

THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU
CANADIEN

Vol.85

2006

No. 2

THE NEW LAW OF CRIMINAL ORGANIZATIONS IN CANADA

David Freedman*

The Criminal Code of Canada contains three offences in respect of an individual's involvement with a "criminal organization." The model of criminal liability created in the Code is considered at large, and with specific reference to the American RICO laws and the UN Convention against Transnational Organized Crime (UNTOC). While the Criminal Code provisions aim to further an internationally coordinated criminal law policy to target organized crime and trans-national criminality in new ways, the content of these new offences is problematic. This is particularly so in respect to the lowest-tier offence of simple "participation in a criminal organization."

Le Code criminel du Canada prévoit trois infractions qui incriminent la participation d'un particulier aux activités d'une « organisation criminelle ». L'auteur examine dans son ensemble le modèle de responsabilité criminelle établi par le Code en faisant référence à certaines dispositions de la Loi sur les organisations corrompues et visées par des activités d'intimidation en vigueur aux États-Unis (RICO - Racketeer Influenced and Corrupt Organisations Act) et de la Convention des Nations Unies contre le crime organisé transnational (COT). Bien que les dispositions du Code criminel visent à élargir la portée de la politique internationale de lutte contre le crime organisé de manière à contrôler la criminalité organisée et transnationale à l'aide de nouveaux moyens, il n'en demeure pas moins que la définition de ces

* Faculty of Law, Queen's University.

nouvelles infractions pose problème en ce qui concerne notamment l'infraction la moins grave des trois celle qui consiste en la « participation aux activités d'une organisation criminelle ».

1. Introduction

Though the labels that are used may change with geography and the times, the public imagination has always been fascinated by organized crime. Even today, bookshops are filled with true and fictional accounts of assorted villains, and filmmakers keep themselves busy with the exploits of photogenic mobsters.¹ We even have a dedicated space in the public consciousness, “gangland,” whose unfortunate residents seem restricted to the single activity of “slaying” one another. Yet despite the general public’s lively interest in both the reality of organized crime and its artistic representations, the Canadian criminal law has until relatively recently kept to a traditional course in dealing with group criminality, relying on conventional criminal offences prosecuted in combination with equally conventional principles of inchoate liability and participation to meet the challenge posed by such criminal activity. In other words, incitement, accessory liability, and especially conspiracy, have traditionally been our weapons of choice in fighting sophisticated criminals.

In the last ten years or so the situation has changed markedly. Canada and a host of other countries have created new forms of individual criminal liability through targeted organized crime legislation. Indeed, some countries - the United Kingdom, for example - have even gone so far as to create new policing organizations to enforce such legislation.² These new laws specify culpability for individual conduct but place the act within the context of group activity, rationalizing more onerous individual punishment as deterrence of group-oriented criminality. This is a difficult exercise given our legal traditions. Our criminal law has always professed to be concerned with the acts or omissions of a discrete individual, with doctrine crafted to link the requisite fault requirements

¹ Film buffs may find it interesting to note that one of the earliest nominees for the *Academy Award* for Best Picture featured an organized crime theme (the 1928 film *The Racket*). The film was presented by Howard Hughes whose next film was, quite appropriately, *Hell's Angels* (from which the motorcycle club has taken their name).

² The Serious Organised Crime Agency (SOCA) was created in April, 2006 pursuant to the *Serious Organised Crime and Police Act 2005* (U.K.), 2005, c. 15. The new agency is part of a broad anti-organized crime strategy, and brings together the responsibilities that were shared by the National Criminal Intelligence Service (NCIS) and the National Crime Squad (NCS). Media reports indicate that the Government of Canada is considering adoption of such a “super-agency” here.

of a given offence with the moral and social considerations that rationalize stigma and punishment - in respect of that individual and for that offence alone. With targeted organized crime laws we move well beyond even the far reach of that “darling of the modern prosecutor’s nursery,”³ the law of conspiracy, and closer, some might say, to guilt by association.

In this paper, I will not attempt to deal with the totality of issues involved in legislation touching criminal organizations in Canada.⁴ There are simply too many diverse concerns which can only be addressed meaningfully within their own individual contexts. My focus here is broader, being to examine the difficulties inherent in this type of legislation through a comparative consideration of the nature of two influential models of anti-gangsterism laws, the American *Racketeer Influenced and Corrupt Organizations Act (RICO)* and the *United Nations Convention against Transnational Organized Crime (UNTOC)*. I then comment upon how these concerns are addressed in the substantive criminal organization provisions of the *Criminal Code*.⁵

2. Preliminary Matters: The Difficult Nature of the Problem and the Equally Difficult Decision to Legislate

As a preliminary matter, it is necessary to consider the decision to legislate in this area in two respects: the nature of the problem, both perceived and proven, and the legitimacy of the intrinsically political decision to treat organized crime or “gangsterism” through innovative

³ *Harrison v. United States*, 7 F.2d 259 at 263 (2d Cir. 1925).

⁴ I use the term “criminal organization” specifically in relation to the offences set out in ss. 467.11-467.13 of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*], to the exclusion of the participation principles applicable to organizations (such as legitimate corporations and unions) set out in ss. 22.1 and 22.2. On the latter provisions generally, see K. Jull, T. Archibald and K. Roach, “The Changed Face of Corporate Criminal Liability” (2002) 48 *Crim. L.Q.* 367; D. MacPherson, “Extending Corporate Criminal Liability?: Some Thoughts on Bill C-45” (2004) 30 *Man. L.J.* 253.

⁵ I have purposely excluded vagrancy, solicitation, and nuisance-oriented laws targeting, *inter alia*, street gangs, such as the *California Street Terrorism Enforcement and Prevention Act* [the STEP Act], California Penal Code § 186.20. In these widely-enacted STEP statutes in the United States, “gang” is often used within a particular statute but with no fixed meaning and is only tangentially linked to organized crime policy. Ontario has experimented with respect to solicitation by “squeegee kids” in the *Safe Streets Act*, 1999, S.O. 1999, c. 8; See *R. v. Banks* (2005), 248 D.L.R. (4th) 118 (Ont S.C.J.). Municipalities in various provinces have also adopted “no colours” and anti-fortified club-house (“biker bunkers”) by-laws as permitted by statute which are nuisance-related but rather more targeted to traditional conceptions of at least one manifestation of organized crime, biker gangs; cf. *Building Code Act*, 1992, S.O. 1992, c. 23, s. 34(5).

models of extended criminal liability as a matter of law.

A. The Nature of the Problem: Perceptions and Reality

There is no room for doubt that public perception has played a significant role in propelling organized crime onto the agenda of both national and international law-makers in recent years. When one thinks of gang-related activity in the last twenty years, what almost automatically comes to mind are such domestic outrages as the killing of eleven-year old Daniel Desrochers⁶ and the attempted murder of journalist Michel Auger⁷ during the height of the Quebec biker wars of the 1990s. Those with a more international perspective might recall the murder of investigating Judge Giovanni Falcone, who led the Italian campaign against the Mafia during the 1980s.⁸ Stories like these, as well as the large number of serious crimes allegedly committed by gang members, have received considerable press. Perhaps the media has spent an inordinate amount of their energies upon sensationalistic reports of notorious events, but one suspects that there is rather more to it than just colourful reporting.⁹

Given that I share the traditional legal suspicion of statistics offered devoid of context or of an indication of the means by which they were gathered, I will refrain from parading crime statistics here as a means of proving the existence and prevalence of organized crime in Canada.¹⁰

⁶ The background is well described in M. Moon, "Outlawing the Outlaws: Importing *R.I.C.O.*'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999), 24 *Queen's L.J.* 451 at 455-58; P. Cherry, *The Biker Trials: Bringing Down the Hells Angels* (Toronto: ECW Press, 2005).

⁷ See M. Auger, *The Biker Who Shot Me: Recollections of a Crime Reporter* (Toronto: McClelland & Stewart, 2002).

⁸ Falcone was one of the major organizers of the Mafia trials of the 1980s in Italy. He was killed by a roadside bomb on the way to the airport in Palermo in 1992 only 20 days after the murder of another leading anti-Mafia judge, Paolo Borsellino. The Palermo airport was subsequently renamed the Falcone-Borsellino Airport.

⁹ See M. Beare and J. Ronderos, "Exploratory Review of Media Coverage on Organized Crime in Canada: 1995-2000" (2001), online: <http://www.yorku.ca/nathanson/Publications/Mediascan.pdf>; J. Dubois, "Media Coverage of Organized Crime – Police Manager's Survey" (2003, Research and Evaluation Branch, Community, Contract and Aboriginal Policing Services Directorate, RCMP), online: http://www.rcmp.gc.ca/html/resources_e.htm.

¹⁰ See M. Lambert, *Organized Crime Statistics* (Ottawa: Department of Justice, 2002). Although Statistics Canada does collect data in respect of charges laid under ss. 467.11-467.13 of the *Criminal Code*, that data is not yet publicly available. For statistics in respect of popular perceptions at the same time see Canadian Press and Leger Marketing, "How Canadians Perceive Organized Crime in Canada", online: <http://www.legermarketing.com/documents/spclm/010806eng.pdf>.

Suffice it to say that organizations like Criminal Intelligence Service Canada have documented gang-related activity by region, industry, and ethnic affiliation. Indeed, the Nathanson Centre for the Study of Organized Crime and Corruption at York University in Toronto posts a quarterly summary of organized crime activities in Canada, a sort of window on the underworld with an accompanying commentary. Perhaps individual researchers or organizations, like the popular press, may have their own biases and agenda, but one suspects that there is both smoke and fire here.

Aside from sensationalistic reporting of notorious events, I would suggest that there are also cultural influences at work. North American popular culture and particularly aspects of youth culture¹¹ are infused with images and the trappings of gang-related activity and violence.¹² Whether this actually results in, or in some way fosters, greater rates of criminality I can only leave to others. In searching for the intention of legislative bodies and politicians, however, I believe that how violence and gangs are presented in what is now an omnipresent global entertainment industry has an influence on the public consciousness and, in turn, must necessarily have at least some resonance with legislators.¹³ Again, whether these cultural influences reinforce street gang related criminality or organized crime is not an issue that I can determine, but I do suggest these influences are important in shaping how members of the public regard the problem of organized crime individually, and collectively through the democratic process.

¹¹ There is a growing amount of literature on the influence of certain aspects of youth culture, particularly hip hop, on public perceptions of gangs and vice-versa; see J. Chang, *Can't stop, Won't stop: A History of the Hip-Hop Generation* (New York: St. Martin's Press, 2005); M. Forman and M. Neal, eds., *That's the Joint!: the hip hop studies reader* (New York: Routledge, 2004); S. Watkins, *Hip Hop Matters: Politics, Popular Culture, and the Struggle for the Soul of a Movement* (New York: Beacon Press, 2005). The interest in gangsterism isn't limited to youth culture, of course, as is evident from the popularity of the television program *The Sopranos*.

¹² Certainly this is quite a controversial subject; see L. Kontos, D. Brotherton and L. Barrios, eds., *Gangs and Society* (New York: Columbia University Press, 2003); T. Hayden, *Street Wars: Gangs and the Future of Violence* (New York: New Press, 2004); J. Messerschmidt, *Crime as Structured Action: Gender, Race, Class, and Crime in the Making* (Thousand Oaks: Sage Publications, 1997); J. Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (Cambridge: Cambridge University Press, 1996).

¹³ One can point to the public controversy that arose in November 2005 when Member of Parliament Dan McTeague suggested that the American hip-hop superstar Curtis Jackson, known as "50 cent" or "Fiddy," be prevented from performing in Canada; Editorial, "How Canada Deals With 50 Cent" *The Globe and Mail* (25 November 2005) A22. In the end, the concerts took place. For those interested, at least one reviewer was favourable: "50 has mastered a magic formula of catchy hooks, booty-shaking beats, and

Having said that there certainly exists a natural curiosity about organized crime which is fuelled by media reports of notorious gang-related incidents and which may well be reinforced through popular culture, one might naturally ask why new laws are needed now. Is the situation really any different than in the past, or are these laws merely a pandering to public hysteria about organized crime? Worse still, are these laws really a rather cynical way of unjustifiably expanding the range of police powers? Certainly the “organized crime” label has been affixed to a variety of provisions, some of which don’t seem to be addressed to the problem of organized crime in any specific way.¹⁴ In the past, when there was pressure to dedicate more public resources to suppressing organized criminals based on perceptions of increased or more visible criminal activity, policy-makers confined themselves to talking sanguinely of additional money for investigation and prosecution of offenders, greater police cooperation at the local level, and increased mutual legal assistance at the trans-national level as the way forward. The newer response incorporates these previous elements but also incorporates new extended forms of liability. Part of the reason for a departure from past practice is a familiar dynamic that poses problems for other areas of the law as well.

The criminal law, like any number of other areas of law, is faced with challenges that are produced by what is popularly termed “globalization.” What I have in mind are such observable facts as the following: innovations in the area of telecommunications, including the ability to communicate seemingly without trace and to defeat investigative interception of communications; the easing of travel and trading restrictions by national authorities designed to exploit

gully rhymes that satisfies the ladies and the fellas alike. That the dude can go an entire show without delivering a dud is indisputable evidence of this. Call him a marketing genius or call him a menace—but don’t call him mediocre”: Tara Henley, “Reviews” in *The Georgia Straight* magazine (8 Dec. 2005).

