the government for deleting that provision from Bill C-24. While

property damage can also be extremely serious and is generally unacceptable on the part of law enforcement personnel, legislation can and should include indemnification for such damage.

Section 25.1(9)(b) allows police officers or the agents they control to bypass the need for authorization by a senior official in three exceptional circumstances, based on a reasonable belief that the grounds for authorization exist but it is not feasible to obtain one. This power is worrisome, particularly since the *Criminal Code* already permits police to act to preserve life or safety in exigent circumstances. Among the remaining two circumstances recognized in Bill C-24, the prevention of the "compromise of the identity" of undercover police or agents is vague, and should also require that the danger be both physical and imminent. The imminent loss or destruction of evidence may similarly be too low a standard given the types of offences exempted under this section.

RECOMMENDATION:

6. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, only in the most narrowly defined and exceptional circumstances should the legislation permit an illegal act or omission without authorization by either a judge or senior official.**

In our view, the proposed exemption should not be extended to agents and section 25.1(10) should be removed entirely. Agents of the police are generally seasoned criminals working for money in an informant capacity. These individuals are accountable to nobody and are beyond the reach of disciplinary bodies. Given the lack of control over these persons, this exemption could easily be abused. We note that the *Kaufman Report* investigating the wrongful conviction of Guy Paul

Morin documented many of the inherent dangers of relying on in-custody agents.[19]

RECOMMENDATION:

7. **The National Criminal Justice Section recommends that, if the amendments are to be accepted in any form, all reference to agents' exemption from criminal liability should be deleted.**

It is also inadvisable to rely on such agents to decide themselves if they have reasonable grounds for believing that committing the offence is for the purpose of assisting the public officer in the public officer's law enforcement duties. Currently, prosecutorial discretion is available where it is inappropriate for an agent or police officer to be charged. Presumably, this amendment is intended to address situations where prosecutors would refuse to exercise such discretion, given the seriousness of the offence. If agents are to be included in the exemption, the circumstances under which they may be exempted from liability should be addressed separately from the exemption permitted to police officers. In our view, this separation will minimize confusion and subsequent litigation.

RECOMMENDATION:

8. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, and if agents are to be included in the exemption, the circumstances under which agents may be exempted from criminal liability be addressed separately from the exemption permitted to public officers.**

---

[19] Honourable Fred Kaufman, Commission on Proceedings Involving Guy Paul Morin (Toronto: Attorney General Ontario, 1998).

The limitations proposed under section 25.1(11) are unlikely to be effective in addressing "loyalty testing." By limiting the exemption, the stakes would be raised so that criminals will ask those they fear are police officers to commit these very serious acts to prove their commitment. We believe it is another inescapable liability of this legislative proposal that it will trap officers into dangerous situations of loyalty testing.

E. Mechanisms to Enhance Accountability

All public officers must be publicly accountable for any exemption from criminal liability that they are permitted. The proposals to enhance accountability in sections 25.2 , 25.3 and 25.4 contain so many limits and exemptions to filing a report that they cease to be an effective mechanism to ensure accountability. Notably, at the end of an already extensive list of limitations to the reporting requirements, section 25.3(2)(e) allows that anything which in the opinion of the competent authority would be otherwise contrary to the public interest need not be reported. In our view, the proposal does not mandate sufficient transparency and the required independent external review of police actions. While delays may be permitted in disclosing information to the public, all information that does not endanger the life of a person should eventually be disclosed.

RECOMMENDATION:

9. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, any acts or omissions exempted from criminal liability be disclosed in an annual report available to the public and submitted to Parliament, and that while delays may be permitted in disclosing such information, all information that does not actually endanger the life of a person should eventually be disclosed.**

Section 25.1(9)(a) includes a requirement for "personal" authorization "in writing" before a senior official authorizes a public officer to commit an offence likely to result in serious loss of or damage to property, adding to the focus and accountability of the process. Further, section 25.2 requires acts or omissions pursuant to section 25.1(9) to be reported. However, as previously mentioned, a wide range of serious offences are not addressed in either this section or in section 25.1(11), including kidnaping, extortion, dangerous driving causing bodily harm or death, unlawful confinement, robbery or extortion, do not seem to require a report. Further, if agents are to be included in this proposal, they must be immediately accountable to someone in higher authority than their immediate supervisor.

