Submission on

Organized Crime (Response to Department of Justice Proposals)

[01-M]

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 37,000 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 as a public statement by the National Criminal Justice Section of the Canadian Bar Association.

Submission on Organized Crime (Response to Department of Justice proposals)

I. INTRODUCTION

The National Criminal Justice Section (the Section) of the Canadian Bar Association (CBA) appreciates this opportunity to respond to government proposals for legislative changes to address organized crime. The Section consists of both Crown and defence counsel from every province and territory.

The Section has considered the issues raised in the *Discussion Draft* dated December 12, 2000, circulated by the Department of Justice. We participated in a consultation with government officials on January 15, 2001 to offer our preliminary response to the proposals. We have also reviewed the eighteen recommendations of the Sub-Committee on Organized Crime of the House of Commons Standing Committee on Justice and Human Rights.[1] Our goal is to work with government to make constructive changes to amend or add 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.

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[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, *Combatting Organized Crime* (Ottawa: House of Commons, October 2000).

II. GENERAL REMARKS

As with the government's proposed legislative response to *R.* v. *Shirose,*[2] which the Section has addressed in an earlier submission, we believe these proposals should not become law. Existing law already addresses the concerns raised in the *Discussion Draft*. There is no reasoned basis for believing that the proposals will actually produce the desired effect. The Section is concerned that essential constitutional and democratic values be safeguarded, and encourages government to be wary of the proposition that more law and harsher penalties will eliminate organized crime. The proposals in the *Discussion Draft* are so broad and vague that they would permit arbitrary use against any targeted groups or individuals, including those with no association with organized crime. This potential could increase the marginalization of particular groups on the basis of factors such as race, 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. However, drastic legislative changes should not be made unless there is a clear and demonstrable need for such change. Despite the pressure from some groups, we see no such need. In fact, we are just starting to observe the impact of the earlier gang legislation enacted in 1997.[3] 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*.

It is essential to keep in mind that the proposals being considered would not be limited in their effect to organized criminals. They could infringe the constitutional rights currently protecting all Canadians. Public demands for government to control

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2 [1999] 1 S.C.R. 565.

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

organized crime may be understandable, but government must be clear about what can be accomplished and what can be lost by amending the law to target one certain group or problem. We must be realistic about the expected impact of any legislative change.

What will it take to eradicate organized crime? Certainly, measures that remove the profit motive will also remove the incentive for criminal organizations to exist. Stronger forfeiture laws and the new money laundering regime are examples of measures that might accomplish that objective. Similarly, there are strong arguments for decriminalization in certain areas, like drugs and prostitution, which currently produce huge illicit profits for organized crime each year.

Giving law enforcement personnel the resources they need to match those available to organized criminals will also help. The House Sub-Committee's first recommendation is that we ensure that the relevant elements of existing legislation, resources, investigative and prosecutorial practices are deployed to their full potential.[4] In a letter written to then Minister of Justice, Allan Rock, just prior to the enactment of Bill C-95, the CBA also emphasized that 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 combatting gangs.[5]

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4 *Supra*, note 1.

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

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.

III. EXISTING LEGAL TOOLS

In our view, the tools needed to maintain a safe society are already available, and to replace or duplicate those tools unnecessarily will only impede the successful prosecution of organized crime. The significant potential for constitutional challenges and uncertainty in the law will also not reduce organized crime. 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 "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 combatting a "criminal organization," including:
    - the definitions;
    - the general ease of obtaining interceptions, with particularly broad exceptions under subsections 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 paragraph 515(6)(a)(ii) and the practically absolute power in paragraph 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

Our court process must be based on sound principles and constitutional guarantees without tainting the process by presupposing that an offence was committed by

organized criminals or that the accused is dangerous and guilty because of the association. Any legislation that imposes unnecessary or unjustified penalties will only lead to disrespect for the processes and institutions of the law.

How feasible is it to imagine a seasoned veteran of a well-known gang considering new, tougher legislation and deciding against proceeding with an offence? We have earlier said:

> [W]e suggest that government leaders must exercise caution in responding to public pressure to eradicate organised crime through new law. There is a danger of offering the public a false sense of security by exaggerating the likely effect of legislative amendment in terms of deterring and preventing organized crime. The costs to individual liberty and the likelihood of constitutional challenges must also be acknowledged. In our view, devoting greater resources to law enforcement will more likely achieve the desired results.[6]

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

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[6] Submission to the Chair of the Sub-Committee on Organized Crime (Ottawa: Canadian Bar Association, October 2000).