¹⁴ Both Ontario and Saskatchewan have enacted provincial statutes dealing with organized crime in some respect. Although the term organized crime appears in the title, the *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*, S.O. 2001, c. 28 is more in the way of a generalized civil forfeiture statute with no specific focus on organized crime. The provisions were recently held to be *intra vires* the provincial legislature; see *Ontario (Attorney General) v. Chatterjee* (2005), 140 A.C.W.S. (3d) 644 (Ont. Sup. Ct.). See generally, A. Kennedy, “Justifying the Civil Recovery of Criminal Proceeds” (2004) 12 *J of Financial Crime* 8. Saskatchewan has enacted the *Criminal Enterprise Suppression Act*, S.S. 2005, c. C-46.1, which targets businesses and business people with a relationship to criminal organizations and includes provisions to cancel licenses and seek damages caused by unlawful acts. The Saskatchewan statute seems rather more closely connected to organized crime than the Ontario statute but has yet to be tested.

international commercial markets, making the mobility of cash and commodities and criminals easier; new forms and methods of non-cash payment; a vibrant black-market economy in legitimate and counterfeit goods, not to mention contraband; and the movement of population from rural to urban environments in developing countries, and the related smuggling of illegal migrants across borders into more developed countries.¹⁵ This last dynamic has had less resonance in Canada than, for example, in Europe, but globally it has created the scourge of people smuggling in general, and trafficking in women and children for purposes of sexual exploitation in particular.

Perhaps, then, changed circumstances really do merit new approaches. Moreover, targeted anti-gang laws usefully move Canada together with other nations towards the coordinated international treatment of an international problem and closer to the goal of an integrated international criminal law policy.

B. Questioning the Wisdom of Legislative Action

Without wishing to delay the evaluation of doctrine unduly, it is important to remind oneself that the ultimate decision to legislate in this area may be controversial, and even unwise, but it is essentially a political one. It is one thing to say that there is some real problem in respect of organized crime in the abstract and that the law should be equipped to treat the problem robustly - a proposition that most would agree upon. It is quite another to decide that the law should intervene in new and specific ways. The validity of the latter proposition, bounded by constitutional limitations, depends inherently on political considerations.

Many noted criminologists, sociologists, economists, and lawyers take the position that organized crime may exist as a phenomenon wherein sophisticated criminals commit offences in rather complex ways, but that the label "organized crime" to denote some sort of coordinated grouping of villains who operate in close cooperation with each other and other such organizations is the stuff more of fantasy than fact.¹⁶ Thus, one must take the utmost care to investigate specific

¹⁵ See generally M. Joutsen, "International Cooperation Against Transnational Organized Crime: The General Development" (Presented at the 119th International Training Course at the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), 2003), online: http://www.unafei.or.jp/english/pdf/PDF_rms/no59/ch18.pdf; M. Sornarajah "Transnational Crimes: The Third Limb of the Criminal Law" [2004] *Sing.J.L.S.* 390.

¹⁶ For discussions of the critical literature see W. Geary "The Legislative Recreation of RICO: Reinforcing the 'Myth' of Organized Crime" (2002) 38 *Crime, L. & Soc. Change* 311; J. Sheptycki, "Against Transnational Organized Crime" c. 1 in M. Beare,

instances of criminality through rigorous empirical analysis to determine with reasonable precision both the scope of the problem and the degree of public support for legislation as a curative before moving on to the more troublesome task of drafting any law. Absent such data, policy-making becomes fraught with difficulties, particularly those arising from obvious subjective prejudices; one of the best examples is the purported link between organized crime and international terrorism.¹⁷

Unfortunately our legislators do not always take the advice of those counselling thorough investigation and careful deliberation before legislating. Professor Don Stuart wrote a critique soon after the 1997 anti-gang amendments to the *Criminal Code* were passed, in which he highlighted the fact that the legislation was rushed through in the dying days of a Parliament, against a backdrop of media-fuelled hysteria over biker-related violence in Quebec.¹⁸ Stuart further argued that the legislation was created by self-interested politicians who may very well have been more concerned with political advantage in the upcoming election than anything to do with criminal justice policy. There is a lot of truth in this.

The subsequent revisions to the 1997 legislation were more clearly linked to significant policy issues. In 2001, the federal Minister of Justice and provincial Attorneys General accepted the proposition that the fight against organized crime should be a public priority, with the front extending well beyond street-level nuisance and violence to encompass

ed., *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption* (Toronto: University of Toronto Press, 2003); M. Woodiwiss, "Organized Crime: The Strange Career of an American Concept" c. 5 in M. Beare, *ibid.*; J. Sheptycki, "The Governance of Organized Crime in Canada" (2003) 28 *Canadian Journal of Sociology* 489.

¹⁷ Studies suggest that such a link is elusive in most cases to say the least, save where terrorist organizations may have regional control of a particular commodity, in which case the link between organized crime and terrorism is rather more narrow and related to short-term transactions than not; see D.C. Prefontaine and Y. Dandurand, "Terrorism and Organized Crime: Reflections on an Illusive [*sic*] Link and its Implication for Criminal Law Reform" (Presented at the Annual Meeting of the International Society for Criminal Law Reform, August 2004), online: www.icclr.law.ubc.ca; R.T. Naylor, "From Cold War to Crime War: The Search for a New 'National Security Threat'" (1995) 1 *Transnational Organized Crime* 37.

¹⁸ D. Stuart, "Politically Expedient But Potentially Unjust Criminal Legislation Against Gangs" (1998) 69 *Int'l Rev. Penal L.* 245 ["Politically Expedient"]; this article expands on (1997) 2 *Can. Crim. L. Rev.* 207. The theme is also discussed by Professor Stuart in "Time to Recodify the Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 *Man. L.J.* 89. See also K. Roach, "Panicking over Criminal Organizations: We Don't Need Another Offence" (2001) 44 *Crim. L.Q.* 1.

sophisticated economic crime and the other issues which were centre-stage on the international agenda (a point I will return to below).¹⁹ The model subsequently enacted places the concepts of a “criminal organization” and a “criminal organization offence” at the centre of a larger scheme wherein the concept may be linked to an aggravated form of an existing offence, the proceeds of crime regime, and special wiretap, bail,²⁰ and sentencing provisions.²¹

As goes the analogy attributed to von Bismarck, laws are like sausages – to maintain a taste for either, it is better not to see them being made. The undisputable fact is that the decision to legislate forcefully in the area of organized crime is an inherently political one and the legitimacy of the exercise of Parliament’s power to legislate is not one usefully evaluated on any good-faith test. For better or worse, politicians are elected to form a Parliament which makes decisions. While one can decry the motives of any one politician, it is the nature of the democratic process that politicians seek re-election, requiring them to act in what they perceive to be a manner popular with the electorate. If Parliament is of the view that organized crime provisions within the criminal law respond to a larger societal need, then their decision to legislate on the matter is entirely legitimate. Provided there is formalistic conformity with Parliamentary procedure and no unjustifiable limitation on rights and freedoms protected under the *Canadian Charter of Rights and Freedoms*, the ultimate policy decision to enact organized crime legislation is one that must be respected by the courts.²²

¹⁹ For a useful summary of the enacted revisions, see Department of Justice, “Federal Action Against Organized Crime” (*Backgrounder*, 5 April 2001), online: http://canada.justice.gc.ca/en/news/nr/2001/doc_26098.html. There are also provincial initiatives. On 25 May 2006 it was announced that the Manitoba, Ontario and Quebec governments are in the process of finalizing an “Inter-Provincial Agreement on the Prevention and Effective Prosecution of Organized Crime” to coordinate the investigation and prosecution of gang-related offences in the three provinces.

²⁰ See *R. v. Osmond*, [2005] O.J. No. 3400 (Sup. Ct.); *R. v. Falls*, [2004] O.J. No. 5870 (Sup. Ct.).

²¹ The concept becomes relevant in parole proceedings as well, but represents a difficulty in assessing an offender’s propensity to reintegrate based on links with criminal organizations; see *Coscia v. Canada (Attorney General)*, [2006] 1 F.C.R. 430 (F.C.A.); *Yaari v. Canada (Attorney General)* (2005), 36 Admin. L. Rev. (4th) 150 (F.C.).

²² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. Indeed, deference to Parliament infuses both conventional statutory interpretation and the *Charter* analysis itself in this regard. See *R. v. Ruzic*, [2001] 1 S.C.R. 687 at para. 26; A. Butler, “A Presumption of Statutory Conformity With the *Charter*” (1993) 19 *Queen’s L.J.* 209; R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Butterworths Canada, 1994) at 8-14.

3. *Organized Crime Laws: Comparative Models*

Legislators creating new laws to address the problem of organized crime beyond the application of conventional doctrine are faced with a daunting task. In terms of structuring a model of anti-gang laws, two sets of concerns must be borne in mind if these laws are to be both effective and defensible.

To begin with, the model chosen should address the phenomenon as it is rather than as one assumes it to be; that is to say, functional considerations respecting criminal organizations must be taken into account, else one risks both failed prosecutions and a series of measures incapable of producing any positive effect. Accordingly, and without wishing to cross disciplinary lines and risk the wrath of social scientists, it is worthwhile to reflect a moment on the nature of criminal organizations.

There is a vast literature on the operation of organized crime, and it engages scholars working in many fields including sociology, criminology, economics, history, and law. The essential point that can be taken from any number of studies is that criminal organizations are founded upon the principle of fluidity rather than rigidity, although there are of course exceptions.²³ Criminologists commonly point to the loose and shifting network of alliances that exist between members of a criminal organization. Criminal organizations can be active and then descend into an underworld of shadows, later to reappear like Osiris reborn and in new combinations.²⁴ Economists emphasize that the influence of organized crime may be deleterious on a national economy, but that its ability to maintain control over larger markets or commodities is usually over-stated given that these organizations aim for more immediate goals and tend to disperse quickly.²⁵ In the short term, however, they can be quite successful. According to one scholar, one can point to three fundamental

²³ For a general review of the major schools of thought and surveys of the literature, see H. Abadinsky, *Organized Crime*, 6th ed. (New York: Wadsworth Publishing, 2000); M. Beare, *Criminal Conspiracies: Organized Crime in Canada* (Scarborough: Nelson Canada, 1996).

²⁴ Osiris, the Egyptian god of the dead, seems a better analogy than the bird of Greek mythology, the Phoenix. Whereas the Phoenix dies and is reborn every five hundred years, Osiris, being a god rather than a bird, can perform the trick at will. Those that mourn his disappearance need only look to the constellation Orion, whom he represented on earth, or visit the place of his supposed burial, the modern Egyptian town of Arabet el Madfuneh.

²⁵ P. Reuter, *Disorganized Crime: The Economics of the Visible Hand* (Cambridge, Mass: MIT Press, 1983); P. Cook and G. Zarkin, "Crime and the Business Cycle" (1985) 14 J. Legal Stud. 115; T. Schelling, "Economics and Criminal Enterprise" in T. Schelling, ed., *Choice and Consequence* (Cambridge, Mass: Harvard University Press, 1984).

features of organized crime: a structure that allows individuals to be removed and substituted without jeopardizing the underlying criminal activity; continuing or repetitive criminal conduct rather than singular instances; and the capacity to operate in adverse circumstances like opposition by violence.²⁶ Thus, mutability rather than inflexibility allows such an organization to pursue its goals successfully.²⁷

The second concern is that the model chosen must comport with institutional legal values. That is, the model created must be a legitimate exercise of the state's criminal law-making power in that it is neither vague nor overly broad in scope, and is capable of predictable and consistent application. We now ventilate these core values through section 7 of the *Charter* and the evocative phrase "the principles of fundamental justice," but we could easily do so through the more fluid set of values we have traditionally called "the rule of law" and such foundational principles as *nullum crimen sine lege* ("no crime without law"). At the same time, offences that aim to criminalize membership or participation in such organizations pose special problems. First, such offences border on the creation of mere status offences which are inconsistent with the foundational considerations of our criminal law. Second, such offences may be duplicitous of liability for more conventional offences committed by gang members and shade back into mere aggravating factors to be accounted for in sentencing. Third, the coupling of broad participation offences with conspiracy doctrine leads to the same problem associated with common law conspiracy to defraud – the problem, that is, of regarding lawful conduct as unlawful based on subjective intent coupled with the magic of plurality.²⁸ These are all difficult points.

Thus, one can say that the potential success of specialized anti-gang legislation rides upon its ability to characterize in some meaningful way both the type of organization to be suppressed and the elements of individual fault to be regarded as the minimum standard of culpability. After all, if the hope is to deter a person from participating in a criminal organization by giving fair warning that to do otherwise is sanctionable, and, further, if one intends that police should have an opportunity to intervene in the early stages of the commission of an offence to prevent it coming to fruition, then one must be able to distinguish a "criminal organization" from its more benign variations at the very least. This is a point that I shall return to below.

²⁶ Beare, *supra* note 23 at 15.

