Her Majesty the Queen v. Lindsay et al.

[Indexed as: R. v. Lindsay]

70 O.R. (3d) 131
[2004] O.J. No. 845
Court File Nos. 022474/01 and 022474/02

Ontario Superior Court of Justice
Fuerst J.
February 27, 2004

Charter of Rights and Freedoms -- Fundamental justice -- "Criminal organization" provisions of Criminal Code not violating s. 7 of Charter -- Definition of "criminal organization" not overbroad -- Section 467.1 and portion of s. 467.12 creating offence of committing indictable offence "in association with" criminal organization not unconstitutionally vague -- Section 467.12 providing for constitutionally sufficient level of mens rea -- Canadian Charter of Rights and Freedoms, s. 7 -- Criminal Code, R.S.C. 1985, c. C-46, ss. 467.1, 467.12.

The accused were charged with committing extortion for the benefit of, or at the direction of, or in association with a criminal organization, contrary to s. 467.12 of the Criminal Code. They were also charged with extortion. Section 467.12(1) of the Code makes it an indictable offence for a person to commit an indictable offence for the benefit of, at the direction of, or in association with a criminal organization. Section 467.12(2) provides that 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. "Criminal organization" is defined in s. 467.1(1). Under s. 467.1(2), facilitation of an offence does not require knowledge of the particular offence, or that an offence is actually

committed. Commission of an offence is defined in subsection (3) to mean being a party to it, or counselling any person to be a party to it. Section 467.14 requires that a sentence imposed [page132] under ss. 467.11, 467.12 or 467.13 shall be served consecutively to any other punishment imposed for an offence arising out of the same event or series of events, or to any other sentence the offender is serving. The accused brought an application for a declaration that ss. 467.1, 467.12 and 467.14 were of no force or effect. They argued that the definition of "criminal organization" is overbroad and, therefore, that ss. 467.1 and 467.12 violate s. 7 of the Canadian Charter of Rights and Freedoms. They also argued that s. 467.1 and the portion of s. 467.12 that renders it an offence to commit an indictable offence "in association with" a criminal organization are impermissibly vague, contrary to s. 7 of the Charter. Third, they argued that s. 467.12 permits the conviction of an accused without a subjective mens rea, thereby violating minimum constitutional requirements pursuant to s. 7 of the Charter. Finally, they submitted that s. 467.14 violates s. 12 of the Charter.

Held, the application should be dismissed.

The objective of the organized crime provisions is not just to combat groups alleged to be responsible for crimes of violence, such as 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. The legislation does not trench on legitimate, 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 fact that the definition of "serious offence" incorporates offences under federal statutes other than the Criminal Code is justifiable. Organized crime involves a wide range of activities, such as tobacco smuggling, migrant trafficking and hazardous waste disposal. The conduct targeted by the legislation does not lend itself to particularization of a closed list of offences. The legislation is not overbroad.

The term "criminal organization" is not impermissibly vague. The components of that term are specified in the legislation. The fact that Parliament could have set the minimum number of persons higher than three does not render the term vague. The group's common objective (main purpose or main activity) is specified to be the facilitation or commission of at least one serious offence that would likely result in the receipt of a material benefit by the group or any person constituting the group. The term "material benefit" is not vague. The meaning of "material" includes "important" or "essential", and the word is often used in this sense in the legal context. Whether something will be found to constitute a "material benefit" will depend on the facts of the particular case. This is the kind of interpretative exercise that appropriately falls to the judiciary. The phrase "in association with" is not impermissibly vague. The phrase is intended to apply to those persons who commit criminal offences in linkage with a criminal organization, even though they are not formal members of the group. The phrase "in association with" requires that the accused commit a criminal offence in connection with the criminal organization. Whether the particular connection is sufficient to satisfy the "in association with" requirement will be for a court to determine, based on the facts of the case.

Section 467.12 does not impose liability on an accused who has less than a subjective mens rea. In order to convict an accused under this provision, the Crown must prove that he or she had the requisite mens rea for the particular predicate offence involved, and that the accused acted for the benefit of, at the direction of, or in association with a criminal organization. There is an implicit requirement that the accused committed the predicate offence with the intent to do so for the benefit of, at the direction of, or in association with a group he or she knew had the composition of a criminal organization, although the accused need not have known the identities of those in the group. [page133]

The application with respect to s. 12 of the Charter was premature, as the issue would not arise unless and until the accused were convicted. The ruling on the constitutionality of

s. 467.14 was reserved until the conclusion of the trial.

