APPENDIX G

[See page 67]

FINANCIAL EXPLOITATION OF CRIME

I. INTRODUCTION

The purpose of this paper is to generate interest in legislation relating to the financial exploitation of crime by persons responsible for it.

After reviewing Uniform Law Conference activities to date in this area and describing recent developments in the law, the paper discusses the constitutional implications of regulating the financial exploitation of crime. In this regard, it suggests that to survive a challenge under the *Canadian Charter of Rights and Freedoms* (hereinafter the "*Charter*"), any law in this area should affect only publications intended to result in a direct commercial exploitation of crime. It further suggests that regulation of the financial exploitation of crime is most accurately characterized as an interference with contractual rights and therefore should appropriately be the subject of provincial legislation. The paper also raises some issues for discussion at the 1995 Uniform Law Conference.

It is recommended that this topic be placed on the agenda of the Uniform Law Conference of Canada, and that a joint committee be formed with a view to reporting with recommendations for a uniform statute.

II. BACKGROUND: UNIFORM LAW CONFERENCE ACTIVITIES TO DATE

In 1983, the Criminal Law Section of the Uniform Law Conference adopted a resolution presented by New Brunswick which advocated the creation of a committee to study the phenomenon of the publication of literary accounts of crime to the financial advantage of the criminal or his or her assigns. The actual resolution was that:

> The Criminal Law Section of the Uniform Law Conference of Canada undertake a study to develop a policy for a legislative response to the phenomenon of the publication of literary accounts of crime to the financial

> advantage of the criminal or his assigns, in order to ensure the payment of damages from such profits to the victim of the crime or his or her survivors and to compensate taxpayers for the expense of policing, prosecuting and incarcerating the criminal with respect to his crime.

A committee was established to undertake the study, consisting of representatives from Canada, Ontario, New Brunswick, British Columbia and Saskatchewan.

The report of this committee was tabled at the meeting of the Criminal Law Section during the 1984 annual meeting of the Uniform Law Conference. The report outlined the legislative experience in the United States on this issue.

The committee addressed the question of whether a new provision could be inserted into the *Criminal Code*. The difficulty identified with respect to using the federal legislation to address this issue was that it may not survive a challenge under the *Charter*. There was concern about a violation of clause 2(b) of the *Charter*, which guarantees freedom of speech.

The recommendation of the committee was that a uniform statute be prepared by the Uniform Law Section providing for a provincial legislative response to the problem. The committee identified a number of elements which the legislation should contain, including the establishment of a trust fund, specific provisions concerning distribution of the fund, procedural requirements and suggested definitions.

At the 1984 Conference, a unanimous resolution was passed by the Criminal Law Section, following discussion of the committee report, as follows:

> It is resolved that the report of the Committee on the Financial Exploitation of Crime be referred to the Uniform Law Section with a view to establishing a joint committee to review the matter.

It appears that matters were simply left at that point. No joint committee was established, and no follow up was requested by the Criminal Law Section.

At the 1994 Uniform Law Conference, Saskatchewan presented a resolution on this issue to determine whether there continued to be interest in pursuing the

matter. The recommendation presented was as follows:

> That the Criminal Law Section confirm its 1984 resolution to refer this issue to the Uniform Law Section with a view to establishing a joint committee to review the matter and that the chair of the Criminal Law Section pursue this issue with the chair of the Uniform Law Section immediately following this conference.

The passage of this resolution indicates that there is interest in addressing this issue before there is a serious case with no legislative response.

One of the conclusions of this paper is that the regulation of the financial exploitation of crime is a matter of provincial jurisdiction. It is suggested that this is also a proper topic for uniformity. Unless uniform legislation containing reciprocal enforcement provisions is enacted by each province, evasion of the law will be a relatively simple matter.

III. RECENT DEVELOPMENTS IN THE LAW

Since the 1984 committee report was prepared, the so-called "Son of Sam law" was ruled unconstitutional and struck down in the United States. This is discussed in detail in Part IV, below.