²⁷ Woodiwiss, *supra* note 16 at 7-12.

²⁸ Such a criticism sounds in tort as well; see *Lonrho p/c v. Fayed*, [1992] 1 A.C. 448 (H.L.).

With these concerns in mind, it is worthwhile considering two different approaches to the problem. The American *RICO* model is interesting in that it attempts to treat the problem of organized crime indirectly; eschewing a rigid approach built around a defined criminal organization, it attempts to come as close as possible to proscribe gang membership directly through detailed provisions respecting a “pattern of racketeering” utilizing a statute-defined “enterprise” which itself may be wholly innocent of wrong-doing. It is a complex model, with a troubling tendency to stray from the narrow confines of organized crime control. The *UNTOC* takes a different tack, attempting to define an “organized criminal group” and thereafter setting out the features of a participation offence. It is this latter model that is ascendant and accounts for much in our own *Criminal Code* provisions. Both models, though, are deserving of consideration.

A. The Racketeer Influenced and Corrupt Organizations Act (RICO)

The American criminal justice system has been overtly concerned with organized crime since the late nineteenth century, moving rapidly from an early concern with simple political corruption to concerns associated with those key features most often associated with criminal gangs - extortion and other crimes of violence, prostitution and the organized exploitation of markets in contraband on an inter-state level. Treatment of these problems in the American system is beyond the reach of the legislative competence or prosecutorial jurisdiction of any one state. In 1967, after five years of study, the President’s Commission on Law Enforcement and Administration of Justice (the Katzenbach Commission) recommended that organized crime in America represented a “pressing national danger” because it had infiltrated legitimate organizations involved in inter-state commerce to such a degree that federal action was required if there was to ever be any successful curtailment of criminal activity;²⁹ *RICO*³⁰ was part of the legislative response by Congress.³¹

²⁹ The legislative history is detailed in G. Lynch, “RICO: The Crime of Being a Criminal” (1987) 87 Colum. L. Rev. 661.

³⁰ Pub. L. No. 92-452, 84 Stat. 922 (codified as amended 18 U.S.C. §§ 1961-1968). Though its etymology is unknown, the term “racket” to denote an illegal scheme and “racketeer” to denote a gang member seems to have its origin in early 19th century British usage but became prominent in the United States in the early 20th century. As a term of art in a legal context it is exclusively American.

³¹ The majority of states – some 32 at last count - now have *RICO* or similar legislation (“baby-RICOs” so-called); see A. Laxmidas Sawkar, “From the Mafia to Milking Cows: State RICO Act Expansion” (1999) 41 Ariz. L. Rev. 1133.

RICO is a complex statute, perhaps rivalling only revenue-collecting regulations in its complicated language. It does not criminalize gangs or gang membership directly,³² but it aims to come as close to that target as possible, and in effect does precisely that.³³ The fundamental idea that drives *RICO* is to isolate an enterprise which is a vehicle for criminality, and thereafter to use it as the organizing vehicle for both the investigation and prosecution of crime in which that enterprise is involved, whether intentionally or innocently. In this way, the law attempts to minimize the normal process of treating particular criminal acts in isolation from this greater context, as fragmentation of this sort ultimately complicates both the ability to investigate and prosecute gang-related criminality.

Though lengthy, *RICO* has an essentially simple structure and core set of requirements. The four primary offences created under §1962 are as follows:

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

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

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

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

Thus, one can set out the fundamental requirements that must be met in any successful *RICO* criminal prosecution: (1) the accused is a

³² Although suggestions were made in the years before *RICO* to make mafia membership illegal; see Hearings on s. 2187 Before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. (1966); M. Goldsmith, "RICO and Enterprise Criminality: A Response to G. Lynch" (1988) 88 Colum. L. Rev. 774 at 783.

³³ See E. Wise, "RICO and Its Analogues: Some Comparative Considerations" (2000) 27 Syracuse J. Int'l L. & Com. 303.

“person” within the meaning of the statute (2) who has utilized a “pattern of racketeering activity” (3) in respect of an “enterprise” (4) in a manner contemplated in one of sub-sections (a), (b), or (c), that is, by investing the proceeds in the enterprise, acquiring or maintaining an interest in the enterprise, or infiltrating the enterprise, or conspiring to do any of these acts. As one might expect for a statute of this sort in a jurisdiction the size of the United States, there is a vast jurisprudence on each of the requisite elements of a *RICO* prosecution and various doctrines have been judicially developed for application in a particular context.³⁴ For present purposes, it is worthwhile to consider these various elements quite briefly and to highlight the two central concepts which make up the essence of the model – the “enterprise” and “pattern of racketeering” requirements. To understand these features of *RICO* is to understand the fundamental nature of the model itself.

a) *Person*

§1961(3) provides the following definition:

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

Thus, both artificial and natural persons are within the statute as are partnerships. The courts have extended the definition to include such bodies as unincorporated associations,³⁵ public utilities,³⁶ and even Canada,³⁷ but not “La Cosa Nostra.”³⁸ Plainly, this is not an unduly restrictive point in the legislation.

b) *The “Pattern of Racketeering” Concept*

§1961(5) provides the following definition:

“pattern of racketeering activity” requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

³⁴ See generally J. Rakoff, H. Goldstein and E. Queen, *RICO: Civil and Criminal Law* (New York: Law Journal Press, 1989).

³⁵ *Jund v. Town of Hempstead*, 941 F.2d 1271 at 1281-82 (2d Cir. 1991).

³⁶ For example, *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, at 1305-1308 (2d Cir. 1990); *Taffet v. Southern Co.*, 930 F.2d 847 at 852 (11th Cir. 1991).

³⁷ *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134 at 146-150 (N.D.N.Y. 2000).

³⁸ *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20 (2d Cir. 1989).

The included term “racketeering activity” is defined within the statute by virtue of a long list of predicate state and federal offences³⁹ for which the accused could have been indicted at the time (conviction not being required)⁴⁰ and committed within the statutory period establishing sufficient continuity and relationship to one another to constitute a “pattern.”⁴¹ Thus, while the “racketeering activity” itself seems relatively straight-forward given the exhaustive statutory definition, the difficulty lies in the proof of a “pattern” which is a question of fact and is imbued with considerations of policy. Unfortunately, the law is difficult here, as the various federal circuit courts use a variety of criteria in differentiating two or more predicate acts (the necessary but not sufficient statutory condition) as either separate acts, a single continuing act, or the golden nugget under *RICO*, a “pattern of racketeering activity.”

In two leading cases, the United States Supreme Court has tried to set out the central considerations that a court ought to be cognizant of in assessing such a pattern. In *Sedima, S.P.R.L. v. Imrex Co.*, the Supreme Court held that the patterning requirement would clearly not be satisfied by merely showing that two predicate acts from the statutory list had been committed.⁴² An additional element, “continuity plus relationship,” was highlighted by the Court based on the legislative history of *RICO*:

The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: “The target of [*RICO*] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one ‘racketeering activity’ and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.”⁴³

Inferior courts thereafter struggled with such questions as whether using the mail multiple times in completing a single commercial fraud is sufficient to establish a pattern under this approach (most, but not all, thought not).⁴⁴ In *H.J., Inc. v. Northwestern Bell Telephone Co.*, the Supreme Court sought to bring some greater order to the state of the law

³⁹ *RICO*, *supra* note 30 § 1961 (1).

⁴⁰ *Ibid.*; *Sedima, S.P.R.L. v. Imrex Co.*, *infra* note 42.

⁴¹ *H. J., Inc. v. Northwestern Bell Telephone Co.*, *infra* note 45.

⁴² 473 U.S. 479 (1985).

⁴³ *Ibid.* at 496, n14.

⁴⁴ *Beauford v. Helmsley*, 865 F.2d 1386 at 1390-91 (2d Cir. 1989), subsequently vacated, 492 U.S. 914 (1989); *Apparel Art International, Inc. v. Jacobson*, 967 F.2d 720 at 722-24 (1st Cir. 1992); *GICC Capital Corp. v. Technology Financial Group, Inc.*, 67 F.3d 463 at 465-69 (2d Cir. 1995); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d

post-*Sedima* occasioned by disparate interpretations of that ruling.⁴⁵ The Court then went on to reject any rigid formula, preferring the law to chart a case by case approach despite the seemingly wide language of the statute. At present the different circuit appeals courts differ on such matters as whether the analysis should be conducted on the basis of particular or multiple factors such as duration or particular predicate acts. A leading treatise concludes:

A review of existing case law indicates that much uncertainty still pervades the determination of a RICO “pattern,” but certain rough principles have emerged. First, predicate acts that do not extend over a period of at least one to two years are unlikely to fulfill the requirements for continuity... Second...schemes involving organized crime, narcotics conspiracies, and other hard-core criminal enterprises are more likely to satisfy open-ended continuity than others. Third, the relationship requirement will be satisfied in all but extreme cases.⁴⁶

Again, one must emphasize that the question of a “pattern” is one of fact, though susceptible to judicially-developed devices pregnant with policy but meaningful only in their appropriate context.

c) *The “Enterprise” Concept*

§1961(5) provides the following definition:

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

594 at 609-611 (3d Cir. 1991); *GE Investment Private Placement Partners II v. Parker*, 247 F.3d 543 (4th Cir. 2001); *Anderson v. Foundation for Advancement, Education and Employment of American Indians*, 155 F.3d 500 at 505-506 (4th Cir. 1998); *Calcasieu Marine National Bank v. Grant*, 943 F.2d 1453 at 1463-64 (5th Cir. 1991); *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385 at 396-97 (6th Cir. 1989); *Corley v. Rosewood Care Center, Inc.*, 142 F.3d 1041 at 1048-1049 (7th Cir. 1998); *Appley v. West*, 832 F.2d 1021 at 1027-1028 (7th Cir. 1987); *Marks v. Pannell Kerr Forster*, 811 F.2d 1108 at 1110 (7th Cir. 1987); *Morgan v. Bank of Waukegan*, 804 F.2d 970 at 975 (7th Cir. 1986); *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322 at 324 (7th Cir. 1986); *Lange v. Hocker*, 940 F.2d 359 at 361-62 (8th Cir. 1991).

⁴⁵ 492 U.S. 229 (1989). Building on the “continuity plus relationship” approach, the Court sought to explain continuity better, holding (at 241) that it “is both a closed- and open-ended concept, referring either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition.”

⁴⁶ *Ibid.* at 241; J. Rakoff, H. Goldstein and E. Queen, *supra*, note 34 at §1.04.

It is clear that under this inclusive rather than exhaustive definition, any grouping can be the subject of the criminal activity under *RICO*.⁴⁷ A criminal organization, however defined, is not required.⁴⁸ Indeed, one can go farther and accept, as do the American courts, that such a requirement was rejected explicitly by both the Katzenbach Commission and Congress on the functional considerations highlighted by social scientists – any definition is bound to be both overly simplistic and under-inclusive. *RICO* aims not to paint the organized criminal organization as the criminal, but to use any enterprise that is infiltrated by organized criminals (whether it is criminal itself or not) as the focus of the investigation and prosecution. Thus, that the enterprise has legal personality or not, is itself dedicated to criminal activity or not, is not strictly relevant. This has always been a controversial point.⁴⁹

However, as a counterbalance, it has been held as inherent within the statute that such an enterprise not be one that comes into existence exclusively for the commission of the predicate offences which are necessary to establish the necessary pattern of racketeering. Thus, courts are called upon to determine whether the enterprise in question has a separate economic, temporal, or spatial existence.⁵⁰ Whilst the various federal circuit appellate courts may differ on the criteria to be used in determining whether such an association in fact exists, they clearly agree that the enterprise and the pattern of racketeering should be kept apart as distinct concepts and that one is not to be used to prove the existence of the other.⁵¹ To do otherwise is to engage in tautological reasoning.

The most difficult aspects of the enterprise concept are made plain through the statutory phrase “any union or group of individuals associated in fact.” Here, formalities of association of any sort are not required. Rather, these “association-in-fact enterprises” have been construed quite broadly, as, for example, “a group of persons associated

⁴⁷ *United States v. Turkette*, 452 U.S. 576 at 580 (1981).

⁴⁸ Indeed, various types of legitimate organizations have been caught in *RICO*'s net. See, for example, *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974) (hotel); *Bennett v. Berg*, 685 F.2d 1053 at 1060-1061 (8th Cir. 1982) (retirement home); *United States v. Hartley*, 678 F.2d 961 at 988-90 (11th Cir. 1982) (seafood producer); *United States v. Weisman*, 624 F.2d 1118 at 1120 (2d Cir. 1980) (corporation); *United States v. Rubin*, 559 F.2d 975 at 978 (5th Cir. 1977) (benefit fund).

⁴⁹ See G. Blakey and T. Perry “An Analysis of the Myths That Bolster Efforts to Rewrite *RICO* and the Various Proposals for Reform: ‘Mother of God-Is This the End of *RICO*?’” (1990) 43 *Vand. L. Rev.* 851.

⁵⁰ For example, *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982); *United States v. Korando*, 29 F.3d 1114 at 1117 (7th Cir. 1994); *United States v. Stokes*, 64 Fed. Appx. 352, 358 (4th Cir. 2003).