R. v. Heywood, [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348, 174 N.R. 81, 24 C.R.R. (2d) 189, 94 C.C.C. (3d) 481, 34 C.R. (4th) 133, apld

Other cases referred to

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76, 2004 SCC 4, 234 D.L.R. (4th) 257, 315 N.R. 201, 180 C.C.C. (3d) 353, 46 R.F.L. (5th) 1, 16 C.R. (6th) 203, [2004] S.C.J. No. 6 (QL), affg (2002), 57 O.R. (2d) 511, 207 D.L.R. (4th) 632, 90 C.R.R. (2d) 223, 161 C.C.C. (3d) 178, 48 C.R. (5th) 218, 23 R.F.L. (5th) 101 (C.A.), affg (2000), 49 O.R. (3d) 662, 188 D.L.R. (4th) 718, 76 C.R.R. (2d) 251, 146 C.C.C. (3d) 362, 36 C.R. (5th) 334 (S.C.J.); Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 1, 218 N.S.R. (2d) 311, 232 D.L.R. (4th) 577, 312 N.R. 1, 687 A.P.R. 311, 112 C.R.R. (2d) 202, [2003] S.C.J. No. 63 (QL); Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, 24 O.R. (3d) 454n, 125 D.L.R. (4th) 385, 183 N.R. 325, 30 C.R.R. (2d) 252, 99 C.C.C. (3d) 97, 41 C.R. (4th) 147 (sub nom. R. v. Canadian Pacific Ltd.); R. v. Beauchamp, unreported, February 11, 2002 (Que. Sup. Ct.); R. v. Beauchamp, [2002] J.Q. No. 4593 (QL), [2002] R.J.Q. 3086 (Sup. Ct.); R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 37 Alta. L.R. (2d) 97, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 13 C.R.R. 64, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023; R. v. Carrier (2001), 44 C.R. (5th) 158, [2001] J.Q. No. 224 (QL) (Sup. Ct.); R. v. DeSousa, [1992] 2 S.C.R. 944, 9 O.R. (3d) 544n, 95 D.L.R. (4th) 595, 142 N.R. 1, 11 C.R.R. (2d) 193, 76 C.C.C. (3d) 124, 15 C.R. (4th) 66; R. v. Finta, [1994] 1 S.C.R. 701, 112 D.L.R. (4th) 513, 165 N.R. 1, 20 C.R.R. (2d) 1, 88 C.C.C. (3d) 417, 28 C.R. (4th) 265; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, 114 N.S.R. (2d) 91, 93 D.L.R. (4th) 36, 139 N.R. 241, 313 A.P.R. 91, 10 C.R.R. (2d) 34, 74 C.C.C. (3d) 289, 43 C.P.R. (3d) 1, 15 C.R. (4th) 1; R. v. R. (J.D.) (1991), 44 O.A.C. 260, [1991] O.J. No. 454 (QL) (C.A.); R. v. Rochon (2003), 173 C.C.C. (3d) 321, [2003] O.J. No. 1155 (QL) (C.A.); R. v. Ruzic, [2001] 1

S.C.R. 687, 197 D.L.R. (4th) 577, 268 N.R. 1, 82 C.R.R. (2d) 1, 153 C.C.C. (3d) 1, 41 C.R. (5th) 1; R. v. Sharpe, [2001] 1 S.C.R. 45, 88 B.C.L.R. (3d) 1, 194 D.L.R. (4th) 1, [2001] 6 W.W.R. 1, 86 C.R.R. (2d) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, 2001 SCC 2; R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, 4 O.R. (3d) 799n, 49 O.A.C. 161, 84 D.L.R. (4th) 161, 130 N.R. 1, 7 C.R.R. (2d) 36, 67 C.C.C. (3d) 193, 38 C.P.R. (3d) 451, 8 C.R. (4th) 145; United States of America v. Dynar, [1997] 2 S.C.R. 462, 147 D.L.R. (4th) 399, 213 N.R. 321, 44 C.R.R. (2d) 189, 115 C.C.C. (3d) 481, 8 C.R. (5th) 79

Statutes referred to

An Act to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence, S.C. 1997, c. 23 [Bill C-95]

An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts, S.C. 2001, c. 32 [Bill C-24]

Canadian Charter of Rights and Freedoms, ss. 1, 7, 12

Criminal Code, R.S.C. 12985, c. C-46, ss. 2 "person", 153, 380, 465(1)(c), 467.1, 467.11, 467.12, 467.13, 467.14

Authorities referred to

House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights, "Combatting Organized Crime" (30 November 1999) [page134]