We question whether the report that officers must file under section 25.2 is intended to be made available to the defence, at least in cases where informant privilege is inapplicable. The rule should be that full and immediate disclosure of each exercise of the exemption allowed under sections 25.1(8), (9) or (10) should be made to an independent body and to the defence. True public accountability will be attained only when these acts or omissions are subject to challenge in open court. The Crown should not be able to rely on Crown or state privilege to suppress details of reliance on this exemption. The proposed reporting requirements might well offend *Charter* protected rights of disclosure and should be clarified to mandate disclosure.

RECOMMENDATION:

10. The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, then, absent informant privilege or danger to the life of a person, they should require full and immediate disclosure of each exercise of the exemption allowed under sections 25.1(8), (9) or (10) to an independent body and to the defence.

We also question why the requirement of reporting is to be as soon as "feasible," as opposed to "practicable." In our view, police officers should be required to file their report within 48 hours, which we consider analogous to the demand that they can only hold a person for a maximum of 24 hours without charge. Further, what exactly the senior officer receiving a report under section 25.2 should do with the report once received needs clarification. The proposal does not require that the senior officer review the report to confirm whether the act or omission conforms with the law. Some review to consider potential disciplinary repercussions is appropriate.

Finally, the proposal should include a provision for a subsequent review of all aspects of the operation of this proposal, including a study of the effects of the legislation, the frequency of its use and the adequacy of accountability mechanisms.

RECOMMENDATION:

11. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, any legislative amendment to allow an law enforcement exemption to criminal liability be subject to a subsequent mandatory comprehensive independent review within one year.**

VI. ORGANIZED CRIME

A. Intimidation

Proposed section 423(1) of Bill C-24 would create an offence to address intimidation generally, and section 423.1 would specifically address intimidation of key players in the criminal justice system. This includes criminal intimidation of a "justice system participant," a journalist or the general public in order to impede the administration of justice, and is subject to a maximum penalty of fourteen years' imprisonment.

We see no advantage to these proposals when other provisions adequately cover such situations. Section 264 of the *Criminal Code* dealing with criminal harassment already applies to the persons protected under these new offences through encompassing language such as "another person" and "anyone known to them." Its scope is sufficiently broad to cover all the behaviour addressed by this proposal. The *Criminal Code* is intended to provide a general orientation for our criminal law, not to be specifically tailored to certain groups or circumstances. Further, while the addition may be targeted at organized criminals, it will apply to everyone. For example, following a successful application for interim release, a

defence lawyer was recently attacked by a victim's friends and family outside of a New Westminster courthouse.[20]

Government consultation documents have acknowledged that much of this conduct is covered by section 264, but argue that the *mens rea* is different and that section 264 would not protect, for example, the children of a justice system participant while at school.[21] Surely the expansive language of section 264, which says the conduct at issue consists of "engaging in threatening conduct" or "besetting or watching the dwelling house, or place where the other person, or anyone known to them, resides..., or happens to be ..." would include the children of a justice system participant while at school. The *Code* contains numerous offences dealing with assault, threats, protection of property, and obstructing justice that can be used to address the problems identified. We do not support the addition of an intimidation offence, given that it adds nothing to existing tools for combating organized crime and would result instead in duplication, vagueness and uncertainty.

The necessary *mens rea* for section 423.1(1)(a) of intending to "provoke a state of fear in a group of persons or the general public...to impede the administration of justice" is also very vague. Could riding a motorcycle in a leather jacket provoke a state of fear in the public? Even evidence of a fearful public reaction does not establish an intention to produce that result. A *mens rea* so difficult to prove may produce a gap between public expectations and what the criminal justice system can actually deliver.

RECOMMENDATION:

---

20 See, *Vancouver Sun*, Saturday, February 24, 2001, at p.1.

21 *Discussion Draft* (Ottawa: Department of Justice, December, 2000) at footnote 7.

12. The National Criminal Justice Section of the Canadian Bar Association recommends that an offence of criminal intimidation not be added to the *Criminal Code*.