⁵¹ See the discussion in *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996).

together for a common purpose of engaging in a course of conduct” and as an “ongoing organization, formal or informal [with]...various associates functioning as a continuing unit.”⁵² Read widely, as it has been, the language of §1961(5) extends *RICO* to any sort of grouping and allows for prosecution of anyone who participates directly or indirectly in the conduct of its affairs.

It is also worthwhile highlighting the very sweeping scope of the conspiracy sub-section, §1962(d), when placed together with this broad interpretation of association-in-fact enterprises. It is clear that *RICO* adopts a deliberate tactic of moving well beyond conventional conspiracy provisions on this point. That is, whereas conspiracy requires proof of a single agreement between various conspirators, *RICO* conspiracy requires only that the accused agree with others to participate directly or indirectly in an enterprise through a pattern of racketeering activity. In one leading case, this strategy was explained in these terms:

In the context of organized crime...a single agreement or “common objective” cannot be inferred from the commission of highly diverse crimes by apparently unrelated individuals. *RICO* helps to eliminate this problem by creating a substantive offence which ties together these diverse parties and crimes. Thus, the object of a *RICO* conspiracy is to violate a substantive *RICO* provision –here, to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity – and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity. The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise’s affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise’s affairs. To find a single conspiracy, we still must look for agreement on an overall objective. What Congress did was to define that objective through the substantive provisions of the Act.⁵³

Indeed, given the wide-ranging nature of a conspiracy to violate *RICO* through an association in fact enterprise, it is not entirely clear where traditional conspiracy ends and a *RICO* enterprise begins and the courts have not developed generally accepted doctrine to assist in distinguishing between the two.⁵⁴

⁵² *Turkette*, *supra* note 47 at 583. See also, *United States v. Weinstein*, 762 F.2d 1522 at 1537, n.13 (11th Cir. 1985).

⁵³ *United States v. Elliott*, 571 F.2d 880 at 902-903 (5th Circ. 1978); *cert. denied*, 439 U.S. 953.

⁵⁴ *Korando*, *supra* note 50 at 1117; *cf. Stokes*, *supra* note 50 at 358.

d) *Assessing the Statute as a Whole*

RICO has been in operation in one form or another in the United States for some thirty-five years. On the one hand it looks like a sentencing statute, imposing additional penalties for predicate offences when committed in furtherance of a larger goal as well as providing for restitution through stripping a wrongdoer of the profits of his wrong. However, when one evaluates the breadth of the substantive offences created, particularly in their inchoate forms, the sweeping nature of *RICO* is apparent. Yet the nature and scope of *RICO* has not given rise to very much in the way of judicial complaint, quite the opposite, in fact.⁵⁵ *RICO* has been judged to be not limited to “criminal enterprises” or “legitimate enterprises infiltrated by criminals,”⁵⁶ nor restricted to “organized crime”⁵⁷ as a matter of public policy. As the United States Supreme Court held: “The occasion for Congress’ action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.”⁵⁸ Thus, as the aptly-named Professor Wise describes it, “*RICO*, as interpreted, has not been limited to cases involving the infiltration of a legitimate business by organized crime. It has not even been limited to cases involving organized crime. It can be invoked whenever predicate crimes are committed by someone associated with an ‘enterprise,’ in the loosest possible sense of the term.”⁵⁹ Given such approval by the United States Supreme Court of this expansive vision of *RICO*, it is not terribly surprising then that suggestions that *RICO* should be revised to restrict its operation to the rationale for the model originally proposed by the Katzenbach Commission have fallen on deaf legislative ears.⁶⁰

⁵⁵ Courts have consistently held the provisions not to be vague (the test being that any person of average intelligence could not help but realize that he or she would be criminally liable for participating in any enterprise through pattern of racketeering activity) or otherwise violative of fundamental constitutional guarantees; see for example, *Parness*, *supra* note 48; *United States v. Amato* 367 F. Supp 547 (DCNY 1973); *United States v. Chovanec*, 467 F. Supp 41 (S.D.N.Y. 1979).

⁵⁶ *Turkette*, *supra* note 47 at 580.

⁵⁷ *H. J., Inc. v. Northwestern Bell Telephone Co.*, *supra* note 45.

⁵⁸ *Ibid.* at 248; see also *National Organization for Women v. Scheidler*, 510 U.S. 249 at 259 (1994).

⁵⁹ Wise, *supra* note 33 at 307.

⁶⁰ See Goldsmith, *supra* note 32; J. Miller, “*RICO* and the Bill of Rights: An Essay on a Crumbling Utopian Ideal” (1999) 104 Com. L.J. 336. There is not perfect harmony on this point; some state legislatures enacting *RICO*-type laws have tried to restrict their own versions of *RICO*. For example, the New York *Organized Crime Control Act* features a detailed definition of a criminal enterprise highlighting the need for a common purpose held by its members and various functional restrictions based on the

Thus, where *RICO* has moved well beyond its original conceived sphere of application (large-scale inter-state organized crime) to anti-abortion protestors⁶¹ or those found guilty of obscenity offences,⁶² the model seems at its absolute weakest in terms of principle, but this expansive view has become accepted policy. The argument remains, however, that an approach of this sort tends towards a sort of generalized prosecutorial weapon which, though effective, may be over-aggressive. Again, this is not in itself a defect, but reflects a certain view of the propriety of using the criminal law in a manner that may seem somewhat over-extensive to those outside the United States. Policy considerations such as these are local and political and not necessarily transferable to other jurisdictions.

B. The UN Convention Against Transnational Organized Crime (UNTOC)

The *UNTOC* is an interesting development.⁶³ Adopted in 2000 by the General Assembly, the Convention is one of the few UN treaties in the criminal law area that deal with the content of substantive law rather than merely procedural issues and facilitating multi-lateral cooperation.⁶⁴ Not only does the Convention attempt to come to grips with the basic offences which by international consensus ought to form part of the criminal law of any developed legal system, it attempts to create bridges between different types of legal systems. Moreover, the Convention contains three protocols dealing specifically with the problems of trafficking in people, smuggling migrants, and the trafficking in and

organization's structure: New York State Consolidated Laws, Title X, 460.10(3); see *People v. Capaldo*, 572 N.Y.S.2d 989 (Sup. 1991).

⁶¹ *National Organization for Women v. Scheidler*, *supra* note 58; see also *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989); T. Millman, "Civil RICO, Protestors, and the First Amendment: A Constitutional Combination" (1995) 60 Mo. L. Rev. 239; B. Murray, "Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms" (1999-2000) 75 Notre Dame L. Rev. 691; C. Bradley, "When is Political Protest a RICO Violation?" (2003) 39 Trial 72.

⁶² *Alexander v. United States*, 509 U.S. 544 (1993).

⁶³ UN GAOR, 55th Sess., UN Doc. A/RES/55/25 (2000). As of this writing, it has been signed by 147 nations and acceded to by 118, sufficient to have brought the Convention into force as of 29 September 2003. Canada was one of the original signatories in 2000, with ratification having taken place on 13 May 2002; *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions*, UN/GAOR, Sess., UN Doc. A/55/383 (2000).

⁶⁴ Many of these multi-lateral treaties deal with narcotics, beginning with the *International Opium Convention* (1912). Non-narcotics treaties treat such topics as the unlawful seizure of aircraft, money laundering, and kidnapping diplomatic personnel.

manufacture of firearms.⁶⁵ For present purposes, I only wish to refer to the background, structure, and the core provisions relating to “participation in an organized criminal group.”

a) Background and Structure

Movement towards greater international cooperation in the treatment of organized crime began in earnest with the creation of the UN Commission on Crime Prevention and Criminal Justice (CCPCJ) in 1991.⁶⁶ The Commission set out a detailed Action Plan in 1993 which included organized crime as one of the three priority themes.⁶⁷ Momentum gathered quickly and a year later, the World Ministerial Conference on Transnational Organized Crime was held in Naples (the Naples Conference). The conference involved high level delegations from 142 nations to work towards an international treaty which it pressed upon the international community “as a matter of urgency.”⁶⁸ It was accepted by the delegates that the way forward in organized crime laws was an international convention built upon a definition and description of transnational organized criminal organizations together with a set of minimum substantive provisions that must be within the criminal law of signatory states. The process culminated in *UNTOC*.

As an organizing principle, the treaty is not merely about organized crime but rather “transnational organized crime”; that is, where the offence was committed in more than one state, or, if the offence was committed in one state only, where the offence was substantially planned and directed from another state, or committed by an organized criminal group that engages in activities in more than one state, or indeed has

⁶⁵ The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* came into force on 25 December 2003. The *Protocol against the Smuggling of Migrants by Land, Sea and Air* came into force on 28 January 2004. The *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition* came into force on 3 July 2005.

⁶⁶ The Commission replaced the UN Committee on Crime Prevention and Control which was formed in 1971. See generally Joutsen, *supra* note 15; R. Clark, “The United Nations Convention Against Transnational Organized Crime” (2004) 50 *Wayne L. Rev.* 161.

⁶⁷ The others were promoting the role of criminal law in protecting the environment and improving the efficiency and fairness of criminal justice administration systems.

⁶⁸ *Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc. A/49/748 approved in U.N. GA Res. 49/159, UN GAOR, 49th Sess., UN Doc. A/49/748 (1994). The United States was quite influential in driving the issue quickly forward internationally, which matched well with contemporary domestic initiatives like *Presidential Decision Directive 42* (PDD-42, 21 October 1995) linking international organized crime and national security.

substantial effects in another state. It is in these cases of transnational effect that the terms of the treaty apply. At a policy level this is reflective of the original conception of *RICO*'s place in the American criminal law, combating organized crime which was inter-state in operation or effect, thus providing the federal legislature with jurisdiction to act.

The treaty itself is structured in four parts: criminalization, international cooperation, technical cooperation, and implementation provisions. Not all aspects of the treaty are mandatory, and even with respect to those mandatory provisions, signatories are not obliged to bring the terms of the treaty directly into effect in national law using the language of the treaty itself.⁶⁹ That said, the key criminalization elements are envisaged to apply in a given state to both national and transnational activity with a view to creating a comprehensive global anti-organized crime strategy.

There are four substantive criminal offences required to be included in the law of signatory states: participation in a criminal group (Article 5), money laundering (Article 6), corruption (Article 8), and obstruction of justice (Article 23). In respect of these substantive offences, it was accepted by the negotiators of the Convention that given quite significant differences in national criminal law amongst signatory states⁷⁰ and the desire to create substantive provisions to deal specifically with the problem of transnational organized crime specifically in respect of the participation offence, *UNTOC* was to concentrate on actors rather than activities.⁷¹ As such, a workable definition of a criminal organization was thought to be key to the success of any created model. However, though such a definition was thought to be critical to the cohesion of the treaty, it was not envisaged as being required explicitly in the domestic law of signatory states; it was rather to be brought into the law of each

⁶⁹ *Ibid.* art. 34(2).

⁷⁰ Especially in respect of conspiracy - civilian jurisdictions do not usually have any counterpart to the common law conspiracy concept; see the discussion in *Prosecutor v. Musema*, Case No. ICTR-96-13-T, para. 186 (Int'l Crim. Trib. for Rwanda Trial Chamber, Jan. 27, 2000), online: <http://www.ictor.org/ENGLISH/cases/Musema/judgement/index.htm>; Wise, *supra* note 33 at 312-14 discussing revisions to the Italian *Civil Code* in respect of anti-Mafia legislation within the larger civilian context.

⁷¹ For a general review see D. Vlassis, "Drafting the United Nations Convention Against Transnational Organized Crime" (1998) 4 *Transnational Organized Crime* 356 ["Drafting"]; D. Vlassis, "The United Nations Convention Against Transnational Organized Crime and Its Protocols: A New Era in International Cooperation" in *The Changing Face of International Criminal Law: Selected Papers* (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy, 2002) at 75, online: <http://www.icclr.law.ubc.ca/Publications/Reports/ChangingFace.pdf> ["A New Era"].

state “in accordance with the fundamental principles of its domestic law.”⁷²

b) “Organized Criminal Group”: Definitional Considerations

The following inter-related definitions are provided for in Article 2 of the Convention:

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

Negotiations at the Naples Conference proved that formulating an acceptable definition of organized crime would be difficult for the same reasons that negotiating international treaties is always difficult – differences in agendas and influence between developed and developing nations. Delegates from developed nations believed that the difficulty of negotiations involving the entire membership of the UN would inevitably lead to a definition of organized crime that met the lowest common denominator, and consequently, a vague and useless definition would result. Keith Morrill, Canada’s chief negotiator of *UNTOC*, preferred a traditional focus on “cooperative provisions” such as extradition, mutual legal assistance and police cooperation.⁷³ If there was to be a definition of organized crime, countries such as Canada, the United States and Turkey preferred a broad one to leave open the possibility of using the Convention against terrorist groups.

The bloc of developing countries favoured involving the full UN General Assembly in drafting the Convention for three reasons. First, most believed organized crime to be a problem of developed nations. Second, a global forum such as the UN favours developing countries by

⁷² *UNTOC*, *supra* note 63 Art. 34(1).