All these complexities support a cautious approach to legislative change. Our submission to the Sub-Committee argues that:

> [L]egislation must conform with values and objectives essential to Canada's constitutional democracy, including the procedural safeguards and respect for liberty and privacy interests enshrined in our *Charter of Rights and Freedoms*. Any review of proposals from legislative amendments must be guided by cautious deliberation and, where available, empirical data. If, following a thorough review, it is determined that legislative amendments can be expected to remedy existing problems, any evolution in the law must only be in accordance with those same values and objectives.[7]

With respect, we have not seen evidence of such cautious deliberation in addressing this critical issue. Bill C-95 was passed into law within days of being tabled in the House of Commons.[8] Now, just a few years later, some argue that it did not go far enough, and that harsher, more encompassing legislation will be needed to truly achieve the desired effect on organized crime. The CBA was unfortunately unable to appear before the Sub-Committee given insufficient time between the invitation and the scheduled appearance, but instead wrote a brief letter outlining our general observations on the issue. The Sub-Committee itself remarks:

> This Interim Report ... is not as complete as the Sub-Committee would have liked. The Sub-Committee considers that it did not have enough time to carry out fully the mandate entrusted to it. Nevertheless, given the extreme urgency of taking action on organized crime, the Sub-Committee felt it was essential to share the information it has gathered so far with the decision-makers and the Canadian public.[9]

The Sub-Committee's report is the form of recommendations, given that its meetings were held *in camera* to ensure the confidentiality of the evidence provided. While this discreet process may have been deemed necessary to protect the witnesses to the Sub-Committee, it also makes it impossible for non-governmental organizations to

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7 *Ibid.*

8 The Bill received First Reading on April 17, 1997 and Royal Assent on April 25, 1997.

9 *Supra*, note 1 at 1.

examine the Sub-Committee's subsequent recommendations in light of the evidence presented.

V. THE PROPOSALS

A. Intimidation

i) New offences

The *Discussion Draft* proposes adding a provision to the *Criminal Code* to address acts of intimidation toward key players in the criminal justice system. The proposal targets criminal intimidation of a "justice official," defined as a prosecutor, judge, witness, juror or peace officer. If this legislation goes forward, certainly defence lawyers should also be included in the definition. It is indefensible to suggest that defence counsel are not key players in the justice system, deserving the same protection as any other justice official.

The proposal would create an indictable offence with a maximum penalty of fourteen years imprisonment, if a person commits or threatens to commit a violent act against a justice official, their family or their property, or if a person follows or watches the place where those people live, work, carry on business, go to school or happen to be. The required intent is of provoking fear in the public or the individuals targeted, or of interfering with the administration of justice, impeding, intimidating or interfering with a justice official's official duties or retaliating for anything lawfully done by a justice official.

We see no advantage to this proposal when other provisions adequately cover these situations. Section 264 of the *Criminal Code* dealing with criminal harassment already applies to the persons protected in the definition proposed for "justice official" by encompassing "another person" and "anyone known to them." The scope of that section is sufficiently broad to cover the behaviour addressed by this proposal. The *Criminal Code* is intended to provide a general orientation for our

criminal law, rather than to address the special needs of certain groups, or each and every particular circumstance. 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.[10]

What would be added by this section beyond what is covered by existing section 264, dealing with criminal harassment? In defending the proposal, footnote 7 of the *Discussion Draft* acknowledges that "much of this conduct" is covered by that section but argues that the *mens rea* is different and points out that section 264 does not cover the school attended by the children of the justice official. Surely the broad language of section 264, which says the conduct at issue consists of "besetting or watching the dwelling house, or place *where the other person, or anyone known to them*, resides..., or *happens to be* ..." (emphasis added) would include the children of a justice official 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 here. We therefore do not support the addition of an intimidation offence, given that it adds nothing to existing tools for combatting organized crime and would result instead in duplication, vagueness and uncertainty.

The necessary *mens rea* of intending to "provoke a state of fear in the general public" is also very difficult to determine. Does riding a motorcycle in a leather jacket provoke a state of fear in the public? Even if there is evidence of a fearful public reaction, that 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:

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[10] See, *Vancouver Sun*, Saturday, February 24, 2001, at p.1.

1. **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 Sub-Committee recommended a constructive first degree murder charge if anyone involved in the criminal justice system was killed during or shortly after investigation of criminal proceedings. The *Discussion Draft* suggests adding paragraph 231.4(d), so that any time a "justice official" is murdered with intent to impede, intimidate or interfere with that person in the course of their duties or to retaliate for something lawfully done by that "justice official," it would be deemed to be first degree murder.