The Bill suggests a constructive first degree murder charge in section 231(6.2). A death caused while committing or attempting to commit an offence under section 423.1, intimidation of a justice system participant, would be deemed to be first degree murder. It is extremely difficult to imagine any murder of a criminal justice system participant that engages the proposed motives that would not also be "planned and deliberate,"and accordingly caught by existing first degree murder provisions. It appears though that the proposal is directed at second degree murders, which are not planned and deliberate, deeming them to be first degree murders and subject to the mandatory longer period of parole ineligibility. In what situations would a justice system participant be murdered as retaliation for their role in the justice system without that act being planned and deliberate? An execution-type killing of someone in the justice system will not only be considered first degree murder, but will certainly be considered as aggravating under subsequent section 745.6 or parole hearings.[22] Even if not planned and deliberate, such an act would already be considered extremely aggravated in sentencing, and would likely be subject to the maximum period of parole ineligibility allowed for second degree murder, the same twenty-five years required for first degree murder.[23]

RECOMMENDATION:

13. The National Criminal Justice Section of the Canadian Bar Association recommends that the proposed amendment within section 231(6.2) be deleted.

---

22 For example, see the Ontario Court of Appeal decision in *R. v. Phillips* (1999), 26 C.R.(5th) 390. The accused was unaware that his victim was a police officer, but the court held that the principle of denunciation required a significant increase in the period of parole ineligibility for a second degree murder.

B. Special Criminal Procedure

Measures to protect jurors

Bill C-24 proposes a number of measures to further protect jurors in trials dealing with organized crimes and to amend jury selection procedures. We note that trial judges already have substantial discretion with respect to courtroom arrangements and security. If there is a need for further protection, any new measures must be carefully developed so as not to compromise the right to a fair trial.

Under proposed changes to section 631, on application by the Crown or on its own motion, the court may order such a measure if it is in the best interests of the administration of justice, including to protect the privacy or safety of jury members. For example, names and addresses of jurors may not, as usual, be written on cards drawn by the clerk, jurors may be referred to by number rather than name or a publication or broadcast ban may be put in place.

In considering such an application, several issues must be considered. Will the Crown use hearsay evidence on a balance of probabilities, similar to the procedure at a show cause hearing? Should the past or potential actions of alleged "associates" be considered as relevant in determining the appropriate process for dealing with an accused? Given that intimidation might be "subtle," there is a risk that many accused could fall under this umbrella.

RECOMMENDATION:

14. The National Criminal Justice Section of the Canadian Bar Association recommends that any changes to enact special criminal procedures to protect jurors be very carefully circumscribed to safeguard the presumption of innocence.

The jury process should be free from undue influences of any kind. Protections for this purpose are in place, such as the change of venue provision or the prohibition against discussions by jurors outside of the jury room. It should be recalled that such influence does not occur solely as a result of the actions of organized criminals. It is not unusual in our experience for victims' families to repeatedly display pictures of the victim to the jury, or for fully uniformed police officers to fill several rows of the court to confront the jury. Obviously, all actions intended to improperly influence jurors should be constrained.

Measures to protect witnesses

Changes to enhance the rights of witnesses to added security are similarly not neutral additions, and must be considered in light of preserving other fundamental rights, such as the right of an accused to a fair trial and to be presumed innocent. The state will often be relying on informants in cases of organized crimes, raising particular credibility issues. The use of a screen may hamper scrutiny of that credibility. The Supreme Court of Canada has recently said, "while in this country an accused does not have an absolute right to confront his/her accuser, in the course of a criminal trial, the right to full answer and defence, generally produces this result."[24] If deemed "necessary and reliable," evidence can already be given by other means, such as being pre-recorded or read in from previous sworn proceedings. Witnesses may also have "screen" protection under existing provisions in the *Criminal Code*.

However, additional security measures will be reasonable in certain circumstances. In making that determination, no measures should be used unless the Crown applies to the trial judge and presents evidence to show that the measures are necessary. Second, it must be kept in mind that each of the

---

24 *R. v. Parrott* (27 January, 2001) File No. 27305 (S.C.C.) at paragraph 51.

contemplated measures may, to differing degrees, detract from appearances consistent with the presumption of innocence. For example, when a witness testifies from behind a screen there is a risk that a trier of fact will infer that the character of the accused is such that the accused must be dangerous and therefore guilty.