⁷³ A. Orlova and J. Moore, “‘Umbrellas’ or ‘Building Blocks’? Defining International Terrorism and Transnational Organized Crime in International Law” (2005) 27 *Hous. J. Int’l L.* 267 at 285.

offering them relative parity through consensus decision-making. Third, developing countries saw *UNTOC* as a way of addressing their own security needs and thought that the issues would be resolved more favourably to their interests before the full General Assembly.⁷⁴ Moreover, some countries in this group, such as Pakistan, India, and Iran, were opposed to any broad definition of organized crime for precisely the same reason it appealed to others - that is, the possible application to terrorism.⁷⁵

The work of the Group of Senior Experts, established by the Group of Eight (G8) nations at Lyon was largely responsible for reversing the scepticism regarding the definition of organized crime. Canada first put organized crime on the G8 agenda when it hosted the 1995 Summit.⁷⁶ The following year, the Group of Senior Experts produced a set of forty recommendations which helped produce a breakthrough during the sixth session of the CCPCJ in 1997.⁷⁷ The CCPCJ established a Working Group to move forward with implementing the declaration resulting from the Naples Conference by drafting a Convention against organized crime which was later submitted to the General Assembly by Poland in 1996.⁷⁸ As the Working Group's report to the CCPCJ indicated, several countries believed a definition was not a crucial element, since with the rapid evolution of organized crime a definition would limit the Convention's scope of application. Other countries argued that a lack of a definition would indicate a lack of political will and lead to problems with implementation. The Working Group concluded that "[t]he problem of definition could be solved by looking at each of its elements separately. It was suggested that a first step towards a definition might be to use the definitions of offences contained in other international instruments."⁷⁹

Proceeding mainly from their consideration of the proposal by Poland⁸⁰ and other proposals, the Working Group identified elements of organized crime that the treaty should speak to in defining a target for national treatment. These included "some form of organization; the use of intimidation and violence; a hierarchical structure of groups, with division of labour; pursuit of profit; and the purpose of exercising

⁷⁴ Vlassis, *supra* note 71.

⁷⁵ Orlova and Moore, *supra* note 73 at 286.

⁷⁶ See Government of Canada, "Public Safety and Emergency Preparedness Canada" online: http://www.psepc-sppccc.gc.ca/publications/news/20001215_e.asp.

⁷⁷ Online: <http://www.uncjin.org/Documents/Conventions/dcatoc/6session/index.htm>.

⁷⁸ UN Doc. A/C.3/51/7.

⁷⁹ Vlassis, "Drafting", *supra* note 71 at 652.

⁸⁰ *Supra* note 78.

influence on the public, the media and political structures.”⁸¹

Following the CCPCJ’s Sixth Session, an intergovernmental group of experts met in 1998 in Warsaw. The Experts Group prepared a first draft of the new Convention based on the Working Group’s recommendations to the CCPCJ, as well as on the forty recommendations of the Senior Experts Group established at Lyon. This draft was submitted to the CCPCJ’s seventh session later that year, and formed the basis for a draft resolution to be considered by the General Assembly.

An Ad Hoc Committee to finalize the Convention, which by this time had grown to include the three protocols, held a preliminary meeting in Buenos Aires in 1998. At that meeting a core group of delegates, including representatives from virtually all regions who were experts in their fields and who had been part of previous negotiations, was selected to negotiate the final text. The Ad Hoc Committee held its first official session in Vienna in January 1999, and finalized negotiations on the text of the Convention in July 2000. It was at this meeting that the Ad Hoc Committee negotiators decided that the way around the problem of defining transnational organized crime was to define the actors rather than the activities. The enumeration of elements of organized crime that characterized the Working Group’s recommendation to the CCPCJ’s Sixth Session was dropped in favour of the final wording of the Convention defining an organized criminal group in Article 2(a).

It was felt by negotiators that the emphasis on the commission of “serious crimes” gives the Convention the flexibility that a list of activities would not. The Ad Hoc Committee had asked the Secretariat to conduct a study of serious crime and how it was dealt with in national laws. Based on the responses of over 50 countries, the study found the concept of “serious crime” was well understood by all, even if the term was not specifically used in legislation. Once a serious crime was defined as a criminal offence “punishable by a maximum deprivation of liberty of at least four years or a more serious penalty,” objections to the term subsided.⁸² Ultimately, countries themselves define the activities that fall within the rubric of serious crimes, given that the definition is linked to punishment rather than a list of predicate offences specifically enumerated. However, since offences and their punishment vary from country to country, the four-year threshold has the potential to raise doubt about which offences should be prosecuted as organized criminal

⁸¹ Vlassis, “A New Era”, *supra* note 71 at 83.

⁸² Vlassis, “Drafting”, *supra* note 71 at 692.

activity.⁸³

Unfortunately, the definitional terms of *UNTOC* are not without their own internal problems. Whilst an “organized criminal group” is deemed to be a “structured group,” a “structured group” does not necessarily have “a developed structure.”⁸⁴ Indeed, *travaux préparatoires* to the Convention indicate that “structured group” must be construed broadly to include “both groups with hierarchical or other elaborate structure” and “non-hierarchical groups where the roles of members of the group need not be formally defined.”⁸⁵ Given the process of creating a definition through negotiation amongst such a large group, one can well see that Mr. Morrill, the Canadian negotiator, may have been quite right to argue that this overly broad definition should be omitted entirely in favour of keeping the definitions of specific offences associated with organized crime.⁸⁶

c) *Participation in a Criminal Group*

Article 5, mandating that national laws proscribe participation in an organized criminal group, provides as follows:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

⁸³ Orlova and Moore, *supra* note 73 at 284.

⁸⁴ *UNTOC*, *supra* note 63 Arts. 2 (a) and 2(c); see Orlova and Moore, *ibid.* at 282.

⁸⁵ *Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, U.N. GAOR, 55th Sess., Agenda Item 105, Addendum, at 2, U.N. Doc A/55/383/Add.1 (2000), discussed in Orlova and Moore, *ibid.*

⁸⁶ Orlova and Moore, *ibid.* at 285.

- a. Criminal activities of the organized criminal group;
 - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;
- (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.
2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

Once it had dealt with the problem of defining an “organized criminal group,” a second major hurdle for the Ad Hoc Committee was the stated desire to harmonize treatment of group criminality. The goal was not to choose any one signatory state’s approach over the others, but to come up with a functional synthesis of differing approaches based on underlying commonalities.⁸⁷ Given that conspiracy was well known to all common law systems, it was agreed that conspiracy alone (as a concept rather than a term of art) would satisfy the participation in a criminal organization obligation, provided that the other requirements of *UNTOC* also formed part of domestic law.

Article 5(1)(a)(ii) is rather more interesting as, according to one commentator, it was intended to be of particular relevance to civilian signatory states:

Subparagraph (a) (ii) of article 5, paragraph 1, on the other hand, is designed to be more congenial to civil law systems with which conspiracy has not found favor. It penalizes those who knowingly associate themselves with and take an “active part” in an organized criminal group. To come within the ambit of the subparagraph, the perpetrator must either be active in the criminal activities of the group, or active in its other activities with the appropriate knowledge, namely that the participation will contribute to the achievement of the criminal aim. It is pretty clear that a perpetrator may contravene this standard without doing acts that make him or her complicit under traditional principles for a serious crime as defined in the Convention. The conduct may, in itself, be a “non-serious” crime or even lawful. As is common in the area of individual criminal responsibility, there is overlap both among these various verbs and between what is caught by subparagraph (a)’s variants (i) and (ii).⁸⁸

This has interesting implications. Conspiracy alone would seem to be satisfactory in principle to bring the treaty into domestic law in a

⁸⁷ Clark, *supra* note 66 at 170.

⁸⁸ *Ibid.* at 172.

country such as Canada. However, to the extent that a particular state wishes to implement the treaty without reliance upon (or restriction by) conspiracy and the requirement for a single agreement amongst conspirators, *UNTOC* legitimises culpability where one participates in non-criminal conduct “actively,” that is, with knowledge of the character of the organization and with the intention of acting to achieve the organization’s criminal aims. Thus, the wording of Article 5(1)(a)(ii) describes a much broader approach than that in the preceding subparagraph. Whereas the conspiracy provision is directed at serious crime, Article 5(1)(a)(ii) contemplates that even lawful acts may still fall within the scope of an offence where directed at the maintenance of the criminal organization or its immediate aims. Thus, the Convention on this point provides a bridge to both civilian systems and the *RICO* approach from conventional conspiracy doctrine.

4. *The Criminal Organization Provisions of the Criminal Code*

Much like any other area of law, the creation of laws seeking to address organized criminality requires a careful balancing between flexibility and certainty in the construction of doctrine. If the law is to be effective, it must speak to the loose and shifting nature of criminal organizations. Thus, flexible doctrine is important, particularly with respect to the definition in law of such an organization; however, inordinate flexibility may result in laws being applied beyond their justifiable reach (as some would say has been the experience under *RICO*). At the same time, one must be mindful that this is “true criminal law” in every sense. Under the *Criminal Code*, the criminal organization offences allow for sanctions that are considerable and the social stigma of conviction is clearly profound. Whether framed as a matter of constitutional validity or otherwise, institutional values demand that criminal law doctrine be clear and predictable in its application. This is critical to provide fair warning to those who might face sanction and to ensure consistent enforcement of the law by public authorities; too rigid a law, however, will have a defectively insubstantial reach. To achieve an appropriate balancing of these concerns is no easy task, and legislators and judges may well feel themselves, to use the traditional analogy, navigating between Scylla and Charybdis for some time to come in respect of the criminal organization offences contained within the *Criminal Code*.⁸⁹

⁸⁹ Homer records in *The Odyssey* that Scylla, the daughter of Poseidon and Gaia, was a beautiful maiden transformed by Zeus into a monster with six dogs’ heads on long necks. Scylla’s cave overlooked the Strait of Messina which also harboured a whirlpool called Charybdis. These twin perils were presented to Odysseus on his long journey home from the Trojan war; he chose to avoid Charybdis at the expense of losing six sailors to Scylla.

Even organizing one's approach to assessing this balancing of interests in the *Criminal Code's* anti-gangsterism model is difficult. The objections that can be made are many, intertwined and dependant on context; that is, one can frame the questions as ones of vagueness, overbreadth, undue punishment, compound criminality, or the adequacy of the physical and mental fault requirements in respect of the individual offences. This becomes rather more complex given the relatively small number of decided cases on point; a certain amount of speculation or opinion necessarily creeps into the argument. For present purposes, I wish to concentrate on the broadest questions touching the new law of criminal organizations in Canada.

A. *Vagueness and Overbreadth*

As the criminal organization model is a complicated one and represents a dramatic departure from standard practice, objections to its constitutional validity based on the related concepts of vagueness and overbreadth must necessarily permeate any analysis. Thus, before plunging into doctrine, it is first necessary to have regard for the foundational values that must guide the assessment exercise.

It is a well-established principle of fundamental justice under Section 7 of the *Charter* that criminal legislation must not be overbroad⁹⁰ and certainly cannot be arbitrary in the sense that it is inconsistent with or unrelated to its objective.⁹¹ This is of course related to, but distinct from,⁹² the rule that criminal legislation must not be vague in the sense that it sets a standard that is unintelligible, that cannot provide the basis for coherent judicial interpretation, that is not capable of guiding legal debate, and does not "delineate a risk zone" of sanctionable conduct.⁹³ Vagueness doctrine requires that persons who are subject to the law's provisions and those tasked with enforcing the law must be able to anticipate with some reasonable degree of precision whether a

⁹⁰ *R. v. Demers*, [2004] 2 S.C.R. 489; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Morales*, [1992] 3 S.C.R. 711.

⁹¹ *R. v. Arkeell*, [1990] 2 S.C.R. 695. The standard for violation, however, is a high one; see *R. v. Clay*, [2003] 3 S.C.R. 735.

⁹² *R. v. Nova Scotia Pharmaceutical Society*, *supra* note 90 at 627-31; *R. v. Zundel* (1987), 58 O.R. (2d) 129 at 157-58 (C.A.).

⁹³ *Canadian Foundation for Children, Youth and the Law v. Canada*, *supra* note 90 at paras. 15-17; *R. v. Nova Scotia Pharmaceutical Society*, *ibid.* at 639-49; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 983. See generally M. Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: UBC Press, 2004).

contemplated course of conduct is prohibited or not⁹⁴ (the long-standing criminal justice policy of “fair warning”),⁹⁵ and reflects a special interest in controlling the use of state criminal law power (the equally long-standing criminal justice policy of “minimal criminalization”).⁹⁶ As the cases maintain quite consistently, the bar of invalidity on the basis of vagueness is set quite high, especially as the long-standing canons of statutory construction may be employed to cure surface problems arising from infelicitous use of language⁹⁷ as well as placing the impugned legislation within a larger interpretive context.⁹⁸

The overbreadth analysis can only be made in respect of legislation which is not vague.⁹⁹ It is not only the words themselves but the very structure and scope of the model created which is relevant here. This is a difficult analysis given that “overbreadth” of criminal law is itself not an autonomous *Charter* value, but provides the vehicle to determine whether the legislation unduly limits other *Charter* values more than is necessary. It is a balancing exercise, and is as difficult to deal with in a constitutional frame as it has been as a principle of statutory interpretation giving effect to the traditional policy of minimal criminalization; the difference between the two lies not in principle but in remedial response. In well-known *dicta*, Gonthier J. held:¹⁰⁰

[O]verbreadth remains no more than an analytical tool. The alleged overbreadth is always related to some limitation under the Charter. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the State, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the Charter.