We question what another deemed first degree murder section would add to our law. Subsection 231(4) applies solely where has been an intentional killing. It is extremely difficult to imagine any murder of a criminal justice official 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 official 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 in subsequent section 745.6 or parole hearings. However, 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.[11] In our view, there is simply no reason or need to add this provision to subsection 231(4).

RECOMMENDATION:

2. **The National Criminal Justice Section of the Canadian Bar Association recommends that the proposed amendment to subsection 231(4), creating a new constructive murder section, be deleted.**

ii) Special criminal procedure

The Sub-Committee also recommended 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.

For the proposed special procedures to apply, the *Discussion Draft* would require the Crown to apply for an exception to the usual process. If the Crown shows a "credible risk" that jurors, witnesses or counsel may be intimidated and the best interests of the administration of justice are served, the judge may direct that special measures be taken. 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, a publication or broadcast ban may be put in place and the courtroom may be closed to members of the public or the proceedings may be broadcast to another location. In making such a direction, a judge can consider things such as the allegation that the

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[11] 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.

charge was committed by, or at the direction of a criminal organization for the benefit of that organization, the accused's involvement in a criminal organization, the potential for lengthy imprisonment or monetary penalty and any past attempts by the accused or associates to interfere with the judicial process.

To show the prerequisite "credible risk," a number of 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 we consider the past or potential actions of alleged "associates" as relevant in determining the appropriate process for dealing with an accused? Considering "potential" for lengthy imprisonment is unnecessary and redundant, as once charged under this part of the *Code*, that "potential" will, by definition, be present. Finally, given that intimidation might be "subtle," many accused could fall under this umbrella.

RECOMMENDATION:

3. **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.**

The Section recognizes the importance of the jury process being 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.

iii) Measures to protect witnesses

This proposal must be given careful thought before changes are made. For example, the state will often be relying on informants in cases of organized crimes. The reliance on such individuals raises particular credibility issues, and use of a screen may hamper scrutiny of that credibility. Changes to enhance the rights of witnesses to added security are 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 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."[12] It should be remembered that 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. If necessary, witnesses also have "screen" protection under existing provisions in the *Criminal Code*.

Security measures such as screens and juror numbers will be reasonable in appropriate circumstances. In determining when such measures are justified, we should be guided by two preliminary considerations. First, no measures should be used unless the Crown applies to the trial judge and presents evidence which demonstrates that the measures are necessary. Second, each of the 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.

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

Further, 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:

4. **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.**

iv) Special investigative powers

Similar to the increased use of protections for witness security, allowing cameras in the courtroom is a controversial subject, with valid arguments on both sides of the debate. The *Code* already allows access to wiretap and electronic surveillance, with judicial authorization. The Section sees no justification for expanding these provisions under the guise of the "fight" against "organized crime," as suggested in draft proposal D.

B. Membership/Recruitment/Leader

We do not support the idea of penalizing participation or membership through legislation like that proposed in the *Discussion Draft*. As also suggested by the third recommendation of the Report of the Sub-Committee on Organized Crime, the

proposal being considered would redefine a "criminal organization" under section 2 of the *Criminal Code* to any collection of three, rather than the five persons first delineated under Bill C-95. Further, 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 a "substantial" purpose or activity, rather than the "primary" activity currently required, was the "furtherance, facilitation or commission of indictable offences." Current law also requires that any or all of the members of that group actually have engaged in a series of criminal offences over the preceding five years, while the proposed change would not require any actual criminal activity or any specific knowledge of the nature of the offences possibly committed. We note that this will apply to an increased number of crimes, given the many offences now hybridized.

Further amendments to subsection 467.1(1), dealing with participation in a criminal organization, would make similar sweeping changes. The current subsection criminalizes participation or a substantial contribution to the activities of an organization, if there is knowledge that any member of the organization engaged in a series of indictable offences punishable by five years or more during the last five years, and a person is party to the 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 who are party to an indictable offence.

The tailored approach legislated through Bill C-95 would be eviscerated by the present proposal. Subsection 467.1(1) would create an indictable offence of any participation or contribution to the activities of the organization for the purpose of enhancing its ability to further, facilitate or commit indictable offences. The

definition is 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. Participation is determined by such things as wearing identifying symbols, associating with people within the organization or repeated commission of either lawful or unlawful activities at the direction of someone with the organization. In our view, people ought not to be convicted on the basis of bad character evidence or what they wear. Evidence of who a person associates with is not evidence of a crime.