House of Commons, Standing Committee on Justice and Human Rights, Minutes of Proceedings (8 May 2001) (Hon. Anne McLellan)

House of Commons Debates (21 April 1997) at 10013 (Hon. Allan Rock)

House of Commons Debates (23 April 2001) at 2954 (Hon. Anne McLellan)

Standing Senate Committee on Legal and Constitutional Affairs, Proceedings (21 November 2001) (Hon. Anne McLellan)

Sullivan, R., Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994)

United Nations Convention Against Transnational Organized Crime, G.A. res. 55/25, annex I, 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (Vol. I) (2001)



APPLICATION for a declaration that the "criminal organization" provisions of the Criminal Code, R.S.C. 1985, c. C-46 are unconstitutional.

W.G. Cameron and L. Salel, for respondent.

S. Skurka and P. Burstein, for applicant Lindsay.

J. Irving and B. Grys, for applicant Bonner.

FUERST J.: --

Overview

[1] At issue on this application is the constitutionality of three aspects of the provisions of the Criminal Code, R.S.C. 1985, c. C-46 that criminalize the activities of persons involved with groups referred to as "criminal organizations".

[2] The applicants, Steven Patrick Lindsay and Raymond Lawrence Bonner, are jointly charged with committing extortion for the benefit of, or at the direction of, or in association with a criminal organization, contrary to s. 467.12 of the Criminal Code. They also are jointly charged with the offence of extortion, and Mr. Bonner alone is charged with breach of recognizance. Their trial is scheduled to commence before me in September 2004.

The Legislation

[3] Section 467.12(1) makes it an indictable offence for a person to commit . . . an indictable offence under the Criminal Code or any other [federal statute] for the benefit of, at the direction of, or in association with, a criminal organization.

[4] The offence is punishable by a maximum of 14 years' imprisonment.

[5] Section 467.12(2) provides that 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. [page135]

[6] The term "criminal organization" is defined in s. 467.1(1) to mean

> . . . 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 [meaning an indictable offence under the Criminal Code or other federal statute punishable by a maximum of five years' imprisonment or more, or another offence prescribed by regulation] that . . . 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.

[7] A group of persons that forms randomly for the immediate commission of a single offence is specifically excluded from the definition of "criminal organization".

[8] Under s. 467.1(2), facilitation of an offence does not require knowledge of the particular offence, or that an offence

is actually committed. Commission of an offence is defined in subsection (3) to mean being a party to it, or counselling any person to be a party to it. Subsection (4) authorizes the making of regulations prescribing offences as "serious offence[s]".

[9] Section 467.11 creates an offence of participation in the activities of a criminal organization. Section 467.13 makes it an offence to instruct another to commit an offence for a criminal organization. Neither of those provisions is in issue in this case.

[10] Section 467.14 requires that a sentence imposed under ss. 467.11, 467.12, or 467.13 shall be served consecutively to any other punishment imposed for an offence arising out of the same event or series of events, and to any other sentence the offender is serving.

The Positions of the Parties

[11] The applicants seek a declaration that ss. 467.1, 467.12, and 467.14 are of no force or effect. They contend that the legislation dealing with criminal organizations violates s. 7 of the Canadian Charter of Rights and Freedoms in three ways. First, the definition of "criminal organization" is overbroad, and ss. 467.1 and 467.12 are unconstitutional on this basis. Although there is a legitimate state objective behind the legislation, the means used to accomplish that objective are broader than is necessary. The definition of a criminal organization does not include any requirement of a pattern of activity, nor is it limited to enterprise organizations. As a result, the legislation captures too much in its net. [page136]

[12] Second, the applicants submit that s. 467.1, and the portion of s. 467.12 that renders it an offence to commit an indictable offence "in association with" a criminal organization are vague. It is unclear when a person commits an offence on this basis. Further, the definition does not indicate when a person is in or out of the group, and it does not require active participation in an offence by those in the group.

[13] Third, the applicants argue that the lack of necessity for the prosecution to prove that the accused knew the identity of any of the persons who constitute the criminal organization, or had an intention to commit the predicate offence in association with the criminal organization, or intended that the commission of the predicate offence would further the interests of the criminal organization, creates a criminal offence without the minimum constitutionally required mens rea.

[14] In addition, the applicants submit that s. 467.14, which requires that a sentence under s. 467.12 be served consecutively to any other punishment imposed for an offence arising out of the same event and to any other sentence to which the person is then subject, violates s. 12 of the Charter. Finally, they argue that none of the breaches of ss. 7 or 12 can be saved by s. 1.