⁹⁴ *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 248 D.L.R. (4th) 632 (Ont. C.A.).

⁹⁵ Though not set in a Canadian or constitutional context, perhaps the best general account of the importance of fair warning as an institutional value in the criminal law is contained in Professor Ashworth’s influential text; see A. Ashworth, *Principles of Criminal Law*, 4th ed. (Oxford: Oxford University Press, 2003).

⁹⁶ *R. v. Campbell* (2004), 120 C.R.R. (2d) 231 at para. 20 (Ont. Sup.Ct.); *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at paras. 51-52.

⁹⁷ That is, the presumption that Parliament intended the legislation to be compliant with the Charter favouring such an interpretation over other possible interpretations; see *R. v. Mills*, [1999] 3 S.C.C. 668; *R. v. Nova Scotia Pharmaceutical Society*, *supra* note 90; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

⁹⁸ *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031.

⁹⁹ *R. v. Heywood*, *supra* note 90.

¹⁰⁰ *R. v. Nova Scotia Pharmaceutical Society*, *supra* note 90 at 630.

In *R. v. Heywood*, Cory J. explained further:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual.¹⁰¹

Clearly vagueness and overbreadth are important not only for reasons of constitutional validity and protection of individual rights and freedoms, but also to ensure efficacious law. With this in mind, one can turn to questions of settled policy.

B. Parliamentary Intent, Public Policy, and "Criminal Organizations"

As I have argued earlier, the central part of any criminal law model touching organized crime requires a careful approach to the definition of the target. This of course directly proceeds from the intention of the legislature in creating such organized crime laws. *UNTOC* and *RICO* take differing approaches, and it is apparent that the drafters of the criminal organization provisions of the *Criminal Code* have created a model of law that shares elements of each of them directed to a broad attack against sophisticated forms of criminality. Thus, rather than the single offence that was originally enacted, the *Criminal Code* now builds upon a legislative construct and then sets out three tiered offences that seek to demarcate the liability of "enhancers," soldiers, and captains (to use part of the terminology of the popular press).¹⁰² Like *UNTOC*, the Code proceeds from a defined target and includes a simple participation offence.¹⁰³ However, like *RICO*, extended individual criminal liability is available through two higher-tier offences as against those who participate in criminal organizations through acts which are themselves

¹⁰¹ *Supra* note 90 at paras. 48-51.

¹⁰² For a narrative of the overall structure of the consequential amendments to the Code and other statutes by Bill C-24, see M. Levitz and R. Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61 *The Advocate* 375.

¹⁰³ One should recall, however, that the Canadian criminal law is considered sufficient under *UNTOC* by virtue of making available liability for conspiracy. The separate participation created under the Convention was intended for civilian jurisdictions where criminal liability for conspiracy is unknown; see discussion above.

regarded as discretely criminal. Like both *UNTOC* and *RICO*, simple membership in a criminal organization is not proscribed *per se*.¹⁰⁴

In its original 1997 form, section 467.1 of the Code defined a criminal organization as follows:

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

(a) having as one of its primary activities the commission of any indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, and

(b) any or all of its members of which engage in or have, within the preceding five years, engaged in the commission of a series of such offences.

This “5-5-5” definition was held to be constitutionally valid, but was equally criticized both by those supporting and those opposing criminal organizations legislation.¹⁰⁵ It seemed both arbitrary in respect of the quantitative elements of the definition, and, at the same time, was considered a hindrance to effective prosecution given the need to prove a pattern of wrong-doing of the various members of the group in a manner more restrictive than that found in *RICO*, as well as to identify the group’s “primary” activity.¹⁰⁶ Though charges were laid, the offence was prosecuted infrequently.¹⁰⁷

¹⁰⁴ Indeed, proscribing membership seems to have been excluded from the outset; see the comments by the Hon. Alan Rock and the Hon. Anne McLellan in *Hansard*, (21 April 1997) at 10009 and (23 April 2001) at 2955 respectively; *R. v. Accused No. 1*, 2005 BCSC 1727 (2005) 35 C.R. (6th) 140 (B.C.S.C.) at para. 22.

¹⁰⁵ *R. v. Doucet* (2003), 18 C.R. (6th) 103 (Que. Sup.Ct.); *R. v. Beauchamp*, [2002] R.J.Q. 3086 (Sup.Ct.); *R. v. Fok* (2001), 285 A.R. 166 (Q.B.); *R. v. Carrier*, [2001] R.J.Q. 628 (Sup.Ct.).

¹⁰⁶ See the statement of the Minister of Justice and Attorney General for Canada, the Hon. Anne McLellan, to the House of Commons in *Hansard*, (5 April 2001) at 1315, 1320; Stuart, “Politically Expedient,” *supra* note 18; A.-M. Boisvert, “Mega-Trials: The Disturbing Situation in Quebec” (2004) 15 C.R. (6th) 181.

¹⁰⁷ Exact figures in respect of prosecutions are not publicly available, nor does Statistics Canada publish yearly rates of convictions for the criminal organization offences separate from other criminal offences. However, federal penitentiary admissions for organized crime offences are instructive and were few in 1997 (4), 1998 (0), 1999 (4) and 2000 (5). From 2001, numbers increased: 2001 (34); 2002 (38), 2003 (85), 2004 (50); see L. Motiuk and B. Vuong, “Federal Offenders with Criminal Organization Offences: A Profile” (Ottawa: Correctional Services of Canada, 2005). See also Lambert, *supra* note 10.

With the decision to participate in the negotiation of, and ultimately ratify, *UNTOC*, a natural opportunity arose to refine the 1997 legislation based on a more developed international model. Again, I would suggest that the Parliamentary record is somewhat unsatisfying in respect of both the 1997 and 2001 amendments to the *Criminal Code*. This is especially the case in respect of the 2001 amendments where the revisions to the organized crime provisions were contained in a larger omnibus set of amendments to the Code, with the focus of the legislative debate bearing upon other more controversial elements such as the limited grant of immunity to police committing criminal offences during the course of a criminal investigation.¹⁰⁸ The introduction of these particular amendments in 2001 nonetheless makes it clear that the intention of the government was to spearhead a more general assault on organized criminality - a “National Agenda on Organized Crime” - including economic crime generally,¹⁰⁹ and cross-border and transnational crime in particular.¹¹⁰ The federal initiative was not restricted to legislative changes; for example, \$150 million was dedicated to the Measures to Combat Organized Crime Initiative, which was designed to create a coordinated response between the Departments of Justice and the Solicitor General, the RCMP, and Corrections Canada.¹¹¹ On November 21, 2001, the Minister of Justice addressed the Standing Senate Committee on Legal and Constitutional Affairs and spoke of the need for legislation to better deal with organized criminals:

We know that the actions of organized criminals are felt across this country, in communities of all sizes and kinds. This is not simply a big city problem. Organized criminals are at the heart of serious social problems, including illegal drug use and organized prostitution. These crimes typically cost victims up to tens of thousands of dollars. Frequently, the victims are those who can least afford it, such as elderly persons on fixed incomes.

Organized crime is also involved in serious property theft, such as automobile theft, to feed illegal markets. We know that criminals are stealing from Canadians through

¹⁰⁸ Now set out in ss. 25.1 and 25.2 of the *Criminal Code*. The legislative history is reviewed at some length by Fuerst J. in *Re Lindsay and Bonner v. The Queen* (2004), 182 C.C.C. (3d) 301 at 310-312 (Ont. S.C.J.) [*Lindsay and Bonner*].

¹⁰⁹ Continuing the 1997 model in this respect; see *R. v. Beauchamp*, *supra* note 105; *Lindsay and Bonner*, *ibid.* at 308-315, reviewing the Parliamentary record and finding the nature of the harm sought to be remedied.

¹¹⁰ See Department of Justice, *supra* note 19.

¹¹¹ The last published review of the project can be found in Department of Justice, “2004 Mid-Term Report-Measures to Combat Organized Crime” online: <http://www.justice.gc.ca/en/ps/eval/reports/04/mcoctech/index.html>.

telemarketing, Internet and credit card fraud. It is an understatement that organized crime has negative effects on public safety and security.¹¹²

It is abundantly clear from the legislative history of these provisions that there was clear all-party legislative support for even more robust criminal organization measures than the 1997 model, and that a simplification of section 467.1 was thought to be consistent with that aim. Indeed, I would suggest that the 2001 revisions to this part of the *Criminal Code* represent a major policy departure from the original model. It was not merely traditional mafia or biker-gang type organizations that seem to have been intended to be within the reach of the legislation, but organized criminality on a much more limited scale.¹¹³

The revised version of section 467.1 now provides as follows:

467.1 (1)

The following definitions apply in this Act.

“criminal organization” means a group, however organized, that

(a) is composed of three or more persons in or outside Canada; and

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

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

“serious offence” means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation.

(2) For the purposes of this section and section 467.11, facilitation of an offence does not require knowledge of a particular offence the commission of which is facilitated, or that an offence actually be committed.

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

¹¹² Quoted in *Lindsay and Bonner*, *supra* note 108 at 311-12.

¹¹³ *Ibid.* at 310-312.

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

What is clearly envisaged under the present definition, then, is that the ultimate target of the legislative effort is *a group* that (1) has some internal cohesion given that it must have at least three persons in its composition, although there need not be a defined structure (“however organized”) nor need those people have any specific connection to each other (or Canada for that matter); (2) has defined purposes or recognizable activities associated with it, amongst which are, necessarily, the “facilitation or commission” of serious offences for the financial or other material benefit of the group or any of its members; and (3) was deliberately and not “randomly” formed for the larger criminal agenda and not for the “immediate commission of a single offence.”

One might say at the outset that it is clear that the definition of a criminal organization under section 467.1 is a deliberately broad concept that can only be understood, and assessed, in the context of its application. That is to say that the organizing principle does not create liability, but it does mediate it and as such the concept becomes meaningful only when taken in the context of one of the offences created in sections 467.11-467.13 of the *Criminal Code*. However, one can equally recognize that any prosecution touching upon a criminal organization will be necessarily complex given that it is the existence of a group with a discernable set of purposes or activities, amongst which is the facilitation or commission of serious crimes, that must be proved.¹¹⁴ Like conspiracy this will be complicated as a practical exercise, but like conspiracy the complexity is very much in the manner of proof rather than law.¹¹⁵ In other words, these are difficult questions very much suitable for determination by a jury.

C. The Participation Offence

The *Criminal Code* provides as follows:

467.11

- (1) Every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity

¹¹⁴ There are few cases on point but such as there are have begun to isolate key elements that can be used to infer the purposes of such a group, such as the group’s characteristics, operational structure, tenets, cultivated reputation, plans, and the criminal records of its members. See *R. v. Lindsay*, [2005] O.J. No. 2870 at paras. 952, 1072 (Sup. Ct.). On the ordered disclosure of a youth criminal record to these ends, see *R. v. C.F.*, [2005] O.J. No. 3708 (Ct. J.).

¹¹⁵ Cf. *R. v. Speak*, [2005] O.J. No. 5880 (Sup. Ct.) where both offences were

of the criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

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

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

(3) In determining whether an accused participates in or contributes to any activity of a criminal organization, the Court may consider, among other factors, whether the accused

- (a) uses a name, word, symbol or other representation that identifies, or is associated with, the criminal organization;
- (b) frequently associates with any of the persons who constitute the criminal organization;
- (c) receives any benefit from the criminal organization; or
- (d) repeatedly engages in activities at the instruction of any of the persons who constitute the criminal organization.

The participation offence is the lowest tier of the three offences in the *Criminal Code* model. It strikes not necessarily at those involved in otherwise distinct criminal wrongs, or in the main activities of a criminal organization, in any way. The objective is to proscribe any act by which one “participates in or contributes to *any* activity” of the criminal organization combined with the requisite degree of mental fault, and very much looks like something that can equally be considered as a nuisance or public order type provision. Certainly there are recent provincial attempts to legislate in that regard.¹¹⁶

Under the statute, then, *enhancers* face liability where a person (1) does or omits to do anything, whether contrary to law or not;¹¹⁷ (2) in so doing “participates in or contributes to any activity” of a “criminal organization;” (3) *knowing* that the organization is a “criminal organization;” and (4) so acts or omits to act “*for the purpose of*

charged.

¹¹⁶ As is attempted in the new Saskatchewan *Criminal Enterprise Suppression Act*, *supra* note 14.