Accordingly, to be able to effectively answer an application by the Crown, the Crown should fully disclose the information upon which the application is based to the accused. In other words, principles of disclosure should continue to apply. An application must be based on evidence under oath and the accused must have the opportunity to test the evidence through cross examination. Finally, in considering the application, a trial judge must be guided by the presumption of innocence, recognizing the extent to which any special measure that might be considered necessary will detract from or undermine the appearance of the presumption of innocence. These precautions will create some analogy to the balancing that is currently required from a judge in considering a wiretap application.

RECOMMENDATION:

15. **The National Criminal Justice Section of the Canadian Bar Association recommends that if special criminal procedure is enacted to further protect witnesses, judges be asked to weigh the presumption of innocence against any demonstrated risk, based on sworn information disclosed in advance to the accused and tested through cross examination by the accused.**

C. Criminal Organization Offences

Bill C-24 would redefine a "criminal organization" under section 467.1(1) of the *Criminal Code* to any collection of three, rather than the five persons introduced

by Bill C-95. The proposal would change the existing description of a group "whether formally or informally organized" to a group, "however organized." As such, any group of three or more people would be considered a criminal organization, if one of its main purposes or activities, rather than the primary activity currently required, is the "facilitation or commission of serious offences" that would likely result in a material benefit to the group. Current law also requires that any or all of the members of that group have actually engaged in a series of criminal offences over the preceding five years, while the proposed change would not require any actual criminal activity. The facilitation described under section 467.1(2) does not require knowledge of a particular offence or the actual commission of an offence. "Serious offences" include all offences with a maximum penalty of five years' imprisonment or more, and would apply to an increased number of crimes, given the many offences now hybridized.

Further amendments to section 467.11(1), dealing with participation in a criminal organization, would make similar sweeping changes. The current section requires both knowledge that within the last five years, a member of the organization engaged in a series of indictable offences punishable by five years or more, and being party to the actual commission of an indictable offence punishable by five years' imprisonment for the benefit of, at the direction of, or in association with the criminal organization. The legislation is therefore tailored to target groups who have actually committed "a series" of offences, and people who associate with those groups knowing what type of organization it is and being party to an indictable offence.

The tailored approach legislated through Bill C-95 would be eviscerated by Bill C-24. Section 467.11(1) would create an indictable offence of knowingly participating or contributing to the activities of the organization for the purpose of enhancing its ability to facilitate or commit indictable offences. The prosecution need not prove that the organization actually facilitated or committed the offence, that the accused actually enhanced the ability of the organization to facilitate or

commit the offence, that the accused knew the specific nature of the offence that might be committed or that the accused knew anyone in the organization. The court can consider use of a name, word, symbol or other representation connected with the organization, association with anyone in the organization or receipt of any benefit from the organization. Similarly, to be guilty of instructing, directly or indirectly, the commission of an offence for a criminal organization under section 467.13(1), there is no need to prove that an offence other than the instruction actually occurred or that the accused instructed any particular person.

The 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. In our view, people ought not to be convicted on the basis of bad character evidence, with whom they associate or what they wear. The proposals invite musing about which innocent and lawful groups might now be classified as criminal organizations. For example, criminal defence lawyers representing people accused of organized crime offences might be said to participate or contribute to a criminal organization, enhancing its ability to further indictable offences. The association with members of the organization as clients, receipt of benefits in the form of retainers and repeated legal representation at the direction of those clients, adds to this possibility.

RECOMMENDATION:

16. The National Criminal Justice Section of the Canadian Bar Associations recommends that proposed changes to section 467.1 of the *Criminal Code* be deleted.

Section 467.14 mandates consecutive sentencing for any offence under sections 467.11, 467.12 or 467.13, so that a person would be sentenced for the offence itself, in addition to a sentence for the connection to an organized crime offence. The Bill would also amend the *Corrections and Conditional Release Act* to increase time served before parole eligibility. We have previously expressed the

view[25] that cumulative sentences are not in the public interest and may actually contravene constitutional safeguards. As the CBA recently said in its submission on Bill C-36, *Anti-Terrorism Act*, mandatory cumulative sentences, coupled with an overbroad definition and a very wide net cast through loosely worded offences, "makes it far too easy to conceive of a grossly disproportionate sentence being imposed."[26] The reverse onus on the offender to show that otherwise available parole procedures should apply is especially harsh when considering the breadth of these proposals. In our experience, where an accused has just been convicted of an organized crime offence, a court will be very unlikely to then agree that the normal parole eligibility should still apply. Further, the proposals would undermine a much larger scheme of rehabilitation and parole, and would also involve young offenders.