In Canada, there have been a number of recent developments in this area.

A. *Criminal Code* Provisions Respecting Proceeds of Crime

Proceeds of crime provisions have been included in the *Criminal Code*. However, these provisions deal with the seizure, restraint and forfeiture of proceeds of certain crimes, ie., property that was obtained directly or indirectly from the commission of certain criminal acts. They do not apply to profits received for the recounting of one's criminal activities.

B. Ontario *Victims' Right to Proceeds of Crime Act, 1994*

In Ontario, the *Victims' Right to Proceeds of Crime Act, 1994* was passed. This

Act provides that any money that an accused or convicted person (or agent, assignee or related person) receives in relation to a crime is used first to satisfy awards arising out of victims' lawsuits against such persons. Parties to contracts for payment to accused and convicted persons in relation to accounts of crime are required to inform the Public Trustee about contract details. Payments under such contracts are to be made to the Public Trustee, in trust, rather than to the person entitled to them under the contract. The Public Trustee, on application, is to pay out money to the victim in order to satisfy judgments awarded to the victim against accused or convicted persons. Before paying money to a victim, the Public Trustee must wait five years and six months after beginning to receive money payable under a contract. On application, remaining money will be paid to persons otherwise entitled to receive money under a contract.

Given the similarities of this legislation to the "Son of Sam law" struck down in the United States, doubts are raised with respect to its constitutionality.

C. Proposed *Criminal Code* and *Copyright Act* Amendments

A private member's bill has been introduced in the House of Commons to deal with these issues. It proposes an amendment to *Criminal Code* provisions dealing with direct profits from crime so as to include indirect profits. It also proposes that the *Copyright Act* be amended, giving the federal Crown copyright in all work principally based on an indictable offence or the circumstances of its commission.

IV. CONSTITUTIONAL IMPLICATIONS OF THE REGULATION OF FINANCIAL EXPLOITATION OF CRIME: ISSUES AND RECOMMENDATIONS

Any regulation imposed on income earned by an individual from materials such as books, videos, movies or other activities relating to his or her criminality raises constitutional concerns, most notably under the *Charter*. This Part will outline issues under both the *Charter* and the division of powers set out in sections 91 and 92 of the *Constitution Act, 1867*. Recommendations respecting any proposal for such regulation will also be made.

A. The *Charter*

Clause 2(b) of the *Charter* guarantees to all Canadians "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Very recently, in *Dagenais v. Canadian Broadcasting Corporation*[1], Lamer C.J. identified freedom of expression as "a paramount value in Canadian society".[2] Indeed, since the advent of the *Charter*, the Supreme Court of Canada has given this particular constitutional provision a most expansive interpretation.[3] It is this constitutional value which is directly engaged by any proposal to regulate the financial exploitation of criminal activity.

1. The Appropriate Analysis Under Clause 2(b)

The Supreme Court in *Irwin Toy*[4] set down a two step analysis to be employed whenever a governmental regulation is alleged to contravene clause 2(b) of the *Charter*. This analysis requires a court to evaluate the following two questions:

1. Was the activity at issue within the sphere of conduct protected by freedom of expression?

2. Was the purpose or effect of the government action to restrict freedom of expression?[5]

If the answer to both questions is "yes", then the impugned measure results in a *prima facie* violation of clause 2(b). Only if it can be defended under section 1 will the law be found constitutional. This is the analysis which must be employed

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[1] [1994] 3 S.C.R. 835

[2] Id. at p. 876

[3] See, eg., *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Zundel*, [1992] 2 S.C.R. 731; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 and *Dagenais, supra.* footnote 1.

[4] *Supra.* footnote 3

[5] Id. at pp. 967-977

when assessing the kind of measure under consideration here.