[15] The party responsible for the prosecution of this case, the Ministry of the Attorney General ("the Crown"), responds that the legislation is neither overbroad nor vague, that notwithstanding the absence of express language, s. 467.12 is to be interpreted as possessing a constitutionally suitable level of mens rea, and that any challenge to the constitutionality of the sentencing provision is premature.

[16] On behalf of the Crown, it is submitted that the objective of the legislation is to combat organized crime across the country. Organized crime groups do not have a prescribed organizational structure, and they can operate through persons who are not formal members. Further, they engage in a wide variety of criminal activities, and are not limited to crimes of violence. Accordingly, the criminal organization legislation must be flexible, while upholding Charter values. The Crown points out that in enacting this legislation, Parliament attempted to adhere to a United Nations Convention to which Canada is a signatory. The Crown argues that the legislation is neither overbroad nor vague. First, the threshold for overbreadth is high. Parliament is entitled to enact legislation that is broad, and to use general language, without contravening s. 7. Second, legislation is not vague if

judicial interpretation is possible, and that is the case with this legislation. No particular phrase needs to be exhaustively defined in the legislation. [page137]

[17] Third, the Crown argues that s. 467.12 does have a sufficient mens rea component. The accused must have the requisite intent to commit the predicate offence, and the intent to do so in association with a group that he/she knows to be a criminal organization. The phrase "in association with" means that there must be a sufficient connection between the predicate offence, and the criminal organization.

[18] The Crown further contends that the s. 12 argument is premature, and should be deferred until such time as there is a conviction. On the issue of s. 1, the Crown submits that if legislation violates s. 7, it cannot be justified under s. 1, but there are remedies other than striking it down.

[19] The Department of Justice, although served with the Notice of Constitutional Question, has not appeared or taken a position on this application.

[20] The Crown does not contest the standing of the applicants to challenge the constitutionality of the provisions under which they have been charged even though the unconstitutional effects may not be directed at them, or the bringing of this application before evidence is heard: see R. v. DeSousa, [1992] 2 S.C.R. 944, 76 C.C.C. (3d) 124; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 18 C.C.C. (3d) 385.

[21] The Supreme Court of Canada recently reiterated that the Charter must be interpreted purposively. While courts should be careful not to overshoot the actual purpose of the Charter's guarantees, they must avoid a narrow, technical, or legalistic approach, in favour of a generous and expansive interpretation of Charter rights: see Doucet-Boudreau v. Nova-Scotia (Minister of Education), [2003] 3 S.C.R. 1, [2003] S.C.J. No. 63 (QL).

Legislative History

[22] In R. v. Heywood, [1994] 3 S.C.R. 761, 94 C.C.C. (3d)

481, Cory J. on behalf of the majority observed that in general, legislative history or debates are not admissible as proof of legislative intent in the construction of statutes, but that legislative history may be admissible for the more general purpose of showing the mischief Parliament was attempting to remedy with the legislation. Moreover, he pointed out at p. 788 S.C.R., p. 512 C.C.C. that more flexible rules apply in constitutional cases. In such cases, "the legislative history will not be used to interpret the enactments themselves, but to appreciate their constitutional validity."

[23] In this case, the applicants and the respondent all referred to the legislative history of the Criminal Code provisions, including excerpts from Hansard. I also was given portions of United Nations documents, and excerpts from texts, without objection as [page138] to their admissibility on this application. I have relied on those materials to the extent that Heywood indicates it is permissible.

[24] It is undisputed that the legislative origin of the criminal organization provisions involved in this case was Bill C-95, which has been referred to as the "anti-gang legislation". It was introduced in Parliament on April 17, 1997, and proclaimed a week later on April 25. In his remarks to the House of Commons, then Minister of Justice Allan Rock said, "We have proposed a new approach to fighting gang activity by criminalizing participation in a criminal organization and adding to the Criminal Code a new definition of criminal organization offence . . . not criminalizing mere membership". The preamble to the Bill referred to concern about the use of violence by "organized criminal gangs" that had resulted in death or injury to several persons as well as serious damage to property, recognition that criminal organizations exist in great part for the purpose of carrying out criminal activities aimed at the acquisition of property, and the need to provide better means to deal with gang-related violence and crime. See: Hansard, April 21, 1997, p. 10013.

[25] The provisions created by Bill C-95 included a definition of "criminal organization" that required

[a] group . . . of five or more persons . . .