¹¹⁷ As was the intention of the government in introducing the legislation; see the statement of the Minister of Justice and Attorney General for Canada, the Hon. Anne

enhancing the ability of that criminal organization” to either facilitate or commit an indictable offence. Knowledge of any particular indictable offence to be facilitated is not required, neither need the participant actually facilitate or contribute to the commission of a particular offence, nor need the criminal organization’s abilities be actually enhanced, nor need the participant have knowledge of the criminal organization’s members or specific offences committed or facilitated by the criminal organization. Thus, and even more so than Article 5(a)(ii) of *UNTOC* (set out above) which authorizes national proscription of participation in an “organized criminal group” by taking “an active part” in key activities of the group, section 467.11 is quite sweeping in scope and made doubly so when one imagines the offence extended through the application of conventional principles of inchoate liability. As no recent case has tested this lowest tier offence little judicial guidance is available. However, one can consider a hypothetical situation.

Assume, for example, that the Hells Angels Motorcycle ClubTM is a criminal organization within the meaning of the Code.¹¹⁸ Not content to busy themselves with the activities conventionally associated with this “club,” the Hells Angels operate a series of shops that sell club paraphernalia and souvenirs.¹¹⁹ Assume that a person who knows the Hells Angels to be a criminal organization visits such a shop and purchases one of the many reasonably-priced t-shirts, calendars, or decorative mugs. Assume further that the customer knows (or perhaps is reckless to, or wilfully blind to) the nature of the Hells Angels as a criminal organization, and further, knows or ought to know that the purchase will contribute in some way to some activity of the

McLellan, to the House of Commons in *Hansard* (5 April 2001) at 1315: “Taking part in the activities of a criminal organization, even if such participation does not itself constitute an offence, will now be a crime where such actions are done for the purpose of enhancing the ability of the criminal organization to facilitate or commit indictable offences.”

¹¹⁸ Registered trade mark no. TMA354187. Presumably, the fact that an organization with an association to the registrant has now actually been found to be a criminal organization has implications under the *Trade-marks Act*, R.S. 1985, c. T-13, s.14(1)(c), which prohibits marks “contrary to morality or public order.” On a related point, it is interesting to note that the Hells Angels in Nevada recently brought suit against the Walt Disney in respect of an as yet unreleased film for infringement of its trade mark; see *Hells Angels Motorcycle Corporation v. Walt Disney Motion Pictures Group Inc.* (U.S. Dist. Ct., Central Dist. Of Ca., No. CV06-1459, filed 8 March 2006).

¹¹⁹ “Route 81” is in fact the official store of the Hells Angels. The numbers 8 and 1 correspond to where the letters “H” and “A” fall within the alphabet. Stores are located in Prince Edward Island, Moncton, Halifax and Toronto. Customers may also shop online; the Hells Angels maintain an Internet presence at the web site www.redwhiteclothing.ca (registered with the Canadian domain name registration authority, CIRA).

organization, like propagating its menacing image amongst the general population. Provided that both the “criminal organization” aspects and mental fault requirements for the act of participation are met, one would think that such a purchase, or indeed frequent visits to the shop alone if members of the criminal organization are present, either in isolation or in combination with each other, may well be sanctionable under section 467.11(1). If the overbreadth analysis is at its core a balancing of interests then the question is stark: Is the goal of deterring criminality by and through criminal organizations so important that acts like these are properly sanctionable with up to five years’ imprisonment? I would suggest not.

Quite simply, the act of participation set out in the Code is not linked in any real way with criminality of the group or its constituent elements. Notwithstanding that the legislative materials would demonstrate a clear Parliamentary will to take the strictest possible approach to organizations like the Hells Angels, it appears that the simple act of participation in a criminal organization creates something very much like guilt by association and broadens the scope of liability in a manner that runs squarely against the dicta of Cory J. in *Heywood*.¹²⁰ Whether through statutory amendment or judicial interpretation based on an implied Parliamentary intent not to create a status offence, I would suggest the inclusion of an *UNTOC*-like requirement of taking an active part in the organization is more meaningful as a basis for sanction, better comports with the policies underlying *UNTOC*, and more closely tracks the public policy interests rationalizing liability. This is not to say that “wearing colours” and other forms of activities are not amenable to regulation; it is to say, however, that self-identification with a criminal organization, without satisfaction of a suitable subjective mental fault, is a limitation on fundamental rights with little real connection to the basis for proscription.

D. The Commission Offence

The *Criminal Code* provides as follows:

467.12

(1) Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

¹²⁰ *Supra* note 90.

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that the accused knew the identity of any of the persons who constitute the criminal organization.

A “soldier” need not be a member of a criminal organization under section 467.12 but faces liability when he or she participates in that criminal organization through the commission¹²¹ of an indictable offence “for the benefit of, at the direction of, or in association with, a criminal organization.” Section 467.12, then, creates an extended form of criminal liability when joined with the criminal organization concept, elevating liability for the predicate offence quite substantially given that the sentence on the section 467.12 offence runs consecutive to that of the sentence for the predicate offence. This is a step beyond merely considering the offender’s association with the criminal organization as an aggravating feature to be taken into account in calculating sentence. Rather, it is the very core offence of the model.

A preliminary question naturally arises based on the bar on compound criminality coming out of *R. v. Kienapple*.¹²² In *R. v. Prince*,¹²³ the rule was restated to make clear that, absent clear Parliamentary intent to the contrary,¹²⁴ a single transaction gives rise to compound liability impermissibly where there is both a factual and legal nexus between the separate offences charged. A legal nexus is shown where the elements of one offence particularize the second, or the elements in the two are different on their face but correspond in essence, or where the elements of one are said to prove the other. Thus, the rule will not apply if the predicate offence and criminal organizations offence have no shared fault elements, or if Parliament intended otherwise. Though of course not determinative, previous versions of the Code provisions were held not to be violative of the rule on this point.¹²⁵ The argument accepted was that the presence of the additional “criminal organization” and *mens rea* requirements differentiates the participation offence from the predicate offence substantially and does so necessarily, due to the need for an appropriate *mens rea* to satisfy constitutional requirements shielding the morally innocent from liability.¹²⁶ One would think that the complex nature of the section 467.12 offence, particularly

¹²¹ That is, being a party to it or counselling any person to be a party to it; see ss. 467.1(1) (definition of “committing an offence”), 21 and 22 of the *Criminal Code*, *supra* note 4.

¹²² [1975] 1 S.C.R. 729 at 747-48.

¹²³ [1986] 2 S.C.R. 480 at 491; *R. v. Wigman*, [1987] 1 S.C.R. 246.

¹²⁴ *R. v. Krug*, [1985] 2 SCR 255.

¹²⁵ *R. v. Doucet*, *supra* note 103; *R. v. Fok*, *supra* note 103; *R. v. Leclerc*, [2001] R.J.Q. 747 (S.C.).

¹²⁶ *R. v. Creighton*, [1993] 3 S.C.R. 3.

as it incorporates the section 467.1 “criminal organization” criteria, clearly differentiates liability for the commission offence from the predicate offence when it is actually committed. Whether the offence is a better substitute for merely considering the criminal organization aspect as an aggravating feature on sentence for the predicate offence remains to be seen.

The commission offence was given a thorough examination in a recent high-profile prosecution in Ontario which was heralded by police and prosecutors as a major test of the new legislation. The prosecution was felt to be particularly suitable to test the criminal organizations model generally, and the commission offence in particular, as the allegations blended the intent of the legislation to attack both traditional organized crime (bikers) and economic crime associated with such organizations (extortion).

Thus, in *R. v. Lindsay*, two men, Lindsay and Bonner, were alleged to have committed extortion in association with a criminal organization (being the Hells Angels Motorcycle Club and the two accused being members of that organization).¹²⁷ The essence of the allegations was that the threats to the victim were made by the two accused who were wearing insignia associating themselves with the Hells Angels Motorcycle Club at the time and who relied upon the reputation of the Hells Angels for violence to intimidate the victim. At the end of the day, the allegations were proven and the accused both convicted.¹²⁸

The Lindsay and Bonner prosecution was a complex one which took place over some twenty-one months.¹²⁹ In a carefully considered judgment respecting the constitutional validity of section 467.1 and section 467.12, Fuerst J. considered the legislative history of the provisions and held that the legislation relied on terms that are all either defined in the statute itself or could be reasonably assumed to bear their dictionary definitions, and as such the legislation is not vague.¹³⁰ It is not overly broad in her view because it is directly connected to the policy Parliament clearly accepted:

The notion that group activity poses a particular danger to society has long been recognized in the case of conspiracies to commit crime. As Cory J. observed in *United States of America v. Dynar* (1997), “the scale of injury that might be caused to the fabric of society can be far greater when two or more persons conspire to

¹²⁷ *Supra* note 114.

¹²⁸ *Ibid.*

¹²⁹ *Supra* note 108.

¹³⁰ *Ibid.* at 314; followed, *R. v. Smith*, 2006 SKQB 132.

commit a crime than when an individual sets out alone to do an unlawful act.” The materials filed on this application indicate that the objective of the organized crime legislation ultimately contained in Bill C-24 was not just to combat groups alleged to be responsible for crimes of violence, such as so-called outlaw motorcycle gangs, but also to deal with groups involved in the perpetration of economic crime, and to stem the organized criminal pursuit of profit...Further, the legislation does not trench on legitimate “non-regulated” or “non-criminal” conduct. The definition of a criminal organization requires that one of the group’s main purposes or main activities is the facilitation or commission of a “serious offence.” It is not merely a prohibition against group activity. The phrase “serious crime” is defined to generally accord with the use of that term in the United Nations Convention. The fact that the definition incorporates offences under federal statutes other than the Criminal Code is justifiable. The material filed by the Crown indicates the wide range of activities to which organized crime extends, such as tobacco smuggling, migrant trafficking, and hazardous waste disposal. There is no such thing as “a type” of crime “normally” committed by criminal organizations.¹³¹

I suggest that Fuerst J. is quite right to accept that it was the intent of Parliament to cast a wide net through an expansive definition of a criminal organization. As I have argued above, the intent of Parliament was both to embrace wider notions of individual liability in relation to criminal organizations as a purely domestic initiative and to move towards collective international action through *UNTOC*. Thus the objection that the ambit of the commission offence is too broad based on a consideration of the expansive definition of a criminal organization taken in isolation is misplaced. The entire structure of the model provided for in the Code consciously rests on a deliberately expansive notion of a criminal organization, but where liability is mediated through the mental and physical fault elements of the offence charging sections.

Thus, like wide definition of a *RICO* “enterprise” laid against the tighter requirement of a “pattern of racketeering activity,” the definition of a “criminal organization” must be brought together with the requisite fault requirements of the commission offence; thereafter one may evaluate its reach. Thus, Fuerst J. rightly held that the construction of the commission offence requires that its constituent elements be managed to ensure that individual blameworthiness is made out based on the incorporation of a suitable form of subjective mental fault that both rationalizes liability and controls the breadth of the offence:

[Section] 467.12 is an offence that carries significant stigma on conviction, and at least the prospect of a substantial penalty. I am unable to agree that it imposes liability on an accused who has less than a subjective mens rea. In order to convict

¹³¹ *Lindsay and Bonner, ibid.* at 315.

an accused under this provision, the Crown must prove that he/she had the requisite mens rea for the particular predicate offence involved, and that the accused acted for the benefit of, at the direction of, or in association with a criminal organization. The Crown takes the position, and I agree, that there is an implicit requirement that the accused committed the predicate offence with the intent to do so for the benefit of, at the direction of, or in association with a group he/she knew had the composition of a criminal organization, although the accused need not have known the identities of those in the group.¹³²

In the trial proper, much expert evidence was led in relation to the identification of the Hells Angels Motorcycle Club as a criminal organization; the trial judgement set out at length the history of the Hells Angels in Canada, their operating procedures, internal policies, relationships with other biker gangs, and concluded that the Hells Angels Motorcycle Club with which the accused were associated was in fact such an organization.¹³³ Fuerst J. held that criminal organization existed to facilitate the commission of serious crime:

I accept that the original impetus for establishing the HAMC may not have been the commission of criminal offences by its members. On the evidence, however, the club evolved in a sophisticated way, such that by 2002 the facilitation of criminal conduct for the economic benefit of its members was one of its main purposes or activities in Canada.

Motorcycling does play a role in the existence of the HAMC in Canada, including in Ontario. There are requirements, for example, that members maintain Harley Davidson motorcycles and participate in motorcycle events. The definition of “criminal organization” does not require, however, that facilitation of a serious offence be the group’s only “main” purpose or activity. It must simply be “one of” its main purposes or activities.

Further, an interest in motorcycling, and the facilitation of serious criminal offences are not mutually exclusive. In fact, there is evidence that the HAMC in Canada uses motorcycling to build alliances with other one percenter motorcycle clubs, to make a show of force, and to foster a reputation for violence and intimidation. In these ways, motorcycling is connected to the facilitation of criminal offences. Moreover, many of the organization’s rules, practices, and concerns have little to do with motorcycling. As a matter of common sense, they are at odds with the operation of a group with purely legitimate interests.

¹³² *Ibid.* at 319.

¹³³ *R. v. Lindsay*, *supra* note 114 at para. 943. In *R. v. Anderson*, 2004 BCSC 645, the Vancouver chapter of the Hells Angels Motorcycle Club was alleged to be a criminal organization for the purposes of sentence on a number of *Criminal Code* offences involving serious violence but the evidence adduced was held to be insufficient on the point.