2. Is the Regulated Activity Expression?

This step of the analysis is simple: the type of activity at issue here clearly amounts to "expression" for constitutional purposes. As already stated, the Supreme Court has adopted an extremely broad approach to expression, excluding only those rare cases in which physical violence is the activity at issue. As Dickson C.J. asserted in *Irwin Toy*, "if the activity conveys or attempts to convey a meaning it has expressive content and *prima facie* falls within the scope of the guarantee."[6] The kind of activity which is sought to be regulated here falls squarely within that rather expansive definition of expression.

3. Does the Regulation Restrict Freedom of Expression?

The second step of the analysis requires an assessment of whether the proposed initiative, either in purpose or effect, restricts freedom of expression. This second step raises more difficulty than the first. It is possible to characterize the purpose and effect of this initiative in either one of two ways: one which at first blush might appear constitutional, the other which does not.

It can be argued that the regulation of monies earned from materials relating to an individual's criminal activity does not impair freedom of expression in any way. A person is always at liberty to publish accounts of his or her crimes; however, any monies earned from such publication must be used to compensate the victims of those crimes, if any, or their estates. It follows that were this line of argument adopted, regulation of the financial exploitation of criminality would not offend clause 2(b) of the *Charter*.

The second approach to the characterization of such a legislative initiative would result in a finding of a *prima facie* breach of clause 2(b). It holds that any attempt to regulate the monies paid to an accused person for published accounts

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[6] Id. at pp. 969 per Dickson C.J. and others

of his or her crimes amounts to a content-based restriction upon freedom of expression. The only basis for depriving an author of any financial benefit from such accounts is the content of the publication. Typically, content-based limitations have been found to violate clause 2(b).[7]

American jurisprudence is useful in resolving this issue.

(a) *Simon & Schuster v. New York Crime Victims Board*

In 1977, the New York State Assembly enacted a statute known colloquially as the "Son of Sam law". Motivated in part by the enormous publicity surrounding the arrest of David Berkowitz (a.k.a the Son of Sam), this statute stipulated that any income earned by an accused person from works describing or relating to his or her crime must be deposited into an escrow account to be administered by the New York Crime Victims Board. The law further required the board to retain the money in escrow for a period not exceeding five years. The monies were to be paid to victims of those crimes, provided a civil action was commenced to recover it.

Ironically, the constitutionality of this law was challenged not by Berkowitz but by Henry Hill, a well known organized crime figure. Berkowitz had voluntarily divested himself of all profits from his book and given them over to the estates of his various victims. Hill had published a book entitled *Wiseguy* recounting his illegal activities, which subsequently was made into the highly acclaimed movie *Goodfellas*. When the Crime Victims Board sought to confiscate the contract from Hill's publisher, Simon & Schuster, a constitutional challenge was commenced. The law was upheld by both the United States District Court and the Second Circuit Court of Appeals.[8]

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[7] See, eg., *Keegstra, supra.* footnote 3 at p. 828 and *Butler, supra.* footnote 3 at p. 488.

[8] *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d. 777 (CA2, 1990) affirming 724 F.Supp. 170 (SDNY). The federal government and most other states also enacted statutes with similar objectives, see: Note "Can New York's Son of Sam Law Survive First Amendment Challenge?", 66 Notre Dame L. Rev. 1075 (1991), at p. 1075, footnote 6 (listing the state statutes).

The United States Supreme Court unanimously allowed Simon & Schuster's appeal from the rulings of those lower federal courts.[9] The Court concluded that the New York statute amounted to a restriction imposed upon expressive material solely because of its message and for that reason it was inconsistent with the First Amendment to the American Constitution. Three opinions were submitted, with O'Connor J. speaking for the majority.