(a) having as one of its primary activities the commission of an indictable offence under [the Criminal Code or any other federal statute] for which the maximum punishment is imprisonment for five years or more, and

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

[26] The Bill also created an offence of participation in a criminal organization, which included being a party to the commission of an indictable offence for the benefit of, at the direction of, or in association with the criminal organization, punishable by a maximum period of imprisonment of five years or more.

[27] To date, constitutional challenges to that legislation, including challenges brought on the basis of overbreadth and vagueness, have been unsuccessful: see R. v. Carrier, [2001] J.Q. No. 224 (QL), 44 C.R. (5th) 158 (Sup. Ct.); R. v. Beauchamp, unreported, February 11, 2002 (Que. Sup. Ct.); R. v. Beauchamp, [2002] J.Q. No. 4593 (QL), [2002] R.J.Q. 3086 (Sup. Ct.).

[28] On November 30, 1999, a sub-committee of the House of Commons Standing Committee on Justice and Human Rights released its report on options available to combat organized crime. It recommended, inter alia, that the Criminal Code provisions be [page139] amended to reduce the number of participants in a criminal organization to three, that the requirement of commission of an indictable offence within the preceding five years be removed, and that the offence of participation be broadened to include all indictable offences.

[29] On November 30, 2000, the United Nations General Assembly adopted the United Nations Convention Against Transnational Organized Crime. Canada participated in the drafting of the Convention, and became a signatory to it on

December 14, 2000. The Convention sets out a definition of "organized criminal group" as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit" [Article 2(a)]. A "serious crime" means "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years . . ." [Article 2(b)]. A "structured group" means "a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure" [Article 2(c)].

[30] On April 5, 2001, Bill C-24, which amended the Criminal Code, was introduced in Parliament. It included a new definition of "criminal organization", created separate offences of participation in the activities of a criminal organization, commission of an offence for a criminal organization, and instructing the commission of an offence for a criminal organization, and broadened the predicate offences to include all indictable offences.

[31] In addressing the House of Commons, then Minister of Justice Anne McLellan said,

> Law enforcement officials and provincial attorneys general have called for a simplified definition of criminal organization and for offences that respond to all harmful forms of involvement in criminal organizations. That is precisely what we have done in the legislation before the House today.
>
> The current definition only covers criminal organizations that have at least five members, at least two of whom have committed serious offences within the preceding five years. As well, the organizations themselves must be shown to have been committing crimes punishable by a maximum sentence of five years or more in prison.

> Canada is a signatory to the United Nations Convention against organized crime which affirms that a group of three persons having the aim of committing serious crimes constitutes a sufficient threat to society to warrant special scrutiny from the criminal justice system.
>
> I believe that Canadians want our law enforcement officials to be able to target criminal groups of three or more individuals, one of whose main purposes [page140] or activities is either committing serious crimes or making it easier for others to commit serious crimes.
>
> . . . . .
>
> Some have called for mere membership in a criminal organization to be an offence. In my view such a proposal would be extremely difficult to apply and would be vulnerable to Charter challenges.

See: Hansard, April 23, 2001, pp. 2954-55.

[32] On May 8, 2001, the Minister of Justice appeared before the House of Commons Standing Committee on Justice and Human Rights, to address the content of Bill C-24. In her opening statement, she indicated that the new provisions aimed to criminalize participation in, and contribution to a criminal organization:

> Membership, if it can be defined, can be extremely difficult to prove since organizations often operate underground or covertly. Organizations could easily change their approach to evade a membership prerequisite.
>
> Finally, persons who are not formal members can still do a great deal of harm to society by helping criminal organizations to either commit or facilitate crime and are often those persons directly involved in crimes committed at the street level on behalf of criminal organizations.
>
> . . . . .

> The provisions in the Bill will include all the people, not just the members who take part knowingly in activities which help achieve the criminal objectives of the organization.

See: Minutes of Proceedings, The Standing Committee on Justice and Human Rights, May 8, 2001, at pp. 5-6.

[33] On November 21, 2001, the Minister of Justice addressed the Standing Senate Committee on Legal and Constitutional Affairs, about Bill C-24. She 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 telemarketing, Internet and credit card fraud. It is an understatement that organized crime has negative effects on public safety and security.

She explained that the then existing definition of criminal organization captured "a limited range of criminal organizations and is excessively complex to establish". The new definition "will target criminal groups of three or more individuals, one of whose [page141] main purposes or activities is either committing serious offences or making it easier for others to commit serious offences". See: Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, November 21, 2001, pp. 2-4.