Arguably, what is being proposed would create an absolute liability offence. According to subsection (4), to convict under subsection (1), participation or contribution to advancing the commission of indictable offences, or subsection (3), knowingly directing the unlawful activities, the prosecution need not prove that the accused was a party to a criminal offence, knew or intended any particular offence would be committed or that any person in the organization had committed an offence. The absence of a need to prove criminality invites musing about which innocent and lawful groups might be classified as criminal organizations. For example, criminal defence lawyers representing persons accused of organized crime offences might to 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.

Subsection (6) mandates consecutive sentencing for any offence under subsections (1), (2), or (3) and would amend the *Corrections and Conditional Release Act* to increase time served before parole eligibility. We have previously expressed the view,[13] and continue to believe that mandatory minimum sentences are not in the

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

public interest and may contravene constitutional safeguards. 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 and raises concerns about creating illusory processes that are realistically unattainable. In our view, 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 undermine a much larger scheme of rehabilitation and parole, and would also involve young offenders.

RECOMMENDATION:

5. **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.**

C. Expanded Definition for Enterprise Crime Offences

The offences that would be included within an expanded definition of enterprise crime offences should be clearly specified. Without specification, the proposal in the *Discussion Draft* 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.

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 set out in paragraph 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.

D. Offence Related Property Issues

The proposal suggests that amendments are being considered because, at least in part, "the experience of law enforcement, Crown prosecutors and criminal law policy lawyers has demonstrated" that the existing provision is "too restrictive and is problematic." Without more information and details of those experiences, it is difficult to properly understand the manner in which the existing provision is either restrictive or problematic, or to assess whether the proposal represents a measured response.

Changes proposed would remove the existing exemption for real property from the "offence-related property" now subject to confiscation under the *Controlled Drugs and Substances Act (C.D.S.A.)*. 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 "grossly disproportionate" to the gravity 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 *C.D.S.A*. A gross disproportionality standard does not address our concern that the justice system should not be the instrument that renders people homeless. The victims of such actions could include innocent third parties, including children, spouses and friends. Further, we question why we would set a level of "gross disproportionately" for such a forfeiture. Surely, if the forfeiture of real property was simply "disproportionate" to the gravity of the offence, the state should also not confiscate it. This is especially true when the property is a home for innocent third parties. 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.

Law that has the possibility of creating an unfairness, such as one which might permit forfeiture disproportionate to an offence, must be rejected without a demonstrated need for the new law and an explanation as to why no other alternative will accomplish that objective. While some may believe the existing law is too restrictive or problematic, there is no demonstrated basis upon which to conclude that an amendment will in any effective way advance the objectives of criminal law.

In our view, we need not and should not go farther than the quite generous powers already contained in the *Code*. We should not overlook 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.

E. 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. While the Section recognizes the costs associated with storing seized property, 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 in a particular situation, it should accept the costs associated with the decision.

A person charged with an offence and acquitted may be entitled to the return of the property. If the property has been destroyed, the individual would then be entitled to compensation. 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.

Crown counsel may at times oppose applications pursuant to subsection 490(15) without compelling reason. Property can, of course, be released on conditions pursuant to subsection 490(16). However, conciliation by Crown and a judicious use of these provisions will reduce total storage costs being incurred by the Government. The exercise of careful discretion at the outset with respect to the seizure of property is the preferable approach to reducing costs.

F. 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 we "enforce" it differently against a Canadian citizen than a citizen of another country? What if the property is here, but the person is not?

There should be a right of appeal in Canada against such an order and third party rights should be fully protected. There must be adequate domestic avenues of review any time Canada will be the instrument of search, seizure, asset restraint or ultimate forfeiture. There should be a mechanism to examine allegations that the order of

forfeiture is unsound, disproportional, or that there is insufficient detail to allow us to be satisfied that the order was justified in the first place, rather than simply allowing justice officials to enforce an order without proper documentation supporting the order being filed, similar to that required for extradition orders. Once those documents are filed, there should also be the right to challenge the findings if the situation warrants.

VI. CONCLUSION

Canada has a legal system that carefully balances safeguards against state violation of privacy and liberty and the need for effective law enforcement. We should have valid reasons and solid evidence that change is required before beginning to erode those safeguards.

The legislative changes contemplated in the *Discussion Draft* to eradicate organized crime are unlikely to achieve that objective, and are more likely to destroy basic constitutional rights that are 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. The Section respectfully suggests that this is a betrayal of 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.

VII. SUMMARY OF RECOMMENDATIONS

The National Criminal Justice of the Canadian Bar Association recommends that:

1. **an offence of criminal intimidation not be added to the *Criminal Code*.**

2. **the proposed amendment to subsection 231(4), creating a new constructive murder section, be deleted.**

3. **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.**

4. **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.**

5. **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.**