RECOMMENDATION:

The National Criminal Justice Section recommends that the cumulative sentencing provision, under section 467.14, be deleted.

D. Expanded Definition for Enterprise Crime Offences

Rather than the inclusive definition of "designated offence" proposed in section 462.3(1), offences that would be included within an expanded definition of enterprise crime offences should be clearly specified. Without specification, the Bill would create law that is unclear and could be applied arbitrarily. It is too simple and too dangerous to create a new offence subject to forfeiture on a case-by-case basis.

---

25 National Criminal Justice Section, Bill C-251, *Criminal Code and Corrections and Conditional Release Act* amendments (Cumulative Sentences) (Ottawa: Canadian Bar Association, 1999).

26 (Ottawa: Canadian Bar Association, November 2001) at 28.

Even if the primary goal should be that "crimes committed for the purpose of obtaining a benefit should not be allowed to pay," ensuring certainty in enumerating all enterprise crime offences, as is currently set out in section 462.3(a) of the *Criminal Code*, is preferable to what has been loosely described as the "broader, more comprehensive approach." The definition of "enterprise crime" will continue to evolve and new offences can be carefully and precisely added if a demonstrated need arises. A properly composed list can include those offences which have a profit potential and thereby eliminate any concerns about creating "two classes of criminals," one subject to forfeiture and one that is not.

E. Offence Related Property Issues

Changes proposed in section 490.41(1) would remove the existing exemption for real property from the "offence-related property" now subject to confiscation under the *Controlled Drugs and Substances Act* (*CDSA*). At present, real property must be "built or significantly modified for the purpose of facilitating the commission of a designated substance offence" to be subject to confiscation. To reduce the possibility of unfairness, 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 offence.

We are concerned about eroding the real property exemption, and note that such property can already be captured by provisions of Part XII.2 of the *Criminal Code* and the *CDSA*. The proposed standard does not address our concern that the justice system should not be the instrument that renders people homeless. If an amendment is made, the forfeiture of real property should be permitted only when the existing conditions for forfeiture have been established, or when it has been demonstrated that the real property was used solely for the purpose of facilitating the commission of a criminal offence. The protection of third party interests should be fully incorporated into any amendments. There could be potential

abuses to "third party interests," "innocent third party interest" legal fees and prosecutorial discretion. A case-by-case judicial determination with a full hearing and the onus on the Crown to prove its case would be preferable.

F. Management or Destruction of Seized Things

The proposal relating to management or destruction of seized things seems to overlook the presumption of innocence or any standard of proof of guilt. It also raises disclosure issues, as once destroyed, the property would not be subject to testing or even inspection. The accused must rely on the state's interpretation and description of the property. There are costs associated with storing seized property, but we are opposed to the possibility that seized property might be destroyed prior to a conviction being registered, and possibly all appeals also being exhausted. If the government chooses to seize property, it should accept the costs associated with the decision. Further, a person charged with an offence and acquitted may be entitled to the return of the property. A valuation and compensation scheme would have to be developed, likely at much greater cost to the government than the storage costs would have been. The exercise of careful discretion at the outset with respect to the seizure of property is the preferable approach to reducing costs.

G. Enforcing Foreign Orders

The proposal being considered is that Canada would enforce confiscation orders from foreign countries, so long as appeals in the requesting country are exhausted. We are not, in principle, opposed to providing assistance to a foreign state in this manner, but our concern is the presumption of legitimacy and the lack of ability to challenge the order or the circumstances surrounding the making of that order. Which countries provide sufficient guarantees of fairness that Canada will want to enforce a foreign confiscation order for a criminal offence? What if the foreign law

and its legal process are totally inconsistent with the Canadian process? Would it be "enforced" differently against a Canadian citizen than a citizen of another country? There must be adequate domestic avenues of review to examine allegations that the order of forfeiture is unsound, disproportional, or that there is insufficient detail, and there should be a right of appeal in Canada against such an order. Further, third party rights should be fully protected.