[34] Bill C-24 was proclaimed on January 7, 2002. Canada ratified the United Nations Convention on May 13, 2002.

Issue #1: Is the Legislation Overbroad or Vague?

[35] Legislation that deprives a person of life, liberty, or security of the person will be contrary to a principle of fundamental justice and offend s. 7 of the Charter if it is overbroad, or vague: see Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76, [2004] S.C.J. No. 6 (QL); R. v. Heywood, supra. As a result of the majority decisions in these two cases, overbreadth and vagueness are properly viewed as distinct doctrines, either of which can ground a violation of s. 7.

[36] There is no dispute that the legislation in issue imposes a deprivation of liberty. The dispute is as to whether the legislation offends a principle of fundamental justice because it is overbroad or vague.

(a) Overbreadth

[37] In R. v. Heywood, supra, at p. 792 S.C.R., p. 516 C.C.C., Cory J. expressed the doctrine of overbreadth in this way: "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." Reviewing legislation for overbreadth under s. 7 involves a balancing of the state interest against that of the individual. In considering whether a legislative provision is overbroad, the question to ask is whether those means are necessary to achieve the state objective. The point is that where legislation limits the liberty of an individual in order to protect the public, the limitation should not go beyond what is necessary to accomplish that goal. Cory J. endorsed the use of reasonable hypotheticals to determine whether legislation is overbroad.

[38] In analyzing a provision for overbreadth, courts must give heed to a number of principles, some of which are interrelated. The starting point is to determine what the legislation in issue truly captures. It must be construed, and interpretations that may minimize the alleged overbreadth must

be explored. In interpreting legislation, the words of a statute "are to be read in their entire context and in their grammatical and ordinary sense [page142] harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see R. v. Sharpe, [2001] 1 S.C.R. 45, 150 C.C.C. (3d) 321 per McLachlin C.J.C. at p. 74 S.C.R., pp. 345-46 C.C.C., quoting from Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994).

[39] A related principle is that there is a presumption that Parliament intended to enact legislation in conformity with the Charter. If a provision can be read in a way that is constitutional and a way that is not, the former should prevail: see R. v. Sharpe, supra, per McLachlin C.J.C. at p. 74 S.C.R., p. 346 C.C.C. Additionally, statutes should be construed to comply with Canada's international treaty commitments: see Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), supra.

[40] Further, in Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, 99 C.C.C. (3d) 97, Gonthier J. writing for the majority pointed out that the principle that a statute should be interpreted to avoid absurd results means that where a provision is open to more than one possible meaning, Parliament is presumed not to have intended to attach penal consequences to trivial or minimal violations of it. The absurdity principle allows for the narrowing of the scope of the provision.

[41] Gonthier J. also pointed out that the use of broad and general terms in legislation may be justified. In identifying what they wish to legislate against, legislators cannot be expected to identify every variation of the factual situations they envisage. The judiciary is expected to determine whether legislation applies in particular fact situations. In R. v. Sharpe, supra, the majority determined that a purposive approach to the child pornography legislation appeared to exclude many of the alleged examples of its overbreadth, finding, for example that works aimed at describing various aspects of life that incidentally touched on illegal acts with children were unlikely to be caught by the provision.

[42] Finally, in determining whether a provision is overbroad, a measure of deference must be paid to the means selected by the legislature, because it must have the power to make policy choices. A judge should not interfere with legislation just because he/she might have chosen a different means of accomplishing the objective: see R. v. Heywood, supra.

[43] 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] 2 S.C.R. 462, 115 C.C.C. (3d) 481 at p. 502 S.C.R., p. 512 C.C.C., "the scale of injury that might be caused to the fabric of society can be far greater when two or more persons conspire to commit a crime than when an individual sets out alone to [page143] 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. See also: R. v. Beauchamp, [2002] J.Q. No. 4593 (Sup. Ct.).

[44] 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. Accordingly, the conduct targeted by the legislation does not lend itself to particularization of a closed list of offences.

[45] The applicants offered three hypotheticals for consideration, and suggested that each one represented an instance where the group involved would be found, inappropriately, to be a criminal organization. The hypotheticals were as follows:

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

(b) Three people form a group to protest the degradation of the environment. One of their main activities is spray painting environmental slogans on office buildings. They are caught doing so, and charged with mischief over $5,000. They admit having done the same thing on eight prior occasions.