I find that the evidence about the group's characteristics, in particular its operational structure and tenets, promotion of a reputation for violence, and interest in territorial expansion all support the conclusion that the facilitation of one or more serious offences for the financial benefit of its members was a main purpose or main activity of the HAMC in Canada.¹³⁴

She went on to find that the extortion offences were committed “in association with” the criminal organization as alleged:

The “in association with” element is established by the evidence of the manner in which Mr. Lindsay and Mr. Bonner chose to portray themselves to Mr. M. I have found that on January 23, 2002, both Mr. Lindsay and Mr. Bonner went to Mr. M.'s house wearing jackets bearing the primary symbols of the HAMC, the name “Hells Angels” and the death head logo. In so doing, they presented themselves not as individuals, but as members of a group with a reputation for violence and intimidation. Only full members of the organization could wear its symbols. It is a reasonable inference and one that I draw, that Mr. Lindsay and Mr. Bonner were each well aware of the implications of their choice of attire.

On January 31, 2002, for their meeting in a public place, Mr. Lindsay chose to wear less overt garb, but nonetheless he was attired in paraphernalia displaying his connection to the HAMC. This included boots with the words “Hells Angels North Toronto” and the death head logo on the foot. Mr. Bonner waited outside in a vehicle, wearing the same jacket as on January 23.

Mr. Lindsay told Mr. M. on January 31 that if he did not receive a sufficient amount of money each month, he would send “people” to Mr. M.'s house, and that the money sought was his and five other “guys” who were “the same kind of mother fuck as I am.” It is a reasonable inference and one that I draw, that Mr. Lindsay intended to communicate that he would send other members of the Hells Angels to Mr. M.'s home.

Both Mr. Lindsay and Mr. Bonner were full members of the HAMC at the time. Mr. Lindsay was a particularly committed member, who kept various chapter cards in his possession, used his chapter's clubhouse as his address on his driver's licence, travelled to other HAMC venues and spent time with other members, and wore front rockers bearing the names of other influential Canadian chapters on his colours. Mr. Bonner had graduated from the position of prospect to become a full member. It is a reasonable inference and one that I draw, that both men were well aware of what the organization was about, including its composition and characteristics, globally and specifically as it existed in Canada and in Ontario. In particular, both men knew the HAMC's reputation for violence and intimidation. They deliberately invoked their membership in the HAMC with the intent to inspire fear in their victim. They

¹³⁴ *R. v. Lindsay, ibid.* at paras. 949-52.

committed extortion with the intent to do so in association with a criminal organization, the HAMC to which they belonged.¹³⁵

I would suggest that unlike the simple participation offence, the commission offence in section 467.12 as prosecuted in the Lindsay and Bonner matter is much more precise and comports well with the rationale for liability. Here the extortion offence was more serious when taken out of splendid isolation and put into the greater context of the relationship of the accused with a proven criminal organization, together with their subjective intention to both exploit the connection and benefit the Hells Angels in committing the extortion. Better than considering this within the context of a sentencing exercise for the predicate offence, the court is able to turn its attention to what Parliament now identifies as a separate and distinct form of extended liability.

The Lindsay and Bonner prosecution was not a mega-trial in the sense that large numbers of witnesses were required to implicate a large number of defendants. It was, however, a complex trial in which much expert evidence had to be weighed to determine whether the criminal organization label could be applied to a particular group. While prosecutors may well think twice about laying such charges given the necessary resources that must be invested, the exercise seems entirely legitimate. Only time will tell whether it will be successful.

E. The Instructing Offence

The *Criminal Code* provides:

467.13

(1) Every person who is one of the persons who constitute a criminal organization and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organization is guilty of an indictable offence and liable to imprisonment for life.

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

- (a) an offence other than the offence under subsection (1) was actually committed;
- (b) the accused instructed a particular person to commit an offence; or

¹³⁵ *Ibid.* at paras. 1085-1089. This judgement was applied in *R. v. Speak*, *supra* note 115 at para. 44. In *Speak*, the Thunder Bay chapter of the Hells Angels were found to be a “criminal organization” but the prosecution failed on a section 467.12 count in respect of the predicate offence of trafficking as there was no evidence offered to make out such an “association” aside from clothing with insignia of the Hells Angels found in the home of the accused.

(c) the accused knew the identity of all of the persons who constitute the criminal organization.

In another recent case, *R. v. Accused No. 1*, a constitutional challenge was brought against the criminal organization provisions generally but most specifically in respect of section 467.13.¹³⁶ Here the allegations did not touch upon an organization as high-profile as the Hells Angels, but on a typical drug-trafficking operation carried out in the greater Vancouver area.

The judgement in this matter was rendered after Fuerst J.'s judgement in *R. v. Lindsay*, and Holmes J. agreed with much of the reasoning in the earlier case – specifically that the definition of a criminal organization was intended by Parliament to be expansive and thus requires a contextual assessment in respect of vagueness and overbreadth.¹³⁷ However, Holmes J. held that what is acceptable for the lower-tier offences may be unacceptable in the context of the section 467.13 instructing offence. For liability to be found here the accused must be a member of the criminal organization and have had the capacity to “instruct” another to commit an offence in association with that organization under the terms laid out in the Code.

In a careful interpretation of the key term “group” as used in section 467.1, Holmes J. held that the expansive definition of a criminal organization prevents an accused from receiving the necessary “fair warning” that he or she may be liable to sanction under section 467.13. That is, one must be a member of a criminal organization which in turn requires that one have the ability to know that one is a member of such an organization. The expansive definition of a criminal organization may operate to convict an accused without such self-knowledge. As such, the terms of the offence are vague and necessarily overly broad, breaching Section 7 of the *Charter* in a manner that cannot be justified.¹³⁸ Holmes J. held:

It was in the context of s. 467.12 that Fuerst J. in *R. v. Lindsay* noted that it is not necessary that the legislation set the precise parameters of the relationship between the accused and the criminal organization. In s. 467.13, the legislation requires the accused to be one of the persons who constitute the criminal organization and therefore has an obligation to define “criminal organization” in a fashion that enables a person to determine whether he or she is one of those persons and which provides guidance as to that question to law enforcement officials.

¹³⁶ *Supra* note 104.

¹³⁷ *Ibid.* at paras. 65-69.

¹³⁸ *Ibid.* at para. 148.

Section 467.13, as it incorporates the definition of “criminal organization” does not do so. The area of risk or liability arises only from the inherent and unconstrained meaning of “group, however organized”, which is so vague as to constitute no meaningful guidance at all.

Alternatively, the phrase may be read as not vague but almost boundless. In that event, s. 467.13 is over-broad for the reasons that underlie my conclusions about its proper interpretation and its effect. By adopting an unconstrained but foundational concept of “group”, Parliament includes within s. 467.13 members of an almost limitless variety of groups. This reaches far beyond the scope of the public policy objectives relating to organized crime that motivated Parliament to enact the provisions. This is a situation where vagueness and over-breadth coincide, because if “group, however organized” has intelligible meaning, that meaning is of almost infinite breadth.¹³⁹

Moreover, the importance of this ability to know one’s status in respect of the criminal group is necessary to balance the expansive nature of the physical fault requirements for the instructing offence. That is, the term “instructs” appears to have a very wide meaning. Notwithstanding that the term may connote some power to compel the person instructed, that power need not emanate from the instructor’s membership in a criminal organization under the statute.¹⁴⁰ As such, any linkage between the instructor and the instructed is left at large.¹⁴¹ In any case, the instruction need not be given to any one person in particular but can be made to persons generally.¹⁴² Further, the range of offences contemplated as falling within such an instruction – any offence under any federal statute - is wide.¹⁴³ Thus, Holmes J. held that the highest-tier offence, carrying as it does the most serious consequence upon punishment, demands a closer linkage between the accused and the criminal organization than is otherwise provided for in the statute to comport with *Charter* values in relation to vagueness and overbreadth. The judgement, however, has not been followed in similar circumstances.¹⁴⁴

¹³⁹ *Ibid.* at paras. 129-131.

¹⁴⁰ *Ibid.* at paras. 90-96; cf. *R. v. Leclerc*, *supra* note 125; *R. v. Bouchard*, (2004), 22 C.R. (6th) 339 (Q.C.A.). In *Leclerc*, the nature of the instructor’s authority was held to be that which emanates from the accused’s association with the criminal organization.

¹⁴¹ *R. v. Accused No. 1*, *ibid.* at paras. 90-96.

¹⁴² *Ibid.* at para. 96, referring to s.467.13(2)(b).

¹⁴³ *Ibid.* at paras. 99-100.

¹⁴⁴ In *R. v. Smith*, *supra* note 130 at paras. 13-15, Zarzeczny J. agreed with each of the judgements in *R. v. Lindsay* and *R. v. Accused No. 1* where they were in agreement, but rejected the analysis of Holmes J. respect of the s. 467.13 offence.

With respect, I would suggest that the reasoning in *Accused No. 1* is not without its weaknesses.¹⁴⁵ While it is true that the criminal organization concept is almost boundless on its face, it is an organizing principle. For the accused to be liable under section 467.13, Holmes J. is quite correct to focus on the necessary subjective knowledge of the accused and his or her ability to “instruct” another to act for the “benefit” of the group. A failure to prove subjective knowledge on the part of an accused that he or she is a member of a criminal organization is not a flaw in the legislation but a circumstance in which a conviction is inappropriate. That the accused may have operated under a mistake of fact is relevant to the jury in settling its verdict, but such a possibility ought not to normally render a proscription either vague or overly-broad or both. That said, I would suggest that the instructing offence would benefit from judicial interpretation as circumstances merit to assist juries in its application in future cases. That is, much as experience under *RICO* has allowed courts in the United States to develop doctrine to assist in the determination of the core elements of a *RICO* “enterprise” and the necessary “pattern of racketeering activity,” I believe that experience will allow courts to develop guidelines for juries to assist in the determination of the physical and mental fault requirements for the criminal organization offences in general and the instructing offence in particular.

F. Assessing the Model and Looking to the Future

Unlike *RICO*, the criminal organization provisions of the *Criminal Code* are of relatively recent vintage. While it is true that the original impetus may have been the particularly tragic incidents in the lead-up to the 1997 general election, the later revisions to the Code have been informed by an internationally coordinated criminal law policy to target organized crime and trans-national criminality in new ways. True, this new international dynamic is also inherently political in nature and somewhat reactive, but such criticisms do little to detract from the inherent legitimacy of the decision of legislators to proceed as they have done.

Like *RICO*, the Code’s organized crime provisions are broad in scope and represent a policy shift from that which went before. Again like *RICO*, courts will be called upon to contextualize the normative content of the offences to comport with the principles that rationalize liability and institutional values in a way which does not unjustifiably limit other important interests. While one might rightly expect American and Canadian approaches organized crime laws to develop consistent with similar, but different, legal cultures, I would suggest that we should be concerned that an expansive model be contained to its rationale and

¹⁴⁵ *Supra* note 104.

not be allowed to wander freely. This is not to say that the criminal organization provisions should not be used in new contexts and one can think of any number of examples where the criminal organization model may be a useful addition to present approaches. An area like labour law, just to point to a single example, could benefit where rogue elements within a commercial organization resist legitimate union activity through acts which are proscribed – as well as the reverse situation. In such a scenario, the rogue element in the legitimate business or the union may constitute a criminal organization and the intersection between the criminal and legitimate organizations may provide for new and extended forms of liability that usefully complement present approaches. Certainly one can anticipate that interested parties may try and manipulate the prosecution of the criminal organization provisions to serve their own ends. Thus, the fundamental tension between flexibility and certainty in the construction of doctrine instantly surfaces, and argues in favour of a cautious and principled approach to the development of doctrine.

I would suggest that the two higher-tier offences of the criminal organizations model are rightly subject to legitimate criticism as to allocation of prosecutorial resources in mounting complex prosecutions. Some degree of faith in prosecutorial discretion is not an inappropriate response; it is allocation of resources that is at issue here not discretionary application of criminal law. Such prosecutions are legitimate responses to what Parliament perceives as a real problem to be remedied through targeted legislation. Moreover, one would think that dealing with the types of wrongs contemplated by the commission and instruction offences as distinct forms of liability, rather than mere aggravating factors on sentence, is in principle a good thing as it more fairly labels the nature of the wrong being punished. The criminal organization model in this regard also accords well with the contemporary emphasis on attacking the economic benefits of criminal wrong-doing, helping to clarify where confiscation, restitution, and other profit-stripping orders are desirable.

However, it is the lowest-tier simple participation offence that is of greatest concern. Here the flexibility of the criminal organization concept is twinned with an expansive notion of participation, seemingly controlled only by strict considerations of mental fault. As the overbreadth analysis is simply an example of the balancing of the state interest against that of the individual, it is suggested that the broad goal of containing criminal organizations is insufficient to justify a broad and sweeping form of liability which is itself too far removed from actual criminal wrong-doing as to be of any practical use. Moreover, it represents a danger in terms of selective enforcement and creating what

our criminal law has always avoided, mere status offences. It is a distracting element of the larger criminal organizations model, and it is to be hoped that it will be revised or removed in due course.