VII. CONCLUSION

The ultimate decision on whether and how to create an exemption for criminal liability for law enforcement personnel is critical. It would signify a significant shift in police power in Canada. We are opposed to this profound change to the law both on principle and out of respect for Canadian constitutional guarantees. The Section does not support the enactment of an exemption allowing law enforcement personnel to commit criminal acts on the basis outlined in Bill C-24.

Canada's legal system carefully balances safeguards against state violation of individual rights and the need for effective law enforcement. There should be valid reasons and solid evidence that change is required before beginning to dismantle those safeguards. The Bill's proposals to eradicate organized crime are unlikely to achieve that objective, but are likely to erode basic constitutional rights essential to Canada's democratic system. Those safeguards protect all people from invasive state action and from being wrongly convicted of criminal acts. Legislative action creating more offences with constitutionally suspect provisions may temporarily and improperly allay the fears of the public, and create a false sense of security. We respectfully suggest that this betrays the public trust, and only puts government in the position of having to "up the ante" when it inevitably happens that organized crime continues in spite of the latest round of legislative amendment. The corner we will paint ourselves into can only get smaller.

SUMMARY OF RECOMMENDATIONS

1. **The National Criminal Justice Section of the Canadian Bar Association recommends that, as there is no credible basis upon which to justify a pressing and substantial need for the amendments, the proposal to exempt law enforcement personnel from criminal liability should be rejected in its entirety.**
2. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, the Definitions as to whom the exemption applies, should be very carefully and narrowly tailored to achieve the desired objective.**
3. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, no exemption from criminal liability should exist in the absence of judicial authorization, based on an affidavit reviewable in a court of law, that supports the authorization by establishing that other investigative procedures have tried and failed.**
4. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, and if judicial authorization is rejected, the offences contemplated under section 25.1(3) should at least require the authorization of a specifically defined senior official.**
5. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, section 25.1(3) should be redrafted to achieve greater clarity and to limit its scope to less serious offences.**
6. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, only in the most narrowly defined and exceptional circumstances should the legislation permit an illegal act or omission without authorization by either a judge or senior official.**

7. **The National Criminal Justice Section recommends that, if the amendments are to be accepted in any form, all reference to agents' exemption from criminal liability should be deleted.**
8. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, and if agents are to be included in the exemption, the circumstances under which agents may be exempted from criminal liability be addressed separately from the exemption permitted to police officers and limited to activities expressly directed by a police officer.**
9. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, any acts or omissions exempted from criminal liability be disclosed in an annual report available to the public and submitted to Parliament, and that while delays may be permitted in disclosing such information, all information that does not actually endanger the life of a person should eventually be disclosed.**
10. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, then, absent informant privilege or danger to the life of a person, they should require full and immediate disclosure of each exercise of the exemption allowed under sections 25.1(3), (4) or (6) to an independent body and to the defence.**
11. **The National Criminal Justice Section of the Canadian Bar Association recommends that, if the amendments are to be accepted in any form, any legislative amendment to allow an law enforcement exemption to criminal liability be subject to a subsequent mandatory comprehensive independent review within one year.**
12. **The National Criminal Justice Section of the Canadian Bar Association recommends that an offence of criminal intimidation not be added to the *Criminal Code*.**

13. **The National Criminal Justice Section of the Canadian Bar Association recommends that the proposed amendment to section 231(4), creating a new constructive murder section, be deleted.**
14. **The National Criminal Justice Section of the Canadian Bar Association recommends that any changes to enact special criminal procedures to protect jurors based on a preliminary showing of "credible risk" be very carefully circumscribed to safeguard the presumption of innocence.**
15. **The National Criminal Justice Section of the Canadian Bar Association recommends that if special criminal procedure is enacted to further protect witnesses, judges be asked to weigh the presumption of innocence against any demonstrated risk, based on sworn information disclosed in advance to the accused and tested through cross examination by the accused.**
16. **The National Criminal Justice Section of the Canadian Bar Associations recommends that changes not be made to sections 2 or 467.1 of the *Criminal Code* to further criminalize membership in, or recruitment to a criminal organization.**