(c) An individual named Jack operates a not-for-profit Internet site, called Jackster, which allows its users to exchange and distribute files that are unlicensed copies of copyrighted music. Hundreds of thousands of people are users. The Applicants suggest that Jackster is a criminal organization. [page144]

[46] In considering the third hypothetical, an Internet site is not a "person" within the expanded definition in s. 2 of the Code. Jackster itself, as distinct from Jack and the users, would not be caught by the provision.

[47] Further, s. 467.1(1) requires that one of the main purposes or main activities of the group be the facilitation or commission of at least one serious offence that would likely result in the direct or indirect receipt of a material benefit including a financial benefit by the group or any of its constituents. In the second hypothetical, there is no material benefit likely to flow to the environmental protesters as a result of their commission of mischief. This group would be excluded from the definition of a criminal organization.

[48] The [first] hypothetical would appear to meet all of the components of a criminal organization. Indeed, it is an example of a group whose objective is the economic deprivation of others through organized means. The mere fact that the group is composed of persons of a certain age is no reason to exclude it from treatment as a criminal organization, if it otherwise falls within the definition. Similarly, assuming that a group of three or more persons could be said to exist in the third scenario, it too is an example of a group involved in the economic deprivation of others (the music industry, including recording artists), through organized means.

[49] The applicants sought to contrast the criminal organization provisions with American statutes referred to as Street Terrorism Enforcement and Prevention, or STEP legislation. These statutes are specifically directed at the activities of criminal street gangs, and the wording of the provisions reflects that narrow focus. As such gangs are but one form of the organized crime to which the Canadian legislation is directed, it makes sense that the Canadian provisions do not track the same wording. The decision to direct the legislation to organized crime more broadly, rather than to target specific forms of it, was a policy choice that Parliament was entitled to make.

[50] I find that the legislation is not overbroad.

(b)Vagueness

[51] A legislative provision will be unconstitutionally vague where it "does not provide an adequate basis for legal debate", in that a conclusion cannot be reached as to its meaning "by reasoned analysis applying legal criteria": see Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), supra, at para. 15; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36, at pp. 639-40 S.C.R. Such [page145] a provision "does not sufficiently delineate any area of risk", "is not intelligible", and "offers no grasp to the judiciary".

[52] Conversely, a law is sufficiently precise if it

"delineates a risk zone for criminal sanction": see Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), supra, at para. 18.

[53] A vague law violates the principles of fundamental justice in two ways. It prevents citizens from knowing that they are at risk for criminal sanction and so makes compliance with the law difficult, and it puts too much discretion in the hands of law enforcement officials: see Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), supra.

[54] The standard to be met for a finding of unconstitutional vagueness is high: see Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), supra, at para. 178 per Arbour J.

[55] The Supreme Court of Canada has recognized that there is a need for flexibility in legislative enactments, and a role for judicial interpretation of legislative provisions. When a legislative provision is enacted, legislators cannot possibly foresee all the situations that may arise for its application. It is impossible for Parliament to achieve absolute certainty. Inevitably there will be areas of uncertainty, but judicial decisions may properly clarify and add precision to legislation: see Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), supra; R. v. Nova Scotia Pharmaceutical Society, supra. In addition to rules of statutory construction, resort to dictionary definitions is not uncommon when judicial interpretation of a particular word or phrase is required: see, for example, R. v. Rochon (2003), 173 C.C.C. (3d) 321, [2003] O.J. No. 1155 (QL) (C.A.).

[56] I am unable to agree with the applicants that the term "criminal organization" is vague. As set out above in para. 6, the components of that term are specified in the legislation. They include a minimum number of persons, and a common objective, that is, a main purpose or activity.

[57] The fact that Parliament could have set the minimum number of persons higher than three does not render the term

vague.

[58] The group's common objective (main purpose or main activity) is specified to be the facilitation or commission of at least one serious offence that would likely result in the receipt of a material benefit by the group or any person constituting the group. There is no vagueness. In particular:

-- There is no uncertainty as to the meaning of the word "commission" in the context of a criminal offence; [page146]

-- The word "facilitate" also has a clear meaning. It is defined in The Concise Oxford English Dictionary (10th ed.) to mean, "make easy or easier". Black's Law Dictionary (7th ed.) indicates that the word "facilitation" has a recognized meaning in the context of criminal law, as follows: "The act or an instance of aiding or helping; esp. in criminal law, the act of making it easier for another person to commit a crime";

-- The phrase "serious offence" is defined in the legislation. The fact that it refers to an "indictable offence" is not objectionable. By example, s. 465(1)(c) dealing with conspiracy refers simply to "an indictable offence" without any further particularity. Section 467.1(1) provides that the indictable offence is one under the Criminal Code or any other federal statute where the maximum punishment is imprisonment for five years or more. For any other offence to be a "serious offence", it must be prescribed by regulation;