O'Connor J. began her analysis by observing that the First Amendment, which stipulates that "Congress shall make no law...abridging the freedom of speech, or of the press"[10], prohibited governments from discriminating amongst speech on the basis of the content of the message. Such discrimination could be manifested in various forms, including financial burdens placed upon speakers. This she found to be the flaw inherent in the law under review. She asserted:

> The Son of Sam law is such a content-based statute. It singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content... [I]t establishes a financial disincentive to create or publish works with a particular content.[11]

O'Connor J. further stated that such a burden may be constitutionally permissible provided the state demonstrates this limitation "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[12] She identified two compelling objectives sought to be advanced by the New York statute, namely ensuring "victims of crime are compensated by those who harm them" and "criminals do not profit from their crimes."[13] However, the impugned law failed the second pre-condition, ie., it was too broad. The manner in which

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[9] *Simon & Schuster, Inc. v. New York Crime Victims Board*, 112 S.Ct. 501 (1991)

[10] This amendment, like the other provisions of the Bill of Rights, applies to state governments by virtue of the Due Process Clause of the Fourteenth Amendment, see: Currie, *The Constitution of the United States: a Primer for the People* (1988, U.Chic. Press) at p. 45, footnote 5 for a collection of the principal authorities.

[11] *Supra*. footnote 9 at pp. 508-509

[12] Id. at p. 509 quoting from *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231

[13] Id. at pp. 509-510

the statute was drawn "encompass[ed] a potentially very large number of works", including such writings as the *Confessions* of Saint Augustine, Henry Thoreau's treatise on civil disobedience and *The Autobiography of Malcolm X*.[14] It was the statute's over-inclusiveness which defeated its constitutionality.

Blackmun J. filed a terse concurring opinion in which he asserted that the New York law was both over-broad and under-inclusive. However, he did not elaborate upon his conclusion.[15] Kennedy J. also wrote separately. He, too, found the law to be constitutionally deficient because it "amount[ed] to raw censorship based on content, censorship forbidden by the text of the First Amendment and well settled principles protecting speech and the press."[16] He took exception to the majority's attempts to justify the impugned statute. He believed such an approach was doctrinally unsound in relation to laws found to compromise First Amendment values.

(b) Conclusion

On at least one occasion, the Supreme Court of Canada has acknowledged that "there is much to be learned from First Amendment jurisprudence."[17] At the same time, the Court has cautioned against a slavish adherence to those precedents, principally because the American Constitution does not contain a justificatory clause similar to section 1 of the *Charter*. However, at this stage of the constitutional analysis, the judgment of the United States Supreme Court in *Simon & Schuster, Inc. v. Crime Victims Board* is especially helpful.

It is likely that a Canadian court would, in accordance with the analysis employed by O'Connor J. in *Simon & Schuster*, conclude that a regulation of the financial exploitation of crime results in a *prima facie* violation of clause 2(b). It is true, in all likelihood, that the *purpose* of regulation of that kind is not to impair an individual's freedom of expression. Rather, it is its *effect* which is

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[14] Id. at p. 511

[15] Id. at p. 512 per Blackmun J.

[16] Id. at p. 515 per Kennedy J.

[17] *Keegstra*, *supra*. footnote 3 at p. 744 per Dickson C.J.

questionable. For the reasoning advanced by O'Connor J., the effect of a financial disincentive upon a criminal is an undue burden solely because of the message contained in the communication.

The first line of argument outlined at the beginning of this section only takes into account the purpose of this impugned regulation. However, *Charter* analysis requires the effect of a law as well as its purpose be scrutinized[18]. A finding that the effect of such regulation is to compromise the value guaranteed by clause 2(b) would be consistent with a purposive interpretation of that constitutional provision and the expansive scope given to expression in Canadian jurisprudence.

In summary, the second stage of the analysis set down in *Irwin Toy* would be answered "yes". Any attempt to regulate the financial exploitation of crime would in all likelihood qualify as a *prima facie* infringement of clause 2(b).