-- The Concise Oxford English Dictionary (10th ed.) meaning of the word "material" includes "important", or "essential". The word is often used in this sense in the legal context, for example "material breach", "material fact", and "material representation". In s. 467.1(1) the term "material benefit" specifically includes a financial benefit, but is not limited to it. Whether something will be found to constitute a "material benefit" will depend on the facts of the particular case. This is the kind of

interpretative exercise that appropriately falls to the judiciary: see Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), supra; R. v. Sharpe, supra. There are many instances in the criminal law of interpretation by the judiciary, for example the determination of whether an accused was in a "position of trust or authority" towards a young person under s. 153, or what constitutes "other fraudulent means" under s. 380.

[59] The phrase "in association with" is not impermissibly vague. The phrase is intended to apply to those persons who commit criminal offences in linkage with a criminal organization, even though they are not formal members of the group. The Oxford English Dictionary (10th ed.) defines the phrase "associate oneself with" to mean, "allow oneself to be connected with or seen to be supportive of". The phrase "in association with" requires that the accused commit a criminal offence in connection with the criminal organization. Whether the particular connection is sufficient to satisfy the "in association with" requirement [page147] will be for a court to determine, based on the facts of the case. It is not necessary for the legislation to set precise parameters on the relationship between the accused and the criminal organization. There is a risk zone for criminal sanction delineated.

[60] The phrases "criminal organization" and "in association with" are not impermissibly vague, whether taken individually or in combination.

Issue #2: The Mens Rea Requirement

[61] In R. v. Ruzic, [2001] 1 S.C.R. 687, 153 C.C.C. (3d) 1, the Supreme Court of Canada reiterated the principle that moral blameworthiness is an essential component of criminal liability, and that that principle falls under s. 7 of the Charter as a principle of fundamental justice. As expressed by LeBel J. at p. 708 S.C.R., p. 20 C.C.C., even before the Charter, it was recognized that "only those persons acting in the knowledge of what they were doing, with the freedom to choose, would bear the burden and stigma of criminal responsibility." With the advent of the Charter, the existence

of a minimum mental state before criminal liability can attach to an act was elevated to a constitutional requirement: see R. v. Ruzic, supra; R. v. Finta, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417.

[62] Although the level of mens rea required varies depending on the nature of the offence, there are some crimes for which the stigma attached to conviction and/or the severity of the available punishment necessitates subjective mens rea. Lamer C.J.C. referred to this as an aware state of mind, and Cory J. indicated that it includes intent, recklessness, and willful blindness, as distinct from negligence: see R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, 67 C.C.C. (3d) 193, at pp. 185 and 238 S.C.R., pp. 213 and 252 C.C.C.

[63] In R. v. DeSousa, supra, Sopinka J. commented on behalf of the court at p. 956 S.C.R., p. 134 C.C.C. that, "As a matter of statutory interpretation, a provision should not be interpreted to lack any element of personal fault unless the statutory language mandates such an interpretation in clear and unambiguous terms."

[64] I agree with the applicants that s. 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 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 [page148] 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. Recognition that subjective awareness is required under s. 467.12 is reflected in the remarks of the Minister of Justice referred to in para. 32, above. See also: R. v. Finta, supra.

[65] Section 467.12 does not fail to meet the constitutional mens rea requirement such that s. 7 of the Charter is violated.

Issue #3: Cruel and Unusual Punishment

[66] The applicants submit that s. 467.14 offends s. 12 of the Charter because in requiring the imposition of a consecutive sentence, it removes judicial discretion to fix the fit sentence for the offender.

[67] I agree with the Crown that this application is premature. It will not arise unless and until the applicants are convicted. They are presumed innocent at this stage. For me to embark on an examination of sentencing considerations would give rise to an appearance of unfairness.

[68] I exercise my discretion to defer this aspect of the application for determination once the outcome of the trial is known: see R. v. DeSousa, supra, at pp. 954-55 S.C.R., p. 132 C.C.C.; R. v. R. (J.D.) (1991), 44 O.A.C. 260, [1991] O.J. No. 454 (QL) (C.A.). Counsel will have an opportunity to make any further submissions at that time.

Conclusion

[69] The ruling on the issue of the constitutionality of s. 467.14 is reserved until the conclusion of the trial is known. Counsel may make additional submissions on that issue at that time.

[70] All other aspects of the application are dismissed.

Application dismissed.
WDPH