4. Section 1 of the *Charter*

The constitutionality of a law found to infringe clause 2(b) of the *Charter*, for example, may be upheld if it can be justified as a reasonable limitation upon that right. The test for ascertaining the reasonableness of a limitation was first articulated by Dickson C.J. in *R. v. Oakes*.[19] It requires a reviewing court to consider the governmental objectives sought to be achieved by the law to ascertain if they are "pressing and substantial". The proportionality arm of the *Oakes* inquiry seeks to assess whether the means chosen by a legislature to attain those objectives are proportionate to the limitation upon the constitutionally protected right or freedom.

Typically, two objectives are advanced for laws regulating the financial exploitation of crime:

- compensating victims of crime from the monies obtained by criminals capitalizing upon their illegal activities;

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[18] See, generally, *R. v. Big M. Drug Mart*, [1985]1 S.C.R. 295.

[19] [1986] 1 S.C.R. 103

- ensuring criminals themselves do not benefit financially from their crimes.

Both of these disparate goals are legitimate. Indeed, in *Simon & Schuster*, O'Connor J. concluded that each of these objectives was indisputably "compelling"[20] and, as a consequence, could over-ride the protection afforded by the First Amendment in appropriate circumstances. A Canadian court would probably conclude that these goals were significant enough to operate as a limitation upon clause 2(b) of the *Charter*.

The proportionality aspect of the *Oakes* inquiry is comprised of three parts. To satisfy it, the impugned measure must be rationally connected to the governmental objective, must be carefully tailored to achieve that objective and must be proportionate. In *Dagenais*, Lamer C.J. reformulated the last requirement. He indicated that this step required that "there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, *and there must be a proportionality between the deleterious and the salutary effects of the measure*."[21]

Respecting the type of regulation discussed here, it is clear that it is rationally connected to the objectives identified earlier. It is the remaining two criteria which are more critical.

Care must be taken to ensure that only those materials clearly designed to capitalize on criminality are subject to regulation. In *Simon & Schuster*, O'Connor J. ruled the "Son of Sam law" over-broad because it purported to regulate established literary works in addition to works that were purely exploitative of crime. This distinction is often a difficult one to make as contemporary experience with pornography illustrates. For example, in Canada, *Go Boy*, a book written by Roger Caron, was awarded a Governor General's Literary Award. This book recounted the author's experience as a young criminal and a prisoner at the Kingston Penitentiary. While the central theme of that book is the author's criminal activity and subsequent incarceration, the real question is whether the

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[20] *Supra.* footnote 9 at p. 510

[21] *Dagenais*, *supra.* footnote 1 at p. 889 (emphasis in original)

predominant purpose of the book is commercial exploitation of that activity. A book of such literary merit presumably should not be deemed exploitative. However, if the law is not carefully drawn, it is possible to catch meritorious works of this kind.

Provided the law is narrowly drawn to regulate only those works intended to exploit criminal activity, especially heinous crimes such as ritualistic or serial killings, it should likely satisfy the third and final criterion under the proportionality inquiry. In those circumstances, its salutary effects would almost certainly outweigh any adverse impact it might have on that kind of expression. Indeed, even if the effect of such a law was to diminish significantly the dissemination of such materials, a court would deem it to be salutary and proportionate. Yet, it must be emphasized that the result under the third criterion is inextricably linked to the second. If the regulation is too broad in its reach, it will in all likelihood fail the final step as well.

5. Conclusions

The following are the conclusions respecting the application of the *Charter* in this context:

- Regulations purporting to curb the financial exploitation of criminal activity in all likelihood will be found to result in a *prima facie* violation of clause 2(b) of the *Charter*.

- To justify regulation of this kind under section 1, it is essential any law affect only publications resulting in a direct commercial exploitation of crime. It is important that works having serious literary merit not be subject to the type of regulation at issue here.

B. Division of Powers

Should a law attempting to regulate the financial exploitation of crime be enacted by Parliament or by provincial legislatures? This question is raised because of the division of legislative powers established by sections 91 and 92 of the *Constitution Act, 1867*. Subsection 91(24) gives the federal government the

exclusive power to enact criminal laws and laws relating to criminal procedure. Subsections 92(13) and (16) permit provincial governments to enact laws affecting civil rights and matters of a private nature. The co-existence of these legislative powers raises the jurisdictional question under discussion here.

The criminal law permits ordering a remedy in the nature of civil damages in very limited circumstances. A bare majority of the Supreme Court in *R. v. Zelensky*[22] held that an accused person could be ordered to compensate victims of crime provided such an order was an element of the sentencing process in the criminal proceedings. Subsequent jurisprudence suggests that the creation of a civil right of action for breach of the criminal law is very likely *ultra vires* Parliament.[23]

It is suggested that laws seeking to attach monies earned from publishing accounts of criminal activity do not fit comfortably within subsection 91(24) of the *Constitution Act, 1867*. To be sure, Part XII.2 of the *Criminal Code* already contains a legal regime designed to assist in confiscating proceeds obtained as a consequence of certain designated crimes. However, the monies sought to be regulated here have only the most tenuous relationship to the crimes of which the individual has been convicted.[24] The act of writing a book or producing a movie is not criminal. It is monies directly earned from those acts that are sought to be confiscated. Simply put, it is difficult to characterize such monies as "fruits" or proceeds of crime which may be subject to federal regulation.

Rather, regulation of the financial exploitation of crime is more accurately characterized as an interference with contractual rights. As a consequence, it is more appropriately the subject for provincial legislative initiative. Trying to house

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[22] [1978] 2 S.C.R. 940

[23] See Hogg, *Constitutional Law of Canada* (3rd ed. looseleaf) at pp. 18-24, citing *Regional Municipality of Peel v. McKenzie*, [1982] 2 S.C.R. 9.

[24] It is interesting to note that the United States Supreme Court left this issue unresolved. In *Simon & Schuster, Inc., supra.* footnote 9, O'Connor J. stated at page 510:

> For the purposes of this case, we can assume without deciding that the income escrowed by the Son of Sam law represents the fruits of crime.

However, in Canada it is a question that is central to resolving the division of powers issue.

such laws within the *Criminal Code* could potentially threaten their constitutionality.

V. CONCLUSIONS RESPECTING CONSTITUTIONAL QUESTIONS

To survive a *Charter* challenge, any law in the area of the financial exploitation of crime by persons responsible for it should govern only publications intended to result in a direct commercial exploitation of crime. Works having serious literary merit should not be affected.

Further, regulation of the financial exploitation of crime is most accurately characterized as an interference with contractual rights, and therefore it should appropriately be the subject of provincial legislation.

VI. RECOMMENDATIONS

- That a joint committee of the Uniform Law Section and the Criminal Law Section be established to present to the 1996 meeting recommendations for a uniform Act respecting the financial exploitation of crime;

- That the following questions be referred to the joint committee:

    - How should the legislation be drafted in order to survive any *Charter* challenge? How can it avoid being over-broad with respect to the materials and activities covered by the legislation?

    - Who should be subject to the legislation? (If consideration is given to covering agents, assignees and relatives of accused and convicted persons in order to ensure that profits of crime are not "hidden", this could include a victim of spousal assault who wrote a book about her experiences.)

    - How can the legislation be made "user friendly"? (The trouble, expense and stress of suing one's aggressor in a court of law may require an unusually proactive and emotionally strong victim.)

- Should accused and convicted persons be treated differently by the legislation? How should it treat accused persons ultimately acquitted?

- What type of body should administer the distribution of funds? May this vary by province?

- How should funds be distributed? Should a person convicted of a crime ever profit? (Under the Ontario legislation, in a sensational case, royalties could far exceed awards to victims, resulting in substantial profits to the convicted person.)

- Should money respecting a particular crime only be available to the victims of that crime, or should victims generally be able to access money in such funds?

- What sort of time limit is appropriate for making claims against funds made up of profits from the financial exploitation of crime?

- How should the legislation be enforced?